CHAPTER 1

Principles and Jurisdiction

LEARNING OUTCOMES

In this chapter, you'll learn about:

- The legal principles and Charter rights most relevant to Canada's criminal procedure.
- The sources of Canadian criminal procedure law.
- The distinction between procedural and substantive justice.
- The inherent tensions and roles within an adversarial system of justice.
- The three types of criminal jurisdiction.
- The classification of offences and its impact on the accused's trial.

CHAPTER OUTLINE

Why Study Criminal Procedure and Evidence?

At first glance, the study of criminal procedure and evidence might seem to be a dry subject. The body of law that governs the administration of criminal trials emphasizes procedural details and administrative processes, which earns it a reputation as a "technical" legal area. Criminal procedure and evidence are thus often mistaken for lands of rote rules and regulations. As legal philosopher Karl Llewellyn once observed, "Procedure courses appear as the technical tools of the trade and nothing more; as books of [legal] etiquette" (2008, pp. 10–11). This technical work, however, has high stakes. Failure to file the proper document or to follow a relevant **case precedent**, for example, can have serious consequences for the lawyer's case and the client's life.

While the consequences of improper procedure can be severe, there are also several areas of pragmatic importance to the laws of evidence and criminal court administration, including rules about how court hearings are structured, scheduled, recorded, and adjudicated. "We cannot all run in on the same judge at once, or none of us will get our business done" (Llewellyn, 2008, p. 10). It would, however, be a mistake to overlook the more foundational principles upon which the daily practice of criminal procedure and evidence is based. Many court processes that are followed during a criminal prosecution exist to protect the accused from unfairness and prejudice. Fundamental values and rights of **due process**, such as the **rule of law**, underpin the many technical layers of a criminal investigation and public prosecution. Amid the forms, motions, and other daily business of a courtroom lies real danger. American law professor Robert Cover (1986) described it this way: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life" (p. 1601). Even when mechanically implemented, then, the laws of criminal procedure and evidence are not

case precedent
a court decision that influences subsequent cases involving similar facts, legal issues, or principles

due process
a set of common law principles of procedural fairness now protected in the *Charter of Rights and Freedoms*; also a model of criminal justice focused on procedural protections

rule of law
an ancient principle of legal and political governance that considers all people and institutions (including heads of state) to be equal before the law

distanced from the foundational principles of due process and rule of law that underlie Canada's criminal justice system. Indeed, as the opening case study on *R v Haevischer* (2023) makes clear, some of the most important human rights lie at the root of the law's "technicalities." This connection between the underlying values of criminal law and criminal procedure can blur the distinction between substantive and procedural law that is often drawn in legal research and education.

> Procedure and evidence and trial practice [are marked off] as fields for special and peculiar study apart from substantive law. They should be marked off. They should be marked off for the most intensive study. But they should be so marked off not because they are really separate, but because they are of such transcendent importance as to need special emphasis. (Llewellyn, 2008, p. 11)

Defining Substantive and Procedural Law

substantive law
statutory and common law that establishes legal rights and responsibilities, as well as the theories and principles to define them

procedural law
statutory and regulatory frameworks that outline the process for bringing a case to court, including how legal violations are investigated, adjudicated, and (when necessary) punished

It is common in several legal fields to differentiate between the laws that outline rights and responsibilities (**substantive law**) and the regulatory schemes that provide guidance on how those laws are enforced (**procedural law**). The substantive and procedural fields of criminal law have several differences between them (see Table 1.1). Substantive criminal law, for example, includes several statutory and common law sources that define criminal behaviour, most notably the *Criminal Code*. Criminal procedure, on the other hand, refers to the regulatory frameworks that outline the process for bringing a criminal case to court, including how legal violations are investigated, adjudicated, and punished. Substantive law is therefore focused on what law *ought* to be, while criminal procedure is about how best to get there. Put another way, the rules of criminal evidence and procedure serve as "the door, and the only door, to make real what is laid down by substantive law" (Richardson, 2011, p. 105). Rules governing the gathering and admissibility of evidence also fall within the field of criminal procedure, alongside the statutes and regulations that delineate the roles and responsibilities for the police and the courtroom's key players, including Crown and defence counsel, the accused, the judge, the jury, and witnesses. In this respect, there is a fair amount of substance to criminal procedure.

> The law of evidence exists to provide a process for gaining access to the benefits provided by substantive rules. Its role is therefore facilitative … it is meant to serve the application of substantive law. (Paciocco, 2021, p. 2)

Read more about *habeas corpus* in Chapter 4.

Importantly, substantive and procedural criminal law have enough areas of overlap to suggest the distinction is more fable than fact. Each field, for example, makes use of the same source materials. The *Criminal Code* and its surrounding case law is equally important to both the substantive and procedural components of criminal law, as are several fundamental common law principles, such as the presumption of innocence or the doctrine of *habeas corpus*. Several other statutes that play a critical role in criminal procedure and evidence law, such as the *Canada Evidence Act*, are informed by the principles of substantive criminal law, and the *Canadian Charter of Rights and Freedoms* (the Charter) has impacted both criminal law and criminal procedure in meaningful and substantive ways. How the police interact with a criminal suspect, for example, can have significant consequences on the admissibility of evidence at trial and, in turn, the Crown's ability to prove the offence's substantive elements.

TABLE 1.1 Criminal Law: Substance and Procedure

Substantive Criminal Law	Criminal Procedural Law
• Provides the legal definitions of crime • Outlines the physical (***actus reus***) and mental (***mens rea***) elements that must be proven to establish a criminal offence • Defines the legal rights of those accused of a crime alongside the state's responsibilities when investigating and prosecuting crime • Includes theories of substantive justice that focus on common law principles and the legal correctness of case outcomes • Imagines what law *ought* to be	• Provides the rules and processes that must be followed before, during, and after a criminal trial • Defines how criminal courts are structured and the roles and responsibilities of a criminal trial's key players, including the Crown, the accused, the judge/jury, and witnesses • Limits and oversees the actions of state agents (police, Crown) during a criminal investigation and trial • Includes theories of procedural justice that focus on fairness and consistency in how law operates • Aims to "make real" the imagined world of substantive criminal law

actus reus
Latin for "guilty act"; a legal term used to refer to the physical acts and circumstances that must be proven to have occurred and been present during the commission of an offence

mens rea
Latin for "guilty mind"; a legal term used to refer to an accused's state of mind that must be proven to have been present during the commission of an offence

The theoretical foundations of substantive and procedural justice are also informed by each other. Substantive justice emphasizes legal correctness in which judicial decisions and case outcomes are "in line with the law on the books," leading to a view of substantive law as "paint[ing] a picture of the world as it should be, according to the legislator. It makes promises to people about their rights, and about the remedies that they should receive if those rights are breached" (Semple, 2022, p. 139). Procedural justice places high importance on legal outcomes reached by impartial decision-makers who can provide reasons for those decisions. Each theory of justice seeks legal outcomes that are predictable and consistent, making the development of rules and procedures essential. "Providing procedural justice increases the likelihood that substantive justice will be done" (Semple, 2022, p. 142). It is therefore best to think about criminal law's substantive and procedural fields as constantly shaping each other (Abell & Sheehy, 2002, p. 268).

The Canadian Charter of Rights and Freedoms

The impact of the Charter on the law of evidence and criminal procedure is substantial, such that it is not possible to study the process of bringing a person accused of a crime to trial without an understanding of the constitutional status awarded to the legal and due process rights of the accused. Later chapters provide a more in-depth examination of specific Charter protections and their procedural requirements, but a brief introduction here to the supremacy and limitation of Charter rights is useful for understanding their impact on criminal investigations and prosecutions.

Supreme Law of the Land

Canada's Constitution has authority over all other laws in the country. Alongside the Charter in 1982, a "supremacy clause" (s. 52(1)) was added to the *Constitution Act, 1982* that makes the Charter's limitations on state power explicit:

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

Read more about section 52(1) of the Charter in Chapter 6.

This provision empowers courts to strike down (render void) any laws or parts of laws that violate Charter rights. Section 24 of the Charter provides further remedies for state and police actions that violate Charter rights, including the exclusion of evidence (see Chapter 6). The "primacy of the Constitution, including the fundamental rights and freedoms of individuals and groups guaranteed by the *Charter*" was recognized by the Supreme Court of Canada in *Ontario (Attorney General) v G* (2020, para. 89), where the public's interest in constitutionally compliant

legislation was highlighted as a fundamental consideration in safeguarding Charter rights. This speaks to the influential role of Charter rights protection in the public's perception of the justice system and its fairness. Canada's Charter has been cited as a leading influence on human rights legislation around the world, including the *South African Bill of Rights* and the *Hong Kong Bill of Rights Ordinance* (among others), and the Charter's place alongside the "supreme law of the land" has given Canada a reputation for being a "constitutional trend-setter among common law countries" (Law & Versteeg, 2012, p. 51).

Reasonable Limits on Charter Rights: The Oakes Test

The Charter provides constitutional protection for several different rights, including both positive (freedom *to*) and negative (freedom *from*) liberties. Although most individuals desire a high level of personal privacy and freedom from state intervention, society as a collective can be well served when the police are both empowered to encroach upon the private lives of citizens and held accountable for these privacy invasions. Section 1 of the Charter is meant to recognize those instances in which some limits to individual rights are necessary. Each time a law or a police action is found to violate a Charter right, the courts must determine whether the violation is "justified" within the meaning of section 1 of the Charter, which reads:

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

Section 1 provides that the rights within the Charter cannot be violated unless the government can offer a sufficiently good reason to do so, and even then, it must do so in the least intrusive way possible. This is what is meant in section 1 by a "reasonable limit." The analytical steps used to determine when a Charter violation can be reasonably limited were first set out in the case of *R v Oakes* (1986) (see "Sidebar: Justifying a Charter Violation: The Case of David Oakes") and have subsequently been known as the *Oakes* test. This test is applied each time a Charter right has been violated, and each step of the test must be passed for the violation to be allowable—that is, to be "justified in a free and democratic society" (s. 1 of the Charter).

The *Oakes* test asks two central questions about the infringing legislation. The first is about the legislation's objective (or ends), and the second addresses its **proportionality** (or means):

proportionality quality or amount in relation to (e.g., a *proportional* punishment is one that fits the crime)

Step 1: "Pressing and Substantial Objective"

The first step of the *Oakes* test asks:

- What is the objective of the law or action that has infringed the Charter?
- Is the law's purpose important enough to justify violating the Charter?

Step 2: Proportionality (in three parts)

After determining that the law's objective is both pressing and substantial, the court must assess whether the measures taken to reach that objective are proportional. The *Oakes* test examines three specific components of proportionality:

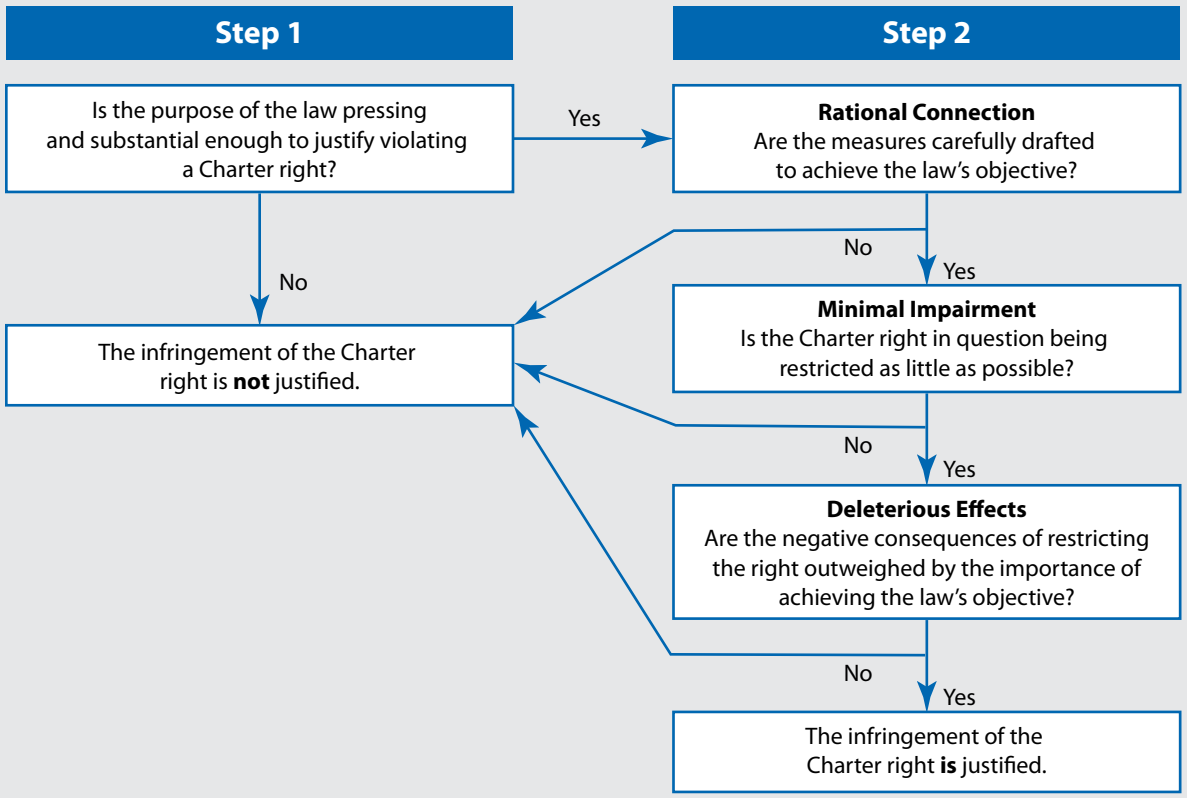
1. Rational connection: Does the law that has violated the Charter right make sense? Given the "pressing and substantial" objective offered in Step 1, does the law present a rational way to achieve it?
2. Minimal impairment: Does the infringing law violate the Charter right as little as possible? Is there another way to achieve the same objective without violating the Charter at all or perhaps not as much?

3. **Deleterious** effects: What might be the negative consequences of violating this right? Even though the law has an important objective, and the means by which the government is trying to achieve it are rational and infringe the Charter as little as possible, are the consequences of allowing a right violation too damaging to permit? In other words, do the ends ultimately justify the means?

deleterious harmful effect; also the third step of the proportionality analysis in the *Oakes* test

A law that violates a Charter right must pass all parts of the *Oakes* test to be allowed as a justifiable limit under section 1 (see Figure 1.1).

FIGURE 1.1 Applying the Oakes Test



As other chapters will detail, the Charter and the application of the *Oakes* test have had a profound impact on the daily work of the police and other criminal justice participants during the investigation and prosecution of crime. Public perceptions of the criminal justice system have also been significantly influenced by the Charter and its surrounding case law. The rights protected by the Charter are as highly valued as they are contested, resulting in several tensions within the criminal justice system's adversarial model.

Sidebar

Justifying a Charter Violation: The Case of David Oakes

Shortly after the Charter was enacted, the Supreme Court was asked to define what "reasonable limits" to a Charter right might mean in light of the language in section 1 in the (now famous) *Oakes* (1986) case. David Oakes was a 23-year-old construction worker at the time of his arrest outside a tavern in London, Ontario. The police searched Oakes and found a little more than $600 and eight one-gram vials of hashish oil in his pocket—a prohibited substance at the time under the *Narcotic Control Act* (NCA). Oakes maintained that the oil was used to alleviate his chronic pain from a workplace accident and was intended only for personal use; however, the NCA contained a provision (s. 8) that created a presumption of trafficking (i.e., selling it to others) for anyone found carrying more than a specified amount of a prohibited substance. This allowed the police to arrest Oakes for drug trafficking rather than just possession and placed the **burden of proof** on Oakes to prove he had no intent to traffic. Oakes was convicted at trial of the trafficking charge—an offence punishable with life imprisonment. Oakes appealed the decision, arguing that the NCA operated on a presumption of *guilt*, which violated his right to be presumed innocent under section 11(d) of the Charter. Both the Ontario Court of Appeal and the Supreme Court agreed, thus requiring an assessment of whether the violation could be "justified in a free and democratic society" (as per s. 1 of the Charter). The steps the Court took to determine this became known as the *Oakes* test.

The analysis in the *Oakes* case fell on the grounds of proportionality. Although the government successfully argued that the objective behind section 8 of the NCA (to decrease drug trafficking) was a sufficiently pressing and substantial purpose, the Court found the government was unable to prove that a trafficking presumption for all instances of drug possession would rationally accomplish this goal, particularly with small amounts. Failing the "rational connection" branch of the proportionality assessment, the section 11(d) violation could not be justified and section 8 was declared unconstitutional. Oakes was released.

The *Oakes* test has since been cited in thousands of cases, both in Canada and in other jurisdictions. On the 30th anniversary of the decision, Oakes was interviewed by the Canadian legal magazine *Law Now* and asked what it was like to play a role in one of the law's most influential decisions. His answer? "I could do without" (Bowal & Kelndorfer, 2016).

burden of proof
the responsibility to prove the allegations at issue in a trial

The Adversarial System and Its Tensions

Canada's justice system, like several court systems around the world, is built on an adversarial model in which opposing parties present their case to an impartial adjudicator. The adversarial system is based on the premise that the truth will emerge when each party is provided with an opportunity to submit evidence in support of their claims and to challenge the evidence offered by the other party. Public court proceedings and the neutral, non-intervening role of the judge are also among the adversarial system's key features, distinguishing it from inquisitorial or scientific methods of inquiry. Stated succinctly, the central goals of Canada's adversarial system of criminal law are truth, justice, and fairness "from both the perspective of the accused and of society more broadly" (*R v Bjelland*, 2009, para. 22).

Importantly, however, these aims are not always harmonious. Procedural protections and rights can complicate, if not obstruct, police investigations into the truth or the Crown's ability to use evidence of guilt. This can erode the public's confidence in the justice system, almost as much as abuses of state power can. Much of the law of criminal procedure and evidence operates within one or more sites of tension inherent in an adversarial model of justice.

> The objective of a criminal trial is justice. Is the quest for justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. … [T]he law makes its choice between competing values … . We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. (Former Manitoba Chief Justice Freedman, as cited in *Bjelland*, 2009, para. 65)

Factual Guilt and Legal Guilt

One of the most prominent tensions in the criminal justice system stems from the rule that decisions by the **trier of fact** about the case and its outcome must rely only on the evidence presented in court. It is therefore possible for a person to be guilty of an offence in fact that is not ultimately provable in law. This conflict between **factual guilt** and **legal guilt** is common ground for criminal procedure and evidence law, in which any number of procedural technicalities can affect the evidence that is heard in a case. In some terrible cases, a factually guilty person escapes legal conviction. Blackstone's ratio says this happens for the right reasons; there are some instances in which the truth simply comes at too high a price for constitutional rights and public confidence in the justice system. Worse still is a **wrongful conviction**, in which a factually innocent person is found legally guilty. Criminal procedure serves as an important safeguard against these unjust outcomes, leading courts and legal academics to suggest the criminal justice system might be better characterized as a "*qualified* search for truth" rather than the pursuit of absolute truth at any cost (Peck, 2001; emphasis added). The adversarial system requirement for legal truth produces rules, procedures, and case outcomes that are not always favourably viewed by the public, particularly when Charter rights are seen as "standing in the way of the truth-finding process" (*R v Noël*, 2002, para. 57). Yet, as the Supreme Court has remarked,

> [I]t has never been the case in our criminal justice system that the search for truth could be pursued at all costs, by all means. … "[H]owever valuable and important, … [truth] cannot be either usefully or creditably pursued unfairly or gained by unfair means … . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." (*Noël*, 2002, para. 57, quoting *Pearse v Pearse*, 1846)

Checkpoint: Test Yourself!

The *Haevischer* case provides a poignant example of the conflict between factual and legal guilt. Explain why, identifying the legal "technicality" that was at issue in the case.

Crime Control and Due Process

The distinction that is drawn in Canada's criminal justice system between factual guilt and legal guilt represents a broader ideological friction about the justice system's overall purpose. Evidentiary rules and procedural protections can bring this tension between the **crime control model** and the **due process model** of justice to the fore. First described in the work of criminologist Herbert Packer (1964), the crime control model of justice prioritizes the pursuit of truth and stresses the importance of defining and enforcing laws in ways that increase public safety. This conflicts with the model proposed by due process advocates who emphasize the value of procedural rights for both the individual accused and the perceived legitimacy of state power. There are also a number of other approaches to the criminal justice system, including the **rehabilitation model** and the **restorative justice model**.

Studying and practising the law of evidence and criminal procedure necessitates striking a balance between these many approaches to criminal law and criminal justice. Former Supreme

trier of fact
the role (assigned to the jury or judge in non-jury trials) of determining the factual circumstances of a case on the basis of the evidence presented at trial

factual guilt
the accused's actual guilt

legal guilt
the accused's guilt that is provable in law

wrongful conviction
a guilty verdict for a person who did not commit the offence

crime control model
a criminal justice system that has the principal aim of preventing and controlling the commission of offences, most notably through the use of punishment

due process model
a criminal justice system that has a primary goal of fairness, most notably through constitutionally protected rights for accused persons

rehabilitation model
a criminal justice system that aims to prevent crime by changing offender behaviour through cognitive and therapeutic treatment

restorative justice model
a criminal justice system that acknowledges and seeks to repair the personal and community harm caused by the offence

Court Chief Justice McLachlin remarked on this balance in *R v Harrer* (1995) within the context of trial fairness, noting that the right to a fair trial is not meant to provide the accused with

> the most advantageous trial possible. … Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. (para. 45)

See also Chapter 6 for further discussion of cases involving abuses of state power.

Importantly, these competing values are always balanced within the circumstantial context of each case. In some instances, the state's interest in controlling crime will outweigh the due process rights of the accused. Courts have explicitly recognized how procedural protections can "make fighting crime harder for the police" (*R v Hassan*, 2023, para. 51). Cases that provide ample justification for criminal procedure and the laws of evidence often involve abuses of state power, such as in the *Haevischer* (2023) case discussed in Case Study One. While public safety and crime control are clearly important objectives of the criminal legal system, there are limits to what the Canadian public is prepared to see its police forces and Crown prosecutors do in the hunt for truth. As noted by the Ontario Court of Appeal in *Brown v Durham Regional Police Service Board* (1998): "The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free" (para. 79).

Legal Jeopardy and Public Justice

Although the presumption of innocence has a long-standing and highly valued status in both constitutional and common law, a criminal accusation is accompanied by severe social stigma; police scrutiny; and state intrusions into the life of the accused, such as arrest or even police custody. Most important, the accused sits in a state of jeopardy, facing the looming threat of criminal punishment while awaiting an uncertain trial and verdict. The Supreme Court has recognized the heightened impact that legal jeopardy and a change therein (e.g., new or additional charges) have on police procedural requirements and Charter protections for the accused (*R v Tessier*, 2022). The laws of criminal procedure and evidence can operate to shield the accused from some of the risks and unjust intrusions of legal jeopardy.

> Criminal procedure is made up of "rules and principles that constrain or affirm the state's power to place a person in jeopardy of investigation, prosecution, and punishment for the commission of a criminal offence" (Coughlan, 2020, p. 3).

There are also ways in which procedural rights and evidentiary rules serve the aims of public justice, maintaining the law's public accountability. Each citizen wants to envision a justice system that is fair, unbiased, and free from state violence. When the wrongfully accused is considered, the dangers of unchecked state power are heightened (see "Sidebar: Wrongfully Hanged? The Case of Wilbert Coffin"). Procedural protections therefore play an important role in improving public confidence in (and compliance with) the law. This is well demonstrated by the unusual facts in *R v Masuda* (1953), a pre-Charter case in which the British Columbia Court of Appeal overturned a murder conviction in the interests of public justice after three of the Crown's witnesses had dined with the jury. The Court concluded that

> if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. The Courts are the custodians of that confidence and it must be upheld and not weakened. (*Masuda*, 1953, p. 124)

Integral to the Court's decision was a core element of public justice: "that justice should not only be done, but be manifestly and undoubtedly … seen to be done" (*Masuda*, 1953, p. 124).

Sidebar

Wrongfully Hanged? The Case of Wilbert Coffin

Wilbert Coffin

The *Masuda* case was cited by the Supreme Court in its decision to uphold a Quebec court's murder conviction and death sentence for Wilbert Coffin (*Reference re R v Coffin*, 1956). Coffin had been the last person to see three American tourists before their bodies were found a month later a few kilometres from his home in the Gaspé woods, torn apart by bears. Coffin became the lead suspect after investigators found some of the deceased's possessions in his home (which Coffin claimed to have salvaged from the deceased's abandoned vehicle). Coffin was convicted of murder at his trial and sentenced to hang; however, his case was referred to the Supreme Court following substantial public concern about Coffin's innocence and allegations of unprofessional conduct by police and prosecutors. The Court concluded that Coffin had received a fair trial and upheld the conviction. Coffin was hanged less than three weeks later.

Public outcry only intensified after Coffin was executed, ultimately leading to a provincial inquiry (Brossard Commission) in 1964, which did not find evidence of wrongdoing or trial unfairness (Pringle, 2015). Coffin's case continues to be cited as a wrongful conviction by several sources and is still under active review by Innocence Canada, a non-profit organization that identifies and works to exonerate the wrongfully convicted (LaForme & Westmoreland-Traoré, 2021; Leverick et al., 2017). Criminologist Kathryn Campbell (2023) has argued that the evidence in Coffin's case "suggests the hallmarks of a wrongful conviction," including "police tunnel vision, prosecutorial misconduct, attempted use of jailhouse informants, political interference, incompetent counsel and a trial lacking judicial oversight. It seems clear that Coffin became the fall guy for a government keen not to disrupt its lucrative tourism trade" (para. 3).

The public's confidence is an integral element of an adversarial system of justice. While the laws of evidence and criminal procedure can be burdensome for police investigations and criminal prosecutions, the spectres of Canada's wrongful convictions provide more than sufficient warning of the dangers that lie in systems without them.

Rights and Roles of Criminal Justice System Participants

The nature of the adversarial system creates several different and often competing roles for its participants. Confusion about these roles and their limitations can affect public confidence in the criminal justice system and aggravate existing tensions. Both crime control and due process agendas are at work in a criminal investigation and ensuing trial, with some actors most focused on the pursuit of truth, while others ensure it is not found at too high a price. The legal jeopardy of the accused and the degree of power that the participant has to affect that legal risk are also important factors when defining the scope and responsibilities of criminal justice system roles.

Read more about the search and seizure powers of the police in Chapter 2.

Role of the Police

The police have two related roles in the criminal justice system: investigating crime and enforcing the law. These aims place the police firmly within the crime control model, in which the interests in public safety and discovering the truth of events outweigh due process concerns. Charter rights and their procedural requirements can therefore operate as obstacles to police investigations. It would be much easier, for instance, if the police could search the home of a criminal suspect without having to get a warrant. Having a right to privacy, however, is important enough to most citizens to justify limits on police investigative power.

The police role is also affected by a person's state of legal jeopardy. As agents of the state, the police must act in accordance with the Charter or risk compromising the evidence that could be used at trial. Therefore, police procedure is heightened when a person of interest becomes a criminal suspect. The sources of police power lie in both statute (such as the *Criminal Code*) and common law (sometimes referred to as "ancillary police powers"), as discussed in the next two chapters outlining the police powers to search, seize, arrest, and detain.

Importantly, the police are the first point of contact for most people as they enter the criminal justice system, whether as a suspect, an accused, a witness, or a victim of crime. It is therefore critical that the police receive sufficient education and resources to respond to crime in effective, procedurally correct, and trauma-informed ways. Revitalizing police-based victim services and implementing a research-based police education model were two of the recommendations made by the Nova Scotia Mass Casualty Commission (2023) in its final report, released following its independent public inquiry into "the most lethal shooting incident in Canadian history" (Vol. 3, p. 408).

Role of the Crown

The Crown prosecutor is so named because the role represents the public's interest in seeing the law enforced. (It is also why Canadian cases are cited as "*R v*" followed by the name of the accused, where "*R*" stands for the Latin word "*Rex*" in reference to the King of England. See "Sidebar: Understanding Case Citations.") Fairness lies at the heart of the Crown counsel role. The adversarial system of justice leaves little room for the victim during a criminal trial, and while it is easy for those closest to a crime to feel personally attached to a trial and its outcome (including those state representatives charged with investigating and prosecuting offences), the role of the Crown prosecutor "excludes any notion of winning or losing" (*Boucher v The Queen*, 1955, p. 24). Instead, as the Public Prosecution Service of Canada (2023) notes, Crown prosecutors "are not lawyers for the police, the victims, or the accused" and their primary goal "is not to secure a conviction, rather, it is to pursue justice. In doing so, Crown counsel represent the public interest" (s. 2.2).

Crown prosecutors are therefore expected to present the facts in an objective way, bringing all relevant evidence and case authorities to the attention of the court, including those that are not favourable or are even contrary to the Crown's position. They must avoid expressing personal opinions and be conscious of bias; and other systemic factors that can lead to miscarriages of justice, such as false guilty pleas and wrongful convictions (Roach, 2023). The Crown's duty of fairness extends to both actions and public perceptions of those acts. Maintaining public confidence in the administration of justice requires that the Crown prosecutor act fairly and also be viewed as doing so by the public. Failure to do so can result in prejudice to the accused and, in serious cases, the need for second trials. Such was the circumstance in *R v S (F)* (2000), in which the Ontario Court of Appeal ordered a new trial after finding the conduct of Crown counsel at trial had "crossed over the line and must be characterized as improper and unfair" (para. 19). The Court made specific note that the Crown prosecutor was "inappropriately sarcastic, flippant

and disrespectful" (para. 17) toward the accused and pointed out the error in personalizing his role in the case:

> Crown counsel breached every aspect of the classic articulation of the role of Crown counsel referred to in R. v. Boucher. He took this case very personally. He injected his own credibility and belief into the case. His stated goal was to obtain a conviction and justice for the complainant. If the appellant were acquitted by the jury, he would have failed. His conduct was anything but moderate and impartial. (para. 18)

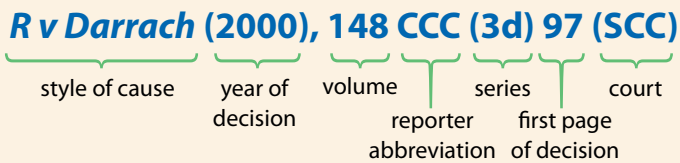
See Chapters 5 and 8 for further discussion of the Crown and defence counsel roles and responsibilities.

Sidebar

Understanding Case Citations

Cases are often reported in more than one place. Many different case law reporters (e.g., *Canadian Criminal Cases* or CCC) publish case collections by topic, region, or court (e.g., *Supreme Court Reports* or SCR). All reported cases can also be obtained from the court directly. It is therefore common for cases to be cited using more than one (parallel) citation. The neutral citation style (used throughout this book) serves only as a case identifier. It does not provide a reporter location for the case, but instead lists only the case name (or style of cause), decision year, court, and assigned court number (e.g., *R v Kahsai*, 2023 SCC 20). Neutral citations serve as case identifiers in most subscription/search engines.

Case citations in Canada follow the *Canadian Guide to Uniform Legal Citation*, known also as the McGill Guide. Understanding case citations is essential to finding cases and honing your legal research skills. Here is an example using a Supreme Court case reported in the *Canadian Criminal Cases* reporter:



The style of cause or name of the case appears in italics and employs the abbreviation "R" for the Latin word for King (*Rex*) or Queen (*Regina*), as applicable. It is customary in Canadian law to use the word "and" (e.g., *The King and Darrach*) when referencing the "*v*" in the style of cause (rather than using the word "versus," as is more common in American law). It is also common to omit the "*R v*" part of the style of cause in subsequent uses in both oral and written argument (e.g., *Darrach*).

Legal citation also uses the Latin abbreviations *ibid* and *supra* when referring to cases and sources that are already fully cited elsewhere in the same document. *Ibid* is used when referring to the source in the immediately preceding footnote or reference. *Supra* is used when referring to a source for which the full citation has already been provided in an earlier note (but not the one immediately prior, in which case *ibid* should be used).

Role of the Defence

Defence lawyers also play an essential role in the proper administration of criminal justice, although in contrast to Crown counsel, a defence lawyer's role is one of fierce advocacy—for both the accused and the fundamental principles of justice, most notably the presumption of innocence. Well-known criminal defence lawyer Edward Greenspan described it by noting that he "only defend[ed] innocent people. Until they are found guilty there are no other kinds of people for me to defend" (as cited in Stuart & Quigley, 2022, p. 606). This role of defence counsel in safeguarding the Charter rights of the accused is integral to maintaining public confidence in the justice system, although that can be hard for the public to see in cases involving violent crimes or vulnerable victims. Although defence counsel cannot knowingly present false testimony and

have an ethical responsibility to act with civility, they must balance this with a duty of "resolute advocacy" to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, which the lawyer thinks will help the client's case" (*Groia v Law Society of Upper Canada*, 2018, para. 73, citing the Federation of Law Societies of Canada, 2017). It is a duty with particular significance in the criminal law context, as noted by Justice Moldaver of the Supreme Court in *Groia v Law Society of Upper Canada* (2018): "Criminal defence lawyers are the final frontier between the accused and the power of the state" (para. 74).

> I haven't the slightest moral conflict defending people accused of homicide, sexual assault, business fraud, environmental offences, or even crimes against humanity. I don't "draw the line" at anything. If I defended *crimes*, maybe I would—but I don't defend crimes. I only defend innocent people. Until they are found guilty there are no other kinds of people for me to defend, and what difference does it make what an innocent person is accused of? (Edward Greenspan, as cited in Stuart & Quigley, 2022, p. 606)

See Chapter 3 for further discussion of the right to counsel during arrest and detention.

This "frontier" role of defence counsel extends to the provision of legal advice and instruction during the pre-trial and police investigative stages of a criminal prosecution. Once arrested, the accused is faced with several decisions, most with severe legal consequences. Section 11(b) of the Charter provides everyone with the right to legal advice when they are arrested or detained by the police. The defence lawyer's role is essential in these early stages of a criminal investigation when the accused is often interacting with the police without an adequate understanding of the case or applicable law. "The choice whether or not to cooperate with the investigation is up to the detainee—not the lawyer—but it should be an informed choice" (*R v Sinclair*, 2010, para. 87). The Supreme Court decision in *R v Lafrance* (2022), for example, reflects the constitutional importance of the accused's right to both receive and understand legal advice and the role that defence counsel play in mitigating the power imbalance between the state and the accused (see Case Study Three).

Role of the Judge and Jury

Read more about the role of the jury in Chapter 7.

The trial judge and the jury share an important role in the criminal justice system. Each serves as the trier of fact and must assess the evidence presented at trial to make factual determinations about the alleged offence. The judge also provides legal instruction to the jury and oversees the trial proceedings. The trier of fact's impartiality is a core component of the adversarial system and the principle of fairness in fundamental justice. Assessments about what happened in a case can be made only on the evidence presented in court and cannot rely on experience or views gathered outside the courtroom. Of particular concern is the use of harmful myths or stereotypes to inform judicial decision-making. Bias—whether conscious or implicit—on the part of a case adjudicator damages the fairness of the trial, the legitimacy of its outcome, and the reputation of the justice system overall. The public view of judicial neutrality is essential, as the Ontario Court of Appeal has observed: "[T]o maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality" (*Hazelton Lanes Inc v 1707590 Ontario Limited*, 2014, para. 60). Even the *appearance* of bias in a trial judge can affect the fairness of the case, its outcome, and the public's confidence in the justice system (see "Sidebar: Judges, Outside Research, and the Reasonable Apprehension of Bias").

Sidebar

Judges, Outside Research, and the Reasonable Apprehension of Bias

The legal test for judicial disqualification in Canada is known as the reasonable apprehension of bias test. It asks what "an informed person, viewing the matter realistically and practically" would think about the judge's ability to decide the case fairly (*Committee for Justice and Liberty v National Energy Board*, 1978, p. 394, as cited in *R v CDH*, 2015, para. 11). As its name implies, the focus of the reasonable apprehension of bias test is not on the presence or absence of actual bias but the perception thereof. Judges must therefore be careful not to engage in conduct that could create a reasonable apprehension of their impartiality, either for the parties to a case or for the public at large. This includes conducting external investigations and relying on information gathered outside of the courtroom. The Canadian system "does not permit a judge to become an independent investigator to seek out the facts" (*R v RDS*, 1997, para. 15).

Appellate courts have been quick to condemn judges for making use of online research outside the evidence presented at trial. In *R v Ghaleenovee* (2015), the trial judge's conviction for assault causing bodily harm was overturned because of an adverse finding of credibility the judge made against the accused on the basis of a Google street view image that the judge downloaded himself and that was not entered into evidence. In *CDH* (2015), the online research of an Ontario trial judge raised serious concerns about the impartiality of his decision to acquit the accused of sexual assault, possession of a weapon, and two counts of unlawful confinement. The trial judge had created a fake dating profile on Match.com "out of curiosity" about the website where the accused and complainant had met (para. 7). Just before delivering his verdict, Justice Ray sent a message to the lead detective and asked to see her **in chambers** following the delivery of his reasons. When the officer arrived, the judge asked "if she had gone onto the website 'Match.com'" (para. 4) and disclosed that he had done so the previous evening and created a fake profile. He then stated that defence counsel "would have been able to hang the victim with all of the available information" collected on the website (para. 5). He then suggested "they have lunch or grab a coffee one day" (Jones, 2014, para. 2). The detective reported the conversation to the Crown counsel, who made an application for mistrial. In granting the mistrial, Justice Ray commented on his error and the importance of the perceived fairness of the process:

> [M]y off the record conversation … in the absence of counsel was clearly an error in judgment on my part … . While I feel confident I can disabuse myself of any out of court evidence … , the appearance of fairness may very well have been affected. I am persuaded that my conversation with Detective Lehman about the evidence in this case after I gave my decision taints the perceived fairness of the process, and is an exceptional circumstance requiring a mistrial. (para. 8)

When granting the Crown's appeal on the acquittals and ordering a new trial, the Court of Appeal emphasized how the trial judge's conduct had jeopardized his judicial impartiality:

> We agree that the conduct of the trial judge created a reasonable apprehension of bias. He conducted his own research into a website that had been the subject of evidence at trial while his decision was under reserve, contrary to the basic principle that judges and jurors must make their judicial decisions based only on the evidence presented in court on the record. Jurors are specifically told not to conduct any Internet searches about anything in the case.
>
> His comment to the officer about the information that defence counsel could have obtained on the website to "hang" the complainant may have an innocent explanation, but viewed objectively, from the standpoint of a reasonable person, the comment creates the impression that, consciously or unconsciously, the trial judge would not decide fairly, and in particular would not fairly decide the credibility of the complainant. (paras. 14–15)

The Ontario Court of Appeal further criticized the trial judge's reasons for judgment in the case, remarking that his use of "irrelevant stereotypes" about sexual assault victims to make adverse findings about the complainant's credibility did little to disabuse the apprehension of bias (para. 17).

in chambers
may refer to a judge's office or an application (heard in a courtroom or not) that is based on oral argument and written affidavit (versus testimonial) evidence

Read Case Study Eight to learn more about legislated protections in the *Criminal Code* for sexual assault complainants.

Another key feature of the adversarial system is the non-intervening role of the judge. Trial judges are not meant to investigate or advocate, and those who intervene too frequently risk having their "vision clouded by the dust of the conflict," thus losing "the advantage of calm and dispassionate observation" (*Yuill v Yuill*, 1945, as cited in Stuart & Quigley, 2022, p. 594). This can be challenging in cases in which the accused is not represented by legal counsel, and the trial judge has a heightened responsibility to ensure a fair, impartial, and orderly trial. The Supreme Court has cautioned that "while trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice" (*Ontario v Criminal Lawyers' Association*, 2013, para. 54). An accused person has the right to represent themselves in court (including at the Supreme Court) and a court "cannot force counsel upon an unwilling accused" (*R v Cunningham*, 2010, para. 9). The rising rate of self-represented accused in Canadian courts has received **judicial notice** (see Chapter 8) by trial and appellate courts, where access to justice has been identified as one of the most pressing challenges facing Canada's judicial system (Gorman, 2020).

Read more about self-represented accused persons in Chapter 8.

judicial notice
a rule in evidence law that relieves the parties from having to prove facts that the court accepts as well known

Role of the Victim

Historically, victims have been allotted a minimal role in criminal court proceedings. Much of this is attributable to the adversarial model, which characterizes the crime as an offence against the community and its social order more than as an individual harm. In 1988, Bill C-79, *An Act to amend the Criminal Code (Victims of Crime) and another Act in consequence* came into force, giving victims the right (among others) to file a victim impact statement (s. 722(1) of the *Criminal Code*) and to read it (or have it read) to the court during a sentencing hearing (s. 722(5)). Section 722.2(2) of the *Criminal Code* also allows for the submission of community impact statements (Form 34.3). There are restrictions, however, on the content of victim impact statements, including prohibitions on expressions of vengeance or sentencing recommendations (Form 34.2; see also *R v Bremner*, 2000).

Read more about victim impact statements in Chapter 9.

In 2015, the *Canadian Victims Bill of Rights* was enacted, establishing four fundamental rights for victims of crime that must be considered during each step of the criminal justice system: information, protection, participation, and restitution.

Look to the back of the *Criminal Code* (s. 849) for the Forms.

Although the victim rights movement has shifted the role of a victim of a crime from that of an observer or a mere witness to that of a participant in the criminal process, follow-up assessments of the impact of the *Canadian Victims Bill of Rights* suggest many gaps remain in the criminal justice system's provision of victims' services and rights. In its five-year review of the legislation, the Office of the Federal Ombudsman for Victims of Crime (2020, p. 2) found that the law's implementation had been "sporadic and inconsistent" and called on governments to be more accountable to victims and their rights in order to increase public confidence in the criminal justice system.

Other Parties

non-party
a person or an organization that is not directly involved in the legal proceeding or dispute

intervenor
a person or an organization that is not directly involved in a legal proceeding but is permitted to participate to offer evidence that the parties are unable to provide

While allowing members of the public who are not directly involved in legal proceedings to participate may seem to run counter to the adversarial system, this practice reflects some of the system's most fundamental values, including the basic tenet that "rights should not be affected without affording the right-holder a hearing" (Sharpe & Roach, 2017, p. 120). The outcome of a case will often have repercussions for parties other than those directly involved in the dispute, so it is only fair to allow people whose rights may be affected by a court's decision to be heard by the court first. An intervention is an application by a **non-party** to participate in a legal proceeding. The *Rules of the Supreme Court of Canada* allow any person or organization that has an interest in a case that is before the Court to apply for **intervenor** status. Research has shown the Supreme Court approves the vast majority of intervenor applications and is increasingly doing so, with intervenors appearing in more than half (55 percent) of the cases heard at the court since the Charter came into force (Callaghan, 2020). The attorneys general of the federal and provincial

or territorial governments are common intervenors in criminal matters, as are civil liberties associations and various interest groups. The Canadian Civil Liberties Association, the Criminal Lawyers' Association, and the Women's Legal Education and Action Fund were the most common non-governmental intervenors in Supreme Court cases (McNabb, 2023). Many cases will have more than one intervenor, depending on the issues the court's decision will address. One of Canada's most important cases about medical assistance in dying, for example (*Carter v Canada (Attorney General)*, 2015), had 26 intervenors, including several religious charities and disability rights advocates. The enhanced participation of third parties in legal proceedings has been attributed to both the enactment of the Charter and a growing victims' rights movement.

Importantly, while intervening parties can offer arguments on the applicable law in a case, they are not permitted to make submissions about the merits of the case itself or to raise new legal issues. This and several other guiding principles were set out in a *Notice to the Profession* on interventions by the Supreme Court in 2021, outlining the Court's expectations of intervenors and the scope of their role (Supreme Court of Canada, 2021). The Court reiterated these principles in *R v McGregor* (2023), noting that intervenors help to enhance the accuracy of the court's analyses by providing perspectives that are "informed by their particular experience or specialized expertise" (para. 103).

Another important role in legal proceedings is that of an *amicus curiae* or "friend of the court." In many jurisdictions, the power to appoint *amicus curiae* is found in the rules of court, although the ability also derives from a court's inherent jurisdiction to manage court procedure and trial fairness. The *amicus* is not a party to the proceedings but instead serves to "help the court by providing a perspective or performing a function that the judge considers necessary to decide the issues in dispute" (*R v Kahsai*, 2023, para. 37). As the name implies, the *amicus curiae* is a role that serves the court, and as the Supreme Court noted in *Kahsai* (2023), *amicus* counsel "owe their duty of loyalty exclusively to the court" (para. 37). This is not to say that the accused can't incidentally benefit from an *amicus* appointment; in criminal proceedings where the accused is not represented by legal counsel, the *amicus* role can be an important means of ensuring trial fairness and protecting the Charter rights of the accused (see "Sidebar: Amicus Curiae in Criminal Court: R v Kahsai (2023)").

Courts can also appoint an *amicus curiae* to represent the public interest, such as in cases involving constitutional rights or the use of government power. This role is often fulfilled by the attorney general of the jurisdiction; however, the court can also appoint an independent lawyer to act as *amicus curiae* and present arguments on specific legal issues that arise during a case but are not adequately addressed by the parties. The Supreme Court appointed an *amicus curiae* in the *Reference re Secession of Quebec* (1998) case "in view of the complexity of the issues raised and the fact that some aspects of these issues would not otherwise be argued by the parties" (Supreme Court of Canada, 1997). The traditional *amicus curiae* role is **non-partisan** and therefore differs from that of an intervenor. While an intervenor presents evidence from a particular viewpoint, an *amicus curaie* should act as a "disinterested advisor to the court on a point of law or fact" (Mirsane, 2022, p. 674).

non-partisan
unaffiliated with any particular viewpoint or group; a neutral position

Sidebar

Amicus Curiae in Criminal Court: R v Kahsai (2023)

In the *Kahsai* case, the accused, Emanuel Kahsai, was charged with two counts of first-degree murder. One of the victims was Kahsai's mother, and several pieces of evidence connected Kahsai to the offence, including traces of both victims' blood on Kahsai's clothing, as well as eyewitness and surveillance evidence of someone matching his description leaving the scene of the crime.

(Continued on next page.)

Although Kahsai obtained a lawyer shortly after his arrest, he discharged his lawyer before the trial began and refused to find another one, insisting instead on representing himself. After he challenged his own mental fitness, three psychiatric assessments found him fit to stand trial and "feigning symptoms of mental illness for ulterior motives or strategic purposes" (*Kahsai*, 2023, para. 11). He was tried by a jury, and the judge appointed an *amicus curiae* to provide the accused with assistance during the jury selection. According to the Supreme Court account, the accused "was repeatedly excluded from the courtroom because of his chronically disruptive behavior. He often interrupted the trial judge and trial process with belligerent and disorderly conduct, despite repeated cautions from the judge" (*Kahsai*, 2023, para. 14).

The trial judge appointed a second *amicus curiae* partway through the trial "to assist the Court in ensuring that the proceedings are conducted fairly and appropriately" (*Kahsai*, 2023, para. 17) and asked that the *amicus* lawyer cross-examine the Crown witnesses. The accused vehemently objected to the *amicus* appointment and retained his right to represent himself and cross-examine witnesses. The trial judge made it clear to the jury that the role of the *amicus* was to assist the Court and not to represent the accused.

Kahsai was convicted by the jury on both counts of murder and sentenced to life in prison with no possibility for parole for two consecutive periods of 25 years—a sentence now subject to appeal given the Supreme Court's decision in *R v Bissonnette* (2022); see Chapter 9 for further discussion. He appealed his convictions, arguing that the Court's appointment of the *amicus curiae* unfairly affected his trial. The Court of Appeal dismissed the appeal, finding no miscarriage of justice. The Supreme Court also dismissed Kahsai's appeal (*Kahsai*, 2023), noting that

> [i]n tailoring the role for *amicus*, the judge must respect both the right of the accused to conduct their own defence and the right to a fair trial. … There is no doubt there was a striking imbalance in this trial. Mr. Kahsai was unrepresented and often excluded from participating in the proceeding because of his disruptive behavior. … Here, the trial judge faced the difficult task of managing a jury trial that Mr. Kahsai seemed determined to derail. Once it became obvious that Mr. Kahsai would not cooperate with the court or advance any viable defence, the trial judge took several measures to preserve trial fairness and restore balance to the proceeding. This included the appointment of an *amicus*. (paras. 2, 4, 5)

The Supreme Court advised that when appointing *amicus curiae*, the judge should consult with the parties and limit the scope and function of the *amicus* accordingly (e.g., cross-examination of certain witnesses, or support for court filings or motions). "While there are necessary limits to the adversarial functions that *amicus* can perform, the scope is broad enough to accommodate what is necessary for trial fairness in a particular case" (*Kahsai*, 2023, para. 64).

Criminal Court System

For a discussion of the appellate court system, see Chapter 10.

The provincial and territorial court system is the first venue for criminal cases in Canada. Although the power to make criminal law and criminal procedure lies with the federal government (s. 91(27) of the *British North America Act*, hereafter the Constitution), the authority to structure the territorial and provincial court systems belongs to the provincial and territorial governments (s. 92(14) of the Constitution). The names of superior courts therefore differ across territories and provinces (see Table 1.2). The superior court is known as the Court of King's Bench in several provinces (Alberta, Manitoba, New Brunswick, and Saskatchewan) and as the Supreme Court of the province in others (e.g., British Columbia Supreme Court). Nunavut has the only single-level court system in Canada, where the Nunavut Court of Justice serves as both the territorial and superior-level trial court (Department of Justice Canada, 2021).

TABLE 1.2 Names and Legal Abbreviations for Canada's Trial, Appeal, and Supreme Courts

Jurisdiction	Court Name	Legal Abbreviation
Federal	Supreme Court of Canada	SCC
Alberta	Alberta Court of Appeal	ABCA
	Alberta Court of King's Bench	ABKB
	Alberta Provincial Court	ABPC
British Columbia	British Columbia Court of Appeal	BCCA
	Supreme Court of British Columbia	BCSC
	Provincial Court of British Columbia	BCPC
Manitoba	Manitoba Court of Appeal	MBCA
	Court of King's Bench of Manitoba	MBKB
	Provincial Court of Manitoba	MBPC
New Brunswick	New Brunswick Court of Appeal	NBCA
	New Brunswick Court of King's Bench	NBKB
	Provincial Court of New Brunswick	NBPC
Newfoundland & Labrador	Court of Appeal of Newfoundland & Labrador	NLCA
	Supreme Court of Newfoundland & Labrador	NLSC
	Provincial Court of Newfoundland & Labrador	NLPC
Northwest Territories	Court of Appeal for the Northwest Territories	NWTCA
	Supreme Court of the Northwest Territories	NWTSC
	Northwest Territories Territorial Court	NTTC
Nova Scotia	Nova Scotia Court of Appeal	NSCA
	Supreme Court of Nova Scotia	NSSC
	Nova Scotia Provincial Court	NSPC
Nunavut	Nunavut Court of Appeal	NUCA
	Nunavut Court of Justice	NUCJ
Ontario	Ontario Court of Appeal	ONCA
	Ontario Superior Court of Justice	ONSC
	Ontario Court of Justice	ONPC
Prince Edward Island	Prince Edward Island Court of Appeal	PEICA
	Supreme Court of Prince Edward Island	PEISC
	Prince Edward Island Provincial Court	PEIPC
Quebec	Cour d'appel/Court of Appeal du/of Quebec	QCCA
	Québec cour supérieure/Superior Court	QCCS
	Cour du Québec/Court of Quebec	QCCQ
Saskatchewan	Saskatchewan Court of Appeal	SKCA
	Court of King's Bench for Saskatchewan	SKKB
	Provincial Court of Saskatchewan	SKPC
Yukon	Court of Appeal of Yukon	YKCA
	Supreme Court of Yukon	YKSC
	Territorial Court of Yukon	YKTC

Provincial and Territorial Courts

Read more about the *Gladue* principles in Chapter 9.

In most cases, a person's first court appearance takes place in a provincial or territorial court. Apart from criminal law, these courts handle a wide variety of matters, such as traffic and by-law violations, all family law cases (except divorces), and small claims (except in Manitoba, Ontario, and Prince Edward Island, where the small claims court operates as part of the superior court). Provincial and territorial courts house a number of specialized courts, such as drug treatment courts and courts that address family and intimate partner violence. Courts with training and knowledge in Indigenous legal systems also operate out of some provincial and criminal courts and are referred to as "Gladue courts," after the Supreme Court case that established a set of sentencing principles for use with Indigenous offenders (*R v Gladue*, 1999).

Provincial and territorial courts are also the venue for several pre-trial hearings, including preliminary inquiries, and may make rules of court for the administration and order of these proceedings as per sections 482(2) and 484 of the *Criminal Code* (see Chapter 5).

Superior Courts

For coverage of the appeal court system, see Chapter 10.

The superior court for each province and territory acts as the first court of appeal for the territorial and provincial courts. The most serious criminal cases are heard at the superior court level, as are all criminal trials with a jury. In some regions, superior courts will travel to remote or rural communities to hold court. This practice is common in Nunavut because many of its residents live far from Iqaluit, where the territorial courthouse is located. The Nunavut Court of Justice "flies to about 85 percent of all 25 communities" in the territory with "a judge, a clerk, a court reporter, a prosecutor, and at least one defense attorney" and, where possible, an interpreter, travelling "as often as every six weeks or as seldom as every two years, depending on how often it's needed" (Department of Justice Canada, 2021, p. 4).

See Chapter 8 for discussion of case management judges in section 551.1 of the *Criminal Code*.

Superior courts of criminal jurisdiction can also make rules of criminal procedure under section 482(1) of the *Criminal Code* to regulate and oversee the fair and expeditious administration of justice. This provision does not allow for the creation of rules that are inconsistent with existing laws, but it does empower courts with wide discretion, as outlined in section 482(3). While this is normally used for procedural efficiencies, as Coughlan (2020) rightly notes, "rules of court can have a major impact: bans on broadcasting judicial proceedings are established by rules of court, for example," (p. 36) as are awards for costs and orders for contempt of court.

Checkpoint: Test Yourself!

Using Criminal Code Annotations

Annotated copies of the *Criminal Code* provide helpful descriptions of each section, including summaries of important cases that have interpreted or applied the *Criminal Code* section in ways that have changed or informed the law. Several annotated versions of the *Criminal Code* are available in physical and online form (e.g., *Martin's Annual Criminal Code* and *Tremeear's Criminal Code*). See also Lance Triskle's (2020) *Guide to Martin's Annual Criminal Code* for a helpful overview of how to read and use an annotated *Criminal Code*.

Using one of these annotated copies of the *Criminal Code*, look up section 484, the provision that empowers provincial or territorial courts to "preserve order" during criminal court proceedings. This section is sometimes used by provincial or territorial courts to hold people in contempt of court. Read through the annotations for section 484. For what kinds of things have people been held in contempt of court under this section of the *Criminal Code*?

Criminal Court Jurisdiction

Before a court can hear a case, it must have the authority, or jurisdiction, to do so. Three types of jurisdiction have important procedural implications for an accused during a criminal trial: territorial, temporal, and statutory. See Figure 1.2.

FIGURE 1.2 Three Types of Criminal Court Jurisdiction

Territorial	Temporal	Statutory
• Established by the geographic location in which the offence takes place • Requires a "real and substantial link" to where the *actus reus* of the offence happened • Can be moved with a change of venue application	• Established by the period of time that the Crown has to bring the accused to trial • 1 year for summary offences (s. 786(2)) • 3 years for treason (s. 48(1)) • A "reasonable time" for all offences (s. 11(b) Charter) (see *Jordan* ceilings)	• Established by the offence classification • Also established by the election of the accused, where applicable (see Figure 1.3, Election Map) • Only provincial courts can hear summary offences and s. 553 indictable offences

Territorial

The geographic location in which the accused commits an offence establishes its territorial jurisdiction. Sections 470 and 798 provide provincial, territorial, and superior courts with territorial jurisdiction over offences committed anywhere in the territory. Courts normally hold criminal trials only for offences that have taken place within the borders of their judicial district, and section 478(1) of the *Criminal Code* prohibits a court from hearing a case if the offence was "committed entirely in another province." A court can, however, accept a guilty plea for an offence committed outside its jurisdiction, provided the attorney general of the province or territory where the offence took place consents (s. 478(3)) and the offence is not listed in section 469 of the *Criminal Code* (see below).

Territorial jurisdiction is normally established where the *actus reus* (or part of it) occurred, but it is not uncommon for offences to be committed across multiple provinces or territories, particularly in the digital age. Although section 6(2) of the *Criminal Code* provides that no one can be convicted of an offence committed outside Canada, several offence exceptions are recognized in the *Criminal Code*, including offences committed on an aircraft (s. 7(1)), as part of terrorist activity (s. 83.01), and some criminal conspiracies (ss. 465(4) and (5)), as examples. The number and strength of connections that can be drawn between an offence and a place can also be used by courts to settle disputes over jurisdiction, including across international borders. The Supreme Court has recognized territorial jurisdiction when a "real and substantial link" between the offence and the Canadian territory could be established (*Libman v The Queen*, 1985, p. 232). Factors such as where the death or injuries took place, the location of the parties and their families, and the national interest in prosecuting the case have been used by Canadian courts to establish extraterritorial jurisdiction (Stuart & Quigley, 2022, p. 24).

In exceptional circumstances, the Crown or the accused can also request a change of venue, which transfers the case to another court within the same province or territory. Such requests are rare, but when there is a reasonable prospect that an accused may not be able to get a fair trial (e.g., because of a lot of negative pre-trial publicity), a court is likely to grant the request.

For further discussion of change of venue applications, see Chapter 5.

Temporal

Temporal jurisdiction refers to the period of time that the state has to bring an accused person to trial. If the Crown takes too long in making its case against the accused, the state can lose its authority to prosecute the offence. The type of offence that the accused is alleged to have committed affects how much time the Crown has to bring a case to trial. In cases involving summary offences (see "Classification of Offences," below), for example, the Crown must begin the proceedings within 12 months of the day of the offence (s. 786(2)). Aside from crimes of treason (which must be prosecuted within three years of the offence; see s. 48(1) of the *Criminal Code*), there is no limitation period for most other offences in the *Criminal Code*. Once a prosecution has begun, however, section 11(b) of the Charter limits the time the Crown has to bring the accused to trial. The constitutional right to be tried within a reasonable time applies from the moment the accused is charged to the conclusion of the trial and can result in a stay of proceedings if the pre-trial delay is too lengthy.

Unreasonable Trial Delay and the Jordan Framework

Read more about the *Jordan* framework and trial delay in Chapter 5.

In *R v Jordan* (2016), the Supreme Court significantly revised the approach for assessing claims of unreasonable delay under section 11(b). The Supreme Court ruled that if "the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable" (*Jordan*, 2016, para. 47). These presumptive ceilings are any period longer than 18 months for cases in provincial or territorial courts and 30 months for cases in superior court. The Crown can rebut the presumption of unreasonableness by establishing the presence of "exceptional circumstances," defined as those outside the Crown's control, such as medical or family emergencies of key participants, extradition or deportation orders, and other circumstances associated with complex cases. Global health crises have also been held by courts to meet the "exceptional circumstances" standard (see "Sidebar: Unreasonable Trial Delay and COVID-19").

The Supreme Court reaffirmed its position on unreasonable delay in *R v KJM* (2019) and ruled that the 18-month presumptive ceiling also applies to youth cases under the *Youth Criminal Justice Act*. The Ontario Court of Appeal followed suit in 2020 and ruled that the ceiling should be applied uniformly, including to provincial ticketed offences, such as speeding or trespassing (*R v Nguyen*, 2020). The *Jordan* framework was also held to apply to corporate accused in the British Columbia case *R v Elite Farm Services Ltd* (2021), featuring animal cruelty charges at a commercial chicken farm.

Sidebar

Unreasonable Trial Delay and COVID-19

The World Health Organization declared the COVID-19 virus to be a global pandemic in March 2020, less than four years after the Supreme Court's *Jordan* decision and its framework for assessing unreasonable trial delay in section 11(b) of the Charter. Before the pandemic, the impact of the *Jordan* case had already been measurable. In 2019, an investigative news report found that stays of proceedings had been granted in almost 800 criminal cases (of approximately 3,100 applications) following the *Jordan* decision, including those involving charges of murder (Russell, 2019). The COVID-19 pandemic resulted in widespread adjournments across Canada as courts suspended criminal matters and jury selections until arrangements for remote trials could be made. This resulted in a significant number of lost court days. The chief justice of Quebec's Superior Court estimated in mid-May 2020 that his court "was losing 1,000 judge [sitting] days per month" (Raymer, 2020). Even with the shift to virtual hearings, the chief justice estimated that courts were working at only 70 percent of their usual rate.

The *Jordan* framework provides for exemptions from the presumptive ceilings for "exceptional circumstances" and several courts have ruled the global health crisis falls within this exemption (see *R v Holsworth*, 2022; *R v Loiacono*, 2023; and *R v Simmons*, 2020, paras. 70–73, in particular). Legal scholars

have also argued that global health crises delays could still result in stayed criminal charges, particularly when the Crown has not made efforts to reduce the delay. Moreover, "many of those who are disproportionately likely to be prosecuted for crimes, or to be victims of crime, are also likely to be among those hit hardest by COVID-19" (Paciocco, 2021, p. 837).

Although the onus for prosecuting the accused within a reasonable time rests on the Crown, the accused might also want a speedy trial for several reasons. Despite the Charter right to be presumed innocent, being accused of a crime comes with a great deal of social stigma and legal jeopardy. The accused may have to await trial in custody or, if released, be subject to restrictive conditions, increased police scrutiny, and the looming threat of an uncertain verdict and ensuing criminal punishment. These dangers and their harmful effects on the accused, the victims, and the community have a direct impact on public confidence in the administration of justice. The promise of timely justice in section 11(b) therefore also serves several societal interests. The Supreme Court remarked on the wider values that are served by a speedy trial in the *Jordan* case:

> As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs. … [T]he right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole. (paras. 2, 19)

Statutory

The *Criminal Code* grants exclusive jurisdiction over some offences to the superior courts and exclusive (or "absolute") jurisdiction over other offences to the provincial and territorial courts (see Figure 1.2). Superior courts also have inherent jurisdiction, meaning they have the authority to act as the court of first instance unless expressly prohibited by statute. Provincial and territorial courts, however, require legislative authority to establish jurisdiction over an offence. Statutory jurisdiction is most influenced by the classification of an offence and has an effect on the procedural rights that are available to an accused, since some trial procedures (e.g., jury trials) are available only in a superior court.

Classification of Offences

All matters in a criminal proceeding begin with the offence classification. How an offence is classified in the *Criminal Code* determines many things, including the range of available punishments for the offence, as well as the trial procedures and appeal options that will apply. As previously noted, the classification of an offence also dictates which court has jurisdiction to hear a case and how much time the Crown has to prosecute the crime.

The *Criminal Code* has three offence classifications: summary conviction offences, indictable offences, and hybrid offences. The punishment provision (sometimes called the charging section) for each offence in the *Criminal Code* is a good way to quickly identify whether an offence has been classified as a summary conviction, indictable, or hybrid offence. The offence of aggravated assault provides a good example. Section 268(1) of the *Criminal Code* describes the elements of the offence of aggravated assault. The offence's classification is found in section 268(2), in which the *Criminal Code* describes the eligible punishments for aggravated assault:

> 268(2) Every one who commits an aggravated assault is guilty of *an indictable offence* and liable to imprisonment for a term not exceeding fourteen years. [Emphasis added.]

This provision indicates that aggravated assault is classified as an indictable offence. Hybrid offences will list both classifications in their punishment provision. Sexual assault, for example, is classified as a hybrid offence, evident in the description of its penalties in sections 271(a) and (b):

> 271 Every one who commits a sexual assault is guilty of
> (a) an *indictable offence* and is liable to imprisonment for a term of not more than 10 years or …
> (b) an *offence punishable on summary conviction* and is liable to imprisonment for a term of not more than 18 months. [Emphasis added.]

Checkpoint: Test Yourself!

Offence Classification

Using the index or online version of the *Criminal Code*, find each of the following offences and determine their classification. Remember to include the relevant *Criminal Code* provision for each answer:

1. breach of recognizance,
2. knowingly opening someone else's mail,
3. bribing a judge.

Summary Conviction Offences

Summary conviction offences are considered the least serious offences in the *Criminal Code*. Examples include many property and fraud offences, as well as public nuisance violations, such as vagrancy or trespassing at night. They are punishable with a maximum penalty of two years less a day of imprisonment, a maximum fine of $5,000, or both (s. 787(1)). Only a provincial or territorial court can hear a summary conviction offence. These offences therefore do not require a preliminary inquiry and cannot be tried by a jury.

Indictable Offences

The most common offences in the *Criminal Code* are indictable offences. Although considered more serious than summary conviction offences, the nature of the crimes they cover is diverse, from violent personal offences to fraud and property crimes. Some indictable offences have **mandatory minimum sentences**, while others (such as attempted murder) are punishable with a sentence of life imprisonment. Unless otherwise stated, indictable offences have a maximum penalty of five years' imprisonment (s. 743).

mandatory minimum sentence
a penalty required by the *Criminal Code* that must be imposed for certain offences

Indictable offences have two procedurally important categories, each referred to by the section of the *Criminal Code* in which it is classified: section 469 and section 553.

Section 469 Offences

Read more about jury trials in Chapter 7.

Section 469 of the *Criminal Code* lists the most serious offences in Canada, including murder, conspiracy, treason, war crimes, and piracy, among others. Superior courts have absolute jurisdiction over section 469 offences, which means that no other court can hear cases involving these crimes. This also means the accused does not have an election (see "Mode of Trial," below) when charged with an offence in section 469. Offences listed in section 469 must also be tried by a judge and jury, unless both the Crown (speaking for the attorney general) and the accused can agree to a trial by judge alone. These offences represent such serious transgressions of the country's values that they must be judged by representatives of the community as a whole. Section 469 offences are also sometimes referred to as "reverse onus" offences because they trigger a shift in the normal burden of proof for several procedural matters, including arrest (see Chapter 2) and bail (see Chapter 4).

Section 553 Offences

Section 553 of the *Criminal Code* lists a series of indictable offences that are classified as offences of absolute jurisdiction for the provincial and territorial courts. Offences listed in section 553 are considered to be less serious than other indictable offences in the *Criminal Code*. Examples include theft or fraud involving property valued at less than $5,000, breach of probation, and public mischief. Superior courts do not have the authority to try section 553 offences, so trials for these offences do not have a preliminary inquiry or use a jury. Offences listed in section 553 also do not involve an election by the accused (see the election map in Figure 1.3).

Hybrid Offences

Some offences are called hybrid (or dual) offences because they can be prosecuted as either summary conviction offences or as indictable offences, depending on how the Crown decides to proceed. This decision is based on a number of discretionary factors and is made known to the accused either before or at the arraignment when the charges are read in court. Some of the factors the Crown considers when deciding whether to proceed by summary conviction or by indictment include the following:

- the seriousness of the offence (on the alleged facts),
- the degree of harm done and the number of victims,
- the criminal record of the accused,
- any involvement in a criminal organization,
- evidence of witness tampering,
- preliminary inquiry procedures and their burden on victims and witnesses,
- the prevalence of the offence in the community and the need for deterrence,
- the public's interest in a trial by jury,
- eligible penalties in the event of conviction (Public Prosecution Service of Canada, 2023).

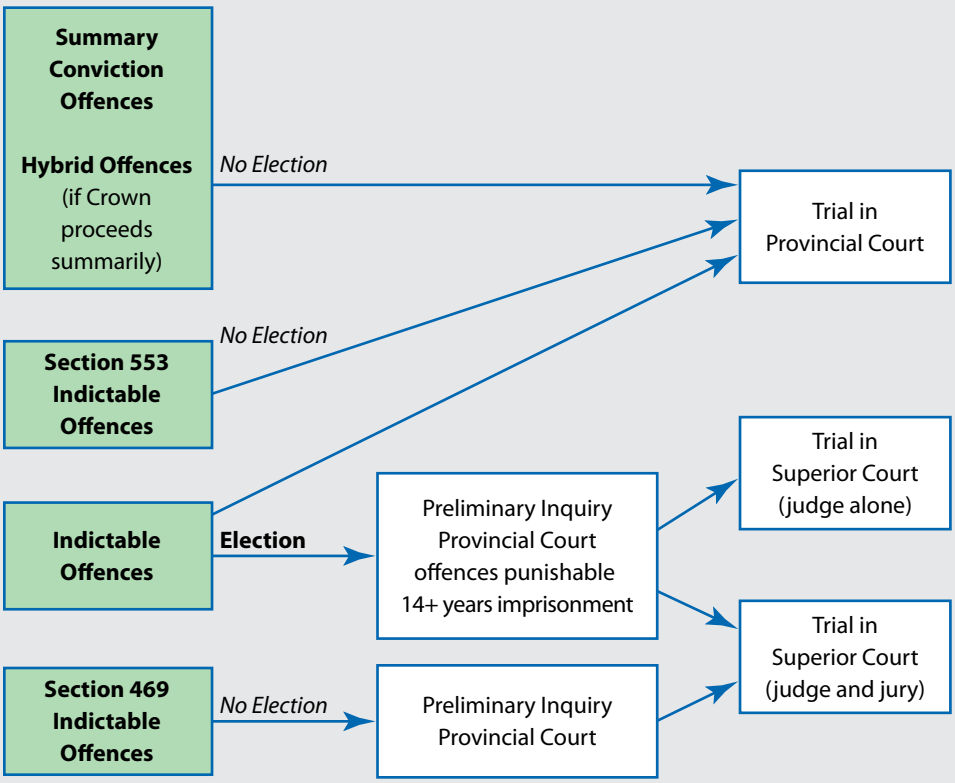
In 2019, the federal government passed Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, which reclassified several offences in the *Criminal Code*, including changing 118 indictable offences into hybrid offences. Reducing trial delay and increasing prosecutorial discretion were both cited as reasons for Bill C-75's "hybridization" of indictable offences (Department of Justice Canada, 2019).

Read more about how trial delay can be addressed in Chapter 5.

Mode of Trial

The classification of an offence plays a role in determining which court will have jurisdiction to hear the case. As noted, some offences fall within the exclusive jurisdiction of the provincial or territorial court, namely: summary conviction offences, hybrid offences (in which the Crown proceeds summarily), and section 553 offences. Other offences, specifically those listed in section 469, can be tried only by a superior court. In any other case in which the offence is not one of absolute jurisdiction, the accused can select which court (provincial/territorial or superior) will hear the case. This choice is referred to as the accused's election. It is available whenever the accused is charged with an indictable offence (not in s. 469 or s. 553) or a hybrid offence in which the Crown proceeded by way of indictment (see Figure 1.3).

FIGURE 1.3 Election Map



Source: Based on Brockman and Rose (2011).

Read more about the preliminary inquiry in Chapter 5.

When the accused has an election, the accused can select:

- a trial by judge in provincial or territorial court,
- a trial by judge in superior court,
- a trial by judge and jury in superior court.

If the accused elects a superior court trial and the offence is one that is punishable with 14 or more years in prison, a preliminary inquiry is first held in provincial or territorial court, followed by the trial (by jury or judge alone, depending on the accused's choice) in superior court. If the accused elects a provincial or territorial court trial, no preliminary inquiry will be held, and the accused does not have the option of a jury trial. As a result, provincial or territorial court trials are much shorter than those in a superior court—a reason an accused might elect a trial by provincial or territorial court. In other cases, however, an accused might want to see a jury determine the matter and would therefore elect a superior court trial.

The attorney general may override the accused's election (under s. 568 and s. 569 of the *Criminal Code*) to force a jury trial if the offence is punishable by more than five years in prison. This override of the accused's election is sometimes used in cases with more than one accused if they have elected different modes of trial. Overriding the accused's election can ensure that all accused persons are tried before the same court.

Checkpoint: Test Yourself!

Election Exercise

Using the election map in Figure 1.3 and the offence classifications you identified in the last Checkpoint, determine the following for each offence:

1. whether or not the accused has an election,
2. what court(s) has jurisdiction to hear the case,
3. why.

Remember to include the applicable *Criminal Code* provision that supports your answer.

Conclusion

"Technical" is a good word to describe criminal procedure. It involves many rules and regulations about the process of bringing a person to trial for a criminal offence. Understanding these rules alongside the tensions that operate in the criminal justice system is more than a reflective exercise. Balancing procedural protections for the accused with the state's obligation to ensure public safety is a very real task performed by judges in the daily work of criminal procedure and evidence law. As the chapters that follow will demonstrate, how these rights and legal rules are interpreted has a significant impact on the way crime is investigated, prosecuted, and adjudicated.

DISCUSSION QUESTIONS

1. The Charter plays a pivotal role in criminal procedure and evidence law and is often cited as the cause of several tensions in the criminal justice system. Is this a fair claim? Choose two of the adversarial system tensions that are discussed in this chapter and explore the role that Charter rights play in fostering or maintaining competing values.
2. What do you think about the role that victims of crime have in criminal trials? Do you think victims should have more influence on how offences are prosecuted? What issues are raised by the increased involvement of victims in criminal prosecutions? How might the intervenor or *amicus curiae* role be used to enhance victims' rights in the criminal justice system?
3. Visit the Supreme Court of Canada website and find the case *Carter v Canada (Attorney General)*, 2015 SCC 5. On the first page of the judgment, read through the list of intervenors in the case. Were any of the names on this list surprising? The *Carter* case resulted in the decriminalization of medically assisted death. What do you think about the intervenors that appeared in the *Carter* case? Is this a practice that you think is important in Canadian law or are there reasons *not* to permit intervenors?

APPLY YOUR KNOWLEDGE

1. You are serving as Crown counsel for a case involving four counts of sexual assault against an accused who groped several women at the entrance to a music festival where he was working as a security officer. On four occasions, the assaults were caught on camera, leading to the charges. Two of the victims live out of province. One of the victims has been reluctant to cooperate and defines the assault as "not that serious." All the victims are anxious to see the case resolved as quickly as possible. The accused does not have a criminal record.

   Sexual assault is a hybrid offence. As the Crown, how do you think this offence should be prosecuted—summarily or by indictment? Why? What factors have influenced your decision?
2. Mulder is on trial for breaking and entering. One evening, during the week of the trial, the trial judge decides to follow one of the defence's key witnesses on Instagram (an online photo-sharing and social media platform). The judge browses through the posts made by the witness on the night of the offence but doesn't learn anything. A few days later, the trial ends and Mulder is convicted. The judge's decision questioned the credibility of the defence witness based partly on "her social media activity," although no social media evidence was submitted at trial. Can the defence use this remark to overturn Mulder's conviction? Provide at least one case to support your answer.
3. Scully has been charged with possession of a controlled substance listed in schedule II of the *Controlled Drugs and Substances Act*. Scully watches a lot of *Law & Order* and has been bragging about not needing a lawyer. "I can't *wait* to tell my story to the jury!"

   It looks like Scully should have taken a criminal procedure course! Why will things not go as Scully has planned?

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