

**SOC 3395: Criminal Justice and Corrections:**  
**Lecture 2: Overview of the Canadian Criminal Justice**

**System 2**

**Processing Cases Through the Canadian Criminal Justice System:**

A key function of our CJS to bring offenders to justice. Simultaneously, our legal system has created a number of legal rights and protections for those accused of crimes. For example, our system is based on the presumption of innocence and is supposed to conduct itself in a manner that is fair, efficient, accountable, participatory, and protective of the legal rights of accused. An integral part in achieving such goals is criminal procedure. This is concerned with the way criminal justice agencies operate during the gathering of evidence and the processing of the accused through the courts - attempting to ensure that agents of the state act in an impartial and fair manner in their search for truth. Criminal procedure is generally divided into pre-trial and trial procedure, which we will outline separately.

*Pre-trial* criminal procedure begins with consideration of arrest, issuing appearance notices and summonses. The main goal of arresting someone is to ensure they appear in court to have their guilt or innocence determined. Another purpose is to prevent the commission of any further crime. With or without a warrant, police can arrest suspects for violating the law. Without a warrant, officers may arrest an accused in the process of committing an offence, known to have committed an indictable offence, if the officer has "reasonable and probable grounds" that the accused has committed an indictable offence, if there are reasonable grounds that an indictable offence is about to be committed, or if the officer reasonably believes there is an outstanding warrant for his arrest. If a warrant is sought, this is usually after an investigation has gathered enough evidence to give police "reasonable and probable grounds" to suspect that a certain person committed the offence. Then the police "lay an information" before a JP, which will serve as the written basis for the charge the accused faces in court. A justice of the peace then issues the arrest warrant to police for execution and an accused is both compelled to appear in court at a certain time. More extensive, Canada-wide warrants are generally issued only after an accused fails to appear in court after being charged with a violent or serious property offence.

However, it is important to note that police don't have to arrest somebody when the offence is either a summary conviction matter or an indictable offence that does not allow the accused to choose a jury trial. Nor do police need to arrest a suspect when they are certain the accused will show in court, where the crown may proceed by a hybrid offence, or when the charge involves certain vice offences (keeping a gaming or betting

house, or a common bawdyhouse). In such cases, police may issue an appearance notice to a suspect or request a JP to issue a summons. Basically, the police at the scene hands the accused a form with the information about the offence and the court date. The police must then lay an information before a JP shortly thereafter. Another alternative is a summons. Here, the accused is ordered to appear in court by a JP, and this is delivered by police or another authority. Summonses can also be left with an adult at accused's last known address.

Once an individual is arrested, police have a number of decisions to make. Most importantly, should the accused be held or released pending trial? The law states that the accused must be released unless there is good reason for holding them. Police cannot hold an accused for an undetermined reason (this contravenes s.9 and 10(a) of the Charter). Superior officers can overrule arresting officers on the decision to hold offenders, and this is usually done unless the suspect is charged with an offence punishable by 5+ years of imprisonment, is felt to pose a threat to the public, or is believed unlikely to show in court. If, however, the decision is made to hold the accused, s/he must be taken before a JP within 24 hours or the earliest possible time. This is for a bail or "show cause" hearing. The purpose of bail is to ensure that accused appear at trial, while permitting them to participate in the development of their defense. The Criminal Code requires the JP to release the accused unless the prosecutor provides evidence to show either that s/he should not be released or that conditions should be attached to the release. This is, in fact, a constitutional right under s.11(e) of the Charter, whereby an accused can "not be denied reasonable bail without just cause." Basically, bail is generally granted unless it can be shown to be in the public interest, necessary for the protection or safety of the public, or where denial is necessary to ensure the appearance of the accused in court.

*Fitness Hearings:* In Canada, an accused is presumed to be fit to stand trial - to understand the trial proceeding and instruct their defense counsel. If there is doubt, an assessment can be ordered at the bail hearing, whether on the court's own motion, on application by the accused or the prosecutor - but the latter may only do so if the accused puts it into issue or there are reasonable grounds for doubt. This enables such evidence to be raised if there is a preliminary inquiry, and the judge (or judge and a special jury) that determines the issue. If found fit, the accused proceeds through the ordinary court process. If not, a judge may make a decision or order a review board to assess the individual. If found unfit, there will be no verdict one way or another unless and until the accused is found fit - though the prosecution may likely thereafter decide not to proceed.

*Trial procedure,* the second component of criminal procedure, begins with the accused's first court appearance, or arraignment, where the

charges are read out and a plea is entered. In many cases this occurs at a preliminary hearing, but young offenders are usually arraigned in a separate hearing. Often, the defense or the crown will indicate that they are not ready to proceed immediately, and the judge orders the matter to be set over to a later date. During such a time, the conditions that governed the accused will continue to apply. Issues arise over waiving the right to a speedy trial in some cases. Generally, if a plea of not guilty is entered, a trial date, or, in some cases, a date for a preliminary inquiry, is specified. However, if the accused pleads guilty, the judge sets a sentencing date and decides on whether the accused is to be held pending sentencing.

In cases where the accused is charged with an indictable offence that enables them to elect to have a preliminary inquiry, they may have a separate hearing to determine whether there is enough evidence to send the case to trial (most don't do this and go right to trial, and 80% of those that do later end with a subsequent guilty plea). In the 6% of cases that chose a preliminary inquiry, a provincial court judge examines whether there is enough evidence to send the accused to trial. The prosecution attempts to show the judge, through calling witnesses and presenting other evidence, that the case merits a trial. The defense can cross examine crown witnesses and may call witnesses of its own, attempting to show that the crown doesn't have a good case. Most preliminary inquiries last less than a day, and only rarely does this end in a judicial decision to discharge the accused or withdraw the charges. Yet, an inquiry may be important to the defense as it reveals much of the evidence that the crown will attempt to use later. It may also help the accused to decide whether or not to plead guilty (71% of preliminary inquiries result in later changes of plea to guilty). If the judge decides enough evidence exists to go to trial, an indictment is written (replacing the information) and the case is sent to trial. If not enough evidence is adduced, the accused is not acquitted - a discharge simply means that insufficient information exists at that time, and, if it later turns up, prosecution may resume under a direct indictment (usually only with the permission of the AG).

Next, matters move on to the trial itself. For most indictable offences, accused can elect trial by judge alone or by judge and jury (with some exceptions). As well, accused have the right to change their minds about the type of trial they want (with some restrictions). In a re-election, 14-15 days are usually the limit here. Once the indictment is read to the accused at trial, s/he has to plead either guilty or not guilty. If pleading not guilty, the prosecution has to prove the accused is guilty of the specified offence beyond a reasonable doubt. No reasonable amount of doubt concerning the guilt or innocence of the accused can be left unresolved. If reasonable doubt exists, the accused is acquitted.

Yet, if the accused pleads, or is found, guilty, the judge has numerous

sentencing options. These range from a discharge (either absolute or conditional), probation, incarceration, suspended sentences and fines. A judge may decide to combine several of these, such as a short period of incarceration and a fine. Much depends on the charges and the offender's prior record. In some instances the judge has no choice (e.g. first degree murder is automatic life with no parole for 25 years).

In sentencing, judges often rely on pre-sentence reports compiled by probation officers to assist them in determining an appropriate sentence. This may look at the offender's employment background and family support. Other sources of information may include victim impact statements, crown and defense submissions, aggravating a mitigating circumstances, and the range of appropriate sentences as laid out by the Criminal Code and the case law.

If the sentence involves a period of incarceration, the offender is sent to either a federal or provincial institution. Federally, s/he may apply for day parole 6 months before the 1/3 point of their sentence. Full parole is possible for most offenders after they complete 1/3 of the sentence or serve 7 years, whichever is less. Most offenders don't serve the full term of their sentence - even if they don't get full parole most receive statutory release at the 2/3 mark. While incarcerated, offenders can receive some form of rehabilitation or treatment. Though programs vary, these are generally designed to help offenders reintegrate into society. After release, offenders on parole must keep regular contact with their parole officer. Some may be required, as well, to spend time in a halfway house or under some form of community supervision.

### **The Informal Operation of the Criminal Justice System:**

Another way of understanding the path of a case through the CJS is referred to as the "criminal justice funnel." After a person commits a crime and is charged by police, the case enters the top of the funnel and then passes through ever narrower stages of the funnel until it exits. Sometimes this exiting takes place at the bottom of the funnel following the offender's placement in a correctional facility. However, it is important to note that there are many other places along the way that a case can exit, such as when charges are dropped for lack of evidence. The point is that there many points where decisions can be made and discretion exercised to deal with a case before reaching the bottom of the funnel.

Thus, while the parties in the CJS are controlled by the formal rules of law, there is lots of informal leeway in how these operate, how activities are allocated, etc. Under this approach, the CJS is best thought of as a process marked by key decision points. Each point is effectively a screening stage involving a series of routinized tasks whose efficiency is gauged largely by

the ability to move the case along to its successful conclusion. Hence, CJS processing of individuals becomes human resources management. In this process, various actors go about their activities without rocking the boat or bending informal social and agency rules. Simple solutions become routine, such as treating like cases alike. Such a system relates more to the personal and political needs of personnel than to any abstract concept of justice or the rule of law.

For example, due to the multiple points of discretion built in to the detection, prosecution and sentencing of offenders, of the 2,822,427 incidents reported to the police in 2003-04, only 10.1% resulted in conviction, and only 30% of these were sentenced to custody (95% provincial/territorial).

While the actors and agencies in our CJS are theoretically controlled by the rule of law, the “courtroom workgroup” is key to the informal operation of the system. In this group, all cooperate through shared methods and values enabling them to meet their mutual goals. Moreover, relationships among members often take priority over concerns about the fairness and equity of how the system is working. Often, there is an emphasis on speedy processing, guilt is presumed, and secrecy is prized. Such relationships, intertwined with professional and agency needs, have a significant impact on the day to day operation of the various agencies, as well as the outcomes of individual cases. If they don’t work together, little will get done (e.g police need to collect evidence sufficient for a prosecutor to try a case). All the same, the CJS doesn’t inevitably secure the convictions of all charged, and at each stage the number of accused persons is reduced.

Now let’s look at some of the informal points of discretion and how they operate in practice. First we must consider reporting the crime. Some people who have been victimized may not realize it, others do but don’t report it to authorities (e.g. “Not worth the hassle”). Police themselves may not spend the time to investigate “minor” cases or those where they stand little chance of catching the offender. However, if police accept the complaint, an occurrence report is recorded.

Recent victimization studies in Canada show that many victims, even of violent crimes, don’t report them (42% of all crimes in the 1993 General Social Survey, 33% of the listed violent offences in the 2004 GSS. (This figure is generally higher for violent crimes). Many don’t report crimes because they are not felt to be important enough, or because victims feel that police can’t do anything.

But even if police are contacted, they may decide after an investigation that an official report and the laying of charges are

unnecessary. Such cases are called “unfounded,” meaning that the crime was neither attempted nor actually committed. Yet there are many reasons why a crime may be so classified (e.g. complexities, lack of citizen cooperation, incidents seen as “minor”). However, when police perceive direct victim complaints to be “major” (i.e. interpersonal incidents, property disputes, automobile or “other disputes), Ericson (1982) reports that police officially recorded 52% of incidents upon investigation. Official reports were more likely to be made where property loss or damage occurred or no personal injury to the victim was involved. Interpersonal disputes, however, were less likely to be recorded as crimes due to the prior relationship between the parties being perceived as a problem in prosecuting the cases. Hence, police more routinely deal with interpersonal disputes by informal means.

Once a suspect is identified and there is sufficient evidence to lay an information, the incident is said to be “cleared by charge.” Incidents may also be cleared otherwise (e.g. suspect dies or the complainant declines to proceed). But things don’t always get this far. Many officers don’t arrest identifiable suspects even when they’ve decided that a crime has been committed (Ericson 1982 found only 27% of the criminal suspects in his study were arrested and subsequently formally prosecuted). Indeed, even when there is a mandatory arrest policy in place for domestic violence cases, Rigakos (1997) found that police rarely arrested offenders (only 35% of peace bond breaches and 21% of civil order violations).

Bail is another point of discretion. Early concern over the ability of an accused to pay bail, and the potential impact on their ability to defend their case, led to the Bail Reform Act enabling an accused to be released on a promise to appear in court if of good character and charged with a minor crime. Yet, following this legislation, researchers found that many accused who were eligible for bail still didn’t receive it, and this significantly increased their chances of being convicted and receiving a longer sentence. Even though the formal law is clear that an accused is not to be denied bail except in exceptional circumstances, Kellough (1996) found that things work differently in practice than in theory. Many applicants are, in fact, detained for secondary reasons other than community safety and appearance at trial.

Moving on to prosecution, research has shown that the greatest attrition of cases in our CJS occurs between the time police lay a charge and the time the prosecutor decides to take a case to court. Prosecutors review most, if not all, of the serious cases brought before them to assess the quality of the evidence before they decide to go ahead. If not satisfied, they may stay or drop the charges altogether. Other factors come into play as well. Witnesses and victims can have an impact on the prosecution of cases (e.g. may not cooperate in testifying). As well, police actions can have a

significant impact, such as making deals with offenders to testify against their peers and associates. Defense lawyers may also be involved in this. Finally, there is the widespread informal process of plea bargaining, where charges may be dropped in exchange for a guilty plea on a lesser charge. Hence, in only a tiny fraction of cases does the accused actually have a trial.

Finally in this regard, let's consider sentencing. Basically, most accused plead guilty at the beginning eliminating the need for a trial. Many simply want to get things over with; others have given incriminating statements or believe that police have the goods on them. Still others feel they will get a more lenient sentence. Yet, especially with property crimes, the sentencing is often much harsher than with most violent crimes. The more serious crimes don't always receive the harshest sentences, and extralegal factors such as race, gender, age, and class may become important when decisions are being made by the judge. Research shows that race is a significant factor in the type and length of sentencing of offenders (e.g. Aboriginals in a CSC study, Blacks as studied by the Ontario Commission on Systemic Racism). Other considerations include that the poor may be unable to afford quality legal representation and as such receive harsher sentences.

### **Values and the Criminal Justice System:**

The final thing we will discuss today involves the various values underlying the informal processes of the CJS - an important consideration given the above practices. Packer (1968) has developed two models of our CJS, both of which reflect divergent value systems. He refers to these as the Due Process and Crime Control models of the CJS. In the former, the main concern was prioritizing the rights of the suspect, best achieved by an accurate, fair, and reliable system of laws and legal procedures. This would emphasize not violating the rights of the accused throughout the proceedings and only punishing the guilty. Conversely, the crime control model emphasized the control and suppression of criminal activity through a quick and efficient system that focuses on incarcerating (and thereby suppressing) criminal activity. Sure, at times, the innocent may be found guilty, but this is seen as more than offset by the deterrent impact on crime.

This crime control model is best characterized by "getting tough on crime" and complaints about the CJS being "weak on criminals." It suggests that the most important goal of the CJS is to reduce crime by jailing criminals for long periods. This is seen as reducing lawlessness and protecting the rights of law abiding citizens. To do this, the CJS must operate like an assembly line moving offenders as efficiently as possible to conviction and punishment so effective crime control can be maintained. Certainly of punishment is reached through mandatory sentences, longer prison terms and the elimination of parole. Needless to say, this approach

rests upon the presumption of guilt (i.e. that most arrested are guilty). Hence, much trust is placed in the decisions of CJS officials, who are assumed to make few, if any errors. Support for their use of discretion and disdain for legal technicalities abound. Hence, concerns over legal rights shouldn't get in the way of the system's ability to cut crime. If a conflict arises between the administration of justice and the protection of society, proponents of this model prefer to err in favor of the latter.

The due process model, on the other hand, emphasizes the protection of the legal rights of the accused. The most important goal here is to see that justice is done by protecting the rights of accused. This ensures that innocent people are not convicted. The best way to prevent such injustice is to limit the discretionary powers of CJS officials in order to avoid potential wrongdoing. This results in a ideal CJS more like an obstacle course. Hence, before arrest, prosecution, and conviction, every attempt should be made to ensure that accused are treated fairly and that justice is served. All offenders should be presumed innocent, CJS officials constantly monitored, and legal controls introduced to ensure that officials don't abuse their power. Moreover, proponents argue that it is hard for the CJS to reduce crime because the criminal sanction cannot prevent all crime from occurring, so justice shouldn't be sacrificed in the name of something beyond reach. Issues that bring the administration of justice into disrepute are the overriding concern of this model - so much so that it prefers to let a factually guilty person go when there has been an inappropriate or unfair procedure in the case.

While both of Packer's models are ideal types, they do help clear up the expectations that different individuals have of the CJS. They also show the different values that operate - often at cross purposes - within the informal operation of the CJS. It is also important to note that these values may fluctuate over time, sometimes the crime control model is in the ascendant (e.g. after September 11), other times the due process model is preferred - by both CJS officials and the public at large. For example, some of the more stringent crime control measures in the new Anti-Terrorism bill (e.g. giving police extraordinary powers to tap phones and read mail) were withdrawn or replaced after public support for these waned over time.

### **Conclusion:**

The study of criminal justice has grown significantly over time, comprising an interdisciplinary approach to get a better handle on crime, improving the operation of various agencies, and how better to deal with offenders.

Criminal justice can be viewed as both a formal system and an informal "funnel." In the former it operates in a formal and highly visible



manner; in the latter more as a series of discretionary, routine activities that ensure the efficient processing of cases. These often conflict and operate with different degrees of emphasis in different cases. Certainly many high profile trials more reflect the formal operation of the system; the many routine cases settled by plea bargains the latter.

Going hand in hand with these are the values underlying these two approaches. The due process model, with its emphasis on the rights of the accused and following proper procedures, is closely associated with the formal legal operation of the CJS - with the ideals as it were. The crime control model, in contrast, fits more squarely with the informal "funnel" with its focus on the efficient capture, processing, and control of offenders, aided and abetted by multiple points of discretion. Both of these approaches are inextricably entwined in our CJS, and we would do well not to forget them as they lurk beneath the surface of many of the topics that we will be dealing with in this course.