Who's Who in the Courtroom

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Learning Outcomes

After completing this chapter, you should be able to:

- Demonstrate an understanding of the adversarial system and the role evidence plays in that system.
- Demonstrate an understanding of the roles of the judge and the jury and the division of their responsibilities.
- Demonstrate an understanding of the function of the *voir dire* and the charge to the jury in the trial process.

Introduction

In this book, we will examine the rules of evidence and their practical application in a courtroom or an administrative tribunal. The role of evidence is to assist the trier of fact in determining the truth in a fair manner. Evidence is about proof of facts, and although that may seem simple at first glance, the principles and rules about the admission and exclusion of evidence in a legal proceeding can be quite complex.

The text is divided into four parts. The first deals with fundamental principles and the legal tests applied to determine whether a particular piece of information meets the basic test for admissibility. The second part deals with the rules about excluding potential evidence from a proceeding. Next we discuss the role of the *Canadian Charter of Rights and Freedoms*[1] and its substantial impact on evidence law. Finally, after we have examined the rules and principles, we look at how evidence is presented in a proceeding.

In this chapter, we take an overview of the criminal and civil (non-criminal) processes in the Canadian legal system and examine how the two processes work within the adversarial system, which is used in Canadian courts to try to reach the truth. We discuss the roles of the decision-makers and the role of evidence in that adversarial system.

Overview of the Criminal and Civil Litigation Processes

The criminal and civil litigation processes are similar in a number of respects. Each starts with a specific court document commencing the action. In a criminal trial, the document is called an information. It is usually laid by a police officer but, in some circumstances, may be laid by a private person. The information outlines the offences that the person charged has allegedly committed. In a civil (that is, non-criminal) process, the person starting the case, usually called the plaintiff, issues a document required by the rules of court. (The name of this document may differ according to province, court level, or type of case. It is often called a writ or a statement of claim.) In this document, the plaintiff outlines the wrong that they feel was done to them by the opposite party, usually called the defendant, and sets out how the plaintiff is asking the court to correct that wrong. In both criminal and civil matters, various pre-trial steps are taken. Most often, these steps are designed to ensure that there will be a fair hearing of the issues. In civil cases, these steps ensure that all parties have an opportunity to discover the evidence that is available both for and against their position, as well as to explore alternatives to a full trial on the issues.

disclosure
the requirement that the Crown produce to the defence, before the trial begins, all the evidence that has been gathered in a criminal case

discovery
the process in a non-criminal case through which every party to the case has an opportunity to examine the evidence

On television and in the movies, court cases are often won when one side surprises the other with a major witness or a major piece of documentary or physical evidence right in the courtroom. Although this might make for good drama, it does not reflect the real-life litigation process in Canadian courts. In both criminal and civil cases, there are specific requirements to share evidence before the trial begins. The sharing of evidence is called **disclosure** in the criminal process and **discovery** in the civil process.

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

In a criminal or quasi-criminal proceeding, the prosecution has an absolute duty to disclose the full evidence against the accused person to the defence, but the defence is not required to disclose the basis for its case or the evidence supporting its position. This difference is due to the fact that an individual charged with an offence is not usually on equal footing with the government prosecuting the case. The government has huge resources to investigate and obtain evidence that is not normally available to individuals unless they are very wealthy. Therefore, to try to ensure fairness and a relatively level playing field, the Crown prosecution must disclose its full case so that the accused person has an opportunity to prepare a proper defence to the charges.

The sharing of evidence, besides attempting to provide fairness, is also designed to streamline the trial process and, where possible, avoid trial entirely by permitting all parties to evaluate what their chances might be in a trial. By assessing the case that the opposing side will present in court, each party can weigh the advantages and disadvantages of continuing on a litigious path. In a criminal matter, after reviewing all of the Crown's evidence against them, an accused may want to offer a guilty plea if the Crown is willing to reduce the charge or agree to a lesser sentence in exchange. This is commonly referred to as a plea bargain or a plea arrangement and is a central process in the criminal justice system. In a civil matter, settlement may be a safer and more economical route than the very expensive and uncertain road of litigation.

The Litigation Process

The following chart compares and contrasts the major steps involved in the criminal and civil litigation processes.

Criminal	Civil
Process commenced by an information.	Process commenced by a specified court document, often called a writ or statement of claim.
Pre-trial process to ensure full disclosure to the accused of the Crown's case.	Pre-trial process to ensure that each side has full opportunity to discover the evidence that the other side has at its disposal.
Selection of mode of trial. (For most serious offences, the accused can choose trial by judge alone or trial by judge and jury.)	Selection of mode of trial. (In the superior civil court in the provinces, either party usually can choose trial by judge or trial by judge and jury.)
Trial commences with the Crown presenting evidence first, usually by having its witnesses testify. The Crown's questioning of its witnesses is known as direct examination or examination-in-chief. The defence then has an opportunity to ask questions or "cross-examine" the witnesses.	Trial commences with the plaintiff presenting evidence first, usually by having its witnesses testify. The plaintiff's questioning of its witnesses is known as direct examination or as examination-in-chief. The defence then has an opportunity to ask questions or "cross-examine" the witnesses.
Evidentiary issues that arise before or during the trial may be dealt with in pre-trial motions or in a *voir dire*.	Evidentiary issues that arise before the trial may be dealt with in pre-trial motions, but evidentiary issues may arise during the course of the trial as well and are dealt with as they arise.

(*Continued on next page.*)

Criminal	Civil
The Crown continues to call evidence until it has presented all of its evidence. The Crown then closes its case.	The plaintiff continues to call evidence until it has presented all of its evidence. The plaintiff then closes its case.
If the defence believes that the Crown has not met its burden of proof (that is, proof beyond a reasonable doubt), the defence may decide not to call any evidence but to make an application to the judge for a directed verdict of acquittal. If the application is successful, the accused will be formally acquitted of the charges.	If the defence believes that the plaintiff has not met its burden of proof (that is, proof on the balance of probabilities), the defence may decide not to call any evidence but to bring a motion for non-suit and argue that the case against the defendant has not been made and there is nothing to answer or defend against. If the motion is successful, the case will be dismissed.
If there is no motion for a directed verdict or such a motion is unsuccessful, the defence counsel who chooses to present evidence then calls its first witness and so on until the defence has presented all of its evidence.	If there is no motion for a directed verdict or such a motion is unsuccessful, the defence calls its first witness and so on until it has presented all of its evidence.
Once the Crown and the defence have presented their evidence, the Crown may be entitled to call reply or rebuttal evidence.	Once the plaintiff and the defendant have presented their evidence, the plaintiff may have an opportunity to call reply or rebuttal evidence.
Both the Crown and the defence now have a chance to argue their case or to state to the trier of fact (judge or jury, if there is one) why it should "find" in their favour (that is, give them what they are asking for). At this stage, counsel argue that the evidence that has been presented supports the outcome they are seeking. This stage of the proceedings is called submissions.	Both the plaintiff and the defendant now have a chance to argue their case to the trier of fact (judge or jury, if there is one), showing why it should "find" in their favour (that is, give them what they are asking for). At this stage, counsel argue that the evidence that has been presented supports the outcome they are seeking. This stage of the proceedings is called submissions.
The trier of fact (judge or jury, if there is one) then considers the evidence and submissions and makes a decision (renders a verdict). This involves a finding that the accused is guilty or not guilty of the offence they are charged with. If the accused is found not guilty, the judge discharges the accused, who is then free to go on with their life. If the accused is found guilty, the judge initiates the sentencing process.	The trier of fact (judge or jury, if there is one) then considers the evidence and submissions and makes a decision. This involves a determination of liability—that is, has the defendant caused a wrong to the plaintiff that has resulted in their suffering damages? If the defendant is found liable, the trier of fact awards compensation to the plaintiff in a set amount of dollars.

The Adversarial System

adversarial system judicial process in which parties present evidence before an impartial decision-maker, who then makes a decision in the case

In Canada, as in most other countries whose legal system is based on the British common law system, the judicial process is adversarial. In theory, each party in the **adversarial system** is represented by a skilled advocate (often referred to as counsel, if a lawyer, or as an agent, if a paralegal), knowledgeable in the law, who presents the party's case in the best possible light, within the permitted ethical rules. The case is

presented before an impartial, unbiased judge who remains relatively passive during the proceedings.

The premise of the adversarial system is that when each party presents and argues their case in the most favourable light and has an opportunity to vigorously challenge the opposing party's case through cross-examination before an impartial judge, the truth can be approached or reached more often than not.

Although the adversarial system has profoundly shaped common law legal thinking, other fact-finding systems exist. The one we may be most familiar with is the inquisitorial system, also known as the scientific process, used in most civil law jurisdictions, such as Quebec and France. This system involves an investigation directed at finding the truth. The fact-finder may use various avenues to resolve the problem they face—for example, whether the accused person committed the assault or which of the parties in a civil case broke the business contract between them. This fact-finder is an active participant who seeks out the truth by investigating and questioning the facts as they are presented.

Impartial Decision-Makers in the Adversarial System

Judges in the adversarial system do not take an active part in the search for truth. In the Canadian system, the judge does not extensively question witnesses or make other investigations into finding the "truth." In fact, too much comment, expression of opinion, or active questioning of witnesses by a judge can be the basis for a successful appeal and a new trial. In legal terms, too much participation in the hearing can result in a finding by an appeal court that there has been "a reasonable apprehension of bias" on the part of the decision-maker, even if there is no actual bias. A perception of bias by a reasonable person is enough.

In our system, a judge who engages in questioning or challenging the evidence, or making comments in relation to it, is more likely to influence or to be seen to influence the outcome of the judicial process through any bias they may hold or be perceived as holding. This may be particularly important in a trial involving a jury. A judge who makes comments or asks questions of a witness may be seen as influencing the jury's decision. However, even in a non-jury trial, questioning of witnesses, making comments, or expressing opinions can lead to a reasonable apprehension of bias on the part of a judge. It is said that a judge who "descends into the arena … is liable to have his vision clouded by the dust of conflict."[2] That is, a judge who takes too active a role risks losing the objectivity we so prize in a decision-maker.

On the other hand, the passivity of the decision-maker can also be reviewed by a higher court if the trial judge acted in a manner that favoured, or appeared to favour, one party over another. This does not mean that the judge cannot participate in the proceedings in any way; in some circumstances, it is important for the judge to take a more active role. In cases where a witness has some frailty, for example, owing to age, a lack of legal representation, or limited knowledge of English, a judge often must take a role in ensuring that the witness can effectively communicate their evidence. In fact, a judge who does not intervene to facilitate testimony in such circumstances may be subject to criticism by the higher courts. The main concern is that the judge not engage in behaviour that actually aids one side to the disadvantage of the other or prevents an accused from mounting a proper defence to the charges they face or is perceived as doing so.

2 *Yuill v Yuill*, [1945] 1 All ER 183 at 189 (CA), Lord Green.

Case *in* Point

Provincial Court Judge Removed from Case for Acting Like Counsel

R v Musselman, 2004 CanLII 34073, 25 CR (6th) 295 (Ont Sup Ct J)

An Ontario Provincial Court judge was prohibited from hearing an impaired driving case when it came up for trial again because he appeared to be wearing two hats, Crown and judge, in the matter. On reviewing his conduct, the Court of Appeal noted that the judge had "become an advocate in his own cause in the forum reserved for the disputes he is to decide impartially in a process of calm and detached deliberation" (at para 1). The judge did not disguise his distaste for those who represent impaired drivers and for the law that the court must apply in these cases. The judge's descent into the arena was particularly strongly demonstrated when he sent a series of emails to Crown counsel who would deal with any appeal of his decision inquiring whether an appeal had been commenced and whether they would like his thoughts on it to assist them. The judge also crossed the line with some comments in *obiter dicta* that were critical of an appeal court judge. In prohibiting the judge from hearing the case, the Court of Appeal stated that "an atmosphere has been created where it appears that the trial judge has matters of his own reputation and integrity in mind when approaching these cases, rather than the dispassionate adjudication of the underlying cases" (at para 14).

By opting for the adversarial system, we have chosen to temper the quest for truth with other values, such as limiting the power of the state to prosecute individuals and emphasizing the appearance of fairness and impartiality. Some would argue that the latter maintains the high regard in which the system of justice is held, an essential ingredient in any system of justice in a democracy.

However, there are criticisms of the adversarial system. The nature of the adversarial system implies that only one party can be a winner. If each side is partially right, then a process that affords only a win–lose resolution contains, by definition, some injustice. Trials are not the only system for resolution of legal disputes in our society, but they remain the main vehicle of last resort. Some parties will include a clause in a contract requiring them to resolve disputes through arbitration, but this process looks very much like litigation by trial. Its main advantage is speedier decision-making, thus allowing the parties to go on with their lives. With speedier decisions can also come monetary savings, but since the arbitration system is largely private, the savings are not ensured.

How Evidence Fits into the Adversarial System

The rules of evidence that we apply today were developed over a considerable period of time in an effort to ensure that there was a fair and equitable process in place for resolving legal disputes. In the early stages of development, fairness and equity were not always prime considerations; the original process was more about protecting royalty and other highly placed persons from having their power (property and ability to tax) eroded. Many disputes were settled by trial by ordeal and trial by battle—that is, the legality of a claim (say, to ownership of land) was

determined by how strong, skilled, or lucky a claimant was. But as the concept of democracy took root, fairness and equity became more important goals of the judicial process, and the principles of natural justice evolved in keeping with the political evolution.

Philosophically, the Age of Reason contributed the thinking that a system of justice should be rational. Trial by ordeal and other crude approaches to justice gave way to more rational concepts, such as relevance and materiality, which were developed to ensure that the decision-maker would consider valid or useful information in coming to its conclusions in a dispute. Think of the expression "garbage in—garbage out": essentially, a decision-maker cannot make a good decision when considering unhelpful, confusing, or useless information. The primary function of evidence law is to ensure that useful or valuable information is placed before decision-makers. It is a vehicle for transmission of information to the decision-makers, and, as with any vehicle, we must ensure that it provides a safe and reliable conveyance. Just as the adversarial system of justice has evolved to its present form over a thousand or more years, the use and abuse of evidence law have likewise evolved over time, and we should not assume that there is nothing to improve upon. We should also keep in mind that an evidentiary system that worked well at one point in our history may become outmoded, awkward, and unsatisfactory at a later time.

Division of Responsibilities in the Adversarial System

In a trial, two types of decisions must be made: the facts must be decided and the law that applies must be determined. The decision-maker may be a judge sitting alone or a judge and jury hearing the case. A very important aspect of this latter situation is the division of their responsibilities.

When a judge sits alone, without a jury, they fulfill both decision-making roles. In other words, the judge is both the **trier of fact** and the **trier of law**. When there is a judge and a jury, the judge is the trier of law and the jury is the trier of fact. The responsibility of the judge in a jury trial is to make all the decisions that require legal training. The judge controls the process to ensure that all parties are treated fairly and that the rules, including the rules of evidence, are complied with. The parties to the dispute cannot be relied upon to present only valid information that will help the decision-maker come to a just conclusion because at least one of the parties would simply prefer that the conclusion was favourable to them whether or not it was just. Thus, the judge determines whether information that one side wishes to present to the jury in the form of evidence will be admitted before the jury. This means that the judge can control whether the jury gets to see or hear this information. This role is like that of a gatekeeper, someone who protects a group from harmful intrusions. In this instance, the harmful intrusion is the admission of information that will potentially damage the fact-finding process or that will make it harder or impossible for the jury to do its job properly.

trier of fact
person in a trial who assesses the evidence and renders a verdict; in a jury trial, the jury

trier of law
person in a trial who controls the trial process, determines the admissibility of evidence, and instructs the trier of fact on the applicable law; in a jury trial, the judge

Perspective and Relevancy

One particularly egregious example of how perspective can cloud a determination of relevancy is the case of Frank Joseph Paul. He was a New Brunswick Mi'kmaq who froze to death on the streets of Vancouver after having been taken from police custody and dumped drunk and wet in an alleyway in freezing weather. Paul's treatment was in fact consistent with the common police practice in some parts of Canada of taking intoxicated people, particularly intoxicated Indigenous people, and dumping them in areas where the police won't have to deal with them.

In reviewing the matter, Crown counsel determined that no charges should be laid against the police, saying,

> Given the available evidence, the Crown is unable to establish that any police officer failed to perform a duty upon them in such a manner that demonstrated a marked departure from the conduct of a reasonably prudent person *or that it was objectively foreseeable that the conduct of the officers in failing to provide a more adequate shelter for Mr. Paul endangered his life or was likely to cause permanent damage to his health*.

How it is not foreseeable that dumping a severely intoxicated person in an alley in freezing weather would, at the very least, endanger his health is unclear. Police records and a police surveillance video showed the police dragging Mr Paul into the elevator, dripping wet, a short time before depositing him into the alley.

Mr Paul's death led to calls for a public inquiry. Those advocating for an inquiry questioned whether the Crown's assessment of available evidence or application of the standard of objective foreseeability and reasonable prudence is impartial or whether it reflects the Crown's close relationship to the police.

In 2007, as a result of revelations that jail guard Greg Firlotte, who was present the night Paul was dumped in the alleyway, was not even spoken to in the police investigation of the incident, the BC attorney general announced that an inquiry would be held.

The gatekeeper lets in the desirable information and keeps out the mischief-making information. Desirable evidence is information that will assist the trier of fact in coming to a fair determination of the issues on the basis of the facts before them. As we will see when examining the other roles of evidence law, the gatekeeper may keep information from the trier of fact that might be helpful in terms of fact-finding but is undesirable for other reasons. These reasons include the maintenance of societal values that are considered more important than the proper resolution of one particular dispute.

The jury, where there is one, has the duty of determining what information they accept and what weight they assign to that information. As the trier of fact, the jury has exclusive authority over issues involving the credibility and reliability of the evidence once it has been admitted. The jury is also responsible for rendering a verdict on the issues—that is, making a finding of guilty or not guilty in a criminal matter and determining whether the plaintiff or the defendant has proven their claims in a civil matter. In a jury trial, the roles of the judge and the jury must be carefully segregated to ensure

that the process is fair. If a judge erodes the jury's independence by directing their conclusions on the facts, the decision in the case may be appealed by the losing party.

Where a judge is sitting without a jury, the judge must play a dual role of trier of law and trier of fact. Thus, the judge will consider certain evidence as required by law and will not consider information they have heard but not admitted into evidence. To illustrate the judge's position, consider an example: An accused person has confessed to an offence. The defence lawyer argues that the confession should not be admitted into evidence because of a number of alleged violations of the Charter. The defence asks the judge to rule the confession inadmissible. Obviously, the judge must hear that there was a confession before they can rule on whether it is admissible as evidence. If the judge determines that the confession is not admissible, then they will not consider the confession in any way in determining the guilt of the accused.

However, when there is a jury, it is the responsibility of the judge, in their gatekeeper role, to ensure that jurors hear only admissible evidence so that they are not swayed by information they are not permitted to consider. The thinking is that a judge, because of their legal training, can more easily separate admissible evidence from inadmissible information.

Roles in the Courtroom

The following chart summarizes the division of responsibilities in the courtroom.

Trier of Law (always the judge)	Trier of Fact (judge or jury)
• Controls the process in the courtroom	• Weighs all admissible evidence
• Determines the admissibility of individual pieces of proposed evidence	• Assesses the credibility and reliability of witnesses and evidence
• Instructs the trier of fact on the law that applies	• Renders a verdict

Voir Dire

voir dire
mini-trial, or trial within a trial, that is designed to determine the admissibility of evidence in the absence of the jury

A ***voir dire*** is an examination that is designed to determine the admissibility of a proposed piece of evidence. The expression, which found its way into the English common law system through the Norman influence, literally means "to speak the truth." It is a process that can be used with information such as a confession where the Crown is obliged to prove that the statement is voluntary or with any other evidence where the two parties are in disagreement about its admissibility. It is sometimes said that a *voir dire* is a trial within a trial.

The process used to keep information from being wrongly considered by a jury is to exclude the jury from hearing information in dispute until the judge determines whether the information is admissible as evidence. The judge declares a *voir dire*, and the jury is sent out of the room while the parties argue the issue. Counsel then present arguments to the judge as to whether the disputed information should be admissible. If the judge determines that it is not admissible, the jury returns and never hears any of it. If the judge determines that it is admissible, the jury returns and the information is repeated in front of the jury as evidence. Where the judge is sitting alone and has

heard the proposed evidence on a *voir dire* but excluded it, the judge must forget what they have heard or "disabuse themselves of the evidence" and not consider it in their decision. If a judge does consider information that did not properly become evidence, the decision may be appealed for this legal error.

We have seen that the admission and consideration of evidence are roles that are handled by two separate bodies, the trier of law and the trier of fact, even where the two are contained within one physical body—the judge. We also know that it is an error for the trier of fact to consider information that is not properly before it. Because the legally trained trier of law determines what information is seen and therefore can be considered by the trier of fact, the system has a built-in protection from improper or dangerous assumptions or conclusions that can result when the trier of fact considers prejudicial information in reaching its decision in a case.

Charge to the Jury

In a jury trial, once all the evidence has been presented by all parties, counsel for each side will make submissions and attempt to persuade the jury to accept its version of the facts. The judge then gives the jury very precise instructions about the law that must be applied to the facts of the case. In a criminal trial, the judge gives a summary of the facts the Crown must prove in order to establish the guilt of the accused. The judge must also explain all defences that are reasonably available to the accused even if a particular defence was not raised by the accused during the trial. In a civil trial, the judge outlines the issues the plaintiff must establish and the defences available to the defendant. Jury instructions may be very lengthy in some cases, taking several days or longer. The jurors are then instructed on their duties once they begin deliberations. This process is called the **charge to the jury**.

charge to the jury
judge's instructions to the jury, before the jury begins deliberations, regarding the applicable law, the standard of proof, and the available defences

Many US jurisdictions have standardized jury instructions and have refined them so that they are much simpler and shorter than Canadian jury instructions. The Canadian Judicial Council has created model jury instructions for criminal matters to assist judges in giving instructions in order to reduce errors that lead to appeals and possible case dismissals and to make the trial system more efficient.[3]

The Supreme Court of Canada has restated the elements that must be addressed in the charge to the jury as follows:

1. instruction on the relevant legal issues, including the charges faced by the accused;
2. an explanation of the theories of each side;
3. a review of the salient facts which support the theories and case of each side;
4. a review of the evidence relating to the law;
5. a direction informing the jury that they are the masters of the facts and it is for them to make the factual determinations;
6. instruction about the burden of proof and presumption of innocence;
7. the possible verdicts open to the jury; and
8. the requirements of unanimity for reaching a verdict.[4]

3 "Model Jury Instructions," online: *National Judicial Institute* <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en>.

4 *R v Daley*, 2007 SCC 53 at para 29.

According to the judgment in another Supreme Court case:

> The jury system has in general functioned exceptionally well. Its importance has been recognized in s. 11(f) of the *Charter*. One of the reasons it has functioned so very well is that trial judges have been able to direct the minds of jurors to the essential elements of the offence and to those defences which are applicable. That process should be maintained. The charge to the jury must be directed to the essential elements of the crime with which the accused is charged and defences to it. Speculative defences that are unfounded should not be presented to the jury. To do so would be wrong, confusing, and unnecessarily lengthen jury trials.[5]

Because the charge to the jury is so important, it is often the subject of an appeal. One party or the other may take the view that the jury has come to an improper conclusion owing to errors in the judge's charge.

Just Not Getting the Point

A jury in British Columbia was hearing the case of a man charged with stealing a horse. After hearing all the evidence and the judge's instructions, the jury went off to deliberate. The jurors returned with their verdict: not guilty, but the accused had to return the horse. When the judge patiently explained that they could not come up with such a verdict because it was contradictory, the jurors dutifully returned to the jury room for further deliberations. They returned with their new verdict: guilty, but the accused could keep the horse.

Source: Peter V MacDonald, *Court Jesters: Canada's Lawyers and Judges Take the Stand to Relate Their Funniest Stories* (Don Mills, Ont: Stoddart, 1985).

Commentary on the Jury System

The jury system developed in England under Henry II in 1166 with the appointment of 12 free men who would resolve civil disputes over land and taxes. Criminal matters were still dealt with by way of trial by ordeal or trial by battle at this time. In the 13th century, the jury system began to be applied to criminal matters. Initially, the jury was an "informed jury," meaning that they either had knowledge of the parties and the facts beyond what they heard in court or were charged with conducting an investigation of the facts on their own. Oath helpers, or witnesses who commented on how reliable or believable other witnesses were, were commonly called upon to bolster the credibility of the parties themselves. By the 16th century, the concept of an informed jury was replaced by the principle that the jury should be independent and impartial and thus not "informed" in the sense of having any foreknowledge of the parties. Decisions were to be based solely on the information that was legitimately placed before them. This established the importance of evidence law, which attempted to ensure that reliable evidence made its way into the courtroom and prejudicial and unreliable evidence was excluded. Witnesses testified under oath. These rules were all positive influences in the search for truth and justice.

5 *R v Osolin*, [1993] 4 SCR 595 at 683, 1993 CanLII 54.

The separation of the roles of judge and jury was solidified in 1670 in the trial of the Quaker William Penn. Penn was charged with unlawful assembly under the *Conventicle Act* of 1664,[6] which had been passed by Parliament to shore up the position of the Church of England and suppress religious dissent. Thousands of Quakers were imprisoned for their beliefs. Penn challenged this oppression by organizing a public meeting on August 14, 1670. The Lord Mayor had him arrested, and at his trial Penn made an eloquent defence of liberty:

> [I]f these ancient and fundamental laws, which relate to liberty and property, and which are not limited to particular persuasions in matters of religion, must not be indispensably maintained and observed, who then can say that he has a right to the coat on his back? Certainly our liberties are to be openly invaded, our wives to be ravished, our children slaved, our families ruined, and our estates led away in triumph by every sturdy beggar and malicious informer—as their trophies but our forfeits for conscience's sake.

Penn and his co-defendants were acquitted by the jury, but this displeased the Lord Mayor, who fined the jurors and imprisoned them in Newgate Prison to encourage them to alter their verdict. The jury seemed to have listened to Penn's comments about liberty for they declined to change the verdict. After two months in the terrible conditions of the prison, the jurors were set free by the Court of Common Pleas. The outcome of this episode was that the highest court in England affirmed that juries must not be coerced to come to a particular verdict or punished if they disagreed with the court. Thus was born one of the more important features of our democratic system: the concept of jury independence. As for William Penn, he later left England for the United States, where he was so influential that the state of Pennsylvania was named after him.

In most serious criminal matters and many civil trials in courts of superior jurisdiction, a litigant can choose a trial by jury. Most criminal matters empanel a 12-member jury, just like the free men of yore. In civil matters, depending on the province, the jury may consist of fewer than 12 jurors; 8 is not uncommon. Failure to reach a unanimous decision results in a hung jury, and the accused must be tried again by a new jury.

Reforming the Jury System

It has been suggested that the jury system should be reformed and that jury sizes could be reduced and majority verdicts be allowed. A majority verdict would eliminate the need for a unanimous verdict. However, a disadvantage of this reform is that it could result in more wrongful convictions. Academics suggest that a more cautious and reasoned approach be taken to the problem presented by jury trials and jury instructions. It would certainly be easier to obtain convictions without unanimity, but Canada already has a scandalous level of wrongful convictions. If we reduced the size of a criminal jury to ten and required only a majority for a verdict, then six jurors in favour of conviction and four against could send a person to jail for life. Contrast that with the scenario of *Twelve Angry Men*, a play and then a movie made in the 1950s but still relevant today, in which one obstinate juror forces the jury to weigh the evidence and test its credibility and reliability, thus avoiding wrongfully convicting a teenaged boy.

6 16 Charles II, c 4.

If prosecutors can obtain "quick and dirty" verdicts from juries, then the dangers of a miscarriage of justice skyrocket.

The *Criminal Code*[7] sets out the procedure for jury selection in criminal trials. Until legislated changes made to the Code in 2019, one aspect of the process involved peremptory challenges. Peremptory challenges were a number of challenges given to both the prosecution and the defence that could be used during jury selection to exclude a potential juror without giving any reason for doing so. The actual number allotted to the Crown and the prosecution depended upon the seriousness of the crime charged and ranged between 4 and 20.

Unfortunately, this process could and did lead to discrimination, and in 2019 Parliament abolished peremptory challenges. Challenges for cause remain part of the procedure. A challenge for cause is one that can be used to exclude a potential juror for a specific reason, such as bias or the existence of a criminal record. This procedure is overseen by the judge to ensure that only eligible and impartial jurors are selected.

7 RSC 1985, c C-46 [Code].

Case *in* Point

Elimination of Peremptory Challenges

The Killing of Colten Boushie

Colten Boushie was a young Indigenous man, a resident of the Red Pheasant Cree Nation in Saskatchewan. He and a group of young friends from the First Nation went on a swimming outing one summer afternoon in 2016. Some drinking was involved over the course of the afternoon. On the way home in their SUV, the group got a flat tire and drove into the driveway of the farm of Gerald Stanley, where Stanley and his son were building a fence.

There was conflicting evidence as to what occurred at the Stanley farm, but it was clear that Stanley availed himself of a semi-automatic firearm and shot an unarmed Boushie, who was sitting in the SUV at the time he was killed. Gerald Stanley was charged with second-degree murder. His defence was that he had shot the gun in the air several times as a warning but that the shot that killed Boushie had been fired accidentally at close range due to a weapon malfunction when Stanley attempted to remove the keys from the SUV in which Boushie was sitting.

During the jury selection process, the defence used their peremptory challenges to exclude every Indigenous-appearing potential juror from the panel. Gerald Stanley was ultimately acquitted by the jury. The verdict led to a major public outcry as it was seen by many as a direct result of the racism and oppression directed toward Indigenous people on the Prairies.

CHAPTER SUMMARY

In the adversarial system, there are similarities and differences between the criminal and the civil litigation processes. The adversarial system is the approach to fact-finding that is used in the Canadian judicial system and in the other systems with their roots in the British common law tradition. The adversarial process has evolved to temper the quest for truth with other values, including limiting the power of the state to prosecute individuals and emphasizing the appearance of fairness and impartiality. The rules of evidence that are applied

today developed over a considerable period of time in an effort to ensure that the process for resolving legal disputes is fair and equitable.

There are two primary decisions to be made at trial. The first is what the facts of a particular case are, and the second is how the law applies to those facts. The role of the jury is to determine the facts, and the role of the judge is to apply the law. When the judge sits alone, without a jury, the judge fulfills both decision-making roles.

The judge also acts as a gatekeeper to ensure that only the evidence that will assist in a fair determination of the issues is admitted. The *voir dire* is the process of "a trial within a trial" to determine what information may properly be admitted into evidence. At the end of the trial, the judge gives a charge to the jury, instructing them on the application of the law to the facts of the case.

Suggestions for reforming the jury system in Canada have been proposed, but they are not without their problems.

KEY TERMS

adversarial system, **6**
charge to the jury, **12**
disclosure, **4**
discovery, **4**
trier of fact, **9**
trier of law, **9**
voir dire, **11**

REVIEW QUESTIONS

1. What are the major differences between the civil and the criminal justice systems? What are the similarities?
2. Describe the major features of the adversarial system.
3. Describe the differences between the role of the judge and the role of the jury in the trial process.
4. What is meant by the term "trier of fact"? Who performs this function in a trial?
5. What do we mean when we say that the judge is the "gatekeeper" for the admission of evidence?
6. What is the role of a *voir dire* in the trial process?
7. What is the purpose of the charge to the jury?

DISCUSSION QUESTIONS

1. Do you think the adversarial approach to court proceedings is one that tends to render a just determination of the case? What other approaches might be considered?
2. The following suggestions have been made for improving the jury system:

   a. Require pre-trial training of jurors in a workshop setting to prepare them for the task.
   b. Shorten and simplify standard jury instructions.
   c. Give judges more freedom to set aside an unreasonable verdict from a jury (subject to appeal of the judge's decision).

   What effect do you think each of these suggestions might have if implemented? Can you think of any other suggestions?