

Trial Procedures

Focus Questions

- How does the adversarial system work?
- What procedures are followed in selecting a jury?
- What different types of evidence can be used by the Crown and the defence?
- What defences can the accused use?
- What is the significance of the judge's charge to the jury?
- What sections of the *Charter* apply to evidence and the rights of the accused?

Chapter at a Glance

8.1 Introduction	216
8.2 Courtroom Organization and Beginning Motions	216
8.3 Juries and Jury Selection	220
8.4 Presentation of Evidence	225
8.5 Defences	235
8.6 Reaching a Verdict	245

Figure 8-1

The judges of the Supreme Court of Canada are formally called "Justices." They are chosen from the highest courts in the provinces and territories. What do you already know about the role of judges?



8.1 Introduction

Trial procedures in Canada are based on the **adversarial system**, which involves two opposing sides: the Crown (representing society) and the defence (representing the accused). The onus is on the Crown to prove beyond a reasonable doubt that the accused committed the offence. For a conviction, both the *actus reus* (“wrongful deed”) and *mens rea* (“guilty mind”) elements of the offence must be proven.

As you learned in Chapter 4, the type of offence committed determines the kind of trial available to the accused. This chapter focuses on trial by judge and jury. If the accused is tried in a provincial court for a summary conviction or indictable offence, trial procedures are similar to trial by judge and jury. No jury is chosen, however, and the proceedings are less formal. The judge acts as both judge and jury.

8.2 Courtroom Organization & Beginning Motions

Canadian trial procedures are adapted from English law and are basically the same in each province and territory. The roles of various people involved in these procedures are outlined on the pages that follow.

■ A Typical Canadian Courtroom

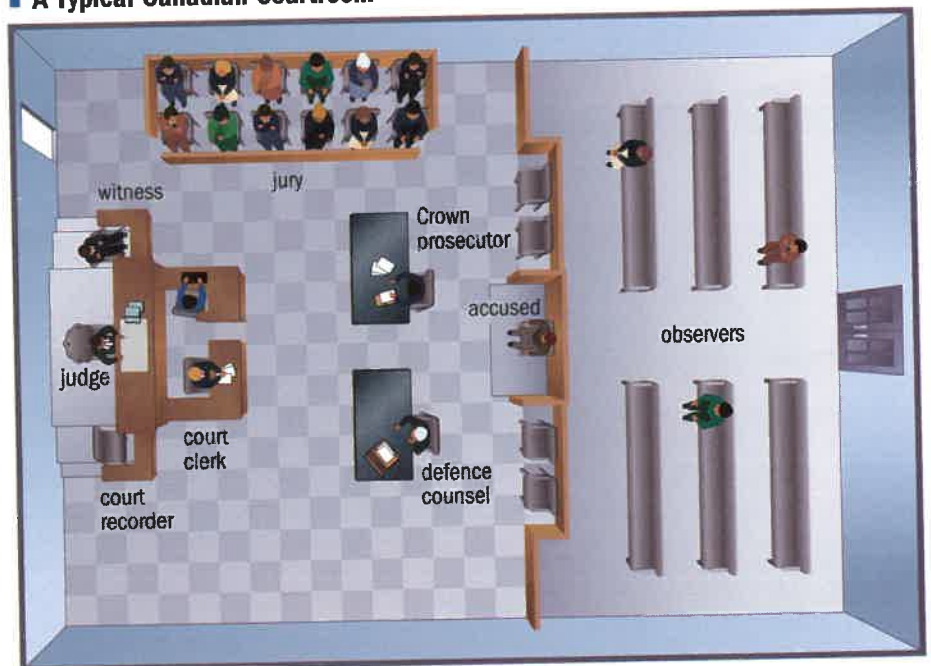


Figure 8-2

This diagram shows the participants in the criminal justice system. Do you know what role each individual plays in the trial process?

Courtroom Organization

The Judge

Judges are often referred to as “the Bench” or “the Court.” The federal government appoints all judges except for provincial or territorial court judges, who are appointed by each province and territory. The judges of the Supreme Court of Canada are formally titled “Justices.” They are paid by the federal government and are generally chosen from among the highest courts of the provinces and territories or from among lawyers who have had at least 10 years of experience.

Judges have full control of the courtroom during preliminary hearings and trials. They can exclude the public—and even the accused—if they think this is necessary to administer justice and maintain order. Cameras of any sort are generally not permitted in Canadian courtrooms. Broadcasts of Supreme Court of Canada hearings, however, have become quite routine.

The decisions judges make on whether evidence and questioning are admissible can greatly influence the outcome of trials. They can also form the basis for appeals. In non-jury trials, the judge decides the question of guilt and sets the sentence.

Some jurisdictions also appoint justices of the peace, who have less power than judges. Justices of the peace may preside over the court of first appearance, where the charge against the accused (defendant) is first read. They may also issue documents for police, such as search and arrest warrants, and certain documents for judicial matters. In some jurisdictions, justices of the peace may conduct trials for offences against municipal bylaws and provincial laws, such as the *Highway Traffic Act*.

The Crown Prosecutor

Because crime is considered to be an act against society, governments hire lawyers to be Crown prosecutors (Crown attorneys). Prosecutors are responsible to see that justice is done. As you have already learned, the “burden of proof” is on the Crown. This means the Crown prosecutor must prove beyond a reasonable doubt that the accused committed the offence.

Crown prosecutors must present all available evidence, even if it may weaken their case. If necessary, the judge can direct the prosecutor to call witnesses whose **testimony** (declarations sworn under oath) may damage the Crown’s case. Prosecutors have great influence. For example, they consult with police on cases and decide whether to lay criminal charges. They can also withdraw charges that have been laid.

The Defence Counsel

The defence counsel represents the accused to ensure that their legal rights are protected. The accused can represent themselves in lower courts, but it is usually wise to hire professional counsel. Because lawyers are trained in procedural and substantive law, they can direct a case through the courts. They will also advise clients on the law involved in the case and how best to proceed. Defence lawyers must represent their clients to the best of their ability, even in cases where the crime is very offensive to the public.

You Be the JUDGE

In June 2001, the Supreme Court of Canada ruled that Quebec judge Richard Therrien should be fired for hiding a criminal conviction of harbouring (giving shelter to) Front de libération du Québec (FLQ) members in 1971, when he was a 19-year-old law student. Therrien had an excellent reputation and the conviction had been pardoned. The Court stated that a “judge is a ‘place apart’ in our society and must conform to the demands of this exceptional status.”

- Was the Supreme Court ruling justified, or did it discriminate against someone based on his past? Explain.

activity

Visit www.law.nelson.com to learn about the Justices of the Supreme Court of Canada.

The Court Clerk and Court Recorder

The **court clerk** reads out the charge against the accused, swears in witnesses, tags evidence, and handles much of the paperwork and routine tasks required by the court.

The **court recorder** sits near the witness box to record, word for word, all evidence given and all questions and comments made during a trial. Because the court relies on an accurate record and may request that evidence be read back, this is a very exacting job. These records are kept and transcripts are made available later, if necessary, for appeals.

The Sheriff

The sheriff and his or her deputies carry out much of the court administration and trial preparation. It is their job to make sure the accused appears in court, to find prospective jurors, and to assist the judge. The sheriff also serves summonses and carries out court orders, such as seizing and selling property to settle claims for damages.

Other Court Officials

Probation officers may be present in provincial or territorial courts, and judges may ask them to conduct interviews with convicted offenders. Such information may help judges in setting sentences.

Nonprofit organizations such as the John Howard Society, Elizabeth Fry Society, and Salvation Army may have representatives in court to help defendants. Services to help victims are also more easily available than they were in the past.

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Visit www.law.nelson.com to learn about nonprofit organizations that help people involved in the criminal justice system.

Case

Nelles v. Ontario

[1989] 2 S.C.R. 170
Supreme Court of Canada

In March 1981, nurse Susan Nelles was charged with murdering four infants at Toronto's Hospital for Sick Children. Nelles was held in isolation for five days and released on \$50 000 bail given by her mother. At the conclusion of the preliminary inquiry, Justice David Vanek discharged Nelles on all counts. "I fear the rather astonishing fact is that there is simply no case against Susan Nelles at all," he stated.

In 1985, Nelles sued the Ontario attorney general's office and the two Crown prosecutors in charge of her case for malicious prosecution. She claimed financial compensation for the pain, public humiliation, and mental anguish that she had

suffered since 1981. Two lower courts had ruled that Nelles could not sue because attorneys general and Crown prosecutors are **immune** (completely protected) from such legal action.

The Supreme Court of Canada judgment, however, stated: "Granting an absolute immunity to prosecutors is akin to granting a licence to subvert individual rights." In other words, Nelles could pursue her lawsuit. The Supreme Court made it clear, however, that there must be proof that the prosecutors had laid charges without reasonable and probable grounds and displayed "malice in the form of deliberate and improper conduct."

In 1991, the Ontario government agreed to pay Nelles \$60 000 for the "severe mental anguish" she suffered after being wrongly accused. Nelles received an additional \$30 000, and a scholarship

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of \$20 000 was established in her name at Queen's University School of Nursing. An endowment fund of \$10 000 was also set up in memory of her father and brother. Both were doctors and both had died during the decade-long legal battle. Family friends speculated that the stress contributed to their deaths. The province also paid \$255 000 in legal fees to Nelles. It was the first time the province of Ontario had paid an individual for personal suffering caused by criminal proceedings that ended in a dismissal.

For Discussion

1. What significant precedent did the Supreme Court set in this case? Why do you think it is considered a landmark decision?
2. In your opinion, should the state be responsible for the acts of the Crown prosecutors, or should Crown prosecutors be personally liable? Explain.

Motions at the Beginning of a Trial

At the beginning of a trial, the Crown prosecutor and the defence may present motions to the judge. These can relate to any procedure that will be used during the trial. One such motion, a **stay of proceedings**, can stop the trial until further action is taken. In some circumstances, a stay of proceedings can stop the trial from proceeding at all. The case of *R. v. Askov* was very controversial in this regard, and it led to thousands of cases being stayed.

Case

R. v. Askov

[1990] 2 S.C.R. 1199
Supreme Court of Canada

Askov, Melo, Hussey, and Gugliotta were charged with conspiracy to commit extortion against Belmont. Belmont operated a Montreal agency that supplied exotic dancers to licensed premises in Ontario. He wanted to enter the Toronto market, where Melo was the supplier.

Belmont told police Melo had demanded a 50 percent commission to operate in Toronto, and an undercover officer was assigned to act as Belmont's driver and bodyguard. Belmont refused to pay the commission and was threatened with a sawed-off shotgun and knife by Melo and Askov. Two more men were arrested later, and all four spent almost six months in custody before being released on bail.

The Crown prepared to set a preliminary hearing date in December 1983, which was rescheduled to February 1984 at the request of the accused. On that date, all counsel agreed to July 4, 1984, as

the new date for the preliminary hearing. Because of courtroom scheduling conflicts, the preliminary hearing could not be completed until September—10 months after the arrests. The accused were ordered to stand trial. The earliest trial date was October 1985, almost two years after the arrests. In October 1985, the case was again delayed. Other cases had priority. A trial was rescheduled for September 1986.

The trial began nearly three years after the arrests. The defence moved to stay the proceedings on the grounds that the trial had been unreasonably delayed and that this had violated the defendants' rights as guaranteed under section 11(b) of the *Charter*. The judge agreed and stayed the charges.

The Crown appealed to the Ontario Court of Appeal, which ordered the trial to proceed. It found there was no misconduct on the part of the Crown, no indication of any objection by the accused to adjournments, and no evidence of prejudice to the accused. This was appealed to the Supreme Court of Canada, which set aside the appeal court judgment and stayed the proceedings.

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The Supreme Court ruled that four factors must be considered in determining whether the delay in bringing the accused to trial had been unreasonable: length of the delay, explanation for the delay, waiver of time period, and prejudice to the accused.

The Court also indicated: “The delay is of such an inordinate length that public confidence in the administration of justice must be shaken.... Justice so delayed is an affront to the individual, to the community, and to the very administration of justice.” The Court suggested a guideline of institutional delay of eight to ten months for proceedings in Provincial Court, and six to eight months from the preliminary hearing until trial.

For Discussion

1. What right is guaranteed by section 11(b) of the *Charter*?
2. What was the main cause of the delays in this situation?
3. Indicate how each of the four criteria set by the Supreme Court of Canada was met in the Askov case.
4. Why is it so important to have a trial within a reasonable time for (a) the accused, (b) society, (c) victims, and (d) witnesses?
5. Should the time limits set by the Supreme Court of Canada be applied rigidly? Why or why not?

Review Your Understanding (Pages 216 to 220)

1. a) What system of trial procedures is used in Canada?
b) Describe the roles of the parties involved and their functions.
2. Who appoints judges to the various levels of courts?
3. For what reason have judges been held to a higher standard of conduct than ordinary people?
4. Which side in a criminal trial bears the burden of proof?
5. Why is the role of court recorder so important to the appeal process?
6. Why might motions be made at the beginning of a trial?
7. Explain the significance of a stay of proceedings.

8.3 Juries and Jury Selection

Although the jury system is not perfect, it usually satisfies the public more than trial by judge. A jury lets the public see conflicts resolved by peers, rather than by a judge alone. A jury also reflects the conscience of the community. Juries are expensive, however, and they are used only for the more serious indictable offences. For certain less severe indictable offences, the accused can choose between trial by judge or trial by judge and jury. A judge alone will try the accused for summary offences. See pages 155 to 157 for a list of summary and indictable offences.

Advantages of Trial by Jury

Trial by jury involves the public in the administration of justice, which also helps to educate the public. The use of juries means that judges do not have to make all court decisions. Juries are composed of people from many different backgrounds, who bring a fresh perspective to the courtroom and