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Legal & Regulatory Influences on Public Safety Communicators

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Answering the Call

LEGAL & REGULATORY INFLUENCES ON PUBLIC SAFETY COMMUNICATORS





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Foreword

This text is the product of several years of developing the content of the law portion of the Public Safety Communications Program at Kwantlen Polytechnic University. Each year, there has been more fine-tuning of the contents and, more difficult to accomplish, a reducing of the contents to fit the time available, and address the greatest needs of the future call taker and dispatcher. The knowledge gained from this course is directed more at the call taker than at the dispatcher, for it is the call taker who will sort out the civil law matters from the criminal ones, the substantive and pressing criminal matters from the trivial ones, and the most appropriate course of action for those matters that remain. The dispatcher will act on the several decisions already made by the call taker.

The author has been concerned that those working as call takers and dispatchers will view the contents of this text as excessive and remote from the everyday work they do. Those with formal legal training will notice the absence of detailed follow-up on explanations legal, and the *too simple* rendition of the law.

The course contents have not been designed to provide the answers to the 200 most often asked questions of call takers by the public. This would not be useful, for invariably the call taker would get that one-for-the-books call. Also, the call taker may be the only employee in a small, remote police detachment working the night shift, or one of several dozen call takers in a large, busy police department. The former is “it” – the one who must have the answer. The latter can put the caller on hold, ask others, or refer the caller to any number of offices where specialists are able to deal with the call.

Instead, the text contents have been created in the hopes that the students – knowing how the law works, knowing which matters fall under federal jurisdiction, and which fall under provincial or municipal jurisdiction, knowing which matters fall under statute, and which fall under judge-made law, knowing which matters are criminal and which are civil, knowing who are parties to a crime and who are not, knowing what the police can and cannot do about it – will be able to find the answer by putting their knowledge to work if the answer to the caller’s request is not close at hand.

The author would be grateful for constructive suggestions for future amendments, additions and editions of this text. It is in its infancy, and will benefit from patient and positive direction.

SECTION 1

PRINCIPLES OF THE CANADIAN LEGAL SYSTEM

Chapter 1: Roles of the Legislative, the Judicial and the Executive Branches

Basis for Democratic Government

We are fortunate to live in a country that has democratic government, but we seldom consider the many treasured qualities that democracy provides. We cannot consider the influences of law on a segment of the population without recognizing that the law is created and applied in a democratic way. This should be contrasted with the creation and application of law in a dictatorship or tyranny. Consider the major characteristics of a democracy, and compare them with what would be found in a country that did not have democratic government.

In a democratic country, the military is under the control of elected government representatives of the people. In a tyranny, the military often is the government and the leader of the country is the leader of the military and is almost always seen in a military uniform. In a democracy, the press and other forms of media are permitted to criticize the government and the people who represent the government. This is a dangerous practice in a tyranny. In a democracy, there is a need to have a well educated populace because it is the wishes of the people that must be followed by the government. A well informed public will make better voting decisions. In a tyranny, it is preferred that the public be ignorant. It is much easier to impose unjust treatment on people when they are uninformed and unaware of the options. Democratic governments attempt to minimize class distinctions and encourage tolerance among the people. Tyrannies are led by people who wish to benefit from class distinctions, and who are intolerant and often try to eliminate those who are not like them. Democratic governments attempt to provide their people with as much freedom from government interference in their lives as possible, and some, like Canada, even pass into statute, laws which set out fundamental freedoms that must be provided to the population even at the expense, inconvenience and risk of weakening the powers of the government. In a tyranny, judges, if there are any, do the bidding of the tyrant. In a democracy, the legal and political independence of the judiciary is crucial to justice and respect for the law. In a

democracy, elections are held in such a way that there is a true choice between candidates, and the voters are able to cast their vote in private. In a tyranny, when and if elections are held, there is often only one candidate (the government's candidate), and if there is more than one candidate, the vote is cast in public, to assure that voters carry out the wishes of the government. In tyrannies, death is often visited upon those who outwardly oppose the tyranny.

Volumes have been written about the qualities and characteristics of democracy. We should be constantly aware of the high quality of life enjoyed by those of us who live in democracies, and should do what is necessary to preserve democracy. When we are learning about the law which applies to Public Safety Communications, remember that this law has been created by or accepted by the various levels of government in Canada, and is limited to forms of control permitted in a democratic country.

Law is one form of social control. There are others: customs and traditions, parental and peer pressure, and institutional patterns of behaviour found in churches and schools. However, law is usually more specific about the behaviour defined and the punishment, if any, to be imposed. In addition, individuals are assigned to enforce the law and the law applies to all. The law seeks to accomplish two goals in social control: to prohibit unacceptable conduct such as murder, assault and theft, and to control desirable acts which may be misconducted, such as driving while impaired, or the neglectful care of a child.

Canada is one of the common law countries and as such has a legal system which draws on two sources of law: statute (government created law) and judge-made law (also called case law or common law). Other common law countries include England, where the common law originated, Wales, the United States, New Zealand, Australia, India and most of Africa. The common law was carried by settlers from England to the frontiers they occupied, hence the existence of the common law in most of the new world.

The other main legal system in the world is called the *civil code system*. For western civilizations, it originated with the Romans about 2,000 years ago. It was characterized by an emphasis on statute as its source of law, with little opportunity for judges to adapt statute to suit special circumstances. With the rise of the Roman Empire, the civil code system was imposed on all the conquered lands, and continues to exist in some of them, most notably the countries of Europe, and the Middle East, even after these countries became free of the Roman influences.

Again, settlers from those countries took the legal system they knew with them when they went to settle in North and South America. It is for this reason that most of South America

operates on the civil code system imported from Spain, and Louisiana and Quebec use the civil code system within their state and provincial boundaries, imported from France.

However, the existence of the civil code system in Quebec will have no bearing on this course, for federal laws are applied in Canada using the common law system, as are the laws of all provinces except Quebec.

Statute is only one name for the kind of law created formally by government. Other terms for statute are: legislation, acts, regulations (which are usually more detailed government created laws and are attached to statutes), codes (which are collections of laws dealing with one topic such as a Labour Code, or Electrical Code), bylaws (which are statutes created by municipalities, cities, townships, villages, etc.), and ordinances (which refer to statutes made for the Northwest, Yukon, and Nunavut Territories which are not provinces and are under the authority of the federal government).

Judge-made law refers to the law generated by judges. In the 600-year history of the common law system, judge-made law was the only source of law until the last few hundred years when statute began to emerge with the formations of more sophisticated governments and a more literate populace. The common law is generated by judges when they are deliberating in cases, actual legal disputes carried out in a courtroom, hence the other term, case law. Because the system of law began with judge-made law, which gradually became common to all members of the society, the legal system became known as the common law. Even after statute was added as a source of law, the term common law referring to judge-made law prevails. The term common law is now used to refer to the historic system of law; to the present system of law; and to that part of the law which is not found in statute.

Three Branches of Canadian Government

The three branches of our democratic government work together to form a whole. Each has specific roles to perform, but each also interacts with the others. The three branches are: the legislative (or parliamentary), the judiciary, and the executive (also referred to as the Cabinet when performing some duties).

Legislative Branch of Government

The legislative branch's main duty is to create statute. In Canada, the federal statute-making body is called Parliament, and it is comprised of the House of Commons (sometimes referred to as the Lower House or Lower Chamber) and the Senate (sometimes referred to as the Upper House or Upper Chamber). Provincially, the statute-making body is called the Legislative Assembly, or the Legislative House.

In federal elections, the voters of Canada elect people who are sent to Ottawa as Members of Parliament (MPs). These elected people occupy the House of Commons. The other federal house, the Senate, contains people who have been appointed to perform the role of Senators by the executive branch of the federal government in power at the time of appointment. Provincially, there is no Senate, and after a provincial election, the elected representatives, called Members of the Legislative Assembly (MLAs) or, in some provinces, Members of the Legislative House, attend the capital of the province and occupy that Assembly or House to do the legislative business of the province. It is important to remember that the MPs who comprise the House of Commons and the Senators who comprise the federal Senate may represent several political parties. In Parliament or the Legislative Assembly/House, one political party has been the winner in the most recent election and has acquired the power to impose its political philosophy against the wishes of the losing political parties and their MP's. The Senate (which exists only at the federal level) has a political makeup that is not as direct. The political party in power usually replaces retired or deceased Senators with people who hold the same political views as that party. When the next election occurs, it is not unusual in Canada for a different political party to win the election, leaving the Senate dominated by Senators of another political persuasion. This has an impact on the success and speed of approval of new or amending statutes as they pass through the Parliamentary process. The process for the creation of statute is described in Section 1, Chapter 3.

Judicial Branch of Government

The judiciary is the collective term for all the judges of Canada. And, since judges perform their duties in courts, so the term judiciary is linked with the court system. The court system will be examined in Chapter Two.

Judges have a number of roles. They oversee trials and appeals, and ensure that correct procedures are followed throughout. They also attend to the facts and legal issues being argued and if sitting without a jury, decide the case on the basis of the facts as they believe them to be and the law as they understand it to apply. While doing this, judges most frequently interpret the meanings and purposes of relevant statutes, and in the absence of statute governing the legal issue, they may generate or apply existing common law or judge-made law to resolve the dispute. This common law can be drawn from previous cases decided in higher courts (called precedents) if they are relevant, or without such cases, simply from the good common sense and wisdom of the judge. Decisions of judges may be appealed to higher courts and reviewed by senior judges when the losing side has complained that the original or previous judge or judges in the case made errors in the interpreting and applying of statute law or the following of precedents or judicial wisdom. Normally, judges

are not permitted to do more than generate common law where no statute exists, or to interpret statute. They are not able to ignore or refuse to follow statute of which they disapprove. However, in cases where a statute, or part of it offends a provision of the Charter of Rights and Freedoms, which is Part I of the *Constitution Act, 1982*, the judge may strike down the offending part of the statute by ordering that it be of no force or effect in the future. The operation and application of the Charter of Rights and Freedoms will be covered in Chapter Five.

Executive Branch of Government

The third branch of government in a democratic government is the executive branch. The executive branch is comprised of the Prime Minister (if the government is federal) or the Premier (if the government is provincial), and the several Members of Parliament (federal) or Members of the Legislative Assembly or Legislative House (provincial) who have been assigned to head government departments. For example, the federal executive is comprised of the Prime Minister and about 20 Ministers including the Minister of Finance, the Minister of Justice, the Solicitor General, the Minister of Foreign Affairs, the Minister of Employment and Immigration, the Minister of Indian Affairs, the Minister of Fisheries and Oceans, etc. All of these departments fall under federal responsibilities.

A provincial executive would be comprised of the Premier, and the provincial Minister of Finance, the Attorney General, the Solicitor General of the province, if one is necessary, the Minister of Health, the Minister of Education, the Minister of Labour, the Minister of Highways and Transportation, the Minister of Housing, etc. All of these departments fall under provincial responsibilities. The division of powers and responsibilities between the federal government and the provinces will be covered in Section 1, Chapter 2.

The executive branch of a democratic government performs many administrative roles including the appointment of judges, the awarding of government contracts, the decision and the power to summon into session or dismiss Parliament (Legislative Assembly/House), the decision and power to appoint new Ministers as department heads, the choosing of a new Governor General (federal) or Lieutenant Governor (provincial), and the implementation of law as made by Parliament (Legislative Assembly/House), or as created by the judiciary. The executive also creates government policy.

The executive also carries out duties as Cabinet. One of the more important duties of Cabinet is the approval of all proposed statutes (bills) which are about to enter Parliament or the Legislative Assembly /House to begin the enactment process which is covered in Section 1, Chapter 3. The Cabinet also approves regulations which are subordinate forms of statute

which supply the small and often changing details necessary for the application of statute. (For example, the regulations would set the dates in the current year during which certain wildlife could be hunted. This would supply the detail necessary to support the statutory provision which prohibits hunting except during periods of time set out in the regulations). These powers allow Cabinet to exert considerable control over the nature and scope of statutory and regulatory law to be considered by Parliament or the Legislative Assembly/House.

These three branches of government were established to operate in cooperation with one another towards a smoothly operating government. There are some rules which govern their relationships with one another.

Most significantly, the judiciary jealously guards its independence, even from the other two branches of government, and views any attempt to alter its group perspective or working conditions detrimentally, as a threat to its independence. Recent efforts to press the judiciary to respond more aggressively towards crimes of violence (especially those directed at children and women, and by youth) have brought protestations from the judiciary that these efforts are an attempt to affect its impartiality towards these legal issues. The executive, however, can affect the makeup of the judiciary by its appointments of new judges, for example.

The legislative branch creates statutes, which the judiciary must interpret and apply. And the Cabinet as part of the executive approves all proposed statutes before they reach the legislative branch.

THREE BRANCHES OF DEMOCRATIC GOVERNMENT

JUDICIAL	EXECUTIVE	LEGISLATIVE
<ul style="list-style-type: none"> Judges in Canada Hears trials, appeals, and various other processes in all aspects of law and from all levels of government Ensures fair procedures in court, and in matters before and after they reach court “Trier of Law” Creates common law Interprets statute Resolves disputes between governments Can invalidate statutory provisions which are inconsistent with the Constitution 	<ul style="list-style-type: none"> Performs all functions not carried out by judicial or legislative branches. <p>Federally:</p> <ul style="list-style-type: none"> Prime Minister, Cabinet* and other officials appointed by P.M. <p>Provincially:</p> <ul style="list-style-type: none"> Premier, Cabinet* and other officials appointed by Premier Appoints judges, Cabinet members, Governor General, Lieutenants Governor Awards government contracts Calls legislative branch into session and ends sessions Calls for elections Implements statutes and common law Creates government policy 	<ul style="list-style-type: none"> Statute-makers <p>Federally:</p> <ul style="list-style-type: none"> Parliament: House of Commons, elected members of Parliament (MPs) Senate: Appointed as vacancies arise by government in power <p>Provincially:</p> <ul style="list-style-type: none"> Legislative Assembly (in some provinces entitled Legislative House), elected MLAs (or MLHs)

* *Cabinet is comprised of the MPs (federally) or MLAs (provincially) who have been given the additional responsibility of heading a government department. e.g. – Minister of Defence, Minister of Labour. Cabinet approves bills or proposed statutes before they go through the process in the legislative branch and passes regulations into law.*

The judiciary does not speak in its own defence, and so complaints are not responded to and debates are not carried on between the judiciary and others in the various media.

Occasionally, the government will speak on behalf of the judiciary, when comments are sufficiently inappropriate.

That part of Parliament or the Legislative Assembly/House that does not represent the dominant political party may argue that the executive or Cabinet is functioning for its own political benefit rather than the benefit of the public. The executive or Cabinet can curb debate or dismiss Parliament or the Legislative Assembly/House, perhaps when a particular

matter is becoming embarrassing for the government. On the other hand, the political opposition may be able to use the rules to prolong debate or the time committees use studying a bill in order to embarrass the party in power. Finally, the power of the media is always there to enlarge on the conduct of the politicians.

Prime Ministers of Canada

Prime Minister	Party	Term(s)
John Alexander Macdonald	Cons.	July 1, 1867 - Nov. 5, 1873
Alexander Mackenzie	Liberal	Nov. 7, 1873 - Oct. 8, 1878
John Alexander Macdonald	Cons.	Oct. 17, 1878 - June 6, 1891
John Joseph Caldwell Abbott	Cons.	June 16, 1891- Nov. 24, 1892
John Sparrow David Thompson	Cons.	Dec. 5, 1892 - Dec. 12, 1894
Mackenzie Bowell	Cons.	Dec. 12, 1894 - Apr. 27, 1896
Charles Tupper	Cons.	May 1, 1896 - July 8, 1896
Wilfrid Laurier	Liberal	July 11, 1896 - Oct. 6, 1911
Robert Laird Borden	Cons.	Oct. 10, 1911 - Oct. 12, 1917
Robert Laird Borden	Unionist	Oct. 12, 1917 - July 10, 1920
Arthur Meighen	Unionist	July 10, 1920 - Dec. 29, 1921
William Lyon Mackenzie King	Liberal	Dec. 29, 1921 - June 28, 1926
Arthur Meighen	Cons.	June 29, 1926 - Sept. 25, 1926
William Lyon Mackenzie King	Liberal	Sept. 25, 1926 - Aug. 7, 1930
Richard Bedford Bennett	Cons.	Aug. 7, 1930 - Oct. 23, 1935
William Lyon Mackenzie King	Liberal	Oct. 23, 1935 - Nov. 15, 1948
Louis Stephen St. Laurent	Liberal	Nov. 15, 1948 - June 21, 1957

John George Diefenbaker	P.C.	June 21, 1957 - Apr. 22, 1963
Lester Bowles Pearson	Liberal	Apr. 22, 1963 - Apr. 20, 1968
Pierre Elliott Trudeau	Liberal	Apr. 20, 1968 - June 3, 1979
Charles Joseph Clark	P.C.	June 4, 1979 - March 2, 1980
Pierre Elliott Trudeau	Liberal	March 3, 1980 - June 30, 1984
John Napier Turner	Liberal	June 30, 1984 - Sept. 17, 1984
Martin Brian Mulroney	P.C.	Sept. 17, 1984 - June 25, 1993
A. Kim Campbell	P.C.	June 25, 1993 - Nov. 4, 1993
Joseph Jacques Jean Chrétien	Liberal	Nov. 4, 1993 - Dec. 12, 2003
Paul Edgar Philippe Martin	Liberal	Dec. 12, 2003 - Feb. 6, 2006
Stephen Joseph Harper	Conservative	Feb. 6, 2006 – Nov. 3, 2015
Justin Pierre James Trudeau	Liberal	Nov. 4, 2015 – Present

USEFUL READING

Funston, Bernard W. and Eugene Meehan. *Canada's Constitutional Law in a Nutshell*. Toronto: Carswell, 1994. 34-36, 41-43, 57-58.

Chapter 2: Division of Powers Between the Federal and Provincial Governments

The Constitution Act, 1867 and the Functions of Governments

In 1867, the territory which would eventually be known as Canada was under British rule, and the task began to form what was and what might be into a nation. There were already two provinces, Upper Canada (the beginnings of Ontario) and Lower Canada (the beginnings of Quebec), and several small colonies located in the Maritimes and on the west coast. The Fathers of Confederation, among whom were British diplomats and parliamentarians, drafted the British statute which was known as the *British North America Act*. It was recognized that the territory under British rule, when formed into a nation, would comprise a vast land mass which could not be governed by the usual British and European two level system of government consisting of a national government, and boroughs or cities. In this new land, two provinces had already been formed. So, the Fathers of Confederation went about the task of creating the framework of a nation consisting of a national government (which we call the federal government because the existing and future provinces were formed into a confederation), the provincial level of government, and the municipal level of government (which encompasses cities, villages, townships, districts, municipalities, etc.). As a result, Canada's governance exists on three levels: federal, provincial and municipal.

However, there are only two truly sovereign levels of government. The federal and provincial levels are sovereign in that within their mandate, they are free to create statute and make decisions without consulting with any higher body. Municipal government is not sovereign, and must seek approval from the province to create statute or adopt policy. Each province has passed a statute usually called the *Municipal Act* which sets out, among other provisions, the limits it has placed on the powers of municipal government. In order for a municipality to come into existence, either out of *unorganized* provincial territory, or as a *breakaway* from an existing municipality, it must comply with requirements set out in the applicable provincial statute. The Northwest Territories, Yukon Territories and Nunavut are not sovereign, being under the control of the federal government.

Division of Powers of Government

Canada has two levels of sovereign government: federal and provincial. The Fathers of Confederation divided the powers normally assigned to one national government in the British and European world, between two levels of government. For example, the powers and responsibilities for immigration were assigned to the federal government. The powers and

responsibilities for education were assigned to each province. Section 91 of the *British North America Act* (in 1982 renamed the *Constitution Act, 1867*) sets out the federal powers and responsibilities and section 92 sets out the provincial powers and responsibilities.

There is some logic behind these divisions. Matters which should be standardized across the country or which cross provincial or international borders fall under federal responsibilities. Obvious examples of this include national defence, immigration, natural resources, the currency and postal systems, aboriginal affairs, foreign affairs, national highways and railways, national parks, etc. Matters which can be left to regional government and which may vary in content from one province to another can be assigned to the provinces, such as education, health, human resources, forestry, housing, labour, etc.

Shared Powers of Government

Some responsibilities are overlapping or shared, such as policing, corrections, consumer protection, and park lands. The criminal justice system contains within it several overlapping jurisdictions. The RCMP operate as a federal police force, as a provincial police force in all but Ontario and Quebec which have their own provincial police forces, and as municipal police forces in many municipalities which have chosen not to select, train and hire their own police officers. Depending upon the nature and duration of a prison sentence, an offender may be supervised in a federal correctional facility, a provincial correctional facility, or for one or two day prison sentences, in a municipal jail. The court system is funded federally, provincial and municipally. Most prosecutors are provincial employees, but for certain offences, the prosecutor must represent the federal government.

Federal Powers

The federal government has jurisdiction over the criminal law and criminal procedure. There are a number of federal criminal statutes such as the *Criminal Code*, the *Food and Drugs Act*, the *Controlled Drugs and Substances Act*, the *Youth Criminal Justice Act*, the *Identification of Criminals Act*, and several others. The term “criminal” denotes a federal offence.

Provincial Powers

However, provinces are able, under their powers, to create offences that in all respects appear to be criminal. They are arrestable, they lead to prosecution, and on conviction can lead to imprisonment and/or a fine. However, because they are not federal offences, they cannot carry the title “criminal”. Rather, they are referred to as “quasi-criminal”. “Quasi” means “similar to”. Provincial offences are similar to criminal offences, but are not called criminal offences because they are not federal.

In order to understand and work with the legal aspects of the criminal justice system, it is necessary to become familiar with and differentiate between the powers and responsibilities of the federal government and the federal statutes that in part reflect those responsibilities and the provincial powers and responsibilities and accompanying statutes.

USEFUL READING

Funston, Bernard W. and Eugene Meehan. *Canada's Constitutional Law in a Nutshell*. Toronto: Carswell, 1994. Chapters 4, 5, 6.

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. Chapters 1, 3.

Chapter 3: Statute Enactment

Two of the levels of government in Canada have sovereign powers, which means, among other things, that they have the absolute power to pass statute so long as it falls within their jurisdiction as either a federal government or a provincial government. This power is protected by the doctrine of parliamentary sovereignty. Parliament or the legislature is comprised at least in part of democratically elected people who represent the public. This democratic character makes the statutes produced by parliament or the legislature the more powerful of the two forms of law: statute and common law or judge-made law.

Federal Process

At the federal Parliament, there are two “houses”: the House of Commons and the Senate. The House of Commons, also sometimes referred to as the “Lower House” or “Lower Chamber,” is comprised of 301 elected Members of Parliament, or MPs. These MPs have been nominated in the various regions or constituencies in Canada by the voters supporting the political parties active in those constituencies. A federal election is held and the successful MPs from these constituencies then attend Parliament in Ottawa. Of the total number of MPs, the greatest portion of them who belong to one particular party form the government, and the leader of that political party, who was also nominated and then elected, becomes the Prime Minister of Canada. The remaining MPs not belonging to the winning political party are in the opposition, with the party winning the second largest number of seats forming the “Loyal Opposition”.

From among the MPs who belong to the winning party and are therefore to form the government, a number are selected to head the various government departments. These MPs are called “Ministers”. For example, there are the Minister of Defence, Minister of Foreign Affairs, Minister of Finance, Minister of Indian Affairs, Minister of Immigration and Employment, etc. The Minister who oversees the personnel working under the federal justice mandate is called the Solicitor General. The Minister of Justice must be a qualified lawyer. He is the top legal officer of the country and is responsible for all law and legal policy. There are several more ministers, but their numbers and titles change often with government reorganizations. All of the federal Ministers and the Prime Minister form the executive branch of government along with a few other officials. At other times, most notably for our purposes when statute is to be proposed, these Ministers and the Prime Minister form Cabinet. Cabinet approves “bills” or “proposed statutes” before they are presented to Parliament. Cabinet also creates regulations which do not need parliamentary approval.

The Senate is composed of 104 members. The Senators are appointed one or two at a time by the executive branch of the government in power at the time, as vacancies arise through retirement or death. Senators are mainly people who have been active in politics, or in prominent civil service positions. Naturally, the government in power will usually appoint people to the Senate who share the political philosophy of the government. Hence the philosophical composition of the Senate slowly swings in the direction of the government. Occasionally, when there have been few vacancies in the Senate, and after an election, the winning party in the House of Commons is of a different political philosophy than the last, there can be political conflict between the House of Commons and the Senate due to the differences in the political constitution of the majority of the members of each House. This can lead to stalling and endless debate in the Senate for political purposes.

A proposed statute or “bill” can be generated by any source: by a group of concerned citizens, by an MP who is not a Minister (called a Private Member’s bill) or, by a member of Cabinet. But it is most often proposed by employees working in the government department in which the need for a new or amended statute is first noticed, and the proposal is passed on to the minister in charge of that department.

The bill is presented to Cabinet for approval. If approval is obtained, it is placed on the “order paper” (the agenda) for the House of Commons. When it reaches the top of the list, it is read aloud to the MPs present in the House of Commons and a copy of the bill is distributed to all MPs. It is then placed on the order paper to await second reading. It is known by the MPs that the second reading of a bill will be followed by debate as to the wisdom and wording of the bill, and if necessary a committee will be formed to further study the bill and any concerns that arise from it and from the debate. MPs with a keen interest in the bill will ensure their presence for second reading. At any point in the process, the bill may be sent back to its originator for redrafting due to concerns not resolved by debate or by the committee for study. If the bill passes second reading, it is again placed on the order paper for third and final reading in the House of Commons. Third reading, as was first reading, is a formality. After the bill has been read, it is put to a vote of the MPs present in the House of Commons. To pass, there must be approval by at least 50 per cent of the MPs present, plus one MP. This is called a simple majority. In other words if there were 100 MPs present and voting in the House of Commons that day, there must be 51 MPs in favor of the bill. If there are insurmountable difficulties with the bill, or it is rejected, it goes back to its originator.

Once the bill has gone through the process in the House of Commons, it must begin the whole process again in the Senate before the Senators. Again the bill is placed on the order

paper for first reading, a formality. Once the bill reaches the top of the order paper for the second reading, it again may be debated and sent to a committee for study. Again, it can be sent back through the process, either to the House of Commons committee for study or back to the originator of the bill to address any concerns that arise. If it passes second reading, it is put on the order paper for third reading, after which a vote is taken, requiring a simple majority. If the bill passes that vote, it has only one more hurdle to cross before it becomes statute. That hurdle is the traditional one of being given “Royal Assent” by the monarch or the monarch’s representative. In Canada, for federal bills, Royal Assent is given by the Governor General, who is the monarch’s federal representative. The Governor General does not have the authority to refuse Royal Assent, and acts on the advice and consent of the Prime Minister and Cabinet.

This process, if dealing with an urgent matter, may take only hours. However, if the matter is controversial, and the political majority in the House of Commons is different from that in the Senate, the passage of a bill can take months. Parliament need only meet once each year, and each session usually lasts about three to four months depending upon the work that needs to be done, so occasionally, bills which are still going through the process in the House of Commons or Senate are left unfinished when the session ends. In this case, it is said that the bill “died on the order paper”.

The whole process of reintroducing this bill to Cabinet and then to Parliament must begin again at the opening of the next session of Parliament, unless the initiators have lost their momentum, or the political thinking or circumstances have changed.

Provincial Process

The provincial process for statute enactment follows the same stages with one important difference: there is no Senate. The statute-making body is called the Legislative Assembly (in some provinces, the Legislative House). The people who wish to represent the public run for office in their various constituencies, and the successful ones attend the provincial capital as members of the Legislative Assembly or MLAs (or members of the Legislative House or MLH’s). Of the MLA’s from the winning party, a few are selected to head provincial government departments, and, again, they are called Ministers. For example, there is a Minister of Health, Minister of Education, Minister of Labour, etc. Two ministers have different titles: the minister in charge of the law for the province, the top legal officer, is called the Attorney General, and the minister in charge of the personnel attached to the justice area is called the Solicitor General. Most of the smaller, less populated provinces do

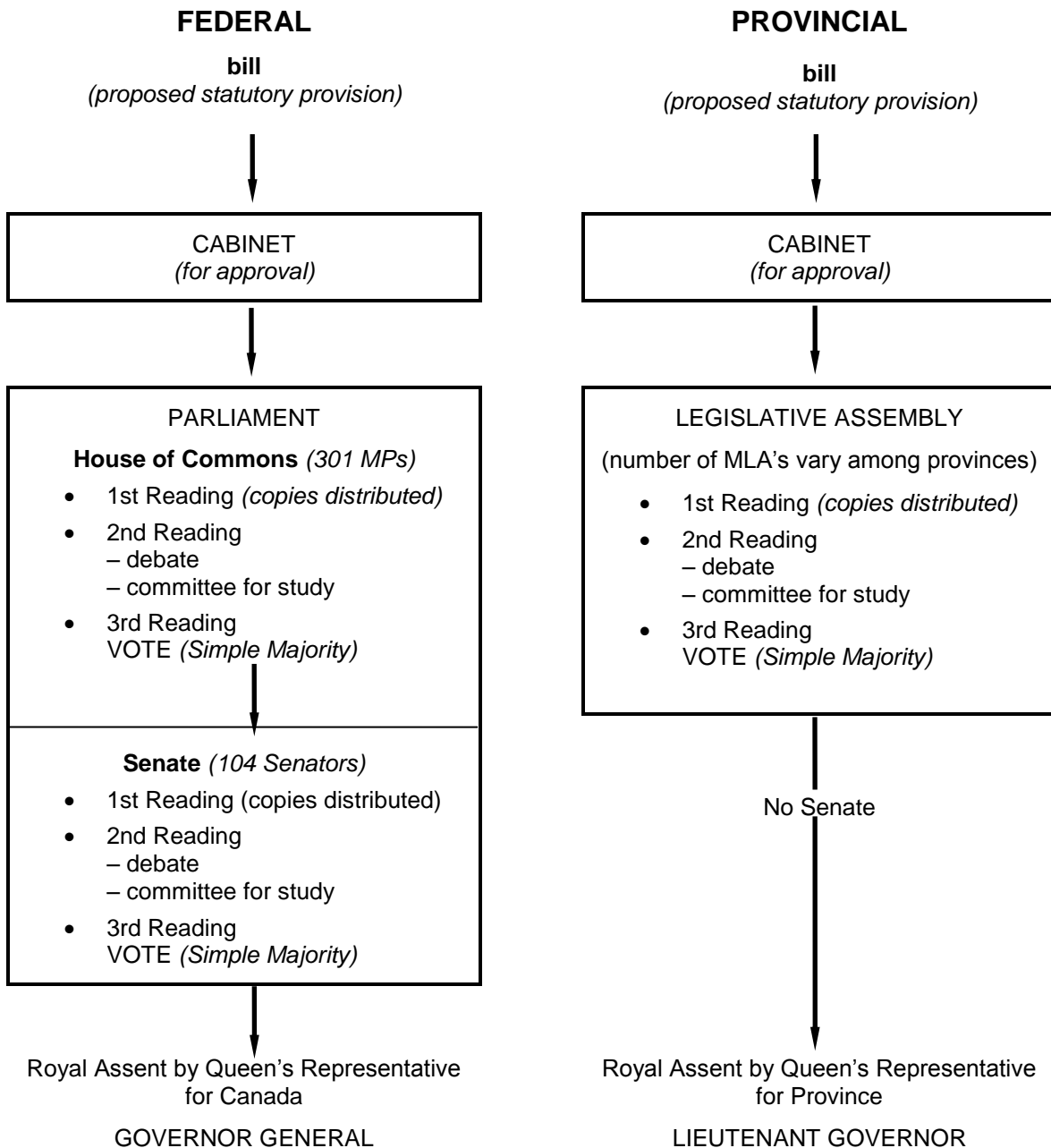
not appoint a Solicitor General, and allow the Attorney General to oversee the personnel as well.

All of the Ministers and the Premier form the executive branch of government. They are also the Cabinet when Cabinet duties are to be performed.

Provincial bills are generated in the same manner as federal bills: some by concerned citizens, some by MLA's who are not Ministers, but most often by the department which sees the need for a change in legislation which it administers. The bill is presented to Cabinet for approval, and if approved goes on the order paper in the Legislative Assembly. It then goes through the same process of first reading, second reading, debate and committee for study, if necessary, and then after third reading, it goes to a vote amongst the MLA's present in the Legislative Assembly. A simple majority will carry the bill that is then sent for Royal Assent to the monarch's representative for the province, the Lieutenant Governor. Provincial bills can become statute very quickly, as there is no Senate which may oppose and stall the process of the bill. The only obstacle to the creation of a provincial statute is a strong opposition party in the Legislative Assembly.

The processes described here must be followed to amend any part of a statute, to create a new statute, or repeal or cancel an unwanted or outdated statute. Once a bill has been given Royal Assent it is published in the federal or provincial government Gazette which makes it known, officially, to the public.

Statute Enactment* process



* *Enactment is only one of the purposes of the process. A statute or any part of it may be repealed (cancelled) or amended by this process as well.*

Notice that the two forms of government may only make statutes that fall within their division of powers as discussed in Section 1, Chapter 2. And the Ministers have responsibility only for matters which come under those specific federal or provincial powers.

Municipal government is comprised of a Mayor (or Reeve) and Councillors (sometimes called Aldermen). They, too, were elected by the public. Municipal government is permitted to pass bylaws so long as they fall within the powers given them by the province. The process of creating bylaws is much less complicated, and all three readings can be performed at the same municipal council meeting. Again, there is no second house through which the proposed bylaw must pass, and no requirement for royal assent.

USEFUL READING

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995. 45.

Chapter 4: Relationship Between Statute and Case Law

There are two sources of law in our common law system, statute and case law (also known as judge-made law or common law).

Statute

“Statute”, “legislation” and “acts” are terms that refer generally to government-made law, the law passed through the process involving the democratically elected representatives of the public. Other terms that refer to statute or legislation are more specific.

“Regulations” are created at the Cabinet level and do not require passage through the enactment process. Many statutes have accompanying regulations that provide the small and changeable detail necessary to apply to statute. For example, the provincial *Wildlife Act* contains many provisions that state that hunting for certain game can only be done in accordance with the regulations. The regulations will change each year and will set the opening and closing dates for hunting season for each type of game. The federal statutes also often have accompanying regulations. For example, the *Customs Act* will require everyone entering Canada to report to the nearest customs entry port. The regulations will list all the customs entry ports in the country. Once a regulation has been approved by Cabinet, it need only be printed in the Gazette to take effect as law.

“Bylaws” are statutes made by subordinate governments such as municipalities and regional districts.

“Ordinances” is the common term for statutes enforceable in the North West and Yukon Territories (and the soon to be created third territory of Nunavut).

The term “code” means a collection of statutory provisions which all deal with the same general matter, such as the *Criminal Code*, which contains most of the federal criminal statutory provisions, or the *Building Code*, which would be confined to specifications for buildings. The term can be used whether the statute is federal, provincial or municipal.

The terms “charter” and sometimes “bill” are used in relation to statutes dealing with human rights. Canada has a *Canadian Bill of Rights* which became a federal statute in 1960. In this case *bill* can refer to a statute which has gone through the enactment process. In 1982, with the agreement of the federal government and all the provinces but Quebec, the *Constitution Act, 1982* was proclaimed into statute law in Canada. It contains seven parts and Part I is entitled the Canadian Charter of Rights and Freedoms. One of the most important documents

in the western history of human rights was the *Magna Carta*, or Great Charter, created in 1215 AD in England.

All these forms are Statute law. Statute law is bound by its own words, and cannot be interpreted beyond its logical meaning or purpose. Therefore, it tends to be somewhat rigid. Judges are allowed to make the statute more flexible by interpretation.

Case Law

“Case law” is the term used to describe the law coming out of a court case where a legal dispute has been resolved. It is law generated by the judge or judges who heard and decided the case. It is also termed “common law” because it is judge-made. When judges speak their opinions about the law, we are only interested in those pronouncements made in the court room in relation to the court case. Judges may often speak at conferences or meetings. Their words may be interesting but have no legal impact.

When judges do make pronouncements in a court of law, the higher the court level, the more important the pronouncement. This is because of the doctrine of precedent which, along with the doctrine of *stare decisis* will be discussed in Section 1, Chapter 5.

In order to understand the law one must consider both Statute Law and Case Law. This text will have relevant case law at the end of some of the chapters. This is a vital part of your learning.

Effects Statute and Case Law have on One Another

The common law system which evolved more than 600 years ago was, for the first several hundred years, composed entirely of judge-made law. Judges travelled rural England and verbally resolved village legal problems. It was not until the members of the public became better educated, more literate, and more sophisticated and the pressure for democratic government brought about public representation in government, that statute began to appear. The first statutes were simply embodiments of the best of the common law. For many centuries, judges on their journeys around the country had condemned murder, rape, theft, and many other forms of unacceptable conduct. The parameters of these and other offences and their penalties became well known. It made sense to have these laws approved by the democratic process. Gradually, statute became more and more prevalent as the other source of law. As government became more practiced in its operations, and its decisions were respected and enforced, its importance became recognized. The doctrine of parliamentary sovereignty emerged, and it came to mean that when there were competing pressures on government, parliament’s role and decisions were supreme. This included the power of statute over common law when they both dealt with the same legal matter.

If the judges had generated a common law which came to be unacceptable to government, it was only necessary for the government to pass into statute a law that overrode the common law, or decreed that it would not exist, and that part of the common law became unenforceable. For example, for many centuries, a legal marriage was performed when two parties of the opposite sex attended their church, and declared to the congregation their commitment to one another. If there were no objections from the congregation, the priest or minister declared them married. For many centuries, judges had approved of this process as sufficient to constitute a legal marriage. However, over time, it became known that marriages were being performed when one or the other of the parties were already married, were drunk, or were infants without the ability or understanding to consent to the marriage. So, in disapproval of the marriage law as it existed in common law, government passed statute which overrode the existing common law marriage. From that point forward, a legal marriage was one that complied with a statute, usually called the *Marriage Act*, which contained requirements that both parties be unmarried, sober, and of a minimum specified age. We continue to use the term “common law marriage” to describe a form of union not approved by statute, and therefore, not in any way a “legal” marriage.

Probably the most common role of a judge is to interpret statute. Because statute is the more powerful form of law, judges are not permitted to ignore or refuse to enforce statute (with one exception which will be discussed in Section 5, Chapter 4). But judges have the power to consider the intent of the statute-makers when the words were chosen for the statute, and give meaning to those words. For example, the offence of “sexual assault” found in the *Criminal Code* does not carry a statutory definition of “sexual”. It is left for the judges to determine which assaults are sexual in nature from amongst the various activities alleged to be sexual. As the decisions are rendered by trial judges in various cases, and appealed to higher courts, a list of activities decreed by judges to be sexual in assaults is gradually developing. In this way, the determination of what is a sexual assault is reached more gradually, and more fairly, taking into consideration the wide range of conduct it may involve. Perhaps, in years to come, when the judges have developed an all-encompassing definition of “sexual” in the context of sexual assault, the statute-makers may adopt this well-established definition into statute, making it a statutory definition.

In areas where there is common law which has not been overridden by statute, the common law continues to exist and is considered just as enforceable and valid as statute. It cannot be argued that because the source of some law is the common law, it can be ignored. If the only source is common law, it must be abided by, just as if it were statute.

However, lawyers see a better opportunity to convince a judge to agree with their side of the argument if the law governing it is in common law, for it is far more flexible and adaptable to special circumstances than is statute.

To summarize, there is a working relationship between statute and case or common law.

- Statute law is the more powerful source of law and overrides common law when it deals with the same legal matter.
- Good common law can become statute.
- Judges generate common law in their interpretations of statute.
- In the absence of statute law, common law is just as valid and enforceable.

USEFUL READING

Funston, Bernard W. and Eugene Meehan. *Canada's Constitutional Law in a Nutshell*. Toronto: Carswell, 1994.

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995.

Chapter 5: Operation of the Doctrines of Precedent and *Stare Decisis* on Case Law

The Changing Law And The Need For Stability

Law is a reflection of society. And changes in the law reflect changes in society. So, change in the law is inevitable. However, it is also well recognized that society requires stability in all its facets in order to function smoothly. The legal dimensions of society are no exception. People make decisions every day that presume that the law will respond in a predictable way. Lawyers are expected to advise clients on how the law will react to their business and personal decisions. Much of the research done in law is directed at determining what the judges have decided in the past and from that, predicting the trend for the future. Predictability and stability in the law could not exist if it were not for the recognition both by the statute-makers and the judges of the importance of these qualities.

The statute-makers recognize that major changes in statute law should be approached slowly, and if possible with the full and informed consensus of the public. This involves commissions, conferences and press releases. During the creation or amendment of statutes, the enactment process described in Section 1, Chapter 3 allows debate in Parliament or the Legislative Assembly or House, and the referral to a committee for study. This permits public input and publicity to ready the general public for the change. The vote taken at the end of the process involves the representatives of the public, and to some degree the result of the vote reflects public opinion. So changes in statute law are usually communicated to the public well in advance of implementation.

The same recognition of the need for stability and predictability exists in the common law. Centuries ago, as judges resolved conflicts in the villages in medieval England, they discussed their decisions with one another, and adopted the better reasoning of the wiser judges, who often became appeal court judges. Over time, a system of appeals was adopted where the losing side of a dispute could ask a higher court judge to reconsider the decision of the judge at trial, and in the face of a negative verdict, appeal even higher. The Canadian court system provides for as many as three appeals of a trial verdict, depending upon the level at which the trial took place. This will be covered in Section 2, and especially Chapters 3 and 4.

History Of Precedent And *Stare Decisis*

Over centuries, judges developed rules to encourage stability and predictability in judicial decisions. These rules are called the doctrines of *stare decisis* and precedent. The rules

themselves are common law rules, created by judges, and cannot be found in statute. They can be seen operating in most judgments when judges draw on the decisions of fellow judges who have already considered the same legal issue in a previous trial or appeal. Remember that the judge's role is to interpret statute to give it meaning and application to the legal issue before the judge, and, where no statute exists, to generate common law that resolves the legal issue. In both cases, the judge is guided by the doctrines of precedent and *stare decisis*. Because judges have such a great impact on the interpretation of statute and the generating of common law, the doctrines of precedent and *stare decisis* are the most important factors in creating predictable law and social stability in legal matters.

The Legal Principle

When a judge rules in a case, the decision is of great importance to the parties in the dispute, but also of importance to the legal community. The important part of a case is the legal reasoning the court used to come to the decision. From the reasoning (or *ratio decidendi*) comes the legal principle that is adopted by other courts when appropriate. This is the part of the law that is subject to the rules of precedent and *stare decisis*.

Precedent

The doctrine of precedent is a basic admonition to judges that whenever appropriate, they should align their decisions with other judges when dealing with the same legal question. In other words, legal principles which came out of judgments which preceded the present court case (hence precedents) and which dealt with similar facts and issues should be used by the judge as guides in developing the present decision.

Stare Decisis

The Latin phrase *stare decisis* is part of a longer phrase that means “to stand by decisions and not to disturb settled matters”. The doctrine of *stare decisis* contains two rules:

a) The legal principles of higher court decisions are BINDING upon lower courts in the SAME jurisdiction when dealing with similar issues.

Example 1: The Supreme Court of Canada has jurisdiction over all courts in Canada, and so all courts in Canada are bound to apply the legal principle of that court when addressing the same legal issue.

Example 2: Each province is a jurisdiction within the greater jurisdiction of the Supreme Court of Canada, and so the legal principle of a decision of the Court of Appeal of a province would be binding on the courts below in that province.

b) The legal principles of higher court decisions are persuasive on lower courts in different jurisdictions when dealing with the same legal issue. The term “persuasive” is used to mean that in the absence of a good reason to decide otherwise, the judge in the present case should follow the reasoning of the higher, but out-of-jurisdiction, court. The higher the high court and the lower the low court, the greater the pressure of persuasiveness. If the two courts are on the same level in the two different jurisdictions, then the persuasiveness is at its weakest or is non-existent.

Example 1: A legal principle from a decision of the Court of Appeal of Ontario (the highest court level in the province) would be strongly persuasive on the Provincial Court level (lowest court) in B.C. A legal principle from a decision of the House of Lords (the highest court in England) would have little or no persuasive effect on the Supreme Court of Canada (the highest court in Canada.)

Remember, though, that the doctrine of precedent presses judges to follow the legal principles emerging from previous decisions whenever possible in the interests of predictability and stability in the law. So, a judge who is only mildly persuaded by a higher court decision from another jurisdiction should follow it anyway, due to the doctrine of precedent.

Judicial Avoidance of Precedent and *Stare Decisis*

If a judge believes that the facts in a particular case alter the issue to be resolved, the judge can consider the legal question without reference to the decisions of other judges in previous cases. This is called “distinguishing” wherein the judge distinguishes between the facts and issues of the cases decided by other judges and the case at hand. There may be other cases which contain more similar fact patterns that apply more directly to the legal issue and the judge may feel bound or persuaded by them. Or, in the absence of any common law in previous cases, the judge will just have to use good sense and personal morality to resolve the legal issue. Remember, that cases decided at courts other than the Supreme Court of Canada may be appealed, and the doctrine of *stare decisis* would again come into play, but with a higher court seeking to resolve the dispute.

It can be seen from this examination of the doctrines of precedent and *stare decisis* that predictability of the law is made possible by the efforts of the statute-makers and the judges, but especially by the judges in their application of the doctrines of precedent and *stare decisis* in their interpretations of statutes, and the creation by judges of common law in the absence of statute.

USEFUL READING

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995. Chapter 10.

SECTION 2

PROCESSES OF THE CANADIAN COURT SYSTEM

Chapter 1

Operation and Goals of the Adversarial Court System

Two Main Court Systems

There are two main court systems in the world: the adversarial court system and the inquisitorial court system. The adversarial court system tends to operate in common law countries, and the inquisitorial court system is usually found in countries that adhere to the civil code system of law. Refer to the Introduction for a fuller explanation of these two systems of law. Canada's court system in all provinces is adversarial.

The purpose of taking a matter to court is to determine what occurred in a legal dispute, and who was to blame. The object is to determine the "truth". In fact the word "verdict" comes from the Latin "to state the truth".

Inquisitorial Court System

The theory behind the inquisitorial court system which exists in many well established democratic countries is that the truth is obtained by fully informing the decision-makers of all relevant and reliable information. The word "inquisitorial" refers to the practice of inquiring, or asking questions. This requires that parties to the court hearing must answer all questions fully and honestly. The court session is called a "hearing" or an "inquiry" and not a "trial" as it would be in the adversarial court system. Judges in the inquisitorial court system have full knowledge of the legal issues and the facts and history behind the case before the court hearing is held. In criminal cases, the judges are involved in the investigation, and direct the police. At the hearing, the judges are allowed to ask questions of any of the parties involved. The parties are not entitled to refuse to answer. Before and during the hearing, the judges eliminate all unreliable and irrelevant information, and make their determination on the extensive information which remains. In this way, the truth is established, and the decision is based on that truth.

Adversarial Court System

The theory behind the adversarial court system is that the truth is obtained by allowing the two (or more) equal disputants or adversaries to go to “battle” before an independent and impartial referee or judge. The judge makes sure the “battle” is being fairly fought and at the end of the “battle” or trial, the one with truth on his or her side wins. The fairness of the process is determined by the judge using rules developed over centuries. Each side gets the opportunity to tell their story in what is called examination-in-chief, and the opposing side gets the opportunity to challenge the information given in the examination-in-chief through cross-examination. The two (or more) sides of the story are told through witnesses who must promise in a formal way to tell the truth. This process is described more fully in Section 2, Chapter 12. During and at the end of the trial process, the “triers of fact and of law” (either a judge sitting alone or a judge and jury) weigh the evidence, examine the conflicts in the evidence from the two (or more) sides, come to a conclusion as to what actually happened (the facts), and then apply the law to the facts to determine who was to blame, and what measures to take to respond to this conduct. The triers of fact and of law are discussed in Section 2, Chapter 6.

In the adversarial court system, judges are not permitted to deliberate on the case if they have prior knowledge of the case, or if it is possible that the judge has a prejudice towards one or the other party to the dispute. Judges in the inquisitorial system are trusted to eliminate incriminating but irrelevant information from their minds when deliberating.

The adversarial court system, as pointed out above, presumes that the parties to the dispute are equal adversaries. This can be generally accepted when the parties are involved in a divorce, or a contract dispute, or a corporate takeover. However, it cannot be said that the parties to a criminal matter come to the trial as equals.

A criminal matter is a public law matter, in which one of the parties to the dispute is the state. Public and private law is discussed more fully in Section 3, Chapter 1. In criminal law, the state, or government has defined certain conduct to be threatening to the stability and safety of society as a whole. When a person disobeys and carries out criminal conduct, the state, on behalf of society, seeks out, prosecutes and, if successful, punishes the offender.

On behalf of society, the police forces are given extra powers that permit arrest, search, and seizure, and, if appropriate, incarceration until prosecution can take place. The accused has no power to oppose these measures unless they have been carried out without authority or inappropriately, in which case, the accused will likely need a lawyer to make the argument to that effect. When the accused reaches the court system, the state appears in the form of the

Crown prosecutor. The Crown prosecutor must have a law degree (which usually results from seven years of formal education and at least one year as an articulated student). The Crown prosecutor works full time in the field of criminal law, and can call on other resources, such as further police investigation, forensic experts, and support staff to help carry out the state's mandate.

The accused may have been released on bail pending the trial, or may have had to remain in custody until the trial. The accused may be wealthy, unemployed, well educated, mentally disabled, or not fluent in English or French. The accused may be able to afford the most proficient lawyer in Canada, but the incidence of this is extremely rare. In other words, the presumption of equality between the parties when the matter is criminal cannot be relied upon. Over time, the recognition of this inequality has been addressed by the development of a number of statutory and common law rules broadly described as “due process” .

Due Process

“Due process” refers to the body of rules that must be followed in order to ensure fairness as the accused travels through the criminal justice process. Examples of the rules of due process include the presumption of innocence; the right to remain silent in the face of questioning by authorities or during the trial and the right not to have that silence offered up by the state as evidence of guilt; the right to counsel; the right to the criminal standard of proof of guilty beyond a reasonable doubt; the right to a jury trial in some cases, and the requirement that the jury's verdict be unanimous; the right to protection from searches of one's dwelling house by police without prior judicial authority; and the right to trial in a fair and open court before an independent and impartial judge. There are many more rules of due process and they are found in many of the procedures set out in the criminal statutes, in the Canadian Charter of Rights and Freedoms (to be discussed more fully in Section 5), and in the rules of evidence, both statutory and common law. The concept of due process has expanded greatly since the creation of the Charter of Rights and Freedoms, and many new rules are being added to the list.

Failure by the authorities to follow due process is termed “abuse of process”. This does not imply that the accused was in some way abused, but that the process was not followed. When evidence of abuse of process is presented to the judge, and depending upon the magnitude and consequences of the abuse of process, it is open to the judge to dismiss the charges against the accused. Or, the judge may, in cases of unintentional minor or technical abuses, rule that no miscarriage of justice occurred, and permit the trial to continue. The accused's lawyer may use such a ruling as part of the grounds for appeal to a higher court.

It can be seen that in the adversarial court system, “truth” is not so important that it can be obtained in a manner that is unfair to the accused. The adversarial court system, especially as it is practiced in criminal cases, seeks fairness in its effort to reach the truth, and truth obtained unfairly will likely not result in a conviction.

In other words, factual guilt (that is, uncontroverted evidence that the accused carried out the guilty act with full intent to do so) will not by itself lead to a conviction. When an accused is proved to be factually guilty according to due process, the court will find the accused to be legally guilty. Legal guilt is the only guilty verdict allowed.

Factual guilt, legal guilt and their relationship to due process are further discussed in Section 4, Chapter 2.

Although Canada uses the adversarial court system in its trials, there are many occasions when a matter is dealt with in court in the manner or spirit of the inquisitorial court system. For example, coroners’ inquests or inquiries are conducted to acquire reliable and relevant information by questioning witnesses. Bail hearings and sentencing hearings are further examples where the adversary nature of a trial is avoided, and information is drawn and presented by all parties for a purpose other than to assign guilt.

USEFUL READING

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 3rd ed. Toronto: Carswell, 1996. 27-28.

Boyd, Neil. *Canadian Law, An Introduction*. Toronto: Harcourt Brace, 1995. 139-140.

Godfrey, Ellen. *By Reason of Doubt: The Belshaw Case*. Toronto: Clarke, Irwin & Co., 1981.

Chapter 2

Trials and Appeals

The two major processes that occur in court are trials and appeals. There can be no appeal until there has been a trial, and there can only be one trial for each particular legal dispute.

Trials

There can be more than one trial dealing with different areas of law (e.g. criminal and tort trials can occur dealing with the same conduct of the defendant) arising out of the same event, and there can be more than one trial involving different parties to a legal dispute (e.g. a trial involving a car accident where a passenger sues the driver, and a separate trial where the driver sues the manufacturer of the vehicle), although whenever possible all parties come together in one trial to save costs and time, and for a more complete airing of the issues and the evidence.

The trial is the crucial event that allows all parties to the dispute to attend, testify, and produce witnesses who also testify. These witnesses must be physically present at the trial, and are subject to the scrutiny of the judge and jury, if there is one. The processes that occur during a trial are discussed in Section 2, Chapter 12 and the role of the judge and jury are discussed in Section 2, Chapter 6. The honesty and reliability of the witnesses are assessed and taken into consideration in the deliberations and subsequent verdict. Trials involve only one judge. The judge may or may not be accompanied by a jury depending upon the court level at which the trial is held and the legal issue in dispute.

Occasionally, a miscarriage of justice occurs during the trial which the trial judge believes cannot be rectified and the trial is ended without a verdict. For example, a juror is approached by one of the witnesses. A new trial must be held. The previous trial is considered a nullity. Sometimes after the trial, the losing side presents arguments in the appeal to a higher court that contend that the judge made an error in the trial that affected its outcome. If the appeal court agrees and cannot determine what the outcome would have been had the error not occurred, the appeal court will order a new trial, and, again, the previous trial is considered a nullity.

Appeals

Appeals occur after a trial has been completed, and result when the losing side argues that the judge erred in some matter of law and that that error led to the incorrect verdict against the appellant. The witnesses do not attend the appeal court hearing, except, if they wish, as spectators. The record of the trial is transcribed into print and the appeal court judges examine the evidence and procedures followed in the trial and listen to the arguments of the

lawyers for the two sides. The appeal court judges review the trial as revealed in the transcripts and in the arguments of the lawyers, and may dismiss the appeal, or uphold the arguments of the appellant and either order a new trial, or, if possible right the “wrong” they believe occurred in the trial by substituting a different verdict.

Although appeals can be heard before one appeal court judge, it is usual for there to be at least three appeal court judges in attendance. Appeal court judges always sit in odd numbers, so that there can be no “ties” in the appeal courts’ decisions.

Depending upon where the trial occurs, there could be as many as three appeals following. The court hierarchy that contains the trial and appeal courts is discussed in Section 2, Chapter 4. Once an appeal has been heard at the Supreme Court of Canada, the losing side must accept the outcome, for it is the highest appeal court, the court of last resort.

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. Chapter 6.

Chapter 3

Hierarchy of Canadian Courts

In some countries, separate courts are established for different jurisdictions or legal matters. For example, the United States has a dual court system with a federal court system for legal matters falling under federal jurisdiction, and a state court for legal matters falling under state jurisdiction. In addition, there are courts for county and municipal matters. The Canadian court system is a unitary court system. This means that all legal disputes whether civil or criminal, whether federal, provincial or municipal go through the same court system.

Supreme Court of Canada

The highest appeal court in Canada is the Supreme Court of Canada. There are nine federally appointed judges in the Supreme Court of Canada. One of them fills the role of Chief Justice and the office alternates between an Anglophone judge and a Francophone judge every five years. Of the nine judges, three are from Ontario, three are from Quebec, one is from British Columbia, one is from the three prairie provinces, and one is from the maritime provinces. The judges do not argue for their provinces in their deliberations, and the geographical distribution exists only to satisfy Canadians that the expertise on the Supreme Court is roughly proportional and representative of the population. The three Quebec judges bring with them their knowledge of the civil code system of law used within the boundaries of Quebec, which occasionally has to be applied at the Supreme Court of Canada.

There are no trials heard at this level, and the court only hears appeals which come from the highest appeal court in each province, usually called the Court of Appeal. The judges of the Supreme Court of Canada are permitted to choose from the applications for appeal to the court, those cases which merit being heard. As a result, only about 100 cases are heard by the Supreme Court of Canada each year. The Court of Appeal decisions are final if the Supreme Court of Canada judges refuse to hear appeals from that court level. Potentially, all types of legal issues can be heard at the Supreme Court of Canada, however, due to its power to decide which cases to hear, the cases it chooses tend to be of national importance or involving Charter of Rights and Freedoms concerns.

Because of the doctrines of precedent and *stare decisis* discussed in Section 1, Chapter 5, the decisions of the Supreme Court of Canada are binding upon all courts in Canada, and are therefore of extreme interest to those working in the legal field.

Current Supreme Court Justices (September 2016)

The Right Honourable Madam Chief Justice Beverley McLachlin, P.C.

The Honourable Madam Justice Rosalie Silberman Abella

The Honourable Mr. Justice Michael Moldaver

The Honourable Madam Justice Andromache Karakatsanis

The Honourable Mr. Justice Richard Wagner

The Honourable Mr. Justice Clément Gascon

The Honourable Madam Justice Suzanne Côté

The Honourable Mr. Justice Russell Brown

Federal Court of Canada

The Federal Court of Canada holds trials and appeals but is limited in the types of legal issues that come before it. These include matters involving federal boards such as the Employment Insurance Commission, the Canadian Radio and Telecommunications Commission and the National Parole Board. It also hears appeals involving certain federal statutes such as the *Income Tax Act* and the *Canadian Citizenship Act*. It rules on some legal issues involving the military, and federal/provincial and interprovincial disputes.

Provincial Court System

Each province has a court system and most of the provincial systems contain three levels of court. In some cases the names of the court levels vary, but their general functions are similar.

Provincial Courts of Appeal

The highest court in the province is also exclusively an appeal court. In most provinces it is called the Court of Appeal. There is a large pool of federally appointed judges who hear appeals which may require one, three or five judges. The complexity and significance of the legal issues tend to determine the number of judges who will hear the appeal. The appeals come from the court below, and may deal with any type of legal dispute. There is a Chief Justice of the Court of Appeal and this office carries the responsibility of Chief Justice of the province.

Provincial Superior Court

The middle level of the provincial court system is called variously the Superior Court, the Court of Justice, the Court of Queen's Bench, or the Supreme Court of the province (not to

be confused with the Supreme Court of Canada). The Superior Court in British Columbia is called the provincial Supreme Court. In Ontario, it is called the Court of Justice and in Alberta it is Queen's Bench. As with the Court of Appeal judges, the judges in this court level are also federally appointed. This court level has an appeal division and a trial division.

Provincial Superior Court, Appeal Division

The appeal division hears appeals from the court below, which is the lowest court in the system. Again the judges in the appeal division may sit in numbers of one, three or five.

Provincial Superior Court, Trial Division

The trial division of this middle court level provides for trials with a judge alone or a judge sitting with a jury. Certain matters must be tried at this level, including contested divorces, private law matters such as contract and tort involving monetary losses in excess of a fixed amount (at present \$10,000 in B.C.), criminal cases involving murder, and rarely occurring crimes such as treason, piracy, and mutiny. As well, several of the criminal offences are categorized as "electable offences" which means the accused can choose to be tried at this level, either before a judge sitting alone or with a jury. The election process will be discussed in Section 2, Chapter 10. The Superior Court is so called because it is the highest trial court.

Provincial Court

The lowest level in the provincial court system is usually called Provincial Court. The judges are provincially appointed, and this court level is exclusively a trial court. There are no juries at this court level. The Provincial Court contains several separate courts, or divisions, each with jurisdiction over certain legal disputes.

Family Court hears matters involving separation agreements and temporary custody and maintenance orders. Family Court also has power to issue orders prohibiting contact between family members involved in disputes where there is fear of violence or abuse. In some jurisdictions, Family Court may hear minor criminal offences involving family disputes (e.g. minor domestic assaults).

Small Claims Court hears disputes involving breaches of contract or personal or financial losses as a result of a tort. All provinces assign a monetary limit on the jurisdiction of the court (in B.C. the dispute cannot involve claims over \$10,000).

Youth Court deals with federal criminal offences and provincial and municipal quasi-criminal offences committed by persons between the ages of 12 and 17, inclusive. The *Youth Criminal Justice Act* is the guiding procedural statute for this court, along with the offences found in the *Criminal Code*, *Food and Drugs Act*, *Controlled Drugs and Substances Act*, and

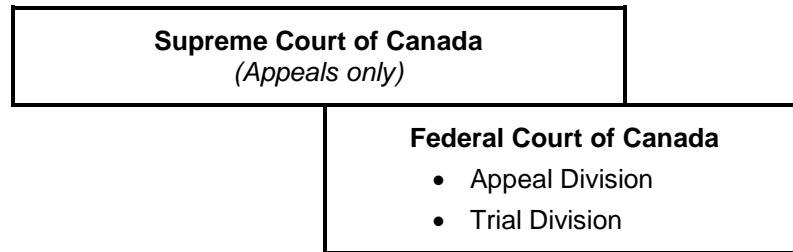
those applicable provincial statutes usually involving motor vehicle offences and liquor offences.

Adult Criminal Court hears trials involving adult offenders (age 18 and over) as well as young offenders raised to adult court. The most common criminal statutes which apply are the *Criminal Code*, *Food and Drugs Act*, *Controlled Drugs and Substances Act*, and various provincial quasi-criminal offences usually involving motor vehicle and liquor offences. The Adult Criminal Court also holds Preliminary Hearings and disclosure hearings held prior to trials which are to take place at the higher court trial division. Preliminary Hearings and disclosure hearings are discussed in Section 2, Chapter 11. All adult criminal matters begin at the Provincial Adult Criminal Court level. Most of them are disposed of at this level. The remainder are heard at the Superior court, trial division.

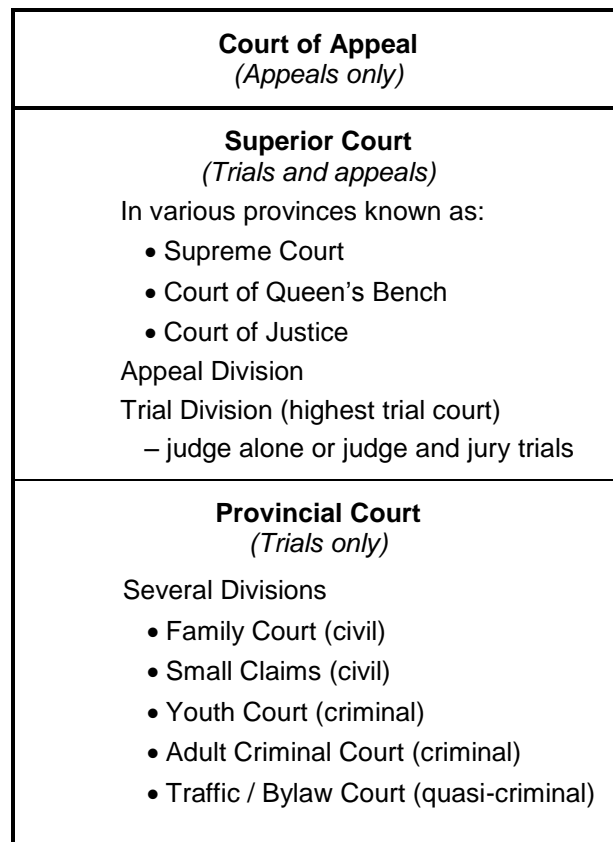
Provincial traffic matters and municipal bylaw infractions may be heard in a separate court in larger cities, often before a Justice of the Peace or added to the court list for Adult Criminal Court in smaller jurisdictions. Provincial and municipal offences committed by youths are heard at youth court.

THE CANADIAN COURT SYSTEM

CANADA



THE PROVINCES



Trial Locations and Routes of Appeals

From the preceding information and a review of the accompanying chart, the locations of trials and the routes of appeals can be determined. If a trial is held at one of the Provincial Court divisions, the losing side can appeal to the superior court level, variously called the Superior Court, the Court of Justice, the Court of Queen's Bench or the provincial Supreme Court. The losing side in that appeal can appeal to the Court of Appeal, and, if permitted, a further appeal can be heard at the Supreme Court of Canada. If the trial takes place at the trial division of the Superior Court variously called the Superior Court, the Court of Justice,

the Court of Queen's Bench or the provincial Supreme Court, the losing side would appeal to the Court of Appeal, and, if permitted, a further appeal can be heard at the Supreme Court of Canada.

It should be noted that criminal matters that reach the Court of Appeal of the province and are not resolved there by a unanimous decision of the judges of that court **must** be heard at the Supreme Court of Canada. The judges of the Supreme Court of Canada cannot refuse to hear the matter. If the Court of Appeal decision is unanimous, the Supreme Court of Canada may or may not decide to hear the appeal.

CASE LAW

R. v. Yebe (1987), 36 C.C.C. (3d) 417 (S.C.C.)

Determinations of guilty verdicts made by juries are appeals based on a question of law.

USEFUL READING

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995. Chapter 7.

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. Chapter 6.

Yates, Richard A. *Business Law in Canada*. 3rd ed. Scarborough, Ont.: Prentice-Hall 1992. 11-16.

Chapter 4

Burdens and Standards of Proof in a Trial

The Burden of Proof

The purpose of a trial is to determine the truth of an allegation of wrong-doing, either criminal or civil, and to respond if the wrong-doing is proved. The party who makes an allegation of wrong-doing must produce evidence which proves it. This requirement is called the “burden of proof” So the burden of proof is always on the party who lodges the complaint.

In a Civil Trial

For an explanation of “civil wrong-doing” and “civil trial”, see Section 3. In a civil trial, the person alleging the wrong-doing is the plaintiff. The burden is on the plaintiff to produce sufficient evidence to establish the liability of the defendant to the civil standard of proof (see below).

In a Criminal Trial

When a criminal act has been alleged, the state, on behalf of society, proceeds against the alleged wrong-doer. The burden of proof, then, is on the state. The Attorney General of each province carries the authority to prosecute alleged criminal acts, and each Crown prosecutor acts as an agent of the Attorney General. In the case of some criminal offences, the Crown prosecutor acts as agent of the federal Minister of Justice. So the burden of proof in a criminal trial is on the party alleging the criminal act, and that is the Crown prosecutor, on behalf of the Attorney General or Minister of Justice who represents society. The Crown prosecutor has the burden to prove guilt to the criminal standard of proof (see below).

The Standard of Proof

The term “standard of proof” refers to the degree to which the evidence must satisfy the judge or jury that the allegation of wrong-doing is true.

In a Civil Trial

The standard of proof in a civil trial is “on a balance of probabilities” . This means that the plaintiff must produce sufficient evidence to lead the judge or jury to conclude that “on a balance of probabilities”, the defendant is liable. When the judge or jury has heard all the evidence, there should be a discernibly larger body of evidence falling on one side of the dispute. When the evidence is evenly balanced, the judge or jury would decide against finding the defendant fully liable, and may determine that the plaintiff is partially liable for the loss suffered in the wrong-doing.

In a Criminal Trial

The Crown prosecutor has the burden to prove guilt in a criminal trial to a much higher standard than is found in civil trials. The standard of proof in criminal trials is expressed as “beyond a reasonable doubt”. In other words, the Crown prosecutor must produce evidence which proves each and every element of the criminal offence to the degree that a judge or jury cannot reasonably come to any other reasonable conclusion but guilt. Any doubt as to the guilt of the accused must be resolved in favor of the accused. The expression does not require the prosecutor to prove guilt beyond **all** doubt. But if there is a possible and reasonable alternate explanation for the accused’s conduct, the accused must be found not guilty.

One of the cornerstones of criminal procedure in a democracy is the “presumption of innocence”. This means that the accused does not have to prove innocence of the criminal charges laid, and if the accused chooses not to provide an explanation or deny the criminal conduct, that silence cannot be used as evidence of guilt. It is the Crown’s burden to prove guilt, and the defendant has no obligation to prove innocence. However, if the defendant has a defence, explanation or justification for the alleged criminal act, that evidence may be used by the accused to raise the reasonable doubt necessary for acquittal.

The defence may raise a reasonable doubt through the cross-examination of a Crown witness which produces indications that the Crown witness is uncertain or being dishonest about the evidence that was given in examination-in-chief. Or the defence may produce witnesses who give evidence which contradicts the evidence of the Crown witnesses, thus raising a reasonable doubt. The role of examination-in-chief and cross-examination is discussed in Section 2, Chapter 12.

Difference in Standards

The standard of proof is much higher in the criminal trial, due to the much more serious implications of a guilty verdict. Depending upon the circumstances, persons found guilty may spend the rest of their lives in prison. It is necessary for the state to be satisfied that there is no reasonable doubt that the accused committed the act and therefore deserves punishment. The high standard of proof is designed to address the old adage: It is better for ten guilty persons to go free than for one innocent person to be punished for a crime the person did not commit.

In a civil trial, the liable defendant will not be sent to prison. The purpose of the civil trial is to award compensation to the plaintiff for loss suffered by the actions of the defendant, so the largest loss to the defendant will be monetary.

USEFUL READING

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 2nd ed. Toronto: Carswell, 1992. 119-120.

Roach, Kent. *Essentials of Canadian Law: Criminal Law*. Concord, Ont.: Irwin Law, 1996. 28-29.

Chapter 5

Role of the Judge and Jury

The Trier of Fact and the Trier of Law

The many events which are occurring during a trial can be separated into two categories: matters of fact and matters of law. As in any dispute, the disputants wish to set out what, in their view, “actually happened” (the facts) and then, based on the facts, determine if some rule has been broken (the law). The role of the judge and jury in regard to the facts and the law apply whether the legal dispute is civil or criminal.

The disputants usually have differing versions of the facts, and one of the roles in a trial is to “try the facts” in order to arrive at the most believable version of what happened. This role is carried out by the “trier of fact” who may be the judge when there is no jury or the jury in a judge and jury trial.

The other role is to determine and apply the law as issues and procedural questions arise during the trial, and at the rendering of a verdict. This is performed by the “trier of law”. The trier of law is always the judge.

“Judge Alone” Trial

In a trial where there is no jury, the judge performs both roles. The judge is both the trier of fact and the trier of law. The two roles are performed simultaneously, as the trial unfolds. Routinely in the formulation of the decision and supporting reasoning, the judge will set out the facts as the judge believes them to be, and then apply that part of the law that arose, to the accepted facts. The application of the law to the accepted facts leads to the verdict.

“Judge and Jury” Trial

In a trial where a jury participates, the jury takes on the role of trier of fact. The judge retains the role of trier of law. At the beginning of a jury trial, the judge will explain to the jury members their responsibilities as triers of fact. The jurors will listen carefully to the witnesses as they proceed through the trial, watching the witnesses for indications of honesty or dishonesty, uncertainty, bias, and any other factor that may contribute to determining what actually happened (the facts). This often involves deciding between two or more conflicting renditions of the facts.

Then, when the trial ends, the judge will “charge” the jury. The term charge in this context means to place the responsibility for the verdict on the jury. The judge will review the facts, including the discrepancies in them, to the jury, and the judge may indicate to the jury what the judge believes the facts to be. The judge will then explain the law that applies to the case,

giving the jury the possible options in law which the jurors must consider (e.g. guilty of murder, not guilty, not guilty by reason of mental disorder, guilty of second degree murder, or of the lesser included offence of manslaughter, etc.). Section 5, Chapters 3 and 4 discuss criminal and quasi-criminal offences and criminal defences.

Armed with this information, the jury retires to the jury room to deliberate, first discussing the various versions of the facts and settling on the one version believed by all jurors. Then, the jury must apply the law as explained by the judge to the facts as they believe them to be. By applying the law to the facts, the jury should reach a verdict.

In civil trials, the twelve jurors do not have to reach unanimity in their verdict. A majority vote is all that is necessary.

However, the twelve jurors in a criminal trial must be unanimous in their verdict. They must continue to deliberate, trying to sway each other toward one verdict. In some trials, the foreman of the jury reports to the judge that the members are unable to reach a unanimous verdict, and the judge will often require them to continue to try. After lengthy deliberations, however, some juries fail to reach a unanimous verdict. This is called a “hung jury” and results in the judge ordering a new trial for the accused with a new jury. The trial just held is considered a nullity.

Jurors are chosen from the voters’ list in the jurisdiction of the court. Not all parties called for jury duty participate in a trial. Each province has legislation setting out the requirements for creating juries, and the conditions for disqualification of jurors. Unlike the practice in the United States, prospective jurors are not asked to reveal much about themselves. Usually, they are only required to provide their name, address, and occupation. They can be asked if they have an opinion about the case for which they may act as juror. Also unlike the United States, jurors in Canada are not permitted to discuss the case with anyone except fellow jurors, even after the trial is over.

CASE LAW

R. v. Barrow (1987), 38 C.C.C. (3d) 193 (S.C.C.). The accused must be present for pre-screening of jurors.

R. v. Born with a Tooth (1993), 81 C.C.C. (3d) 393 (Alta. Q.B.). The panel in which Juries are selected must be representative and impartial.

R. v. Butler (1984), 63 C.C.C. (3d) 243 (B.C.C.A). New Trial was ordered by the Court when allegations were made that the Sheriffs office excluded Aboriginal People from serving.

R. v. Pearson (1994), 89 C.C.C. (3d) 535 (Que. C.A.). The Jury must unanimously agree to the guilt of an accused, however, they do not all have to agree on how the crime occurred.

USEFUL READING

Yates, Richard A. *Business Law in Canada*. 3rd ed. Scarborough, Ont.: Prentice-Hall 1992. 19-20.

Chapter 6

Powers of the Judicial Justice of the Peace

The British Columbia Provincial Court Act was amended in April 2001 to make a new position from the old position of Justice of the Peace. The new positions are called Judicial Justices of the Peace and they have greater powers, increased financial remuneration and distance from police.

The Judicial Justice of the Peace is a position occupied in the part of the criminal justice process related to court proceedings. The Judicial Justice of the Peace is usually found working in the Justice Centre located at 222 Main Street, Vancouver Provincial Court. Judicial Justices of the Peace work 24 hours a day 7 days a week in the Justice Centre. In the Justice Centre, Judicial Justice of the Peace are able to process police officers, Information to Obtain (ITO's) relating to search warrants both under Federal and Provincial law. Judicial Justices of the Peace also utilize sophisticated telephone and videoconferencing in order to do bail hearings.

These changes affect call takers because prior to the inception of the Judicial Justice of the Peace once a person had been arrested at a family trouble it was unlikely that they could cause any further problems that night. With the introduction of the Judicial Justices of the Peace it is possible, however, rare that a domestic call might occur at the same residence that police earlier attended and made an arrest.

The Judicial Justice of the Peace performs a number of tasks during the pre-trial process, and acts as a "justice" or in a "quasi-judicial" role in courts trying municipal bylaw infractions, some provincial offences and minor federal criminal offences.

In some jurisdictions, Judicial Justices of the Peace conduct preliminary inquiries. Preliminary inquiries are discussed in Section 2, Chapter 11. The role of the Judicial Justice of the Peace varies with the size and policies of the jurisdiction.

Judicial Justices of the Peace are mistaken for judges as they share similar work performed by judges. Judicial Justices of the Peace, as well as judges, have the authority to accept the oath of a person as to the truth of the contents of a document or statement. Accepting oaths forms the basis for many of the functions of the Judicial Justice of the Peace.

Criminal charges are laid before the Judicial Justice of the Peace. In other words, the document that initiates criminal proceedings, the Information, is sworn by the person alleging the criminal conduct before a Judicial Justice of the Peace. The process of laying charges is discussed in Section 4, Chapter 6. Police officers wishing to obtain a search warrant or an

arrest warrant must make contact with a Judicial Justice of the Peace, and provide certain required information and swear to the truth of that information. The Judicial Justice of the Peace may then authorize the issuance of a search warrant or an arrest warrant which are discussed in Section 4, Chapter 4. In cases where a criminal act has been alleged and an Information sworn before a Justice of the Peace, but the accused is not considered a danger to the public, and likely to appear in court voluntarily, the Judicial Justice of the Peace will issue a Summons which is sent to the accused's home notifying the accused of the initial court date for the matter. And in cases where the accused has been dealt with by a police officer who believes arrest is not necessary, or by the officer in charge of the police lock-up who believes that continued arrest and imprisonment prior to trial is not necessary, the accused may be released on an Appearance Notice or Promise to Appear, respectively, which are then confirmed by the Judicial Justice of the Peace. This is discussed further in Section 2, Chapter 8 and Section 4, Chapter 4.

Another large role of the Judicial Justice of the Peace is in relation to the pre-trial release of offenders when release has not been arranged through the Appearance Notice or Promise to Appear. In such cases, the Judicial Justice of the Peace may set bail, so long as the offence is not one for which bail must be set by a judge.

Although the Judicial Justices of the Peace do perform some of the minor tasks of judges, it should not be concluded that they are one and the same. A judge must have been a lawyer prior to being appointed to the bench. This means completing four years towards a Bachelor of Arts or Science degree (applicants to law school are rarely accepted with only three of the necessary four years), and then a Bachelor of Laws degree that takes another three years. The prospective judge must then article with a law firm for at least one year as a student lawyer, then gain years of experience in the practice of law, usually exceeding ten years. Hence a judge has had about nine years of education and ten years of experience before taking the appointment.

The training for the position of Justice of the Peace varies from province to province. In most cases, an established and well-respected employee in the administrative branch of the court system, who is seen to demonstrate clear thinking and good judgment is given the opportunity to take the course to become a Judicial Justice of the Peace. The course is mainly by correspondence, and may take up to six months. A Judicial Justice of the Peace can only be employed by the provincial government, and the course is not offered unless a vacancy is being filled.

CASE LAW

R. v. Gray (1993), 81 C.C.C. (3d) 174 (Man. C.A.) The Court took issue that a Justice of the Peace assisted police officers in their preparation of an Information to Obtain a search warrant. Justices must be impartial and hence cannot assist police in anyway including giving advice.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, 215.

Chapter 7

The Bail Process

Bail

Bail is the general term used to refer to the process of releasing from custody persons accused of committing a crime for the period of time between the laying of charges and the end of all possible appeals. Depending upon the seriousness of the alleged crime, the potential danger to the public posed by the accused and the likelihood that the accused will appear for trial if released, the release decision may be made by the attending peace officer, the officer in charge of the local lock-up, the Justice of the Peace or a judge. There is the option of not releasing an accused at all in cases where the alleged criminal act involved extreme violence or where the danger to the public or the intention of the accused to leave the jurisdiction of the court is obvious.

The Canadian Charter of Rights and Freedoms adds weight to the pressure to release accused offenders from custody while awaiting trial in its s. 11(e) which provides that “any person charged with an offence has the right not to be denied reasonable bail without just cause.” What is “reasonable” is derived from balancing the presumption of innocence assigned to all accused prior to conviction, with the need to protect the public and the court process.

There are also statutory restrictions on the level of authority that makes the bail decision. To understand these restrictions, it is necessary to understand the terms “summary conviction offence”, “indictable offence” and “dual” offence. Dual offences are also called “mixed” or “hybrid” offences. These three categories of offences are more fully discussed in Section 2, Chapter 10.

A summary conviction offence is a very minor criminal offence. There are approximately 30, and they are all found in the *Criminal Code*. Examples of summary conviction offences are nudity (s. 174), causing a disturbance (s. 175) and trespass by night (s. 177).

Indictable offences are at the other end of the continuum of criminal acts according to their seriousness. Indictable offences can be found in all federal criminal statutes including the *Criminal Code*, *Food and Drugs Act*, and *Controlled Drugs and Substances Act*. There are numerous indictable offences, and they include offences that range from theft of property with a value of over \$5,000 (s. 334, *Criminal Code*), and trafficking in a narcotic (s. 4, *Controlled Drugs and Substances Act*) to first degree murder (s. 231, *Criminal Code*).

Dual offences will become either summary conviction offences or indictable offences once the attending peace officer decides which process to follow. The statutory wording for these

offences sets out the option. See for example the offences of possession of a narcotic (*Controlled Drugs and Substances Act*, s. 3) and assaulting a peace officer (s. 270, *Criminal Code*). The decision of the attending peace officer may be affirmed or overruled by the Crown prosecutor when the file reaches that stage, often within a few hours.

Summons

The Summons should be recognized as a method of requiring attendance in court without the necessity of arrest. Accused who have allegedly committed fairly minor offences and who have roots in the community sufficient to make it unlikely that they would leave the jurisdiction of the court may be contacted by mail by the court, notifying them of the criminal charge (if they were not already spoken to at the scene) and advising them of the date and time of their first court appearance. In the case of Summonses, there is no need to consider bail for the accused is not placed in custody. The Summons is Form 6, *Criminal Code*.

Appearance Notice

The Appearance Notice is Form 9 in the section of Forms at the end of the *Criminal Code*. The provisions for its issuance are set out in ss. 495-497. The Appearance Notice is issued by the attending peace officer regarding a crime that has just occurred. The Appearance Notice is only available if:

- a) the peace officer has the power to arrest the accused under s. 495 of the *Criminal Code*. Powers of arrest will be discussed in Section 4, Chapter 5.)
- b) the alleged offence is either a summary conviction offence, a dual offence, or one of the indictable offences listed in s. 553 of the *Criminal Code*.
- c) the circumstances match those set out in s. 495(2)(d) and (e) of the *Criminal Code*. These circumstances are often referred to as the “public interest” test. The peace officer can only issue the Appearance Notice in place of arrest and only for those offences set out in b) above if the accused meets the following public interest test:
 - i) the identity of the accused has been satisfied,
 - ii) there is no evidence which should be retrieved or secured before release (e.g. drugs thrown from a car window, or stolen property in the trunk),
 - iii) the peace officer is satisfied that the accused is not likely to repeat the offence or commit another offence in the next few hours (e.g. return to the victim and continue the assault, or drive off in a drunken condition), and

- iv) the peace officer is satisfied that the accused is likely to appear in court or for fingerprinting as required. This is often determined by a distant place of residence or employment for the accused or by a previous record for failing to appear in court or for fingerprinting.

Once a peace officer concludes that the Appearance Notice is the appropriate process to follow, the officer will fill in the blanks on the form and give a copy to the accused. The officer fills in the date on which the accused is expected to appear for fingerprinting (if the offence is not a summary conviction offence), and the date the accused is expected to make a first appearance in court.

If the accused complies with the required appearance for fingerprinting and the first and all subsequent appearances in court, the Appearance Notice continues to act as bail. If the accused fails to comply with any requirements to appear, the accused will be charged with failure to appear under s. 145 of the *Criminal Code* and will be arrested, usually under an arrest warrant. The accused now has two criminal charges to deal with and the likelihood of not being released on an Appearance Notice if the accused is found engaging in future criminal acts.

Promise to Appear

If the attending peace officer feels the accused is not a candidate for the Appearance Notice because the accused fails one or more of the “public interest” test criteria, the officer arrests and conveys the accused to the local police lock-up where release is further considered by the officer in charge of the jail. If, at some point, the “public interest” test is satisfied (e.g. the full identify of the accused is obtained, or outstanding evidence is located and secured), the officer in charge of the jail may release the accused on a Promise to Appear. Again, the alleged offence must be either a summary conviction offence, a dual offence or one of the indictable offences listed in s. 553 of the *Criminal Code*. The Promise to Appear is Form 10, *Criminal Code*, and requires the accused to sign the form, promising to comply with its terms.

Recognizance

(Issued by Officer In Charge or Other Peace Officer)

There is a second option available to the officer in charge of the jail. This is a Recognizance under Form 11 in the *Criminal Code*. The Recognizance is used when the accused does not ordinarily live in the province or within 200 kilometres of the place of custody, or when the officer in charge of the jail believes that an additional assurance is necessary from the accused in the form of an acknowledgment of debt to the Crown of up to \$500. The accused

is usually not required to deposit cash at the Court Clerk's Office, but is required to sign the Recognizance, which, if not obeyed will result in up to \$500 being removed from the accused's bank account or payroll cheque. If the requirement for the deposit of cash of up to \$500, failure to appear would result in those funds being lost to the accused. In either case, in addition, a warrant for the arrest of the accused would be issued for failing to appear, and again the accused would have to contend with the original criminal charge, and the subsequent one for failing to appear, and in most cases, the loss of funds.

Undertaking

(Issued by Officer In Charge or Other Peace Officer)

In addition to the issuance of a Promise to Appear or a Recognizance, the peace officer or officer in charge of the jail may require the accused to enter into an Undertaking as set out in Form 11.1. This Undertaking requires the accused, in addition to the requirements of the Promise to Appear or Recognizance, to abide by conditions set out in the Undertaking. These conditions include reporting to a designated authority at specified times or frequencies, remaining within a designated geographical area, notifying a designated authority of any change in address, employment or occupation, abstaining from communication with a specified person or persons, and if applicable, depositing any passport with the peace officer or other named authority.

The Undertaking is useful in cases where the peace officer or officer in charge of the jail is concerned that the accused may continue criminal conduct, especially in relation to domestic assaults, sexual assaults or criminal harassment (stalking). The accused can refuse to agree to the conditions set out in the Undertaking, but such refusal will result in not being released from custody. If the accused signs the Undertaking and then fails to abide by its terms, the accused can be arrested under s. 145(5) of the *Criminal Code*. In this way, some protection is gained for the target of the accused's criminal intentions.

Judicial Interim Release

The Appearance Notice, Promise to Appear, Recognizance and Undertaking discussed above are documents available to the attending officer and / or the officer in charge of the jail.

If an accused is not released through these forms of bail, the accused must be presented before either a Justice of the Peace or a judge for bail conditions to be determined. This is the reason for the expression "judicial interim release". The release from custody for the interim between charging the accused and trial or appeal is now determined by judicial authority.

Again there are a number of options available to both the Justice of the Peace or judge. However, if the alleged offence falls under s. 469 of the *Criminal Code*, which contains the very serious offences of murder, treason, sedition, and several other offences involving the overthrow of legitimate government, the decision to release must be made by a judge.

The terms of bail may be determined or reviewed at either trial level in the court system. If the criminal matter is being dealt with at the Provincial Court level, bail can be determined by a Justice of the Peace or a judge at that level. If the criminal matter is one that has proceeded to the trial division at the Superior Court (Supreme Court, Court of Justice or Queen's Bench) level, then the judge at that level may consider release of the accused on bail. However, usually such decisions have been made at the lower level, and are reconsidered at the higher court.

Undertaking – Issued by Justice of the Peace or Judge

The Justice of the Peace or judge can require the accused to agree to an Undertaking under Form 12 of the *Criminal Code*.

This Undertaking is virtually the same as the one available to the officer in charge of the jail and the peace officer except that the Justice of the Peace or judge can add “any other reasonable condition” to the Undertaking, whereas the conditions listed in Form 11.1 for the officer in charge of the jail or peace officer are limited to specific restrictions. The Undertaking under Form 12 may not contain any conditions at all if the Justice of the Peace or the judge considers this appropriate.

Recognizance – with or without surety

The Justice of the Peace or the judge may require the accused to enter into a Recognizance with or without “sureties”. The term “surety” can be applied both to the process and to the person who acts as surety. A surety requires that a person other than the accused attend at the Court Clerk's Office (where bail documents are completed) and sign the Recognizance agreeing to acknowledge a debt in a specified amount of money to the Crown. This means that if the accused fails to abide by the conditions of release, the debt is paid to the government by the withdrawal of the funds from the surety's bank account, or seizure of other asset.

Surety (with deposit)

If the Justice of the Peace or judge has ordered a surety “with deposit”, the person who is acting as surety must produce cash in the amount specified. Again, if the accused fails to abide by the conditions of release, the funds are lost to the person who has acted as surety.

There is no statutory limit on the amount of money the Justice of the Peace or the judge may order. The surety must be a friend or relative of the accused and is not permitted to charge the accused for this service. (The “bail bondsman” system used in the United States is not permitted in Canada.)

A surety who is concerned that the accused is about to disobey the terms of release, thus causing monetary loss to the surety, must attend the Court Clerk’s Office and withdraw the surety. Once this is done, the accused will be re-arrested, and bail will be reset, probably with more onerous conditions. The surety remains in jeopardy of losing the funds committed until the accused is back in custody.

No Bail / No Contact

In cases where the accused is charged with one of the offences under s. 469 of the *Criminal Code* (murder, treason, sedition, etc.), the accused shall not be released from custody by a Justice of the Peace, and, in accordance with s. 515(11) may be ordered not to communicate with specified people during incarceration in compliance with s. 515(12) of the *Criminal Code*. Release can only be ordered by a judge.

Show Cause Hearing

When bail has not been set or the accused wishes bail to be lowered, the hearing to do so is called a “show cause” hearing, in which the Crown prosecutor must “show cause” or justify why the accused should not be released pending trial, or why the bail should be set higher than the accused, through the defence lawyer, believes is appropriate. In some cases, the burden is on the accused to show cause why continued detention is not justified. This occurs in cases where the accused has allegedly committed a criminal offence while on bail for another offence, where the accused is not ordinarily resident in Canada, where the accused has been convicted of failing to appear or abide by bail conditions in the past, or where the offence is one of trafficking, exporting or importing narcotics or conspiracy to do so.

As already stated, as long as the accused abides by the conditions of release from custody, those conditions are likely to continue, even beyond conviction, to the end of all appeals of the decision. If bail has been set by an officer in charge of a jail, Justice of the Peace or judge and the accused is unable to meet those bail conditions, a show cause hearing may be held to reconsider and perhaps reduce the conditions making release more possible. If the accused is unhappy with the show cause hearing, the matter can be appealed to a higher court.

Bail Supervision / Bail Verification

In some jurisdictions, accused persons who have been released on bail may be required to report to a “bail supervisor” who is usually a probation officer. In this way, closer track may be kept of the accused’s conduct while out in the community. Probation officers are also sometimes required to interview friends, relatives and employers of an accused wishing to be released in order to verify the information provided by the accused in the request for release. This information is given to the Justice of the Peace or judge who is making the bail decision.

It should be observed that the greater the danger to the public the release of an accused would pose, the higher is the level of authority necessary to decide upon release from custody, and the more onerous are the restrictions placed on the accused while out in the community.

Bail Process

	Issuing Authority	Nature of Offence	Level of Bail	Applicable Form # and <i>Criminal</i> Code Section #'s
J U D I C I A L I N T E R I M R E L E A S E	Judge only	Indictable offences listed in s. 469 <i>Criminal Code</i>	Recognizance with conditions with cash deposit* and sureties*	Form 32 s. 493, 550, 679, 515
			Recognizance with conditions and cash deposit*	
			Recognizance with conditions, debt* acknowledgments and sureties*	
	Judge or Justice of the Peace	Indictable offences not listed in s. 553, <i>Criminal Code</i>	Recognizance with conditions and debt* acknowledgments	Form 12 s. 473, 679, 515
		Persons not released by officer in charge of jail or police officer	Undertaking with or without conditions	
			*No upper limit on dollar value	
	Officer in charge of jail	All summary conviction offences, all dual offences and indictable offences listed in s. 553, <i>Criminal Code</i>	Undertaking (with conditions) in conjunction with Promise to Appear or Recognizance	Form 11.1 s. 493, 499, 503
			Promise to appear	Form 11 s. 493
				Form 10 s. 493
	Attending peace officer with power to arrest		Undertaking (with conditions) in conjunction with Promise to Appear or Recognizance	Form 11.1 s. 493, 499, 503
			Appearance Notice	Form 9 s. 493, 495(2), 496
	Rank of Issuing authority	Seriousness of the crime, danger to public	Restrictions, commitments from accused	

CASE LAW

R. v. Bielefeld (1981), 64 C.C.C. (2d) 216 (B.C.S.C). Bail conditions can include area restrictions if their intent is to prevent further criminal offences and are simply not punitive.

R. v. Garrington et al. (1972), 9 C.C.C. (2d) 472 (Ont. H.C.) If Bail is granted it must not impose such conditions on the accused that it amounts to a detention order.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, 216-235.

Chapter 8

Crown Prosecutors

State as Prosecutor

Under the division of powers between the federal and provincial governments (discussed in Section 1, Chapter 2), provincial governments have responsibility for the administration of the courts in the province. This includes the processing of criminal offenders through the court system.

Criminal conduct is that group of activities defined by the law as threatening in some way to all members of society. Criminal conduct causes people who see themselves as potential victims to fear for their safety, and in some cases to act out against perceived criminals. This, taken to its extreme, would bring out vigilante activities which may be as disruptive to the stability of society as the criminal conduct they are meant to address. For these reasons, the government or the state, on behalf of society, responds to any activities seen to be criminal. The criminal justice system was developed just for that purpose.

Position of the Crown Prosecutor

The Attorney General is the highest law enforcement officer in the province. Prosecutions against criminal conduct are carried out by agents of the Attorney General who are called Crown prosecutors. The term “Crown” indicates the prosecution is being carried out by the government. Private prosecutions are technically possible but rarely occur.

The Crown prosecutors, as agents of the Attorney General, proceed against those committing criminal acts against the federal criminal statutes, most commonly the *Criminal Code*, and those committing quasi-criminal acts which are provincial offences, such as offences against the provincial liquor and motor vehicle statutes. With regard to the *Controlled Drugs and Substances Act*, the *Food and Drugs Act* and some federal taxation offences, the Crown prosecutor acts as agent of the federal Minister of Justice due to an exception to the rules regarding the division of powers. In larger jurisdictions, a separate criminal court room is provided for these offences so that the Crown prosecutor, acting as agent of the federal Minister of Justice, can prosecute all matters falling under that jurisdiction more conveniently.

Powers of the Crown Prosecutor

The Crown prosecutor has tremendous independence as an employee of the government. The main role of the Crown prosecutor is to present the evidence against the accused in a fair manner, keeping all aspects of due process in mind, and not to withhold evidence which may

operate in favor of the accused. The Crown prosecutor is not directed by the Attorney General in how or whether to prosecute a case, nor is the Crown prosecutor required to oblige a judge in some matter in which the powers or integrity of the office of Crown prosecutor might be compromised.

The Crown prosecutor has a great degree of discretion in carrying out the mandate. This means that the Crown prosecutor may choose from a number of legally permissible options when making decisions, and the choice does not have to be “justified” to a supervisor, an accused, a witness or the tort victim of the crime. In some cases, however, choices must be carried out only with the permission of the presiding judge or the Attorney General.

Dual Offences

The Crown prosecutor, upon reviewing the decision of a police officer to treat a dual offence as either a summary conviction offence or an indictable offence, may overturn or veto the police officer’s decision. The Crown prosecutor’s decision in this regard greatly affects the options and repercussions for the accused. The discussion and implications of this dual category can be found in Section 2, Chapter 10.

Laying Charges

The Crown prosecutor has the power to determine whether or not a charge should be laid against an accused, and if so, which charge or charges. In some smaller jurisdictions, the initial decision is made by the attending police officer, but the ultimate approval is in the hands of the Crown prosecutor.

Withdrawal of Charges

After charges have been laid, the Crown prosecutor has the power to withdraw the charge without the need for judicial approval up to the point in the process when the accused is about to enter a plea of guilty or not guilty. Once the plea has been entered, the Crown prosecutor may only withdraw the charge with the consent of the judge. The usual reasons for the withdrawal of charges include the discovery that the wrong charge has been laid, in which case new charges can be laid. Or, an essential witness may have indicated their unwillingness to attend or give reliable testimony. Hence, the charge will be withdrawn due to an inability to prove it.

Stay of Proceedings

The Crown prosecutor may also “stay” proceedings at any point after the charge has been laid, up to just before the verdict is rendered at the trial, without the permission of the judge. A “stay” means that the case is suspended for a period of time. If the case is not reactivated

within one year of the stay, it is as if the case had never been commenced. The more common reasons for a stay include the temporary illness of a valuable witness, or the anticipation of a ruling from a higher court that will affect the outcome of this case. When a case has been stayed, and the time has lapsed for it to be reactivated, the Crown prosecutor may re-lay the charges, but must expect complaints of abuse of process from the defence, which may be favorably addressed by the judge.

Other Powers

The Crown prosecutor has other powers which include the “direct indictment” (discussed in Section 2, Chapter 10), the power to compel an accused in certain cases to be tried by a judge and jury, and the power to oppose bail provisions. In sentencing hearings the Crown prosecutor has the power to recommend a sentence to the judge, based on information the Crown prosecutor chooses to provide to the judge, thereby controlling, to some extent, the options available to the sentencing judge.

Plea Bargaining

The Crown prosecutor, using the power to lay and withdraw charges, and to control the information available to the judge is able to “plea bargain”. This refers to the practice of Crown prosecutors and defence lawyers entering into agreements whereby the accused pleads guilty to lesser offences or less serious offences in return for some benefit. In this way, the Crown prosecutor benefits by not having to conduct a trial, the accused benefits by receiving a less severe sentence, and the defence lawyer benefits by completing a case in a shorter time, and to some extent, successfully.

Accountability of Crown Prosecutor

The Crown prosecutor is accountable to the Attorney General for decisions made. The Attorney General as a minister of the Crown and a member of the Legislative Assembly is accountable to the legislature, and ultimately to the electorate. The Attorney General does not become involved in the work of the Crown prosecutors, but does oversee them, occasionally issuing directives on prosecuting certain offences. Some decisions made by Crown prosecutors must be approved by the Attorney General, for example the offence of nudity (s. 174(3), *Criminal Code*) and the decision to proceed by way of a direct indictment.

Judges recognize that there should be no interference by them in the decision-making of the Crown prosecutors, unless there has been a serious abuse of the court process. In this case, the judge has the power to order a judicial stay of proceedings, which cannot be opposed by the Crown prosecutor or the Attorney General. It is unlikely that at the end of the year time

limit, the judge would re-activate the case, so a judicial stay is, practically speaking, like a withdrawal of the charges.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. 303-336.

Chapter 9

The Classification of Offences and The Election Process

The Election Process

The “election process” refers to the choices available to some accused persons as to where to have their trial: at the Provincial Court level before a judge alone, or at the Superior Court of the province (the provincial Supreme Court, Court of Justice, or Court of Queen’s Bench) before a judge of that court, alone, or with a jury. The election process is only available to those adults and young offenders raised to adult court, accused of committing certain federal criminal offences.

In order to understand the election process, it is necessary to define the three classifications of offences (summary conviction, indictable and dual) and to learn which offences fall under the absolute jurisdictions of the Provincial Court and the Superior Court of the province (Supreme Court, Court of Justice, or Court of Queen’s Bench).

Classification of Offences

Summary Conviction Offences

The term “summary conviction offence” refers to those federal criminal offences of the least serious nature. There are about 30, and they are all found in the *Criminal Code*. Examples of summary conviction offences include communicating for the purpose of prostitution (s. 213), indecent acts, (s. 173), and vagrancy (s. 179). The maximum penalty for a summary conviction offence is a \$2,000 fine, 6 months in prison, or both, unless otherwise provided (s. 787). Parties accused of committing summary conviction offences cannot be photographed or fingerprinted under the *Identification of Criminals Act*, R.S.C. 1985, c. I-1.

Police and the public’s powers of arrest for summary conviction offences are minimal. Powers of arrest are discussed in Section 4, Chapter 4. All summary conviction offences are tried at the Provincial Court level, which has absolute jurisdiction over them. In addition, all offences listed in s. 553 of the *Criminal Code* fall within the absolute jurisdiction of the Provincial Court. Dual offences proceeded with as summary conviction offences are also under the absolute jurisdiction of the Provincial Court.

Indictable Offences

Indictable offences form the largest part of the federal criminal offences and can be found in all the federal criminal statutes, including the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*. They range in seriousness from permitting or assisting in escape from lawful custody (s. 146 of the *Criminal Code*), to possession for the

purpose of trafficking in a restricted drug (s. 48 of the *Food and Drugs Act*), to aggravated sexual assault and murder (sections 273 and 231, *Criminal Code*).

Punishments for indictable offences have been divided into categories, with maximum prison terms of two, five, ten, and fourteen years, and life imprisonment and for those declared dangerous offenders, indefinite prison terms. These are maximums and other sentences are available such as shorter terms of imprisonment, fines, probation, absolute and conditional discharges and suspended sentences. Sentencing is discussed in Section 7.

Persons accused of, in custody for, or convicted of indictable offences are fingerprinted and photographed under the *Identification of Criminals Act*. The powers of arrest for police officers and the public are much greater, due to the greater danger of the criminal conduct set out in indictable offences. Only those indictable offences set out in s. 469 of the *Criminal Code* are within the absolute jurisdiction of the Superior Court of the province (Supreme Court, Court of Justice, Court of Queen's Bench). Section 469 includes the offence of murder, treason, sedition, and several other of the most serious offences. Those indictable offences not listed in s. 469 or 553 of the *Criminal Code* are electable offences, leaving to the accused the choice of trial level and jury.

Dual Offences (also called Mixed Offences) or Hybrid Offences)

Dual offences are offences that can be prosecuted by way of indictment or summarily. The Crown prosecutor will decide which way to proceed. Examples of dual offences are theft of property with a value of \$5,000 or less (s. 334, *Criminal Code*), assault (s. 266, *Criminal Code*), and possession of a narcotic (s. 4 of the *Controlled Drugs and Substances Act*).

All dual offences not listed in s. 553 of the *Criminal Code* and not proceeded with by way of summary conviction are electable, which means the accused can choose the court level and whether or not to have a jury trial.

Absolute Jurisdiction of Provincial Court

All summary conviction offences, all dual offences treated as summary conviction and all offences listed in s. 553 of the *Criminal Code* must be tried at the Provincial Court under the absolute jurisdiction of the Provincial Court judge.

Absolute Jurisdiction of the Superior Court of the Province (Supreme Court, Court Of Justice, Court of Queen's Bench)

All offences listed in s. 469 of the *Criminal Code* must be tried at this court level, either before a judge alone or a judge and jury.

Electable Offences

All the remaining offences, that is all dual offences not listed in s. 553 of the *Criminal Code*, or not proceeded with by way of summary conviction and all indictable offences not listed in sections 553 and 469 of the *Criminal Code* are electable. At the point in the court process where the accused is ready to plead to the criminal charges, if the plea is “not guilty”, the accused will then be required to make an election. The accused will be able to choose a Provincial Court trial, or a trial at the Superior Court of the province (Supreme Court, Court of Justice or Court of Queen’s Bench), with a judge alone or a judge and jury.

There are many reasons why an accused may choose one of these options over the others. Provincial Court trials can be scheduled much sooner than the higher court trials. The cost to the accused is much less in legal fees and time.

The issue in the case may be one frequently addressed by Provincial Court judges and resolved usually in favor of the accused. The accused may re-elect if a change is seen to be necessary. In some cases, this may even be done during the trial. This will be further explained in Section 2, Chapter 11.

A trial at the higher court will not take place for some time, as there will be a Preliminary Hearing held at the Provincial Court in advance of the scheduling of the trial date. This provides the advantage of delay for the accused. Preliminary Hearings will be discussed in Section 2, Chapter 11.

In addition, the issue in the case may be better put to a jury for a more sympathetic view than would be obtained from a judge. Or, the issue may be one which has not been raised before, and the defence lawyer may conclude that a favorable decision is more likely before a judge more concerned with the doctrines of precedent and *stare decisis*. Precedent and *stare decisis* were discussed in Section 1, Chapter 5.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. 216, 218, 235-240.

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 2nd ed. Toronto: Carswell, 1992. 75, 80-82.

Pink, Joel E. and David Perrier. *From Crime to Punishment*. 2nd ed. Toronto: Carswell, 1992. 38-41, 148-152.

Chapter 10

Preliminary Hearings and Disclosure Court

Preliminary Hearings

If an accused person is to stand trial at the Superior Court of the province (Supreme Court, Court of Justice, or Court of Queen's Bench), either because the offence alleged is within that court's absolute jurisdiction set out in s. 469 of the *Criminal Code*, or because the accused, charged with an electable offence, has chosen to be tried at the Superior Court of the province (Supreme Court, Court of Justice, or Court of Queen's Bench), a Preliminary Hearing must be held before the trial. A full discussion of electable offences can be found in Section 2, Chapter 10.

The purpose of a Preliminary Hearing is to determine whether the Crown prosecutor has sufficient evidence against the accused to justify the trial at the higher court. The Preliminary Hearing is designed to save the court system time and money by eliminating cases where the evidence is inadequate and should not be heard at the more expensive higher court. The Preliminary Hearing is held at the less expensive Provincial Court level before a Provincial Court judge.

The Preliminary Hearing is very similar in many ways to a trial. The rules of evidence apply, and the trial processes involving examination-in-chief and cross-examination are followed. Section 2, Chapter 12 will discuss examination-in-chief and cross-examination more fully. The Crown prosecutor will call witnesses for the Crown who are subject to cross-examination by the defence lawyer. The defendant through the defence lawyer may call witnesses for the defence who are subject to cross-examination by the Crown prosecutor. However, there are important differences between a trial and a Preliminary Hearing. The burden of proof remains on the Crown prosecutor. The standard of proof is different.

The standard of proof in a criminal trial is "guilt beyond a reasonable doubt". Burdens and standards of proof in a trial were discussed in Section 2, Chapter 5. The standard of proof in a Preliminary Hearing is called *prima facie*. The Crown prosecutor has only to present a *prima facie* case. The term *prima facie* translates from the Latin to "at first sight", or "on the face of it". The Crown prosecutor need only present sufficient evidence to satisfy the judge at the Preliminary Hearing that the trial judge will likely convict. The defence may be able to produce evidence to counter this standard of proof, so the Crown prosecutor tends to present more than sufficient evidence.

Remember, the purpose of the Preliminary Hearing is to save the cost of a trial at the higher court level if there is insufficient evidence to take it there. The Crown prosecutor will try to

call only that evidence necessary to establish a *prima facie* case. To call all the Crown witnesses and all the physical and documentary evidence at the Preliminary Hearing defeats, at least in part, its purpose.

Another difference between a trial and a Preliminary Hearing which also is a result of the lower standard of proof is the participation of the defence lawyer. Even though there is the extra time and cost of the defence lawyer at the Preliminary Hearing, the defendant is in no jeopardy of conviction. The “worst” that can happen for the defendant at the Preliminary Hearing is that the judge rules that a *prima facie* case has been made out and commits the accused for trial. It is also possible that the judge may conclude that the Crown prosecutor’s evidence fell short of a *prima facie* case, and this will result in the defendant being discharged, and the criminal charges dropped. The defence lawyer may not choose to cross-examine or present defence witnesses at the Preliminary Hearing, but rather to simply listen to the extent and quality of the Crown’s evidence in preparation for the trial.

If the accused is committed for trial, that is, the Crown prosecutor has established a *prima facie* case, the trial at the higher court must be scheduled, and this could mean a further delay of more than a year in some jurisdictions. In most cases, delay is an advantage for the defence. Crown witnesses move on with their lives and memories fade.

In rare cases, where the evidence against the accused is overwhelming, the Attorney General may order a direct indictment. This means that the accused will go to trial at the higher court without a Preliminary Hearing. It is seen that there is no need to show that there is sufficient evidence to justify going to trial because the evidence is copious and direct. This is also used in cases of notorious criminals associated to organized crime groups.

It has been recognized that some defence lawyers have their clients elect to be tried at the Superior Court of the Province (Supreme Court, Court of Justice, Court of Queen’s Bench), not because they have the concrete desire for the trial to occur there, but rather because of the advantages of delay and disclosure of the Crown’s case made possible by the required Preliminary Hearing. After hearing the Crown’s case at the Preliminary Hearing, the defence lawyer may then have the accused re-elect to be tried at Provincial Court. The defence lawyer has had the advantage of more time to prepare a defence, and a better idea of what the Crown’s case will involve. In many cases, the defendant, with the advice of the defence lawyer, will change the plea from “not guilty” to “guilty” in the face of strong evidence presented by the Crown in the Preliminary Hearing.

In some jurisdictions, there has been an effort to reduce the number of cases in which the accused has elected trial at the higher court, proceeded through the Preliminary Hearing, re-

elected to Provincial Court, and plead guilty. One of these efforts resulted in Disclosure Court.

Disclosure Court

Recognizing that the defence lawyers are seeking much more information about the Crown's case, court administrators have begun establishing Disclosure Court, also referred to as "discovery" proceedings. The purpose of Disclosure Court is to permit the defendant and the defence lawyer a more complete look at the evidence the Crown intends to present.

Disclosure Court is held before a Provincial Court judge (not the one who will preside at the Preliminary Hearing, if there is to be one), along with all the other staff usually working in a courtroom. The evidence presented is given under oath. No witnesses are required to attend as the Crown prosecutor simply recites the evidence expected to be elicited from each Crown witness. There is no requirement for the defence lawyer to present any of the defence evidence planned for the Preliminary Hearing or trial, however, on occasion, an issue not in dispute may be conceded by the defence in the interests of saving time and effort at the Preliminary Hearing or trial.

On occasion, a case being heard at Disclosure Court leads to a plea bargain between the defence lawyer and the Crown prosecutor under the supervision of the judge, and in some cases, the accused pleads guilty to the charge upon hearing the evidence intended to be presented by the Crown.

CASE LAW

R. v. C. (M.H.) (1991), 63 C.C.C. (3d) 385 (S.C.C.). The Crown acting on behalf of the State must reveal all information to the accused in order that the accused may answer to the charges on them. This also includes information not favorable to the Crown's case.

R.v. Mills (1986), 26 C.C.C. (3d) 481 (S.C.C.) A preliminary inquiry cannot consider or grant remedies for a Charter of Rights breach.

Stinchcombe v. The Queen, (1991), 68 C.C.C. (3d) 1 (S.C.C.). The Supreme Court of Canada recognizes the right of disclosure under section 7 of the Charter of Rights and Freedoms.

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994. 239-246.

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 2nd ed. Toronto: Carswell, 1992. 75-82.

Chapter 11

Examination-in-Chief and Cross-Examination

A Real Trial

All of us have watched television, and witnessed fictional trials as well as portions of real trials. But few of the rules regarding the presentation of evidence emerge from this source. A few visits to a trial court will afford everyone a better understanding of what is occurring there, and a healthy disrespect for what passes as trials in movies. Defence lawyers cannot do what the actors on “Law and Order” or “The Practice” do routinely – solve the murder without the testimony of witnesses, or at least without some semblance of the rules of court.

In order for a trial to occur, the accused must deny guilt. The “not guilty” plea means that the accused is putting the Crown to the burden of proof. If an accused admits guilt, no trial is held. The Crown prosecutor provides the judge with the pertinent information surrounding the criminal act, and the judge, with the assistance of the Crown prosecutor and the defence lawyer, if there is one, determines an appropriate sentence.

Witnesses

A trial cannot occur without witnesses. Witnesses are there to report what they experienced through their five senses, and occasionally to express their opinion, based on their experiences or special skills or knowledge. Physical and documentary evidence cannot be presented to the court except through the witnesses who encountered them. So the testimony of witnesses must be guarded by rules to make sure that the evidence is as accurate and clear as possible. For example, witnesses are not permitted to watch the trial until after they have given all of their testimony, so that their evidence cannot be affected by what they heard in the trial.

The witnesses are, for the most part, presenting facts. The trier of fact whether it is the judge or jury begins the trial with no knowledge of what occurred. The trier of fact knows the name of the accused and the nature of the charges. If, through reports from television, newspapers, or other media, the trier of fact is aware of some facts surrounding the case, these must be eliminated from the deliberations. Because the trier of fact has or carries no foreknowledge of the case, the Crown prosecutor and defence lawyer must be sure to present their witnesses in some logical or chronological order, for each witness is telling only a part of the story, and very often in conflict with the evidence of other witnesses. The trier of fact must piece together one believable rendition of what occurred from these several and often contradictory witnesses.

Before each witness testifies, the witness must promise to tell the truth. The *Canada Evidence Act*, R.S.C. 1985, c. C-5, sections 13-15, provide two methods to extract this promise. For witnesses who are Christian or Jewish, the oath is sworn using a Bible, to “tell the truth, the whole truth, and nothing but the truth, so help me, God”. If the witness does not have a belief in the Judaic-Christian God, the witness may “solemnly affirm to tell the truth, the whole truth and nothing but the truth”. Special considerations and procedures are followed where the witness is under the age of fourteen or where the mental capacity of the witness is challenged. These procedures are covered in the *Canada Evidence Act*, s. 16.

The burden of proof is on the Crown, and so the Crown must present its side of the case first. When the Crown prosecutor has presented all evidence through the Crown witnesses, then the defence begins its presentation.

When both sides have exhausted all their evidence and arguments, the trier of fact and the trier of law combine to present a verdict. A discussion of the role of the triers of fact and law can be found in Section 2, Chapter 6.

Examination-in-Chief

The Crown begins its case by calling each of its witnesses in order. After each witness is called to the stand and has promised to tell the truth by oath or affirmation, the Crown prosecutor will begin examination-in-chief. Examination-in-chief is the term used to describe the process of extracting evidence by the lawyer from each witness on the same side as the lawyer. In this case, the Crown prosecutor is extracting evidence from a Crown witness. The purpose of examination-in-chief is to obtain, without pressure or interruption, all the information about the case that the witness possesses.

The Crown prosecutor will establish the identity of the witness and then ask the witness to provide a narrative of what was experienced in relation to the case. The witness must endeavor to remember, without prompting, all the essential information within their knowledge. The Crown prosecutor is not permitted to ask “leading questions”. This means that the Crown prosecutor cannot put words into the mouth of the witness or ask questions in a form that only requires a “yes” or “no” answer to the question. Obviously, if the Crown prosecutor’s efforts are not of concern to the defence lawyer, there is no problem, but if the Crown prosecutor is attempting to establish evidence that may not be within the knowledge or memory of the witness and which is in contention in the case, the defence lawyer may object to the judge. If the judge agrees with the defence lawyer, the judge, performing the role of trier of law, will either require the Crown prosecutor to withdraw the question, or, if it has already been answered by the witness, ask the jury, if there is one, to disregard the

answer. If there is no jury, the judge, as trier of fact and trier of law will disregard the answer.

Cross-Examination

When all the evidence to be gleaned from this witness has been heard, the Crown prosecutor will turn the Crown witness over to the defence lawyer for cross-examination. Cross-examination occurs when the lawyer and the witness are on opposite sides of the case. Here, the Crown witness is being questioned by the defence lawyer.

The purpose of cross-examination is to challenge the evidence given by this opposing witness. The defence lawyer is permitted to ask leading questions, suggest answers, argue that the witness is not being honest or careful in testimony, or that the witness' memory or ability to recall is faulty. The defence lawyer is allowed to suggest that the witness is lying, or is biased and giving distorted testimony. Cross-examination is certainly the most exciting part of a trial, especially for the witness. In this way, the defence lawyer may be able to raise a reasonable doubt in the mind of the trier of fact sufficient to lead to acquittal.

Each Crown witness is taken through examination-in-chief by the Crown prosecutor and then cross-examination by the defence lawyer. After each witness has completed these two procedures (and perhaps re-examination by both sides) and is not going to be recalled at a later point in the trial, the witness is permitted to leave the courtroom, or to remain in the courtroom to hear the rest of the case. If the witness will be required to take the stand again later in the trial or Preliminary Hearing, the witness must remain available and outside the courtroom until recalled.

When the Crown's case has been completed, the defence begins to present evidence that it hopes will raise a reasonable doubt in the mind of the trier of fact. The defence lawyer will call the defence witnesses one at a time. Each defence witness will go through examination-in-chief under the guidance of the defence lawyer. The defence lawyer cannot ask leading questions of the defence witness, who must provide a narrative of their knowledge of the case. Again, the Crown prosecutor will be watching carefully to make sure the defence lawyer follows the rules. Once the defence lawyer has extracted all the evidence from the defence witness, the defence lawyer will turn the witness over to the Crown prosecutor who will cross-examine the witness with a view to discrediting the defence witness. As with the defence lawyer in cross-examination of Crown witnesses, the Crown prosecutor can suggest to the defence witness that he or she is not being honest, or is confused, or biased.

The process will continue with each defence witness being subjected to examination-in-chief by the defence lawyer and cross-examination by the Crown prosecutor until all defence witnesses have testified.

This ends the trial process with the exception of submissions from the Crown prosecutor and the defence lawyer to the triers of fact and law. Each side will emphasize the strengths in its case and the weaknesses of the opposing side. Then the matter is turned over to the triers of fact and law for a verdict. The role of the jury in reaching a verdict is discussed in Section 2, Chapter 6.

Not all trials have several Crown and defence witnesses, and very often, the defence calls no witnesses, or only the accused as a witness.

Expert witnesses can be called by either side to add special knowledge to the case, and to express an opinion. For example, in a case involving a charge of criminal negligence causing death, where a pedestrian was killed when struck by a truck, an expert mechanic may be asked by the Crown prosecutor to examine the braking system of the truck. The expert would then be called by the Crown to give testimony about the lack of maintenance of the braking system, as evidence of the negligence of the truck owner or driver. The defence lawyer could also call an expert to refute the Crown's expert witness' testimony.

Voir Dire

Another process that should be discussed is the *voir dire*. This is a procedure that takes place during a trial, most commonly to present the statement made by an accused person to a police officer. The main trial is suspended, and the *voir dire* operates as a small trial within the larger trial. The circumstances around which the statement was taken are described by the testifying police officer, and argument may be presented by both the Crown prosecutor and the defence lawyer as to the legal voluntariness of the statement. The judge, as trier of law, will determine whether the statement was legally voluntary, and then rule that it is admissible or inadmissible as evidence. The main trial will then recommence with or without the statement, depending upon the judge's ruling. If there is a jury, it is excluded during the *voir dire*, in case the statement, presented in the *voir dire*, is ruled inadmissible. In this way, the jury is not affected by the inadmissible evidence. The *voir dire* and the circumstances under which a statement made by an accused to a police officer may be admissible or inadmissible in court are more thoroughly discussed in Section 4, Chapter 5.

CASE LAW

R. v. Levogiannis (1993), 85 C.C.C. (3d), 85 C.C.C. (3d) 327 (S.C.C.), If a child victim of a sexual assault wishes to testify behind a screen this does not violate the rights of an accused.

R. v. Salituro (1991), 68 C.C.C. (3d) 289 (S.C.C.). Spouses who are separated and have no reasonable expectation of reconciliation are still not compellable to testify.

R. v. Seaboyer; R. v. Gayme (1991), 66 C.C.C. (3d) 321 (S.C.C.). The provisions of the rape shield law that prevent defence counsel of asking rape victims about past sexual conduct do breach the rights of an accused. However, the Court has stated that the defence will only be permitted to ask such questions when the Judge is convinced that the questions must be allowed for a legitimate purpose within the Defence case.

R. v. Whyte (1988), 42 C.C.C. (3d) 97 (S.C.C.). A person occupying the driver seat of a motor vehicle is in care and control of the motor vehicle, and hence can be convicted of operation of a motor vehicle while impaired even if vehicle is parked.

USEFUL READING

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 2nd ed. Toronto: Carswell, 1992. Chapters. 11-13.

SECTION 3

CIVIL AND CRIMINAL DISPUTES

Chapter 1

Civil and Criminal Law

Although all court cases travel through the same court system, the processes for initiating them, their purposes and outcomes differ.

Civil or Private Law Matters

Civil or “private” law matters involve disputes between individuals, corporations, and registered societies. For example, a homeowner could sue a landscaper for breach of contract; two spouses could go to court to resolve the division of their marital assets on divorce; a corporation such as John’s Janitorial Service, Ltd. could sue a customer for an unpaid bill; a registered society such as the Main Street Senior Citizens’ Society could sue a person who vandalized their club house; or a caller to the police may sue the call taker and/or dispatcher for negligence in their duties. In this case, the police agency would probably also be sued. The liability of Public Safety Communications Operators is discussed further in Section 9. There are many fields of law that fall under the civil or private law heading. This is further discussed in Section 3, Chapter 1.

In order to initiate a civil law matter, the party with the complaint, usually called the plaintiff commences the process by drawing up a Writ of Summons. The document is served on the defendant who must then respond to the claims made by the plaintiff, and the civil process begins.

The purpose of a civil action is to seek a ruling from the court that the defendant was in some way liable for a loss suffered by the plaintiff, or has acted contrary to one of the several private laws. The loss may be a physical or emotional injury, property loss or damage, loss of income, loss of future earnings, loss of quality of life, a debt, the determination of child custody, etc. Upon a determination that the defendant is liable, the court then determines what loss or breach of law occurred and how best to restore the plaintiff to the condition or circumstances that existed prior to the loss or breach. Very rarely, the judge may order the return of an item that represented the loss, but most often the loss is irrecoverable, and can only be substituted by the award of money. In this case, the judge would be required to put a

dollar value on the loss. Therefore, the outcome of a civil matter would be the determination by the judge that the defendant was not liable, or that the plaintiff and the defendant were each proportionately liable, or that the defendant was entirely liable. In cases where the defendant is partially or fully liable, the judge would determine the amount of the loss suffered by the plaintiff, and apportion that loss between the plaintiff and the defendant if they are both liable, or award the compensation to the plaintiff in full when the defendant is found to be solely liable.

In cases where compensation is not the goal, such as family matters or disputes over ownership, the judge may order the defendant or plaintiff, or both, to follow certain conduct or order that one party has not succeeded in their claim.

Criminal Law

Criminal law matters fall under the heading of public law, in which the state or government is a party to the legal relationship. Public law will also be discussed in Section 3, Chapter 1.

The purpose of a criminal trial is to proceed against a person (and occasionally a corporation or registered society) for conduct that has been defined as criminal by statute, and, if the offender is found to have carried out the criminal act without justification, to punish the offender.

The purpose of the procedure is to protect society from such conduct by the offender and others in the future, and to assure society that it is safe. A convicted offender is sentenced and some forms of sentence involve efforts directed at the offender's rehabilitation. If successful, such rehabilitation should lead to a safer society. Other sentences lead to incarceration of the convicted offender, again to protect society for a time.

Differences

The terminology in civil cases differs from those in a criminal case. In a civil case, the person initiating the action is called the plaintiff. In a criminal case, the state initiates the action, and the agent of the state is the Crown prosecutor. In a civil case, the plaintiff "sues" the defendant and in a criminal matter, the state "charges" the accused, or assigns responsibility for the criminal act to the accused. The document that commences a civil action is called a Writ of Summons, and the document which commences a criminal action is called an Information (see Form 2 in Part XXVIII of the *Criminal Code*).

The civil process determines liability and value of loss. The criminal process determines guilt. The civil process results in compensation or restoration of the condition of the plaintiff. The criminal process results in punishment of the offender.

The standard of proof resting on the plaintiff in a civil case is to prove the liability of the defendant “on a balance of probabilities”. The standard of proof resting on the state through the Crown prosecutor in a criminal case is guilt “beyond a reasonable doubt”. The standard of proof in a criminal case is much higher, due to the potential of finding an innocent person guilty of a criminal offence. Punishment can range all the way to life imprisonment for serious offences.

Both Civil and Criminal Actions can Occur

A civil trial and a criminal trial can both take place in regard to the same improper conduct. Some improper conduct is both a criminal offence and a private law or civil dispute.

An obvious, although not Canadian, example of this is the O.J. Simpson case. The criminal trial in which he was acquitted of the two murders took place in 1995. The civil case in which he was sued by the families of the victims for their wrongful deaths (a tort which falls within the private law field) followed. The judge and jury in the second trial (the civil trial) did not consider the evidence or the outcome of the criminal trial, because the purposes of the two trials are different, as are the standards of proof, and admissible evidence. O.J. Simpson was found liable for the wrongful deaths of the two victims even though he was found not guilty in the criminal trial. The role of the tort victim in the criminal process will be further discussed in Section 3, Chapter 4.

USEFUL READING

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995. 25-26, 28.

Yates, Richard A. *Business Law in Canada*. 3rd ed. Scarborough: Prentice-Hall, 1992. 16-23, Chapters 3, 4.

Chapter 2

Public and Private Law

Public Law

“Public law” is the term used to describe those areas of law and legal relationships in which a level of government be it federal, provincial, or municipal is a party to the law and legal relationship. There are four general areas of public law. They are: taxation law, constitutional law, administrative law and criminal law.

Taxation Law

In every case, tax is levied by a government level on an individual, a registered society, or a private incorporated company. The federal goods and services tax (GST), provincial social service taxes, federal gas taxes, municipal school taxes, property taxes, and federal and provincial income taxes are only a few of the major taxes. In each case, the tax is imposed by a level of government. Any dispute over the imposition of taxes would involve the government taxing body and the individual, society or company complaining. A court case involving taxation law would appear as *Morrison v. Revenue Canada*, for example.

Constitutional Law

The term “constitution” refers to the rules of an organization. Each level of government has a constitution. When the rules of the country, province or municipality become the subject of complaint by an individual, society or company, the resulting dispute involves the government on one side and the individual, society or company on the other. Examples of disputes involving constitutional law could include discriminatory practices by a government department (e.g. the refusal to allow a same-sex spouse to receive CPP death benefits) or governments acting beyond their authority (e.g. the banning by a municipality of nuclear materials within its boundaries – this power resides with the federal and provincial governments). A constitutional dispute may appear as *Rodriguez v. British Columbia (Attorney General)*, for example. This was the case in which Sue Rodriguez, dying of ALS, asked the Supreme Court of Canada to strike down the federal law that prohibited her from having a doctor-assisted suicide.

Administrative Law

Each level of government creates administrative tribunals to make decisions in specific matters. Examples of federally created administrative bodies include the National Parole Board, the Employment Insurance Commission, and the Canadian Radio and Telecommunications Commission. Provincial administrative tribunals include the Workers

Compensation Board, the Egg and Poultry Marketing Board and the Police Commission. Finally, municipalities are permitted by the province to create administrative tribunals and examples include the Parks Board, Police Board, Library Board, and School Board. These administrative tribunals must abide by the rules and obligations assigned to them by the government level that created them. Again, when we as individuals must deal with certain matters (e.g. obtaining government support while unemployed, or obtaining financial assistance after being injured at work), we must address the administrative tribunal that handles those matters. Societies and companies also deal with some of these administrative tribunals as employers or reporting agencies. An administrative law dispute may appear as *Cuddy Chicks Ltd v. Ontario (Labour Relations Board)*, for example.

Criminal Law

The federal government, over time, and with the participation of the judiciary, has defined in statute, those forms of human conduct that are seen to be threatening to society. Provincial and municipal governments have done the same. There are two forms of conduct that are addressed under the general term “criminal law”. They are forms of conduct which are prohibited (e.g. murder, theft, assault) and forms of conduct that are controlled (e.g. driving without a licence, or while impaired, drinking in public or by underage people).

Whenever a person disobeys one of these forms of prohibited or controlled conduct, the government that has created the legislation to address it becomes involved. Criminal conduct is seen as dangerous to social stability, and governments have seen fit to act on behalf of society, rather than wait for individuals to respond to protect themselves, by resorting to vigilante activities and lynch-mobs as in “days of yore”. And so, any criminal law matter involves an individual, society, or company (only certain crimes can be committed by registered societies or private incorporated companies), and a level of government.

Criminal cases use a different format in their names. A criminal case title will involve the term *Regina* or “the Queen” if the current monarch is female, and *Rex* or “the King” if the current monarch is male. Hence criminal cases will appear as *Regina v. Morgentaler* or *Smithers v. The Queen*. Queen Elizabeth II has been the monarch since 1953, and so cases with the term *Rex* or “the King” in the title pre-date her coronation.

Note that in all “public” law matters, some level of government must be one of the parties to the legal relationship.

Private Law

“Private law” is a term used to refer to all legal relationships where it is not necessary for the government to be one of the parties. A level of government may happen to be a party, but it is not a requirement. Private law matters are also referred to as “civil law” matters, but this term should not be confused with the civil code legal system discussed in the Introduction.

Family Law

The law governing families is private law. The parties to the dispute could include the husband, the wife, common law spouses, or the children of the marriage. A case involving a family law matter would appear as *Kramer v. Kramer*, for example.

Contract Law

Contract law is another example of a private law matter. A homeowner could sue a roofing company for shoddy workmanship, or a landlord could sue a tenant for leaving the rental premises in damaged condition. A level of government may sue a contractor for a breach of the terms of a contract. Here it can be seen that a level of government is a party to a private law matter, in this case contract law, but only because it is a party to the dispute. A contract dispute would appear as *ABC Janitorial Supplies, Ltd. v. Smith*, for example.

Tort

Another example of a private law matter is the law of tort, in which a person or persons, society or company has suffered some harm or loss by the actions or failure of another person or persons, a society or a company. For example, a woman slips on the wet floor in a grocery store and sues the store and its owner for damages. A case involving a tort could appear as *Brown v. Fresh Foods, Inc.*, for example.

There are many forms of private law besides those already mentioned above. They include the law regarding wills and estates, real property law (technically a sub-category of contract law), consumer protection, and company law. In each case, the government need not be a party to the legal relationship.

USEFUL READING

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995, chapter 2.

Chapter 3

Private Law Matters Which Can Develop into Criminal Matters

Role of Government in Criminal Matters

Private law involves those areas of law in which the government need not be a party. Public law requires that the government be a party to any legal matter falling within the public law domain. Criminal law is public law. The government has assumed the responsibility for the protection of the members of society from conduct deemed to be criminal. The criminal justice system with all its components is designed to identify, prosecute and sanction those individuals who commit criminal offences. Police officers frequently encounter disputes which are private, and when they do, they advise the parties of this and direct each of them to contact a lawyer. Most of the time, the parties to the dispute resolve it in this way. However, occasionally, what begin as private law disputes deteriorate into criminal offences usually involving assault or property damage.

Contract Law

This field of law makes most business dealings run smoothly. A contract occurs when two or more parties agree to exchange something of equal value. For example, there is a contract when, after getting several estimates, a homeowner agrees with a roofer that the homeowner will pay a specified amount of money in return for the re-roofing of the home by the roofer. The contract is complete when each party carries out their side of the agreement. An agreement need not be in writing unless it involves the sale of “real property” (land). However, problems more frequently arise when all the terms of the non-property agreement are not in writing, and one party has a different understanding or expectation than the other party of what was agreed to. In contract law, all parties to the agreement must be in a sound mental state, that is, not under the influence of drugs or alcohol, duress, or suffering from a mental disorder when making the agreement. Persons under the age of majority (in most provinces statutorily set at 19 years) cannot enter into a contract except for necessities of life such as food, clothing, and shelter. All terms of the agreement must be discussed and agreed to voluntarily. In other words, a contract is not legal if a person is forced by physical or mental pressure to agree to it. The purpose of the contract must be a legal one. For example, an agreement to carry out a contract killing is not an enforceable contract.

When one party fails to perform their side of the agreement, a breach of contract has occurred, and that party can sue the other party in Small Claims Court (a division of Provincial Court), or, if the value is in excess of a specific amount (in B.C. it is \$20,000) the

suit would be heard in the Superior Court of the province (variously named High Court, Queen's Bench, or provincial Supreme Court).

Police agencies are often contacted by members of the public in cases where contracts are involved, but the matter has or may become a criminal one. A common criminal activity involving contracts is fraud or false pretences. Fraud or false pretences can occur when two or more persons appear to be carrying out a contract, but one or more of the parties misleads the other party, or parties, and obtains money or some other benefit to which they were not entitled. For example, a homeowner, agreeing to have the roof redone pays the entire cost of the job in advance to the roofing contractor, who (having no intention to perform the work), leaves with the money, and does not return.

Food, beverages, accommodations and transportation may be obtained by fraud or false pretences. For example, when a person enters a restaurant and orders a meal, an implied contract has come into existence. The person ordering the meal has, by ordering it, implied to the restaurateur or the employee that they intend to pay for the meal after consuming it. The restaurateur or employee implies by taking the order that the food will be served reasonably promptly and that it will be fit for human consumption. If, upon receiving the meal, the person is unable to eat it due to its unpalatable condition, then there has been a breach of contract on the part of the restaurant, and the person can refuse to pay for the meal. The honesty of the person may come into question, if all or most of the allegedly unpalatable meal has been eaten. When a person consumes a meal and then leaves the premises without the intention of paying for the meal, the person has committed a criminal offence, for it is clear that the person entering the restaurant and ordering a meal did not intend to pay for it, but led the restaurateur or employee to believe that to be the case. This form of fraud can be found in section 364 of the *Criminal Code*, which includes cases where the offender has obtained food, beverage (a pub or beer parlour) or accommodation (a hotel or motel). The same principles apply with regard to obtaining transportation. When a person enters a taxicab, bus, train, subway, aircraft, boat, etc., the person implies by their conduct in entering the transport vehicle that they have paid or will pay before exiting. Failure to do so is the offence of fraud in relation to fares, s. 393 of the *Criminal Code*.

There are several other forms of fraud or false pretences as a perusal of the *Criminal Code* index will reveal. In most cases, the legal basis for the fraud or false pretences was a contract, and the offender, as a party to that contract, lacked the intention of fulfilling his side of it, either before or during the carrying out of the contract.

Another contractual relationship that often leads to police involvement is the landlord/tenant relationship. Much of the law regulating the landlord/tenant relationship is in provincial statute. Problems arise when one or both parties act outside the statutory provisions. For example, a tenant may refuse to pay rent until a matter of complaint (such as excessive heat in the apartment) is resolved. Or the landlord may enter the tenant's apartment and remove tenant property to hold in lieu of non-payment of rent. Then, either party will call the police to complain. The parties should be advised to contact a lawyer, or, in provinces where there is a government agency that deals with landlord/tenant disputes, the parties should be directed to that agency. In most cases, the landlord or tenant has taken non-criminal action, but action that cannot be permitted under contract law.

Occasionally, a tenant will move from an apartment and take with him or her property that belongs to the landlord. This complaint, at least at the outset is non-criminal, for it may be that the tenant did not realize that the property belonged to the landlord, or that the property had been included in the tenant's belongings inadvertently. There should be reasonable efforts by the landlord to contact the tenant and request the return of the property before criminal intent is presumed. However, if a tenant cannot be found, and the evidence is such that it can be concluded that the tenant intended to keep the landlord's property, the offence of theft would be considered by the police. The offence of theft can be carried out when a person comes into possession of someone else's property legally, but then "converts" it to his own use or to the use of others. So a tenant who is permitted, during the tenancy, to use landlord property, but intentionally takes it with him on vacating the premises, has committed the offence of "theft by conversion" set out in s. 322 of the *Criminal Code*.

Family Law

In most provinces, the important aspects of family law are covered in provincial legislation. This legislation deals with separation agreements (a form of contract), family court orders for temporary custody of children of the legal or common law marriage, orders for support or maintenance of the dependent spouse and/or children of the legal or common law marriage, orders for the divisions of moveable assets of the marriage, such as furniture, vehicles and bank accounts (not usually land), orders for one or the other of the parties to the marriage to reside in the family home, and orders against one or the other parties (or both, on occasion) to make no contact with the other.

No contact orders arising from a family court hearing, before a family court judge are enforceable by police officers, but each province provides its own policy for such

enforcement. This information may be acquired through family court, which is a division of the Provincial Court level. (See Section 2, Chapter 4)

Matters involving the division of real property (land), the dissolution of the marriage (divorce), and the permanent custody of the children of the marriage are dealt with at the Superior Court (High Court, Queen's Bench, Supreme Court) level of the province.

Uncontested issues would not be heard in court, but be approved by a judge of this level, by consent of the parties.

Although most domestic calls to police agencies are clear cases of assault, and leave no doubt in the mind of the call taker or dispatcher as to what should be done, occasionally a call to the police may involve a different criminal act centred around a family relationship. For example, if after a legal separation (written contract) has been signed, one spouse removes from the other's belongings property which was to remain with that other spouse, there is a provision in the *Criminal Code* which acknowledges theft between spouses. This can be found in s. 329.

Another matter which may arise out of a domestic problem is the possible abduction of a child or children of the marriage by one parent, from the custody of the other. The offences are covered in sections 280-286 of the *Criminal Code*. The offences apply variously according to the age of the child, and the existence or non-existence of a custody order. The offences can also apply to a person who is not a parent, but is a guardian or other person having legal responsibility for the child.

Wills and Estates

This field of law deals with the Will and assets of a deceased person. In cases where the deceased person had a Will, one or more parties will be named in the Will to settle the estate of the deceased in accordance with the Will. The party so named is called the Executor (or Executrix, if female). This person has full access to the deceased's assets and is in a position of trust. If a deceased person had no Will, matters are in suspense until such time as a family member or friend is named to act as Administrator or Administratrix of the estate. In the meantime, family members may have access to the deceased's assets because they shared a residence, household effects, a vehicle, or perhaps a bank account. Thefts may occur of assets of the deceased by parties accessible to them.

Even a person's Will can be the subject of a criminal offence. The offence of theft of a testamentary instrument (usually a Will) falls under the more serious category of theft of property where the value exceeds \$5,000. (See s. 334(a) of the *Criminal Code*.) The reason

that a Will or testamentary instrument is such a valuable document relates to the result if the Will “disappeared”. When a person dies without a Will, the statutory provisions of the provincial government come into effect, and the assets of the deceased will be distributed in accordance. For example, if a divorced, childless person dies, leaving all assets to charity in a Will, a sole brother or sister would (having found and illegally destroyed that Will), according to provincial statute, inherit the entire assets of the deceased.

Tort

This is a very important area of the law in relation to criminal offences. Tort refers to the causing by an individual, group or organization of a loss to a person, group or organization. This loss could be in the form of physical injury, property damage or loss, psychological harm, loss of income, loss of future earnings, loss of enjoyment of life, loss of reputation, etc. The causing of this loss may be accidental or intentional. When a tort occurs, the injured party may sue the individual, group or organization that caused the loss. Examples of torts include such a minor event as bumping into a person causing them to drop what they were holding. Obviously, we, as a society tolerate many unintentional and minor losses. However, when the loss is more substantial, the person suffering the loss may approach the individual, group or organization that caused it, seeking compensation or restitution. For example, if a person allowed a large tree in their yard to continue growing with heavy branches hanging over the fence, and a branch gave way and fell on the neighbour’s motor home, this would be a tort, and the neighbour could sue. Some losses are insured, and the insurance company may reimburse the person suffering the loss, and may in turn sue the party causing the loss.

The difficulty for call takers may lie in recognizing when a tort has been inadvertent or when it has been intentional. The party calling may be angry, and the relationship with the party alleged to have caused the tort may carry long-standing grudges. The party may claim that what was accidental was really intentional. Another problem may arise when the law has made some unintentional torts criminal acts. A good example can be made from any sport which involves physical contact between the players. When players enter the game, there are certain reasonable expectations as to the level of force to be used. When the level of force exceeds that reasonable expectation, then a criminal assault has occurred. The call taker should respond when a caller reports an injury that resulted from excessive force in a sport, as a criminal assault may have taken place. In the same vein, parties who agree to fight may escape criminal prosecution for assault unless weapons become involved, in which case the courts, as a matter of public policy, will treat the person wielding the weapon as an offender.

For almost every criminal act, there is a corresponding tort. For example, the person accused of a sexual assault may face a criminal trial for that conduct, and be sued in tort by the victim of the sexual assault as well. A notorious example of this is the O.J. Simpson case. Mr. Simpson was charged with two counts of murder. He has also been sued by the families of the two deceased persons for the tort of causing wrongful death. The trials are held for different purposes: the criminal trial to protect society and sanction parties who are convicted of criminal acts, and the tort trial to obtain compensation for the families for the losses they have suffered. See Section 3, Chapter 1 for a discussion of the differences between the criminal and civil court processes.

USEFUL READING

Yates, Richard A. *Business Law in Canada*. 3rd ed. Scarborough, Ont.: Prentice-Hall, 1992, Chapters 3-5.

Chapter 4

The Overlap Between Criminal Offences and Tort.

“Victims” of Tort

The law of tort extends past the minor, unintentional losses that occur in society, and includes almost all criminal acts. In other words, when a bank robber carries out the crime, not only has there been a criminal offence (in this case, s. 343 of the *Criminal Code*), there has also been a number of torts. The bank can sue the robber in tort for the loss of business caused by the subsequent temporary closure of the bank during the investigation by the police, as well as the loss of money taken in the robbery if it was not recovered. The tellers and customers can sue the robber for the tort of interference with a person, in this case through a threat to the safety of the teller. It is very unusual, however, for the party suffering the loss in a tort which also involves a criminal act to sue the person who caused the tort, because that person is usually without assets, and a suit for compensation may be technically successful, but practically speaking not worth the cost and effort involved.

There is an exception to the general rule that there is a tort action in every criminal act. Before examining this, it is necessary to remind the reader that the legal “victim” of crime is society. Crime costs all members of the public in the price of goods, insurance, and in the high interest rates and low savings rates in investments. Crime leads to rising costs of medical care, and waiting lines in emergencies, and to the escalating costs of the criminal justice system. The person who is assaulted is not a victim of crime in any greater legal sense than any other member of the public. But the assault victim is a victim of the tort.

Criminal Acts including Tort

In a criminal trial, the assault (tort) victim is identified as simply a witness. The trial is conducted on behalf of society to attempt to reduce the incidence of crime and punish the convicted offender. However, in the private law or civil tort trial, the tort victim is central to the case. The purpose of the civil tort trial is to determine if and to what extent the defendant was liable for the loss suffered by the tort victim, and to require the defendant to compensate the tort victim for that loss.

Victimless Crime

There are a few crimes for which there is no “tort” victim. These crimes are the consensual crimes of communication for the purpose of prostitution, drug trafficking and possession, and illegal gambling. These crimes are often erroneously referred to as the “victimless crimes”; they are victimless not because society does not suffer loss when they are committed, but victimless in the sense that there is no party to sue in tort. Some people, based on this

incorrect understanding of the purpose of criminal sanctions, suggest that such victimless crimes should be decriminalized.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 2.

Chapter 5

The Criminal Process and the Tort Victim

The Tort Victim

The tort victim may be the person from whom the purse was stolen, or the person who was assaulted, or the family of the murder victim. In a criminal trial, the purpose of which is to prosecute the guilty offender and impose punishment to protect society from future criminal conduct, the tort victim is just one of the witnesses for the prosecution. The tort victim may be an essential witness, being the only party present other than the offender when the crime was committed, or the tort victim may have a small role to play as a witness because of age or mental condition, or because the tort victim was not present during the crime (e.g. burglary of a residence, or the family of a murder victim). The tort victim's role is to provide evidence against the accused so far as is possible, along with the other witnesses.

Process of Redress

The tort victim may obtain personal redress from the person who caused the loss (and who may also be the subject of a criminal charge) by initiating civil or private law proceedings against the person. The process of initiating a civil or private law suit can be found briefly described in Section 3, Chapter 2.

Victim Assistance

However, the criminal justice system, in the past few decades has acted to assist the tort victim while participating in the criminal process. At one time, the tort victim's physical and emotional condition and usual lack of understanding of the criminal process were not taken into consideration by the criminal justice system. Now, there are programs where volunteers accompany the tort victim to court, give them emotional support, instruct them in the criminal process as it unfolds, and refer them to other supportive agencies. Some jurisdictions have established victim/offender reconciliation programs in which minor offences are dealt with between the tort victim and the offender with assistance from a mediator, and if successful, do not reach court.

Most provincial governments have a criminal injuries compensation program in place which administers the applications of the tort victims of criminal acts, and provides, from taxpayer funding, monetary compensation to them. The amounts are never reflective of the awards that would have been made by a civil court. But the compensation program is usually the only source of monetary compensation available to the tort victim.

Private non-profit agencies have filled the void by providing support and counselling for abused spouses, sexual assault victims, and drug users, as well as transition houses, shelters, and “hotlines”.

The federal government has established legislation that permits the tort victim to be kept informed about the offender, including the offender’s eligibility dates for conditional and permanent release from prison.

The trial courts have also moved to assist the tort victim by permitting in some cases, as part of the sentence of the convicted accused, an order for restitution to the tort victim. There are limitations on the ability of the court to order restitution. The loss must have been monetary, and measurable (i.e. not physical or psychological injury), and the offender must have the income from which to make restitution.

The police call taker should become thoroughly familiar with all the agencies and services available in the area for the tort victim so that referrals may be made at the time of the call.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 2.

SECTION 4

CRIMINAL JUSTICE POWERS AND PROCEDURES

Chapter 1

Roles within the Criminal Justice System

It is generally accepted that there are five main components of the criminal justice system. They are: the public, the police, the prosecutors as agents of the Attorney General, the courts, and corrections. In any system, the component parts are expected to interrelate, with one common goal, and one main authority. When the criminal justice system is examined in this light, it can be seen that often the components do not interrelate, or even communicate with one another, that although there is one common goal, that of protecting society from crime, the component parts disagree with one another about how to carry out that goal, and that the authority which propels the criminal justice system comes from more than one main source.

The roles and the degree of interrelationship between the components of the criminal justice system will be discussed below. The criminal justice system's avowed goal is to protect the public from criminal conduct and to proceed against those who carry out such criminal conduct in order to deter them and those who may follow them. The problem appears to be with how this goal can be achieved. The police agencies believe that given more authority, personnel, and equipment, they will be able to protect the public. The police authorities will state that the other components of the criminal justice system often frustrate their efforts. The prosecutors and courts take the view that more authority, personnel and equipment may improve police effectiveness in detecting offenders, but it may also allow many people who are not offenders to enter the criminal justice process, even temporarily, and this is not appropriate. Corrections officials acknowledge that most offenders leave corrections facilities undeterred, and argue that better correctional facilities and programs, more sentencing options not involving prison, and more personnel for counselling would assist in releasing rehabilitated offenders, thus protecting the public. All components of the criminal justice system agree that prevention of crime through school and community and employment programs would protect the public, but the funds and knowledge necessary to establish these programs are not available.

There are also difficulties with the need in a system for one central authority. The criminal justice system is predominantly under federal control. However, the agencies that operate the

system may be funded and directed by federal, provincial or even municipal authorities. For example, the R.C.M.P. is the federal police force. Each province has a provincial police force, and each incorporated municipality or city has a municipal police force. Most provinces have entered into contracts with the R.C.M.P. to provide provincial policing. The two exceptions are Ontario and Quebec. Most municipalities or cities outside of those provinces have also contracted with the R.C.M.P. to provide local policing services. However, many cities have their own locally trained police officers working in city or regional police agencies. Although the criminal law is a federal responsibility, each province has laws which are enforced by the police. The most common provincial offences involve motor vehicle and liquor offences. Municipalities or cities also have bylaw offences, which may be heard in the court system. Larger jurisdictions employ bylaw enforcement officers to enforce these bylaws, but smaller jurisdictions rely on their police force. Corrections is also divided along government jurisdictional lines. Offenders sentenced to 2 years or more are sent to federal institutions. Those sentenced to 2 years less a day, or less, are sent to provincial facilities. And most cities have local “lock-ups” to hold accused persons for short periods. Young offenders must be placed in provincial youth facilities, as are adults held in custody awaiting trial. It can be seen that all three levels of government have some part to play in the administration of justice in Canada, and this lack of one central authority frequently causes difficulty and dissension in the system.

Public

The public, as the component that sits at the entrance to the criminal justice system has several roles. From the public, are drawn the offenders, the victims, the witnesses and the employees who work in the criminal justice system. The purpose of the criminal justice system is to protect the public, so the public is the reason for the existence of the criminal justice system. However, the public, in general, is not knowledgeable about the criminal justice system, and this lack of understanding affects the effectiveness of the system. Members of the public are not aware of the functions and limitations of the criminal justice system, and, as a result, often make unreasonable requests of the system. Seasoned call takers will attest to this. Added to this is the emotional dimension that often accompanies the connections by members of the public with some other component of the criminal justice system, and the dissatisfaction by the public is magnified. Hence, we hear complaints that the police are slow in arriving at calls, that the obvious culprit was not arrested and “thrown in jail”, that the prosecutor was not interested in the case, the courts were too easy on the offender, and the prison released the offender too soon, and without making any improvement.

The police call taker must recognize the lack of understanding in the public, when taking calls from people. Whether the call taker should or can provide a brief explanation for the perceived inadequate response by the criminal justice system to the caller, is probably a personal or employment policy choice. However, it must be recognized that cooperation by the public is absolutely essential for the effective operation of the criminal justice system. A study done by the federal government in the early 1980s indicated that “only 3 percent of criminal victimizations were discovered by the police without the assistance of the public” (Griffiths and Verdun-Jones, 1994, p.71). This means that the police rely on public reporting for 97 per cent of their law enforcement activities.

There are a number of reasons why members of the public do not report criminal activity or suspicious circumstances to the police. The same study reported that a large number of incidents were not reported to the police because they were seen by the member of the public as too minor for police intervention, or because the member of the public believed that the police could not do anything about the matter. Another reason for not reporting a criminal incident was because nothing was taken or the items were returned, or no damage was done. Other members of the public chose not to call because it would be inconvenient to do so. Some victims of crime did not call because of fear of revenge, or of making their relationship with the criminal more difficult. Unfortunately, another reason for not calling the police involved the person’s concern with the attitudes of the police and the courts. It is possible that those members of the public who have had what they perceive as negative experiences with the police or courts are less likely to contact the police about criminal activities. Some crimes are not reported to the police because the witness or victim wishes to protect the offender from police attention, or because the criminal act is seen as a personal matter. And those criminal acts in which all parties are voluntarily participating, such as drug use, gambling and offences involving prostitution would not reach the attention of the police through the public, except, perhaps through general complaints regarding an area of the community.

It is common knowledge that many sexual offences and domestic assaults go unreported. As well, older people tend to report crimes more readily than younger people, and, in one study it was found that women “were more likely (than men) to report incidents in order to stop or prevent them from reoccurring and to receive protection from the criminal justice system” (Griffiths and Verdun-Jones, 1994, p. 76). In property-related cases, the rate of reporting by the public is close to 100 per cent, due to the necessity of a police report to obtain insurance compensation.

Given the delicacy of the public's willingness to contact the police about criminal activities, and the immense importance of the public's support of the criminal justice system, it can be seen that the role of the police call taker is crucial to the detection and prevention of as much criminal activity as possible. Trained call takers have learned the most appropriate and effective approaches to use when dealing with members of the public who are reporting crime, so as not to frustrate or annoy the caller, who is usually affected emotionally at that time, and to create a perception in the member of the public that future calls about information useful to the police will be welcomed. In addition, the call taker needs a working knowledge of the applicable law, so as to recognize police-related concerns, and to direct the caller to other agencies or to a lawyer, when necessary.

Members of the public could have contact with other components of the criminal justice system if they become involved in a criminal matter. Their role in the criminal matter affects how and when they would come in contact with the other components. If the member of the public is the offender, and the offender is charged, goes to trial, and is convicted and sentenced, then there will be contact with all components. However, if the member of the public is a witness (as an observer or as the tort victim of the criminal act), there could be frequent contact with the police component, and when the matter proceeds toward trial, there will be interviews conducted by the prosecutor or the defence lawyer in preparation. The member of the public will likely be a witness in the trial. If the suspect is convicted, the judge will impose a sentence. The member of the public may learn the sentence, and, perhaps as a family member of the offender or victim, have some input into the sentence. If the sentence involves probation, a suspended sentence, conditional discharge or prison, the corrections component will oversee the offender for some period of time for the purpose of carrying out the terms of the sentence. The member of the public will not have contact with the corrections component unless the person is a close family member, and makes contact with the corrections authorities for the better management of the offender. Or as the tort victim of the offence, the member of the public may be informed under federal legislation of the eligibility and release dates of the imprisoned offender, and perhaps the residential address of a released offender.

Police

Police agencies have evolved over the decades along with the public component of the criminal justice system, and will continue to evolve to meet public demands.

When the police encounter criminal activity that is to be proceeded with through the criminal justice system, it is necessary to direct their attention and communication to the prosecutorial

component of the criminal justice system. In larger jurisdictions, the patrol officer is rarely in direct contact with the prosecutor, except for a pre-trial interview, and during the court testimony. Police officers working in investigation squads, have better access to the prosecutors, in order to obtain direction in their efforts to obtain evidence, and process the offender. In some jurisdictions special prosecutors are assigned to only handle certain kinds of crime such as spousal assault files and gang violence files. In smaller jurisdictions, there tends to be a closer tie between the police and prosecutorial component.

Police officers have no direct contact with the judge, except in giving testimony in court, and little contact with correctional employees, unless the officer encounters an offender who is on probation, parole, or who is an escapee. In this case there may be conversations or reports between the police and the corrections component.

Prosecutor

The prosecutor (also called the Crown prosecutor) is an agent of the Attorney General, who is the top legal officer of the province. Depending on the size of the jurisdiction, there may be many dozens of prosecutors working in the court system. Some prosecutors have been designated as having federal jurisdiction to prosecute matters exclusively reserved to the federal government in addition to their provincial responsibilities. These matters include those falling under the *Controlled Drugs and Substances Act*, the *Food and Drugs Act*, and certain taxation laws. Federal prosecutors, while so acting, are agents of the Minister of Justice, the top legal officer of the country.

The role of the prosecutor is to act, on behalf of society, to accuse those properly suspected of criminal conduct, and to represent society in the trial that takes place to determine the legal guilt or innocence of the alleged offender. The prosecutor is not a “police prosecutor” and does not take the position that whatever the police allege is true. The prosecutor certainly causes the alleged offender to face the possible processes and sanctions of the criminal justice system, but is not there to “win the case”. The prosecutor must make sure that the alleged offender’s conduct meets the legal requirements of the criminal offence alleged, and that the process that brings the offender to court has been conducted fairly. The judge will be overseeing this, to ensure that the prosecutor performs this role correctly. The prosecutor cannot withhold evidence that may assist or exonerate the offender. The prosecutor must, according to law, prove that the alleged offender is guilty “beyond reasonable doubt” in the mind of the judge, or jury if there is one. See Section 2, Chapter 9 for the powers of the prosecutor.

In most criminal trials, the alleged offender has a defence lawyer, either privately funded, or provided through legal aid. The role of the defence lawyer is to “raise a reasonable doubt” in the mind of the judge, or jury if there is one. The defence lawyer has no obligation to reveal evidence that may assist the prosecutor.

The prosecutor does not have any direct contact with the offender, except when they are both in court, and only when such conduct is compliant with the law. Any interaction between the accused and the prosecutor is done through the defence lawyer. Difficulties arise for this reason when the accused is not represented by a defence lawyer.

Courts

The courts are occupied by judges, who were once lawyers, and who have had significant experience in the practice of law prior to coming to the bench. The role of the judge is to be the overseer of the criminal justice system and its processes. It is open to a judge to make a ruling as a result of a matter that arose prior to the court hearing, such as the failure of the accused to have adequate legal advice, or after the court hearing, such as the changing of probation conditions, or the extension of the time to pay a fine. The judge is vigilant to ensure fairness to those involved in the criminal process. The judge is the trier of law in all trials, meaning that the judge constantly applies the law to the events taking place. In non-jury trials, the judge is also the trier of fact, meaning that the judge is weighing the likely truth and accuracy of the evidence of the witnesses testifying in court. See Section 2, Chapter 6 regarding the role of the judge and jury. In addition, the judge is often the official determining whether an offender should be released from custody pending trial. See Section 2, Chapter 8 regarding the bail process. Judges also sit in Preliminary Hearings, Disclosure Court, and pre-trial hearings. See Section 2, Chapter 11. After a trial has taken place, other judges may be involved in an appeal by the losing side. See Section 2, Chapter 3.

In a democracy, the judiciary must be independent and impartial. This means that there should be no attempt to influence judges’ decisions by anyone, including the government that pays their salaries. As a result of this principle, judges tend to be isolated from most public activities, and especially from the participants in criminal matters that will or may come before them. Therefore, the contact of other components of the criminal justice system with the judges is minimal, and controlled to prevent even the appearance of influence.

Corrections

The role of corrections is to carry out the sentences handed down by judges. This could include arranging the assignment of a probation officer to a person sentenced to probation or a suspended sentence, or a conditional discharge, and the administration of the operation of

the probation service. It could involve the classification of an offender to the most appropriate prison, and the administration of the prison sentence according to the judge's orders and the applicable federal or provincial legislation. When an offender is granted some form of conditional release from prison (temporary absence, day parole, full parole, statutory release), the Corrections branch must oversee the release, and if the offender is on full parole or statutory release, a parole officer must be assigned to the offender. Corrections attempts to create programs for offenders under its jurisdiction who are either in or out of prison to assist in rehabilitation.

Only members of the public with some particular interest in an offender, either as a family member or as the victim have contact with corrections agencies. Police agencies contact corrections in the course of investigations, or in order to notify potential or past victims of an offender or the offender's activities. Prosecutors may contact corrections for administrative purposes, and the judges would not have any contact. Corrections tends to have the least contact with the rest of the criminal justice system, which is reflected in its "end of the line" position as one of the five main components of the criminal justice system.

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994.

Chapter 2: Factual Guilt, Legal Guilt and Due Process

Factual Guilt

“Factual guilt” can be defined as the knowledge that the accused carried out all the elements of the criminal offence, with the necessary guilty intention to do so. For example, a man wearing a mask, enters a bank, carrying a fully loaded handgun, a paper bag and a hold-up note which reads “Give me all your money or I will shoot you. Do not push the alarm button”. He approaches a teller, waves the gun at her, and points to the hold-up note. As she reads the hold-up note, he opens the paper bag, and pushes it towards her, telling her to fill it with money, and that if she doesn’t or if she attempts to alert others, he will shoot her. She does what he asks, and he runs from the bank with the money. This person has carried out all the elements of the offence of robbery with the full intent to do so. He can be said to be factually guilty of the offence of robbery.

Legal Guilt

However, it is not sufficient for our criminal justice system to convict an accused based only on factual guilt. The factual guilt must be proved in a criminal court before an impartial and independent judge or judge and jury, and following a body of rules which, so far as possible, ensure fairness to the accused. The body of rules is referred to, generally, as “due process”. If, at the end of the trial and any subsequent appeals, there has been no failure to follow due process, a factually guilty person will be found legally guilty. Failure to follow due process is referred to as abuse of process.

Due Process

It can be seen that due process is an important part of the steps taken in the criminal justice system to not only protect society from crime, but to do so fairly, so that only those legally guilty of crime are convicted.

Due process includes a great many procedural rules and principles. For example, one of the principles is the presumption of innocence. An accused person is not a guilty person, and the accused must be treated, so far as possible, as an innocent person. Only those accused persons who are seen to be a danger to the public, or very likely to fail to attend court as required are detained in custody pending the trial. The accused person is not required to prove innocence. This means the accused person does not have to offer an explanation for the suspicious conduct, or establish an alibi to the investigating authorities, and, in fact, must be advised by the authorities of the right to remain silent and the right to consult with a lawyer before speaking to the authorities or answering their questions. After consulting with a

lawyer, the accused can refuse to speak or answer any questions posed by the authorities. Any statement the accused may make to the authorities will have to be tested in court in a *voir dire* to ensure its legal (in addition to factual) voluntariness. See Section 2, Chapter 12 for more discussion on the *voir dire*. The burden of proof is on the state, through the prosecutor. The accused does not have to speak during the trial, or provide evidence proving innocence, and the state cannot make comment on the accused's failure to do so.

Another example of an important principle of due process is the standard of proof. The accused's guilt must be proved "beyond a reasonable doubt". This means that any doubt about the accused's guilt must be resolved in favour of the accused. The evidence must go far beyond "probably guilty". There can be no other reasonable explanation for the conduct of the accused, but guilt. See Section 2, Chapter 5 for more information on the burdens and standards of proof.

Other examples of due process include the requirement that the jury's decision be unanimous in a criminal trial, that the judge and jury, if there is one, are impartial, having no pre-conceived opinions about the guilt or innocence of the accused, and no prior knowledge about the case which may cause them to have such opinions. Except when special circumstances exist, all courts are to be open to the public. This is a right accorded to the accused, in order that it can be said that the trial was fairly held. The public is seen to be the "police" of the courts, to see that justice is done.

There are many other examples of due process, most notably in the Canadian Charter of Rights and Freedoms which will be examined in Section 5. The Charter contains several rights which have existed for some time, and some which were new when the Charter was made into law. Some of these due process rights are: the fundamental freedoms of religion, expression, peaceful assembly and freedom of association; the right to life, liberty and security of the person (briefly, the right to make decisions about one's own person); the right to counsel and the right to be advised of the right to counsel; the right to be advised of any offence alleged against the person; the right to be tried within a reasonable time; the right not to be denied reasonable bail without just cause; the right to a jury trial for offences carrying a maximum penalty of imprisonment for five years or more; the right not to be tried more than once; the right to the benefit of the lower penalty in sentencing when the level has been amended while the accused has been going through the criminal justice process; the right not to be subjected to any cruel and unusual treatment or punishment; the right to be protected against self-incrimination; the right to an interpreter if the accused is deaf or does not understand or speak the language in which the proceedings are conducted; and the right to equality before and under the law and in particular the right not to be discriminated against

by reason of race, national or ethnic origin, color, religion, sex, age, or mental or physical disability. Further discussions concerning these rights can be found in Section 5.

There are many more examples of due process in the rules of evidence. For example, there are rules preventing a witness from repeating what the witness overheard outside of court, if the purpose of doing so is to add to the proof that the words were true. In other words, if the accused happened to express his hatred for a person who is now deceased, and the accused has been accused of causing that person's death, there are strict rules against "hearsay" to control including in evidence, his words, spoken in the heat of the moment or without sincerity. Certain statements or conversations made between the accused and their legal spouse cannot be admitted in evidence, nor can the spouse be compelled to be a witness against the accused spouse for some offences. Conversations between accused persons and their lawyers are also protected. These rules can be seen in the *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 4.

Even when an accused person is obviously factually guilty, evidence may emerge that there has been abuse of process in the handling of the accused, beginning with the police investigation, and continuing through the trial process. For example, in the case of the bank robbery, the arresting officers may not have advised the robber of the right to remain silent and the right to speak to a lawyer without delay. He may have been too intoxicated by drugs or alcohol to understand the explanation of the rights. Or, the robber's trial may have been unduly delayed by inefficiencies in the prosecutors' offices. If the abuse of process is found by the judge to have been blatant, or substantive, and detrimental to the welfare of the accused and the accused's case, the judge has the authority to exclude crucial evidence, stay the proceedings, or dismiss the charges, due to the failure of the authorities to follow due process. Hence, it can be seen that a factually guilty accused may not, ultimately, be determined to be legally guilty.

If, however, all proper procedures were followed, a factually guilty person will be found legally guilty. In this way, the balance is struck between the truth in regard to the accused's allegedly illegal conduct, and fairness to the accused in reaching that truth.

USEFUL READING

Pink, Joel E. and David C. Perrier. *From Crime to Punishment*. 3rd ed. Toronto: Carswell, 1997, chapters 1, 3, 8 and 22.

Chapter 3:

Police and Courts Jurisdictional Limits

Throughout the criminal justice process there are jurisdictional limits on the various authorities. These may be geographical limits, time limits, age limits of offenders, limits related to the nature of the alleged offence, and to the range and power available.

Police

Geographical Limits

R.C.M.P. officers may be employed as federal police officers or they may be employed as provincial police officers (in provinces which do not have their own provincial police force) or as municipal police officers (in municipalities which do not have their own municipal police force) by contract with provincial or municipal governments. While acting as federal, provincial or municipal police officers, there are limits on their geographical jurisdiction. This is also true for non-R.C.M.P. provincial and municipal police forces. The role of the R.C.M.P. as contracted provincial or municipal police forces was discussed in Section 4, Chapter 1.

Section 476 of the *Criminal Code* sets out most of the pertinent geographical limitations on police officers in their pursuit or investigation of crime. It provides for overlapping jurisdictions between two territorial divisions in relation to bridges or bodies of water. For example, an impaired driver encountered on a bridge that joins two municipalities falls under the jurisdiction of both municipalities, and either police force may proceed against the offender. The same is true for an impaired boater on a river, canal or inland waterway between two territorial divisions.

In addition, police jurisdictions extend across the borders between territorial divisions by five hundred metres. In other words, if a motor vehicle accident requiring police attendance occurs beyond a municipal boundary but by no more than five hundred metres, the police of that municipality may cross the boundary to attend. In a different situation, an offence may begin in one municipality or territorial division, and end in another, or even travel through several territorial divisions. For example, a vehicle may be stolen in one municipality, be driven in a reckless manner through several other municipalities, and be stopped after an accident in yet another jurisdiction. The offence is said to have been committed in all of the jurisdictions involved. The police agencies will decide amongst themselves which police jurisdiction will take charge of the investigation and criminal processes.

In the case of an offence committed in an aircraft in the course of a flight, the police jurisdiction in which the flight commenced, or ended, or over which the flight passed, may be the assigned police jurisdiction.

These rules apply even when the territorial jurisdictions involve two different provinces, a province and one of the territories (Northwest Territories, Yukon Territories or Nunavut) or between countries.

For the police call taker, it is important to establish from the caller the physical location of the offence or police event, in order to determine whether the employer police force has the jurisdiction to deal with the offence or event. If, for example, a caller wishes to report an offence that occurred earlier at work, and the workplace is in another territorial division, then the call taker must refer the caller to the police agency in that territorial division.

Conspiracies to commit crimes may occur in other countries, but be criminal offences in Canada. This is covered in s. 7 of the *Criminal Code*.

On occasion, police officers in pursuit of an alleged offender, may continue the pursuit into another territorial jurisdiction. This requires the police agency in the new territorial jurisdiction to be advised immediately, and police officers from that territorial jurisdiction will be assigned to assist the original pursuing police officer. Police agencies develop policies for such cross-territorial pursuits and the call taker should determine what those are before the need to know arises.

Some police jurisdictions are adjacent to or incorporate lands that are owned and administered, and often policed by other agencies. These may include aboriginal lands, ocean harbors, railway property, parks, and watersheds. The call taker should become aware of the geographical boundaries of such areas and the applicable policing jurisdiction.

Time Limits

Certain offences require processes to be carried out within a specific period of time. For example, breath samples obtained from a suspected impaired driver must be obtained within three hours of the driving and must be taken at least fifteen minutes apart. Under the Charter of Rights and Freedoms, certain due process matters must be attended to “promptly” or “without unreasonable delay”. Arrested persons must be brought before a judge or Justice of the Peace “within 24 hours, or as soon as practicable” in order for their rights to be protected, and bail, if any, to be arranged. Persons arrested by people who are not peace officers (i.e. private security employees or members of the public) must be taken to a peace officer as soon as possible.

Age Limits

When police officers encounter children under the age of twelve years, who are involved in criminal activities, the police officer does not have the jurisdiction to commence the criminal process, in compliance with the *Youth Criminal Justice Act*, S.C., 2002, c. 1, which defines young offenders as being at least twelve years of age. Instead, the police officer will turn the child over to the government family and child services agency.

For offenders who are at least 12 years of age, but under the age of 18, the police officer has jurisdiction under the *Youth Criminal Justice Act* which sets out the procedures applicable to young offenders. In cases where the person appears to be within that span of age, but is later determined to be younger or older, the person will be transferred to the agency or jurisdiction that applies upon such determination.

The Nature of the Alleged Offence

The jurisdictional limits related to offences depend upon the level of policing involved. An R.C.M.P. officer acting in the federal capacity does not have the jurisdiction to enforce provincial laws or municipal bylaws. A provincial police officer or R.C.M.P. officer contracted to work as a provincial police officer does not have the jurisdiction to enforce municipal bylaws, but does have the jurisdiction to enforce provincial and federal laws.

The municipal police officer has the jurisdiction to enforce municipal, provincial and federal laws.

Internationally Protected Persons

Police powers of arrest, search and seizure will be examined in Section 4, Chapter 4. Such powers may be exercised against any person, subject to the limits set out above. There is one exception to this and it applies to internationally protected persons as defined in s. 2 of the *Criminal Code*. These persons include consuls, ambassadors, their families and staff who are in Canada performing the duties of such offices. They cannot be arrested or prosecuted in Canada under certain circumstances covered in s. 7 of the *Criminal Code*, however, they can be required to leave Canada.

Courts

Geographical Limits

Unless there is to be a change of venue, a criminal matter must be heard in the geographical jurisdiction in which it occurred. A change of venue occurs when, usually due to concern that the accused may not get a fair trial in light of public sentiment, the judge orders the trial to take place in a distant jurisdiction.

Each court level has a geographical boundary. Please refer to Section 2, Chapter 4 for an explanation of the hierarchy of the court system in Canada.

The Supreme Court of Canada has jurisdiction over all of Canada, and therefore has jurisdiction to hear the appeal of any legal matter which may arise anywhere in the country.

Each province has a similar hierarchy with, generally, three levels of court. The highest court in each province is usually titled the Court of Appeal. This court level has jurisdiction to hear all matters, coming up from the court system below, which arose within the province. In most provinces, the Court of Appeal is headquartered in the largest city and some of the Court of Appeal Justices travel the province each spring and fall (the Assizes) holding court in smaller communities, making travel by the parties involved in the appeal to the headquarters of the Court of Appeal unnecessary. Such travel would tend to deter parties with legitimate grounds for appeal due to cost, time and convenience constraints.

The court level below the Court of Appeal is variously called the Superior Court of the Province, the Court of Queen's Bench, the Supreme Court, or the Court of Justice. This court level usually has an appeal division which hears appeals of matters arising from the lowest court level usually called the Provincial Court. It also has a trial division that holds judge alone and judge and jury trials for a number of different criminal and civil disputes. This court level is usually divided into geographic counties, based on population and breadth of area. Again, these divisions serve the public, making travel to one central location in the province unnecessary. Criminal or civil trials or appeals which arise within the county boundaries and which are to be heard at this level would be heard at the court located in that county seat.

Provincial Courts are very numerous, being established to serve much smaller portions of the province. Each large city or population has a Provincial Court. The geographical boundaries of each Provincial Court are also clearly set, and matters leading to criminal or civil trials which arise within a geographical boundary will be heard in that Provincial Court. Within Provincial Courts, there are divisions such as Adult Criminal Court, Youth Court, Family Court, Small Claims Court, Traffic and Bylaw Court. Judges assigned to each of these divisions have jurisdiction only within the division, unless surrogate judges are appointed to cover judicial shortages due to illness or vacations

Time Limits

There are a number of time limits with regard to court matters. In the case of criminal offences, there is no time limit for indictable offences, and a court has jurisdiction over the matter even when the accused was not charged or brought to trial until many decades after

the event. However, with regard to summary conviction offences, there is a six month time limit, beginning with when the summary conviction offence is encountered by the police or brought to their attention. If the Information is not sworn (charges are not laid) within the six month period, the criminal courts lose jurisdiction over the matter, and it cannot be proceeded with.

With regard to civil disputes, each province sets the time limits, usually referred to as the “statute of limitations”. For example, in B.C., a claim of debt must be proceeded with within seven years of its creation or its acknowledgment by the debtor. A claim of property damage must be commenced within one year of it occurring, and a claim of physical or psychological damage must be commenced within two years. Failure to have a Writ of Summons issued within the time limit means the claimant cannot proceed.

Age Limit

Age has a bearing on criminal prosecutions. A youth court judge has jurisdiction over those accused persons who are more than eleven years of age and under the age of eighteen. If in error, a trial was held before a youth court judge involving an accused who was under eleven or over eighteen, the trial would be considered a nullity because of the lack of jurisdiction of the judge.

Although not a matter of jurisdiction, special measures must be taken by the Courts when dealing with witnesses about to testify in court who are below the age of fourteen years. Section 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 deals with those procedures.

Nature of the Alleged Offence

Certain criminal offences fall under the absolute jurisdiction of the Provincial Court Adult Criminal Division. They are all summary conviction offences, all dual (mixed, hybrid) offences treated as summary conviction offences, and the offences listed in s. 553 of the *Criminal Code*. This means that these offences must be tried before a Provincial Court judge. Certain criminal offences fall under the absolute jurisdiction of the Superior Court (Court of Queen’s Bench, Supreme Court, Court of Justice). These offences are listed in s. 469 of the *Criminal Code*, and may be heard before a Superior Court judge alone or a judge and jury. The remaining criminal offences may be tried at either Provincial Court or Superior Court before a judge alone or judge and jury at the election of the accused. See Section 2, Chapter 10 for further discussion of election procedures.

The law regarding the jurisdiction of the courts over civil matters is much more complicated, and it varies in some matters from province to province. In B.C. civil claims for

compensation for more than \$10,000, or for unspecified damages are heard at the Supreme Court level, as are contested divorces, permanent child custody orders, and disputes involving real property (land and improvements). Other family matters are heard at Provincial Court, Family Court Division. Compensation claims involving values of less than \$10,000 are heard in the Small Claims Division of Provincial Court. In order to determine which court has jurisdiction to hear a particular matter, it is necessary to look in the applicable statute. Reference is usually made in the first few sections to the court which has jurisdiction.

Range and Power Available

The courts, as with the rest of the criminal justice system are controlled mainly by statute. In the case of criminal matters, the courts follow statute and common law as the trial, appeal or hearing unfolds, and are similarly limited to the remedies available. The losing side of a trial, appeal or hearing may appeal (unless it has reached the Supreme Court of Canada, or lacks valid grounds to appeal). The Canadian Charter of Rights and Freedoms has given the courts greater power when constitutional issues arise. This will be dealt with in detail in Section 5. The courts have retained the one common law offence still available in Canada, called “contempt of court”. This means that a court may cite a person for showing contempt not necessarily to the judge, or in the courtroom, but to the integrity of the judicial process and the courts. Failure to obey a court order, or showing disrespect to the judicial process is sufficient cause for a civil or criminal charge of contempt of court. There is no upper or lower limit on the criminal or contempt sentence, which is within the judgment of the court, however, like any other criminal offence, the outcome is subject to appeal.

USEFUL READING

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 3rd ed. Toronto: Carswell, 1997.

Pink, Joel E. and David C. Perrier. *From Crime to Punishment*. 3rd ed. Toronto: Carswell, 1997.

Chapter 4: Police Powers

The process of arrest, search and seizure is the same whether the offence is a federal criminal offence or a provincial quasi-criminal offence. However, the extent of the powers are not the same. It is necessary to examine the powers of arrest, search and seizure for federal offences separately from those for the provincial quasi-criminal offences.

Peace Officer

The term “peace officer” is used in the *Criminal Code*, and an examination of its definition in s. 2 will reveal that the term includes a police officer as well as many other designated criminal justice employees, designated military employees, and pilots in command of aircraft. For the purposes of this course, it is only necessary to consider these powers in relation to a police officer.

Powers of Arrest

Federal Criminal Offences

The term “arrest” involves the physical taking into custody of the criminal suspect. This usually involves the police officer at least touching the suspect (a symbolic “legal” assault) and advising the suspect that he or she is under arrest. Depending upon the circumstances, it may also include physical force to restrain the suspect and the use of handcuffs.

Arrests can occur either with or without an arrest warrant. We will first examine arrests that take place usually at or near the scene of the offence, and during or shortly after it. These arrests can be made without the need of an arrest warrant, which will be examined below.

Arrests Without Warrant

Police powers of arrest without a warrant for all federal criminal offences are set out in the *Criminal Code*, section 495. Here it can be seen that a police officer has the power to arrest a person, without an arrest warrant, who ***is found committing*** any criminal offence, meaning any federal criminal offence, whether it is summary conviction, indictable or dual (s. 495 (1)(b)). If the offence is an indictable one, the peace officer has the power to arrest the person without an arrest warrant if the person ***is found committing*** the offence as just mentioned. If the peace officer did not find the person committing the offence, the peace officer has the power to arrest under s. 495 (1)(a) without an arrest warrant if the police officer ***has reasonable grounds to believe the person has committed*** an indictable offence. Under that same section the police officer has the power to arrest a person without an arrest warrant if the police officer ***has reasonable grounds to believe that the person is about to commit*** an

indictable offence. This last provision is there to allow police officers to prevent crimes from occurring. If no part of the crime or an attempt to commit it occurs before the police officer intervenes, then no charges can be laid.

If the offence is a dual offence the police officer consider the Bail Reform Act after the arrest to determine if the arrest needs to continue.

Here are some examples:

A police officer encounters a group of people causing a disturbance in a residential area. Causing a disturbance (s. 175 of the *Criminal Code*) is a summary conviction offence. Because the police officer found the suspect(s) in the act of committing the offence of causing a disturbance, the police officer has the power to arrest the suspect(s) without an arrest warrant.

If, however, the police officer attended a complaint about a disturbance in the neighborhood, and it had ended before the officer arrived, identifiable suspects could not be arrested, but could be *Summoned* through the office of the Justice of the Peace. The Summons is Form 6, and must be preceded by an Information (Form 2). Refer to Section 2, Chapters 7 and 8 for further information.

If an officer was on the scene of a bank robbery, the officer could arrest the suspect without warrant, because the police officer has the power to arrest a person for any criminal offence if the person is found committing it. However, if the police officer arrived on the scene moments after the robbery had occurred, and the fleeing suspect was pointed out to the officer who gave chase, the police officer would have the power to arrest the suspect without an arrest warrant based on the police officer's reasonable grounds to believe that the suspect has committed an indictable offence. Similarly, if an officer had reliable information that a robbery was about to take place, the officer could arrest the person based on the police officer's reasonable grounds to believe that an indictable offence was about to take place.

The least serious level of assault is a dual offence. If a police officer encountered such an assault taking place, the officer could arrest. The police officer may make an arrest, however, because the assault is a dual offence the police office must consider the Bail Reform Act. This consideration will determine if the arrested person must be taken to the police gaol.

Be aware of the implications of the classifications of offences as set out in Section 2, Chapter 10, including the higher potential sentences accorded to indictable offences, and the power of police officers to fingerprint those involved in indictable offences under the *Identification of Criminals Act*. The prosecutor may decide to proceed summarily or by indictment.

Arrest For Breach of the Peace

Section 31 of the Criminal Code of Canada allows police officers the ability to arrest people who are involved in a breach of the peace. A breach of the peace was defined in *R. v. Howell* (1981) as

Whenever harm is actually done or is likely to be done to a person or in his presence to his property, or whenever a person is in fear of being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

The police may arrest a person involved in such behavior and may transport them to another location or to a police gaol. The police can only keep a person in custody until such time as the arrested party no longer poses a threat to peace in the community.

Arrest with Warrant

An arrest warrant is a document which provides a police officer with the authority to arrest a person alleged to have committed a criminal offence after an investigation has occurred and the identity of the person has been determined. When the name of the suspect is not known, but there is sufficient information to identify the suspect from photos or fingerprints, a “John Doe” warrant may be issued. The arrest warrant is Form 7 in the Forms set out at the end of the *Criminal Code*. When an arrest is to be made using an arrest warrant, an Information has to have been sworn first. The Information is Form 2 in the *Criminal Code*. This form initiates the criminal justice process by alleging the criminal conduct of the person named in the Information. These two forms are completed by the court clerk’s office at the courthouse, and sworn before the Justice of the Peace (although an arrest warrant may also be ordered through a judge in court, and is then referred to as a “bench warrant”).

The geographical jurisdiction of arrest warrants vary depending upon the dangerousness of the alleged offender and the urgency of the need for arrest. Arrest warrants may be “returnable” or enforceable for only short distances from the issuing jurisdiction, for example 200 kilometers. Or, an arrest warrant may be “Canada-wide”. Many times, police officers encounter people wanted on arrest warrants, but the person is beyond the jurisdiction of the warrant. A warrant may be “endorsed” by a Justice of the Peace or judge, in order to extend its jurisdiction to reach the location of the wanted person.

Once an arrest warrant has been completed, it is held until it can be “executed” which means it is served on the person named in the warrant who is then taken into custody. If the location of the person named in the arrest warrant is known, then the police officer will take two

copies of the arrest warrant and attend at the location to execute the warrant. If the location of the person named in the arrest warrant is not known, the arrest warrant is held in a file until such time as the person is located. Frequently, a person being checked by a police officer during the course of an investigation on another matter is identified as being wanted on a warrant. Section 495(2) of the *Criminal Code* permits the arrest of that person even if the police officer does not have a copy of the warrant at the time of encountering the person, so long as the person is within the territorial jurisdiction of the warrant.

Special requirements apply when an arrest warrant is to be executed at a dwelling-house. “Dwelling-house” is defined in s. 2 of the *Criminal Code*, and includes any part of a dwelling-house connected to it by a doorway or covered and enclosed passage-way, such as a carport, or woodshed. It also includes temporary residences such as hotels, motor homes and camp tents, when they are in use as residences. When police officers attend at a dwelling-house to execute an arrest warrant, the police officers must make their presence known, as well as the purpose of their attendance. They must then wait a reasonable amount of time. If the person in the dwelling-house does not, within a reasonable time, allow the police officers to enter to execute the arrest warrant, the police officers must consider obtaining a “*Feeney*” warrant.

Mr. Feeney was involved in the bludgeoning murder of an 85-year-old man in Likely, British Columbia. Police officers attended to arrest Mr. Feeney as they had the authority under an earlier case of *R. v. Landry*. In *Landry* the Court had previously decided that the police could enter a dwelling house to effect an arrest if they made proper announcement and that they believed on reasonable grounds that the person to be arrested was arrestable for an indictable offence. In *R. v. Feeney* the Supreme Court of Canada (1997) ruled that the police must have priory judicial authorization in order to enter into a dwelling house to make an arrest.

Under the “*Feeney*” provisions police officers faced with a situation where a person may be arrested on a warrant in a dwelling house must consider the following:

1. Is the warrant for the arrest within the jurisdiction?
2. Is the warrant valid?
3. Is there a section 529 Criminal Code of Canada combined entry/arrest authorization warrant?
4. Consider applying for an arrest/entry warrant.

If police do enter to arrest then the police officers cannot remain longer than necessary to locate the person wanted on the warrant and to execute the warrant, taking the person into custody. What is a “reasonable time” depends upon the circumstances.

Provincial Quasi-Criminal Offences and Municipal Offences

All provincial quasi-criminal offences and municipal offences are classified as summary conviction offences but they differ from the federal summary conviction offences. Generally, police do not have the power to arrest, but can arrange a Summons through the Justice of the Peace. However, a few provincial quasi-criminal offences contain within them the specific power of arrest for police officers who find the suspect committing the offence. Municipal offences do not carry any powers to arrest.

Each province has provisions for provincial arrest warrants, and rules similar to those for federal criminal offences apply to them with regard to their execution.

Powers of Arrest Under Mental Health Act

Section 28 of the Mental Health Act grants the police authority to take a mentally disordered person into custody. Section 28 states:

If a police officer or constable is satisfied from his or her own observations or from information received by him or her that a person:

A) is acting in a manner likely to endanger his or her own safety; and

B) is apparently suffering from a mental disorder;

the police officer or constable may take the person into custody and take the person immediately to physician.

As call takers you may take a 911 call from a family member who is requesting police assistance with a family member who is suffering from a mental disorder. These calls can be very difficult for police officers to respond to as the mentally disordered person may be suffering from psychosis and may be very unpredictable. These calls are dangerous for the police as well as the person suffering the mental disorder.

Powers of Arrest under Child, Family and Community Service Act

A police officer may encounter a child under the age of 12 who cannot be held legally responsible for their actions. The police may apprehend such a child and deliver them to a parent or to a staff member of social services.

Further a police officer may apprehend a child if the police officer has reasonable grounds to believe that a child's health or safety is in immediate danger. Police may enter anywhere (including a dwelling house) and may use reasonable force to affect the entry and apprehension.

Powers of Search

Federal Criminal Offences

Unlike the powers of arrest, police powers of search are scattered through the federal statutes and the common law. It is necessary for a police officer to consider what is being searched for and where, as well as the nature of the urgency to carry out the search, before the appropriate powers can be invoked.

Search Warrants

If the place to be searched is a dwelling-house, a search warrant must be obtained before carrying out the search. And in cases where a search is necessary, and is permitted under a federal statute, but there is no urgency in carrying out the search, then a search warrant is necessary, regardless of where the search is to be conducted and what is being searched for, except a dwelling-house.

There are two forms of search warrant: the "traditional" search warrant, and the telewarrant. The traditional search warrant is so-called here to differentiate it from the more recent telewarrant. Search warrants in the traditional form have been available to police officers throughout the history of criminal process. The process to obtain a search warrant under the federal laws is set out in s. 487 of the *Criminal Code*, and the forms are Form 1 and Form 5. Form 1, which is a sworn document, provides the information necessary to the Justice of the Peace prior to determining whether a search warrant is justified. Based on the information provided in Form 1 by the informant, usually a police officer, the Justice of the Peace will, if justified, prepare and issue a search warrant as seen in Form 5. The police officer must take two copies of the search warrant along and serve one copy on an adult person at the premises to be searched. The same rules apply when executing a search warrant, as when executing an arrest warrant. The police must announce their presence at the premises, and their purpose for being there. After a reasonable time, the police officers, if not admitted by the occupants may use as much force as is reasonably necessary to enter and search. The search is limited to the items listed in the search warrant and to the locations in the premises where those items would be reasonably found.

Telewarrants are a recent addition. They are search warrants that are obtained by the police officer over the telephone or some other form of telecommunication with the Justice of the Peace. The police officers have the forms with them as a matter of routine, and rather than take the time to physically appear before the Justice of the Peace, the police officer can supply the information for Form 1 over the telephone and if the Justice of the Peace agrees that the search is justified, the police officer completes Form 5.1. The same procedures are followed, except that the police officer must attend later at the office of the Justice of the Peace to complete the documentation. Telewarrants are obtained when time or circumstances make the obtaining of the traditional search warrant impractical.

Recent amendments to the *Criminal Code* have provided special powers to police officers to obtain blood samples and DNA evidence through special search warrants.

Warrantless Searches Authorized by Statute

When the police are searching for certain items, statute has provided them with the power to search without the necessity of a warrant, so long as the search is not to be conducted in a dwelling-house, and there is some urgency making a search warrant or even a telewarrant impractical. For example, s. 117 of the *Criminal Code* permits the search of any place other than a dwelling house for prohibited weapons, restricted weapons, firearms or ammunition, when obtaining a search warrant or telewarrant would not be practical. Under s. 11 of the *Controlled Drugs and Substances Act*, police officers have similar powers with regard to narcotics. Various provisions are set out amongst the federal criminal statutes providing police officers with powers of warrantless searches, and may be found by consulting the index to each statute.

Common Law Powers to Search

Police officers have power to search if the person consents. In addition, under judge-made law, police officers have the power to search any person whom they lawfully arrest, and search anything within the arrested person's immediate control (such as a shopping bag, vehicle, clothing, pockets, etc.). The search can only be conducted to locate items related to the offence for which the person has been arrested (in other words, no "fishing expedition" to see if the person *has* committed an offence), or to locate items with which the person may seek to harm themselves or others, or to aid in escape. The arrest must have been a lawful arrest, which means the police officer must have had the power of arrest under s. 495, must have carried out the arrest in a lawful way, and must have advised the arrested person of their rights under the Charter of Rights and Freedoms.

In order for a consent search to be deemed lawful the police must be able to articulate that the consent given was informed consent. Informed consent means that the person consenting to their search understands the following:

1. They have the authority to give consent.
2. The consent was voluntary and not the product of police oppression
3. There was no coercion or other external conduct, which negated the freedom to choose.
4. The person is aware of the search and type of search to be conducted.
5. The person was aware of his or her right to refuse to permit the police to engage in the search.
6. The person was aware of the potential consequences of giving the consent.

Police may also conduct warrantless searches if they have articulable cause under common law. Police officers for years conducted street checks of people in the general vicinity of a crime that matched the description of the suspect. Police officers did these searches because it is the police common law duty to protect life and property and to prevent and detect crime. Recently the Courts have given authorization for these searches under common law if specific ingredients are present. Police officers are allowed to have investigative detention in those incidents where they may not have formed reasonable grounds to arrest someone for a crime but the totality of the incident leads the police officer to suspect that the person may have been involved in the crime. Police may search people under the common law for articulable cause if they have a specific safety concern related to the incident. For example, a police officer could not use articulable cause to search all drug addicts in the Downtown Eastside. However, if a crime had been committed in the area like a bank robbery and the police observed a male matching the description provided by the bank manager. The police could stop and detain the person, if officer safety threat cues were present then the handcuffing and searching for weapons would be authorized by common law.

Provincial Quasi-Criminal Offences and Municipal Offences

Any police powers to search under provincial quasi-criminal offences will be specified in the wording of the statutory provision itself. Provincial statutes provide for search warrants and they are obtained in the same manner as those for federal criminal offences. Common law powers of search apply even when the arrest is for a provincial quasi-criminal offence. Municipal bylaws do not usually contain nor need powers of arrest or search.

Powers of Seizure

Whenever a police officer carries out a lawful search, the police officer is permitted to seize the items found. They must be brought before a judge or Justice of the Peace, as required by the particular statute. If items seized are to be used as evidence in court, they must be given special treatment to ensure they retain their physical and legal validity and integrity. Items may be seized for destruction, such as weapons and drugs. Statutory provisions apply to such measures.

CASE LAW

Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257 (S.C.C.) Police officers are allowed to search a person after an arrest if the search is conducted in a reasonable manner and it is done for a legitimate criminal justice purpose.

R. v. Duarte. (1990), 53 C.C.C. (3d) 1 (S.C.C.). Police may listen to conversations of two people if they are conducted in a public place where a person has no real expectation of privacy.

R. v. Evans and Evans (1994) 93 C.C.C. (3d) 130 (B.C.C.A.). Police cannot go onto a person's property and knock on the door to smell a marijuana grow operation.

Hunter et al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.). All warrantless searches are prima facie unreasonable.

R. v. Plant (1993), 84 C.C.C. (3d) 203 (S.C.C.). Police may access public records like Hydro in their investigations without requiring a search warrant.

R. v. Kokesch (1990), 61 C.C.C. (3d) 207 (S.C.C.). Police may not enter onto an accused persons property in order to sniff for marijuana, make observations within, or check Hydro meters.

USEFUL READING

Griffith, Curt T. and Simon N Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 4.

Mewett, Alan W. *An Introduction to the Criminal Process in Canada*. 3rd. Ed. Toronto: Carswell, 1997, chapters 3 and 4.

Chapter 5: Police Questioning and Its Limits

Purposes

When police attend an event, it is necessary for them to determine what occurred in order to know whether or not the event involved a criminal act. This means the police should question all possible witnesses or others with knowledge of or background information about the event. It also means that the police should speak to the person or persons who are identified as responsible for the event. This initial questioning is not of great concern in law, for it is recognized as necessary and non-threatening fact-finding.

However, when the police have determined that the event involved a criminal act, and have identified one or more possible suspects, matters of “due process” arise. For more discussion on “due process”, consult Section 2, Chapter 1 and Section 4, Chapter 2.

Generally, there are two parts to a criminal offence: the *actus reus*, or “guilty conduct” and the *mens rea*, or “guilty mind”. As part of their investigation, police officers must determine if all the elements of the *actus reus* are present in the suspect’s conduct, and, if possible, the police officers must learn what was in the mind of the suspect at the time of the conduct in order to establish the *mens rea*. For more discussion of *actus reus* and *mens rea*, consult Section 6, Chapters 1 and 2.

Therefore, the questioning of the suspect about the criminal event and the suspect’s intent at the time of the criminal event, is very useful to the police investigation. Often, the only source of such information is from the suspect.

Police officers are not necessarily seeking a “confession” to the crime when they question the accused. It should be noted that the term “statement” is used, rather than “confession”. This is because what may appear at the outset to be a statement denying guilt, may after further investigation be proved to be a lie. Such a false statement will work to further incriminate rather than exonerate the accused.

Right to Remain Silent

However, as part of the rules of due process, everyone has the right to remain silent in the face of questioning by authorities. This principle has existed in common law for some time, and now is considered embodied in the Canadian Charter of Rights and Freedoms under section 7 which provides for the right to “security of the person”. Further discussion of the Charter of Rights and Freedoms can be found in Section 5. This means that no accused person is required to answer questions asked of them by the police, or other government

authorities, and that if a person is being tried for a criminal offence, the person is not required to take the witness stand and testify on his or her own behalf. In fact, the failure to testify cannot be commented upon by the Prosecution. This rule is tied in with the presumption of innocence. All parties are presumed to be innocent until proven otherwise by the state. There is no responsibility to prove innocence on the part of the accused. The burden of proof is on the state to prove guilt beyond a reasonable doubt, without any response or cooperation from the accused.

Charter Rights

This means that at the point in an investigation where the police determine that a certain person is a suspect in a crime, the police must, in compliance with s.10 of the Charter of Rights and Freedoms, advise the suspect of the offence believed to have been committed by the suspect, advise the suspect of the right to consult with counsel (a lawyer, usually), and give the suspect access to counsel. The suspect must also be advised of the right to remain silent. These procedures should be carried out at the point where the person is determined to be a suspect and is about to be detained or arrested by the police. They should be repeated whenever the police wish to question a suspect whether arrested or not.

If a person is nothing more than a witness to a crime, such procedures are not necessary, but if, at some point the police officer determines that the “witness” may have been involved in the crime, the due process procedures described above should be implemented, without delay.

Statements made by a suspect to a “person in authority” are given special treatment in the criminal justice process. A person in authority is one who the suspect believes has some power over his or her immediate future. With this belief a suspect may feel pressured to speak in spite of the right to remain silent, and may lie either to avoid admitting guilt, or to say what the suspect believes the person in authority wants to hear, in order to be released or given some other benefit. Persons in authority include police officers, teachers in relation to students, parents in relation to their children, and employers in relation to their employees. In cases where suspects have made statements to such persons in authority, the statements have been subject to extra scrutiny in court by way of a *voir dire*, or “mini-trial within the main trial” to determine if the statement was legally voluntary. The *voir dire* is further discussed on the following pages and in Section 2, Chapter 12.

Legal Voluntariness

The legal voluntariness of a suspect’s statement requires that none of the following concerns be present in the taking of the statement.

1. The statement cannot have been obtained by promises of a benefit from the person in authority. For example, the person in authority cannot offer to “go easy” on the suspect, or release the suspect’s friend, or not charge the suspect if the suspect makes a statement.
2. The statement cannot have been obtained by threats of a disadvantage from the person in authority. For example, the person in authority cannot threaten the suspect that more charges will be laid, or that the suspect will remain in custody until he or she cooperates.
3. The suspect must at the time of making the statement have been advised of the rights under the Charter of Rights and Freedoms, as described above, including the right to remain silent and the right and access to counsel.
4. The suspect must have had an “operating mind” at the time of making the statement. This means the suspect cannot have been under the influence of drugs or alcohol, hypnosis, or a mental disorder at that time.
5. The suspect must not, at the time of making the statement, be suffering from mental or physical trauma. This means that a suspect who witnessed the death of a loved one, or who was apprehended using substantial physical force, should not be asked to make a statement until such time as the trauma has subsided.
6. The suspect should not have been in an “oppressive” atmosphere when the statement was taken. For example, the suspect should be questioned in a quiet, preferably open area, in the presence of only those officers necessary. A mentally ill prisoner who is screaming within hearing would make the atmosphere oppressive for the suspect. It has been held in judicial decisions that a large number of officers present when a statement has been taken can be viewed as oppressiveness.

Unlike many old movies, police officers do not resort to “Third degree” tactics involving a bright light, and a small, darkened, smelly room, and several large, sweaty detectives confronting the suspect.

The *Voir Dire*

When a statement has been taken by a person in authority and has formed part of the evidence at the trial, there must be a *voir dire* in order to test the legal voluntariness of the statement, taking into consideration the concerns listed above. As a trial progresses, it reaches the point, usually in the evidence of the Prosecution, when the statement is sought to be admitted as evidence. At this point in the trial, the main trial is “suspended” and the *voir dire* begins. If it is a jury trial, the jury is removed from the courtroom before the *voir dire* begins. In the *voir dire*, the person who took the statement (usually a police officer) describes

the circumstances in which the statement was taken, including the physical surroundings (no oppressive atmosphere), the mental condition of the accused (operating mind, and absence of trauma), the conversation leading up to the statement (no promises or threats), and the advising of the accused of the rights available under the Charter. The person in authority also recounts the content of the statement. The evidence of the person in authority is subject to cross-examination by the opposing lawyer (usually the defence lawyer), who will attempt to show that one or more of the concerns existed at the time of the taking of the statement. If there was more than one person in authority present when the statement was taken, each of them must take the stand and testify as to the circumstances of the making of the statement. It is for this reason, that when a suspect is about to make a statement, any unnecessary police or staff presence should be eliminated.

After the two opposing lawyers have summarized their positions, the trial judge will rule on whether or not the statement is admissible as a legally voluntary statement. The *voir dire* has now ended.

The jury, if there is one, is returned to the courtroom. If the judge had ruled that the statement was legally voluntary, the statement of the accused is presented to the judge and jury by the person in authority, without hindrance. If the statement was ruled legally involuntary, the testimony of the person in authority would recommence at the point after the statement was taken, and no mention would be made to the jury as to the content of the statement or why it was not admitted.

If there was no jury, the judge either adopts the legally voluntary statement into the evidence without the need for its repetition, or disregards the statement if it was found to be legally involuntary.

In cases where the police have failed to provide the accused with the protections of due process, including the rights set out in the Charter or breached the concerns set out above, it is possible that the judge may rule a very incriminating statement as inadmissible as a remedy to the accused under s. 24(2) of the Charter. This will be discussed further in Section 5.

It is often the case that the content of the statement is not a serious concern to the opposing side in the trial, and the *voir dire* is carried out without anything more than token testing of the circumstances. However, when a statement is extremely damaging to the opposing side in the trial, the *voir dire* could last hours or even days.

In some police jurisdictions, police officers are now videotaping the statements of the accused. This is advantageous, as it depicts the Charter rights being explained to the accused,

the absence of threats or promises, the mental state of the accused, and the absence of an oppressive atmosphere or trauma. However, it may not reveal any abuses of process prior to the videotaping, and there remains some concerns about possible editing of videotapes. So far, such videotaping has not been readily adopted by the courts as evidence in a *voir dire*.

Gaining Information by “Trickery”

One other aspect of statement-taking by police officers involves the placing of an undercover operator in the jail cell with the accused, in the hopes that the accused will discuss with this “fellow prisoner” the criminal activities being investigated. It has been held by courts that, so long as the undercover operator has not prodded the accused for information, and that the accused has offered the information in conversation initiated by the accused, the evidence may be admitted in court against the accused.

Identification Information

It should be noted that the right to remain silent is not fully available to a person who has committed an offence for which the police cannot arrest, but for which the police can, and wish to obtain a Summons. The person must supply the investigating police officer with sufficient information regarding personal identification, to complete a Summons.

Failure to provide this information can result in the person being arrested for the *Criminal Code* offence of obstructing a peace officer in the execution of his duties (s. 129(a)) or the arrest may occur because the accused will not meet the Bail Reform Act.

CASE LAW

Black v. The Queen (1989), 50 C.C.C. (3d) 1 (S.C.C.). Police must re-warn a person of their Charter of Rights and Freedoms under Section 10 if the circumstances change and a more serious charge will be laid. (Attempt murder to murder)

R. v. Brydges (1990), 53 C.C.C. (3d) (Ont. C.A.). The State and the police must make an accused aware of free legal aid.

R. v. Clarkson (1986), 25 C.C.C. (3d) 207 (S.C.C.), The accused must be able to understand the seriousness of waiving their rights. (Clarkson was intoxicated and the police took an inculcate statement)

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, Chapter 4.

Chapter 6: The Process of Laying Charges

Documents

The expression “laying charges” or “charges have been laid” means that a document called an Information has been completed and sworn before a Justice of the Peace.

The Information document can be seen in the *Criminal Code* as Form 2. It is usually the first document completed in a criminal prosecution, the only exceptions being when a search warrant is executed prior to charges being laid, or in cases where a person is issued an Appearance Notice or a Promise to Appear. In each case, the next document to be prepared would be the Information. A criminal matter cannot be proceeded with without an *Information* being sworn, and thus it is seen as the crucial initiating document in a prosecution.

An examination of the Information in Form 2 will show that it requires a great deal of detail to be completed. The “informant” can be the investigating or attending police officer, or an officer who has received information from the investigating or attending officer. Or, the informant may be the tort victim of the crime, meaning the person who was assaulted or robbed, etc. Or, the “informant” may be someone who personally witnessed the criminal act. This would usually only be the case when there was no police notification of the crime, and the victim was unable (or, perhaps unwilling) to act as informant.

The informant must either have personal knowledge of the crime (i.e. as police or non-police witness or victim), or believe on reasonable grounds that the crime took place (as non-attending police officer). The nature of the criminal act must be spelled out with great care. If the Information lacks enough information to allege a crime, it is a nullity, and may not be proceeded with. Or, if the Information contains inaccurate information, it must be amended, sometimes with the reluctant permission of the judge who may also refuse. Finally, the contents of the Information must be proved in its entirety, so, if information is included that ultimately cannot be proved, the case may fail. Because of the difficulties involved in drafting an Information, a set of “forms of charges” have been created. Each criminal offence can be described with little need for adjustment using the forms of charges. These can usually be found at the end of privately published copies of the federal criminal statutes.

Process

The party who wishes charges to be laid, attends at the Court Clerk’s office and speaks to the Justice of the Peace. See Section 2, Chapter 7 for a discussion of the role of the Justice of the Peace. After a discussion with the Justice of the Peace, the decision is made by the Justice of

the Peace either that there has been no adequate allegation of a criminal offence, or that there has. If the Justice of the Peace is satisfied that a criminal act has taken place, the Information will be completed, and the party making the allegation will swear that the contents of the Information are true. The Justice of the Peace will take the oath of the informant and complete the Information document.

If a party swears to the truth of something that the party knows to be false, the party can be charged with the federal criminal offence of swearing a false affidavit, under s. 134 of the *Criminal Code*.

Once an Information is sworn, the criminal process begins, and the accused may be arrested or Summoned, if the accused has not already been arrested or issued an Appearance Notice or Promise to Appear. The accused will be required to make the first of several court appearances, and make several decisions regarding the conduct of the pending trial.

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 4.

Chapter 7: Processing Young Offenders

Statutes

The *Criminal Code* provides most of the provisions for the processing of adult criminal offenders. The *Youth Criminal Justice Act* contains the procedures for processing young offenders with some exceptions mentioned below.

The *Juvenile Delinquents Act* was repealed in 1984 and replaced by the *Young Offenders Act* and subsequently replaced in 2002 by the *Youth Criminal Justice Act*. The new statute brought many changes to the criminal law and procedures relating to young offenders. The *Juvenile Delinquents Act* applied to persons aged seven through to age sixteen inclusive, although the upper age varied among provinces. There was only one offence under the *Juvenile Delinquents Act*, that of being a juvenile delinquent by conduct that could range from incorrigibility at home to first-degree murder.

The *Youth Criminal Justice Act* applies to those persons who are twelve years of age or more and who are under the age of eighteen, so it no longer applies to the very young offender, and now includes those who are seventeen years of age anywhere in Canada. The offences applicable to the young offender are the same as those that can be laid against adults. The young offender may be charged with any federal offence, such as theft under the *Criminal Code* or possession of narcotics under the *Controlled Drugs and Substances Act*. The young offender may also be charged under provincial legislation or municipal bylaws.

In some cases, a young offender may be raised to adult court, referred to as “ordinary” court under the *Youth Criminal Justice Act*. There are several requirements, and conditions set out before such a transfer to ordinary court can take place. This can only occur if the young person has committed an indictable offence, and is at least fourteen years of age and such raising is in the interests of society and not contrary to the interests of the youth.

For offences involving first or second degree murder, attempted murder, manslaughter or aggravated assault, the 16 or 17 year old youth is tried at ordinary court automatically unless special application is made against it.

Persons who committed crimes while they were at least twelve years of age and under the age of eighteen, will be tried in youth court even if they are not apprehended or brought to trial until after they have reached their eighteenth birthday. Thus, a person who is eighteen or more may be tried in youth court for a crime committed while the person was a young person.

Offenders who are eleven years of age or less are not prosecuted, but are placed under the supervision of the provincial family and child services agency for care and rehabilitation.

There are several important differences in the handling of young offenders when compared with the handling of adults.

In Canada on any given day about 3500 to 4000 youth are in custody. Further while property crime has decreased amongst youth since 1991 violent crime has increased (Department of Justice, Canada, Web Page)

Procedures

The taking of a statement from an alleged young offender by a person in authority carries several additional requirements. For a discussion on the taking of statements generally see Section 4, Chapter 5. Also, statements from alleged young offenders must be in compliance with s. 146 of the *Youth Criminal Justice Act*. This section requires that any waiver of the rights of the alleged young offender must be in writing, that an adult person chosen by the alleged young offender may be physically present if the alleged young offender so chooses, and that the explanation of the alleged young offender's rights must be presented in a way that is understandable to the youth. The alleged young offender must have been advised of his or her rights to counsel, and to remain silent, and given the opportunity to consult with counsel before the taking of the statement. The testing of the legal voluntariness of the statement will occur in court in the form of a *voir dire* as explained in Section 4, Chapter 5.

Upon arrest, young offenders cannot be held or imprisoned in facilities used for adult criminals. Young offenders are entitled to legal counsel paid for by the state, without regard for their financial circumstances. Court appearances, including a trial, are held in the Youth Court, a division of the Provincial Court level. For further explanation of the court system, see Section 2, Chapter 4. Notice of future court appearances are given to the parents of the youth. Bail provisions for a young offender follow the same rules as those for adults (see Section 2, Chapter 8), and the young offender may be placed into the care of a responsible adult who is to ensure attendance at future court appearances. This adult is often a parent.

The *Youth Criminal Justice Act*, s. 34, contains provisions permitting the judge to order extensive psychological and medical assessments and reports regarding the youth for purposes of possible transfer to ordinary court, determination of bail, or of mental fitness to stand trial, or to consider the defence of mental disorder, and for disposition (sentencing).

The Declaration of Principle, set out in s. 3 of the *Youth Criminal Justice Act* is valuable in its efforts to raise the level of responsibility of the young offender to society, but at the same time to provide support and guidance for the young offender in the rehabilitation process.

The statute also makes provision for Alternative Measures, which involve diverting the young offender, who has not committed a crime of violence, and is a first or minor offender, from entering the criminal justice system, if such diversion does not threaten society, and may assist the youth. The Alternative Measures provisions are set out in s. 39 of the *Youth Criminal Justice Act*.

The term “disposition” is used in place of “sentence” in the youth process. Dispositions differ greatly from the sentences handed out in adult (ordinary) court. Maximum prison sentences are lower, even for those youth raised to adult (ordinary) court. And incarceration can occur in open or closed custody settings.

The criminal records of young offenders are protected under the *Youth Criminal Justice Act*, under s. 114, 115 and 116. Failure to comply with the provisions can lead to criminal charges against those who illegally retain or reveal such criminal records according to the *Youth Criminal Justice Act*. In addition, the identity of the young offender cannot be published according to the protection of privacy provisions of the Act.

The Young Offenders Act was replaced in April 2003 with the Youth Criminal Justice Act. This Act will promote public safety with a balance of protection for young people charged with crimes. The Act allows for informal and formal cautioning by police.

USEFUL READING

Griffith, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 14.

Young Offenders Act, R.S.C. 1985, c. Y-1.

Youth Criminal Justice Act, S.C. 2002, c. 1.

Chapter 8: Private Security

Role

Private security refers to those persons who provide protection services directly to customers. Private security officers are not employed, directed or paid by the public or by government, except in rare cases where a matter is contracted out to a private security corporation. Common examples of private security services include store detectives, bank investigators, personnel who guard private property and parking lots, and “bouncers” in licensed establishments.

While private security personnel may be employed directly by a company or person. They are often employed through a private security company contracting with a consumer who may be an individual with land and property to protect, or a corporation or registered society that owns or has authority over property. The contract may be between a celebrity and a private security company to provide the celebrity with privacy and isolation from an adoring public. In any case, the basis of this legal relationship is contract. The terms of the contract would be set out in written form, usually, and the private security personnel is directed by the employer to carry out the terms of that contract. If a member of the private security personnel fails to carry out the terms of the contract, or goes beyond what was expected of the private security company, there may be a civil action for breach of contract against both the private security employee and the private security company, the employer, by the person or corporation which sought their services.

If the conduct of the private security employee involved a criminal act, such as assault, then the public police would become involved. In addition, the employee and the company could be facing a civil action for the tort of assault.

It is not uncommon for private security personnel to work in cooperation with the public police, and to provide great assistance in detecting crime and apprehending offenders.

Powers

Private security personnel have the same powers of arrest, search and seizure as all other members of the public. The powers of arrest are set out in s. 494 of the *Criminal Code* and the classifications of criminal offences are described in Section 2, Chapter 10 which explains the differences between summary conviction offences, indictable offences, and dual (also called mixed or hybrid) offences. Private security powers are also covered by the statute and regulations that are enacted by each province and territory, such as the *B.C. Security Act*, and regulations.

A member of the public has the power to arrest any person found committing any federal indictable or dual offence. A member of the public has the power to arrest any person found committing any federal summary conviction offence on or in relation to property in the lawful possession of the arresting member of the public, or property over which that member of the public has authority. For example, a member of the public may arrest a person who is driving while drunk, for this is a dual offence, or a person found shoplifting (theft is a dual or indictable offence, depending upon the value of what is being stolen).

A member of the public, however, cannot arrest a person found in the act of nudity (a summary conviction offence) if the offender is in a department store, for example, because the offender is not committing the offence on or in relation to property in the lawful possession of the member of the public or over which the member of the public has authority. This is where the store detective has the power to arrest which the member of the public lacks. The store detective has been given authority to protect the property of his or her employer, and this gives the store detective the extended power to arrest. The power of the store detective only extends to the property over which he or she has authority by employment.

The public, and private security personnel, also have the power to assist in an arrest if it is believed that the person attempting to make the arrest has the legal power to arrest and the offender has committed a criminal offence and is being freshly pursued by the person. This is covered under s. 494(1)(b) of the *Criminal Code*.

Limits on Private Security Personnel Powers

Private security personnel have no more power than a member of the public, but through employment have more property to protect, and therefore more property over which to apply the non-police power to arrest. Powers of search and seizure are available to members of the public, and private security personnel through the common law. These powers were described in Section 4, Chapter 4. The public and private security personnel do not have the authority to search given to peace officers by search warrants, telewarrants, or specific statutory provisions.

USEFUL READING

Smith, Kenneth N. and Robert J. Prouse. *Canadian Private Security Manual*. Toronto: Carswell, 1987.

SECTION 5

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Chapter 1

History and Context of the Canadian Charter of Rights and Freedoms

Terminology

The word “constitution” refers to the set of rules that establishes an organization and allows for its operation. Even a household has a constitution. Who pays which bills? Who makes decisions about household maintenance? Who makes decisions about the garden? Who takes out the garbage, does the dishes, buys the groceries? Some rules of a household are set out in writing, and may be posted on the fridge door. Some are agreed upon, informally, perhaps at the dinner table, and some rules of the household are established by habit or decree, without discussion, and just become the “conventional” or customary way of doing things.

Societies such as the S.P.C.A. and United Way have constitutions, usually made up of society “bylaws” Corporations (incorporated companies) have constitutions often called the “memoranda and articles of association”. Countries have constitutions, and like households, societies and corporations, some rules of a country’s constitution are set out in formal statute, some rules are recorded in an informal way, such as in directives or minutes of meetings, and some are unrecorded but are complied with as a matter of custom or convention.

History

Prior to 1982, Canada’s constitution was derived from a number of recorded and unrecorded sources. One source was historical statutes, both Canadian and British, the most noteworthy of which was the *British North America Act* passed by the United Kingdom Parliament in 1867. Another source was the legislation that created the remaining provinces after confederation, letters patent (open letters) and letters of instruction to the colonial governments. The other main part of our constitution was the collection of statutes and regulations of the Parliament of Canada and the provincial legislatures as they became established. The unwritten component of the constitution still exists and is called “convention”. Convention arises out of “customs or traditions or usages” which are practices that have become established through repetition and acceptance by the various government

levels. Although not having the force of statute, convention can be relied upon by government levels as the way something has been done in the past, and therefore the way it will be done in the future. Failure of a government level to follow convention may lead to negative political consequences from the public and the other government levels affected.

Independence

In the late 1970s and early 1980s, the government of Canada, led by Pierre Elliot Trudeau began the process of “patriating our constitution”. This term came to mean obtaining final and complete national independence from the United Kingdom. In addition, Canada was to be no longer dependent upon the constitutional history and structure of Great Britain, and needed to replace these with its own constitution, which was to include a set of provisions to protect the rights and freedoms of the people of Canada. These and many other goals were met on April 17, 1982.

Entrenchment

This set of provisions along with the entire *Constitution Act, 1982*, is “entrenched”. The term “entrenched” means that the legislation providing the people of Canada with rights and freedoms cannot be easily changed, for example, by a change of government, or the simple repealing (cancelling) of the statute. This is due to Part V of the *Constitution Act, 1982*, the amending formula. It also means that the provisions take precedence over other statutes as part of the “supreme law of Canada” under s. 52(1) of the *Constitution Act, 1982*. In this way, any law, at any government level that is inconsistent with the provisions of the constitution can be declared by a judge to be “of no force or effect”. The most noteworthy example of this occurred in 1988 when the Supreme Court of Canada found that the *Criminal Code* provision which made it an offence for a woman to obtain an abortion other than through the hospital accreditation procedure set out in that provision was inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms (Part I of the *Constitution Act, 1982*) which gave everyone the right to “security of the person” including the right to make decisions about one’s own body. It was ruled that women were being denied the right to security of the person by the provision in the criminal statutes that prohibited abortion on demand.

Amending the Constitution

In order for there to be a major change in the *Constitution Act, 1982*, there must be unanimous consent from the ten provinces and the federal government. Less important changes require the approval of at least seven provinces with populations that total more than 50 per cent of the population of Canada, and the federal government. (See Part V of the

Constitution Act, 1982, “Procedure for Amending Constitution of Canada”) From this, it can be seen that the *Constitution Act, 1982*, is the “supreme law of Canada”. It should be noted that it is the only statute that can be said to be neither federal, nor provincial in nature. In fact, it is both federal (and therefore territorial) and provincial (and therefore municipal) due to its scope, and the manner in which it was created.

Consolidation

With the creation of the *Constitution Act, 1982*, many of the sources of constitutional rules were brought together under the one statute. While the *Constitution Act, 1982*, is not the only constitutional document, it is now the main one. Those sources of our constitution not incorporated into the *Constitution Act, 1982*, however, continue to form a part of our constitution, and this includes convention.

Our *Constitution Act, 1982* first appeared as Schedule B to the *Canada Act, 1982*, which is the United Kingdom statute passed on April 17, 1982, to permit Canada to exist as an independent nation. In giving us our independence, the government of the United Kingdom incorporated our *Constitution Act, 1982* into its statute, to show that Canada had established its own “household rules”. Our *Constitution Act, 1982*, although embodied in the United Kingdom’s *Canada Act, 1982*, is also Canada’s main constitutional statute.

In referring to the *Constitution Act, 1982*, it is necessary to include the year, 1982, as part of the statute title. This is because, upon the creation of the *Constitution Act, 1982*, the historical constitutional statute formerly titled the *British North America Act* was renamed the *Constitution Act, 1867*. In each case, the year must be included to be accurate and to avoid confusion.

Constitution Act, 1982

The *Constitution Act, 1982* contains seven parts and sixty-one sections. They are:

- I. The Canadian Charter of Rights and Freedoms (Sections 1-34)
- II. Rights of the Aboriginal Peoples of Canada (Sections 35-35.1)
- III. Equalization and Regional Disparities (Section 36)
- IV. Constitutional Conferences (Section 37-37.1)
- V. Procedure for Amending Constitution of Canada (Sections 38-49)
- VI. Amendment to the Constitution Act, 1867 (Sections 50-51)
- VII. General Provisions (Sections 52-61)

For the purpose of Section 5, Chapter 2, we will be looking mainly at Part I, The Canadian Charter of Rights and Freedoms. We will also look at s.52 (1) found in Part VII.

USEFUL READING

Constitution Act, 1982. R.S.C. 1985, Appendix II, No. 44.

Gall, Gerald L. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995, Chapter 5.

Chapter 2: Fundamental Freedoms and Legal Rights Protected Under the Charter.

Purpose

The purpose of the Charter is to protect the people of Canada from the power of the state when it is applied excessively or unfairly. The Charter does not protect us from the actions of each other. It cannot, for example, be invoked against a father by his son because the father has limited the boy's time to practice his drums. Although this is a limitation of the boy's freedom of expression, it cannot be dealt with under the Charter because the father does not represent the state, or government.

Reach of the Charter

The extent of the "state" has yet to be determined by the governments. For example, are colleges and hospitals that are virtually fully funded by government through the taxpayers, part of government, and therefore subject to the requirement to uphold the protection of rights and freedoms set out in the Charter? By the same token, are members of the public who carry out arrests and searches required to protect the rights of the arrested person under the Charter when doing so? So far, the judges of the courts of Canada, who have the responsibility to interpret the Charter, have not found the opportunity to define the extent of the 'government' for purposes of the application of the Charter.

Preamble

The first lines of the Charter are called the Preamble, and state "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:".

This simply states two of the founding principles. The rule of law refers to the principle that no one is above the law, not even those who create or enforce the law, including the leaders of the country and the monarch. No person, regardless of standing or motive, is allowed to disobey the law. This principle was first declared in the *Magna Carta* in 1215, and forms part of the foundation of a democracy.

Where our Rights can be Found

The Charter sets out a number of rights and freedoms, but it cannot be considered an exhaustive list. It would be impossible to list all rights and freedoms, for some of them are yet to be discovered. And, a number of our rights are set out in other sources, such as the *Canadian Bill of Rights* which was created as a federal statute in 1960, but is not an

“entrenched” statute. Also there are various provincial human rights statutes, as well as the protections of rights still found in the common law.

Review of the Most Pertinent Rights

The rights set out in sections 2, and 7 through 15 are the ones that are most applicable to the criminal justice process. However sections 3 through 6 that deal with “democratic rights” and “mobility rights” are also valuable sections to know.

Section 1 of the Charter will be examined later in Chapter 3 of this Section, but the reader should be aware that it has the effect of permitting the limitation of our rights under certain circumstances. Obviously this is necessary, for if each of us exercised our rights to the fullest, we would be infringing on the rights of many other people.

Fundamental Freedoms

Section 2 contains several rights in the four sub-sections. Section 2(a) protects our fundamental freedom of “conscience and religion”. This sub-section has been used to eliminate Sunday closures of businesses that was seen to increase the freedom of those who do not hold Sunday as their Sabbath. It has encouraged prisons to accommodate prisoners’ spiritual needs. It has been used to allow the wearing of turbans and kirpans (a ceremonial sword) as religious symbols when secular law provided otherwise.

Section 2(b) provides for “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. This sub-section has been used to determine the guidelines for publication bans in court. It has also been used to determine under what circumstances anti-Semitic speeches may be permitted, whether governments can censor films, and that municipalities cannot absolutely ban the placing of posters on public property. It was used to determine that the government cannot impose a ban on all tobacco advertising, however this issue is still being challenged.

Section 2(c) provides for “freedom of peaceful assembly”. This sub-section has been used to challenge the charging of those picketing abortion clinics, logging sites, and lands over which there are ownership issues between the government and members of the public, such as the Mohawk nation.

Section 2(d) provides for “freedom of association”, and has been used to challenge compulsory membership in unions, and to protect people who have only associated with criminals, but not participated with them in criminal activities.

Legal Rights

Sections 7 through 15 are entitled the “legal rights”. Section 7 provides that “(E)veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. This section, as do several others, provides for more than one right. The right to life and liberty have been less frequently evoked. However, the right to “security of the person” has been used extensively in cases involving the right to remain silent in the face of questioning from authorities; the right to doctor assisted suicides; seizure by police of blood samples taken for medical purposes; the taking of fingerprints, handwriting samples and hair samples by police; provincial helmet laws for motorcyclists and bicyclists; seat belt legislation; the assignment of responsibility to the owner of a motor vehicle for the actions of the driver; license suspensions for impaired driving or driving under suspension; and the obtaining of a statement from a prisoner by an officer posing as a fellow prisoner. There have been many more decisions involving this section – too many to document here and an examination of an annotated Charter of Rights and Freedoms will add depth to the many and varied issues which arise under this sub-section. Use of annotated statutes is discussed in Section 8 of this book.

Section 8 of the Charter provides that “(e)veryone has the right to be secure against unreasonable search or seizure”. This section has been considered in cases involving the taking of blood samples from an unconscious suspect; strip searches and choke-hold searches in certain circumstances; frisk searches by female corrections officers of male prisoners; video surveillance of private and public places; perimeter searches based on the smell of marijuana; warrantless searches of computerized records and garbage placed at the curbside; and the use of a “beeper” to follow a suspect’s vehicle. Again, there are many more examples of the use of s. 8 to challenge the actions of criminal justice authorities and these may be found in an annotated Charter of Rights and Freedoms.

Section 9 provides that “(e)veryone has the right not to be arbitrarily detained or imprisoned”. The key words in this section are “arbitrarily detained”. Police officers must have “reasonable grounds to believe” that a crime has taken place, is taking place, or is about to take place in order to arrest or detain the alleged offender. “Arbitrary” means without good reason. The Charter ensures that such arrests or detentions are carried out based on good reason. Cases dealing with section 9 have involved the remand of a prisoner to a psychiatric institution; the carrying out of wholesale arrests without necessarily possessing reasonable grounds; police actions based on suspicion or intuition rather than reasonable belief; and random police spot checks and road blocks.

Sub-sections 10(a) and (b) have had a major impact on policing responsibilities. They contains several separate rights, all of which must be provided to the person who has been arrested or detained. The person must be told promptly of the reasons for the arrest, in general terms. Later in the process, the person will be advised of the specific charge or charges that have been laid. The person must be told of the right to speak to a lawyer, and be provided with the opportunity to speak to a lawyer in private without delay. It is not necessary for the police to provide the lawyer of the accused's choice, or to make a lawyer physically available, or to allow the accused to contact a lawyer by long-distance telephone. However, in jurisdictions where legal aid is available, the accused is entitled to a legal aid lawyer at any time of the day or night. If the accused is not fluent in English (in the English-speaking provinces), an interpreter must be provided to explain the accused's rights under s. 10(a) and (b). As well, the accused must have an "operating mind" when being advised of these rights, and not be suffering from the effects of alcohol or drugs, or physical or psychological trauma or injury. The police cannot induce a statement by trickery, promise or threat.

"Without delay" has been interpreted by the courts to mean "without unreasonable delay" and an accused may be transported to headquarters to use the phone there, unless there is a pay phone near the place of arrest. Failure to allow an accused to call his wife in order for her to contact a lawyer has been considered a breach of this section.

"Detention" means the temporary restraint of the freedom of the suspect. This includes detentions for the purpose of obtaining a breath sample. In cases where a person voluntarily attends the police station, or answers questions at home, there has not been a detention. Where a person is asked to enter the police car and accompany the officers to the station, the court held that "detention" had occurred, requiring the application of Section 10 (a) and (b).

Sub-section 10(c) embodies the right of any person to challenge the authority of those who have imprisoned another by filing a writ of *habeas corpus*. This right existed before the drafting of the Charter.

Section 11 pertains to those who have been charged with an offence. This means that an Information has been sworn before a Justice of the Peace. Section 11 contains a "smorgasbord of rights". Section 11(a) provides for the right to be advised of the specific offence without unreasonable delay. This cannot be done until the Information is sworn, but should not be delayed after that event has occurred. Section 11(b) requires that those charged with offences and intending to plead not guilty must not be subjected to unreasonable delays in proceeding to trial. The period of time in consideration is the time from the swearing of the

Information to the trial, and not the period of time before charges are laid, nor the time leading up to an appeal. If the accused is responsible for the greatest part of the delay in reaching the trial then the accused cannot benefit from this delay and claim an infringement of the right provided under s. 11(b). However, if the police authorities, Crown prosecutor or judge delays the completion of the process unreasonably, the accused may be entitled to a dismissal of the charges. The reasonableness of the delay would be determined by a court on the application of the accused.

Section 11(c) provides that an accused cannot be required to take the stand in his own trial. This is a right which existed before the Charter came into existence and is part of the presumption of innocence and the right to remain silent in the face of questioning by the authorities.

Section 11(c) contains several rights. They include the right to the presumption of innocence, which existed before the Charter, the right to a “fair hearing” which calls on all the rules of “due process” and the right to a “public hearing”. This right to a “public hearing” existed in a weaker form before the Charter came into existence, and courts were more willing to close courts to the public. Now, however, the pressure is greater on the courts to avoid closing courts to the public except in the most justifiable cases, such as the sordid testimony of sexual activities by a child victim. The court must balance the sensitivity of the parties in the trial with the right of the public to open courts. Many matters may be banned from publication without offending the right to public hearings. The names of young offenders, of victims of sexual offences, and the events in preliminary inquiries are, by statute, not available for publication.

Section 11 (c) also provides for “an independent and impartial tribunal”. A “tribunal” is any decision-making body, and includes judges in courts of law. The judge must be independent, which means that the judge cannot be influenced by pressures from his or her employer (the government) or any other individual or group. This includes lobby groups who press for changes to the application of criminal law in cases of sexual and domestic assaults, and the level of sentencing. Judges must also be impartial, which includes the need to come into a trial without any biased notions as to the guilt or innocence of the accused, or the type of crime alleged.

Section 11(e) provides for reasonable bail to be granted pursuant to the bail process. This requires the court to balance the presumption of innocence of the accused with the protection of the public.

Section 11(f) provides that all persons charged with criminal offences which carry a maximum prison sentence of five years or more are entitled to a jury trial, which means a trial at the provincial Superior Court (also known as the Court of Justice, provincial Supreme Court, or Queen's Bench). Military courts martial are excluded.

Section 11(g) requires that criminal offences in Canada be seen by other like-minded nations as acceptable offences under international law.

Section 11(h) protects the accused from being placed in jeopardy of conviction more than one. This is a right that existed prior to the enactment of the Charter.

Section 11(i) gives to the accused the benefit of any legal (i.e. by statute or common law) change in the penalty for an offence if the change took place while the accused was proceeding through the criminal justice system for the offence. The accused will receive the lesser of the two penalties, regardless of whether the change was to a lower or higher sentence.

Section 12 of the Charter provides that "(e)veryone has the right not to be subjected to any cruel and unusual treatment or punishment". "Cruel and unusual treatment or punishment" has been held to include life prison sentences for importing narcotics and compulsory treatment of any kind in prison. However, solitary confinement and imprisonment in a province other than the "home" province of the accused for the accused's own safety has not been held to be cruel and unusual treatment or punishment. Nor has mandatory prison sentences for second convictions for impaired driving, refusing to provide a breath sample, or driving while disqualified, been considered cruel and unusual.

Section 13 protects persons who are required to testify under oath in any proceeding from having the words spoken by them used to incriminate them in other subsequent proceedings, except when the person testifying was lying, or when the evidence given by the person in the two proceedings are in conflict. An example of this protection may assist. A person, while driving a motor vehicle, becomes involved in a fatal accident due to the person's attempt to make notes and use a hand-held cellular phone. The coroner of the jurisdiction decides to hold an inquest into the cause of the accident and the person is subpoenaed (summonsed as a witness) to testify under oath. The person must reveal the inattention with which the vehicle was being operated while on the stand, under oath, at the coroner's inquest. The prosecuting authorities cannot use the testimony of the person as part of the evidence in a subsequent prosecution for criminal negligence causing death against the person. The prosecutor may present evidence from other witnesses or from physical evidence, but cannot use the words spoken under oath by the person at the coroner's inquest. However, the prosecutor can

present those words in the trial for criminal negligence for the purpose of showing the person has given two different “stories” on the stand, or in a subsequent prosecution of the person if the person lied under oath at the coroner’s inquest.

Section 14 provides the right to an interpreter to deaf persons or those who do not speak the language of the proceedings. This is not a new right.

Section 15 was a very controversial provision when the Charter and its contents were being drafted. Several provinces objected to the sweeping provision, expressing concern that its ultimate effects were not known and may be chaotic. As a concession to the provinces, the federal government agreed to postpone the enactment of section 15 for three years, and so it was not put into effect until April 17, 1985. This was a wise decision, for many provincial and federal statutes and policies had to be revamped to accommodate the s. 15 provisions.

Section 15 provides that “(e)very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability”. This very broad provision has been used extensively in non-criminal challenges. There are a few criminal Charter challenges under s. 15. In applications to raise young offenders to adult or ordinary court, the defence lawyers have argued that the provision in the *Youth Criminal Justice Act* which permits young offenders who have committed indictable offences and who are 14 years of age or more to be raised to adult or ordinary court is contrary to s. 15 of the Charter as being discriminatory by reason of age. Discrimination by reason of age has been the grounds for other defence lawyers to argue on behalf of their young offender clients who are under the age of 14 that they are being denied the opportunity of a jury trial because they are ineligible for the provision. Section 15 was argued unsuccessfully in a case where the jury did not represent the same racial origins as the accused.

Limits on Persons Entitled to Rights

It should be noted that all rights enunciated under the Charter are not available to every person in Canada. Some of the rights apply only to citizens, such as the right to vote, and the right to enter, remain in and leave the country. Some rights by their nature are confined to those persons arrested, detained, or charged with a criminal offence, or to a witness or party to a judicial proceeding. Most of the other rights apply to “everyone” or “every individual”.

USEFUL READING

Constitution Act, 1982 , R.S.C. 1985, Appendix II, No. 44, Ss. 2, 7-15

Stuart, Don. *Charter Justice in Canadian Criminal Law*. Toronto: Carswell, 1991.

Any annotated Charter of Rights and Freedoms

Chapter 3: Effects of Sections 1 and 24 of the Charter

Section 1, Limiting of Rights

Section 1 of the Charter reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section must be examined carefully. It should not be seen as an opportunity for the state to “take back” the rights it has set out. Rather, it should be interpreted as the recognition that we cannot each exercise our rights to the ultimate without trampling on the rights of others. It also recognizes that on occasion, the government must limit our rights in order to carry out justifiable practices.

The drafters of this section begin by saying that the rights set out in the Charter are guaranteed. But this guarantee is a conditional one. If the state must, at any time, limit one of our rights, that limit must pass the test set out in s. 1; that is, the limit the state imposes on our rights must be:

- a) reasonable (that is, the purpose of the limit must be sufficiently important to warrant overriding a constitutional right, and the limit must be carried out in a manner appropriate to the purpose), AND
- b) prescribed by law (that is, it must already exist either in statute or common law), AND
- c) demonstrably justified in a free and democratic society. (In other words, given that Canada is a democracy, and democracies hold their peoples’ rights and freedoms as sacred, can the state demonstrate that this limit on a person’s right is justified?)

All three of these elements must be proven. If the state fails to prove any one of them, it will not be permitted to further limit the right in question, at least in the manner it has chosen. The burden of proving the necessity to limit a right is on the state, and the forum where the limit is tested is in the court. The standard of proof throughout a Charter challenge is “on a balance of probabilities”, also referred to as the “civil standard of proof”.

Two examples may assist in understanding the process that takes place under s. 1.

Example #1

While seated in a crowded, darkened theater, Jenny feels the urge to express herself freely, by yelling “Fire! Fire!” In spite of the resulting stampede of theater patrons, Jenny is

identified as the person who did the yelling and is subsequently arrested and charged under s. 437 of the *Criminal Code* which reads:

Every one who willfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be made or circulated an alarm of fire is guilty of (an offence).

Jenny is brought to court on the charge, and explains to the judge that by arresting and charging her, the state, represented by the police, has limited her right under s. 2(b) of the Charter, which grants her freedom of expression.

The judge would agree that Jenny has that right, but then the judge would explain that there are occasions when the state can limit that right. The state, represented by the Crown prosecutor would have the burden of showing the judge, on a balance of probabilities, that the limitation which the police imposed upon Jenny's right to freedom of expression was:

- a) reasonable (It is reasonable to prohibit persons from yelling "Fire! Fire!" in a crowded, darkened theater) AND
- b) prescribed by law (This prohibition is set out in s. 437 of the *Criminal Code*.) AND
- c) demonstrably justified in a free and democratic society. (In a democracy, the people should be able to go about their lives without unnecessary threats to their safety, such as false reports of fire.)

In this case, the Crown prosecutor would satisfy the burden of proof on the state to show why this particular limitation on Jenny's right to freedom of expression is acceptable, and the judge would not rule in Jenny's favor. Prosecution would continue.

Example #2

Henry, a lawyer is incensed at the ruling of the judge in a case he was defending, and states publicly that the judges are all "in bed with" the police, and that there is no possibility of getting a fair trial. His statements reach the media and are reported across the nation. As a result, he is charged with criminal contempt of court.

Henry is brought before the court, and he states that he has the freedom to express himself pursuant to s. 2(b) of the Charter, and that the contempt of court charge is a limitation of his freedom. Again, the judge would accept the argument that there is such a right, but the judge would state that under s. 1, that right may be limited, if the limitation passes the test. The judge would then examine the contempt of court charge to see if, as a limitation, it is:

- a) reasonable, AND

b) prescribed by law, AND

c) demonstrably justified in a free and democratic society.

In this case, *R. v. Kopyto* (1987) 61 C.R. (3d) 209; 39 C.C.C. (3d) 1, the Ontario Court of Appeal held that although the limiting of Kopyto's freedom of expression in this regard was prescribed by law in the form of the common law offence of contempt of court, such a limitation was neither reasonable, nor could it be demonstrably justified in a free and democratic society. The court ruled that in a democracy, such criticism of the court, while ill-considered, should not be seen as a threat to the judiciary, such as to result in criminal sanctions of the offender's conduct. In other words, this limitation on Henry's freedom of expression failed the s. 1 test, and the charge against him was dismissed.

The court system is the forum where claims that rights have been improperly infringed or limited are examined. Once it has been determined that an infringement or limitation has been improperly imposed on a person by the state (that is, the infringement or limitation has failed the s. 1 test), the court may grant a remedy under s. 24 of the Charter.

Section 24, Remedy Section

In those cases where the court rules that the government has failed to pass the s. 1 test, the court will order a remedy pursuant to s. 24.

Section 24(1) of the Charter is the section that provides for remedies. It reads:

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 appropriate and just in the circumstances.

The "court of competent jurisdiction" refers to the court that is hearing the matter out of which the Charter challenge arises. In criminal cases, the court of competent jurisdiction is the criminal trial court.

The nature and extent of the remedy is left to the discretion of the court, so long as it is "appropriate and just in the circumstances". This vague passage allows the judge to be flexible in determining the remedy. Although, through judicial decisions, the list is still developing, due to the relative youthfulness of the Charter, some of the remedies which have been granted to those whose rights have been inappropriately infringed by the state include the reinstatement of the right, dismissal of charges, a judicial stay of proceedings, and, rarely, monetary compensation.

Section 24(2) provides for a specific remedy– the exclusion of evidence, if the "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this

Charter”, and, if the judge believes under the circumstances, that to include the evidence would “bring the administration of justice into disrepute” (i.e. bring shame on the administration of justice). This special remedy is invoked frequently in criminal cases, where the authorities, usually the police, have used procedures that are considered to be inappropriate limitations or infringements on the accused’s rights.

For example, if the police fail to advise the accused of the accused’s right to speak to a lawyer before making a statement, any subsequent confession that the police may obtain would be considered “evidence (which) was obtained in a manner that infringed or denied (the right to counsel under s. 10(b) of the Charter)”. If the judge believed that to allow the confession into evidence in the trial would bring the administration of justice into disrepute, the judge may use discretion to exclude the confession, possibly leaving the Crown prosecutor with insufficient other evidence to gain a conviction, thereby resulting in an acquittal.

The question of what would bring the “administration of justice into disrepute” is also still being developed by judges in their decisions. It is clear that blatant attempts by criminal authorities to circumvent the protection of the rights of the accused would satisfy this definition. However, breaches of rights that put the accused at a real or potential disadvantage have been held to be sufficient to warrant the exclusion of evidence. Also, judges have considered as part of the criteria whether or not the public would be shocked by the inclusion of evidence obtained through a breach of an accused’s rights.

USEFUL READING

Constitution Act 1982, R.S.C. 1985, Appendix II, No. 44, Ss.1, 24.

Gall, Gerald N., *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995, Chapter 5.

Chapter 4: Effect of the *Constitution Act, 1982*, Section 52(1)

Power of S. 52(1)

There is another possible result of the ruling of a court that a law has improperly infringed on the rights of a person. The court has the power to “strike down” an offending law. This power is found in s. 52(1) of Part VII of the *Constitution Act, 1982*, which reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

To demonstrate the power of this section, one only has to consider the landmark Morgentaler case which was decided by the Supreme Court of Canada in January of 1988. Dr. Morgentaler argued that s. 287 of the *Criminal Code* which prohibits abortions unless approved by a hospital board abortion committee and performed in an accredited hospital, was inconsistent with s. 7 of the Charter which provides for the right to “security of the person”. Dr. Morgentaler claimed that the abortion law prevented women from making decisions about their own bodies, and this left them without “security of the person”. The Supreme Court of Canada agreed, and used s. 52(1) of the *Constitution Act, 1982* to strike down s. 287 of the *Criminal Code*, making it “of no force or effect”. The provision remains in the *Criminal Code*, but cannot be enforced.

It can be seen that s. 52(1) gives tremendous power to the judges to eliminate those laws which are seen to be contrary to the constitution of Canada, and especially to the Canadian Charter of Rights and Freedoms.

Continuing Change

Our constitution and its implications are in their infancy, having only been examined and tested against a written document since 1982. Many changes will take place in this regard, and given that society is always in a state of flux, so too will the consideration of our country’s rules of organization and their effect on our civil liberties. This part of the text is intended as a primer on the operation and application of the *Constitution Act, 1982*, and especially of the Canadian Charter of Rights and Freedoms, and it must be supplemented with a continuing survey of the decisions of the judiciary, and the policy considerations of governments as they flow from the constitutional process.

USEFUL READING

Gall, Gerald N. *The Canadian Legal System*. 4th ed. Toronto: Carswell, 1995, chapter 5.

SECTION 6

CRIMINAL AND QUASI-CRIMINAL OFFENCES AND DEFENCES

Chapter 1:

Mens Rea (Guilty Mind) and *Actus Reus* (Guilty Act) of Criminal and Quasi-Criminal Offences

Statutory Requirement for Criminal and Quasi-Criminal Offences

All offences, whether they are criminal or quasi-criminal, with one exception, must exist in statute. That one exception is contempt of court, which is the only common law criminal offence, and is entirely in the domain of the judge.

In a democratic country, conduct that may lead to punishment must be announced to the public in advance of it becoming penal. In this way, people who displease the authorities cannot be imprisoned for performing acts which, at the time they were performed, were not illegal, but which were only declared to be illegal after the fact. This requirement for penal offences to be in statute prevents improper use of political power.

Federal Criminal Offences

Federal criminal offences are those listed in statutes such as the *Criminal Code*, *Controlled Drugs and Substances Act*, and *Food and Drugs Act*. These are offences seen as “criminal” in their nature, and have been created by federal legislation. These are to be differentiated from quasi-criminal offences which are offences which appear to be criminal, in that the consequences of a breach are penal, but the offences are created by governments other than the federal government (i.e. provincial, municipal), or the nature of the offence is not truly “criminal” (i.e. regulatory offences, pollution offences, etc.)

Federal criminal offences contain “parts” which are essential for their existence. A federal criminal offence must contain a *mens rea* (the guilty mind) and an *actus reus* (the guilty act), along with qualifying circumstances. For example, the offence of uttering threats under s. 264.1 of the *Criminal Code* provides that:

- (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
 - (a) to cause death or bodily harm to any person;

- (b) to burn, destroy or damage real or personal property; or
- (c) to kill, poison or injure an animal or bird that is the property of any person.

The provision goes on to say that an offence under s. (1)(a) is a dual offence, carrying a maximum term of five years imprisonment if proceeded with by the indictable process, and if proceeded with by way of summary conviction carries a maximum term of 18 months.

The offences described under paragraphs (1)(b) and (c) are also dual and carry penalties of two years as indictable offences and the standard 6 months and \$2,000 fine if proceeded with by way of summary conviction. For further discussion on the classifications of summary conviction, dual and indictable offences, please refer to Section 2, Chapter 10.

Essential Ingredients

In a case where a person is on trial for committing the offence of uttering threats, the Crown prosecutor through the Crown witnesses, must establish the essential ingredients of the offence. For further discussion on the trial process, please refer to Section 2, Chapter 12. The essential ingredients include the *mens rea* or guilty mind and the *actus reus* or guilty act.

The *mens rea* (or guilty mind) for uttering threats can be seen in the word “knowingly”. Thus, the Crown prosecutor must establish through the witnesses that at the time the accused spoke the allegedly threatening words, the accused “knew” the words were threatening. This can be shown by other conduct of the accused that indicates the accused’s dislike of the person to whom the threats were made, or by other relevant evidence. The *actus reus* (or guilty act) can be seen by the words “utters, conveys or causes any person to receive a threat to...” These are “acts” any of which the accused must perform in order to fulfill the *actus reus* requirement. Notice the words are joined by “or” which means the accused need only “utter” or “convey” or “cause any person to receive” the particular threat.

Other essential ingredients include, according to the wording of the offence, that the recipient of the threat must be a person (see definition of “person” under s. 2 of *Criminal Code*). There are a number of types of threats possible, as can be seen by the frequent use of the word “or”. The threat may be to cause death to any person, or to cause bodily harm to any person, or to burn real property (e.g. a house or structure attached to land), or to burn personal property, or to destroy real property, or to destroy personal property, or to damage real property, or to damage personal property, or to kill an animal that is the property of any person, or to kill a bird that is the property of any person, or to poison an animal that is the property of any person, or to poison a bird that is the property of any person, or to injure an animal that is the property of any person, or to injure a bird that is the property of any person. Remember that this offence involves the threat to do any one of these things, not to actually carry the threat

out. If the threat is carried out, the accused would probably be charged, in addition, with the offence actually carried out.

Therefore, in every federal criminal offence, there will usually be a word, or group of words which signify the *mens rea*, and a word or group of words which signify the *actus reus*.

Mens Rea

Examples of common words signifying *mens rea* are: “intentionally”, “with intent”, “knowingly”, “meaning to”, “fraudulently”, “willfully”, “corruptly”, “falsely”, “recklessly”, “carelessly”, etc. Searching for these words in the offences set out in the federal criminal statutes will help to identify what form the *mens rea* takes. *Mens rea* may exist in a range of offences in different forms. For example, in first-degree murder, one of the possible requirements is that the murder be “planned and deliberate”.

Knowledge in *Mens Rea*

Many of the more serious criminal offences require some level of knowledge from the accused. For example, an accused cannot be convicted of being in possession of illegal drugs, if he has been given a package wrapped in birthday paper and containing the illegal drugs by a person who has claimed that it was a birthday present he wanted to have hidden for his wife, who always searches for and finds her birthday present before he intends to give it to her. If the accused can raise a reasonable doubt in the mind of the judge or jury that he did not know that the package contained the drugs, he cannot be convicted due to the lack of knowledge necessary to illegally possess the drugs.

Willful Blindness and *Mens Rea*

Related to the requirement for knowledge in some offences is the concept of “willful blindness”. In a case where an offender fails to ask reasonable questions, so that his or her knowledge about future conduct is complete, the offender cannot use this intentional ignorance to avoid being seen by the judge or jury to have knowledge. For example, if a person were offered \$500 to take a package across a international border, and meet a person on the other side, the person should ask reasonable questions, such as “Why don’t **you** take the package across?” or “What is in the package?”. By not asking such reasonable questions, the person lacks the specific knowledge, as required for the *mens rea*, but the court will not allow such an escape from criminal liability, and attribute “willful blindness” to the offender, thereby disallowing the claim of lack of knowledge.

Recklessness and Carelessness as *Mens Rea*

Some criminal offences require *mens rea* where clear intent is not necessary. *Mens rea* can be found in crimes such as criminal negligence (ss. 219 – 221 of the *Criminal Code*) in which

the guilty intent of the accused need only be lack of proper caution, or concern for the consequences. A person who is reckless in the criminal sense is aware of the risk he or she is taking, but takes the risk anyway, when the reasonable person would not have done so. Another form of *mens rea* is carelessness, in which the offender fails to see the risk, and does not, therefore, avoid the risk, when the reasonable person would have. An example of criminal carelessness is s. 86(2) of the *Criminal Code*, which makes it an offence to use or store a firearm in a careless manner.

Actus Reus

The *actus reus* of an offence may appear in one of three forms. The *actus reus* may require physical movement, such as “applies force”, “steals”, “loiters or prowls”, “utters”, etc. Or, the *actus reus* may amount to a failure to do something required by law. In those cases, a legal duty is imposed which the accused fails to meet. For example, a person may be charged with failing to provide the necessities of life (s. 215, *Criminal Code*), or with failing to safeguard an excavation (s. 263, *Criminal Code*), or being criminally negligent by failing to do anything that it is his duty to do (s. 219, *Criminal Code*). Finally, there are a few offences which contain an *actus reus* requirement of “being in a prohibited state” such as in possession of a narcotic (s. 5, *Controlled Drugs and Substances Act*) or of stolen property (s. 354, *Criminal Code*), or of having care and control of a motor vehicle while impaired (s. 253, *Criminal Code*). Notice that this last group of offences does not require physical movement on the part of the accused, nor the failure to perform a legal duty, but just the offence of being in a state that is prohibited by law. A common quasi-criminal (provincial) offence which involves this form of *mens rea* is the offence of being in a state of intoxication in a public place. It is useful to expand on this information by perusing the federal criminal statutes and examining some of the more common offences for the words denoting *actus reus*.

Coexistence of Mens Rea And Actus Reus

The *actus reus* and the *mens rea* must occur at the same time, and in relation to the same crime. To demonstrate this, consider how many times you have bumped into another person accidentally. In doing so, you have fulfilled the *actus reus* of the crime of assault. You have “applied force to another person, without their consent”. However, obviously, at that moment, you were thinking about when you could manage to get a few groceries for supper, or whether you should see a particular movie. You did not possess the *mens rea* to carry out an assault on that person. So there was no criminal offence. In another example, a person may be fantasizing about robbing a bank, and getting away with “millions”, but that is hardly *mens rea*, and it is not being committed while robbing a bank. There have even been cases

when a person was knowingly in the act of committing a crime, but due to the lack of essential circumstances to make the crime, there was no offence. In the *Ladue* case, a man, after some heavy drinking, encountered a woman lying in the snow. He assumed she was unconscious, and proceeded to have sexual intercourse with her. However, he was apprehended, and it was learned that at the time of the sexual intercourse, the woman was deceased. The accused had the *mens rea* for sexual assault, but he mistakenly believed the woman to be alive. The offence of sexual assault requires the person being assaulted to be alive at the time, so he was not fulfilling the *actus reus* of sexual assault. He was ultimately convicted of performing an indignity with a dead body (s. 215, *Criminal Code*), but he did not commit this offence, for he lacked the *mens rea* because he did not know the body was dead. The judge in this case was wrong. This is not a frequent problem. But this “unique” case assists the reader in understanding that *mens rea* and *actus reus* must co-exist for there to be a crime, and must be related to the same offence.

Additional Requirements

In addition to the requirement of the Crown prosecutor to prove the *mens rea* and the *actus reus* of a federal criminal offence, the prosecutor must prove any other requirements set out in the statutory provision. For example a person who causes a disturbance, must do so “in or near a public place” (s. 175, *Criminal Code*). A person who carries out an assault must do so “without the consent” of the person being assaulted (s. 265, *Criminal Code*). Each offence carries with it certain circumstances that must exist before the crime has occurred. In addition, the Crown prosecutor must connect the accused to the *mens rea* and the *actus reus* so that the identity of the offender is not in question. All of this must be proven to the standard of proof of “beyond a reasonable doubt”.

Quasi-Criminal Offences

Quasi-criminal offences are offences against a provincial statute or municipal bylaw and differ from federal criminal offences in relation to the *mens rea*. Many quasi-criminal, offences are either absolute or strict liability offences.

Absolute Liability Offences

There are two forms of quasi-criminal offences in terms of *mens rea*. Absolute liability offences are those offences in which there is no need for the Crown prosecutor to prove *mens rea*, and the absence of *mens rea* does not prevent a conviction. Common examples include the provincial offence of exceeding the speed limit. An offender will not succeed by arguing at the trial that he or she did not have the intent to speed. Most speeders can say that they were unaware of how fast they were going when they were stopped by the police. Obviously,

if intent were necessary in such offences, the courts would be clogged with offenders making the same argument. The statute-makers have decided that by not providing the excuse of lack of intent for these relatively minor offences, people will be more responsible and vigilant as to the speed they are going. Most traffic offences are absolute liability offences, and this means that the person is absolutely liable so long as the person carried out the *actus reus* and any other circumstances required by the statutory provision.

Strict Liability Offences

The other form of quasi-criminal offence which treats *mens rea* differently than the federal criminal offences is called the strict liability offence. These are offences where the Crown prosecutor is required to prove the *actus reus* and any other circumstances required by the statutory provision. The Crown prosecutor is not required to prove *mens rea* in relation to the offence. But the offender can raise the defence of “due diligence”. This amounts to arguing that the offender did everything reasonably possible to avoid the *actus reus*. For example, if a company was charged under the pollution control laws for allowing a toxic chemical to enter a nearby stream, the Crown prosecutor would present evidence that the *actus reus* occurred. Then the company could present witnesses to describe the several measures taken at the plant which were designed to prevent such a thing from happening. If the judge concludes that the measures were reasonable, and that the company was duly diligent in trying to avoid the *actus reus*, the judge can acquit.

Absolute liability offences and strict liability offences, therefore, do not require proof of *mens rea*, but do require the Crown prosecutor to establish the *actus reus* and any other statutory requirements. Unfortunately, so far, the courts have not established firm criteria to determine which quasi-criminal offences are absolute liability offences and which are strict liability offences.

USEFUL READING

Verdun-Jones, Simon N. *Criminal Law in Canada*. 2nd ed. Toronto: Harcourt Brace, 1997, chapter 5.

Chapter 2: Essential Ingredients in Common Criminal and Quasi-Criminal Offences

The call takers should become familiar with the various federal, provincial and municipal offences that are likely to arise in the course of their work experience.

Federal Criminal Offences

Assault

There are three levels of non-sexual assault and three levels of sexual assault in the *Criminal Code*. The levels provide for the degree of physical and/or psychological harm or violence that occurred. The basis for all six offences is s. 265 that defines assault, whether sexual or non-sexual. The definition includes a number of different ways in which an assault can take place, and a reading of the definition of assault requires the reader to pay close attention to the uses of the words “and” and “or”. The following are the possible manners in which a criminal assault may take place. The accused may be charged with assault if,

- without the consent of another person, he applies force intentionally to that other person **directly** (e.g. a punch in the face)
- without the consent of another person, he applies force intentionally to that other person **indirectly** (e.g. by throwing an object, or knocking the person down with a motor vehicle, etc.)
- he **attempts** by an **act** to apply force to another person **if he has** present ability to effect his purpose
- he **attempts** by an **act** to apply force to another person **if he causes that other person to believe** on reasonable grounds that he has present ability to effect his purpose
- he **attempts** by a **gesture** to apply force to another person **if he has present** ability to effect his purpose
- he **attempts** by a **gesture** to apply force to another person **if he causes that other person to believe** on reasonable grounds that he has present ability to effect his purpose
- he **threatens** by an **act** to apply force to another person **if he has** present ability to effect his purpose
- he **threatens** by an **act** to apply force to another person **if he causes that other person to believe** on reasonable grounds that he has present ability to effect his purpose

- he **threatens** by a **gesture** to apply force to another person **if he has** present ability to effect his purpose
- he **threatens** by a **gesture** to apply force to another person **if he causes that other person to believe** on reasonable grounds that he has present ability to effect his purpose.

As you can see, each provision has to be read carefully, so as to recognize whether the offending conduct falls within the prohibited act. The above definition applies whether the assault is sexual or non-sexual.

The courts are working on a comprehensive common law definition of the term “sexual” in relation to those offences which have sexual circumstances attached, and have determined so far, that what is and is not sexual in relation to an assault should be assessed in terms of reasonableness, which means an assessment of the general population’s views, or a view which is objective and not attached to a particular judge’s or jury’s outlook. The judges have also declined to attach the term “sexual” to any particular part or parts of the body, but have ruled that it refers to the integrity of the person, and not the anatomy.

Note that one of the manners in which an assault can occur, and one of the most frequently applied, requires the lack of “consent” from the person allegedly assaulted. In other words, if it can be established that the person consented to what occurred (so long as the person is legally capable of giving consent), then there was no offence. The issue of consent may arise in cases involving contact sports where some bodily contact is assumed by the players before they enter the field or ice rink. When the level of assault or violence exceeds the consent implied by the willingness of the players to participate in the sport, the offence of assault has occurred. Consent also arises in what are commonly called “date rapes” where the accused claims a belief in the consent of the person who was sexually assaulted. There are several provisions which should be read which apply to this aspect of assault. Be sure to read over sections 265(3), (4), 273.1, and 273.2 of the *Criminal Code* which statutorily restrict the defence of mistaken belief in the consent of the victim.

An offence of assault commonly known as “assault by trespass” should be discussed here. This offence arises when a person in lawful possession of real property (with or without land and buildings attached to it) attempts under s. 41 of the *Criminal Code* to eject a person who trespassed on the property, or, who has become a trespasser by their conduct. For example, a person enters a restaurant, orders food, eats it, and then remains in a chair for several hours, or, falls asleep from the effects of alcohol, or in some other way, becomes an unwanted patron. The proprietor or the employees have the right to deny further services or accommodation to the person, and can request that the person leave, for the person is now a

trespasser. The trespasser may leave voluntarily, which is the most desirable scenario. However, if the trespasser refuses to leave, the proprietor or the employee may attempt, using no more force than is necessary, to guide the trespasser to the exit. Any resistance on the part of the trespasser amounts to assault under s. 41 and s. 266 of the *Criminal Code*. The proprietor or employee can now allege an assault took place, carry out a non-police arrest under s. 494 of the *Criminal Code*, and hold the trespasser for the police. Or, the proprietor or employee may contact the police and ask for assistance to remove the trespasser, in which case the police officer may use s. 41 to assist in the removal and, perhaps, arrest of the trespasser. This section also applies to persons in dwelling-houses, or any other real property and buildings. Sections 38-42 of the *Criminal Code* have further information on the defence of property, both real and personal.

Another aspect of assault is covered under s. 43 of the *Criminal Code* which permits school teachers, parents, or persons standing in the place of a parent to use reasonable force to correct a child.

Theft, Fraud and False Pretenses

The offence of theft requires that the owner or lawful possessor of property unknowingly parts with the property. This means that when the property is taken by the accused, the owner or lawful possessor is not present (i.e. theft of a potted plant from the front porch when the residents are out), or is not being attentive to the property (i.e. theft of a purse from an employee's desk drawer). Shoplifting and "pick-pocketing" are examples of theft. Often, theft is combined with the offence of breaking and entering (s. 348 of the *Criminal Code*). The definition of theft is found in s. 322 of the *Criminal Code*. There are a few terms in this offence that deserve examination.

Theft can occur when a person "fraudulently" (dishonestly) and "without colour of right" (with no legitimate claim of ownership, part ownership, or financial interest) takes anything whether "animate or inanimate" (whether alive such as a plant or animal, or without life, such as a vehicle or wallet). Theft can also occur when a person fraudulently and without color of right "converts to his use or to the use of another anything ..." This phrase means that even when a person comes into possession of another person's property legally, such as by finding it (a wallet) or borrowing it (a vehicle), the legality of the matter changes when the person begins to use the item as if it were his own, or he gives or sells it to another as if it were his to give or sell. For example, by finding a wallet, the person comes into possession legally, but, if the person then puts the cash found in the wallet in his own pocket, and uses the credit card to make purchases, the theft by conversion has occurred. It was possible, due

to the presence of identification in the wallet, for the person who found it to arrange for its return. This differs from a situation where a person finds a \$50 bill lying on the sidewalk, where no person has just passed by. In a similar way, a vehicle may be loaned for a day or for a specific purpose, but when the borrower drives to Florida in the car instead, the car has been converted to the use of the vacationer who has committed theft.

There are a number of kinds of theft set out in the *Criminal Code*, including theft of cattle (s. 338), credit cards (s. 342), electricity, gas or telecommunication services (s. 326), from the mail (s. 356), and even theft of oysters (s. 323) and ore or mineral specimens (s. 333).

One of the more common issues that arises around theft is the question of whether the taking of property between estranged spouses is an offence. This is covered under s. 329 of the *Criminal Code*. A close reading of this section and the relevant judicial pronouncements will reveal that a theft can occur between legally married spouses only after a separation agreement has been entered into and the division of matrimonial property has been determined. If the parties are not legally separated, the property continues to be property of the marriage, and the taking by one spouse of such property from the possession of the other is not theft.

The offence of theft is one of five types of federal criminal offences which are separated into offences involving property valued at more than \$5,000, and property that is valued at \$5,000 or less. These offences are commonly referred to as “theft over \$5,000” and “theft under \$5,000”. The other four types of criminal offences which fall into this dichotomy are: fraud, false pretenses, mischief (commonly, property damage or illegal occupation of property) and possession of property obtained by crime (such as theft, robbery, kidnapping, fraud, etc.).

The offence of “joy-riding” is one of the variations of the offence of theft. It is usually charged when the person who took the vehicle has been allowed to use it in the past, and knows the owner of it. This is a less serious offence than the usual theft over \$5,000 which would be alleged for the theft of most vehicles. This offence can be found in s. 335 of the *Criminal Code*, as “taking a motor vehicle or vessel without consent” and is a summary conviction offence.

Theft of or from the mail is a serious offence, and is covered under section 356 of the *Criminal Code*.

The “over \$5,000” offences are indictable and the “under \$5,000” offences are dual. For further discussion about the classification of offences, please consult Section 2, Chapter 10.

There is a difference between theft and the offences of fraud and false pretenses. Fraud and false pretenses, legally, represent the same form of contact: the obtaining of property from the owner or person in lawful possession with their consent by “lying” to them in some way. The “lying” need not be in words, but can occur by the conduct of the offender. For example, by entering a restaurant, ordering food, and consuming all or part of the food, the diner is implying by his or her conduct the intention to pay for the food at the end of the meal. By leaving the restaurant without paying for the meal, the person has misled the proprietor or employees of the restaurant, and committed the offence of fraud in relation to food (s. 364 of the *Criminal Code* which also covers fraud in relation to lodging, hotels, etc.). There are several offences involving fraud or false pretenses, including more common ones, such as fraud in relation to fares (obtaining bus, train or taxi transportation without paying for it), found in s. 393 of the *Criminal Code*, personation (impersonation), s. 403, and the offence for non-specific forms of fraud (s. 380). Frauds can occur when people canvass door-to-door for a non-existent charity, when price tags are switched before an item is taken to the cashier, and when sellers knowingly make false promises to purchasers in order to obtain a sale. In each example, the “victim” parts with money or property voluntarily, but this willingness is based upon dishonest information provided by the offender, knowing that the information is untrue.

Robbery

Robbery occurs when a theft, or attempted theft is accompanied by violence or threats of violence to a person. This offence is defined in s. 343 of the *Criminal Code*. Very frequently, members of the public confuse the terms “robbery” and “theft”. When taking a call in which the person claims he or she has been robbed, it is necessary for the call taker to clarify whether there has been violence or threats of violence to a person in the course of a theft, or if, for example, the caller has just arrived home from work and found their home has been burglarized, which means there has been a breaking and entering and theft or mischief, not a robbery.

Mischief

The term makes the group of offences it covers appear to be minor, however, a reading of section 430 of the *Criminal Code* will show that the offence can include minor acts of vandalism such as spray painting a fence or wall, as well as offences involving the destruction of property, and acts which may endanger life. The act of blowing up a building is “mischief”. This section includes conduct such as “sit-ins” where the accused interferes with the lawful use, occupation or operation of property.

Breaking and Entering

This offence requires that an accused “break” and “enter” a “place” with the intent to commit an indictable offence (such as arson, sexual assault, theft, mischief or other possible offences which are either indictable or dual in classification), or that an accused “break out of a place” after entering with that intent. This offence is found in s. 348 of the *Criminal Code*). The terms “enter” and “place” are defined in section 350 of the *Criminal Code*). A reading of these sections will indicate that it is not necessary for the accused to actually break something to commit the offence, and that entrance occurs when any part of the accused’s body or any instrument the accused uses is within the place. A breaking and entering can occur in any “place” which means a dwelling-house, a building or structure or any part of a building or structure, a railway vehicle, a vessel, an aircraft or trailer, or a pen or enclosure which holds fur-bearing animals. Note that a motor vehicle is not included in this definition. If an accused breaks into a car, the offences of mischief and theft may have occurred, not breaking and entering.

Another related offence is that of being unlawfully in a dwelling-house. This is covered under s. 349 of the *Criminal Code*. This section does not require the offender to “break” and “enter” in order to commit an offence. And it includes offenders who were originally in the dwelling-house lawfully, but whose purpose has now become unlawful. Section 41 of the *Criminal Code*, discussed above under the heading “Assault” may be used to remove the person.

Offences Involving Weapons

Weapons play a large part in assaults, robberies, murders and manslaughter. In these cases, the offender would receive a greater punishment for the additional involvement of a weapon. There are offences which involve the possession of a weapon, where no other offence is committed. The definition of “weapon” (s. 2 of the *Criminal Code*) includes “offensive weapon” and the definitions of “antique firearm”, “firearm”, “prohibited weapon”, and “restricted weapon” are found in s. 84 of the *Criminal Code*.

Offences involving weapons include carrying a concealed weapon, s 89; discharge of a firearm with intent, s. 244; possession or imitation of a weapon at a public meeting, s 88; and possession or imitation of a weapon for a purpose dangerous to the public, s. 87.

Sexual Offences Against Children

There are a few offences that involve sexual acts not amounting to assault, and relating to children as victims. “Sexual interference”, found under s. 151 of the *Criminal Code*, applies

when the victim is under the age of fourteen years, and it requires the offender to touch the victim for a sexual purpose. The offence of “invitation to sexual touching” found under s. 152 of the *Criminal Code* involves victims under the age of fourteen years, and requires the accused to invite, counsel or incite the victim, for a sexual purpose, to touch the body of any person, including the accused. The offence of “sexual exploitation” found under s. 153 applies to accused who are in a position of trust or authority towards the victim, or upon whom the victim is dependent. The offence involves the same conduct described in the two previous offences of “sexual interference” and/or invitation to sexual touching.

Other offences for the protection of children include the offences of “parent or guardian procuring sexual activity”, s. 170; householder permitting sexual activity, s. 171; and corrupting children, s. 172 of the *Criminal Code*.

Miscellaneous

The call taker should be aware that it is an offence for a person, for a benefit, to condone, or conceal an indictable offence under s. 141 of the *Criminal Code*.

The offence of criminal harassment or “stalking” should be familiar to the call taker, and a careful reading of ss. 264 and 423 will assist the call taker in advising a caller who complains of the conduct set out in either of these two sections.

Indecent, threatening or harassing phone calls fall under s. 372 of the *Criminal Code*. There are a number of offences falling under this section. The telephone company assists the caller in avoiding such calls, and also assists the police in apprehending the author of such calls.

There are many offences involving possession in the *Criminal Code*, *Controlled Drugs and Substances Act*, and *Food and Drugs Act*. Possession can involve drugs, property obtained by crime, illegal weapons, counterfeiting equipment, housebreaking instruments, etc. The call taker should be familiar with Section 4(3) of the *Criminal Code* that applies to all federal possession offences and contains the definition of “possession”. It can be seen from a reading of it that possession can include circumstances where the items are not within the personal possession of the offender, but are in some other place. The offence can also occur if one person is in possession along with a group of people who are aware and consent to that person’s having possession. For example, a number of persons may be riding in a stolen vehicle, all with knowledge of the fact and consenting to it. This means that all parties are offenders, not just the driver.

Another interesting and perhaps useful piece of information to a call taker, is that a person who is selling material which is not illegal under the *Controlled Drugs and Substances Act* or

the *Food and Drugs Act*, but is claiming to the prospective purchaser that the material is the desired drug, is committing an offence. In other words, if a person offers for sale a plant-like material which is parsley and oregano, but tells the interested customer that the material is marihuana, the seller is committing the offence of trafficking in a substance held out to be a narcotic under s. 5 of the *Controlled Drugs and Substances Act*. A similar provision exists under ss. 39 and 48 of the *Food and Drugs Act*. So, selling a probably harmless material but claiming it to be the drug desired by the purchaser is a criminal offence.

There are many other federal criminal offences with which call takers should be familiar but which are not so common in their occurrences, and are not complicated in their definitions. There are many offences which are not likely to come to the attention of the police through the police call taker, or which do not require further information about the applicable law for the call taker to act, and therefore are excluded from the following list. Common *Criminal Code* offences include:

- unlawful assembly, s. 63 - 66
- public mischief, s.140
- prison escapes, ss. 144-147
- incest, s. 155
- bestiality, s. 160
- corrupting morals, s. 163
- offences involving child pornography, ss. 163.1
- indecent acts, s. 173
- nudity, s.174
- causing a disturbance, s. 175
- trespassing at night, s. 177
- common nuisance, s. 180
- keeping a common bawdy house, s. 210
- failing to provide the necessities of life, s. 215
- abandoning child, s. 218
- counselling or aiding suicide, s. 241
- traps likely to cause bodily harm, s. 247

- failure to stop at the scene of an accident, s. 252
- failure to safeguard opening in ice or excavation, s. 263
- uttering threats, s. 264.1
- forgery, s. 366
- false alarm of fire, s. 437
- endangering, injuring, causing unnecessary suffering of animals, ss. 444-447

Quasi-Criminal Offences

Each province has jurisdiction to create offences and penalties for matters coming under provincial jurisdiction. The most common provincial quasi-criminal offences involve traffic and liquor offences. The call taker must be familiar with those provincial statutes that arise most frequently.

Traffic Offences

The call taker may be expected to answer questions about the legality of some practices in traffic, but will be unlikely to become involved in such matters in progress. Some of the more common questions involve the entering of an intersection on an amber light, left turns across double lines, and speed zones. A perusal of the provincial motor vehicle legislation and the related regulations will assist the call taker in providing such information, if the policy of the department permits.

Liquor-related Offences

The other often referred-to provincial statute is the one that controls the use of liquor. Call takers may have to respond to questions about the obtaining of a liquor license for a wedding reception or high school reunion, and a perusal of the applicable legislation and regulations is necessary. The more frequent offences committed under provincial liquor legislation include being in a state of intoxication in a public place, consuming liquor in a public place, minors in a licensed establishment, serving liquor to intoxicated patrons, minors in possession of liquor, the refusal of a patron to leave a licensed establishment after having been required to leave by the proprietor, and the return of a patron who has been required to leave a licensed establishment within the prohibited time period.

Very few provincial offences carry the power of the police officer to arrest, and so the usual practice is for the offender to receive a Summons to appear in Provincial Court to answer to the charges. The offence of being drunk in a public place is often used to deal with drunk people who are unable to care for themselves.

Municipal Offences

Municipalities also have the power to create offences and penalties for matters falling within municipal responsibility. The most common offences involve parking, littering, and noise bylaws. Larger municipalities have bylaw enforcement officers who deal with these complaints, however, the municipal police officers have authority as well to enforce these bylaws. In smaller municipalities, the municipal police force carries out enforcement. Municipal bylaws do not provide the police or bylaw enforcement officers with the power of arrest, so in all cases, Summonses must be issued. If, in dealing with a complaint of the breach of a municipal bylaw, the police officer encounters a provincial quasi-criminal and/or a federal criminal offence, the police officer has the greater power from those statutes.

The call taker should become familiar with the most commonly referred-to provincial quasi-criminal statutes and the municipal bylaws, copies of which are usually handy in the phone room.

USEFUL READING

Federal criminal statutes, provincial quasi-criminal statutes and regulations, and municipal bylaws

Pink, Joel E. and David C. Perrier. *From Crime to Punishment*. 3rd ed. Toronto: Carswell, 1997, Chapter 10.

Chapter 3: Criminal Defences

Responsibility of the Defence

The criminal law sets out the essential ingredients of the offences in the statute, and these include the *mens rea*, *actus reus*, and the other circumstances, all of which must be proved beyond a reasonable doubt by the prosecution. See Section 6, Chapters 1 and 2 for further discussions on the essential ingredients of criminal and quasi-criminal offences.

Once the prosecutor has established the essential ingredients of the offence, the responsibility shifts to the defence to raise a reasonable doubt, either by discrediting the Crown witnesses (see Section 2, Chapter 12), establishing abuse of process sufficient to lead the judge to rule in favor of the defence (see Section 4, Chapter 2), or, as this chapter discusses, setting out a counter-argument or defence to the allegations.

Quasi-Criminal Offence Defences

Absolute liability quasi-criminal offences do not require proof of *mens rea* in order for a conviction to occur. The defence, therefore, does not argue a lack of *mens rea* as a defence, but rather expends its energies arguing a lack of *actus reus* (i.e. it did not happen, or the accused is not the person who did it). In strict liability offences, the defence may argue “due diligence” which is a common law defence applicable only to strict liability offences where *mens rea* is not a necessary element, but lack of intent, shown in the form of reasonable efforts to avoid what occurred may lead to an acquittal. For more discussion of absolute and strict liability offences, see Section 6, Chapter 1.

Criminal Offence Defences

A very different situation occurs with criminal offences, where the guilty intent (the *mens rea*) is a necessary element. In criminal cases, much of the defence efforts are geared towards disproving the *mens rea* by presenting a defence that is designed to raise a reasonable doubt in the mind of the judge or jury as to the existence of the guilty mind in the accused. There are a number of defences, some of which can be found in statute, and the remainder are found in the common law.

The statutory defences are mental disorder (s. 16 of the *Criminal Code*); self-defence or preventing an assault (s. 34-37 of the *Criminal Code*); provocation to murder (s. 232 of the *Criminal Code*); and compulsion (s. 17 of the *Criminal Code*). The most frequently used common law defences are mistake of fact, automatism, intoxication by drugs or alcohol, the defence of necessity, and entrapment. There are other developing common law defences

which have not yet been fully adopted by the courts, such as post-traumatic stress syndrome (sometimes referred to as “battered wives” syndrome), temporary insanity, and biological chemical imbalances such as those brought about by PMS.

It is worthwhile to know which defences are statutory and which are common law. The person seeking more information about a defence must know that if it is a statutory defence, the search begins in statute. If the defence is a common law one, nothing of value will be found in statute to deal with the defence, and the search must begin in the common law source of law (i.e. Case law) For further explanation on researching statute and common law please refer to Section 8.

Defences are the tools of the defence lawyer, or the defendant who is self-representing. The defence side need only satisfy the essential ingredients of the selected defence on a balance of probabilities. It is not necessary for the defence to prove innocence. It is also possible for the defence to present more than one defence. For example, the defence of self-defence and intoxication, may arise in a case where there was a murder.

Statutory Defences

Mental Disorder

Mental disorder, when being argued as a defence, must have existed at the time of the crime, because any *mens rea* must have existed then. In addition, all forms and degrees of mental illness are not acceptable as defences. The form and degree of mental illness must fit into the statutory definition of mental disorder found in s. 16(1) of the *Criminal Code*, and the accompanying judicial interpretations..

A successful defence of mental disorder will lead to the full acquittal of the accused of the criminal charges due to the lack of *mens rea*. However, the person may require treatment so that the *actus reus* of the crime will not occur again. This means that the person may be committed to a mental institution to be treated. Recent amendments to the *Criminal Code* have removed the automatic committal of persons found not criminally responsible by reason of mental disorder to facilities for treatment. These amendments can be found in part XX.1 of the *Criminal Code*. The acquitted person may be released by the court, or the court may order that the person be assessed by a review board (s. 672.38) to determine whether the person should be detained in a facility for the mentally disordered until well enough to be released. Persons who are under the authority of the review board, may not be in forensic hospitals, if it is seen to be unnecessary by the review board, and may, instead, be in ‘halfway houses’ or living on their own with regular visits by representatives of the review board. Such release from a forensic institution is usually accompanied by terms similar to those that would exist

if the person were on bail. If a person is found in the community, and has a history of mental illness and criminal involvement, it may be that the person has left a facility without permission, or is permitted to be in the community under specified conditions.

Read s. 16 of the *Criminal Code*, and be aware of the ‘ands’ and ‘ors’ set out in s. 16(1). Take note that this is a legal definition of mental disorder, and has little bearing on the present state of knowledge in the psychiatric and medical fields. A reading of s. 16(1) should reveal that the person must have a mental disorder that renders “the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”. A person using mental disorder as a defence must satisfy the judge or jury that the mental disorder was of such a nature that the person, at the time of the *actus reus* of the crime was not able to perceive the consequences, impact and results of the criminal act. The person must be incapable of understanding the physical effect of what they are doing and what their actions are doing to the victim or the property. Or, the person must have a mental disorder which prevents the person from knowing that the *actus reus* is illegal. There are many mental illnesses that can disable the person in serious ways, but not render the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Mental disorder is the only defence that may be raised by either side of the matter. In other words, if the Crown prosecutor discerns some level of mental disorder in the offender, the Crown prosecutor can raise it as a defence. This is due to the concern for fairness to the defendant and the protection of the public. It would be unconscionable for a person who is mentally disordered to be prosecuted, and receive the full force of the law, and punishment, when the condition would, if brought to the attention of the court, result in acquittal, and any necessary treatment. Whoever raises the defence of mental disorder has the burden of proof, and the standard of proof, as it is with all defences, is on a balance of probabilities.

Self-Defence or Preventing an Assault

Self-defence and acting to prevent an assault could arise as defences when the accused is charged with any of the non-sexual assault offences, murder, or manslaughter. The accused would be arguing that he did not apply force for the purpose of assault (or murder or manslaughter) but was applying force in order to protect himself or another person from assault (or murder or manslaughter).

If a defence of self-defence, or preventing assault is successful, the accused will be acquitted of the charge or charges. However, if excessive force was used in the self-defence, or preventing of an assault, the accused may not succeed, and may be convicted of the charge.

The defence of self-defence is available in cases of unprovoked assaults, and in cases where the accused originally provoked the fight.

The defence of self-defence to an unprovoked assault can be found under s. 34(1), so long as the acts of self-defence did not cause death or grievous bodily harm to the other party. If the acts of self-defence did cause death or grievous bodily harm, s. 34(2) would apply.

In cases where the accused “started” the fight, and then had to act in his own self-defence when the other party fought back unexpectedly, s. 35 applies. This “starting of the fight” can be considered “provocation” as defined in s. 36. Note that this form of provocation includes “blows, words or gestures”, but is not limited to these acts. Remember also that provocation in cases of assault is very different from provocation as a defence to murder discussed later in this chapter.

A close reading of the wordings of the self-defence and preventing of assault sections, reveals that a number of conditions must exist before the defence can apply. For example, in s. 34(1) the person claiming the defence of self-defence cannot have had the intent to cause death or grievous bodily harm, and the force used must have been reasonable (i.e. looked at objectively, what the reasonable person would have used).

In s. 34(2) the person alleging self-defence, must have had the fear that he was about to suffer death or grievous bodily harm from the other party, and that fear must have been fear that any reasonable person would have felt. It cannot apply if the person claiming the defence of self-defence had a fear of death or grievous bodily harm, when most people would not have had that fear (i.e. being threatened by a person on the other side of a plate glass window).

The defence of preventing an assault is closely related to the defence of self-defence. It can be found in s. 37. It requires only the reasonableness test, in showing that the force used to prevent the assault was, in the view of most people, necessary. As in the defence of self-defence, excessive use of force will likely override the acceptance of the defence by the judge or jury.

Provocation to Murder

Provocation under s. 232 of the *Criminal Code* can only be raised as a defence when the accused has been charged with murder, and cannot be confused with the provocation discussed in the defence of self-defence.

Provocation to murder is called a “partial defence” because even if it is argued successfully as a defence to a murder charge, it will not result in an acquittal. Instead, the murder charge will be reduced to a conviction for manslaughter. Therefore it is not a full defence.

The degree of provocation is described in s. 232(2). The person charged with murder must satisfy this definition to the extent that the judge or jury has a reasonable doubt that the accused could form the required *mens rea* due to that provocation.

The defence requires that the person using the defence satisfy on a balance of probabilities that he or she was actually emotionally upset at the time of the *actus reus* due to the provoking act. The provocation must be such that the ordinary person would have also been provoked. It is not provocation if the person allegedly doing the provoking is doing something he or she has a legal right to do. And it is not provocation if the person allegedly doing the provoking was prodded into doing it by the now accused murderer in order for the accused to have an excuse to kill. See s. 232(3) and (4) of the *Criminal Code*.

Compulsion

Originally, the defence of compulsion (also known as duress) was a common law defence. However, the federal government felt that the judges were applying the defence too leniently. So, it attempted to eliminate the common law part by passing a provision amending the *Criminal Code*. However, it was soon discovered that the amendment did not capture and override all the common law relating to the defence of compulsion. So far, the federal parliament has not seen fit to correct its error.

At one time, any person charged with any offence, or with any mode of participation in any criminal offence, could claim that they were compelled to commit the crime because of the threats of another person to injure any person or damage any property. The person could make the threats from anywhere, and the threats could be minor or major in nature. The defence was very broadly interpreted and applied by judges.

As a result of this too broad interpretation by judges, the government passed s. 17 of the *Criminal Code*. A close reading of this section will show that the defence cannot be applied to the list of serious offences in the section. Also, the person doing the threatening has to be physically present when the offence is committed, and the threats must be of immediate death or bodily harm to the person committing the offence. The person committing the crime has to believe that the person doing the threatening will carry out the threats if he or she does not commit the crime.

The statutory defence created by the government refers only to “(a) person who commits an offence”. There are many other possible participants to an offence besides the person who commits it. People who aid and abet the person who commits the offence, or counsel the person to commit it, or act as an accessory after the fact by protecting the offender from detection and arrest by the authorities, are also parties to the offence, but did not commit it. Therefore, the common law part of the defence continues to apply to those persons who did not commit the offence, but participated in the crime in one of these other ways. For further discussion on parties to the offence who did not commit it, see Section 6, Chapter 4.

For example, the driver of the getaway car has aided and abetted the robbers due to their compulsion of him by threats. He can claim the common law defence of compulsion, even though robbery is on the prohibited list in s. 17. He can claim the defence even though the threat that caused him to cooperate with the robbers was not of immediate death or bodily harm, and the person doing the threatening did not have to be in the car with him while he acted as the getaway driver. This was the decision in *Regina v. Paquette* [1977] 2 S.C.R. 189.

Common Law Defences

Mistake of Fact

As already discussed in Section 6, Chapter 1, the *mens rea* component of a crime often requires knowledge of certain facts before it can be established. For example, Ladue did not know the woman was dead, so he could not form the *mens rea* to “improperly or indecently interfere with or offer any indignity to” her dead body, under s. 182(b) of the *Criminal Code*. Similarly, it would be impossible to prove the *mens rea* of possession of a narcotic, if the defence could show that the accused lacked knowledge of the nature of the substance in his possession. From this it can be seen that “knowledge” of some facts are often essential to proof of *mens rea*. However, remember the effect of a finding of “willful blindness” discussed in Section 6, Chapter 1.

The defence of mistake of fact applies when the defence can show, on a balance of probabilities, that the accused lacked the knowledge necessary to form the required *mens rea*. For example, if Joe takes a jacket from the coat room that does not belong to him, mistakenly believing that it is his because it is very similar in style, Joe should not be convicted of theft or possession of property obtained by theft, for in order to commit these offences, Joe has to know at the time he takes it that the item taken does not belong to him.

The general rule, with regard to defences of mistake of fact, is that the defendant need only raise a reasonable doubt about his intent, that he had a personal, honest, mistaken belief in

what turned out to be one or more facts essential to the *mens rea*. It is not necessary, as a general rule, to prove that a reasonable person would have made the same mistake.

However, there is an exception to this general rule. In the case of assaults, both sexual and non-sexual, there is an added requirement. One of the common essential ingredients of the offence of assault is proof of the lack of consent by the person assaulted, to the application of force. Persons accused of assault can argue in their defence that they thought the victim was consenting. This would amount to the defence of mistake of fact. The accused would be saying, "I cannot have had the intent to assault, because I mistakenly thought the alleged victim was consenting to my actions".

The exception to the general rule requires that in cases where the accused is raising the argument that he or she thought that the victim was consenting to the assault, the judge or jury must consider not only whether the accused honestly believed that the victim was consenting, but also that the mistaken belief was reasonable. In other words, the defence of a mistaken belief in consent in cases of assault requires the mistaken belief to have been both honest and reasonable. This occurs most often in sexual assault cases.

Automatism

This condition has been described as “(U)nconscious involuntary behaviour, the state of a person who though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done.” *Regina v. Berger* (1975) 27 C.C.C. (2d) 357 (B.C.C.A)

It is occasionally stated that the defence of automatism is actually a defence against the *actus reus* of a criminal offence, and not against the *mens rea*. In other words, a person using the defence of automatism is stating “I did not commit the crime; my body did, but at the time, my mind was dissociated from my body, and so I did not commit the *actus reus*”. In any case, the condition of automatism means that the accused, at the time of the crime was operating as an automaton or robot. There was no involvement of the mind in the criminal act.

This defence is raised only in very serious offences, such as murder, and is related very closely to the statutory defence of mental disorder. In fact, there have been cases where the defence has presented automatism as the defence in the case, and the court has ruled that the condition was not automatism, but mental disorder.

The defence is difficult to prove, and requires experts in the medical and psychiatric fields to testify. The prosecutor will also present experts in an attempt to disprove the existence of

automatism. So far the Canadian judiciary has accepted automatism caused by sleepwalking, physical blows to the head resulting in temporary unconsciousness, involuntarily drug or alcohol induced automatism, and psychological blows. In each of these cases, the accused argues that during the carrying out of the *actus reus* alleged by the Crown, the accused's mind was not operating due to one of the above causes.

If, however, the judge or jury decides that the condition was not caused by any of these events, but rather is a condition which arises from within the accused, such as extreme neurosis, or an inability to cope with rejection, anger, frustration, etc., the court may rule that the condition is a form of mental disorder. The result is the same in that the accused is found not guilty, but in cases where the acquittal is as a result of a mental disorder, there is the possibility that the now acquitted person may have to submit to an indeterminate period of time in psychiatric treatment, in an institution, or at the least under the supervision of the courts or psychiatric review board. In cases where the automatism was externally induced, the court would fully acquit the accused.

Intoxication by Drugs or Alcohol

The defence of intoxication by drugs or alcohol is in a state of legal confusion. The common law dispensed by judges has not been clear and consistent. Consequently, the defence is seen by some as a virtual guarantee of a reduction in criminal responsibility for the accused.

The common law rules applied to intoxication are as follows. Some offences require at least some small amount of forethought before they are carried out. These offences are called "specific intent offences" because they require "specific intent" to be committed (e.g. robbery). Other offences require no forethought. They are carried out reflexively, or follow other events without interruption or an opportunity to think (e.g. sexual assault). These offences are called "general intent offence".

The judges have seen intoxication as a condition that prevents rational thought. Therefore, for those offences where some thought is necessary before carrying them out, intoxication operates as a partial defence, having the effect of reducing the offence down to a lesser included offence (e.g.. Murder reduced to manslaughter; robbery reduced to assault). Because general intent offences require no forethought, there is no thought for the state of intoxication to affect, and so intoxication is not a defence to a general intent offence. General intent offences include all assaults, for example. It is for this reason that intoxication is not successfully used as a defence to an assault.

The difficulty with this defence seems to lie with the disagreements among judges in their judicial decisions as to which offences should be considered specific intent offences and

which should be considered general intent offences. Judges may, on occasion disallow the defence, but reflect their perception of reduced criminal responsibility for the crime in the sentence.

Recently high courts including the Supreme Court of Canada have allowed extreme intoxication amounting to a state of automatism to be accepted, not as an intoxication defence but as a non-insane automatism defence, leading to full acquittal of the accused. Some of the more high-profile cases involved aggravated sexual assaults and murders. In response to this perceived leniency of the courts in cases where extreme intoxication was successfully used as a defence, the federal government has passed an amendment to the *Criminal Code* under s. 33.1. Remember, statute overrides common law. This amendment denies the use of the defence of intoxication which was self-induced for any offence that “includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.” This amendment is very recent and at the time of publication, no judicial interpretations of the amendment have been reported.

Necessity

The defence of necessity overlaps with the defences of self-defence and prevention of assault in that a person who acts in self-defence or to prevent an assault is acting out of necessity. But this common law defence can be applied to offences other than assault. The accused in using the defence of necessity is claiming he did not have the intent to commit the alleged crime. He knew he was committing a crime, but had no choice, due to the circumstances. This defence is not often successful.

The Supreme Court of Canada, in the case of *Perka et al. v. The Queen* [1982] 2 S.C.R. 232, provided three criteria which must exist before the defence can be successful. They are:

- a. “situations of clear and imminent peril when compliance with the law is demonstrably impossible;” AND
- b. no reasonable legal alternative to breaking the law; AND
- c. some degree of proportionality between the offence committed and the evil that it was designed to avoid.

In other words, a person attempting to use the defence of necessity must be able to satisfy the judge or jury that there was some immediate danger to life where no other option existed except to break the law, and the law that was broken was less of a consequence than there would have been if the law had not been broken. For example, if a man’s wife was delivering a baby in a car as he drove her to the hospital, he may be found not guilty for some traffic

infractions which were necessary in order to get her medical attention sooner, however, it could be argued that he could have contacted 911 and received medical attention more quickly.

Entrapment

Entrapment is a very recent defence, having been accepted in the courts for the first time in the last decade. The accused, in a case where he alleges there was entrapment is claiming he did not have the *mens rea* to commit a crime. He states that the conduct of the police, or police operators who were undercover at the time, using pressure tactics caused him to commit a crime he would not normally commit.

Undercover work by the police is acceptable when it gives practising criminals an opportunity to commit a crime in police presence. When overly aggressive police work pressures a normally law-abiding person into committing a crime, the defendant may be able to argue entrapment. In cases where entrapment is believed to have occurred, the judge will usually order a stay of proceedings, which, in effect, relieves the accused of the charges, but does not amount to a full acquittal.

For example, good police undercover work would result in a drug trafficker approaching the undercover officer and offering to sell him drugs. Entrapment would occur if the undercover officer offered an extraordinarily large sum of money to a person to find and supply him with illegal drugs. Or, entrapment could occur if the person gave in to subtle threats of violence from the undercover officer. It is not entrapment when an undercover officer lies to a suspect. Obviously, in order to be successful in undercover operations, the very fact of not wearing a uniform is a form of misrepresentation to the suspect as to the identity of the person. If police officers working undercover were required to tell the truth to the suspect, it would be simple for the criminal element to ask any person involved if they were a police officer, thereby defeating the criminal investigation.

Miscellaneous Undeveloped Defences

Alibi is not technically a defence. It is rather a claim by the accused that he or she did not commit the crime, that the authorities have the wrong person. The accused would back up this claim by presenting evidence of his whereabouts at another location at the time of the crime. If the evidence proves to be true, the person is not the suspected criminal, but the police will check the validity of an alibi before excluding the accused as a suspect.

The courts are beginning to allow forms of defences that can be categorized as “diminished responsibility” defences. Some forms of diminished responsibility can already be seen in the

criminal statutes. For example, infanticide is an offence that can be committed only by the mother of the infant during the infant's first year of life, and while the mother is experiencing the physical and emotional effects of giving birth and/or breast feeding. The crime is a form of murder, but it is seen as appropriate to consider the diminished responsibility of the mother under these circumstances, and therefore the maximum penalty is only 5 years imprisonment. Another example of an offence that involves diminished responsibility is the offence of "taking an auto without the owner's consent" or "joyriding". The offence is one of theft, and would normally fall under theft over \$5,000, carrying a maximum penalty of 10 years in prison, but "joyriding" is normally charged against a person known to the owner of the vehicle, and who has had the opportunity to drive the vehicle before. The accused is often the child of the owner of the vehicle. The maximum penalty for the summary conviction offence reflects the perception of diminished responsibility in the accused.

The courts have not yet accepted the defence of irresistible impulse in Canada, although it has been seen as a form of temporary insanity in other countries.

Battered Spouse Syndrome is now being accepted by judges as a defence to charges of murder carried out on a spouse or partner. It is accepted as a form of common law defence of self-defence. In cases where the battered spouse can prove continued beating from the deceased or threats to the spouse or other, the act of murder is seen as self-defence, carried out before or after the accused has been abused. The permitted delay in acting in self-defence is understood as necessary due to the inability to do so at the moment of assault. Frequently, the deceased partner was asleep or unconscious through drugs or alcohol when the murder took place. This is a very recent addition to the common law defences and is yet not clearly or fully developed by the judges.

USEFUL READING

Pink, Joel E. and David Perrier. *From Crime to Punishment*. 3rd ed. Toronto: Carswell, 1997. Chapters 8 and 9.

Barnhorst, Sherrie and Richard Barnhorst. *Criminal Law and the Canadian Criminal Code*. 3rd ed. Toronto: McGraw-Hill Ryerson Limited, 1997, Chapter 4.

Chapter 4

Parties to the Offence

Parties to a Criminal Offence other than the Perpetrator

So far, we have considered the criminal liability of the person who actually carries out the offence. There are others ways in which a person can become criminally liable.

Aiding and Abetting

Section 21 of the *Criminal Code* applies to all federal offences whether found in the *Criminal Code* or not. Section 21(1)(a) deals with the person who actually commits the offence.

However, s. 21(1)(b) deals with persons who do or omit to do something that aids a person to actually commit the offence. For example, the party to the offence of breaking and entering and theft may leave a window unlocked at his place of employment, so that his partner in crime is able to obtain entrance. The “lookout” in a criminal act would be charged as a party to the offence to that crime. Section 21(1)(c) requires the person to abet by promoting or encouraging another to commit a crime. Abetting involves more psychological support for the crime than physical assistance. But mere “passive acquiescence” is not an offence. In other words, simply standing by while a crime occurs does not amount to abetting. This was decided in the case of *R. v Dunlop & Sylvester* (1996) 47 C.C.C. (2nd) 93 (S.C.C.) in which two males were present while a “gang rape” took place, but did not participate and did not encourage the parties to the crime.

The act of “aiding or abetting” set out in s. 21 requires the same *mens rea* and knowledge as the person who actually commits the offence. The *actus reus* of “aiding or abetting” is the assisting or encouraging as set out in s. 21. It is interesting to note that the actual perpetrator of the crime need not be convicted for the aider or abettor to be convicted. This can be seen in s. 23.1 of the *Criminal Code*.

The person who is found to have “aided or abetted” is charged with the actual offence and is eligible for the maximum penalty.

Common Intention

Read s. 21(2) of the *Criminal Code*. The term “common intention” is the same as “common purpose”. All persons with common intent share criminal liability for offences committed by any one of them to fulfill that common intent. Four elements must be proved:

1. there must be a formation of an intention in common to
2. carry out an unlawful purpose, and

3. to assist each other in that unlawful purpose;
4. the offence committed is known to be a probable consequence of the carrying out of the common purpose.

The unlawful intent must be different from the offence actually charged. For example, two or more parties set out to rob a victim but in the attack, the victim dies in the course of the robbery from the violence used. All parties will be charged with murder or manslaughter depending upon the level of *mens rea* that may be proved even though the original intention was just to rob the victim, if it can be proven that the parties knew death was a probable consequence of the method being used to carry out the robbery. The penalty for the offence would be the same as it would be if the parties had set out to commit the murder or manslaughter.

Accessory After the Fact

Read s. 23(1) of the *Criminal Code*. A person who, knowing that a crime has occurred, and with the intent to help the person escape, carries out an act or omission to aid the accused in escaping. The party who is the accessory after the fact would be charged with the offence of being an accessory after the fact to robbery (for example) and would not be eligible for the maximum penalty for the offence. Maximum penalties for the offence of being an accessory after the fact are set out in s. 463 of the *Criminal Code* and are generally 1/2 of the maximum sentence for the full offence. However, when the offence is murder, s. 240 of the *Criminal Code* applies, and the maximum penalty for being an accessory to murder is life imprisonment.

It is important to note that the legal spouse of an offender cannot be charged with the offence of being an accessory after the fact to a crime committed by the offender. This exception is set out in s. 23(2) of the *Criminal Code*.

The party who commits the offence need not be convicted for the accessory after the fact to be found guilty. See s. 23.1 of the *Criminal Code*.

Counselling an Offence that is later committed

Read s. 22(1) of the *Criminal Code*. Note that there is also an offence of counselling an offence that is not committed. This will be dealt with below.

When a party counsels another to commit a crime, and the counselled person does commit the crime, the party doing the counselling can be charged with counselling, not only of the offence counselled, but any other offence which the judge or jury rules that the counsellor knew or ought to have known would be committed as well, in order for the counselled crime

to be committed. For example, if a party counsels another to rob a bank, and the actual perpetrator also steals a getaway car and a gun, the counsellor is criminally liable for these offences as well. This can be seen in s. 22(1) of the *Criminal Code*.

The maximum penalty for the counsellor is the same as that for the actual perpetrator, but the crime must have been committed by the actual perpetrator before a charge can be laid against the counsellor in this case.

Counselling an Offence not committed

Read s. 464 of the *Criminal Code*. The offence being counselled must exist in criminal law, and the counsellor must intend to induce a person to commit the offence, and to counsel the person in order for the offence of counselling to occur. The offence has been committed once the counsellor, with intent to induce the person to commit the crime, has so counselled. An example of this offence can be seen in the effort of a person to arrange the contract killing of another. The interception of the killing by police would lead to a charge of counselling a murder that is not committed. The maximum penalty for the crime of counselling an offence not committed is set out in s. 463 of the *Criminal Code*, and is generally half the maximum penalty of the full offence, if it had been committed.

Penalties

As can be seen above, the penalties for the offences involving parties to the offence other than the actual perpetrator fall into two categories. Persons who “aid” or “abet”, or have a “common intention”, or who counsel another to commit an offence that is then committed are liable to the same maximum penalty as the person who carried out the crime.

Persons who are accessories after the fact, or counsel a crime that is then not committed are eligible for a maximum penalty which is somewhat lower than the maximum penalty for the offence. This penalty provision is found in s. 464 and provides that if the offence carried a maximum penalty of life imprisonment, the accessory or counsellor is eligible for a maximum penalty of up to fourteen years in prison. If the offence carried a maximum penalty of fourteen years or less, the accessory or counsellor is eligible for a maximum penalty of one half the maximum penalty set out in the statute.

Finally, if the offence is a summary conviction offence, the accessory or counsellor is eligible for the same penalty as the person who actually carried out the offence. This maximum penalty is set out in s. 787 of the *Criminal Code*, and amounts to a maximum of a \$2,000 fine, or to six months in prison, or both, unless otherwise specified by statute.

USEFUL READING

Mewett, Alan W. and Morris Manning. *Mewett & Manning on Criminal Law*. 3rd. ed. Vancouver: Butterworths, 1994, Chapter 8

Pink, Joel E. and David C. Perrier. *From Crime to Punishment*. 3rd ed. Toronto: Carswell, 1997, Chapter 5.

Chapter 5: Attempts and Conspiracies

Attempts

There are many occasions when an offender is “caught in the act” or at least at the beginning of the act, and has not completed the *actus reus* of the offence. In this case, the offender will be charged with an attempt to commit the full offence. For example, if an offender is disturbed by the authorities as he or she is about to break and enter a building, the charge would be attempted breaking and entering. If in an attempt to kill another person, the victim either is able to escape the attack, or receive medical attention early enough, and therefore does not die, the accused may be charged with attempted murder. The general rule is that for those criminal offences where the *mens rea* required to commit the full offence is present, but the *actus reus* falls short of the statutory requirements, the accused has carried out an attempt to commit the crime.

However, some offences cannot be “attempted” due to the nature of the *mens rea* involved. A person cannot be charged with attempted impaired driving, or attempted criminal negligence, or attempted manslaughter, because the level of *mens rea* in these offences does not involve a clear decision to carry out the crime, and the *actus reus* required in these offences is either there, or not there.

Mere acts of preparation have been held not to amount to an attempt. For example, if a person, unable to make further mortgage payments on his or her residence, arranged for the maximum insurance coverage, removed irreplaceable items from the house, and poured an inflammable liquid around the rooms, the person has not yet committed the offence of attempted arson. However, once the match has been lit, with the intent to ignite the gasoline, an attempt has probably occurred in law.

The maximum penalty for an attempt to commit a crime is set out in s. 463 of the *Criminal Code*. If the full offence carries a maximum penalty of life in prison, an attempt to commit that offence makes the accused eligible for a maximum penalty of fourteen years. If the maximum penalty for the full offence is imprisonment for any period up to fourteen years, the maximum penalty for the attempt would be half of that. If the maximum penalty for the full offence is that set out for summary conviction offences, the attempt would carry the same maximum penalty.

Conspiracies

Conspiracy is an offence in itself. A person may conspire to commit a crime, and the crime of conspiracy has taken place, even though the object of the conspiracy (e.g., murder,

robbery, importing narcotics, etc.) never takes place. The *mens rea* of a conspiracy is the intent to agree with at least one other person to commit a crime. The *actus reus* of conspiracy is the agreement itself. Once the agreement has been entered into, with the intent of two or more parties to carry out a crime, the crime of conspiracy has taken place. Even if the parties, or one of them, then change their minds, and decide not to carry out the crime agreed to, the crime of conspiracy still has occurred. Read s. 465 of the *Criminal Code*.

A conspiracy requires at least two people who are not legal spouses (spouses cannot conspire according to the law) and the conspiracy cannot occur between one party and an undercover officer who is pretending to conspire. A conspiracy can involve any number of people, but the fewer people involved, the easier it is to keep it hidden from the authorities, and the easier it is to manage. Conspiracies are usually detected by the law enforcement authorities when one of the parties to the conspiracy decides to report it to the police, or, the police learn of the development of the conspiracy through another source and investigate using undercover officers and wiretapping equipment.

If the offence conspired also takes place, the parties may be charged with both conspiracy and the offence conspired. For example, parties may be charged with conspiracy to import narcotics into the country and with importing narcotics, as well. The maximum penalty for a conspiracy is the maximum penalty for the offence that was the subject of the conspiracy, and if the parties are also convicted of the offence being conspired, they would be eligible for the maximum penalty in each conviction.

USEFUL READING

Barnhorst, Sherrie and Richard Barnhorst. *Criminal Law and the Canadian Criminal Code*. 3rd. ed. Toronto: McGraw-Hill Ryerson, 1997, pp. 58-61.

Mewett, Alan W. and Morris Manning. *Mewett & Manning on Criminal Law*. 3rd ed. Vancouver: Butterworths, 1994, Chapter 9.

Chapter 6: Parties to which the Criminal and Quasi-Criminal Law May Not Fully Apply

Children

The *Youth Criminal Justice Act* defines “young person” as one who, in the absence of evidence to the contrary, is or appears to be twelve years of age or more and under the age of eighteen. Children eleven years of age or younger cannot be prosecuted in Canada and, instead, are likely to be referred to the provincial child services agency for counselling and supervision.

Mentally Disabled Persons

The law does not specifically exclude persons with mental disabilities unless they qualify under s. 16 of the *Criminal Code* which provides a defence for those parties suffering a mental disorder which interferes with their ability to have the necessary *mens rea* for a crime. Persons who have varying degrees of mental disability due to congenital causes, accidents or age, may be prosecuted for criminal or quasi-criminal offences. However, some component of the justice system may interrupt the processing of such a person when it is evident that the process is not appropriate to the situation. In cases where it is possible for people with mental disabilities to be convicted of criminal offences, often the penalty reflects the recognition of the judge of the reduced capacity of the person to appreciate the wrong-doing, and the sentence may also require placement in a facility where assessment, treatment and/or appropriate supervision is available.

Spouses

As has been seen in Section 6, Chapter 5, legal spouses cannot be charged with the offence of being an accessory after the fact to the criminal act of the other spouse, nor can two legally married people conspire with one another in law. As has been discussed in Section 6, Chapter 2, theft between legally married spouses who have not entered into a separation agreement is not treated as a criminal offence.

The *Canada Evidence Act* provides for certain privileges between legally married parties with regard to compulsory testimony in court, and conversations which have occurred between the spouses during the marriage. Section 4 of that act sets out these provisions.

Corporations and Societies

A registered corporation or society is a legal entity separate from the people who create it. Certain criminal offences can be carried out by a company or a society, and the company or

society can be prosecuted. There must, for a criminal offence, be *mens rea* and *actus reus*. The *actus reus* can be carried out by any employee or representative of the company or society, so long as the conduct is within the directives of the company or society. Obviously, an employee of a company who commits murder while at work is acting outside the mandate of his employment. In contrast, an employee who, at the direction of his supervisor, misrepresents facts to a customer, may be the instrument through which the company is committing fraud. It is necessary for there to be *mens rea* or guilty intent that can be traced to the management of the company or society. In the case of regulatory or quasi-criminal offences such as causing pollution, where *mens rea* is not an ingredient of the offence, the company or society may be prosecuted for the offence even though there was no intent to commit the crime on the part of any manager or employee. On occasion, a company or society and individuals who work for it or manage it may be jointly charged with the criminal offence, if the prosecution believes that both the company or society and the individual had the required guilty intent and were involved in carrying out the criminal act.

The sentencing of a registered corporation or society presents its own problems. Depending upon the nature of the offence, an officer of the company or society could be imprisoned. However, if the guilt lies at the feet of the company or society alone, then the sentence is limited to those penalties that can be imposed on entities other than human beings, such as a fine or probation with appropriate conditions. For more on the sentencing options of the criminal justice system, please see Section 7.

Internationally Protected Persons

“Internationally protected person” is defined in s. 2 of the *Criminal Code*. This definition includes the head of state of any country, a head of government, minister of foreign affairs, or a member of their family or staff accompanying them, a representative or official of a state, such as a consul or ambassador, and their family or staff. The definition is much more lengthy than this, and is worthy of study. Generally, internationally protected persons who are acting on behalf of Canada, are given special protection under s. 7(3) of the *Criminal Code* in regard to those criminal offences listed in s. 7(3), and internationally protected persons who are in Canada, acting on behalf of another government, with the knowledge and consent of the Canadian government, are also protected. This protection amounts to the absence of prosecution for any criminal or quasi-criminal offence committed by the internationally protected person, their family or staff. Practical examples would include not issuing a traffic ticket to a person who is the consul of another country, or their family member or staff member for a provincial motor vehicle offence. If such a person commits a criminal offence, there will be no prosecution, but it is likely that the person will be required

by Canada to return to their home country. On occasion, foreign governments who have representatives in Canada, may waive the protection, and permit the prosecution of the internationally protected person in the Canadian courts.

USEFUL READING

Mewett, Alan W. and Morris Manning. *Mewett & Manning on Criminal Law*. 3rd ed. Vancouver: Butterworths, 1994, Chapter 8.

SECTION 7

SENTENCING AND COMMUNITY-BASED CORRECTIONS

Chapter 1:

Types of Sentencing Available

Once a person has plead guilty or been found guilty, the judge must impose a penalty. The maximum penalties are set out within the applicable statute, and the judge may not impose a sentence greater than that maximum. However, there are many penalties available to the judge which fall within that limit.

Goals of Sentencing

There are a number of goals that a judge may wish to accomplish through the sentencing of the offender. If the main goal is to protect the public from the further dangerous actions of the offender, then the offender's capacity to reoffend must be taken away from him. This means imprisonment. Perhaps the offender is a first-time offender, and the offence is not violent or destructive in nature. In this case, the goal of the sentencing judge may be to rehabilitate the offender by imposing a suspended sentence or probation, complete with special restrictions on the offender designed to address that offender's particular form of misconduct. If the judge believes that the sentence must be geared to deterring the offender in future, one way to do this, in the case of a crime involving monetary gain, would be a large fine, taking the "profit" out of the criminal act. This would be appropriate in offences involving theft, fraud, prostitution, drug trafficking and gambling. In some cases, the judge believes the public must also be deterred from the criminal offence, and may impose a sentence that brings the case to greater public attention, thereby alerting members of the public to the sentiments of the criminal justice system as to their frequent law-breaking. This may occur in cases involving speeding, impaired driving, or "running red lights". In cases where the offence meets statutory requirements, and the judge concludes that the conviction, itself, is sufficient punishment for the offender, the judge may sentence the offender to an absolute discharge, which means, in effect, that the offender has been pardoned. Or, in cases where the judge believes the offender should meet some conditions before the discharge becomes absolute, the judge may sentence the offender to a conditional discharge which becomes an absolute discharge when those conditions are met.

Judges are also looking at the effects of denunciation of the criminal conduct of the offender, the need of the public for retribution, and the essential balance which must be struck between these two, so that the offender gets his “just deserts” but is not made an example of.

Fines

When a person is fined by a judge, it is evident that the judge is not concerned that the offender may jeopardize public safety, nor does the judge believe that rehabilitation is needed. The fine can act as a deterrent, making the offender more aware in the future of the potential for a similar or greater loss of funds. Some offences carry statutory maximums for fines. For example, summary convictions cannot result in fines greater than \$2,000 unless otherwise specified. Corporations may pay greater fines than individuals for some offences.

When a fine is imposed, the offender is advised of a period of time in prison that may be served in lieu of paying the fine. In addition, the judge usually permits the offender a period of time during which the fine must be paid, and the judge gears the time to the ability of the offender to pay. Failure to pay the fine will result in the offender being arrested, and unless other arrangements can be made with the court, the offender may serve the specified period of time in prison in lieu of payment of the fine. Fine surcharges of 15% are imposed in some jurisdictions and the funds go to assist victims of crime.

Suspended Sentence and Probation

These are two different forms of sentencing, but due to their similarities, it is appropriate to discuss them together. The suspended sentence is used most often for first or youthful offenders where there has been no violence involved in the crime. The judge sets the penalty as a specified number of months or years in prison, but does not “pass” sentence. In effect, the offender is advised that he or she must “keep the peace and be of good behaviour” for a period of time set out by the judge, and if the offender fails to do so, the sentence of time in prison will be imposed or “passed” and the offender will be sent to jail. The sentence of probation is similar except that it is a sentence. The offender is told that he or she must “keep the peace and be of good behaviour” for the duration of the term of probation. If the offender fails to do so, the offender is returned to court and an additional term of probation may be added, or the offender may be charged with the summary conviction *Criminal Code* offence of breach of probation.

The similarities of suspended sentence and probation include the fact that the offender is allowed to carry out the sentence in the community where he or she can continue to contribute to society, and the offender is expected to report at specified frequencies to a probation officer for guidance and support.

In contrast, a probation order may contain a number of terms and conditions selected by the judge with the offender specifically in mind. For example, if the offender has a “drinking problem”, the judge may include as a term of the probation order that the offender not frequent liquor outlets, or drink, or the offender may be required to attend counselling sessions for alcoholics. A probation order can be used to impose geographical limits on the offender, no contact orders with the target of the offender’s criminal conduct, prohibitions as to the ownership of firearms or animals, or as to being in the company of children under a specified age, etc. Or the probation order may include orders to forfeit weapons, or other property which is related to the criminal conduct of the offender.

Probation orders may be combined with small fines or prison sentences, if the judge feels this may be effective. Occasionally, where circumstances permit, the judge may order the offender to pay a sum of money each month into court, such funds to be paid to the tort victim of a crime where the offender caused measurable property loss or damage. This amounts to satisfying the civil tort action through the criminal justice system. It is only available when the offender has the means to pay the compensation, and the loss is demonstrable and measurable in dollars. The term of the probation would coincide with the time it would take to make the payments into court and satisfy the cost of the loss.

In other words, if the loss amounted to \$300, the court may order the offender to be on probation for six months, and to pay \$50 per month, so that the total amount was paid into court during the probation term.

The courts will impose suspended sentences and probation orders only once or twice. If a repeat offender is not benefiting from such lenient sentences, they will not be resorted to in future sentences for that offender.

Imprisonment

In cases where the first priority is the protection of the public, the judge may order an offender to be imprisoned for a period of time not to exceed the maximum specified in the statutory provision. If an offender is sentenced to two years or more, the offender shall be housed in a federally operated prison. If the offender is sentenced to two years less a day, or less, the offender will be housed in a provincial prison. Once sentenced to a period of time in prison, the offender will be assessed by special employees in the prison system as to the level of security necessary (maximum, medium or minimum), as well as any treatment or medical needs of the prisoner. The corrections system will attempt to house the offender in a facility near family and friends, so as to obtain the greatest opportunity for rehabilitation.

In cases of offenders designated “dangerous offenders” under s. 753 of the *Criminal Code*, the prison sentence is undetermined, and depends upon the successful rehabilitation of the offender. This is the only circumstance under which a person may be sentenced to prison in Canada without having a fixed term of imprisonment.

Prison sentences for multiple convictions may be passed consecutively or concurrently. In other words, an offender sentenced to prison for three offences, where the sentences are 2 months, 8 months, and one year, would serve one year if the sentences were imposed concurrently, and 22 months if the sentences were to be served consecutively. Intermittent sentences in prison are also imposed. They occur when the offender is employed or has other obligations in the community, and where the offence is not of a violent nature. In such cases, the judge may order the offender to serve the short (no more than 90 days) prison sentence on weekends, or days off, or days when the family and financial obligations of the offender do not have to be met.

USEFUL READING

Griffiths, Curt T. and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, Chapters 8 and 9.

Chapter 2: Community-Based Corrections

Definition

The term “community-based corrections” can be applied to that part of the criminal justice system that oversees persons who have been convicted or plead guilty in court, and whose punishment allows them, at some point, to live in the community under certain conditions. There are two routes that may lead an offender to a community-based corrections status: as a result of the sentence of the court, and as a result of early release from prison.

Sentence of the Court

Probation

Offenders who have been found or plead guilty may be sentenced to a term of probation, or to conditional discharge, or may have the passage of the sentence suspended as detailed in the previous chapter. In all cases, the offender will be assigned to a probation officer whose function is to guide and supervise the offender through their probation period. This will include ensuring that the offender abides by conditions imposed by the court. In the case of a suspended sentence, the offender may simply be required to “keep the peace and be of good behaviour” for a specified period. In the cases of probation and the conditional discharge, the offender will have additional conditions attached to the term of probation, such as remaining sober, remaining out of specified geographical areas, and forfeiting weapons or other items determined by the court to be unsuitable in the hands of the offender. The fact of the sentence and the terms of the sentence should be available to communications staff either through local files or CPIC.

When an offender fails to abide by the terms of a suspended sentence, probation order or conditional discharge, additional criminal sanctions may apply. In the case of a suspended sentence, the offender may be brought before the sentencing judge to have sentence passed (which usually involves a short jail term). In the case of probation, the offender may be charged with the offence of breaching the terms of the probation order. This is a summary conviction offence found in s. 740 of the *Criminal Code*. In the case of a conditional discharge, the breaching of terms will result in the revoking of the conditional discharge by a court, and a different sentence may be substituted. If a call taker is advised by a caller that an offender has breached the terms of a probation order, or conditional discharge, it may be necessary to confirm the terms of the probation order or conditional discharge, notify the assigned probation officer, and perhaps, arrange for police presence.

The offender may have breached the terms of any of these sentences by committing another crime, in which case, the criminal justice process may proceed not only against the breach, but also with charges for the subsequent offence.

Early Release from Prison

In cases where the court has imposed a prison sentence on an offender, there is usually a point in time when the offender is permitted to serve the rest of the prison sentence in the community, in this case, under the supervision of a parole officer.

There are a number of kinds of conditional release from prison: temporary absence, escorted and unescorted; day parole, escorted and unescorted; full parole, and statutory release (formerly called mandatory supervision). A new form of sentencing, called a “conditional sentence”, although not a release from prison, requires supervision and conditions similar to those set out in full parole.

Temporary Absence

A prisoner on “temporary absence” may be permitted to live in the community, or may be required to return to the prison institution each evening. Depending on the level of risk to the public, a prisoner’s temporary absence may be escorted by a corrections officer. Maximum security prisoners are not eligible for temporary absences.

The range of purposes for temporary absences include visits to a dentist, attendance at a community educational program, family visits, employment and preparation of the prisoner for eventual release. The decision to permit temporary absences is made within the institution. Such absences carry a host of conditions, and a prisoner found in circumstances which breach those conditions is returned directly to the prison institution. Generally, temporary absences are not available to prisoners until they have served the longer of one-sixth of the prison term or six months. In the case of prisoners sentenced to life in prison, the eligibility date for temporary absences is three years before their parole eligibility date, and in the case of dangerous offenders who are sentenced to indeterminate terms, the eligibility date for temporary absences is after three years imprisonment.

Day Parole

The purpose of “day parole” is to prepare the prisoner for life in the community when the parole eligibility date arrives. Eligibility is based on whether the prisoner is serving time in a federal prison (two years or more) or a provincial institution (two years, less a day, or less). For federal prisoners, day parole eligibility occurs when the prisoner has served the longer of one-sixth of the prison term or six months. Provincial offenders are eligible for day parole

after serving one-half of the time before full parole eligibility is reached. Prisoners granted day parole often spend that part of their prison sentence in “half-way” houses in the community, under supervision. Conditions attach to this form of release, and offenders in breach of such conditions are returned to the institution. The decision to release on day parole is made within the prison institution.

Full Parole

Generally, prisoners are eligible to apply for parole after they have served the shorter of one-third of their prison sentence or seven years. Exceptions to this general rule apply to persons sentenced to a mandatory sentence of life imprisonment, for example, in cases of first degree murder. These offenders must serve the mandatory 25 years before they are eligible to apply for parole. This provision has an exception under s. 745 of the *Criminal Code*, better known as the “faint hope clause” which permits such persons, after serving fifteen years, to ask a jury to decide whether full parole eligibility should be considered at this earlier date. Full parole is determined by either the federal or the provincial parole board, depending upon the category of institution that is housing the offender. The parole board will impose conditions on a person being released on parole, and such a person is supervised by a parole officer. Failure to abide by the conditions of release can lead to immediate return to the prison and further prosecution for any offences committed during release.

Statutory Release (formerly Mandatory Supervision)

Some prisoners do not apply for parole, even after their parole eligibility date has passed. Some prisoners are denied parole when they apply. As federal prisoners serve their time in prison, they are granted one day of “earned remission” for each two days served with good behaviour. This means that one-third of the prison sentence may be served in the community, if the prisoner has not caused any difficulty in prison sufficient to lose days of earned remission, whether or not the prisoner has applied for parole, and whether or not such an application was denied. The eligibility for such release occurs when the length of the sentence remaining to be served equals the length of the earned remission time.

Until the early 1990s, prisoners whose earned remission finally equaled the remainder of their prison sentence, were released into the community on mandatory supervision, even though the prison officials had reason to believe that the prisoner would re-offend in a serious way shortly after release. Several notorious cases where this happened led to an amendment to the federal statutory provisions governing such release. The result was mainly a change in terminology, and a restriction on release of those prisoners deemed to be too dangerous.

Now, prisoners with sufficient earned remission, who are not a risk to the community, are released on statutory release. Those who are seen as a risk, in spite of accumulated earned remission, are kept in prison, perhaps for the remainder of the prison sentence imposed.

Offenders on statutory release have conditions attached to their behaviour while living in the community. They are supervised by parole officers, and failure to abide by those conditions will result in immediate return to prison.

Conditional Sentence

A new form of sentencing called a “conditional sentence” is now being utilized by the courts. This sentence is to be given when offenders have committed non-violent, but serious offences, where the threat of a prison sentence may assist in deterring the offender from such conduct in the future. The sentence allows the person to remain in the community, under the supervision of a parole officer, so long as the person abides by conditions imposed by the court. A conditional sentence can last up to two years. If the offender fails to abide by the conditions, the offender can be imprisoned.

The call taker should be aware of the status of persons who are on some form of release from prison, and be able to access the necessary information to learn the conditions of release, and to contact the parolee’s parole officer, if appropriate.

The call taker should also understand the important differences between a person on a form of probation, and a person who is on parole, and the attendant requirements for the handling of each.

USEFUL READING

Curt T. Griffiths and Simon N. Verdun-Jones. *Canadian Criminal Justice*. 2nd ed. Toronto: Harcourt Brace, 1994, chapter 12.

SECTION 8 LEGAL RESEARCH

Chapter 1: Statute and Case Law Use

There are two sources of law in our common law legal system. They are statute and judge-made law (also known as common law or case law).

When learning what the law is in a particular area, it is necessary to search for statutes that may deal with it, and then to search for judges' decisions that may affect the statute. If there is no statute covering the area, then the law in that area is judge-made and it is necessary to learn the law through judges' decisions. See the Introduction and Section 1, Chapter 4 for a fuller discussion of the relation between statute and judge-made law.

To research statute and judge-made law, it is first necessary to learn how to find it. There is a system that must be used to find statute and a system to find judge-made law. In each system, certain numbers and letters are used in specific order, much like a street or Internet address. The system of setting out the "address" of a statute or a judge's decision is called "citing" or providing a "citation". Much like any other reference to a source of information in a book or article, the citation tells the reader where to find the law in the form of a statutory provision or a judicial decision. Statute and case names should either be italicized or underlined.

Statutes and Citations

When searching for law to be found in statute, the researcher must first determine whether the statute is a federal one, a provincial one, or a municipal one. For a discussion of the division of powers between the federal and provincial governments, please refer to Section 1, Chapter 2. Once the government jurisdiction of the statute has been determined, the researcher must go to the index to the statutes at that government level. It is necessary for the researcher to think long and carefully about the key words that may have been used in the index to locate the area of statute law.

For example, if the researcher was interested in the statute law which prohibits having *animals* ride in the back of a *pick-up truck* without being *restrained*, the researcher would first have to determine whether the law was under the federal jurisdiction, provincial jurisdiction or municipal jurisdiction. The answer is that it would be found under provincial

jurisdiction, and the researcher might have to check all three levels of government statute before knowing this. All provinces follow the same system for citing statutes. The example that we are using here involves B.C. statutes.

Once the index to the provincial statutes was found, the researcher would have to search for the most likely key words that would lead to the provision. The underlined words above would not lead the researcher to the provision. Instead the provision would be found under “domestic animals”, “transport of”. As you can see, the researcher must use a great deal of imagination and determination to find the particular statutory provision.

Once the provision has been found in the index, it is necessary to use the “address” given in the index to find the statute on the shelf. The provision mentioned above would appear in the index as:

domestic animals,
 transportation of, c. 288, s. 66

The index being consulted is the index to the Revised Statutes of British Columbia, which was last revised in 1996. Hence part of the citation would contain:

R.S.B.C. 1996

All the provincial statutes are placed in alphabetical order, and then numbered. Just like any other book, the parts of the book (in this case, each statute) are called chapters. So each provincial statute is a chapter in the book of statutes and has a name, and a chapter number. Chapter 288 (c. 288 above) is the number of the chapter named *Motor Vehicle Act*. Within the *Motor Vehicle Act*, section 66 (s. 66 above) is the provision that prohibits the transportation of domestic animals in open vehicles without their being restrained.

So the full citation for this provision is:

Motor Vehicle Act, R.S.B.C. 1996, c. 288, s. 66

Statutes are printed by the Queen’s Printer for the federal or provincial governments. Municipal statutes are printed by the municipality. Federal and provincial statutes are sold to libraries, law firms, colleges etc. in one of two forms: loose-leaf or bound. The form of the statutes has an impact on the appearance of the citation.

For example, when a provincial statute is created after the last revision in 1996, it is not part of the R.S.B.C. 1996. This part of the citation will instead appear as S.B.C. 1982 (or whatever year the provision was created after 1996). (Note the “R”. is missing because it refers to the 1996 revision, and the year of the new statute reflects a year later than 1996.) If

this is the case, the chapter number will also reflect the creation of a new statute. Because statutes are placed in alphabetical order, a new statute could be placed alphabetically in the loose-leaf book between two old statutes that are numbered 193 and 194, for example. The new statute placed between them would be given a decimal number to show that it falls alphabetically between the other two. The new statute would probably be numbered 193.1. If only part of a statute was being changed, the change would be added on a new page, and included in the old statute as an amendment to it. A new section in an existing statute would carry a section number with a decimal point. For example, a new section placed between two existing sections numbered 264 and 265 would appear as 264.1 This is the case if the statutes are in loose-leaf type books.

Some libraries do not wish to pay the extra cost of loose-leaf form, so they buy the 1996 statutes in bound form. This means that the new statutes or sections cannot be inserted between the existing statutes or sections. In this case the new statute will remain in a separate bound book that was created to hold the new statutes created by the province or the government for that year. So, in our example, the new statute would be found in the supplement to the 1996 statutes and particularly in the year that included new statutes for 1982. Because it is in a different book, it would have a different chapter number. If only a part of a statute is being changed, it would also have to go into the supplement for the year of the change. Thus, if the statute being researched is in bound form, it is necessary for the researcher to consult the last revised statutes and then consult the index to the supplements to be sure the 1996 statute hasn't been repealed or amended.

The federal statutes follow the same pattern. If the researcher looked up the definition of criminal negligence in the federal statutes it would appear as criminal negligence, c. C-46, s. 219

Federal statutes are also considered chapters and are placed in alphabetical order and numbered. But the numbering system is a bit different. Rather than number all the statutes in consecutive order, the federal government numbering system begins with the number 1 at the beginning of each letter of the alphabet. So C-46 refers to the 46th statute (chapter) under the Cs. When the researcher goes to the federal statutes on the shelf and looks up the 46th statute (chapter) under the Cs, the researcher will find the statute named the *Criminal Code*.

Federal statutes were last revised in 1985, and so part of the citation would be

R.S.C. 1985

So the full citation for the provision that defines criminal negligence is

Criminal Code, R.S.C. 1985, c. C-46, s. 219.

The rules for adding new statutes or parts of statutes for the federal revised statutes follow the same pattern as explained above for provincial statutes. Federal statutes can come in loose-leaf or bound forms. So the method of research and of citation varies as it does with provincial statutes depending upon whether the library copy of the federal statutes is in bound form or loose-leaf form.

In order to emphasize and set apart the reference to statute in a composition, the title of the statute should be underlined or placed in italics as shown above.

The federal statutes and some provinces' statutes are now available on the electronic medium (CD-ROM, disk or Internet). Many college, university and law libraries are converting to these sources for statutes. The researcher will still use the procedures set out above to find statute in the electronic medium, and the same format will be necessary for citations.

Case Law and Citations

Courts are in session across Canada throughout each week, and judges are turning out decisions that may uphold or alter the existing law. This judge-made law is also called "case law" because it is the law stated by the judge in a case. When a judge makes a decision in a legal dispute, and the decision alters the existing law in a significant way, private publishing companies print the judge's decision. The private publishing companies create "legal reports" in series and these reports contain what that company believes to be the most important case law at the time in relation to the type of law being reported. For example, Motor Vehicle Reports contains judges' decisions that affect the law governing motor vehicle matters. Reports of Family Law contain the most important judges' decision in the area of family law.

There are several law reporting systems in Canada; some companies publish several reporting systems covering many areas of law. Each system produces approximately four to eight books per year, depending upon the area of law, and each book costs approximately \$80-\$100. Depending upon the demand and the budget, most colleges, institutes and universities subscribe to a few reporting systems. Local court houses and law schools will possess the most comprehensive collections. Some of the more commonly held reporting systems are:

- Canadian Criminal Cases (C.C.C.)
- Criminal Reports (C.R.)
- Dominion Law Reports (D.L.R.)

- Supreme Court Reports [S.C.R.]

The first two of these systems, C.C.C. and C.R. report the most important case law in criminal law matters decided by judges across Canada. The cases are almost exclusively from the appeal courts of the provinces and the Supreme Court of Canada. For a further discussion on the court system, please refer to Chapter 2. On rare occasions, a trial judge's decision may be reported if it is seen as indicating a change or trend in the interpretation or application of the law. D.L.R. reports case law from all areas of legal issues (i.e., family, contract, constitutional, administrative, wills and estates, etc.) including criminal law matters. But due to space limitations, only the most important cases in each field are reported. D.L.R. reports on cases that have arisen anywhere in Canada. The S.C.R. is not published privately but by the federal Queen's Printer, and it reports all decision of the Supreme Court of Canada. It should be noted that the S.C.C. confines the cases it hears to those of major national significance. The researcher may find several other reporting systems in a library, in addition to the ones listed above. The process of research is the same. Most libraries which carry law reporting systems will also have a few books on using a law library, and these are very useful in legal research.

The citation for a case, as with statute, also follows an unalterable pattern. The following is a sample citation for a judge's decision:

Regina v. Brown, (1984) 17 C.C.C. (3d) 146 (Ont. C.A.)

In order to understand how to decipher this citation, it is necessary to break it down into parts.

Regina v. Brown is – the title of the case and it should be in italics or underlined. The word “*Regina*” or “*Rex*” in the name of a case in Canada signifies that the case is of a criminal nature. *Regina* stands for the female monarch, and *Rex*, the male monarch. Criminal cases will also use the term “the Queen” or “the King”. Because the reigning monarch is female, the terms *Regina* and “the Queen” are used for arising criminal cases. A case with *Rex* or “the King” in the title dates back to before Elizabeth's coronation in 1953.

Usually, the name appearing first in the title of the case is the name of the person or agency initiating the action, so in the sample above, the government, in the name of the Queen is initiating the criminal prosecution. If the title was *Brown v. The Queen*, it usually indicates that Brown is appealing, and is thus launching the court action.

C.C.C. – is the reporting system in which the case will be found: Canadian Criminal Cases

(1984) – is the year the case was decided by the court level being reported

17 – is the volume number of the book in which the case is being reported

(3d) – represents the series number. Some reporting systems change and improve the appearance and usefulness of their books to researchers every 10 or 15 years and when they do so, they begin a new series. This indicates that the researcher must go to the 3rd series of C.C.C. to find the volume 17 that contains the case of *R. v. Brown*. The first and second series would contain a volume 17, too.

146 – is the page number in volume 17 of the third series on which the case of *R. v. Brown* begins.

(Ont. C.A.) – stands for the Ontario Court of Appeal, the court level at which this decision was rendered.

So, in order to find this case, the researcher must first find the reporting system in the library. Then, the researcher must go to the series indicated in the citation. Next, the researcher finds the correct volume number, and finally, opens that volume to the correct page number. There, the researcher should find the first page of the case of *R. v. Brown*.

Knowing the court level is not necessary in order to find the case, but the researcher should know at what court level the decision was rendered in order to appreciate its power as a judicial decision. For further information on the doctrines of *stare decisis* and precedent, and their affect on the power of judicial decisions, please refer to Section 1, Chapter 5..

Some reporting systems chose to have citations that do not fit this pattern completely. For example,

R. v. Brown [1984] 2 S.C.R. 912 (S.C.C.)

In this citation, the year is in square brackets instead of round ones, and there is no series number. The rest of the pattern remains with 2 referring to the volume number, and 912 referring to the page in that book. In reporting systems that use square brackets, each year is considered the beginning of a new series and the first volume published each year is volume 1. This means that every year of the reporting system will have a volume 1, 2, 3, etc. The square brackets indicate that the researcher must use the year to find the book on the shelf. The year in the square brackets indicates the year the case was reported in this particular system. In the example, above, the researcher would first find the collection of books entitled

S.C.R. (Supreme Court Reports). Next, the researcher would find those books with cases reported in 1984. The years appear on the spine of the book. Then the researcher would find volume 2, take it off the shelf and open it to p. 912. There the researcher should find the first page of the case entitled *R v. Brown*.

Each publishing system has its own method of indexing the cases it reports. All cases are listed by the case name in an alphabetical index. Indexes setting out the case names are called “Case Index” or “Table of Cases” or other similar terms. Some publishing companies cross-index each name twice (at least) because each case contains at least two parties. For example:

ABC Janitor Supply v. Brown

(vs. or v. means “versus” or “against”)

Brown, ats ABC Janitor Supply

(ats means “at the suit of” or “being sued by”)

For this reason, the case index must be scrutinized carefully in more than one place to make sure the Brown case is found.

Finding Case Law when Case Names are not Known

When a researcher is attempting to learn what the current judicial decisions are in regard to a particular area of the law, the researcher must use one of the other parts of the case reporting system index. If, for example, a researcher wishes to read cases in which police officers have been assaulted, to determine what the courts see as the legal requirements for conviction, the researcher must examine the Subject Index (also called the Digest of Cases or the Cumulative Index). Here, the researcher must look for key words which may lead to the sought after cases. In some case reporting indexes, the cases may be found under “assault” in a sub-category for “peace officer”. In another system, the publishers may have chosen to place such cases under “peace officer”, with the sub-category being “assault”. The researcher must be very patient in formulating all possible key words, and may be assisted by reading parts of texts in the library that deal with the topic. For example, the offence of assaulting a peace officer may be discussed in texts on police procedures, or generally, on criminal law. When the researcher finds that part of the subject index which lists the cases dealing with assaults on police officers, the researcher will also see the case names and citations for some of the cases in which such an issue has been judged.

Another approach to researching the issue of, for example, assaults on police officers would be to go to that section of the reporting system index which is entitled “Statutes Considered”. Here the researcher would have to know the citation for the statutory provision which makes

assaults of police officers an offence (*Criminal Code*, R.S.C. 1985, c. C-46, s. 270). The researcher would search under the heading “Statutes Considered” for the statute and year of revision and finally, the section number. Under that section number the researcher would find a number of cases that have dealt with that offence. The citations would lead the researcher to the cases on the shelf.

The indexes to reporting systems are published about every 25 volumes and therefore only cover the case law for that reporting system for about four years. Each volume has its own index, as well. So, the researcher must check all indexes to do a thorough search for the relevant case law. If there is more than one reporting system available, the researcher should perform the same techniques on the other systems as well. These systems are in competition with one another, and do not necessarily report the same cases.

Annotated Statutes

Another research tool is the “annotated” statute. This is a statute that contains all the statutory provisions, but in addition, the publisher has provided short descriptions of recent, high court level cases which have been decided and which relate to some section or part of the statute. Not every section of a statute would have been dealt with in court cases, so not every section has case law attached in the annotated statute. The *Criminal Code*, *Controlled Drugs and Substances Act*, *Food and Drugs Act* and *Youth Criminal Justice Act* and Charter of Rights and Freedoms have been reproduced by publishers who have included annotations which are useful to the researcher.

Some annotated statutes are published yearly, and others are in loose-leaf form and are updated by the library about four times each year. The researcher should check the most current annotated statute first, then if the information is not found, the researcher can check previous years’ publications.

Whenever research is being done on the law, the researcher should make sure that both the statute and the case law are current. Twenty-year old cases are seldom applicable to current law, and cases from higher courts are more powerful than cases from lower courts. Cases from other provinces or countries are less powerful than cases from the Supreme Court of Canada or cases in the province in which the issue is being examined.

USEFUL READING

Margaret A. Banks and Karen E. H. Foti *Banks on Using a Law Library, A Canadian Guide to Legal Research*. Scarborough, Ontario: Carswell, 1994.

SECTION 9

CIVIL LIABILITY OF PUBLIC SAFETY COMMUNICATIONS OPERATORS

Chapter 1:

Negligence in Civil Actions

Duty of Care

One of the private law areas of most concern to us all is the field of non-criminal negligence. We are concerned enough to shovel our sidewalks after a snowfall, or fix a rickety stair so that friends, relatives and strangers will not be injured due to our failure to protect them from harm while they are within our boundaries. All members of society have a duty to act in ways that will not harm others. It is commonly called a “duty of care” . This responsibility is determined using the reasonableness test. If a person carries out an act, or fails to do something that a reasonable person would see as a potential danger to others, and someone is injured as a result, the person is liable in the tort of negligence for all reasonable losses suffered.

For example, Mr. Brown has a very large, heavy old apple tree growing near his fence, and the tree branches stretch over the fence and over the neighbor’s motor home that is stored on the other side of the fence. The tree is loaded with apples and the limbs are bowing due to the weight of the apples. There is a storm with rain and wind. The large limb suspended over the motor home breaks with the weight and the wind and damages the neighbor’s motor home. Mr. Brown has been negligent. The neighbor could sue Mr. Brown for the tort of negligence.

In order for the neighbor to succeed, he must prove, on a balance of probabilities:

- Mr. Brown had a duty of care to protect the neighbor’s property from his overhanging tree.
- The reasonable person would have foreseen the potential for damage due to the heavy limb hanging over the motor home.
- The reasonable person would have taken steps to prevent the damage from occurring by pruning the tree, propping up the heavy limb, picking the apples, or asking the neighbor to move the motor home until the danger was past.
- Mr. Brown failed to take reasonable steps to perform his duty of care.

- Mr. Brown's failure caused the damage to the motor home.

The tort of negligence is available to any person who suffers a loss at the hands of another, except when the legal arrangement between them involved a contract. The tort of negligence is available when a person, registered society or incorporated company suffered the loss or caused the loss. In most cases, even governments can sue and be sued in tort, although there are cases where governments invoke Crown immunity from such actions. In other words, police departments, government highways departments, taxi firms, and individuals may be sued for negligence. In addition, where it appears that individuals within these agencies were personally negligent, the person suffering the loss can sue both the agency and the individual. It is not unusual for a person who believes they have suffered a loss as a result of the negligent actions of a police department to commence a civil suit against the police department and the police officer directly involved and it is no different for a call taker or police dispatcher.

The loss may be physical, such as broken bones, a shortened life span, or a loss of quality and enjoyment of life. The loss may be psychological, such as depression, mental disorder, anxiety or phobias. Or the loss may be monetary, such as property damage, lost wages, or loss of future earnings. Or the person may have suffered a combination of such losses. All losses caused by the negligence of the defendant will be compensated as the judge determines, and the usual method of compensation is by the payment of a sum of money.

Liability

In a case where an agency is being sued in negligence, the plaintiff (the person who has suffered the loss and is initiating the suit) may add as a defendant the individual employee directly involved. As the evidence is presented in court, it may turn out that the employee was acting beyond the scope or policies of the agency. If this is the case, then the judge would find the agency not liable, and the individual employee liable for the losses suffered by the plaintiff. If the employee was acting within the rules of the agency, then the agency alone would be responsible for the loss. If both the employee and the agency were failing in their duties of care, then they would be "jointly and severally liable" which means that the plaintiff could collect compensation for the damages from either the employee or the employer, or from both to the full amount of the damages allowed by the judge (but not the full amount from each). Usually, in the attempt to collect the damages awarded, the plaintiff will focus attention on the party with the "deeper pockets". In other words, even though an employee has been found jointly liable in negligence, it is likely that the employer will be pursued by the plaintiff for compensation more vigorously. However, in the case where the

negligence is due solely to the conduct of the employee, the plaintiff has the power to seize real property and chattels, garnishee wages, and intercept payments (for example, income tax refunds, debt payments) before they reach the defendant employee.

The liability for negligence is a “threat” to all of us. However, some activities invite the potential for suit more than others. A company that offers “white water rafting” as a recreation, is more likely to be sued for negligence than a charitable society which cares for stray animals. Although police employees are much lower on the scale than white water rafting enterprises, there is greater potential for civil action than most occupations.

Precautions Against Negligence Claims

In addition to all the other reasons why call takers and police dispatchers should do their jobs well, there is the threat of a civil suit for negligence.

It is for this reason that call takers and police dispatchers should take careful note of and perform the requirements of all policies and directives that affect their work. If possible, call takers and police dispatchers should create a personal file of such policies and directives. If a call taker or police dispatcher is given an order which appears to be contrary to those policies and directives, the call taker or dispatcher should question the person giving the order, and if possible obtain the order in written form. Or, the call taker or dispatcher may wish to have the order confirmed by a supervisor. If at all possible, the call taker or dispatcher should have another person witness the order being given. Although this may appear to be an over-reaction, such measures can prevent an unfortunate occurrence, and if this is not possible, will at least protect the call taker or dispatcher if it is alleged that they were the party who was negligent and not the order-giver, the supervisor or the agency.

An example may assist. A caller indicates in a drunken, emotional voice that there is a body in the back seat of a car parked in the back lane. This caller has been a nuisance in the past for reporting non-existent problems, and is always drunk when making these calls. It is a busy Friday night, and the police department is short of cars. The call taker decides to disregard the caller’s information. The next morning, a man is found in the back seat of his car parked in the back lane, just as the caller had indicated. He is in a diabetic coma and is rushed to the hospital but dies shortly after arrival. His family is able to determine that a call was made to the police department at a time when police and medical attention would have saved his life. The family sues the police department and the call taker.

If the evidence shows that the judgment of the call taker was reasonable, based on the history of the caller’s drinking habits and unreliability in reporting real incidents, then the judge could rule that the call taker had not fallen below the reasonable standards of the duty of care.

If the court ruled that all such calls should be responded to, and that the call taker failed in the duty of care, then the call taker could be personally liable for the losses suffered by the deceased's family. If, however, the call taker checked with the supervisor who directed the call taker to disregard the call, then the supervisor would also be a defendant in the civil action. If the agency had a policy that supported the decision of the supervisor, then the agency would also be a defendant in the suit.

The call taker would need evidence that such an order was given by the supervisor, in order to spread the liability to include others who were responsible. Evidence of the agency policy dealing with such calls would also assist the employee who carried out such policies, and in doing so brought about the loss.

It is not suggested that call takers and dispatchers should be documenting all actions and seeking approval for all decisions. The likelihood of a civil action for negligence is very small. However, the call taker and dispatcher should be aware of the importance of operating within the confines of the agency's rules, for the protection of the public, as well as the employee. Finally, if a call taker or dispatcher observes a policy or practice which has the potential for negligence actions against the employer, the employer should be advised and be open to such worthwhile employee suggestions.

USEFUL READING

Yates, Richard A. *Business Law in Canada*. 3rd ed. Scarborough, Ont. Prentice-Hall, 1992, pp. 85-99.