

**Sociology 3395: Criminal Justice & Corrections**  
**Classes 13 & 14: The Courts and Criminal Trial**

**Procedure**

The courts play an important role in our CJS, expected to simultaneously identify the guilty, free the innocent, provide a deterrent, safeguard civil liberties, punish the guilty and rehabilitate criminals. Yet, again, we must remember that very few individuals charged actually go to trial (9% in 1999-2000, the rest being guilty pleas or cases terminated without trial).

Beyond questions over the role of providing legal aid due to the burden of self-represented accused, as discussed in your book, another major issue is overburdened courts. Plea bargaining has been the traditional, though unofficial, way of dealing with this. However, this still didn't stop the Askov case where the SCC threw out over 100,000 cases for having been delayed too long due to scheduling problems and loaded dockets (an infringement of the right to a speedy trial). Though this occurred 14 years ago, the issue of court delay remains critical (though the SCC has ruled that cases should take less than 10 months to move through the provincial court system and no more than another 8 months to reach trial in a provincial Supreme Court, there have been many cases where things took much longer and have been routinely dismissed as a result). Nationally, despite attempts to speed things along in the courts, between 1995-96 there was a 9% increase in the median elapsed time from the first to last appearance in court, growing from 77-84 days. Moreover, efforts to speed things up have led some, particularly advocates of the due process model, to question whether justice is being sacrificed for efficiency. As a result, mediation services, specialty domestic violence and drug courts, and plea bargaining have been employed to help. Whatever the solutions, we must also remember that advocates of the crime control model argue that speed and efficiency in the courts are benefits rather than shortcomings.

**The Functions of the Courts:**

The crime control and due process models we discussed at the outset of this course are applicable to our court system. Yet, a third "bureaucratic function" model has also been developed, rooted in the informal nature of our CJS, in an attempt to provide an alternative perspective on the courts.

Under the due process model, the primary focus of our courts is to protect citizens from the unfair advantages held by the state. Rights guaranteed under the Charter are viewed as "equalizers" so that various parties in the courtroom are on as equal a footing as possible. This approach also emphasizes the adversarial nature of our court system, including a neutral and impartial decision-maker, equal chances to the

presented evidence by crown and defense, and a highly structured set of procedures that must be followed. Through this system, due process advocates argue that truth is discovered and upheld by the courts.

The crime control model, in contrast, urges that safeguarding individual liberties is of secondary importance to the value of protecting society from criminals. Hence, it is OK for the police to use devious techniques to outwit offenders, and for the courts to emphasize punishment for offenders' actions and the harms they have inflicted. The main goal of the courts is not so much to ensure that the accused is given a fair chance, but to achieve justice through deterrence and lengthy punishments. Constitutional rights are meant to protect the law abiding citizen, not the accused.

The new "bureaucratic function" model noted above is different than both of these traditional approaches in that it focuses more on the day to day operations of the courts. While both constitutional rights and punishment are considered, the day to day issues facing the operation of the courts come to the forefront. Issues of speed, efficiency, backlogged dockets, etc. become significant. Rather than have a number of offenders serve so much time waiting for their cases to be heard that they are released for "time served" rather than sent to jail, the real measure of success for judges becomes their ability to move cases along rather than questioning whether justice has been served. As such, for some observers, the real adversarial nature of our courts is not between the crown and the accused, but between the ideal of justice and the reality of bureaucratic limitations.

### **The Organization of Canadian Criminal Courts:**

The Canadian CJS involves a variety of provincial and federal courts (13 provincial/territorial courts and the federal government). Each differs from the others in certain ways. Each court has a geographical jurisdiction (either a province or territory, with the SCC having jurisdiction over the whole country). Provinces and territories vary in their coverage, with some larger towns and cities having permanent courts of various levels; some rural areas being served by circuit courts.

Provincial courts are divided into courts of limited jurisdiction and courts of general jurisdiction. The former are those that specialize in certain areas, such as motor vehicle cases. Judges sitting alone presides over the proceedings, and most minor criminal cases are dealt with here. Also, these serve as venues for police to swear out informations, get authorizations for search and seizure, summonses, subpoenas, and remand warrants. Courts of general jurisdiction, however, deal with the most serious criminal offences, and depending on the offence, the case may be decided by a judge

and jury or a judge sitting alone. In order to cut the backlogs here, some provinces have now introduced specialized courts that focus solely on things like family violence or drug offences. Finally, there are also courts of appeal in each province/territory that act as institutions to review decisions by the lower courts.

The SCC is essentially an appeal court, but has authority over the decisions of all provincial/territorial appeal courts, as well as those coming from the federal court system. It has final authority over all public and private law in Canada. This means it can rule on all federal, provincial and municipal laws, as well as all common law, legislation, and constitutional interpretation. It hears a limited number of cases a year (105-140), most of which are hand picked by a special committee of Justices because they are felt to involve legal issues of general importance. The rest involve “as of right” appeals where either the Crown or the defense has a right to appeal in a criminal matter when provincial appeal courts involved dissenting opinions, or when appeal courts overturned a trial acquittal.

The SCC creates criminal justice policy in 2 ways. First, judicial review enables the SCC to determine whether a given law or policy is constitutional (e.g. same sex marriage, the anti-terrorist legislation, etc). Secondly, the SCC has the authority to interpret the law, deciding on the meaning of statutory laws when applied to particular situations (e.g. whether the wording of a section of the Criminal Code involves a subjective or objective interpretation of *mens rea*).

It is common to refer to the “lower” and “higher” courts in Canada. The former refers to provincially constituted courts which try all provincial and summary offences. The latter refer to those federally appointed courts which hear indictable offences. These include appeal courts, which have the final say in a given jurisdiction unless there is a right, or leave to appeal is granted by the SCC.

### **The Court System:**

The term “court” refers to a rather complex part of the CJS. Before entering court, all that exist are suspected criminal offences, allegations, police investigations, charges and bail-related issues. The only proof required beforehand is probable cause. In order to actually convict an offender, proof beyond a reasonable doubt is required. This high standard is meant to ensure that those proven legally guilty are punished, not those thought to be so. It is felt that higher standards of proof contribute to higher public confidence in both the fairness and accuracy of the CJS.

Once arrested individuals enter their plea, they face a series of decisions that have a significant impact on their case and potential

punishment. Aside from the issues facing accused, other central participants at this point include prosecutors, defense counsel, judges, juries and victims. Only court appointed officials can decide to detain accused before trial, only the courts can decide on his guilt or innocence, and only the courts can decide on the appropriate sentence.

Judges act as officers of the government in charge of a court of law. Their duties include deciding on admissibility of evidence, appropriate questions that may be asked, and any procedural issues that may arise. In jury trials, judges must also instruct the jury about evidence and the charges prior to their beginning deliberations. If a trial by judge alone, the judge actually decides on the guilt or innocence of the accused.

### **The Court System in Canada:**

Court procedures are governed by law, tradition, and judicial authority. These govern who may speak, when, and in what order. What can and cannot be said in court is dictated by the rules of evidence, as interpreted by the judge.

Studies of Canadian provincial courts consistently show that in most cases (70%) the accused pleads guilty during the first court appearance. At this lower court level, the police play an important role in prosecutorial discretion. Prosecutors generally have little time to prepare a case, so must rely on police information. In some cases, they even follow investigating officer's recommendations. Generally, research has shown that police work closely with prosecutors to avoid lengthy trials that tie up courts, judges, police, crown counsel and witnesses. Thus, if police are successful in getting statements of guilt from an accused, they can bargain with the defense from a strong position. In most of these cases (60%) offenders are given no concessions for their guilty pleas, and those who were able to get the number of charges reduced still received no guarantee of a shorter sentence.

Naturally, prosecutors can use their own discretion to stay proceedings, withdraw charges, or dismiss the charges altogether. Sometimes this is to expedite matters for victims, to speed up decision-making, or to protect child victims from the trauma of testifying in court. Other reasons include insufficient evidence, witness problems, due process problems, pleas on another charge, and referral to another jurisdiction for prosecution.

The defense counsel represents the legal rights of the accused in court. Though some believe s/he is a deal-maker who attempts to get the best bargain for his/her client, in fact defense counsel's primary role is to ensure that the client's legal rights are protected. To further this goal, they

generally examine all of the evidence police used to establish probable cause so as to assess the strength of the Crown's case in proving guilt beyond a reasonable doubt. This, of course, puts the defense at odds with the other parties in the case. Yet the role of defense is not to criticize anyone, but to assess the validity and reliability of the evidence used by the prosecution.

The defense is also responsible for preparing the case and selecting a strategy with which to attack the Crown's case. They also help most defendants, untrained in the law, to understand what is happening in court and the likely consequences of the charges if found guilty. In some cases the defense may also hire specialists to investigate certain aspects of the case or to get a second opinion.

Some of the most significant work of the defense involves discussing the case with the police and Crown. Many are familiar with each other and discuss the strengths of the client's case and the possibility of getting a successful plea bargain.

The defense may represent the accused throughout the CJS process, from the time of charge, through bail, plea negotiations, preliminary inquiries, jury selection, trial and sentencing. They may appeal a conviction or sentence, or argue for the most lenient sentence possible. Throughout the formal trial process, the defense must formally exercise professional skill and judgement in the conduct of the case and uphold the interest of the client without regard to any unpleasant consequence to himself or any other person. So, if the accused admits the crime to the defense, counsel may still act on his behalf by contesting legal issues (though it is considered unethical to suggest that someone else did it in these circumstances, or to introduce alibi evidence believed to be false).

Many defense counsel are asked how they can do their job - defending someone they know is guilty. In fact, they are required to protect even such clients as much as possible. Our legal system insists that accused persons have the legal right to use every legitimate resource to defend themselves, so defense counsel have to question the Crown's evidence and raise reasonable doubts about the accused's culpability. Indeed, some view the role of defense lawyers as being necessary to protect the integrity of our legal system. Trials can't happen without them.

The Crown, on the other hand, is responsible for presenting the state's case against the accused. Their prime duty is not to secure a conviction but to enforce the law and maintain justice by presenting all the evidence relevant to the crime being tried. As such, they must disclose to the defense all relevant facts and known witnesses that could influence the guilt, innocence or punishment of the accused.

Many prosecutors face a problem in maintaining an impartial role in the court in attempting to find the defendant guilty as charged. There is often pressure on prosecutors to gain as many convictions as possible, a pressure stemming from the need to maintain personal credibility at work (so as to avoid defense taking more cases to trial when s/he is the Crown) , as well as to maintain confidence in current administrative practices through a low acquittal rate. Essentially, to maintain credibility, prosecutors need a good batting average, to gain as many guilty pleas/ convictions as possible. Hence, caseload pressures force prosecutors in many cases to decide on the outcome of a case more on the basis of expediency than justice. This leads to criticisms that the CJS is little more than an assembly line.

Some argue that this role makes prosecutors more powerful simply because it enables them to virtually define the parameters of a court case (e.g. in the traditional opening address, given to the Crown, which makes a significant first impression as is suggested to have happened in the Milgaard case).

Prosecutors can be seen as the chief law enforcement officers in the court system. They represent provincial or federal A.G's or Ministers of Justice in all parts of their job, from the beginning to the end of court cases. Their most obvious responsibility is to try offences in the courts, but also act to examine documents and liaise with other officials to determine if further evidence is needed. As well, they interview victims and subpoena witnesses, decide when not to try a case, withdraw charges or decide when to offer no evidence so that the court will dismiss a case.

Crown prosecutors are responsible for trying a wide spectrum of cases involving a variety of charges. As they are often assigned to particular courtrooms instead of cases, a number of prosecutors may work on a single case as it winds its way through the court system. However, in recent years there has emerged a trend towards specialization in which special prosecution units try only cases involving specific charges, such as financial, drug, or domestic crimes.

For a number of reasons, the Crown may decide not to go ahead with charges despite the police believing that they should. In some provinces (BC, Quebec and NB) the police actually have to have prosecutors review and approve evidence before charges are laid. In the rest, charges can be laid by police, but the Crown may later decide not to go ahead with them. For indictable offences, as well, the defense may contest the evidence at a preliminary inquiry to determine whether sufficient evidence exists to go to trial. In such circumstances, the Crown must demonstrate that sufficient evidence exists - or may, in fact, pull the charges if they don't feel the case

is strong enough.

The scope of prosecutorial work is daunting, as Crown duties encompass the entire CJS from police investigation through to appeals. Hence, many prosecutors become overloaded with work (e.g. in 1990-92, Gomme and Hall found prosecutors routinely prosecuting 6-10 trials a day in provincial courts, 5 days a week). These levels increased during peak periods. Not only are prosecutors overloaded with work, this seriously cuts into the time needed for careful case preparation according to professional standards. Many prosecutors are susceptible to burnout, leading to questions about their professional effectiveness and about whether justice is compromised.

Judges, finally, act to uphold the rights of accused and arbitrate any disagreements between the Crown and defense in court. They also act as triers of fact in cases and may decide whether the accused is guilty or innocent along with the type and length of sentence. They ideally are viewed as objective participants so that their decisions on rules of law and procedure may be seen as acceptable to all parties involved.

Under our constitution, the federal Cabinet has the power to appoint Superior Court Trial judges, provincial and territorial Appeal Court judges, federal and tax court judges, and the Justices of the SCC. Provincial Cabinets appoint judges in the Provincial Court system beneath the level of the Superior Court. While some provinces regulate the appointment of provincial judiciary through “nonpartisan appointment procedures” (e.g. nominating committees), most provinces allow patronage to reign supreme in this respect. Of course, many good lawyers still get appointments, but some inappropriate ones occur under this system as well.

### **Criminal Trial Procedure:**

The criminal trial kicks off the adjudication stage of our CJS, and is really the centrepiece of our court system. If the accused pleads guilty, a date is set for sentencing. However, if the accused elects to be tried in court, s/he has various alternatives, depending on the charge. One possibility is trial by judge and jury (only about 2% of cases heard at the Superior Court level). Most are heard by judge alone.

In most cases an accused appearing in court for an indictable offence enters either a guilty or not guilty plea. However, aside from such general pleas, there are also special pleas available such as *autrefois acquit*, *autrefois convict*, and *pardon*. An estimated 90% of accused plead guilty prior to trial or when they appear in a lower court for the first time. If the accused pleads not guilty, a trial date is set that is acceptable to the Crown and defense. In most cases, the accused is released on the same terms as

before.

What happens next depends on the type of charge. In summary conviction cases, the trial is held in a summary conviction court (usually before a provincial court judge). If the accused pleads guilty they will either be sentenced immediately or remanded until sentencing. In indictable offences under the absolute jurisdiction of a provincial court, trial may either proceed immediately or be set over for another date.

When an accused is charged with an offence that must be tried by judge and jury, or elects to be so tried, the next step is a preliminary inquiry. In most cases this is waived by the accused with the consent of the prosecutor, especially if the accused and his/her lawyer know what evidence the Crown will be using during trial. A defendant is most likely to waive his/her right to a preliminary inquiry if s/he has already decided to plead guilty, wants to speed up the process and get to trial, or hopes to avoid negative publicity. Yet, the purpose of the preliminary inquiry is important and cannot be overlooked. It affords the defense an opportunity to see whether the Crown has collected enough evidence to proceed to trial and may serve to protect accused from being placed on trial unnecessarily.

During a preliminary inquiry, a provincial court judge or JP examines the evidence and hears witnesses in order to determine whether a reasonable jury (or judge) would find the accused guilty. The intention here is not to determine guilt, but to see if sufficient evidence is available to make the guilt of the accused a reasonable conclusion.

Preliminary inquiries are conducted in much the same way as regular trials. Most are open to the public, though accused or the Crown can request a publication ban (the defense has more rights in this regard). The Crown basically presents its evidence and witnesses and the defense has the right to challenge evidence and cross examine Crown witnesses. It isn't necessary for the Crown to present all the evidence so long as it presents sufficient evidence to the judge that a reasonable case can be made against the accused. Afterwards, the judge gives the accused a chance to speak (rarely do they do so, as such comments can be used against them at trial). After this, the defense can call any witnesses and the Crown can cross examine them. After all evidence is presented, the judge decides whether the prosecution has presented sufficient evidence to prosecute the accused. The judge weighs the evidence on the same basis he would use to assess the evidence at a criminal trial. If sufficient evidence has been presented, the judge sends the case to trial. If not, the charges are dropped and the defendant is freed. However, such a discharge doesn't mean that new evidence can't result in new charges against the accused, by way of direct indictment.



In common practice, the accused often waives the preliminary inquiry with the consent of the prosecutor, especially if s/he knows what evidence the crown will be using at trial, wants to speed things up, seeks to avoid negative publicity, or has decided to plead guilty. In 2003, due to ongoing debates over the role and need for preliminary inquiries, a new policy was introduced that now requires the crown or defense to explicitly request a preliminary inquiry.

As stated earlier, prosecutors don't necessarily proceed with charges brought to them by the police. Many cases are never brought to trial and Crown prosecutors have virtually unfettered discretion as to when to charge, what to charge, and when the charges should be reduced or dropped. Hence, the Crown can decide to proceed on the original charges, plea bargain, stay proceedings, or dismiss the charges outright. They also have the discretion to proceed by way of indictment or summary conviction in hybrid offences. Such discretionary powers inhere to prosecutors at all levels of criminal trials, and courts have been reluctant to reign it in despite the Charter.

The Crown's decision to proceed with a case or not is a major source of case attrition. This screening process involves consideration of several factors: (1) prosecutor's belief in there being enough good evidence to secure a conviction (or not); (2) case priorities, reflecting the seriousness of the offence, offender's record, and personal/political concerns about particular types of cases, such as impaired driving; (3) cooperativeness of witnesses; (4) the credibility of victims/witnesses; (5) whether the accused will testify against offenders in a bigger case.

Such case-processing decisions become integrated into a strategy for the prosecutor's office. A number of models have been developed to guide prosecutors when to proceed with a case and when to stay or drop charges. These include:

(1) The transfer model in which little screening occurs at the front end and most consideration is given to the resources available (more resources=more cases heard);

(2) The unit model, where individual prosecutors largely follow their own discretion;

(3) The legal sufficiency model, where cases are screened according to the legal elements of the charge.

(4) The system efficiency model, in which cases are disposed of in the quickest possible way. High success probability/less resource intensive cases are prioritized/others left behind;

(5) The trial sufficiency model, where cases only go ahead if a trial conviction is seen likely; and

(6) The defendant rehabilitation model, in which prosecutors decide to

proceed or not based on an assessment of whether the defendant can be rehabilitated/ helped by alternative programs rather than by charges.

Then there is the issue of plea-bargaining. This has been defined as the exchange of prosecutorial and judicial concessions for guilty pleas. It mostly occurs before trials begin, but can also happen at the trial stage when the defense comes to think that there may be a more favorable sentence ordered than if the trial proceeds.

Plea bargaining may take several forms. *Charge-bargaining* involves either the reduction of the charge to a lesser or included offence; the withdrawal or stay of other charges or the promise not to proceed on other charges; or the promise not to charge friends or family of the defendant. A *plea bargain for dropped charges* is the dropping of extraneous illegal actions contained in the complaint. *Sentence bargaining* involve Crown and defense agreeing to and recommending to the judge an appropriate sentence for the accused. Judges don't have to go along, but usually do (there are a variety of other specific promises worked out between the parties in such cases, such as to proceed by way of summary conviction and not to appeal). In the case of *fact bargaining*, both parties agree not to submit certain facts about the case or the offender's background into court such that the offender receives a lighter sentence. *Label bargaining* involves defense counsel have clients plead guilty to, say, assault rather than suffer the stigma of a more socially objectionable record for, say, child molestation.

Importantly, s.10(b) of the *Charter* provides that an essential component of prosecutorial discretion actually lies in negotiating such bargains with accused and their lawyers in criminal cases. Both parties are supposed to offer and receive some benefit in turn. All the same, as noted above, judges don't have to go along.

Plea bargaining, though an unofficial practice, exists because it serves a variety of purposes, including: (1) improving the administrative efficiency of the courts; (2) lowering the costs of prosecution; and (3) permitting the prosecution more time to devote to important cases.

Some prosecutors prefer to devote their time to serious crimes or to cases in which they have a good chance of securing a conviction, agreeing to accept guilty pleas in others to save the courts time and money, and reducing damage to their "batting average" and reputation. Moreover, they may, as a result, gain information about other criminals that may solve other crimes.

Plea bargaining has been both criticized and defended - indeed by the Law Reform Commission at different times. Some feel that it falls too

heavily on the poor; others that the system would bog down and be unworkable otherwise.

Next, we must consider the accused's right to a jury trial - to be democratically tried by a group of one's peers - under certain circumstances. S. 11(f) of the *Charter* provides that any person charged with an offense has this right when the maximum punishment is imprisonment for 5 years or more. Challenges to make this rule more widely applicable have failed. Moreover, most indictable offences are electable and many accused choose not to go the route of a jury trial. Note, as well, that once an accused is convicted and further proceedings take place on that basis (e.g. when a new trial is ordered; dangerous offender applications), there can be no additional jury trial (e.g. the Bernardo case).

If the accused chooses to be tried by judge and jury, jury selection follows. This is a 4 step procedure. First, a jury list is prepared of persons who may be qualified, under provincial law, to serve. Next, their identities are confirmed and some are disqualified under the exemptions listed in the legislation. Third, there is a selection of names from the remaining individuals of a jury panel, whom are summoned to court. Finally, these individuals in the jury panel appear in court for a further, in court, selection process. This is to determine which of the prospective jurors are impartial. In Canada, the judge does not determine impartiality; this is done by two layperson triers, randomly chosen from the panel, who listen to prospective jurors as they respond in turn to questions approved by the court. Once a person is deemed impartial, he replaces one of the original triers, another prospective juror is called forward, and so on. However, even once the triers decide that the candidate is impartial, either the Crown or the defense may exercise a peremptory challenge to force the triers to call another juror. Once 12 people have been chosen, the jury is sworn.

There are 2 types of challenge in Canada, the challenge for cause (where a reason must be given for, and a determination made about, its validity); and the peremptory challenge (where no cause need be stated). These challenges are meant to eliminate jurors considered by either side to be unqualified or not impartial. Potential jurors may be challenged or questioned under oath by Crown or defense to assess their appropriateness to sit on a jury (e.g. on their personal background, attitudes about certain issues, etc.) If there is a challenge for cause, however, a reason must be provided and the judge must make a ruling (e.g. s/he cannot serve if convicted of an offence and was incarcerated for over 12 months). The usual approach is to challenge for cause first, as the number of peremptory challenges is limited (20 for high treason or murder, 12 for offences punishable for 5 years or more, 4 in the rest). Nevertheless, challenges for cause are uncommon in Canada, and most challenges are peremptory.

Challenges for potential racial bias have historically not been allowed in Canada, though there have been cases in which this was allowed (Parks). Throughout the 1990's the courts started moving more in favor of allowing challenges on this basis (Williams; Mankewe).

Generally, only the trial judge has the right to excuse a prospective juror, and then only in limited circumstances (e.g. illness, personal hardship, or another reasonable cause). In such cases, when the full jury has not yet been sworn, the trial judge can call back jurors in the hope that each side agrees on their role. However, these will still be subject to the same challenges as other potential jurors.

In Canada, all juries consist of 12 people. If jurors, for any reason, are excused or cannot continue, a trial can still go ahead so long as 10 remain. If the number falls below that, the whole process must begin over.

### **Legal Rights and Criminal Trials:**

At trial, the prosecution must prove, according to law, the guilt of the accused. This means establishing that the accused committed the act in question and had the appropriate mental element when doing so. However, in doing so, we must remember that every trial involves certain legal principles concerning the rights of the accused to a fair trial under both the *Charter* and the rules of evidence. We will now briefly outline some of the most important of these.

First and foremost, the accused has the right to be presumed innocent until proven guilty according to law in a fair and public hearing (s.11(d)). The burden of proof lies on the Crown here, and legal guilt, not factual guilt, is what counts.

Next, the accused has the right to confront the accuser. This is crucial because it controls the type of evidence used in court (e.g. hearsay evidence may only be accepted in rare circumstances, such as dying declarations). As well, the accused has the right to cross examine all witnesses and victims who testify against him in order to discredit their testimony (there are contentious exceptions, such as allowing child sexual abuse victims testify by closed circuit TV or through a screen, which have been upheld by the courts after having been challenged). The use of videotape as the sole evidence of the victim's testimony has proven more problematic, however, since there is no opportunity to directly confront the statements or question the accused. This has led to such practices being ruled as violating s.7 and 11(d) of the Charter (Thompson).

Third, an accused has the right under s.11(b) to a speedy trial (i.e. to "be tried within a reasonable time"). It is also seen to be one of the

principles of fundamental justice under s.7 (Askov). This comes up against the problem of court delays we have already noted. The SCC has set out 4 factors that courts should consider when deciding whether unreasonable delay has occurred: (1) Length of delay; (2) explanation for the delay (i.e. the Crown's conduct, systemic/ institutional delays, and the actions of the accused); (3) Waiver (i.e. has the accused waived the right); and (4) Whether there is any prejudice caused to the accused by the delay. The Askov case, in enunciating these principles, resulted in over 100,000 criminal charges being permanently stayed in Ontario alone, and countless others elsewhere. Within 2 years, the SCC clarified things, suggesting that a delay of 14-15 months was OK in an impaired driving case (Morin). Since then, the number of cases being stayed for unreasonable delay has fallen dramatically. This has been particularly due to increased resources being provided to the courts, along with the broadening of diversion programs. Most cases are now heard within 1 year of the first court appearance, usually within 4 months.

Fourth, there is the issue of a right to a public trial. While most trials are indeed public and open to the media, s.11(d) guarantees the presumption of innocence to the accused - something that may be put in jeopardy when sensationalist media get into the act. While s.2(b) guarantees freedom of the press, this may be limited by s.1. Hence, the accused can early on request a judge to order a ban on publication of the evidence that may affect potential jurors. Such cases typically involve pretrial publicity. However, the SCC ruled in Dagenais v. CBC that the right to a fair trial doesn't take precedence over the right to a free press. The test was whether a publication ban was "necessary to prevent a real and substantial risk to the fairness of the trial." Another limitation would be to protect the techniques used by the police in an undercover operation (Mentuck). Another important issue is whether criminal trials should be televised, as in the US (not likely). Also, according to s.486(1) of the CC, a judge has the right to exclude the public for all or part of the trial if s/he feels that it is in the interest of public morals, the maintenance of order or the proper administration of justice (e.g. when children or mentally challenged people are about to testify and will be helped by this). But one of the most controversial decisions a judge can make is to exclude the media. This is rarely done, though publications bans are often ordered to protect the integrity of the court, or to protect the names of complainants, victims and witnesses in cases involving sexual offences.

### **The Criminal Trial:**

A criminal trial itself is a formal process that strictly follows rules of evidence, procedure and criminal law. This is far removed from the drama we see on TV, as certain formal procedures must be followed by all participants. This can be complicated, and questions often arise about

technical questions of procedure and admissible evidence.

The key actors here are the Crown prosecutor and defense counsel, who try to present their case as persuasively as they can in favor of their client. The Crown will use police reports, testimony from witnesses and victims, as well as physical evidence in an attempt to show the accused's guilt. The defense will try to punch holes in the Crown's case, present evidence favorable to the accused in order to raise a reasonable doubt about his guilt, and to raise the accused's constitutional rights and ensure that they are not violated.

Once the trial begins, both counsel have the right to make opening statements to the jury. The Crown begins, usually summing up the charges, the facts of the case, and outlining how it will proceed. This must be done in an impartial fashion, without personal opinions or attempts to incite or inflame the jury against the accused. The defense doesn't have to make an opening statement if s/he doesn't wish to. If s/he does, again the case is outlined but s/he describes how s/he intends to show how the accused is innocent and the prosecution's case is inadequate.

Prosecutors cannot promise evidence that they will not bring to court. If they do so, and it is not introduced, that part of the opening statement may be ruled prejudicial to the accused and a verdict against the accused may be set aside. Moreover, the prosecutor cannot mention any evidence s/he knows to be inadmissible nor the prior record of the accused.

If the trial doesn't involve a jury, opening statements can be brief, as the trial judge doesn't need as much background material.

All evidence submitted must meet the highest standard of proof - beyond a reasonable doubt. This is viewed as the basis for reducing the risk of mistaken conviction if there are questions about certain facts presented at trial. The common statement invoked is that "it is better to release 100 guilty persons than to convict 1 who is innocent."

Once opening statements are finished, the prosecution begins to adduce evidence. Usually sworn witnesses provide testimony first (e.g. police, doctors, victims, witnesses). They describe what they saw, heard or touched. Some may also give opinions, particularly expert witnesses. Once the Crown finishes questioning, the defense has an opportunity to cross examine each witness on their oral or written statements. Other types of evidence that may be dealt with by each side are real evidence (e.g. weapons, fingerprints); direct evidence (e.g. observations); and circumstantial evidence (e.g. subsidiary facts from which the guilt or innocence of the accused may be inferred). All evidence presented in court is governed by the law of evidence. The judge acts as an impartial arbitrator

and rules on whether certain types of evidence are allowed into court or not (e.g. hearsay evidence, similar fact evidence).

Like the Crown, the defense counsel has the right to introduce any number of witnesses or none at all. If s/he does, then the Crown has the right of cross examination. A big decision here is whether or not to put the accused on the stand (not commonly done). This is because the accused has the right against self incrimination - not to testify.

After evidence is heard, counsel proceed to their closing arguments. If the defense has presented evidence or the defendant testifies, the defense goes first. Otherwise, the Crown proceeds. In closing arguments, both counsel are allowed to offer reasonable inferences about the evidence to show how the facts of the case prove or disprove the accused's guilt. Yet, they are not allowed to refer to any evidence not used - or allowed - during trial.

Next, if a jury trial, the judge must instruct (or "charge") the jury in the relevant principles of law that they must consider when deciding the guilt or innocence of the accused. This includes the elements of the offence, the evidence required to prove each charge, the degree of proof required for a guilty verdict, and the procedures they are to follow. This must be done clearly as the charge to the jury, if mishandled, may prove to be grounds for an appeal. Hence, the final instructions must include the definition of the crime, the presumption of innocence, that the burden of proof lies with the Crown, and that if, following discussion, there remains reasonable doubt, the accused must be acquitted. Finally, the judge also instructs the jurors of the verdicts they must consider (e.g. beyond guilt and innocence, there may be the option of degree under the charges in question).

After the jury deliberates and has come to a unanimous verdict (as it must be), they come back into court and announce it. However, juries can sometimes take a long time or become deadlocked, and in the latter case the judge may declare a mistrial. If the jury returns a guilty verdict, the judge will set a sentencing date. In so doing, the judge can request a pre-sentence report from a probation officer before a sentence is imposed. The defense can start looking for grounds for appeal and the offender may be released at this time pending sentence.

The jury has no role in sentencing except in cases of second-degree murder, where it makes a recommendation for parole eligibility. An important role of the jury is nullification. This involves the jury not following or suspending requirements of strict legal procedure or law it considers to be unjust. This can result in the judge either declaring a guilty verdict to be erroneous and ordering the defendant acquitted, or the judge requesting

the jury to arrest its verdict of guilty and acquit the accused.

### **Appeals:**

All those convicted of a crime have the right to a direct appeal. Both the defendant or the Crown may appeal either the verdict or the sentence, as well as decisions on mental fitness to stand trial or being held criminally responsible (due to mental disorder).

If involving an indictable offence, an accused's appeal is taken to the provincial court of appeal either on questions of law, fact, or length of sentence. The Crown may appeal an acquittal involving questions of law or length of sentence, but not questions of fact. In summary conviction cases, however, the Crown can appeal against a dismissal of the sentence. In indictable offenses, as well, the Crown can appeal acquittals occurring as the result of determinations about the accused's mental disorder.

Appeals must be filed within a specified time, though extensions may be granted for various reasons. During this time, it isn't unusual for the offender to be granted another form of conditional release.

The appeal court can either order a new trial or acquit the individual if it finds the trial judge made an error in law, that the verdict was unreasonable and not supported by the evidence, or that a miscarriage of justice took place. If a prosecution appeal is allowed, it generally orders a new trial - though it can convict and sentence the accused if the trial was by judge alone and enough evidence was presented.

For summary offences, the individual usually appeals to a federally appointed judge in a Superior Court, and may again be released for a time. It is rare for these ever to end up in the SCC.

### **Summary:**

Our court systems are organized both federally and provincially. Because of the presumption of innocence, the Crown must prove guilt beyond a reasonable doubt. The Crown represents the state, the defense counsel the accused, the former using police-collected evidence to convince the court of the accused's guilt, the defense all along attacking his case.

Jury selection is important in allowing a public role, though each counsel may challenge potential jurors both peremptorily and for cause.

Trials are conducted in accordance with the rules of evidence and criminal procedure. These rules are enforced by judges who act as



arbitrators of any issues that arise. Evidence must be reliable and relevant or it is inadmissible.

Finally, the issue of direction is important, as there are far more charged than trials. Hence, plea bargaining becomes important in the day to day functioning of our CJS. Due to this unofficial practice, most cases are never heard in formal court. In some cases overcharging contributes to the problem, and even more plea bargaining becomes necessary. As a result, some jurisdictions have instituted charge-approval mechanisms to deal with this problem at the front end (i.e. the police).