A Guide for Self-Represented Accused in Criminal Cases

Table of Contents

Introduction/Summary:

This guide cannot anticipate every situation that may arise during the court process. It is meant to serve as a starting point for self-represented accused persons, to assist them through the court process and is ***not*** legal advice nor should it be used as a substitute for hiring a defence lawyer.

All accused persons are encouraged to seek independent legal advice and representation. However, every accused has the right to represent themselves in court. The trial judge can provide some assistance to a self-represented accused, but the judge cannot become their lawyer. Being represented by a trained defence lawyer usually helps an accused considerably.

Only a lawyer can represent an accused person in the Superior Court of Justice. If an accused person wants to hire a lawyer, they should let the court know as soon as possible. This issue will be canvassed during court appearances prior to trial and at the judicial pre-trial. If an accused person fails to tell the court they wish to be represented by a lawyer or if they change their mind shortly before or during the trial, there is no guarantee that the presiding judge will grant the accused person an adjournment or order a mistrial.

Role of Judge

Judges ensure that the case is dealt with fairly and impartially, and also ensure that the law of evidence and procedures of the court are followed. Judges consider the offence(s) charged, hear from witnesses, assess the credibility of witnesses, consider arguments, and make decisions based on the law and the facts. Where there is no jury, a judge will decide whether you will be found “guilty” beyond a reasonable doubt or “not guilty” at the end of the trial. If there is a jury, the judge will instruct the jury on the law so they can decide whether you will be found guilty beyond a reasonable doubt. A judge cannot provide you with legal advice, tell you how to protect your rights or assist you with presenting your case. They must remain neutral and unbiased. However, a judge will provide you with information about the process and help explain and clarify what is happening. If you do not understand what is happening or what you are being asked to do, you should ask the judge to explain. If you need an interpreter, let the judge know. You are not permitted to communicate directly with the trial judge outside of the courtroom. If you need to send a letter or email to the court, this must be sent through the Trial Coordinator's Office. Make sure to also send the Crown counsel a copy of everything you are sending to the court.

Role of Crown Counsel

Crown counsel are advocates for the prosecution, but are also Ministers of Justice, with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime, and the public. Crown counsel have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest.

The role of Crown counsel is not to obtain a conviction; it is to put before a judge or a jury, what the Crown considers to be, credible and relevant evidence of an alleged crime.

It is important to note that the Crown is not your lawyer and cannot give you advice. Any questions you have about your charges should be brought to a criminal defence lawyer.

Role of Defence Counsel

A defence lawyer is a lawyer who represents a person charged with a criminal offence. It is the defence lawyer's job to ensure that the rights of the accused are protected throughout the criminal process. At trial, a defence lawyer must question the evidence put forward by the prosecution; examine the importance or relevance of that evidence; and explore other possible interpretations. A defence lawyer, amongst other things, will negotiate resolution options with the Crown; hold the Crown to their burden of proof; and present a defence to the offence if applicable. A defence lawyer is an accused person's best advocate and representative during a criminal trial.

Finding a Lawyer / Legal Aid / Rowbotham Applications

You are strongly urged to get advice from a criminal defence lawyer about your legal options and the possible penalties you could face. You can get referrals to a lawyer or paralegal as follows:

Law Society Referral Service: The Law Society Referral Service (LSRS) can connect you with a lawyer. When you complete a referral online, provided they have a match available, you will be given the name of a lawyer who will provide a free consultation of up to 30 minutes. The online request, the referral process, and your initial consultation of up to 30 minutes are free. The consultation is meant to help you determine your rights and options. You can start the online process of obtaining a lawyer referral or paralegal referral at www.findlegalhelp.ca.

Lawyer Directory: You can search on-line for lawyers and paralegals by name, city or postal code at: Lawyer and Paralegal Directory | Law Society of Ontario (lso.ca). You can also look for a lawyer or paralegal on the Internet or in the telephone directory.

Legal Aid Ontario: If you cannot afford a lawyer, you may be eligible for legal aid if there is a likelihood of jail if you are convicted. You also may be able to get free legal advice at your local community legal aid clinic, or from law students at a university-based student legal service organization (SLSO). Each clinic and SLSO has its own guidelines and financial eligibility for accepting clients, so you should contact them directly.

For more information, contact Legal Aid Ontario at 1-800-668-8258 toll free or at 416-979-1446. You can also visit the Legal Aid Ontario website at http://www.legalaid.on.ca/en/contact/

Rowbotham Applications: If you're facing serious and complex criminal charges and have been denied legal aid and cannot afford a lawyer, you can make a Rowbotham Application to the court. There is no general right to a court-appointed lawyer in Canada. However, in certain circumstances (lack of financial ability, seriousness of case, and other factors), you may make an application to a judge (a "Rowbotham Application") to halt (stay) the case, unless the Government funds a lawyer for you (through Legal Aid).

To qualify you must show you:

1. need a lawyer but cannot afford one;
2. have been denied legal aid, and exhausted all avenues of appeal of the legal aid denial;
3. face a serious criminal charge(s); and
4. face a complex criminal proceeding.

To file a Rowbotham Application you must apply to the court in writing to ask for an adjournment of your case while your Rowbotham Application is being considered. An affidavit is a written statement, sworn under oath or affirmed, explaining your situation and background that supports your application. You will also need to submit an Affidavit and a Notice of Application and Constitutional Issue. You must follow the Criminal Proceeding Rules for the Superior Court of Justice on how to serve the documents.

About the Criminal Proceedings Rules for the Superior Court of Justice

The Superior Court of Justice is a superior court of criminal jurisdiction. The court has the power to try any indictable offence under the *Criminal Code of Canada*; however, the Superior Court generally only tries the most serious criminal offences. These include murder, manslaughter, drug trafficking, and other offences against the security of the state, or an attempt or conspiracy to commit one of these offences. An individual accused of any of these offences is tried by a judge of the Superior Court, sitting either with or without a jury.

Criminal proceedings in the Superior Court are governed by the *Criminal Code of Canada* and the *Criminal Proceedings Rules*. It is important that you review the *Criminal Proceedings Rules* as there are important steps and/or instructions you need to follow to properly defend yourself.

To locate a court in your area, please see the List of Ontario Court Addresses on the Ministry of the Attorney General's website.

Forms Under the Criminal Proceedings Rules of the Superior Court of Justice

There are forms that you may need to use under the Criminal Proceeding Rules of the Superior Court of Justice. The forms can be located on the Superior Court of Justice website.

Types of Criminal Offences

In Canada, there are two categories of criminal offences: summary and indictable.

A summary offence (also known as a summary conviction offence) is considered less serious than an indictable offence. Some other key differences are:

- a summary conviction offence must be charged within 6 months after the alleged act occurs and proceeds before the Ontario Court of Justice.

- An indictable offence has no time limit for when charges can be laid and, most often, proceeds at the Superior Court of Justice.

A hybrid offence is an act that can be tried as a summary or indicatable offence. If you are charged with a hybrid offence the Crown Attorney has the discretion on whether to proceed summarily or by indictment. Their decision will, amongst other things, depend on the seriousness of the offence and/or allegations.

Attending Court

Failure to attend court when you are required to attend may result in serious consequences for you and your defence. If you do not attend your court or trial date, the judge might issue a warrant for your arrest. The Criminal Code permits a trial to continue with the accused *in absentia*, which means in your absence. If your trial has started and you fail to appear at any time the trial is scheduled to continue, the trial judge might issue a warrant for your arrest and may continue the trial in your absence, which would include your sentencing, if you are found guilty. If your matter is scheduled for a jury trial, you may also lose your right to a jury trial.

Court normally starts at 10:00 am each day. The court usually breaks for lunch at 1:00 pm and starts the afternoon session at 2:15 pm. Court ends at approximately 4:30 - 5:00 pm each day. These times might vary. During your trial, the trial judge will tell you if/when these times have changed.

During your trial, you must be present in court and ready to proceed when the trial resumes sitting in court so that the trial is not delayed. It is the trial judge's responsibility to ensure that the trial proceeds in a reasonable and timely fashion. If necessary, the trial judge may take steps to ensure that the trial proceeds in a reasonable and timely fashion.

If you are not in custody pending your trial then you will be permitted to sit at a table in front of the court and next to where Crown counsel sits during the trial. This table is referred to as the "counsel table".

If you are in custody, you may ask the trial judge to sit at counsel table during the trial. If you do, the trial judge will ask Crown counsel if there is any objection to you sitting at counsel table and, if so, the nature of the objection, including any security concerns. If there is an objection, the trial judge will hear from you and Crown counsel (and possibly from one or more witnesses such as a court security officer), and then decide whether you will be permitted to sit at counsel table during the trial or whether you must stay in the prisoner's box.

What to Do if you Cannot Attend a Court Date

It is imperative that you advise the court in advance if you expect to be late or if you are unexpectedly detained. You must contact the courthouse immediately as soon as you become

aware of the situation. Call the courthouse telephone number to speak with someone or leave a message detailing why you are going to be late or unable to attend that day. It is expected that you will be in court on time, ready to proceed. If you do not attend court the judge could issue a warrant for your arrest.

Court Decorum

Every court participant must respect the dignity of the court and the court process. There are certain rules for how to act in a courtroom. For example, whenever the judge enters or leaves the courtroom, everyone, who can, must stand as a sign of respect. This also applies to jury, in jury trials, when they enter or leave the courtroom.

You also must stand whenever you wish to say something. You should address all your comments or questions to the judge and not to the Crown Attorney, the jury or any other person in the courtroom. During a jury trial, you are only entitled to address the jury directly during your closing address to the jury.

It is important not to interrupt while the judge or lawyers are speaking. Only one person should speak at a time. Court proceedings are recorded, and the recording will not be helpful if more than one person speaks at a time. You will be given the opportunity to speak to the court when it is your turn to do so. The same rules will apply when you are speaking.

When you speak to the trial judge, use "Your Honour". When you refer to Crown counsel, use Mr. or Ms., as appropriate, or the "Crown". When you speak to any witness, use Mr. or Ms. as appropriate. Do not use anyone's first name. In a jury trial when you speak to the jury, you refer to them as "members of the jury".

You may take notes about everything that takes place during the trial. If you are in custody, unless there are security issues, the trial judge will assist you in arranging to have a pencil and paper for the purpose of note taking.

If during the trial you cannot hear what any of the witnesses, Crown counsel or the trial judge says, or if you cannot see something a witness is referring to, you should let the trial judge know immediately. It is very important that you hear everything that everyone says in the trial and that you can see everything that a witness may be describing in an exhibit.

Most court appearances in the Superior Court of Justice will be in-person. However, if you are appearing in a virtual courtroom there are rules of etiquette you should keep in mind, for example:

- Sign into the meeting using your own name (or a professional name).
- Wear clothing that is appropriate for a court appearance.
- If possible, sit in a quiet space with a neutral background.
- Keep yourself muted when you are not speaking.
- If possible, use headphones with a microphone, or a headset.
- Do not move away from the screen or camera without permission of the court.
- Do not eat during the hearing.
- It is your responsibility to make sure that your technology is working properly. Wherever possible, use a wired connection rather than wireless internet. If at any point you experience technical difficulties that don't resolve themselves, let court staff know. Court staff is unable to provide technical support.

The Indictment

The Indictment lists the offences(s) or charge(s) the Crown alleges that you committed.

Sometimes, the offences or charges will be referred to as a "count" in the order they are in the Indictment. For example, the first charge would be referred to as Count #1; the second charge would be referred to as Count #2 and so on. Whether it is referred to as a count, offence or charge, it is referring to the same thing.

The Crown is responsible for proving beyond a reasonable doubt that you committed the offences you are charged with. You are presumed to be innocent of the charge(s).

You may wish to review the sections of the Criminal Code which are referred in the Indictment.

Ask the trial judge if you would like to be provided with a copy of the relevant sections of the offences you are charged with.

For you to be found guilty of an offence, the Crown must prove that you did each of the things that make up the elements of each offence. These are called the essential elements of the offence.

At any time prior to your plea or during the trial, you may ask the trial judge to review the particular essential elements of the charge(s) against you so that you understand what it is the Crown must prove.

Presumption of Innocence and the Burden of Proof

You are presumed to be innocent of each charge unless the Crown proves your guilt of an offence(s) beyond a reasonable doubt.

It is the Crown's job to prove that you are guilty of the offence *beyond a reasonable doubt*. You are not responsible for proving that you are not guilty. You are not obliged by law to testify or lead any evidence in your defence. The onus is on the Crown to prove that you are guilty of the offence(s). This means that it is the Crown's responsibility to prove each element of the offence (or each offence) with which you are charged, beyond a reasonable doubt.

You have the right to remain silent, relying upon the Crown's obligation to prove all the essential elements of the offence(s) which you are charged. To repeat, you do not have to testify or call any witnesses to testify, and you cannot be compelled to do so. However, should you decide to testify and/or call witnesses to give evidence at the trial, you must be ready to proceed with all your witnesses and have all documents that you wish to refer to ready and available immediately at the conclusion of the Crown's case. If you do testify the Crown will be entitled to cross-examine you.

Reasonable Doubt

What does "reasonable doubt" mean? A reasonable doubt is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence or the lack of evidence. It is not enough for the trial judge or the jury to believe that you are probably or likely guilty. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt. However, it is nearly impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high.

If, at the end of the case, based on all the evidence or the lack of evidence, the jury or the trial judge (if trial by judge alone) are not sure that you committed the offence, the jury or the trial judge will find you not guilty of that offence.

If, at the end of the case, based on all of the evidence, the jury or the trial judge (if trial by judge alone), is sure that you committed an offence, you will be found guilty of that offence since the jury, or the trial judge, would have been satisfied of your guilt of that offence beyond a reasonable doubt.

If you are found guilty, the trial judge will proceed with a sentencing hearing to determine the appropriate sentence for the offence(s) of which you have been found guilty.

Pleading "Guilty" or "Not Guilty"

At the beginning of the trial, the Registrar, who sits in front of the judge, will read the charges/offences against you.

You will be asked whether you to plead guilty or not guilty to each charge. This is not the time to provide explanations or put forward your defence. This is where you inform the court whether you plead "guilty" or "not guilty".

You have the right to plead not guilty. If you plead not guilty, your trial will proceed.

If you do not know what the essential elements are for the offences(s), or the range of penalties for each offence, *it is strongly advisable* that you ask the trial judge to provide you with that information before entering a guilty plea.

If you plead guilty to the offence(s), you are admitting that you committed the offence(s) described in the charge(s) against you. You are truthfully admitting that you committed all the necessary acts and had the necessary knowledge/intention(s) which comprise all the essential elements of the offence(s) that you are pleading guilty to. You are also waiving your right to a trial and to have the Crown prove that you committed each of the offences beyond a reasonable doubt.

You should know that if you plead guilty, the trial judge is not required to agree to any deal you may have made with the Crown about your sentence. Although the trial judge will give serious

consideration to any jointly proposed sentence, the trial judge does not have to sentence you in accordance with what you and the Crown have agreed to.

If you choose to proceed with a guilty plea, the judge will have questions you will be required to answer before the judge will accept your guilty plea. Typically, you will be asked:

a) Do you understand the nature of the charges against you?
b) Do you understand that by pleading guilty you are admitting you committed the offence?
c) Do you understand that by pleading guilty you waive your right to a trial and your right to require the Crown to prove its case beyond a reasonable doubt?
d) Do you understand that the trial judge is not bound by any agreement made as to sentence between yourself and the Crown?
e) Do you voluntarily and freely decide to plead guilty?

The Crown will then advise the trial judge of a summary of the Crown's evidence and the facts the Crown relies upon to prove the charge(s). Listen carefully to that summary as the trial judge will want to ensure that you do in fact admit the truth of the essential facts alleged against you. The trial judge will ask if you agree the summary is accurate. If you agree, no witnesses will be called by the Crown. If you do not agree with the accuracy of the summary, the Crown may proceed to call evidence on the disputed points. If the Crown does, you will also have an opportunity to call evidence. The trial judge will then decide if the admitted facts and any evidence called prove your guilt of the charge(s). If the trial judge is satisfied of your guilt, you will then be found guilty of the charge(s). The trial judge will record that you have pled guilty to the offence(s).

The sentencing hearing may proceed right away or be adjourned to a future date.

You should be aware, that once you plead guilty, there are limited circumstances where a judge will permit you to withdraw your guilty plea.

If you refuse to plead guilty or not guilty, the trial judge will enter a plea of "not guilty" and the trial will proceed.

Pre-Trial Applications and Charter Notice

In some cases, there are pre-trial applications to determine certain legal issues or the admissibility of certain evidence. These pre-trial applications are usually heard before the jury is selected and the trial evidence is called.

The Crown may serve you with one or more applications in advance of the trial seeking certain orders with respect to the trial. You should review the Crown's applications carefully. If you dispute the relief the Crown is seeking in its applications, you may file responding materials which must be served on the Crown and filed with the Court.

You may also bring your own pre-trial application(s) which may include applications to stay (end) the proceedings or exclude evidence because it was obtained in breach of the *Charter of Rights and Freedoms*. If you intend to do so you will have to, in advance of the trial, serve the Crown with your Notice of Application (Form 1) and any other documents that you rely on. If you intend to argue that the law under which you have been charged is unconstitutional, you must complete and file a Notice of Application and Constitutional Question (Form 5) along with the supporting material.

Please refer to the criminal proceedings rules for the procedure for pre-trial applications and, in particular, Rules 27, 30 and 31. These rules can be found on the Court's website.

Pre-trial applications are heard and decided only by the trial judge or another judge even if you have decided to have a jury trial. The trial judge will explain the nature of any applications brought by the Crown and the process that will be followed.

The process for pre-trial applications includes what is called a *'voir dire'* which means a 'trial within a trial'. It has this name because the Crown or you may call witnesses on the *voir dire* but the evidence of those witnesses is not evidence at the trial. You may cross-examine any witness the Crown calls and in turn, they may be re-examined by the Crown. During the *voir dire* you will be able to call witnesses or testify yourself. If you do testify or call witnesses, you and your witnesses will be subject to cross-examination by the Crown.

The trial judge or other judge hearing the application will then provide you and the Crown with a ruling on the pre-trial applications.

You should be aware that, if you testify on a *voir dire*, and eventually decide to testify at the trial, you may be cross-examined on your evidence at the *voir dire*, if it is different from the evidence you give at the trial.

Disclosure

The Crown is required to give you copies of the information that they have against you and the evidence that they intend to call at your trial, including the exhibits or documents they intend to enter as evidence, as well as any other relevant information the Crown does not intend to present. This is called disclosure. This should include all relevant information, whether it is favourable or unfavourable to your case.

It is a fundamental element of the fair and proper operation of the Canadian criminal justice system that if you are accused of a crime, you have the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information. All relevant information, in this context, generally means that there is a reasonable possibility that the information will be useful to you as the accused in answering the charges and making a defence. Usually, in a criminal case, disclosure will include at least the following:

- the information / indictment: the document that states the charges made against you;
- the police narrative or synopsis: a summary of what the police say happened;
- statements of all witnesses who have been interviewed by the police;
- statements or transcripts / video or statements you made to the police, if any;
- police notes;
- photos and / or video, if any; and
- any other materials relevant to the case.

Sometimes disclosure will not be available at your first appearance. In that situation, the matter will need to be adjourned (rescheduled to a later date) for disclosure to be provided to you. Sometimes partial disclosure will be made at the first appearance, and there will be subsequent disclosure made as it becomes available. You have a right to request further disclosure of specific things if you believe the police are in possession of additional relevant materials, or if further relevant materials could be available to the police through investigation. The Crown counsel in court will tell you how to collect the rest of your disclosure. You can also call or attend the Crown Attorney's Office to request or pick up further disclosure.

By the time of your trial, you should have received full disclosure from the Crown of all the relevant evidence in the possession of the police and the Crown. If at trial you hear or see evidence that you were not provided in the Crown's disclosure, please notify the trial judge immediately.

Bail Review

If you are arrested and charged with an offence, you could be held in custody or you could be released on bail ("judicial interim release") until your trial. A bail hearing is where a judge decides whether you should be released or held in custody until your trial, and if you are released, what types of conditions you should follow in the meantime.

You may apply to legal aid if you cannot pay for a lawyer yourself. You are not required to have a lawyer, but you may be at a disadvantage at your bail hearing if you do not have assistance from a lawyer. A lawyer can negotiate with Crown, find more details about the allegations, and help you prepare and put in place a release plan (conditions that may make custody unnecessary) to present to the Court. You should talk to a lawyer to get advice on how to best present your bail case.

If you have been denied bail or if you want to change your bail conditions, you can apply (on notice to the Crown) to have a bail review hearing in the superior court.

You may apply at any time, after denial of bail, and every 30 days thereafter, before trial for a judge of a superior court to review your bail order. Although you can apply every 30 days, realistically, unless something material has changed, it is unlikely that the court is going to reconsider the terms of a Release Order. To apply for a bail review you usually need to file and serve on the Crown:

- a notice of application;
- supporting affidavits; and
- the transcript of the original bail hearing.

The review will be based on the transcript and exhibits of the original hearing and the original judge's decision. You are usually responsible for obtaining and paying for the transcript of the original hearing (which can be expensive). You and the Crown may also present further evidence. This additional evidence can be given by affidavits or by calling witnesses.

If the review was requested by you, you must convince the judge that at least one of two things happened:

1. the original judge made a mistake in how they interpreted or applied the law to your case, and that this error affected how the judge made their decision; or
2. there has been a material change in circumstances since your original bail hearing, and that if the decision was made today, the decision would be different.

You and the Crown will have the opportunity to show the judge why you should be held in or released from custody, or why your bail conditions should be changed. The judge will either dismiss your application (i.e. make no changes to the bail order) or make a new order that they think is right in the circumstances. If you wish, you can ask the judge to make an order that the evidence and the arguments at your bail hearing, as well as the judge's decision, cannot be published or broadcast (publication ban) until your trial is over.

Note: You may also have an automatic right to apply for a detention review if you are held in custody for 90 days (pursuant to s.525 of the Criminal Code). You should seek legal advice to better understand your rights to a detention review.

Pretrial Conferences

You may be asked to attend a pre-trial conference (also called Judicial Pre-trials). The main purpose of the pre-trial conference is to clarify the issues in the trial and to discuss how the trial will proceed. The judge will also explain what is expected at trial and may suggest additional resources to assist you.

Here are some topics that may be covered at your pre-trial conference (these and other topics may be included in a written pre-trial conference form set out in the Criminal Rules in your jurisdiction):

- the judge's role to assist but not provide legal advice.
- the advantages of having a lawyer represent you.
- The elements of the charges (making sure you understand them).
- The consequences if you are found guilty.
- Whether there has been full disclosure.

- Whether there will be any pretrial applications or issues that need to be decided in a voir dire (a voir dire is a hearing held, without the presence of the jury and usually before the trial begins, to determine whether an issue of fact or law will be admissible).
- Review of the witnesses expected to be called.

If you have any issues or questions about the trial, you should ask them at your pre-trial conference.

Getting Ready for Trial

In preparation for your trial, you are expected to:

- review all the court documents and the disclosure provided by the Crown, including the police officer's and complainant's statement(s).
- understand the elements of the offence(s) you are charged with
- prepare all witnesses, if you are going to call evidence and make sure that all your witnesses have been served with a subpoena / summons which lets them know where and when to come.
- Organize and make at least three (3) copies of any documents or caselaw you intend on relying on (for you, the Crown and the Judge)
- Prepare a strategy for trial, your opening statement, and questions for the Crown's witnesses and your witnesses.
- Wear appropriate clothing in court.
- Be on time for your court appearance

Jury Trials

You may choose for your case to be decided by a "judge and jury" or "judge alone". If you choose to have a jury trial, it is the jury who will decide whether you are "guilty" or "not guilty". A jury will usually be made up of 12 ordinary people selected from a panel of potential jurors. You refer to the jury as "the jury" or as "members of the jury".

If you have a jury, you will still have a judge who will be present throughout your trial. The judge's role in a jury trial is to decide what law applies to your case, to deal with evidence problems, to make sure that the trial is properly conducted, and that the jury is properly instructed. The purpose of judicial instructions to the jury is to educate the jury so that it can make an informed decision, but not to tell the jury what decision to make.

Final jury instructions must leave the jury with a clear understanding of the factual issues to be resolved, the legal principles governing the factual issues, the evidence adduced at trial, the positions of the parties, and the evidence relevant to the positions of the parties on those issues. The jury's job is to decide whether you are guilty or not guilty. The jury will do this by considering the evidence presented in the trial and the judge's instructions.

Although the judge, in final instructions, will be commenting on the evidence after all the evidence is completed, it is the jury's view of the evidence that counts. The judge is the trier (decision maker) of the law and the jury is the trier (decision maker) of the facts.

From time to time, the jury may be asked to leave the courtroom so legal issues or problems with the evidence can be dealt with. This is to ensure the jury is not influenced by what is said and/or by any evidence that cannot be admitted.

Trial Procedure

a) Your Location in the Courtroom

If you are not in custody pending your trial, you will sit at the counsel table opposite the Crown's table.

If you are in custody, you will have to ask to sit at the counsel table. If you do, the trial judge will ask for the Crown's position on your request, including what, if any, security concerns exist. This may result in a hearing by the trial judge that may, or may not, require witnesses. After hearing from everyone, the trial judge will decide whether you may sit at the counsel table or remain in the prisoner's box.

b) Note taking

You may, and are encouraged to, take notes of the trial proceedings. If necessary, you may ask the trial judge for a pencil and paper to take notes.

c) Difficulty Hearing or Seeing the Proceedings

If at any time you have difficulty hearing or seeing any of the proceedings, advise the trial judge immediately. This includes anything that is said, shown or described during the trial proceedings.

d) Trial Judge's Preliminary Instructions to the Jury (If Jury Trial)

At the commencement of the trial, the trial judge will provide preliminary instructions to the jury. It is very important that you pay very close attention to what the trial judge says to the jury as it will review some of the procedure and law that applies generally to jury trials and to your trial.

e) Excluding Witnesses from the Courtroom

When a trial begins, quite often one side or the other asks the trial judge to make an order that any person who is going to be a witness remain outside the courtroom until it is their turn to give evidence. When requested, this order is usually granted. Sometimes, an exception may be made for a person such as the officer in charge to assist the Crown. You may ask for an exemption for someone you want in the courtroom, but you will have to explain why they need to remain in the courtroom during the evidence before they testify.

This is done to ensure, as much as possible, that a witness does not change what they are going to say in evidence because of something another witness has said. If such an order is made, you must make sure that your witnesses remain outside the courtroom until it is their turn to give evidence. It is also important that you do not discuss any of the evidence, that has been given in the courtroom, to any of your witnesses.

f) Exclusion of the Jury

When objections are made to evidence that is being led or a question that is asked of a witness, the trial judge may excuse the jury while submissions are made. This is done so that the jury is not influenced by hearing evidence that may not be admissible in the trial. In a judge alone trial, the trial judge will ignore any evidence determined to be inadmissible.

The jury may also be excused when issues of law or procedure arise during the trial.

If you have any questions for the trial judge regarding the trial, your questions should be raised with the trial judge after the Court convenes but before the jury is called into the courtroom, or alternatively, after the jury is excused from the courtroom but before the judge and lawyers leave the courtroom.

g) Crown Opening Statement

After the trial judge has completed the preliminary instructions to the jury (if there is a jury), the trial judge will ask the Crown to explain the background to these charges and the evidence that the Crown hopes to call. This is called an opening statement.

What the Crown says in Crown's opening statement is not evidence. You must not interrupt the Crown's opening statement even if you disagree with some parts of it. You can raise any concerns about the Crown's opening statement with the trial judge after the Crown has completed the opening statement and the jury has been excused.

h) Crown Witnesses

After the Crown's opening statement, the Crown will call witnesses to give evidence, some of whom may produce documents or objects that may be marked as exhibits.

The Crown will examine each of their witnesses. In general, the Crown is not allowed to ask leading questions to their witnesses. A leading question is a question that suggests its own answer, like "you have a blue car, don't you?" A non-leading question would be something like "what colour is your car?"

Once the Crown has finished the examination of a witness, you may cross-examine that witness. During cross-examination, you are allowed to ask leading and non-leading questions. You don't have to cross-examine a witness if you don't want to.

The purpose of cross-examination is to challenge what the witness has said, to ask about details that the witness has forgotten or didn't mention, and to raise doubts about what the witness said under the Crown's examination. This challenges the credibility and reliability of a witness' evidence. Cross-examination is not the time to make a speech or argue with a witness. You cannot give evidence or argue your case while you are cross examining a witness.

You may also use cross examination to get the witness to admit facts that are favourable to your case. You can put your defence or your intended evidence to the Crown's witness in the form of a question. For example, you might ask the witness something like "I was not there that night, is that right?" or "you never saw me there that night, did you?". However, it is important to understand that once a witness gives an answer, either side may use that evidence if they wish, not just the

side who asked the question. Therefore, you should consider, before asking a question, whether the answer to your question could hurt your position. Once a witness gives an answer, either side may use that evidence if they wish, not just the side who asked the question.

During your cross-examination of the Crown's witnesses, you may want to pay special attention to things like:

- the witness' attitude and behaviour in the witness box;
- the witness' ability and to see or hear the things about which he or she testified;
- the witness' ability to give an accurate account of what he or she saw and heard;
- whether the witness has any reason to be biased or prejudiced, or has an interest in the outcome of the case;
- whether the witness seemed to answer questions in an honest and candid manner, or whether the witness seemed to be argumentative or tried to avoid answering questions; and
- whether the witness' evidence was neutral and unbiased, or whether it was slanted in favour of one side or the other.
- Whether the witness said something different on an earlier occasion

You should know that if you are going to challenge a witness' recollection of events or statements, you should cross-examine that witness on your version of events. If you fail to do so, it may make your suggested version of the events less compelling because the witness was not given a chance to provide their explanation of the events. But remember, your questions are not evidence for the jury to consider. Only the answers are evidence that the jury or the trial judge can consider.

After you have finished cross-examining the witness, the Crown will have an opportunity to ask further questions as a re-examination, but only about things that were not part of the Crown's first examination and that came out of your cross-examination.

i) Objections

At any time during the Crown's examination of their witnesses, you have the right to object to the questions that the Crown asks. You can also object to the introduction of exhibits, including any documents or other evidence that was seized from you or from other persons.

If you make an objection like this, the trial judge will listen to your reasons why the question was improper or why the evidence should not be admitted. The trial judge will then ask the Crown to explain why the question was proper or why the evidence should be admitted. The trial judge will decide the admissibility of the question, or the evidence, and the trial will continue. Usually, this is done in the absence of the jury. Sometimes, the witness is excused while the Crown and you provide the trial judge with your reasons for the objection, because the reasons for the objection might forewarn or assist the witness to answer the question one way or another.

Once the trial judge has made a decision, it is final, and you must accept it. You have the right to appeal the decision at the end of the case. In doing so, you can then challenge the trial judge's decision on appeal.

j) Exhibits

Documents and objects that are admissible as evidence are often entered as exhibits during the trial. In very general terms, a document or an object is admissible if it is relevant to the case and is properly proven or tendered by agreement reached beforehand by you and Crown counsel.

Ordinarily, any document or object you or Crown counsel want to enter into evidence and mark as an exhibit must be identified by a witness. For example, if a picture is to be introduced into evidence a witness must be able to identify what is in the picture and testify that the picture accurately shows that place or object.

Again, if you object to documents or objects presented by a Crown witness, you must stand and advise the trial judge that you have an objection. In a jury trial, usually after the jury is excluded, you will be asked to state the basis of your objection. The Crown will then have an opportunity to make submissions with respect to your objection. The trial judge will then decide the issue in accordance with the rules of evidence.

If there are documents or objects that you wish to present as evidence either through a Crown witness or as part of your case, you should bring the original document or the object with you to the trial. The Crown may object to the admissibility of some or all your documents or objects. Should that occur, the procedure is the same as with your objections to the admissibility of any of the Crown's documents or objects.

As documents or objects are marked as “exhibits”, they will be given a number by the Court Registrar who is responsible for keeping track of all exhibits. If you request them, you will be given copies of all documents that are made exhibits and an exhibit list, which will be updated as the trial proceeds. The objects may be looked at but must remain in the possession and control of the Registrar.

k) Agreed Statements of Fact or Admissions

If you and the Crown agree on certain facts, then no evidence is required to prove those facts. The agreed upon facts will form part of the evidence which will be considered on this trial

l) Directed Verdict of Acquittal

At the end of the Crown’s case, you may ask the trial judge to decide that you should be acquitted of some or all the charges on the basis that the Crown failed to introduce any evidence upon which a reasonable jury, properly instructed, could find you guilty. This is called a directed verdict of acquittal.

If you ask the trial judge for a directed verdict of acquittal, the trial judge will ask you to explain why an acquittal should be directed. The trial judge will then ask the Crown to respond to your motion. The trial judge will then make a decision.

If the trial judge directs an acquittal, the trial judge will withdraw some or all the charges from the jury or dismiss the charges if the trial is a judge alone trial.

If the trial judge decides not to direct an acquittal on all or some of the charges, the trial will continue. You will then have to decide whether you will call evidence, by testifying yourself or by calling other witnesses to give evidence.

m) The Defence

Once the Crown has completed calling its evidence and any motion for a directed verdict has been heard (if dismissed), you have the following options:

- You have the right to call no defense and not to call any evidence. For example, you may decide that it is in your best interests not to call any witnesses because no other evidence exists which is favorable to your case or because you believe the Crown has not proven the offences beyond a reasonable doubt; or

- You may decide to call witnesses, including deciding to testify yourself, as part of your case.

n) Decision to Testify

You have the right to remain silent. You do not have to testify, and you do not have to ask anyone else to give evidence. The onus is on the Crown to prove each of the essential elements of the charges beyond a reasonable doubt.

If you do not testify or call other evidence, neither the Crown nor the trial judge may mention your decision not to testify in addressing the jury. Similarly, the jury cannot be asked to draw a negative conclusion based on your decision not to call a defence. If you do not call a defence, the only evidence the jury will have is the evidence presented by the Crown. In a judge alone trial, the trial judge also cannot draw any inference from your decision.

Whether in a jury trial or judge alone trial, if you do not testify or call witnesses, then the verdict will be based on the evidence introduced by the Crown alone. You will not be able to tell the trial judge or the jury what you or someone else would have said had you testified or called that person to testify.

If you decide to testify you will be asked to affirm or take an oath that you will tell the truth, and you will give your statement of the facts regarding what happened in this case. You cannot use this time to make arguments to the court. When you are done, you will be cross-examined by the Crown.

If you have a criminal record, you may not want the jury to know about any of your prior convictions. Before you testify, you can ask the trial judge to order that the Crown not cross-examine you about all or part of your criminal record. The trial judge will hear from you and the Crown and decide whether your criminal record can be referred to and/or to what extent it can. After the trial judges decides on this issue, you will be asked whether you would like to testify.

o) Defence Opening

Following the Crown's completion of calling its evidence, if you decide to testify or call evidence; you may give an opening statement of your own. Your opening statement should outline the

evidence that your witnesses will give when they testify. You are not required to give an opening statement, but you can if you wish.

You should remember that what you say in your opening statement is not evidence. Your opening statement can only be used by the jury to help understand your evidence as it is being introduced by the witnesses or yourself, if you choose to testify.

Before making this decision, you should remember three things:

1. First, anything you tell the jury in your opening statement is not evidence and cannot be treated as evidence by the jury or by the trial judge in a judge alone trial.
2. Second, you are not obliged to reveal your defence before you start to call your witnesses.
3. Third, you are not obliged to identify your witnesses before you begin to call them.

p) Defence Witnesses

Your Evidence

If you decide to testify, you may wish to be your first witness. While not required as a matter of law, by doing so you avoid any suggestion by Crown counsel that you waited until you heard what other witnesses said before deciding what your evidence would be.

If you testify, there will be no one asking questions during your examination in chief, therefore, you must come prepared on what you intend to say. You must rely on your memory rather than reading a prepared statement of evidence. However, you may prepare an outline or a chronology to assist you while you are in the witness box, to ensure that you cover all the points you wish to cover in your evidence. You will need to ask the trial judge for permission to use such a document. You will be required to tell the trial judge what the document is and why you need to look at it so that the trial judge can determine if it is permissible. The Crown counsel and the trial judge will review any document you wish to use to assist you in testifying and the trial judge will decide if you will be permitted to use the document to help you testify. If you need to look at any other document to remember details, you must also first ask the trial judge for permission to do so.

If there are any documents you wish to make exhibits, you will need to identify the document(s) during your testimony and ask that the document(s) be marked as an exhibit.

It is very important that you understand the difference between giving evidence and making submissions. All evidence from a witness (also called testimony) is given under oath or on affirmation by a witness from the witness box. An oath is an oath on a holy book of the witness' choice whereas an affirmation is a solemn promise to the court to tell the truth. Both have the same effect and consequences in law. With some exceptions, a witness can only testify about what the witness personally saw or heard. Generally, a witness cannot testify about what someone else may have seen or heard even if that other person told the witness about it. Only that other person can testify about it. Nor can a witness make a submission or an argument; a witness can only give evidence, not make submissions.

If you choose to give evidence, you can only give evidence in your role as a witness. Anything else you have said during the trial will not be considered evidence unless you also say it during your testimony.

Once your evidence as a witness has been completed, you can no longer give evidence unless you request an opportunity to give further evidence and the trial judge permits you to do so. Otherwise, you will be restricted to making submissions based on the evidence presented at trial.

In summary, you will be heard by the Court in only two ways: either as a witness giving evidence, or as a self-represented accused person making submissions at the end of the trial. You cannot combine the two and must always maintain this distinction.

Other Defence Witnesses

If an order excluding witnesses has been made in this trial, your witnesses must remain outside of the courtroom until it is their time to testify. You cannot tell them what the evidence heard in court was in their absence. You should also tell each of your witnesses that they should not discuss their evidence with your other witnesses who have yet to testify.

When it is time for your witness to testify, he or she will go into the witness box and take an oath or affirm to tell the truth.

The same rules apply to your witnesses as applied to the Crown witnesses. You will examine your witness first. You cannot ask your witnesses leading questions. The Crown is entitled to cross-examine each of your witnesses. You can then ask more questions of each witness as a

re-examination, but only about things that weren't part of your first examination and new matters that arose because of the Crown's cross-examination.

Whenever you ask a witness a question, you should allow the witness to finish their answer before asking the next question. A recording is made of everything that is said during the trial. If two people talk at the same time, it makes it very difficult to understand who said what on the recording.

It is important to remember that the Crown can cross-examine each witness that you ask to give evidence. You should not call a witness unless the evidence they give the court evidence will help your case or challenge the Crown's case.

You may also tender, as evidence, any documents or objects that are admissible by showing them to a Crown witness or during your evidence (if you testify) or through Defence witnesses who can identify and testify as to the nature of the document or object. If there is any dispute about the admissibility of a document or object, the trial judge will hear submissions from you and Crown counsel in the absence of the jury, if there is one, and then decide if the document or object is admissible.

You can ask anyone to come to court and give evidence in your defence. But you should realize that witnesses frequently have other commitments during the day. You should plan their attendance well in advance.

Remind your witnesses to bring with them any documents or other exhibits they have relating to your case, especially if you plan on entering the exhibit into evidence when your witness testifies.

q) Summoning Defence Witnesses

If you are concerned that any of your witnesses will not attend Court, you should arrange a subpoena, which is a formal summons to Court to testify. You will need to fill out Form 16 pursuant to s. 698 of the *Criminal Code*. Copies of this form can be obtained from the Trial Coordinator's office. You can complete the form in handwriting provided it is legible. Be sure to include a reference that the witnesses bring any documents you wish the witness to have during their evidence.

Once you complete the form, you will need to take it to the Trial Coordinator's Office, to have it sworn before a local Registrar. You must then "serve" the subpoena on the witness by arranging to have a copy of the subpoena given to the witness by one of the methods set out in the subpoena form. You should do this well in advance of your trial so that the witness has ample time to make arrangements to be present when needed.

If a witness fails to attend at trial or to remain in attendance in accordance with the requirement of a subpoena, they are liable to be arrested upon a warrant issued by this Court. You will have to prove to the judge that the witness was properly summons and should ensure that you have such proof available if necessary.

If you decide during the trial that a witness is required whom you have not subpoenaed, you will have to act quickly to arrange for the attendance of the witness as it is not likely that the trial will be adjourned unless there are exceptional circumstances. If that occurs, you should raise this with the trial judge. To avoid this problem, ensure you arrange to serve subpoenas on your potential witnesses well in advance of your trial.

Just because you serve a subpoena on a potential witness does not mean you have to call that person as a witness.

If you have reason to believe that a witness who has been served with a subpoena will not attend Court when required to do so, you should raise the matter with the trial judge as soon as possible.

If a witness is out of province, you can require him or her to come to court by issuing a summons. You should advise the pre-trial judge that you intend to summons an out of province witnesses and ask the trial judge for more information on the procedure for issuing a summons to out of province witnesses if this applies to you. You may also inquire, with he judge, on the possibility of the witness providing their testimony remotely over a video link.

r) Judge Questioning Witnesses

The trial judge also has the right to ask questions of any witness, whether called by the Crown or the Defence. The trial judge will usually only do so to clarify things that the witness has said or to check that the trial judge has understood the witness' evidence.

s) Reply Evidence

If you decide to call witnesses, after you are finished calling your witnesses, the Crown may ask more persons to give evidence to address the things that your witnesses have said. This is called reply evidence. Such evidence is strictly limited to that purpose and may not include evidence that should have initially been part of the Crown's case. If you are concerned that the Crown's proposed evidence should have been introduced as part of the Crown's case and is not proper reply evidence, then you can object to the introduction of this evidence.

If the Crown is permitted to call reply evidence, the Crown will examine each of their witnesses. You may then cross-examine them and, when you're done, the Crown may re-examine them.

That usually concludes the evidentiary portion of the trial.

t) Conference to discuss the trial judge's Final Instructions

In a jury trial, before your closing addresses to the jury, the trial judge will ask you, while the jury is out of the courtroom, about the things you want to be included in the trial judge's final instructions to the jury. The trial judge's final instructions to the jury is when the trial judge reviews the evidence heard during the trial and explains the law that relates to the evidence.

The trial judge may provide you with a draft copy of the final instructions. You should review it carefully as it provides you with what the trial judge considers to be the appropriate legal instructions to the jury. If you disagree with anything included in the draft final instructions or believe that other matters should be included, it is important for you to tell the trial judge at this conference.

The trial judge may also provide you with a draft summary of the evidence. This is usually separate from the draft jury final instructions. You should review the summary of the evidence very carefully. While it is the trial judge's summary of the evidence, if there are any mistakes as to the trial judge's recollection of the evidence, you should raise any areas you think the trial judge may have made a mistake as the trial judge would prefer to accurately refer to the evidence.

You should also review the draft summary of the evidence to ensure that the trial judge has not left out something that you consider is important or would not fairly summarize the evidence in a balanced way. You should raise any concerns with the trial judge at this conference.

u) Submissions / Closing Arguments

At the end of the trial, Crown counsel and you, may make submissions to the trial judge in a judge alone trial or as part of your closing address to the jury in a jury trial.

Submissions are observations and comments about either the Crown's position or its merit or about the Defence position and its merit, i.e. about guilt or innocence. Submissions may also be argument about legal issues. You can refer to the evidence that has been given, including the exhibits, when you make your submissions, but you cannot give evidence yourself when you are making a submission.

The purpose of your address to the jury, in a judge and trial, is to outline your defence, to review the evidence that supports your defence, and to point out the weaknesses in the evidence led by the Crown. You must not refer to anything that has not come out in the evidence. Accuracy with respect to the evidence is very important.

If there are any erroneous references to the evidence, by either you or the Crown in the closing addresses, the trial judge might address the jury and correct the error(s). You should try to avoid this situation by being careful and accurate with your references to the evidence.

You must not try to give new or additional evidence yourself during the closing. The time for evidence is over. Again, if you do give evidence, the trial judge will have to correct this with the jury.

You may also raise any questions or concerns you have regarding what the Crown has said in its closing address as incorrectly referring to evidence, being improper or not permitted by law.

If you have given evidence or asked any other witnesses to give evidence, you will give your address to the jury first. If you have not given any evidence, the Crown will go first, and you will address the jury last. You must not refer to anything that has not come out in the evidence.

v) Charge to the Jury

The trial judge will give the final instructions to the jury after you and the Crown have finished your addresses to the jury. During the trial judge's final jury instructions, the trial judge will tell the jury about the law it must apply and review some of, but not all , the evidence.

The jury will then leave the courtroom to consider the evidence and the law, and make its decision.

You must not interrupt the trial judge's charge/final instructions to the jury. The trial judge will give you an opportunity, after the jury has left to object to anything that was said in the final jury instructions. If the trial judge agrees with any of your objections, or those that the Crown might have, the trial judge will recall the jury and clarify the final jury instructions.

The jury's job is to determine the facts and then, based on the trial judge's explanation of the law, decide whether or not the Crown has proven you guilty beyond a reasonable doubt of the offences you are charged with.

The jury must be unanimous in deciding that you are guilty or not guilty of each charge. If the jury cannot reach a unanimous decision on any charge, the trial judge will have to declare a mistrial on that count and there may be a new trial on that charge at some future time.

Additional Trial Matters

These are some of the additional issues which arise in many trials that you should be aware of. If other issues come up during the course of the trial, the trial judge will assist you with those other issues as best the trial judge is able to do so.

a) Character Evidence

This is a caution regarding the introduction of character evidence. Character evidence relates to your personal characteristics or background which would tend to show a propensity for or likelihood of behaving in a particular manner.

If you introduce evidence that you did not commit the offence, that is not character evidence. However, if you suggest that you are not the type of person who would commit the offence that is character evidence.

Should you testify, if you say you are not the sort of person who would commit the offences you are charged with, this puts your character in issue. The same applies if you say something like “I am an honest person” or “I never cheat.”

You may introduce evidence regarding your good character. However, if you do so, this will permit the Crown to introduce evidence to rebut your good character evidence and/or call evidence of your bad character.

If you do not place your character in issue, the Crown may not lead evidence about your bad character or, should you testify, cross-examine you about your bad character.

If you cross-examine a Crown witness suggesting you are a person of good character, this may also put your character in issue and permit the Crown to lead evidence of bad character and, should you testify, cross-examine you on your bad character. The Crown can also bring an application to lead character evidence as part of their case.

b) Publication Ban

The court is generally open to the public. In some very limited situations, the public can be excluded from the courtroom. In some cases, the court can be requested to ban the publication of the names of the accused, complainant, or witnesses.

If this applies to your case, you may raise the issue with the trial judge and the trial judge will provide you with more information on this issue.

c) Voir Dire Hearings

A voir dire is a trial within a trial. It is a hearing held, without the presence of the jury, to determine whether an issue of fact or law will be admissible. For example, a voir dire will be required when there is a question about the evidence, such as the Crown wanting to use a statement that you made to the police or evidence the police seized during its investigation. Most of the time a voir dire will be heard before the actual trial starts.

During the *voir dire*, the trial judge will hear evidence to determine whether the evidence is admissible. You may cross-examine any witnesses the Crown calls, and in turn, they may be re-examined by the Crown.

During the *voir dire*, you will have the same options about calling witnesses, or testifying yourself, as you have during the rest of the trial. If you decide to testify or call witnesses, you and they will be subject to cross-examination by the Crown.

If you testify during the *voir dire*, the Crown might be entitled to ask you about the offences you are charged with. However, what you say cannot be used in the trial. However, you should be aware that, if you testify on a *voir dire*, and eventually decide to testify at the trial, you may be cross-examined on your evidence at the *voir dire*, if it is different from the evidence you give at the trial.

After hearing all the evidence during the *voir dire*, the trial judge will make a decision about whether the evidence is admissible in the trial. The trial judge will then ask the jury to come back in and the trial will continue.

d) Hearsay Evidence

The only evidence a witness can give is about the things he or she personally saw, heard or did. If a witness tries to give evidence about what someone else saw or heard, that evidence is normally not admitted. This is called hearsay. Hearsay also includes what someone else has said in a document unless that person is in court and can confirm what he or she wrote.

There are some special circumstances when hearsay evidence can be admitted. For example, any statements you may have made to a witness, that witness can testify that you made those statements. Another example are business records, like bank statements and income tax returns, which can also be admitted by certain witnesses.

Hearsay evidence can also be admitted if the trial judge decides that the evidence is necessary and reliable. “Necessary” often means that the person who saw, heard or did the thing is not available to the court. “Reliable” means that the hearsay evidence can be trusted because of the circumstances in which it was made. For example, the statement may have been video-taped or made under oath.

Hearsay evidence of what someone else told the witness is also admissible from the witness who heard the statement if it is not put before the Court for the truth of the statement but only to prove

that the statement was made by the person. In other words, the fact that the statement was made may, by itself, be relevant and admissible, quite apart from whether or not the statement itself is true. For example, if a witness at trial heard someone else say that they were going to hurt the accused person, that evidence could be admissible solely for the purpose of proving that this statement was made. This could be important if, for example, you take the position that you heard this statement and as a result certain things happened or were done because the statement was made.

If there is hearsay evidence that you wish to lead, you should alert the trial judge so that the trial judge can decide as to whether or not it will be admissible.

e) Prior Statements by the Accused

The Crown may ask to admit a statement that the Crown says you made to the police. The Crown must satisfy the trial judge, beyond a reasonable doubt, that the statement was made by you and that you made it voluntarily. This is dealt with by way of a pre-trial application.

"Voluntary" means that the police did not threaten you into making the statement or promise that things would go better if you made the statement. The Crown must prove that you knew what you were saying when you made the statement and made the statement of your own free will because that is what you wanted to do.

The Court will hold a *voir dire*, a hearing with the jury out of the room, to talk about the statement and whether it should be allowed into evidence. Usually, this will occur before the jury is selected or the trial starts. For example, you may wish to ask questions about whether the police told you of your right to speak to a lawyer and the availability of legal aid counsel to establish that the police breached your *Charter* rights before asking you questions.

f) Prior Witness Statements

The witnesses called by the Crown have probably given statements to the police and/or testified at the preliminary hearing. You can use these statements and any transcripts when you cross-examine a witness who made a statement.

If the witness said something different in their statement than what their evidence is at trial, you can cross-examine the witness about their earlier statement. If the witness said something

favourable about your case in an earlier statement, you can ask about that as well. If the witness says something different than what is in their statement, you can read the earlier statement to the witness, ask if they recall saying it, and then ask if it was true. If the witness cannot remember the question or the answer, a special procedure applies, and the trial judge will provide you with information about this procedure to admit the earlier statement if necessary.

If the witness says it was true, the earlier statement will be assumed to be true. If the witness says it is not true, the earlier statement may be used only to suggest the lack of truthfulness and believability of the witness. This is called impeaching a witness.

To impeach a witness based on different evidence given at the trial, first ask the witness if they recall providing a statement to police or if they recall attending at the preliminary hearing and answering questions under oath. You can put the date and place to the witness to help them recall. Next, read the relevant part of the prior statement or the questions and answers from the transcript to the witness, then ask if the witness recalls being asked these questions and giving these answers, and finally ask the witness if what was said earlier is true. If the witness says this earlier statement is true, the earlier statement is evidence in your trial for the truth of that statement. If the witness says it is not true, then the evidence may be used only in your trial to assess the credibility of the witness, i.e. the fact that the witness has said two different things.

g) Expert Witnesses

You may call experts to testify in your trial if the judge rules the evidence is admissible. Usually, experts are called to testify on matters relating to science or testing, medical and psychological matters. An expert's evidence is introduced to shed light on issues when those issues are needed to understand matters that are outside of common knowledge.

There are four points that must be met for the introduction of expert evidence:

1. it must be relevant;
2. it must be necessary to assist the jury/trial judge;
3. it cannot go against an exclusionary rule; and
4. the expert must be properly qualified.

If there is an issue whether the expert is permitted to testify, the trial judge will consider whether expert evidence should be permitted in the absence of the jury and make a decision.

A Crown expert cannot testify at trial unless the person calling the expert has served the other person with a report signed by the expert in advance of trial in accordance with the provisions of the *Criminal Code*. A Defence expert report must be served at the end of the Crown's case and before you call any evidence.

The report should set out the expert's name, address, qualifications and describe what the expert will say at trial. The report must state the expert's findings, opinions, and conclusions, as well as the documents, calculations and data they used in reaching their opinions or conclusions.

Once the report is produced, that expert may be examined and cross-examined at trial about the factual basis for their opinions, including any discussions between the expert and the person who hired the expert.

An expert witness, unlike an ordinary witness, is allowed to give their opinion, provided it is within their established expertise. Experts cannot offer opinions outside of their area of expertise. For example, an electrical engineer cannot provide an opinion about firearms.

An expert does not take over the function of the trial judge or the jury, if there is one. The expert may only interpret the evidence based on their special knowledge. The expert is not allowed to make recommendations on the outcome of the trial.

h) Transcripts

While the entire proceeding will be recorded, there will not be daily transcripts available for you to review. If you want to order transcripts of the trial proceeding, speak to the Court Reporter when the court is recessed and obtain information for ordering the transcripts.

Sentencing

If you were found guilty at a trial or if you plead guilty you will attend a sentencing hearing. After a sentencing hearing a judge will decide what sentence to give you. There is a wide range of possible sentences:

- Absolute Discharge: a finding of guilt without any other penalty or fine.
- Conditional Discharge and Probation: a finding of guilt combined with a probation order.

- Suspended Sentence and Probation: a conviction without a jail sentence but with a probation order.
- Fine
- Jail:
    - Intermittent Sentence: A type of sentence served in intervals, usually weekends.
    - Conditional Sentence: a jail sentence served in the community with conditions.
    - Jail sentence to be served in a provincial institution (less than two years)
    - Jail sentence to be served in a federal penitentiary (two years or more)

A sentence may also include other orders such as a ban from possessing a weapon, a requirement to provide a sample of your DNA, or a requirement to register with the sex offenders' registry. A sentence may also have other consequences for your work, travel, and immigration status. It is important to speak to a lawyer about the consequences of a sentence. Even if you did not have a lawyer assist you in the trial, you can still have a lawyer assist you for sentencing.

The Crown will present recommendations for what sentence they think would be appropriate. You will also be able present your case for a lesser sentence. You and the Crown may be permitted to call witnesses and present evidence. The judge will then decide on what sentence to give you. A sentencing hearing might be right after your trial or guilty plea or you can ask to have it adjourned to a later date in order to prepare.

A judge needs to consider the following objectives for sentencing when deciding what sentence to give you (see s.718 of the Criminal Code):

- Denunciation of the offence
- Deterrence of the offender and of others from similar conduct
- Protection of the public
- Rehabilitation of the offender
- Reparation to victims
- Promotion of a sense of responsibility in the offender

The type of sentence applicable to you will depend in part on the offence (some have a minimum jail time or fines attached), your circumstances and arguments you and the Crown present to the judge.

When starting to prepare for your hearing consider the following:

- Check the Criminal Code (or the statute under which you are charged) to see what the maximum sentence is for the offence on which you are to be sentenced. Some Annotated Criminal Code texts will have a table of offences to help you find this information.
- Check to see if that offence has a minimum sentence.
- If you don't know already, find out what the Crown will be saying is the appropriate sentence.
- Consider what impact that sentence would have on your life.

When presenting your position include:

- Your name, age and place of birth
- Your family background and current status, including whether you have any dependents
- Your education and training.
- Your job and employment history.
- Any physical or mental health issues.
- Anything about your background or present circumstances that will help the judge understand your situation and / or your offence.
- Reference letters from family, friends, colleagues or employers.
- Rehabilitation plan.
- Why the sentence you submit is appropriate, including any research you have done on what the appropriate range of sentence is for similar offences and offenders with similar background or circumstances to you.

Appeals

Once you have received the judge's or jury's decision / order regarding either the verdict or the sentence, you might want to appeal the decision(s). You can appeal your conviction, your sentence, or both. An appeal is where you argue in a higher court that the court that made the decision in your case made an error (usually in misapplying the law to the facts of your case). The decision to appeal should not be taken lightly. Making an appeal can be timely and costly. It is important to get legal advice. A lawyer can help assess the probability of success if you were to appeal a decision.

An appeal is not a new hearing or a new trial. There are no affidavits, witnesses or juries. The job of the appeal court is to decide if there were any legal or factual errors made at the trial or in the judgment, and whether the errors had an effect on the outcome.

It is not enough to be unhappy with the result of a trial. In order to succeed on appeal, you must show that the judge's decision was unreasonable or cannot be supported by the evidence, the judge made a mistake about the law, or there was a miscarriage of justice.

Mistake about the facts: This is when the evidence given at trial was misunderstood by the judge or the judge drew an improper inference from it. Appeals on mistake of fact are seldom allowed and a decision may only be overturned where it is found to be unreasonable or cannot be supported by the evidence. Generally, appeal courts will not disagree with a lower court's decision about the credibility of witnesses.

Mistakes about the law: Generally, if the judge's decision about the law is wrong, the case can be appealed. When there is a jury, you may also be able to appeal if the judge made an error in their instructions to the jury.

Glossary of Legal Terms

Absolute Discharge: The lowest level adult sentence. It is a finding of guilt, but there is no fine or penalty. An absolute discharge could show up on some types of criminal records checks for one year after sentence.

Accused: Someone who has been charged with committing an offence.

Acquittal: When the court finds the accused not guilty of committing an offence.

Act: An Act is a written law that has been passed by the federal or provincial legislature. Also called legislation or statute.

Actus Reus: the physical act of committing the criminal offence.

Adjournment: The postponement, suspension or interruption of an ongoing hearing, proceeding, or trial, to resume at some future date. This may be at the request of one of the parties or directed by the Court. It is always the Court who decides whether or not to adjourn the proceedings.

Admissible Evidence: Evidence that may be received by a trial Court to aid the judge or jury. Generally, evidence must be both relevant and material to be admissible, as well as not barred by any specific rule. In addition, the inclusion of the evidence should not be significantly unfair or prejudicial to a party.

Affidavit: A document that contains facts that a person swears or affirms to be true. A lawyer, notary public, or commissioner for affidavits must witness the person's signature and sign it.

Alternative Measures: For a less serious offence, police or Crown might offer an alternative to going to trial. The accused may be given an opportunity to accept personal responsibility for their behaviour by agreeing to make amends to the victim and the community – e.g. by making an apology and / or paying compensation for the loss or damage, or by agreeing to go to drug treatment court.

Appeal: When either the accused, or defence counsel (lawyer) on their behalf, or Crown counsel ask a higher court to review the decision of a lower court because they believe there has been a serious error.

Application: a request to the Court to decide on a matter relevant to the case.

Arraignment Hearing: This is held to determine how the accused person will plead (guilty or not guilty); what mode of trial they elect (jury or judge alone).

Bail Hearing: A court hearing where a judge decides if an accused will be released from custody while awaiting their trial or appeal. May also be referred to as a show cause hearing or judicial interim release hearing.

Bail: A court order (a "Release Order") releasing an accused from custody while they are awaiting trial or appeal and requiring them to obey certain conditions (rules) and return to court on a specific date. In some cases, bail orders may require a money deposit or a bail surety. See "Surety" in this glossary.

Bail Review: A application and hearing before the Superior Court asking a judge to review a person's detention order or bail conditions.

Beyond a Reasonable Doubt: The burden of proof in criminal law means the judge or jury deciding the case is very sure that the accused is guilty. In a criminal case, Crown counsel must prove all the elements of the offence beyond a reasonable doubt.

Burden of Proof: The party who must prove something, on whatever standard (e.g. beyond a reasonable doubt) has the "burden of proof".

Case Law: Decisions of courts relating to a particular matter or issue. Case law from the same level of court or other jurisdictions may be persuasive, but the court does not have to follow it. Case law from a higher court is binding on the lower court.

Charge: The specific criminal offence(s) a person is accused of committing. If a person is charged, it means they have been formally accused by the Crown of committing a crime.

Complainant: Any person who is the subject of the alleged harm that comprises the charge against an accused – see Victim.

Conditional Discharge: A type of sentence that involved a finding of guilt and a probation order that carries certain conditions. After the probation period is over, if you've met all the conditions, the discharge becomes complete. A conditional discharge may show up on some forms of criminal records checks for three years after the completion of probation.

Court Order: A legally binding direction by the Court to do something. There are serious legal consequences for disobeying a court order.

Court Reporter: A trained professional who creates official records of things said during examination for discovery/questioning, and court proceedings. This may also be done electronically

Criminal Record: Information about a person's record of convictions in the criminal justice system. Criminal Records are kept in central computer systems which most police agencies across Canada can access.

***Criminal Rules of Proceedings*:** Rules that govern the criminal practice and procedure of the Court. They provide guidelines for each step in the prosecution of an alleged offence and set time limits for when certain steps must be completed.

Cross-Examination: The questioning of a witness by a lawyer or party on the other side – who did not call the witness to testify. Cross-examination takes place after the lawyer or party who called the witness to testify has finished asking question in direct examination (or examination in chief). The purpose of cross-examination is to test the witnesses' truthfulness or reliability. Questions in cross-examination are allowed to be leading, that is, to suggest a certain answer.

Crown Counsel / Prosecutor: Lawyers who work for the government's prosecutions service. It is their job to present the Crown's (or the state's) case in criminal matters. They are also known as prosecutors and "Crown". In Canada, crimes are dealt with as wrongs against society as a whole and therefore, Crown counsel act on behalf of all members of the public and do not represent victims specifically.

Defence Counsel: The lawyer representing the person accused of an offence.

Detention Order: When a detention order is given by a judge, the accused is denied bail and remains in custody until the conclusion of the trial or appeal, subject to bail reviews or detention reviews. A detention order may also contain conditions not to contact the victim, witnesses, or other named persons.

Direct Examination: The questioning of a witness in court by the person who called the witness to court. The questions must be open ended and must not suggest a specific answer – i.e. they cannot be leading questions. Direct examination is also called examination in chief.

Discharge: When a person is found guilty or pleads guilty, but the judge decides that a conviction and criminal record are not necessary. See Absolute Discharge and Conditional Discharge.

Disclosure: Is the Crown's obligation to give the accused all relevant information it has about the case. The Crown must disclose, or share, with the accused all the relevant information gathered in the investigation so that the accused can fully defend themself against the charges. The documents and other material provided by the Crown are often called the disclosure package or particulars.

Diversion: See Alternative Measures.

Duty Counsel: Lawyers paid by Legal Aid or otherwise publicly funded, or pro bono, who may help unrepresented persons, generally at courthouses or places of detention, in providing brief, summary services, related to various civil, family, criminal, or immigration law problems, depending on the jurisdiction, Duty counsel provide free legal advice for a specific court appearance, but do not take on your whole case or represent you at trial.

Election: For most indictable offences (with some exceptions), the accused is entitled to elect, or choose, how to be tried: by a Provincial Court judge without a jury; or by a superior court judge without a jury; or by a superior court judge with a jury. After the accused elects their mode of trial, they may re-elect (i.e. change to a different mode of trial) but only with the consent of the Crown. Some other legal restrictions set out in the Criminal Code may also apply.

Elements of the Offence: Each offence in the Criminal Code may be broken down into "elements" that comprise the offence. Each element must be proven beyond a reasonable doubt before the accused is found guilty of the offence.

Evidence: Oral or written statements under oath or affirmation by a witness, or "real" evidence, such as documentation or objects (which become exhibits), presented to the court by agreement of all parties, and the judge, or under evidentiary rules, to prove facts.

Exhibit: A document or object admitted as evidence in court.

Expert: A witness who gives evidence to help the court understand technical and scientific issues in the legal action. He or she may give opinions in areas that would not normally be within the judge's knowledge. The expert must be shown to possess the necessary skill and qualifications

in the area in which their opinion is sought. An expert can give evidence in person, and / or by writing a report called an expert report.

Facts: Something that can be shown to be true, to exist, or to have happened. In a legal case it is based on or related to the evidence presented. Matters of fact are issues for a judge or a jury to decide.

Final / Closing Arguments or Submissions: At the end of the trial, you will present your argument to the court (judge alone in civil and family trials and judge and jury in some criminal trials). It is a summary of your position based upon the evidence that has been presented to the court about the decision that the court should make.

First Appearance: Describes the first time the accused is required to come to court.

Guilty: A person found guilty of a criminal offence as originally charged, or a lesser and "included offence" (e.g. simple assault is an included offence of aggravated assault) either as a result of an acknowledgment by the accused pleading guilty, or as a result of a trial at which the accused was found guilty beyond a reasonable doubt.

Hearing: A proceeding before a judge to determine questions of law and / or questions of fact, whether the hearing of an application or the hearing of a trial.

Hearsay: Testimony that is given by a witness based on what others have said or observed rather than what the witness personally heard or observed. Generally, hearsay evidence is not admissible during a trial, however, there are a number of exceptions to hearsay being inadmissible – it is a complex legal area.

Hybrid Offence: The Criminal Code creates two categories of offences, Indictable and Summary Conviction. Hybrid offences (sometimes known as dual offences) are those which Crown can proceed with under either category. The Crown's decision will be based on the seriousness of the circumstances, when the offence occurred, whether or not the accused has been previously convicted of a similar offence and the likely sentence to be incurred. Once the Crown decides and advises the judge in open court, the offence is treated as the kind the Crown has chosen.

Indictable Offences: A category of criminal offences that are usually more serious crimes and carry greater maximum sentences than summary conviction offences. Because these offences may have a more significant consequence to the accused if convicted, the accused has a choice about what level of court will hear the trial. The accused can usually choose to have the trial held in Provincial / Territorial Court before a Provincial / Territorial Court judge, or a superior court judge alone, or by a superior court judge with a jury. If the accused is found guilty, the potential maximum sentences are the same, regardless of whether the trial was in a superior or provincial/territorial court, or with or without a jury.

Indictment: An indictment is the document used in a superior court that sets out the charges.

Information: An information (sometimes called a summons or appearance notice) is the document used in the provincial / territorial court that sets out the charges.

Innocent Until Proven Guilty: This is the rule that a person accused of a crime is innocent until the judge or the jury decides that the evidence presented by the Crown at the trial proves, beyond a reasonable doubt, that he or she committed the crime.

Intermittent Sentence: An intermittent sentence allows the offender to serve his or her time of incarceration in intervals (for example on weekends).

Issues: Factual or legal matters in dispute between the Crown and the accused in a criminal case.

Judicial Interim Release: See Bail.

Jurisdiction: A court's power or authority over people, territories, or subject matter.

Leading Question: A question that prompts or encourages a desired answer. Usually allowed in cross examination but not allowed in direct examination (or examination in chief).

Leave of the Court: The court's permission to proceed with certain types of applications or appeals or to proceed in a certain way.

Legal Advice: Advice from a lawyer about the law as it applies to a particular case. It usually includes information about whether, why and how a party should do something.

Legal Aid: Free legal information, advice and representation for people who cannot afford a lawyer and who qualify for the services.

Material Fact: A fact that is important to proving your case.

Mens Rea: the intent to commit the criminal offence.

Motion: a request for Court to decide on a matter relevant to the case.

Not Guilty: A plea made by an accused person. This plea signals the burden on the Crown to prove the accused's guilt beyond a reasonable doubt. "Not Guilty" can also be the finding of a judge or jury following a trial in which Crown was unable to prove the accused's guilt beyond a reasonable doubt.

Objection: A statement made by a party during a hearing or trial for the purpose of challenging any specific evidence sought to be introduced. Common objections during trial include when a party inappropriately asks leading questions, when a party asks multiple questions at once, when a party asks vague or confusing questions, when a witness gives inadmissible hearsay evidence or opinion evidence, and when a party tries to introduce privileged information as evidence. The judge determines whether the objection succeeds or not, and may suggest a different form of question.

O'Connor Application: Is an application made by the accused requesting documentation from a party other than the Crown or its agents, to produce relevant documents for the purpose of using them in court.

Offence: A state recognized crime or violation of a statute (written law passed by the federal parliament or a provincial / territorial legislature) that results in a penalty.

Onus: The burden of proof – who (which party) has to prove something.

Open or Open-ended Questions: Questions that cannot be answered with a simple yes or no. They usually begin with who, what, where, why, and how.

Order: A ruling made by a judge or master that tells a party to do something or not do something. It can also be the document that sets out the decision of the judge or master (in some civil and family cases).

Particulars: See Disclosure.

Peace Bond: An order made by a judge in criminal court, designed to protect one person from another. The peace bond lists certain conditions that must be followed by the person the peace bond has been issued against. The conditions usually include that the person have no contact, direct or indirect, with the other person, and that they stay a certain distance from that person's residence, place of work, etc.

Plea: The statement an accused person makes to the court when asked if they plead guilty or not guilty to the offence charged.

Precedent: An earlier decision of a court or a higher court that should generally be followed in subsequent similar cases.

Preliminary Hearing / Inquiry: A preliminary hearing is a court proceeding that may be held before the trial to determine if there is enough evidence on the charges to proceed with a trial. If there is a preliminary hearing, it is held in the Provincial / Territorial Court.

Promise to Appear: The accused may be released by a police officer after promising to appear in court on a specific date. The document signed by the accused is called a "Promise to Appear".

Proof Beyond a Reasonable Doubt: It is the responsibility of the Crown to prove an accused's guilt beyond a reasonable doubt before the court can find an accused person guilty. Therefore, after hearing all the evidence, if the court has reasonable doubt about whether the accused is guilty, the accused receives the benefit of that doubt and is acquitted. Also see Burden of Proof.

Publication Ban: An order the Court makes that prevents anyone from publishing, broadcasting, or sending any information about the particular matter described in the publication ban. Often, this is information that could identify a victim, witness, or other person who participates in the criminal justice system.

Prosecution: When a person is charged with an offence and legal proceedings are pursued against them.

Re-Examination: Questions asked by the party or counsel who called the witness, after cross-examination by the other party or counsel. Re-examination happens if the cross-examination has brought out new facts, or if something raised for the first time in cross-examination was unclear.

Retainer: An agreement with a lawyer for legal work is called a “retainer”. A written retainer letter sets out the work that the lawyer has agreed to do, what the lawyer will not do, and how the lawyer’s pay will be calculated. The retainer agreement sets out the scope of your lawyer’s involvement in the file.

Reverse Onus: In bail hearings, it is usually the responsibility of the Crown to "show cause" why an accused should be detained while awaiting trial. In very limited circumstances, this responsibility (onus) shifts to the accused. When this applies, the accused must "show cause" why they should not be detained.

Rowbotham Application: If you’re facing serious and complex criminal charges and you have been denied legal aid but can’t afford a lawyer, you can make a Rowbotham Application to the court. If you are successful, a lawyer will be appointed to you by the government.

Search Warrant: A court order authorizing entry to somebody’s property to look for evidence related to an offence.

Sentence: A sentence is the penalty or punishment, pronounced by the Court upon the accused who has pleaded or been found guilty of an offence.

Show Cause: See bail hearing.

Statute: See Act.

Stay of Proceedings: A stay of proceedings might be directed by Crown or the Court. The first is when the prosecution process is suspended, by the Crown, for up to one year. If the Crown does not recommence the prosecution within one year, the criminal process is terminated. The second is when the Court suspends the case until further notice.

Subpoena: A subpoena (pronounced sub-pena) is an official court document, which orders a witness to come to Court to give evidence and to bring relevant documents, and that failure to do so could have serious negative consequences.

Summary Conviction Offences: These offences are usually less serious than indictable offences. The maximum penalty for a summary offence is usually a $5,000 fine and / or six months in jail. Some summary offences have higher maximum sentences.

Summons: An official notice telling an accused person they must appear in court at a specific time and place to give evidence. A summons is also used to require potential jurors to appear in court on a specific date and time for jury selection.

Surety: is the person who vouches that the accused will attend court as required and will obey all conditions of their bail while he or she is on bail awaiting trial or appeal. Depending on the terms under which a surety is accepted, the surety may be at risk of losing significant assets if the accused does not abide by his or her bail conditions or fails to attend Court.

Testify: To declare or say something in the witness stand under oath / affirmation in a court of law.

Trial: A criminal trial is the court proceeding where the Crown presents its evidence against the accused person, and the accused person may present evidence in their defence (or may elect not to). The judge or jury then determines if, based on the facts and law, the accused person is guilty or not guilty of committing the offence charged.

Verdict: The decision the judge or jury makes about whether an accused committed the offence(s) with which they were charged. The verdict can be either guilty or not guilty. In criminal cases, a jury's verdict, must be unanimous.

Victim: The victim (often called the "complainant") is an individual who suffers physical or mental injury, or economic loss as a result of an offence.

Voir Dire: It is a hearing held (before or within a trial), without the presence of the jury in jury trials, to determine an issue relating to the trial. For example, a voir dire may be used to decide whether certain aspects of an expert witness' testimony will be allowed, or whether a statement the accused person made to the police was voluntary and admissible in evidence.

Warrant for Arrest: A judicial order that gives the police the power to arrest the person named in the warrant, so that person can be brought to court.

Witness: A person who gives evidence in a court proceeding orally under oath or affirmation, or by affidavit. Witnesses are persons who testify in court because they have some information about the case. A witness may volunteer to testify or may receive a subpoena (a legal document which orders him / her to come to court at a certain time to testify).

Young Person: Under the YCJA (Youth Criminal Justice Act) a youth charged with an offence allegedly committed when they were 12 years old or older, but younger than 18, is called a "young person". The charge and prosecution are governed by the YCJA, as well as the Criminal Code (or other statute that the charge is under), and there are special considerations and procedures to take account of the young age of the person.