TRY JUDGING™

B. Resource Materials

I. The Judge's Decision-Making Process

a) Weighing Evidence and Making Findings of Fact

The judge (or jurors, in jury trials) plays the role of the "trier of fact" in a trial, examining each piece of evidence presented and deciding how much weight, or importance, it carries. Judges must assess the credibility of each witness and decide whether to accept all, some or none of what the person says happened. Judges compare what each witness says to other believable evidence before the court, and assess how this person's version of events supports or contradicts the body of facts that is emerging. Once all the evidence has been heard the judge makes findings of fact, then applies the relevant law to those facts to determine whether someone is guilty of a crime or whether a civil claim has been proven.

b) Interpreting the Law and Statutes, Following Precedent

Judges are constantly called upon to interpret what the law means and to apply legal principles to the cases that come before them. The lessons of these countless decisions, made and refined over centuries, have created a vast body of law known as the common law that provides guidance and insights as judges grapple with cases and legal issues. To determine how the law should deal with a particular problem or situation, judges and lawyers refer to reports of previously decided cases known as precedents—collected in law books and, increasingly, in databases and on the Internet—for answers. Once it becomes clear how courts have approached a particular legal issue in the past, judges are required to follow these precedents and make a similar ruling under the principle of *stare decisis,* or "standing by former decisions." Judges are not slaves to precedent, however, and there is enough flexibility to allow the common law to evolve to meet modern realities, new legal challenges, and to prevent unfair or unjust rulings. If there are no precedents that deal with an issue, judges must strike out on their own and create new law. And since the details of two cases can never be precisely the same, judges can cite these differences—a process known as "distinguishing" the precedent—and reach a different conclusion about how the law applies.

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The level of court that issues a judgment is a key factor in determining whether it must be followed as a precedent. Judges at every level of court must follow rulings of the Supreme Court of Canada, the country's highest court. If the Supreme Court has not ruled on a particular issue, judges must follow the precedents of the court of appeal or any higher court within their province or territory. This means, for instance, that a judge of the provincial court must follow any precedent set at the trial level of the superior court or the court of appeal. Within a level of court, the ruling of one judge does not tie the hands of his or her colleagues—judges are free

to issue contrary rulings, but an appeal court will likely be asked to review the issue and set a precedent that clarifies the law for future cases.

Judges often look to rulings from other provinces or territories for guidance, but they are not required to follow precedents set outside their borders, even rulings made at the court of appeal level. If there is no Canadian precedent dealing with a particular issue, judges will consider the rulings of courts in Britain, the United States and other common-law countries as they make their decisions.

c) Verdicts, Sentencing and Remedies

In a criminal case, the judge (or jury) must find that there is enough evidence to prove beyond a reasonable doubt that the defendant is guilty. The Crown's evidence may support a conviction on some charges but not others, or the defendant may be convicted of a less-serious offence that is supported by the facts. A person found not guilty is free to go and can only be tried again on the same charges if an appeal court overturns the verdict and orders a new trial.

If the defendant is convicted, the judge imposes punishment. The *Criminal Code* sets out the maximum prison term for each offence—up to life in prison for murder and other serious crimes—and, for some offences, a minimum sentence that must be served behind bars.

Judges have an array of sentencing options other than prison. Offenders may be ordered to pay a fine, or to pay restitution to compensate the victim of the crime for injuries or lost money or property. Offenders may be placed on supervised probation for up to three years, and may be required to complete community service work or seek treatment or counselling. If a judge combines probation with a suspended prison sentence, an offender who breaches the conditions of probation can be jailed for the period of the suspended sentence.

First-time offenders responsible for minor crimes may receive a discharge, leaving them without a criminal record. In 1995 Parliament amended the *Criminal Code* to require judges to consider imposing conditional sentences if a jail term of less than two years would have been appropriate and the offender is not considered a danger to others. Commonly known as house arrest, these sentences require offenders to remain in their homes except to go to work, medical appointments or church.

The fundamental purpose of sentencing is to promote public safety and to foster respect for the law, and this is done by imposing a penalty severe enough to deter the offender, and others, from breaking the law.

A judge must consider a host of principles and factors when deciding on the proper sentence, including the circumstances of the offender and the seriousness of the offence. The fundamental purpose of sentencing is to promote public safety and to foster respect for the law, and this is done by imposing a penalty severe enough to deter the offender, and others, from breaking the law. The penalty must make it clear that such conduct is unacceptable to other citizens and reflect the severity of the crime and its prevalence in the community. Finally, the sentence must take into account the need to rehabilitate offenders, so they do not commit crimes in the future.

As they consider these completing goals, judges review reports of the sentences other judges have imposed for similar offences as a means to ensure punishment is consistent and fits the crime. They also take into account aggravating factors—such as whether the offender held a position of trust or used a weapon to commit the offence—which may require a harsher sentence. If an offender is young or has no criminal record, these are mitigating factors that will justify a lighter sentence. The *Criminal Code* requires judges to impose stiffer penalties for domestic abuse and offences motivated by racial hatred or intolerance. On the other hand, special efforts are to be made to keep aboriginal offenders out of prison because they have traditionally accounted for a disproportionate number of inmates.

In civil cases, the judge (or jury) must find that the plaintiff has proven his or her claim on a balance of probabilities—that it is more likely than not that the plaintiff has suffered a loss or injustice and that the defendant is at fault. In most cases, the plaintiff receives an award of damages (money to compensate for the injury). In actions for breach of contract, the defendant may be required to fulfil the terms of the contract. A judge can also impose an injunction (a court order that forbids the defendant from doing something that is likely to harm a plaintiff's interests) and issue orders to overturn or alter the decisions of lower courts, administrative tribunals and government officials.

To be a classified as a crime, a person's actions or conduct must have two elements. First, there must be a guilty act, known by the Latin term *actus reus.* In other words, the act itself must be a crime…A second element, known as *mens rea* or guilty mind, also must be present.

2. Understanding Criminal Law

a) What Is a Crime?

To be a classified as a crime, a person's actions or conduct must have two elements. First, there must be a guilty act, known by the Latin term *actus reus*. In other words, the act itself must be a crime—another person must be struck or harmed or property must be taken or damaged. A second element, known as *mens rea* or guilty mind, also must be present. The person committing the guilty act must *intend* to cause the harm inflicted, or act recklessly despite being aware of the harm that could result. For instance, an airline passenger who leaves the airport with someone else's suitcase after a flight has committed the act of theft. But the passenger will not be found guilty of stealing the bag if it resembled theirs and it was taken by mistake. There was no intent to commit theft, so the second element of a crime was not present.

b) Who Can Be Charged with a Crime?

Anyone over the age of 12 can be charged with a crime (offenders under 18 are prosecuted under special procedures set out in the *Youth Criminal Justice Act,* as discussed below). It is also an offence to attempt to break the law. Persons not directly involved in the crime can also face charges. The driver of the getaway car used to rob a store, for instance, can be charged as a party to the offence of robbery, even if the driver did not enter the store and took nothing. It is also an offence to abet, or encourage, someone to break the law or to advise another person on how to commit a crime. Anyone who helps an offender make arrangements to commit a crime—for instance, obtains a weapon for the person—can be charged with being an accessory to the crime, as can someone who helps an offender escape or destroys evidence linking someone to an offence.

Anyone who joins others in a plan to commit one crime can be charged with any other crime committed by an accomplice. For example, if three persons agreed to rob a bank at gunpoint and one of them shot and killed the bank manager, all three could be charged with murder because each one knew, or should have known, there was a risk of someone inside the bank being shot. Someone can also be charged with conspiring to break the law even if the crime is never carried out, because the offence is established as soon as the person agrees to take part in the plan to commit an offence.

c) Defences to Criminal Offences

The *Criminal Code* and the common law provide defences that may absolve an offender of a crime or reduce the severity of the offence. Someone who establishes that they killed an attacker in self-defence would be found not guilty of murder. A person accused of murder may be able to put forward two defences to show that, while the person killed another, the act was not intentional. One is drunkenness: if a judge or jury accepts evidence that the killer was too drunk or intoxicated to have intended to kill, the person must be acquitted of murder but convicted of the less-serious offence of man-

slaughter. Someone who was provoked into lashing out at another person in a sudden, thoughtless rage can claim the defence of provocation to a charge of murdering that person and this defence, if accepted, will also lead to a conviction for manslaughter. Manslaughter is defined as an unintentional killing that results from an illegal act, such as an assault or misuse of a gun.

An alibi is perhaps one of the best-known defences. Defendants will be acquitted if they can establish they were in another location and could not have committed the crime. The defence of necessity absolves some persons who claim they had no choice but to intentionally break the law—an example is a driver who speeds down a residential street to rush a critically ill person to hospital. A person found to have suffered from a mental disorder when an offence was committed will be declared not criminally responsible and detained in a psychiatric facility rather than in a jail.

d) Categories of Offences

There are three categories of crime in Canada. Summary conviction offences are minor acts like shoplifting, assaults that do not cause injury, impaired driving, damage to property, and theft of money or goods when the amount involved is less than $5,000. Charges must be filed within six months of the date the offence occurred and the maximum penalty is typically a $2,000 fine and six months in jail. Offences under provincial laws that resemble crimes—underage drinking, illegal fishing or hunting, workplace safety infractions, traffic violations—are dealt with as summary conviction matters but may be punishable by larger fines and longer jail terms.

The most serious crimes and crimes of violence are known as indictable offences. These include first- and second-degree murder, manslaughter, robbery, armed robbery, violent physical and sexual assaults, and thefts and frauds involving large sums of money, as well as serious narcotics offences such as the trafficking or smuggling drugs. These offences can be punished with lengthy prison terms—up to life in prison, in the case of homicide—or large fines. There is no deadline for charging someone with an indictable offence.

The third category is hybrid or dual-procedure offences, which can be dealt with as either summary conviction or indictable matters. Hybrid offences prosecuted "by indictment" can be punished more severely that those pursued "summarily." The Crown attorney decides which route to take after assessing the severity of the crime and whether the offender has a significant criminal record and should face a greater punishment if convicted. For example, while shoplifting is usually prosecuted as a summary conviction offence, a Crown attorney may choose to proceed by indictment against an accused shoplifter who has a long history of such thefts.

e) Arrest

To make an arrest, a police officer must have "reasonable and probable grounds" to believe a person committed an offence or is trying to break the law. This does not mean the police need absolute proof of guilt to make an arrest, but they must have more than mere suspicions. Suspects may be apprehended at the scene of a crime or picked up on a court order known as an arrest warrant. If an arrest is justified, a suspect who struggles or refuses to cooperate could be charged with resisting arrest. In many cases, an arrest is not necessary—the suspect is notified and ordered to appear in court at a later date to answer to the charges. In most Canadian jurisdictions the police decide which charges a suspect will face, usually after seeking legal advice from a Crown attorney. Citizens have the right to detain offenders and make a "citizen's arrest" in some cases.

f) Young Persons and the Criminal Law

The *Youth Criminal Justice Act* sets out the procedures for dealing with young persons older than 12 and but younger than 18 who are accused of breaking the law. The act's objective is to punish youthful offenders for their crimes while recognizing that they may lack the maturity and insight needed

to fully appreciate the impact of their actions. The act also recognizes that most youths commit minor, non-violent crimes.

Young persons are dealt with in a separate court system and, if sentenced to a term of custody, they are held in special facilities where there are no adult inmates. Publication bans and strict controls over court records are used to shield the identities of those charged and aid in their rehabilitation. Measures are taken to keep youths who commit minor offences out of the court system—the police must consider issuing warnings and a restorative justice approach, which brings offenders face to face with their victims and community representatives, is also encouraged. The act emphasizes reprimands and other alternative punishments for property offences such as theft and break and enter. Detention in youth jails is reserved for violent offences and youths who are repeat offenders.

3. Pre-Trial Procedure in Criminal Cases

a) Arraignment and Disclosure of Crown Evidence

The arraignment is an accused person's first appearance in provincial court to answer to a charge. Before the person enters a plea or selects the court where the trial will be held, the Crown attorney must give the person details of the evidence the police have gathered. Reports, witness statements and any information relevant to the offence must be disclosed, including information that suggests the person is innocent and evidence the Crown does not plan to use in court. The disclosure process protects a person's right to defend themselves and ensures no one will be "ambushed" with a surprise witness at trial. Defendants disclose evidence to the Crown only if they plan to try to establish an alibi, enabling the authorities to investigate and determine whether the alibi is true.

b) Election and Plea

The election is the defendant's choice of which court will hear the trial.

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Summary conviction offences must be tried in provincial court, so defendants have no right to choose a trial in a higher court. Defendants either plead not guilty, and have a date set for trial, or plead guilty and face a sentencing hearing before the provincial court judge.

For most indictable offences, defendants can choose to stand trial in provincial court, before a superior court judge or before a judge and jury in superior court. (The exceptions are trials involving the most serious criminal offences—such as murder, piracy and treason—which must be held in superior court.) If the defendant chooses trial in provincial court and pleads not guilty, a trial date is set. If the defendant opts for trial in superior court, however, no plea is taken and the judge will set a date for a preliminary hearing in provincial court. A plea is entered only if the defendant is ordered to stand trial after the Crown's evidence has been reviewed at the preliminary hearing.

For hybrid or dual procedure offences, the Crown attorney's decision on how to proceed will determine how the election and plea unfolds. While hybrid offences prosecuted as summary conviction matters remain in provincial court, defendants have the right to elect trial in superior court for hybrid charges if they are pursued by indictment.

c) Bail and Release Before Trial

Once someone has been arrested and charged, a decision must be made whether the person should be released until a trial is held. The police release many suspects who have signed a document promising to show up in court as directed to answer to the charge. If the authorities believe a defendant should remain in custody, the person must appear before a judge or justice of the peace within 24 hours for an arraignment and a bail hearing. Bail hearings are known as "show cause" hearings be-

cause the Crown attorney must show there is cause, or reason, to prevent the person's release. Suspects are presumed innocent and have the right to their liberty until they are proven guilty at a trial, so they do not have to prove they deserve to be released. The *Charter of Rights and Freedoms* guarantees access to release on bail on "reasonable" terms to everyone accused of a crime, even those awaiting trial for serious or violent crimes.

At the hearing, the judge hears a summary of the Crown's evidence and information about the suspect's background and criminal record, if any. Since this information could influence the jury at trial, the defendant has the right to ask the judge to ban publication of most of the information revealed at the hearing. To deny release on bail, a judge must be convinced the accused person would flee, commit more crimes or try to intimidate witnesses if released. If the allegations are serious, a judge can order a defendant to remain in custody to maintain public confidence in the administration of justice.

Release on bail usually comes with conditions. A suspect may have to observe a curfew, promise not to drink or use illegal drugs, or agree to stay away from potential witnesses. Suspects are often required to deposit their own money with the court or have a relative or friend act as a "surety," pledging money or property to satisfy bail requirements. Defendants granted bail may remain in custody if they do not have enough money to satisfy a bail order or no one to act as a surety.

d) Preliminary Hearings

When a defendant chooses trial in superior court, this proceeding—also known as a preliminary inquiry—is conducted to ensure the Crown's case is strong enough to justify a trial. (Some defendants decline their right to this hearing and proceed directly to trial.) At the hearing, the Crown presents its witnesses and the defence gets a chance to cross-examine each one. The defendant has the right to ask the judge to order a ban on publication of the evidence revealed at the hearing, to ensure jurors empanelled at trial have not heard details of the allegations and made up their minds in advance. The ban remains in place until the trial is over. To order a trial, the judge must be satisfied there is "some" evidence that, if believed, would be enough to convince a jury to convict. Since the Crown is usually able to meet this requirement, most preliminary hearings end with the defendant being ordered to stand trial. If the judge finds the Crown's case is too weak, the defendant will be discharged and the prosecution ends.

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e) Preferred Indictments

The Crown has the right to issue a preferred indictment (also known as a direct indictment) to send a defendant directly to trial. While an indictment can be preferred at any point before a trial, the procedure is usually used to reactivate the prosecution of a person discharged at a preliminary hearing.

f) Plea Negotiation

A defendant can plead guilty at any point as a criminal case proceeds. The Crown attorney may agree to withdraw some charges in exchange for a guilty plea to others, or allow the defendant to plead guilty to less-serious charges. Such agreements spare taxpayers the cost of conducting a trial and spare victims of crime from having to testify. The Crown attorney and the defence lawyer may agree, as well, to recommend a lighter sentence than normal for the offence. The judge who passes sentence is free to impose a harsher penalty, but must have good reasons for ignoring such recommendations.

g) Withdrawing or Staying Charges

A Crown attorney has the right to appear in court to formally withdraw charges and end a prosecution. Charges must be dropped if the Crown attorney no

longer believes it is likely the defendant will be convicted. There can be a number of reasons for this decision—a key witness may refuse to testify or a review of the evidence may raise doubts about the strength of the prosecution's case. Crown attorneys also have the power to stay (shelve) charges for up to a year, giving the police more time to search for evidence. A prosecution stayed by the Crown must be revived within a year or the charges lapse and can no longer be pursued.

h) Pre-trial Motions

Legal arguments over the admissibility of evidence and other legal issues are usually dealt with during the trial. However, superior courts often hold separate hearings weeks or months before trial to deal with lengthy and complicated matters such as Charter motions and applications to stay charges.

Note: Procedures at the trial stage of a criminal case are outlined in the Teachers Guide for Unit 3.