Case

R. v. Richardson

(2001) 153 C.C.C. (3d) 449
British Columbia Court of Appeal

Two officers set up a traffic roadblock looking for drivers who might be driving under the influence of alcohol or driving without valid licences or insurance. At 1:30 A.M., the police noticed a car approaching the roadblock. It slowed down and then approached them. The officers detected a strong smell of marijuana and asked Richardson and two other occupants to get out of the vehicle. When confronted about the strong smell, Richardson produced a small metal box that contained small amounts of marijuana and hashish oil. The officers then asked Richardson to open the trunk of the car. In it they found 11 bags of marijuana and $6000 in cash.

Richardson protested against the search, claiming that it was illegal. The officers had no warrant to search the car. The police handcuffed Richardson because he was obstructing a legal search. The officers believed they had a legal right to search the car. They charged Richardson with possession of a narcotic for the purpose of trafficking and possession of cannabis resin.

In court, Richardson argued that the officers had searched the car illegally and that the evidence should not be admitted in court. It was a violation of sections 8 and 10 of the *Charter*. The trial judge ruled that the evidence was admissible under section 24(2) of the *Charter*. The judge convicted Richardson of possession of marijuana for the purpose of trafficking and gave him a six-month suspended sentence. Richardson appealed. The question was whether it was appropriate to exclude the evidence found in the trunk of the car because of the abuse of police powers. The appeal court dismissed Richardson's appeal. It ruled that the circumstances justified the search and the handcuffing. The charge was a serious one, and to exclude the evidence would weaken the public's confidence in the legal system.

For Discussion

1. **The defence and the Crown referred to sections 8, 10, and 24(2) of the *Canadian Charter of Rights and Freedoms*. Look up these sections and summarize them in your own words.**
2. **On what basis could the defence argue that the police abused their powers?**
3. **How did the appeal court justify including the evidence?**

Review Your Understanding (Pages 196 to 199)

1. **Describe how a search warrant is obtained and used.**
2. **What should a person know when police officers arrive with a search warrant?**
3. **What is a telewarrant and what is its purpose?**
4. **What restrictions are there on the use of electronic surveillance equipment used under the authority of a warrant?**
5. **Outline the important exceptions to search laws for illegal-drug and alcohol offences.**
6. **Under what circumstances can police search motor vehicles? What are they usually looking for?**

activity

Visit **www.law.nelson.com** and follow the links to learn how wiretapping is used to fight telemarketing fraud.

7.6 Release Procedures

Most people accused of crimes are not locked up after being arrested. They may be taken down to the police station where the police record the criminal charges. The officer in charge of the lockup or station may release people charged with summary convictions, hybrid offences, or indictable offences that carry a penalty of five years or less. If there are grounds to believe that further offences will be committed or that the accused will not appear in court, the accused may be confined until a bail hearing takes place.

For indictable offences carrying a penalty of more than five years' imprisonment, accused persons must be brought before a judge within 24 hours, or as soon as possible, for a bail hearing. "Bail" is money or other security paid to the court to ensure the appearance of the accused at a later date. Once bail is paid, the accused is released. The judge decides whether or not bail will be granted. If bail is granted and the accused fails to appear on the court date, the person who posted the bail loses the money.

In 1985, the *Criminal Code* was changed to put less emphasis on the payment of money as a condition of being released. The old bail laws were thought to discriminate against the poor. Now, if a person pleads not guilty, the judge must release the accused on his or her promise to appear. Only if the Crown attorney can show that the accused would likely miss his or her court date or be a threat to the protection and safety of the public can bail be denied.

If the charge is serious, such as a murder charge, the accused must show why he or she should not be kept in custody and should be released until the court date appearance. This is known as **reverse onus.** The responsibility is on the accused to prove that no threat exists to society and that he or she will appear when so ordered. For other criminal offences, it is up to the Crown attorney to prove that the accused should not be released.

Case

R. v. Mapara

(2001) 149 B.C.A.C. 316
British Columbia Court of Appeal

In 2001, Sameer Mapara was convicted of first-degree murder, a crime that carries a minimum penalty of 25 years' imprisonment. His trial lasted five months. He appealed the decision and asked to be released on bail until his appeal was decided. He argued that he had no previous criminal record and posed no threat to anyone. He also promised to turn himself into custody if his appeal was rejected.

The Crown opposed his release on the following grounds:

- There was no guarantee Mapara would surrender himself back into custody.
- He was a flight risk.
- He had originally emigrated from Kenya and could easily go back there, where he had family and friends.

The Crown argued that public confidence in the justice system would be shaken if persons appealing first-degree murder convictions were allowed out on bail.

Mapara is married and has four young children. He has serious financial difficulties. His father-in-law is suing him for $780 574, and the Bank of Montreal has reported that he issued cheques for $107 242.45 without sufficient funds.

The British Columbia Court of Appeal observed that Parliament has not excluded persons who have been convicted of first-degree murder from seeking

continued

release on bail. It wondered what the bail conditions would be for such a serious offence. It concluded that it would consider the matter and make a judgment at a later date.

For Discussion

1. **What is reverse onus? How can it be applied to this case?**
2. **What argument has the Crown used to oppose granting bail?**
3. **How do Mapara's personal circumstances support his request to be released on bail?**
4. **Why did the appeal court not immediately reject his request?**
5. **What judgment would you render on Mapara's request to be released on bail? Explain your answer.**

Judicial Release Procedures

If released, the accused is required to sign an **undertaking** and to live up to the conditions set by the court. These conditions might include a curfew, orders not to associate with former friends or go to certain places, and an order to report to a police station once a week. These regulations are designed to help the accused avoid further trouble with the law before the court hearing. The accused might also be required to sign a **recognizance.** This document states that the accused recognizes that he or she is charged with an offence, and that he or she promises to appear in court on a certain date. Depending on the case, the accused may pay money in order to be released.

Release Denied

If the accused is not released by the judge, he or she is entitled to appeal the decision to a higher court. If, for any reason, the accused is kept in prison without being arrested, or is denied a bail hearing, an application for a writ of *habeas corpus* can be made. This writ requires the accused to appear in court, to swear that he or she has been denied these rights, and to ask for release. A judge rules on the application. If the writ is granted, the accused is released.

Fingerprints and Photographs

People who are charged with indictable offences and are released may be fingerprinted and photographed before the release. Of course, this step would be unnecessary if these procedures were done at the time of the arrest.

When people are acquitted of a crime, they do not automatically have the right to insist that fingerprint and photo records be

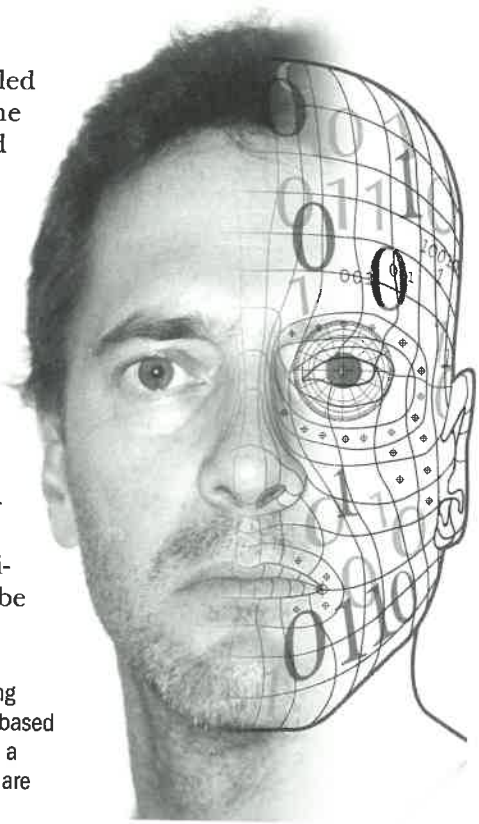

Figure 7-7

Biometrics is a new science that establishes the identity of individuals by measuring their physical features; for example, their nose, eyes, lips, ears, and hairlines. It is based on the idea that the distances between someone's features can be represented by a mathematical pattern. Why do you think gambling casinos and some police forces are using biometrics technology?

removed from police files. There is no law that says this must happen. Each police force decides whether or not to comply with this request. Similarly, if someone is mistakenly arrested and fingerprinted, it is difficult to have the file destroyed.

Protection of Society

Maintaining the balance of rights between citizen and society is a matter of concern to Canadians. Too much emphasis on individual rights can lead to less emphasis on the protection of society, possibly leading to an increase in crime. On the other hand, too much emphasis on the protection of society can result in a police state and the elimination of individual rights. It is up to the public and police to reduce the possibility of conflict. The public can contribute by not exploiting their rights to take advantage of others and the Canadian legal system. The police can contribute by not abusing their powers and by remaining aware of their duty to society.

Review Your Understanding (Pages 200 to 202)

1. **After being arrested, which categories of accused persons might be released until their court appearances?**
2. **Under what circumstances will suspects not be released until their court date appearances?**
3. **Why were the bail laws revised?**
4. **How could it be argued that reverse onus breaks the rule that someone is presumed innocent until proven guilty? How could its use be justified in our society?**
5. **Distinguish between an undertaking and a recognizance, and identify the purpose of each.**
6. **Why is *habeas corpus* an important legal right in a democracy?**
7. **What happens to the fingerprints and photographs of people who are acquitted? Do you agree with this procedure?**
8. **Why is it important to maintain the balance of individual rights and the protection of society as a whole? In your opinion, is this balance being achieved?**

7.7 Awaiting Trial

The accused should consult a lawyer and reveal everything that is connected to the case. The lawyer can then prepare the best defence possible. The lawyer will study legal texts and laws related to the offence, interview witnesses, and examine previous court decisions and precedents to gather the necessary background for the case. The accused has the right to make suggestions to the lawyer. If there is a serious disagreement, the accused can change lawyers, or the lawyer can withdraw from the case.

Legal Aid

Section 10(b) of the *Canadian Charter of Rights and Freedoms* states that all Canadians have the "right to retain and instruct counsel without delay" for criminal cases. If the accused cannot afford a lawyer, he or she can apply for "legal aid": a court-appointed lawyer paid for by the government. Legal aid is provided only to those who receive social assistance or those whose family incomes are below social assistance levels. Besides criminal cases, legal aid is also available in civil and family court cases. People who are awarded legal aid can choose which lawyer will represent them.

activity

Visit **www.law.nelson.com** and follow the links to learn more about legal aid.

Did You Know?

There are approximately 1.1 million applications in Canada for legal aid each year, and almost 750 000 of them are approved.

Disclosure

The Law Commission of Canada says that **disclosure** is one of the most important features of the criminal justice system. Prior to a trial by jury, the Crown attorney and the defence are required to meet and reveal all the evidence that both sides have for the upcoming trial. The Crown must show its evidence so that the accused can fully understand the Crown's case and can prepare a defence. The defence may put forward evidence or arguments that prove to the Crown that it does not have a case. If the defence proves its case, charges will be dropped and no trial will occur.

Disclosure has become more important in recent years and has reduced the number of jury trials. It also reduces the time and cost of trials. It helps to ensure that the accused gets a fair trial because once people know all the evidence that will be used against them, they can prepare a proper defence. In non-jury trials, the accused or the Crown may ask for such a meeting for the same purpose.

Collecting Evidence

Before a criminal trial, both the Crown and the defence may examine exhibits that have been offered to the court as evidence in the trial. Such items might include weapons, clothing, traces of blood or other fluids, or fingerprints. In so doing, they are making use of **forensic science.** Forensic science uses medicine and other sciences to try to solve legal problems. The term is perhaps used most often in connection to an autopsy, an examination to determine the cause of death. Forensic scientists can find clues in samples of blood and other bodily fluids, teeth, bones, hair, fingerprints, handwriting, clothing fibres, and other items. These clues can help to determine the guilt or innocence of the accused.

Recent technology has led to many advances in forensic science. For instance, fingerprinting now involves computers rather than ink and paper. A computer can be used to compare fingerprints to a vast number of other fingerprints on file, reducing to a few hours a task that used to take months. This automated system was established in 1976.

Another new procedure is DNA matching. This technique is based on the fact that every cell of a particular human being contains a unique form of the complex chemical DNA (deoxyribonucleic acid). The unique profile of each person's DNA makes possible the technique of DNA matching.

activity

Technology has increased our ability to rely on evidence gathered at the crime scene. Visit **www.law.nelson.com** and follow the links to learn more about DNA.

Did You Know?

Forensic scientists can tell a person's sex from a hair root and determine the probable make, model, and year of a hit-and-run vehicle from a speck of paint. The RCMP's forensic crime laboratories handle thousands of cases a year.

This is a powerful tool. It allows the Crown to enter into evidence a DNA match; for example, a hair sample matching that of the accused found on the victim's body at the scene of the crime. The defence can also show that there is no match between the accused and the evidence collected at the scene of the crime.

Because of the importance of DNA matching as evidence, the *Criminal Code* was amended in 1995 to permit police to obtain DNA samples from suspects. A warrant is required. In 2000, the RCMP opened a DNA data bank that stores the genetic profiles of people convicted of serious crimes. The purpose of the data bank is to track criminals and solve crimes. It cost $10.6 million to set up and its operation costs are $5 million a year. (See Issue, page 210.)

Case

R. v. Feeney

(2001) 152 C.C.C. (3d) 390
British Columbia Court of Appeal

Feeney was accused of murdering an 85-year-old man by striking him repeatedly on the head with a crowbar. He was also accused of stealing the man's cash, cigarettes, beer, and truck. The deceased's truck was found later in a ditch with a bloody crowbar beside it. A cigarette butt was found at the victim's mobile home, as were fingerprints.

The police entered Feeney's home and seized a bloody shirt; they did not have a search warrant. At his trial, Feeney's sister testified that she saw him arrive home on the day of the murder and saw bloodstains on his shirt. But she said that she did not know if she was dreaming or could actually remember what she had seen. Feeney was convicted of second-degree murder. On appeal, the Supreme Court of Canada set aside the conviction and ordered a new trial. The police had not obtained a search warrant and the search of Feeney's home was illegal. The bloody shirt could not be used as evidence, even though the blood stains matched the victim's blood type.

During the second trial, the RCMP obtained other evidence to prove Feeney's guilt. The cigarette butt was analyzed to provide DNA material. A warrant was issued under section 487.05 of the *Criminal Code* to obtain a blood sample from Feeney. There was a match: the DNA on the cigarette butt was the same as Feeney's. The RCMP also obtained a set of fingerprints from the Calgary Police Department, which had fingerprinted Feeney the previous year for a break and enter. There was another match: the fingerprints were the same as those found at the scene of the crime. Feeney's sister also changed her testimony and said that she had actually seen Feeney with the bloodstains and that it was not a dream.

Feeney's lawyer argued that the fingerprint evidence should not be considered because it had been obtained after an illegal arrest. Section 487.05 of the *Criminal Code* should not apply because Feeney's rights had been violated under sections 7 and 8 of the *Charter*. He noted that evidence given by Feeney's sister was unreliable and should not be considered. Despite these arguments, the second trial jury found Feeney guilty of second-degree murder. On appeal, the British Columbia Court of Appeal rejected his defence arguments and upheld his conviction.

For Discussion

1. **Why do you think the RCMP did not obtain a search warrant before searching Feeney's home?**
2. **Why did the Supreme Court order a new trial?**
3. **Why did the RCMP have to obtain new evidence for Feeney's second trial?**
4. **What new evidence did the RCMP obtain for use in the second trial?**
5. **Do you agree with the appeal court's decision? Explain.**

Agents of Change — Alec Jeffreys

In the early 1980s, a young British geneticist was experimenting with extracting DNA from human muscle tissue and made an astounding discovery. Alec Jeffreys realized that random segments of human DNA—the protein molecules in cells that determine the genetic characteristics of all living things—are "genetic markers." They are as unique to each individual (with the exception of identical twins) as a fingerprint.

Jeffreys found a way to process these markers, using electricity and radioactive labelling, so that they formed a distinct bar-code-like pattern on X-ray film. Police could then match with great probability the bar codes from DNA evidence at a crime scene with DNA samples taken from suspects. Jeffreys called his technique "DNA fingerprinting."

Jeffreys' technique first came to public attention when it helped to solve the murders of two British women in the mid-1980s. The police arrested a 17-year-old male and sent semen and blood samples to Jeffreys for testing. The results proved that the young man was not the murderer. Jeffreys would later recall that this was "the first man ever proved innocent by molecular genetics, and without the evidence he would have gone to jail for the rest of his life." The police then required that all males in the area between the ages of 13 and 30 give blood samples for DNA testing. There was still no match.

Later, 27-year-old Colin Pitchfork was overheard in a bar boasting to friends that he had persuaded a friend to give a blood sample for him. Police arrested him, and DNA tests showed that he had likely committed both crimes. He was given two life sentences. This was the first time that DNA testing had pointed to a criminal.

For his contribution to forensic science, Jeffreys was knighted by the Queen in 1994.

For Discussion

1. **What discovery did Alec Jeffreys make with respect to DNA?**
2. **Briefly summarize the technique of DNA fingerprinting.**
3. **Explain the significance of the Colin Pitchfork case.**

Figure 7-8
Alec Jeffreys

Court Appearances

When the accused appears in court, the provincial court judge will set a trial date or ask for an **adjournment,** which puts the matter over to a later date. This gives the accused time to obtain legal advice. The judge will also indicate in which court the case will be tried. The three possibilities are determined by the type of offence:

- Offences over which a provincial court has absolute authority include all summary and minor indictable offences, and they are listed in section 553 of the *Criminal Code.* They include theft, fraud, mischief (all under $5000), and keeping a bawdyhouse.
- For more serious indictable offences, the accused can elect to be tried by a provincial court judge without a jury; or tried in a higher court by a judge alone or a judge and jury. These crimes include assault, sexual assault, and weapons offences.

- Offences that can be tried usually by a judge and jury in a supreme court of the province are the most serious indictable offences. These are listed in section 469 of the *Criminal Code* and include treason, murder, and piracy. Only 5 percent of crimes are heard at the superior court level. When the accused appears in provincial court, the judge will set a date for a preliminary hearing.

The Plea

Someone charged with committing a criminal offence enters a plea in provincial court. The person states whether he or she is guilty or not guilty of the charge read in court. About 90 percent of accused Canadians plead guilty at this stage of the process.

If the accused pleads guilty to a summary conviction or minor indictable offence, he or she is sentenced immediately or remanded (sent back) into custody. The **remand** can last up to eight days, or until the judge can review the circumstances of the case and the criminal records of the accused and pass sentence. If the accused pleads not guilty, the provincial court judge will set a trial date. If the accused pleads guilty to a serious indictable offence and wants to be tried by a provincial court judge, the same procedures will apply as for summary convictions and minor indictable offences.

Preliminary Hearing

The **preliminary hearing** lets the provincial court judge decide whether there is sufficient evidence to proceed with a trial in a higher court. It only takes place when the accused pleads not guilty to an indictable offence and chooses to be tried by a higher court judge or a judge and jury. During the preliminary hearing, the judge hears evidence and the testimony of witnesses to determine if a reasonable case can be made against the accused. If the evidence is insufficient, the charges are dropped and the accused is free to go. If there is sufficient evidence, the trial date is set by the judge.

The defence does not need to call evidence at the preliminary hearing, but can cross-examine the Crown witnesses. If evidence is presented, it is recorded and may be brought up at trial to attack the credibility of witnesses who change their story. Such evidence may also be useful if the witnesses later refuse to testify, flee, or die.

Sometimes the defendants will skip the preliminary hearing and go directly to trial. This is done if (1) the accused has decided to plead guilty; (2) the accused wants to have the trial date set as early as possible; or (3) the accused wants to avoid negative publicity that may result from the preliminary inquiry.

Case

R. v. Olubowale

(2001) 142 O.A.C. 279
Ontario Court of Appeal

The accused was arrested and charged with murder. At his preliminary hearing, the Crown presented this evidence: The accused was a bouncer at a tavern. A group of men were asked to leave the tavern and the bouncer followed them outside. The victim made racial comments to Olubowale and a fight ensued.

Olubowale weighed twice as much as the victim and was 30 cm taller. He was also a trained boxer. Witnesses said the accused hit the victim three times with blows described as "precise," "powerful," "full force," and "very strong." Olubowale delivered the last blow after chasing the victim around a car. The victim fell and hit his head on the concrete and died of his injuries. At his preliminary hearing, the accused asked the judge to reduce the charge to manslaughter.

Section 229 of the *Criminal Code* defines murder as follows:

(a) where the person who causes the death of a human being
  (i) means to cause his death, or
  (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

The provincial court judge would not reduce the charge to manslaughter and committed the accused to stand trial for murder. Olubowale appealed this ruling. The Ontario Court of Appeal decided that the accused could not be tried under section 229(a)(i). But it also ruled that Olubowale's actions were reckless because he knew his actions were likely to cause death (section 229(a)(ii)). The appeal was dismissed and the accused was ordered to stand trial for murder.

For Discussion

1. **When is a preliminary hearing held?**
2. **Why were Olubowale's actions considered reckless?**
3. **What would have happened if the appeal court had upheld the appeal?**

Resolution Discussions

Before trial, defence attorneys may encourage the accused to participate in a resolution discussion. The result can be a **plea negotiation,** commonly known as plea bargaining. Plea and sentencing decisions are discussed in these pre-trial resolution meetings. If there is strong evidence against the accused, the defence may encourage the person to plead guilty to a lesser charge in hope of receiving a lighter sentence. A guilty plea to a lesser charge benefits the court. It saves time and money and eliminates jury selection.

Plea negotiations may free up the court system, but they are not formally recognized in the *Criminal Code.* During discussions, the accused may give up the right to a fair public hearing in court, where he or she might receive a "not guilty" verdict. If the plea cannot be negotiated, any evidence that was revealed during the negotiations can be used at trial. This may weaken the position of the accused.

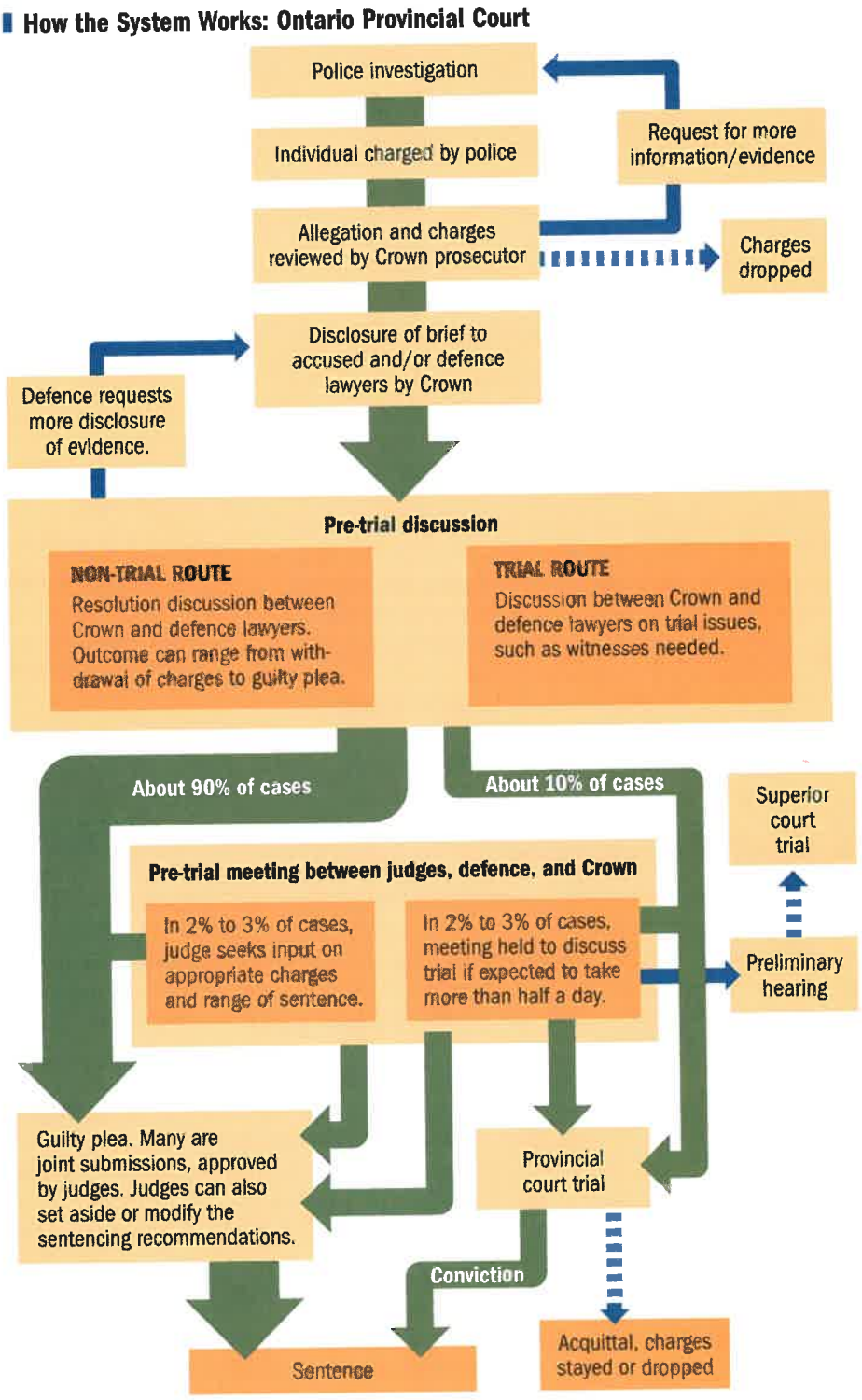

Figure 7-9

This diagram shows the process a case goes through, from the initial police investigation to sentencing.

Plea negotiations are often regarded as compromising justice. The 1993 plea bargain that resulted in a 12-year sentence for Karla Homolka led some experts to question its value and legitimacy. Homolka was sentenced before the public became aware of many of the gruesome facts that were revealed during the trial of her ex-husband Paul Bernardo. (The pair had been accused of torturing and killing several young women.) By court order, testimony in her case could not be reported until his trial was complete. Supporters of the Homolka plea bargain point out that Homolka's evidence, made available through plea negotiations, was needed to establish the strongest possible case against Bernardo (*R. v. Bernardo* (1995)).

Without plea negotiations, the court system would be overwhelmed by the number of cases going to trial. Through such negotiations, justice is served. The Crown obtains a conviction and the accused receives a penalty, although not the maximum one. It can save victims or their families a great deal of suffering. They do not have to take the witness stand and relive their ordeals.

Review Your Understanding (Pages 202 to 211)

1. **What information does a defence lawyer use to prepare the background for a case?**
2. **Why is legal aid an important part of the legal system?**
3. **Why is disclosure an essential part of the criminal justice system?**
4. **How is forensic science used in the criminal justice process?**
5. **Explain the purpose of the DNA data bank.**
6. **What is the purpose of an adjournment?**
7. **On what basis does the *Criminal Code* establish the court in which a case will be tried?**
8. **What is a plea? What percentage of accused Canadians plead guilty?**
9. **(a) Identify the purpose of a preliminary hearing.**
   (b) Under what circumstances would the accused skip a preliminary hearing?
10. **Explain plea negotiation and outline the advantages and disadvantages of the process.**

ISSUE

Should a Suspect Be Forced to Provide Samples for DNA Testing?

Deoxyribonucleic acid (DNA) contains the genetic code of life and is a powerful form of genetic fingerprinting. When a DNA sample is taken from someone, it is turned into an image that is unique to that individual, much like a fingerprint. The chances of any two individuals, except identical twins, having the same DNA image (print) is about one in 10 billion.

Since its discovery in 1984, DNA matching has been used over a thousand times in Canadian courts. Even microscopic traces of blood, bone, hair, saliva, or semen left at the scene of the crime contain DNA.

The importance of DNA testing was seen in the highly publicized case of Guy Paul Morin, who was convicted in 1992 of murdering nine-year-old Christine Jessop, his next-door neighbour (*R. v. Morin* (1993)). Six years earlier, he had been acquitted of the same crime. Following his second trial, he was sentenced

Figure 7-10
This scientist is working with DNA samples, an expensive and delicate operation.