



Module 4: How do Judges Make Decisions?



➤ Case Study: Bail Hearing in Armed Robbery Case

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Module 4: How do Judges Make Decisions?

The desired outcome for Module 4 is encapsulated in the following paragraph:

“Well done. Every day, judges are called upon to make tough decisions that affect people’s lives and their futures. Now you have a better idea how judges review evidence, consider the law, and apply principles of fairness and justice as they make these important decisions.”*

(*audio feedback to each student from the online judge after the successful completion of the online task at www.tryjudging.ca)

NB: all lettered Sections identified in the overview are referenced within the body of each of the 5 modules, with each module being located directly after each suggested lesson plan(s), and will be found at www.tryjudging.ca.

Module Learning Outcomes: Module 4, Section (A)

Students will:

- Explore how judges weigh evidence in making a decision;
- Explore how judges interpret laws and use precedents;
- Learn the basics of criminal law and the steps in a criminal prosecution.

Provided Resources for Module 4

I. Resource Materials: Module 4, Section (B)

(Note: information on the first five sections below is in Module 4 (B) of the teacher’s guide and can also be accessed at www.tryjudging.ca. Click on “Teacher Resources”.)

- I. The Judge’s Decision-Making Process
 - a) Weighing Evidence and Making Findings of Fact
 - b) Interpreting the Law and Statutes, Following Precedent
 - c) Verdicts, Sentencing and Remedies

2. Understanding Criminal Law
 - a) What Is a Crime?
 - b) Who Can Be Charged with a Crime?
 - c) Defences to Criminal Offences
 - d) Categories of Offences
 - e) Arrests
 - f) Young Persons and the Criminal Law
3. Pre-Trial Procedure in Criminal Cases
 - a) Arraignment and Disclosure of Crown Evidence
 - b) Election and Plea
 - c) Bail and Release Before Trial
 - d) Preliminary Hearings
 - e) Preferred Indictments
 - f) Plea Negotiation
 - g) Withdrawing or Staying Charges
 - h) Pre-trial Motions
4. Appendix A
Release on Bail: A Case for Class Discussion
5. Appendices B
(Teacher's page) and C (Students' page): Case Study on armed robbery (a precursor to 6, 7, 8, and 9 below)
6. Video: Case Study #4
Bail Hearing in Armed Robbery Case (<3minutes) available at www.tryjudging.ca

7. Video
Background and Script available at www.tryjudging.ca
8. *Try Judging*
online interactive program for students is available at www.tryjudging.ca.
9. Quiz
(embedded within the online interactive student programme)
- IO. Additional Exercises for Classroom Use and Assignments
(these are found in Module 4 (D) of the teacher's guide and at www.tryjudging.ca)
- II. Internet Links to More Resources
(these are found in Module 4 (E) of the teacher's guide and at www.tryjudging.ca)

2. Case Study: Module 4, Section(C)

(to be used in conjunction with the video and the online interactive site)

Case Study: Bail Hearing in Armed Robbery Case
(The case study can be accessed at www.tryjudging.ca. It is designed as an interactive exercise that can be adapted for an in-class activity and/or a written assignment. The website, furthermore, provides all resource materials for teachers in PDF format.)

3. Additional Exercises for Classroom Use and Assignments: Module 4, Section (D)

(all the following are elaborated upon at www.tryjudging.ca)

- 1) In-Class Discussion of Decisions to Grant or Deny Bail
- 2) Release on Bail: A Case for Class Discussion
- 3) In-Class Discussion: Understanding Proof Beyond a Reasonable Doubt
- 4) In-Class Discussion Based on the O.J. Simpson case
- 5) Applying Reasonable Doubt to the Evidence: An Exercise
- 6) Exercise in Understanding Sentencing Decisions
- 7) Sentencing: An In-Class Discussion
- 8) Suggested questions for class discussion and/or written assignments

4. Internet Links to More Resources: Module 4, Section (E)

These links, found at www.tryjudging.ca, provide information on the following: criminal law proceedings in superior courts, The Criminal Code, The Charter of Rights and Freedoms, overview of criminal justice, legal information centre, etc.



Module 4: How Do Judges Make Decisions?

Suggested Lesson Plans

Teaching Objectives and Learning Outcomes

Students will:

- Explore how judges weigh evidence in making a decision;
- Explore how judges interpret laws and use precedents;
- Learn the basics of criminal law and the steps in a criminal prosecution.

Teacher and Student Learning Materials and Resources

(Note: information on the first three sections below is in Module 4 (B) of the teacher's guide and can also be accessed at www.tryjudging.ca. Click on "Teacher Resources".)

1. The Judge's Decision-Making Process

- a) Weighing Evidence and Making Findings of Fact
- b) Interpreting the Law and Statutes, Following Precedent
- c) Verdicts, Sentencing and Remedies

2. Understanding Criminal Law

- a) What Is a Crime?
- b) Who Can Be Charged with a Crime?
- c) Defences to Criminal Offences
- d) Categories of Offences
- e) Arrests
- f) Young Persons and the Criminal Law

3. Pre-Trial Procedure in Criminal Cases

- a) Arraignment and Disclosure of Crown Evidence
- b) Election and Plea
- c) Bail and Release Before Trial
- d) Preliminary Hearings
- e) Preferred Indictments
- f) Plea Negotiation
- g) Withdrawing or Staying Charges
- h) Pre-trial Motions

4. Appendix A

Release on Bail: A Case for Class Discussion

5. Appendices B

(Teacher's page) and C (Students' page): Case Study on armed robbery (a precursor to 6, 7, 8, and 9 below)

6. Video: Case Study #4

Bail Hearing in Armed Robbery Case

(<3minutes) available at www.tryjudging.ca

7. Video Background and Script

available at www.tryjudging.ca

8. Try Judging

online interactive program for students is available at www.tryjudging.ca.

9. Quiz

(embedded within the online interactive student programme)

10. Additional Exercises for Classroom Use and Assignments

(these are found in Module 4 (D) of the teacher's guide and at www.tryjudging.ca)

11. Internet Links to More Resources

(these are found in Module 4 (E) of the teacher's guide and at www.tryjudging.ca)

Teaching Plan and Strategy

1.

The teacher will conduct a class discussion centering around a case study dealing with release on bail. Appendix A, for the teacher, provides not only the case study but also a number of questions that specifically focus upon that case study.

2.

As a precursor to the following strategy (3), the teacher will use Appendices B and C to provide an opportunity for students to improve their abilities to assess a crime within the context of whether or not release on bail should be warranted.

3. Critical learning materials and resources 6, 7, 8, and 9

will enable students to fully analyse Module 4's Section (C) Case Study: Bail Hearing in Armed Robbery Case. The online video (approximately 3 minutes in length), subsequent online interactive programme, and associated online quiz (all found at www.tryjudging.ca), provide an excellent student-centred learning activity for teachers to use.

4. Follow up activities

such as those outlined in Module 4 guide's Section (D), using the Internet links listed in Section (E) of the guide, can be considered for further study.

Evaluation/ Assessment

1. Appendix C (see Materials and Resources #5 above): Bail—To Grant or Not to Grant (this can be perceived as more of a diagnostic assessment)
2. Quiz for online interactive program (see Materials and Resources #9 above)
3. Exercises or assignments associated with Module 4, Section (D) and Section (E) (see Materials and Resources #10 and #11 above)

Appendix A For teachers

Release on Bail: A Classroom Discussion

(source: Module 4, Section (D))

Case Study:

A man is arrested and charged with aggravated assault causing bodily harm after beating a teenager into a coma. The man has no criminal record and works full-time. At his bail hearing, the judge rules he can be released if he post \$10,000 bail. The parents of the victim, who attend the hearing, are shocked. As they leave the courtroom, the victim's father tells reporters that judges are "soft on criminals" and the justice system has let them down. "The man deserves to be in jail for what he did", the father says as he breaks down in tears, and the whole legal process is a "joke".

Series of Discussion Questions

1. Do students feel the man should have been granted bail?
 - What grounds are there for denying release?
 - What factors would justify keeping the man in custody while he awaits trial?
 - If they were the judge, what would they decide and why?
2. Should the victim's parents be surprised that the suspect was released?
 - What does the Charter say about the presumption of innocence and the right to release on bail?
3. Discuss whether the father's criticism is fair.
 - Does it properly reflect why bail is granted?
 - Does it take into account the presumption of innocence or the Charter right to reasonable bail?
4. Should judges consider what crime victims think before deciding to grant bail? Why or why not?
5. Would a media report that focused on the father's comments be fair? How should the media report the hearing's outcome and the parent's reaction?

Appendix B For teachers

Students are to read the following scenario (the same that is referred to in resource materials 6, 7, 8, and 9, but dealt with differently), and answer the accompanying questions.

Scenario:

A teenager, with one hand in her pocket as if she has a gun, demands cash from a gas station attendant. The attendant hands over some money and the woman flees but is cut off by a police cruiser and surrenders without incident.

The woman is arraigned and pleads not guilty to a charge of armed robbery. A judge is asked to decide whether she should be released while awaiting trial.

Which factors should favour the defendant's release? Which do you think would justify detaining her and denying bail?

1. No violence was used and it turns out she did not have a gun in her pocket. (favours release)
2. The woman has a long criminal record, including previous convictions for assault, theft, and attempted robbery. (favours detention)
3. The woman was kicked out of her home at age 14 for using drugs, has no family support, no job, and lives on the street. (favours detention)
4. While the woman is a suspect in another crime, she has not been charged and police admit it is unlikely she will be. (favours release)
5. Robbery is a serious offence and there has been a rash of gas station robberies in the city. (favours detention)
6. The investigating officer says the woman phoned the attendant, the key Crown witness, and left a threatening message on the attendant's answering machine. (favours detention)

(This exercise is designed to make students think about the factors that a judge must take into consideration when making a decision—in this case, a decision whether to release a suspect who is awaiting trial on a charge of armed robbery.

Many people may believe that someone charged with a serious offence like armed robbery should remain in custody until trial. But a blanket rule of pre-trial detention would undermine the Charter's guarantees of presumption of innocence and the right not to be denied release on bail 'without just cause'. The Criminal Code allows a person awaiting trial to be deprived of their liberty only if a judge decides the person poses a danger to others, may try to intimidate witnesses, is likely to flee to avoid trial, or is accused of a serious crime and it would undermine public confidence in the justice system if the person were released. The Crown must present evidence to show that one or more of these factors is present and justifies keeping the person in custody.

In this exercise, students are challenged to consider details about the suspect and the crime, as revealed at a bail hearing, and to decide whether this additional information favours releasing the suspect on bail or favours keeping the suspect in custody.)

Appendix C For students

Assignment: Bail—To Grant or Not to Grant

You are to read the following scenario, and then answer the accompanying questions:

Scenario:

A teenager, with one hand in her pocket as if she has a gun, demands cash from a gas station attendant. The attendant hands over some money and the woman flees but is cut off by a police cruiser and surrenders without incident. The woman is arraigned and pleads not guilty to a charge of armed robbery. A judge is asked to decide whether she should be released while awaiting trial.

Indicate which factors should:

- a. favour the defendant's release (R), or
 - b. would justify detaining her and denying bail (D)
1. No violence was used and it turns out she did not have a gun in her pocket.
 2. The woman has a long criminal record, including previous convictions for assault, theft, and attempted robbery.
 3. The woman was kicked out of her home at age 14 for using drugs, has no family support, no job, and lives on the street.
 4. While the woman is a suspect in another crime, she has not been charged and police admit it is unlikely she will be.
 5. Robbery is a serious offence and there has been a rash of gas station robberies in the city.
 6. The investigating officer says the woman phoned the attendant, the key Crown witness, and left a threatening message on the attendant's answering machine.



Module 4: How Do Judges Make Decisions?



Case Study: Bail Hearing in Armed Robbery

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A. Learning Outcomes

B. Resource Materials

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- b) Interpreting the Law and Statutes, Following Precedent
- c) Verdicts, Sentencing and Remedies

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- h) Pre-trial Motions

C. Case Study: Bail Hearing in Armed Robbery Case

D. Additional Exercises for Classroom Use and Assignments

E. Internet Links to More Resources



A. Learning Outcomes

Students will:

- ⊕ Explore how judges weigh evidence in making a decision;
- ⊕ Explore how judges interpret laws and use precedents;
- ⊕ Learn the basics of criminal law and the steps in a criminal prosecution.



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.

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

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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

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.

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.

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

To be 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.

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.

2. Understanding Criminal Law

a) What Is a Crime?

To be 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 than 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.

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.

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.

Bail hearings are known as "show cause" hearings because 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.

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.



C. Case study: Bail Hearing in Armed Robbery Case

The following case study will be created at www.tryjudging.ca as an interactive exercise that can be adapted for an in-class activity or a written assignment. The website will provide teachers with all resource materials in PDF format as well as worksheets that can be downloaded and distributed to students. These worksheets will list the questions posed below and ask students to supply the answers based on their exploration of the website.

Scenario

A teenager, with one hand in her pocket as if she has a gun, demands cash from a store clerk. The clerk hands over some money and the woman flees but is cut off by a police cruiser and surrenders without incident. The woman is arraigned and pleads not guilty to a charge of armed robbery. A judge is asked to decide whether she should be released while awaiting trial.

Which factors should favour the defendant's release? Which do you think would justify detaining her and denying bail?

- 1) No violence was used and it turns out she did not have a gun in her pocket [Favours release]
- 2) The woman has a long criminal record, including previous convictions for assault, theft, and attempted robbery [Favours detention]
- 3) The woman was kicked out of her home at age 14 for using drugs, has no family support, no job, and lives on the street [Favours detention]
- 4) While the woman is a suspect in another crime, she has not been charged and police admit it is unlikely she will be [Favours release]
- 5) Robbery is a serious offence and there has been a rash of store robberies in the city [Favours detention]
- 6) The investigating officer says the woman phoned the clerk, the key Crown witness, and left a threatening message on the clerk's answering machine [Favours detention]

This exercise is designed to make students think about the factors that a judge must take into consideration when making a decision—in this case, a decision whether to release a suspect who is awaiting trial on a charge of armed robbery.

Many people may believe that someone charged with a serious offence like armed robbery should remain in custody until trial. But a blanket rule of pre-trial detention would undermine the Charter's guarantees of presumption of innocence and the right not to be denied release on bail "without just cause."

The Criminal Code allows a person awaiting trial to be deprived of their liberty only if a judge decides the person poses a danger to others, may try to intimidate witnesses, is likely to flee to avoid trial, or is accused of a serious crime and it would undermine public confidence in the justice system if the person were released. The Crown must present evidence to show that one or more of these factors is present and justifies keeping the person in custody. In this exercise, students are challenged to consider details about the suspect and the crime, as revealed at a bail hearing, and to decide whether this additional information favours releasing the suspect on bail or favours keeping the suspect in custody.



D. Additional Exercises for Classroom Use and Assignments

I. In-Class Discussion of Decisions to Grant or Deny Bail

The *Criminal Code* sets out three grounds that can be the basis for a judge's decision to deny bail to a suspect who is awaiting trial:

- To protect the public and witnesses and to ensure the suspect does not commit more crimes
- To prevent the suspect from fleeing to evade justice
- To maintain public confidence in the administration of justice if the crime is serious, the Crown has a strong case, and the suspect faces a lengthy prison term if convicted

Provide a handout to the class listing these grounds, then ask students to pretend they are a judge presiding at a bail hearing for the following suspects. Would they grant or deny release on bail? Ask them to explain why or why not, basing their answers on the grounds for denying release:

- A man whose brother belongs to a biker gang is charged with shoplifting. He has no criminal record but the prosecutor urges the judge to consider him dangerous and deny bail because of his “close ties” to the motorcycle gang.
- A woman is charged with shoplifting. She has a long criminal record for theft and fraud and has spent many months in jail in the past, but has never committed a violent offence.
- A bookkeeper has been charged with impaired driving causing bodily harm. The offence is serious but he has no criminal record, has three young children, and will lose his job if he is not released.
- A woman is charged with second-degree murder in the death of her ex-boyfriend. At the bail hearing, the investigating officer reveals that the victim had abused and harassed the woman in the past. The woman has a good job and no criminal record. The penalty for second-degree murder is life in prison without release on parole for at least 10 years.
- A man accused of taking part in a violent home invasion is seeking release on bail. Two men barged into the home of an elderly couple, tied them up and ransacked the home. The couple were threatened but not harmed. Home invasions are on the rise and the province's court of appeal recently called on judges to impose stiffer prison terms for such offences.
- A man being sought on an arrest warrant for a string of thefts is discovered hiding in a vacant cabin in the woods. The prosecutor wants bail to be denied because the man has been at large for many months and is likely to try to evade the charges once again. The man tells the judge his fugitive days are over and, if he is released, he insists he will show up for his trial.
- A man is charged with living off the avails of prostitution—in other words, of being a pimp. Two women, both ex-prostitutes, will testify against

the man at his trial. A police officer testifies at the bail hearing that the man has beaten both women in the past and they fear he will attack them if he is released.

- A truck driver is arraigned on a charge of sexually assaulting a female hitchhiker. The assault is considered minor but the Crown is concerned that the defendant will flee the jurisdiction if released, because he hauls loads of freight to a neighbouring province every week.
- Invite students to suggest other cases, either fictional or ones they have heard about in the media, and to discuss whether the suspect in each case should be released on bail.

Relevant sections of the *Criminal Code*:

Justification for detention in custody:

515 (10) ... the detention of an accused in custody is justified only on one or more of the following grounds:

- a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, 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) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Relevant *Charter* provisions:

II. Any person charged with an offence has the right ...

- d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e) not to be denied reasonable bail without just cause;

Use one or more of the scenarios set out in this exercise as the basis for a written assignment. Ask students to take on the role of the judge and to decide whether each suspect should be freed on bail or held in custody. In each case, ask them to explain their reasons, drawing on the Criminal Code's grounds for denying bail.

2. Release on Bail: A Case for Class Discussion

Case Study: A man is arrested and charged with aggravated assault causing bodily harm after beating a teenager into a coma. The man has no criminal record and works full-time. At his bail hearing, the judge rules he can be released if he posts \$10,000 bail. The parents of the victim, who attend the hearing, are shocked. As they leave the courtroom, the victim's father tells reporters that judges are "soft on criminals" and the justice system has let them down. The man deserves to be in jail for what he did, the father says as he breaks down in tears, and the whole legal process is a "joke."

- Do students feel the man should have been granted bail? What grounds are there for denying release? What factors justify releasing the man while he awaits trial? If they were the judge, what would they decide and why?

- Should the victim’s parents be surprised that the suspect was released? What does the Charter say about the presumption of innocence and the right to release on bail?
- Discuss whether the father’s criticism is fair. Does it properly reflect why bail is granted? Does it take into account the presumption of innocence? The Charter right to “reasonable” bail?
- Should judges consider what crime victims think before deciding to grant bail? Why or why not?
- Would a media report that focused on the father’s comments be fair? How should the media report the hearing’s outcome and the parents’ reaction?

3. In-Class Discussion: Understanding Proof Beyond a Reasonable Doubt

Lead students in a discussion based on the following quotation from William Blackstone, an influential 18th century British judge: “It is better that ten guilty persons escape than one innocent suffer.” Blackstone was explaining the rationale for the high standard of proof required for a criminal conviction. In our justice system, it is understood that the Crown will not be able to present sufficient proof to convict some suspects who are guilty. This is the price we are willing to pay to avoid wrongfully convicting innocent persons.

Points for discussion: What do students think Blackstone meant by this comment? Ask students to explain why they agree or disagree that it should be acceptable for guilty persons will go unpunished. Is this standard of proof too onerous, setting up the justice system to fail and criminals to go free? Should the prosecution be required to prove defendants guilty with absolute certainty, to prevent injustices and wrongful convictions?

After the discussion, ask students to vote on whether the standard of proof is too stringent or not stringent enough. Break the class into two groups based on their answers, and ask each group to write out their

suggestions for where they would draw the line—how much evidence do they feel should be needed to convict? Would be it enough, for instance, if a judge felt it was more likely than not that a person is guilty? Should the standard be without a shadow of a doubt, or 99.9 per cent sure? Is it enough to say the defendant is likely guilty or appears to be guilty? Ask each group to consider the impact of their choice—would more persons be convicted or acquitted? Would there be more wrongful convictions, or fewer? Would more guilty persons be convicted, or fewer? Finally, ask students to put themselves in the position of an innocent person wrongly accused of a crime—do they still feel their standard of proof is fair? Assuming they are innocent, do they feel the standard of proof beyond a reasonable doubt is fair?

4. In-Class Discussion Based on the O.J. Simpson case

In 1995 a California jury acquitted former football star O.J. Simpson of murdering his estranged wife and her friend. In a later civil trial, another jury ruled that Simpson caused the deaths and must pay damages to the families of both victims. This well-known case highlights the difference between the standards of proof in criminal and civil cases. In criminal cases, a judge or jury must find there is proof beyond a reasonable doubt that the defendant is guilty. In a civil action or lawsuit, the person suing only has to prove on the balance of probabilities that it is more likely than not the defendant is responsible.

Describe the outcome of Simpson trials to the class. Ask if anyone can explain these contrary results. What does the outcome of the Simpson case say about how difficult it is to prove someone is guilty of a crime? Why is the hurdle set so high? Do students think it is set too high, enabling guilty persons to “get off” without being punished? Should the criminal courts adopt a standard of proof closer to the one used in civil cases? What could be the consequences of making it easier to convict someone of a crime?

Ask students to suggest why the standard of proof is not as strict in civil cases. Is it too low, making people responsible for paying damages when they should not be? What would happen if people launching lawsuits were required to prove their case beyond a reasonable doubt?

5. Applying Reasonable Doubt to the Evidence: An Exercise

A man flees a bank after a robbery. A woman walking by on the other side of the street sees the man and gives the police a description—average height and weight, brown hair and moustache, dark jacket and pants. Two days later, police arrest John Smith, who is on parole after serving time for armed robbery. The witness picks him out of a police lineup but is not completely certain he is the man she saw—he is wearing different clothes and has no moustache. Police find two \$20 bills taken from the bank in the man’s wallet, but the rest of the stolen money—about \$19,000—is never recovered.

- Is the eyewitness testimony sufficient to convict Smith? Why or why not?
- Is the fact he was found in possession of the two marked \$20 bills sufficient evidence to convict? Why or why not?
- If the eyewitness testimony and the discovery of the marked \$20 bills are put together, is there enough evidence to convict? Why or why not?
- What if the eyewitness testifies she is absolutely sure Smith is the man she saw running from the bank?
- What if the crime happened in the morning while the sun was low in the sky and shining into the witness’s eyes?

- What if the police asked the witness to pick out the assailant from a lineup of only three people, instead of the usual ten?
- What if the defence shows that the woman’s line of sight was obscured by buses parked at a stop across the street, making it difficult if not impossible for her to see anyone leave the bank?
- What if the witness has a history of mental illness?
- What if it is established at trial that the marked bills taken in the robbery have been used to pay for goods and make change at stores all over town?
- What if Smith takes the witness stand, denies robbing the bank, and says he was with a friend on the other side of town at the time the bank was robbed?
- What if the friend cannot be found and does not testify to corroborate Smith’s alibi?
- What if the friend testifies, but turns out to have a criminal record for theft and fraud?

Use the examples of the strengths and weaknesses of evidence as set out in the bank robbery exercise as the basis for a written assignment. Pick several of the scenarios, ask students to play the role of a judge, and ask them to explain which ones raise sufficient doubts in their mind about the defendant’s guilt to support a verdict of not guilty.

6. Exercise in Understanding Sentencing Decisions

Review the principles of sentencing with the class. Ask students to come to class with a newspaper account of a recent sentencing hearing. Assign them to write a list of the facts of the case, as reported in the media. Does the report outline the judge’s reasons for the sentence and, if so, what are they?

Which principles of sentencing apply to the case? Ask the students whether they feel the sentence is appropriate and to explain why, citing the principles of sentencing. What sentence do they feel would have been appropriate for this offender, and why?

To modify this exercise for a class discussion, choose a newspaper report of a sentencing hearing, make a copy for each student, and pose the above questions to the class.

7. Sentencing: An In-Class Discussion

A school has been firebombed, causing extensive damage to the library and the adjacent principal's office. A 23-year-old man has been convicted of the offence and comes before a judge to be sentenced.

Ask students to discuss whether each of the following factors would cause the judge to impose a more severe sentence or a less severe one, and to explain why:

- The man has no criminal record
 - The man pleaded guilty and has expressed sincere remorse for committing the crime, and apologized to students and their parents
 - The man is aboriginal
 - The man is aboriginal and has a criminal record for theft, break and enter and assault
 - The man has sought treatment to deal with drug addiction, which led to his involvement in the crime, and is considered an excellent candidate for rehabilitation
 - The man pleaded guilty and has agreed to testify against two other men who were involved in the firebombing
- The offender has a long history of violence and was on parole at the time of the firebombing
 - The offender is a member of a motorcycle gang
 - The school was firebombed because it teaches Jewish students

Use these scenarios as the basis for a written assignment, asking students to explain how each factor could affect the severity of the sentence imposed.

8) Suggested questions for class discussion and/or written assignments:

- a) List the grounds for refusing bail to an accused person who is awaiting trial.
- b) Why must the Crown establish that a suspect awaiting trial should not be released, instead of the suspect having to show he or she deserves to be released?
- c) Why is the principle of following precedent so important in our justice system?
- d) An opposition party proposes a law that would require judges to commission polls to gauge public opinion before deciding on the proper punishment for criminals. Should popular opinion be one of the principles for judges to follow in passing sentence? Explain your answer.
- e) Assign students to find a recent newspaper account of a sentencing hearing and to identify the principles of sentencing that apply to the case.
- f) When a judge is passing sentence, what alternatives does she have to imposing a prison term?
- g) Why are appeal courts reluctant to overturn a lower court's decision on whether a witness is telling the truth?



E. Internet Links to More Resources

A Compendium of Law and Judges:

Chapter 9: Criminal Law Proceedings in Superior Courts;

Chapter 10: Criminal Law Evidence;

Chapter 12: Common Criminal Law Defences;

Chapter 21: The Youth Criminal Justice Act;

Chapter 23: Sentencing.

http://www.courts.gov.bc.ca/legal_compendium/

Nova Scotia Public Prosecution Service website:

“The Criminal Case: Step by Step”:

http://www.gov.ns.ca/pps/criminal_case.htm

Criminal Code. An electronic version is available online:

<http://laws.justice.gc.ca/en/C-46/index.html>)

Charter of Rights and Freedoms.

Available on-line at:

<http://laws.justice.gc.ca/en/charter/index.html>

Overview of the Criminal Justice System of Canada: A primer on criminal law, policing, and corrections, with useful parallels to the American justice system.

<http://www.cjprimer.com/canada.htm>

Duhaime’s Canadian Legal Information Centre:

Background on family, contracts, criminal and other areas of law and links to legal websites in all provinces. Includes an on-line legal dictionary.

<http://www.wwlia.org/ca-home.htm>