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THE CANADIAN  
JUSTICE SYSTEM  
AND THE MEDIA

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# FOREWORD

I am very pleased to present *The Canadian Justice System and the Media*, a publication which seeks to foster discussion on the role of both judges and reporters in giving the public a better understanding of issues relating to the administration of justice in Canada.

This document should not be taken as a definitive comment on the state of the law about issues of public reporting of court cases; on the contrary, some of the issues discussed here are likely to come before the courts in future legal challenges. However, it is my hope that the information contained in the following pages will serve as a starting point for dialogue between judges, lawyers and journalists.

I was honoured to work under the direction of Council's Public Information Committee in the development of this discussion paper. While members of the judiciary have provided valuable input into this publication, and Council members directed its development, the document should not in any way be construed as representing the views of judges on the legal issues discussed here.

Lisa Taylor, an LL.M. candidate at Dalhousie University and a lecturer in the Journalism Programme at the University of King's College, was the main contributor to this text. Her expertise in the area of media law has been of immense value and I am very grateful for her dedication and flexibility in the development of this publication. I also wish to acknowledge the contribution of *Ad IDEM*, an association of media lawyers representing most of Canada's print and electronic media. Their comments contributed to make this publication a better tool.

Any suggestions for changes to this document are gratefully received and can be sent to the Canadian Judicial Council, Ottawa, Ontario, K1A 0W8.

Norman Sabourin  
Executive Director and Senior General Counsel





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# THE CANADIAN JUSTICE SYSTEM AND THE MEDIA

*“... [W]here there is no publicity there is no justice.  
Publicity is the very soul of justice.”*

– Jeremy Bentham, 18<sup>th</sup> century British philosopher

The Canadian Judicial Council (“CJC”) recognizes the pivotal role journalists play in informing the public about what happens in courtrooms throughout the country. Courts are public places; practically speaking, however, relatively few members of the public ever have the opportunity to witness courtroom proceedings first-hand. And that’s what makes the work of a free press vitally important.

The media is the public’s surrogate, observing and reporting on matters of interest and concern to the public. We’ve all heard it said that justice must not just be done, it must be *seen* to be done.

It’s a valuable public service; it can also be a weighty responsibility, primarily because legal processes and proceedings can be inordinately complex. Despite being a “public” process, it’s rarely an intuitive one, nor is it always observer-friendly. Lawyers and judges often resort to the jargon and verbal shorthand of the courts – language that, to the uninitiated, may sound far removed from plain language. Or, as Vancouver media defense lawyer David Sutherland explains in an article entitled “Court-Speak”...

Veterans of the “Court Beat” can usually figure out what’s happening in criminal cases. Goodness knows how they do it. The lawyers and the judge speak in code half the time.

“Another adjournment, Mr. Jones, and Ms. Smith will Askov you.” Case names are used as verbs to refer to the principles established in the precedents. “If Crown proceeds, I’ll *Kienapple* counts 2 and 4,” says defence counsel (referring to the rule against double jeopardy). “Did she say ‘pineapple?’” asks a bystander.

Case names are only part of the problem. There is Latin, of course. Why would lawyers use a simple word like “intent” when they can speak of *mens rea*? Why would they talk of a higher court “overturning” a ruling, when they can slur through the Latin, *certiorari* (pronounced, by me, ser-shor-are-eye). Even if you can find the word in the index to an annotated Criminal Code (why would you look under the letter “c”?), where does that get the average observer? Half the time, it’s not even good Latin, so the meaning is doubly obscured.

Then there’s the French. “Is this a *Kienapple* or an “*autrefois acquit*” application?” I say whaaat? “A pineapple or an *outrefwa* I quit,” suggests the bystander. A *voir dire* (note the verbs as a noun) is not a “look see,” but it’s a full-blown trial, within a trial, often about whether evidence is sufficiently reliable, whether admissions were pressured and such things.

Many journalists refer to the language of the judicial system as “legal-ese” although, to state the obvious, there’s nothing “easy” about it. And it’s apparently the mother tongue of the entire courthouse, since support staff speak it almost exclusively as well.

It should be noted that the justice environment is far from being the only professional milieu in which the ordinary working language would be incomprehensible to an outsider. Most judges (or anyone else outside the realm of journalism), for example, would have a hard time deciphering the jargon of a newsroom’s daily editorial or production meeting, with its talk of “vis” and “graphs” and “stand-ups.” That being said, a newsroom production meeting is *not* a public process, whereas a criminal trial is, which is why judges, where reasonably possible, are taking greater pains to make the language of the courtroom accessible to journalists and other spectators. But this can’t always happen, primarily because the legal process is a complex one; as a result, there are times in which there is simply no easier way to advance or explain the concepts at play.

“Sometimes the fear that comes from a lack of knowledge about the law can kill a story the public should know,” journalist and lawyer Michael Crawford notes in *The Journalist’s Legal Guide*. “On the flip side, ignorance or recklessness in publishing or broadcasting news can end up distorting the truth.” The CJC is alive to both problems – to stories that get ignored because they’re inaccessible to reporters, as well as stories that are inadvertently distorted or misreported. In both cases, the root cause is the same – a lack of understanding of the process.

No one is advocating a system in which journalists cease to criticize and scrutinize the courts – in both practice, and in judicial decision-making, Canadians believe in a free and democratic media. But all of us expect that information disseminated by the media should be reliable, and that the problems brought to the public’s attention should be real shortcomings, not the product of a journalist’s lack of knowledge of the system and its underlying principles.





# STRIVING FOR BETTER COVERAGE OF THE JUSTICE SYSTEM

The CJC understands that editorial decision-making is an individualized process, reflecting the views and objectives of both the news organization and the individual journalist. So we don't presume to suggest that this process can be reflected in a simple list of dos and don'ts.

That being said, the CJC's members, through the course of our work AND in our capacity as ordinary consumers of the media's work product (after all, we're part of your audience too), have identified some common ground in good reporting, as well as a few consistent themes or problems in the reportage that cause us concern.

Later in this section we'll review the habits and practices we see as being fundamental to good court coverage; but first we look at the key areas in which legal coverage can run afoul of the law.

## CONTEMPT OF COURT

Despite what American television would have you believe, being cited for contempt of court does not involve a red-faced, irate judge banging a gavel and shouting "You're in contempt!"

In real (Canadian) life, the spectre of contempt is raised when the media appears to try to usurp the role of the courts or influence the course of justice. The law of contempt protects a fundamental principle of justice: civil litigants and persons accused of crimes have a right to a fair trial. This right, however, must be balanced against the right to free expression. So just how is that balance struck? Well, therein lies the proverbial challenge.

When it comes to contempt of court, there's no black and white, no discrete categories or boundaries – what may be considered contempt by one analysis is simply good journalism when measured by another yardstick. "What information will, if published, cause real prejudice to the administration of justice?" asks media law professor Robert Martin. "The honest answer is that no one really knows for sure." To add to the uncertainty, the line between contempt and fair reporting is a moving target – news outlets are becoming bolder in their coverage, while judges are recognizing that courts must be open to criticism and that media-savvy jurors can think for themselves. Local rules and practices have diverged to a point where news reports tolerated or ignored in one province are cited for contempt in another.

The law of contempt as it applies to the Canadian media is in a state of flux. Journalists who are unsure how far they can go in reporting on a specific case should seek legal advice before publication or broadcast. Whether and to what extent there are limits on pre-trial publicity is a hotly-debated question; among the specific issues that generate the most heated discussion include whether a journalist should report on an accused person's criminal record, or recount details of a confession or other evidence that may never be admissible in court.

So, where do you draw the line? How do you know if you run the risk of overstepping it? The following are some key considerations...

## CRIMINAL CASES

**How close is the trial?** It's not just what you say, it's when you say it. The rule of thumb is that the risk increases as the date of trial approaches, and is at its highest once the jury is in place. People selected for jury duty are unlikely to recall the details of media reports that appeared up to a year or more before trial. A related factor is the notoriety of the case – the more sensational the information and the crime, the more likely the report may influence people who could wind up on the jury.

The risk of contempt arises once a case is *sub judice* – “under the consideration of the court.” The clock begins running once charges are laid, someone is arrested, or a warrant is issued for a suspect's arrest – in other words, as soon as the identifiable accused faces specific charges.

Criminal trials in Canada are held either before a judge alone or before a judge and jury. Journalists have more freedom to report upon issues leading up to and during a trial before a judge alone than is the case when it is before a judge and jury. To determine whether or not you are able to report upon any matter that arises either before or during a judge and jury trial, you are urged to seek legal advice. No one wants to see a fair trial jeopardized by reporting that is improper.

**Does the report explicitly link the accused to the crime?** Obviously the most blatant way to prejudice someone's right to a fair trial is to tell the world, flat out, that he or she committed the crime. In reports of a crime or when providing background information on a case before the courts, journalists attribute actions to an unspecified man, woman, or suspect. Typically, the accused is identified in a separate paragraph as the “alleged” assailant or is reported to be facing charges “in connection” with the incident. Be aware that out-of-court statements by the police enjoy no special status and must not declare guilt or taint character.

**Does the report reveal an accused's criminal record?** It is a principle of our justice system that cases should be decided on the evidence, not on the basis of the accused person's character or past crimes. An accused person's criminal record is presented in court only when it is relevant to a specific issue, such as whether the accused is credible, and even then is usually done so only after the judge hears evidence on the subject and determines that it is in fact admissible. As a result, news reports revealing a defendant's criminal record unless and until it is properly disclosed in court can be grounds for a mistrial. Statements that a defendant consorts with criminals, has a bad reputation, or is “known to police” also fall into this category. Such reporting may result in a journalist being prosecuted for contempt for disclosing an accused's record at time of arrest.

There are exceptions to the criminal record taboo. Reporting why an escapee was in prison or why an accused person was on parole is an integral part of such crimes. It is also considered permissible to report that someone accused of a crime is before the courts on unrelated charges.

**Does the report reveal a confession or other statement to police?** Judges must thoroughly analyze the circumstances surrounding a confession to police officers or other authority figures before the statement will be accepted as evidence and put before a jury. It is highly prejudicial to report that an accused confessed or to reveal details of a confession before they are presented at trial. Since people may equate any statement to police to an admission of guilt, reporters must avoid even mentioning that an accused has given such a statement. Reporting on confessions an accused has made to other witnesses may also be contemptuous, since the media must avoid linking an accused directly to a crime.

**Does the report reveal information not presented to the jury?** When reporting on trials in progress, journalists must avoid introducing information that has not been aired in court. While prosecutors and lawyers may agree to be interviewed during trials, they generally take care to repeat only what has been said in the courtroom.

Media reports delving deeper into incidents revealed in court are risky, since they may be seen as trying to enhance the credibility of a witness or undermine a defendant's case. Such information, if newsworthy, can be pursued but the results should not be published until the jury retires to deliberate. Descriptions of security measures not seen by jurors, such as the accused leaving the courtroom in handcuffs and leg irons, have also drawn contempt citations in the belief such details portray the accused as dangerous. In most cases this concern does not extend to references to precautions such as screening spectators with metal detectors.

**Does a publication express opinions that could influence the outcome?** Columnists and editorial writers often produce colourful, opinionated accounts of trials that examine evidence and the conduct of courtroom players with a critical eye. This is a new trend in Canadian journalism and some judges and lawyers have complained publicly that this "play-by-play" approach may influence jurors. So far, however, courts have tolerated even strongly worded opinions that do not attack or ridicule a defendant, imply guilt, or guide jurors to return a particular verdict.

**Does a published opinion "scandalize the courts?"** This category of contempt is reserved for criticism of the courts so extreme that it threatens to undermine public confidence in the fairness of the justice system. Editorial writers and columnists are free to comment on rulings and judicial conduct, but such criticism should be balanced and based on fact. Personal attacks or imputing improper motives or bias to a judge or jury has led, on rare occasions, to contempt citations. Examples are a city councillor who said a trial "stinks from the word go," a student reporter who dismissed the courts as "instruments of the corporate elite," and a federal cabinet minister who believed no "sane" judge could make a ruling he described as "silly" and "a complete disgrace."

There have been no prosecutions since 1987, when the Ontario Court of Appeal ruled in the case of *R. v. Kopyto* that the offence of scandalizing the courts violates the guarantee of freedom of expression in *The Charter of Rights and Freedoms*. The courts, the judgment noted, "are not fragile flowers that will wither in the hot heat of controversy." As a result most media law texts consider this class of contempt to be obsolete, and a recent example supports this view. A week before a high-profile jury trial began in 1998, a Halifax columnist predicted the proceedings would be a "sick charade" and "Kafkaesque monstrosity" that would dispense "vengeance, not justice." No action for contempt was taken. Note, however, that judges have the same right as other citizens to sue for defamation over published criticisms that are inaccurate or unfair.

## CIVIL CASES

The rules of *sub judice* contempt apply to civil cases and journalists must take particular care when covering the relatively small number of civil actions heard by juries (civil trials with juries are quite rare). The following contempt concerns arise specifically in civil cases:

**Damages:** Statements of claim sometimes put a dollar figure on the damages a plaintiff is seeking. The amount is often inflated and not necessarily known to jurors as they deliberate. The dollar figure sought can be reported when lawsuits are filed, but the risk of influencing jurors increases as the date for trial approaches.

**Allegations in pleadings:** A statement of claim describes the plaintiff's view of the case and contains the allegations a plaintiff hopes to prove in court. The media can cover these allegations early in the court process, since reports based on information in such documents are subject to privilege and shielded from defamation actions. But repeating them shortly before and during a trial may invite a citation for contempt unless the allegations have been presented to the jury – for instance, in the judge's instructions or a lawyer's opening statements.

**Insurance:** References to insurance coverage are off-limits to lawyers and reporters alike unless the existence of an insurance policy is revealed in court. The courts fear that jurors may award higher damages if they know a civil defendant is insured and will not personally bear the burden.

**Criminal records of parties or witnesses:** While such information may be on the public record, it should not be published during a civil trial unless disclosed to the jury.

## DEFAMATION

Before entering into the substance of this section, it should be noted that this document speaks to the law of defamation in Canadian common law jurisdictions. There is a difference in Quebec, such matters are governed by the civil law of defamation, a regime which is significantly different from that which applies in the rest of Canada. In *The Journalist's Legal Guide*, author Michael Crawford provides a concise overview of the differences between the two approaches; these differences will be summarized later in this section. For now, however, it is important to understand that the specifics of defamation and the defences which are set out below speak to the law as it applies in Canada with the exception of Quebec.

At its most basic level, defamation is essentially a law against reporting things you can't substantiate. The law of defamation is not simply about punishing those who ruin the reputations of others. It fosters and protects good journalism – news stories about people and events that are factually correct and fair in their opinions. If reporters, editors, producers, and news organizations conduct themselves professionally and responsibly, the risk of being sued decreases and the chances of facing a defamation action – let alone losing one – become remote.

Consider, for a moment, the impact on journalism if defamation laws were eliminated in the interest of unfettered free speech. The media would be free to report whatever they liked, without fear of legal action.

Rumours, hearsay, the conclusions of a reporter's cursory investigation, the ravings of every conspiracy theorist who walks through the newsroom door – all would be fair game for publication. The consequences for the media's credibility would be devastating. As British journalist Paul Foot noted in *The London Review of Books*, "if no one had any redress for libel, no one would ever believe a word we wrote."

That is the double-edged sword of defamation law: While it imposes limits on free speech to protect the reputations of individuals, it also helps to ensure information reaching the public is reliable, fair, and fact-based. In short, it is a legal framework that defends good journalism and recognizes the media's crucial role in a democratic society.

Michael Crawford cites the classic definition of a libel as any statement which tends to discredit or lower an individual "in the estimation of right-thinking members of society generally." It also applies to statements that may cause others to shun or avoid a person, or tend to expose them to "hatred, ridicule, or contempt."

At first glance, the law of defamation presents a big problem to a reporter covering a trial: based on the definition above, how can a journalist possibly avoid defaming someone if the very basis of their story is, for example, the fact that a criminal accused is alleged to have killed someone, or a civil defendant allegedly breached a contract? Since reporting on just about any allegation that brings a defendant to court is bound to tarnish the person's public image, how do journalists manage to report on courtroom proceedings? The answer is in the materials below on *defences to defamation*; but, before we get to that, here are a few other key aspects of the law of defamation:

- The plaintiff must be alive. The legal right of a person to defend that reputation dies with them. Relatives and descendants cannot pursue a libel action on behalf of an estate.
- Defamation law protects the reputations of individuals in Canada, as well as that of certain identifiable groups, e.g. corporations, labour unions, non-profit organizations.
- When a negative statement is made about a group, it *may* be able to sue, depending on the size of the group – the smaller the group and the more specific the reference, the greater the likelihood that a defamation action will succeed. Thus, a statement that "all politicians are crooks" is likely immune from defamation, while a report that provincial cabinet ministers in a particular jurisdiction are on the take is likely sufficient to launch an action.
- When seeking to determine whether words are in fact defamatory, a court will look to the ordinary meaning of the words – a journalist's assertion that they didn't *intend* the words to be defamatory isn't sufficient.
- Leaving it to the audience to "read between the lines" to infer what you're alleging isn't necessarily sufficient to save you from an action in defamation, since innuendo may also be defamatory. Robert Martin's advice? "Journalists should never waste their time beating around the bush or coyly suggesting conclusions. If a reporter does not have all the details of the story verified, he should not try to make up for the gaps in it by hinting at things."
- Just about any component of media work product can potentially defame – articles, columns, editorials, editorial cartoons, letters to the editor, advertisements – anything that appears in print, broadcast, or posted on the Internet. And, while satire, parodies, and editorial cartoons are generally given more latitude than news reports and opinion pieces, such publications can cross the fine line between humorous criticism and mean-spirited character assassination.
- In a defamation action, the burden of proof rests with the defendant. That means it's not up to the person allegedly defamed to prove that the allegation is false – it's up to the journalist to prove that it's true. That means "knowing" something isn't enough – you're going to have to provide a court with "proof" to back up the alleged statement in question.

## DEFENCES

A defendant can rely on four possible defences.

**1) Truth or justification:** Establishing that a publication is true is not as straightforward as it may appear. As in any civil case, a media defendant must prove disputed statements to be true on a balance of probabilities. Witnesses must be produced to establish the facts to the satisfaction of the judge or jury, so journalists cannot rely on anonymous informants or sources who are unwilling or unlikely to appear in court. These witnesses must be believable; even though persons with shady backgrounds or criminal records may be telling the truth, their evidence alone may not be enough to prove a story to be true. The bottom line is this: it's not sufficient for you to *know* it's true...you have to be able to *prove* it's true.

**2) Consent:** As strange as it sounds, a person may agree to be defamed. If a self-proclaimed pedophile, for example, knowingly agrees to an interview to decry the lack of services and treatment for people like himself, he'll be hard-pressed to succeed in claiming that the news organization should be found liable for defaming him by publishing the very fact that he has sexually abused children.

**3) Fair comment:** While aspects of the law of defamation vary substantially from one province to the next, it is often stated that four elements must be present for a report to be deemed fair comment. First, the comment must be on a matter of public interest. This extends beyond issues to comments on the conduct of public figures who, by virtue of their high profile, invite attention and sometimes criticism. Second, the comment must also be an honest expression of the author's belief. Third, the comment must be based on fact, and those facts must either be public knowledge or be set out in the item as published or broadcast. Reporters and columnists alike must take care to establish the facts upon which opinions are based, and to ensure those facts have not been distorted or taken out of context. Finally, the comment must be made without malice.

**4) Privilege:** This defence is by far the most important one from the perspective of court reporters. In certain forums and on certain occasions, defamatory statements may be made – and duly reported in the media – without fear of attracting an action in defamation.

Privilege may be absolute or qualified – that is, subject to certain conditions being met. In either case it is the occasion or forum where information originates that dictates whether it is privileged, not the nature of the information itself. To foster open and frank debate, the public proceedings of Parliament and provincial legislatures, city and municipal councils, school boards and other official public bodies – as well as their committees and subcommittees – are privileged. The same holds true for most public meetings and **proceedings in open court**, but not for an *in camera* session closed to the media and public.

Under defamation statutes, the media is granted a “qualified” privilege – immunity subject to certain conditions. News reports of what happened in a privileged forum must be a “fair and accurate” representation of what was said. Furthermore, the media must publish or broadcast “a reasonable statement of explanation or contradiction,” if requested by the target of a defamatory comment made in a privileged proceeding.

A 1999 decision of the U.K.'s House of Lords, while not binding on Canadian courts, may provide guidance for journalists. In *Reynolds v. Times Newspapers*, the court considered the circumstances in which journalists may be acting in the public interest, and thus be able to avail themselves of a defence of qualified privilege. The criteria set out by the House of Lords is as follows:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

In a column in *Media* magazine published shortly after the *Reynolds* decision, lawyer David Crerar advised that "journalists would be well advised to use the ten factors in the checklist before publishing or broadcasting a contentious story."

Qualified privilege also applies to news reports based on certain documents. The rulings of courts, tribunals, and official inquiries are covered, as are the contents of documents produced or discussed in open court or before a tribunal or inquiry. The document filed with the courts that sets out details of criminal charges and initiates a prosecution (known as an "information," or in rare cases, a "direct indictment") is privileged. In a 1995 ruling, the Supreme Court of Canada extended qualified privilege to fair and accurate news reports of pleadings filed with the courts in civil actions – the plaintiff's statement of claim and the defendant's written response. Privilege also attaches to information in "public documents," which courts have defined as information on the public record that government agencies, by law, are required to keep.

**Provincial Statutes:** the statutes governing the laws of defamation vary from province to province (but are usually known by the title *Defamation Act* or *Libel and Slander Act*). For more information, you should refer to the relevant provincial statute in your jurisdiction.

**The Province of Quebec:** As previously stated, the specific information provided in the preceding paragraphs regarding the nature of the tort of defamation and the defences a journalist may use in response to an allegation of defamation are a summary of the law as it applies in common law jurisdictions. In *The Journalist's Legal Guide*, Michael Crawford points out the aspects of defamation law in the province of Quebec which distinguish it from the rest of Canada; for our purposes, the most relevant of those are as follows:

- The target of a defamatory statement does not have to be alive; descendants of a defamed individual may sue if they can show that their reputation is damaged as a result of the defamation of an ancestor.
- The notion of “public interest” is pivotal. “The presence of public interest,” notes Crawford, “Can serve as a complete defence...provided there is no proof of malice.”
- Truth is not an absolute defence in Quebec – there is still a “public interest” requirement.
- Neither “absolute privilege” nor “qualified privilege” exist as defences in Quebec.

Internet posting and republication by wire services may result in your work being “published” in Quebec despite the fact that you live and work in a common law province; thus, prudent journalists should always be aware that their work may be assessed according to the laws of Quebec regardless of what province they were in when crafting their work.

## AVOIDING CONTEMPT CITATIONS, DEFAMATION ACTIONS, AND OTHER PITFALLS

The following tips and observations are based on court rulings, established good journalism practice (as described in several leading journalism texts), and common sense:

**Be meticulous:** Ensure accuracy by double-checking facts against credible sources of information, such as previous news stories, official reports, press releases, court file documents, official spokespersons (e.g. a court liaison officer or police media relations officer) or other reliable information source that may back up a statement or assertion.

**Consider the source:** You’ve no doubt encountered sources who share information with you for reasons other than their strong sense of public duty; instead, they have their own agendas to promote or axes to grind. The courtroom is an adversarial place, one in which people do all they can to persuade and convince; likewise, many of the participants have strong vested interests in the outcome of a proceeding. Thus, journalists must be wary of the motivation of sources, vigilant in their efforts to verify the information they provide, and alert to the fact that even factually correct information may have been “spun” to suit the point of view of a source.

**Be fair and balanced:** Strive for a balanced report that portrays both sides of an issue or controversy. Formulaic black-and-white, good-guy/bad-guy stories are easy to produce, but nuance and interest is found in the grey areas between such extremes.

And remember, it’s not just what information you put in your stories – you must also consider the relevance of what you leave out. In analyzing a news report to determine whether it is defamatory, courts don’t just look at what was said – they also consider what information wasn’t conveyed, and what aspects of an interview didn’t appear in the report.



Providing balance in daily coverage of lengthy trials can be especially challenging, since days may go by before the “other side” has a chance to make its case. Good journalism practice demands that you take pains to balance your coverage, ideally by referring to cross-examination evidence or, if that’s not feasible, by repeating what’s previously been said by opposing counsel (e.g. in opening statements, or prior comment to the media). Finally, if that’s not available, make sure to make it clear to your audience that this is just one side’s version of events, and that it’s still up to a judge or jury to determine the truth of the matter.

Bear in mind there are two sides to every story. An accused person’s right to be presumed innocent is meaningless if the media ignores evidence that contradicts the prosecution’s case or raises a reasonable doubt about guilt. The public is poorly served by one-sided media reports that suggest acquittals are unwarranted and justice has not been served.

Strive for reports that strike a balance between Crown and defence, or plaintiff and defendant in civil cases. Be on the lookout for alternative explanations or answers given during cross-examination that will add depth and fairness to stories.

This approach should apply to how stories are presented in a newspaper or newscast. Charges, accusations, and convictions often rate front-page treatment, while acquittals are begrudgingly relegated to an inside page.

An example of the justice system working as intended – freeing persons the Crown cannot prove guilty beyond a reasonable doubt – should be as newsworthy as a conviction. Media organizations should also strive for consistency, reporting only on criminal cases they intend to cover from start to finish. If an arraignment is covered, fairness demands that the outcome of the prosecution be given prominence.

**Exercise restraint:** Avoid sensationalism and using language that is unduly harsh or more judgmental than the facts will bear. Courtrooms are often places of great drama; however, it is your responsibility to convey that drama without imposing your own interpretations and values.

Perception is a personal thing; perhaps that’s why one reporter might characterize an accused’s testimony as “evasive” while another might attribute inconsistencies to the “rapid-fire testimony” of the cross-examining lawyer. There is wisdom in letting the facts speak for themselves, and in allowing viewers and readers to draw their own conclusions. Watching people being cross-examined, particularly about personal or emotional subject matter, can be difficult even for a seasoned reporter – but that doesn’t mean the cross-examining lawyer should be vilified for doing their job. Similarly, while giving testimony may obviously be painful for an alleged victim, describing them as “brave” or “courageous” can be trite, and does little to further your audience’s understanding of the proceeding.

**Limit deadline pressure:** any journalist who’s ever been faced with the onerous task of providing daily coverage of trials will tell you there’s precious little time between the conclusion of the day’s court proceedings and one’s editorial deadline. Thus good journalists use their time wisely throughout the day, using breaks to check facts and copy public documents, rather than waiting until day’s end to fill in the gaps in their knowledge of a story. Better yet, if you have the luxury of knowing in advance that you are going to cover a trial or other court proceeding, do your homework before the trial gets underway, and go to court on day one with a copy of the key documents, and some background information to help you make sense of the issue or dispute.

**Get the paperwork:** Always double-check basic facts such as names, dates, charges, and allegations. Go to the court registry and review court orders, statements of claim, affidavits and any other document in the public file.

Lawyers may agree to provide you with copies of filed documents. During a hearing or trial, ask the court clerk at a break in the proceedings for a chance to peruse documents and exhibits. Don't rely on second-hand information, even from participants, and don't be afraid to ask any of the participants to assist you with obtaining or reviewing documents that are part of the record – it's the single best thing you can do to ensure you get the facts straight.

**Be specific:** When identifying persons accused of crimes, report full names, ages, street addresses, even their occupations, if known. Criminal allegations create a stigma that should not be visited on an innocent person whose only crime is to have a name similar to that of an accused person. The more common the name of the accused, the more effort that should be made to provide identifying details, e.g. reporting that "Forty-seven year-old Mark Smith of Toronto has been charged with aggravated sexual assault" will likely result in more than just the accused person being subject to scrutiny and speculation by people who know a middle-aged Mark Smith.

The same precision applies to charges. Double check the information or indictment to ensure charges are correct. Take care in describing allegations: manslaughter is not murder; possession of stolen goods is not theft; possessing a narcotic is not trafficking in drugs. Look up offences in the *Criminal Code* or the relevant statute to help craft the proper wording, but avoid using arcane legal terminology that means little to members of the public. Anyone who "intentionally or recklessly causes damage by fire or explosion" is guilty of arson, for example, and the offence of taking someone's money or property "by deceit, falsehood or other fraudulent means" is fraud. The headings of each section of the *Criminal Code* offer a useful guide to putting offences into plain language.

**Show up:** Never rely on what counsel, court clerks, litigants, or other journalists say happened. Reporters should be in court, and their editors or producers should realize that attempts to reconstruct what occurred in the courtroom is a major cause of errors. Journalists who miss a court proceeding or are tied up at another hearing should avoid the temptation to quote the judge or counsel based on interviews with participants. Reporters who want to go beyond a "bare-bones" account of a missed proceeding should consult a taped or written transcript.

**Develop sources:** Seek out lawyers and legal experts who understand the law and are willing to explain its intricacies, on and off the record. In the book *Getting Away with Murder*, law professor David Paciocco says the legal profession must shoulder its share of responsibility for Canadians' loss of confidence in the justice system. "We have an obligation to explain in understandable terms why the system is the way it is and why we do what we do," he told his fellow lawyers.

"We would go a long way towards restoring the credibility of the administration of justice if only we would seek to explain the system to the general public."

Provincial bar societies may be of assistance in identifying lawyers who are expert in a given subject area who will agree to assist you in understanding the process. The Nova Scotia Barristers' Society, for example, provides a roster of lawyers who will provide background information to assist a reporter to better understand and interpret a case (see <http://www.nsbns.ca/press/reviewers.htm>); law professors will often agree to help a reporter better understand the process or a particular legal issue.

But, as is the case whenever you're looking for assistance, the more notice, the better; for that reason, enterprising court reporters will often contact their trusted experts in advance of a trial, if only to put them on notice that they may be placing a deadline-driven call in the coming days.

**Accurately portray the workings of the justice system:** The media should take pains to explain how the justice system's underlying principles relate to the case being covered. Never assume all members of the public understand the different standards of proof in criminal and civil cases, an accused person's right to remain silent and other legal fundamentals.

If the family of a crime victim criticizes the sentence handed to an offender, take the time and space to explain the precedents and sentencing options the judge faced. If a court throws out damning evidence, make sure the public understands the *Charter* rights involved, how they were violated, and why they are important. When politicians criticize judges for being "soft" on offenders and call for harsher sentences, confront them with the concept of judicial independence. The media should inform public opinion, not feed misconceptions.

**Avoid snap judgments and the assumption of error:** Journalists and commentators sometimes conclude the justice system has failed when closer examination shows it has not. The media should apply a healthy scepticism to the allegations of lawyers and the complaints of parties who have a vested interest in the outcome of a case. An adversarial system ensures there will be winners and losers and journalists should cast a critical eye on the assertions of those on the losing end. The concerns of crime victims and other critics should not be ignored, but the media should put such assertions into context by presenting contrary opinions and the views of legal experts, and explaining the law and precedents that apply. Balance and objectivity, not fear-mongering, are particularly important when reporting on bail hearings and sentencing.

Bear in mind, as well, that the media is not a monolith and neither is the justice system.

If the police or a Crown attorney make a mistake that causes a prosecution to go off the rails, responsibility rests with the individuals and the agency involved, not the system as a whole. Too often, the media creates an impression the justice system failed when it is clear other components of the system performed their roles as intended.

**Press for access:** To be an effective window on the justice system, the media have a duty to insist on access to all proceedings and court records that are required, by law, to be public. The courts, in turn, should ensure reporters obtain prompt access to the information they need to ensure accuracy and inform the public. Too often, a lack of understanding of access rights creates unnecessary friction between journalists and court officials.



# PUBLICATION BANS AND OTHER RESTRICTIONS ON MEDIA COVERAGE

Judges have long acknowledged the media’s crucial role as a public watchdog. Calling openness of the courts “one of the hallmarks of a democratic society,” the Ontario Court of Appeal declared in 1983 that “public accessibility to the courts ... is a restraint on arbitrary action by those who govern and by the powerful.”

That is not to say, however, that the media enjoy an unlimited right to broadcast all information related to a judicial proceeding in all cases. There are two key competing objectives – the protection of privacy and the constitutional right of all criminal defendants to undergo a fair trial, free of media reports revealing criminal record, inadmissible evidence, or other information that could influence a jury and prejudice a case.

In the following pages, we’ll review the most common bans, the reasons behind them, and what you have to be aware of in order to avoid offending these bans. But first, we’ll review the two most significant modern-day developments in terms of the media’s right to information: the 1982 introduction of *The Charter of Rights and Freedoms*, and the Supreme Court of Canada’s landmark 1994 ruling in *Dagenais v. Canadian Broadcasting Corp.*

***Dagenais and The Charter of Rights and Freedoms:*** The *Charter* guarantees the right of persons accused of crimes to be presumed innocent until proven guilty while simultaneously declaring in section 2(b) that “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” are fundamental to Canadian society.

In this regard *The Charter*, has had a profound impact on how judges exercise their inherent powers to restrict media coverage. In *Dagenais v. Canadian Broadcasting Corp.*, the Supreme Court of Canada decreed that the fair trial rights of an accused no longer trump the right to freedom of expression, and these competing rights must be balanced when devising bans. The media may sometimes seek standing to mount a legal challenge to a ban.

Under *Dagenais*, in situations where a judge has discretion to tailor a ban to the specific circumstances (a so-called “discretionary ban”), that judge must ensure the ban covers no more information than is necessary. There must be a “real and substantial risk” to the fairness of the trial and the judge must be satisfied that alternative measures, such as screening jurors and moving the trial to another location, will not alleviate the risk. The benefits of imposing the ban must outweigh the harm caused by limiting freedom of expression. Finally, the onus for showing the ban is justified rests on the prosecutor or defence lawyer seeking it.

In late 2001 the Supreme Court of Canada revisited the publication ban issue in a pair of rulings that rejected a Crown request for a sweeping ban on police undercover operations. Canada “is not a police state,” the court said, and the public must be free to scrutinize and debate the tactics used in apprehending suspected criminals. As well, the court found that openness benefits an accused person in two ways. First, it ensures the trial is conducted fairly. Secondly, media scrutiny enables the public to understand the basis for an acquittal, vindicating the accused while ensuring citizens are not left with the impression a suspect was freed on a technicality or without valid legal reasons.



Bans stem from one of two sources: they may be a creation of a judge, by virtue of their inherent jurisdiction (more on this below), or they may be set out in statute. Of the statutory bans, some are at the discretion of a judge, while others leave a judge no leeway – they *must* impose the ban as set out in the *Criminal Code* or other statute.

The media’s right to intervene under *Dagenais* does not apply to mandatory bans set out in the *Criminal Code* and other statutes. It does, however, apply to a statutory ban if the judge has a discretion not to impose it.

**Publication bans based on inherent jurisdiction:** Judges have the power to create and impose bans other than those provided by statute to deal with situations in which publication of evidence could prejudice the right to a fair trial or unduly invade privacy. One common example of this power in action is when persons accused of the same crime stand trial separately – a judge will often ban publication of information during the first trial that would tend to incriminate co-accused still awaiting trial. A similar approach may be taken when a person pleads guilty and is sentenced while one or more co-accused await trial. A well known and controversial example is an Ontario court’s 1993 decision to ban publication of Karla Homolka’s sentencing for manslaughter while her estranged husband, Paul Bernardo, awaited trial for the murder of two teenaged girls.

**Statutory publication bans:** Some general observations can be made about statutory bans. Openness demands that each one is specific and limited in scope. Few bans apply automatically, so reporters are usually told when one is being imposed.

In criminal trials, judges have the discretion not to impose certain bans if they are sought by the Crown, but have no choice if the defendant makes the request. Reporters are entitled to remain in the courtroom and can take notes for future use.

This is an important right, since most (but not all) bans expire once charges are dismissed, a defendant pleads guilty, or a verdict is reached – once there is no longer a need to protect the defendant’s right to a fair trial. This frees the media to report evidence, legal arguments and other banned information vital to understanding how a case unfolded.

The following is an overview of *Criminal Code* bans, in the order a journalist is likely to encounter them once an accused person is arraigned in court. While we hope you find this summary useful, we suggest that you will be better served by resorting to an annotated version of the criminal code, which will give you a better sense of how these *Criminal Code* provisions are applied:

## IDENTITY OF CRIME VICTIMS, SEXUAL ASSAULT COMPLAINANTS AND WITNESSES

### Section 486.4

**Rationale and Scope:** Section 486.4 provides authority for a judge to ban publication of the name and “any information that could disclose the identity” of the alleged victim of sex-related crimes and witnesses to such offences. The provision is designed to encourage victims of sexual assault and witnesses to come forward without fear of embarrassment.

**When imposed:** Prosecutors usually seek this ban as soon as a defendant is arraigned in court. Judges must impose the ban when it is requested, and have a duty to inform complainants and witnesses under the age of 18, “at the first reasonable opportunity,” of their right to seek a ban. Given the ban’s laudable purpose of encouraging the reporting of crime, some news organizations have a policy of not naming sexual assault victims if no ban is sought – usually due to an oversight – or if the name is found in court documents before a ban is requested.

**Duration:** This ban never expires – a victim or witness can never be named, even if the accused is acquitted.

**Commentary:** Some victims and witnesses, after being afforded the protection of this ban, opt to “go public” and agree to be identified in the media. If a ban has been imposed, however, it remains in force despite the wishes of the person involved. In such cases victims and witnesses must ask a judge (usually through a Crown attorney) to rescind the order before the media can reveal their identity.

While the ban on names is straightforward, the prohibition against publishing or broadcasting any information that “could disclose the identity” is not. One judge has said the word “could,” when used in this context, means there must be “more than a slight degree of possibility” a given media report will make the person’s identity known. Describing a victim as “a 32-year-old Winnipeg man,” for instance, does nothing to reveal identity, while “the 13-year-old daughter of the mayor” obviously gives away the person’s identity. Between these two extremes lies a grey area – there have been few prosecutions and court rulings to clarify how much detail can be provided. Specific references to where a victim lives, works, or goes to school, coupled with age and gender, could help others deduce who the person is. The more detailed the description of the person and the smaller the community, the greater the chance of running afoul of the ban.

Of greater concern are cases where reporting the identity of the accused person could identify a victim or witness. Obviously, this arises whenever assailants and victims or witnesses share the same surname, or when a stepparent faces charges. To sidestep this problem, journalists often name the accused person without revealing the relationship to the unnamed victim. Where there is a professional relationship between defendant and victim – when the accused is a clergyman, teacher, or doctor, or the victim is a babysitter or other employee – journalists must assess whether such information, coupled with other details, could identify the victim. Again, the deciding factor may be whether the case occurred in a rural hamlet, where the process of elimination works quickly, or

amidst the anonymity of a large city. Journalists may contend that reporting such details will identify victims only to persons who already know or suspect who is involved; there are no known cases in which a court has accepted this argument.

### Section 486.5

**Rationale and Scope:** Under Bill C-24, the organized crime legislation before Parliament in late 2001, this section was created to afford a “justice system participant” the right to seek a ban on his identity. Among those categorized as participants are politicians, judges, lawyers, jurors, court administrators, police officers and prison guards, parole officials, informants, and customs officers.

**How Imposed:** The procedure for considering this ban includes consideration of *The Charter* right to freedom of the press, to conform with the *Dagenais* ruling. It is not mandatory for judges to impose the ban, the application must be in writing, and the applicant must notify “any other person affected by the order” (usually the media) that a ban is being sought.

A judge may hold a hearing and must weigh a range of factors – including the impact on the right of free expression, security concerns, and alternatives to restricting publication – before agreeing to impose a ban. The judge may hold the hearing in private and the media can only report what happened if the ban is denied. If one is imposed, “the contents of the application” are banned from publication – essentially imposing a blackout on the procedure.

**Duration:** Permanent.

**Commentary:** Media outlets have successfully opposed bans under this section. A Nova Scotia judge refused to ban publication of the identities of two young assault victims and the accused, their mother’s boyfriend, noting that persons who report crimes must expect public scrutiny and “simple embarrassment” is not sufficient grounds for a ban. An Ontario judge allowed the media to identify the owner of a building where a murder occurred, ruling the landlord’s fear of financial loss did not justify a ban.

## BAIL (SHOW CAUSE) HEARINGS

### Section 517 (1)

**Rationale and Scope:** Section 517(1) authorizes a sweeping ban on the contents of a hearing to determine whether an accused person should be free from custody while awaiting trial. While a judge can turn down a prosecutor’s request for a ban in these situations, she must impose one if the accused requests it.

If granted, the ban covers the evidence and information presented and the arguments of the prosecutor and defence lawyer. It even extends to the judge’s reasons for or against granting bail, since these revolve around whether the accused will flee if released or must be kept in jail to protect witnesses and other members of the public. Courts have ruled that the fact a hearing is held, whether bail is granted or denied, and the amount of money posted or other conditions of the defendant’s release can be published, without violating the ban.

**When imposed:** The ban can be imposed “before or at any time during” the hearing – a unique provision, since other bans must be sought before proceedings begin. The ban can also be imposed on hearings to review a judge’s order to grant or deny bail; applications to vary the terms of bail; hearings into violations of bail conditions; and reviews of detention orders.

**Duration:** Such a ban is temporary, remaining in force only until the accused is discharged (has all charges dismissed after a preliminary hearing) or the trial has ended (with a guilty plea or a verdict at trial). Once the need to protect the right to a fair trial evaporates, the media can report everything said at the hearing.

## PRELIMINARY HEARINGS / INQUIRIES

### Section 539 (1)

**Rationale and Scope:** Where serious criminal charges have been filed, a preliminary hearing (also known as a preliminary inquiry) is held in provincial court to determine whether there is enough evidence to justify sending the accused for trial. Since the purpose of a preliminary inquiry is to determine whether the Crown has a *prima facie* case (rather than to also hear evidence the defence may present to rebut the Crown's case), the hearing often doesn't provide a balanced picture of the evidence. To prevent the airing of potentially distorted and prejudicial information, the judge presiding at a preliminary hearing has the power to ban publication of "the evidence taken" at the proceeding. Again, the order is mandatory if sought by the defendant but the judge can refuse a prosecution request.

The ban specifies "evidence" – that is, the testimony of witnesses and any information contained in documents tendered as exhibits. But it isn't as sweeping as the restriction on reporting on bail hearings, so the media can report procedural matters, legal arguments and other courtroom statements that do not disclose evidence.

**When sought:** The order must be sought "prior to the commencement of the taking of evidence."

**Duration:** The ban expires once an accused is discharged or the trial is ended. Media outlets sometimes staff preliminary hearings in high-profile cases in the event the accused is discharged or later pleads guilty. If the case proceeds to trial, much of the evidence heard at the preliminary hearing will be repeated at trial, when it becomes publishable. A written transcript of the evidence, obtained from the court file or from counsel, may contain newsworthy evidence that is publishable once the ban expires at the end of the trial.

## ADMISSIONS AND CONFESSIONS PRESENTED AT PRELIMINARY HEARINGS

### Section 542 (2)

**Rationale and Scope:** On the rare occasions no "blanket" ban is imposed under 539(1) (above) at a preliminary inquiry, the media is free to report on evidence **with one key exception:** you must still heed Section 542(2), which applies automatically (no one has to request this ban) and makes it an offence to reveal any "admission or confession" the prosecution presents at a preliminary hearing.

In this specific regard, the ban is all-encompassing – even a reference to the fact a confession or statement to police exists (which would be sufficient to suggest to most people there has been an admission of guilt) is sufficient to violate the ban. Since a statement to police must meet stringent legal tests of its reliability before being accepted as evidence, so there is a possibility it will never be presented to a jury.



**When Imposed:** This ban is automatic – it is always in place and might never even be mentioned in the courtroom.

**Duration:** It's temporary. Like the ban on evidence at the preliminary hearing stage, the ban expires once one of the following events occurs: (1) the accused is discharged; or, if the matter has proceeded to trial, (2) the trial ends, or (3) details of the confession are presented at the actual criminal trial.

## TRIAL STAGE: THE *VOIR DIRE* RULE

### Section 648 (1)

**Scope and Rationale:** Many journalists operate under the misapprehension that the *voir dire* rule means what is said in the absence of the jury can never be used. But Section 648 (1), which incorporates the rule into the *Code*, decrees that “no information regarding any portion of the trial at which the jury is not present” shall be published “before the jury retires to consider its verdict.”

The section comes into play because jurors are usually allowed to return to their homes at night during a trial; unlike the American practice, it is rare for a jury in this country to be sequestered until deliberations begin. *Voir dire* hearings are primarily held to consider the admissibility of evidence – such as a weapon seized using a search warrant or incriminating statements to police – that may never go to the jury.

Even though jurors are warned during trials to ignore media coverage, the publication ban is imposed to ensure that jurors are not influenced by information the trial judge has excluded as irrelevant or improperly obtained.

The ban is far-reaching – note the use of the word “information,” a term that encompasses all court business transacted in the jury's absence, evidence and legal argument alike.

In some jurisdictions, this ban also applies to pre-trial hearings held under Section 645 (5), which permits *Charter* arguments and other complex issues that would otherwise be heard in the absence of a jury, to be argued before a jury is even chosen. The rationale is that there *will* be a jury, and that jury should not be prejudiced by hearing information they wouldn't otherwise have access to.

In some trials heard by judge alone, the term “*voir dire*” is still used to describe legal arguments, often about the admissibility of evidence. But, since there is no jury, the ban does **not** apply and *voir dire* evidence can be published when presented in court.

**When imposed:** This ban is automatically in place until the jury is sequestered.

**Duration:** Once deliberations begin, jurors are kept together and denied access to news coverage until a verdict is reached. Thus, the moment jurors are sequestered, the ban expires and legal rulings or testimony heard in their absence can be reported. Even evidence ruled inadmissible can be used, unless it is subject to another publication ban.

## SEXUAL HISTORY

### Section 276.3 (1)

**Rationale and Scope:** Where a person on trial for sexual assault seeks to introduce evidence of the complainant's sexual history, the accused must make an application to the judge, who will determine whether such evidence is admissible. This section creates a ban on such an application.

The media can report that an application has been made to present such evidence, but there is a ban on publishing any other information about the motion. The ban covers the "contents of an application," plus all evidence, information, and legal arguments presented on the application for a hearing to review the evidence and at the hearing itself. In any event, the hearing, if one is held, will be *in camera*.

A decision to reject the application is banned from publication unless the judge orders it revealed "after taking into account the complainant's right of privacy and the interests of justice." A judge's ruling to admit the evidence and the reasons for doing so can be reported, as can the evidence itself once it is presented at trial.

**When imposed:** Automatic.

**Duration:** Permanent.

## CONFIDENTIAL RECORDS

### Section 278.9 (1)

**Rationale and Scope:** This ban is similar to that described above in relation to sexual history. Section 278.9 (1) deals with hearings in sexual assault cases that determine the admissibility of the private records of a complainant or witness. These include medical, psychiatric, therapeutic, counseling, education, and employment records; adoption and social services records; and personal journals and diaries. This is known as an *O'Connor* application, after the leading Supreme Court of Canada ruling on the issue.

The plain fact an application has been made for access to records can be reported, but the "contents of an application" are banned. The application involves a two-stage process: a hearing must be held to determine whether records should even be reviewed by the judge; if they are, the judge may hold a second hearing to determine whether the records should be turned over to the defendant. The media is prohibited from publishing "any evidence taken, information given or submissions made" at either hearing, which must be held *in camera*.

A judge's decision whether to produce the records or to provide them to the accused, and the reasons for those rulings, are also banned from publication "unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published."

**When imposed:** Automatic.

**Duration:** Permanent.

## OTHER *CRIMINAL CODE* RESTRICTIONS

### RESTRICTION ON INTERVIEWING JURORS

#### Section 649

**Rationale and Scope:** Contrary to popular belief, Canadian journalists are not forbidden from interviewing persons who have served on a jury. There are, however, significant limits on what jurors can say; as a result, this is a potential minefield, one which should be entered cautiously (particularly if a broadcast journalist is conducting a “live” interview).

Section 649 makes it an offence for jurors to reveal “any information relating to the proceedings of the jury when it was absent from the courtroom.” The only exception is the disclosure of such information to police during an investigation of possible obstruction of justice and testimony in court if such charges are laid.

The section covers everything said in the jury room during deliberations – comments, opinions, arguments, and votes cast in the process of reaching a verdict. This means the media can interview jurors about their personal experiences, their impressions of the process, even their impressions of the evidence and the defendant – anything that does not disclose information about deliberations or what fellow jurors said or did. Such interviews have been conducted in many high-profile cases and journalists who have served on juries have written about the experience, without breaking the law.

Contacting and interviewing jurors must be done only after a verdict has been announced and the jury has been discharged, to avoid the prospect of causing a mistrial or being accused of jury tampering. While the section only applies to jurors, a journalist who induced a jury member to disclose details of deliberations could risk being charged as a party to the offence.

**When imposed:** Automatic.

**Duration:** Permanent.

### IDENTIFYING JURORS

#### Section 631 (3.1) and 631 (6)

**Rationale and Scope:** Under section 631 (3.1), a judge may order that jurors be referred to in the courtroom only by an identifying number, rather than by name.

In order to do so, the judge must be satisfied it is “in the best interest of the administration of justice” and necessary “to protect the privacy or safety of the members of the jury.” If such an order is made, the judge may rely on section 631 (6) to further impose a ban on publication of any information that could disclose a juror’s identity if satisfied the ban “is necessary for the proper administration of justice.”

**When Imposed:** A prosecutor may apply for this ban; in addition, a judge has the right to make this motion without being asked.

**Duration:** Permanent.

## EXCLUSION ORDERS

### Sections 486 (1), 486 (2) and 537 (1)(h)

**Rationale and Scope:** Two *Code* provisions, while not bans, restrict coverage by giving judges the power to order members of the public to leave the courtroom in certain circumstances. While Section 486 (1) mandates that, as a general rule, criminal proceedings be held in open court, it also states that a judge can exclude “all or any members of the public” for “all or part” of a hearing. Such action can be taken “in the interest of public morals, the maintenance of order or the proper administration of justice.”

A similar provision, Section 537 (1)(h), enables a judge at a preliminary hearing to order everyone except the prosecutor, the accused, and the defence lawyer to leave the courtroom where “the ends of justice will be best served by so doing.”

**When imposed:** This power to clear the courtroom is usually reserved for sexual assault cases, when the victim or witness is a child likely to be intimidated by the presence of spectators. Section 486 (1.1) specifies that the “proper administration of justice” includes protecting witnesses under age 18 in cases of sexual or violent offences. Use of exclusion orders has declined in recent years because provision has been made for young witnesses to testify via videotape or shielded by screens.

Courts have ruled that Section 486 (1) must be invoked with caution and only after considering other options and the media’s right to free expression, in keeping with the principles set out in *Dagenais*. The presence of spectators must be so stressful that witnesses will not testify or the quality of their evidence will suffer. Potential embarrassment or financial loss to a witness is not sufficient reason to bar the public. A judge’s use of this section to weed out reporters from the public gallery to prevent publication of the names of witnesses was overturned on appeal.

**Publication not banned:** Note that these sections do not ban publication, but simply prevent journalists from being present to report on the proceedings. Journalists can base reports on taped or written transcripts once they become available unless another court order, such as the ban on preliminary hearing evidence, applies.

## DISPOSITION HEARINGS FOR THOSE DECLARED NOT CRIMINALLY RESPONSIBLE

### Sections 672.5 (6) and 672.51 (11)

**Rationale and Scope:** A court or review board hearing to decide the fate of a person found unfit to stand trial, or not criminally responsible for an offence due to a mental disorder, can hold a hearing in camera if doing so is “in the best interests of the accused and not contrary to the public interest.” In addition, the court or review board has the authority to ban publication of information disclosed at a hearing when the person who is the subject of the hearing is absent, or if a court or review board believes release of the information would be “seriously prejudicial” to the individual and “protection of the accused takes precedence over the public interest in disclosure.”

**Duration:** Permanent.

## SEARCH WARRANTS

There are several applicable sections in the *Criminal Code*; the following provides an overview:

Search warrants and their supporting documentation are public documents **once they have been executed** (that is, the search has been conducted) and **only if evidence has been seized** as a result. Section 487.2 (1) of the *Criminal Code* states that the media cannot report on search warrants without the permission of those searched, unless charges were laid; however, several courts have determined this provision to be a violation of freedom of expression rights; as a result, many commentators suggest the section is not likely to be enforced in any jurisdiction.

Judges have the discretion to seal warrants and related documents under Section 487.3 (1) if “the ends of justice would be subverted” or the information would be used for an improper purpose if released. These concerns must outweigh the public’s interest in accessing the information. Justice could be subverted, the section says, by information that could reveal the identity of a confidential informant, compromise an ongoing investigation, endanger an undercover officer and prejudice such operations in future, or taint an innocent person.

Media outlets can make an application at any time under Section 487.3 (4) to the judge who sealed the warrant, asking that all or part of it be made public.

## YOUTH CRIMINAL JUSTICE ACT

The *Youth Criminal Justice Act* sets out how the Canadian justice system deals with young people who are accused of crimes, from the time they are 12 years old until their 18<sup>th</sup> birthday. For an overview of the Act and its objectives, the ways in which it differs from the *Young Offenders Act* (which it replaced in 2003), the federal Department of Justice offers a valuable primer, entitled “YCJA Explained” (<http://www.justice.gc.ca/en/ps/yj/repository/index.html>). This online document, which contains a wealth of information about the Act, can be reviewed online, or printed as a pdf document.

Youth courts are open to the media and other members of the public; however, as noted in Dean Jobb’s text, *Media Law for Canadian Journalists*, “the Act shields the identities of most of the persons involved – children and young persons who are victims of crime or witnesses, as well as the young defendants themselves.”

Section 110 (1) is the starting point for the media; that’s where it is stated that neither the name nor “any other information” that could identify a youth charged under the Act.

Section 111 (1) shields from broadcast the identities of young people who are witnesses to or victims of crimes allegedly committed by another young person.

Admittedly, this sets up an illogical inconsistency in our criminal law: if a young person is harmed by another young person, the victim’s identity is protected; however, if that same victim were harmed in the same manner by an adult offender, the media would be free to report the young victim’s name. It is to be noted that an Alberta court has declared invalid that section of the YCJA.

There are exceptions to that general rule that a young accused’s identity is protected; those exceptions are set out in section 110 (2), and will be highlighted in the following paragraphs.

### **Adult Sentences**

In cases in which a court has determined that a young person should be sentenced as an adult, the media have the right to identify the youth accused.

### **Presumptive Offences**

Of note from the media's perspective is the category "presumptive offences" – murder, attempted murder, manslaughter or sexual assault, or any cases in which the youth accused has been charged with a crime of violence after having previously been found guilty of violent crimes at least twice prior. In such situations, the Crown must make an application if he wishes the court to consider imposing an adult sentence.

If the Crown succeeds, the youth is sentenced as an adult and journalists are able to identify the young person.

However, even if the Crown's application is denied, the ban does **not** automatically continue: the judge must ask Crown and defence counsel if either wants the ban to continue to apply; if either one seeks a continuation of the ban the judge must, as per s. 75 (3) of the Act, consider whether it is "...appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest." Finally, if neither Crown nor defence counsel seeks a continuation of the ban, the ban is lifted, even though the young person will not receive an adult sentence.

From the media's perspective, there is one more wrinkle of note in relation to the presumptive sentencing regime, which is set out in section 65 of the Act: if the Crown gives notice "at any stage of the proceeding" that it does not intend to seek an adult sentence for a presumptive offence, the judge shall order a ban on the identity of the youth.

So, for all practical purposes, a young person found guilty of a presumptive offence, even if still sentenced as a youth (rather than as an adult), may or may not have the continued protection of a ban on his identity.

### **Young Person May Lift the Ban**

An individual whose privacy interests were protected by section 110 (1) of the Act may, upon reaching the age of 18, give the media permission to reveal their identity; this is provided for under section 110 (3) of the Act. If a young person who has been the subject of proceedings under the Act wishes to have their identity known through the media prior to reaching age 18, they can make an application to the court to have the ban lifted; see section 110 (6).

It's worth noting that, in either of the circumstances described above, the person who was prosecuted under the YCJA cannot reveal their identity to one media outlet, while expecting other journalists to abide by the ban: once the ban is lifted for one, it's lifted for all.

Section 111 similarly allows for young people who have been witnesses or victims (or the victim's parents, in circumstances in which a victim is under the age of 18 or is deceased) to lift the ban that protects their identities.

### Temporary Suspension of Ban When Young Person at Large

Section 110 (4) of the YCJA provides for a young person's identity to be revealed temporarily in very specific circumstances: when the individual is believed to have committed a crime and "there is reason to believe the young person is a danger to others." This provision allows authorities to enlist the public's assistance in apprehending the young person; since the provision has a specific, limited-time purpose, the ban is lifted for a period of five days only.

This puts an added onus on media outlets, since they have to stop identifying the young person once the five days has elapsed. There is also an interesting area of disagreement over whether news organizations are obliged to "cleanse" their website of such identifying information – some commentators suggest that the media must do so in order to avoid breaking the law, while others contend that online news archives are no different than libraries, which do not destroy old copies of newspapers that contain such information.

## BANS ON CIVIL PROCEEDINGS

Under the common law, the *voir dire* restriction on news coverage applies to civil jury trials until deliberations begin. In addition, judges presiding over civil actions have the power to issue publication bans to protect the administration of justice. Generally speaking, however, the threshold for a party to a civil action seeking a ban is high.

Still, parties in civil actions have obtained orders to seal certain evidence or ban its publication. Judges may restrict coverage to protect the safety of a witness or child, when patents or trade secrets are in dispute, or in situations where – to use the B.C. court's wording – "the administration of justice would be rendered impracticable by the presence of the public."

Provincial statutes ban publication of the identities of young persons involved in child-protection applications. As well, federal and provincial tribunals may have the authority to ban publication of evidence or restrict public access in certain situations.



## WHO, WHAT, WHERE AND WHY: A JUSTICE SYSTEM PRIMER

There are two separate bodies of law in Canada, each distinguishable from the other on the basis of the parties involved, the issues in dispute, and the remedies a court can impose. **Civil law** encompasses lawsuits involving individuals or corporations – legal disputes between private parties resolved in the public courts. If an action succeeds, the outcome is often an award of money from the unsuccessful party to the successful one. The civil courts also hear challenges to laws and government actions or policies.

**Criminal law** is concerned with the prosecution of parties charged with crimes. While many people hold the mistaken belief that the Crown is the victim's lawyer, the Crown actually acts on behalf of the state. That rationale behind this structure is that a crime is a violation against society as a whole. The stakes for those convicted are high; courts can mete out fines and jail terms as punishment, with the severity of the crime dictating the severity of the sentence.

Canadian law is derived from three sources:

**The constitution:** *The Constitution Act, 1982*, is the basis for the Canadian state. It incorporates the *British North America Act*, and *The Charter of Rights and Freedoms*. The *Charter* protects basic rights such as freedom of religion and assembly, safeguards citizens from discrimination and arbitrary police actions, enshrines the legal rights of accused persons, and promotes minority language rights. Included is section 2 (b), which protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

The *British North America Act* sets out the legislative responsibilities of each level of government. The federal government, for example, regulates matters of national scope and importance, like defence, foreign affairs, transportation, and banking. The list includes criminal law and divorce law, which are uniform across the country. Provinces control matters of more local or regional nature – education, land ownership, use of natural resources, the civil law and the administration of the court system.

**Legislation:** The federal and provincial governments have the power to enact laws to govern matters under their jurisdiction. **Statutes** are proposed in the form of **bills** introduced in Parliament or a provincial legislature; they become law (and are transformed into **acts**) once passed by the majority vote of elected representatives and given royal assent.



**Regulations**, which are created under the authority of statutes, are detailed rules that outline how an act's provisions are to be carried out and enforced. The provinces have delegated powers to municipal councils to pass bylaws and ordinances, forms of legislation that deal with local matters ranging from land use to dog control.

**The common law:** Also referred to as "case law" or "judge-made law", this is the vast body of judicial decisions that have shaped Canadian law. As judges interpret statutes and apply common law principles to disputes that wind up before the courts, our laws are better articulated and refined. Judges draw on the lessons of the past in the pursuit of a just ruling on the questions before them. In the words of a British jurist, Lord Reid, the common law "has been built by the rational expansion of what already exists in order to do justice to particular cases."

Resolving a legal dispute is an exercise in finding the law, as judges and lawyers comb through precedents (previously decided cases) and legal textbooks for guidance; the search begins with Canadian materials, but can expand to rulings of courts in Britain, the United States and other common-law countries if there are few home-grown decisions on a particular legal point. The common law is also the source of many of the rules that govern court procedure and the admissibility of evidence.

The common law is followed in nine provinces and the territories. Quebec courts adhere to a European-style *Civil Code*, which establishes the principles to be applied, on a case-by-case basis, to resolving civil disputes. Judges in Quebec often follow precedents, but are not bound to do so. The criminal law, however, applies across the country and Quebec judges follow common law principles when hearing criminal cases.

**The courts and the *Charter of Rights and Freedoms*:** Until 1982 the courts could strike down only those statutes that exceeded the jurisdiction of the federal government or a province, but the *Constitution Act* has radically changed this legal landscape. It declares the constitution to be the supreme law of Canada, and "any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force and effect." The courts – not Parliament – have become the final arbiter of whether a given law is consistent with the freedoms all Canadians enjoy.

The wider power of the courts to strike down and rework legislation has generated controversy but when politicians complain about "judicial activism," journalists should bear in mind that it was elected politicians, not unelected judges, who thrust this responsibility upon the courts.

Since the *Charter* is intended to protect individuals and minorities from government actions that violate their constitutional rights, it generally does not apply in civil cases involving disputes between private litigants.

**Structure and hierarchy of the courts:** Under the constitution, Ottawa and the provinces have the power to create courts with certain powers and jurisdiction over specific types of cases. The federal government is responsible for **courts of superior jurisdiction** – trial and appeal courts in each province and the Supreme Court of Canada. The federal government appoints and pays the judges who serve on these benches. In general, superior courts hear civil cases involving larger sums of money and serious criminal offences, including most crimes of violence.

The name given the superior jurisdiction (or trial) court varies across the country – it is known as the Supreme Court in Nova Scotia, Prince Edward Island, Newfoundland, British Columbia, the Northwest Territories and The Yukon; the Court of Queen’s Bench in New Brunswick, Manitoba, Alberta, and Saskatchewan; in Quebec as the Superior Court; in Ontario as the Superior Court of Justice; and as the Court of Justice in Nunavut.

The provinces establish **inferior courts** and, as the name suggests, their powers and jurisdiction are more limited in scope. These courts tend to deal with less serious crimes and lawsuits and the enforcement of provincial statutes. Examples are small claims courts; youth courts that deal with minors charged under the *Young Offenders Act*; traffic, and probate. The inferior court most journalists encounter is also the busiest: the provincial court, where all criminal cases originate and all but the most serious offences can be heard. Inferior court judges are appointed and paid by the provincial government. Superior and inferior courts may share courthouses and even courtrooms. Under the constitution, the provinces are responsible for operating the justice system and provide court facilities, support staff, and maintain court registries and files.

When it comes to precedent, not all courts are created equally. All judges must follow rulings of the country’s highest court, the Supreme Court of Canada. Its nine judges hear cases that raise significant points of law or issues of national importance, and most appellants must seek **leave**, or permission, to have their cases heard. For most Canadians the quest for justice ends at the level of court immediately below the Supreme Court of Canada – the provincial courts of appeal.

Within each province, notes Michael Crawford, the rule of thumb is that “a lower court must follow the precedents set by higher courts in that province.”

Judges take their cue from their court of appeal, and precedents set in another province – even by a higher court – are not binding on them. While judges may give consideration to rulings from other provinces, they are free to reach a different conclusion. As well, their rulings may be at odds with those of other judges on their court.

One level below the court of appeal is the superior court, which hears trials as well as appeals from some inferior court decisions. Most rulings of superior court judges may be appealed to the court of appeal. Judges of the inferior courts are obliged to follow the precedents of all higher courts within the province. Journalists sometimes fail to grasp these distinctions and report that a provincial court judge made a “precedent-setting” decision, even though such rulings are binding on no one, not even on other judges of the same court.

A brief note about how trials differ from appeals. Trial courts weigh evidence gleaned from witnesses and documents, make findings of fact, and apply the law to reach a verdict. The Supreme Court of Canada and provincial courts of appeal review rulings and the written record from the court below to determine if the judge has made an error in interpreting the law or the facts that justifies overturning a verdict or award of damages, or ordering a new trial. Appeal courts do not retry a case and rarely hear additional evidence.

**Other courts and administrative tribunals:** Canadian federal courts consist of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada, and the Tax Court of Canada. The Federal Court hears claims against the federal government and challenges to federal statutes. It also shares jurisdiction with the superior courts over maritime law matters such as orders seizing a ship and salvage claims.

Ottawa and the provinces have created a labyrinth of administrative tribunals to complement the work of the courts. Tribunals are quasi-judicial bodies that operate like courts, holding hearings and canvassing evidence to resolve disputes over workplace standards, settle claims for compensation, set power rates, and review police actions or human rights violations, to name just a few of their roles. The decisions of federally appointed tribunals, such as the Canadian Human Rights Commission and the National Parole Board, can be appealed to the Federal Court. Most provincial tribunal decisions can be appealed to the superior court.

## ROLES OF THE MAIN PLAYERS IN A COURTROOM

**The judge:** The **independence of the judiciary** is a hallmark of the Canadian justice system. While paid and appointed by government, judges are not government employees.

The distinction, while not easy to appreciate at first glance, is crucial, because the state often appears as a litigant in civil cases and, in the form of the Crown, prosecutes criminal offences. If judges were beholden to government for their pay cheques and jobs, any appearance of impartiality would disappear. Judges' salaries and benefits are recommended by independent commissions and they have security of tenure until mandatory retirement age. A judge may face disciplinary action from a judicial council for misconduct, but only Parliament has the power to remove a federally appointed judge from office. In most provinces, the cabinet has the power to remove an inferior court judge from office, on the recommendation of the provincial judicial council. Judicial independence ensures no judge will hesitate to make a just ruling that might offend government. It also offers the security judges need to make rulings that are sound in law but unpopular with the public.

Ultimately, the judge has a duty to ensure justice is done. In a ruling in 2001, the Supreme Court of Canada called the judge "the pillar of our entire justice system" and said the public has a right to demand "virtually irreproachable conduct from anyone performing a judicial function."

**Jurors:** Trial by jury is a right for anyone charged with a serious crime. Juries also hear a limited number of civil actions, notably defamation suits. Jurors assume the role of trier of fact, but the presiding judge instructs them on the appropriate law to be applied in assessing those facts to reach a verdict. Juries provide an important check on the power of judges and the state, and may acquit defendants in situations where the strict letter of the law justifies a conviction but the facts do not.

Criminal cases are heard by juries of 12, selected by Crown and defence counsel from a pool of citizens summoned for jury duty from names drawn at random from voters' lists. Their verdict must be unanimous, and failure to agree will result in what's known as a "hung jury" and a new trial for the accused. Juries play no role in sentencing except in cases of a conviction for second-degree murder, when the judge will ask them to recommend whether the offender (who faces an automatic penalty of life in prison) should wait more than 10 years before being eligible to apply for release on parole.

A civil jury is asked to make findings of fact and decide how much money should be awarded to a successful party as damages. The number of members on a civil jury varies from province to province and their verdict need not be unanimous. It should be noted that in the province of Quebec civil juries have been abolished.

**The Crown:** The Crown attorney or Crown prosecutor – an official of the provincial attorney general’s or justice department, or the federal department of justice – is responsible for presenting the case against those charged with crimes. The role brings with it enormous power.

Prosecutors in three provinces decide whether an individual will face criminal charges and, in all jurisdictions, whether charges will be pursued through the courts. Prosecutors must use this discretion to forego charges, or withdraw charges filed by police, where it is unlikely there is enough evidence to secure a conviction.

Prosecutors act for the state. They are not counsel for the police or victims of crime. Most importantly, despite the competitive structure of the adversarial system, it is not the prosecutor’s job to secure a conviction. “The role of prosecutor excludes any notion of winning or losing,” the Supreme Court of Canada has said. While Crowns must act firmly in presenting credible evidence, the court has held, they must act fairly to ensure justice is done whatever the verdict.

**Lawyers:** Lawyers are duty bound to do their utmost, within the bounds of the law and the ethical duties of the legal profession, to put forward their client’s case. This should be remembered by anyone who watches a lawyer conduct an emotionally-charged cross-examination – while some observers may find this offensive, it is, quite simply, a lawyer’s duty and responsibility to ask questions that may be painful, embarrassing or deeply personal, when circumstances require. They also have a duty not to mislead the court and must not, for instance, present alibi evidence on behalf of a client who has admitted the crime to the lawyer.



## THE CRIMINAL JUSTICE SYSTEM

The *Criminal Code* sets out most of the acts that constitute a crime, the procedure for handling prosecutions, the defences available to accused persons, and the punishments to be imposed upon conviction. It is a federal statute, making the criminal law uniform across the country. The *Code* is accessible on the Internet (<http://laws.justice.gc.ca/en/C-46/>) and a pocket-sized paperback version is available. As well, journalists can consult annotated editions published annually under the names *Tremear’s*, *Martin’s*, and *Cournoyer-Ouimet’s* which not only contain the provisions of the *Code*, but also provide details of how courts have interpreted the *Code*’s 800-plus sections. Other crimes are set out in the *Youth Criminal Justice Act*, the *Controlled Drugs and Substances Act*, and provincial statutes.

A criminal conviction carries serious consequences – the prospect of imprisonment and a fine, and the stigma and reduced life opportunities that come with a criminal record. In an effort to level the playing field, the common law provides a series of safeguards to help ensure that only the truly guilty are convicted.

Critics are correct when they complain that the justice system emphasizes the rights of the accused, but it should be borne in mind that these are rights enjoyed by every citizen, not special rights created to shield criminals from the full weight of the law. The following provides an overview of these safeguards which serve as a check on the power of the state.

**Burden of proof on Crown:** The state must produce sufficient evidence to prove a defendant guilty of an offence. There is no onus on accused persons to prove their innocence.

**Offences must be proven “beyond a reasonable doubt”:** The Crown must prove its case beyond a reasonable doubt, a hurdle that may well mean guilty persons go free. Judges and jurors must not believe an accused person is “probably” guilty or “likely” guilty, but the Supreme Court of Canada has said the Crown cannot be expected to prove guilt with absolute certainty. A trier of fact should convict if “sure” the accused committed the offence. One needs only to point to the ordeals of Donald Marshall Jr., David Milgaard, Guy Paul Morin and others who have been wrongfully convicted to underscore the importance of ensuring the justice system protects innocent people from such a fate.

**Presumption of innocence:** Every accused, at every stage of a prosecution, has the right to be treated as an innocent person until declared guilty by a judge or a jury. Journalists sometimes lose sight of this concept, producing reports of arrests in which police and community members express relief that a crime has finally been solved.

**Right to silence:** Defendants are not compelled to explain or justify their actions at any stage. They may refuse to give a statement to police, testify, or call evidence in their defence. This right is consistent with the presumption of innocence and the burden of proof on the Crown.

**Defences:** The law provides accused persons with a series of defences that, if accepted by a court, will lead to an acquittal. Accused persons may have acted in **self-defence** or may be able to produce **alibi** evidence showing they were elsewhere when the crime occurred. An accused person who was too intoxicated to have intended to commit murder can raise the defence of **drunkenness**, while someone provoked into lashing out in a sudden, deadly fury can argue **provocation**; in either case, a judge or jury may convict of the less-serious offence of manslaughter. An accused person deemed to be suffering from mental disorder when an offence was committed does not possess the guilty mind required for a conviction. Such persons will be declared **not criminally responsible** and detained (if necessary) in a psychiatric facility.

**Categories of offences:** The most serious crimes – murder, manslaughter, armed robbery, violent physical and sexual assaults, thefts and frauds involving large sums of money – are classified as **indictable offences**. Such crimes are punishable by heavy fines and maximum prison terms of two, five, 10, or 14 years, and a mandatory life sentence in the case of murder. In keeping with their seriousness, persons charged with these offences have the right to a jury trial.

Minor crimes, including shoplifting, vandalism, thefts and frauds involving less than \$5,000, are **summary conviction** matters. Offenders found guilty of these crimes face a maximum penalty of six months in jail and a \$2,000 fine. Summary offences fall within the exclusive jurisdiction of the provincial court, where judges hear cases without juries.

There is a third category of crimes, known as **hybrid or dual-procedure offences**. As the names suggest, these offences can be prosecuted as either summary conviction or indictable matters. The Crown decides which procedure will be followed, an example of the discretionary power wielded by prosecutors. An act of mischief that damages property or a computer database, for instance, can be prosecuted as a summary conviction offence but, if pursued by indictment, could bring a two-year prison term upon conviction. A prosecutor may opt to proceed by indictment if the accused has a serious criminal record or the damage caused warrants the more severe punishment.

**Police procedures:** While private prosecutions are possible, most criminal charges are filed after an investigation by the Royal Canadian Mounted Police or a provincial or municipal police force. Police officers have wide powers to arrest suspects, search homes and offices and seize evidence, subject to the Charter's protections against arbitrary detention, search, and seizure.

Once a police officer is satisfied there are **reasonable and probable grounds** to believe an individual has committed a crime, a charge can be laid. In British Columbia, Quebec, and New Brunswick, Crown attorneys decide whether charges will be laid. In all other jurisdictions, the charging decision is made by the police, usually after consulting a prosecutor about the appropriate charge and the evidence needed to support a prosecution.

The charge is laid in the form of an **information**, a public document filed with the provincial court that sets out when and where the offence allegedly occurred, names the accused, and outlines the charges he or she faces. The accused may be arrested and brought to court or a warrant may be issued for the arrest of a suspect who is at large. In most cases, however, the information is filed with the courts and the accused is summoned to appear in court at a later date to answer to the charges.

## CRIMINAL PROCEDURE

The following is an overview of how a criminal case unfolds in the courts:

**Arraignment:** This is an accused person's first appearance in provincial court to answer to the charges. The judge usually reads out the charge, although defence lawyers may waive the right to this formality. In many instances defendants will seek an adjournment of several days to provide time to examine the allegations

**Election and Plea:** This term is given to the accused person's formal response to the charges, but it is a bit of a misnomer. The defendant's election (choice of court to hear the trial) will determine whether a plea is entered at this stage.

First, a note on semantics: "plea" is the noun that describes whether an accused declares himself to be guilty or not guilty of a crime. In so doing, the accused "pleads"; however, the past tense of the verb, "to plead", when used in relation to courtroom procedure, is "pleaded", not "pled".

A plea is entered only before the court that will ultimately try the case, which in turn is determined by the type of offence alleged. Summary conviction charges, as noted, must be tried in provincial court; defendants facing those charges have no right to elect a higher court and will enter a plea. If the plea is not guilty, a date will be set for trial. A guilty plea will set the stage for a sentencing hearing, either immediately or at a later date.

Persons facing indictable offences have the right to choose trial in provincial court or before a superior court, either by judge alone or by judge and jury. Exceptions are charges of first- or second-degree murder (and other rare offences, such as piracy and treason, which were once capital crimes) which must be tried by a superior court.

In cases other than murder, an accused person who selects trial before a provincial court judge will then enter a plea. A guilty plea advances the case to sentencing, while a date for trial will be set if the plea is not guilty. An accused person's decision to face trial in superior court, however, triggers a more complicated procedure. First, no plea is entered since the case is not yet before the trial court. Journalists sometimes assume the plea is implied or they missed the words being uttered, and mistakenly report that the accused pleaded not guilty.

When an accused elects trial in superior court, the judge who presides over the election will set a date for a preliminary hearing – an interim proceeding, held in provincial court, to assess whether there is enough evidence to justify sending the case to trial.

In the case of hybrid or dual procedure offences, whether the Crown opts for the summary conviction or indictable route determines how election and plea unfolds. The prospect of an expensive and time-consuming jury trial on a relatively minor charge is an important check on a prosecutor's misuse of this discretion.

An accused can return to court at a later date to change their election, a move that often signals an intention to forego a trial and enter a guilty plea.

**Disclosure of Crown evidence:** Defendants have a right to review the evidence against them before they make their election and plea. The Crown must divulge police reports, witness statements and any other evidence, including information that could exonerate the accused. A judge may ultimately have to settle disputes over how much information should be disclosed, and charges have been stayed where courts have concluded the denial of information has violated the Charter right to make a full answer and defence to the allegations. There is no onus on the accused to disclose any information to the Crown, except where the defence of alibi will be raised.

**Show cause (bail) hearings:** Since everyone is presumed innocent until proven guilty, the *Charter* gives accused persons the right “not to be denied reasonable bail without just cause.” Most defendants are released on an **undertaking**, a written promise to appear at the next court proceeding. The Crown, however, may seek to “show cause” why an accused person should remain in custody or be released only after posting money or property as bail. Judges can deny bail only if there is a risk the accused will flee, commit more offences, or try to intimidate witnesses. If the allegations are serious, a judge can deny bail if detention is justified to maintain confidence in the administration of justice. Where there is evidence of mental instability, an accused may also be remanded for a psychiatric examination to determine fitness to stand trial.

**Preliminary hearings:** Also known as preliminary inquiries, they are held to review the evidence supporting charges in cases of indictable offences. The Crown presents its case and, while defence counsel has a chance to question witnesses, it is rare for an accused person to testify or call defence witnesses. The hurdle facing the Crown is low – the judge must be satisfied there is some evidence that **could** lead a jury (even in cases to be heard by judge alone) to convict. An accused can waive the right to a preliminary hearing and proceed to trial.

This dry-run for the trial usually ends with an order or **committal** to stand trial. But the judge may find the Crown's case to be so weak that no trial is warranted and the accused should be **discharged**. If this happens, however, the Crown has the right to issue a **preferred or direct indictment**, a procedure that reinstates the charges and takes the accused to trial.

**Plea bargains:** Accused persons can change their plea to guilty at any point in a prosecution, and such decisions are often the result of agreements worked out between defence counsel and the prosecutor. A typical arrangement may see some charges withdrawn in exchange for a guilty plea as well as a **joint recommendation** on what the penalty should be. While judges usually accept such recommendations, they are free to impose any sentence they believe is proper

**Pre-trial motions:** Legal arguments over the admissibility of evidence and other legal issues are usually dealt with during the trial. However, lengthy matters such as complicated Charter motions and applications to stay charges are increasingly dealt with at separate hearings that can be convened many months before trial.

**The trial:** The procedure followed at trial is essentially the same for cases heard by judge alone as those with juries.

In jury trials, counsel select a 12-member jury from a pool of citizens summoned to court for jury duty. The indictment is read, the accused enters a plea of not guilty, and the trial begins.

The prosecutor usually makes an opening statement to the jury outlining the Crown's case, but is not obliged to do so. Then the Crown presents its witnesses, in an order that helps the jury understand how an incident unfolded and why the defendant is considered the culprit. The prosecutor must not ask leading questions that suggest the answer, so witnesses describe what happened in their own words.

Evidence may be **direct** (what an eyewitness saw) or **circumstantial** (evidence that the accused was found with the victim's wallet, for instance), and may be in the form of documents introduced through a witness who is able to vouch for their origin and contents. In most instances **hearsay**, or second-hand information, is not admissible, and usually only witnesses the judge deemed to be **experts**, such as doctors and scientists, can offer opinions based on the evidence.

The defence has the right to **cross-examine** each witness to challenge the evidence presented or to draw out information favourable to the accused. Defence counsel tend to focus on the loose-ends of an investigation – the unanswered questions and missing evidence that may raise the reasonable doubt needed for an acquittal. The prosecutor can ask further questions on what is known as **redirect** examination, but only to explore new information brought out under defence questioning.

Once the Crown closes its case, the defence has the right to call evidence. If the prosecution's case appears weak, the accused may ask the judge for a **directed verdict** of not guilty; such motions rarely succeed.

The defendant's lawyer may opt to call no evidence, but usually some defence witnesses are called. And, as was the procedure with the Crown's case, after defence witnesses are cross-examined, the Crown can cross-examine, and defence counsel may redirect.

While the accused is under no obligation to testify they often do, particularly in a jury trial when 12 citizens inundated with incriminating evidence are eager to hear the defendant's explanation.

At any point during the trial, a **voir dire** hearing may be held to determine whether evidence is admissible, a question is proper, or to resolve other disputes. In jury trials, jurors will be asked to leave the courtroom during this "trial within a trial" so they are not exposed to inadmissible or potentially prejudicial information.

When the defence closes its case, the Crown has the right to call **rebuttal** evidence. This is not a chance for the prosecutor to get a second kick at the can, and rebuttal evidence must relate to new information introduced as part of the defence case. If there is no rebuttal evidence, lawyers for each side present their **closing argument** to the judge or jury, marshalling the evidence to support their version of events.



**Verdict:** The judge then delivers the **charge to the jury**, reviewing the evidence and explaining how the criminal law applies to the allegations before the court. Jurors deliberate in secret.

If there is no jury then, obviously, there is no charge to the jury, and the judge is the sole decision-maker as to whether the Crown proved its case beyond a reasonable doubt.

In some cases an accused may be acquitted of a charge in the indictment but convicted of an **included offence** – for example, found not guilty of first-degree murder (a planned and deliberate killing) but convicted of the less-serious, included offence of manslaughter (an unintentional killing caused by an illegal act, such as reckless use of a firearm). Jurors must return a unanimous verdict; a hung jury requires that a new trial be held. It is rare for a jury's verdict of not guilty to be overturned on appeal.

**Sentencing:** If the accused is convicted, the judge must pass sentence. The *Criminal Code* dictates the maximum penalty for each offence; however, journalists should be aware that the maximum sentence is rarely imposed. A number of principles are brought to bear when crafting a sentence: deterring the offender and others from committing crimes; punishing offenders to show society's denunciation of their acts; making the punishment fit the severity of the crime; and the need to rehabilitate the offender.

Judges review sentences meted out for similar crimes to guide their decisions. A court may also review a pre-sentence report that assesses the offender's background and prospects for rehabilitation, and statements from victims describing the impact of the crime.

Possible punishments include fines, prison terms, a suspended sentence, supervision during a term of probation, or a period of community service. First-time offenders may be granted a discharge – leaving them without a criminal record – for a minor offence. Discharges can be absolute or conditional on completion of community service, a term of probation, or similar requirement. In 1995 Parliament amended the *Criminal Code* to require judges to impose alternative sentences to a jail term whenever possible, a measure designed to control the cost of the prison system. The changes also allow judges to impose conditional sentences, to be served in the community, if a jail term of less than two years is appropriate. Criticism and public outrage often greet sentences of "house arrest," but the media should not lose sight of the fact that the federal government has decided this is an appropriate punishment, not the courts. Moreover, judges play no role in the parole system and must not consider the prospects of an early release when sentencing an offender.

**Appeal:** Either side can appeal a verdict, a sentence, or a judge's ruling. An appeal court will not change findings of fact or a judge's assessment that a witness should not be believed, but may overturn a verdict and order a new trial if an error in interpreting or applying the law was made.

**Other offences:** Offences related to illegal drugs are set out in the *Controlled Drugs and Substances Act* and prosecuted in the same manner as crimes, except the Crown prosecutor represents the federal Department of Justice. Young people aged 12 to 17 are charged with *Criminal Code* offences but their cases are conducted under special procedures set out in the *Youth Criminal Justice Act*. Offences created under provincial statutes that resemble crimes, such as trespass, illegal fishing or hunting, and traffic violations, fall under the jurisdiction of the inferior courts.



## THE CIVIL COURTS

The civil courts provide redress for injuries an individual or institution has suffered at the hands of another party. Civil wrongs, most of them known as **torts**, arise from a breach of a legal duty.

Examples are lawsuits alleging negligence, whether in a car accident or in polluting drinking water; an action claiming damages for defamation or wrongful dismissal from a job; breach of a written or verbal contract; and disputes over property lines or a patent infringement. A mechanic's lien is a civil action which a tradesman or contractor may file to force payment for work done. A claim for breach of a fiduciary duty relates to the harm inflicted by a teacher, a corporate director, or other person in a position of trust.

While dealt with publicly in the court system, civil claims are essentially private actions involving private parties. The state plays no role in a civil action, unless it is the party suing or being sued. While the media tends to focus on criminal cases, civil claims account for most of the cases brought before the courts. The vast majority of civil cases are of little interest to anyone other than the parties involved, but some generate rulings that affect how the law applies to the general public – for instance, a claim to have a law declared invalid or to interpret its coverage. Lawsuits involving prominent people, government agencies, and large corporations often attract media attention. The biggest obstacle to news coverage is the tendency for most pre-trial proceedings to be held in private. Journalists must rely on documents filed with the courts and interviews with counsel to monitor the progress of a civil claim.

The usual outcome of a civil action is an award of **damages** – money to compensate for the injury. **Punitive damages** may be awarded to punish a party that has acted maliciously, and the losing party is usually ordered to pay a portion of the other side's legal bills, known as **costs**. Other remedies a court can impose include **specific performance** (an order forcing the losing side to honor a contract); an **injunction** to restrain a party from taking an action likely to cause an injury; and **writs** (usually *certiorari* and *mandamus*), which are used to review decisions of officials, tribunals, or lower courts.

The burden of proving a civil claim lies on the party that makes the claim. Since the liberty of an individual is not at stake, the evidence needed to establish a claim is not as high as the standard in criminal cases. A judge or jury must be satisfied on a **balance of probabilities** that the injury has occurred and the defendant is responsible. The trier of fact must be convinced the claim is probably true, a measure sometimes defined as better than 50-50, or a preponderance of evidence. The difference between the standard of proof in criminal and civil cases is perhaps best illustrated by the famous case of O.J. Simpson, who was acquitted of murder but was found liable in the civil courts for causing the deaths of two people.

**Terminology:** When journalists cover civil actions, their most common mistake is to apply criminal terms. The party pressing a lawsuit is the **plaintiff**, not the Crown, and the defendant is sued, not charged. A verdict establishing a civil claim is not a conviction and the defendant is not "guilty" of anything; the losing party has been found to be negligent, to have breached a contract, or is liable to pay damages, as the case may be. Finally, an award of damages is just that – it is not a fine.

## CIVIL PROCEDURE

The rules that determine how a lawsuit unfolds are complex and vary from province to province. The following is an overview of the major stages of a civil case:

**Pleadings:** All civil actions start with a pleading stage. The documents that start a lawsuit are known as an **originating notice and statement of claim**, which name the defendants, set out the facts and allegations that form the basis for the claim, and indicate the damages or other remedies sought.

**Application route:** This is the simpler of the two procedures and arises, for example, when the party launching the action (the applicant) seeks an injunction, a declaration of a right or entitlement, to enforce a Charter right, or to obtain an interpretation of a statute. It is also used in emergencies, when a swift decision is needed to prevent irreparable damage, such as the razing of a heritage building. In such cases, the court may agree to hear the initial application *ex parte*, without the party being sued (the respondent) being notified or present.

In applications, the focus of the dispute is the law and not the facts. Evidence is presented in **affidavits** (sworn written declarations setting out information relating to the case) filed with the court, but witnesses may be required to testify if the opposing party challenges statements made in their affidavits. Legal arguments are filed with the court in writing and lawyers usually provide brief oral arguments reviewing the positions set out in written briefs presented to the court.

Hearings usually take place before a superior court judge sitting in **chambers** – not a judge’s office, as we often see on American television, but usually a smaller courtroom open to the public. Since the legal issues and the facts tend to be limited in scope, and the parties are anxious for a resolution, judges may deliver an oral decision as soon as they hear from the lawyers (known as a ruling “from the bench”) and follow up with a written decision.

**Trial route:** After the pleading stage, there is an exchange of documents between the two sides. While a description of these documents may be filed with the court, the documents themselves remain private. Then each party has the right to question the opposing side’s witnesses at **examination for discovery**, private sessions usually held at a law firm’s boardroom. Discovery examinations are transcribed for possible use at trial, but it is rare for the transcripts to be filed with the court and become publicly accessible. This is the fact-finding stage of a lawsuit, where parties and their lawyers are able to assess the strength of their case.

The party (or parties) named as defendant in a lawsuit have a set time period to file a **statement of defence** denying the plaintiff’s allegations. Failure to file a defence may lead a judge or court official to grant an order for a **default judgment** in the plaintiff’s favour. A defendant may also file a **demand for particulars**, seeking further information about the claim before filing a defence. Defendants sometimes file a **counterclaim**, a lawsuit seeking damages from the plaintiff.

The claim then takes one of two routes, depending on what relief the plaintiff is seeking from the courts.

Prior to trial either side may file an **interlocutory application** to resolve any disputes that may arise. For example, a judge may be asked to quash a lawsuit as frivolous, or to order disclosure of documents or a reluctant witness to answer questions at discovery. Such motions are heard in chambers following the streamlined procedure used for applications, offering the media a chance to report on the progress of a lawsuit.

Most actions are dropped or end with **out-of-court settlements** as the facts emerge at discovery, legal fees mount, and the parties take a realistic view of their chances at trial. Less than five per cent of all lawsuits filed actually go to trial. Details of an out-of-court settlement may be filed with the court, but it is common for both sides to keep the terms confidential as part of the settlement agreement. This practice, which limits the media to reporting only the fact that a settlement has been reached, creates another barrier to coverage of civil actions.

Trials are held in superior court. (The exception is small claims court, an inferior court where lawyers appointed as adjudicators hear claims involving limited amounts of money, in which most parties argue their case without a lawyer.) Still, in some instances, civil trials, which are held in public, are usually heard by judges; however, juries are called on to assess some claims, such as defamation, malicious prosecution, and false imprisonment. While verdicts can be appealed to the provincial court of appeal, a further appeal to the Supreme Court of Canada is possible only if the case raises an important legal issue.



# CONCLUSION:

## REAL LIFE, REAL LAW

The information in this document will hopefully assist all those with an interest in media and the law. Given the nature of the Canadian justice system, there are of course many differences in the processes, statutes, practices and even language used from one jurisdiction to the next. The print and online resources listed in the appendix should be helpful in better understanding practices in local courts.

Judges speak directly to the people of our country through their rulings or written decisions. However, we know that, practically speaking, such information reaches the public primarily through the work of the media. That's why it's important to judges, lawyers and indeed all Canadians that journalists who cover the work of the courts understand what they observe.



## APPENDIX: RESOURCES

### TEXTS:

The following texts should prove to be useful resources for your work. This list is also an acknowledgment of authors to whom we are indebted, since their work has helped shape and inform this document:

Michael G. Crawford, *The Journalist's Legal Guide*, 4<sup>th</sup> ed. (Thomson Carswell, 2002).

Dean Jobb, *Media Law for Canadian Journalists* (Emond Montgomery, 2006)

Robert Martin, *Media Law* (Irwin Law, 2003).

### ONLINE:

For starters, if you want to learn more about us, we invite you to visit the Canadian Judicial Council's website: <http://www.cjc-ccm.gc.ca/>

The links below are external links; thus, we do not endorse nor are we responsible for the content of external sites. All sites were current at the time this document was created.

### STATUTES

**Federal:** The Government of Canada's website posts federal statutes and regulations, including the Criminal Code and the Young Offenders Act, and The Charter of Rights and Freedoms.

[http://canada.justice.gc.ca/Loireg/index\\_en.html](http://canada.justice.gc.ca/Loireg/index_en.html)

**Provincial:** Full-text of statutes, regulations, and bills are available, with few exceptions, through the home page maintained by each provincial and territorial government. Links to these sites can be found on the Government of Canada's website.

[http://canada.gc.ca/othergov/prov\\_e.html](http://canada.gc.ca/othergov/prov_e.html)

## REPORTED CASES

**Canadian Legal Information Institute (CanLII):** This fully searchable site provides access to the full-text of recent decisions of most superior and federal courts. Older decisions will be added in future, and the database includes rulings of courts that do not maintain their own websites.

<http://www.canlii.org/index.html>

**Supreme Court of Canada rulings:** Full-text of all decisions since 1989, searchable by keyword.

<http://scc.lexum.umontreal.ca/en/index.html>

**Superior Court websites:** Courts in the following provinces and territories maintain websites offering access to recent rulings plus links to statutes and regulations, local legal resources and other sites providing legal information:

Federal Court of Appeal	<a href="http://www.fca-caf.gc.ca">http://www.fca-caf.gc.ca</a>
Federal Court	<a href="http://www.fct-cf.gc.ca">http://www.fct-cf.gc.ca</a>
Court Martial Appeal Court of Canada	<a href="http://www.cmac-cacm.gc.ca">http://www.cmac-cacm.gc.ca</a>
Tax Court of Canada	<a href="http://www.tcc-cci.gc.ca">http://www.tcc-cci.gc.ca</a>
Alberta	<a href="http://www.albertacourts.ab.ca/">http://www.albertacourts.ab.ca/</a>
British Columbia	<a href="http://www.courts.gov.bc.ca/">http://www.courts.gov.bc.ca/</a>
Manitoba	<a href="http://www.jus.gov.mb.ca/registry/index.htm">http://www.jus.gov.mb.ca/registry/index.htm</a>
New Brunswick	<a href="http://www.gnb.ca/cour/index-e.asp">http://www.gnb.ca/cour/index-e.asp</a>
Newfoundland	<a href="http://www.justice.gov.nl.ca/just/sitemap.htm">http://www.justice.gov.nl.ca/just/sitemap.htm</a>
Northwest Territories	<a href="http://www.nwtcourts.ca/">http://www.nwtcourts.ca/</a>
Nova Scotia	<a href="http://courts.ns.ca/">http://courts.ns.ca/</a>
Nunavut	<a href="http://www.nucj.ca/unifiedcourt.htm">http://www.nucj.ca/unifiedcourt.htm</a>
Ontario	<a href="http://www.ontariocourts.on.ca/">http://www.ontariocourts.on.ca/</a>
Prince Edward Island	<a href="http://www.gov.pe.ca/courts/supreme/index.php3">http://www.gov.pe.ca/courts/supreme/index.php3</a>
Quebec	<a href="http://www.tribunaux.qc.ca/mjq_en/index.html">http://www.tribunaux.qc.ca/mjq_en/index.html</a>
Saskatchewan	<a href="http://www.sasklawcourts.ca/">http://www.sasklawcourts.ca/</a>
Yukon Territory	<a href="http://www.yukoncourts.ca/">http://www.yukoncourts.ca/</a>

## GENERAL LEGAL INFORMATION

**A Compendium of Law and Judges:** An incredibly useful resource, with information about Canadian criminal and civil law, the role of the judiciary, and the parole system, with a focus on the British Columbia courts. B.C. Chief Justice Allan McEachern is principal author of this guide, which includes detailed examinations of The Charter and the Criminal Code.

[http://www.courts.gov.bc.ca/legal\\_compendium/](http://www.courts.gov.bc.ca/legal_compendium/)

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

## LAW SOCIETIES

**Canadian Bar Association:** This 36,000-member organization of legal professionals lobbies for changes to the law and keeps its members informed of new developments and rulings. There are CBA branches in each province and the association is divided into sections that concentrate on specific areas of law, such as criminal, family, environmental, bankruptcy, and immigration. The site provides contact information for branches and sections, offering journalists quick access to experts in specific fields.

<http://www.cba.org>

**Federation of Canadian Law Societies:** This umbrella group provides links to its member bar societies and to legal organizations in other countries.

<http://www.flsc.ca>