CHAPTER 1

Learning Objectives

After completing this chapter, you should be able to:

- Outline the major components of the Canadian criminal justice system.
- Explain the importance of social control and its relationship to how crime is regulated.
- Differentiate among the various definitions of crime.
- Summarize the major components of the normative system of the Canadian criminal justice system.
- Outline the major components of the rule of law.
- Summarize the major ideologies of the Canadian criminal justice system, including their goals.
- Summarize the key decision points of the formal criminal justice system.
- Summarize the major components of the informal criminal justice system.
- Describe the various types of discrimination in the criminal justice system.

An Overview of the Criminal Justice System in Canada

This chapter provides an overview of the issues, agencies, and practices found within our criminal justice system. It begins by briefly reviewing the basic ideas about what is meant by crime, justice, and criminal justice and then identifies some of the challenges facing our criminal justice system. This is followed by an outline of the major areas of our criminal justice system, including an overview of its formal procedures and informal organization. Our criminal justice system has developed as a response by the state to alleged and actual violations of the criminal law as well as the appropriate punishments when someone is convicted. How our criminal justice system operates is important: we expect our system of justice to follow the rule of law and uphold the legal rights of all individuals and to treat all members of society equally.

Changes to our criminal law and new legislative initiatives impact criminal justice policies and processes. Regardless of the nature of these changes, we expect the criminal justice system to search for truth and uphold justice by, for example, ensuring that the innocent are not wrongfully punished or that the outcomes of decisions are not inaccurate. Our laws, legislation, and procedures have to achieve justice, ensure legal rights are upheld, and uphold both fairness and equality. The following chapters will elaborate on many of the major issues facing our criminal justice system by placing them within the context of each of the major institutions (the police, the courts, and corrections).

Since our criminal justice system deals with individuals who are suspected of committing a crime; arrested by the police; tried in a court of law; and, if convicted of an offence, punished, an important task at the outset is to examine what exactly is meant by "crime." Some people answer this question by stating that it is an act that is in violation of the criminal law. Yet, when asked to give examples, most people think about crimes committed by strangers in public spaces. Another response

may recognize there are many other criminal offences (e.g., domestic violence and corporate crime) that may not be as visible but are just as or more harmful. Another question we could ask is who decides "what is crime"? It is important to recognize that crime is not a fixed, objective entity but rather the result of laws created by changing views of what is acceptable behaviour in society or changes in how laws are enforced. A key point is that the way in which people decide to respond to crime has a profound impact upon who enters our criminal justice system and how it operates.

What, then, is criminal justice, and what is its purpose? The most common answer to this question is to look at the formal response to crime by the state and/or the functions of its various agencies (i.e., the police, the courts, and corrections). Criminal justice in this view is

> [t]he process through which the state responds to behaviour that it deems unacceptable. Criminal justice is delivered through a series of stages: charge, prosecution; trial; sentence; appeal; punishment. These processes and the agencies which carry them out are referred to collectively as the criminal justice system (Hudson 2006:93–94).

Others prefer to answer the above question by identifying what they feel are the most important forms of our criminal justice system, including:

> *Substantive law*: The content of the criminal law provides the starting point …
>
> *Form and process*: Who responds to crime and what procedures must be used?
>
> *Functions*: What are the intended consequences and aims of the system?
>
> *Modes of punishment*: What sentences are available to the courts? (Davies et al. 2005:8)

But what is "justice" in the context of "criminal justice"? We have all probably experienced someone asking us what we understand by criminal justice. Some of us may have responded by identifying the following as essential aspects of justice within our criminal justice system: *fairness*, *personal liberty*, *respect*, *tolerance*, *equality*, *public safety*, *rights*, *due process*, and *appropriate punishment*. You might have also added to your answer that justice is found in our procedures and laws to protect the well-being of both individuals and communities.

Are there any challenges to attaining justice? A number of challenges that face our criminal justice system could be identified, including the overrepresentation of Indigenous people, Black people, and vulnerable and marginalized groups. Other challenges that could be mentioned here include the problems associated with mandatory minimum punishments, the length of time it takes for a trial to begin, the underreporting of crimes by victims to the police, as well as the necessity of having alternative approaches, such as specialized courts and restorative justice, that may better serve people to attain justice.

What, then, is the best way for our criminal justice system to achieve justice? When deciding how justice might be achieved, responses usually include the importance of having a criminal justice system that treats everyone equally. This is thought by many to be the way our criminal justice system operates, but others may disagree as they feel certain laws or procedures aren't just. While all of the major institutions in our criminal justice system have differing organizational structures and goals, each recognizes that they try to achieve justice. All these institutions are concerned with who deserves justice, how people should receive justice, and how justice is to be delivered.

Who *deserves* justice? Almost everyone would agree that people who experience harm or suffer an injury at the hands of someone when a crime has been committed deserve justice. And most would support the idea that people who have allegedly broken the law also deserve justice while they are investigated and tried in a court of law, as they are presumed to be innocent. Deserving justice could also mean there is an impartial and deliberate process that provides individuals with the same access to justice as everyone else. That is, people deserve justice by being treated impartially and equally, having the same rights, privileges, and opportunities. But are there limits as to who deserves justice? Some people would argue that once a person is convicted of a crime, they don't deserve the same extent of justice as law-abiding citizens. This has led to debates about whether individuals convicted of certain types of crimes should receive less justice than others.

Another question is how should people *receive* justice? To facilitate an impartial and deliberate process in which people are treated impartially and equally, a number of institutions and procedures have emerged and evolved in Canada. We could point out that people in our society receive justice through the operation of the criminal justice system; that is, through the practices of such agencies as the police and the courts, as well as the various individuals who work within these agencies, such as lawyers. When someone is convicted of a crime they enter into the correctional system, and here, too, they should receive justice.

Who makes sure that the system of criminal justice *delivers* justice in a fair and impartial manner? In our society, it is typically the federal or provincial governments who take on the responsibility of ensuring justice is achieved and maintained. But what are the best policies

that will allow a society to attain social control as well as to manage risk? What approaches are best when it comes to protecting law-abiding citizens and treating those who are charged and found guilty of a crime fairly?

In summary, in our society when most people speak of justice they are referring to an expectation that justice is found in the application of the law as well as the relevant institutions found within our criminal justice system. Before we can explore in detail various issues related to the Canadian criminal justice system, we need to ask broader questions, such as "What are the essential characteristics of our criminal justice system?" and "How are cases processed through our criminal justice system?" To do so, we need to look at the major institutions of our criminal justice system as well as some of the ways our criminal justice system operates. It is these areas that are the focus of the remainder of this chapter.

The Canadian Criminal Justice System

The police, the courts, and corrections are the major elements of what most people think of as the criminal justice system. The police play the major role up to arrest—their role is to investigate crimes, collect evidence, arrest any suspects, and talk to prosecutors. The courts are involved in adjudication, and they decide whether any person charged is guilty of a crime as well as determining the type and amount of punishment for the guilty. Corrections, which comprises many different forms, takes over after a person is found guilty of a crime. Each element plays a key role in our criminal justice system, and this text arranges the chapters in order to be consistent with the flow chart found later in this chapter (see Figure 1.4).

The Major Components of the Canadian Criminal Justice System

In order to understand the structure of the Canadian criminal justice system, we need to first look at its three major agencies: the police, the courts, and corrections.

The Police

Three main levels of police agencies exist in Canada: municipal, provincial, and federal. The most common type of police agency is found at the municipal level. Some municipalities establish their own police force and hire their own police personnel; others contract with the Royal Canadian Mounted Police (RCMP) to provide police services. As of 2021, at the municipal level, there were 137 stand-alone police services and 35 First Nations self-administered police services. Municipal police services are found in almost every major Canadian city, including Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Montreal, and Halifax. The 10 regional police services in southern Ontario (including the Halton Regional Police Service and the Peel Regional Police) are classified as municipal police services. Some larger municipalities (including Burnaby and North Vancouver, BC) contract out with the RCMP, but most municipalities that do so have a population between 50,000 and 100,000. Most jurisdictions in Canada have some municipal police services; the exceptions are Newfoundland and Labrador, Yukon, the Northwest Territories, and Nunavut.

Each province is responsible for developing its own municipal and provincial policing services. This means a province may require all cities within its jurisdiction that reach a certain population size (e.g., any city with more than 50,000 people) to form and maintain their own municipal police service. Provincial police services enforce all relevant laws in those parts of the province that are not under the control of a municipal police service. Besides the RCMP, which operates at the provincial level in most provinces, there are currently three provincial police services: the Ontario Provincial Police, the Sûreté du Québec, and the Royal Newfoundland Constabulary.

The RCMP is organized under the authority of the *Royal Canadian Mounted Police Act* and is part of the portfolio held by the federal minister of public safety. The RCMP, while involved in municipal and provincial policing across Canada, is also charged with other duties, such as enforcing federal statutes, carrying out executive orders of the federal government, and providing protective services for visiting dignitaries. In addition, it operates forensic facilities and an educational facility in Ottawa (the Canadian Police College), as well as the Canadian Police Information Centre (CPIC), the automated national computer system used by all Canadian police services.

The RCMP are responsible for all federal policing across Canada.

The Courts

All provincial/territorial court systems in Canada, with the exception of Nunavut, have three levels, though their formal titles differ by province (Russell 1987). The **lower courts** are called the provincial courts in most jurisdictions, although in Ontario they are referred to as the Court of Justice and in Quebec as the Court of Quebec. Higher than the lower courts are the **superior courts**, usually known as the Court of King's Bench or Supreme Court (Trial Division). In Ontario these courts are called the Superior Court of Justice, and in Quebec they are called the Superior Court. The highest level of criminal court in any province or territory is the appeal court. The court with the greatest authority in any criminal matter is the Supreme Court of Canada (SCC). The Nunavut Court is unique in Canada in that it consists of a single-level trial court and superior court judges hear all criminal, family, and civil matters. This system was introduced to simplify the structure of the courts, improve accessibility, and reduce the travel required of judges.

The provincial courts are the first courts most Canadians encounter when they are charged with a criminal offence. These courts are typically organized into specialized divisions that deal with different areas of the law. For example, a province may decide to divide its provincial court into a criminal court, a family court, a small claims court, a youth court, and a family violence court. These courts deal with the majority of criminal cases, including disorderly conduct, common assaults, property offences, traffic violations, municipal by-laws, and provincial offences (see Figure 1.1).

Corrections

An accused, having been found guilty, may be sentenced to a term in the federal or provincial/territorial correctional system. In Canada, the correctional system involves various facilities, agencies, and programs. The responsibility for adult corrections is divided between the provincial/territorial governments and the federal government. Provincial and territorial governments are responsible for any individual serving a term of **incarceration** under two years and for all non-custodial sentences (e.g., probation). The federal government, through the Correctional Service of Canada, is responsible for any adult sentenced to a prison term of two years or more. A person sentenced to a term of two years or more who decides to appeal the conviction or sentence will first be incarcerated in a provincial facility. Those who waive the right to an appeal are sent directly to a federal institution to start serving the sentence.

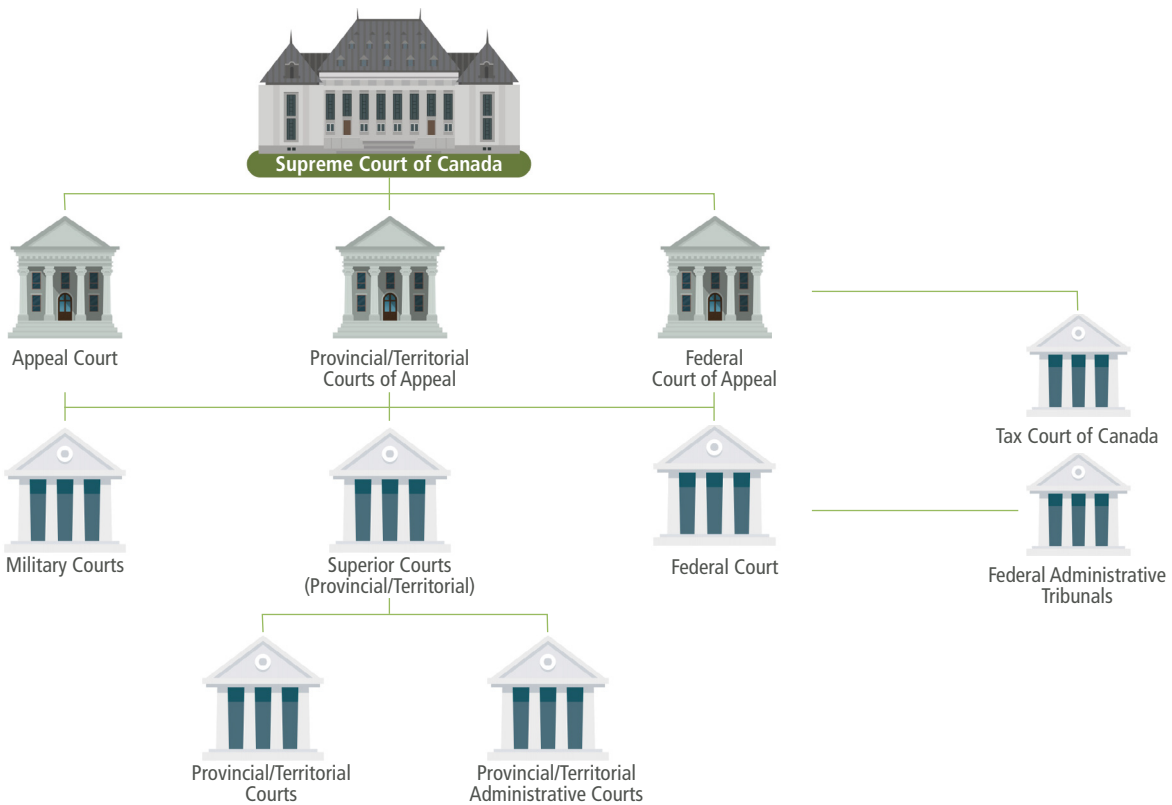


FIGURE 1.1 Canada's Court System: How the Courts Are Organized

The highest level of court in a province or territory—the appeal court—hears appeals from the superior courts and occasionally from provincial courts. These courts do not try criminal court cases; rather, they deal with issues concerning sentence lengths and the possibility of procedural errors. Defendants rarely appear in cases heard in appeal courts. Instead, lawyers representing the Crown and the defendant argue the case before a panel of appeal court judges.

What Is Crime and How Is It Regulated in Canada?

In order to understand our criminal justice system, we need to ask the question, "What is crime and how is it regulated?" To answer this question, we need to look first at the meaning of social control and then at some of the different ways to define crime.

It is important to recognize that behaviours in a society are shaped by common ways of thinking, feeling, and acting. Since some individuals engage in activities that are inconsistent with the welfare of society, systems have been developed that indicate the disapproval of those who break with approved ways of thinking and acting. In Western societies, an important function of governments has been to develop mechanisms of social control. Various formal and informal social control systems have emerged over time—in Canada, our formal system of social control has developed to include the police, the courts, and the correctional system.

What Is Crime?

How does a society define crime? And how should we deal with issues such as equality, justice, privacy, and security? There are no easy answers to these questions as people hold different opinions on how we should define crime and achieve justice.

Criminal law is reserved for wrongful acts that seriously threaten the social values of Canadians. These wrongful acts are reflected in the various categories of crime found in the *Criminal Code*, such as violent and property crime. According to Bowal and Lau (2005:10), it is important to understand crime as it "largely defines a society because it mediates the powerful forces of security, morality, and control." They also point out that criminal law is not static, because as social attitudes change, "our definitions of crime are constantly refashioned in response."

There are two commonly used definitions of crime. The first focuses on the violation of a criminal law, the second on the determination of guilt in a criminal court. According to the first definition, an act can be called a crime only when it violates the existing legal code of the jurisdiction in which it occurs. The second approach—sometimes referred to as the "black letter" approach—stipulates that no act can be considered criminal until a duly appointed representative of the criminal court (e.g., a judge or a jury) has established the guilt of an offender.

These two definitions have two important consequences. First, without the criminal law there would be no crime. In other words, no behaviour can be considered criminal "unless a formal action exists to prohibit it." Second, no behaviour or individual "can be considered criminal until formally decided upon by the criminal justice system" (Muncie 2002:10). In essence, then, a criminal act can be established only once it is determined that it violates the criminal law and/or when an accused person is found guilty in a court of criminal law.

A number of criticisms have been directed toward the use of these two definitions. According to Muncie (2002), these criticisms include the fact that not every individual who violates the criminal law is caught and prosecuted. Another is that many criminal acts are not prosecuted even after the authorities have discovered them. Muncie also raises the issue that these two definitions neglect "the basic issue of why and how some acts are legislated as criminal, while others remain subject only to informal control" (2002:12). Further, he points out that these definitions separate the criminal process from its social context—that is, they look only at how the courts treat people and ignore the significance of society and how changing social norms influence the decisions made in our criminal justice system.

Criminologists have forwarded alternative definitions of crime for many decades. For example, some view crime as a violation of social norms (see Exhibit 1.1). This definition was first used by the criminologist Edwin Sutherland, whose research into corporate crime led him to argue that crime shouldn't be defined by criminal law but rather on the basis of two more abstract notions: "social injury" and "social harm." He felt that the essential characteristic of crime is that it is "behaviour which is prohibited by the State as an injury to the state" (Sutherland 1949:31). He also noted that there are two abstract criteria that are necessary elements in a definition of a crime—the "legal descriptions of an act as socially harmful and legal provision of a penalty of an act." According to him, some sort of social normative criteria must be applied before any definition of crime can be developed. In part, this means that we need to consider how crime, law, and social norms are linked. We can do this by asking what behaviours should be regulated. Today, this type of approach is visible in attempts to classify behaviour as "criminal" on the basis of normative decision-making. For example, some Canadian cities now equate crime with disorderly conduct (such as panhandling), arguing that such conduct undermines public safety and security.

EXHIBIT 1.1 Differing Definitions of Crime

Legal: Crime is that behaviour prohibited by the *Criminal Code*.

Social norms: Crime is that behaviour that violates social norms.

Social constructionist: Crime is that behaviour so defined by those who have the power to do so.

Source: Walklate, S. (2005). *Criminology: The Basics*. London, Routledge.

Investigating: Changing Definitions of Crime: Medical Assistance in Dying

Some of the criminal laws in Canada are ***mala in se*** (e.g., murder); that is, they are immoral and inherently wrong by nature. Those that are ***mala prohibita***—for example, sex work and assisted dying—are behaviours prohibited by law. But what constitutes *mala prohibita* has changed over time. Some laws in Canada once considered appropriate are no longer thought to be applicable. What usually happens is debates emerge about whether an act should remain in the *Criminal Code*. Then an individual challenges a law, and if the Supreme Court hears the case and subsequently agrees with the defence by finding the law unconstitutional, the federal government will have to draft new legislation.

Medical Assistance in Dying

This is what happened during the past 30 years over the issue of whether or not individuals should have the "right to die"—that is, are people legally entitled to have assistance to end their own life? This is known as assisted suicide: the intentional act of providing a person with the medical knowledge to die by suicide (*Criminal Code* s. 241(b)). While suicide had been decriminalized in 1972, helping someone else die remained a crime. If an individual who violated this law was found guilty of an indictable offence, they could be sentenced to prison for up to 14 years. However, criminal cases involving charges of assisted suicide were not common in Canada. A report published in 2007 found only 40 cases where there had been a charge of assisted suicide, but it also said that "there are thousands of cases in Canada in which doctors have illegally helped patients die" (Eckstein 2007:1). A later study found three persons who, after performing an assisted suicide, had been convicted and sentenced to a period of incarceration. They also reported that at least 18 other cases had come to the attention of the authorities in which the defendants were acquitted, the charges were stayed or dropped, or a charge was not laid (Royal Society of Canada 2011:35).

How did this law change? The constitutionality of the law on assisted suicide was first raised in 1993 by Sue Rodriguez. She suffered from amyotrophic lateral sclerosis (ALS) and, when informed she had 14 months to live, requested assistance to die by suicide. She argued that the section on assisted suicide in the *Criminal Code* violated her rights under sections 7, 12, and 15(1) of the Charter (*Rodriguez v. British Columbia (AG)* (1993)). She lost both her case and appeal in British Columbia and then appealed to the SCC. But the SCC, in a 5–4 decision, held that a "Charter violation was present, but that the violation was necessary in order to protect society's weak, vulnerable and disabled." Ms. Rodriguez died by suicide in 1994 with the assistance of an anonymous physician.

Over the next two decades, public support in favour of physician-assisted death increased significantly. During this time some other jurisdictions, including the Netherlands and the US state of Oregon, had legalized the process. In Canada, a number of private members in the House of Commons tabled assisted-dying legislation, but they did not succeed as the federal government did not support these initiatives.

In 2009, the Quebec College of Physicians surveyed more than 2,000 of its members and found that 75 percent of them favoured euthanasia as long as it occurred within clear legal guidelines. Eighty-one percent informed the pollsters that they had seen euthanasia practised in Quebec, with most of the cases involving the suspension of medical treatment accompanied by sedation (Peritz 2009). One month later, it was reported that Quebec doctors had "issued a cautiously worded policy … suggesting Criminal Code changes to protect doctors who follow an 'appropriate care logic' to end the life of suffering patients facing 'imminent and inevitable death'" (Perraux 2009:A5). In June 2014, Quebec became the first jurisdiction in Canada to legalize physician-assisted death by placing the new law into its provincial health legislation.

The next constitutional challenge occurred in 2011 when Gloria Taylor, who was also suffering from ALS, was informed that she would die within a year. In December 2011, the British Columbia Supreme Court agreed to expedite her case for assisted suicide (Hume 2011). The Court granted Ms. Taylor the right to assisted suicide, and she became the first Canadian to win the legal right to receive a doctor's help to die. The federal government appealed this ruling, and in October 2013 the BC Court of Appeal overturned the lower court's ruling. The SCC agreed to hear an appeal of this and other similar cases and in 2015 unanimously held in *Carter v. Canada (AG)* that adults facing a grievous and irremediable medical condition and for whom natural death must be reasonably foreseeable had the right to end their life with a physician's assistance. The SCC held that the *Criminal Code* provisions that made physician-assisted dying a criminal offence interfered with the section 7 Charter right to life, liberty, and security of the person. This decision was suspended for a year to give the federal government time to change sections of the *Criminal Code* to align with section 7 of the Charter. The federal government then amended the *Criminal Code* (Bill C-14), and in June 2016 the medical assistance in dying (MAID) law was passed. At the end of 2022, over 44,000 individuals had received MAID across Canada since the law was enacted.

In 2017, Quebec resident Jean Truchon, who had been living with spastic cerebral palsy since birth and was completely paralyzed except for his left arm, and who had been recently diagnosed with severe spinal stenosis and myelomalacia (a degenerative condition with no treatment), applied to receive MAID. Quebec is subject to the *Criminal Code* but its provincial law (*Act Respecting*

Investigating: Changing Definitions of Crime: Medical Assistance in Dying (*Continued*)

End-of-Life Care) allows individuals with a "reasonable foreseeability of natural death" to seek physician-assisted death. His doctor refused his application as his condition would not lead to his death in the foreseeable future. In 2019, the Superior Court of Quebec heard the case, ruling that the reasonable foreseeability of natural death was unconstitutional (*Truchon c. Procureur général du Canada* (2019)). The legislative response of the federal government was to pass Bill C-7 in 2021. This removed the eligibility criteria—that is, the requirement for death to be reasonably foreseeable—and changed it to a condition that had to be both grievous and irremediable. New safeguards were introduced for those eligible persons whose death is not reasonably foreseeable.

Bill C-7 temporarily excluded, until March 2024, people who are suffering only from mental illness from receiving MAID. A joint parliamentary committee consisting of members of Parliament and senators was created to evaluate whether individuals with mental illness should receive MAID. In January 2024, they submitted their final report to the federal government with the majority of members saying that MAID in this area should not be allowed until the health and justice ministers are satisfied, "based on recommendations from their respective departments and in consultation with their provincial and territorial counterparts and with Indigenous peoples, that it can be safely and adequately provided" (Kirkup 2024:A6). The committee also noted that it should be formed again one year prior to any change that would allow MAID for individuals whose only reason is a mental disorder, "to verify the degree of preparedness" (Kirkup 2024:A6). In February 2024, federal legislation was brought into force that extended the exclusion of those individuals suffering solely from mental illness from eligibility for MAID until March 17, 2027. A significant issue here is that mental illness needs to be grievous and irremediable, which is defined by the *Criminal Code* as "incurable, with an advanced state of irreversible decline in capability" (Belland 2023:28). Critics point out, for example, that it's difficult to accurately predict incurability for individuals with mental disabilities and thus any expansion of MAID should wait until there is more consensus on this issue.

Table 1.1 shows major milestones for MAID in Canada from 1993 to 2024.

Questions

1. What was the *Criminal Code* definition of assisted suicide when Sue Rodriguez challenged the constitutionality of the law? What happened in her case?
2. What led to the change in assisted suicide? What was the SCC's decision in *Carter v. Canada*?
3. What were the issues in *Truchon c. Procureur général du Canada*, and how did the federal government respond to this Quebec case?

TABLE 1.1 Timeline for MAID in Canada

1993	Sue Rodriguez is denied her request for assisted suicide in British Columbia.
1993	The SCC dismisses the appeal by Rodriguez.
1994	Sue Rodriguez dies at home with the assistance of an unknown doctor.
2012	The SCC, in a case involving Gloria Taylor, rules that Canada's laws against physician-assisted suicide are unconstitutional.
2012	Gloria Taylor dies from an infection.
2014	The National Assembly of Quebec passes the end-of-life care bill in June 2014 and it becomes law in December 2015.
2015	The SCC hears an appeal from the British Columbia civil liberties association requesting that the Court overturn the legal ban on physician-assisted dying.
2015	The SCC unanimously overturns the legal ban on physician-assisted suicide.
2016	The federal government passes the medical assistance in dying (MAID) law, allowing people with a "reasonable foreseeability of death" to seek physician-assisted death.
2019	The Superior Court of Quebec hears the case of Jean Truchon and rules that the "reasonable foreseeability of death" requirement is unconstitutional.
2021	Bill C-7 is passed by the federal government in March 2021. It allows people to access MAID through two differing eligibility approaches. This legislation excludes people who are suffering only from mental illness until March 2023.
2023	The federal government passes legislation to extend the ban to exclude people who are suffering only from mental illness until March 2024.
2024	Legislation is passed extending the exclusion of people suffering only from mental illness until March 2027.

Crime has also been called a "constructed reality," or "social construction," as it is created by societal response, such as the definitions and perceptions of legislators, perpetrators, victims, and other legal actors (such as the police and prosecutors). This perspective views crime as a result of social interaction that involves the alleged offender, victim(s), police, court personnel, and even lawmakers. According to this definition, the actions of alleged offenders are important but so are those factors that affect the decision to prosecute, including the wishes of the victim; the prior record of the alleged offender; the resources of the prosecutor's office; the nature of the evidence; and perhaps the race, gender, and ethnicity of the offender.

All of these definitions can be used to describe and analyze the nature of crime in our society. Yet definitions of what is considered a crime can change. Since the introduction of the *Canadian Charter of Rights and Freedoms* (the Charter) in 1982, numerous changes have occurred about what is a crime in Canada. For example, abortion was legalized, as was physician-assisted death, which is now available to most Canadians through the medical assistance in dying (MAID) legislation. The *Investigating* feature highlights how a type of activity once considered to be criminal can be altered as perceptions change, with the result that how that behaviour is regulated has been revised but issues remain as to how many people should be able to access it.

Social Control

One of the primary functions of criminal justice is **social control**. Social control refers to the various types of organized reaction to behaviour that violates our criminal law and thus protects law-abiding citizens. We can measure and judge our criminal justice system as an institution of formal social control—the police, the courts, and corrections all have the function of controlling crime in some way. As societies develop, they adjust the ways in which criminal behaviour is defined as well as how the social control systems respond to such behaviour. Historically speaking, criminal behaviour has been attributed to immorality, wickedness, and poverty (among other things). At the same time, the mechanisms for maintaining social control have also changed. For example, societies have attempted to socially control criminals through death (i.e., capital punishment) as well as rehabilitation. Whatever approaches are used, the objective has always been to in some way control behaviour viewed as criminal.

In our contemporary society, the most typical way of trying to control both crime and criminals has been to establish a formal system of criminal justice that will enable the major institutions of social control—the police, the courts, and the correctional system—to investigate, prosecute, and punish offenders. Remember, though, these institutions cannot do whatever they wish as limits are always placed on them by various laws, such as the Charter.

SUMMING UP AND LOOKING FORWARD

The very concept of "justice" is challenging as it raises questions about how it should be received and delivered. The way in which we conceive of justice in our society is important as it can raise questions about the best way to approach social control. While we may agree on how we interpret justice, differing definitions of crime have emerged. As a result, we can consider a variety of ways to be the best approach to study and understand crime in our society. Many people prefer the "black letter" definition as it focuses upon those convicted in a court of criminal law; others prefer to identify more with the social constructionist approach as they feel by studying the actions of the various agencies within our criminal justice system we gain a better understanding of crime in our society. The legal response to certain types of behaviours (e.g., MAID) can change over time, from one in which there is a blanket prohibition to one in which there are legal options.

So, what are the essential elements we have developed in the hopes our criminal justice system operates as a just system? This question is the subject of the following section.

Review Questions

1. What is justice and how should it be delivered and received?
2. What are the differing definitions of crime, and how do they influence our understanding of a "crime"?
3. What is social control and what is its relationship to our understanding of crime?
4. Summarize how legal change can occur by discussing the timeline of MAID.

The Normative Framework of Our Criminal Justice System

Our criminal justice system is not a series of unrelated ideas and decisions that are placed together in a haphazard fashion. A number of key elements form the basis of our criminal justice system, and while some of these may be more recognizable than others, each one impacts the decisions made throughout the entire system. These elements establish our normative approach to criminal justice: this includes discovering the truth, the rule of law, protecting the legal rights of individuals, ensuring that

everyone can access justice, and guaranteeing that citizens are treated with fairness and equality. It is important to recognize that as social norms change in our society, the Charter "will evolve as well. [One] might think that certain constitutional principles get decided and then they're fixed forever, but the law doesn't work like that" (Lacy, in Fine 2021:A15).

The Adversarial System

An **adversarial system** of justice has a number of components. Both parties involved hope to win the case and have the right to argue about what evidence the court will consider. A feature of this system is that a prosecutor (representing the state) is concerned initially that justice is to be done (e.g., that charges are laid only where enough evidence exists to support them) and later on with the successful prosecution of the case. Another is for the trial to be heard by an impartial fact finder—the judge—who is trained in the law and who is not involved in presenting evidence or questioning witnesses. This guarantees that the defendant receives a fair trial. The judge ensures that the appropriate questions are asked and that the rules of a criminal court case are followed.

In theory, all levels of our court system operate in an adversarial manner. The purpose of the adversarial system is to search for the truth—specifically, to determine the guilt or innocence of the accused. This system has been designed to ensure that the accused's fundamental legal rights are protected, that the trial is fair, and that the final decision is impartial. Issues have been raised about the benefits and limitations of the adversarial system of justice, and some of these are outlined in Exhibit 1.2.

Substantive and Procedural Justice

How does our criminal justice system operate to make sure that its decisions are fair and equal and do not discriminate? The answer to this question is found in part by looking at what our society considers the most important components of justice. The first component is **substantive justice**—specifically, the accuracy or correctness of the *outcome* of a case and the appropriateness of a judgment, an order, or an award. If a criminal suspect is in fact guilty, a verdict of "guilty" is a just decision. However, if the suspect is in fact innocent of the charge, then the verdict of "not guilty" is just. Substantive justice is primarily concerned with the truthfulness of the allegation, the accuracy of the verdict, and the appropriateness of the sentence. The high expectations we have of our criminal justice agencies to make correct decisions are the result of our concern with substantive justice.

The second component is **procedural justice**, which refers to the decisions made by courts and the government impacting "the rights and interests of individuals" and, as such, it "seeks to preserve, above all else, the fundamental fairness of the process" and is the "main method by which we enforce and observe the fundamentals of fair trials and other proceedings" (Davison 2006:17, 19). If fair procedures aren't used the trial cannot be just whether or not substantive justice was attained. For example, a person who is found guilty could in fact have violated the law (substantive justice), but if unfair procedures were used at some point during the investigation and/or trial, the conviction will be considered unjust according to procedural justice. This situation is sometimes brought to our attention when a higher court in this country, such as a provincial appeal court or the SCC, rules there was a problem with the procedural fairness in a case (e.g., the interrogation of the suspect by the police did not follow appropriate procedures). In Canada today, issues involving procedural justice are more common than those involving substantive justice.

EXHIBIT 1.2 Benefits and Limitations of the Adversarial System of Justice

Benefits

- A clear division exists among the various actors and agencies.
- As much evidence as possible is looked at in each case, particularly as it benefits each side, since each is committed to winning.
- The legitimacy of the criminal justice system is promoted through the appearance of fairness operating throughout the criminal justice system.

Limitations

- The opposing sides often cooperate in order to reach a desired result, thereby undermining procedural justice in favour of efficiency.
- The length of a trial becomes a concern, since each side presents as much information as possible in the hope that they will be able to win the case.
- Relevant evidence may be excluded if the judge considers that its use will violate the Charter.

The Rule of Law

According to the rule of law, in our system of justice there is a "sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Resolution to Amend the Constitution, 1981*). In other words, society must be governed by clear legal rules rather than by arbitrary personal wishes and desires. Central to this is that no one individual or group has a privileged exemption from the law unless an exception

is identified. Everyone is subject to the laws that have been introduced by the government. To protect society from the self-interest of individuals or groups, the rule of law ensures that laws are created, administered, and enforced on the basis of acceptable procedures that promote fairness and equality. The **rule of law** plays a central role in our society as it "forms part of the supreme law of our country, binding on all levels of government and enforceable by the courts" (Billingsley 2002:29). Davison (2006:17) points out that the rule of law means that "all members of society must follow and obey the law no matter what their area of activity or endeavour …" and that it "provides certainty and stability in our dealings with one another."

The basic elements of the rule of law include the following:

- *Scope of the law*. This means that there should be no privileged exemptions to the law. All people come under the rule of law. There are political and social aspects to this statement. Government under law is the political component. Both the government and public officials are subject to the existing law. The social aspect is equality before the law.
- *Character of the law*. This means that the law should be public, clear enough that most people can understand it, and relatively clear and determinate in its requirements.
- *Institution of the law*. In the Anglo legal system, this means that there are certain rules that the institutions of the law must produce in order for the law to be fair and just. These include an independent judiciary, written laws, and the right to a fair hearing.

But what happens when laws discriminate against individuals and/or groups because judges, when they make their decisions, say they are following the "rule of law"? According to former SCC Justice Abella, "[m]uch of what's done in the name of rule of law can be unjust." She points out that the role of a judge "should be to support a 'just rule of law' or a 'rule of justice,' a notion that evokes a more assertive purpose" (Abella, in Fine 2021:A15). The "law is there to serve the public, and to serve the public's need for justice."

Access to Justice

One component of the rule of law is **access to justice**, which involves the idea of legal equality, found in section 15 (the equality section) of the Charter. This section sets out that each individual is equal under the law and is entitled to be treated without discrimination based on, for example, age, sexual orientation, sex, race, religion, and mental or physical disability.

The SCC has held that the right of access to our courts is an essential aspect of the rule of law. In *BCGEU v. British Columbia (AG)* (1988), the Court ruled on an issue involving the right of unionized civil servants to picket in front of their place of work—in this case the courts in British Columbia, which led to issues concerning the rights of other people to access the courts. The SCC upheld a lower court's injunction against picketing in front of courts, stating that although the injunction infringed on the right to peaceful assembly under section 2(b) of the Charter, the infringement was a justifiable limit based on section 1 of the Charter. The decision was based on the assertion that one right could not be at the expense of another important right, in this case access to justice (Seaman 2006). In their judgment, the SCC held that "there cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (at para. 25).

Parker (1999:31) points out that the "history of access to justice movement can be read as an ongoing struggle to overcome the discrepancy between the claims of substantive justice and the formal legal system." Since a key aspect of access to justice in our criminal justice system involves the provision of legal services, "much access to justice policy relies either directly or indirectly on reorganizing institutions of legal professionalism and legal service delivery." The three components of the access to justice movement are (1) legal aid, (2) public interest law, and (3) informal justice.

Starting in the mid-1960s, demands for better access to justice began to increase with demands for improved systems of legal aid. While the state has had a responsibility to provide effective, efficient, and accessible courts since the time of the Magna Carta (1215), historically the ideal of equal justice has oftentimes favoured the socio-economic elite since it was they who possessed the resources to access and enjoy the benefits of individual

The physical presence of our courts conveys their importance and high status in our society.

rights and liberty. In the mid-1960s, the obligation to ensure legal representation was introduced, leading to an increase in the ability of people to access the courts through legal aid.

Public interest law focuses on achieving justice by emphasizing group participation in law and placing traditionally underrepresented and marginalized members into groups in order that they be better represented in the legal process. Since the Charter can lead to issues of "fundamental societal significance, access to Charter justice enables the resolution of public interest issues important to the whole community … public interest litigants are crucial to realizing the Charter's democratic potential because they illustrate the systemic impacts of the law on the most vulnerable people" (Phillips 2013:23). This approach attempts to change laws, court procedures, and the nature of legal practices in order that access to justice can be attained by the members of various groups whose voices have traditionally not been heard in court, such as consumer action groups and environmental and women's movements.

A third type of approach that attempts to increase access to justice is informal justice, which has attempted to increase access to justice through the creation of alternatives to the traditional criminal justice system. A significant and successful part of this approach was the introduction of restorative justice (see Chapter 3). Other examples include the introduction of mediation and arbitration services, alternative dispute resolution, and community justice centres.

SUMMING UP AND LOOKING FORWARD

How does our criminal justice system operate to ensure that its decisions are fair and equal? The answer to this question is found in part by looking at what our society considers the most important characteristics of justice. The critical characteristics of our system of justice include the adversarial system, substantive justice, procedural justice, the rule of law, access to justice, and feelings of legitimacy toward criminal justice institutions. These are some of the essential aspects of the normative framework of our criminal justice system. While there is almost total agreement on the above characteristics, there is not necessarily as much agreement on what the goals of our criminal justice system should be. Various goals have been identified and these have allowed different conceptualizations to be put forward about what our criminal justice system should achieve. This has led to the identification of principles and characteristics that ultimately provide for different understandings of the role of criminal justice in our society. It is these ideologies, referred to most commonly as models, that are the focus of the next section.

Review Questions

1. Identify each of the major characteristics of our criminal justice system.
2. Do you think that the adversarial system always leads to the discovery of truth?
3. To what extent do you think the normative framework is practised throughout our criminal justice system on a daily basis?
4. Identify and discuss laws that may represent an unjust rule of law.

The Major Ideologies of Canada's Criminal Justice System

One of the important aspects of our criminal justice system, as a social institution and as one of social control, is that it operates as an ideology. An ideology consists of beliefs that guide individuals or groups. This means that the people can interpret the operations of the various elements of our criminal justice system based upon different belief systems. When this occurs, value conflicts can emerge. One of the most important value conflicts is how we should approach controlling crime: should there be more individual freedom or social order? The best-known analysis of these value conflicts is the work of Herbert Packer (1968), who described two models that are helpful in understanding the issues and decision-making of our criminal justice system. What Packer called models are in fact ideologies, and he developed two of them: the **due process model** (Figure 1.2) and the **crime control model** (Figure 1.3).

Packer pointed out that different agencies can prioritize a different model than other agencies, although they are able to co-exist. For example, the police prefer the crime control model, while prosecutors follow the due process model.

The due process model emphasizes the rule of law and the protection of the legal rights of the accused. It is viewed as being just and fair by upholding the ideal of equality throughout all areas of the criminal justice system. This approach operates on the basis of "the need to administer justice according to legal rules and procedures which are publicly known, fair and seen to be just" (Hudson 2001:104). The most important goal of this model is not to reduce crime but to see that justice is done—specifically, by protecting the legal rights of the accused. This ensures that innocent people are not

convicted. If they are, a serious wrong has occurred somewhere in the justice system and it needs to be corrected immediately. The best way to protect the rights of the accused is to limit the powers of criminal justice officials. The criminal justice system under this model operates very differently than it would under the crime control model—it operates like an obstacle course.

According to Sykes and Cullen (1992), the crime control model is best characterized by such statements as "get tough on crime" and "the criminal justice system is weak on criminals." It holds that the most important goal of the criminal justice system is to reduce crime by incarcerating criminals for lengthy periods of time. This reduces lawlessness, controls crime, and protects the rights of law-abiding citizens. To achieve this goal, the criminal justice system operates like an assembly line—it moves offenders as efficiently as possible to conviction and punishment so that effective crime control is attained. Certainty of punishment is achieved through mandatory sentences, longer prison terms, and the elimination of parole.

The crime control model rests on the presumption of guilt. That is, most individuals who are arrested are in fact guilty and so great trust is placed in the decisions made by criminal justice officials, who wish to protect society. To ensure conviction, very little attention (if any) is placed upon the legal rights of individuals being processed through the system. The model assumes that criminal justice officials make few errors (if any), since most defendants are guilty. Each stage of the criminal justice system involves a series of uniform and routine decisions made by officials.

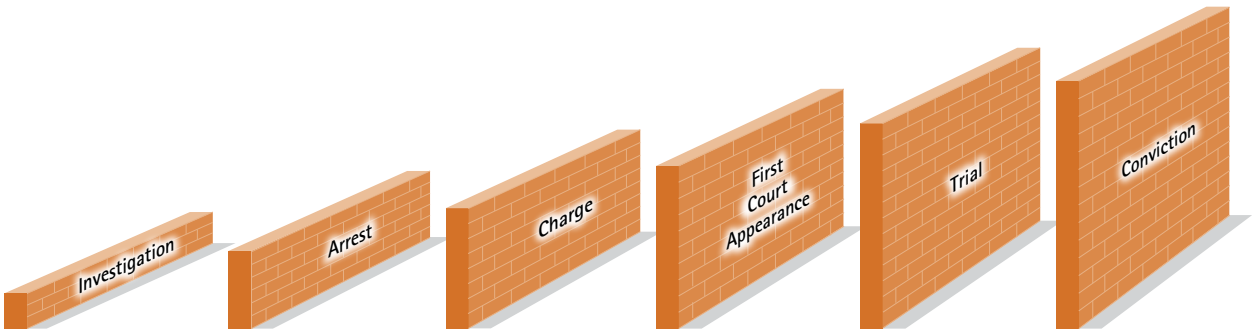


FIGURE 1.2 The Due Process Model

The due process model is an obstacle course.

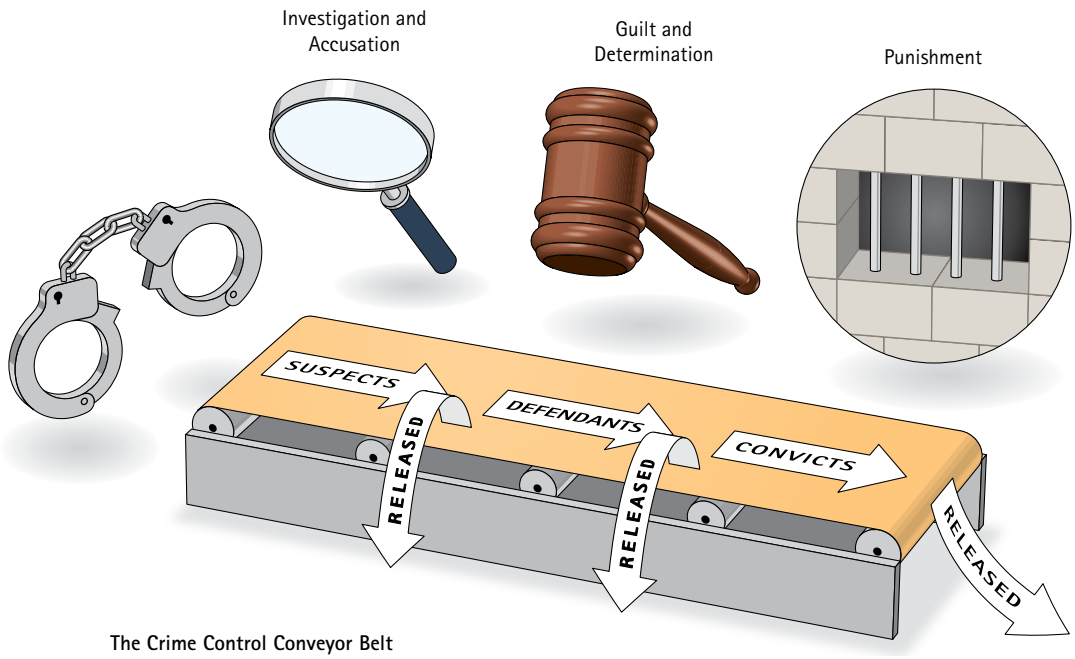


FIGURE 1.3 The Crime Control Model

Finality is important to officials, because it indicates that there are few problems with the system and that, as a result, there will be few challenges to the system. Support for the use of discretion throughout the system is a key feature of this model, since legal technicalities would reduce its efficiency. When the criminal justice system is allowed to operate as efficiently as possible, it is believed that the crime rate will be reduced. Furthermore, when issues about the administration of justice come into conflict with the goal of protecting society, the crime control model errs in favour of protecting the rights of the law-abiding citizenry.

The crime control model highlights law and order and that the focus of the criminal justice system should be to eliminate crime and to convict and incarcerate all offenders. Others have attempted to develop different models, largely on the grounds that the original ideologies developed by Packer fail to take into account the current realities of the criminal justice system. Some believe that the criminal justice system possesses a multitude of goals beyond due process and crime control, while others focus on the impact of scarce resources. King (1981), for example, identified two other models, one of which is what he referred to as the **medical (rehabilitation) model**, whose goal it is to rehabilitate those convicted of a criminal offence. The majority of activities associated with this model are found at the latter stages of the system, after the individual has been convicted and is being assessed by those who work in the court system or in corrections. Probation officers assist judges by preparing pre-sentence reports, providing information to the judge about an offender's needs. They may recommend release into the community with conditions, which may include attending appropriate treatment programs or involvement in a therapeutic court such as a problem-solving court (see Chapter 11). If the individual is sentenced to a period of incarceration, correctional staff may select the appropriate treatment program for the offender.

The second model developed by King is the **bureaucratic model**, which emphasizes the pressures felt by those working in the criminal justice system to work within numerous restrictions, such as scarce resources, as well as the intense pressure placed on them by the public to solve crimes. Cost-effectiveness has increasingly become a major issue for the various agencies in the criminal justice system over the past few decades. According to King, these restrictions have led various agencies to create measures of bureaucratic efficiency, such as making sure that those charged with a criminal offence are tried within a reasonable period of time. Otherwise, charges may be dropped on the basis that the government has taken too long to try their case. If a defendant decides to plead not guilty, both the prosecution and defence have to prepare a case, which may involve the expenditure of significant amounts of resources. However, if the defendant pleads guilty much of this cost can be avoided. As a result, guilty pleas are more cost-effective than prosecuting the majority of cases.

Others have attempted to update the models to reflect more contemporary goals relevant to the criminal justice system. Roach (1999), for example, has proposed an alternative model: the **punitive model of victims' rights** and the **non-punitive model of victims' rights**. Roach views the punitive model as more of a rollercoaster approach to punishment, in a continual state of crisis as the rights of victims and potential victims are in constant conflict with the rights of the accused. The non-punitive model is portrayed as a circle that "symbolizes successful crime prevention through family and community-building and successful acts of restorative justice" (Roach 1999:699). For Roach, the benefit of an emphasis upon a non-punitive approach is that it would lead to a reduced tendency to rely upon the constant use of the criminal sanction.

Table 1.2 summarizes models of the criminal justice system and their major goals. Ruth and Reitz (2003) prefer to ignore differentiating between separate models and instead offer a unified set of goals they believe should be shared among all major agencies operating within the criminal justice system. They identify five goals; the first four are the ones the criminal justice system should achieve, while the fifth goal focuses upon the proper size and scope of the system itself (see Exhibit 1.3). Each goal is interrelated with the others, and while they may never be attained, they nevertheless serve as a guide to the formal and affiliated agencies working within the criminal justice system.

What Is Criminal Justice?

When most people are speaking of justice they are referring to the fairness of our criminal law system, and their view is informed by three different assumptions. First, guilt, innocence, and the sentence should be determined fairly and in accordance with the available evidence. Second, punishment should fit the offence as well as the offender. Third, like cases should be treated alike and different cases differently (Law Reform Commission of Canada 1977).

This view of criminal justice currently guides most Canadians' thinking regarding the most appropriate form for justice to take in our society. It is most closely related to what is called the justice model (see Chapter 3). This approach emphasizes that justice is achieved when the various agencies of our criminal justice system follow legal rules and procedures that are publicly known, fair, and just. Key components of this approach are ideas such as the presumption of innocence, procedural fairness, and the need to follow legal rules. Discretion and unequal treatment must be reduced as much as possible.

TABLE 1.2 Models of the Criminal Justice System

Models	Goals
Crime Control Model (Packer)	Assembly line (efficient) justice
	Factual guilt
	Public safety
	Punish offenders
	High rate of conviction
Due Process Model (Packer)	Fairness, equality, and justice
	Obstacle course
	Legal guilt
	Protection from the powers of the state
	Search for truth
Medical (Rehabilitation) Model (King)	Needs of the offender
	Treatment of the offender
	Discretion of judges
	Expertise of treatment personnel
	Community reintegration
Bureaucratic Model (King)	Management of criminals
	Speed of case processing
	Efficiency of system
	Management of resources
	Administrative discretion
Punitive Model (Roach)	Rollercoaster
	Factual guilt
	Victims' rights
	Victim focus throughout the system
	Greater punishment
Non-Punitive Model (Roach)	Circle (healing, cooperation, restoration)
	Victims' needs
	Reduction of harm
	Non-adversarial emphasis
	Reduced involvement of criminal justice actors

A primary principle of the justice model is that punishment should be proportional; that is, "commensurate to the seriousness of the offence" (Hudson 2003:40).

It is argued that when these rules and procedures are followed, our criminal justice system operates in an efficient, fair, and impartial manner (von Hirsch 1976). An important component of the justice model is "justice as fairness," or equality before the law. Here, the rule of law dictates that justice prevails in every stage of the criminal justice system, so no one person experiences discrimination.

EXHIBIT 1.3 Ruth and Reitz's Unified Goals of the Criminal Justice System

Goal #1: To reduce the amount of crime. The response must include not only immediate reactions (e.g., arresting, prosecuting, and punishing) but also activities that are not connected to traditional activities, such as alternative dispute resolution.

Goal #2: To confront fear. Fear can lead to a society that is "divided, distrustful, and distracted."

Goal #3: Justice needs to include the crime victim, potential future victims, and the offender. It also requires just laws, fair processes for their enforcement, and the even-handed administration of those processes.

Goal #4: The justice system must operate in a way that creates and sustains broad faith in its moral legitimacy. Perceptions of injustice as the outcomes of our criminal justice system are problematic as they reduce the perception of legitimacy within our justice system.

Goal #5: The proper scope of the crime response. Criminal justice should be used only when the behaviour in question is severe enough to be condemned as criminal.

SUMMING UP AND LOOKING FORWARD

What does our criminal justice system seek to achieve? Is it to reduce the amount of crime and to prevent crime in the future? Differing ideologies have led to the varying explanations about the various criminal justice agencies as well as what policies should be adopted. Various models allow us to recognize different conceptualizations of goals in our criminal justice system. Some focus on specific approaches (e.g., the crime control model, the bureaucratic model, or the punitive model of victims' rights), while others focus on having all criminal justice agencies working together to achieve agreed-upon goals.

Now that the essential characteristics and models have been discussed, we need to outline some of the key decision points in order to understand how people are processed through both the pre-trial and trial stages of our criminal justice system.

Review Questions

1. Identify the major elements of the crime control, due process, rehabilitation, and bureaucratic models.
2. What is the importance of including victims in the goals of our criminal justice system?
3. Do you think all the central actors in our criminal justice system can identify what the most important goals are?

Key Decision Points of the Criminal Justice Process

According to the Law Reform Commission of Canada (1988), a key function of our criminal justice system is to bring offenders to justice. At the same time, our legal system has developed a number of legal rights and protections for those accused of crimes. Various fundamental principles exist that attempt to ensure that no arbitrary actions violate these principles. Our criminal justice system is based on the presumption of innocence of all defendants and is supposed to conduct itself in a manner that is fair, efficient, accountable, participatory, and protective of the legal rights of those arrested and charged with the commission of a criminal action.

An integral part of these guarantees is found in what is known as *criminal procedure*. **Criminal procedure** is concerned with how criminal justice agencies operate during the interrogation of suspects, the gathering of evidence, and the processing of the accused through the courts. Criminal procedure also ensures that the agents of the state act in a fair and impartial manner in their search for truth. Our system of criminal procedure has two major parts: *pre-trial procedure* and *trial procedure*. What follows is an overview of the pathway people experience as they are processed through our criminal justice system. This approach (see Figure 1.4) has numerous formal decision-making points before they can move on to the next stage.

Pre-Trial Criminal Procedure

Arrest

The main purpose of arresting someone is to ensure that the accused appears in a criminal court, where that person's guilt or innocence will be determined. Another purpose of arrest is to prevent the commission of any further crimes. There are two types of arrest: (1) without a warrant, and (2) with a warrant. The most common type of arrest is an arrest without a warrant (or a warrantless arrest), which typically occurs when police officers don't have the time to lay an information because they discover a crime in progress or believe that a serious crime will be committed. The police, however, do not have to arrest every person they find violating the law. Police officers have options to assess before they decide to arrest someone, including the seriousness of the offence, the amount of evidence against the suspect, and the wishes of the victim. Police officers have a tremendous amount of discretion, particularly with less serious offences. Decisions not to arrest someone are often the result of a police officer's attempt to achieve "**street justice**," which refers to the police dealing with problems without arresting anyone. If a police officer decides to arrest a suspect, the next key decision stage in the criminal justice system is the initial appearance.

Initial Appearance

An arrest with a warrant is issued after a crime has been committed and the police, through their subsequent investigation, have collected enough evidence so they have reasonable and probable grounds to suspect that a certain person committed the offence. Once the evidence has been collected, the police must go to a justice of the peace and lay an information against the suspect, indicating why they feel it is in the public interest to arrest the suspect. After the arrest warrant has been signed, the police execute the order by arresting the individual named on the warrant. Most warrants are issued only for the province in which the police investigated the crime. A Canada-wide warrant is issued only after an individual fails to appear in court after being charged with a violent or serious property offence.

Police officers need not arrest an individual when the offence in question is either a summary conviction offence or an indictable offence that does not allow the accused to choose a jury trial. Nor do police officers need to arrest a suspect when (1) they are certain the suspect will appear in court at the designated time and date; (2) the prosecutor can proceed by way of a summary, hybrid, or indictable offence; or (3) the offence involves a charge of certain offences such as keeping a gaming or betting house.

Police may issue an appearance notice to a suspect or request a justice (i.e., a judge or justice of the peace) to issue a summons. An appearance notice is given to the suspect by a police officer at the scene of the crime. In these cases, the police hand the accused a form with information pertaining to the offence as well as the time and place when the accused needs to appear in court to answer the charge(s). Police officers must lay an information with a justice as soon as possible thereafter. Another alternative to an arrest is a summons. Here the accused is ordered by a justice to appear in court. The summons must be handed to the accused by a police officer or person granted special powers by provincial authorities. It can also be left at the accused's last known address with an individual who appears to be at least 16 years old. When this document is served, the accused is compelled to appear in court at a designated time and place (Barnhorst and Barnhorst 2004).

Detention

After an individual is arrested, the police have numerous decisions to make about the suspect. They are the first to decide whether the person charged should be released. In many situations the police will release an individual when they promise to appear in court (a Promise to Appear) and, if necessary, have the individual sign an undertaking that allows a police officer to set certain conditions that need to be "reasonable in the circumstances."

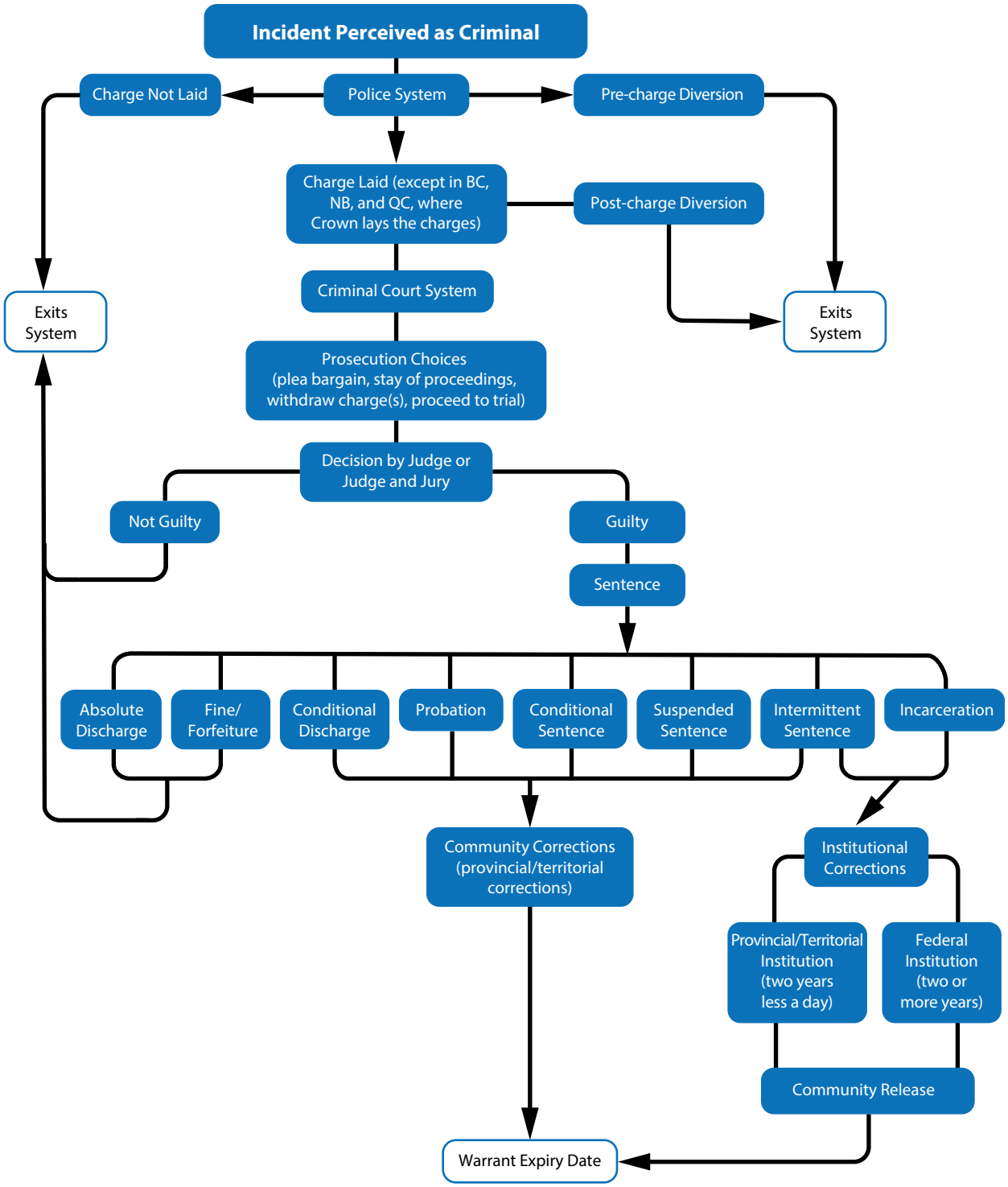


FIGURE 1.4 Overview of the Adult Criminal Justice System

Source: Adapted from Statistics Canada, Catalogue no. 85-005-X.

The police can also decide if the person arrested should be held in custody before trial. The law in Canada states that the accused must be released unless there is good reason for keeping them in custody. The police cannot hold an individual for an undetermined reason; section 9 of the Charter states that "everyone has the right not to

be arbitrarily detained." In addition, section 10(a) states that "everyone has the right on arrest or detention to be informed promptly of the reasons thereof." If the arresting officer decides the accused is to be formally arrested and taken into custody, the officer in charge at the police station to which the accused is taken has the discretion to release the suspect, typically with an undertaking. The officer in charge usually exercises that discretion unless the suspect is being charged with a criminal offence punishable by imprisonment of five years or more, the suspect is felt to pose a threat to the public, or the suspect is believed unlikely to appear in court. If the officer in charge decides the accused is to remain in custody, the accused must be taken before a justice within 24 hours or—if this is not possible—at the earliest possible time to see if they can receive bail.

Bail or Custody

The purpose of bail is to make sure that the accused appears at the ensuing trial. In Canada today, the *Criminal Code* requires all individuals arrested to be brought before a justice, who decides whether the accused is to be released before trial. They shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions (*Criminal Code* s. 498(1.1) or s. 515(10)). This is known as the **principle of restraint**. An individual is expected to be released unless the prosecutor supplies evidence to show either that the individual should not be released or that conditions should be attached to the release. The judge or justice of the peace gives attention to the circumstances of the individual appearing before them if (1) the accused is Indigenous, or (2) the accused belongs to a vulnerable population that is overrepresented in the criminal justice system and is disadvantaged in securing a release in this situation (*Criminal Code* s. 493.2). When a hearing occurs that establishes a defendant is dangerous to the community, bail can be denied. Those charged with first- or second-degree murder can be released on bail only by a superior court judge.

An arrest involves the words of arrest along with the touching of an individual with the purpose of detaining them or the individual submitting to the arrest.

Bail is such an important part of the Canadian legal process that section 11(e) of the Charter guarantees the right of the accused "not to be denied reasonable bail without just cause." According to section 457 of the *Criminal Code*, bail may not be granted when it can be shown to be in the public interest or necessary for the protection or safety of the public, and/or when denial is necessary to ensure the appearance of the accused on the designated date of the trial. In certain circumstances, it is up to the accused to inform the justice that they should be released pending trial. If they are not released, they will be placed into pre-trial custody until they make their first appearance in court.

Whether the accused is granted bail or is held until the trial, almost all criminal prosecutions in Canada start with an *information*. According to Mewett and Nakatsuru (2000), this serves two important purposes in the Canadian legal system. First, it compels the accused to appear in court on a specific date and at a designated time. Second, it forms the written basis for the charge that the accused faces in court.

Trial Procedure

The First Court Appearance

In most jurisdictions, the accused is *arraigned*—that is, hears the charges that are being brought against them and enters a plea in response. During the arraignment, the accused is brought before a provincially appointed judge. All formal charges are read by the court clerk at this time and the accused (or the accused's lawyer) makes the initial plea. The arraignment does not involve a hearing on the facts of the case but rather allows the defendant to plead guilty or not guilty to the charge(s). If the defendant pleads not guilty, a trial date is set. However, if the defendant pleads guilty, a finding of guilt is entered by the judge. A significant number of defendants plead guilty at this time, often as part of an agreement (i.e., a plea bargain) reached between the defence and prosecution. In a typical plea bargain, charges are dropped or reduced by the prosecution in exchange for the certain conviction of the defendant without a trial. Sometimes the defence counsel or prosecutor indicates to the judge that they are not ready to proceed. This usually happens in cases that involve complex issues, where more time is needed to prepare the defence or prosecution. In such cases, the presiding judge agrees to set aside the case until a later date.

The Indictment and Preliminary Inquiry

A preliminary inquiry is limited to those accused who have been charged with an indictable or hybrid offence that has a punishment of 14 years or more in a federal correctional institution. Both the Crown prosecutor and defence counsel have the right to elect a preliminary inquiry as long as their request is within the time limit set by either the justice or the court. Preliminary inquiries are heard by a provincial court judge. Summary conviction offences proceed differently from indictable offences in our court system and don't involve a preliminary inquiry.

When a preliminary inquiry is requested, the court and the other party receive a statement identifying (1) the evidence the requesting party wants to be given at the inquiry, and (2) the witnesses they want to hear at the inquiry. The purpose of a preliminary inquiry is not to determine the guilt or innocence of the individual charged with a crime but rather to determine whether enough evidence exists to send the accused to trial. One reason witnesses are called to testify is to get their testimony on record, especially if witnesses are sick or about to leave the country. The evidence provided by witnesses during the preliminary inquiry may be used during the trial. Most preliminary inquiries last no more than a few days, and only rarely does a preliminary inquiry end in a judicial decision to discharge the accused or withdraw the charges. An inquiry is important to defendants because it allows them to "hear the nature and judge the strength" of much of the evidence that the prosecution will use during the trial (Barnhorst and Barnhorst 2004:21). The defendant may then decide to plead guilty.

If the judge decides to discharge the accused, this does not mean that the accused is acquitted. It simply means that insufficient evidence exists at this time to proceed to trial. Mewett and Nakatsuru (2000:88) point out that a discharge means that "the accused cannot be tried on that information and that proceedings on that information are terminated." If, at a future date, new evidence is produced and strongly indicates the accused was involved in the crime, the prosecution usually proceeds by way of a direct indictment instead of requesting another preliminary inquiry. Whichever avenue is chosen, the attorney general or a senior official in the provincial justice department is required to give personal approval of the Crown's actions.

The Trial

Once the indictment is read to the accused in court, that person pleads to the charge(s) by entering a plea of either guilty or not guilty. If the accused pleads not guilty, the prosecution has to prove that the defendant is guilty of the offence beyond a reasonable doubt. In this situation, no reasonable amount of doubt concerning the guilt or innocence of the accused can be left unresolved. If reasonable doubt exists, the accused is acquitted of all charges.

A witness is sworn in during trial. All individuals who give evidence in court must swear or, if they object to taking an oath, make a solemn affirmation to tell the truth.

At trial, the prosecutor must prove beyond a reasonable doubt that the defendant committed the offence for which they have been criminally charged. The defendant's lawyer tries to discredit all or part of the prosecutor's case by establishing some type of doubt about whether the defendant committed the alleged offence.

A trial may be heard by a judge alone or a jury. For most indictable offences, the accused can elect trial by judge alone or by judge and jury. Some exceptions apply—for example, with first- and second-degree murder charges the accused must be tried by judge and jury unless both the defendant and the attorney general of the province agree to proceed with a judge alone. A trial by judge alone involves a judge hearing the evidence and then deciding whether the defendant is not guilty or guilty. If the trial involves a jury, it is supposed to consist of a representative cross-section of the community where the offence allegedly occurred. The jury, after hearing the evidence, decides whether the accused is guilty. If the verdict is guilty, the defendant proceeds to the sentencing stage of the trial.

In Canada, the accused has the right to change their mind about the type of trial chosen, although some restrictions apply. In a re-election, as this process is called, an accused has the right to re-elect the mode of trial and has 60 days to change their mind.

Sentencing

If the accused is found guilty, the judge will select criminal punishment from the sentencing options available. Commonly applied sentences in Canada include an absolute or conditional discharge, probation,

Changes to Preliminary Inquiries

Preliminary inquiries were originally developed during the 1800s in England and came into force in Canada in 1893 to ensure the courtroom that enough evidence exists to put an accused on trial by vetting the criminal allegations. Prior to the SCC decision in *R. v. Stinchcombe* (1991) (see Chapter 8), they also provided the accused with early disclosure of the case against them prior to trial.

Prior to 2019, preliminary inquiries had been modified only once in Canada since they were introduced. This occurred with the *Criminal Law Amendment Act, 2001*, which made preliminary inquiries for indictable offences available on request rather than being automatic, with the hope that the parties involved would consider whether a preliminary inquiry was necessary. Over time, however, some believed preliminary inquiries were being used for other reasons. Some of these reasons were that preliminary inquiries added to the length of trials by creating delays that could lead to potential memory lapses among witnesses. Also, they had the potential for retraumatizing victims—for example, victims in sexual assault cases, "by subjecting them to an extra round of cross-examination 'to attack the credibility of witnesses' and with the hope of 'trapping' them in inconsistent statements" (Fine 2017a:A11).

At the same time, many justices and prosecutors felt that developments in the law as well as the practices of various criminal justice actors, particularly the police, had diminished the need for many preliminary inquiries to the point where it was rarely needed. The key developments they were referring to were (1) improvements in police expertise and investigations; (2) changes in disclosure, the Crown now having to disclose to defence lawyers the evidence gathered by investigators that will be used in court (see *R. v. Stinchcombe* (1991) in Chapter 8); (3) Crown prosecutors routinely assessing potential criminal cases and screening out weak ones; and (4) budget limitations resulting in weaker cases no longer being prosecuted. These developments meant many trials were proceeding by way of direct indictment instead of using a preliminary inquiry.

Preliminary inquiries became an issue when, in *R. v. Jordan* (2016) (see Chapter 8), the SCC introduced new time ceilings for criminal cases: they were now limited to 18 months for a provincial court trial and 30 months for those cases that would be tried in superior courts. In addition, the SCC suggested preliminary inquiries may no longer be needed. Many provincial ministers of justice began to think by eliminating preliminary inquiries the time limits of court cases would be easier to achieve as they were seen as a major issue in the length of many trials. For example, the Chief Justice of Manitoba pointed out that in every month in 2017 there were 20 to 25 cases involving a preliminary trial, and they typically took 18 to 24 months to go to trial (Fine 2017b).

When the federal government introduced Bill C-75 into Parliament in 2017, they proposed new amendments to the *Criminal Code* including preliminary inquiries, citing the SCC's statement in *R. v. S.J.L.* (2009) that no constitutional guarantee of a preliminary inquiry existed as long as the prosecution's evidence and a summary of the witness's statements are disclosed. The original proposal for preliminary inquiries in Bill C-75 was that their use would be restricted. One of the proposed amendments was that only those adults accused of an offence with a punishment that had the possibility of life imprisonment would have a preliminary inquiry. In such cases, the amendments would limit the issues that could be explored as well as the number of witnesses who could appear at an inquiry. It was thought that these proposed changes would narrow the number and scope of preliminary inquiries by making them more efficient and effective while maintaining certain benefits, such as discovery at the earlier stage of the criminal justice system.

Defence lawyers, however, were not enthusiastic about limiting the number of preliminary inquiries. In 2017, the head of the Canadian Bar Association's criminal justice group said that "any connection between court delays and the preliminary inquiry is speculative at best" (Berra, in Editorial 2017:A10). And the Canadian Bar Association noted that preliminary inquiries were being used only infrequently. They said that only 2 percent of eligible cases had a preliminary inquiry, the number of cases with an inquiry was under 5 percent in court caseloads in Canada, and when preliminary inquiries occurred they took only two days or less to complete. The Criminal Lawyers' Association took the position that they did not support the amendments because they felt most trials would increase delays and create new pressures in the criminal justice system. The head of the Criminal Defence Lawyers Association of Manitoba said that preliminary inquiries "allow the Crown and defence to 'streamline' what will happen at trial." And if there wasn't a preliminary inquiry, it might take four weeks in an actual trial "just to know what you're fighting about. Most homicide preliminary hearings are done in two weeks" (Newman, in Rollason and Martin 2017:A4). Bill-75 was enacted in 2019, and now preliminary inquiries are restricted to those cases involving adults charged with offences punishable by a maximum term of imprisonment of 14 years or more (including life imprisonment).

incarceration, a suspended sentence, and a fine. A judge may decide to combine two of these sentences, such as a period of incarceration with a fine. The sentence depends in large part on the charges the individual was found guilty of and the prior record of the offender. In a few instances, a judge has no choice in setting the penalty. For example, a judge who finds an offender guilty of first- or second-degree murder must sentence the accused to life imprisonment with no chance of parole for a specified number of years.

In many instances, a judge also relies on a pre-sentence report compiled by a probation officer. This report may evaluate such things as the employment record of the offender and any family support. Other sources of information that a judge may use to determine a sentence include a victim impact statement, information given about the accused at the sentence hearing by the Crown prosecutor or the defence lawyer, and any mitigating or aggravating circumstances surrounding the commission of the crime. These can be significant factors in the sentencing.

Incarceration

If the sentence involves a period of incarceration, the offender is sent to either a provincial jail or a federal institution. The majority of offenders sentenced to a period of incarceration serve some portion of their sentence under community supervision on either parole or probation. Most offenders in Canada do not serve the full term of their sentence as they receive either day parole or full parole before the end of their sentence. If they don't receive parole, they receive statutory release after serving two-thirds of the sentence. While incarcerated, offenders can receive some form of rehabilitation or treatment. Programs have been designed to help offenders reintegrate into society. The amount of treatment given to offenders varies, however. After their release, offenders on parole must contact their parole officer on a regular basis. They may be required to spend some time in a halfway house or under some other form of community supervision.

SUMMING UP AND LOOKING FORWARD

A key function of our criminal justice system is to bring offenders to justice. It closely follows the justice model, which emphasizes legal rights and protections for those accused of crimes. Our criminal justice system is based on the presumption of innocence of all defendants and is supposed to conduct itself in a manner that is fair, efficient, accountable, participatory, and protective of the legal rights of those arrested and charged with the commission of a criminal action.

Much of what we learn about the criminal justice system is formal in nature; that is, the majority of those individuals charged are processed through each stage of the system. This system can be divided into two major categories: pre-trial procedure and trial procedure.

Pre-trial procedures typically involve an individual being investigated by the police, who determine whether charges should be laid. They may decide to release or detain a person or they may decide to arrest an individual and take them to the police station for further questioning or issue an appearance notice or a summons for a later court date. In those situations where a crime has already been committed, the police may decide to obtain a warrant to arrest someone or to gather evidence. Individuals who are arrested may be placed into custody and then apply for bail to ensure that they will appear at a later court hearing.

Once a case reaches court, there are a number of trial procedures. At the first court appearance, the individual charged will enter a plea. If it is "not guilty" there may be a preliminary inquiry depending on the charge. If a decision is made to proceed, there is a trial. If there is a finding of guilt at trial, the individual will be sentenced. In these situations, an individual may be incarcerated; prior to completing their sentence, they may be released on either day parole, full parole, or statutory release.

This is not always what people experience as they are processed through the system, however. Alternative interpretations have been developed to explain a different approach, which is premised on the argument that not all criminal cases are handled in the exact same way by either the police or judiciary. This approach argues that the type of treatment received by an accused is commonly based on their group membership, the seriousness of the charge, the personal status of the individual, as well as their resources. Commonly referred to as the "informal criminal justice system," this model is discussed in the next section.

Review Questions

1. Identify the key decision points found in the pre-trial stages of our criminal justice system.
2. Identify the key decision points found in the trial stages of our criminal justice system.
3. What are the different types of sentences one can receive if convicted?

The Informal Organization of the Canadian Criminal Justice System

The previous section illustrated some of the key decision points as an accused moves through our criminal justice system. Those who focus upon the informal processing tend to look at how the system operates in what can be described as a **wedding cake model**: layer 4, the lowest level (where most cases are located), involves lesser offences; layer 3 includes the less serious crimes; layer 2 includes the more serious crimes; and layer 1, the top level, is where the most celebrated cases are and where most of the media attention is focused, since these crimes involve celebrity defendants or unique factors (see Figure 1.5).

The reality of this informal processing has been recognized not only by researchers but also by some members of the legal profession. For example, the Law Reform Commission of Canada (1977:12–13) has recognized that, despite the belief that only those who commit crimes are formally charged, processed, and tried, and only those convicted of a crime are punished, "reality falls short of aspiration" and "our picture of the criminal justice system bears little resemblance to reality." An important aspect of this approach is its attention to the ways in which the organizational and institutional cultures found within criminal justice agencies can affect the services provided to offenders. A variety of approaches have been forwarded that attempt to explain the operations of the informal system of criminal justice.

Researchers investigating the daily operation of our criminal justice system believe that almost everyone who enters it experiences quite a different process than that pictured by the formal system. For example, Ericson and Baranek (1982) argue that the formal system operates only in theory and that the legal protections given to the accused are frequently ignored or plea bargained away by the defence counsel and prosecutor. As such, "legal justice" does not exist. Instead, most defendants receive a form of "bargain justice," where the accused is encouraged to plead guilty in return for a reduced sentence or the dropping of some charges. These critics argue that the final result is a court system in which the vast majority of the accused plead guilty before any item of evidence is contested in open court. Guilty pleas usually involve a reduction in the number of charges or a recommendation to the judge that the sentence be reduced.

Provincial criminal courts are crowded with individuals who are charged with lesser offences and waiting to have their cases heard. The courtrooms themselves have an air of "assembly-line justice"; defendants line up to enter the courtroom, only to have their cases summarily dispatched. Defendants in these courts rarely contest their cases in front of a judge. Most defendants who enter the provincial courts plead guilty to the charges during their initial appearance or find the charges either stayed (postponed indefinitely) or withdrawn by a prosecutor (Ericson and Baranek 1982; Wheeler 1987).

One approach developed to explain the informal nature of our justice system is the **courtroom workgroup**. Its existence disputes the belief that the criminal courts operate as a formal, rational legal system with all of its members following the rule of law and well-defined rules as they go about their daily work roles. Instead, courts consist of informal workgroups whose members hold considerable discretion, largely as a result of professional bonds that have developed among the members (Eisenstein and Jacobs 1974). One important feature of this group is group cohesion—that is, everyone involved cooperates with everyone else, and the members establish shared methods and values that help the group as a whole achieve its goals. As a result, the needs of the group members take precedence over concerns about the system's fairness and equality. The relationships among the individuals in this group have a significant impact on the day-to-day operations of the various criminal justice agencies and on the outcomes of individual cases.

FIGURE 1.5 The Wedding Cake Model of Criminal Justice

The wedding cake model of criminal justice features a four-tiered hierarchy of criminal cases, with the tiers decreasing in size as the severity of the cases increases. A small number of celebrated cases make up the highest-tier level.

An essential component of the courtroom workgroup is that it develops a shared understanding of **normal crimes**, which refers to the social characteristics of the individuals who have been charged with a criminal offence, the settings in which the alleged crime has occurred, and the types of victims that are involved. In these cases, the members of the courtroom workgroup "make sense" of the individuals and cases being processed through the courts, an assessment that may only in part be influenced by legal definitions of crime (Sudnow 1965).

Three other characteristics of the courtroom workgroup essentially allow its members to accomplish their tasks: (1) there is an emphasis on speed—that is, on disposing of cases rather than dispensing justice; (2) guilt is presumed—in other words, it is generally understood that individuals charged by the police are in fact guilty; and (3) secrecy is prized, because it enables all members to decide cases among themselves and to keep these negotiations private. All of these have a significant impact on the daily operations of our justice system and on the type of justice administered to and experienced by both offenders and victims.

An alternative approach to explaining the processing of cases through the criminal justice system is referred to as the **criminal justice funnel** (see *Criminal Justice Insight*). When a crime is committed and the offender is charged by the police, the case enters the top of the funnel. From there, it passes through ever-narrowing stages until it exits. Sometimes this exiting occurs at the bottom of the funnel, with the offender being sent to a correctional facility, but it can also exit higher up the funnel, such as when all charges are dropped because a witness refuses to testify or because the prosecutor feels the evidence is not sufficient. Between the top and the bottom of this funnel, then, are key decision-making points; at each, the case load has the potential to be reduced.

The actors and agencies in our criminal justice system are controlled by the formal rules of law; that said, they enjoy considerable leeway in how they prioritize and carry out their activities. According to those who study the informal criminal justice system, it is better to perceive the system as a process. This view emphasizes the key decision points through which cases pass. Each decision point is, in effect, a screening stage that involves a series of routinized operations; its efficacy is gauged primarily in terms of its ability to move a case to its next stage and a successful conclusion. The processing of individuals through our criminal justice system has in effect become a system of human resource management. The various actors go about their daily activities without stepping on toes, all the while bending informal agency rules. This system is dedicated to the search for simple solutions. Simple routine justice treats similarly situated defendants in the same ways. Its central elements correspond more to the personal and political needs of justice personnel than to any abstract concept of justice or the rule of law.

Both of these approaches note that a significant feature is that people are treated unfavourably on the basis of a number of factors, such as their gender, social class, race, ethnicity, and sexual orientation. This is due to **discretion**; that is, the ability of an individual or an organization within our criminal justice system to take alternative courses of action beyond the formal rules and procedures. This discretion leads to disparity and discrimination, both of which occur "where the law is permissive and individual discretion wide, and that where there are few guidelines as to how a decision should be taken, decision making is often based on subjective judgments" (Gelsthorpe and Padfield 2003:4).

Disparity and Discrimination

Canada is, both socially and legally, a multicultural society. The cultural and racial diversity of Canadian society is promoted through "the full and equal participation of individuals and communities" and "ensuring that individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity, among several others" (Cotter 2022:4). However, both disparities and discrimination exist in our society.

Disparity refers to a difference but one that doesn't necessarily include discrimination. Concerns about disparity in our criminal justice system arise when inconsistencies appear as a result of the authorities using illegitimate factors when making their decisions. In the area of criminal justice, disparity has most commonly been raised with sentencing, most specifically whether people receive different sentences for similar offences. However, it has also been used to analyze a broader issue, notably whether individuals, such as offenders and victims, are treated equally or unequally when there are similar circumstances. As Gelsthorpe and Padfield (2003) note, when a disparity is found it "strikes at the heart of the ideal … that all are equal before the law."

Legitimate reasons for differences include appropriate legal factors, such as the seriousness of the offence and the prior record of the offender. These are considered to be legitimate reasons for differences in our treatment of alleged offenders and those convicted of a crime within our criminal justice system since they are specifically concerned with the criminal behaviour of the offender. Illegitimate factors are extralegal factors, such as race, religion, and gender, which involve decisions about the group the alleged offender belongs to and are unrelated to the criminal activity of any particular individual. For example, our criminal justice system is not supposed to operate or decide about a person's criminality on the basis of their social class. If it did, it is entirely possible that middle- and upper-class individuals who commit crimes would serve their sentence within the community, while members of the working class would receive a prison sentence.

Criminal Justice Insight

The Crime Funnel

The criminal justice funnel reveals how decisions made at one stage in our criminal justice system impact the next stage by sorting out who should and should not continue (see Figure 1.6). This is referred to as *case attrition*; that is, at each stage of the funnel, there are fewer people than before, as more people are released or placed into other parts of the system—for example, when a judge decides to sentence someone to a community sanction instead of sending them to a correctional facility. The decisions made throughout the criminal justice funnel by authorities oftentimes reflect the strength of the case. For example, prosecutors may decide that there is not enough evidence to proceed with the charges and judges may decide that the crime was not serious enough to send the person convicted to a correctional facility, especially after looking at their (non-existent) prior record. In other words, the criminal justice system is considered to be fair and just.

Decisions made by lax officials also may lead to reductions throughout the funnel. There are too many loopholes in the system and the result is offenders being dealt with "too easily." This leads to claims that the criminal justice system is unfair and unjust.

Does the criminal justice funnel represent a system operating in a fair and just way, according to formal rules, or does it represent an informal system where fairness and justice are compromised?

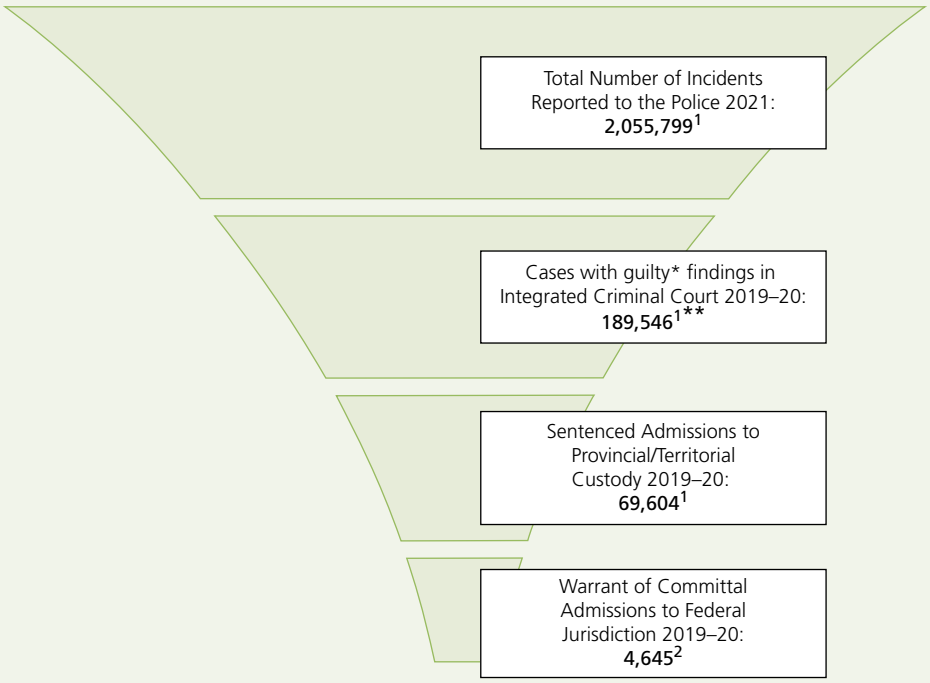


FIGURE 1.6 The Criminal Justice Funnel

The criminal justice funnel reveals that at each stage in the criminal justice system, fewer numbers of people are processed at the next stage.

[1] Uniform Crime Reporting Survey 2, Adult Criminal Court Survey, and Adult Correctional Services Survey, Canadian Centre for Justice Statistics, Statistics Canada.

[2] Correctional Service Canada.

* The type of decision group "guilty" includes guilty of the offence, of an included offence, of an attempt of the offence, or of an attempt of an included offence. This category also includes cases where an absolute or conditional discharge has been imposed.

** This figure includes only cases in provincial court and partial data from Superior Court. Superior Court data are not reported to the Integrated Criminal Court Survey for Prince Edward Island, Quebec, Ontario, Manitoba, and Saskatchewan. Information from Quebec's municipal courts is not collected.

Source: Adapted from *Corrections and Conditional Release Statistical Overview Annual Report 2021*, Fig. A11, p. 27. https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2021/ccrso-2021-en.pdf.

(*Continued on next page*.)

Criminal Justice Insight (*Continued*)

Questions

1. What is the importance of the crime funnel for understanding the operation of the Canadian criminal justice system?
2. What are the reasons for the reductions in the number of people flowing through each stage of the crime funnel?

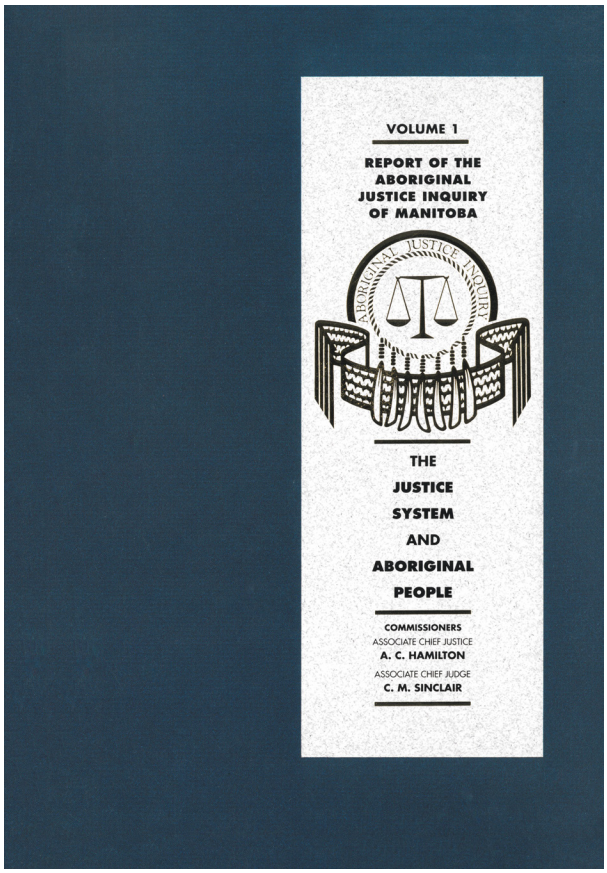
Discrimination

Discrimination refers to the differential treatment of individuals based on negative judgments relating to their perceived or real membership in a group. In other words, something about an individual (e.g., race) overrides their other qualities (e.g., educational attainment). Most research efforts in the area of discrimination focus upon gender and race, while fewer have studied sexual orientation, age, religion, and disability. Discrimination can occur when individuals or groups are perceived as inferior or difficult (Gelsthorpe and Padfield 2003).

Various types of discrimination have been identified, and each has the potential to influence fairness in a variety of different ways in our criminal justice system. **Systemic discrimination** refers to discrimination (e.g., race and/or gender) existing in all aspects of the operations of our criminal justice system. This means that discrimination can consistently be found in the rates of arrest, the type of charges laid, and the decision to prosecute or stay charges, as well as in the conviction rates and types of sentences given to those convicted without any significant variation over a selected time period. Provincial inquiries into the treatment of racial minorities within the Canadian criminal justice system during the 1990s (e.g., the Manitoba Aboriginal Justice Inquiry) reported the existence of systemic discrimination.

With **institutionalized discrimination**, disparities appear in the outcomes of decisions. Such disparities are the result of established (i.e., institutionalized) policies in the criminal justice system. These policies do not directly involve extralegal factors, such as an individual's employment status, race, gender, or religion. The main issue here is one of system outcomes, or results, rather than any intent to discriminate against a specific individual or member of a group. One example involves decisions made within the criminal justice system based on the employment status of those accused of a crime when they are applying for bail. A policy granting bail based on the employment status of the accused can be legitimized based on research showing that employed persons are better risks for showing up for trial than those who are unemployed. But what if all men are employed and very few women are? Since women are disproportionately overrepresented among the unemployed, they are more likely to be denied bail. This result is referred to as a *gender effect*, which means that discrimination is the result of a policy that is not concerned with the gender of those who apply for bail. Institutional discrimination is the result of a policy; it does not exist because of individuals who are prejudiced.

Contextual discrimination arises from organizational policies within criminal justice agencies, such as the police and the courts. One example is when a police service fails to enforce the criminal harassment (or anti-stalking) provisions of the *Criminal Code* simply because it foresees the complainant dropping charges before the case enters the courts. Another example is when a judge sentences



In its study of the treatment of Indigenous peoples in the criminal justice system in Manitoba, the Aboriginal Justice Inquiry found evidence of systemic discrimination across the province.

the members of one racial minority group more harshly when they victimize the members of another racial group but less severely when they victimize a member of their own racial group.

Individual discrimination occurs when an individual employed within the criminal justice system acts in a way that discriminates against the members of certain groups. For example, a police officer may discriminate against members of a certain social class and/or ethnic group by arresting them in all circumstances while only giving warnings to all others.

It is important, however, to recognize that discrimination and disparities can be permitted under exceptional conditions in our criminal justice system. For example, an individual who is found not criminally responsible for committing a crime may in fact face a longer sentence than a criminally responsible offender convicted of the same offence. This is because the potential exists for the individual found not criminally responsible to receive an indeterminate sentence, whereas the criminally responsible offender receives a designated term of punishment. It has been argued (*R. v. LePage* (1999); *Winko v. British Columbia (Forensic Psychiatric Institute)* (1999)) that this policy discriminates against those with mental disabilities. The SCC upheld the relevant *Criminal Code* provision (s. 672.65) even though a disparity resulted. The Court held that for an individual convicted in a criminal court, a specific period of incarceration is punishment for the criminal act. A more flexible approach is warranted for offenders who are not criminally responsible, given that they are not morally responsible for their actions. In such cases, the purpose of punishment is the protection of society and the treatment of the offender (Mewett and Nakatsuru 2000).

Investigating: Challenging Discrimination Against Transgender Individuals

The pursuit of justice oftentimes focuses upon the pursuit of equal treatment. It is important to ask whether everyone is treated equally or if there are systematic inequalities and/or discriminatory treatment based on race, ethnicity, social class, gender, or sexuality. If inequalities or discrimination exist in our society, this can have a tremendous impact on how different groups of people are perceived, processed, and treated by the criminal justice system. Changes in our *Criminal Code* have led to the criminalization of certain types of acts against transgender individuals.

Transgender Rights

Transgender people often experience abuse, harassment, and discrimination. In a 2011 national survey of Canadian transgender high school students, 74 percent of respondents reported experiencing verbal harassment at school from other students and teachers, and 37 percent said they had experienced physical assault. A 2015 study reported that of the transgender people they had surveyed in Ontario, 73 percent said they had been made fun of for being trans, 20 percent reported they had been physically or sexually assaulted for being trans, and 10 percent of trans emergency room patients said they'd had care stopped or denied (Bauer and Scheim 2015). The Canadian Human Rights Commission noted that transgender persons typically face high levels of discrimination. Transgender and gender-diverse individuals across Canada "face discrimination, exclusion, and hostility in their daily lives—often impacting their access to everyday services that many Canadians take for granted when they, for example, want to see a family physician, travel, or use a public washroom" (Human Rights Tribunal of Ontario 2014). This is because the legal protections for transgender people in Canada have been minimal.

A few members of parliament have introduced private member bills to protect transgender individuals from discrimination but these did not pass. It was not until 2016 that the federal Liberal government introduced Bill C-16 to give protections to transgender Canadians. This Bill was designed to protect trans-identifying individuals by including gender identity and gender expression in the hate provisions of the *Criminal Code*. It also would help "combat the historical 'erasure' of trans people, by acknowledging their unique social challenges in the face of widespread societal and institutional discrimination and marginalization" (Ponsford 2017:23).

A key aspect of Bill C-16 was that it proposed to amend the *Criminal Code* to include both gender identity and gender expression as grounds for hate crimes. Both terms were used by the federal government to refer to a person's understanding of what their gender is and how they choose to express it.

Bill C-16 was passed and received royal assent in June 2017. The minister of justice stated that the new legislation "would protect trans and gender diverse Canadians who are targeted because of their gender identity or expression from hate propaganda. These changes would also require a court to treat the commission of an offence that is motivated by hate based on gender identity or expression as an aggravating factor for sentencing purposes" (Department of Justice Canada 2017).

Questions

1. What are the types of discrimination faced by transgender persons in Canada?
2. What is the significance of Bill C-16? What other changes do you feel need to be made?

SUMMING UP AND LOOKING FORWARD

Not all criminal cases are viewed or processed in the same manner despite claims to the contrary. The type of treatment given to any case may be determined by such factors as an individual's membership in a particular group, their social status, the seriousness of the offence, and the defendant's ability to use their personal resources. For many critics, then, the processing of cases through our criminal justice system does meet the expectations set out in the essential characteristics of justice. This has been referred to as the informal criminal justice system and a number of explanations have been forwarded to try to explain it, such as the courtroom workgroup and the criminal justice funnel. Discretion is a common feature in these approaches, and the concern is that disparity and various types of discrimination may occur.

This chapter has largely focused upon an approach to achieving and delivering justice through the normative framework of the criminal justice system. This section presents yet another perspective: the informal organization of our criminal justice system. This approach to criminal justice policy emphasizes how groups operate to expedite offenders and make the system more efficient. Some have questioned this approach by arguing that it contravenes many aspects of the normative framework of our criminal justice system. As later chapters are considered, it will be possible to assess many of these new directives to achieving and delivering justice.

Review Questions

1. Is our criminal justice system always "just"?
2. Is it inevitable that discretion will exist in our criminal justice system? Is it possible for significant amounts of discretion to co-exist with the essential characteristics of our criminal justice system?
3. Define disparity and discrimination. What is the potential negative impact of each on our criminal justice system?

Critical Issues in Canadian Criminal Justice

DISCRIMINATION, INJUSTICE, AND THE FEDERAL APOLOGY TO 2SLGBTQI+ PEOPLE IN CANADA

Although the Charter wants justice and equality for all, injustices exist. Injustice can surface when we think about how the criminal justice system responds to crime. Do certain laws lead to unjust results? Do the laws target certain groups of people indiscriminately? How can discrimination be overturned through law reform so that the injustices no longer exist?

An injustice was at the centre of an address given by Prime Minister Justin Trudeau in November 2017 when he apologized in the House of Commons for the decades of organized discrimination of sexual minorities in Canada. As victims of purges of homosexual people from the federal public service watched from the gallery, the Prime Minister stated that "over our history, laws and policies enacted by the government led to the legitimation of much more than inequality—they legitimized and brought shame to those targeted … It is with shame and sorrow and deep regret for the things we have done that I stand here today and say, we were wrong. We apologize, I am sorry. We are sorry" (Trudeau 2017).

His apology followed demands from 2SLGBTQI+ people in Canada to have apology and redress for the decades of discrimination against sexual minorities by the federal government. From the 1950s through to the 1990s, government officials attempted to identify and then remove and/or discredit any person thought to be a member of a sexual minority from the federal public service, the RCMP,

Prime Minister Justin Trudeau and other federal ministers raise the pride and transgender flags on Parliament Hill in Ottawa.

and the military. One reason given for these actions was national security, as the government considered homosexual people to be potentially open to blackmail by the Soviet Union. During the 1960s, the investigations had gone deep into the federal public service with an RCMP unit reportedly having a list of at least 9,000 "expected" homosexual people who were deemed to be "national

Critical Issues in Canadian Criminal Justice (*Continued*)

security" threats. The Canadian government also commissioned a Carleton University professor to develop a homosexuality test—the so-called "fruit machine" test. In one test, people were exposed to pornographic images while a camera took pictures of their pupils to see if they dilated, which suggested excitement and, therefore, attraction to the same sex. This machine was used by the federal government throughout the 1960s until the Defence Research Board eliminated funding in 1967 (Pritchard 2016). The last recorded dismissal of an individual based on sexual orientation occurred in the 1980s. Homosexuality was partially decriminalized in 1969 when the *Criminal Code* sections on gross indecency were amended to permit such acts between two consenting adults (over 21 years of age) in a private setting.

In 2016, Prime Minister Trudeau promised to consider pardons and apologies for people convicted of gross indecency in response to numerous stories about federal government public service workers and members of the military who had been dismissed. In November 2016, he appointed MP Randy Boissonnault as his special adviser on 2SLGBTQI+ issues. But this response was still too slow according to those who pointed out that some nations, including Germany, the United Kingdom, and New Zealand, had apologized, pardoned, and/or given financial compensation to people who in the past were convicted of committing homosexual acts. In late 2016, the issue of compensation in Canada resulted in a class action lawsuit being filed against the federal government by former members of the federal public service and the military (Brewster 2016). In 2017, it was announced that an agreement in principle had been reached to settle the class action lawsuit. In the agreement, individuals whose careers were affected due to their sexuality prior to 1996, when the *Canadian Human Rights Act* was amended to prohibit discrimination based on sexual orientation, were to receive a minimum payment from the federal government of $5,000 to a maximum payment of $150,000, depending on the amount of discrimination and/or harassment they experienced. The total cost of the settlement was estimated to be $145 million.

When the Bill was passed in 2017, some felt this was going to lead to "a springboard for action to remove ongoing discrimination" (Ibbitson 2017:A5). Numerous advocates for the rights of sexual minorities found the Bill to be flawed as it didn't allow the convictions for those individuals convicted of other offences, such as a bawdy house offence, to be overturned. The section of the *Criminal Code* outlawing bawdy houses (see below) allowed the police to "inscribe instances of gay sex into 'acts of indecency' in the bawdy house section to attempt to produce it as a crime" (Kinsman 1996:341).

The federal government stated it would introduce legislation to expunge the records of individuals who were criminally convicted of specific offences and have their judicial records destroyed. Bill C-66, the *Expungement of Historically Unjust Convictions Act* was tabled in late 2017 and passed by Parliament in June 2018. It created a process through which an individual could apply to the Parole Board of Canada for expungement of a criminal conviction for consensual same-sex actions under the *Criminal Code* provisions of gross indecency, buggery, and anal intercourse. The legislation also prompted the federal government to add other *Criminal Code* provisions to the list in the future. When the Parole Board grants an expungement, the record of the conviction is to be destroyed. Convictions under the *Criminal Code* as well as the *National Defence Act* are eligible for destruction.

Bill C-66 was criticized by many as it doesn't cover all the offences used to criminalize 2SLGBTQI+ people. While the Prime Minister's apology had given specific mention to the bathhouse raids and to the bawdy house provision in the *Criminal Code*, these did not qualify for expungement. Between 1968 and 2004, it is estimated that over 1,300 people were charged with bawdy house offences in police raids on bathhouses in Toronto, Montreal, and Ottawa. Individuals convicted of other criminal offences, such as those who were arrested and charged in the bawdy house raids, as well as other indecent acts, are unable to clear their names. See Table 1.3 for a timeline of significant events from 1967 to 2017.

TABLE 1.3 Selected Timeline of Milestone Events for 2SLGBTQI+ People in Canada

1967	Justice Minister Pierre Trudeau proposes amendments to the *Criminal Code* that would relax the laws against homosexuality.
1968	A bathhouse is raided by the Toronto police with the majority of the criminal charges laid against men for the offence of being found in a common bawdy house.
1969	Prime Minister Pierre Trudeau's amendments pass into the *Criminal Code*, decriminalizing homosexuality in Canada.
1973	One bathhouse in Toronto is raided by police with the majority of the criminal charges laid for the offence of gross indecency.
1975	One bathhouse in Montreal is raided by police with all the criminal charges (found in a common bawdy house) laid against men.

(*Continued on next page.*)

TABLE 1.3 Selected Timeline of Milestone Events for 2SLGBTQI+ People in Canada (*Continued*)

1977	Quebec includes sexual orientation in its Human Rights Code, making it the first province to pass a gay civil rights law.
	Seven bathhouse raids take place, four in Toronto and three in Montreal. Most of the criminal charges are for being found in a common bawdy house.
1978	A new federal *Immigration Act* is passed with homosexual people removed from the list of inadmissible classes.
	One police raid of a bathhouse takes place in Montreal while another occurs in Toronto; all charges are for being found in a common bawdy house.
1979	Two police raids of bathhouses occur, one in Montreal and the other in Toronto. Just over half of all the charges are for being found in a common bawdy house.
1980	In May, Bill C-242, *An Act to Prohibit Discrimination on the Grounds of Sexual Orientation*, has its first reading in the House of Commons. The Bill, which would place "sexual orientation" into the *Canadian Human Rights Act*, does not pass. MP Svend Robinson introduces similar bills in 1983, 1985, 1986, 1989, and 1991, but they also do not pass.
	One bathhouse raid takes place in Montreal with the majority of the criminal charges for being found in a common bawdy house.
1981	More than 300 men are arrested during the same evening following police raids at four gay bathhouses in Toronto. Most of the criminal charges are for being found in a common bawdy house. The next night, approximately 3,000 people march in downtown Toronto to protest the arrests.
	Three other bathhouse raids occur in Toronto and one in Edmonton, with the majority of criminal charges laid for being found in a common bawdy house.
1983	One bathhouse raid occurs in Toronto; most criminal charges laid are for being found in a common bawdy house.
1984	One bathhouse raid occurs in Montreal; most criminal charges laid are for being found in a common bawdy house.
1985	The Parliamentary Committee on Equality Rights releases a report entitled "Equality for All." The committee says it is shocked by the discrimination directed toward homosexual people in Canada. The report discusses the harassment, violence, physical abuse, psychological oppression, and hate that homosexual people live with. The committee recommends that the *Canadian Human Rights Act* be changed to make it illegal to discriminate based on sexual orientation.
1986	The federal government issues a report, "Toward Equality," in which it states that the government will take necessary measures to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.
1990	The Montreal police raid a bathhouse; eight protestors are arrested.
1991	Delwin Vriend, a lab instructor at King's University College in Edmonton, is fired because of his sexual orientation. The Alberta Human Rights Commission refuses to investigate the case because the Alberta *Individual's Rights Protection Act* does not cover discrimination based on sexual orientation. Vriend takes the government to court, and in 1994, the court rules that sexual orientation must be added to the Act. On appeal in 1996, the provincial government wins, and the lower court ruling is overturned.
	In November 1997, the *Vriend* case is heard by the Supreme Court of Canada, which on April 2, 1998, unanimously rules that the exclusion of homosexual people from Alberta's *Individual's Rights Protection Act* is a violation of the Charter.
1992	The Ontario Court of Appeal, in *Haig v. Birch*, rules that the failure to include sexual orientation in the *Canadian Human Rights Act* is discriminatory. Federal Justice Minister Kim Campbell responds to the decisions by announcing the government will take steps to include sexual orientation in the *Canadian Human Rights Act*.
	The Federal Court lifts the ban on homosexual people in the military, allowing them to serve in the Armed Forces.
	The Federal Justice Minister introduces Bill C-108, which would add "sexual orientation" to the *Canadian Human Rights Act*; it passes first reading.
1994	The police in Montreal raid a bathhouse; all criminal charges are for being found in a common bawdy house.
1996	The federal government passes Bill C-33, which adds "sexual orientation" to the *Canadian Human Rights Act*.
	The Toronto police raid a bathhouse; almost all criminal charges are for being found in a common bawdy house.
2013	Parliament passes Bill C-279, a private member's bill that extends human rights protections to transgender individuals.
2017	Bill C-16 is passed by Parliament. It updates the *Canadian Human Rights Act* and the *Criminal Code* to include "gender expression" as protected grounds from discrimination. The Bill also adds "gender identity" and "gender expression" to the list of aggravating factors in sentencing.
	Prime Minister Justin Trudeau apologies to 2SLGBTQI+ people in the House of Commons. Civil servants and military personnel who lost their jobs from discriminatory actions will share in a financial settlement from a class action suit.

SUMMARY

Key Points

1. While our criminal law is reserved for wrongful acts that seriously threaten the social values of Canadians, it is important to realize that it is not static, and so our understanding of what is a crime constantly changes.
2. A key objective in our society is to socially control behaviour viewed as criminal.
3. The criteria used to judge the performance and practices of our criminal justice system are known as the normative approach to criminal justice, which includes the adversarial system, substantive justice, procedural justice, the rule of law, access to justice, and the legitimacy of our criminal justice institutions.
4. The two major models of our criminal justice system are the crime control model and the due process model.
5. Other models of our criminal justice system have been identified, including the medical (rehabilitation) model, the bureaucratic model, the punitive model, and the non-punitive model.
6. The view of criminal justice that currently guides most Canadians' thinking about the proper way for our criminal justice system to operate is the justice model.
7. The three major agencies of our criminal justice system are the police, the courts, and corrections.
8. The Canadian criminal justice system is based on the presumption of innocence and it is supposed to operate in a way that is fair, efficient, accountable, participatory, and protective of the legal rights of those charged with a criminal offence.
9. The two types of criminal procedure found in the Canadian criminal justice system are the pre-trial criminal procedure and trial procedure.
10. The informal criminal justice system operates with similarities to a wedding cake as it is arranged hierarchically in four layers.
11. The courtroom workgroup disputes the belief that the criminal justice system operates in a formal and rational way.
12. The informal approach to the criminal justice system uses the image of the criminal justice funnel to explain how cases are processed.
13. There are four types of discrimination, which all have serious implications for individuals being processed in the criminal justice system: systemic, institutionalized, contextual, and individual discrimination.

Key Words

access to justice, 10
adversarial system, 9
bureaucratic model, 13
contextual discrimination, 24
courtroom workgroup, 21
crime control model, 11
criminal justice funnel, 22
criminal procedure, 15
discretion, 22
discrimination, 24
disparity, 22
due process model, 11
incarceration, 4
individual discrimination, 25
institutionalized discrimination, 24
lower courts, 4
mala in se, 6
mala prohibita, 6
medical (rehabilitation) model, 13
non-punitive model of victims' rights, 13
normal crimes, 22
principle of restraint, 17
procedural justice, 9
punitive model of victims' rights, 13
rule of law, 10
social control, 8
street justice, 15
substantive justice, 9
superior courts, 4
systemic discrimination, 24
wedding cake model, 21

Critical Thinking Questions

1. In order to understand our criminal justice system, we need to explore the differing definitions of "crime" and the impact these have upon the role of criminal legislation and what we perceive to be behaviour that has to be regulated. What definition of crime best describes how our criminal justice system operates?
2. A number of key characteristics form the basis of our criminal justice system, and while some of these may be more recognizable than others, each impacts the decisions made throughout the entire system. What are the essential characteristics of the normative approach to our criminal justice system?
3. What does our criminal justice system seek to achieve? Is it to reduce the amount of crime and to prevent crime in the future? Is it to treat all people equally and achieve equal justice for all?
4. According to the crime control model, the primary focus of our criminal justice system is a safe and secure society, while the due process model guarantees that fair procedures will be used throughout the system. Based on these two models, what should be the primary focus of our criminal justice system?
5. What are the key points that people experience as they are being processed through the formal structure of our criminal justice system? In the formal criminal justice system, courts are legal institutions where lawyers fight to defend their clients, prosecutors fight to protect society, and neutral judges act as referees to make sure the system is fair and operates according to the principles of fundamental justice.
6. The operation of our criminal justice system may be more informal than formal. In the informal criminal justice system, trials are conducted for the purpose of sanctioning what was decided behind closed doors. Once defendants are convicted, prosecutors, defence lawyers, and judges agree they are guilty of something so the main issue is to determine the appropriate punishment. Defendants are outsiders in this process. What are the implications of an informal approach for our system of criminal justice?
7. Most people say it is important to follow the rule of law as there should be no privileged exemptions to the law. Former Supreme Court Justice Abella has said that "much of what's done in the name of the rule of law can be unjust" (Abella, in Fine 2021:15). Identify some of the laws Justice Abella may be talking about.

Weblinks

The issue of assisted dying has been of great interest to Canadians in recent years. To understand many of the legal issues surrounding this issue, watch the following videos on YouTube: "Mini Law School: A conversation about assisted dying: What does the law have to say?" (1:18:10); "How Canada is transforming assisted death safeguards" (13:58); and *The Fifth Estate*, "Is it too easy to die in Canada? Surprising approvals for medically assisted death" (43:27).

Senator Murray Sinclair, a co-author of Manitoba's Aboriginal Justice Inquiry (1991) and chair of the Truth and Reconciliation Commission (2015), speaking from his position as a Senator, discusses racism against Indigenous peoples. See "Racism—Indigenous perspectives with Senator Murray Sinclair" (1:30:56). See also "This is what anti-Asian racism looks like in Canada" (6:25).

In 2017, Prime Minister Justin Trudeau delivered the federal government's apology to 2SLGBTQI+ Canadians. See the following on YouTube: "Trudeau's historic apology to LGBT communities" (8:38) and "Trudeau delivers historic apology to LGBT Canadians" (1:00:49).

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Criminal Code, RSC 1985, c C-46.

Criminal Law Amendment Act, 2001, SC 2002, c 13.

Expungement of Historically Unjust Convictions Act, SC 2018, c 11.

Individual's Rights Protection Act, RSA 1980, c I-2 [Repealed].

National Defence Act, RSC 1985, c N-5.

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