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Professional Legal Training Course 2024

Practice Material

Criminal Procedure

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CRIMINAL PROCEDURE

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Chapter 1

Criminal Law and Practice[1]

[§1.01] Introduction to These Materials

These materials follow a generally chronological order. The materials start with the initial steps in a criminal file, when a person is accused of a crime and consults a lawyer. From there, the materials cover bail principles, trial practice, sentencing, and appeals. These materials also address the *Youth Criminal Justice Act* as a separate chapter (Chapter 7).

[§1.02] Current Awareness

One excellent way to stay current in criminal law is to be active in local Criminal Justice Subsections of the BC Branch of the Canadian Bar Association (CBA) and to attend section meetings. These meetings bring together Crown and defence counsel to discuss current issues. Judges often attend or serve as speakers. For information about membership and section meetings, go to the CBA's website (www.cbabc.org).

Lawyers should also attend courses and seminars relating to the practice of criminal law, like those hosted by the Continuing Legal Education Society of BC and the Trial Lawyers Association of British Columbia. The materials produced for these programs are topical, and materials from courses conducted in previous years are also available. Courthouse Libraries BC also provides webinars, both live and in their online archives.

The National Criminal Law Program (NCLP) put on by the Federation of Law Societies of Canada provides an excellent educational opportunity each summer. The NCLP rotates annually between three themes: Substantive Criminal Law, Criminal Procedure and the *Charter*, and Evidence.

Criminal lawyers seeking practice advice, including on ethical issues, should consider contacting senior defence or Crown counsel, a Law Society Practice Advisor, or the CBA's Criminal Practice Advisory Committee. The Committee consists of senior criminal counsel who are prepared to give guidance. The names of current members of the Committee are available from the CBA or from the *CBABC Lawyers' Directory*, published annually by the BC Branch of the CBA.

Junior defence counsel should be aware that many senior prosecutors and defence counsel are willing to assist them by answering questions or discussing legal issues, even if they have no prior relationship with the junior lawyer.

[§1.03] Essential Resources

Lawyers who intend to practice criminal law must be familiar with a wide variety of statutory, regulatory, evidentiary, procedural, and administrative materials.

All criminal lawyers must have at least one current annotated *Criminal Code*, R.S.C. 1985, c. C-46. *Martin's Annual Criminal Code* and *Tremeear's Annotated Criminal Code* (both from Thomson Reuters) are the most commonly used versions. These annotated *Codes* include the following statutes:

Criminal Code

Canada Evidence Act

Canadian Charter of Rights and Freedoms

Controlled Drugs and Substances Act

Youth Criminal Justice Act

Tremeear's also includes other useful statutes such as the *DNA Identification Act*, the *Firearms Act* and the *Interpretation Act*. *Martin's* includes an "Offence Grid" and *Tremeear's* includes "Offence Tables," all of which are useful in setting out possible sentences and ancillary orders for each offence.

While these publications are useful tools, counsel should never assume that they always set out the current provisions of the *Criminal Code*. Legislative amendments are ongoing, and it is impossible to keep an annual text completely current. Supreme Court of Canada and British Columbia Court of Appeal decisions can also affect substantive and procedural criminal law at any time. Counsel need to stay informed of both legislative reforms and court decisions affecting the practice of criminal law.

In addition to an annotated *Code*, counsel should know and access the *Criminal Rules of the Supreme Court of BC*, the *Provincial Court of BC Criminal Caseflow Management Rules*, and the *BC Criminal Appeal Rules, 1986*. These rules govern criminal practice in the various levels of court. They are supplemented by practice directions (called practice directives in the Court of Appeal). The rules and practice directions are published on the courts' websites (www.bccourts.ca).

[1] **Rebecca McConchie**, McConchie Criminal Law, kindly revised this chapter in July 2023. This chapter was previously revised by Micah Rankin (2021); Joseph J. Blazina (2016, 2018, and 2019); and Tina L. Dion (2002 for Aboriginal law content).

It is essential that counsel carefully review the practice directions prepared by the superior courts and updated from time to time. In 2022 many Court of Appeal practice directives that apply to both civil and criminal matters (such as "Appearing Before the Court" and "Citation of Authorities") were updated as part of a transition to a new *Court of Appeal Act*, S.B.C. 2021, c. 6 and Rules. Practice directions also provide helpful guidance about basic procedural matters, such as gowning, introducing oneself on the record, and formatting written material.

Online services and websites also afford access to relevant legislation and case law. CanLII provides free access to case law and statutory materials. Provincial and federal statutes are available online (www.bclaws.ca and www.laws.justice.gc.ca/). Specialized criminal-law content is available online from LexisNexis's Quicklaw service in their "Criminal Essentials" package, and from Carswell's Westlaw service in their "Criminal Source" package. Portions of the LexisNexis and Carswell services are available for free at BC Courthouse Libraries. The Courts of British Columbia website contains recent judgments, court schedules, court policies, and fillable forms and templates for applications and other types of written material (www.bccourts.ca). Court Services Online, BC's electronic court registry, allows users to see information about a completed or ongoing provincial court criminal matter, including upcoming court dates. Users can search by client name or court file number (https://justice.gov.bc.ca/cso/esearch/criminal/partySearch.do).

Note that during the COVID-19 pandemic, there were several procedural changes in the courts. For current procedures, consult practice directions issued by the courts relating to matters such as court protocols, scheduling, filing, and remote appearances. Effective January 14, 2023, *An Act to Amend the Criminal Code and the Identification of Criminals Act and to Make Related Amendments to Other Acts (Covid-19 Response and Other Measures)*, S.C. 2022, c. 17 is in force. It addresses options to appear by videoconference or telephone, as well as remote jury selection, among other things.

[§1.04] Further Reading

Listed below are law reports, texts and loose-leaf services for the working library of a criminal lawyer. These resource materials are available through the various branches of the BC Courthouse Library Society and in the libraries of the law schools in the province.

1. Annotated Codes, Digests and Reports

Canada Supreme Court Reports

Criminal Reports (C.R.)

Canadian Abridgment Digests: Criminal Law

Crankshaw's Criminal Code of Canada

Canadian Criminal Cases (C.C.C.)

Martin's Annual Criminal Code

Supreme Court of Canada Judgments (Lexum)

Tremeear's Annotated Criminal Code

Weekly Criminal Bulletin (W.C.B.)

CLEBC Case Digest Connection: Criminal Digests

2. Criminal Procedure

Ewaschuk, E.G., *Criminal Pleadings & Practice in Canada*, 3rd ed. Toronto: Carswell (loose-leaf).

Gold, Alan D., *The Practitioner's Criminal Code*, 2024 ed. Toronto: LexisNexis, 2023.

Doran, Anthony, *Judicial Interim Release—Bail Manual*, 4th ed. Toronto: LexisNexis (loose-leaf).

Kenkel, J.F., *Criminal Lawyers' Trial Book*. Toronto: LexisNexis (loose-leaf).

Pearson, Jeffrey E. and Lori A. Thompson, *Criminal Procedure: Canadian Law and Practice*, 2nd ed. Toronto: LexisNexis (loose-leaf).

Rose, David, *Quigley's Criminal Procedure in Canada*. Toronto: Thomson Reuters (loose-leaf).

Trotter, Gary, *The Law of Bail in Canada*, 3rd ed. Toronto: Thomson Reuters, 2018.

Salhany, (Hon.) Roger E., *Canadian Criminal Procedure*, 6th ed. Toronto: Thomson Reuters (loose-leaf).

Salhany, (Hon.) Roger E., *Criminal Trial Handbook*. Toronto: Thomson Reuters (loose-leaf).

Watt, D., and J. Di Luca, *Carswell's Forms and Precedent Collection: Criminal Law Precedents*, 2nd ed. Toronto: Thomson Reuters (loose-leaf).

3. Evidence

(a) Generally

Fuerst, Michelle et al, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 6th ed. Toronto: LexisNexis, 2022.

Gibson, John L. and Henry Waldock, *Criminal Law Evidence, Practice and Procedure*. Toronto: Carswell (loose-leaf).

Hageman, Cecilia et al, *DNA Handbook*, 2nd ed. Toronto: LexisNexis, 2008.

Paciocco, David M. et al, *The Law of Evidence*, 8th ed. Toronto: Irwin Law, 2020.

Rose, David and Lisa Goos, *DNA: A Practical Guide*. Toronto: Carswell (loose-leaf).

Salhany, (Hon.) Roger E. and Edward W. Claxton, *The Practical Guide to Evidence and Proof*

in Criminal Cases, 9th ed. Toronto: Carswell, 2022.

Segal, M., *Disclosure and Production in Criminal Cases.* Toronto: Carswell (loose-leaf).

Tanovich, David et al, *McWilliams' Canadian Criminal Evidence*, 5th ed. Toronto: Carswell (loose-leaf).

Watt, David, *Watt's Manual of Criminal Evidence 2023*. Toronto: Carswell.

Wigmore on Evidence (the most-cited historical treatise, available on Heinonline.org).

(b) Search and Seizure

Fontana, James and David Keeshan, *The Law of Search and Seizure in Canada*, 12th ed. Toronto: LexisNexis, 2021.

Hutchison, Scott, *Hutchison's Search Warrant Manual 2015*. Toronto: Carswell, 2014.

Hutchison, Scott and Michael Bury, *Search and Seizure Law in Canada*. Toronto: Carswell (loose-leaf).

Schermbrucker, David et al, *Search and Seizure*. Toronto: Emond Publishing, 2021.

4. Substantive Law

(a) Generally

Barrett, J. and R. Shandler, *Mental Disorder in Canadian Criminal Law*. Toronto: Carswell (loose-leaf).

Gibson, John L. and Henry Waldock, *Canadian Criminal Code Offences.* Toronto: Carswell (loose-leaf).

Gordon, John M. and Susan Brown, *Working Manual of Criminal Law*. Toronto: Carswell (loose-leaf).

Manning, Morris and Peter Sankoff, *Manning, Mewett & Sankoff—Criminal Law*, 5th ed. Toronto: LexisNexis, 2015.

Stuart, Don, *Canadian Criminal Law: A Treatise*, 8th ed. Toronto: Carswell, 2020.

(b) Drinking and Driving

Gold, Alan D., *Defending Drinking, Drugs and Driving Cases 2022*. Toronto: Thomson Reuters, 2022.

Jokinen, Karen and Peter Keen, *Impaired Driving and other Criminal Code Driving Offences*, 2nd ed. Toronto: Emond Publishing, 2023.

McLeod, R. et al, *Breathalyzer Law in Canada: The Prosecution and Defence of Drinking and Driving Offences*, 5th ed. Toronto: Carswell (loose-leaf).

(c) Drugs

Bennett, Russell and Alan Young, *Canada's Cannabis Act: Annotation & Commentary*, 2023/2024 ed., Toronto: LexisNexis, 2023.

Gorham, Nathan et al, *Prosecuting and Defending Drug Cases: A Practitioner's Handbook*. Toronto: Emond Publishing, 2019.

MacFarlane, Bruce A., KC et al, *Cannabis Law*, 2nd ed. Toronto: Carswell, 2021.

(d) Sexual Offences

Brown, Daniel and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, 2nd ed. Toronto: Emond Publishing, 2020.

5. *Canadian Charter of Rights and Freedoms*

Asma, Matthew and Matthew Gourlay, *Charter Remedies in Criminal Cases: A Practitioner's Handbook*, 2nd ed. Toronto: Emond Publishing, 2022.

Dunn, Melanie and Andrew Bernstein, *Canadian Charter of Rights Annotated*. Toronto: Carswell (loose-leaf).

McLeod, R.M. et al, *Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences*. Toronto: Carswell (loose-leaf).

Stuart, Don, *Charter Justice in Canadian Criminal Law*, 7th ed. Toronto: Carswell, 2018.

6. Advocacy

(a) Witnesses

Levy, Earl J., KC, *Examination of Witnesses in Criminal Cases*, 7th ed. Toronto: Carswell, 2016.

Mewett, Alan W., KC and Peter Sankoff, *Witnesses*. Toronto: Carswell (loose-leaf).

Salhany, (Hon.) Roger E. et al, *Cross-Examination: The Art of the Advocate*, 4th ed. Toronto: LexisNexis, 2016.

(b) Jury Trials

Der, Balfour, KC, *The Jury—A Handbook of Law and Procedure*. Toronto: LexisNexis (loose-leaf).

Ferguson, G.A. et al, *Canadian Criminal Jury Instructions* (CRIMJI). Vancouver: CLEBC, 2019 (online).

Watt, David, *Watt's Manual of Criminal Jury Instructions*, 3rd ed. Toronto: Carswell, 2023.

(c) Appeals

Bennett, Elizabeth, *Indictable Appeals in British Columbia*. Toronto: Carswell, 1995.

Karimjee, Moiz, *Issues in Criminal Trials and Summary Appeal Law*, 2nd ed. Toronto: LexisNexis, 2018.

Gelowitz, Mark et al, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th ed. Toronto: LexisNexis, 2022.

7. Sentencing

Nemet-Brown, S., *Canada Criminal Sentencing Digest*. Toronto: LexisNexis (loose-leaf).

Green, Ross Gordon, *Justice in Aboriginal Communities: Sentencing Alternatives*. Ottawa: Canadian Electronic Library, 2016.

Ruby, Clayton et al, *Sentencing*, 10th ed. Toronto: LexisNexis, 2020.

Sproule, C., *Canadian Sentencing Digest Quantum Service*. Toronto: Carswell (loose-leaf).

8. Youth Criminal Justice

Bala, Nicholas and Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed. Toronto: Irwin Law, 2012.

Bloomenfeld, (Hon.) Miriam H., *Youth Criminal Justice Act Manual*. Toronto: Carswell (loose-leaf).

Direnfeld, Rochelle et al, *Annotated Youth Criminal Justice Act*, 2nd ed. Toronto: LexisNexis (loose-leaf).

Tustin, Lee, *A Guide to the Youth Criminal Justice Act*, 2023/2024 ed. Toronto: LexisNexis, 2023.

Chapter 2

Preliminary Matters[1]

This chapter deals with preliminary matters in a criminal case, including taking the case and bail.

An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019, c. 25 (former Bill C-75) made changes to the bail regime. These changes came into force on December 18, 2019. Among other things, the changes increase the types of conditions that police can impose on an accused person, provide guidance on bail conditions, and require that the bail court consider the circumstances of Indigenous accused and accused from vulnerable populations.

Note that in January 2024, further changes to the bail provisions of the *Criminal Code* under Bill C-48 came into force. The Bill requires a parliamentary review of these measures in December 2028, five years after the Bill received Royal Assent.

[§2.01] Taking the Case

A lawyer's first decision concerning a criminal matter will be whether to take the case. This decision can be made irrevocably at the outset, or it may be reserved to a later stage in the proceedings or even depend upon completion of certain conditions. The lawyer may take on the entire case until completion or take on a limited part of the proceedings only.

1. Services the Lawyer Provides

These services are commonly provided:

(a) interview with the accused or associate of the accused—preliminary advice given and no further services provided;

(b) attendance for a police interview of the accused who is surrendering on a warrant—no further services;

(c) attendance to all matters up to conclusion of bail hearing—no further services;

(d) application for a Rowbotham order, obliging the state to pay for or contribute to the cost of the accused's defence;

(e) attendance to all matters up to conclusion of preliminary hearing—no further services;

(f) responsibility for the whole of the case (this is the most common situation); or

(g) responsibility for several charges against the same accused (also a very common situation).

A general introduction by a lawyer at a court appearance implies that the lawyer is prepared to see the matter through to the conclusion of the case. It is important that seeing the matter through to the conclusion of the case include compliance with the *Criminal Caseflow Management Rules* ("CCFM Rules") as amended (available on the Provincial Court website: www.provincialcourt.bc.ca). The CCFM Rules are designed to manage adult and youth criminal cases in Provincial Court. The CCFM Rules set out the obligations and expectations of Crown counsel, defence counsel and the court for required pre-trial court appearances. An example of a pre-trial appearance is an arraignment hearing. See Chapter 3 for more on the CCFM Rules.

It is best practice that a lawyer who acts for a client only in a limited capacity should promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person. See also the *Code of Professional Conduct for British Columbia* (the "*BC Code*"), section 3.2-1.1 ("Limited Scope Retainers").

2. Factors to Consider

In deciding whether to take a case, the lawyer should consider several factors:

(a) the nature of the charge and the complexity of the case, including whether the lawyer is competent in that area of law;

(b) the probable time required, and the lawyer's workload;

(c) the amount of the fee, and the prospects of being paid;

(d) whether the client is in custody, and if so, whether the location is remote;

(e) the effect of the case on the position of the lawyer in the community;

[1] **Ellen Leno**, Administrative Crown Counsel, Vancouver Provincial Crown Counsel, kindly revised this chapter in February 2023 and December 2020. Previously revised by Mornè Coetzee (2019); Baljinder Girn (§2.10 in 2019); Ellen Leno (2017); Adrienne V. Lee (2011 and 2012); Richard Hewson (2006); Kenneth D. Madsen (2003–2005); Thomas E. Burns (1996–2002); and Bronson Toy (1994). Reviewed by Tina L. Dion in 2002 for Aboriginal law content.

(f) the position of the client in the community as it affects the position of the lawyer in the case;

(g) the lawyer's relationship with others involved in the case, including the judge, prosecutor, victims, relatives, witnesses, co-accused, co-counsel, etc. (i.e. whether there are any conflicts of interest);

(h) whether the client previously retained other counsel for this matter; and

(i) proceeds of crime legislation and anti-money laundering rules (see *Practice Material: Professionalism: Practice Management*, Chapter 7, for more on this topic).

The weight given to these and other factors will vary in each case. For example, a lawyer might decide not to defend a client who has a history of firing counsel just before hearings (see h. above), or a lawyer in a small town may decide against defending a local accused because of the lawyer's relationship with others in the case (see item g. above).

3. Information and Communication

There are many ways to establish the solicitor-client relationship. Often, the client initiates the relationship by contacting the lawyer directly or through an intermediary such as a friend or relative. Legal aid administrators might contact the lawyer who has registered to provide legal aid services. When the client contacts the lawyer directly, the lawyer may immediately begin considering the case and whether to accept it. If an intermediary is involved, the lawyer's first task is to determine whether the intermediary has authority and is accurately representing the wishes of the client. The lawyer should make every effort, as soon as possible, to confirm that the client wants the lawyer to consider taking the case. In addition, instructions received through intermediaries must be confirmed with the client, as soon as possible. Court proceedings may be delayed and counsel may be embarrassed when there is confusion about who (if anyone) is acting as counsel, or if there is uncertainty about the lawyer's instructions. These difficulties occur less often when the lawyer deals directly with the client.

Prompt, direct contact with clients is always important to reassure them that their interests are being addressed. This is critical with clients who are in custody. In practice, telephone contact can almost always be made at any detention facility, although the lawyer may have to leave a message and wait a few minutes for the client to call back.

The initial contact with the client can vary from a short telephone message to a full interview. Whatever contact is made, certain information must be obtained from the client immediately:

(a) the full legal name of the client, and the name under which the client is charged;

(b) the date, time and location of the next court appearance;

(c) the client's address, telephone number and contact details;

(d) bail information if the client is in custody; and

(e) copies of any documents in the client's possession, which may include:

  (i) the release order (Form 11);

  (ii) Certificate of Qualified Technician, in impaired driving cases involving a breath sample; and

  (iii) in impaired driving cases, a Notice of 24-Hour Prohibition, and Notice of 90-Day Administrative Driving Prohibition.

The lawyer should also obtain general background information about the client:

(a) age (and possibly birth date) and birthplace;

(b) present address (own or rent), past addresses (how long at each);

(c) employment history, and current employer's name, position held, etc.;

(d) marital status, length of marriage, children, etc.;

(e) notable family—names, ages, sex, etc.;

(f) friends and other roots in the community;

(g) education and training;

(h) clubs, social and religious affiliations, etc.;

(i) criminal record;

(j) psychiatric history;

(k) summary of financial position; and

(l) health problems (might affect trial date).

It may be unwise in the initial stages to ask the accused for their version of the circumstances of the offence. Confine your inquiry at this stage to obtaining background details.

4. Gathering Details of the Case

When a client has been released by the police, other information from the police may not be available until after charges have been approved by Crown counsel. Documents that should be obtained as soon as possible after that time include the following:

(a) The court registry number for the file (which may be obtained from the daily court list).

(b) The sworn Information (Form 2) showing the registry file number, the charges and the date the charge was laid. A copy is usually available from the court clerk or from the prosecutor at one of the initial appearances.

(c) Particulars of the Crown's case against the accused (also known as circumstances—see §3.03). The lawyer should also obtain the criminal record of the client and any statements the client made, including verbal statements recorded by the police.

(d) Informations to Obtain Search Warrants (Form 1) and copies of the search warrants themselves.

(e) Copies of all documents in the possession of the Crown, including:

(i) notices pertaining to certificates, greater penalties, etc.;

(ii) certificates themselves (Certificate of Qualified Technician, fingerprint, drug analysis, etc.);

(iii) written statements by the accused and witnesses;

(iv) business records, such as invoices, etc.;

(v) experts' reports (e.g. handwriting examinations);

(vi) photographs, plans, etc.; and

(vii) psychiatric or other medical reports.

For some of these documents to be admissible at trial, the Crown must give the defendant notice of its intention to produce the document. If notice has not been served, defence counsel may not want to alert the Crown to the oversight by requesting copies of the documents.

Some counsel suggest that at the initial interview, counsel should explain the charge and give the client a brief outline of the possible defences to the charge, together with a request that the client make notes immediately on everything relevant that occurred. It is particularly important that the client try to recall statements made by or to the police; information about how many police officers were present (and their names or identification numbers, if known); names and addresses of other witnesses; and information specific to the charge. Such information might include, for instance, the client's eating and drinking patterns if the charges concern impaired driving, or a history of arguments if the charges involve assaults. These notes may help refresh the client's memory if the client is called to testify.

5. Further Considerations

The issue of conflict of interest requires attention at this stage. Generally, it is best to avoid acting for more than one accused in the same matter. Counsel who interview co-accused run the risk, at the very least, of having to withdraw from representing one of them if the respective interests of the co-accused later conflict. Counsel should also consider whether prior relationships with others involved in the file, such as victims, creates a conflict. Counsel must be alive to such potential difficulties from the outset to avoid putting themselves and their clients at risk.

Considering the above information and concerns will help a lawyer to decide whether or not to represent a particular client. Ideally, the lawyer will take the entire case. In some circumstances, however, lawyers can only say with confidence that they will proceed to specific stages, where they will have to reconsider the matter.

Although it is possible to accept a case with minimal information, it is advisable to be as well informed as possible when deciding to accept the client's case. Further interviews with the client are often difficult to arrange, so it is best to interview the client thoroughly and carefully at the beginning. The client's background information not only familiarizes the lawyer with the client but will be useful in later proceedings. For example, it may be useful at a bail hearing, may come out if the client gives evidence at trial, or may be used when making submissions on sentence. In addition to its courtroom uses, the background information may help the lawyer in other ways.

If the client is Indigenous, their experiences with intergenerational trauma from the effects of colonization or residential school may be relevant in making *Gladue* submissions or requesting a *Gladue* report. Bail or sentencing of Indigenous people may be heard in one of BC's Indigenous Courts (also called "First Nations Courts" or "*Gladue* courts"). See "First Nations/Indigenous Courts" at aboriginal.legalaid.bc.ca. Also, the Native Courtworker Program may be able to assist or provide the client with culturally appropriate resources. See www.nccabc.ca.

If the client's background includes psychiatric history or mental health issues, the Forensic Psychiatric Services Commission provides court-ordered assessments including assessments of fitness to stand trial and evaluations of criminal responsibility.

Obtaining particulars, notices and documents will be dealt with later in these materials as part of preparation for trial. Gather this information early to

help you decide whether to represent the client, assess the costs of representation, and give the client a well-informed opinion about how best to proceed with the matter.

6. Retainer

Once the lawyer decides to represent the client, it is prudent to prepare a written retainer so that client and lawyer both know exactly what service is being provided at what cost. Bonus billing occurs in only the rarest of criminal cases (see *Campney & Murphy v. Arctic Installations (Victoria) Ltd.* (1994), 86 B.C.L.R. (2d) 226 (C.A.)). A retainer agreement should also contain provisions for contingencies, such as non-payment of fees.

Lawyers who want to withdraw in a criminal matter should be mindful of *R. v. Cunningham*, 2010 SCC 10, in which the court sets out the circumstances under which a lawyer may withdraw from acting for a client. When the withdrawal is for non-payment of fees the court may exercise its discretion to refuse to allow the withdrawal. There is also an obligation to advise the court and other parties of your withdrawal: see the *BC Code*, sections 3.7-1 to 3.7-10 and *Practice Material: Criminal Procedure*, §3.23.

When the retainer is to be arranged through legal aid, counsel must be sure that the client has filled out the appropriate documents and has been approved for funding. Counsel who intend to act on legal aid retainers must have a billing number. Counsel may obtain a billing number by contacting Legal Aid BC. In some courthouses, including Vancouver, there is an onsite legal aid worker who can assist the accused with their application.

Once the lawyer has gathered all the necessary information, obtained preliminary instructions, decided to represent the client, and been retained, often the next step is to consider the custody status of the client.

[§2.02] Compelling Appearance and Judicial Interim Release (Bail)

Two issues arise immediately when an individual is alleged to have committed an offence: how to make the accused aware of the charge, and how to compel the accused to appear to answer the charge. The bail provisions in Part XVI of the *Criminal Code* are concerned with securing attendance of the accused to answer the charge. They should be read in detail.

When the police arrest an individual (with or without warrant) the police will want to ensure that the accused will attend court to answer the charge. For this purpose, the police are authorized to release the accused, provided they follow the procedures in the *Criminal Code*.

In some circumstances the court issues a summons to compel the accused to attend in court to answer the charge. If a summons is issued, the accused is not taken into custody.

The following are the processes by which an accused may initially be compelled to attend court:

1. appearance notice (*Criminal Code*, ss. 496, 497, 499, 500; *Offence Act*, s. 39);
2. undertaking given by the accused to a peace officer (*Criminal Code*, ss. 498, 499, 501);
3. summons (*Criminal Code*, ss. 509);
4. warrant (*Criminal Code*, ss. 512, 512.1, 512.2, 512.3); or
5. arrest without warrant (*Criminal Code*, s. 495).

Generally, police or court authorities prepare these documents without lawyers intervening. The documents should be examined for errors: non-compliance with the forms prescribed in Part XVI may mean that jurisdiction is lost. However, jurisdiction can usually be regained by issuing a new process. Section 485 is a broad curative provision with respect to questions of loss of jurisdiction.

The 2019 amendments streamlined the means by which an accused could be compelled to attend court. The amendments also legislate a principle of restraint for peace officers and courts in making decisions about release or bail:

> **Principle of restraint**
>
> 493.1 In making a decision under [Part XVI-Compelling Appearance of Accused before a Justice and Interim Release] a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

This provision reflects the Supreme Court of Canada's decision in *R. v. Antic*, [2017] 1 SCR 509, where the court summarized the "ladder principle" of bail: "[T]he ladder principle means 'that release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds'" (*Antic* at para. 29, citing *R. v. Anoussis*, 2008 QCCQ 8100). See also *R. v. Zora*, 2020 SCC 14, which reiterated the need for restraint, with the default position being bail without conditions. When bail conditions are imposed, they must be necessary, reasonable, and linked to the grounds of detention under s. 515(10) (i.e. securing the accused's attendance in court, ensuring the protection or safety of the public, and maintaining confidence in the administration of justice). Any bail

conditions imposed should be the least onerous necessary to address the risks listed in s. 515(10).

Section 493.2 requires that the circumstances of Indigenous accused and of accused from vulnerable populations be considered in making decisions about interim release or bail:

> **Aboriginal accused or vulnerable populations**
>
> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> (a) Aboriginal accused; and
>
> (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

[§2.03] Release by Police

Section 498 of the *Criminal Code* sets out the powers of a peace officer to release a person who has been arrested without a warrant for an offence other than one listed in s. 469. (Section 469 lists certain serious offences including murder, treason and war crimes). The peace officer *must*, as soon as practicable, release the person from custody if:

(a) the peace officer intends to compel the person's appearance by issuing a summons;

(b) the peace officer issues an appearance notice to the person; or

(c) the person gives an undertaking to the peace officer (s. 498(1)).

This mandatory release is subject to s. 498(1.1); that is, the peace officer *must not* release the person if the peace officer believes on reasonable grounds that the detention is necessary in the public interest considering all of the circumstances, including because release would impair the ability to identify the person arrested, the ability to preserve evidence relating to the offence, the ability to prevent the continuation or repetition of the offence, or the ability to ensure the safety of a victim or witness to the offence.

The mandatory release provisions also do not apply if the offence is one described in s. 503(3), which deals with arrest without a warrant for an indictable offence allegedly committed in Canada but outside the arresting jurisdiction.

Also, a peace officer *may* release an individual arrested with a warrant for an offence other than one listed in s. 469, if the peace officer issues an appearance notice to the person or the person gives an undertaking to the peace officer (s. 499). The warrant must be endorsed in order for the police to release the accused. The required contents of an appearance notice are set out in s. 500 and the required contents of an undertaking are set out in s. 501. Both release procedures must compel the accused to appear in court (s. 500(1)(c); s. 501(2)). The appearance notice or undertaking may also require the accused to attend for fingerprinting and photographing pursuant to the *Identification of Criminals Act*, R.S.C. 1985, c. I-1.

The *Criminal Code* authorizes the police to release individuals on an undertaking taken before a peace officer; see ss. 499(2). The intent of these sections is to expedite the release of accused individuals. The recent amendments increase the types of conditions peace officers can impose on accused persons.

The undertaking *must* include a condition that the accused attend court at the time and place stated in the undertaking. The additional potential conditions that can be imposed on the accused by an undertaking include the following (s. 501(3)):

(a) report at specified times to the peace officer or other specified persons;

(b) remain within a specified territorial jurisdiction;

(c) notify the peace officer or other specified person of any change in their address, employment or occupation;

(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, except in accordance with any specified conditions;

(e) abstain from going to any specified place or entering any geographic area related to any person referred to in paragraph (d), except in accordance with any specified conditions;

(f) deposit all their passports with the peace officer or other specified person;

(g) reside at a specified address, be at that address at specified hours and present themselves at the entrance of that residence to a peace officer or other specified person, at the officer's or specified person's request during those hours;

(h) abstain from possessing a firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and surrender those that are in their possession to the peace officer;

(i) promise to pay an amount specified in the undertaking, which shall not be more than $500, if they fail to comply with any condition of the undertaking;

(j) deposit, with the peace officer specified in the undertaking, money or other valuable security whose value does not exceed $500 if, at the time of giving the undertaking, the accused is not ordinarily resident in the province or does not ordinarily reside

within 200 kilometres of the place in which they are in custody; and

(k) comply with any other specified condition for ensuring the safety and security of any victim of or witness to the offence.

Section 502 provides mechanisms for modifying the conditions of the undertaking. The undertaking may be varied at any time with the written consent of the prosecution and the accused. In the absence of consent between the prosecution and the accused, either may apply to a justice to replace the undertaking. If the prosecution is making the application, the prosecution must give three days' notice to the accused.

When an individual is arrested and detained by police at a time when the court is not sitting (weekends, evenings, or holidays), bail applications are addressed through the Justice Centre by Judicial Justices ("JJs," addressed in court as "your worship"). Crown counsel in British Columbia are available outside of court sitting hours to participate in bail hearings. In these instances, conference calls are set up with the JJ to address bail. Crown counsel or the accused can apply to adjourn the hearing to the next court date, or the Crown may seek to remand the accused to custody pursuant to s. 516, for no more than three clear days (unless the accused consents to longer). See the Provincial Court Practice Direction, *CRIM 05 Hearing of Bail Applications* (09 January 2023).

[§2.04] Release by the Court

1. Objectives

Sometimes the accused will not be released by the peace officer and will be brought before the court for a hearing. The hearing determines judicial interim release and is referred to as a "bail hearing" or a "show cause hearing."

The purpose of a bail hearing is to determine if continued detention of the accused is justified.

Generally, the presumption is against detention, and the Crown must show cause why continued detention is necessary according to the grounds listed in s. 515(10), that is, to ensure that the accused will attend court, to protect the public, or to maintain confidence in the administration of justice. If the Crown cannot satisfy the onus on *at least one* ground, the accused is entitled to release on reasonable bail, and the outcome of the bail hearing is restricted to how the accused is to be released (on what conditions, if any).

However, for certain offences, the onus is on the accused to show why the grounds do *not* justify detention—this applies to offences listed in s. 469 and offences listed under s. 515(6), described later in this chapter.

2. Procedure at the Bail Hearing

The Crown can consent to release on certain terms which can be agreed upon with defence. Part XVI uses the term "justice" to describe the individual presiding at a bail hearing. In British Columbia, a justice can be a Judicial Justice, a Provincial Court judge, a Supreme Court judge, or a judge of the Court of Appeal (*Provincial Court Act*, s. 30(3)).

The justice presiding at a bail hearing is typically a Provincial Court judge, unless the hearing is outside regular court hours. However, only a Supreme Court judge has jurisdiction to grant bail on offences listed in s. 469 (which include certain serious charges such as murder, treason, and crimes against humanity). On these charges, the accused is detained under s. 515(11), bail must be sought by petition to the Supreme Court (s. 522), and the onus is on the accused to show why detention is not justified.

When the accused is charged with an offence other than one listed in s. 469, the judge presiding at the bail hearing is governed by s. 515(1). The accused (who does not plead guilty) will be released without conditions, unless the Crown shows cause why there should be conditions on release. If the judge does not release the accused without conditions under s. 515(1), then the accused will be released with conditions under s. 515(2), unless the Crown shows cause why detention is justified.

Section 515(3) provides that in making an order under s. 515, the justice shall consider any relevant factors, including:

(a) whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; or

(b) whether the accused has been previously convicted of a criminal offence, including any offence in the commission of which violence was used, threatened or attempted against any person.

A justice making an order under s. 515 must also include in the record of the proceedings a statement that the justice considered the safety and security of every victim of the offence and the safety and security of the community when making the order (s. 515(13)). The justice must also set out how they determined whether the accused is referred to in s. 493.2 (described earlier in this section and concerning Indigenous accused persons and accused persons from vulnerable populations). If the justice determines the accused is referred to in s. 493.2, the justice must set out how they considered the accused's particular circumstances, as required by that section.

3. Release Orders

Under s. 515(2), the judge making a release order with conditions may order that the accused comply with any of the conditions listed in s. 515(4), which are generally as follows:

(a) report at specified times to a peace officer or other person designated in the order;

(b) remain within a specified territorial jurisdiction;

(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;

(d) abstain from communicating with any victim, witness or other person identified in the order, except in accordance with any conditions the justice specifies;

(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any conditions the justice specifies;

(f) deposit all their passports;

(g) comply with any other specified condition that the justice considers necessary; or

(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

The order may also include any of the following (s. 515(2)):

(a) an indication that a release order does not include any financial obligations;

(b) the accused's promise to pay a specified amount if they fail to comply with a condition of the order;

(c) the obligation to have one or more sureties, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order;

(d) the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order; or

(e) if the accused is not ordinarily a resident in the province in which they are in custody, or does not ordinarily live within 200 kilometres of the place in which they are in custody, the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount by the justice if they fail to comply with a condition of the order and with or without sureties.

The Crown has the onus of proving each additional condition under s. 515(2) from (b) to (e) is necessary. Section 515(2.01) provides:

> The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.

Any condition must relate to ensuring the attendance of the accused, preventing further offences or ensuring there is no interference with the course of justice, or the safety and security of any victim or witness.

The court must include a firearms prohibition as a bail condition for certain offences, unless the court considers the condition is not required for the safety of the accused or the safety or security of a victim of the offence or another person. For offences listed in s. 515(4.3) the court must consider the safety and security of victims and witnesses and determine if no-communication or other conditions should be included (s. 515(4.2)).

The release order is in Form 11 and includes the conditions that apply to the accused, consequences for non-compliance, and any financial obligations included in the order (such as a promise to pay a specified amount if the accused fails to comply with the conditions). The Form 11 is signed by the accused; any surety (if applicable); and the judge, justice, or clerk of the court.

As stated in the Form 11, the conditions of the release order may be varied with the written consent of the accused, Crown, and any sureties (s. 519.1), or the accused or Crown may apply to the court to have a condition in the release order cancelled or changed.

Counsel should discuss appropriate bail conditions before the bail hearing, because most judges are sympathetic to joint bail submissions, and consent releases can be worked out with Crown. The court has wide discretion as to what evidence or circumstances to consider (s. 518(1)(a), as discussed in *R. v. Cheung*, 2016 BCCA 221).

4. Detention

Under s. 515(10), the detention of an accused is justified only on the following grounds:

(a) the primary grounds, where the detention is necessary to ensure the accused's attendance in court;

(b) the secondary grounds, where the detention is necessary for the protection or safety of the public, including any victim or witness, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) the tertiary grounds, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including:

(i) the apparent strength of the prosecution's case;

(ii) the gravity of the offence;

(iii) the circumstances surrounding its commission including whether a firearm was used; and

(iv) the potential for a lengthy term of imprisonment or, in an offence that involves a firearm, a minimum punishment for a term of three years or more.

See *R. v. St. Cloud*, 2015 SCC 27, for the framework of the tertiary grounds. Though it is only listed in the tertiary grounds under s. 515(10)(c), many judges consider the strength of the Crown's case in determining an appropriate form of bail.

As noted earlier in this chapter, the onus is usually on the Crown to show why the continued detention of the accused is necessary. However, the onus is on the accused to show why they should *not* be detained in the following "reverse onus" situations under s. 515(6):

(a) the accused is charged with an indictable offence other than an offence listed in s. 469:

(i) alleged to have occurred while the accused was at large after being released for another indictable offence;

(ii) as a participant in a criminal organization;

(iii) that is a terrorism offence;

(iv) that is an offence under ss. 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*;

(v) that is an offence under certain other sections of the *Security of Information Act* committed in relation to an offence referred to in (iv);

(vi) that is an offence under ss. 95, 98, 98.1, 99, 100, 102 or 103 of the *Criminal Code*;

(vii) that is an offence under certain sections and is alleged to have been committed with a firearm; or

(viii) that is alleged to involve a firearm, an explosive substance, or various restricted or prohibited weapons and devices, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of s. 84(1), including a release order made under s. 515, that prohibited the accused from possessing any of those things;

(b) the accused is charged with an indictable offence other than an offence listed in s. 469, and the accused is not ordinarily a resident in Canada;

(b.1) the accused is charged with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted or discharged under s. 730 of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;

(b.2) the accused is charged with an offence in the commission of which violence was allegedly used, threatened or attempted against a person with the use of a weapon, and the accused was convicted within the last five years of an offence where violence was used, threatened or attempted against any person with the use of a weapon, if the maximum term of imprisonment for each of those offences is 10 years or more;

(c) the accused is charged with an offence under ss. 145(2)–(5) (e.g. failure to attend court, failure to comply with an appearance notice or summons, failure to comply with an undertaking, failure to comply with a condition under a release order, etc.) that is alleged to have been committed while they were at large after being released; or

(d) the accused is charged with an offence punishable by imprisonment for life under any of ss. 5–7 of the *Controlled Drugs and Substances Act* or conspiring to commit such an offence.

In reverse onus situations it is customary for the Crown to proceed first, although the court can require the defence to proceed first. The Crown usually outlines the facts of the most recent alleged offence, the accused's record of criminal convictions, and the outstanding charges that give rise to the reverse onus, and then indicates the Crown's position on bail. Defence counsel replies to the allegations

of the Crown regarding the circumstances of the present offence and submits that, for the reasons outlined, the accused has shown cause why further detention in custody is not required.

Defence counsel's argument in a bail hearing should be that the accused's detention is not necessary to ensure the accused's attendance in court, to prevent the commission of further offences, or to maintain confidence in the administration of justice. Counsel should organize the facts to support the argument. If it appears that Crown counsel is only relying on one ground, defence counsel might ask the judge, "Do you wish me to argue on the other grounds, or are you satisfied that my client is not likely to fail to appear?" The judge may then indicate that the court's only concern is on a specific ground and counsel can confine argument to that issue. Remember that the best strategy for obtaining bail is to present a realistic alternative to detention, and that strict bail conditions are preferable to no bail.

Before making submissions at the bail hearing, it is important to do as much groundwork as possible to assist the court and present a workable alternative to detention. For example, make telephone calls to determine if the client is acceptable for bail supervision, eligible (where available) for Native Courtworker services, able to reside at a particular place, etc. Also canvass with the client whether alternatives such as curfews or area restrictions are acceptable (will they conflict with work or residence?) and investigate whether acceptable sureties are available. If the client has mental health issues, you may wish to consult the local Forensic Outpatient Client as to what services they might provide, or talk to the onsite mental health worker about resources or have them meet with your client to assess their fitness (where available). There are mental health workers at the Vancouver Provincial Courthouse and at Downtown Community Court who can assist. It may also be useful to have family or friends of the accused in court to reassure the court that responsible people are concerned about the accused and able to provide support. Client information forms may also be useful in interviewing and speaking to bail.

Especially in a serious case, it may be useful to file letters at the bail hearing to establish that the accused has a place to live, a place to work, and a good reputation in the community.

Even if the accused is already detained on other charges, or is in custody serving a sentence, they may seek bail on the new charge under s. 515. Of course, if bail is granted it does not become effective until detention on the other charges ends.

When a new Information is sworn charging an accused with the same offence as the original Information or an included offence (additional charges may be added), the bail order made on the original Information continues to apply to the new Information under s. 523(1.1). In such circumstances, either the Crown or defence may apply under s. 523(2)(c), without the consent of the other party, to vary the original order. The release order may also be varied with the written consent of the accused, Crown, and any sureties (s. 519.1). While the *Criminal Code* allows for this to be done in writing, as a practical matter it is dealt with on the record in court and not in writing through the registry.

On cases that are likely to attract some notoriety, counsel should consider applying under s. 517 for an order prohibiting publication of the evidence taken at a bail hearing.

A more detailed list of relevant factors for both regular and reverse onus show cause bail hearings appears at §2.12 of this chapter. Although the checklist is designed for Crown counsel making submissions at the bail hearing, the factors outlined are equally pertinent to defence counsel and of interest to the judge at the bail hearing.

5. Evidence

Sections 518(1)(a)–(e) set out the material on which the justice may base a decision at a bail hearing. The justice may receive and base the decision on evidence considered "credible or trustworthy" by the justice in the circumstances of each case. This includes evidence ordinarily inadmissible at trial (such as hearsay) so long as the other party has a fair opportunity to correct or contradict it (*Re Powers v. R.* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.)). Both the common practice and the formal requirements for "evidence" on bail hearings are set out in *R. v. Woo* (1994), 90 C.C.C. (3d) 404 (B.C.S.C.).

The evidentiary burden upon the Crown during a bail hearing is the balance of probabilities (*R. v. Julian* (1972), 20 C.R.N.S. 227 (N.S.S.C.)). The burden is on the accused in reverse onus situations.

[§2.05] Bench Warrants, Judicial Referral Hearings, and s. 524 Hearings

An accused who succeeds in obtaining initial judicial interim release may (and often does) return to custody on the charge. The most common situation is when an accused fails to attend court and a bench warrant is issued under ss. 512, 512.1 or 512.2.

Another situation that commonly arises is that an accused breaches conditions of their release or commits other administration of justice offences. Recent amend-

ments to the *Criminal Code* introduced a new process, the judicial referral hearing, to address these circumstances. The judicial referral hearing is intended to reduce the number of prosecutions for certain administration of justice offences. As an alternative to laying charges, if a peace officer has reasonable grounds to believe that the accused has failed to comply with a summons, appearance notice, undertaking or release order, or to attend court as required, the peace officer may issue an appearance notice to the accused to appear at a judicial referral hearing under s. 523.1 (s. 496). At the judicial referral hearing, if the judge or justice finds that the accused failed to comply with the summons, appearance notice, etc., but that the failure did not cause harm to a victim, the judge or justice can review the accused's release conditions and take no action, release the accused on new conditions, or detain the accused.

Where there are reasonable grounds to believe an accused has contravened (or is about to contravene) a summons, appearance notice or undertaking, or has committed an indictable offence while on release, a peace officer can arrest the accused without a warrant under s. 495.1 for the purpose of bringing them before a judge or justice to be dealt with under s. 524. A justice may also issue a warrant on this basis under s. 512.3 to require the accused to appear before a justice under s. 524. At the s. 524 hearing, the Crown will seek to have the accused's earlier release cancelled under s. 524(3).

[§2.06] Charges in Other Jurisdictions

An accused may be arrested without warrant on the basis that a peace officer has information that there is an outstanding warrant for an indictable offence in another province, or in another part of British Columbia. If the alleged offence took place outside the province but within Canada, the justice will usually remand the accused in custody for six days under s. 503(3) to await the execution of the warrant and the arrival of an escort of peace officers from the other province. If the escort of peace officers has not arrived by the sixth day, the accused must be released. In this situation, the original warrant has never been executed or cancelled. The warrant is still active, and the accused may be arrested again later.

As an alternative to a six-day remand, the accused may be released pending execution of the warrant if the prosecutor consents under s. 503(3.1). Counsel may want to contact the originating jurisdiction to discuss a consent release.

When dealing with an outstanding warrant from another area in the province, most jurisdictions grant a three-day adjournment to the prosecution under s. 516(1) to allow a police escort to attend to execute the warrant and transport the accused to the issuing jurisdiction (see *R. v. Ragan* (1974), 21 C.C.C. (2d) 115 (B.C. Prov. Ct.)). Provincial Court judges increasingly are exercising their province-wide jurisdiction under the *Provincial Court Act* to conduct show cause hearings on offences from other areas of the province. This eliminates the need to transport the accused before the bail hearing but reduces local involvement.

The justice may allow the accused to appear at the show cause by telephone or video conferencing (s. 515(2.2)). This procedure offers an alternative to transporting the accused. Consent of all parties is required if evidence is to be taken from a witness and the accused cannot appear by video conferencing (s. 515(2.3)).

[§2.07] Sureties

A surety is generally a person who ensures that another person is going to do something. A surety is a kind of security, and typically a surety posts money as security for the obligations of that other person.

In the bail context, the primary obligations of a surety are to ensure that the accused appears in court for the trial or other appearance, and keeps out of trouble. A surety's responsibilities are outlined under ss. 515.1(1) and 764.

If a judge or justice directs release of an accused with one or more sufficient sureties, those sureties must be acceptable to the court. A person is typically unacceptable as a surety if the person:

(a) has a previous criminal record;

(b) is acting as a surety for someone else;

(c) is charged with a criminal offence;

(d) is a co-accused;

(e) is being indemnified for acting as a surety (e.g. a bail bondsperson);

(f) does not have sufficient funds, in the opinion of the justice, to satisfy any order should the accused default on their appearance; or

(g) is the lawyer for the accused (*R. v. Orme* (1980), 4 W.C.B. 357 (Ont. Co. Ct)).

While the determination of a suitable surety is usually left to the justice of the peace, s. 515(2.1) allows the judge who makes the bail order to name particular persons as sureties in the bail order.

Before a person can be named as a surety, they must sign a declaration in Form 12. The declaration includes such information as the surety's contact information and their acknowledgement that they understand the role and responsibilities of a surety (see s. 515.1(1)). Exceptions to this requirement are listed under s. 515.1(2).

When the accused later wants to change sureties, s. 767.1 allows the court to substitute another suitable person for the original surety without taking the accused into custody again. Otherwise, when any change is made

to a surety bail, the accused will be remanded in custody until the surety agrees to accept the altered bail. Prudent counsel will ensure someone arranges easy contact with the surety whenever a bail change is likely.

Section 766(1) gives power to a surety to be relieved of obligations under a recognizance by obtaining an order from a justice of the peace to have the accused arrested.

Defence counsel should be extremely cautious about contacting potential sureties. Defence counsel must make it clear they are representing the accused and should not pressure potential sureties nor guarantee that the accused will comply with the conditions of release. Some counsel refuse to contact potential sureties, while others limit their contact to a message that the accused has asked them to telephone and make the request. Counsel should warn the surety of the consequences should the accused breach their recognizance, and emphasize that the decision is the surety's alone. Prudent counsel will suggest to the potential surety that the surety obtain independent legal advice.

Note also the following *BC Code* provisions with respect to a lawyer acting as a surety:

> **Judicial interim release**
>
> **3.4-40** A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.
>
> **3.4-41** A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

[§2.08] Bail Variations in Provincial Court

In limited circumstances, the original order may be revisited and modified in Provincial Court. In practice, very few, if any, Provincial Court judges will interfere with the order of another judge, unless there has been a major change in circumstances. Even then, some Provincial Court judges will request that the matter go back before the judge who presided at the bail hearing.

Non-consensual bail variations are possible in two situations. First, if the accused is before the Provincial Court judge before whom the accused is being or is to be tried in the future, that judge can change bail under s. 523(2)(a). Second, a Provincial Court judge can change bail once the preliminary inquiry is completed under s. 523(2)(b). In each of these instances, the prosecutor does not need to consent. The judge can only vary bail in relation to the matter being dealt with in the trial and not for other outstanding matters.

If Crown counsel consents to a bail variation, then s. 523(2)(c) applies and the Provincial Court judge who made the original order, or any other judge, may make an order. Most bail variations in the Provincial Court occur under this section. Some prosecutors will consent to rehearing bail but oppose the change that is sought. If the prosecution, any sureties, and the accused consent in writing to the variation of the bail, then s. 519.1 permits a written variation without any court appearance; however, as a practical matter, the applications are dealt with in court on the record.

When an application is made under s. 523 and the bail is varied, then, subject to the *Lee* case below, no bail review on that order can be taken to the Supreme Court: *R. v. Archambeault* (1980), 20 C.R. (3d) 157 (B.C.S.C.). If no variance is made in the original order, further bail review can be taken in the Supreme Court. Consequently, defence counsel applying under s. 523 may want to suggest to the presiding judge that, if the original bail will not be substantially changed, the presiding judge exercise discretion not to deal with the original bail, rather than substituting the judge's own order and potentially ousting the jurisdiction of a higher court to review bail. In *R. v. Lee* (1982), 69 C.C.C. (2d) 190 (B.C.S.C.), the court held that *Archambeault* does not apply if the accused has been denied the right to reasonable bail under s. 11(e) of the *Charter* and that under s. 24 of the *Charter* a Supreme Court judge may vary the bail order.

A judge cannot vary a bail order on the judge's own motion, although this is sometimes unlawfully done after committal on a preliminary hearing. The judge can only order the accused into custody "upon cause being shown" (*R. v. Braithwaite* (1980), 57 C.C.C. (2d) 351 (N.S.S.C.-A.D.)).

[§2.09] Bail Reviews in Supreme Court

The accused or Crown may apply to have the original bail order reviewed under ss. 520 and 521, on application to the Supreme Court. A bail review is like an appeal of the original bail order.

On a bail review the onus is on the appellant to show that the judge who fixed the original bail made an error in law or principle, that circumstances have changed, or that it would be unjust not to order release (*R. v. Vukelich* (1993), 32 B.C.A.C. 81).

The accused also can bring an application for certiorari to quash a bail order (*Re Keenan v. The Queen* (1979), 57 C.C.C. (2d) 267 (Que. C.A.)). This procedure permits a further appeal to the Court of Appeal.

Applications are also the possible under the *Charter*, as previously noted.

The Supreme Court cannot review a bail decision made by a judge under s. 522 with respect an offence listed in s. 469; such decisions must be reviewed under s. 680 by the Court of Appeal.

[§2.10] Section 525 Detention Reviews

When an accused has been charged with an offence other than an offence listed in s. 469 and has been in custody for 90 days, the court must review bail in order to determine whether the accused should be released.[2] The review under s. 525 is automatic—the accused is not required to apply.

Section 525 obligates the "jailer" (the person having custody) to apply for the detention review hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503. Section 525 also obligates the judge to fix a hearing date.

In *R. v. Myers*, 2019 SCC 18, the Supreme Court of Canada held that the "overarching question" for a reviewing judge to consider is whether "the continued detention of the accused in custody [is] justified within the meaning of s. 515(10)." The accused is not required to show that there has been "unreasonable delay" in proceeding to trial in order to have a review hearing, although it is a factor that can be considered by the reviewing judge.

The hearing is a "review" of the detention. As such, deference will be afforded for any findings of fact made by the initial decision-maker. However, the reviewing judge is entitled to consider the lapse of time and any other relevant factors and can receive any evidence "considered credible or trustworthy." The reviewing judge can also rely upon the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review (*Myers* at para. 48).

Not all accused in custody are eligible for a s. 525 review hearing. In *Myers*, the court expanded those eligible for a review hearing to include accused persons who have consented to remain in custody or chosen not to have a bail hearing in the first instance. In these instances, the judge is required to conduct the full bail hearing "from the ground up" in accordance with the "ladder principle" articulated in *Antic* (see §2.02), taking into account the time the accused has already spent in pretrial custody (*Myers* at para. 56). The review can be waived or a bail hearing court can simply occur in Provincial Court. As well, the phrase "other narrow circumstances" referred to in *Myers* has since been interpreted to allow an accused to have a s. 525 hearing where bail was granted but not yet perfected: *R. v. Khafisov*, 2019 BCSC 1088. However, those in custody during a trial or while awaiting sentencing continue to be ineligible for reviews under s. 525.

In response to *Myers*, the BC Supreme Court instituted a comprehensive interim Practice Direction CPD-4 on s. 525 hearings. Legal Aid BC has also published information for defence counsel relating to s. 525 hearings.

[§2.11] Bail Review Documents (ss. 520 and 521)

A bail review may be taken if the accused is detained or cannot make the bail that has been set. Although a review by the Supreme Court may be taken anywhere in British Columbia (s. 520), this practice is discouraged. The general rule is that applications should be brought in the location where the offence occurred (see *Criminal Rules of the Supreme Court of British Columbia*, Rule 2(4)). Exceptions will be considered when there are valid grounds for bringing the application elsewhere, particularly when Crown and defence counsel have agreed to a change of location. Frequently, urgency and the availability of a judge are the deciding factors in determining the appropriate venue for a bail review.

At least two clear days' notice must be given to Crown counsel. The Crown will frequently try to accommodate the schedule of defence counsel, and some reviews have been set down on only a few hours' notice. Short service is permitted by s. 520(2).

Once a review has been taken, a further review is precluded for 30 days (s. 520(8)).

There are five documents required on a s. 520 and 521 bail review.

1. Notice of Application

   The original plus one copy must be filed in the registry. There also must be a copy each for Crown and defence (for a total of four). When filing bail review applications, copies of all Informations relating to the charges for which the bail review is sought must be filed along with the material for the application. See *Applications for Bail Reviews* (Supreme Court Practice Direction, 22 September 2005), available on the BC Supreme Court website (www.bccourts.ca/supreme_court). An Information can be made an exhibit to the affidavit of the accused.

   The facts upon which the application is based must be in numbered paragraphs. Usually, these facts summarize the information in the affidavit of the accused or another person, or both. Finally, the application must have details of the documents supporting it—the affidavits.

2. Notice to Person(s) Served

   The original plus one copy must be filed in the registry. There also must be a copy each for Crown and defence, for a total of four. This document is filed and served with the application.

[2] Prior to the coming into force of *Criminal Code* amendments (on December 18, 2019), the threshold was 30 days for summary conviction offences; the amendments replaced this threshold with a 90-day threshold for all offences.

3. Affidavit in Support

The original plus one copy must be filed in the registry. There also must be a copy each for Crown and defence, for a total of four. This document should be filed and served with the application, although this is often difficult when the accused is in custody, or when a friend or relative is swearing an affidavit in support and is not available to swear the affidavit before the documents are filed. Affidavits that are anticipated should be referred to in the application as "such further material as counsel may advise." The Crown usually does not object to documents filed later, provided the Crown received an accurate unfiled copy earlier. The affidavit should be in the usual form with information in numbered paragraphs. (See the Supreme Court Civil Rules and the *Practice Material: Civil* for general rules regarding affidavits.)

4. Transcript of Provincial Court Hearing

The original must be filed in the registry. There must be a copy each for Crown and defence, for a total of three. The transcript should be ordered immediately after the bail hearing to avoid delays. On legal aid files it is necessary to get authority from Legal Aid BC before bringing the application and especially before ordering the transcript. This authority should be requested immediately, because there may be some delay.

5. Order After Bail Review

If the application is successful, a fifth document is prepared. The successful party or the registry draws the order, if one is necessary. Attend the registry to determine if an order is necessary to secure the release.

If counsel must prepare an order, get instructions from the registry staff about the appropriate language for the order. The opposing party must approve the order as to form. Before you leave the courtroom, find out where the other party will be over the next few hours, so that you may obtain their signature.

The order must state where bail is to be perfected. Discuss this in detail with the registry staff. If you want to be safe, you can specify in the order that bail may be perfected in either the Provincial Court registry or the Supreme Court registry.

[§2.12] Information for Bail Hearings

Up-to-date criminal records should be secured for the bail hearing. Where the accused is on parole or probation, these authorities should be consulted for information about whether the accused has been living up to the conditions of their parole, probation, etc.

The following is a suggested list of information (including the updated criminal record) that should be gathered by the Crown for bail hearings. The list is by no means exhaustive, nor will all the suggestions be relevant to each bail hearing. Although written from the prosecution perspective, it emphasizes areas of concern to the court that are frequently addressed by both counsel. Defence counsel will prepare for the show cause hearing by taking a more positive approach to the enumerated factors. The list is only intended to provide some guidance.

1. Attendance

Section 515(10)(a)—detention necessary to ensure attendance in court. This is sometimes referred to as the "primary" ground of detention. Relevant evidence could include any of the following:

(a) age;

(b) education;

(c) place of residence;

(d) citizenship (is the accused a Canadian citizen, and if not, what roots has the accused in the community, and should their passport be seized);

(e) assets in the community (ownership or rental of a home, general financial assets);

(f) potential consequences (or length of jail term) if convicted of the offence charged;

(g) criminal record:

  (i) outstanding charges under s. 145,

  (ii) previous convictions for failing to appear or breach of probation;

(h) addiction to alcohol, drugs and whether attempts have been made at treatment;

(i) employment status;

(j) present environment:

  (i) friends and relatives in the community,

  (ii) whether living with spouse or family, and

  (iii) whether associating with known criminals;

(k) character witnesses;

(l) circumstances of apprehension:

  (i) did the accused surrender into custody, and if not, why not;

  (ii) was the accused fleeing from prosecution in this or another jurisdiction;

  (iii) was the accused in breach of probation or parole;

(m) distance from the accused's residence to the court; and

(n) history of the accused complying with past bail supervision orders.

2. Protection of the Public

Section 515(10)(b)—detention for the protection or safety of the public. This is sometimes referred to as the "secondary" ground of detention. Relevant evidence could include any of the following:

(a) the accused's criminal record:

(i) how long since the last offence, how similar it is to the current charge and whether it suggests a pattern;

(ii) circumstances of past offences may not be evident from the record, so get as much information as possible (for example, the record may identify assault but not the severity of the offence or the relationship to the victim, etc.);

(b) circumstances of the current offence:

(i) violence—whether the accused has a history of violence and, if so, whether it is associated with alcohol or drugs;

(ii) victims—whether alleged victims were known to the accused or were random strangers; and

(iii) property—whether the alleged offence includes property theft or damage, and if so, the amount involved and whether the property was recovered;

(c) the accused's known associations:

(i) is the accused a leader of a peer group or known to influence potential offenders who pose a risk in the community;

(ii) does the accused's detention affect the rate of serious crime in the community;

(d) prior releases—if the accused was previously released, did the accused stay out of trouble;

(e) impediments to investigation—has the accused threatened witnesses or tried to prevent a police investigation;

(f) deliberation—whether the crime the accused is charged with involved planning;

(g) risk of loss—would releasing the accused present a significant risk to property, including risks that counterfeit money could be distributed, proceeds of crime could be laundered, or evidence could be destroyed; and

(h) any other outstanding charges.

3. Confidence in the Administration of Justice

Section 515(10)(c)—detention to maintain confidence in the administration of justice. This is sometimes referred to as the "tertiary" ground of detention. Relevant evidence could include any of the following:

(a) the apparent strength of the prosecution's case;

(b) the gravity of the offence;

(c) the circumstances surrounding the commission of the offence, including whether a firearm was used; and

(d) the fact that the accused is liable for a potentially lengthy term of imprisonment, or where the offence involves a firearm, or carries a minimum punishment of imprisonment of three years or more.

[§2.13] Bans on Publication

Publication bans may flow from statute or common law. They can be automatic, mandatory (upon meeting preconditions), or discretionary. Some bans are designed to protect the accused's the *Charter* rights, such as the presumption of innocence and right to a fair trial. These include bans on the publication of the evidence taken at a bail hearing or preliminary inquiry (*Criminal Code* ss. 517 and 539; *Toronto Star Newspapers v. Canada*, 2010 SCC 21).

[§2.14] Estreatment Procedures

Part XXV of the *Criminal Code* governs estreatment proceedings that may be taken by the Crown against the principal (i.e. the accused) or the sureties (or both) if the accused has defaulted on an undertaking, release order or recognizance. The judge hears the application by the Crown for an order against the principal or sureties to make them judgment debtors to the Crown under s. 771(2). The judge will hear first from the Crown regarding the accused's failure to appear at one or more appearances. The judge will then hear from the principal as to the reason for the failure to appear, and from the sureties as to what efforts they made to ensure the accused's appearance. The factors the court considers in determining whether or not to grant the order are set out in *R. v. Sahota* (1979), 9 B.C.L.R. 385 (S.C.). Sureties should attend estreatment hearings because judges are frequently sympathetic to defences by the surety and may return all or part of the bail. This is especially true if some efforts were made by the surety to get the accused to appear in court.

[§2.15] Mental Disorder

1. Aspects to Consider

This is a brief overview of a complex area of criminal procedure and law. If mental disorder is in issue, that may have consequences throughout the file and the trial process:

(a) on the initial appearance of the accused in the Provincial Court for the bail hearing or the initial appearance in a trial court (if there is a concern regarding fitness, the accused can be remanded for an overnight assessment as a first step, seen by an onsite mental health worker to assist in determining next steps, or referred to the mental health bail program at Downtown Community Court, where available);

(b) on the return of an accused after an assessment made pursuant to an order under s. 672.11 of the *Criminal Code*, or after a finding of fitness by a Review Board under s. 672.48;

(c) at any time during the preliminary hearing or trial when the issue of mental disorder or fitness to stand trial is raised; and

(d) at any time where there is evidence that the accused had a mental disorder at the time of the offence.

An accused who has a mental illness *may* (or may not) fall under any of these categories:

(a) not "criminally responsible" as defined in s. 16 of the *Criminal Code*;

(b) "unfit to stand trial" as defined in s. 2 of the *Criminal Code*; or

(c) involuntarily admissible to a health unit as a person with a mental disorder under s. 22 of the *Mental Health Act*.

If the police officers involved consider that the behaviour of the accused or circumstances of the alleged offence indicate that the accused might have a mental disorder, the police officers will so advise Crown counsel. As a result of this, or on Crown counsel's own initiative after reviewing the circumstances of the offence, Crown counsel may ask a doctor to examine the accused (see s. 672.16(1)). In most cases, the doctor's report will address the fitness to stand trial criteria in s. 2 of the *Criminal Code*.

2. Fitness to Stand Trial

After an examination by a doctor (usually a general practitioner), Crown counsel reviews the doctor's report. If the doctor is of the opinion that the accused is fit to stand trial, the matter proceeds. If, however, the doctor is of the opinion that the accused is unfit to stand trial, Crown counsel or defence counsel may apply to have the court order an assessment under s. 672.11. Alternatively, the Crown may seek to remand the accused in custody under s. 516. A doctor (usually a psychiatrist) may see the accused during the remand period and give evidence at a subsequent fitness hearing.

The definition of "unfit to stand trial" is set out in s. 2 of the *Criminal Code*:

> "unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or the object of the proceedings;
>
> (b) understand the possible consequences of the proceedings; or
>
> (c) communicate with counsel.

The core question in a fitness assessment is whether the accused is fit, and if not, can be treated or rendered fit within 60 days.

An assessment normally takes five days (travel days are not counted), but with the consent of the accused, the assessment order may be continued in force for up to 30 days.

The *Criminal Code* contains a presumption against custody during the assessment period, unless the court is shown cause why custody of the accused is necessary (s. 672.16). The assessment order cannot direct the accused to undergo treatment (s. 672.19). Treatment may, however, be given under the *Mental Health Act* while the accused is being assessed, if other prerequisites are met.

Once an accused returns from an assessment, the court may hold a fitness hearing. If the accused is found to be fit, the trial proceeds as if the issue of fitness had never been raised. If the court returns a verdict of unfit, the court has four options:

(a) order a further assessment for up to 30 days under s. 672.11(d);

(b) order treatment of the accused for up to 60 days under s. 672.58;

(c) proceed directly to a disposition hearing under s. 672.45; or

(d) defer disposition to the Review Board, who must make its disposition within 45 days under s. 672.47(1).

Basically, the *Criminal Code* allows the court to make the initial determination of fitness and an interim disposition, but gives the Review Board full

jurisdiction over the unfit accused afterwards. Release without conditions is not an option at this stage. It is also the Review Board that determines when the accused is fit to stand trial. The Review Board conducts an annual review of all persons found not fit to stand trial or not criminally responsible. Appeals from decisions of the Review Board go directly to the Court of Appeal.

3. The Defence of Mental Disorder

Section 16(2) of the *Criminal Code* provides that "[e]very person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility . . . until the contrary is proved on the balance of probabilities." "Mental disorder" is defined in s. 2 of the *Criminal Code* as a "disease of the mind."

Under s. 16(1), the test is whether the accused has a disease of the mind to the extent that it renders the accused incapable of appreciating the nature and quality of the act or omission, or of knowing that the act or omission is wrong according to the ordinary moral standards of reasonable members of society (*R. v. Chaulk* (1990), 62 C.C.C. (3d) 193 (S.C.C.), and *R. v. Landry* (1991), 62 C.C.C. (3d) 117 (S.C.C.)).

In *R. v. Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.), the Supreme Court of Canada fashioned a rule regarding when evidence of mental disorder can be raised in a trial. Under the rule, the Crown may lead evidence of mental disorder in only two circumstances.

(a) The Crown may raise the issue at the conclusion of the trial after a verdict of guilt. At that point, the Crown may lead evidence of mental disorder, which evidence the trier of fact will then consider in determining whether the proper verdict should be a conviction or a verdict of not guilty by reason of mental disorder.

(b) The Crown may lead evidence of mental disorder if the defence puts mental capacity in issue.

The accused is entitled to raise the issue of mental disorder at any stage of the trial.

The persuasive burden of showing that the accused was suffering from a mental disorder at the time of the offence is on the person advancing it (*R. v. Herbert* (1954), 113 C.C.C. 97 (S.C.C.) and *Chaulk*).

Even if the Crown and the defence agree that the accused was not NCRMD, it is still up to the trier of fact to make the final decision on this issue. Although the evidence of psychiatrists is important, it is not determinative with respect to the issue of whether or not the accused was suffering from a "disease of the mind" (*R. v. Rabey* (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), aff'd (1980), 54 C.C.C. (2d) 1 (S.C.C.)).

4. Disposition—Not Criminally Responsible

In determining whether the court or a Review Board should make the initial disposition after a NCRMD verdict, the following matters, set out in ss. 672.54, 672.5401 and 672.541, are to be considered:

(a) the safety of the public, which is the paramount consideration (see s. 672.5401);

(b) the mental condition of the accused;

(c) the reintegration of the accused into society and the other needs of the accused; and

(d) the victim impact statement if one has been filed.

Using these considerations, the court or Review Board must make the disposition that is the least onerous and the least restrictive. The options are as follows:

(a) directing that the accused be discharged absolutely;

(b) directing that the accused be discharged from custody on conditions; or

(c) directing that the accused be detained in custody in a hospital designated under the *Criminal Code* by the provincial Minister of Health.

5. Sentencing—Minor Mental Illness

A psychiatric assessment may be helpful to the judge sentencing an accused who has a mental illness that does not give rise to the defence of NCRMD. In these circumstances and when requested by the court, the Crown commonly arranges a psychiatric examination and a medical report as part of a presentence report. Defence counsel may want a referral to a psychiatrist of their own choosing rather than to a psychiatrist retained by the Forensic Psychiatric Services Commission. In the latter situation, the court does not pay for the psychiatric assessment and it does not form part of the presentence report.

If the accused has a minor criminal record or none at all, the circumstances of the offence are not serious, and the accused is a person with a mental disorder as defined by the *Mental Health Act*, the Crown may decide to let the matter be dealt with as a medical problem and enter a stay of proceedings once it is clear that a mental health facility will admit the accused.

Chapter 3

Preparation for Trial[1]

[§3.01] Steps in Preparing

This chapter canvasses the practical and legal issues that counsel must address before proceeding to a trial of a criminal case. It includes description of some of the motions and applications that may be appropriate before the trial or hearing begins.

Each case is unique and will have its own requirements and features that counsel must deal with. However, there are broad common steps that counsel should take in every case. This chapter describes these steps in the most typical sequence. Several steps may also be occurring contemporaneously.

[§3.02] Preparation Generally

Preparation is the key to effective and competent presentation of a case on behalf of a client to the court. It also will establish a positive reputation with other counsel, judges of the court, and clients. A good reputation is one of counsel's most valuable assets.

Trial counsel must always be prepared for the unexpected and recognize very few trials unfold exactly as anticipated. The goals of preparation generally are as follows:

1. ensuring that the client fully understands what choices and options are available, and the pros and cons of those alternatives;
2. understanding as thoroughly and completely as possible what evidence exists against the client in support of the charges that the client is facing;
3. anticipating and being prepared for all the legal issues that might arise during the trial, and the factual issues that the trier of fact will have to determine at the conclusion of the trial; and
4. identifying any evidence that may be required for presentation during the case and presenting that evidence efficiently and effectively. (This includes witnesses, real evidence, documents, photographs, etc.)

Defence counsel should always remember that the onus is on the Crown to prove its case *beyond a reasonable doubt*. Defence counsel should be cautious when entering into discussions or making requests for information, because those actions might alert the Crown to deficiencies in the case that the Crown has overlooked.

Both Crown counsel and defence counsel should turn their minds at an early stage in the proceedings to preserving evidence—especially witnesses' memories. Failure to preserve evidence early can result in the loss of material that only assumes significance later in the case. Crown counsel will request that the police obtain statements from all relevant witnesses. Defence counsel should ensure that statements from possible defence witnesses are obtained at the earliest opportunity. When the client can afford it, defence counsel may also consider retaining the services of a private investigator to conduct interviews of key witnesses as quickly as possible.

Defence counsel may also want to visit the scene of the alleged offence before it changes (if possible). Ultimately, a visit may reveal inconsistencies or impossibilities in the Crown's evidence at trial. Photographs or video recordings of the scene may be useful as long as there is a witness for either the Crown or defence (preferably other than the accused) who can identify the scene and testify that the visual aids accurately depict the scene at the time of the alleged offence (in terms of distance, size, lighting, etc.).

Both Crown and defence counsel should also try to identify legal issues as early as possible so that the law can be researched, and factual underpinnings explored. Crown and defence counsel should carefully read the statute under which the accused is charged, paying attention to sections containing definitions, presumptions, procedures and penalties. These sections may be in different sections of the statute than the offence section.

[§3.03] Disclosure of Particulars

1. Purpose

The onus is upon the Crown to prove its case against the accused.

The common law and the *Code of Professional Conduct for British Columbia* (the "*BC Code*") establish the Crown's obligation to disclose all relevant information *in its possession* to an accused. This obligation is also constitutionally entrenched in s. 7 of the *Charter* (see §6.10(3) regarding the *Charter* and the right to disclosure). The duty of Crown counsel to provide full disclosure was canvassed at length by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and *R. v. McNeil*, 2009 SCC 3.

[1] Revised by **Mornè Coetzee**, Crown Counsel, BC Prosecution Service, in July 2023. Previously revised by Ann Seymour (2020); Mornè Coetzee (2019); Christie Lusk (2017); Lesley Ruzicka (2005, 2008, 2010 and 2012); D. Allan Betton (2006); Kenneth D. Madsen (2003 and 2004); Thomas Burns (1995–2002); and Bronson Toy and Thomas Burns (1994). Reviewed in 2002 by Tina Dion for Aboriginal law content.

2. Content

Subject to certain limits, the Crown is under a general duty to disclose *all relevant information* in its possession or control, regardless of whether the evidence is inculpatory or exculpatory (*R. v. Chaplin*, [1995] 1 S.C.R. 727 at 739). Relevant information includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist in the exercise of the right to make full answer and defence.

The *BC Code* requires the Crown to disclose all relevant facts and known witnesses, whether tending to show guilt or innocence. Crown counsel should disclose evidence regardless of whether Crown counsel intends to adduce it. The information need not be credible nor capable of becoming evidence itself. See rules 2.1-1, 5.1-3 and commentary [1] to 5.1-3.

At the initial disclosure stage, the particulars will generally include the Report to Crown Counsel and copies of witness statements, police notes, exhibits, any statement made by the accused, and a copy of the accused's criminal record. The particulars may also include photographs, audio and video tapes, and relevant police disciplinary records (see *McNeil*). Defence counsel should closely review the Report to Crown Counsel to determine if other items are relevant and should be requested. Often, many of the documents referred to in §3.04 (court records, transcripts) will be included.

Defence counsel should also obtain copies of notices or certificates if the Crown intends to produce them in court. The client might have these documents, but counsel should ensure they are complete.

Defence counsel should also obtain from the prosecutor a copy of any psychiatric or doctor's report concerning the accused that has been prepared at the request of the Crown.

In certain cases, documents from businesses or financial institutions will be produced in court. When counsel anticipates this, counsel should obtain copies of these documents. The accused and defence counsel are entitled to inspect any documents that the Crown will produce under the business records exception to the hearsay rule (s. 30(7) of the *Canada Evidence Act*).

The Crown has a continuing obligation to provide disclosure throughout the proceedings. Further, the Crown's obligation to provide disclosure extends beyond the trial. In the appellate context, the Crown is required to disclose any information where there is a reasonable possibility that it may assist the appellant in prosecuting an appeal: *McNeil*.

3. How and When to Request Particulars

When the police have concluded their investigation of a matter, they will submit a document entitled a Report to Crown Counsel, which is used by the Crown in the charge approval process. Once charges have been approved, those particulars are available to the defence.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead: *Stinchcombe* at para. 28. The Provincial Court's *Criminal Caseflow Management Rules* (the "CCFM Rules") require the Crown to make the disclosure required by law at the initial appearance or as soon as practicable after it, and fuller and better disclosure as it becomes available or as required by law, but in a timely manner (Rule 6).

Counsel must obtain initial disclosure at the earliest opportunity. It is impossible to interview the accused properly, and difficult to conduct a proper arraignment hearing or estimate the length of the hearing accurately, without reviewing the particulars (see §3.11–§3.13 on pleas, elections and re-elections).

While it may be expedient to make verbal requests for disclosure from the Crown, defence counsel should consider making a well-crafted written disclosure request. A complete and thorough written request for disclosure crystallizes some of the Crown's obligations, and the written request can serve as a very useful tool if disclosure issues arise as the trial approaches, or during the course of a trial. Defence counsel should include requests for all business and medical documents in the written request for particulars.

If, after reviewing the initial particulars, defence counsel determines that additional disclosure is required, defence counsel should request those particulars from Crown counsel in a timely manner.

In Provincial Court, if the Crown does not agree that the disclosure is required or does not respond to a request in good time, the CCFM Rules specify that an application may be brought to a judge for "directions" or for "further and better disclosure." Applications for further disclosure must be brought in a timely manner (Rule 6).

At the BC Supreme Court, outstanding requests for disclosure can also be addressed at a pre-trial conference (see Chapter 4, §4.03), although any actual pre-trial applications for disclosure must be brought in accordance with the *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140 (Rule 2).

Courts may be unsympathetic to complaints that full disclosure has not been made where the defence has not pursued disclosure in a timely manner*: Stinch-*

combe at para. 24; *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (B.C.C.A.), aff'd (1996), 111 C.C.C. (3d) 32 (S.C.C.).

Requests for further disclosure may arise at any stage of the proceedings. For example, cross-examination at the preliminary inquiry of the police officer in charge of the investigation may reveal information not previously known to the defence that triggers disclosure obligations.

4. Limitations

Crown counsel does retain some discretion to delay or refuse disclosure on the basis that the material sought is beyond the control of the Crown, clearly irrelevant, privileged, or falls within one of the statutory exceptions to the general rules relating to prosecutorial disclosure (see *Stinchcombe*, *Chaplin*, *McNeil*, and ss. 278.1–278.9 of the *Criminal Code*). Further, the Crown retains discretion as to the manner and timing of the disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. For example, non-disclosure may be justified based on public interest immunity, such as police informer privilege (see e.g. *R. v. Kelly* (1995), 99 C.C.C. (3d) 367 (B.C.C.A.)). Withholding or delaying production of information may also be justified out of concern for the security or safety of witnesses or persons who have supplied information to the investigation, or to protect the identity of police officers engaged in an ongoing investigation: *Stinchcombe* at paras. 16, 22.

The Crown's disclosure obligation to the defence extends only to "first-party" records or "*Stinchcombe* disclosure," also referred to as the "fruits of the investigation." This is material relating to the accused's case in the possession or control of the prosecuting Crown entity: *McNeil* at para. 22. The investigating police force (or other investigating state authority) has a corresponding obligation to provide the Crown with all relevant material pertaining to its investigation of the accused. Therefore, it is not open to Crown counsel to explain a failure to disclose this material on the basis that the investigating police force failed to disclose it: *McNeil* at paras. 14, 24.

The Crown's disclosure obligation to defence does not extend to "third-party records" (i.e. information in the hands of other government agencies or third parties). The Crown cannot disclose what it does not have or cannot obtain. Instead, production of these records is generally governed by the two-part test for production set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411, discussed below.

Not all records in the possession of the police are subject to the first-party disclosure regime. While the investigating police force (or other investigating agency) stands on the same "first-party" footing as the Crown for the purpose of fulfilling its obligation to provide the Crown with all relevant material pertaining to its investigation of the accused, the police and the Crown are unquestionably separate and independent entities, both in fact and in law. Information in the possession of the police or other government departments that is *unconnected to the investigation giving rise to the charges* (such as criminal investigation files involving third parties) generally falls outside of the scope of first-party disclosure, and its production will instead be governed by the third-party "*O'Connor*" regime: *McNeil* at paras. 13, 22–25.

Notably, information about maintenance of breathalyzers was formerly subject to first-party *Stinchcombe* disclosure, pursuant to *R. v. Phangura*, 2010 BCSC 944. The Supreme Court of Canada in 2018 decided that such information is subject to the rules for information in the hands of third parties. An accused must apply to court and show the documents are likely relevant in order to obtain them: *R. v. Gubbins*, 2018 SCC 44.

The Crown does have a role to play in "bridging the gap" between first-party disclosure and third-party production. The Crown, in fulfilling its *Stinchcombe* disclosure obligations, does not have to make inquiries of every state authority. However, if the Crown is "put on notice" about the existence of relevant information in the hands of other agencies pertaining to the case against the accused, or to the credibility or reliability of a witness in the case, the Crown has a duty to make reasonable inquiries of those other Crown agencies or departments and, if it is reasonably feasible to do so, obtain the information: *McNeil* at paras. 13, 48–51.

Where the accused is seeking disclosure of third-party records, and the third party asserts that the documents are either not relevant or attract a privacy interest, defence counsel must bring a formal third-party records application for production of the information: see *McNeil* at para. 27. The procedure to be followed on a third-party records application is as follows (see *McNeil*):

1. The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third-party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
2. The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in their trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records, and any other

person who may have a privacy interest in the records targeted for production.

3. The application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, the application for production becomes moot and there is no need for a hearing.

4. If the record holder or some other interested party advances a well-founded claim of privilege, the existence of privilege will effectively bar the accused's application for production, unless the accused's innocence is at stake. Issues of privilege are best resolved at the outset of the application process.

5. Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *R. v. O'Connor*, [1995] 4 S.C.R. 411. At the first stage, if the judge is satisfied that the record is likely relevant to the proceedings against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

Special rules apply where an accused is seeking personal records relating to a complainant or witness in proceedings for one of the sexual offences listed in s. 278.2(1), whether the records are in the hands of a third party or Crown counsel. Crown counsel may refuse to disclose records on the basis that they fall within the statutory exceptions to disclosure set out in ss. 278.1–278.91 of the *Criminal Code.* To apply to obtain the records in these circumstances, counsel must bring a formal written application for production pursuant to the procedure outlined ss. 278.2–278.91 of the *Criminal Code*. For a summary of the applicable procedure, see Chapter 4, §4.02(2).

5. Remedies for Lack of Disclosure

When defence counsel is concerned that full disclosure has not been made, these concerns should be put on the record and counsel should consider scheduling a pre-trial disclosure motion as contemplated in *Stinchcombe.* See §6.10(3), regarding the *Charter* and the right to disclosure.

The Crown's decision not to disclose information may be reviewed by the trial judge on a *voir dire*, in which the Crown bears the onus of justifying the non-disclosure: *Stinchcombe* at paras. 21-23. On review, the trial judge should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege or on the basis that the information is irrelevant: *Stinchcombe* at para. 22.

[§3.04] Court Records, Informations, Transcripts

Defence counsel should also consider obtaining the following documents as part of preparation for the hearing:

1. a photocopy of the Information;

2. a photocopy of the Record of Proceedings which indicates when appearances were made, what occurred on appearance dates, the next appearance, bail disposition, etc.;

3. photocopies of the police booking sheets that provide information such as a full description of the accused, where the accused was arrested, condition of the accused upon arrest, what belongings the accused had at the time of the arrest, etc.;

4. photocopies of any other relevant documents in the court file, such as probation orders, release orders, etc.;

5. photocopies of any warrants that have been issued pursuant to the Information;

6. photocopies of all search warrants, including the Information to Obtain a Search Warrant (the Information to Obtain may provide useful disclosure about the police investigation or a basis to attack the search warrant at trial as part of an application to have evidence seized under the search warrant excluded under the *Charter*; see §6.12);

7. photocopies of all affidavits sworn in support of any Authorizations to Intercept Private Communications (To obtain these, counsel must apply to the court prior to the preliminary inquiry or trial (*Dersch v. Canada (Attorney General)* (1990), 60 C.C.C. (3d) 132 (S.C.C.)); s. 187 of the *Code*). As a practical matter, the Crown will often make the application. Subject to editing by the prosecutor—for example, to protect a confidential informant—the defence is entitled to a copy of all affidavits in support of such Authorizations or Renewals so that the accused may be able to make full answer and defence. The defence may seek an order from the judge for disclosure of any edited portion.);

8. transcripts from any preliminary matters which may be relevant for the hearing of the matter; and

9. transcripts from other related criminal or civil court proceedings in which potential witnesses have testified about the matters before the court.

[§3.05] Informations and Indictments

The *Indictment* or *Information* is the document charging the accused. Both Crown and defence counsel should review the Information or Indictment closely and as early as possible because this is the document that guides the proceedings.

The definition of "Indictment" in s. 2 of the *Criminal Code* includes "an information or a count therein." Therefore, the law relating to the sufficiency, amending, and quashing of Indictments also applies to Informations.

Historically, many cases were decided on technical arguments concerning Informations and Indictments. The modern approach is to reject minute analysis of Informations and Indictments. Generally, an Information will be sufficient if it reasonably informs the accused of the charges against that person and raises the allegations from the general to the particular. As long as the Information discloses an offence known to law, the courts are likely to cure any defect in the charging document by amending the document and granting the defence an adjournment.

Counsel should review the Information and consider the following questions:

1. Does the Information charge an offence known to law?
2. Is the Information properly sworn?
3. Was the Information laid within the applicable time frames?
4. Does the Information contain sufficient particularity to raise the charges from the general to the particular?

Criminal Pleadings and Practice in Canada, by E. G. Ewaschuk, is an excellent source of material on Informations and Indictments. *Martin's Annual Criminal Code* also has a useful appendix that contains charge wording for most sections under the *Criminal Code*, although counsel must remember that other wordings may be equally valid, and wordings in *Martin's* may be defective.

To challenge an Information or Indictment, defence counsel must make a motion to quash under s. 601(1) of the *Criminal Code*. Such an objection must be made before plea or with leave of the court. Remember that in most cases, when an objection is made before plea, any serious prejudice to an accused can be avoided by an adjournment to allow the accused time to prepare to face the "cured" Indictment.

Lamer C.J.C. set out the current attitude towards amending Informations and Indictments in *R. v. Webster* (1993), 78 C.C.C. (3d) 302 (S.C.C.):

> Since the enactment of our *Criminal Code* in 1892 there has been, through case law and punctual amendments to s. 529 [now s. 601] and its predecessor sections, a gradual shift from requiring judges to quash to requiring them to amend them instead; in fact, there remains little discretion to quash. Of course, if the charge is an absolute nullity, an occurrence the conditions of which the Chief Justice has set out clearly in … reasons, no cure is available as the matter goes to the very jurisdiction of the judge. … But, if the charge is only voidable, the judge has jurisdiction to amend. Even failure to state something that is an essential ingredient of the offence (and I am referring to s. 529(3)(b)(i) [now s. 601(3)(b)(i)]) is not fatal; in fact, it is far from being fatal, as the section commands that the judge "shall" amend.

A controversial issue is when a court can quash an Information that is allegedly an abuse of process. A trial court judge has a residual discretion to stay proceedings, but a judge should exercise this power only in the "clearest of cases" (see §6.10(2), regarding the *Charter* and judicial stays for abuse of process). Direct indictments similarly have withstood motions to stay when they were argued to be "without foundation" (*R. v. Denbigh* (1988), 45 C.C.C. (3d) 86 (B.C.S.C.)).

When determining whether an amendment is appropriate, the focus is on prejudice to the accused and the possibility of an injustice. Unless the charge is an "absolute nullity," the judge has very wide powers to cure a defect through amendment and must do so unless the amendment would cause injustice in that the accused has been misled or prejudiced by the defect. Even if there has been such an injustice, the court should amend and adjourn rather than quash.

Section 601 of the *Criminal Code* sets out the circumstances in which an amendment can be made. Several cases address the issue of *when* amendments can be made:

1. before election (*R. v. ITT Industries of Canada Ltd.* (1987), 39 C.C.C. (3d) 268 (B.C.C.A.));
2. at the preliminary hearing (s. 601);
3. after a no-evidence motion (*R. v. Powell*, [1965] 4 C.C.C. 349 (B.C.C.A.));
4. after an insufficient evidence motion, but if the motion to amend is allowed, then the accused should be permitted to re-elect to call evidence (*R. v. Wiley* (1982), 65 C.C.C. (2d) 190 (Ont. C.A.));
5. after the defence case closes (*R. v. Hagen* (1969), 6 C.R.N.S. 365 (B.C.C.A.));
6. during final submissions of counsel (*R. v. Clark* (1974), 19 C.C.C. (2d) 445 (Alta. S.C. App. Div.)); and
7. on appeal (*R. v. Morozuk* (1986), 24 C.C.C. (3d) 257 (S.C.C.) and *R. v. Irwin* (1998), 123 C.C.C. (3d) 316 (Ont. C.A.)).

[§3.06] Limitation Periods

Section 786(2) imposes a limitation period of 12 months for summary conviction offences.[2] There is generally no limitation period for indictable offences. When the offence charged is a "hybrid offence" (summary or indictable at the election of the Crown) and when the charge has been laid more than 12 months after the date of the offence, the Crown must proceed by indictment on the charge, if appropriate.

Counsel can waive a summary conviction limitation period under s. 786 (2). There may be situations in which the defence wants a summary conviction trial rather than an indictable proceeding where the charge was sworn outside the 12-month limitation period. In these circumstances it may be worthwhile to approach Crown counsel to see if they will consent to a summary conviction proceeding.

[§3.07] Alternatives to Prosecution

Once defence counsel has reviewed the particulars and the Information, counsel should consider whether the accused might be eligible for alternative measures. Note that "alternative measures" programs are often referred to colloquially as "diversion" because they "divert" offenders out of the criminal justice system.

Formal "alternative measures" to prosecution were introduced in the *Criminal Code* in 1995—see s. 717.

Conditions for approval of an alternative measures plan are set out in s. 717. They include that the plan must:

1. not be inconsistent with the protection of society;
2. be part of a program of alternative measures authorized by the Attorney General;
3. be appropriate to the needs of the accused and the interests of society and the victim; and
4. be entered into
   (i) by a fully informed accused who fully and freely consents to participation in the alternative measure after being advised of their right to counsel;
   (ii) by an accused who accepts responsibility for the act or omission that formed the basis of the offence; and
   (iii) in cases where the prosecution is of the opinion that there is sufficient evidence to proceed with the offence and the prosecution of the offence is not in any way barred by law.

Alternative measures may be considered at any time throughout the prosecution. Crown counsel may on occasion make a referral to alternative measures prior to laying an Information if the referral and any program can be completed prior to the expiration of the limitation period and is otherwise appropriate. There are advantages to defence counsel contacting Crown counsel to seek alternative measures at the earliest possible time in order to influence prosecutorial decisions before they become entrenched in the formal charge process.

When considering an application to the prosecution for an alternative measure, defence counsel may want to review the ALT 1—Alternative Measures for Adult Offenders Policy, in the *Crown Counsel Policy Manual*, Criminal Justice Branch, Ministry of Attorney General (a public document), so that counsel can tailor the request to address the factors contained in the Policy. With respect to the federal Crown, counsel should explore alternative measures with the Public Prosecution Service of Canada or its agent in their area.

The process will usually start with a submission by defence counsel to the Crown in which the responsibility of the client is admitted, full antecedents of the client are provided, and an explanation is given as to why the offence occurred and why it will not occur in the future. Reference letters may help. The Crown will review the material and make a referral to a service provider (usually Community Corrections) for a report. The agency will investigate the accused's suitability for alternative measures and report back to Crown counsel. Any report that recommends alternative measures will also include an alternative measures plan. Crown counsel may accept, reject, or modify the proposed plan. Many alternative measures agreements include some form of supervision, monitoring, or other involvement by a third party.

No admission, confession or statement accepting responsibility in an alternative measures agreement is admissible in evidence against that person in any civil or criminal proceeding (s. 717(3)). Entry into an alternative measures arrangement does not prevent laying of an Information or bar a prosecution. However, if a prosecution is commenced, the accused may ask the court to dismiss the charge under s. 717(4) if the terms and conditions of the alternative measures plan have been completely complied with, or if they have been partially complied with and the court is of the opinion that the prosecution would be unfair having regard to the circumstances of the case and the person's performance of the alternative measures.

Generally, alternative measures agreements in British Columbia must be completed within three months. However, there may be exceptional cases that require a longer time period than three months. Police and government agencies retain records of alternative measures (ss. 717.2 and 717.3). The records may be disclosed in limited circumstances under s. 717.4.

If an accused is not eligible for alternative measures, defence counsel may want to consider early disposition.

[2] Prior to the coming into force of amendments to the *Criminal Code*, the limitation period was six months.

[§3.08] Early Disposition

Once the lawyer has agreed to take the case and obtained initial disclosure, and the custodial status of the client has been determined, the lawyer can consider early disposition of the case.

Although the majority of cases are set for hearing (even if some of them are ultimately resolved by means other than a full hearing), in some cases the matter is disposed of by guilty plea, stay of proceedings, withdrawal, or by various combinations of these, on the very first appearance of the accused, or on a very early appearance.

A guilty plea is only appropriate where the client accepts responsibility for having committed the crime.

An early guilty plea may be beneficial in the following situations:

1. The Crown file is deficient. For example, the criminal record is missing or is incomplete, or a police investigation is ongoing.
2. The lawyer and the accused find the judge, prosecutor, or police presently dealing with the matter to be to their liking, and want to avoid the possibility of less favourable opponents assuming responsibility for the matter later.
3. Another charge against the same accused must be dealt with and it is apparent that the accused would benefit from a "package deal" (dealing with both charges at the same time).
4. Counsel is satisfied that a guilty plea is otherwise appropriate, and the accused cannot tolerate any delay and wants to enter the plea as soon as possible.
5. The accused has been detained or has consented to remain in custody and a determination of guilt is probable. However, remember that time spent in custody awaiting trial (pre-disposition custody) may be taken into account by the sentencing judge in reducing the length of the sentence ultimately imposed (see §8.04(19)(a)).
6. Several cases can be manipulated to the advantage of the accused without misleading the court. For example, an accused may have charges in several jurisdictions. Separate pleas can be arranged without the prosecution knowing what is happening in the other areas, resulting in the offences being treated as isolated instances, and sentences that result being concurrent. The "*Justin* case-tracking system" makes this more difficult to do than it used to be. Alternatively, counsel may consider waiving all charges to a single jurisdiction where the most favourable disposition is possible.

There are, of course, other additional factors not set out here that support early disposition.

[§3.09] Plea Resolution

While there may be some debate over the desirability of plea bargaining, the reality is that discussions and negotiations leading to compromise by the Crown or defence are a fact of criminal practice. No one can predict with certainty what the outcome of a trial will be.

From an accused's perspective, it is imperative that they know what alternatives exist in order to be able to make fully informed decisions about whether to proceed to trial. The accused is the person who knows what occurred and whether the charges are well-founded or not. Defence counsel rarely can know with certainty whether they are being told all of what the accused knows. The accused, for a variety of reasons, may not be entirely honest or complete in what they tell defence counsel. Consequently, each accused needs to know what the alternatives are so that they can assess what is the best for themselves.

Rules 5.1-7 and 5.1-8 ("Agreement on Guilty Plea") of the *BC Code* state the duties of defence counsel as follows:

> 5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.
>
> 5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,
>
> (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
>
> (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
>
> (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
>
> (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.
>
> Commentary [1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

The Crown views resolution discussions as essential to the functioning of the justice system when they are conducted properly, in a principled manner, and in accordance with the charge approval standard. See RES-1 "Resolution Discussions and Stays of Proceedings" in the *Crown Counsel Policy Manual* for the factors the Crown considers when engaging in resolution discussions. Resolution discussions are beneficial because they allow Crown counsel to consider information known only to the defence concerning the strength of the Crown's case. The early resolution of criminal charges

reduces stress and inconvenience to victims and witnesses. It also results in a more efficient justice system when trials are either not necessary, or are shorter, due to the focusing of proceedings on those facts which are clearly in issue. During resolution discussions, Crown counsel must act in the public interest at all times.

Generally, as part of the initial disclosure package, the Crown will give defence counsel a completed *Crown Counsel's Initial Sentencing Position* ("ISP"). The ISP outlines what sentence the Crown will seek if the accused enters an early guilty plea. The ISP also alerts defence counsel to what additional information the Crown requires in order to determine a sentencing position.

Plea negotiation can result in many things, including:

1. a guilty plea to some charges in return for other charges being dropped;
2. a guilty plea to a lesser charge in return for the primary charge being dropped;
3. a guilty plea to the charge in consideration for the Crown not proceeding by Notice to Seek Greater Penalty;
4. a guilty plea on the understanding that the Crown will take a certain position on sentence;
5. a guilty plea on the understanding that the guilty plea or sentence will occur on certain specified dates; or
6. a guilty plea on the understanding that the charges against other persons will be dropped.

It is improper for the Crown to conceal any of an accused's previous convictions from a sentencing judge by "not alleging" them as part of a plea bargain. However, when such convictions are brought to the judge's attention, the Crown may state that they are not material because of their age or nature.

In order to arrange a plea bargain, defence counsel should contact the Crown in charge of the case and propose a position the Crown should take if the client were to plead guilty either to the offence charged or some other offence. Defence counsel frequently use this opportunity to provide the Crown with new information, especially on the background of the accused, to assist the Crown in reviewing the proposal. Tactically, defence counsel should decide beforehand whether the proposal is the one hoped for or simply a negotiable position. When the proposal is accepted, it must be conditional on confirmation from the client. This confirmation must be done promptly.

The accused's hope is that, as a result of the discussions, the sentence will be somewhat lower than it would be after trial, disposition will occur at a time to suit the accused's convenience, disposition by guilty plea will be less expensive than a trial, fewer convictions will appear on the accused's record, and the likely outcome will be known in advance. Where Crown and defence are in full agreement as to the exact sentence as a result of negotiations, the likely outcome *will* be known in advance. A judge will only reject a joint submission if it would bring the administration of justice into disrepute or be otherwise contrary to the public interest: *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 32–34. The threshold is a high one:

> Rejection [of a joint submission] denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down.

In practice, when judges are considering departing from a joint submission, they will advise counsel of their concerns and invite further submissions on those concerns.

If a judge has concerns about a joint submission, an accused *may* also be allowed to withdraw a guilty plea, but not always. Defence counsel must remember to communicate clearly to the client that although a plea agreement with the Crown lends greater predictability to a case, the court is not bound by the bargain and may impose a sentence quite different from that agreed to by defence and Crown.

Section 606(1.1) of the *Criminal Code* sets out the conditions for a court accepting a guilty plea. A court may only accept a guilty plea if it is satisfied that the accused is making the plea voluntarily and that the accused understands the following:

- that the plea is an admission of the essential elements of the offence;
- the nature and consequences of the plea; and
- that the court is not bound by any agreement made between the accused and the prosecutor.

It is important to remember the consequences of a guilty plea. A guilty plea is a formal admission of guilt. It involves an acknowledgement of all the legal elements necessary to constitute the crime. To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, in that the accused must be aware of the nature of the allegations made against them, the effect of their plea, and the consequence of their plea. See e.g. *R. v. Singh*, 2014 BCCA 373.

A trial judge has the discretion to permit a guilty plea to be withdrawn at any time before sentence is imposed. The onus is on the accused to satisfy the court that there are "valid reasons" for a court to exercise its discretion to permit a guilty plea to be withdrawn. There are several factors for the court to consider in determining whether to exercise its discretion: *Adgey v. The Queen* (1973), 13 C.C.C. (2d) 177 (S.C.C.); *R. v. M.(D.L.)*, 2012 BCSC 538.

An accused seeking to appeal a conviction based on a guilty plea can only succeed under s. 686(1)(a)(iii) of the *Criminal Code*: see *Singh*. The accused must satisfy the appellate court that the acceptance of the guilty plea was a miscarriage of justice and resulted in prejudice to the accused: *R. v. Wong*, 2018 SCC 25. The accused must establish that the plea was not voluntary in the sense that the accused did not appreciate the nature of the charge or the consequences of the plea: *Singh*. Though some appellate courts have required that an accused establish an "articulable route to acquittal" before the plea will be set aside, the Supreme Court of Canada rejected this approach in *Wong*. The applicable standard of proof is one of "reasonable possibility"; that is, the accused must show that there is a "reasonable possibility" that a similarly situated person would have proceeded differently if aware of the legally relevant consequences at the time of the plea. The onus of showing on a balance of probabilities that the plea was invalid is not easily discharged: *R. v. Alec*, 2016 BCCA 282.

When disposition or alternative measures are not possible at an early stage, the next step is to set the matter for a hearing.

[§3.10] Criminal Caseflow Management Rules

1. Objectives of the Rules

Counsel who appear in the Provincial Court need to be familiar with the *Criminal Caseflow Management Rules* (the "CCFM Rules"). The objectives of the CCFM Rules include reducing time to trial, using judicial resources more effectively, and increasing accessibility of the court.

The CCFM Rules were amended in 2013 to allow initial appearances and uncontested, non-adjudicative administrative appearances to be before a Judicial Case Manager rather than before a Provincial Court judge. The revisions also reduced the number of times an accused person must appear in court before trial.

Counsel should also be familiar with two key Practice Directions that provide clarification and guidance about criminal procedure under the CCFM Rules:

- *Practice Direction—Criminal Caseflow Management Rules Simplified Front End Criminal Process (No. 2013/CPD-1)*, as updated June 12, 2020 (the "*2013 CPD-1 CCFM Practice Direction*"); and
- *CRIM 08 Criminal Caseflow Management Rules Simplified Front End Process (2013) Forms and Procedure* (the "*CRIM 08 Forms and Procedure*").

These Practice Directions support the objectives of the revised rules and process by, among other things, assigning most administrative and remand matters to Judicial Case Managers. *CRIM 08 Forms and Procedure* also introduces the Consent Requisition, Consent Remand, and Consent Arraignment forms. Where the preconditions are met (as set out in *CRIM 08 Forms and Procedure*), counsel may use these forms to negate the need for a pre-trial/hearing personal appearance. Appropriate use of the Consent Arraignment forms will be discussed in more detail below in §3.10(3).

For the current CCFM Rules and the relevant Practice Directions and forms, consult the Provincial Court website (www.provincialcourt.bc.ca/), under "Criminal Caseflow Management Rules" and "Criminal & Youth Court Matters Practice Directions." Be aware that practice in this area varies considerably throughout the province.

2. Initial Appearances

The CCFM Rules contain specific provisions relating to an accused's initial appearance (Rule 5). Judicial Case Managers preside over initial appearances. All Judicial Case Managers are required to be Justices of the Peace.

An initial appearance includes the first attendance of a person in court in respect of a charge, and adjournments from such appearances.

The main purpose of initial appearances is to set a timely date for the accused's arraignment hearing, unless the accused indicates to the justice that they intend to plead guilty, in which case the justice will set the matter before a judge for the taking of a plea and sentencing (Rules 5(1) and 5(5)).

To this end, initial appearances allow an accused to obtain initial disclosure (Rule 6) and to obtain counsel if the accused wishes to do so (Rule 5).

Once counsel is retained, the usual practice in initial appearance court is for defence counsel to wait for the court clerk (or Crown counsel in some jurisdictions) to call the case by number and name. Defence counsel then introduces themselves (spelling their name unless the spelling is obvious), advises whether the client is present, and states the purpose of the appearance. When counsel is prepared to appear only on a limited basis for the client—for example, for the preliminary hearing only—counsel should state these limitations at this time.

When the client is not present, counsel should explain the client's absence so that the court can determine whether an appearance by counsel or agent will be accepted. Counsel may appear as counsel or agent for a client charged with a summary conviction offence (see s. 800(2) of the *Criminal Code)*, although the court may require the accused to appear personally. Counsel must have precise instructions from the client to appear in court on a certain

date as an agent. After such an appearance, counsel must inform the client of what transpired and of the date of the client's next court appearance. Failure to appear may result in a warrant being issued by the court for the client's arrest. On indictable offences, the client must appear personally unless a counsel designation notice has been filed. See s. 650.01 for the circumstances in which defence counsel can appear pursuant to a counsel designation notice.

At the first appearance on a hybrid offence matter, defence counsel may want the Crown to state, on the record, whether the Crown intends to proceed by way of summary conviction or by indictment. This will prevent any uncertainty or confusion at a later stage.

Once counsel is retained (if an accused wishes to retain counsel), the Judicial Case Manager will ask the accused to indicate an intention concerning plea and election (if the Information carries a right of election). Where an accused person refuses to do so, the Judicial Case Manager will refer that person to a judge as soon as possible.

A document dated June 30, 2016, entitled *JCM Guidance on Arraignment*, was distributed by the Chief Judge to Judicial Case Managers to assist them in fulfilling their duties pertaining to arraignment of accused persons, as set out in the Notice to the Profession, *NP03 – Assignment of Duties to Judicial Case Managers*.

The guidance directs Judicial Case Managers to continue with the arraignment process where an accused person has indicated an election before a Provincial Court judge or an intention to plead not guilty, and to solicit information about the number of witnesses, anticipated *Charter* applications, and time estimates. Judicial Case Managers may not record a plea, but will schedule the matter for trial with the direction to parties that the plea is to be entered before the trial judge on the first day of trial. Judicial Case Managers are also authorized to take and record an election from a person represented by counsel, and to schedule a preliminary inquiry where one is requested.

As a matter of practice, in some locations, including Vancouver (222 Main Street), Judicial Case Managers will conduct arraignment hearings for summary matters only (except for recording the intended plea). Judicial Case Managers will schedule dates for trial and will direct the parties to enter the plea on the first day of trial. In indictable matters, once the Judicial Case Manager is satisfied that the purposes of the initial appearance have been addressed, the case will be adjourned to a judge for the purposes of recording the election and not guilty plea *before* fixing a trial date.

3. Arraignment Hearing

Rule 8(1) of the CCFM Rules sets out who must attend an arraignment hearing, whether for a summary or indictable proceeding. Unless a "justice orders otherwise" the prosecutor, legal counsel for the accused or other legal counsel designated for the purpose of that hearing, *and* the accused must attend the arraignment hearing.

In some locations (currently only Vancouver Island and the Northern Regions) no in-court appearance may be required in an adult criminal matter if the Crown and defence counsel have discussed the matter and agree the matter is ready to be set for trial, preliminary inquiry, sentencing or other hearing; agree that an in-court arraignment or appearance is not required; and have filed a Form 4 Consent Arraignment form that has been accepted by the Judicial Case Manager office in advance (*CRIM 08 Forms and Procedure*). If submitted and accepted prior to the pre-set arraignment event, the Judicial Case Manager will vacate the future arraignment appearance.

At an arraignment hearing before a judge, the judge may call on the accused to make an election (if the accused is entitled to an election) and enter a plea. In addition, a judge may make inquiries or orders, or give directions to facilitate a trial or preliminary inquiry and to dispose of or simplify the issues. If necessary, the judge will adjourn the arraignment hearing to enable compliance with any order or direction. The judge may also hear applications, if convenient and practicable for the court and all parties.

At the arraignment hearing, the case may be disposed of by plea and set for sentencing, adjourned for pre-trial applications, or set for trial. Where the matter is being set for trial, counsel should be prepared to discuss the probable length of the case, how many witnesses will likely be called, and whether there will be any pre-trial or *Charter* applications.

Once the arraignment hearing is conducted, counsel will be directed to the office of the Judicial Case Managers to schedule a hearing date based on the time estimate determined at the arraignment hearing. If the judge directs it, the trial scheduler will also set a time for the hearing of applications in respect of the case. Dates will be set at the convenience of the court, Crown witnesses, and defence counsel.

Defence counsel should consult the client about convenient days for trial to determine if the client can take a day off from work or school. The client may want an early trial date if detained in custody, or want to have a jail sentence or licence suspension finished by a certain time of year or before an up-

coming trip or job. Alternatively, the client may want a delay to locate witnesses, to improve their situation for sentencing purposes, or simply to postpone an inevitable jail sentence, fine, or licence suspension.

When scheduling dates, counsel should also keep in mind that if there are difficulties scheduling a trial within an acceptable time frame, the trial scheduler may refer the case to the judge who presided at the arraignment hearing. This is particularly important given the framework for assessing the reasonableness of delay under s. 11(b) of the *Charter*: *R. v. Jordan*, 2016 SCC 27.

- For trials in Provincial Court, delay that exceeds 18 months from charge to anticipated or actual end of trial is presumed unreasonable.
- For trials in the Supreme Court, the presumptive ceiling is 30 months.

Delay caused or waived by the defence does not count towards the presumptive ceiling. If delay falls below the ceiling, then to show the delay was unreasonable, defence counsel will need to demonstrate that it took meaningful, sustained steps to expedite proceedings.

Counsel should think about the effect any position they take with respect to available dates may have on a future s. 11(b) breach claim. Before waiving any delay, counsel must have their client's informed instructions.

[§3.11] Pleas

The following pleas are available to an accused:

1. not guilty;
2. guilty;
3. autrefois acquit (ss. 607–610, 808(2));
4. autrefois convict (ss. 607–610, 808(2)); and
5. pardon (s. 607).

With Crown consent, the accused may plead not guilty to the offence charged but guilty to any other offence arising out of the same transaction (s. 606(4)). It need not be an included offence. When an accused refuses to plead or does not answer directly, a plea of not guilty is entered.

For a discussion of the plea of autrefois acquit, see *R. v. Petersen* (1982), 69 C.C.C. (2d) 385 (S.C.C.), where the court held that the plea of autrefois acquit should succeed where an accused has been placed in jeopardy on the same matter on an earlier occasion before a court of competent jurisdiction and there was a disposition in the accused's favour resulting in an acquittal or dismissal of the charges. There need not be a disposition "on the merits" (*R. v. Riddle* (1979), 48 C.C.C. (2d) 365 (S.C.C.)).

When charges are "quashed" after plea as defective, even if there has been no trial on the merits, the plea of autrefois acquit will normally be available and there will be few circumstances where the Crown can successfully just re-lay the charge—the Crown must appeal (*R. v. Moore*, [1988] 1 S.C.R. 1097). If the Information is quashed before plea, autrefois acquit will not lie, and the Crown may re-lay the charge (*R. v. Pretty* (1989), 47 C.C.C. (3d) 70 (B.C.C.A.)). In cases where there is autrefois acquit or autrefois convict, it may be productive for defence counsel to advise the Crown in advance because verification of the previous acquittal or conviction may well result in the charge being stayed.

When the plea is guilty, the hearing may proceed directly to sentencing. The facts are "read in" by the Crown. The defence is usually asked if it disputes the facts. Even if not asked directly, it is still important that the defence make it clear if a relevant fact is in dispute. Factual assertions made in submissions are not "evidence." A judge can accept a fact advanced solely through submission only if that fact is non-contentious. Any clear and unequivocal dispute as to a relevant fact must be resolved by calling admissible evidence, which can include credible and trustworthy hearsay: *R. v. Pahl*, 2016 BCCA 234 at paras. 53–56.

The burden is on the Crown to prove any disputed aggravating fact beyond a reasonable doubt. There is a corresponding burden on the accused to prove any disputed mitigating fact on a balance of probabilities (*R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.); s. 724(3)). Any major dispute as to facts alleged may require an adjournment in order to marshal evidence. To avoid unnecessary delay, counsel should discuss the facts on which the plea is based in advance.

A trial judge has the discretion to permit a guilty plea to be withdrawn at any time before the sentence is completed (*R. v. Atlay* (1992), 70 C.C.C. (3d) 553 (B.C.C.A.); *R. v. M.(D.L.)*, 2012 BCSC 538).

Generally, a guilty plea should not be entered on behalf of a client without having first canvassed all available disclosure, considered and discussed with Crown the possibility of any compromise regarding the charges or circumstances related to those charges, Crown's position on sentence, the facts Crown intends to allege, or any other issues such as scheduling that might be important to the client's decision to plead.

[§3.12] Elections

Some judges permit an accused to waive the reading of an Information or an election. This practice varies from judge to judge. Before agreeing to waive either of these procedural safeguards, defence counsel must ensure that the accused fully appreciates and understands the options available.

For **summary conviction offences**, whether federal or provincial, the forum is the Provincial Court. The accused has no right of election for trial in a higher court for summary conviction offences.

There are several offences in the *Criminal Code* and other federal statutes that are either indictable or summary, at the choice of the Crown. These are often referred to as **hybrid offences**. When the accused is charged with a hybrid offence, the Crown has the discretion to proceed by summary conviction or by indictment.

If there are mixed hybrid and summary or indictable offences in an Information, then all counts must be proceeded with by the Crown in the same manner or the counts will have to be severed for separate hearings (*R. v. Chartrand*, [1974] B.C.D. Crim. Conv. (C.A.) and *R. v. Morelli* (1970), 2 C.C.C. (2d) 138 (Ont. C.A.)).

Indictable offences are triable in one of three forums:

1. Provincial Court (no jury);
2. Supreme Court without a jury; and
3. Supreme Court with a jury.

For some offences, the court that will hear the matter is determined automatically by operation of statute. For example, the offences listed in s. 469 must, subject to s. 473(1), be tried by a Supreme Court judge and jury.

In other cases, a Provincial Court judge under s. 553 of the *Criminal Code* has absolute jurisdiction over the offence. On absolute jurisdiction offences, the accused has no choice as to the forum for hearing and the offences are triable only in the Provincial Court. However, absolute jurisdiction is not exclusive jurisdiction. By operation of ss. 468 and 469, any superior court of criminal jurisdiction also has jurisdiction over these offences (*R. v. Cave* (1978), 9 B.C.L.R. 19 (S.C.)). As such, where absolute jurisdiction offences are joined on an Information with electable offences, the accused's election of a superior court forum will apply to all offences.

Also, even on an indictable offence where a Provincial Court judge has absolute jurisdiction, at any time before the accused has entered upon their defence, a judge who determines there is good reason for the charge to be prosecuted in a superior court may decide not to adjudicate, inform the accused of the decision (s. 555(1)), and put the accused to an election of trial by judge or judge and jury (s. 555(1.1)). If the accused is entitled to a preliminary inquiry and the accused or the prosecutor requests one, the provincial court judge will continue the proceedings as a preliminary inquiry (s. 555(1.2)). This discretion is exercised sparingly but does occur from time to time (see e.g. *R. v. Pappajohn* (1980), 14 C.R. (3d) 243 (S.C.C.), aff'g (1978), 45 C.C.C. (2d) 67 (B.C.C.A.).

For all other indictable offences (except when a direct indictment is preferred), the accused has an election as to the forum in which the trial will be held.

An accused is put to an election on the Information as a whole and may not make separate elections on each count in the Information (*R. v. Watson* (1979), 12 C.R. (3d) 259 (B.C.S.C.)).

If an accused does not elect when put to an election under s. 536, they are deemed to have elected judge and jury (s. 565(1)(b)).

If Crown counsel exercises the Crown's power under s. 568 to proceed by a jury trial, then the accused has no election or the accused's election becomes irrelevant. If the Attorney General prefers a direct indictment under s. 577, the accused is deemed to have elected judge and jury and no preliminary inquiry, though an accused may re-elect to judge alone (s. 565(2)).

Under s. 567, if not all jointly charged accused elect or are deemed to elect the same mode of trial, the justice or Provincial Court judge may decline to record the elections or deemed elections and simply hold a preliminary inquiry. When this occurs, there is a deemed election of trial by judge and jury (s. 565(1)(a)).

Part XVIII of the *Criminal Code* governs elections and preliminary inquiries. Counsel should read Part XVIII carefully. (See also §4.01.) In brief, if the accused is charged with an indictable offence punishable by imprisonment of 14 years or more, and elects trial by a Supreme Court judge alone, or judge and jury, a preliminary inquiry will be held where either the Crown or the accused request it. Absent a request for a preliminary inquiry, the Provincial Court judge will set a date in Supreme Court to schedule a trial.

If a preliminary inquiry is requested, the party requesting the inquiry must define the issues to be addressed, and the required witnesses. In addition, recent amendments allow the justice conducting the preliminary inquiry to limit the scope of the preliminary inquiry to specific issues and witnesses (s. 537(1.01)). (See Chapter 4 for more on preliminary inquiries.)

[§3.13] Re-Election

Section 561 is the main provision in the *Criminal Code* regarding re-elections.

When considering re-election, timing is important. Although in some instances the accused may re-elect as of right, this right may be lost after specified time deadlines have passed, and then Crown consent will be required. (See s. 561 for timelines.)

As a practical matter, defence counsel should contact the appropriate Crown counsel to discuss the proposed re-election. In cases where consent is required, the Crown's position might as well be known before further steps are taken, and in many cases the process will go more smoothly because a date can be agreed upon for the re-election and the Crown may be able to assist in arranging this date with the appropriate registry.

When the re-election is being done following committal, often a convenient time to do it is at the Supreme Court trial fix date because the accused should also be present to confirm their consent.

The proper forum to hear a re-election is the court where the Indictment or Information will ultimately be placed (*R. v. Ishmail* (1981), 6 W.C.B. 148 (B.C.S.C.)).

If not all jointly charged accused are seeking to re-elect to the same mode of trial, the judge may decline to record the re-election (s. 567).

There has been some jurisprudential controversy as to whether the re-election provisions in the *Code* are exhaustive such that an accused cannot re-elect without the Crown's consent where statutorily required (see e.g. *R. v. Diamonti* (1981), 61 C.C.C. (2d) 483 (B.C.S.C.)). The weight of appellate authority now appears to hold that a trial judge has no discretion to permit re-election in such circumstances unless the Crown's exercise of discretion in refusing to consent to re-election amounts to an abuse of process: *R. v. E.(L)* (1994) 94 C.C.C. (3d) 228 (Ont. C.A.). A failure to provide reasons for withholding consent does not in itself show an abuse of process (*R. v. Ng*, 2003 ABCA 1, leave to appeal dismissed [2004] S.C.C.A. No. 33). As a practical matter, provided a timely request is received so that witnesses are not inconvenienced and trial time is not lost, the Crown will usually consent to re-election from judge and jury to judge alone, and will usually give the necessary consents to facilitate a re-election for the purpose of a guilty plea before a court that is already dealing with the accused for disposition on other matters.

Failure to follow the re-election wording in the *Criminal Code* precisely is not fatal: substantial compliance is all that is necessary (*MacKenzie*). However, when an accused re-elects trial by a Provincial Court judge during a preliminary inquiry, failure to take a plea after re-election may result in an acquittal being set aside (*R. v. Atkinson* (1977), 37 C.C.C. (2d) 416 (S.C.C.)). Unless there is agreement that evidence taken on the preliminary inquiry be evidence on the trial, the evidence must be repeated after the plea (*R. v. Matheson* (1981), 59 C.C.C. (2d) 289 (S.C.C.)).

[§3.14] Interim Appearances and Pre-Trial Conferences in Provincial Court

This section describes both the process for pre-trial conferences that has been in place for some time, and a new type of pre-trial conference introduced during the COVID-19 pandemic. This section reflects procedures that are in flux and practitioners should consult the latest Practice Directions for updated directions.

1. Interim Appearances and Pre-Trial Conferences to Ensure Trial Readiness

After an election (if required) and a plea of not guilty that results in the scheduling of a Provincial Court trial, the trial scheduler may consult with counsel to determine whether a pre-trial appearance before a judge or Judicial Case Manager is appropriate to ensure the parties are ready for trial.

Pre-trial conferences are meant to ensure that the parties do not end up needing to reschedule trial dates in order to deal with unresolved issues.

A Judicial Case Manager may schedule an **interim appearance** to confirm trial readiness where after consultation with counsel the Judicial Case Manager deems it appropriate, or where an accused is self-represented. Counsel may also request an interim appearance, but no interim appearance will be set for summary matters unless the Judicial Case Manager determines it is required.

Cases where counsel may wish to request an interim appearance before a Judicial Case Manager or judge include cases where disclosure issues have arisen, there are unanticipated *Charter* issues, or the time reserved for the proceeding has become inadequate.

If counsel becomes aware that it is necessary to adjourn a trial or preliminary inquiry, counsel must make an application to a judge at the earliest opportunity.

In indictable matters, if an accused elects trial in Supreme Court, then in most cases a pre-trial conference will be held in that court. See §4.03 for information about pre-trial conferences in Supreme Court.

2. Pre-Trial Conferences Introduced During COVID-19

During the COVID-19 pandemic, Practice Direction *CRIM 12 Criminal Pre-Trial Conferences During Covid-19* was issued. The Practice Direction was updated effective June 16, 2022 under the name *CRIM 12 Criminal Pre-Trial Conferences*. The files subject to this Practice Direction must have a pre-trial conference *after* the arraignment hearing and *before* the scheduling of a trial or a preliminary inquiry.

The purpose of these pre-trial conferences is to ensure only those files truly requiring a trial are set for hearing, and to manage the files that will be set for trial in order to accurately estimate how much time they will require, so as to avoid trials running over their scheduled dates and generating delay.

The Practice Direction applies to the following adult and youth criminal files in Provincial Court:

- In the Fraser, Interior, and Vancouver Regions, for files requiring three days or more of trial or preliminary inquiry time, or for files requiring at least at least one day, where both counsel request a pre-trial conference.

- In the Northern and Vancouver Island Regions, for files requiring two days or more of trial or preliminary inquiry time, or for files requiring at least one day, where both counsel request a pre-trial conference.

The Practice Direction only applies when the accused is represented by counsel. (Self-represented accused with trials requiring one day or more of trial time will have a pre-trial conference with a judge, preferably the trial judge, approximately eight to ten weeks before the first trial date for trial management purposes.)

Pre-trial conferences under this Practice Direction are held via videoconference or audioconference and off the record (unless otherwise ordered).

The conferences must be attended by Crown counsel and counsel for the accused, and are before the pre-trial conference judge, who will not be the trial judge if the matter proceeds to trial. If the matter is resolved prior to trial, the disposition may be done by the pre-trial conference judge or assigned to another judge.

Before the pre-trial conference, Crown counsel and counsel for the accused must have thoroughly reviewed their files and discussed with each other all of the issues which will form the subject of the pre-trial conference. At least three business days before the pre-trial conference, the parties must exchange copies of all materials for the conference and must also deliver them to the Judicial Case Manager to deliver to the pre-trial conference judge. The parties are encouraged to exchange materials that may assist with resolution and trial management. Crown counsel *must* provide a Crown Synopsis in Form 1, a copy of the Information that the Crown is proceeding on, and any criminal record of the accused.

At the pre-trial conference, all counsel must be prepared to make decisions about the resolution of the matter; disclosure; applications that the parties will bring at trial (e.g. *Charter* applications); the witnesses the Crown intends to call at the preliminary inquiry or trial; admissions the parties are willing to make; legal issues that the parties anticipate may arise in the proceeding; and an estimate of the time needed to complete the proceeding.

The pre-trial conference judge will pursue resolution in order to avoid the need to set trial dates, and will canvass the issues to reduce them to only those requiring adjudication. The judge may make case management directions; confirm admissions made on the record; confirm or change the time estimates for trial; adjourn the matter to the Judicial Case Manager to set dates for another pre-trial conference, disposition, preliminary inquiry, or trial; or take any other steps consistent with the Practice Direction.

Consult *CRIM 12 Criminal Pre-Trial Conferences* for the full requirements under this Practice Direction.

Note that the separate form of pre-trial conference described above (§3.14(1), Interim Appearances and Pre-Trial Conferences to Ensure Trial Readiness) may still be required later in the process.

[§3.15] Assignment to a Judge and Courtroom

All Provincial Court locations in BC have a delayed assignment scheduling model. Seven locations have an "Assignment Court" (explained below) to better support that objective: Port Coquitlam, Vancouver (222 Main Street), Robson Square, Victoria, Kelowna, Abbotsford and Surrey.

Delayed assignment is an important feature of the Provincial Court scheduling model. It recognizes the high collapse rate of scheduled matters, and strives to allow the court to make the most efficient use of its time. Except where a judge has been pre-assigned (such as where a matter is expected to take more than eight days), judges are assigned to locations, not cases. The Judicial Case Manager will schedule a case for particular days, but will not assign a judge to the case until close to the day of trial (or on the day of trial, in Assignment Court locations), after efforts have been made to confirm the matter is proceeding as scheduled.

In locations with an Assignment Court, at the time of charge approval Crown counsel will designate a file as a special assignment ("SA"), general assignment ("GA"), or summary proceedings court ("SPC") file. SPC files are matters that are less complex and with time estimates of a day or less. When scheduled, each SPC file is given a single time slot in the summary proceedings court. When a file is designated SA or GA, it will be assigned to a particular prosecutor prior to arraignment if not sooner. If no judge is pre-assigned, then when the Judicial Case Manager schedules the matter for trial, preliminary hearing, or disposition the matter is returnable to Assignment Court.

[§3.16] Adjournment

Adjournment requests may arise before the first day scheduled for trial, on the first day scheduled for trial, or partway through the hearing and for various reasons, including the unavailability of counsel and witnesses.

To be entitled to an adjournment on the ground that witnesses are absent, a party must show that:

- the absent witnesses are material witnesses in the case;
- the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of the witnesses; and

- there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

See *R. v. Darville* (1956), 116 C.C.C. 113 at 117 (S.C.C.).

It is usually the Crown who needs to request an adjournment because a witness is absent. If the test in *Darville* has been met, and if it is the first such application, the Crown will likely obtain the adjournment.

Both Crown and defence counsel should strive to make any applications to adjourn a trial date well in advance of the first day scheduled for trial or preliminary hearing. The CCFM Rules require counsel to apply to a judge at the earliest opportunity after becoming aware that an adjournment of trial or preliminary inquiry is necessary (Rule 11). In order to facilitate that, the *2013 CPD-1 CCFM Practice Direction* also notes that the court expects counsel to contact the Judicial Case Manager as soon as possible in the event of a contested or uncontested adjournment application (para. 39). At least two days before the application for an order to adjourn is to be heard, notice of the application in Form 5 must be given to the court and counsel, unless a judge dispenses with notice (CCFM Rule 11(3)). If defence counsel gives early notice of an application to adjourn a trial or preliminary inquiry, the Crown will be more likely to consent, although the Crown may still ask the defence to formally waive delay. However, it is not always possible for counsel to say with certainty whether an adjournment will be necessary before the first day of trial, in which case the adjournment application will have to be brought on the day of trial.

When there are objections to the adjournment, both defence and Crown counsel should place their objections to the delay, and the reasons for them, on the record for use on future s. 11(b) *Charter* applications.

There may be tactical reasons for the defence not to oppose the Crown's application to adjourn. It may be that such an adjournment works to the accused's advantage. It may also serve some benefit in discussions or negotiations with Crown for the resolution of the file, or some issue associated with the file. However, counsel should be mindful of the impact that not opposing a Crown application to adjourn may have on any future claim of a breach of their client's s. 11(b) rights. When counsel is agreeing to or not opposing a Crown application to adjourn because it seems inevitable that it will succeed, but delay is still of concern to their client, counsel will wish to have that noted on the record, and explore if there is any way to minimize the amount of delay for the purpose of any future application under the *Charter*.

In indictable matters, whether in Provincial or Supreme Court, when a trial or preliminary hearing date is adjourned, if the client appears or defence counsel is appearing pursuant to a counsel designation notice, the matter can be adjourned directly to a new date. In summary conviction matters, the lawyer may appear as agent to adjourn a trial, when the lawyer has the client's express instruction to do so, and properly and adequately informs the client. Otherwise, the client must still appear on the old or an intervening date to be formally adjourned to the new date.

As set out above, the Crown and the court may ask whether the accused is prepared to waive their rights under s. 11(b) of the *Charter* in respect of the time period between the date of the adjournment request and any new trial date set. Defence counsel must ensure that the client fully understands the ramifications of waiving such rights, in case the client later claims to not have been aware of their rights and tries to invoke this *Charter* right at a later point in the proceedings.

[§3.17] Obtaining Further Particulars

After reviewing the Information or Indictment, defence counsel may want to make a motion for particulars. Section 587 of the *Criminal Code* defines what is meant by formal particulars. A distinction should be drawn between "particulars" as defined in s. 587, and "disclosure" of the sort made by Crown counsel to defence counsel before trial: "Particulars" constitute a precise statement of the essential elements of the charge faced by the accused. "Disclosure" refers to the relevant information in the Crown's possession or control related to the alleged offence. (For more on disclosing particulars, see §3.03; for more on pre-trial applications, see §4.02.)

The court can order particulars under s. 587, but these orders are extremely rare. Section 587 contemplates that these "formal" particulars be delivered in writing at trial and that they be entered in the trial record. Once entered in the trial record these particulars assume the same importance as the allegations made in the Information or Indictment itself. The Crown is bound to prove these particulars beyond a reasonable doubt, with failure to do so resulting in acquittal. The Crown generally opposes applications for particulars because the Crown must then prove these further elements of the charge. Note that a Provincial Court judge at a preliminary hearing has no power to order particulars (*R. v. Hayes*, *Ex parte Chew*, [1965] 2 C.C.C. 326 (Ont. H.C.)).

Generally, the informal particulars provided by Crown counsel by way of disclosure far exceed those that would be ordered by the court under s. 587, so applications for particulars are rarely made.

When a charge alleges "with intent to commit an indictable offence," it has been common for defence counsel to ask for particulars specifying the indictable offence. The Ontario Court of Appeal held in *R. v. Khan* (1982), 66 C.C.C. (2d) 32, that it would be inappropriate to require the Crown to furnish particulars limiting the Indictment so as to charge an intent to commit one offence and not another.

[§3.18] Joinder and Severance

After reviewing the Information or Indictment, defence counsel may also want to consider applying for either joinder or severance. Joinder and severance apply to both counts and accused. Sections 589 and 591 of the *Criminal Code* concern joinder of counts in an Information, and s. 591(3) concerns severance of accused.

The prosecution has a broad discretion to determine how charges are laid. The courts generally permit multiple counts and multiple accused when there is a legal or factual nexus between the incidents or parties. Two accused may be joined on one Information even though they are not jointly charged on a common count, if there is a factual nexus supporting the charges (*R. v. Kennedy* (1971), 3 C.C.C. (2d) 58 (Ont. C.A.)). The court may only sever counts or accused when it is satisfied that the ends of justice require it.

The severance application should be brought before the trial judge. A Provincial Court judge on a preliminary inquiry has no jurisdiction to sever counts. Severance is granted after the election is put to the accused and only if the trial proceeds (*R. v. Anderson* (1971), 2 C.C.C. (2d) 449 (B.C.S.C.)). The application is usually presented at the beginning of the trial, although case management practices may affect this timing.

Severance of counts is usually sought on the basis that the prosecution is too complex to be defended readily, there is no factual or legal nexus between the counts, the counts prejudice the accused because there is a risk evidence will be misapplied on various accounts or findings of guilt on various counts will prejudice consideration of the evidence on other counts, and the accused wishes to testify on some counts but not others.

Common grounds for applications to sever accused are that one accused wants to call the co-accused as a witness at the trial, the defences of the accused are antagonistic, and evidence which is admissible against one accused but inadmissible against the other implicates the other accused (for example, a confession).

The concern with severance of counts or accused is it results in multiplicity of trials and inconsistent verdicts.

In *R. v. Clunas* (1992), 70 C.C.C. (3d) 115, the Supreme Court of Canada ruled that a trial court can conduct a single trial on two separate Informations when the parties consent. This also permits simultaneous multiple trials on indictable and summary conviction offences at the same time.

A *Criminal Code* charge that is proceeded with summarily may be joined with a provincial summary conviction offence (*R. v. Massick* (1985), 21 C.C.C. (3d) 128 (B.C.C.A.)).

[§3.19] Stays of Proceedings, Withdrawals and Dismissals for Want of Prosecution

Stays of proceedings in the case of indictable offences are dealt with under s. 579 of the *Criminal Code*. Section 795 makes s. 579 applicable to stays of proceedings of summary conviction offences as well.

In the Provincial Court, Crown stays are "entered" by Crown counsel simply directing the court clerk (either in or out of court) to make an entry on the Information that proceedings are stayed. The power to enter a stay of proceedings under s. 579 of the *Criminal Code* is totally within the discretion of the prosecutor; neither the judge nor defence counsel have any say in the matter.

Proceedings may be recommenced within one year after the date proceedings were stayed, except that summary conviction proceedings must be recommenced within the original time limitation period. If the Crown fails to recommence indictable proceedings within a year of the date the stay was entered, the Crown is not precluded from commencing a new process or issuing a direct indictment.

The Crown has a right of withdrawal separate and distinct from the ability to direct a stay of proceedings. There is no provision in the *Criminal Code* allowing the "withdrawal of the Information." However, the Attorney General's authority to withdraw an Information at its discretion prior to plea and with leave of the presiding judge after plea has been recognized in the case law: see *R. v. Carr* (1984), 58 N.B.R. (2d) 99 (N.B.C.A.); *R. v. McHale*, 2010 ONCA 361. This procedure is *not* commonly used by Crown counsel in BC, who instead direct a stay of proceedings. If a prosecutor were to withdraw a charge, the customary procedure is for the prosecutor to apply to the judge for "leave to withdraw" the charge, giving a short explanation as to why. At times, the complainant will be asked to tell the court their own position respecting the application.

On occasion, when the Crown is not able to proceed on the trial date, the Crown may, instead of entering a stay of proceedings, allow a matter to be dismissed for want of prosecution. This may occur, for example, when a Crown adjournment request has been refused, because it is considered by some to be an affront to the judge to then stay the charge. When dismissing a charge for want of prosecution, the Information is read to the accused, an election is taken if necessary, and the accused then pleads not guilty. No evidence is called, and the charge is dismissed.

[§3.20] Interviewing Clients

Ideally, defence counsel should conduct two distinct interviews with the client. The pre-bail interview will not include the depth of detail necessary for the pre-trial interview. At the pre-trial stage, defence counsel should

control the interview. Counsel must control the client, the interview process, the facts of the case (by limiting discussion to certain matters), and the issues that are emerging. The lawyer is retained to do a job for the client, and takes instructions, but does not follow orders.

The objective of the interview is to obtain information about the following matters:

1. Client

   Name, date of birth, marital status, education, employment history, citizenship, previous police contacts (as accused, victim or witness), roots in the community, immigration status, medical disabilities or impairments, doctors' names, references, social contacts, etc. Much of this information will have been obtained when securing pre-trial release and will be useful when speaking to sentence. This is a useful way to begin the interview since the client feels more at ease when providing this information than when speaking about the offence.

2. Offence

   Obtain the client's version of the incident. There is a wide variation in practice and technique in how you obtain it. Ethical aspects are a major issue here. The following are some approaches:

   - Let the client say anything, no matter how inculpatory. Such statements during the interview are not on oath. If the client later contradicts themselves in the witness box, it can be rationalized that it is the "statement on oath that counts," and the lawyer should not be concerned about the contradiction.
   - Let the client say anything, and if the client incriminates themselves and insists on giving exculpatory evidence inconsistent with what they have said to be the truth, they will be referred to other counsel.
   - Tell the client not to say anything if the client will be incriminating themselves. Advise the client as to the available defences and what facts would support such defences, and then ask for their rendition of the events.

   Since the interview raises ethical and other professional issues, carefully consider the approach before the interview starts.

3. Arrest, Detention and Searches

   Obtain information on these matters from the client. Pay attention to possible *Charter* violations.

4. Statements and Confessions

   Whether the statements or confessions were made to police or otherwise, obtain full details with particular attention to voluntariness (threats, promises, oppression, operating mind, or other trickery) and possible *Charter* violations (including breach of the right to counsel enshrined in s. 10 of the *Charter*).

5. Evidence

   Were fingerprints, photographs, or blood, hair or urine samples taken? Was a lineup held, and if so, under what circumstances? See Chapter 5.

6. Real Evidence

   Did the police seize any documents, clothing, firearms, other weapons, money, contraband, or property of any nature, and if so, under what circumstances?

7. Physical Injuries or Complaints

   Obtain full details of physical injuries or complaints.

8. Witness and Defence Evidence

   As defence witnesses and evidence often vanish quickly, obtain full details including names, addresses and whereabouts of incident witnesses. Review the location and preservation of real evidence, such as receipts or photographs. Consider suggesting to your client that they should tell defence witnesses to make notes to themselves of their evidence while it is still relatively fresh in their minds. Although it is preferable that defence counsel communicate directly with each of the defence witnesses, often the client is in a better position to speak with such people.

9. Advice for Client

   Depending on the background of the client, it may be necessary to provide basic information on the workings of the legal system and what steps will be taken in the prosecution (for example, options for trials, preliminary hearing, etc.). Practical steps the client can take should also be considered. It may be useful at an early stage to plan a course of action to cover client problems such as alcohol and drug abuse, if the client is willing to start a rehabilitative program that will assist in the event of ultimate conviction or guilty plea. The importance of witnesses, and of appearing for court, should also be covered.

After the above information is obtained, the client should be advised that under no circumstances should they discuss these matters with anyone other than the lawyer. The client can then be advised, in a general way, as to the procedural steps that will occur.

A final, important matter is agreeing on your fee. Provide the client with as accurate an estimate as possible of the ultimate cost of conducting the defence. In addition, advise the client of how and when the client should

make payment, and the extent to which you can expend funds for the client. Advise the client that if the client does not honour the fee obligation, you will apply to withdraw from the record. Dealing with the matter of fees at the first opportunity, in a forthright manner, reduces the possibility of misunderstandings later.

Counsel acting in criminal matters should also be aware that they cannot withdraw for non-payment if there is insufficient time before trial for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial, and an adjournment would be adverse to the client's interests (*BC Code* rule 3.7-5). The rights of counsel to withdraw and obligations not to do so in certain situations are discussed in more detail in §3.23.

The following would be an acceptable format for interviewing the client (see also the much more detailed "Criminal Procedure" and "Client Identification and Verification Procedure" checklists in the Law Society's *Practice Checklists Manual*):

(a) verify the client's identity as required by Law Society Rules 3-98 to 3-110, and obtain antecedents to help prepare the case;

(b) explain the Information to the client so that the client understands the nature of the charges;

(c) tell the client about the police particulars;

(d) ask the client to tell their own side of the story and allow the client to give the narrative without interruption, categorizing the issues and defences;

(e) ask the client to repeat the story, focusing on the critical issues;

(f) give the client advice and decide on a course of action; and

(g) discuss the fee.

The above information will help when preparing the case for hearing and will also be relevant for sentencing. If you obtain full information at this stage, it will be unnecessary to have more than a very short interview when preparing to speak to sentence.

At this time, you might also canvass these matters:

- discussing possible sentences with the client (which should be canvassed at the first interview);
- getting suggestions from the client as to which type of sentence the client would prefer;
- discussing the client's ability to pay a fine;
- discussing whether the client needs time to pay an anticipated fine; and
- discussing whether the client would prefer straight or intermittent incarceration.

For preparing to speak to sentence, see Chapter 8.

[§3.21] Witness and Client Statements

When preparing for a hearing, Crown and defence counsel should closely review the statements of all witnesses and the accused. The Crown must provide the defence with copies of all statements relevant to the case. These statements include written statements given by civilian Crown witnesses to the police. Similarly, the Crown must provide the defence with copies of all statements that have been made by the accused and any co-accused.

When witnesses provided written statements, defence counsel will want to have copies of them. The form and condition of the document on which the statement is written and the character of the handwriting itself will give some indication of the circumstances under which the statement was taken. Also, at trial, counsel will want to check that the evidence provided by the witness in court is consistent with the statement.

When a statement has been recorded or videotaped, it is important to listen to or watch the statement, as there may be important features of the witness's demeanor, language, or presentation that will assist counsel in preparing to examine or cross-examine the witness that may not be evident from simply reading a transcript.

The witness may use a copy of the statement to help refresh their memory and, if so, may be asked to produce it in court for inspection and to be cross-examined upon it. Statements made by a witness who later recants at trial may themselves be given in evidence and used for the truth of those statements as exceptions to the hearsay rule—see the discussion in Chapter 5.

Remember that the trial judge has discretion, on application by either party, to admit the witness statement as an exhibit. This should be done rarely: the damaging nature of a statement so admitted may outweigh the advantages gained by inconsistencies disclosed. An edited version may be made an exhibit instead of the entire statement (*R. v. Rodney* (1988), 46 C.C.C. (3d) 323 (B.C.C.A.)).

Due to illness or absence abroad, a witness may not be available to give their evidence at trial. In such circumstances, counsel should consider applying to obtain the witness's evidence on commission pursuant to ss. 709 and 712 or to permit the witness to testify by audio or video link pursuant to ss. 714.1–714.8.

[§3.22] Witnesses

1. Types of Witnesses and Procedure

There are three basic categories of witnesses: incident witnesses, expert witnesses, and character witnesses. As incident witnesses and evidence often vanish quickly, obtain full details, including names, addresses and present whereabouts, as soon as possible. Eyewitnesses should be interviewed without delay. Obtain a written statement from them. It is good practice to obtain from these witnesses not on-

ly their version of the incident, but also sufficient background to identify the witness to the court.

Be sure to make it clear to the accused whether they are responsible for arranging for all incident and character witnesses to attend interviews.

Section 698(1) sets out the test for obtaining a subpoena: see *R. v. Blais*, 2008 BCCA 389. When it is necessary to subpoena a witness, defence counsel should have the subpoena typed on forms that are available at the court registries. The subpoena should comply with Form 16 (s. 699). Deliver the subpoena to the appropriate court registry to be signed by a justice of the peace (Provincial Court) or clerk of the court (Supreme Court). Then, arrange for service.

For valid service of a subpoena, the subpoena must be served by a peace officer (ss. 701 and 509 of the *Criminal Code*, taken together). If counsel will be seeking a "material witness" warrant to enforce the appearance, the subpoena must be served by a peace officer. Despite the broad definition of "peace officer" in s. 2 of the *Criminal Code*, it appears that "Parliament intended to restrict its meaning to a person employed in an official capacity to serve a Crown-appointed officer or a court" (*R. v. Burns* (2002), 170 C.C.C. (3d) 288 (Man. C.A.)).

Sheriff services do not normally advise the Crown of defence subpoenas, but in the rare case when the defence is particularly anxious to ensure that the Crown not learn the whereabouts of a witness, counsel might consider serving subpoenas by other means. The Crown, for example, mails subpoenas to some willing witnesses. Similarly, an accused or someone on the accused's behalf can give a subpoena to a witness. However, this form of service relies on the witness's goodwill or ignorance because if the witness does not appear, no "material witness" warrant can be obtained to enforce the appearance (see s. 698(2)).

When the registry issues (signs) the subpoena, no copy is kept and defence counsel need not file the copy with the completed affidavit of service, unless a material witness warrant is being sought for a witness who fails to appear (see s. 698(2)). In such cases, when a subpoena has been properly served and the witness is material, the court will normally grant an adjournment to allow time for the witness to be arrested on the warrant.

When interviewing witnesses (and clients who are going to testify), it may be useful to simulate some cross-examination questions and to go through questions to be asked in chief. This is not to coach answers, but rather to make witnesses aware of and comfortable with the process, and to test their demeanour in assessing whether to call them.

Counsel must not advise a witness to refuse to communicate with an opposing party or the party's lawyer, as "there is no property in a witness." However, it is not improper for counsel to advise a witness that if the witness decides, for any reason, that they do not want to be interviewed by either Crown or defence counsel, they cannot be compelled to submit to an interview before testifying at either a preliminary inquiry or trial.

The particulars provided by the Crown seldom contain the addresses of Crown witnesses. Counsel who wish to interview a Crown witness may ask the prosecutor to disclose the contact information. The prosecutor will likely have concerns about the safety and privacy of witnesses, so Crown counsel will likely relay the defence request to the witness, who can decide whether to call defence counsel. Alternatively, defence counsel may bring an application for disclosure of the witness contact information: *R. v. Pickton*, 2005 BCSC 967; *R. v. Charlery*, 2011 ONSC 2952.

Defence counsel should take care to ensure their client does not get into a situation in which an allegation of tampering with a Crown witness is made. Although "there is no property in a witness," it may be wise to seek the Crown's cooperation when arranging defence interviews with Crown witnesses.

The Crown must disclose all potential witnesses to the defence (*R. v. Franks* (1991), 67 C.C.C. (3d) 280 (B.C.C.A.)). Having done so, the Crown has no obligation to call a witness who would contradict or impeach other Crown evidence, unless that witness is essential to the unfolding of the narrative.

2. Expert Witnesses

The possibility of using expert witnesses is often overlooked. When preparing for trial, defence counsel should consider how to make better and more frequent use of expert evidence. If the decision is made to use expert evidence, the expert should be properly prepared to ensure that they give evidence in the most effective and understandable manner. Unfortunately, some experts use incomprehensible language and tend to assume everyone understands what they say. This problem can be resolved by a careful interview.

Section 657.3 sets out the provisions governing expert evidence called by both the Crown and defence. For more on expert evidence, see Chapter 5.

3. Character Witnesses

Defence counsel can sometimes overlook the importance of using character witnesses. Effective character evidence goes to the improbability of the accused committing the offence and to the accused's credibility if the accused gives evidence (*R.*

v. Tarrant (1981), 63 C.C.C. (2d) 385 (Ont. C.A.); see also *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.)).

Before calling this type of evidence, carefully consider what the Crown might be able to call in rebuttal. The accused or any witness, including prosecution witnesses during cross-examination, may put character in issue by asserting the accused is of good character. This allows the Crown to call rebuttal evidence of bad character.

Character witnesses are often presented without enough preparation so that their evidence is not as effective and convincing as it could be. Many defence counsel seem unsure of exactly what evidence the character witness should give. Preparing a witness is often done at the last minute. It is very important to have a thorough interview with character witnesses so that they are prepared to give evidence on the following four matters:

1. the character witness's own credibility and reputation (this must be established as a foundation to the rest of their evidence);
2. the witness's contact with and exposure to the accused person;
3. the witness's ability to comment on the accused's general reputation in the community for the character trait involved; and
4. the general reputation of the accused in the community regarding the relevant character trait.

[§3.23] Withdrawal as Counsel[3]

Counsel do not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is limited in their ability to withdraw from a case once they have chosen to represent an accused: *R. v. Cunningham*, 2010 SCC 10 at para. 9. These limits are outlined in the rules of professional conduct.

Section 3.7 of the *BC Code* governs the right of counsel to withdraw from criminal cases (and from other matters). See specifically rules 3.7-4, 3.7-5, 3.7-6 and commentary [1] ("Withdrawal from Criminal Proceedings"):

> 3.7-4 If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:
>
> (a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;
>
> (b) accounts to the client for any monies received on account of fees and disbursements;
>
> (c) notifies Crown counsel in writing that the lawyer is no longer acting;
>
> (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and
>
> (e) complies with the applicable rules of court.
>
> 3.7-5 If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.
>
> 3.7-6 If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.
>
> Commentary [1] If circumstances arise that, in the opinion of the lawyer, require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

In some circumstances a lawyer is obliged to withdraw. This is governed by rule 3.7-7 of the *BC Code*:

> 3.7-7 A lawyer must withdraw if:
>
> (a) discharged by a client;
>
> (b) a client persists in instructing the lawyer to act contrary to professional ethics; or
>
> (c) the lawyer is not competent to continue to handle a matter.

Examples of a client instructing the lawyer "to act contrary to professional ethics" would be when a client indicates to a lawyer that the client intends to offer false testimony or intends to suborn the perjury of a witness.

The technical manner of withdrawal is governed by rules 3.7-8 and 3.7-9 of the *BC Code*. A lawyer must promptly notify the client, other counsel and the court or tribunal of the lawyer's withdrawal from a file (rule 3.7-9).

[3] Some material in this section is reproduced from "Withdrawal of counsel in criminal matters – implications of *R. v. Cunningham*" in *Benchers' Bulletin*, Summer 2010 at pp. 16–17. Edited for PLTC.

The Law Society Ethics Committee recommends that a lawyer who proposes to withdraw because of a client's failure to comply with the financial terms of a retainer should take the following steps:

- advise the client in writing that the lawyer will apply to withdraw from the case unless the client provides the necessary retainer by a certain date. The date must be one that leaves the client enough time to retain other counsel if the client is unable to come up with the necessary funds; or
- act for the client in a limited capacity only, and do not go on the record for the client until the client has provided the necessary retainer for the trial or other matters requiring representation.

In criminal matters, a judge may exercise their discretion to prevent withdrawal by counsel if the withdrawal is a result of non-payment of the lawyer's fees: *Cunningham*. Where counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal without inquiring into counsel's reasons for withdrawing (para. 47). In such cases, it may be that an application to withdraw is not required; rather counsel may withdraw by notifying the client, the Crown and the registry. However, if timing is an issue (i.e. an adjournment of the trial *is* required), counsel should attend court to apply to withdraw. In those circumstances, the court is entitled to inquire further (para. 48).

If counsel is withdrawing for ethical reasons, the court must grant the request to withdraw (para. 49). Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of their professional obligations, or if the accused refuses to accept counsel's advice on an important trial issue (para. 48). However, if the real reason for the withdrawal is non-payment of fees, counsel *cannot* represent to the court that they seek to withdraw for "ethical reasons" (para. 48).

If the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court, as the non-payment of legal fees does not attract the protection of solicitor-client privilege (para. 31). However, in either the case of withdrawal for ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further, to avoid trenching on potential issues of solicitor-client privilege (para. 48).

Where counsel is applying to withdraw for non-payment of fees, the court may exercise its discretion to refuse counsel's request. The court's discretion must be exercised "sparingly" and only when necessary to prevent serious harm to the administration of justice. "Harm to the administration of justice" recognizes that there are other persons affected by the ongoing and prolonged criminal proceedings (i.e. complainants, witnesses, jurors and society at large) (para. 51).

In *Cunningham* at para. 50, the Supreme Court of Canada set out the following non-exhaustive list of factors that a court should consider when determining whether allowing withdrawal would cause serious harm to the administration of justice:

1. feasibility of the accused representing themselves;
2. other means of obtaining representation;
3. impact on the accused from delay in proceedings, particularly if the accused is in custody;
4. conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
5. impact on the Crown and any co-accused;
6. impact on complainants, witnesses and jurors;
7. fairness to defence counsel, including consideration of the expected length and complexity of the proceedings; and
8. the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

The threshold for refusing leave to withdraw is high (para. 54). Courts should not interfere with counsel's withdrawal unless it is necessary to do so to prevent serious harm to the administration of justice (para. 45). However, a court's order refusing a request to withdraw may be enforced by the court's contempt power (para. 50).

As timeliness of the application for withdrawal is a factor that may influence the court's decision whether to inquire into the reasons for the withdrawal, counsel should consider bringing the application early enough in the proceedings that an adjournment of the trial will not be necessary. If a lawyer decides to withdraw in a way that contravenes section 3.7 of the *BC Code*, the Benchers may take disciplinary action.

If a lawyer's reason for withdrawal goes to the merits of the case or would cause prejudice to the client, solicitor-client privilege may attach to the information: *Cunningham* at para. 31. The Law Society Ethics Committee suggests a lawyer may give the following explanations to the court:

> *If the lawyer's withdrawal is for ethical reasons*
>
> If a lawyer seeks to withdraw from a case because the lawyer is in a conflict, has received instructions from the client that require the lawyer to cease acting or for other reasons relating to the lawyer's ethical obligations, the lawyer may advise the court that they are withdrawing "for ethical reasons."

If the lawyer's withdrawal occurs under BC Code rule 3.7-2

In other circumstances, if the lawyer is permitted to withdraw under section 3.7 of the *BC Code*, but the circumstances do not engage the lawyer's ethical obligations, the lawyer may be permitted to advise the court that the lawyer's reasons for withdrawing do not involve the lawyer's financial arrangements with the client. Such circumstances could occur under rule 3.7-2 of the *BC Code* which permits a lawyer to withdraw when there has been a serious loss of confidence between lawyer and client. Commentary [1] to rule 3.7-2 states:

> A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by the client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

If the lawyer's withdrawal is for non-payment of fees

If a lawyer seeks to withdraw because a client has not paid the lawyer's fees, the lawyer must disclose that information to the court when asked to explain the withdrawal. (See rule 3.7-9.1 and commentary [1]).

What if a lawyer cannot disclose the reason for withdrawal?

If a lawyer is unable to answer a court's request for the reason for withdrawal because the reason goes to the merits of the case or the client will be prejudiced by disclosing the information, the lawyer should simply advise the court of that fact. A lawyer who expects to be in such a position may want to consult a Bencher or Law Society Practice Advisor.

When must counsel appear in court to withdraw from a criminal matter?

If counsel's withdrawal raises no issue about adjournment of the case, counsel may withdraw from a criminal case by notifying the client, the Crown and the appropriate registry of the withdrawal. If the withdrawal may raise such an issue, however, counsel should attend at court to withdraw.

Chapter 4

The Trial[1]

[§4.01] The Preliminary Inquiry

1. Election Procedure

When an accused who is charged with an indictable offence punishable by 14 years or more of imprisonment elects to have a trial in Supreme Court, either before a judge alone or a judge and jury, the Provincial Court judge who takes the accused's election (or another judge of the same court) will hold a preliminary inquiry if the accused or Crown requests one.

An accused charged with multiple counts on an Information may be entitled to request a preliminary inquiry for some counts on the Information but not others. For example, where both aggravated assault and assault with a weapon are charged on the same Information and the election is made for a Supreme Court trial, a preliminary inquiry can only be requested on the count of aggravated assault. The election must be recorded under s. 536(2) for the aggravated assault count and s. 536(2.1) for the assault with a weapon count.

An accused who wants a preliminary inquiry must request one when electing the mode of trial. If no request for a preliminary inquiry is made, the justice must fix a date for trial in the event of a Provincial Court election, or a date to attend to the Superior Court to fix a date for trial if there has been an election for trial in that place (see s. 536(2),(4), and (4.3)). Where two or more accused are jointly charged, a request by one accused for a preliminary inquiry triggers a mandatory preliminary inquiry by all co-accused (s. 536(4.2)).

If the accused requests a preliminary inquiry, counsel for the accused must provide the court and the Crown with a statement identifying the issues on which the requesting party wants evidence to be given at the inquiry and the witnesses that the requesting party wants to hear (s. 536.3). The request for witnesses forces counsel to think about what evidence or witness they really want to hear, and does not affect the ultimate discretion of the prosecution as to who it will call on the preliminary inquiry. The judge can also limit the issues and witnesses at the preliminary inquiry (s. 537).

The Provincial Court *Criminal Caseflow Management Rules* (the "CCFM Rules") are in effect throughout British Columbia and provide for a simplified process of appearances and scheduling hearings and trial dates where such matters are uncontested. The CCFM Rules are supplemented by Practice Directions issued by the Chief Judge. In 2013, the authority of Judicial Case Managers (also called "JCMs") was expanded to enable most non-contested appearances to occur before a JCM. Both the CCFM Rules and various Practice Directions provide for a simplified process which utilizes consent remands and arraignment to allow counsel to facilitate initial appearances.

Practice Direction CRIM 02 requires an arraignment hearing for all indictable matters. Elections pursuant to s. 536(2) and 536(2.1) of the *Criminal Code* must be taken at the arraignment hearing, and all preliminary inquiry procedures described in ss. 536(4) and 536.3 will be completed at that hearing (BC Provincial Court Practice Direction CRIM 02).

In addition, the court (on its own motion, or at the request of counsel) may order a "focusing" hearing. A focusing hearing is not mandatory; its purpose is to help the parties identify the issues on which evidence will be given at the preliminary inquiry, help the parties identify the witnesses to be heard, and encourage the parties to consider any other matters that would promote a fair and expeditious inquiry (s. 536.4). The result of the focusing hearing, including any admissions, is on the record. The judge who conducts the preliminary inquiry will also conduct the focusing hearing.

Whether or not a focusing hearing is held, the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. This agreement is filed with the court and will determine which issues must be considered regarding the test for committal to trial.

Provincial Court Practice Direction *CRIM 12 Criminal Pre-Trial Conferences* applies to preliminary inquiries. In the Fraser, Interior and Vancouver regions, a pre-trial conference is mandatory where trial or preliminary inquiry time is estimated to be three days or more, and in the Northern and Vancouver Island regions where trial time is estimated to be two days or more. See Chapter 3, §3.14(2).

[1] **Michael Fortino**, Crown Counsel, BC Prosecution Service, updated this chapter in July 2023. It was previously updated by Patti Tomasson (2018, 2020, 2021), Michael J. Brundrett (2010, 2012, and 2016); Mark Jetté (1999–2004); James Bahen (1997 and 1998); Karen Walker (1996); and Terence A. Schultes (1995).

2. Election Considerations—Trial or Preliminary Inquiry?

While the strict purpose of a preliminary inquiry is simply to determine if there is sufficient evidence to put the accused on trial (s. 548(1)), its practical value to the accused is much greater. When properly conducted, a preliminary inquiry allows the accused's counsel to hear and test the evidence that the Crown will lead at trial. For the Crown, the preliminary inquiry presents an opportunity to ensure evidence is recorded, under oath, in cases where victims or witnesses may become unavailable before trial owing to illness, hostility or otherwise.

When deciding whether to elect to have a preliminary inquiry or to proceed directly to trial in the Provincial Court, the defence will consider the nature and seriousness of the offence, and the extent to which full disclosure of the Crown's evidence has been provided. If the offence is serious and the disclosure made by the Crown is incomplete, the prudent choice is usually to have a preliminary inquiry so that the defence can assess the strength of the case against the accused. If the offence is less serious and the Crown's evidence has been fully disclosed, a trial in the Provincial Court carries the advantage of the generally lower sentences that are imposed in that court in the event of a conviction.

3. Limiting the Scope of a Preliminary Inquiry

A preliminary inquiry may be limited to specific issues if the prosecutor and the accused agree (s. 549(1.1)). For example, the prosecution and defence may agree that identification is not in issue. If that admission is reduced to writing and filed with the court, Crown counsel will not be required to lead evidence of what would otherwise be an essential element of the offence in order to obtain a committal for trial (ss. 536.5 and 549(1.1)).

If counsel agree to limit the scope of the preliminary inquiry, the justice, without recording evidence on any other issues, may order the accused to stand trial after a limited preliminary inquiry (s. 549(1.1)). This provision permits counsel to focus on key issues and save valuable court time (ss. 536.5 and 549(1.1)). Under amendments that came into force in September 2019, the preliminary inquiry judge can also limit the issues and witnesses at the preliminary inquiry (s. 537(1.01)).

4. Evidence on Preliminary Inquiry

After the accused elects a trial in Supreme Court and requests a preliminary inquiry, the Crown will call its evidence on the preliminary inquiry. If counsel for the accused so requests, the court must order a ban on publication under s. 539. The order is discretionary if sought by the Crown. Also see Chapter 2 on publication bans.

The format resembles a trial: witnesses are called by the Crown, cross-examined by the defence, and if necessary, re-examined by the Crown. Note that a sitting justice may halt any part of a witness examination or cross-examination if the examination is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate (s. 537(1.1)).

Many of the rules of evidence are the same as those for a trial. For example, the Crown must prove the statements of the accused to be voluntary on a *voir dire*, and must provide notice to the defence of its intention to enter business records pursuant to s. 30 of the *Canada Evidence Act.* Experts must be qualified, and hearsay is subject to the usual legal tests for admissibility.

Though less frequently used, s. 540(7) of the *Code* permits a justice to receive any evidence in a preliminary inquiry they consider "credible and trustworthy in the circumstances of the case" (the same test used for show causes). This subsection includes the ability to tender statements provided by witnesses that would not otherwise be admissible. Reasonable notice is required (s. 540(8)). The opposing party may require "any person whom the justice considers appropriate to appear for examination or cross-examination" with respect to the evidence tendered in this manner (s. 540(9)). Evidence tendered pursuant to s. 540(7) cannot be read in at a subsequent trial (s. 646).

The transcript of evidence given by a police officer at a preliminary inquiry may be admitted at trial, provided reasonable notice is given by the Crown. (s. 715.01).

One significant difference from a trial is that *Charter* remedies are not available on a preliminary inquiry. A justice presiding at a preliminary inquiry is not a "court of competent jurisdiction" for the purpose of excluding evidence under s. 24(2) of the *Charter* (*R. v. Hynes* (2001), 159 C.C.C. (3d) 359 (S.C.C.); *R. v. Mills* (1986), 25 C.C.C. (3d) 481 (S.C.C)). The preliminary inquiry can play an important discovery role and will at least permit a full exploration of *Charter* breaches, in anticipation that an application for a remedy will be made at trial, including applications for disclosure.

The defence has a key opportunity to use cross-examination on a preliminary inquiry to investigate the Crown's case. Technically, nothing achieved by the defence, short of a total absence of proof of essential elements of the charge(s), will affect the outcome of a preliminary inquiry, since the judge is not determining guilt but only assessing the sufficiency of evidence. The evidence of Crown wit-

nesses may be valuable, however. Although the Crown discloses all relevant material in its possession, whether favourable or unfavourable to the defence, the oral evidence of a witness is more detailed than any written statement or summary of expected evidence could be. No advance disclosure by the Crown can anticipate the actual evidence that will emerge when a witness testifies. In addition, the physical presence of the Crown's witnesses at a preliminary inquiry gives the defence a chance to assess their demeanour when giving evidence and to decide on the most effective way to cross-examine them at trial.

Most important to the defence is the opportunity that a preliminary inquiry provides to commit the Crown's witnesses to their evidence under oath. If at trial the witness departs in a material way from evidence given under oath at the preliminary inquiry, cross-examination on that inconsistency with the aid of a transcript can be very effective. While cross-examining Crown witnesses on the basis of inconsistent statements to the police is a useful tactic, the witnesses can often explain inconsistencies with their present testimony. They might refer to their emotional state at the time of the statement, or to the fact that they were not under oath when they spoke to the police. But at trial, inconsistencies between their current evidence and the evidence they gave at the inquiry are all sworn evidence. For this reason, the heart of any effective cross-examination at trial is the skillful exploitation of inconsistencies between the witness's evidence at trial and what was said at the preliminary inquiry. Given how important cross-examination at the preliminary inquiry is to an effective defence, counsel must prepare thoroughly.

Defence counsel must develop a coherent theory of the defence based on a thorough review of the particulars provided by the Crown and the accused's instructions. Then, defence counsel must determine what portion of the expected Crown evidence is damaging to the theory of the defence and devise strategies for approaching this evidence during cross-examination. The most useful of these strategies may be described as "discovery" and "limitation."

In the discovery approach, defence counsel at a preliminary inquiry asks the witnesses non-confrontational, open-ended questions designed to uncover the existence of additional sources of evidence favourable to the defence, and to explore the outside limits of the evidence a witness is able to give. For example, an investigating police officer might be asked if other witnesses were spoken to whose names do not appear in the police report, or whether exhibits seized by the police have been tested forensically. Similarly, a complainant might be asked for the names of relatives or friends who would have been around at the time of the alleged offences, or for the names of any counselors or therapists who have been involved in treating the complainant before or since the offences were disclosed. The information received from the witnesses in answer to this type of questioning will often allow defence counsel to apply to the trial judge for an order that the Crown disclose the full details of the evidence uncovered in cross-examination. This technique, together with "hallway" interviews before the witnesses give evidence, will alert counsel to dangerous areas in the witnesses' evidence, which may be avoided before the trier of fact at a trial.

In the limitation approach, defence counsel narrows the evidence and commits the witness to specific assertions, so that the witness is bound by those answers at trial. For example, where the offence is alleged to consist of numerous incidents that have taken place over an extended time period, the witnesses should be encouraged during cross-examination to commit to a specific number of incidents within a definite time period. Any deviation by witnesses at trial from those precise answers will allow defence counsel to impeach credibility. Similarly, when a witness purports to narrate conversations with the accused, counsel makes the witness commit to specific words that the accused is alleged to have spoken and has the witness confirm that there are no other conversations relating to this subject matter. Again, witnesses cannot allege additional conversations at trial without impairing their own credibility.

It may be unwise to challenge and confront Crown witnesses directly when cross-examining at the preliminary inquiry. Credibility is not in issue and the sitting justice lacks the jurisdiction to prefer the evidence of one witness over that of another. As a matter of tactics, a direct challenge to credibility will alert the witness to counsel's line of attack at trial, and will make the witness less willing to provide the kind of detailed and cooperative answers that make a preliminary inquiry useful. On the other hand, there may be circumstances that arise in the course of a cross-examination that will make confrontation at this early stage a worthwhile gamble. Where defence counsel can demonstrate to Crown counsel that the witness is not believable, a stay of proceedings or a plea to some lesser charge short of trial might result. Judgment is always required when deciding whether the tactic of confrontation might successfully move the witness to a more agreeable place in their evidence, or the Crown toward a resolution more favourable to your client.

When Crown counsel calls witnesses at a preliminary inquiry, it is critical that they have a thorough understanding of the theory of their case and how the witness's evidence fits with that theory. This is particularly important when the preliminary inquiry is limited and only select witnesses are presented to give evidence. The preliminary inquiry is not a time for discovery for Crown counsel. Crown counsel must have a thorough and deep understanding of all the evidence and potential defences available in their case prior to embarking on a preliminary inquiry so that the evidence that is tendered is focused and the Crown can properly assess the strength of any new information or evidence that arises in the course of the hearing.

Once the Crown has called all its witnesses at the preliminary inquiry, it will close its case, and the judge will then address the accused in the words of s. 541(2). This address asks whether the accused wishes to say anything in answer to the evidence and warns the accused that anything that is said in answer to the charge may be recorded and given in evidence at the trial. Since nothing that is said by the accused at this point can affect the outcome of the preliminary inquiry, there is almost never an advantage to making such a statement and the best advice to give to the accused is to say nothing.

After addressing the accused, the judge will ask if any witnesses will be called on behalf of the defence. Again, given the purpose of a preliminary inquiry, there is rarely anything to be gained by calling defence witnesses. However, if the Crown refuses to call a witness who is crucial to preparing the defence, defence counsel might consider calling that person on behalf of the defence at the preliminary inquiry pursuant to s. 541(5) of the *Criminal Code*. Unfortunately, any advantage gained by having the witness available to the defence will likely be outweighed by the fact that this witness must be examined in chief by defence counsel and may be cross-examined by the Crown. Since the likely reason for the Crown refusing to call the witness in the first place was the witness's hostility to the prosecution and the Crown's belief that the witness is unreliable, the Crown may benefit from the opportunity to cross-examine and thereby limit or damage the witness's evidence.

There may be circumstances in which calling a witness is the only way to preserve vital evidence. For example, counsel may know that a key witness is seriously ill and may die, or is planning to leave the country permanently before the trial. Calling this witness may be the only way to preserve critical evidence for use at trial. This evidence in transcript form may be admissible at trial pursuant to s. 715 of the *Criminal Code*, which permits the reading in of transcript evidence from a preliminary inquiry in certain limited circumstances. Nevertheless, it will be rare for defence witnesses to be called at a preliminary inquiry. It is better to persuade the Crown to call that witness, if possible.

Note that the defence's and the Crown's ability to call witnesses is limited in the same way under s. 537(1.01), which allows the judge to limit the scope of the inquiry and the witnesses called at the preliminary hearing.

5. Order Following Preliminary Inquiry

Once the accused has called any witnesses on behalf of the defence, or has indicated that no witnesses will be called, the preliminary inquiry judge will call on defence and Crown counsel for submissions as to whether or not the accused should be ordered to stand trial. If there is evidence to clearly support an order to stand trial, experienced defence counsel will often make no submission.

The test to be applied by the judge in deciding this question is whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty (*U.S.A. v. Sheppard* (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.)). The judge does not generally weigh the evidence heard at the preliminary inquiry, nor does the judge generally assess the credibility of the witnesses. The Crown must simply have put forward a *prima facie* case, which amounts to some evidence directed at each element of the offence(s) alleged. The Crown is not required at a preliminary inquiry to prove its case beyond a reasonable doubt.

Even where the defence calls exculpatory evidence, an accused will be committed to trial where the Crown adduces direct evidence on all the elements of the offence. Where the Crown evidence consists of, or includes, circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence to determine whether a reasonable jury properly instructed could return a verdict of guilty (*R. v. Arcurai*, 2001 SCC 54).

The accused will be discharged if the Crown fails to call evidence on an essential element of the offence. For example, if the accused has not been identified as the offender, or if there is no evidence that property found in the possession of the accused was obtained by the commission of an indictable offence, the accused will be discharged on that count. It is only the entire absence of evidence on an essential element that will lead to a discharge at a preliminary inquiry; if there is any evidence at all, the case will be left for the trier of fact at trial.

Pursuant to s. 548(1)(a) of the *Criminal Code* the judge may order the accused to stand trial if "there

is sufficient evidence to put the accused on trial for the offence charged, or any other indictable offence in respect of the same transaction." This means that an accused may be committed for offences that do not appear on the Information, so long as evidence meeting the test for committal has been tendered before the court. A committal on offences different from those charged may also arise when the evidence led does not meet the required standard for that offence, but does meet the test for some lesser included offence. For example, if the charge is robbery, but the evidence fails to show any violence or any threat of violence surrounding the taking of property, the accused may simply be ordered to stand trial on the offence of theft.

Rather than seeking a committal on other charges at the preliminary hearing, the Crown may later exercise its option, under *Criminal Code* s. 574(1)(b), of adding to the Supreme Court indictment any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry.

If an accused is charged on an Information with multiple counts, any argument concerning committal should relate to only those counts that were the subject of the preliminary inquiry: that is, those counts punishable by 14 years' imprisonment or more.

6. Direct Indictment

The *Criminal Code* also provides several methods for avoiding a preliminary inquiry entirely. Where the accused does not request a preliminary inquiry, the case is referred directly to the trial court, be it the Provincial or Supreme Court, to fix a date for trial. (As noted earlier, under recent amendments, an accused can only request a preliminary inquiry if they are charged with an indictable offence punishable by 14 years or more of imprisonment.)

Pursuant to s. 577, the Crown may obtain a "direct indictment" from the Attorney General, so that the accused goes directly to the Supreme Court without having had a preliminary inquiry. Before *R. v. Jordan*, 2016 SCC 27, this was done only in the most serious cases, such as murder or conspiracy. *Jordan* established reasonable lengths of time for an accused to wait for trial. Since *Jordan*, direct indictment has become more common.

7. Consent Committal

Pursuant to s. 549, the accused may consent to be committed to trial at any stage of the preliminary inquiry, with the Crown's agreement. When the client wants a trial, a consent committal may be undesirable because it means a loss of the discovery benefits that may flow from a preliminary inquiry. However, if the Crown disclosure is so complete that there is little benefit from an examination of the witnesses, a consent committal may result in the matter proceeding to trial much quicker than it ordinarily would have.

8. Re-election

If things are going particularly well for the defence during a preliminary inquiry, defence counsel may, with the consent of the Crown, re-elect before the Provincial Court judge and convert the preliminary inquiry into a trial (*Criminal Code* s. 561(1)(a)). Because the preparation by the Crown for a preliminary inquiry is so different from that for a trial, the Crown may not consent to a re-election when difficulties in its case arise.

However, in the rare circumstances where the Crown has called a full case at the preliminary inquiry, and no additional evidence may be expected to emerge before the trial, the Crown will likely consent, particularly when an acquittal is inevitable at trial. When re-election to a Provincial Court trial is a possibility, it is best for counsel to alert the judge before commencing the preliminary hearing, as the judge's attention and note-taking will differ markedly depending upon the nature of the hearing.

9. Review by Certiorari

When a preliminary inquiry judge orders an accused to stand trial in the absence of any evidence on an essential element of the offence, defence counsel may seek a review of the order in Supreme Court by certiorari. The Crown may also seek a review by certiorari where an accused is discharged at the preliminary inquiry in circumstances where the hearing judge exceeded their jurisdiction. A Crown application for this remedy is rare, as the Crown may proceed with a direct indictment in these circumstances.

Once again, the standard placed upon a Provincial Court judge is quite minimal: if there was *some* evidence before the judge upon which a reasonable jury could convict, the order to stand trial will not be interfered with. The reviewing court will not substitute its opinion for that of a Provincial Court judge as to whether the evidence relied upon was in fact sufficient (*R. v. Russell* (2001), 157 C.C.C. (3d) 1 (S.C.C.)). It is only the entire absence of evidence on an essential element that will lead to a quashing of the order to stand trial. When the Crown's evidence is merely weak on a given element rather than non-existent, defence counsel should save the argument for trial.

There are other potential grounds for a certiorari application. One is the denial of procedural fairness, in particular the denial of a full opportunity to cross-examine a witness on a matter central to the

making of full answer and defence. A superior court may quash the committal and send the matter back before the Provincial Court judge with an order that cross-examination of a particular witness proceed at the preliminary inquiry (see *Forsyth v. R.* (1980), 53 C.C.C. (2d) 225 (S.C.C.)).

[§4.02] Pre-Trial Applications

1. Crown Disclosure

The Crown must make full and timely disclosure to the defence of all relevant material in its possession, whether favourable or unfavourable to the accused. This duty is subject to certain exceptions: the Crown need not disclose clearly irrelevant material, privileged material, or matters relating to informers. The Crown must, however, disclose all material that may possibly be relevant to either the prosecution or defence of the charge. The timing of disclosure may be delayed where early disclosure would prejudice a continuing investigation (see *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.)).

The Crown in British Columbia complies with both the letter and the spirit of *Stinchcombe*, so that in most cases defence counsel will have received complete disclosure of the case against the accused well before the trial date. Occasionally, however, situations will occur in which defence counsel asks the Crown to produce material that is in the possession of third parties, or to produce material when relevance is in dispute. In these cases, the defence must apply to court, before trial, for an order for production of the contentious material.

If the Crown possesses but refuses to disclose relevant materials (such as records of related police investigations or criminal records of Crown witnesses), defence counsel may apply to the court for an order compelling disclosure. Counsel prepares an application, together with any available supporting material demonstrating why the requested material is relevant to a matter in issue, and why disclosure is necessary in order for the accused to make full answer and defence. Where possible, disclosure applications should be made well before the trial date so that the defence will not have to seek an adjournment once the requested material is received. These applications must be made to a trial court; a preliminary inquiry justice does not have jurisdiction to compel Crown disclosure (see *Stinchcombe*).

2. Third-Party Records and Sexual History

In sexual offence cases, where the application is for personal records that are in the possession of third parties (such as therapists) or the Crown, the procedure to be followed is set out in ss. 278.1–278.91 of the *Criminal Code* (the "*Mills* regime"). For the purposes of these sections, a "record" is defined in s. 278.1 of the *Code* as "any form of record that contains personal information for which there is a reasonable expectation of privacy." The definition includes a non-exhaustive list of types of records that qualify, including medical, psychiatric, therapeutic, counselling, education, employment and social services records, personal journals and diaries.

The defendant brings an application after having given notice to the records custodian and anyone whose privacy interests may be affected by disclosure (most commonly, the complainant). The custodian also receives a subpoena.

The application will proceed in two stages. First, the judge (usually the trial judge) will hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge (s. 278.4).

On the hearing of stage one of the application, the judge will consider the factors outlined in s. 278.5(2), and if the judge is satisfied that the applicant has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify, and that producing the record is necessary in the interests of justice, the judge may order production of the records for review by the court.

If the judge orders that the record be produced, the judge will proceed to stage two, and must review the record in the absence of the parties to determine whether any part of it should be produced to the accused (s. 278.6). A judge may order a record to be produced to an accused applicant if the judge is satisfied that the record, or part of it, is likely relevant to an issue at trial or to the competence of a witness to testify, and its production is necessary in the interests of justice (s. 278.7). In making that determination, the court considers the probative impact of disclosure on the accused's right to make full answer and defence, and weighs the prejudicial effect and the rights of the person to whom the record relates. The Supreme Court of Canada found these provisions to be constitutional in *L.C. (the complainant) and the Attorney General for Alberta v. Mills*, (1999) 139 C.C.C. (3d) 321. If the judge orders production of the record, they may also impose conditions upon which the record may be used (s. 278.7(3)).

In the age of text communications, it is common for the accused to have information in their possession that they wish to adduce at trial to answer to the charge against them. Where records relating to the complainant are in the possession or control of the accused, s. 278.92 prohibits admission of any "record relating to a complainant that is in the posses-

sion or control of the accused — and which the accused intends to adduce" in proceedings in relation to one of the enumerated sexual offences unless the accused makes an application pursuant to ss. 278.93 and 278.94. The purpose of this regime is: (1) to protect the dignity, equality, and privacy interests of complainants; (2) to recognize the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) to promote the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes (*R. v. J.J.*, 2022 SCC 28).

The above provisions only apply to certain scheduled sexual offences in the *Criminal Code* (s. 278.2). For production of materials from third parties in relation to offences that do not appear on this list, the common law rules outlined by the Supreme Court of Canada in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) apply. The common law rules are similar to the procedures provided in the *Criminal Code* for sexual offences, but in some respects are somewhat less restrictive for the applicant seeking disclosure. To obtain disclosure of such records, defence counsel must apply formally to the trial judge and must serve notice on the Crown, the person in possession of the records, the complainant to whom the records relate, and any other person with an interest in the confidentiality of the records.

No matter how obtained, an order for disclosure to the defence of third-party records does not include an automatic right to use any of that material in court, for cross-examination or otherwise. Cross-examination may be restricted and rulings may be required before certain types of testimony can be given. The ultimate relevance of the evidence obtained from this disclosure is a matter for the trial judge.

It is also critical to note that in sexual offence cases, counsel must pay special attention to rules restricting questions regarding a complainant's prior sexual activity. Section 276 of the *Criminal Code* sets out a procedure that must be followed where these questions are proposed. The procedure requires that a notice of motion be filed. The notice must describe the specific instances of sexual activity, how that activity is relevant to an issue at trial, and why it is that this evidence has significant probative value that is not substantially outweighed by prejudice to the proper administration of justice (see ss. 276–276.4). At the resulting hearing (under s. 278.93–278.94) on admissibility, the jury and members of the public are excluded.

3. Defence Disclosure — Experts and Alibi

In some circumstances, the defence must disclose material to the Crown. Case law has established that where the defence elects to call an expert witness to give opinion evidence at trial, documents such as a report prepared by that expert witness for the defence may, in some circumstances, result in an order that the report and other supporting documents be disclosed to the Crown, even before the witness gives evidence in chief. The court will rule that the act of calling the defence expert constitutes waiver of any privilege attaching to the report, and may find that a reference to the report in defence counsel's opening address is similarly a waiver of privilege, giving rise to an order that the report be disclosed to the Crown (*R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.)).

Following on the heels of *Stone*, Parliament legislated defence disclosure of expert reports. Section 657.3 of the *Criminal Code* requires that a party (Crown or defence) who intends to call a person as an expert witness shall, at least 30 days before the trial begins, give notice to the other side of their intention to do so. That notice must include the name of the witness, a description of their area of expertise, and a statement of qualifications. The Crown must provide a copy of its expert report to the defence "within a reasonable period before the trial," while the defence must disclose its report to the Crown "not later than the close of the case for the prosecution." Failure to meet these notice provisions will not render the report inadmissible, but may give rise to other remedies, including adjournments and the calling of evidence in rebuttal. The Crown is not permitted to produce into evidence any part of the material disclosed by the defence when, for whatever reason, the defence chooses not to tender the report into evidence.

The common law has long required timely and specific disclosure of the defence of alibi. If the defence presents evidence of an alibi for the accused, but fails to disclose the details of the alibi to the Crown before trial, the trier of fact can give less weight to the alibi. The timing of the notice must leave sufficient time before trial to allow the Crown to act on the notice and attempt to verify specific details of the alibi defence (*R. v. Cleghorn* (1995), 100 C.C.C. (3d) 393 (S.C.C.)).

4. Testimonial Supports and Accommodations

In some situations it might be necessary to make pre-trial applications for orders about the manner of testimony. Perhaps a witness outside the jurisdiction may be accommodated by allowing testimony by electronic means, or perhaps witnesses who are suffering from trauma may testify in the presence of

a support person, behind a screen or from outside of the courtroom. Sometimes witnesses will be anonymized in order to protect valid public interests. In many cases, testimonial accommodations are mandatory upon application; however, in some cases, they are discretionary.

If the accused or a witness requires the assistance of an interpreter, the court will order a certified court interpreter for the hearing. Counsel must advise the court in advance of any court appearance where an interpreter is required so that accommodations can be made. Failing to provide adequate interpretation can lead to a breach of an accused's *Charter* rights and can result in a successful appeal.

[§4.03] Pre-Trial Conferences

Subsection 625.1(2) of the *Criminal Code* requires that a pre-trial conference be held for all jury trials. Such a conference may be held for other kinds of trials, with the consent of the Crown and defence (s. 625.1(1)).

In the Supreme Court of British Columbia, pre-trial conferences are held for all jury trials, trials by direct indictment, longer judge-alone trials of four days or more, and extradition hearings (see *Criminal Code* s. 625.1, Rule 5 of the *Criminal Rules for the Supreme Court of British Columbia, 1997*, and the Supreme Court Criminal Practice Direction—*Criminal Pre-Trial Conference Process*, 25 November 2022 (CPD-1)).

At the pre-trial conference, the Crown and defence counsel attend in person or by electronic means before a judge of the Supreme Court in chambers. If a trial judge has been assigned to the matter, the pre-trial conference is typically before that judge. The accused might be required to attend, or might do so voluntarily. The Crown must file a synopsis of its case, which is used only as a case management tool. The presiding judge asks counsel about such matters as the anticipated length of the trial, the likelihood of any *Charter* applications, the adequacy of disclosure by the Crown, and whether the jury should attend on the first day of the trial. The judge may make orders about the conduct of the trial and may schedule additional conferences before the trial if any important issues remain unresolved.

In practice, the effectiveness of pre-trial conferences is directly related to how well counsel prepare. If both counsel are well-prepared, valuable court time can be saved. In some cases, guilty pleas follow the conference. Counsel who want to make the conference productive should write to the other side in advance, setting out the issues to be resolved, and seeking agreement on non-contentious matters.

Additional procedural mechanisms have been adopted to assist in the management of large trials. A "case management judge" may be appointed by the Chief Justice or Chief Judge under s. 551.1(1) to assist in promoting a fair and efficient criminal trial. In addition, where there are related trials with similar issues and a joint hearing would assist, the Chief Justice or Chief Judge may make an order under s. 551.7(1) for a joint hearing.

Trials that occur in the Provincial Court are subject to mandatory pre-trial conferences if the requirements of *CRIM 12 Criminal Pre-Trial Conferences* are met.

[§4.04] Jury Selection

Every person who is charged with an indictable offence, except those offences listed in s. 553 of the *Criminal Code*, is entitled to a trial by a jury, unless the accused chooses to be tried by a judge of the Supreme Court sitting without a jury, or by a Provincial Court judge.

See s. 536 of the *Criminal Code* for the available elections, and s. 11(f) of the *Charter* for the constitutional right to a jury trial.

If the trial is by judge and jury, the proceedings begin with the selection of the jury. In some jurisdictions, potential jury members are assembled in groups on designated jury selection days, often weeks before the scheduled trial dates. In other jurisdictions, juries are picked just before the trial starts.

Jury selection starts with taking the accused's plea. If the plea is "not guilty," jury selection follows. A jury panel of sufficient size to fill all the required juries, allowing for the fact that not all prospective jurors will be suitable, gathers in the courtroom. The panel can number up to 200 people, depending on how many trials require juries. These people have been chosen at random from the voters' list. From this panel each jury of 12 persons is selected. Lists of the names, addresses, and occupations of the jurors are provided to each counsel who will be selecting the juries. Section 631(2.2) of the *Criminal Code* permits a judge to order that 13 or 14 jurors, instead of 12, be sworn if it is advisable in the interests of justice (for instance, in particularly long trials). These additional jurors will serve as alternates in the event one of the first twelve jurors is discharged. The trial judge may discharge the alternate jurors during the proceedings; however, they must do so prior to deliberations.

The court clerk draws the names of individual jurors from a box. The selection is random. At the instance of the presiding judge, an arbitrary number of potential jurors (usually 10 to 20) will be called forward and will stand at the front of the courtroom. The sheriff then calls each potential juror forward one at a time. At this point, the potential juror may indicate to the judge that they are unable to serve on the jury and why.

The judge may excuse a juror at any time before trial for any of the following reasons: personal interest in the matter to be tried, relationship with the judge, accused, counsel or prospective witness, or other reasonable cause

(s. 632). The judge may also direct a juror to "stand aside" for reasons of personal hardship, maintaining public confidence in the administration of justice, or any other reasonable cause (s. 633). These provisions were recently amended by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25. As described in the Legislative Background to the Act, "maintaining public confidence in the administration of justice" ensures an impartial jury:

> The Act amends s. 633 to permit a judge to stand aside a juror to maintain public confidence in the administration of justice. This tool helps to ensure that potential jurors are impartial and capable of performing their duties, if selected. The concept of maintaining public confidence in the administration of justice is already used in other parts of the *Criminal Code* and has been interpreted by the SCC in *St-Cloud* (2015) [2015] 2 S.C.R. 328 in the context of bail. In this context, decisions are made on a case by case basis and are based on all relevant circumstances, including the importance of ensuring that the jury is impartial, competent and representative. The amendment recognizes and enhances the role of judges in promoting an impartial, representative and competent jury.

Under the *Jury Act*, certain individuals are disqualified from serving as a juror, and would be excused for that reason. Examples include people who are not Canadian citizens or BC residents, people under the age of 19, certain federal civil servants, lawyers, peace officers and correctional officers.

Prior to September 19, 2019, counsel for the Crown and the defence could challenge a juror they did not wish to have on the panel for cause or peremptorily (as of right). Recent amendments to the *Criminal Code* abolished peremptory challenges.

A prosecutor or an accused is entitled to challenge for cause for the grounds listed in s. 638, for instance, if the juror's name does not appear on the list, the juror is not a Canadian citizen, or a juror does not speak either of the official languages of Canada. Under s. 638(1)(b), a prosecutor or accused is entitled to argue that a juror is not impartial and invoke a challenge for cause. This may encompass situations in which a juror or pool of jurors has been subjected to extensive media coverage, or when there is some evidence of racial or other bias in the community that may prejudice a fair trial. A party who demonstrates a realistic potential for bias has the right to challenge potential jurors for cause. The court will usually resolve doubts in favour of the right to challenge, but the challenger must satisfy the court:

(a) a widespread bias exists in the community; and

(b) some jurors may be incapable of setting aside the bias and rendering an impartial decision, despite trial safeguards.

The presumption that prospective jurors are indifferent or impartial must be displaced before they can be challenged and questioned in these areas (see *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. Find* (2001), 154 C.C.C. (3d) 97 (S.C.C.)).

A notice of application to challenge potential jurors for cause must be filed and delivered to the opposing party 30 days in advance of jury selection: see BC Supreme Court Notice—*Challenging Potential Jurors – Application for Leave* (NP: 29 July 1999).

Prior to September 19, 2019, a challenge for cause was heard by lay persons called "triers." After September 19, 2019, the judge determines whether or not the juror shall be sworn (s. 640).

Once the jury has been chosen, the judge may invite the jury to retire and choose a foreperson from among them, although the usual practice is to instruct the jury to wait a day or two after the trial begins so they get to know each other before they select a foreperson. After a jury has been chosen, the judge instructs the court clerk to begin the selection of the next jury. If no other juries are to be selected, the judge instructs the remaining members of the jury panel of the date and time they are to return to participate in the selection process for the next group of trials.

Section 631(2.1) of *Criminal Code* provides a procedure for selecting additional or "alternate" jurors where there is to be a break in time between jury selection and the commencement of trial. This kind of delay often occurs when lengthy *voir dires* are to be completed before the jury will be required. Courts routinely must replace one or more jurors when after selection but before the trial starts, a juror advises the court of a problem or circumstance that would justify a discharge from jury duties. Sections 631(2.1) and 631(2.2) of the *Criminal Code* allow for the selection of one or two alternate jurors. Where 13 or 14 jurors remain after the charge to the jury, s. 652.1 provides for the reduction of the jury to 12 at the end of the trial after the charge and before the jury retires.

If the number of jurors falls below 10, s. 644(3) permits the judge, with the consent of the parties, to discharge the jurors, continue the trial without a jury, and render a verdict.

[§4.05] The Crown's Case

Crown counsel must be fair and impartial throughout the hearing. The Crown's role is to present to the court relevant, admissible evidence in a clear, precise, and firm manner. While the role of the Crown excludes the notion of winning or losing (see *R. v. Boucher* (1954), 110 C.C.C. 263 (S.C.C.)), Crown counsel would not be performing their role properly if the case for the Crown was not presented in a manner designed to convince the jury

or judge of the worthiness of the Crown's case. The Crown may not express a personal opinion that the accused is guilty or innocent.

No duty is cast on the Crown to call any particular witness, provided that in deciding not to call a witness the Crown is not acting for an oblique or improper reason. Generally, the Crown may be expected to call all witnesses who are essential to the unfolding of the narrative. While the Crown may not be required to call a given witness, the failure of the Crown to call a witness may leave a gap in the Crown's case which will leave the Crown's burden of proof undischarged and entitle the accused to an acquittal (*R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.)). There is a duty on the Crown to provide particulars to defence counsel of any evidence that has a bearing on any issue in the trial, and this of course includes disclosing the existence of witnesses who may have relevant evidence even though the Crown will not be calling them.

Every jury trial (and most non-jury trials) follows a set pattern that begins with the opening address by the Crown, the case for the Crown, the opening address for the defence, the case for the defence, rebuttal evidence (if any), and closing addresses by both Crown and defence counsel.

In Provincial Court, the Crown usually calls the case. In Supreme Court, the clerk will call the case. After both counsel have introduced themselves, the accused is arraigned. The charge is read, any relevant elections are made and the plea is taken. The Crown or defence may ask for an order excluding witnesses. The Crown will then call its first witness.

With multiple accused, the order of names on the indictment determines the order of the questioning of witnesses, the order in which each accused will be called upon to call defence, if any, and the order of closing addresses: *R. v. Sandham* (2009), 248 C.C.C. (3d) 392 (Ont. S.C.J.).

[§4.06] Crown's Opening in Non-Jury Trials

A brief, concise outline of the case assists the court in gaining an overview of the case for the Crown. In Provincial Court and in non-jury trials in Supreme Court, openings by the Crown are not as common as in jury trials. This is unfortunate because a Crown opening is an excellent opportunity for the Crown to outline its case with precision and clarity, and any "heads up" as to the key issues or important evidence in the case is extremely helpful to the trial judge. Openings usually include a short summary of the following:

- alleged circumstances;
- number of witnesses and their anticipated evidence;
- anticipated issues; and
- more important exhibits.

If there are many exhibits, it is preferable, with the consent of the court and defence, to prepare a list of exhibits to present to the court at the outset of the hearing. If many documents are involved, they should be properly tabbed and indexed.

[§4.07] Crown's Opening in Jury Trials

After the jury has reassembled, and the accused has been put "in charge of the jury," the trial continues. The first order of business is the opening by Crown counsel.

The opening address is a very useful tool for the Crown, not simply to present the jury with an overview of the case, but also to acquaint the jury with the theory of the Crown and how the evidence fits into that theory.

The prosecutor's opening generally consists of a brief outline of the case that the Crown intends to prove. This outline is designed to provide the jury with an overall view of the case so they can see how the various pieces of evidence fit together. The prosecutor will usually warn the jury that what the prosecutor is saying is not evidence. Unless a *voir dire* has been held before the opening, in which contentious evidence has been ruled admissible, Crown counsel cannot refer to contested evidence (for example, a statement by the accused). If the jury is made aware of evidence that the judge does not later admit, a mistrial is possible. For this reason, it is always preferable for the Crown to seek rulings on disputed pieces of evidence before making the opening address.

Crown counsel must not engage in any type of argument in the opening statements. The Crown's opening statement should amount to an impartial summary of the evidence that it expects to call.

The accused is shielded by the presumption of innocence and the Crown must be most careful to respect and honour that presumption. Inflammatory language, personal opinions as to guilt or innocence, and legal argument masquerading behind a series of rhetorical questions have no place in Crown counsel's opening remarks before a jury. Mistrials have been declared in many cases in which these boundaries have not been observed.

After finishing the opening address to the jury, the prosecutor will then begin to call witnesses.

In some circumstances a trial judge will permit defence counsel to address the jury immediately after the Crown opening. This has been permitted in cases that are complex and when it is anticipated that the Crown's evidence will take a long time to present. It has also been permitted when defence counsel has wanted to communicate to the jury that the accused is making significant admissions, which will help the jury to focus upon

the remaining contentious issues as between the Crown and defence (*R. v. Sipes*, 2011 BCSC 695; *R. v. Johal et al*., [1995] B.C.J. No. 3010 (B.C.S.C.); *R. v. Gibson*, [1999] B.C.J. No. 1050 (B.C.S.C.)).

[§4.08] Direct Examination

The procedure of calling witnesses is designed to elicit the necessary evidence to prove all the essential elements of the offence charged, and to permit this evidence to be tested before the court. The role of examination-in-chief (or "direct examination") is to allow this evidence to emerge in a convincing, complete, and orderly way.

When examining a witness on behalf of the Crown, particularly before a jury, it is important to consider how the evidence is being received. Can the witness be heard? Is the evidence being followed? Should the witness speed up, slow down, or give more explanation? Often it is best to ask questions that allow a witness to narrate in their own words; constantly interrupting a witness tends to throw the witness off balance and fragment the evidence. At the end of a trial, the jury will be left with an impression of the witness, including credibility, so direct examination should be conducted so as to allow the witness to make a favourable impression. The jury can be reminded later of specific pieces of evidence, but the jury's impression of the witness is formed while the witness is in the box.

If, during pre-trial interviews, counsel becomes aware that a witness wants to change their testimony from that contained in a pre-trial statement or in a preliminary hearing transcript, counsel should, during direct examination, point out the inconsistency and ask the witness to give an explanation. By following this procedure, counsel will remove a potent weapon from opposing counsel.

[§4.09] Leading Questions

A leading question is one phrased to suggest a particular answer to the witness. The objection is that through a leading question, counsel is influencing testimony. Generally, a witness is more favourably disposed to the party calling them, and psychologically may be open to suggestion as to what evidence they will give. The mere fact that the answer to a question is "yes" or "no" does not make it a leading question. It is only if the question suggests an answer to the witness that it offends against the rule.

1. When Permitted

Subject to certain exceptions, leading questions are not permitted on direct examination or re-examination. They are, of course, allowed on cross-examination since the essence of cross-examination is making suggestions to the witness in the hope that the suggestions will be adopted. The judge has discretion to allow leading questions in any situation where justice demands (*R. v. Maynard and McKnight* (1959), 126 C.C.C. 46 (B.C.C.A.); and *Ref. Re R. v. Coffin* (1955), 116 C.C.C. 215 (S.C.C.)). Appropriate cases in which leading questions would be permitted might include witnesses of limited intellectual capacity, or very young child witnesses.

Using leading questions inappropriately or excessively, even when permitted by a judge, may severely diminish the strength of a witness's evidence. It does not affect its admissibility (*Moor v. Moor*, [1954] 2 All E.R. 458 (C.A.)). An answer on a critical issue elicited by a leading question is entitled to little if any weight (*R. v. Williams* (1982), 66 C.C.C. (2d) 234 (Ont. C.A.)).

2. Exceptions

Leading questions are permitted on direct and re-examination in the following situations:

(a) for introductory matters such as address, occupation, time and place;

(b) for matters not in dispute (this saves time and clarifies the case, and often defence counsel will advise the Crown before the hearing as to the contested issues, or the Crown will ask defence if it might lead in certain areas);

(c) for summarizing or repeating evidence about which the witness has already testified;

(d) for counsel to simply direct the witness's attention to a specific area of the evidence; and

(e) for stimulating or fixing the witness's recollection of a name, date or place after an attempt by counsel to exhaust the witness's memory.

In criminal cases where a witness gives evidence inconsistent with a prior written or recorded statement, and an attempt at refreshing the witness's memory has failed, an application to cross-examine the witness on the issue may be made pursuant to s. 9(2) of the *Canada Evidence Act.* In such case, the procedure in *R. v. Milgaard* (1971), 4 C.C.C. (2d) 206 (Sask. C.A.) must be closely followed.

In practice, where an honest witness is simply mistaken, another option is to refresh the memory of the witness (see §4.10) or ask for a break and show the witness the contradictory part of their statement in order to assist their memory while being mindful that the witness's out-of-court conversation with counsel may be the subject of cross-examination. The witness can then be recalled and asked if their memory has changed (*R. v. Fedan*, 2016 BCCA

26). Resort to the procedure in s. 9(2) is usually better reserved for hostile witnesses.

Where a witness demonstrates more generally that they are "adverse," an application may be made under s. 9(1) of the *Canada Evidence Act* to cross-examine the witness at large but only on the circumstances of the making of the prior statement. Additionally, a witness can be declared "hostile" at common law and cross-examined generally (*R. v. Coffin* (1956), 114 C.C.C. 1 (S.C.C.); *R. v. Figliola*, 2011 ONCA 457). In practice, applications to declare a witness hostile or adverse are rare and can usually be avoided with proper planning and witness preparation.

[§4.10] Refreshing a Witness's Memory

A forgetful witness can be aided by asking a moderately leading trigger question which directs the witness's mind to the subject area counsel is canvassing. Failing that, a witness may refresh their memory by referring to a prior transcript or statement, or even a picture or recording (*R. v. Fliss*, 2002 SCC 16). Leave of the court is required before refreshing the memory of a witness on the record.

The practice of allowing police officers and civilian witnesses to refresh their memories by looking at notes of the incident made at the time (or at prior statements) is common. Typically, the witness will be first asked to exhaust their memory on the subject, though there is some debate about whether this is required (*R. v. Carroll* (1999), 118 B.C.A.C. 219; *R. v. Fliss*, 2002 SCC 16; *R. v. Violette*, 2009 BCSC 503).

After establishing that reference to an earlier statement would refresh that memory, counsel can simply hand the witness a copy of their statement or preliminary hearing transcript, refer to the particular place of interest, ask them to read it silently, and then ask if it refreshes their memory. This technique is usually successful.

As for notes made at the time of the incident, the Crown will lay the foundation to allow the witness to stimulate their current recollection by asking: "Were the notes made at the time or shortly after the event?" and "Did you use your notes to refresh your memory before testifying today?"

In *R. v. Bengert, Robertson* (No. 2) (1978), 15 C.R. (3d) 7 (B.C.S.C.); aff'd (1980), 15 C.R. (3d) 114 at 160 (B.C.C.A.), Berger J. held that a witness who had prepared a notebook relating to meetings with the accused, using his own recollections and notes made by a police officer of the information that the witness had passed on to that officer, could use the notebook to refresh his memory during his testimony. It was not the notebook that was to be the evidence but the recollection of the witness, refreshed by using the notebook.

In *R. v. Burns*, (1979), 51 C.C.C. (2d) 27 (B.C. Co. Ct.), Anderson J. ruled that the police officer in that case was entitled to give evidence by referring to his notes before exhausting his memory. After approving *Bengert*, Anderson J. stated:

> . . . in my view it is only a matter of common sense that the evidence that this witness has to offer be presented in an orderly and sensible manner and that he be permitted to refer to his notes in giving this evidence to the court. The notes, as I understand it, were made at or about the dates and times in question. They were made by Sergeant Barguent as part of his duties as a police officer.

As a result of *Stinchcombe*, the production of notes made by Crown witnesses is routine. Police notes should always be requested, and their content can be a fruitful area for cross-examination.

For a useful discussion of how to cross-examine a witness on a prior statement, see *R. v. Smith* (1983), 35 C.R. (3d) 86 (B.C.C.A.).

If a witness has no present memory of certain events and reference to a prior statement does not refresh the witness's memory, the evidence may still be placed before the court if certain conditions are met. If a witness made a statement at a time when the events were fresh in their mind and the witness can testify that the statement was true at the time it was made, the statement itself may become evidence under the doctrine of past-recollection recorded (*R. v. Fliss*, 2002 SCC 16; *R. v. Rouse and McInroy* (1977), 36 C.C.C. (2d) 257 (B.C.C.A.)).

[§4.11] Admissions of Fact

Evidence may be adduced by agreed admissions of fact under s. 655 of the *Criminal Code*.

Section 655 applies to indictable proceedings, and to summary proceedings through s. 795. For preliminary inquiries, the authority is *Re Ulrich and R.* (1977), 38 C.C.C. (2d) 1 (Alta S.C.T.D.).

There is no specific provision in the *Criminal Code* allowing for Crown admissions. However, it has long been the practice that the Crown may, at the request of the accused, waive technicalities of proof in relation to facts known by the Crown, to help bring out all facts tending to strengthen the accused's defence.

Admissions of fact are made in order to shorten the trial and narrow the issues. Accused persons may admit any facts alleged against them in order to dispense with the necessity of proving those facts. For example, on a trial for "failing to appear," the accused may admit all the allegations in the Information except "without lawful excuse." Those admissions form the case for the Crown, and the defence then calls the accused to testify as to the excuse for failing to appear in court.

Although Crown counsel generally should embrace any opportunity to expedite the progress of the trial through admissions by the defence, Crown counsel should be aware that experienced defence counsel may offer admissions as a means of diminishing the impact of some aspects of the Crown's case. For example, defence counsel may seek to admit that a complainant suffered "bodily harm" rather than have the doctor who treated the complainant describe the actual injuries for the jury. Provided that the evidence is not led solely for its inflammatory effect, it is quite proper for Crown counsel to reject offered admissions and insist on leading certain evidence before the jury.

If admissions are agreed upon, it is good practice to have them reduced to writing before the trial. Reducing admissions to writing is expected in Supreme Court trials. Written admissions are marked as an exhibit and may later be examined by the jury.

[§4.12] Witnesses and Exhibits

Crown counsel should have a firm knowledge and a clear picture of the case for the Crown as a whole. This is impossible without thorough personal interviews with Crown witnesses because police reports to Crown counsel often lack detail.

The prosecutor must make it clear to the witness why the witness is being called and the points the witness will establish. In Provincial Court, heavy caseloads and last-minute movement of cases from one prosecutor to another may mean the Crown has insufficient opportunity to interview witnesses at length. Still, it is a dangerous practice for the Crown to call a witness who has not been interviewed in advance, however briefly.

In the interests of justice, the prosecutor must permit the witness to give the witness's whole testimony, whether or not it is favourable to the case for the Crown. In Supreme Court trials, the Crown should inform the defence well before of any witnesses who are to be called at the trial who were not called at the preliminary hearing. If this is not done and defence counsel is taken by surprise, defence counsel will usually be allowed an adjournment in order to prepare cross-examination of the witness.

The Crown should consider carefully whether the witness is essential and whether the witness's evidence is required in light of the evidence of other witnesses. If the witness's testimony would be superfluous, the witness should not be called. The Crown should simplify the case and sift out the essential from the non-essential facts. Good counsel have the ability to do so effectively.

Before giving evidence, a witness over the age of 14 years must swear the oath, or solemnly affirm. A party may challenge a witness' ability to testify. If the witness is over the age of 14 years, this procedure is governed by s. 16 of the *Canada Evidence Act*. The witness can be challenged on their ability to understand the nature of an oath or a solemn affirmation and whether the person is able to communicate the evidence. Witnesses under the age of 14 years can also be challenged but only for their ability to understand and respond to questions. This procedure is governed by 16.1 of the *Canada Evidence Act*. Witnesses under the age of 14 years testify upon promising to tell the truth, and cannot be questioned on their understanding of the oath, solemn affirmation or promising to tell the truth.

To help the court follow the evidence, Crown should lead their case in a logical order. In cases with many exhibits, the Crown will often start by calling the "exhibit officer" (the officer who seized all of the police exhibits) to have the exhibits tendered into evidence (even if only for the purpose of later identification by the witness who can actually describe the relevance of the exhibits to the case). For example, a knife might be marked "for identification" on the testimony of the exhibit officer that "this knife was given to me by Constable Smith."

Unless admitted, the Crown will have to lead further evidence to prove the "continuity" of the exhibit, linking it to the crime or to the accused. For example, Constable Smith may testify that he received the knife from the pathologist who removed it from the deceased in Constable Smith's presence. When such continuity evidence is established, the exhibit formerly marked "for identification" may be marked as a full exhibit in the trial and considered as evidence by the jury. If there is no issue as to continuity, or if the defence wants the exhibit in the trial, continuity can be admitted so that the item can be entered directly as an exhibit in the trial as soon as the exhibit officer produces it.

In a jury trial, rather than marking exhibits for identification, objections to the admissibility of exhibits should be resolved in a *voir dire* so that exhibits objected to will not be seen by the jurors before the issue has been determined.

It is also common when witnesses will be referring to maps, plans, or photographs, either to file these items at the commencement of the trial by consent, or to call as the first witnesses those who will prove these items.

In many cases it is the exhibits, or "real evidence" that will convict an accused. In serious cases it may be particularly useful for both the Crown and defence to examine the exhibits in advance to ensure there will be no unpleasant surprises.

[§4.13] Cross-Examination

When a witness gives evidence, opposing counsel has a right to cross-examine. Cross-examination is a powerful weapon for testing the accuracy and completeness of the evidence and the veracity of the witness. It enables the trier of fact to weigh or evaluate the evidence in the case.

Before trial, defence counsel should find out from the Crown which witnesses will be called and in what order, so as to anticipate their effect on the case. It is extremely helpful to have some background on the witnesses, their involvement in the case, and anything they have to say. Defence counsel has a right to demand such information from the Crown. Defence counsel is also entitled to interview Crown witnesses so long as they agree to be interviewed; there is "no property in a witness." This is often the best method of testing a response to a question that might otherwise be too dangerous to chance before the trier of fact.

Counsel must decide whether to cross-examine each witness. Protracted and irrelevant cross-examination is bad technique and a waste of time. Cross-examination can be harmful if a witness merely repeats unfavourable evidence given on direct. Cross-examination will probably not be able to shake an essentially true story.

When you are on firm ground with your case, ask only a few questions or none at all. Further questions may elicit unexpected explanations that may sink your case. Never ask a really critical question—the answer to which may destroy your case—unless you know the answer or the answer will not harm your case no matter what it is. Be cautious and know when to sit down. Stopping is one of the most effective tools. For example, the witness may answer a question and be expecting to say more with a qualification or explanation, when counsel either changes the topic of cross-examination or does not question further.

Counsel must know the objective of their cross-examination. Determine first what facts are in issue and ask yourself the following questions:

- Can I elicit new evidence from this witness that favours my case?
- Has the witness hurt my case and if so, how can I weaken, qualify or destroy the witness's evidence?
- Can I discredit the witness's testimony or use it to discredit the unfavourable testimony of other witnesses?

Counsel should stop once the objective of cross-examination is attained. To continue is to risk that the witness will modify evidence and destroy the value of the objective that was reached.

Defence counsel should generally avoid asking questions to which the answers are unknown because an unexpected answer may be devastating to your case. The time to have asked such questions is at the preliminary inquiry. However, there may be circumstances where counsel must risk asking such a question if a favourable answer is essential to the defence and failure to put such a question would likely lead to conviction.

Cross-examination of a witness by Crown counsel is qualitatively different in that the prosecutor will usually want a defence witness to provide details and elaborate upon their testimony so that an assessment can be made as to whether the details make sense and fit with other evidence. While Crown counsel may use some of the same cross-examination methods, fear of an unexpected answer is less important for the Crown than fully exploring the logic and credibility of any explanation for the accused's conduct.

The dangers of suggesting to a witness that they have only recently concocted a story should be kept in mind. Cross-examination on recent fabrication of evidence will entitle the Crown to lead evidence in re-examination or from other witnesses of previous consistent statements by that witness to show the evidence has not been recently fabricated (*R. v. Ellard*, 2009 SCC 27).

Cross-examination is often the whole of the case for the defence. Counsel is entitled to ask leading questions on cross-examination, a great advantage in eliciting fresh evidence that puts a new light on direct examination. The result is to build up one's own case and weaken that of the other side.

Note the following special rules:

- If you intend to use testimony from your own witness to directly contradict a Crown witness or impeach that witness's credibility, you must put your version to the Crown witness (*R. v. Dyck*, [1970] 2 C.C.C. 283 (B.C.C.A.)).
- If you do not put the contrary version to the witness, the trial judge is entitled (but not obliged) to weigh the failure to cross-examine against the accused (*R. v. MacKinnon* (1992), 72 C.C.C. (3d) 113 (B.C.C.A.)).

Rarely will counsel be able to completely destroy adverse evidence. Witnesses will almost never admit to lying or colouring their testimony. The breakdown and confession while in the witness box is something seen only on television.

Sometimes counsel is fortunate and has an opportunity to destroy a verbose witness who has offered an unlikely story on direct. The witness can be pressed for more and more detail. Silence on the part of counsel can be a good technique, driving the witness further and further into defensive explanations.

Another method of attack is to draw statements from the witness that are inconsistent with the rest of their story or that can be disproved by other evidence.

Pre-trial statements made by a witness that conflict with that witness's testimony at trial may be used to impeach the credibility of the witness. Moreover, the prior inconsistent statement may be admitted as evidence of the truth of its contents if, during a *voir dire*, the trial judge is satisfied that the statement is necessary and reliable. For example, a prior inconsistent statement may be admissible for the truth of its contents if it was made under

oath, a videotaped record of the statement exists, and the opposing party has a full opportunity to cross-examine the witness at trial (*R. v. B.(K.G.)*, [1993] 1 S.C.R. 740).

More often, counsel will try to weaken evidence so that the judge cannot attach much weight to it. This can be effective when the evidence is circumstantial. Test the witness's story against items of real evidence, such as exhibits, and against the evidence of other witnesses who are reliable. Anticipate the answers to your questions as much as possible. The witness may be delicately "lured" into saying something that can be disproved through other witnesses, or into saying something illogical. If so, pursue the matter.

Cross-examine as to powers of observation, intelligence, memory, and accuracy. Impeach the credibility of the witness by showing, for example, bias, previous convictions or prior contradictory statements. Watch witnesses carefully and listen to their voices, adapting your style to their personality. It is good practice to ask Crown counsel for copies of criminal records of those civilian witnesses you hope to discredit. It may also be possible to obtain either the cooperation of the Crown or a court order for the production of police reports behind those convictions. This information can greatly assist defence counsel in cross-examination.

In his book, *The Technique of Advocacy*, John Munkman describes several techniques of cross-examination:

- "confrontation"—confronting the witness with damaging facts which the witness cannot deny and which are inconsistent with the witness's evidence;
- "probing"—inquiring thoroughly into details of the story to discover flaws; and
- "insinuation"—the building up of a different version of the evidence in chief by bringing out new facts and possibilities.

Counsel, with preparation and experience, will develop their own style of cross-examination tailored to the context.

[§4.14] Limits of Cross-Examination

Although the scope of cross-examination is much wider than that of direct examination, it is not an unfettered right.

The cross-examiner may not intentionally insult or abuse a witness. In *R. v. Ma*, *Ho and Lai* (1978), 6 C.R. (3d) 325, the British Columbia Court of Appeal adopted the following guidelines from *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 at 572 (Ont. C.A.):

> I acknowledge that the trial Judge has the right and duty to restrict cross-examination in all cases where the evidence sought to be obtained is irrelevant, repetitive or in any other manner incompatible with a fair and proper trial. [The Judge] must be vigilant in protecting a witness against vexatious and abusive questioning…

See also *Brownell v. Brownell* (1909), 42 S.C.R. 368 (relevancy); *R. v. Prince* (1945), 85 C.C.C. 97 (B.C.C.A.) (harassment); and *R. v. Daly* (1992), 16 W.C.B. (2d) 622 (Ont. C.A.) (sarcasm).

The answer to cross-examination on a collateral matter (that is, a matter that is not relevant to a fact in issue) is final and cannot be contradicted by other witnesses; you are stuck with the answer given by the witness (*R. v. Shewfelt* (1972), 6 C.C.C. (2d) 304 (B.C.C.A.)). Cross-examination on matters related to the credibility of the witness is permitted, but will be considered collateral if not relevant to a matter in issue at the trial (*R. v. Jackson and Woods* (1974), 20 C.C.C. (2d) 113 (Ont. H.C.) and *Dyck*). Where the cross-examination on credibility is directly relevant to a trial issue, answers given by the witness are not final and can be contradicted by other evidence (*R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.); *R. v. Jackson*, [1985] B.C.D. Crim. Conv. 5380-01 (C.A.)).

It is improper to ask one witness to comment on the veracity of another witness, for example, by asking a witness to agree that another witness must be lying because of inconsistent testimony (*R. v. Brown and Murphy* (1982), 1 C.C.C. (3d) 107 (Alta. C.A.), aff'd (1985), 21 C.C.C. (3d) 477 (S.C.C.); *R. v. Ellard*, 2003 BCCA 38).

A witness may be cross-examined on the witness's own criminal record because the record is relevant in assessing credibility. A non-accused witness who has a record may also be cross-examined regarding details of the offences for which they were convicted. An accused person as a witness may be cross-examined on their own criminal record pursuant to s. 12 of the *Canada Evidence Act*, but may not be cross-examined on the details of the offences (*R. v. Menard* (1996), 108 C.C.C. (3d) 424 (Ont. C.A.), aff'd (1998), 125 C.C.C. (3d) 416 (S.C.C.); and *R. v. Bricker* (1994), 90 C.C.C. (3d) 268 (Ont. C.A.)).

[§4.15] Re-Examination

The right to re-examine occurs when new matters have arisen on cross-examination. The purpose of re-examination is to qualify or explain fresh evidence or variations on evidence elicited on cross-examination. New topics cannot be introduced, since counsel should have elicited any relevant evidence on direct examination. Since counsel is examining their own witness, counsel cannot ask leading questions; this is a very common mistake and opposing counsel should be alert for leading questions in re-examination.

Frequently, cross-examination will bring out an aspect of direct evidence that a clever cross-examiner will leave unfinished. The re-examiner is prevented from touching

on it when the cross-examiner says "it arose on direct and you should have dealt with it there."

Counsel may not discuss the case with their witness between cross-examination and re-examination unless opposing counsel consents or the court grants leave. Witness interviews may be permitted to clear up honest mistakes, ambiguities, or to clarify the points left obscure by cross-examination. While there are some situations in which communication may not be appropriate, the court will readily grant leave in most cases. See *R. v. Montgomery* (1998), 126 C.C.C. (3d) 251 (B.C.S.C.); "When May Counsel Talk To A Witness During Trial? – The Unwritten Rules" by Brian McLaughlin in (1989) 47 *The Advocate* 237 and "Speaking to Your Witness" in (1990) 48 *The Advocate* 565.

[§4.16] No-Evidence Motion

At the close of the Crown's case, the defence has the option to make a motion of no evidence. The basis of such a motion is that the Crown has led no evidence to prove one or more essential elements of the offence. If a jury is sitting, the motion is called a motion for a directed verdict. A successful no-evidence or directed verdict motion will end with an order of acquittal. If unsuccessful, the trial continues, and the accused is put to their election on the calling of evidence.

The defence can make a no-evidence motion, yet reserve its right to call evidence if the motion fails. The defence must make it clear that it is reserving this right to avoid the judge ruling not just on the motion, but on the whole case (*R. v. Kavanagh* (1972), 8 C.C.C. (2d) 296 (Ont. C.A.)).

1. The Rule

For such a motion to succeed there must be no evidence on which a jury, properly instructed and acting reasonably, could have convicted the accused.

This is a question of law. The issue is the existence or non-existence of evidence on a crucial element. The judge is not entitled to weigh or evaluate the evidence and must assume that a jury would have accepted all the evidence as tendered by the Crown's witnesses. Neither is the judge entitled at this point to assess the credibility of witnesses nor to choose which parts of their evidence to accept or reject (*R. v. Morabito* (1949), 93 C.C.C. 251 (S.C.C.) and *U.S.A. v. Sheppard*).

If a no-evidence motion is successful, the trial judge will acquit (when sitting without a jury) or, in a jury trial, withdraw the case from the jury and enter an acquittal (*R. v. Rowbotham* (1994), 90 C.C.C. (3d) 449).

2. Circumstantial Evidence

At trial, the jury will be instructed that before basing a guilty verdict on circumstantial evidence, they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the evidence or absence of evidence. As this is a question of weight to be attached to the evidence, a matter solely within the purview of the trier of fact, a no-evidence motion *must* fail when it is open to the trier of fact to infer guilt from a body of circumstantial evidence (*R. v. Cooper* (1997), 34 C.C.C. (2d) 18 (S.C.C.); *R. v. Monteleone* (1982), 67 C.C.C. (2d) 489 (Ont. C.A.)).

[§4.17] Insufficient Evidence Motion

An insufficient evidence motion is an argument at the end of the Crown's case, on the evidence as a whole. This time, the judge does weigh and evaluate the evidence and assess the credibility of the witnesses. The judge draws proper inferences from proven facts and rules as to whether the Crown has proved its case beyond a reasonable doubt. It is defence counsel's final argument to the judge, since the submission is not made until defence counsel has unequivocally elected to call no evidence for the defence.

The defence can first make a no-evidence motion and, if this fails, elect to call no evidence in the defence's own case and pursue an argument of insufficient evidence. The most important factor is that before electing to bring an insufficient evidence motion, the defence has first elected to call no evidence; if the motion fails, there will be a guilty verdict, and that is the end of the matter.

[§4.18] Defence Case

When the defence elects to call evidence, counsel is entitled to make an opening statement to the court (see s. 651(2)). As in the case of Crown openings, the defence opening is a unique opportunity to outline the case for the defence. The same general considerations apply as in the Crown's opening. Defence counsel should only open in detail if counsel is confident that the defence witnesses, including the accused, will deliver what is promised.

In a jury trial, any issue regarding the admissibility of evidence should be addressed before the trial judge and in the absence of the jury, before the evidence is referred to in the opening address. It is both embarrassing and potentially disastrous for the client if evidence is referred to in an opening address but is not led before the jury because of a valid objection raised by the Crown, or if heard, becomes subject to a special instruction from the trial judge that the evidence is not to be considered in deliberations.

In Canada, there is no rule as to the order in which witnesses for the defence can be called. The accused or defence counsel is completely free to decide whether the accused will testify and if so, in what order or sequence the accused will be called in relation to other defence witnesses. However, if a witness (including an accused) is in court while other witnesses testify, the trier of fact can give that evidence less weight given that it might have been tainted by exposure to other testimony.

1. Whether to Call Evidence

The defence must determine whether to call the accused or other witnesses at all. Some factors to consider include the existence of a criminal record (which may be put to the accused on cross-examination by the Crown or on direct by defence counsel), and the impression the accused is likely to have on the court (that is, does the accused appear to be a credible witness with a valid defence, or is the accused inarticulate or unimpressive).

The accused may be convicted on a *prima facie* case and runs this risk if no evidence is called to rebut it. However, the point at which the accused should explain "can only be the point where the prosecution's evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt" (*R. v. Johnson* (1993), 79 C.C.C. (3d) 42 (Ont. C.A.)).

Often, defence counsel will not know until the close of the Crown's case whether to call evidence. Defence counsel may be able to rely on weaknesses in the Crown's case and its failure to prove essential elements on its own direct examination. Defence counsel should not call a defence if they do not need to; otherwise counsel takes the risk of damaging the case for the defence. Request a brief adjournment at the close of the Crown's case. Analyze the evidence presented so far to see if the Crown has made out its case. This is a critical and difficult decision in both complex and simple cases.

2. Presenting the Evidence

Again, counsel should try to present the evidence as effectively and persuasively as possible. This means preparing it. Have a theory to which all the questions in direct and cross-examination will be directed. Get the story from the witnesses and prepare them as to dates, times, and the order in which certain areas will be dealt with. Instruct them to listen to the questions and to answer briefly and simply. Ask them to speak loudly.

Try to present the evidence in a logical order (often chronological) and make every effort to find out before trial the answers the witnesses will give to any question asked either in direct or cross-examination. This may prevent the disastrous result of having the client convicted through the client's own mouth or those of their own witnesses.

[§4.19] Cross-Examination of the Accused

The same basic considerations apply as in the Crown's case. Counsel acting for a co-accused must cross-examine a defence witness before the prosecutor cross-examines (*R. v. Woods and May* (1853), 6 Cox C.C. 224 (C.C.)).

1. Scope of Cross-Examination

Accused persons cannot be compelled to testify, but if they give evidence, they must bear the consequences.

In the United States, a witness may decline to answer a question on the grounds that it may incriminate them. In Canada, where we have a "use immunity model," an accused must answer incriminating questions but restrictions are imposed on use of such testimony in future proceedings. An accused witness may invoke the protection of s. 5 of the *Canada Evidence Act*, in which case, the answer given shall not be "used or admissible in evidence against him" in another proceeding. The accused witness may rely also on s. 13 of the *Charter of Rights and Freedoms*. The *Charter* protection is broader and largely makes the s. 5 *Canada Evidence Act* protection redundant.

While the witness must claim the protection of s. 5, s. 13 will automatically protect the witness and prevent the use of previous testimony for the purpose of incrimination at any subsequent proceeding.

Section 13 reads as follows:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

While the Crown cannot simply produce a transcript of the evidence of an accused from one trial as part of its evidence in chief to prove criminality at a second trial, the Crown may put to an accused their prior inconsistent statements to impeach credibility. If this is done, the statement is not tendered as evidence to establish the proof of its contents, but is tendered for the purpose of revealing a contradiction between what the accused is saying now and what the accused said on a previous occasion. However, cross-examination on prior inconsistent testimony aimed solely at incriminating the accused will not be permitted (*R. v. Nedelcu*, 2012 SCC 59).

The accused can be cross-examined as to prior contradictory statements in the same way as other witnesses. If the Crown seeks to cross-examine an ac-

cused on a statement made to a person in authority, that statement must first have been subject to a *voir dire* and ruled voluntary and admissible (see Chapter 5, §5.04—Statements of the Accused). However, if there is more than one accused, the trial judge has broad discretion to permit cross-examination of one accused by counsel for a co-accused on statements made to the police, without the necessity of a *voir dire* and without showing the statement to be voluntary (*R. v. Ma, Ho and Lai*).

Generally, the Crown cannot adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the Information in order to imply that the accused is a person likely to have committed the offence they are being tried for, or is not credible (*R. v. Davison, De Rosie and MacArthur* (1974), 20 C.C.C. (2d) 424 at 444 (Ont. C.A.), adopted in *R. v. Morris* (1978), 6 C.R. (3d) 36 at 54-55 (S.C.C.)).

There may be cases where Crown counsel can argue that conduct outside the four corners of the indictment is relevant and probative under the "similar fact" rule of evidence. A *voir dire* is required to determine what, if any, evidence outside the offence charged may be lead in chief by the Crown, which in turn determines the availability of that evidence for cross-examination of the accused (if the accused elects to testify) (*R. v. B.(C.R.)* (1990), 55 C.C.C. (3d) 1 (S.C.C.)).

2. Previous Convictions

Any witness, including the accused, may be cross-examined as to previous convictions, but this is relevant only to the credibility of the witness (*Canada Evidence Act*, s. 12(1) and *R. v. Burgar*, 2010 ABCA 318). Proof of previous convictions by admission of the accused or otherwise is not proof that the accused committed the offence for which they are being tried.

Section 12 allows admission only of prior convictions and not prior charges (*R. v. Koufis* (1941), 76 C.C.C. 161 (S.C.C.); *R. v. McLaughlan* (1974), 20 C.C.C. (2d) 59 (Ont. C.A.)).

The accused may also be examined in direct regarding their prior criminal record and this does not thereby put their character in issue if done for tactical reasons (if it is admitted). But if the criminal record is denied, this opens up character under s. 666 (*Morris*).

In addition to having specific convictions put to them, the accused may be asked simply: Do you have a criminal record? (*R. v. Clark* (1977), 41 C.C.C. (2d) 561 (B.C.C.A.)). Such cross-examination also permits questions concerning a juvenile "record": *Morris*. Discharges are not convictions that can be put to the accused (*R. v. Danson* (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)).

Crown counsel will sometimes agree not to put highly prejudicial past convictions to an accused on cross-examination.

The trial judge has a discretion to prevent cross-examination on criminal records (*R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.)). Since *Corbett*, the courts have been somewhat inconsistent in their exercise of this discretion. For many years following *Corbett*, trial judges were generally prepared to prohibit Crown counsel from cross-examining on offences which, unlike theft and fraud and the like, lack a "dishonesty" component. For example, the trial court might prohibit cross-examination regarding prior convictions for offences involving violence, particularly where the indictment before the court alleged similar conduct. Our courts have moved away from that approach, ruling increasingly often that cross-examination on any sort of prior criminal history is fair game. The BC Court of Appeal endorsed this approach in *R. v. Fengstad*, 1989 CanLII 5168 (B.C.C.A.).

If permitted, and if not already part of the accused's evidence in chief, the Crown in cross-examination will put the accused's criminal record to the accused. A jury will be instructed that they may consider the criminal record of the accused solely and exclusively for the purpose of determining the degree of credibility which might be attached to the accused evidence. They will also be instructed that a criminal record is not evidence that the accused is more likely to have committed criminal acts in general, or the particular offences in the indictment before the court (*R. v. Leforte* (1961), 130 C.C.C. 318 (B.C.C.A.); *R. v. Williams and Irvine*, [1969] 3 C.C.C. 108 (Ont. C.A.)).

When providing proof of previous convictions, evidence of the date, location, offence and sentence imposed are the only admissible aspects of the criminal record of the accused. When the accused is being cross-examined, the circumstances of past offences are not admissible (*R. v. Bricker* (1994), 90 C.C.C. (3d) 268 (Ont. C.A.)).

[§4.20] Defence Re-Examination

The considerations are the same as those in re-examination by the Crown (see §4.15). The defence will try to weaken and qualify any damaging new matters that have arisen on cross-examination by the Crown.

[§4.21] Rebuttal or Evidence in Reply

Rebuttal evidence is evidence tendered by the Crown. It happens after the close of the case for the defence and it is used to rebut or contradict evidence adduced by the defence. It should not be confused with re-opening the Crown's case, which may be permitted after the Crown's case is closed. See e.g. *R. v. Robillard* (1978), 41 C.C.C. (2d) 1 (S.C.C.); *R. v. M.P.B.* (1994), 89 C.C.C. (3d) 289 (S.C.C.) and *R. v. G. (S.G.)* (1997), 116 C.C.C. (3d) 193 (S.C.C.), on the latitude given to the Crown to re-open its case to lead evidence that was omitted due to inadvertence, or even newly-discovered evidence that is material and probative.

The rebuttal cannot merely confirm or restate the Crown's case, but is strictly confined to rebutting or answering the evidence adduced in the case for the defence (*R. v. John* (1985), 23 C.C.C. (3d) 326 (S.C.C.)).

1. When Rebuttal is Proper

The decision to let the Crown call rebuttal evidence is within the discretion of the judge. The Crown will apply to call such evidence when, for example, the accused puts forward a defence that takes the Crown by surprise. The Crown may foresee a certain defence without being able to assume it will in fact emerge (*R. v. Coombs* (1977), 35 C.C.C. (2d) 85 (B.C.C.A.)). The general rule is that rebuttal evidence should not be allowed when it was both in the possession of the Crown and relevant to the Crown's case in chief. What constitutes proper Crown rebuttal was authoritatively reviewed by the Supreme Court of Canada in *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 390:

> The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings, in a criminal case, the indictment and any particulars … This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence—as much as it deemed necessary at the outset—then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.
>
> The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters that merely confirm or reinforce earlier evidence adduced in the Crown's case, which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

Also see the Supreme Court of Canada's treatment of this rule in *R. v. Aalders* (1993), 82 C.C.C. (3d) 215, in which Crown counsel was entitled to lead rebuttal evidence relevant to a robbery, which was itself determined to be an integral and essential aspect of a case of planned and pre-meditated first-degree murder.

Although rebuttal on collateral matters is generally not allowed, keep statutory provisions allowing rebuttal in mind. For example, s. 11 of the *Canada Evidence Act* allows the proof of a previous inconsistent statement relative to the subject matter of the case where such a statement is not admitted in cross-examination, and s. 12 of the Act allows the proof of convictions that are denied by the witness.

2. Examples of Rebuttal

Examples of subject matter for rebuttal include:

- self-defence or provocation—the Crown cannot assume the accused will be called to give such evidence;
- alibi—note that the Crown may only attack the material parts of the alibi (*R. v. Latour* (1976), 33 C.C.C. (2d) 377 (S.C.C.));
- drunkenness or mental disorder;
- character of the accused put in issue by the accused—the Crown can rebut evidence of good character by evidence of bad character (*R. v. McFadden* (1981), 28 C.R. (3d) 33 (B.C.C.A.)); and
- defence evidence led to impeach the credibility of a Crown witness. The Crown may call rebuttal to rehabilitate the witness (*Toohey v. Metropolitan Police Commissioner* (1964), 49 Cr. App. R. 148 (H.L.)).

[§4.22] Surrebuttal

If the Crown's rebuttal evidence is new evidence, the defence may have the opportunity to call surrebuttal evidence. For example, the Crown may introduce evidence denying the position advanced by the defence or establishing an alternate explanation for the accused's conduct. If the defence did not have the opportunity to deal

with that evidence in its own case, then the defence may be entitled to call surrebuttal evidence.

The right of an accused to fully answer the case against them also applies to rebuttal evidence, so the rules regarding the permissible scope of surrebuttal will be applied liberally in favour of the accused (see *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 (C.A.)).

Calling rebuttal and surrebuttal evidence is rare.

[§4.23] Addresses of Counsel

1. Order

The accused or the accused's counsel is entitled to present argument to the judge last if the defence has called no witnesses to give evidence (ss. 650(3) and 651(3)). However, if the defence has called witnesses, or if any witnesses are called on behalf of one of the accused in a joint trial, then the defence presents argument first (s. 651(3) and (4)).

The constitutional validity of those sections in the *Criminal Code* that mandate the order of addresses where defence evidence is called has been challenged. The Supreme Court of Canada determined in *R. v. Rose*, [1998] 3 S.C.R. 262, that these sections of the *Criminal Code* did not infringe the *Charter*. The court also recognized that "in the clearest of cases" (that is, almost never), there may be a limited right of reply following Crown counsel's address to the jury. The court held that the right of reply would arise when some part of the Crown's address could not adequately be dealt with in the judge's charge, and to deny a reply would impact upon the defendant's ability to make full answer and defence or prejudice the defendant's right to a fair trial. The court offered as examples: a Crown address which advanced a significant change in the Crown's theory of liability against an accused which could not fairly have been anticipated by the defence; or a situation in which the Crown has simply misled the defence as to its theory of liability.

2. Content

Counsel should plan an address, make notes during the trial, and think about a logical order for presentation.

Counsel may urge the judge to find the existence of disputed facts if they are capable of rational inference from the existence of proven facts and not merely speculation. All references to the evidence must be absolutely accurate.

Counsel should be prepared to argue the charges on the Information. On included offences counsel should be prepared to argue also that some of the charges overlap and that conviction on all counts is inappropriate. For the general principles, see *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.); *R. v. Rinnie* (1970), 3 C.C.C. 218 (Alta. S.C. App. Div.); *R. v. Fergusson* (1961), 132 C.C.C. 112 (S.C.C.); *R. v. Manuel* (1960), 128 C.C.C. 383 (B.C.C.A.); and *R. v. Luckett* (1980), 50 C.C.C. (2d) 489 (S.C.C.).

3. Crown

The Crown will stress the evidence that establishes the proof of each essential element of its case beyond a reasonable doubt, and then deal with any defence raised or anticipated.

A Crown closing address is an opportunity to persuade the trier of fact why they should come to the conclusion they want the trier to reach. In a jury trial, the closing address will highlight the important evidence that was heard and how it fits within the Crown's theory of the case. It will fairly assess the evidence of the witnesses, including the accused, and provide the jury a pathway to the conclusion they wish the jury to make, including any inferences they need to draw from the evidence. A closing in a jury case does not reference case authorities as it is for the trial judge to instruct the jury on the law.

In a judge-alone trial, the Crown may provide the court with the legal framework including case authorities, a summary of the evidence and a persuasive argument on why the court should come to the conclusion it wishes the court to make. If the evidence is weak or does not support a conviction, the Crown should highlight this evidence and either urge the trier of fact not to accept it, or, if necessary, even invite an acquittal.

Where an accused testifies in his defence, the Crown should be prepared to address how the evidence should be assessed in accordance with the principles found in *R. v. W.(D).*, [1991] 1 SCR 742.

Regardless of whether the trial proceeds by jury or judge alone, the Crown's closing address is an opportunity for the Crown to firmly, but fairly, advocate and persuade the trier of fact and where appropriate, seek a conviction.

4. Defence

Defence counsel will try to emphasize weaknesses in the case for the Crown and stress the evidence for the defence.

The defence should first explain the theory of the defence simply, and then expand the theory using a thorough analysis of the evidence or absence of evidence which defence counsel argues should leave the jury in a state of reasonable doubt.

Defence counsel should point out inconsistencies and contradictions in the evidence and attack the credibility of the witnesses (where reasonable to do so). Defence counsel should examine each item of adverse evidence to see if counsel can draw some favourable argument from it. Counsel should try to explain adverse facts and answer arguments that counsel anticipates from the other side. If there is not much in the way of affirmative evidence as a defence, base defence argument upon what the Crown has failed to prove.

At a trial before a judge alone, defence counsel should have copies of any authorities to be cited or relied upon for the judge and the Crown. Defence counsel should formulate the general principles of law that the defence wants the court to accept and offer the cases in support.

Be selective, highlighting the main points, and speaking simply yet with conviction.

[§4.24] Judge's Charge on a Jury Trial

Once both counsel have completed their addresses, the judge will charge the jury. When charging the jury, the judge will probably recollect relevant facts. The judge will also deal with the theory of the Crown and with the theory of the defence. The judge will then proceed to deal with the law as it relates to the charge before the jury.

It is important to thoroughly prepare for the charge to the jury ahead of time. It has become increasingly common for trial judges to give counsel a draft copy of the charge before the judge delivers it to the jury. This is counsel's opportunity to make suggestions regarding the trial judge's treatment of both the evidence and the law. Even if the judge is not using a written draft charge, it is common for the judge to seek the input and submissions from counsel on particular issues before the charge is given to the jury.

Counsel should be particularly careful to follow the judge's charge so that they can make the judge aware of any errors or omissions concerning the law that the judge has set out to the jury.

Once the judge completes the charge, the jury will be excused and the judge will then invite counsel to comment upon the charge. At this time, counsel should advise the judge of any errors in the charge that counsel feels may have occurred. The judge may invite the jury back and correct the charge, or the judge may feel that this is not appropriate, in which case the jury will be allowed to continue with its deliberations. The judge's charge to the jury has been described as also being the judge's address to the Court of Appeal.

It is important to remember that there are several types of errors that should be brought to the judge's attention for correction, including the following:

- errors that are unfavourable to the accused and that, when corrected, will make acquittal more likely (failure to seek a correction may weigh against the accused on an appeal); and
- errors that are favourable to the accused and that, if uncorrected, may allow a Crown appeal (whether the defence should raise such errors will depend on their nature).

The nature of the jury charge differs with the circumstances of each individual case, but the following is a list of points that the judge will almost inevitably deal with in the charge to the jury:

- facts for the jury alone to decide upon;
- law for the judge alone to set down;
- presumption of innocence;
- onus of proof on Crown;
- proof beyond a reasonable doubt;
- what the evidence consists of;
- what credibility means;
- accept all or part of a witness's evidence;
- the law with respect to the offence;
- verdicts open to the jury;
- verdicts must be unanimous;
- theory of the Crown;
- theory of the defence;
- included offences; and
- particular defences in issue.

This list is not exhaustive. Counsel should create a similar list and check off the various points as the judge deals with them in the charge.

CLE's loose-leaf manual *Canadian Criminal Jury Instructions* (CRIMJI), by Professor G.A. Ferguson, Madam Justice Elizabeth Bennett, and Mr. Justice Michael Dambrot, is the preferred resource in British Columbia. It includes standard jury charges and annotations. The Canadian Judicial Council's model jury instructions (available online) and *Watt's Manual of Criminal Jury Instructions* are also useful.

During the deliberations of the jury, you may find that the jury requests further instructions from the judge. The request may be about a point of law or it may be in the nature of a request to clarify some of the evidence. On occasion you may find that a portion of a person's evidence is read to the jury by the court reporter. If there is some dispute as to the propriety of the jury receiving

certain information or instruction, counsel may be called upon to argue the correct course of action to be followed by the judge. For this reason, it is advisable to remain clear-headed during the occasionally lengthy jury deliberations.

Where a question is posed by the jury, it is critical that the trial judge is responsive to the question. A failure to adequately respond to the question may form the basis of an appeal. While the ultimate responsibility to ensure the jury receives the assistance it seeks rests with the trial judge, as counsel you should be prepared to assist the court to provide that assistance.

Chapter 5

Evidence[1]

Detailed knowledge of the law of evidence is essential in criminal law. This chapter provides an overview. For further discussion of topics covered by this chapter, refer to the texts listed in Chapter 1.

[§5.01] Burden and Standard of Proof

1. General Rule

The Crown has the primary or "legal" burden of proof throughout the trial and must prove all essential elements of the offence, including the *actus reus* and the *mens rea* of the offence, beyond a reasonable doubt. The accused is presumed innocent until the Crown proves the accused's guilt to the standard of "proof beyond a reasonable doubt" (*Woolmington v. D.P.P.*, [1935] A.C. 462; *Canadian Charter of Rights and Freedoms*, s. 11(d)). A "reasonable doubt" is a doubt arising from the evidence or the lack of evidence, and is closer to a certainty than to proof on the balance of probabilities (*R. v. Lifchus*, [1997] 3 S.C.R 320; *R. v. Starr*, [2000] 2 S.C.R. 144).

In deciding whether the Crown has proven guilt beyond a reasonable doubt, a trier of fact must look at the evidence *as a whole*, rather than deciding whether each individual piece of evidence has been proven beyond a reasonable doubt. The standard of proof beyond a reasonable doubt is *not* to be applied to individual pieces of evidence (*R. v. Morin*, [1988] 2 S.C.R. 345). Since the Crown bears the burden of proof beyond a reasonable doubt, a trier of fact need not accept a given piece of evidence as true in order for that evidence to raise a reasonable doubt (*R. v. Miller* (1991), 68 C.C.C. (3d) 517 (Ont. C.A.). In a case where the accused testifies and denies their guilt, this principle means that the trier of fact need not accept the accused's (exculpatory) testimony to acquit the accused.

The Supreme Court of Canada in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 held that, when an accused testifies, a trial judge should instruct a jury (or the judge, in a judge-alone trial), as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The British Columbia Court of Appeal supplemented this model instruction in *Regina v. C.W.H.* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.):

> If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

In *R. v. J.H.S.*, 2008 SCC 30, the Supreme Court reinterpreted the test from *R. v. W.(D.)*, holding that the three steps are not a "magic incantation" requiring specific wording. However, a judge or jury must understand these key principles:

- an accused's lack of credibility does not prove the accused's guilt;
- one may accept some of an accused's testimony while disbelieving other parts;
- one must consider *all* of the evidence in deciding whether there is any reasonable doubt; and
- any reasonable doubt must be resolved in favour of the accused.

Although the Crown always bears the burden of proof beyond a reasonable doubt, when the accused advances a so-called "affirmative" defence, such as the defence of self-defence, provocation or intoxication, the accused bears an "evidentiary" burden of pointing to some evidence that has been adduced at trial, either in the Crown's case in chief or in the defence case, that gives an air of reality to that particular defence. If there is no air of reality to the defence, the accused cannot rely on it. If the evidence supports an air of reality to the defence, the burden shifts back to the Crown to disprove that defence on the standard of proof beyond a reasonable doubt (*R. v. Cinous*; 2002 SCC 29; *R. v. Fontaine*, 2004 SCC 27).

2. Statutory Presumptions That Shift the Burden of Proof

The *Criminal Code* includes certain statutory presumptions that shift the burden of proving or disproving a particular fact from the Crown to the accused. Some such presumptions only require the accused to point to "some" evidence, either in the Crown case or adduced by the accused, in order to raise a reasonable doubt as to the existence (or ab-

[1] **Louise Kenworthy, KC**, Crown Counsel, BC Prosecution Service, kindly updated this chapter in January 2024. Previously revised by Micah Rankin (2021); Joseph J. Blazina (2016–2019); Marian K. Brown (2004–2010); S. David Frankel (1996–2001); Geoffrey Barrow (1995); and Michael Klein (1994).

sence) of the presumed fact. These presumptions are said to shift an "evidentiary" or "secondary" burden of proof onto the accused.

The *Criminal Code* also includes other presumptions that shift the "primary" or "legal" burden of proof to the accused. These are often referred to as "reverse onus" provisions. The trier of fact is required to apply the presumption unless the accused disproves it on a balance of probabilities. An example of this type of presumption is found in s. 320.35 of the *Criminal Code*:

> In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

In some cases, a single *Criminal Code* section may contain both types of presumptions. One example of this type of provision is s. 349, which defines the offence of being unlawfully in a dwelling house. Section 349(1) requires an accused to establish (on a balance of probabilities) the existence of a "lawful excuse" to be in the dwelling house, and s. 349(2) provides that in the absence of "any evidence to the contrary", the absence of such a lawful excuse is proof that the accused entered the dwelling house with the intent to commit an indictable offence therein.

Some of these statutory presumptions have been challenged under s. 11(d) of the *Charter*, which enshrines the right to be presumed innocent until proven guilty. In *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.), the court held that the *Charter* requires, at a minimum, that an individual must be proven guilty beyond a reasonable doubt, and the state must bear that burden of proof. In *R. v. Downey*, [1992] 2 S.C.R. 10, the court held that a statutory presumption will not infringe the *Charter* only where proof of a basic fact included in the presumption leads "inexorably" to proof of the presumed fact.

In some cases, reverse onus provisions were found to infringe s. 11(d) of the *Charter* but were upheld as being demonstrably justified under s. 1 of the *Charter*. In *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193, the Supreme Court of Canada upheld the requirement that an accused prove the defence of what was then called "insanity" (now, "not criminally responsible by reason of mental disorder") on a balance of probabilities. Similar reasoning was applied in *R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.) with regard to the defence of automatism.

It should be noted that the recent amendments to the *Criminal Code* abolished several of the remaining statutory presumptions, many of which were of limited application in any event.

3. Inferences From Evidence

A judge or jury may make logical inferences from evidence, especially in cases of circumstantial evidence. For instance, possession of property or drugs can be inferred from their presence in a residence over which the accused has exclusive or primary care and control (*R. v. Fisher*, 2005 BCCA 444). Similarly, an accused may be convicted of a break and enter where the accused's fingerprints are found on an item inside the premises (*R. v. O'Neill*, [1996] 71 B.C.A.C. 295).

Other common evidentiary inferences include:

(a) The "common sense inference" that people intend the natural consequences of their actions (*Regina v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.)) (But note that any evidence that creates a reasonable doubt about the accused's actual intent will displace this inference.); and

(b) The "doctrine of recent possession," which provides that on a charge of possession of stolen property, the unexplained possession of recently-stolen goods permits an inference that the accused knew that the goods were stolen (*R. v. Kowlyk* [1988], 2 S.C.R. 59). This inference is not mandatory and cannot be drawn if the accused gives an explanation for possession of the goods which could reasonably be true.

Where the accused does not testify, the accused's *res gestae* statements to other witnesses may provide an explanation that will displace the inference (*R. v. Crossley* (1997), 117 C.C.C. (3d) 533 (B.C.C.A.)).

[§5.02] Eyewitness Identification of the Accused

Highly-publicized cases of wrongful convictions have resulted in close scrutiny of all identification evidence, and judges now carefully caution themselves, or the jury, regarding identification of the accused (*R. v. Sophonow (No. 2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.), leave to appeal refused (1986), 54 C.R. (3d) xxvii (S.C.C.)).

A prudent Crown will warn witnesses to be fair and cautious with respect to identification of the accused. Where identity is in issue, competent defence counsel will often find much to cross-examine those witnesses about, including the length of time they had to make the observation, the quality of the lighting or the witness's eyesight,

the presence of objects or persons that interfered with the witness's observations, and the level of detail in the identification itself. In many cases, identification of the accused does not depend solely upon eyewitnesses, but rather depends upon a combination of circumstantial evidence, eyewitness evidence, and sometimes forensic evidence. Normally, there are discrepancies among eyewitness descriptions, and sometimes there are irregularities in police procedure. Counsel for the defence need to bring these matters to the attention of the judge or jury, whose responsibility it is to carefully consider all the evidence, including its flaws (see *R. v. Whitford*, 2006 BCCA 32).

1. Descriptions of the Accused

A witness's identification of an accused in the courtroom, by itself, is usually accorded little evidentiary weight (see the reasons of Madam Justice Rowles, in dissent, in *R. v. Reitsma* (1997), 97 B.C.A.C. 203, adopted at [1998] 1 S.C.R. 769). To have evidentiary weight, in-court recognition should be supported by the witness's testimony describing what the witness remembers about details of the accused's appearance when first seen (*R. v. McKay* (1996), 61 W.W.R. 528 (B.C.C.A.); *R. v. Williams* (1982), 66 C.C.C. (2d) 231 (Ont. C.A.)). The "honest but mistaken" witness is not uncommon in identification cases, as the witness's ability to observe detail is always dependent upon distance, angle, lighting, duration, and other factors which should be explored in examination and cross-examination (*R. v. Gordon*, [2002] O.J. No. 932 (Ont. S.C.J.)). While a witness's testimony identifying an accused may be challenged if the witness has given different descriptions at different times, the trier of fact may only rely on prior descriptions given by the witness for the limited purpose of assessing the reliability and credibility of the witness's testimony. Evidence of the witness's prior descriptions is only admissible for the truth of its substantive contents if it satisfies the "principled approach" to the rule against hearsay or is admissible as past recollection recorded (*R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Campbell*, 2006 BCCA 109).

The weaknesses and dangers inherent in identification evidence are most pronounced where a witness is asked to identify a person previously unknown to the witness whom the witness saw only briefly. Where the witness purports to recognize someone whom the witness has known quite well for some time prior to the sighting, the issue is not really one of identification—the issue is whether the circumstances at the time of the offence were such that the witness could reliably recognize the accused (*R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R. 461).

2. Police "Line-ups" and Photo Packs

Physical "line-ups" of suspects are rare now, but a suspect is entitled to consult a lawyer before being presented for viewing by a witness (*R. v. Leclair and Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C)). Refusal to participate in a line-up must not be regarded as evidence of guilt (*R. v. Shortreed* (1990), 54 C.C.C. (3d) 292 (Ont. C.A.)). An unfair line-up, where the suspect is presented alone or with dissimilar persons, will greatly weaken the identification.

More commonly, witnesses are shown a photo pack or series of photographs, which counsel should scrutinize for fairness in the choice of photographs and the manner in which police presented them to a witness. Although the report on the Sophonow Inquiry recommended certain specific procedures for police officers who show photo packs to witnesses, those recommendations do not have the force of law, and photo identification is not excluded if those procedures were not followed. Instead, the weight of photo identification depends upon the fairness of the procedure used in the particular case (*R. v. Doyle*, 2007 BCCA 587).

Where a witness has seen or been shown a photograph of the accused prior to court and was advised or led to believe that the person in that photograph is the person who committed the offence, this may taint their subsequent in-court identification of the accused as the offender. Similarly, if the witness has seen images of the accused in media, that too may taint their courtroom identification evidence (*R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (B.C.C.A.); *R. v. Smierciak*, (1946), 87 C.C.C. 175 (Ont. C.A.)).

Even if a witness at trial no longer recognizes the accused, the Crown can lead evidence that the witness previously identified the accused's photograph, provided that the witness confirms in court that they previously identified the photograph (*Tat*).

3. Accused Sitting in Body of Courtroom

When identification of the accused is in issue, defence counsel may apply to the judge to permit the accused to sit in the public area of the courtroom, so that a witness will not make any assumption about the offender's identity based on where the accused is sitting (*R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327 (S.C.C.)). Of course, seating an accused in an otherwise empty courtroom where only counsel and the judge are present does little to advance the objective of an impartial identification.

4. Video Evidence of an Offence

Photographs and video recordings may be tendered as exhibits upon testimony by a witness (not necessarily the photographer) who can say that the imag-

es accurately depict what they purport to show (*R. v. Bannister* (1936), 66 C.C.C. 38 (N.B.S.C. App. Div.)). The judge or jury may recognize the accused in a video recording of the offence, if the recording is of sufficient clarity and duration (*R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.)). Normally, it is for the trier of fact to decide if the video or photo evidence sufficiently identifies an accused. In some cases, however, a witness who knows the accused well may be called upon to identify the accused (*R. v. Leaney* [1989] 2 S.C.R. 393). The admissibility of such recognition evidence must be determined in a *voir dire.* The purpose of the *voir dire* is to determine whether the recognition witnesses are in a better position than the trial judge, as a result of their prior acquaintance with the accused, to determine whether the person depicted in the video or photograph is the accused (*R. v. Field*, 2018 BCCA 253). The judge must permit counsel to tender any other evidence about the identification or the video recording, and to make submissions on any limitations of the video images (*R. v. T.A.K.*, 2006 BCCA 105).

[§5.03] *Voir Dire*

A *voir dire* is a procedure in which the trial proper is suspended, and the court embarks upon a trial within a trial to determine the admissibility of a certain item of evidence. Any type of evidence that requires a ruling as to admissibility may be the subject of a *voir dire.* Some examples are the admissibility of statements of the accused; the admissibility of hearsay; and the admissibility of evidence obtained in a search that is alleged to violate the *Charter.*

Applications in criminal proceedings (relating to admissibility of evidence or otherwise) can only be summarily dismissed without the calling of evidence where they are "manifestly frivolous" (*R. v. Haevischer*, 2023 SCC 11). Given the high bar for the dismissal of applications, most applications in criminal cases will involve the calling of evidence on a *voir dire*.

Evidence on a *voir dire* may, but will not necessarily, consist of the examination and cross-examination of witnesses, including the accused. If the accused testifies on a *voir dire*, *their* evidence is not part of the trial, and the accused need not testify later during the trial. Exhibits such as an expert's report or the recorded statements of the accused are entered as exhibits on the *voir dire*, separate from exhibits that are evidence on the trial.

To promote efficiency, application judges in criminal cases have broad discretion to receive information in a form in which it would not be admissible at trial, where the credibility and reliability of the witness' evidence is of little or no relevance to the outcome of the application. Admissibility *voir dires* are frequently conducted on the basis of statements of counsel, summaries of evidence, preliminary inquiry records, and summaries of proposed hearsay (*R. v. Aragon*, 2022 ONCA 244). When making or responding to an application in a criminal proceeding, counsel should turn their mind to whether *viva voce* evidence is required or whether there is some more efficient way of putting evidence before the court. It is prudent to canvas the form of evidence with the court and opposing counsel in advance of the *voir dire*.

Counsel should advise the court at the pre-trial conference, or at the beginning of the trial, if counsel anticipates any *voir dire*. Since the application is based on an objection to the admissibility of the evidence, the application for a *voir dire* must be made before, and certainly no later than, when the evidence is tendered (*R. v. Kutynec* (1991), 70 C.C.C. (3d) 289 (Ont. C.A.)).

In a trial without a jury, the judge declares a *voir dire*, hears the evidence at issue, and rules on its admissibility. If the evidence is ruled admissible, Crown and defence counsel can agree that the evidence in the *voir dire* (or part of it) then becomes evidence in the trial, to avoid repeating the evidence. When "rolling over" evidence from a *voir dire* into the trial, counsel must take care to clearly state on the record which pieces of evidence are admissible and inadmissible in the trial proper (*R. v. Ahmed-Kadir*, 2015 BCCA 346).

During a jury trial, counsel should advise the court whenever admissibility of evidence is at issue (without saying what the evidence is) so that the jury can be excused, and the *voir dire* commenced. The judge hears the evidence and arguments and decides whether the evidence is admissible. If the judge rules that the evidence is admissible, the evidence is called again before the jury. In jury trials, *voir dires* are often heard and decided before the jury has been empanelled to avoid having jurors wait around for lengthy periods while evidence is heard and arguments are made in their absence.

[§5.04] Statements of the Accused

1. General

Only the Crown may choose to tender as evidence the utterances or statements of an accused; the accused may not tender "self-serving" evidence of what the accused said to police or other persons (with the exception of evidence that is admissible as part of the *res gestae*; see the discussion of *res gestae* statements at §5.06(2)). Also, an accused's utterances or statements can only be used as evidence with regard to that accused, and are not admissible as evidence with regard to any co-accused.

A common reason to hold a *voir dire* is to determine whether statements of the accused, made to a person in authority, are (a) voluntary and (b) obtained without violating either the *Charter* right to silence (s. 7) or right to counsel (s. 10(b)).

A single *voir dire* may deal with all these issues, but the onus of proof differs: there is an onus on the Crown to prove voluntariness of the accused's statements beyond a reasonable doubt, and there is an onus on the defence to prove *Charter* violations on a balance of probabilities.

In a *Charter voir dire*, although the application and the burden of proof are both the accused's, the Crown will often call police officers or other witnesses to testify in chief, so that the accused can cross-examine them. To prove a *Charter* breach, the defence may either rely solely on the cross-examination of witnesses called by the Crown, or may choose to call its own witnesses, including the accused.

To prove voluntariness, the Crown will usually call as witnesses on the *voir dire* all police officers and other "persons in authority" who dealt directly with the accused to such an extent that they may have affected the voluntariness of the accused's utterances. Again, the defence may rely solely on the evidence of Crown witnesses, or may call its own witnesses, including the accused.

An accused is entitled to testify on a *voir dire* without prejudice to the accused's right to not take the stand before the jury. The accused may be examined and cross-examined about statements made to persons in authority, but not about their innocence or guilt (*R. v. Erven*, [1979] 1 SCR 926). Crown counsel are not permitted to use a *voir dire* as a forum for unfair questioning of the accused and must confine cross-examination to what is necessary to determining the issues on the *voir dire*. Inconsistencies between the testimony of an accused on a *voir dire* and at trial can be used to impugn credibility but not to establish culpability (*R. v. Cochrane*, 2018 ABCA 80).

The Crown must prove that the accused's statements were voluntary, both if the Crown intends to tender those statements as part of its case, and if the Crown wants to be able to cross-examine the accused on those statements should the accused choose to testify (*Lizotte v. R.* (1980), 61 C.C.C. (2d) 423). Voluntariness must be proven, whether a statement is inculpatory or exculpatory (or both). Defence counsel may admit voluntariness and dispense with the need for a *voir dire*, but such waiver must be clear and unequivocal (*R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.)).

An accused's utterance that is the *actus reus*, or part of the offence charged, is admissible without a *voir dire*. These are some examples:

- threatening words, where the offence is uttering threats;
- words about refusing to give a breath sample, where the offence is refusal;
- false or misleading information given to police, such as giving a false name or refusing to identify oneself, where the offence is obstruction or public mischief; and
- words such as "stick 'em up," where the offence is robbery.

2. Persons in Authority

Voluntariness is at issue only when the accused speaks to a "person in authority," typically a police officer or prison guard. It may be argued that an employer, parent, or other person is "in authority" if the accused reasonably believed that the person could influence or control the investigation or prosecution. Defence counsel must seek a *voir dire* in such cases, or the judge may declare a *voir dire* of the judge's own motion (*R. v. S.G.T.*, 2010 SCC 20; *R. v. Hodgson*, [1998] 2 S.C.R. 449; *R. v. Wells*, [1998] 2 S.C.R. 517).

An undercover police officer is not regarded as a "person in authority" if the accused did not subjectively believe that person to be a police officer and therefore felt no duty to speak (*R. v. Liew* (1999), 137 C.C.C. (3d) 353 (S.C.C.); *R. v. Grandinetti*, 2005 SCC 5). A Justice of the Peace or a Provincial Court judge presiding at a bail hearing is also not a person in authority, and an accused's statements at a bail hearing need not be proven voluntary (*R. v. Tran*, 1995 BCCA 535). If the statements in issue were made by the accused's lawyer, they cannot be directly attributed to the accused.

3. Voluntariness

The classic expression of the "confessions rule" is found in *R. v. Ibrahim*, [1914] A.C. 599 at 609, where Lord Sumner stated:

> … no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

In *R. v. Hodgson*, [1998] 2 S.C.R. 449, Cory J. affirmed that an accused's statement to a person in authority must not have been coerced or induced, and must have been the product of an "operating mind." To meet these requirements, accused persons must be able to understand what is said, be able to understand that their utterances could be used against them, and be able to choose to remain silent (*R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.)). These requirements aim to ensure that only reliable and fairly obtained statements are admitted into evidence.

The Supreme Court of Canada comprehensively reviewed the law of voluntariness in *R. v. Oickle* (2000), 147 C.C.C. (3d) 321. Threats or inducements by police or other persons in authority, and oppressive conditions of interrogation, may render an accused's statement unreliable and involuntary. There also may be an issue as to whether police trickery deprived the accused of the choice to remain silent. A statement that is involuntary due to any of these factors will be excluded from evidence. Generally, whenever the police offer something in return for a statement (*quid pro quo*), the admissibility of the statement will be in question. However, an experienced and confident suspect who bargains with police may be freely deciding whether or not to speak, so that the accused's statements remain voluntary (*R. v. Spencer*, 2007 SCC 11).

4. *Charter* Sections 7 (Right to Silence) and 10(b) (Right to Counsel)

Violations of the right to silence and the right to counsel normally result in the exclusion of the accused's statement under s. 24(2) of the *Charter*. Procedurally, evidence with respect to such alleged violations is often led in the same *voir dire* in which the voluntariness of the statement is determined, and the issues are often related. For example, a severely intoxicated person may lack the operating mind required for voluntariness, and may also be unable to appreciate the consequences of waiving the right to counsel (*R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 (S.C.C.)).

If a detainee (person being detained) tells the police they want to speak with counsel, any statements elicited by the police before the detainee has had a chance to do so will commonly be excluded from evidence. In practice, police officers usually make the phone calls and then pass the phone along to the detainee so that the detainee may speak either with the *Brydges* duty counsel, or with counsel of choice. Contact with counsel may be of a brief duration and still qualify as effective access to counsel. However, if a young or mentally limited suspect receives only brief, incomplete information from counsel regarding a very serious charge, a court may hold that there was no effective access to counsel and the suspect's subsequent confession may be excluded (*R. v. Osmond*, 2007 BCCA 470, leave to appeal refused [2007] S.C.C.A. No. 545).

In Canada, a suspect is not entitled to have a lawyer present during police questioning, and generally police are not required to cease questioning simply because suspects state repeatedly that they do not want to talk to the police. Police are permitted to attempt to persuade suspects to forgo their right to silence, but depending upon a suspect's mental and emotional states, there may be an issue as to whether police pressure has overcome a suspect's free will, or a suspect's ability to choose whether or not to talk. Thus, the confessions rule and the right to silence have become "functionally equivalent" (*R. v. Singh*, 2007 SCC 48).

In general, a detainee is only entitled to an initial consultation with legal counsel in order to fulfill their s. 10(b) rights (*R. v. Sinclair*, [2010] 2 S.C.R. 310). However, in some instances, a detainee may be entitled to a renewed legal consultation, such as when there is a new charge or a new non-routine investigative procedure is deployed by police (e.g. a polygraph or line-up).

If police breach a suspect's *Charter* rights in obtaining a statement, and police later attempt to obtain another statement, the initial breach may "taint" and render the later statement inadmissible, if the initial breach and the later statement are part of the same transaction or course of conduct, or if there are temporal or causal connections (*R. v. Wittwer*, 2008 SCC 33; *R. v. I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504).

[§5.05] Statements of Non-Accused Witnesses

Like the accused, witnesses may be cross-examined on their prior *inconsistent* statements. Generally, inconsistent statements are admissible only for the purpose of assessing a witness's credibility, unless the witness adopts the prior inconsistent statement as the truth, in which case it becomes the witness's evidence. Cross-examination on a written inconsistent statement of an opposing witness is governed by s. 10(1) of the *Canada Evidence Act*. Where the witness does not admit making the prior statement, pursuant to s. 11 of the *Canada Evidence Act*, counsel may call evidence to prove that the witness in fact did make the statement. Exceptionally, a party may apply for leave to cross-examine their own witness on a written inconsistent statement, pursuant to s. 9(2) of the *Act* (*R. v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.), leave to appeal refused (1971), 4 C.C.C. (2d) 566n (S.C.C.); *R. v. Rouse* (sub nom. *McInroy v. R.*) (1979), 42 C.C.C. (2d) 481 (S.C.C.)). Counsel may also attempt to have their witness declared hostile: *Reference Re R. v. Coffin*, [1956] S.C.R. 191. See also §5.06(4) (Application of the "Principled Approach" to Prior Inconsistent Statements) below. Needless to say, if the trial has come to the point where counsel is applying to cross-examine their own witness, things are not going as planned.

Witnesses' prior *consistent* statements are regarded as self-serving. They are generally not admissible in evidence, and do not corroborate the truth of that witness's testimony (*R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Beland*, [1987] 2 S.C.R. 398; *R. v. Kokotailo*, 2008 BCCA 168).

In exceptional cases, a prior consistent statement may be admissible to rebut an allegation or suggestion of "recent fabrication"; in other words, if the apparent position of the opposing party is that the witness has made up a false story since the alleged offence. However, even when tendered to rebut fabrication, a prior consistent statement is relevant only to credibility and is not independent corroborative evidence (*R. v. Evans*, [1993] 2 S.C.R. 629; *R. v. Stirling*, 2008 SCC 10). A prior consistent statement may also be admissible "as part of the narrative" for the limited purpose of showing the fact and timing of a complaint, which may assist in assessing a complainant's credibility (*R. v. Dinardo*, 2008 SCC 24; *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.)). On the other hand, in sexual assault cases, especially cases of abuse within families, the fact that a complainant did not report the offence should never reduce that complainant's credibility (*R. v. D.(D.)*, [2000] 2 S.C.R. 275).

[§5.06] Hearsay

1. General Rule

A classic statement of the rule against hearsay is set out in the case of *Subramanian v. D.P.P.*, [1956] 1 W.L.R. 965 at 970 (P.C.):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

More recently, in *R. v. Khelawon*, [2006] 2 S.C.R. 787, the Supreme Court of Canada defined hearsay as follows:

> The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

The key is the purpose for which the evidence is being tendered. If during a trial you hear evidence that sounds suspiciously like hearsay, stand up and object by asking the purpose for which the statement is being tendered. If evidence is not tendered for the truth of what was said, but for another purpose—such as to show the state of mind of either the speaker or the person who heard the statement—it may not be hearsay and may be admissible (*R. v. Ly* (1997), 119 C.C.C (3d) 479 (S.C.C.); *R. v. Nguyen and Bui*, 2003 BCCA 556).

2. Traditional Exceptions

The rule against hearsay has always been subject to various common-law exceptions. Some, such as the exception for dying declarations and the exception for declarations against penal interest, are rarely invoked. The exception for statements of intent made by persons who are since deceased sometimes arises in homicide cases, notably *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 (B.C.C.A.); and *R. v. Mafi* (1998), 130 C.C.C. (3d) 329 (B.C.C.A.).

Perhaps most commonly invoked by the defence is the exception for *res gestae* statements, which are utterances made at the time of, or soon after, an allegedly criminal act. The *res gestae* exception often arises in cases of possession of drugs, weapons, stolen property, or counterfeit money. A statement by the accused which the defence seeks to have admitted a *res gestae* statement may be elicited in the defence's cross-examination of the arresting officer or of whichever other Crown witness heard the statement. The jurisprudence on this topic was thoroughly reviewed in *R. v. Crossley* (1997), 117 C.C.C. (3d) 533 (B.C.C.A.). Factors to be considered when assessing the admissibility of such utterances include the spontaneity of the statement and the degree of contemporaneity to the act in issue; whether the declarant had any motive, or any time or opportunity to concoct the statement; and the mental and emotional state of the declarant (*R. v. Risby*, [1978] 2 S.C.R. 139; and *R. v. Slugoski* (1985), 17 C.C.C. (3d) 212 (B.C.C.A.)).

3. The "Principled Approach"

The law of hearsay in Canada was substantially changed by a long series of cases from *R. v. Khan*, [1990] 2 S.C.R. 531 to *R. v. Khelawon*, 2006 SCC 57; *R. v. Baldree*, 2013 SCC 35; and *R. v. Bradshaw*, [2017] 1 S.C.R. 865. In *R. v. Smith*, [1992] 2 S.C.R. 915, Lamer C.J.C. wrote: "Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of that evidence, and its necessity." However, subsequent decisions have clarified that courts should first consider whether a statement is admissible under any traditional exception to the hearsay rule (*R. v. Starr*, 2000 SCC 40; *R. v. Mapara*, 2005 SCC 23). Where admission under a traditional exception is successfully opposed, or where no traditional exception applies, courts should resort to the "principled approach" and should assess necessity and "threshold reliability."

The requirement of "necessity" is usually met by proof that the speaker cannot testify because the

speaker is unavailable, either because the speaker is now deceased (*R. v. Blackman*, 2008 SCC 37), incompetent to give testimony (*R. v. Hawkins* (1996), 111 C.C.C. (3d) 129 (S.C.C.)), or has no present memory of events due to an intervening injury or illness. Note that the principled approach to hearsay developed largely in response to the dilemma of the fearful and silent child complainants in *Khan* and *R. v. Rockey* (1996), 110 C.C.C. (3d) 481, and in these cases the criterion of necessity was satisfied even though the witnesses were physically available to testify.

The parameters of "threshold reliability" were redefined in *Khelawon*. Threshold reliability is established when the hearsay is "sufficiently reliable to overcome the dangers arising from the difficulty of testing it." The hearsay dangers relate to the difficulties of assessing the declarant's perception, memory, narration or sincerity without the traditional safeguards of the declarant giving the evidence in court (under oath or its equivalent) and subject to contemporaneous cross-examination.

In *Bradshaw*, the Supreme Court of Canada described two general means of establishing threshold reliability:

(1) *Procedural reliability* is established when there are adequate substitute safeguards for testing the evidence, despite the fact that the declarant has not given the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. These substitutes must allow the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement. Among the substitutes for traditional safeguards are video-recording the statement, administration of an oath, and warning the declarant about the consequences of lying. However, some form of cross-examination, as for example of a recanting witness at trial, is usually also required.

(2) *Substantive reliability* is established where the hearsay statement is inherently trustworthy. To determine whether the statement is inherently trustworthy, a trial judge considers the circumstances in which the statement was made and any evidence that corroborates or conflicts with the statement. The standard for substantive reliability is high: the judge must be satisfied that the statement is so reliable that contemporaneous cross-examination on it would add little if anything to the process.

Procedural and substantive reliability are not mutually exclusive. They may work in tandem, in that elements of both can combine to overcome the specific hearsay dangers a statement might present, even when each, on its own, would be insufficient to establish reliability.

Admission of hearsay evidence is also subject to the trial judge's residual discretion to exclude evidence where its probative value is slight and where it would unduly prejudice the accused (*Smith*). Once hearsay is admitted, the trier of fact must decide the "ultimate reliability" of the hearsay evidence; that is, whether the statements were actually made, were accurately reported, and were truthful. As with all evidence, the trier of fact also decides what weight (if any) to accord to such statements.

4. Application of the "Principled Approach" to Prior Inconsistent Statements

In *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257, the Supreme Court of Canada decided that the prior inconsistent statements of a witness who recants those statements at trial may be admissible under the new principled approach to the admissibility of hearsay evidence. Under the common law rules, such statements were admissible only to impeach a witness' credibility, and not as evidence of the truth of the statement. However, in *R. v. B.(K.G.)*, the Supreme Court decided that the fact the witness recanted at trial made admission of the prior statements necessary, and the criterion of "reliability" could be met if other factors were present at the time the statements were made. Specifically, the court found that there were sufficient "circumstantial guarantees of reliability" to permit admission of the prior statement where the statement was made under oath or solemn affirmation following a warning about criminal sanctions, the statement was videotaped in its entirety, and the witness could be cross-examined at trial. Its weight as evidence would remain to be assessed by the trier of fact.

The Supreme Court left open the possibility that there might be guarantees of threshold reliability other than those defined in *R. v. B.(K.G.)*. Some interesting fact patterns have since founded the admission of the prior inconsistent statements of recanting witnesses. In *R. v. U.(F.J.)*, the statement of a young girl who recanted the allegation that her father had repeatedly sexually assaulted her was admitted on the basis that it was "strikingly similar" to the father's own voluntary statement about the same offences. In *R. v. Naicker*, 2007 BCCA 608, leave to appeal denied [2008] S.C.C.A. No. 45, a convicted former co-accused refused to testify (and therefore could not be cross-examined), but his statement incriminating the accused was admitted because it had indicia of reliability (and it had been admitted on his own conviction). Similarly, in *R. v. Adam*, 2006 BCSC 1355, where contrary to their plea agreements two of the accused's' co-conspirators refused to testify, their prior statements were admit-

ted. A rare example of hearsay tendered by the defence, which was found inadmissible due to lack of threshold reliability, appears in *R. v. Post*, 2007 BCCA 123.

Generally, the admissibility of a "*K.G.B.*" statement is determined in a *voir dire*, which begins under the terms of s. 9(2) of the *Canada Evidence Act*, and continues with evidence on the necessity and reliability of the statement. However, there are alternative procedures under s. 9(1) of the *Canada Evidence Act* (*R. v. Uppal*, 2003 BCSC 1922 and 2003 BCSC 1923), or in Crown re-examination of a witness who has recanted on cross-examination (*R. v. Glowatski*, 2001 BCCA 678).

5. Documents as Hearsay—Statutory Exceptions

Generally, when the author or maker of a document does not testify, that document is hearsay, but there are many statutory exceptions to this rule. The *Canada Evidence Act* provides for admission of business records, banking records, and government records (ss. 26-30); the provincial *Motor Vehicle Act* provides for the admission of motor vehicle records (s. 82); the *Criminal Code* provides for the admission of breath analysis certificates (now s. 320.31; formerly s. 258); and the *Controlled Drugs and Substances Act* provides for the admission of drug analysts' certificates (s. 51).

These exceptions generally are subject to notice provisions in each statute and counsel should always read the notice provisions carefully. Notice is valid if served on the accused, counsel, an articled student, or perhaps even office staff. If the statute does not explicitly require written notice, filing the document at the preliminary inquiry is sufficient notice (*R. v. Norris* (1993), 35 B.C.A.C. 133). In general, the remedy for late notice or lack of notice is an adjournment.

Further guidance on the law of documentary evidence may be found in Nightingale's *The Law of Fraud and Related Offences* (Toronto: Carswell, 2019, supplemented text) and in *Electronic Evidence in Canada*, (Toronto: Carswell, 2019, supplemented text.)

Other statutory exceptions to the rule against hearsay appear in ss. 715.1-715.2 of the *Criminal Code*, which permit video-recorded statements of disabled witnesses and witnesses under the age of 18 to be entered into evidence at trial, providing the witness adopts the statement in their testimony (*R. v. C.C.F.* (1997), 120 C.C.C. (3d) 225 (S.C.C.)). However, recorded statements admitted under this provision are not independent corroboration of the witness's testimony (*R. v. L.(D.O.)*, [1993] 4 S.C.R. 419; *R. v. S.(K.P.)*, 2007 BCCA 397).

[§5.07] Character Evidence

1. Evidence of Accused's Good or Bad Character

The Crown must not tender evidence that indicates or suggests that the accused is of bad character or has a propensity to commit offences, unless the evidence is relevant to some other issue in the case, and unless the probative value of the evidence outweighs its prejudicial effect upon the defence (*R. v. B.(F.F.)*, [1993] 1 S.C.R. 697; *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716). Sometimes the accused's other bad behaviour, before or after the offence, may be relevant to their motive or intent to commit the offence. For instance, "relationship evidence" tendered to prove motive in cases of spousal violence. However, counsel should take great care to determine legal relevance and admissibility before such evidence is heard by a jury. Where such evidence is admitted for a limited purpose only, the trial judge must carefully instruct the jury on the limited admissibility of the evidence, and warn the jury against convicting the accused because the accused is a "bad" person or is "likely" to have committed the offence.

In general, the accused's character is not a fact in issue in a criminal case. While it is open to the accused to make it so by adducing evidence of their general good reputation for a character trait in issue, such as truthfulness or nonviolence, counsel for the accused must recognize that in most cases such evidence will put the accused's character in issue, opening the door for the Crown not only to cross-examine the accused on their character in general, past convictions and their details, and any other specific instances demonstrating the accused's bad behaviour, but also to call evidence in reply to demonstrate the accused's bad character.

Where the defence does choose to adduce evidence of the accused's good character, it may do so by eliciting testimony as to the accused's general reputation for a relevant character trait, but witnesses are not permitted to express their personal opinion of the accused or to describe the accused's prior specific good acts. The accused, however, may testify as to specific acts of good conduct demonstrating the relevant trait, or may tender expert evidence as to the accused's disposition which renders their participation in the offence less likely (*R. v. Mohan*, [1994] 2 S.C.R. 9).

Evidence of the accused's good character is relevant both to the accused's credibility, and to render unlikely the accused's participation in the offence. (*R. v. Kootenay* (1994), 27 C.R. (4th) 376 (Alta. C.A.); *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.)). With respect to specific offences such as sexual assault upon children, however, the trier of fact is entitled to find that evidence of good char-

acter has limited probative value (*R. v. Profit* (1993), 85 C.C.C. (3d) 232 (Ont. C.A.)).

2. "Putting Character in Issue"

It is often difficult to determine whether the accused has put their character in issue by the conduct of their defence. The accused does not put their character in issue simply by denying the prosecution's allegations, or by advancing a positive defence or justification, such as self-defence. However, where the accused asserts, either expressly or impliedly, that they are unlikely to have committed the offence due to good character, then the accused has put their character in issue. Where defence counsel is approaching the boundary of this issue, senior Crown will often rise to advise the court, and their friend, that they believe the line is fast approaching.

There are several ways in which counsel can put the accused's character in issue, and it would be unwise to attempt to list them all. Some of the more obvious examples, however, include adducing evidence that the accused is a nonviolent person when they are charged with assault; eliciting evidence with respect to the accused's financial probity when they are charged with fraud; adducing evidence to show that a third party, by reason of disposition, is more likely to have committed the offence; and of course where the accused, when asked if they committed the offence, testifies that "I would never do such a thing."

Once the accused has put their character in issue, the Crown may cross-examine the accused and defence witnesses, as well as lead rebuttal evidence on the accused's bad reputation, disposition or character traits relevant to the offence, on details of any previous convictions, and on any prior bad acts that are similar to the offence charged (*R. v. Farrant*, [1983] 1 S.C.R. 124; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), aff'd sub nom. *R. v. Canadian Dredge and Dock Co.*, [1985] 1 S.C.R. 662; *R. v. Brass* (2007), 226 C.C.C. (3d) 216 (Sask. C.A.); *Alcius v. R.* (2007), 226 C.C.C. (3d) 544 (Q.C.A.)).

Remember, however, that evidence of the accused's bad character (reputation or disposition, or propensity to have committed the offence), can only be used to rebut the evidence of the accused's good character, or to rebut the disposition evidence led to show that a third party is more likely to have committed the offence. The trier of fact must be careful, or be warned, not to use such evidence to reason that because of the accused's bad character or disposition, they are more likely to be guilty (*R. v. Dvorak* (2001), 46 C.R. (5th) 160 (B.C.C.A.); *R. v. Chambers*, [1990] 2 S.C.R. 1293).

3. Character of Non-Accused Witnesses

Crown and defence witnesses other than the accused may be cross-examined on their bad character, including unrelated disreputable conduct, facts underlying previous convictions, disposition to lie, association with others, and habits of life (*R. v. Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)). While trial judges have a discretion to decide whether tendered evidence should be admitted, after weighing the probative value of the evidence against its prejudicial effect, the exercise of that discretion will be more closely scrutinized where the effect of the ruling is to preclude the defence from leading evidence. However, trial judges will only rarely allow any witness to testify as to whether they would believe another witness's sworn testimony (*R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (Ont. C.A.) and *R. v. R.I.L.*, 2005 BCCA 257).

A jury must be given a "clear and sharp" warning of the danger of relying upon the unsupported testimony of any witness who cannot be trusted to tell the truth under oath due to their amoral character, criminal activities, past dishonesty, or motives to lie, including involvement in the offence or benefits from the police or the prosecution. Such a *"Vetrovec"* warning is usually required regarding the testimony of in-custody informers and accomplices. The warning alerts the jury:

- drawing the jury's attention to each witness whose testimony requires special scrutiny;
- explaining why the testimony requires special scrutiny, with reference to the characteristics of the witness which put their veracity in doubt;
- cautioning that it would be dangerous to convict in reliance on the unconfirmed or unsupported testimony of the witness; and
- directing the jury's attention to independent evidence that is capable of confirming or supporting material parts of the witness's testimony.

(See *R. v. Khela* (2009), 238 C.C.C. (3d) 489; *R. v. Smith* (2009), 238 C.C.C. (3d) 481; *R. v. Bevan* (1993) 82 C.C.C. (3d) 310.)

The general rules regarding character evidence apply to witnesses who are victims of alleged sexual offences, except that ss. 276–277 of the *Criminal Code* generally prohibit evidence of a victim's prior sexual activity or sexual reputation. An evidentiary hearing may be held to determine whether evidence of specific instances of sexual activity is relevant to the offence charged, and to determine whether the probative value of such evidence outweighs its prejudicial effect.

4. Criminal Records

A witness's criminal record is a particular form of character evidence. An ordinary witness may be examined and cross-examined about prior convictions and the facts of prior offences which resulted in convictions. In contrast, the accused may be examined and cross-examined about prior convictions but not about the facts of prior offences, unless the accused has put character in issue. Many defence counsel pre-empt cross-examination of the accused on their criminal record by leading the record in direct examination. Crown counsel may do the same with Crown witnesses. Section 12 of the *Canada Evidence Act* provides the statutory basis authorizing adducing evidence of prior convictions, and proving those prior convictions where a witness denies them. Section 666 of the *Criminal Code* authorizes the Crown to cross-examine an accused on the specific circumstances underlying prior convictions where the accused puts character in issue.

Evidence of an accused's prior convictions is only admissible and only has probative value to impugn the accused's credibility, and (if applicable) to rebut any evidence of the accused's good character. Prior convictions must not be used to infer that the accused has a propensity to commit offences (*R. v. W.(L.K.)* (1999), 138 C.C.C. (3d) 449 (Ont. C.A.)).

The accused has the constitutional right to know whether the Crown intends to cross-examine on their record before they decide whether to testify. Where the Crown has indicated that they intend to do so, a *voir dire* is usually held at the end of the Crown's case to decide which, if any, of the accused's prior convictions the Crown may put to them in cross-examination. Defence counsel may outline what the accused would say in their testimony, to allow the judge to assess the potential effect of cross-examination regarding particular convictions. The trial judge has the duty to exclude those convictions whose prejudicial effect outweighs their probative value (*R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Underwood* [1988] 1 S.C.R. 77).

Cross-examination on convictions involving dishonesty is generally permitted, but in jury trials, cross-examination on prior convictions that are similar to the charge at trial may be prohibited as being too prejudicial. A trial judge's ruling will also be affected by how vigorously the accused has attacked the character of Crown witnesses.

Absent error in principle, appellate courts are reluctant to overturn a trial judge's ruling on the admissibility of the accused's record. (*R. v. Fengsted and Stewart*, 117 B.C.A.C. 95; *R. v. Gibson*, 2001 BCCA 297). However, the BC Court of Appeal did order a new trial in a case where the trial judge failed to consider editing the accused's lengthy record in order to ensure the accused's fair trial (*R. v. Madrusan*, 2005 BCCA 609). Of course, the Crown has the discretion to refrain from cross-examining on all or part of the accused's criminal record, and counsel may agree on "editing" the record without a *voir dire* or a "*Corbett*" application.

5. Impermissible Questions

It is improper for either counsel to ask a witness if another witness could be lying (*R. v. Brown and Murphy* (1982), 1 C.C.C. (3d) 107 (Alta. C.A.)); and it may be fatal for the Crown to ask the accused why witnesses would lie about the accused (*R. v. Ellard*, 2003 BCCA 68).

[§5.08] Opinion Evidence

1. General

An "opinion" is an inference from observed facts. The common law rules of evidence generally limit any witness to describing what that witness directly observed, and prohibit the witness from expressing any opinions the witness may have drawn from those observations (*R. v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.)). Despite this exclusionary rule, opinion evidence is often adduced at trial.

First, numerous apparent statements of fact—such as a person's age, height, weight and sobriety, the speed of a vehicle, and the identification of people or things—are arguably expressions of a witness's opinion. So long as the opinions are within the realm of ordinary experience and the witness formed the opinions based on the constellation of facts observed at the time, such evidence is commonly admitted (*Graat v. R.*, [1982] 2 S.C.R. 819).

Second, if a witness has special training, skill or experience in an area that is outside the knowledge of the trier of fact, that witness may be allowed to give an opinion based on the witness's specialized knowledge, that is, to give expert evidence. In determining whether the witness qualifies as an expert, the question is whether the witness has "by dint of training and practice, acquired a good knowledge of the science or art concerning which [their] opinion is sought, and the practical ability to use [their] judgment in that science" (*R. v. Kinnie* (1989), 52 C.C.C. (2d) 112 (B.C.C.A.)).

2. Admissibility of Expert Evidence

In *R. v. Mohan* (1994), 89 C.C.C. (3d) 402, the Supreme Court of Canada held that the following criteria govern the admissibility of expert evidence:

(a) relevance;

(b) the necessity of expert evidence to assist the trier of fact;

(c) the absence of any rule excluding the particular evidence; and

(d) a properly qualified expert.

The burden is on the party calling the evidence to establish that each of these criteria is satisfied, on the balance of probabilities.

The modern legal framework for the admissibility of expert opinion based on *Mohan* is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance, (2) necessity, (3) absence of an exclusionary rule, and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182). At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweigh its benefits. Appellate courts have particularly scrutinized the "necessity" of admitting expert evidence in the realm of the behavioural sciences to address questions of motivation or credibility. In *R. v. D.D.*, 2000 SCC 43, the court held that expert evidence regarding children's reluctance to report sexual abuse is not necessary because public understanding is sufficient now for the topic to be addressed by a suitable jury instruction. The BC Court of Appeal has held that "the admission of expert evidence regarding human behaviour or psychological factors relevant to credibility is justified where the evidence goes beyond the ordinary experience of a lay person" (*R. v. Meyn*, 2003 BCCA 401), but has also warned that courts are often "overly eager" to abandon their fact-finding responsibilities to such experts, and "should be wary" of accepting evidence of experts in the behavioural sciences (*R. v. Orr*, 2015 BCCA 88).

Expert evidence will be treated as "novel" scientific evidence where there is no established practice of admitting that particular kind of evidence. Where such evidence is tendered, it is subject to special scrutiny trial judges must determine whether such evidence meets a threshold of scientific reliability, and will pay particular attention to whether such evidence is truly "necessary" (*R. v. J.(J.-L.)*, 2000 SCC 51). While once novel, DNA evidence has long since become generally accepted (*R. v. Terceira* (1998), 123 C.C.C. (3d) 1 (Ont. C.A.), aff'd [1999] 3 S.C.R. 866).

3. Factual Basis for Expert Opinion

A party who tenders expert evidence must establish in evidence the facts upon which the expert's opinion is based (*R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.)). Expert opinion may be based, in certain circumstances, on hearsay, but this will impact upon any weight that may be attached to it (*R. v. Lavalee* (1990), 55 C.C.C. (3d) 97 (S.C.C.)). However, the expert's opinions must be specific to the case before the court (*R. v. Li (No. 2)* (1980), 59 C.C.C. (2d) 79 (B.C.S.C.)).

4. Procedure

Section 657.3 of the *Criminal Code* requires both the Crown and defence to give notice, 30 days before the trial, of an intention to call expert evidence. In addition, the Crown must provide a copy of its expert's report, or at least a summary of its expert's opinion, within a reasonable time before trial. The defence must provide its report or summary of expert evidence no later than the close of the Crown's case.

Before an expert may give opinion evidence, the expert must be "qualified" (*R. v. Marquard*, [1993] 4 S.C.R. 223). Counsel tendering the expert evidence should advise the judge that counsel is seeking a ruling that the witness is qualified to give opinion evidence in a specified field, for example, the identification of firearms and toolmarks. A *voir dire* is then held for direct examination and cross-examination of the expert regarding the expert's education, training, and experience in the specified field. The limitations of an opposing expert's qualifications should be carefully probed. The judge will then rule on whether the witness is qualified to give evidence in that field. In a jury trial, such a "qualification" *voir dire*, unlike other *voir dires*, is usually conducted in the presence of the jury. Counsel should be aware that by virtue of ss. 320.12 and 320.31(5) of the *Criminal Code*, a drug recognition expert is legislatively qualified as an expert for the purposes of providing an expert opinion on impairment (see *R. v. Bingley*, 2017 SCC 12).

Often, the expert's qualifications are known and admitted by the opposing party, but it is still wise for the party tendering the witness to briefly elicit their qualifications, in order to enhance the weight of their opinions. Once the expert is "qualified," opposing counsel should be quick to object if the witness ranges beyond the specified field of expertise.

[§5.09] Authentication of Evidence

1. General

When a party seeks to tender an item as real or documentary evidence, they must authenticate it. The general requirement to authenticate evidence comes from the common law. The question to be answered is whether there is evidence, direct or circumstantial, to support a finding that the item is what the tendering party claims it to be. Authentication is

"nothing more than a threshold test requiring that there be some basis for leaving the evidence to the fact-finder for ultimate evaluation" (David M. Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11:2 C.J.L.T. 181). This is a low threshold which must be satisfied on a balance of probabilities. (See *R. v. Ball*, 2019 BCCA 32; *R. v. C.B.*, 2019 ONCA 380.)

2. Digital Evidence

Parties seeking to tender digital items or documents will similarly need to authenticate them. Where the digital evidence meets the definition of an "electronic document" under s. 31.8 of the *Canada Evidence Act* counsel can authenticate the evidence by establishing the integrity of the electronic document pursuant to ss. 31.3 or 31.4 of the *Canada Evidence Act.* Electronic documents are data stored in or by a computer system or other similar device, readable to people, computers, or other similar devices. Printouts, displays, and other outputs of such information are included in the definition.

In the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven by: (1) evidence capable of supporting a finding that at all material times the computer system was operating properly, or (2) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it (s. 31.3 of the *Canada Evidence Act*).

If the electronic document received is legible, readable and coherent, this is some evidence that the integrity of the document was unaffected by any problem the system that sent or received the electronic documents might have had (*R. v. Martin*, 2021 NLCA 1). To be authentic, an electronic document does not have to be exact, complete or unaltered (*R. v. Bridgman*, 2017 ONCA 940).

Where the evidence in question is a screen capture of a social media post, or communications on a commonly used messaging platform, evidence from a layperson will often be sufficient. Expert evidence to explain how commonplace technologies work is not required if a lay witness familiar with their use can give such testimony. For more complex evidence it will be appropriate to call expert evidence.

There is no express statutory requirement to hold a *voir dire* to authenticate digital evidence, however, where the opposing party calls into question whether the requirements of ss. 31.3 or 31.4 are met, a *voir dire* should be held. (See *R. v. Vermeer*, 2023 BCCA 206; *R. v. Ball*, 2019 BCCA 32.)

Commonly tendered electronic documents such as social media posts and text communications often contain a blend of relevant and admissible evidence in addition to` hearsay or otherwise irrelevant and inadmissible information. When tendering digital evidence, counsel should be mindful that the general rules of admissibility are not affected or abrogated by ss. 31.1 to 31.4 *Canada Evidence Act.* (See s. 31.7 of the C*anada Evidence Act*; *R. v. S.H.*, 2019 ONCA 669, aff'd 2020 SCC 3.)

[§5.10] Remote Evidence

Section 714.1 of the *Criminal Code* gives the court the discretion to permit a witness in Canada to give evidence by audioconference or videoconference where it would be "appropriate" in all the circumstances. Factors the court is to consider include: (a) location and circumstances of the witness, (b) the cost of in-person attendance, (c) the nature of the anticipated evidence, (d) the suitability of the location from where the evidence would be given, (e) the right to a fair and public hearing, (f) the nature and seriousness of the offence, and (g) potential prejudice caused by the fact that the witness would not be seen (if the application is for audioconference evidence).

In earlier cases, and while considering previous iterations of this provision, courts have taken a restrictive view of when this discretion should be exercised. In response to improvements in videoconferencing technology and the normalization of the use of videoconferencing technology in courtrooms since the COVID-19 pandemic, the court's approach has recently become more flexible. The question is whether the court's exercise of discretion has a reliable and sufficient basis in order for it to be properly exercised (*R. v. J.L.K.*, 2023 BCCA 87).

Section 714.2 of the *Criminal Code* makes orders for witnesses testifying outside of Canada via videoconference presumptive. A party opposing such an order will need to satisfy the court that receiving such testimony would be contrary to the principles of fundamental justice.

Whether counsel is applying for a discretionary order under s. 714.1 or a presumptive order under s. 714.2, it will be important to be able to provide the court with details of how the proposed order will be implemented. Counsel should be in a position to confirm the compatibility of technology as between the court's and witness's location. Counsel will need to consider how the witness will be shown exhibits, and, if the witness is in a different time zone, whether any accommodations as to timing of evidence will be needed. Other issues that merit consideration include the setting in which the witness will be giving their evidence, including whether there need to be assurances that the witness is alone and does not have materials, such as witness statements, open in front of them while they testify.

[§5.11] Rebuttal Evidence

The rule against the Crown splitting its case is well established. The Crown must call all the evidence it intends to rely on before the accused is required to decide whether to present a defence (*R. v. Krause*, [1986] 2 S.C.R. 466). An accused has the constitutional right to know the case they must meet before answering the Crown's case (*R. v. Latimer*, 2001 SCC 1). The Crown cannot lead in rebuttal evidence which it should or could have led as part of the Crown's case *(R. v. Moir*, 2013 BCCA 36). However, if the Crown could have led certain evidence, but the evidence did not become relevant or did not become a "live issue" until during the defence case, then the Crown may lead the evidence in rebuttal (*John v. R.*, [1985] 2 S.C.R. 476; *R. v. Aday*, 2008 BCSC 397).

Chapter 6

Charter Applications[1]

[§6.01] The *Charter*

The *Canadian Charter of Rights and Freedoms* (the "*Charter*") came into force in 1982. It forms Part I of the *Constitution Act, 1982*, Canada's Constitution. Laws of all levels of government across Canada, including statutes, regulations, and the common law, must be consistent with the Constitution (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573).

Section 52(1) of the *Constitution Act, 1982* proclaims the Constitution as "the supreme law of Canada" and declares any law inconsistent with the Constitution, "to the extent of the inconsistency, of no force or effect." This subsection provides the basis for constitutional challenges to laws that either violate the *Charter* in purpose or effect, or are inconsistent with other parts of the Constitution (i.e. under a division of powers analysis).

Corporations cannot claim their *personal* freedoms guaranteed by the *Charter* were infringed. Instead, they may argue that a law is constitutionally invalid under s. 52 (*R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154).

Challenging a statute or a government action for unconstitutionality requires careful and early preparation and planning. Counsel should pay close attention to the notice requirements, evidentiary foundation, and availability of the remedy sought.

[§6.02] Jurisdiction

1. Challenges to Legislation

An inferior court (e.g. the Provincial Court of BC) or administrative tribunal may decide that a law is inconsistent with the *Charter*, but it is only able to use that determination in resolving the matter before it. It cannot make a formal declaration of invalidity. Only superior courts (e.g. the Supreme Court of BC) have jurisdiction to invalidate legislation (*R. v. Lloyd*, 2016 SCC 13; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54).

2. Challenges to State Conduct

Section 24(1) of the *Charter* allows those whose constitutional rights have been infringed or denied to seek a remedy that is "appropriate and just in the circumstances" by applying to "a court of competent jurisdiction."

Courts of competent jurisdiction possess:

- jurisdiction over the subject matter;
- jurisdiction over the person; and
- jurisdiction to grant the remedy (*R. v. Mills*, [1986] 1 S.C.R. 863 ("*Mills* 1986").

(a) Criminal Trial Court

The criminal trial court is a court of competent jurisdiction for most *Charter* remedies, unless it is necessary to obtain a remedy prior to trial to prevent a continuing violation, or a lower court itself violated the *Charter* (*Mills* 1986).

(b) Superior Courts

Superior courts have constant and concurrent jurisdiction to hear s. 24(1) applications, to ensure there is always a court of competent jurisdiction (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62). The trial court, however, is the preferred forum for hearing such applications, as it is in the best position to consider all the circumstances (*R. v. Menard*, 2008 BCCA 521).

(c) Provincial Court Hearings (Other Than Trials)

A provincial court hearing a preliminary inquiry is not a court of competent jurisdiction because the court exercises only a "limited screening function" to "determine whether there is sufficient evidence to proceed to trial" (*R. v. Hynes*, 2001 SCC 82). Likewise, a provincial court judge presiding over a judicial interim release (bail) hearing is not a court of competent jurisdiction (*Menard*).

(d) Administrative Tribunals

A tribunal that can decide questions of law will be a court of competent jurisdiction, unless that power has been removed in the enabling legislation. Whether a tribunal can grant a particular remedy is a question of whether the remedy accords with the tribunal's mandate and function (*R. v. Conway*, 2010 SCC 22).

[§6.03] Notice and Timing

Anyone challenging the constitutional validity or applicability of legislation, or seeking a s. 24(1) *Charter* remedy, must give at least 14 days' notice to the Attor-

[1] **Rebecca McConchie**, McConchie Criminal Law, kindly revised this chapter in January 2024. Previously written and revised by Gordon S. Comer and Drew J. Beesley (2020); Gordon S. Comer (2019); M. Joyce DeWitt-Van Oosten (2004–2006, 2008, 2010 and 2016); Oliver Butterfield (2001–2003); Ravi R. Hira (1998 and 1999); David M. Towill (1998); Andrew G. Strang (1997); and William B. Smart (1995 and 1996).

neys General of BC and of Canada (*Constitutional Question Act* (the "CQA"), s. 8).

Formal notice of an application to exclude evidence under s. 24(2) is not required under the CQA. The prosecution, however, must still be given reasonable notice of the intention to seek exclusion, with particulars. This notice should occur before the evidence is tendered, to ensure a fair and efficient process (*R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Bhander*, 2010 BCSC 1980).

Where sufficient notice is not provided, the usual remedy is for the court to grant the Crown an adjournment. In exceptional circumstances, the court may refuse to hear the application (*R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.)).

The evidentiary basis for *Charter* breaches must be laid either in a pre-trial hearing or at trial. It is only in exceptional cases that a *Charter* application can be brought for the first time on appeal. Appellate courts are reluctant to make *Charter* rulings without an evidentiary foundation (*R. v. Lilgert*, 2014 BCCA 493).

Courts will not hear *Charter* challenges that are "collateral attacks" on court or administrative orders (e.g. release orders), except in proceedings "whose specific object is the reversal, variation or nullification of the order" (*R. v. Bird*, 2019 SCC 7).

[§6.04] Standing

Applicants must be granted standing before they can seek *Charter* remedies. There are two types of standing: "private interest" or "public interest." Either category entitles a litigant to challenge the constitutionality of legislation under s. 52, but only those granted private interest standing may seek a s. 24 remedy (*R. v. Ferguson*, 2008 SCC 6).

1. Public Interest Standing

Those not directly affected by the law may be granted public interest standing if they establish:

(a) there is a serious justiciable issue (with respect to the validity of the legislation or administrative action);

(b) they have a real stake or genuine interest in the validity of the legislation; and

(c) the litigation is a reasonable and effective way to set the issue before the court (*Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45; *British Columbia (AG) v. Council of Canadians with Disabilities*, 2022 SCC 27).

Any accused, including a corporation, may challenge the constitutionality of the charging statute because "no one can be convicted of an offence under an unconstitutional law" (*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295).

2. Private Interest Standing

An applicant whose rights have been directly affected by the unconstitutional law or state conduct may be granted private interest standing. An applicant may not, however, rely on a breach of the rights of a co-accused or accomplice (*R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Hyatt*, 2003 BCCA 27).

(a) Grounds for Private Interest Standing

There must be a causal connection between the impugned law or state action and the impact on the accused's *Charter* right. An uncertain or hypothetical connection will not suffice (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44).

Standing may also be granted for anticipated breaches in order to prevent harm, if the applicant can establish the threat of a probable future violation (*United States of America v. Kwok*, 2001 SCC 18).

(b) Private Interest Standing to Argue a Breach of s. 8 Privacy Interests

Section 8 protects against unreasonable search and seizure (discussed at §6.12). To establish standing, the applicant must have a "reasonable expectation of privacy" in the place searched or the item seized. Whether an accused has a reasonable expectation of privacy is determined on the totality of the circumstances, including:

(i) whether the accused owned or had possession or control of the property or place searched;

(ii) historical use of the place searched; and

(iii) the existence of a subjective expectation of privacy (*Edwards*; see also *R. v. Tessling*, 2004 SCC 67; *R. v. Patrick*, 2009 SCC 17).

In *Edwards*, the appellant had no privacy interest to challenge the admissibility of drugs that were found in his girlfriend's apartment because he was a visitor who only stayed over occasionally. Similarly, two accused who claimed to be babysitters were denied standing to challenge a search warrant because they did not have a reasonable expectation of privacy in the residence (*R. v. Khuc*, 2000 BCCA 20).

An accused mounting a s. 8 *Charter* claim may ask the court to assume as true any fact the Crown alleges against them in order to establish the privacy interest necessary for standing (*R. v. Jones*, 2017 SCC 60).

When information is seized from electronic devices, and that information may exist in the cloud or servers globally, it is challenging to describe the place of the search or location of the seized item. The courts have therefore focused on the nature of the seized information: the claimant must have a direct interest in the seized material and an objectively reasonable expectation it would be private (*R. v. Marakah*, 2017 SCC 59).

For example, Marakah sent text messages about firearms to an accomplice. Police seized that accomplice's cell phone and extracted the messages, without a warrant. The court ruled that Marakah had a reasonable expectation of privacy in the messages and should have been granted standing to seek their exclusion, because text messages can reveal personal information, a sender's objectively reasonable expectation of privacy may endure even after they are sent, and control over the information is not lost simply because another person can access it.

Not all electronic communications attract a reasonable expectation of privacy. For example, it is not objectively reasonable to expect that a threatening text message would not be turned over to police (*R. v. Pelucco*, 2015 BCCA 370). See also *R. v. Mills*, 2019 SCC 22, where the relationship between the communicating parties (or rather, the lack thereof) was determinative. Mills communicated online with a police officer who was posing as a child. The court held that privacy cannot be reasonably expected by an adult who sends online messages to an unknown child.

[§6.05] Evidentiary and Legal Burdens

The applicant bears the legal burden of persuading the court, on a balance of probabilities, that the applicant's *Charter* right was infringed. The applicant also bears the evidentiary burden of presenting evidence in support of the alleged breach, unless the breach arises from the Crown's case alone. For certain issues, however, the burden shifts to the Crown, such as the question of whether the accused would have acted differently had the right to counsel not been infringed (*R. v. Bartle*, [1994] 3 S.C.R. 173) or whether legislation which violates a *Charter* right or freedom can be "saved" under s. 1 of the *Charter*. Evidence relating to the s. 1 inquiry is sometimes tendered after the court has ruled on whether there has been a *Charter* breach.

A court may summarily dismiss a *Charter* application without holding a hearing only if the application is "manifestly frivolous." In *R. v. Haevischer*, 2023 SCC 11, the Court held that the party seeking summary dismissal (usually the Crown) has the burden of establishing that the underlying application is manifestly frivolous. The party bringing the underlying application bears the minimal burden of providing the judge with specifics respecting the relevant legal principles, statutory provisions, or *Charter* provisions and how they have been infringed; the anticipated evidence and how it may be adduced; the proposed argument; and the remedy requested. The judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest when assessing whether the application is manifestly frivolous.

Normally the court will hear the evidence relating to the alleged breach on a *voir dire*, and then rule on the issue. Often the parties will agree that some or all of the evidence taken in the *voir dire* can be admitted into the trial proper.

Counsel should be cautious of presenting evidence on a *voir dire* in summary form or by an agreed statement of facts, as doing so may leave important considerations unexplored, to the prejudice of the applicant.

[§6.06] Limits on *Charter* Rights

The *Charter* 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" (*Charter*, s. 1).

If the applicant establishes that legislation is inconsistent with a *Charter* right or freedom, the burden falls on the Crown to prove under s. 1 that the objective of the legislation is "of sufficient importance to warrant overriding a constitutionally protected right or freedom," and that the infringement is "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" (*R. v Oakes*, [1986] 1 S.C.R. 103). This requires the means to be rationally connected to the objective and to impair the right or freedom as little as possible. Finally, the court will look to the proportionality between the effects of the impugned provision and the importance of the objective. In *R. v Sharpe*, 2001 SCC 2, the test was described this way:

> . . . The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment. . .

Three general principles guide the s. 1 analysis:

(a) The test "must be applied flexibly," considering "the factual and social context of each case" (*RJR-MacDonald Inc. v. Canada (AG)*, [1995] 3 S.C.R. 199).

(b) Common sense and inferential reasoning may supplement the evidence tendered in support of justification (*Sharpe*).

(c) The *Charter* does not demand perfection. The legislature need not adopt the least restrictive means of achieving its objective. It is sufficient if "the means adopted fall within a range of reasonable solutions to the problem confronted" (*Sharpe*).

For a discussion of how these principles are applied, see *Canada (Attorney General) v. Bedford*, 2013 SCC 72 and *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[§6.07] Remedies for Unconstitutional Legislation

When a court finds a law inconsistent with the *Charter* in a manner that cannot be justified under s. 1, it must determine the extent of the inconsistency and the most appropriate way to remedy it (*R. v. Schachter*, [1992] 2 S.C.R. 679).

Remedies for unconstitutional laws include:

(a) striking down the provision in its entirety;

(b) "severing"—declaring the inconsistent portion of the law invalid;

(c) "reading in"—inserting what the statute wrongly excludes or omits; and

(d) "reading down"—shrinking the legislative reach of the statute to what is permissible.

Courts may grant a temporary suspension of a declaration of invalidity in order to give the legislature an opportunity to address the issue with new legislation. Such suspensions should be granted rarely, "only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect" (*Ontario (AG) v. G*, 2020 SCC 38). In such cases, under s. 24(1), courts may grant individual exemptions from compliance with the temporarily valid law (see e.g. *R. v. Ndhlovu*, 2022 SCC 38).

[§6.08] Remedies for Unconstitutional State Conduct

Section 24(1) of the *Charter* gives broad discretion to provide remedies for unconstitutional state action. Courts take a purposive approach to this remedial provision in order to fashion appropriate, effective, and responsive remedies that promote the purpose of the right being protected (*R. v. 97649 Ontario Inc.*, 2001 SCC 81; *Doucet-Boudreau*).

Examples of s. 24(1) remedies include:

- a reduction in sentence;
- the exclusion of evidence;
- a declaration of a mistrial;
- an award of costs against the Crown; and
- a judicial stay of proceedings.

[§6.09] Exclusion of Evidence

Applications to exclude evidence based on *Charter* breaches are normally brought under s. 24(2). The applicant must show the evidence was obtained in a manner that infringed rights under the *Charter* (see §6.12(3) respecting the necessary nexus between the *Charter* breach and the evidence the applicant seeks to exclude).

Once a breach has been established, the analysis moves to the question of exclusion, and the applicant must establish that the admission of the impugned evidence would bring the administration of justice into disrepute.

A court hearing an application for exclusion must assess and balance the effect of admitting the evidence on society's confidence in the justice system. There are three lines of inquiry:

(a) the seriousness of the state conduct;

(b) the impact of the breach on the accused's interests; and

(c) society's interest in an adjudication on the merits (*R. v. Grant*, 2009 SCC 32).

On the first question, the more severe and deliberate the conduct, the more a court will want to dissociate itself from it by excluding the evidence. On the second question, the court evaluates the extent to which the breach undermined the *Charter*-protected interests. More serious incursions carry the greatest risk that admission will bring the administration of justice into disrepute. On the third question, the court considers whether the truth-seeking function of the criminal trial process is better served by admitting or excluding the evidence, having regard to the reliability of the evidence and its importance to the Crown's case.

There is no automatic exclusionary rule. Each case must be assessed independently in light of all the circumstances under the s. 24(2) framework.

Evidence may also be excluded pursuant to s. 24(1) if the evidence was obtained lawfully but admitting it would result in an unfair trial or otherwise undermine the integrity of the justice system (*R. v. White*, [1999] 2 S.C.R. 417). Exclusion of evidence under s. 24(1) is only available "where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system" (*R. v. Bjelland*, 2009 SCC 38).

[§6.10] Liberty Rights

Section 7, which guarantees both substantive and procedural fairness, is a source of diverse *Charter* applications. It contains broad language protecting life, liberty, and security of the person, and the right not to be de-

prived of those rights except in accordance with the principles of fundamental justice. These rights protect physical and psychological integrity, as well as the ability to make important and fundamental life choices (*Carter* and *Blencoe*).

1. Vague or Overbroad Legislation

Legislation which is vague or overbroad can be challenged under s. 7 as offending principles of fundamental justice. Laws must neither be so lacking in precision that they fail to give guidance for legal debate (vagueness), nor too sweeping in relation to the objective (overbreadth) (*Ndhlovu*). Nor can laws be arbitrary (having no connection between the purpose and effect of the law) or grossly disproportionate (where the seriousness of the deprivation is totally out of sync with the objective of the law) (*Bedford*; *Carter*). Vague or overbroad laws can sometimes be read down by severing the offending portions (*R. v. Hall*, 2002 SCC 64; *Schachter v. Canada*, [1992] 2 S.C.R. 679).

2. Abuse of Process

Abuse of process applications are brought under s. 7 because life, liberty, or security of the person must not be deprived through state conduct that is oppressive or vexatious (*R. v. O'Connor*, [1995] 4 S.C.R. 411).

An abuse of process may arise from state conduct that either:

(a) compromises trial fairness (i.e. causing irreparable damage to the ability to make full answer and defence) (the "main" category); or

(b) risks undermining the integrity of the judicial process (the "residual" category) (*R. v. Babos*, 2014 SCC 16).

Regardless of the category, a judicial stay for abuse of process is only available where:

(a) the *prejudice* caused by the abuse will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome;

(b) there is *no other remedy* available that is reasonably capable of removing that prejudice; and

(c) the *balance of interests* favours granting a stay over society's interests in a final decision on the merits.

With the "main" category, the third stage of the analysis is only reached where uncertainty about the appropriateness of a stay of proceedings remains after the first two stages. With the "residual" category, the third stage is always considered (*Babos*; *R. v. Bacon*, 2020 BCCA 140). A judicial stay is "the most sweeping and drastic remedy in the arsenal of remedies" (*R. v. Erickson*, 1984 CanLII 527 (BCCA)) and is therefore reserved only for the "clearest of cases" (*R. v. Regan*, 2002 SCC 12).

3. Disclosure

It is a principle of fundamental justice that a person charged with an offence has the right to make full answer and defence. The Crown's duty to provide full, fair, and timely disclosure flows from this right (*R. v. Carosella*, [1997] 1 S.C.R. 80). The Crown must disclose all information unless it is:

(a) beyond the control of the prosecution;

(b) clearly irrelevant;

(c) privileged; or

(d) otherwise prohibited by law (*R. v. Gubbins*, 2018 SCC 44).

The Crown has a continuing duty to disclose all relevant information that it has in its control or possession. This obligation applies to both inculpatory and exculpatory evidence. Relevance is defined in terms of the information's usefulness to the accused; it does not matter whether the prosecution plans on tendering the evidence at trial. Information is disclosable if there is a reasonable possibility it could be used by the accused in meeting the Crown's case, advancing a defence, or making a decision about the conduct of the defence (*Gubbins*). When in doubt, the Crown must err on the side of inclusion (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326).

Defence counsel must be diligent in pursuing disclosure from the Crown: "A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process" (*R. v. Dixon*, [1998] 1 S.C.R. 244).

The duty to disclose includes an obligation to preserve relevant evidence. Evidence which has been inadvertently lost or destroyed, however, does not automatically result in a finding of a *Charter* breach. The test is whether the evidence was lost or destroyed due to unacceptable negligence, having regard to:

(a) whether the Crown (or police) took reasonable steps to preserve the evidence; and

(b) the perceived relevance of the evidence at the time (*R. v. La*, [1997] 2 S.C.R. 680).

Crown counsel have a duty to make reasonable inquiries when put on notice of potentially relevant material in the hands of the police or other Crown entities (*R. v. McNeil*, 2009 SCC 3; *Gubbins*). The Crown's discretion in this regard is not reviewable by the court, unless the information is obviously relevant. Instead, the defence must bring an *O'Connor* application for the information *(R. v. Nicholson*, 2015 BCSC 772).

Third-party records which come into the possession of the Crown are generally disclosable, subject to the *Stinchcombe* principles. An exception exists for proceedings for sexual offences, where disclosure is governed by ss. 278.1–278.91 of the *Criminal Code* (see *R. v. Mills*, [1999] 3 S.C.R. 668). Under this statutory regime, a court must determine that the records are likely relevant to an issue at trial or the competence of a witness to testify. If so, the court must also determine whether, among other things, the need for disclosure to make full answer and defence outweighs the detrimental impact on privacy. For offences not governed by this statutory regime, a similar balancing process is provided for in *O'Connor* (see also *McNeil*; *R. v. Quesnelle*, 2014 SCC 46).

Remedies available for a breach of an accused's right to disclosure include:

- an order for disclosure of the information;
- an adjournment of the trial for further disclosure (possibly with an order for costs);
- an order for a new trial where disclosure is made after the verdict has been entered (*R. v. Illes*, 2008 SCC 57); or
- a judicial stay of proceedings.

In determining the appropriate remedy, the court will balance the right of the accused to a fair trial with the interest of society in the efficient administration of justice, and grant the least severe remedy that will cure the prejudice to the accused. A stay of proceedings will only be imposed in the clearest of cases, either where no alternative remedy will cure the prejudice to the accused to make full answer and defence, or irreparable prejudice would be caused to the integrity of the judicial system (*R. v. Taillefer*, 2003 SCC 70; *Bjelland*).

4. Pre-Charge Delay

Pre-charge delay which results in demonstrated prejudice to the accused's fair trial rights or amounting to an abuse of process can be a breach of s. 7 (see dissent of Hoegg J.A. in *R. v. Hunt*, 2016 NLCA 61, aff'd 2017 SCC 25). It is not the *length* of the delay that is at issue, but its *effect*. It is insufficient to merely establish that evidence is missing or no longer available. The accused must establish that they suffered actual or substantial prejudice that:

- compromised trial fairness affecting the right to make a full answer and defence—e.g. lost or degraded evidence, missing witnesses, loss of memory; or
- risks undermining the integrity of the judicial process—e.g. egregious, inexcusable inaction on the part of the police or Crown, or serious state-imposed psychological stress (*Mills* 1986; see also *Blencoe*).

The usual remedy for pre-charge delay is a stay of proceedings (*R. v. Underwood*, 2008 ABCA 263). Other remedies are possible, such as admitting defence evidence or disallowing Crown evidence.

To warrant a judicial stay, the pre-charge delay must so adversely affect the fairness of the trial or the accused's ability to make full answer and defence that it offends the principles of fundamental justice (*R. v. L.J.H.* (1997), 120 C.C.C. (3d) 88 (Man. C.A.)). The prejudice must be "of such magnitude and importance that it amounts to a deprivation of the opportunity to make full answer and defence" (*R. v. Leuenberger*, 2014 BCCA 156).

Where the accused is seeking a judicial stay, the s. 7 hearing should be heard after all the evidence is before the court. Judges cannot assess trial fairness or the ability to make full answer and defence in an evidentiary vacuum (*La*).

[§6.11] Fair Trial Rights

Section 11 of the *Charter* identifies several rights held by "[a]ny person charged with an offence." One such right is the right to be presumed innocent unless proven guilty according to law after a fair hearing (s. 11(d)). *Charter* applications alleging a breach of the right to a fair trial often rely on both s. 7 and s. 11(d).

1. Rowbotham Applications

Courts have an interest in ensuring that an unrepresented accused has a fair trial. Where the absence of defence counsel is a barrier to a fair trial, the court will explore every reasonable way to address the issue.

The *Charter* does not expressly guarantee the right of an indigent accused to be provided with state-funded counsel. However, in cases where provincial legal aid is denied, ss. 7 and 11(d) require funded counsel to be provided if the accused wants legal representation but cannot afford a lawyer, and representation of the accused is essential to a fair trial. A *Charter* application by the accused for the appointment of funded counsel is called a "Rowbotham Application," after the leading case (*R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)).

A Rowbotham application will be granted only in exceptional cases. The factors a court may consider include:

- the accused's financial situation;
- the complexity of the legal and factual issues; and

- the likelihood of imprisonment (*R. v. Crichton*, 2015 BCCA 138).

If the application is successful, the judge will direct a stay of proceedings until the government provides funds for counsel. Such an order may sometimes result in the Crown discontinuing the prosecution. The Crown has a right of appeal from the stay of proceedings.

The appointment of counsel can also be made pursuant to a provision of the *Criminal Code*, such as at a fitness hearing (s. 672.24), for the cross-examination of certain witnesses (s. 486.3), or in proceedings at the Court of Appeal (s. 684).

2. Ineffective Assistance of Counsel

The right to the "effective assistance of counsel" is a principle of fundamental justice under ss. 7 and 11(d) of the *Charter.* A convicted offender can be granted a new trial on appeal where ineffective representation by defence counsel results in a miscarriage of justice (*R. v. G.B.D.*, 2000 SCC 22).

The offender must substantiate the alleged ineffective assistance with evidence establishing that:

- counsel's acts or omissions constituted incompetence (the "performance component"); and
- the ineffective representation resulted in prejudice causing a miscarriage of justice (the "prejudice component").

In determining competence, the conduct of counsel is assessed against a reasonableness standard and there is a strong presumption in favour of competence. Reasonable minds may disagree on strategies to employ in conducting a defence and it is not enough to simply say, in hindsight, that counsel should have handled the case differently (*G.B.D.*; *R. v. Trejo*, 2020 BCCA 302; *R. v. Baylis*, 2015 ONCA 477).

The BC Court of Appeal has a Criminal Practice Directive regarding appeals of this nature, requiring, among other things, that trial counsel be notified. This gives trial counsel an opportunity to respond to the allegations of incompetence (see *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013)).

[§6.12] Search and Seizure

Everyone has the right to be secure against unreasonable search and seizure (s. 8). When real evidence (physical evidence) is tendered at trial, its admission is frequently challenged under s. 8 of the *Charter.* The right also protects information in which an individual has a reasonable expectation of privacy. Accordingly, police are required, for example, to obtain a warrant to gather subscriber information for internet users (*R. v. Spencer*, 2014 SCC 43). If a s. 8 breach is proven, the evidence can be excluded under s. 24(2).

A search will be reasonable only if*:*

- it is authorized at law (pursuant to statute, the common law, or a prior judicial authorization);
- it is conducted in a reasonable manner, namely, it is carried out in accordance with the procedural and substantive requirements the law provides; and
- the scope of the search is limited to what is authorized (*R. v. Caslake*, [1998] 1 S.C.R. 51).

1. Authorized by Law

Examples of statutory provisions that authorize searches are s. 487(1) of the *Criminal Code* and s. 11 of the *Controlled Drug and Substances Act*, both of which allow for the issuance of a search warrant. They also specifically authorize warrantless searches in exigent circumstances.

The police also have common law search powers, including the power to search incident to a lawful arrest. Where an individual is detained in relation to a specific crime but not arrested, the common law empowers the police to conduct a protective "pat-down" search if there are reasonable grounds to believe that the officer's safety or the safety of others is at risk (*R. v. Mann*, 2004 SCC 52; *R. v. MacDonald*, 2014 SCC 3; *R. v. Patrick*, 2017 BCCA 57).

(a) Warranted Searches

Searches for which the authorities had a search warrant (or other form of prior judicial authorization, such as a production order) can be attacked by focusing on defects on the face of the warrant or on problems with how it was obtained.

The defence may challenge the "facial validity" of the warrant by trying to show that there were insufficient grounds for the warrant to be issued (*R. v. Liu*, 2014 BCCA 166). The defence can challenge the affidavit prepared by the police setting out the grounds for the warrant (the "Information to Obtain" or "ITO"). Leave of the court is required to cross-examine the ITO affiant (*R. v. Lising*, 2005 SCC 66). Insufficient grounds for the issuance of a search warrant may result in the warrant being ruled invalid, thereby establishing a s. 8 breach.

The defence may also challenge the "subfacial validity" of a warrant by arguing that the ITO is materially misleading or inaccurate (*R. v. Morelli*, 2010 SCC 8). Material non-disclosure by the affiant, or deliberate misrepresentation, may invalidate a warrant that appears valid on its

face. The mere presence of non-disclosure or misinformation is not fatal. The reviewing court must ask whether, setting aside the misinformation, there was a sufficient basis to issue the warrant (*R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Garofoli*, [1990] 2 S.C.R. 1421).

(b) Warrantless Searches

Warrantless searches are *prima facie* unreasonable. The burden thus shifts to the Crown to demonstrate, on a balance of probabilities, that the search was reasonable (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145). The same principle applies to the seizure of items that fall outside of a search warrant's express parameters (*R. v. Mandziak*, 2014 BCCA 41). For example, a computer can only be searched as part of a warranted search when the warrant specifically allows it to be done (*R. v. Vu*, 2013 SCC 60).

2. Conducted in a Reasonable Manner

Even if a search is found to be authorized by law, it must also be conducted in a reasonable manner.

For example, "strip searches" or searches of bodily cavities, even when incident to a lawful arrest, must not be carried out routinely. Further, the manner of the search must be reasonable, namely:

(a) the search should be carried out in a police station, in privacy;

(b) the search should be supervised by a senior officer;

(c) police must ensure the health and safety of the suspect; and

(d) the search should involve minimal force (*R. v. Golden*, 2001 SCC 83; *R. v. Saeed*, 2016 SCC 24).

For a further example, police may search a cell phone that was seized incidentally to a lawful arrest only to the extent that the search is reasonably necessary to achieve some valid purpose connected to the arrest. Police must also take detailed notes of the search (*R. v. Fearon*, 2014 SCC 77). Failing this, the search will not have been conducted in a reasonable manner.

3. Nexus Between the Breach and the Evidence

The applicant must show that the evidence they seek to have excluded from the trial was "obtained in a manner that infringed or denied" a *Charter* right. As such, there must be a causal, temporal, or contextual connection between the *Charter* breach and the evidence (*R. v. Wittwer*, 2008 SCC 33).

In *R. v. Goldhart*, [1996] 2 S.C.R. 463, for example, the police searched a house and discovered a marijuana grow operation. The house had three occupants, including the accused, and all three were arrested. One occupant subsequently pleaded guilty and testified at the trial of the accused. The accused sought the exclusion of this testimony on the grounds that it was the product of an illegal search. The court found there was no temporal link given the many intervening events between the search and the testimony, and the causal connection between the illegal search and the witness's decision to testify was extremely tenuous.

4. Searches of Law Offices

Searches of law offices and seizures from lawyers must comply with a strict regime established to protect the privacy interests of lawyers and their clients. Solicitor-client privilege is a principle of fundamental justice protected by s. 7, and the privilege is *prima facie* at risk in this situation. The seized material must be sealed until privilege can be asserted and the issue adjudicated by the court (see *Lavallee v. Canada (AG)*, 2002 SCC 61).

The Law Society has issued guidelines on its website for law office search warrants to help ensure privilege is protected. If client files become the subject of a search or seizure by police or other authorities, you should assert privilege promptly and, where possible, seal the materials in packages. You should also contact the Law Society immediately.

[§6.13] Arbitrary Detention

Section 9 of the *Charter* prohibits arbitrary detention. It protects individuals from unjustified state detention, usually by police.

An arrest involves seizing or touching a person's body with a view to detaining that individual, or uttering words to that effect to a person who submits to an arresting officer. It is the substance of what occurred that matters, not the precise form of words used by the officer (*R. v. Latimer*, [1997] 1 S.C.R. 217).

Detention, for *Charter* purposes, can arise in three ways:

1. physical restraint;
2. psychological restraint (with legal compulsion)—where a state authority assumes control over the movement of a person through a demand or direction which may have significant legal consequences (e.g. a demand for a breath sample); or
3. psychological restraint (without legal compulsion)—where a person interacting with police acquiesces in a deprivation of their liberty, reasonably believing that they have no choice but to comply with the police direction or demand *and* that they are not free to leave (*R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Grant*, 2009 SCC 32).

To establish a detention, the accused must demonstrate an element of compulsion or coercion. Not every conversation or physical interaction between police and a suspect will amount to a detention. There must be an element of significant physical or psychological restraint at the hands of the state (*R. v. Suberu*, 2009 SCC 33). Detention includes situations where the individual is obligated to comply or where a reasonable person in that individual's place would feel they were obligated to comply (*R. v. Le*, 2019 SCC 34).

[§6.14] Right to Counsel

Everyone detained or arrested has the right to retain and instruct counsel without delay, and to be promptly informed of that right (s. 10(b)).

The purpose of s. 10(b) is to ensure that those under investigation and under the control of the state are given a meaningful opportunity to seek legal advice on issues such as disclosure, judicial interim release and the right to silence (*R. v. Bartle*, [1994] 3 S.C.R. 173). The police have an "informational duty" to advise the person in custody of the right to counsel, that immediate and free legal advice can be provided, and how to access the advice (*R. v. Brydges*, [1990] 1 S.C.R. 190).

Police also have "implementation duties" that are only triggered after the detainee asserts the right to counsel. Police must provide the detainee with a reasonable opportunity to exercise that right, except in urgent and dangerous circumstances. Police must also refrain from eliciting evidence from the detainee until the right has been exercised (*R. v. Taylor*, 2014 SCC 50; *R. v. Prosper*, [1994] 3 S.C.R. 236; *Bartle*).

If the accused is unable to reach their lawyer of choice, police must give the accused a reasonable opportunity to consult with someone else before they proceed to gather evidence from the accused (*R. v. McCrimmon*, 2010 SCC 36).

Detainees who assert the right to counsel must be diligent in exercising it, or police may continue their investigation (*R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Smith*, [1989] 2 S.C.R. 368). The accused should be allowed a reasonable amount of time to consider exercising the right before questioning begins (*R. v. Hollis* (1992), 76 C.C.C. (3d) 421 (B.C.C.A.)). Absent evidence that the accused did not understand the right when informed of it, the onus falls on the accused to show the accused was either denied counsel or was denied the opportunity to ask (*R. v. Baig*, [1987] 2 S.C.R. 537). Once police properly inform a detainee of the right to counsel, the onus is on the detainee to assert it (*R. v. Knoblauch*, 2018 SKCA 15; *Hollis*; *Baig*).

As s. 10(a) requires the police to provide the reasons for the arrest or detention; the right to counsel can only be exercised in a meaningful way if the extent of jeopardy is known. Where the offence under investigation becomes significantly more serious, the detainee should be advised of this change, and again be afforded both components of the right to counsel (*R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Sinclair*, 2010 SCC 35). Where the change arises out of, or is easily envisaged as part of the initial investigation, a new s. 10(b) advisement may not be required (*R. v. Boomer*, 2001 BCCA 220; *R. v. O'Donnell*, 1991 CanLII 2695 (N.B.C.A.)).

The prosecution bears the burden of establishing that the accused waived the right to counsel (*Bartle*). The waiver must be voluntary, clear, informed, and unequivocal (*Prosper*). Waivers will be scrutinized closely where the accused is vulnerable because of age, mental capacity, or extreme intoxication. If an accused asserts that right but then waives it, police must again advise the accused of the right to contact counsel (*Prosper*; *R. v. Smith*, 1999 CanLII 3713 (O.N.C.A.)).

The right to counsel does not include a right to have a lawyer present during police questioning (*Sinclair*).

When a denial of the right to counsel occurs, statements or confessions obtained by police are likely to be excluded pursuant to s. 24(2), because their admission would adversely impact trial fairness (*R. v. Elshaw*, [1991] 3 S.C.R. 24; *Evans*).

[§6.15] Post-Charge Delay

Everyone charged with an offence has the right to be tried within a reasonable time (s. 11(b)). A judicial stay of proceedings is the only remedy available for a breach of this right.

These applications are usually made pre-trial, to the trial court, and (preferably) heard by a different judge than the trial judge (*R. v. Fagan*, 1998 CanLII 5018 (B.C.C.A.)). The motion should be supported by either an agreed statement of facts or an affidavit setting out the reasons for the delays, and referencing the relevant portions of the transcript of proceedings.

For the purposes of s. 11(b), the delay "clock" starts ticking when the charge is laid against the accused. In *R. v. Jordan*, 2016 SCC 27, the Court established timelines for when a delay between the charge and the anticipated end of trial will presumptively be unreasonable. A delay of more than 18 months for trials in provincial courts, or more than 30 months for trials in superior courts, is presumptively unreasonable. Delay caused or waived by the defence does not count toward these limits. To rebut the presumption of unreasonableness, the Crown must establish the presence of exceptional circumstances, which may arise from (a) discrete, unexpected events; or (b) case complexity. If the Crown cannot rebut the presumption, the delay will be found unreasonable and a stay of proceedings must follow. Where the delay falls short of the presumptive ceilings, it is still open to the accused to argue that the delay is unreasonable within the context of the case.

Section 11(b) also applies to unreasonable delay between the conclusion of trial and when the judge renders a decision. Such delay is unreasonable where the trial judge took "markedly longer" than reasonably necessary (*R. v. K.G.K.*, 2020 SCC 7).

Finally, s. 11(b) applies to unreasonable delay between conviction and sentencing. This delay, however, is considered separately from pre-trial delay using the analytical framework set out in *R. v. Morin* (*R. v. S.C.W.*, 2018 BCCA 346).

Section 11(b) does *not* apply to pre-charge delay. As discussed above, prejudice that arises from pre-charge delay is addressed under s. 7 of the *Charter.*

[§6.16] Cruel and Unusual Punishment

Everyone has the right not to be subjected to cruel and unusual treatment or punishment (s. 12). The purpose of s. 12 is to protect human dignity and ensure respect for the inherent worth of each individual. Section 12 prohibits the state from imposing a punishment that is "grossly disproportionate" in relation to a particular offender, and from having recourse to punishments that, by their very nature, are intrinsically incompatible with human dignity (*R. v. Bissonnette*, 2022 SCC 23).

Challenges to the constitutionality of a mandatory minimum sentence are usually brought under s. 12. Courts will consider whether the minimum sentence is grossly disproportionate for the offender, or for offenders in other reasonably foreseeable cases. To be grossly disproportionate, the sentence must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society (*Lloyd*).

Several (though not all) mandatory minimum sentences were eliminated in 2022 by *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15.

The only available remedy for a s. 12 breach is a declaration that the sentence is of no force and effect, due to inconsistency with the *Charter*. A constitutional exemption under s. 24(1) is not appropriate (*R. v. Ferguson*, 2008 SCC 6). A reduction in sentence below a mandatory minimum sentence, however, may be available as a remedy under s. 24(1) for egregious and unconstitutional state conduct (*R. v. Nasogaluak*, 2010 SCC 6).

Section 12 only protects human beings, so corporations cannot use it to challenge punishments imposed on them (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32).

[§6.17] Costs or Damages

Criminal courts are courts of "competent jurisdiction" to award *costs* against the Crown under s. 24(1). Only courts hearing civil actions, however, are courts of "competent jurisdiction" to order *damages* awards against the Crown for unconstitutional conduct.

1. Costs Against the Crown in Criminal Proceedings

Costs are an available remedy under s. 24(1) in criminal proceedings for a *Charter* breach involving prosecutorial misconduct, but not police misconduct in which the Crown did not participate (*R. v. LeBlanc*, 1999 NSCA 170). Mere negligence by the Crown is not enough (*R. v. Singh*, 2016 ONCA 108). Costs are a rare and exceptional remedy available in cases involving "a marked and unacceptable departure from the reasonable standards expected of the prosecution" (*R. v. 974649 Ontario Inc.*, 2001 SCC 81).

The trial court may not be the best venue to hear an application for costs where the Crown needs to be able to make full answer and defence. In this situation, the procedure governing civil actions provides a more appropriate framework for the application with pleadings, discovery of the parties, and the discovery of documents (*R. v. McGillivary* (1990), 56 C.C.C. (3d) 304 (N.B.C.A.)).

2. Damages for *Charter* Violations in Civil Proceedings

Damages under s. 24(1) may be awarded in a civil action where the claimant demonstrates (1) that the state (police or Crown) breached their *Charter* rights and (2) a damages award would provide just compensation or deter future breaches. If established, the onus then shifts to the state to rebut the claim. The state typically claims policy grounds (*Vancouver (City) v. Ward*, 2010 SCC 27). For example, damages were awarded against the Crown for intentionally withholding material disclosure, thus causing a miscarriage of justice (*Henry v. British Columbia (AG)*, 2015 SCC 24).

Damages will only be available where state conduct taken pursuant to law was clearly wrong, in bad faith, or an abuse of power. Damages are not otherwise available for harm caused by a law that is subsequently declared to be unconstitutional (*Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13).

Chapter 7

The *Youth Criminal Justice Act*[1]

[§7.01] Purpose and History

Because of their stage of cognitive and emotional development, and the different considerations that apply for young people, most countries have a criminal justice system for youths that is distinct and separate from the adult system. That is true for Canada. The youth justice system applies to "young persons" — from ages 12 to 17 inclusive — and puts in place an overlay of special principles and procedures. This regime has been implemented by the federal *Youth Criminal Justice Act*, the subject of this chapter. Having said that, the youth justice system is, in many respects, almost identical to the adult criminal justice system. Trials are virtually the same; so too are the rules of evidence and the protections mandated by the *Canadian Charter of Rights and Freedoms*. There are, however, important adjustments that any practitioner must be aware of when they deal with a youth case. That is especially true with respect to diversion, bail hearings and sentencing.

In most courthouses in the province (Vancouver being the exception), youth criminal cases take place in the same courtrooms and with the same judges as adult cases proceeding at the British Columbia Provincial Court level. While everything may look the same, practitioners should read those sections of the Act relevant to whatever they are dealing with, particularly when doing a bail hearing or a sentencing, but also in addressing the admissibility of any statement made to the authorities by a youth, and in seeking diversion (which the Act refers to as "extra-judicial measures," and "extra-judicial sanctions," as explained below).

The *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the "*YCJA*") was enacted on April 1, 2003. It replaced the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (the "*YOA*"). The *YCJA* enacted some changes, compared to the *YOA*:

(a) it provides a broader range of sentences;

(b) it narrows the circumstances in which a young person may be detained pending trial;

(c) it strictly limits the availability of custodial sentences; and

(d) it eliminates pre-trial applications to transfer a young person to adult court for trial, by allowing for such "raise hearings" to take place *after* the trial has concluded and sentencing is underway.

1. Principles and Interpretation

The *YCJA* begins with a strong statement of the values underlying our youth justice system: accountability, respect, responsibility and fairness.

The *YCJA* preamble also sets moral and legal standards for the protection and care of young people in Canada, and how they should be treated by the youth justice system. The preamble recognizes the United Nations Convention on the Rights of the Child, ratified by Canada in 1991, which guarantees enhanced procedural protection for young people.

Section 2 defines terms used throughout the *YCJA*, including new definitions introduced in 2012, such as "serious offence," "violent offence" and "serious violent offence."

Section 3 sets out the guiding principles of the *YCJA*, which include the following:

(a) the youth criminal justice system is intended to protect the public by holding young people accountable and promoting their rehabilitation and reintegration;

(b) the criminal justice system for young people must be separate from that of adults, since:

(i) it presumes young people are less blameworthy than adults; and

(ii) there must be timely intervention to reinforce the link between the offending behaviour and its consequences;

(c) sentencing should be meaningful in light of the youth's circumstances, and should respect gender, ethnicity, cultural and linguistic differences, including the needs of Indigenous youth and youth with special needs; and

(d) a young person charged with a criminal offence must be given the right to be heard and to meaningfully participate at every stage of the decision-making process (this principle reflects Canada's ratification of the United Nations Convention on the Rights of the Child, as noted in the Preamble).

Lawyers who represent young people must understand and start from these guiding principles. For resources to assist in practice, see Chapter 1.

[1] **Brock Martland, KC** revised this chapter in July 2023. It was previously revised by Derek Wiebe and Lionel Farmer (2020 and 2016) and PLTC (2018 and 2019). Jennifer Duncan wrote this chapter in January 2004 and updated it in 2005, 2006 and 2008.

2. Overview of 2019 Amendments

Amendments to the *YCJA* were made in 2019. The amendments affect "administration of justice offences," which refers to offences against the integrity of the justice system, such as a failure to appear in court. The amendments encourage alternatives to charges for these offences, and narrow the availability of custodial sentences for them. The legislative aim was to reduce how often youths were jailed for relatively minor contraventions.

The amendments also restrict the conditions that can be imposed on young persons at bail or sentencing, in order to ensure that any conditions imposed on youth are reasonable in the circumstances and necessary for criminal justice purposes.

Some of the amendments reduce delay. This is consistent with the Supreme Court of Canada's direction in *R. v. Jordan*, 2016 SCC 27 that chronic delay in the criminal justice system cannot be tolerated. As noted earlier in the *Practice Material: Criminal*, the decision in *R. v. Jordan* set out ceilings beyond which delay is presumptively unreasonable. In *R. v. K.J.M.*, 2019 SCC 55, the court confirmed that those timeframes apply to youth cases, and declined to make them shorter for youth.

[§7.02] Jurisdiction

The *YCJA*, s. 2, defines a "young person" as being at least 12 but under 18 years of age. Persons under 12 simply cannot be charged with crimes. Persons who are 12–17 may be tried in Youth Justice Court, a division of the BC Provincial Court. Persons who are 12–17 are generally entitled to free legal representation through legal aid. Accused persons who are 18 or older go to trial in adult court. Youth and adult prosecutions cannot be combined.

The BC Youth Justice Court hears cases involving criminal offences arising primarily under the *Criminal Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as well as violations of provincial law under the *Youth Justice Act*, S.B.C. 2003, c. 85 (for provincial prosecutions, see §7.10).

To have jurisdiction over an accused person, the court must ensure they are actually a young person. Proof of age can come from the testimony of a parent, a birth certificate, a business record of a society that has care or control of the young person, any information the court considers reliable, or from inferences drawn from the person's appearance or statements made in direct or cross-examination (s. 148). In practical terms, defence lawyers routinely address the "age and notice" requirement by confirming for the court that a parent or guardian is aware of the charges and can provide the date of birth confirming the young person is between 12 and 17.

The *YCJA* prohibits the publication of any information that could identify a young person who is accused or found guilty. This ban is subject to exceptions listed in s. 110, such as where the young person was given an adult sentence. Access to Youth Justice Court records is highly restricted, and is governed by ss. 117–129.

[§7.03] Alternatives to Charging an Offence

Not every offence alleged to have been committed by a young person will end up as a charge before the Youth Justice Court, particularly if the transgression is minor and does not involve bodily harm. There are various "off-ramps" that allow for cases to be diverted out of the formal court system. In adult court the usual term for this is "diversion." The *YCJA* instead speaks of "extrajudicial measures" and "extrajudicial sanctions." The former *includes* the latter: extrajudicial measures are defined in s. 2(1) as any measures other than judicial proceedings to deal with a young person and their conduct. Within this broad category of measures, "extrajudicial sanctions" are a more specific set of measures implemented through a program.

Under the *YCJA*, police *must* consider alternatives before forwarding a report to Crown Counsel for charge approval, and likewise the Crown will routinely look at alternatives to charging young persons. But defence counsel should always ask the Crown if extrajudicial measures were considered, and advocate for them where appropriate.

1. Extrajudicial Measures

Section 6 of the *YCJA* requires a police officer investigating an offence alleged to have been committed by a young person to consider whether other measures would be adequate, such as the following:

- taking no further action;
- warning the young person or administering a caution; or
- referring the young person to a community-based agency to help them stay out of trouble.

Section 4.1(1) sets out when extrajudicial measures are *presumed* to be adequate for certain administration of justice offences, such as breaches of conditions or of community-based youth sentences. If extrajudicial measures would not be adequate, s. 4.1(2)(b) directs that, as an alternative to proceeding with a charge, an appearance notice should be issued under the new judicial referral hearing process in the *Criminal Code*, or the youth sentence should be reviewed under the *YCJA* provisions relating to reviews of community sentences, if either of those measures would be adequate.

Extrajudicial measures by police are informal (much like how a police officer might warn a

speeding driver instead of ticketing them). They do not require that the young person admit guilt or accept responsibility.

Crown counsel also have some authority to use extrajudicial measures, such as issuing a caution letter rather than approving a criminal charge.

2. Extrajudicial Sanctions

The kinds of extrajudicial measures described in s. 6 may not be appropriate in some cases, because of the seriousness of the offence, a history of offences by the young person, or the presence of aggravating factors. If the measures set out in s. 4.1(2)(b) would also not be adequate, extrajudicial sanctions pursuant to ss. 10–12 may be appropriate, if these criteria are met:

- the accused young person accepts responsibility for the behaviour;
- the young person is informed of their right to be represented by counsel;
- the Attorney General considers there is enough evidence to prosecute; and
- the young person's parents are informed.

A victim is entitled to know the name of the young person who is given extrajudicial sanctions.

A program of extrajudicial sanctions might include community service, apology and restitution, attending school, or counselling. The Justice Education Society of BC provides information about youth justice and extrajudicial sanctions: www.ycja.ca/?q=youth/extrajudicial-measures/in-depth.

There is a record of a young person's compliance with extrajudicial sanctions. If the young person fails to comply with some requirement under the extrajudicial sanctions program, they can be prosecuted for the offence. However, any admission or acceptance of responsibility made by the young person in order to be considered for extrajudicial sanctions *cannot* be used against them if the matter proceeds to trial.

[§7.04] First Appearance

At the first appearance on a charge in Youth Justice Court, a judge has several obligations under s. 32(1):

(a) to read the charges to the young person;

(b) if the young person is not represented by counsel, to inform them of the right to retain and instruct counsel; and

(c) if the Crown gives notice that it intends to seek an adult sentence, to inform the young person that if there is a finding of guilt, the court might impose an adult sentence.

In addition to confirming that the young person has appeared before the court and is aware of the charges, first appearances are regularly used to establish jurisdiction (a finding of "age and notice," described earlier), and to confirm choice of language and any need for an interpreter.

[§7.05] Detention and Release Before Sentencing (Bail)

Section 28 of the *YCJA* incorporates the bail provisions from Part XVI of the *Criminal Code*, with certain exceptions and modifications.

Peace officers and judges are prohibited from detaining a young person in custody or imposing conditions of release as a substitute for providing proper child protection, mental health, or other social measures (s. 28.1).

Section 29(1) sets out the limited circumstances for imposing conditions under s. 515(4)–(4.2) of the *Criminal Code* on a young person:

(a) the condition must be necessary to ensure the young person's attendance in court or for the protection or safety of the public, including any victim of or witness to the offence;

(b) the condition must be reasonable, having regard to the circumstances of the offending act; and

(c) the young person must reasonably be able to comply with the condition.

Section 29(2) sets out the limited circumstances for detaining a young person before sentencing:

(a) the young person has been charged with

  (i) a "serious offence" as defined in s. 2, or

  (ii) an offence other than a serious offence, but the young person's record shows a pattern of offences or outstanding charges; and

(b) the court has found on a balance of probabilities that detention is necessary

  (i) to ensure the young person attends court,

  (ii) for the protection and safety of the public, or

  (iii) if release would undermine the public's confidence in the administration of justice; and

(c) the court is satisfied that any risks identified under (b) could not be addressed by imposing conditions of release.

The court must inquire whether a "responsible person" is available to care for a young person who would otherwise be detained in custody (s. 31). The responsible person (often a parent, guardian, or relative) must be willing and able to take care of and exercise control over the

young person, and the young person must be willing to be placed in the care of that person. A person who agrees to act as a "responsible person" under s. 31, but then willfully fails to comply with the undertaking required by s. 31, can be found guilty of an offence (s. 139). A "responsible person" who fails to meet the obligations required by s. 31 may also face civil liability.

Unlike in adult court, where Part XVI of the *Criminal Code* dictates that in some circumstances the onus of proof in a bail hearing may shift to the accused, in Youth Justice Court the onus to establish that detention is necessary always remains with the Crown (s. 29(3)).

Section 525 of the *Criminal Code* requires that pre-trial detention be reviewed by the Supreme Court 90 days after the accused is first brought before the court. This provision of the *Criminal Code* applies to youth, except that if a youth is being prosecuted summarily, the 90-day time limit is reduced to 30 days by virtue of s. 30.1 of the *YCJA*.

[§7.06] Conferencing

Conferences are a distinctive feature of the youth criminal justice regime. They allow for concerned participants to gather and collectively address matters other than in a conventional adversarial courtroom setting. A conference may be convened by a youth judge, youth probation officer, police officer, justice of the peace, prosecutor, or youth worker for the purpose of making a decision under the *YCJA* (s. 19). For instance, a conference may be held to determine appropriate extrajudicial sanctions, bail terms, or sentences. After the Youth Justice Court has found a young person guilty of an offence, a conference may be convened for recommendations on sentencing (s. 41).

[§7.07] Trial

1. Venue

In almost all cases, youth trials take place before a Provincial Court judge. The only exception is for cases where the Crown serves notice that it will seek an adult sentence if the young person is convicted, in which case the youth may be able to elect mode of trial (trial by jury, by Supreme Court judge, or by Provincial Court judge).

The Crown may serve notice that it will seek an adult sentence if the young person is charged with an offence for which the maximum available sanction for an adult under the *Criminal Code* is two years or more, and the young person is over the age of 14 (s. 64). This notice must be served either before a plea is entered or with leave of the court. Following recent amendments, prosecutors no longer need to consider seeking adult sentences for serious violent offences or advise the court if they decide not to seek an adult sentence.

If the Crown has served notice that it will seek an adult sentence, then the young person may access all the procedural options that would be available to an adult facing an indictable Information. Specifically, the young person may elect the mode of trial in the same way and with the same options for a trial that would be available to an adult in Supreme Court, with a judge, or judge and jury, and with a preliminary inquiry if the offence is punishable by 14 years or more of imprisonment. Election as to mode of trial is governed by s. 67 of the *YCJA*. Just as the Crown may proceed by direct indictment against an adult and require that the adult be tried by judge and jury, the Crown may also require that a young person be tried by judge and jury pursuant to s. 67(6), despite the young person's election.

2. Evidence

Evidence is led before a Youth Justice Court essentially the same way it is in an adult criminal court, except for the treatment of statements made by accused young persons. The statements of accused young persons are governed by s. 146. This provision gives young persons much stronger protections against seeing their police statement used against them at trial, compared to adults. The *YCJA* recognizes that young persons are not adults: additional procedural protections are necessary to meet the special needs of young people. In order for the oral or written statement of a young person that was given to a peace officer or person in authority to be admitted into evidence, in addition to compliance with *Charter* rights upon arrest or detention, the Crown must prove the following:

- the statement was voluntary, in the common law sense (s. 146(2)(a));
- the person taking the statement clearly explained to the young person, in age-appropriate language, that the young person was under no obligation to make a statement, that any statement made could be used in evidence against the young person, that the young person had the right to consult counsel and a parent or other person chosen by the young person, and that the statement must be made in the presence of counsel and a parent or other person chosen by the young person, unless the young person decided otherwise (ss. 146(2)(b)(i)–(iv));
- the young person was given a reasonable opportunity before making the statement to consult with counsel and a parent, adult relative, or person of choice, so long as that person was not a co-accused or under investigation for the same offence (s. 146(2)(c)); and

- if the young person chose to consult with a person, the young person was given a reasonable opportunity to make the statement in the presence of that person (s. 146(2)(d)).

Under s. 146(6) of the *YCJA*, a statement may be admitted into evidence despite a technical irregularity, if the admission of the statement would not bring into disrepute the principle that youth are entitled to enhanced procedural protection.

Young persons may waive their rights under the *YCJA* and give statements without consulting anyone or having anyone present. The waiver must be in writing, or audio- or videotaped (s. 146(4)). If the waiver is technically irregular (for example, if the audiotape fails to record), the statement may still be admitted (s. 146(5)).

The statement provisions do *not* apply to spontaneous statements made to a peace officer or other person in authority, if the spontaneous statement was given before there was a reasonable opportunity for the police to comply with the requirements of the *YCJA* (s. 146(3)).

[§7.08] Youth Sentences

1. The Purpose and Principles of Sentencing

The *YCJA*, s. 38, sets out the purpose and principles of youth sentencing. Also, if the youth is Indigenous, *Gladue* factors will apply: see §8.02(2)(e) and §8.02(3)(d).

The purpose of youth sentencing is to hold the young person accountable by imposing just sanctions that have meaningful consequences and promote the young person's rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public (s. 38(1)).

Principles of youth sentencing — which resemble but have important differences when compared to those for adults (*Criminal Code*, ss. 718-718.2) — are listed in *YCJA* s. 38(2):

(a) the sentence must not result in greater punishment than an adult convicted of the same offence in similar circumstances would receive;

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the young person's degree of responsibility for it;

(d) all available alternatives to custody that are reasonable in the circumstances should be considered, with particular attention paid to the circumstances of Indigenous youth; and

(e) subject to (c), the sentence shall be the least restrictive one that is capable of achieving the purpose in s. 38(1), be the one most likely to rehabilitate and reintegrate the young person into society, and promote a sense of responsibility and acknowledgement of harm done to victims and the community.

(e.1) if this Act provides that a youth justice court may impose conditions as part of the sentence, a condition may be imposed only if

(i) the condition is necessary to achieve the purpose set out in s. 38(1),

(ii) the young person will reasonably be able to comply with the condition, and

(iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures; and

(f) subject to paragraph (c), the sentence may have the following objectives:

(i) to denounce unlawful conduct, and

(ii) to deter the young person from committing offences.

Section 38(3) requires the sentencing judge to consider the degree to which the young person participated in the offence, the harm done and whether it was intentional or reasonably foreseeable, any reparation made by the young person, any time spent in pre-trial custody, previous findings of guilt, and any aggravating or mitigating circumstances relevant to the purpose and principles of youth sentencing.

Section 39(1) restricts the use of custody. The court must *not* impose custody unless:

(a) the young person has been found guilty of a violent offence (defined in *YCJA*, s. 2);

(b) the young person has previously been found guilty of an offence under s. 137 of the *YCJA* (failure to comply with a sentence or disposition, i.e. breach of conditions) in relation to more than one sentence and, if the court is imposing a sentence for an offence under ss. 145(2)–(5) of the *Criminal Code* or s. 137 of the *YCJA*, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;

(c) the young person is guilty of an indictable offence for which an adult can be sentenced to imprisonment for more than two years, and has a history that indicates a pattern of extrajudicial sanctions or of findings of guilt; or

(d) in exceptional cases, the court may impose a custodial sentence if the offence is indictable and the aggravating circumstances would make a non-custodial sentence inconsistent with s. 38 of the *YCJA*.

If any of s. 39(1)(a) through (c) applies, the court must still consider all alternatives to custody that are reasonable in the circumstances, and may not impose custody unless no alternative would achieve the purpose and principles of sentencing (s. 39(2)). A judge who imposes custody must give reasons why a non-custodial sentence would not achieve the purpose of youth sentencing, including (if applicable) the reasons why the case is exceptional (s. 39(9)). The judge must consider a pre-sentence report, unless it is waived (ss. 39(6) and 40).

This sentencing regime is structured to support penalties that are more focused on rehabilitation than pure punishment. The principles allow defence lawyers to argue that for numerous reasons, a less harsh sentence must be imposed. And they require judges to justify why the less punitive sentence cannot be employed. Lawyers practicing in Youth Justice Court are likely to use precedents from other *YCJA* sentencings, but adult precedents will generally be inapplicable.

2. Available Sentences

The available youth sentences are found in s. 42(2):

(a) a judicial reprimand;

(b) an absolute discharge;

(c) a conditional discharge, in accordance with s. 38(2)(e.1);

(d) a fine, to a maximum of $1,000;

(e) an order to pay compensation or damages;

(f) an order to return property to another person;

(g) an order to compensate any innocent purchaser of property where the court has made a restitution order;

(h) an order to compensate any person in kind or by way of personal services;

(i) an order to perform community service;

(j) any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament (other than s. 161 of the *Criminal Code*, which involves offences against persons under the age of 16, and s. 51 of the *YCJA*, which requires the court to impose a mandatory prohibition for certain offences involving violence, firearms or drugs);

(k) probation up to two years, with conditions;

(l) an intensive support and supervision order;

(m) an order to attend a non-residential program;

(n) a custody and supervision order to a maximum of two years (unless the offence is one for which an adult could be sentenced to life imprisonment, in which case the maximum is three years);

(o) for attempted murder, manslaughter and aggravated sexual assault, a custody and supervision order to a maximum of three years;

(p) deferred custody and supervision up to six months;

(q) for murder, a custody and conditional supervision order (a maximum of ten years for first-degree murder, in custody for up to six years followed by conditional supervision, and a maximum of seven years for second-degree murder, in custody for up to four years followed by conditional supervision);

(r) an intensive rehabilitative custody and supervision order for a maximum of two years (unless the *Criminal Code* maximum for the offence is life, in which case it must not exceed three years, or the offence is first-degree murder, in which case it must not exceed 10 years, or the offence is second-degree murder, in which case it must not exceed seven years); and

(s) any other conditions the court considers appropriate, in accordance with s. 38(2)(e.1).

As indicated above, all custodial sentences under the *YCJA* include an order for supervision of the young person in the community following custody.

This menu of sentences under s. 42(2) might be compared to a ladder, with numerous opportunities for one party or the other to argue that the court should step up or down a rung. In considering such arguments, the principles under s. 38 are paramount for the court.

A peace bond under s. 810 of the *Criminal Code* is also an available sanction for youth by virtue of ss. 14(2) and 20(2) of the *YCJA*. (A peace bond is a type of protective recognizance which is casually described as a kind of "restraining order"; it requires that the accused cannot contact or approach the complainant for a period of time, usually a year. Peace bonds are *not* criminal convictions, and they are established on the lower standard of proof on a balance of probabilities.) The Youth Justice Court may impose a peace bond instead of imposing a sentence under s. 42(2), or it may impose one at an earlier stage in proceedings, as it does not require a finding of guilt.

[§7.09] Appeals and Reviews

1. Appeals

Summary appeals (sentence and conviction) are filed in the Supreme Court. Indictable appeals are filed in the Court of Appeal. If an Information contains both summary and indictable offences, they can be appealed together to the Court of Appeal (s. 37(6)).

The *YCJA* s. 37(10) indicates that no appeal lies as of right from a decision of the Court of Appeal, so leave is required to appeal to the Supreme Court of Canada. The constitutionality of this provision was challenged in *R. v. C.P.*, 2021 SCC 19. The majority held that automatic rights of appeal are not fundamental rights protected in the *Charter*, and the provision also balances protecting young people against automatic rights of appeal by the Crown.

2. Reviews

Two types of sentence review are available under the *YCJA*:

(a) reviews of non-custodial youth sentences, such as probation orders, under s. 59; and

(b) reviews of custodial sentences, under ss. 87, 94 and 98.

Section 59 permits the court to terminate or review non-custodial sentences on application by a young person, that young person's parent or guardian, the Attorney General, or the provincial director. The grounds for such reviews are set out in s. 59(2), and can include the young person's inability to comply with the sentence. A review under this section cannot result in a more onerous sentence without the young person's consent, except if the review application is being made because the young person breached the original sentence, or if the sentence must be extended to allow the young person to complete programs included in the sentence (s. 59(8)).

Section 87 allows a young person serving a custodial sentence to apply to the court to be moved to a less restrictive level of custody (commonly called "open custody") or to a more restrictive level of custody (commonly called "closed custody"). The reason for moving to closed custody is typically to access programs that are only available there.

Section 94 provides for the review of custodial sentences, which can result in the Youth Justice Court converting the sentence from custody to conditional supervision. Section 94(1) requires that any youth custodial sentence over one year must be reviewed one year after it was imposed, and at the end of every subsequent year, until its completion. If multiple sentences were imposed, then the year starts from the date the first sentence was imposed (s. 94(2)). Section 94(3) governs optional reviews of custodial sentences. It permits a young person, the young person's parent, the Attorney General, or the provincial director to apply for a review of the young person's sentence. If the sentence is for less than one year, the application can be made after 30 days or one-third of the sentence has elapsed, whichever is greater; if the sentence is for over a year, the application can be made after six months. The Youth Justice Court will only review the sentence where there are grounds for the review, such as a change in the young person's circumstances (s. 94(5)).

Section 98 allows the Attorney General or the provincial director to apply to convert the community supervision portion of a custody and supervision order into custody, if the court finds that there are reasonable grounds to believe that the young person will commit a serious violent offence and that the conditions of sentence would not prevent this.

[§7.10] Provincial Statutory Offences

The *Youth Justice Act*, S.B.C. 2003, c. 85, governs prosecutions under provincial legislation, such as the *Motor Vehicle Act* and the *School Act*. In practice it is not common for the Youth Justice Court to deal with such charges.

A sentence of custody for not more than 30 days is available for the following offences, among others:

- failure to comply with a youth sentence;
- contraband in, or trespass upon, a youth custody centre or corrections centre; and
- trespassing on school grounds.

A youth can also be sentenced to not more than 90 days custody for driving while prohibited or suspended, or for contravening a protective intervention or restraining order.

Unlike under the *YCJA*, custodial sentences under the *Youth Justice Act* do not include a period of supervision in the community.

Chapter 8

Sentencing[1]

[§8.01] Preparation

One of the most difficult tasks judges face in a criminal matter is imposing sentence. Many counsel spend hours, days or weeks cross-examining witnesses and arguing the finer points of the facts and law on the issue of guilt or innocence and, when their client is found guilty, they spend only a short time preparing for the sentencing proceeding. Ensuring that a fit sentence is imposed is a vital part of the practice of criminal law. This chapter addresses that practice in two parts: the sentencing hearing and the sentences that are available.

All section references are to the *Criminal Code* unless otherwise specified. Note that several (not all) mandatory minimum sentences were eliminated effective November 17, 2022 upon *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15 receiving Royal Assent and coming into force.

[§8.02] Sentencing Hearing—The Process

A sentencing hearing starts with either the admission or determination of guilt of the accused. The Crown makes submissions first, followed by the defence. Each of these aspects is explored in more detail below.

1. Preliminary Issues

(a) Determination or Admission of Guilt

A sentencing hearing follows either the judge's finding of guilt after trial or after the accused pleads guilty to the charge(s). If an accused is intending to enter a guilty plea, defence counsel needs to consider several issues.

Before the client enters a plea, defence counsel must be satisfied that the person truly admits the essential elements of the charged offence and is entering the plea for appropriate reasons (it would be inappropriate, for instance, to enter a plea to "get it over with"). Attempting to qualify a guilty plea generally results in the plea being struck and counsel being embarrassed. Defence counsel should review the charges with the client in detail and consider whether any legal defences are available to them. If the client decides to enter a guilty plea, counsel should review s. 606(1.1) and its substantive components with them before they enter a plea. This section requires that the plea be voluntary; that the accused understands the plea is an admission of the essential elements of the offence, the nature and consequences of the plea, and that the judge is not bound by any agreement between the accused and prosecutor; and that the facts support the charge. Generally, the sentencing judge will ask counsel to confirm they have reviewed this section with their client before accepting a plea, but it is not uncommon for the judge to review this section with your client on the record even if counsel confirms a s. 606(1.1) inquiry was conducted in advance.

Before any plea decision is made, each person charged with an offence will receive an initial sentencing position indicating whether the Crown intends to seek jail. This is relevant information for the legal aid application process. Once retained, defence counsel should discuss the Crown's position on sentencing with the Crown before speaking to the client about a plea. To advise the client properly, counsel will want the accused to understand exactly what sentence (or range of sentence) the Crown will seek. Defence counsel should be aware that the Crown's sentencing position on a guilty plea prior to fixing a date for trial will usually be lower than after the trial date is fixed. This recognizes the mitigating effect of an early guilty plea and the remorse it demonstrates.

Prior to entering a plea on behalf of a client, counsel should also confirm whether the client has other outstanding matters before the courts in any jurisdiction. Charges from other jurisdictions can be "waived" into a common jurisdiction for a guilty plea to combine it with other files. The advantage of dealing with all outstanding files simultaneously is that the "totality" principle should result in a lower ultimate sentence than many separate sentences that may be served consecutively. The disadvantage is that the Crown may argue that the larger picture shows a higher level of criminality.

[1] **Stephanie Dickson** updated §8.01–§8.10 of this chapter in January 2024; **Erica Olmstead** updated §8.09 in January 2024 and December 2022; and **Eric Purtzki** updated §8.10 in February 2023. Previously updated by Colleen Elden and Sara Clouston (§8.01–§8.08 in 2023); Kasandra Cronin, KC, and Sara Clouston (§8.01–§8.08 in 2021); Kasandra Cronin, KC (§8.01–§8.08 in 2017 and 2019); Peter H. Edelmann (§8.09 in 2020); John W. Conroy, KC (§8.10 in 2017); Michelle Booker, Nicole Jedlinski and Christie Lusk (2014); Elizabeth Campbell and Carol Fleischhaker (2003 and annually thereafter); Jacinta Lawton (2001); Teresa Mitchell-Banks, KC (1998–1999); and John W. Conroy, KC (annually until 1997).

(b) Pre-Sentence Reports

Once the accused has entered a guilty plea or the court finds the accused guilty, the court can order a probation officer to prepare and file a pre-sentence report. These reports are intended to assist the court when imposing a sentence or when determining if the offender should be discharged (s. 721). These reports are based on the description of the offence summarized in the police report, unless the court advises the probation office otherwise. It may take eight weeks or longer in some jurisdictions for a report to be prepared.

Subsection 721(3) sets out the factors that must be contained in a pre-sentence report, unless the court otherwise specifies. These include: the offender's age, maturity, character, behaviour, attitude and willingness to make amends; the offender's previous record, including any youth record (subject to the disclosure restrictions in s. 119(2) of the *Youth Criminal Justice Act*); and the history of any alternative measures used and the offender's response to them.

If the offender is Indigenous, the report should contain a *Gladue* component. (*Gladue* is addressed later in this chapter.) Counsel will need to gather comprehensive information relevant to the *Gladue* analysis in addition to that contained within the pre-sentence report, or request a stand-alone *Gladue* report, to ensure the court has all the information it must consider.

The probation officer will not, and should not, give an opinion about what they regard as an appropriate sentence. The probation officer can assist the court by setting out resources available to the offender in relation to the sentencing options.

Defence counsel should obtain a copy of the pre-sentence report before the sentencing hearing and review it carefully to ensure it complies with s. 721 and does not contain improper opinions or inaccurate facts. Defence counsel should also ask the client to review the pre-sentence report for inaccuracies. Defence counsel should discuss with the Crown, prior to the sentencing hearing, any matters defence counsel believes are improperly included in the pre-sentence report and any disputed factual information. Where the Crown does not agree that the information is inaccurate and should be corrected, or that the judge should be invited to disabuse their mind of the information, defence counsel should consider whether an objection is merited. An objection will give the Crown the opportunity to prove the disputed fact in the pre-sentence report: s. 724(3). Absent an objection, the judge is entitled to consider all of the contents of the pre-sentence report: *R. v. Schneider*, 2007 BCCA 560.

(c) *Gladue* Reports

Section 718.2(e) of the *Criminal Code* requires that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Section 718.2(e) is a remedial provision which was introduced to address the overincarceration of Indigenous people in Canada. *R. v. Gladue*, (1999), 133 C.C.C. (3d) 385 (S.C.C.) and *R. v. Ipeelee*, 2012 SCC 13, are the leading cases on how s. 718.2(e) should be applied, and the framework for sentencing Indigenous offenders.

At every sentencing of an individual who is Indigenous, the judge has a statutory duty to consider (1) the unique systemic and background factors which may have played a part in bringing the particular offender before the court (called "*Gladue* factors"); and (2) the types of sentencing procedures and sanctions which may be appropriate because of the offender's particular Indigenous heritage. To ensure this information is before the court at sentencing, counsel should request a *Gladue* report, where appropriate and time allows.

In BC, the court can order a *Gladue* report, which is now prepared by the BC First Nations Justice Council. The client will need to provide contact information and consent to the Crown office to provide redacted disclosure to the BC First Nations Justice Council. A *Gladue* writer will be assigned to review the materials and interview the client, family members, friends, and others. In addition to outlining *Gladue* factors, the report will contain options or a healing plan. Defence counsel and the client may alternatively choose to order a private *Gladue* report. Defence counsel should review the report with their client to ensure the contents are accurate. Crown and defence counsel should meaningfully consider the *Gladue* report and s. 718.2(e) in determining an appropriate sentence to submit to the sentencing judge.

Participating in and reviewing the contents of a *Gladue* report can be very difficult for the client. Counsel should aim to take a trauma-informed approach, including by discussing the process and its potential emotional impacts with the client before their participation so that they can seek out the support they may require.

2. Crown's Submissions

(a) Facts

When a judge has determined guilt following a trial, the facts will already be before the court. The court may accept as proven any information disclosed at trial and any facts agreed upon by the Crown and the defence. If the trial involved a jury, the court must accept as proven all express or implied facts that are essential to the jury's verdict of guilty. The court may find that additional facts (aggravating or mitigating) were proven at trial, or the court may hear additional evidence about that fact by either party. The party seeking to rely on a relevant fact, including something contained in the pre-sentence report, has the burden of proof. If the Crown seeks to rely on a relevant fact as an aggravating factor, and the defence disputes it, the Crown must prove the fact beyond a reasonable doubt (*R. v. Gardiner*, [1982] 2 S.C.R. 368; s. 724 (3)). If the defence seeks to rely on a relevant fact as a mitigating factor, and the Crown disputes it, the defence must prove the fact on a balance of probabilities.

When an accused enters a guilty plea, the Crown will read the facts into the record. The Crown and defence may also provide the court with an "agreed statement of facts."

If the defence disputes any facts, the Crown may call evidence at the sentencing hearing to prove the facts in issue. The defence may cross-examine those witnesses. If the defence intends to dispute any of the facts in the police report, it is best to advise the Crown so that if it is a point the Crown is seeking to prove, the witnesses can be notified and appropriate court time can be set aside. Similarly, if the defence chooses to call evidence at the hearing, the Crown may cross-examine the witnesses. The court may also compel any person to attend to assist the court in determining the appropriate sentence (s. 723(4)).

(b) Victim Impact Statements

Following submissions on the facts, Crown counsel will often file a victim impact statement ("VIS") with the court. Note that s. 2 of the *Criminal Code* has a broader definition of "victim" than just the victim of a crime. It also includes a person who has suffered harm, property damage or economic loss resulting from an offence against another person.

Section 722 outlines the content and form of a VIS. It must be in the prescribed form and may detail the emotional and financial impact of the offence on the victim. There are specific criteria defining what information may and may not be included. For example, the victim cannot assert unproven facts or give an opinion on what the sentence should be. Nor should a VIS ask the court to place a value on the life of a deceased victim greater than what is due every deceased victim of crime (*R. v. Bremner*, (2000), 146 C.C.C. (3d) 59 (B.C.C.A); *R. v. Berner*, 2013 BCCA 188.). Defence counsel should review the form and content of any VIS with the accused and ensure that it includes only properly admissible information.

While the VIS must be in writing, the sentencing judge must permit the victim to read the VIS or present the VIS in any other way the court deems appropriate, if the victim requests (s. 722(5)).

(c) Criminal Record

The Crown will seek to file a criminal record for the accused if one is alleged. Defence counsel should make sure that the record is accurate before it is filed in court. Defence counsel should alert the Crown to any disputed entries on the alleged record because the Crown may seek to adjourn the hearing so that evidence can be called to prove the record.

(d) Law

For Crown counsel the next step in the sentencing hearing is to refer to any law the Crown thinks is relevant to the hearing.

Counsel will likely want to refer to law from two sources during a sentencing hearing: (1) the *Criminal Code* ss. 718–718.201, which set out the purposes and principles of sentencing; and (2) sentencing decisions (case precedents). When referring to case precedents, counsel will look for those cases involving similar offences and individuals in similar circumstances to the offender.

Section 718 sets out the following objectives in sentencing:

(i) denunciation;

(ii) deterrence;

(iii) protection of the public;

(iv) rehabilitation of the offender;

(v) reparation to victims; and

(vi) promotion of a sense of responsibility in the offender.

Section 718.01 directs sentencing judges to give primary consideration to denunciation and deterrence when sentencing for an offence involv-

ing abuse of a person under the age of 18 years. See also *R. v. Friesen*, 2020 SCC 9 for sentencing principles for sexual offences against children.

Sections 718.02 and 718.03 require denunciation and deterrence be given primary consideration for listed offences against a peace officer or other justice participant, and service animals.

The government introduced new sentencing provisions with respect to violence against intimate partners and vulnerable people, as part of *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. These provisions require the court to give primary consideration to denunciation and deterrence where the offence involved abuse against a vulnerable person (s. 718.04); to consider the increased vulnerability of women victims, with particular attention to the circumstances of Aboriginal female victims, when imposing a sentence in respect of an offence that involved the abuse of an intimate partner (718.201); and to consider violence against an intimate partner to be an aggravating factor (s. 718.2(a)(ii)). Section 718.3(8) allows the court to impose a term of imprisonment that is more than the maximum term for the offence where an accused is convicted of an indictable offence involving violence used, threatened, or attempted against their intimate partner.

Regardless of which sentencing objectives are primary in the particular circumstances of the case, a judge must always consider the objectives in light of the fundamental principle that a sentence must be *proportionate* to the gravity of the offence and degree of responsibility of the offender (s. 718.1). Proportionality is the organizing principle in reaching a fair, fit and principled sentence (*R. v. Parranto*, 2021 SCC 46).

Section 718.2 sets out factors that the court is statutorily required to treat as aggravating, including abuse of a child or intimate partner, and motivations of hate or bias regarding race or sexual orientation. This is *not* an exhaustive list of potentially aggravating factors.

Other important sentencing considerations are also set out in s. 718.2:

(i) Parity is the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances: s. 718.2(b).

(ii) The totality principle says that where sentences are imposed consecutively, the combined sentence should not be unduly long or harsh: s. 718.2(c). A sentence should not exceed the overall culpability of the offender, and may offend the totality principle if it is substantially above the normal level of a sentence for the most serious of the individual offences involved, or its effect is crushing and not in keeping with the offender's record and prospects: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500.

(iii) An offender should not be deprived of liberty if less restrictive principles may be appropriate (also known as the principle of restraint): s. 718.2(d).

(iv) All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders: s. 718.2(e).

(e) *Gladue*

As noted above, in every case involving an Indigenous offender, the judge has a statutory duty, imposed by s. 718.2(e), to consider (1) the unique systemic and background factors which may have played a part in bringing the particular offender before the court; and (2) the types of sentencing procedures and sanctions which may be appropriate because of the offender's particular Indigenous heritage (*Gladue* and *Ipeelee*, *supra*). The offender is not required to establish a causal link between background factors and the commission of the offence before being entitled to have those factors considered by the sentence judge. For the defence position on Indigenous offenders, see §8.02(3)(d).

(f) Maximum and Minimum Sentences

The *Criminal Code* sets out maximum sentences for offences. The maximum available sentence can differ depending on whether the Crown decides to proceed summarily or indictably on a hybrid offence. For summary offences, the maximum sentence is generally a fine of not more than $5000, imprisonment of not more than two years less a day, or both, unless otherwise provided for by law (s. 787).

A number of mandatory minimum sentences in the *Criminal Code,* including for sexual interference, child pornography offences, and sexual assault of a complainant under age 16, have been struck down as unconstitutional by case law in BC. *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, which received Royal Assent on November 17, 2022, repealed mandatory minimum sentences for a number of weapons offences, robbery and

extortion without a firearm, and *CDSA* offences. These changes provide for wider discretion in imposing non-custodial sentences (see §8.04(8)). Prior to the sentencing hearing, counsel should research applicable case law to determine whether a mandatory minimum still applies or whether it has been struck down because of a constitutional challenge.

(g) Sentencing Position

The final step for the Crown is to submit to the judge the sentence it deems appropriate in all the circumstances of the case. It is quite appropriate for the Crown to point out the salient features of the offence, any aggravating or mitigating circumstances, and an appropriate sentence within the range suggested by the case law.

Sometimes (usually if the Crown and the defence have been negotiating before the sentencing hearing) Crown and defence counsel may agree on the appropriate disposition. There is a difference in the legal implications of a formal joint submission and a case where the Crown suggests a range and defence agrees that is the appropriate range. Where counsel have negotiated a joint submission for a particular sentence, they should advise the court. While sentencing is ultimately a function of the judge, and the court is not bound by anything agreed to by counsel, a court should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest (*R. v. Anthony-Cook*, 2016 SCC 43). A sentencing judge considering a harsher sentence than what is proposed must provide counsel with the opportunity to make further submissions (*R. v. Nahanee*, 2022 SCC 37).

(h) Ancillary and Other Orders

The Crown may seek ancillary orders appropriate to the offence, potentially including a firearm prohibition (ss. 109, 110); forfeiture of weapons and ammunition (s. 491); a DNA order (s. 487.051); a prohibition preventing access to children (s. 161); or a *SOIRA* order concerning the *Sex Offender Information Registration Act* (s. 490.012); see §8.05–§8.08. Section 743.21 provides that the court may order the offender be prohibited from communicating with any witness, victim, or other person during the custodial portion of the sentence.

3. Defence Submissions

(a) Facts

Defence counsel must consider the facts upon which the sentence will be based because there are implications beyond the sentence itself that could have lasting impacts on the offender.

For example, if the offender is imprisoned, the details of the offence and the offender will generally be given to the institution. Several decisions affecting the offender during the sentence may be based on those details. Initially, the offender will be classified to maximum, medium or minimum institutions, and case workers will select facts from the materials provided and put them into reports to others who will make decisions about the offender. Ultimately, a parole officer or other case worker will consider much of the material provided when preparing reports that will be forwarded to provincial corrections officials or the Parole Board of Canada. These decision-makers will usually accept the facts provided in the documentation and may rely on the facts to decide on the liberty of the offender. Psychiatrists, psychologists and other professionals will rely on these facts when assessing offenders and expressing their opinions. In some cases, an offender may do more time in prison because insufficient attention was spent on the details of the facts at the outset.

See §8.02(2)(a) with respect to disputes and agreements regarding the facts.

(b) Offender's Circumstances

In order to explain the offender's circumstances, defence counsel will want to consider providing the court with details about the offender's background, present character, relevant facts surrounding the circumstances of the offence, and any criminal record, if one exists.

A Provincial Court judge may hear dozens of sentencing submissions each day. Defence counsel's role is to help the judge see the client as an individual in a comprehensive yet concise way. Remember this when obtaining information from the client.

(i) Client's Background

It is useful for defence counsel to develop a standard Client Information Form to be completed at the first interview with the client and kept up to date. If the client has a sentencing hearing, the lawyer will have the necessary facts about the client ready.

Defence counsel should obtain details that include the following:

- a copy of a piece of identification;
- the client's full legal name, age, and date and place of birth;
- If the client is Indigenous, their community, Nation, or band; family/community history; *Gladue* factors; and non-custodial options for bail or sentencing (see Legal Aid BC's *Gladue* Submission Guide);
- the client's marital status, the name of the client's spouse and their occupation, and the names and ages of all dependants;
- the client's educational background and training certifications;
- the client's occupation, employment circumstances and employment history (also relevant to ability to pay a fine or make restitution);
- the length of time the client has lived or worked in the community and their citizenship status; and
- the client's physical and mental health.

Counsel may also want to obtain consents from the client for third parties and institutions to release medical, school, tax and probation records.

(ii) Character Evidence

Evidence of good character may be very important to the judge when determining an appropriate sentence. Counsel can interview the family of the accused, friends, neighbours, business associates and employers to gather information about the client's background. Counsel should ensure that the witnesses themselves are of good character and are credible and impressive. On sentencing, specific examples of the good work and conduct of the offender are admissible and helpful to the judge when assessing the overall character of the offender. Counsel may call witnesses, or file letters obtained from employers and character references. The letters are of greater weight where the authors make clear they are aware of the conviction. Defence counsel should vet and provide these materials to Crown in advance.

(iii) Criminal Record

Counsel should review the offender's past criminal record, if any, and obtain not only the date, place and description of prior offences, but also the penalties imposed and if the client pled guilty or was found guilty after trial. Knowing the circumstances of past convictions is also important to address aggravating or mitigating circumstances. A complete analysis of a past criminal record can be extremely helpful to a sentencing court.

Defence counsel looking at the client's criminal record should ask the following:

- Is the record accurate?
- If there are previous convictions, how long has it been since the last one, what were the circumstances of the offences, and how does the client explain previous convictions?
- If the offences were similar, what were the sentences for those offences? If the previous offences were of an entirely different nature, might that affect sentencing?
- Has the accused made any attempt since that time to rehabilitate?

(c) Sentencing Position and Rehabilitation Plan

To formulate a sentencing position and prepare submissions, defence counsel will need to get details about the offender and the offence(s), analyze the situation, isolate the relevant principles of sentencing in the circumstances of the case, and organize the facts, circumstances and relevant principles into a logical and cohesive argument or submission on sentence.

It is important to canvass past sentencing cases involving similar offences and offenders of similar background. Although counsel will rarely find an identical case, a review of the cases will determine the appropriate *range* of sentence. This will help when arguing about the range within which the sentence should fall. Note that ranges are helpful tools that can assist sentencing judges in crafting a proportionate sentence, but are not binding (*Parranto*, *supra*). While sentences should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, sentencing is always an individualized process.

Counsel should consider consulting sources for sentencing cases and ranges, such as Nadin-Davis's *Canadian Sentencing Digest*, available

on Westlaw CriminalSource and through Courthouse Libraries BC, and sentencing cases available through Quicklaw. Quicklaw also contains helpful secondary sources such as Ruby, Chan and Hasan's *Sentencing*, 8th edition (Toronto: LexisNexis, 2012).

Try to avoid referring the court to a raft of cases with limited applicability to your client's situation. A busy Provincial Court judge will not appreciate having to wade through a two-inch thick binder of case law at a sentencing hearing involving shoplifting. An effective practice is to provide the court with the *current* leading Supreme Court of Canada or BC Court of Appeal decision dealing with the applicable sentencing principles in the type of case before the court: for example, theft from an employer or break and enter of a dwelling place. Then, if you can find *recent* case law from British Columbia dealing with circumstances as close to your client's as possible, provide the court with only those cases. If they are from the BC Supreme Court or Court of Appeal, even better.

If the accused was detained, then counsel should know the exact time spent in pre-trial custody. If a custodial sentence is to be imposed, the judge will generally grant 1.5 days' credit for every day of pre-sentence custody served, provided the accused is not disqualified under s. 719(3.1), and provided the Crown does not seek to rebut the inference that the accused would have obtained early release: s. 719; *R. v. Summers*, 2014 SCC 26. Credit for pre-sentence custody is discussed in more detail in §8.04(19).

In some cases, it may also be important to ensure that the court is aware of the various programs and facilities available to assist it in tailoring the sentence to fit a particular individual. Although judges receive some information from the Corrections Branch, the Correctional Service of Canada and others, generally the court depends on Crown and defence counsel to provide this information and to update the court on current programs, facilities and options available.

Provide the court with concrete solutions and sentencing suggestions. When the offender has a drug addiction or there are other factors for which a rehabilitation plan is appropriate, put a plan together and show the court it is in place, for example, by arranging for an available bed at a treatment centre.

Section 720(2) allows an offender, with the consent of the Crown and the court, to delay sentencing in order to attend an approved treatment program. The Drug Treatment Court is such an approved program and may be an option for offenders whose crime cycles are motivated by drug use and who wish to engage in treatment.

In most cases, preparation for sentencing commences from the first interview with the client. When the accused intends to plead guilty and the causes of the criminal behaviour can be identified at an early stage, encourage the client to start some rehabilitative action, such as alcohol and drug counselling or psychological or psychiatric treatment, before the sentencing hearing. These actions help show the offender's commitment to rehabilitation and that any danger to the public can be managed by a non-custodial sentence. Up-to-date progress reports concerning such rehabilitative measures should be filed with the court at the time of sentencing. Periods of time on bail, or prior non-custodial sentences that have been completed satisfactorily should be brought to the attention of the court to demonstrate the offender's ability to comply with a supervisory sentence and to show that a sentence of incarceration is unnecessary.

Counsel should consider how the application of *Gladue*, or social context evidence such as anti-Black racism, reduces the client's level of moral blameworthiness or otherwise mitigates the sentence (*Gladue*; *R v. Morris*, 2021 ONCA 680).

Defence counsel must bring to the court's attention particulars of any reasonable chance of rehabilitation outside of custody, raise any relevant mitigating circumstances (which may include an individual's mental health: *R. v. Badhesa*, 2019 BCCA 70) or collateral consequences (*R. v. Suter*, 2018 SCC 34), urge upon the court the least restrictive reasonable alternative sentence in the circumstances, and ensure that the sentence is fit and just and within the normal range in accordance with the principles of sentencing and relevant past applications.

Section 728.2(d) of the *Code* can help defence counsel persuade the court to impose a non-custodial sentence. This section states that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. For example, a conditional sentence involving some form of "house arrest" may be appropriate as part of a sentence.

(d) Indigenous Offenders

When the client is an Indigenous person, counsel should be aware of additional considerations

that apply on the sentencing. As noted earlier, s. 718.2(e) requires the court to consider all available sanctions other than imprisonment for every offender, but judges must pay particular attention the circumstances of offenders who are Indigenous. Section 718.2(e) applies in all cases involving an Indigenous offender.

As the Supreme Court of Canada determined in *Gladue*, *supra*, s. 718.2(e) requires the sentencing judge to consider the unique systemic and background factors that may have contributed to bringing the Indigenous offender before the court. Judges must take judicial notice of the broad systemic and background factors affecting Indigenous people generally. Any additional case-specific information can come from counsel or a pre-sentence report with a *Gladue* component.

The defence may also obtain a stand-alone *Gladue* report (by hiring a report writer privately or asking the court to order a *Gladue* report) or might make *Gladue* submissions without the benefit of a report. When gathering and making *Gladue* submissions, counsel should be mindful of using a culturally competent, trauma-informed approach.

Practically, when counsel is trying to formulate an appropriate and persuasive submission on sentence, counsel should be aware of the many resources available to Indigenous offenders. For example, the Native Courtworker and Counselling Association of British Columbia is an excellent resource and has offices throughout British Columbia. Native Courtworkers assist people through the court system daily. They provide an invaluable service to both the offender and the courts. Native Courtworkers can also help find places for Indigenous offenders in treatment centres and counselling programs designed specifically for offenders who are Indigenous.

Clients who are Indigenous and are pleading guilty to a criminal offence may be able to have their case heard for sentencing in one of the BC's Indigenous Courts (also called First Nations Courts or *Gladue* courts). These courts approach sentencing from the perspective of restorative justice. There are Indigenous Courts located in Duncan, Kamloops, Merritt, New Westminster, North Vancouver, Prince George, Williams Lake, and Hazelton.

Indigenous Justice Centres, located currently in Merritt, Prince George, and Prince Rupert, may also assist with an offenders' reintegration and restorative options.

[§8.03] Preparing Submissions on Sentence

There are resources to help counsel address the factors in sentencing and prepare to make submissions. For example, see the Provincial Court's "Sentencing Fact Sheet," the Law Society's "Sentencing Procedure" in the *Practice Checklists Manual*, and the CLE publication "Sentencing Preparation Check Sheet" (November 2009), prepared by the Honourable Judge Joanne Challenger of the BC Provincial Court and Ursula Botz, Crown Counsel.

[§8.04] Available Sentences

The following paragraphs describe the sentences that are available under the *Criminal Code.* These sentences are listed in approximate ascending order of severity.

1. Absolute Discharge

(a) Imposing a Discharge

A discharge, either absolute or conditional, may be imposed for either summary conviction offences or indictable offences. A discharge may be granted for offences under the *Code*, as well as for provincial offences (*R. v. Trow* (1977), 38 C.C.C. (2d) 229 (B.C.S.C.)). A discharge may be granted even if the offender has previously completed a diversion program (*R. v. Drew* (1978), 45 C.C.C. (2d) 212 (B.C.C.A)).

A discharge (either absolute or conditional) can only be imposed if two conditions exist:

(i) the offence has no minimum punishment; and

(ii) the offence has a maximum punishment of less than 14 years imprisonment

(s. 730; *R. v. Bradshaw* (1975), 21 C.C.C. (2d) 69 (S.C.C.)).

When these statutory requirements are met, a sentencing judge may impose a discharge (absolute or conditional) if:

(i) the discharge is in the best interests of the accused; and

(ii) the discharge is not contrary to the public interest

(s. 730; *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.)).

For example, if the offender must support a family and needs to travel outside the country for work, it would be in the offender's interests to receive a discharge. A discharge may not be appropriate for violent crimes, including crimes involving violence against women (*R. v.*

Begley, 2019 BCCA 331), but discharges have been granted in some such cases.

The fact that an offender has previously been granted a discharge is a relevant consideration at the time of sentencing (*R. v. Tan* (1974), 22 C.C.C. (2d) 184 (B.C.C.A.); *R. v. Small*, 2001 BCCA 91). However, a record does not preclude the granting of a discharge.

(b) The Effect of an Absolute Discharge

When the offender receives an absolute discharge, the offender is deemed "not to have been convicted" (ss. 730(1) and (3)).

One year following an absolute discharge, the record of the accused's conviction is to be deleted from the automated criminal conviction records retrieval system kept by the police. No department or agency of the Government of Canada (including the police) can disclose the existence of the record or discharge without the prior approval of the Solicitor General of Canada (s. 6.1 of the *Criminal Records Act*, R.S.C. 1985, c. C-47 (the "*CRA*")). Exceptions are made for disclosure to police enforcement agencies under limited circumstances (s. 6.2 of the *CRA*).

Despite these provisions, an absolute discharge will often show on the records retrieval system for up to three years. U.S. customs officers may have access to these records, and offenders sentenced to discharges may be turned away at the border.

The *CRA* provisions respecting record suspensions apply only to offenders who have been "convicted" of an offence. Offenders who have been discharged are deemed not to be "convicted" pursuant to s. 730(3) of the *Criminal Code*, and therefore are not part of the pardon system.

2. Conditional Discharge

(a) Imposing a Discharge

See §8.04(1), "Absolute Discharge" for when a conditional discharge may be imposed.

(b) The Effect of a Conditional Discharge

When a sentencing judge directs that an offender be discharged conditionally, the offender is placed on probation for a set period of time. Once the probation order expires and the offender has abided by the conditions of the probation order, the conditional discharge becomes absolute.

Three years after an offender has been granted a conditional discharge, the criminal record is to be deleted from the automated criminal conviction records retrieval system kept by the police. No department or agency of the Government of Canada (including the police) can disclose the existence of the record or discharge without the prior approval of the Solicitor General of Canada (s. 6.1 of the *CRA*). There are exceptions for disclosure to police enforcement agencies under limited circumstances (s. 6.2 of the *CRA*).

(c) Revoking a Conditional Discharge

A conditional discharge may be revoked and a conviction substituted against an offender in two situations:

(i) the offender is convicted of a new offence while on the probation order; or

(ii) the offender is convicted of a breach of any of the conditions of the probation order.

Once the conditional discharge is revoked, the court may enter a conviction and impose a sentence (s. 730(4)).

3. Probation Orders

(a) Imposing a Probation Order

The court may impose a probation order either in combination with a suspended sentence (if there is no minimum punishment), or in addition to a sentence of a fine or imprisonment. (Those sentences are described more below.)

The primary purpose of a probation order is to secure the good conduct of the convicted person (*R. v. Dashner* (1973), 15 C.C.C. (2d) 139 (B.C.C.A.)).

The probation order may bind the offender for up to 3 years after it comes into force (s. 732.2(2)(b)).

Before making a probation order, the court must consider whether s. 109 or 110 of the *Code* (a firearms prohibition) is applicable (s. 731.1(1)).

(b) Conditions and Variations of Probation Orders

Subsection 732.1(2) sets out the compulsory conditions of a probation order. Subsection 732.1(3) provides for optional conditions.

The offender, the probation officer or the Crown may apply to the court that made the probation order to vary the optional conditions in the order (s. 732.2(3)).

(c) Transfer of Probation Orders

The court may transfer a probation order to another area within the province or outside the

province (s. 733). A transfer outside the province requires the consent of the Attorney General of the province in which the order was made.

(d) Breach of Probation Order

A breach of a probation order occurs when an offender who is bound by a probation order fails or refuses to comply with a condition of the probation order without reasonable excuse (s. 733.1).

Section 733.1 sets out the penalty for breach of a probation order. The Crown may proceed either by indictment (maximum penalty of four years), or summarily.

The Crown must prove all elements of the offence—the existence of the probation order as well as the circumstances that gave rise to the breach. Once the existence of the breach is proven, the offender may provide a reasonable excuse.

The trial for this offence can be held anywhere in the province where the offender is arrested or found. If the arrest occurs outside the province in which the original order was made, no proceedings can be instituted in that province without the consent of the Attorney General of the province in which the offender is arrested.

4. Suspended Sentence and Probation Order

(a) Imposing a Suspended Sentence and Probation Order

The court may impose a "suspended sentence" in combination with a probation order. A "suspended sentence" means that the court suspends the passing of sentence and directs that the offender be released on conditions as prescribed in the probation order (s. 731). A suspended sentence is **not** available when the offence carries a minimum penalty (s.731(1)(a)).

(b) When a Probation Order Pursuant to a Suspended Sentence Comes into Force

A probation order made pursuant to a suspended sentence comes into force on the day it is made (s. 732.2(1)(a)).

When an offender is subject to a probation order and is then convicted of another offence (including the offence of breach of probation), or is imprisoned in default of payment of a fine, the probation order continues in force, except insofar as the sentence renders it impossible for the offender to comply with the probation order (s. 732.2(2)(a)).

(c) Breach of a Probation Order that Is Part of a Suspended Sentence

When a probation order is made pursuant to a suspended sentence, the offender must be warned that if they breach the probation, they may be charged with a separate offence of breach of probation, and may be brought back before the court and sentenced on the original offence (s. 732.1(5)). Any failure by the court to comply with the obligations as set out in s. 732.1(5) does not render the probation order invalid.

Following a breach, the originating court may revoke the suspended sentence where:

(i) an offender bound by probation order is convicted of another offence (including a breach of that probation order under s. 733.1); and

(ii) no appeal has been taken on that conviction, or an appeal on that conviction has been taken and has been dismissed or has been abandoned (s. 732.2(5)).

Following the hearing, the court may:

(i) revoke the probation order and impose any sentence that could have been imposed initially if the sentence had not been suspended;

(ii) make such changes to the optional conditions that it deems desirable; or

(iii) extend the period for which the probation order is to remain in force, provided it does not exceed one year (s. 732.2(5)(d) and (e)).

Revocation applications are rare.

5. Fines

Section 734 outlines the imposition of fines on individuals. Section 735 outlines how fines are imposed on organizations. Fines are imposed rarely.

(a) Imposing a Fine on an Individual

The court must be satisfied, on a balance of probabilities, that the offender is able to pay the fine. When the court imposes a fine, it must meet the requirements in 734.1–734.2, which require that the amount and timeline of payment or partial payment be stated; that the offender has a copy of the order; and that the offender understands the order, consequences of non-compliance, options of payment including the fine option program in s. 736, and way to apply for a change in the terms of the order under s. 734.3.

The order is not rendered invalid just because the court fails to advise the offender of the information contained in s.734.2(1) (s. 734.2(2)).

(b) Changes to Fines Imposed on Individuals

Following the imposition of a fine, the court may hear an application, by or on behalf of the offender, to change any term of the order except the amount of the fine (s. 734.3).

The time to pay may be extended by subsequent application, even after the time to pay has expired and a warrant of committal has been issued (*R. v. Yamelst* (1975), 22 C.C.C. (2d) 502 (B.C.S.C.)).

(c) Default of Payment

An offender defaults where payment of the fine has not been paid in full by the time set out in the order.

Where an offender defaults on payment, the provincial or federal government may refuse to issue or renew a license, permit, or other similar instrument until the fine is paid in full (s. 734.5); the Crown may file and enter the order as judgment in the amount of the fine plus costs in any civil court in Canada that has jurisdiction for that amount, and it may then be enforced (s. 734.6); or the court may impose a period of imprisonment under s. 734(5).

(d) Warrant of Committal

When time has been allowed for payment of a fine, the court can only issue a warrant of committal in default of payment of the fine (s. 734.7) if:

(i) the full time allowed for payment has expired; and

(ii) the court is satisfied that the method of refusing to issue or renew a license or permit or other similar instrument or civil proceedings are not appropriate, or the offender has, without reasonable excuse, refused to pay the fine or discharge it under the fine option program (s. 734.7).

If no time has been allowed for payment of the fine and the offender defaults, the court must provide reasons for the immediate committal in the warrant (s. 734.7(2)).

(e) Reductions by Part Payment

The default term of imprisonment can be reduced proportionately by part payment of the fine, whether the payment was made before or after the execution of a warrant of committal. However, once the warrant of committal is executed, no amount offered in part payment of the fine will be accepted unless that amount is sufficient to secure a reduction of the sentence of one day or a whole number of days (s. 734.8).

(f) Fines on Organizations

Any fine imposed on an organization will be at the discretion of the court, unless otherwise provided by law (s. 735(1)(a)).

Fines imposed on organizations convicted of summary offences cannot exceed $100,000 (s. 735(1)(b)).

(g) Victim Surcharge

Section 737 of the *Criminal Code* requires that an offender convicted or discharged of an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* must pay a victim surcharge (s. 737). The amount of the surcharge is 30% of any fine imposed for the offence; or, if no fine was imposed, then $100 for an offence punishable by summary conviction and $200 for an offence punishable by indictment. This section was recently amended in response to *R. v. Boudreault*, 2018 SCC 58, where the court struck down the victim surcharge regime as unconstitutional. The recent changes (in force as of July 2019) re-enact the victim surcharge regime but provide the court with the discretion to waive the surcharge in appropriate cases. The court can waive the surcharge if satisfied that the surcharge would cause the offender undue hardship or would be disproportionate to the gravity of the offence or the degree of responsibility of the offender.

6. Fine Plus Probation Order

A fine and a probation order may be imposed together (s. 731(1)(b)).

7. Restitution

A restitution order requires the offender to pay money to the victim of a crime for the victim's financial losses resulting from the crime. The rationale is that restitution supports the principle of general deterrence. Before making any restitution order, the court must determine the exact amount to be paid and to whom. Therefore, counsel should come to court with the precise amount to be paid and to whom, with an address for forwarding funds.

Restitution may be part of a probation order under s. 732.1(3)(h) or a "stand alone" order under s. 738. These are two different orders having different consequences to the offender and victims.

(a) Restitution as Part of a Probation Order

Section 732.1(3)(h) provides that the court may order the offender to comply with such other

reasonable conditions as the court considers desirable. This subsection is commonly used to direct the offender to pay restitution to the victim of the offence as part of the probation order.

Failure to pay on time could result in a breach of probation charge being laid. In order to ensure that this condition is enforceable, the restitution amount must be made payable before the probation order expires.

(b) Restitution as a Stand-Alone Order

A stand-alone restitution order under s. 738 is an entirely separate order, which may be made alone or in addition to any other punishment imposed on the offender. It permits the court to order that an offender compensate a victim for damage or destruction of property property and other readily ascertainable amounts incurred from harms caused by the commission of a criminal offence, including costs resulting from intimate partner violence (s. 738(1)(c)). It may be made whether the offender is convicted of the offence or discharged (under s. 730), and at the court's initiative or on application by the Crown.

Where a stand-alone order is not paid, the order may be filed as a civil judgment in any civil court in Canada. Essentially, s. 738 relieves the victim of a criminal offence from having to sue the offender to be compensated for their damages. Should the offender later come into funds, the judgment may be enforced and the funds collected.

8. Conditional Sentence Order of Imprisonment

(a) Nature of Conditional Sentence Order

A conditional sentence order ("CSO") is a sentence of imprisonment served in the community instead of in an institutional setting. For certain offences, a court can impose a CSO instead of requiring that the offender serve a traditional jail sentence.

A court should only impose a CSO when a sentence of imprisonment of less than two years is appropriate. The court cannot impose a CSO when the offence is punishable by a minimum term of imprisonment.

CSOs include both punitive and rehabilitative conditions (distinguishing them from probationary measures, which are primarily rehabilitative). The punitive conditions ought to restrict the offender's liberty. House arrest should be the norm, not the exception (*R. v. Proulx*, [2000] 1 S.C.R. 61). In practice, onerous curfews are often imposed to restrict the offender's liberty.

The CSO provisions in s. 742.1 are intended to reduce reliance on incarceration and to increase resort to principles of restorative justice in sentencing (*R. v. Proulx*, [2000] 1 S.C.R. 61. Note the court's similar assertions regarding attempts to reduce institutional incarceration for Indigenous offenders in *R. v. Gladue*, [1999] 1 S.C.R. 688).

(b) Pre-Conditions for Imposing a CSO

The *Safe Streets and Communities Act*, which passed on March 12, 2012, provided mandatory minimum sentences for a number of drug and sexual assault-related offences, and restricted the use of CSOs. Pursuant to *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15, the *Criminal Code* was amended, effective November 17, 2022, to alter or remove many of those mandatory minimum sentences. As a result, CSOs are now available for numerous offences for which they were previously excluded.

CSOs **are not** available for the following offences (pursuant to s. 742.1):

(i) any offence punishable by a minimum term of imprisonment; and

(ii) terrorism or criminal organization offences prosecuted indictably with a maximum sentence of ten years or more;

(iii) the offences of attempted murder (s. 239), torture (s. 269.1) or advocating genocide (s. 318).

Where a CSO is not specifically excluded, its availability is governed by whether community safety would be endangered by the offender serving the sentence in the community (s. 742.1(a)), whether the imposition of a CSO would be consistent with the fundamental purpose and principles of sentencing as found in s. 718–718.2 (s. 742.1(a)), and the general principles set out in *R. v. Proulx*.

Where denunciation and general deterrence are the primary sentencing principles, the court is more likely to impose incarceration in an institutional setting. However, conditions of a CSO may be crafted that will satisfy these principles. As with probation orders, the court is required to provide the offender with a copy of the CSO. The court must take reasonable measures to ensure that the offender understands the CSO (s. 742.3(3)). The court's failure to comply with these obligations does not render the CSO invalid (s. 742.3(4)).

(c) Effect of Pre-Sentence Custody

A CSO cannot become available to an offender who otherwise deserves a penitentiary term (more than two years) simply because the offender has spent enough time in pre-sentence custody to reduce the penitentiary term to a sentence within the range required for a CSO (less than two years). The CSO provisions were not designed for offenders for whom a penitentiary term is appropriate (*R. v. Fice*, 2005 SCC 32).

(d) Combining Jail and CSOs

A court cannot impose a "blended" sentence of a conditional sentence and custodial imprisonment for a single offence (*R. v. Robertson*, 2002 BCCA 579; *R. v. Fisher*, 2000 CanLII 4948 (Ont. C.A.)). However, where an offender is sentenced for more than one offence, the court may blend a conditional sentence with custodial imprisonment, provided the combined sentence does not exceed two years less a day, the conditional and custodial sentences are not served concurrently, and the requirements of s. 742.1(b) (the offence is not punishable by a mandatory minimum sentence) are satisfied at least with respect to one of the offences (*R. v. Ploumis* (2000), 150 C.C.C. (3d) 424 (Ont. C.A.)).

(e) CSOs, Fines and Probation

Often a CSO will be followed by a period of probation up to a maximum of three years (s. 732.2(1((c)). Where a CSO and probation are ordered in relation to the same offence, a fine cannot be imposed (this would offend the "two out of three" rule). However, where the offender is convicted of more than one offence, courts have imposed conditional sentences, along with probation and a fine (*R. v. Ladha*, [2001] O.J. No. 5818 (S.C.J.); *R. v. Krolyk*, [1997] O.J. 4207 (Gen. Div.)).

The *Code* requires that a CSO, standing alone, be consistent with the fundamental purpose and principles of sentencing. Where a CSO does not otherwise satisfy that pre-condition, it cannot be supplemented with a fine (*R. v. Heidarian*, 2007 BCCA 288; leave to appeal refused, 2007 S.C.C.A. No. 69; *R. v. Joe*, 2005 YKCA 9 (Y.T.C.A.).

(f) No Burden to Show CSO Is Inappropriate

There is no burden on the Crown to establish that an offender should not receive a CSO. Thus, when considering whether to impose a CSO, the court will likely consider all of the evidence, regardless of which party ultimately tenders the evidence. In practical terms, it will generally be the offender who is best situated to convince the court that a CSO is indeed appropriate (*R. v. Proulx*, [2000] 1 S.C.R. 61).

(g) Compulsory and Optional Conditions

The compulsory conditions of a CSO in s. 742.3(1) are similar to those for a probation order under s. 732.1(2). Some of the optional conditions for a probation order in s. 732.1(3), such as reporting and remaining within the jurisdiction, are compulsory for CSOs.

The optional conditions for a CSO are also similar to those for a probation order. However, the court can order the offender to attend a treatment program approved by the province, and does not require the offender's agreement (s. 742.3(2)(e)).

Further, the other reasonable conditions imposed on a conditional sentence order are intended to secure the good conduct of the offender and to prevent the offender from repeating the same offence or any other offences (s. 742.3(2)(f)).

(h) Electronic Monitoring Program

The Electronic Monitoring Program (the "EMP") provides a means of monitoring an individual who is on house arrest as part of a CSO. It is available in the most densely populated parts of British Columbia.

Under the EMP, a bracelet transmitter is placed on the ankle of the offender and special equipment that communicates with the Corrections Branch computer is placed on the offender's home telephone. A curfew is established with clear start and finish times during which the offender is required to remain in their residence. If the offender leaves the designated residence at an unscheduled time, the equipment alerts the Corrections Branch computer and the authorities then take appropriate steps.

To be accepted into the program, offenders should meet criteria that includes the following:

(i) pose no threat to the safety of the community or to others in the home;

(ii) have no history or pattern of violence;

(iii) be serving a sentence less than two years;

(iv) be willing to obey the rules of the program and accept its restrictions; and

(v) have a home situation suitable for the program.

Defence counsel should request an adjournment to assess the suitability of electronic monitoring before making submissions on sentence. The British Columbia Corrections Branch develops policy and decides who will be placed on electronic monitoring, but only after offenders are carefully assessed for technical suitability.

(i) Changing Optional Conditions of a CSO

Changes to the optional conditions of a CSO may be proposed by any of the following:

(i) the CSO supervisor (s. 742.4(1));

(ii) the offender (s. 742.4(5)); or

(iii) the Crown (s. 742.4(5)).

The person proposing the change must give notice to the offender, the Crown, and the court of the proposed change and the reasons for it. Within seven days of receiving that notice, the offender or the Crown may ask the court to hold a hearing to consider the proposed change. Alternatively, the court may, on its own initiative, order that a hearing be held to consider the change (s. 742.4(2)).

The hearing regarding the proposed change must be held within 30 days after the court receives notice (s. 742.4(2)). These types of hearings can be held in chambers (s. 742.4(6)).

At the hearing, the court can (s. 742.4(3)):

(i) approve or disapprove the change; and

(ii) make any other changes to the optional conditions it deems appropriate.

If the CSO supervisor seeks the change, and the Crown or defence does not request a hearing after receiving notice of the proposed change, or the court does not order a hearing within the seven days, the proposed change takes effect automatically 14 days after the court receives notice. The supervisor is required to notify the offender and file proof of notice with the court (s. 742.4(4)).

(j) Transfer of CSO

When an offender moves to a different territorial division from the one that made the CSO, the court that made the CSO can transfer the CSO to a court in that other territorial division that would have jurisdiction to make the CSO in the first place. That latter court can then enforce that CSO in all respects as if it was the court that made the CSO (s. 742.5(1)). The Attorney General of the province in which the CSO was made must consent (s. 742.5(1.1)).

(k) Breach Hearing for CSO

When an offender allegedly breaches a condition of their CSO, the offender attends a hearing. Usually the judge who imposed the CSO presides at the CSO breach hearing and determines whether the offender did in fact breach the CSO.

Proceedings for hearing a breach allegation must commence within 30 days or as soon as is practicable after the offender's arrest on the breach or issuance of a warrant or summons (s. 742.6(3)).

Before the hearing, the Crown files with the court a written report, prepared by the offender's CSO supervisor, outlining the circumstances of the alleged breach. The CSO supervisor's report must include signed witness statements (s. 742.6(4); *R. v. McIvor*, 2006 BCCA 343). Subject to a waiver by the offender, failure to comply with this requirement will render the supervisor's report inadmissible under s. 742.6(5), and the court cannot rely on it to find a breach.

The CSO supervisor's report is admissible in evidence if the Crown has given the offender reasonable notice and a copy of the report (s. 742.6(5)).

With leave of the court, the offender may require the supervisor or any witness to attend at the hearing for cross-examination (s. 742.6(8)). However, often at CSO breach hearings, no witnesses are called—the Crown simply files the report, the offender admits the breach and may testify as to a "reasonable excuse" for the breach—and the court reevaluates the CSO.

After a hearing of the allegation of breach of a CSO (s. 742.6):

(i) the allegation may be withdrawn;

(ii) the allegation may be dismissed;

(iii) the court may find that the offender had a "reasonable excuse" for the breach; or

(iv) the court may find that offender has, on a balance of probabilities, breached the CSO without "reasonable excuse."

When the judge is satisfied, on a balance of probabilities, the onus of which is on Crown to prove, that the offender has breached the conditional sentence order *without* reasonable excuse, the judge can do any of the following (s. 742.6(9)):

(i) take no action;

(ii) change the optional conditions;

(iii) suspend the CSO and order the offender to serve part of the unexpired sentence in custody, and order that the CSO resume on release from custody; or

(iv) terminate the CSO and direct the offender be committed to custody until the expiration of the sentence.

When the offender breaches a condition without reasonable excuse, there should be a presumption that the offender will serve the remainder of their sentence in jail (*R. v. Proulx*, [2000] 1 S.C.R. 61; *R. v. Leighton*, 2007 BCCA 42).

(l) Suspension of CSO

A conditional sentence is suspended ("the clock stops ticking") from the time the warrant or summons issues or the offender is arrested on the breach until the court determines if the offender has in fact breached a condition (s. 742.6(10)).

When the offender is detained in custody pending the hearing of the breach allegation, the CSO starts to run again on the date of the detention order (s. 742.6(12)).

When the offender is not detained in custody pending the hearing of the breach allegation, the CSO will *not* start to run again, but the conditions of the CSO will continue to apply (s. 742.9(11)).

(m) Credit Towards CSO Pending Breach Hearing

An offender *may* receive some credit for the time between when the warrant or summons issues or the offender is arrested on the breach and when the court determines if the offender has breached a condition. Such credit may be obtained whether the offender was in or out of custody pending the breach hearing, and whether or not the court finds that the offender breached the CSO. However, the detention of the offender, and the determination at the breach hearing, affect the amount of time credited (ss. 742.6(14)–(17)).

Where an alleged breach is withdrawn or dismissed, or the court finds the existence of a "reasonable excuse," the offender will receive credit towards the time remaining on the CSO (s. 742.9(15)).

Where the court is satisfied that the offender has breached the CSO without "reasonable excuse," the court still may order, in exceptional circumstances and in the interests of justice, that some or all of the period of suspension be deemed to be time served under the CSO (s. 742.6(16)).

(n) Imprisonment for New Offence While on CSO

If an offender who is subject to CSO is imprisoned for another offence, whenever committed, the running of the CSO is suspended during the period of imprisonment for that offence (s. 742.7).

9. Intermittent Sentence of Imprisonment

(a) Imposing an Intermittent Sentence of Imprisonment

When the court imposes a total sentence of imprisonment of 90 days or less, the court may order, pursuant to s. 732(1), that the sentence be served intermittently at such times as specified in the order. The sentence need not be completed within 90 days of the date of imposition of sentence (*R. v. Lyall* (1974), 18 C.C.C. (2d) 381 (B.C.C.A.)). When imposing an intermittent sentence, the court must have regard to the following (s. 732(1)):

(i) the age and character of the offender;

(ii) the nature of the offence;

(iii) the circumstances surrounding its commission; and

(iv) the availability of appropriate accommodation to ensure compliance with the sentence.

During times when the offender is not serving their sentence in jail, the offender must comply with the conditions prescribed in the probation order (s. 732(1)(b)).

(b) Changing an Intermittent Sentence of Imprisonment

An offender serving an intermittent sentence can, on notice to the prosecutor, apply to the court that imposed the sentence to allow the offender to serve the sentence on consecutive days instead of intermittently (s. 732(2)).

(c) Terminating an Intermittent Sentence of Imprisonment

When a court imposes a sentence of imprisonment on an offender who is subject to an intermittent sentence on another offence, the unexpired portion of the intermittent sentence is to be served on consecutive days, unless the court orders otherwise (s. 732(3))

Where the sentence received on another offence (either at the same time or subsequently) is a CSO, the unexpired portion of the intermittent

sentence is not required to be served on consecutive days under s. 732(3). A CSO is not a "sentence of imprisonment" for purpose of s. 731(1) or 732(3), and intermittent sentences can be effectively combined with CSOs on other offences: *R. v. Middleton*, 2009 SCC 21.

10. Intermittent Sentence of Imprisonment, and Probation

A court *must* order that an offender is subject to conditions of a probation order while not in confinement until the intermittent sentence is complete and *may* order that probation continue for a set period after completion of the intermittent sentence (s. 732(1)(b)).

11. Intermittent Sentence of Imprisonment, and Fine

Section 731(1)(b) of the *Code* allows for probation in addition to either a fine or imprisonment, but not both. Since an intermittent sentence requires an offender be subject to a probation order while not in custody, and since this probation order can extend beyond the completion of the intermittent sentence, some debate has arisen in the case law as to whether an offender can receive an intermittent sentence and a fine. Given the inconsistent decisions, the best practice may be to not seek a fine with an intermittent sentence, and thus, avoid a possible appeal of a sentence.

12. Imprisonment for Two Years Less a Day, or Less ("Provincial Time")

A person sentenced to imprisonment for a term of two years less a day (or less) shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or other place of confinement within the province in which that person is convicted, other than a penitentiary (s. 743.1(3)). One exception is when the court convicts a person for escape from prison. In this circumstance, the court may order the term of imprisonment be served in a penitentiary, even if the time to be served is less than two years (s. 149).

The judge cannot designate the provincial institutions where the offender will receive provincial time.

13. Imprisonment for Two Years Less a Day, or Less ("Provincial Time"), and Probation

(a) Imposing "Provincial Time" Plus Probation Order

In addition to sentencing an offender to imprisonment for a term not more than two years, the court may direct that the offender comply with the conditions prescribed in a probation order (s. 731(1)(b)).

A probation order must be in addition to either a fine *or* imprisonment, not both. Where both a fine and imprisonment are imposed, there is no jurisdiction to order probation (ss. 731(1)(a) and (b); *R. v. Blacquiere* (1975), 24 C.C.C. (2d) 168 (Ont. C.A.); *R. v. Wright*, [1982] B.C.J. No. 701 (C.A.); *R. v. Bennicke*, [1982] O.J. No. 116 (C.A.)).

The probation order must not exceed three years (s. 732.2(2)(b)).

The probation order starts once the sentence of imprisonment expires (s. 732.2(1)(b)).

Probation cannot be imposed on a sentence of imprisonment for less than two years in the following situations:

(i) a concurrent jail sentence is imposed for another offence and this concurrent sentence is for two years or more (s. 731(1)(b); *R. v. Hackett* (1986), 30 C.C.C. (3d) 159 (B.C.C.A.); *R. v. Fontaine*, 2004 BCCA 477; *R. v. Weir*, 2004 BCCA 529); or

(ii) a consecutive jail sentence is imposed for another offence at the same time and the cumulative or aggregate jail sentence results in the offender serving two years or more (*R. v. Pawlak*, 2005 BCCA 500; *R. v. Hackett* (1986), 30 C.C.C. (3d) 159 (B.C.C.A.); *R. v. Autenreith*, 2004 BCCA 321).

The phrase "imprisonment for a term not exceeding 2 years" in s. 731(1)(b) relates only to the actual term of imprisonment imposed by a sentencing court at a single sitting. When an offender is serving a jail sentence to which a term of probation is attached, and then, before the expiration of that jail sentence, receives another jail sentence which, in combination with the prior sentence, totals more than two years, the probation order remains valid (*R. v. Knott*, 2012 SCC 42).

(b) Order Comes Into Force

When imprisonment that is less than two years ("provincial time") is imposed with a probation order, the probation order comes into force as soon as the offender is released from prison (*R. v. Ivan*, 2000 BCCA 452).

However, when the offender is released by way of conditional release (day parole or full parole), the probation order starts when the sentence of imprisonment expires rather than when

the offender receives conditional release (s. 732.2(1)(b)).

14. Imprisonment and Fine

The following information regarding imprisonment and fine applies to all sentences of imprisonment—both "provincial time" and "federal time."

When an offence does not require a minimum term of imprisonment, a court may impose a fine on the person (other than a corporation) convicted of the offence in addition to or instead of any other sanction that the court is authorized to impose (s. 734(1)(a)).

When the offence requires a minimum term of imprisonment for the convicted person (other than a corporation), the court may impose a fine *in addition to* the minimum term of imprisonment (the court cannot impose a fine instead of a required minimum term of imprisonment) (s. 734(1)(b)).

15. Imprisonment for a Term of Two Years or More ("Federal Time" or "Penitentiary Time")

(a) Imposing Sentence

A person who is sentenced to two years or more, or to two or more terms of less than two years each that are to be served one after the other for a total of more than two years, must serve the time in a penitentiary (s. 743.1).

Once sentenced to federal time, a prisoner will not be sent to a federal penitentiary for 15 days unless the prisoner agrees to be transferred earlier (s. 12 of the *CCRA*). The purpose of the delay is to allow the prisoner to file an appeal or attend to personal affairs before the transfer takes place.

A court that sentences or commits a person to a penitentiary must forward to the Correctional Services of Canada ("CSC") (s. 743.2):

(i) its reasons and recommendations relating to the sentence or committal;

(ii) any relevant reports that were submitted to the court; and

(iii) any other information relevant to administering the sentence or committal.

At the conclusion of sentencing, Crown and defence counsel should make submissions concerning what materials should be forwarded to CSC, including whether any parts of the materials should be deleted because they might unfairly prejudice the administration of the sentence.

(b) Where "Federal Time" Is Served

The judge who imposes sentence has no jurisdiction to designate the penitentiary in which the sentence is served.

(c) *Corrections and Conditional Release Act*

The *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "*CCRA*") governs federal time. The *Prison and Reformatories Act*, R.S.C. 1985, c. P–20 also has some limited application.

The *CCRA* authorizes the exchange of service agreements between the federal government and the province so that a person sentenced to federal time can serve their sentence in a provincial facility and vice versa. Federal prisoners so transferred are subject to the provincial laws and rules of the provincial prison and vice versa.

When an offender receives federal time, the Correctional Service of Canada must obtain the following information (s. 23 of the *CCRA*):

(i) relevant information about the offender and the offence;

(ii) any recommendations made at the time of sentencing or appeal;

(iii) any reports relevant to conviction or sentence that are submitted to the court; and

(iv) any other information relevant to administering the sentence.

CSC must ensure that the information it uses is accurate, current and complete (s. 24 of the *CCRA*). This duty exists in part because CSC is obliged to give to the PBC, provincial governments, provincial parole boards, police and other authorities, any relevant information to assist in decision-making, supervision or surveillance (s. 25 of the *CCRA*).

(d) Eligibility for Release

The *CCRA* sets out release eligibilities for prisoner serving fixed sentences of federal time. Generally, if a federal prisoner does not get day or full parole, they will be released after serving 2/3 of their sentence ("statutory release").

Despite the *CCRA*, when sentencing an offender for an offence set out in Schedule I (violent offences) or II (serious drug and related offences) of the *CCRA*, a judge may order that full parole eligibility be set at one-half of the sentence or ten years, whichever is less, on consideration of the factors in s. 743.6.

16. Imprisonment for a Term of Two Years, and Probation

(a) Imposing "Federal Time" Plus Probation Order

A probation order can only be imposed with a sentence of "federal time" if that sentence is exactly two years (s. 731(1)(b)). A probation order cannot be ordered with a sentence of "federal time" in excess of two years *except* where an offender is credited with time spent in pre-trial or pre-sentence custody, as this time should not be taken into account when determining if the period of imprisonment is such that a probation order may be added (*R. v. Goeujon*, 2006 BCCA 261; *R. v. Mathieu*, 2008 SCC 21).

(b) Order Comes Into Force

On a two-year sentence that is a federal sentence, the probation order will commence once the sentence expires.

17. Imprisonment of Two Years or More, and Fine

See §8.04(14).

18. Sentences of Life Imprisonment

Under the *Criminal Code*, life imprisonment is the maximum penalty that can be imposed for certain offences. In some cases, notably first and second degree murder, the *Criminal Code* provides for life imprisonment as a *minimum* sentence (s. 235 and s. 745 to 746.1).

Except where sentences of life imprisonment are fixed by the *Criminal Code*, such sentences are appropriate only for the worst offences committed by the worst offenders.

(a) First Degree Murder and Parole Eligibility

An individual convicted of first degree murder is automatically subject to a minimum of 25 years before full parole eligibility. Eligibility for day parole and unescorted temporary absences occurs at 22 years. There is no room for submissions by counsel on sentence in these circumstances. The Supreme Court of Canada held that the combined effect of s. 231(5)(e) and s. 742(a) [now 745(a)] of the *Code* does not infringe ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms* (*R. v. Luxton* (1990), 58 C.C.C. (3d) 449 (S.C.C.); *R. v. Arkell*, [1990] 2 S.C.R. 695).

(b) Second Degree Murder and Parole Eligibility

For second degree murder, the sentencing judge has the discretion to set the period of parole ineligibility between 10 and 25 years (s. 754(c) of the *Code*). On an appeal from a conviction of first degree murder where the Court of Appeal substitutes a conviction for second degree murder, the Court of Appeal may also set this parole ineligibility period (*R. v. Kjeldsen* (1980), 53 C.C.C. (2d) 55 (Alta. C.A.), affirmed [1981] 2 S.C.R. 617).

A jury may make a recommendation regarding the parole ineligibility period (s. 745.2 of the *Code*). This recommendation is based on the evidence leading to conviction, and not on further evidence or submissions from counsel regarding the proposed recommendations (*R. v. Nepoose* (1988), 46 C.C.C. (3d) 421 (Alta. C.A.); *R. v. Poirier*, 2005 CanLII 3583 (Ont. C.A.)). If the jury makes a recommendation, it is a factor for the trial judge to consider when imposing sentence, but the judge alone bears the responsibility to impose a fit sentence having regard to the factors specifically set out in s. 745.4 of the *Code* (*R. v. Jordan* (1983), 7 C.C.C. (3d) 143 (B.C.C.A.), leave to appeal refused December 5, 1983; *R. v. Cerra*, 2004 BCCA 594, leave to appeal dismissed, [2004] S.C.C.A. No. 15).

As a general rule, the period of parole ineligibility shall be for ten years, but this period can be substituted for a longer period (but not more than 25 years) if, according to the criteria in s. 745.4, the judge determines that the offender should wait a longer period before having their suitability to be released into the general public assessed (*R. v. Shropshire*, [1995] 4 S.C.R. 227).

When a parole ineligibility period of more than 15 years is imposed and the offender has served at least 15 years of the sentence, the offender may apply for judicial review to reduce the parole ineligibility period (s. 745.6; *R. v. Vaillancourt*, 1989 CanLII 7181 (Ont. C.A.); *R. v. Swietlinksi* (1995), 92 C.C.C. (3d) 449 (S.C.C.)). The application is heard by a jury, which determines whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, having regard to the factors in s. 745.63(1).

(c) Multiple Murders and Parole Eligibility

Section 745.51 of the *Criminal Code* authorizes the court to order that an offender convicted of multiple murders serve their periods of parole ineligibility consecutively rather than concurrently (meaning the periods of parole ineligibility could be stacked to make the offender ineligible for parole for longer than 25 years). In *R. v. Bissonnette*, 2022 SCC 23, the Supreme Court of Canada struck down s. 745.51 as unconstitutional. As a result, 25 years is the max-

imum period of parole ineligibility that may now be imposed on offenders sentenced to imprisonment for life.

19. Additional Considerations for Sentences of Imprisonment

(a) Credit for Pre-Sentence Custody (Dead Time)

A sentence commences at the time it is imposed, which is after pre-sentence custody has been credited (s. 719(1); *R. v. Mathieu*, 2008 SCC 21). A court must state on the record what the sentence would have been if credit for pre-sentence custody had not been granted (sometimes referred to as the "effective sentence"); the amount of time spent in pre-sentence custody and credit granted for that time; and the actual sentence imposed (s. 719(3.3)). However, failure to do so does not affect the validity of the sentence: s. 719(3.4).

Every offender charged after February 22, 2010, when the *Truth in Sentencing Act* was enacted, is entitled to credit for each day spent in custody at a ratio of at least one day's credit for every day spent in pre-sentence custody. Most offenders are given "enhanced credit" at a ratio of 1.5 days' credit for every day spent in pre-sentence custody where the circumstances justify it. The maximum credit that can be given is 1.5 days for every day served: *R. v. Summers*, 2014 SCC 26; *R. v. Clarke*, 2014 SCC 28; s. 719(3); s. 719(3.1).

The rationale for 1.5 days' credit is that the offender who is not released on bail and is instead held in pre-trial custody loses eligibility for parole or early release. This is because only time after the sentence is imposed is used to calculate dates for federal parole and statutory release, and gives a provincial offender the opportunity to earn remission. Without enhanced credit for time spent in pre-sentence custody, the offender who did not receive bail but received statutory release after serving 2/3 of his sentence would spend longer in jail than an identical offender who received the same effective sentence but did receive bail prior to being sentenced.

The *Criminal Code* is silent on whether credit should be given for time spent on judicial interim release. However, case law provides that stringent bail conditions (such as curfew, area restrictions, and house arrest) should be seen as a mitigating factor at sentencing, rather than time for which credit is given based on a rigid formula. A court should consider the impact of conditions on the offender's liberty and look at whether the accused was able to carry on with many aspects of ordinary life, such as employment (*R. v. Cuthbert*, 2007 BCCA 585; *R. v. Downes* (2006), 205 C.C.C. (3d) 488 (Ont. C.A.)).

(b) Release (Parole) Eligibility

The Parole Board of Canada ("PBC") makes parole decisions in BC. The Correctional Service of Canada ("CSC") supervises parolees.

The PBC is an independent administrative tribunal that has exclusive jurisdiction and absolute discretion to grant parole to an offender; terminate or to revoke the parole or statutory release of an offender; and cancel a decision to grant parole to an offender, or to cancel the suspension, termination or revocation of the parole or statutory release of an offender.

This jurisdiction applies to offenders serving a federal sentence and to offenders serving provincial time where a provincial parole board has not been established in a province (ss. 107(1) and 108(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "*CCRA*").

The *CCRA* guides PBC policies, operations, training and parole decision making and provides the legal framework for the correctional and parole system in Canada.

The *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20 (the "*PRA*") also provides some authority with respect to the release of provincial and territorial offenders.

Criminal lawyers are usually not involved in parole eligibility matters—these matters are a consequence of sentencing and are generally referred to specialists.

(c) Concurrent Terms of Imprisonment

Concurrent terms of imprisonment are served at the same time as one another. If two offences are closely linked, concurrent sentences may be proper (*R. v. Munilla* (1986), 38 Man. R. 79 (C.A.); *R. v. Hassan*, 2012 BCCA 201). Generally, unless the court specifically states that a sentence is consecutive or concurrent to any outstanding sentence, the sentences must be served concurrently (*Ewing v. Mission Institution*, 1994 CanLII 2390 (B.C.C.A.); *R. v. Duguid* (1953), 107 C.C.C. 310 (Ont. C.A.)).

(d) Consecutive (or Cumulative) Terms of Imprisonment

Consecutive (or cumulative) terms of imprisonment are served one after the other. If the charges against the offender arose out of separate and distinct transactions, consecutive sentences should be imposed (*R. v. Munilla* (1986), 38 Man. R. 79 (C.A.); *R. v. Grant*, 2009 MBCA

9). The "relevant date" for the purpose of imposing a consecutive sentence is the day of sentencing (not the offence date or conviction date) (*R. v. Johnson* (1998), 131 C.C.C. (3d) 274 (B.C.C.A.)). The "totality principle" requires that the cumulative sentence does not exceed the overall culpability of the offender: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

A court that sentences an offender may direct that the terms of imprisonment be served one after the other (consecutively) where the offences do not arise out of the same event or series of events, or one of the offences was committed while the accused was on bail or while fleeing from a peace officer. See s. 718.3(4) of the *Code* and s. 139 of the *CCRA.*

A judge may order a sentence to be served consecutive to another sentence the judge has previously imposed or is imposing. However, that judge ("judge #1") cannot order that a sentence be made consecutive to a sentence imposed by another judge ("judge #2") in another case, unless that sentence had already been imposed by judge #2 at the time of the conviction in the case in which judge #1 is sentencing (s. 718.3(4)(a) and *R. v. Paul*, [1982] 1 S.C.R. 621). This rule is important to note since adjournments can occur between the date of conviction and the date sentence is imposed.

Sentences for child pornography and other sexual offences against a child must run consecutively under s. 718.3(7).

The imposition of a sentence that is consecutive to a life sentence is illogical (*R. v. Cochrane* (1994), 88 C.C.C. (3d) 570 (B.C.C.A.)). Excessive sentences resulting from the accumulation of consecutive sentences will be tempered by the principle of proportionality in circumstances where the fixed sentence begins to exceed the offender's expected remaining lifespan (*R. v. Stauffer*, 2007 BCCA 7).

20. Dangerous Offenders and Long-Term Offenders

As part of the sentencing process, the Crown may apply to designate an offender as a "dangerous offender" or a "long-term offender." These designations have different consequences for sentence and are described below. Note that in determining an appropriate sentence under the dangerous offender or long-term offender scheme, s. 718.2(e) and *Gladue* apply (*R. v. Boutilier*, 2017 SCC 64).

The first step in any dangerous offender or long-term offender application is determining whether a psychiatric assessment is required. Where an offender is convicted of a "serious personal injury offence" or an offence referred in 753.1(2)(a) (specified sexual offences), and there are reasonable grounds to believe the offender might be found a dangerous offender or long-term offender, the court will grant the Crown's application for a psychiatric assessment of the offender (s. 752.1).

(a) Dangerous Offenders

A trial judge's discretion in deciding whether to declare an offender dangerous must be guided by the fundamental purposes and principles of sentencing as found in s. 718 to 718.2 of the *Criminal Code* (*R. v. Johnson*, 2003 SCC 46).

On July 2, 2008, the law on dangerous offenders changed. However, the previous law continues to apply to offences for which they are being sentenced, that were committed before that date. Most dangerous offender hearings are now governed by the current legislation.

Under the current legislation, the court **must** declare an offender dangerous when the following criteria under s. 753(1) (a) or (b) are met:

(i) the offence for which the offender was convicted is a "serious personal injury offence" set out in paragraph (a) of the definition of "serious personal injury offence" in s. 752, and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on evidence establishing the following (s. 753(1)(a) and *R. v. H.(M.B.)* (2004), 186 C.C.C. (3d) 62 (Ont. C.A.)):

- a pattern of repetitive behaviour that shows a failure to restrain the offender's behaviour, and a likelihood of causing death, injury, or severe psychological harm;
- a pattern of persistent aggressive behaviour that shows a substantial degree of indifference to the consequences to other persons;
- brutal behaviour associated with the offence that compels the conclusion that the offender is unlikely to be inhibited by normal standards of behavioural restraint; or

(ii) the offence for which the offender was convicted is a "serious personal injury offence" set out in paragraph (b) of the definition of "serious personal injury offence" in s. 752, and the offender has shown a failure to control their sexual impulses such that harm to other persons is likely (s. 753(1)(b); *R. v. H.(M.B.)* (2004), 186 C.C.C. (3d) 62 (Ont. C.A.)).

In some cases, based on an offender's criminal history, there is now a rebuttable presumption that the criteria in s. 753(1)(a) and (b) are met.

Upon designating an offender a "dangerous offender," the court must impose an indeterminate sentence *unless* there is a reasonable expectation on the evidence that a lesser measure will adequately protect the public from the offender committing a murder or a serious personal injury offence (s. 753(4.1)). If there is such a reasonable expectation, the court may impose either a determinate sentence of imprisonment of at least two years followed by long-term supervision of up to ten years, or a traditional sentence for the offence committed (s. 753(4)).

If the court does not find the offender to be a dangerous offender, the court may treat the application as a long-term offender application (described below) or hold another hearing for that purpose (s. 735(5)).

Given the matters under consideration, dangerous offender applications usually involve disclosure of the offender's entire corrections and criminal history and testimony of expert psychiatric/medical witnesses.

(b) Long-Term Offenders

The Crown can apply for a long-term offender designation at the outset, or the court may impose the designation if the evidence does not meet the legal test for a dangerous offender designation but does meet the test for a long-term offender designation. The court may impose the designation if satisfied of the following:

(i) a sentence of imprisonment of two years or more is appropriate for the offence for which the offender has been convicted (s. 753.1(1)(a));

(ii) there is a substantial risk that the offender will reoffend (s. 753.1(1)(b)); and

(iii) there is a reasonable possibility the risk can eventually be controlled in the community (s. 753.1(1)(c)).

The court *must* find there is a substantial risk of reoffending if the criteria listed in s. 753.1(2) are met (i.e. the offence is listed in s. 753.1(2); and the offender has shown a pattern of repetitive behaviour that shows a likelihood of causing death, injury, or severe psychological harm to other persons, or by conduct in any sexual matter has shown a likelihood of causing harm to other persons through similar offences). Where these criteria are not met, the court *may* still find a substantial risk to reoffend: *R. v. McLeod*, 1999 BCCA 347.

When a court finds that the criteria in s. 753.1(1) are met, including a substantial risk that the offender will reoffend, it may designate a person a long-term offender.

If a person is designated a long-term offender, the court must impose a sentence of a minimum of two years' imprisonment for the offence for which the offender was convicted and order long-term supervision for up to ten years (s. 753.1(3)).

When a court declines to impose a long-term offender designation, the court shall impose a sentence for the offence for which the offender was convicted (s. 753.1(6)).

[§8.05] Firearms and Weapon Prohibition Orders

Firearms prohibitions can be ordered in the following circumstances:

- upon sentence, pursuant to *Criminal Code* ss. 109 and 110;
- pursuant to applications under certain sections of the *Criminal Code*, such as ss. 111, 117.05, 117.011, 810, 810.01, 810.1, and 810.2;
- as part of a conditional sentence; and
- as a term of probation.

In some circumstances, the *Code* requires the court to impose prohibition orders; in other circumstances they are discretionary.

1. Mandatory Firearm and Weapon Prohibition Orders

The *Criminal Code* s. 109(1) requires the courts to make prohibition orders in these circumstances:

(a) an offender is convicted of an indictable offence for which an offender can receive a sentence of ten years or more and where violence against a person was used, threatened or attempted;

(b) an offender is convicted of an indictable offence where violence was used, threatened, or attempted against the person's intimate partner, the intimate partner's child or parent, or anyone who resides with the intimate partner.

(c) an offender is convicted of an offence under the *Code* of:

(i) using a firearm or imitation firearm in the commission of an offence under s. 85(1) or (2);

(ii) possession of a prohibited or restricted firearm with ammunition, under s. 95(1);

(iii) weapons trafficking in s. 99(1);

(iv) possession for the purpose of weapons trafficking, under s. 100(1);

(v) making an automatic firearm, under s. 102(1);

(vi) importing or exporting knowing it is unauthorized, under s. 103(1); or

(vii) criminal harassment, under s. 264;

(d) an offender is convicted of an offence under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "CDSA") of:

(i) trafficking in a controlled substance, under s. 5(1) of the *CDSA*;

(ii) possession for the purpose of trafficking, under s. 5(2) of the *CDSA*;

(iii) importing or exporting a controlled substance, under s. 6(1) and (2) of the *CDSA*; or

(iv) producing a controlled substance, under s. 7(1) of the *CDSA*; or

(e) an offender was subject to a prohibition order at the time that the offender committed a new weapons or firearms offence.

The length of time that a court must impose a mandatory prohibition order depends on whether the offence is a first or subsequent offence to which s. 109(1) applies (s. 109(2)):

(a) For offenders who have been convicted of an offence to which an order applies for the first time, the court must prohibit the offender from possessing:

(i) prohibited firearms, restricted firearms, prohibited weapons, prohibited devices, and prohibited ammunition *for life*; and

(ii) any firearm other than a prohibited firearm, restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance *for at least 10 years.*

(b) For offenders who receive subsequent convictions for an offence to which an order applies, the court must prohibit possession *for life* (s. 109(3)).

2. Discretionary Firearm and Weapon Prohibition Orders

Unlike a mandatory prohibition order, a discretionary prohibition order is not necessarily a blanket prohibition. The court can pick which kinds of weapons or firearms to prohibit the offender from possessing.

The *Criminal Code* allows a court to impose a discretionary prohibition order in the following circumstances (s. 110(1)):

(a) when the offender is convicted of an offence in which violence against a person was used, threatened or attempted, other than an offence referred to in s. 109; or

(b) when an offence was committed by an individual who was not subject to a prohibition order at the time of the offence, and which offence involved a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, any kind of ammunition, or an explosive substance.

When determining whether a discretionary prohibition order should be issued, the court shall consider whether it is desirable, in the interests of safety of the offender or any person, to make such an order (s. 110(1)).

When the court does not make a prohibition order, or makes an order prohibiting the possession of specific items, the court is required to give reasons (s. 110(3)).

Discretionary orders may last for any period up to ten years (s. 110(2)).

3. Preventative Firearm and Weapon Prohibition Orders

The court may prohibit an individual from possessing weapons, including firearms, even if the person is not convicted of an offence. Preventative firearm and weapon applications are rare, and beyond the scope of these materials, but may arise in two situations: (1) on application of a peace officer or firearms officer to a provincial court judge for an order prohibiting a person from possessing firearms and other regulated items (s. 111); or (2) on application of a peace officer to a justice where an item has been seized (s. 117.05). The judge or justice must be satisfied on reasonable grounds that it is not desirable in the interests of safety for the person to possess the specified weapons.

4. Lifting Firearm and Weapon Prohibition Orders

The court may lift prohibition orders only if the person subject to the order can establish the following (s. 113):

(a) they require a firearm or restricted weapon for sustenance hunting or employment purposes; or

(b) a prohibition order would constitute a virtual prohibition against employment in the only vocation open to the person.

Section 113 has also been applied to allow an exception for hunting for ceremonial purposes.

5. Surrender and Forfeiture Orders

When a court or "competent authority" makes a prohibition order, the court or "competent authority" may require the prohibited person to **surrender** to a peace officer, firearms officer or chief firearms officer (s. 114) the following:

(a) anything the order prohibits the person from possessing that the person possesses on the commencement of the order; and

(b) every authorization, licence and registration certificate relating to anything the order prohibits the person from possessing that the person possesses on the commencement of the order.

When an accused is convicted of an offence in which a weapon, an imitation firearm, a prohibited device, ammunition or an explosive substance was used and that thing has been seized, the Crown should seek a **forfeiture order** pursuant to s. 491. This order requires that every item that is prohibited by the prohibition order and is in the possession of the prohibited person is forfeited to His Majesty, to dispose of or otherwise deal with these items as the Attorney General directs (s. 115, s. 491(1)).

When a prohibition order or forfeiture order is made, the lawful owner or a person lawfully entitled to possess the item covered by the order may apply to have the item returned. If the item was destroyed, the value of the item will be paid to the owner (s. 117, s. 491(2)).

[§8.06] DNA Orders

1. Generally

Following conviction, the Crown may apply for an order requiring that a sample of the offender's DNA be taken. Most often the Crown makes such an application during the sentencing hearing.

The *Criminal Code* permits a court to order the collection and storage of bodily substances from certain convicted offenders. The *DNA Identification Act*, S.C. 1998, c. 37 regulates their use and storage. When a DNA order is made, a sample of one or more bodily substances (blood, hair or buccal cells) is obtained and sent to the National DNA data bank of Canada. The sample is processed, and a DNA profile is created and put into a database called the Convicted Offender Index.

2. Primary Designated Offences

For two subcategories of "primary designated offences" a DNA order is mandatory or presumptive. "Primary designated offences" are defined in s. 487.04.

Where an accused (adult or young person) is convicted or discharged of one of the "primary designated offences," listed under paragraph (a) and (c.02) of s. 487.04, the court must order the taking of a DNA sample from that offender (s. 487.051(1)).

However, where an accused is convicted or discharged of a primary designated offence under paragraph (a.1) to (c.01) and (c.03) to (d) of s. 487.04, the court shall order the taking of a DNA sample unless the court is satisfied that the offender has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice (s. 487.051(2) of the *Criminal Code*; *R. v. R.C.*, 2005 SCC 61).

3. Secondary Designated Offences

"Secondary designated offences" are defined in s. 487.04 of the *Criminal Code*.

If the accused is convicted, discharged, or found not criminally responsible on account of mental disorder, of a "secondary designated offence," the court *may*, on application by the prosecutor, order the taking of a DNA sample from that offender (s. 487.051(3)(b)).

In deciding whether or not to make such an order, the court must consider the factors listed in s. 487.051(3) and give reasons for its decision (s. 487.051(3); *R. v. R.C.*, 2005 SCC 61).

4. Collection of DNA Sample

When a court order authorizes the taking of samples of DNA, the court may order the offender to report at a certain place, day and time for the samples to be obtained (s. 487.051(4) of the *Criminal Code*). Samples shall be taken as authorized under the court's order or as soon as feasible afterwards (s. 487.056(1) of the *Criminal Code*).

5. Failing to Comply With DNA Order

If an offender fails to appear as required by a court order for the DNA sample, a Canada-wide warrant may issue for the offender's arrest in order to obtain the DNA samples (s. 487.0551(1) and (2) of the *Criminal Code*).

6. Use of DNA Information

The samples of DNA provided by the offender can only be used for investigative purposes (s. 487.08(1), (1.1) and (2) of the *Criminal Code*).

The information stored in the DNA data bank is not directly admissible in court proceedings. Should the identity of a suspect become known through information obtained by the police from the DNA data bank, the police must seize (or "re-seize") the DNA from the offender pursuant to a DNA warrant under s. 487.05 in order for that DNA to be used in a prosecution.

[§8.07] Prohibitions (s. 161)

The *Criminal Code* s. 161 allows a court to make various ancillary orders if the offender is convicted of a sexual offence against a person who is under the age of 16. Section 161 orders prohibit the offender from engaging in behaviour that brings the offender into unsupervised contact with people under the age of 16. Section 161 might include orders that the offender stay away from schoolgrounds, public parks or swimming areas, have no unsupervised contact with persons under 16 years of age, or not use the internet except under conditions imposed by the court.

[§8.08] *Sex Offender Information Registration Act* ("*SOIRA*") Orders

1. Purpose and Applicability of *SOIRA*

The *Sex Offender Information Registration Act* ("*SOIRA*") came into effect December 15, 2004, establishing the National Sex Offender Registry. The purpose of *SOIRA* is "to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders" (s. 2 of *SOIRA*). The Registry is maintained by the RCMP and is not accessible to the public.

Pursuant to s. 490.012(1), a court has been required to order that an offender convicted or found not criminally responsible on account of mental disorder in relation to certain sexual offences register with *SOIRA*. For specified other offences in s. 490.011(1), the Crown has been able to apply under s. 490.012(2) or (3) for a discretionary *SOIRA* order. Section 490.013(2.1) has required courts to impose *SOIRA* orders for repeat sexual offenders.

R. v. Ndhlovu, 2022 SCC 38, in a 5-4 ruling rendered October 28, 2022, altered the landscape of *SOIRA*. The majority found that ss. 490.012 and 490.013(2.1) infringe s. 7 of the *Charter* and cannot be saved by s. 1. The majority suspended their declaration pronouncing s. 490.012 of no force and effect for one year, with prospective application. The declaration striking down s. 490.013(2.1) is in immediate effect and retroactive.

SOIRA orders have never applied to "young offenders" as defined by the *Youth Criminal Justice Act*, unless they received an adult sentence (s. 490.011(2)). Counsel should be aware that persons may be subject to *SOIRA* obligations not arising from s. 490.012 orders. For instance, amendments to the *Code*, *SOIRA*, the *National Defence Act*, and the *International Transfer of Offenders Act* have been made to include Canadian Forces personnel convicted of sexual offences within the military justice system in the Registry and to allow for the inclusion within the Registry of persons convicted abroad of sexual offences deemed by the Attorney General or Minister of Justice as equivalent to a paragraph (a) s. 490.011 designated offence and who enter or re-enter Canada after April 15, 2011.

2. Appeals and Termination

There is a right of appeal from the imposition of a *SOIRA* order under s. 490.012(2) (the section that requires the court to impose an order where the Crown proves a secondary intent). The prosecutor may also appeal the refusal to make an order under this subsection (s. 490.014).

The offender may apply to terminate a *SOIRA* order under s. 490.012 earlier than its term. Various time periods must pass before such an application can proceed, essentially at the half point of the term of the order or after 20 years if the term is life: s. 490.015 of the *Criminal Code*.

The court will terminate an order early if the offender has established that the impact of continuing an order or obligation (including on their privacy or liberty) would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature (s. 490.016 of the *Criminal Code*).

3. Obligations if *SOIRA* Order Imposed

Within seven days of a s. 490.012 order, or the offender's release from custody, the offender must report to the registration centre (s. 4(1) and (2) of *SOIRA*). Failure to register is an offence (s. 490.031 of the *Criminal Code*).

An offender must provide identifying information including name and any aliases; addresses of residences, places of employment or school; home phone and cell phone numbers; height; weight; and identifying marks. It is an offence to knowingly provide false or misleading information under s. 5(1) or s. 6(1) of *SOIRA*: s. 490.0311 of the *Code.*

An order takes effect immediately. An offender may have a reporting obligation for life, for 20 years, or for 10 years, depending on the maximum term of imprisonment, whether the offender was convicted of more than one designated offence in a single proceeding, and whether the offender had previously been subject to an order or notice of obligation to comply with *SOIRA*: s. 490.013.

[§8.09] Immigration Consequences of Sentencing

Counsel must be aware of possible collateral consequences under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") that may follow a conviction and sentence. The consequences could be as serious as removal from Canada and could have a more significant impact on the accused than the conviction itself.

Prior to trial, sentencing, or any plea negotiations, counsel should consider consulting a lawyer knowledgeable in immigration matters to appropriately advise their client so the client can make informed decisions about how to proceed in the charges against them. A client who is not fully informed of legally relevant collateral consequences may seek to withdraw their guilty plea if it was entered without the benefit of this information. It is important to confirm a client's immigration status early in the process. Be sure to note this information on your client intake form, as the range of immigration consequences that an individual may face, particularly at sentencing, will depend on the individual's status in Canada.

Note that the consequences of a plea or sentence will often be different under the immigration law of other countries. If future entry into a foreign jurisdiction is important to a client, then a referral to a competent practitioner of foreign law is appropriate.

There are essentially three relevant levels of immigration status in Canada: citizen, permanent resident or protected person, and foreign national.

1. Citizen

A citizen has the most stable status. Under our current law, the only basis upon which citizenship can be revoked is if it was originally obtained fraudulently or through misrepresentation, including by providing false information or omitting information that could have induced error.

While a citizen's status will not be placed at risk by criminal processes, there can be other immigration implications in certain situations, such as the citizen losing passport privileges or becoming ineligible to sponsor relatives.

2. Permanent Resident or Protected Person

The status of permanent resident or protected person is relatively secure but can be lost in a defined set of circumstances, including if a permanent resident is found inadmissible to Canada for "serious criminality." Serious criminality is defined under s. 36(1)(a) as "having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed." For the purposes of this section, a hybrid offence is deemed to be indictable, so the relevant maximum term for a hybrid offence is the maximum term for the indictable version of the offence at the time of the conviction (s. 36(3)(a); *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50).

In assessing the length of the term of imprisonment imposed, pre-sentence custody that is expressly credited towards a person's sentence will count (*Canada (Minister of Citizenship and Immigration) v. Atwal*, 2004 FC 7). Conditional sentence orders will not count as they are not considered a "term of imprisonment" for immigration purposes (*Tran, supra*).

If sentenced to a term of imprisonment in Canada of less than six months, a permanent resident or protected person will have a right to appeal the potential loss of status for serious criminality to the Immigration Appeal Division of the Immigration and Refugee Board on equitable humanitarian and compassionate grounds (ss. 63 and 64). This right is the most significant protection the person has from loss of status and deportation from Canada.

Criminal procedures may also have other immigration implications. Following certain types of convictions, a person who is making a refugee claim could become ineligible to make a claim, barred from obtaining protected person status, and subject to removal from Canada without any assessment of their risk of persecution (ss. 101, 112, 113).

Certain convictions or sentences could affect a person's ability to sponsor relatives, eligibility to apply for citizenship, or access to travel documents.

Admissions or findings of fact in criminal matters could also have serious implications in immigration processes. Inadmissibility on security grounds or on grounds of organized criminality (ss. 34 and 37), for example, does not require a conviction and could be based on admissions made or evidence gathered in criminal processes. These grounds are broadly defined and made out on a "reasonable grounds to believe" standard (s. 33). Findings of fact in a criminal court will also be given significant weight

in admissibility proceedings, equitable appeals or other immigration applications.

3. Foreign National

A foreign national is any person who is not a Canadian citizen or a permanent resident, and has the most precarious immigration status. Foreign nationals require authorization to enter Canada and to engage in activities such as working or studying. A single criminal conviction for any hybrid offence under an Act of Parliament, even if prosecuted summarily, will render a foreign national inadmissible for criminality and subject to potential deportation (s. 36(2)(a)). A resolution that does not result in a conviction, such as a conditional discharge, may avoid this inadmissibility consequence. A sentencing judge must consider collateral immigration consequences in deciding a fit sentence. The risk of deportation cannot justify imposing a sentence that is inconsistent with the fundamental purpose and principles of sentencing and should not be used to circumvent the provisions and policies of the *IRPA*. However, if a sentence is in the appropriate range for the offence, it may be appropriate for a judge to impose the sentence that avoids the collateral consequence, given the harsher treatment the individual would experience flowing from the conviction (*R. v. Pham*, 2013 SCC 15).

Post-conviction relief can be sought through the pardon or record suspension process, or in the appellate courts—for example, by challenging the validity of the conviction (*R. v. Reid*, 2017 BCCA 53; *R. v. Agbor*, 2010 BCCA 278), seeking to withdraw a guilty plea that was not properly informed (*R. v. Wong*, 2018 SCC 25), or pursuing a sentence appeal (*Pham*, *supra*).

[§8.10] Record Suspensions and Pardons

1. Record Suspensions

An offender who has completed all of their sentences (including the payment of fines, surcharges, costs, restitution and compensation orders) may seek to minimize the continuing impacts of a past criminal conviction by seeking a record suspension pursuant to the *Criminal Records Act*, R.S.C. 1985, c. C-47 (the "*CRA*").

Applications for record suspensions are made to the Parole Board of Canada. Depending on the nature of the conviction, a person must wait a specified period of time following both summary conviction offences and conviction by indictment before applying (s. 4(1)(a) and (b) of the *CRA*).[2] The waiting periods vary depending on the date when the offence was committed. For offences committed on or after March 13, 2012, the waiting period is 10 years for indictable offences and five years for summary conviction offences.

Persons who have been convicted of an offence in Canada under a federal act or regulation, or a Canadian offender found guilty of an offence in another country and transferred to Canada under the *International Transfer of Offenders Act*, may apply for a record suspension (s. 3 of the *CRA*), unless they are ineligible.

Some offenders are permanently ineligible for a record suspension. For instance, a person is permanently ineligible if they were convicted of more than three offences prosecuted by indictment or subject to a maximum punishment of imprisonment for life, and for each was sentenced to imprisonment for two years or more (s. 4(2)(a),(b) of the *CRA*). Persons who committed an offence listed in Schedule 1 to the *CRA* (sexual offences in relation to children) are not eligible for a record suspension unless the offender satisfies the Board that they were not in a position of trust or authority towards the victim and the victim was not in a relationship of dependency with them, the offender was less than five years older than the victim, and there was no violence, intimidation or coercion used or threatened (s. 4(3)(a)-(c)).

The Board may order a record suspension upon being satisfied that the applicant was of good conduct and not convicted of an offence during the applicable waiting period. Additional criteria apply if the offence falls under s. 4(1)(a) of the *CRA* (primarily indictable offences). In 2010 and 2012, Parliament enacted the *Limiting Pardons for Serious Crimes Act*, and the *Safe Streets and Communities Act*, which amended provisions of the *CRA*, requiring applicants to meet additional eligibility criteria for a record suspension. The additional eligibility criteria require that the Board also be satisfied that the suspension would provide a measurable benefit to the applicant, sustain rehabilitation, and not bring the administration of justice into disrepute (s. 4.1(1)(b), 2 and 3). The retroactive application of the amendments was successfully challenged on constitutional grounds in *Chu v. Canada (Attorney General)*, 2017 BCSC 630. The effect of that judgment is that if an

[2] As a result of Parliament's amendments to the *CRA* in 2019, Canadians with criminal records for simple possession of cannabis can apply for a record suspension with no mandatory waiting period or cost.

applicant seeks a record suspension for a conviction that precedes the 2010 and 2012 amendments to the *CRA*, they are not subject to the additional criteria and are instead assessed according to the eligibility criteria in place at the time of the applicant's first offence.

A record suspension does not erase a criminal conviction, but it removes it from the Canadian Police Information Centre (CPIC) database. This means that neither the criminal record nor a record of suspension will appear in a CPIC search. This helps remove barriers to employment and educational opportunities that make it difficult for people with a criminal record to reintegrate into society. Some preventative obligations and disqualifications cannot be removed by a record suspension (s. 2.3(b) of the *CRA*), including various obligations to comply with *SOIRA* and prohibitions under s. 161 of the *Code*. (However, a person can also apply to terminate their *SOIRA* obligations: s. 490.015 of the *Code*.)

Note as well that a record suspension does not guarantee entry or visa privileges in other countries. That is a matter of the law of that other country and not Canadian law.

A record suspension may be revoked, within the discretion of the Board, as set out in s. 7 of the *CRA*. It also automatically ceases to have effect in the circumstances described in s. 7.2 of the *CRA*, such as if the person is subsequently convicted of an indictable offence under a federal statute or regulation.

2. Pardons

As an alternative to a record suspension, and as an exceptional remedy, a person convicted of a federal offence may apply for a pardon on the basis of clemency under the *Criminal Code* (s. 748; s. 748.1) or under the royal prerogative of mercy. The application is made to the Parole Board of Canada.

Chapter 9

Appeals

Appeals: Summary Conviction Offences[1]

[§9.01] Legal Framework

A single judge of the Supreme Court hears appeals of offences that are prosecuted summarily, and of offences prosecuted under provincial statutes and municipal by-laws. The Provincial Crown (BC Prosecution Service) is the respondent for *Criminal Code* offences, and the Public Prosecution Service of Canada for those under the *Controlled Drugs and Substances Act* and other Acts under the jurisdiction of the Federal Crown. By-law offences are handled by legal counsel for the municipality.

The relevant law and procedure for summary conviction appeals brought for criminal matters is found in ss. 812–838 of the *Criminal Code* and under Rule 6 of the *Criminal Rules of the Supreme Court of British Columbia* (the "Rules"). The Rules also include boilerplate forms that should be used in drafting the applicable documents.

Parts of sections 683–689 (except s. 683(3) and(5)) of the *Criminal Code* apply to summary conviction appeals (s. 822). This includes applications for the appointment of counsel pursuant to s. 684 of the *Criminal Code*.

Sections 101 to 130 of the *Offence Act* govern summary matters under provincial statutes (for example, convictions under the *Motor Vehicle Act*). Section 109 of the *Offence Act* incorporates parts of ss. 683–689 of the Criminal Code into *Offence Act* appeals. Where the *Offence Act* is silent on a given point, s. 133 of that legislation makes the *Criminal Code* provisions on summary conviction applicable.

[§9.02] Procedure

1. Jurisdiction

Determining whether to file a criminal appeal in the Supreme Court or the Court of Appeal is straightforward. The appellate jurisdiction of the Supreme Court is limited to those matters prosecuted summarily under Part XXVII of the *Criminal Code*. If the Crown elected to proceed by way of indictment on a hybrid offence, the appeal is made to the Court of Appeal. However, when an accused has pleaded guilty to a combination of both summary as well as indicted offences and is appealing the sentence, the best approach is to have all matters heard in the Court of Appeal pursuant to s. 675(1.1) of the *Criminal Code*.

Appeals and reviews for young persons convicted of offences are dealt with in Chapter 7, §7.09.

When an appeal is filed, the oral hearing will ordinarily be set for a morning or afternoon court sitting (or portion thereof). These blocks of time are referred to as "Criminal Chambers." If more time is required, this may result in a longer wait for a hearing date.

Pursuant to s. 814(3) of the *Criminal Code*, the appeal will be heard in the Supreme Court closest to the Provincial Court where the adjudication under appeal was made. An application may be made under that same section to move the hearing to another courthouse.

2. Documents and Timelines

Appeals are commenced by filing six copies of the notice of appeal (Form 3 Defence, Form 4 Crown) at the appropriate registry. "Registry" means an office of the appeal court in the judicial district nearest to the place where the trial was held (Rule 6(1)).

If the defence appeals, the appeal must be filed within 30 days after the order under appeal has been pronounced, or within 30 days after the sentence has been imposed (Rule 6(2)). The registry clerk forwards a copy of the notice of appeal to the Crown. If the accused was convicted, the defence may commence an appeal on that conviction before the sentence is imposed (*R. v. Benson*, 1978 CanLII 2365 (B.C.C.A.)).

If the Crown appeals, the appeal must be filed and served within 30 days after the order under appeal has been pronounced (Rule 6(3)). The Crown must serve the defendant personally or, if necessary, apply under Rule 6(4)(c) for directions from the court for alternative service, or obtain an order for substituted service if the accused is evading service (Rule 6(4)(d)).

The date for hearing the appeal can be fixed when the documents are filed, or soon after. Counsel must provide available dates to Supreme Court Scheduling, which is distinct from the registry staff, although in some court locations they may be close to each other. The hearing date for the appeal must be within six months from the date the Notice of Appeal was filed. Within that six-month period, the date may be changed with agreement of counsel, confirmed by filing a requisition. Dates beyond the six-month period can only be set with leave of the

[1] Revised by **Nicholas Reithmeier**, Crown Counsel, Summary Conviction Appeals, New Westminster, in May 2023, February 2021, August 2018 and 2016. Previously revised by John Caldwell (2010); Lisa Falloon (2009); Gillian Parsons (2006); Anita Ghatak (2005); Gail C. Banning (2004); Adrienne Lee (2002); K. Angela White (1998–2001); Sandra Dworkin (1996 and 1997); and Suzanne Williams (1995).

court (Rule 6(11)), which would be done through an in-court application to a Supreme Court judge.

Most appeals are argued on the transcript. Consequently, within 14 days of serving the notice of appeal, the Rules stipulate that the appellant must furnish proof (satisfactory to the registrar) that transcripts have been ordered (Rule 6(5)). If the appeal is from a conviction, the evidence and reasons for judgment are required. Submissions of counsel are not required under the Rules, but can be helpful and would typically be ordered and filed. In contrast, an appeal of a sentence (i.e. the appellant says the sentence is improper) must include submissions by counsel. The original and one copy of the required transcripts and reasons for judgment must be filed and served within 30 days (sentence appeals) or 45 days (all other appeals) of service of the notice of appeal (Rule 6(7)).

Not later than 30 days before the hearing, the appellant must file a statement of argument and serve one copy on the respondent (Rule 6(14)). The appellant's statement must be no more than 20 pages (Rule 6(18)) and must include the circumstances, relevant facts, and points of law and fact to be argued (Rule 6(15)).

The respondent must then file a response not later than 14 days before the hearing (Rule 6(14)). The respondent's statement must indicate which portions of the appellant's circumstances and facts are accepted, state the respondent's version of the circumstances and facts where there is disagreement, and include any additional circumstances or facts to be relied upon. In addition, the respondent must state a position about the points of law contained in the appellant's argument and state any additional points to be argued (Rule 6(16)) and is also limited to 20 pages (Rule 6(18)).

Though not required by the Rules, three bound copies of all case law referred to in the statement of argument can also be filed. A modern approach is to hyperlink the cited cases within a PDF of the argument and forward this to Supreme Court Scheduling, who in turn forwards it to the judge assigned to the appeal. If counsel are referring to many of the same cases, they should consider preparing and filing a joint book of authorities.

A statement of argument is not required if the appellant is unrepresented (Rule 6(19)(a)) or if the appeal is from sentence only (Rule 6(14)). In sentence appeals, however, it is useful to file a brief or memorandum of argument setting out the party's position. It is also very useful for the Crown to file an argument when the appellant is self-represented.

All statements of argument must refer to the transcript and list the authorities relied upon. References to authorities should include the full citation. The statement of argument must be on 8 1/2 x 11-inch paper, be double-spaced, and have consecutively numbered paragraphs (Rule 6(18)).

Unlike appeals in the Court of Appeal, there is no requirement for appeal books to be filed in summary conviction appeals. However, it will usually fall on counsel to arrange for all exhibits used in trial and sentencing to be transferred from the Provincial Court registry to the Supreme Court registry where the appeal has been filed.

Although all these foregoing provisions are written as mandatory, in practice, many of them (other than Rule 6(2) and (3)) are rarely strictly enforced. The deadlines that follow after the filing of the notice of appeal will frequently be given latitude through the agreement of counsel.

An appeal may be abandoned by filing a notice in Form 5, or by speaking to the matter in court.

Rule 6 (subrules (2)–(22)) provides that the respondent or the registrar may apply for dismissal of the appeal if the appellant fails to pursue the appeal diligently or fails to comply with the Rules.

3. Extension of Time to Appeal

Applications to file a notice of appeal outside of the 30-day limitation period may be made pursuant to Rule 6(25) to a Supreme Court judge. The legal principles governing an application for an extension of time are well established and were succinctly stated in *R. v. Khungay*, 2020 BCCA 269:

> [8] A justice of this Court may extend the time to file a notice of appeal or application for leave to appeal: *Court of Appeal Act*, …. The criteria applicable to granting an extension of time are found in *Davies v. C.I.B.C.* (1987), 1987 CanLII 2608 (B.C.C.A.), 15 B.C.L.R. (2d) 256 at 260 (C.A.) and are summarized as follows:
>
> 1) Was there a bona fide intention to appeal?
>
> 2) When were the respondents informed of the intention?
>
> 3) Would the respondents be unduly prejudiced by an extension of time?
>
> 4) Is there merit in the appeal?
>
> 5) Is it in the interests of justice that an extension be granted?
>
> [9] In *Davies*, Seaton J.A. for the Court said the fifth factor "encompasses" the other factors and "states the decisive question" (at 260).
>
> …
>
> [10] These same factors apply in the criminal context: *R. v. Smith*, 1990 CanLII 1028 (B.C.C.A.) at 2-3.

See also the summary of this law in *R. v. Vinet*, 2011 BCSC 1928 at para. 15. As can be seen from *Vinet*, time is of the essence when it comes to com-

plying with the Rules for commencing an appeal, particularly if the Crown is appealing. The court may give greater latitude to defence applications, but all efforts should be made to comply with Rules 6(2) and (3).

4. Pre-Hearing Conferences and Applications for Directions

A pre-hearing conference may be held pursuant to Rule 6(12) and (13). Rule 6(34) also allows either party to apply for directions for any matter not provided for in Rule 6. It may be prudent to use these provisions if the appeal deals with a complex question such as the ineffective assistance of counsel or an application to adduce fresh evidence. For the former issue, while the Court of Appeal has a Practice Directive to help the parties navigate such litigation, the Supreme Court does not, but can adopt the steps set out within the higher Court's directive.

[§9.03] Uncommon Forms of Appeal

Most summary conviction appeals are launched under s. 813. Some other sections, however, might be used.

Section 822(4) is the basis for seeking a trial *de novo* (new trial) in the Supreme Court (s. 822(4)). An appeal may be allowed "because of the condition of the record," or for any other reason where the interests of justice so require. In practice, this section is rarely invoked (*R. v. Louis*, 2014 BCSC 1029). It might be used if there was a malfunction in the recording equipment at trial.

Section 830 provides that any party may appeal against a "conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court." This section gives the Crown a more expansive scope of appeal than that provided under s. 813(b).

Section 830 sets out three grounds for appeal:

(a) it is erroneous in point of law;

(b) it is in excess of jurisdiction; or

(c) it constitutes a refusal or failure to exercise jurisdiction.

The court's powers under s. 830 are set out in s. 834: the court can affirm, reverse or modify the conviction, judgment, verdict, or other final order or determination; or it can remit the matter to the summary conviction court accompanied by the opinion of the appeal court.

[§9.04] Bail Pending Appeal

An appellant may apply for bail pending appeal under s. 816. Unlike s. 679 releases (by the Court of Appeal), s. 816 does not set out what the court must consider when determining if the applicant should be released. However, the common law has incorporated the considerations under s. 679 (*R. v. Gill*, 2010 BCSC 1987) (further described in §9.11). Amendments to the *Criminal Code*, in force as of December 18, 2019, require the court to impose, as a condition of release, a date for the accused to surrender themselves into custody (s. 816(1)).

Note that jail sentences in summary matters are typically shorter than for indictable offences. The fact that an appellant may have served most or all of a sentence before an appeal is heard is often a significant factor that the court will consider. If the appellant is refused bail pending appeal, then there is a strong practical purpose in bringing the appeal promptly.

[§9.05] Hearing the Appeal

1. Grounds of Appeal (see also §9.10)

The bases on which an appeal will be allowed or dismissed are in s. 686 of the *Criminal Code*. Because ss. 683–689 apply to appeals taken under s. 813, the grounds of appeal are virtually identical to those outlined later in this chapter in §9.10.

One exception is that, while there is no appeal to the Court of Appeal from findings of fact, the Crown may appeal questions of fact in the Supreme Court (*R. v. Bassi*, 2019 BCSC 1224 at para. 16).

A second distinction is that the Court of Appeal must grant leave to appeal in some circumstances (for instance, in sentence appeals), while s. 813 of the *Criminal Code* gives both the defence and the Crown a right of appeal in the Supreme Court.

2. The Hearing

Although written submissions are made in advance, there is an oral hearing for all appeals. Counsel are required to gown for the hearing. A party to the appeal who is represented by counsel need not appear in person at the hearing, unless there is an order compelling that party to appear. Personal attendance will usually be required if the party is at large on a bail order pending appeal or if there is a matter that has been stayed pending appeal.

Because the judge will typically only be assigned to the summary offence appeal the day prior to the oral hearing, counsel should not assume that the judge has had the opportunity to review all the filed material in detail, or at all.

The appellant will start and should not assume that there will be an opportunity to reply following the respondent's submissions.

The court may give reasons from the bench the day of the hearing, or may reserve judgment.

[§9.06] Orders

On defence appeals, the summary conviction appeal court may dismiss the appeal, allow the appeal and order a new trial, or allow the appeal and enter an acquittal.

On Crown appeals, the court may dismiss the appeal, allow the appeal and order a new trial, or allow the appeal, set aside the acquittal and enter a conviction. The latter order will only be made if the Crown can satisfy the court that all the findings necessary for a conviction were made in the trial court (*R. v. Cassidy* (1989), 50 C.C.C. (3d) 193 (S.C.C.)).

A successful appeal might result in remitting the matter back to Provincial Court. If the Crown is seeking detention or conditions of release, the Crown can argue for either on the date of the appeal judgment, applying s. 821 of the *Criminal Code*.

A paper order form is usually filed with the registry after the conclusion of the appeal. The practice is for the Crown to prepare and file the order regardless of whether the Crown is the successful party. Unless the court dispenses with the necessity of it, the order should be agreed as to content by both counsel, evidenced by signatures within a footer at the conclusion of the form.

[§9.07] Further Appeals for Summary Convictions

An appeal from the judgment of the summary conviction appeal court may be taken to the Court of Appeal on a question of law alone, with leave of a judge of the Court of Appeal (s. 839).

Appeals: Indictable Offences[2]

[§9.08] Governing Provisions

All indictable offences are appealed directly to the Court of Appeal. The relevant law and procedure is found in Part XXI of the *Criminal Code* (Appeals—Indictable Offences) and the Criminal Appeal Rules, 1986.

The Court of Appeal has no inherent jurisdiction to hear appeals or grant remedies. Its jurisdiction and powers are restricted to those specifically conferred by statute.

Where an offence is pursued by indictment, appeals may arise from the trial court's decisions to convict, sentence or acquit (including a stay of proceedings). If the proceedings were by indictment, but the conviction in question was for an included offence punishable on summary conviction (see s. 662 of the *Criminal Code*), the appeal arises out of a "proceeding by indictment" within the meaning of s. 675 of the *Criminal Code*, and Part XXI of the *Criminal Code* applies. The *Criminal Code* does not provide for appeals from interlocutory rulings, although such rulings may give rise to appeal at the conclusion of the trial.

To avoid the unnecessary bifurcation of appeals, when summary conviction offences are tried with indictable offences, and the Crown or defence wants to launch appeals on both, Part XXI applies if the conditions set out in ss. 675 (1.1) and 676 (1.1) of the *Criminal Code* are satisfied. In that event, the appeals relating to both the summary conviction and indictable offences are "consolidated" and heard in the Court of Appeal. If these provisions do not apply, a party wanting to appeal from a conviction, acquittal or sentence imposed with respect to a summary conviction offence, and a conviction, acquittal or sentence imposed for an indictable offence, if those offences were tried at the same time, must pursue appeals in both the Supreme Court and Court of Appeal. If indictable and summary conviction matters are consolidated for appeal purposes, leave with respect to the summary conviction offences, as required by s. 839(1) of the *Criminal Code*, is still necessary (*R. v. F.M.*, 1999 BCCA 443 (Chambers)).

Appellate procedure for young offenders is governed, in part, by s. 37 of the *Youth Criminal Justice Act*. See Chapter 7, §7.09.

When preparing appeal documents, pay close attention to the requirements of the Criminal Appeal Rules, 1986. A "checklist to assist in the filing of appeal books and transcripts," which details common shortcomings ranging from illegible photocopies to wrongly coloured covers on transcripts and appeal books, is available at the registry. The civil rules requiring approval of the transcripts and appeal books before they are filed do not apply to criminal matters. Counsel are responsible, however, for filing complete materials to support the grounds of appeal. E-filing of criminal appeals documents is encouraged (*Registrar's Filing Directive* (18 July 2022)).

All appeals against conviction and acquittal are now subject to specific filing deadlines. See *Criminal Conviction/Acquittal Appeals Timeline* (Criminal Practice Directive, 13 January 2014). Barring exceptional circumstances, the aim is to ensure that such appeals are heard within a year of the filing of the notice of appeal.

When appearing before the Court of Appeal, counsel should first review *Appearing Before the Court* (Civil and Criminal Practice Directive, 20 October 2022) for useful information on in-court etiquette, as well as other Practice Directives.

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[2] Updated by **John Caldwell**, Crown Counsel, Vancouver, in March 2023, January 2021 and September 2018. Previously reviewed by Michael J. Brundrett (2008, 2010, 2012, and 2016); Gregory J. Fitch (1997–2008); Kenneth Madsen (2006); and Alexander Budlovsky (1994 and 1996).

[§9.09] Notice of Appeal

The proper forms to use in filing the notice of appeal, or notice of application for leave to appeal are prescribed in the Criminal Appeal Rules. Five copies should be filed with the registry. The notice of appeal, whether it be from conviction, sentence, or both, must be filed 30 days from the pronouncement of sentence. If the Crown appeals, the notice of appeal must be filed within 30 days after the pronouncement of the order under appeal (Rules 3, 4 and 5). If a notice of appeal is not filed within 30 days, an application to extend time to appeal must be filed—see §9.12 of this chapter.

The Court of Appeal registry serves the notice of appeal on Crown counsel. Counsel for the appellant must arrange service on the Crown of all other documents, including documents related to applications for bail and other interlocutory matters.

Since September 7, 2010, when a notice of appeal against conviction or acquittal is filed, the registry will prepare and send a "Criminal Appeal Filing Schedule Advisory Letter" to the parties or their counsel. This letter sets out the standard deadlines that govern the case. The appellant has 12 weeks to file the transcripts and appeal books, and another 16 weeks thereafter to file their factum, after which the respondent gets 18 weeks to file its factum, which is normally done within six weeks of the hearing. The registrar will monitor the filing dates and will contact counsel if a filing date is missed.

[§9.10] Grounds of Appeal

The provisions discussed below are the typical grounds of appeal. Provisions regarding dangerous and long-term offender proceedings (s. 759 of the *Criminal Code*), extraordinary remedies (s. 784), and contempt proceedings (s. 10) are not discussed in this chapter.

1. From Conviction

The accused may appeal (without leave) a conviction on any ground of appeal that involves a question of law alone (s. 675(1)(a)(i)). The accused may appeal (with leave) on any ground of appeal that involves a question of mixed law and fact (s. 675(1)(a)(ii)), or on any other sufficient ground (s. 675(1)(a)(iii)).

2. From Acquittal

The Crown can only appeal on a ground of law alone (s. 676(1)(a)). It can be challenging determining what is a question of law alone and what is a question of mixed law and fact. There are many cases that distinguish between questions of law alone and other kinds of questions: see, for example, *R. v. Biniaris*, 2000 SCC 15; and *R. v. J.M.H.*, 2011 SCC 45.

3. From Sentence

The accused or the Crown may apply for leave to appeal sentence, saying the sentence imposed by the trial court was unfit (s. 687). "Sentence" is defined in s. 673. The Supreme Court of Canada recently confirmed the standard for appellate review of a sentence in *R. v. Friesen*, 2020 SCC 9 at para. 26:

> As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44).

Once the sentence is put in issue by an accused, the court has jurisdiction to increase the sentence, even if the Crown has not filed a cross appeal on sentence asking for the sentence to be increased (*R. v. Hill* (1975), 23 C.C.C. (2d) 321 (S.C.C.)). The policy of the Court of Appeal, however, is that it will not consider increasing the sentence unless the Crown has given notice to the appellant that an increase in the sentence will be sought. This is a power that is rarely exercised by the Court of Appeal.

[§9.11] Bail Pending Appeal

The law governing applications for bail pending appeal is set out in s. 679 of the *Criminal Code*. Pursuant to s. 679(5), Parliament requires that the court impose a surrender date as a condition of a release order whenever an appellant is released on bail pending appeal.

1. Bail Pending Appeal From Conviction

The *Criminal Code* states that an appellant appealing conviction may be released if the notice of appeal (or notice of application for leave to appeal) has been filed and the appellant satisfies the court as to specific concerns:

(a) the appeal or application for leave to appeal is not frivolous (s. 679(3)(a));

(b) the appellant will surrender themselves into custody in accordance with the terms of the order (s. 679(3)(b)); and

(c) the appellant's detention is not necessary in the public interest (s. 679(3)(c)).

If the applicant satisfies the court as to the first two criteria, the court will consider the public interest question from two angles: public safety and public confidence in the administration of justice. If the applicant satisfies the court that granting bail would not compromise public safety, then the court will weigh the public interest in enforcing the verdict (which could be weighted more heavily in cases of serious crimes) against the public interest in reviewing the conviction for serious error: *R v. Oland*, 2017 SCC 17.

2. Bail Pending Appeal From Sentence

The *Criminal Code* ss. 679(1) and (4) set conditions for release of an applicant appealing a sentence:

(a) leave to appeal has been granted;

(b) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship were the appellant detained in custody;

(c) the appellant will surrender themselves into custody in accordance with the terms of the order; and

(d) the appellant's detention is not necessary in the public interest.

This is a more stringent test than the test for bail pending appeal of a conviction. The court may set down an early hearing date for an appeal from sentence rather than release the applicant on bail.

3. Review of Initial Decision

A judge's decision under s. 679 may, on the direction of the Chief Justice of the Court of Appeal, be reviewed by that court (s. 680 and Rule 20). The process has two steps. The first step involves written submissions only to the Chief Justice, who decides whether to order a review. If a review is ordered, then an oral hearing occurs before a Division of three justices of the Court of Appeal.

4. Bail Pending New Trial

When either the Court of Appeal or the Supreme Court of Canada orders a new trial, the pre-trial bail provisions of the *Criminal Code* apply (s. 515 or 522) except that those powers are exercised by a judge of the Court of Appeal (s. 679(7.1)).

[§9.12] Extension of Time to File

Extension of time is also discussed in §9.02.

Rule 3 of the Criminal Appeal Rules, 1986 provides that a person appealing against conviction, sentence or both, shall, within 30 days after the imposition of the sentence, commence the appeal by filing an original and four copies of the notice of appeal. If the prosecutor wants to appeal, the notice of appeal must be filed within 30 days after the order under appeal in pronounced (Rule 4).

If the 30 days expires, the appellant must file (in Form 7) a notice of application seeking to extend time for filing the notice of appeal. Granting an extension of time is at the court's discretion. The appellant must establish "special circumstances" for the extension. The appellant must file an affidavit establishing a *bona fide* intention to appeal within the appeal period and setting out a meritorious basis for the appeal. The affidavit should explain reasons for the delay (*R. v. Roberge*, 2005 SCC 48; *R. v. Scheller (No. 2)* (1976), 32 C.C.C. (2d) 286 (Ont. C.A); *R. v. Smith*, [1990] B.C.J. No. 2933 (C.A.)).

If the delay in filing the notice of appeal is systemic and flows from necessary steps taken by Legal Aid BC to determine whether to fund the appeal, an affidavit in support of the extension application may be obtained from Legal Aid BC's Appeals Coordinator.

An application for extension of time may be made on two clear days' notice (s. 678(2) of the *Criminal Code* and Rules 16 and 17). The application for extension is usually addressed when the appeal is heard. The extension application may be heard in advance of the appeal where it will be opposed or will be time-consuming, or where there are matters (for example, bail) that must be dealt with before the hearing date of the appeal.

[§9.13] Transcripts and Appeal Books

For conviction appeals, an appellant is required by Rule 7 to file four copies of the transcript and appeal book and deliver one copy of each to the respondent within 60 days after filing the notice of appeal. The form and content of transcripts and appeal books is addressed in Rule 8 and Forms 4 and 5. Counsel are directed by Rule 9 to attempt to reduce the size of the transcript and appeal book by excluding exhibits and/or evidence that is unnecessary for a proper hearing of the appeal. Written confirmation of the request for transcripts and appeal books must be filed with the registry within four weeks of the notice of appeal being filed. See *Criminal Conviction/Acquittal Appeals Timeline* (Criminal Practice Directive, 13 January 2014).

The time required to prepare transcripts and appeal books sometimes makes it impossible to comply with the 60-day period set out in Rule 7. While some delay may be forgiven, an appellant who fails to file transcripts and appeal books within a reasonable time risks facing an application by the respondent to dismiss the appeal for want of prosecution (Rule 13(1)), or a registrar's reference (Rule 13(3)), which obliges counsel to appear before the court or a justice to explain the failure to diligently pursue the appeal or comply with the filing requirements set out in the Criminal Appeal Rules, 1986.

For relatively straightforward sentence appeals, the Court of Appeal registry will typically order the necessary transcripts so long as the proceedings are not unduly lengthy. However, for sentence appeals involving more protracted proceedings, or appeals against both conviction and sentence, responsibility for furnishing the necessary transcripts will fall to the appellant.

[§9.14] Factums

Factums must be prepared in Form 6 (of the Criminal Appeal Rules, 1986). The appellant's factum is bound with a buff (beige) cover; the respondent's factum is bound with a green cover.

The Court of Appeal has said that, absent exceptional circumstances, factums should not exceed 30 pages: *Chief Mountain v. Canada (A.G.)*, 2012 BCCA 69 (Chambers). In practice, the registry will not accept a factum longer than 30 pages without the approval of the registrar or a judge of the court.

See *Citation of Authorities* (Criminal Practice Directive, 18 July 2022, on the BC Court of Appeal website) for information about how to cite authorities.

The appellant's factum must be filed within 16 weeks of the date the transcripts and appeal books are filed. If the appellant misses the factum filing deadline, they will be expected to appear at a "compliance hearing" (usually scheduled for one week after the due date for the filing), to canvass reasons for the delay and a revised filing schedule. The respondent's factum must be filed within 18 weeks of the appellant's factum being filed and not less than six weeks before the hearing date. A reply factum (if any) is filed not less than five weeks before the hearing. See *Criminal Conviction/Acquittal Appeals Timeline* (Criminal Practice Directive, 13 January 2014).

For sentence appeals, arguments are limited to eight pages and are filed three weeks (appellant) and two weeks (respondent) before the hearing date. See the practice directive entitled *Sentence Appeals* (Criminal Practice Directive, 11 March 2016) for the correct form, content and filing rules for written argument.

[§9.15] Abandonment

An appellant may abandon an appeal by informing the court in person, or through counsel, of an intention to abandon the appeal, or by signing and filing a notice of abandonment in Form 11. When the appellant (as opposed to counsel) personally signs the notice of abandonment, their signature must be witnessed (Rule 14).

[§9.16] Setting Down the Hearing

For appeals against conviction or acquittal, see the *Criminal Conviction/Acquittal Appeals Timeline* (Criminal Practice Directive, 13 January 2014). This directive provides that upon filing of transcripts and appeal books, the registrar will contact counsel to arrange an agreed hearing date falling within a year from the date the notice of appeal was filed.

In practice, hearing dates for conviction appeals are often fixed after the appellant's factum has been filed. Appeals from sentence are generally set down once the registry has received the sentencing transcript. If a very short sentence is being appealed, it can usually be set down for hearing without significant delay.

[§9.17] Raising a New Issue on Appeal

During the trial, counsel should keep in mind that the failure to raise a point or make an objection before the trial judge may be a factor weighed later by the appellate court in dismissing an appeal (*R. v. Sherman*, 1979 CanLII 2952 (B.C.C.A)). Counsel should be particularly careful about issues of law, especially under the *Charter*. Generally, new issues cannot be raised for the first time on appeal. This includes applications to exclude evidence, questions of statutory interpretation and constitutional challenges to the validity of the legislation. See *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (C.A.); *R. v. Tomlinson*, 2009 BCCA 196, *R. v. Lilgert*, 2014 BCCA 493, and *R. v. Gill*, 2018 BCCA 144.

[§9.18] The Appeal Hearing

1. Appeals From Conviction

Section 686 states that counsel for the appellant should be prepared to demonstrate the error under appeal: the trial court erred so that the verdict is unreasonable or cannot be supported by the evidence, or the trial judge erred on a point of law, or there was a miscarriage of justice. These errors are explained below in further detail.

(a) Verdict is unreasonable or cannot be supported by the evidence

The proper test is "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered" (*R. v. Yebes* (1987), 36 C.C.C. (3d) 417 (S.C.C.); *Biniaris*). When applying the test, an appellate court must engage in a thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict is a reasonable one.

It is not sufficient for the reviewing court to simply take a different view of the evidence than the trier of fact. Nor is it sufficient for the appeal court to refer to a vague unease or a lingering doubt based on its own review of the evidence.

An appeal court, if it is to overturn the verdict, must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence.

(b) Trial judge erred on a point of law

Questions of law could include the following:

- interpretation of a statute (*R. v. Audet*, [1996] 2 S.C.R. 171);

- application of a legal rule or principle (*Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748);
- instructions to a jury (*R. v. Lifchus*, [1997] 3 S.C.R. 20, *R. v. Russell*, [2000] 2 S.C.R. 731, *R. v. Avetysan*, 2000 SCC 56); or
- failure to provide sufficient reasons for judgment (*R. v. Sheppard*, 2002 SCC 26; *R. v. Gagnon*, 2006 SCC 17, *R. v. R.E.M.*, 2008 SCC 51, *R. v. G.F*., 2021 SCC 20).

(c) Miscarriage of justice

Categories of what constitutes a miscarriage of justice are still open. A miscarriage of justice may include a misapprehension of evidence (*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), *R. v. Lohrer*, 2004 SCC 80) or errors in the trial process affecting trial fairness.

An appeal court has an unfettered right on appeal from conviction to order a new trial or direct that a verdict of acquittal be entered (s. 686(2)). Generally, if the verdict is found to be unreasonable or unsupported by the evidence, the remedy is acquittal.

If the court finds there was an error of law, the court may still dismiss the appeal where no substantial wrong or miscarriage of justice occurred (s. 686(1)(b)(iii)). In such a case, the Crown must satisfy the court that there is no reasonable possibility that the verdict would have been different had the error not been made. This can occur in two situations: (1) either the error was so harmless that it would not have made a difference; or (2) the evidence of guilt is so overwhelming that a conviction would have occurred in any event (*R. v. Khan*, 2001 SCC 86).

The court can also dismiss an appeal despite finding there was a procedural error, including one that may go to jurisdiction (see s. 686 (1)(b)(iv) and *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.)).

The court can also dismiss the appeal but substitute a conviction for an included offence, as an alternative to allowing the appeal (ss. 686(1)(b)(i) and 686(3)).

2. Appeals From Acquittal

Appellate courts have "read in" the equivalent of s. 686(1)(b)(iii) to appeals by the Crown from acquittals, even though the *Criminal Code* is silent on this point (*R. v. Vezeau* (1976), 28 C.C.C. (2d) 81 (S.C.C.); *R. v. Graveline* (2006), 207 C.C.C. (3d) 481 (S.C.C.)). The Crown must demonstrate that, but for the error of law, the verdict would not necessarily have been the same. There must be a reasonable degree of certainty that the error was material to the verdict: see *R. v. George* (2017), 349 C.C.C. (3d) 371 (S.C.C.).

Generally, on an appeal from an acquittal the Crown cannot change its position by raising a new legal argument that it did not raise at trial: *R. v. Barton*, 2019 SCC 33; *R. v. Suarez-Noa* (2017), 350 C.C.C. (3d) 267 (Ont. C.A.).

The court has the power to enter a guilty verdict rather than order a new trial when, in its opinion, the accused should have been found guilty but for the error in law. However, the court cannot exercise this power if the appeal is from an acquittal by a jury (s. 686(4)(b)(ii)).

The court will not enter a guilty verdict on a Crown appeal from an acquittal unless it is satisfied that all of the factual findings necessary to support a verdict of guilty have been made; in other words, a conviction would have resulted but for the error in law. See *R. v. Cassidy* (1989), 50 C.C.C. (3d) 193 (S.C.C.), and *R. v. Chung*, 2020 SCC 8. When a guilty verdict is entered on appeal, the appeal court can either pass sentence or remit the case to the trial court for a sentence to be imposed by the trial court.

3. Appeals From Sentence

Section 687 sets forth the jurisdiction of the court with respect to appeals from sentence. The Supreme Court of Canada has affirmed a highly deferential standard of review on appeals from sentence. Absent an error in principle, *which also had an impact on the sentence imposed*, an appellate court can only intervene to vary a sentence imposed by a sentencing judge if the sentence is "clearly unreasonable" or "demonstrably unfit" (*R. v. Lacasse*, 2015 SCC 64; *R. v. Agin*, 2018 BCCA 133; *Friesen*).

An appeal court does not have jurisdiction to hear appeals on a summary conviction matter unless it involves a question of law alone. Quantum of sentence is not a question of law alone.

Under Rule 12, the court may order that a post-sentence report be prepared relating to a person in respect of whom an appeal against sentence is outstanding. The court is often reluctant to order a post-sentence report given that the appeal typically deals with fitness at the time the sentence is imposed (*R. v. Radjenovic*, 2013 BCCA 131).

If a probation or conditional sentence order has been suspended pending appeal, the appeal court must take into account any conditions of an undertaking or recognizance and the period during which they were imposed in determining whether to vary a sentence (s. 683(7)).

[§9.19] Miscellaneous Appeal Provisions

Part XXI of the *Criminal Code* covers several matters that have not been referred to in this material. For example, s. 683 outlines an appeal court's other powers, including the power to admit fresh evidence (*R. v. Palmer and Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.) and *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 (S.C.C.)).

Under s. 684, an appeal court may assign counsel to act on behalf of an unrepresented party to an appeal if it appears desirable in the interests of justice that the accused have legal assistance and if the accused doesn't have sufficient means to obtain that assistance (*R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.)). See *Applications for a Court-Appointed Lawyer Under Section 684 of the Criminal Code* (Criminal Practice Directive, 19 September 2011) for the procedure to be followed, and *R. v. Silcoff*, 2012 BCCA 463 (Chambers) for a good summary of the factors to be considered when a justice decides whether to order the appointment of counsel under s. 684. The Supreme Court of Canada or a judge of that court has jurisdiction to make the same order on appeals to that court (s. 694.1(1)).

Appeals to the Supreme Court of Canada are governed by ss. 691–695 of the *Criminal Code*, the *Supreme Court Act*, R.S.C. 1985, c. S-26, and the Supreme Court of Canada Rules. Under the *Criminal Code*, the Supreme Court of Canada will hear only appeals on questions of law alone. However, under s. 40(1) of the *Supreme Court Act*, issues of mixed law and fact may be reviewed with leave.