

# So you know the law ? ... well, don't bet on it

Did you know that everyone is exactly and entirely equal before the law?

That you can't phone your lawyer until the police are through questioning you?

That the police must tell you "anything you say may be used against you at your trial", before they question you?

That you are entitled to one phone call after you are arrested?

That a witness can refuse to testify, or to choose which questions he/she will answer, or to take the Fifth Amendment?

Lots of people "know" all those "facts" — and they're wrong.

The Manitoba Legal Aid society has prepared a paper listing these, and other, common misconceptions about how the law works. Here are 25 of the more common mistakes about Canadian law — and the real truth about them.

**Mistake:** In Canada, criminal offences are classified as felonies (more serious) and misdemeanors.

**Fact:** These are terms used in the United States. The words in Canada are indictable (more serious) offences, and summary (less serious) offences. Some offences can be indictable or summary conviction, at the choice of the Crown.

**Mistake:** People who choose to remain silent when questioned about a crime, must be guilty of something.

**The Law** says that a person accused of a crime has the right to remain silent. This rule was developed not to protect the guilty, but partly to stop abusive questioning procedures which have taken place from time to time to force people to confess to things they may or may not have done.

The rule also recognizes that words can be given different meanings and that a person asking questions — with the object of proving what that person thinks must be the truth — can twist facts and completely confuse the person being questioned.

People who are questioned long enough or who are put under enough pressure, may break down and confess to most anything — including (maybe) the truth.

The right to remain silent includes, of course, people who are not charged with an offence. In most situations, a person need not talk to the police if the person doesn't care to. Obviously, the police couldn't do the work we ask them to do, and society would be the

worse off if people didn't co-operate with the police.

There are times when it is best not to remain silent. For example, a person who has an alibi defence is usually better off to make it known as soon as possible.

**Mistake:** Criminal law is 50 per cent of all the law.

**Fact:** The law is often divided for convenience into criminal law and civil (noncriminal) law, but they are not equal in size. Civil law involves dozens of different kinds of law like tax law, prison law, real property law, welfare law, transportation law, juvenile law and so on.

Criminal law gets more publicity than the rest of the law, but it is only one small part of the law.

**Mistake:** If a person is robbed or assaulted or is a victim of any crime, he or she can drop the charges at any time.

**The Law** considers crime to be against all of society and not just against the individual victim. It is usually not a victim's choice as to whether a charge should be laid to whether a trial should take place.

A victim can influence a particular case: the person may not report the crime or may not fully cooperate with the police. But once a crime is under police investigation, it isn't often that the victim is given the chance to make decisions about what should be done about it.

**Mistake:** All people released on bail must deposit hundreds or even thousands of dollars at court.

**The Law:** It is true that some people are required to deposit money before they are released. But most people are released from jail simply by signing a promise (the legal word is recognizance) to go back to court when their cases come up. The recognizance may include a promise to pay a certain amount of money if the person does not go to court when he or she is supposed to.

For example, you will often hear a judge in court say that a person can be released "on his own recognizance of \$1,000." The \$1,000 is not paid to court and never will have to be if the person returns to court and lives by any other conditions set by the judge — such as staying away from a certain place or abstaining from drinking alcohol.

Bail is not usually necessary. Accused

persons can be released from custody on a simple promise to be in court when required.

**Mistake:** Everyone is exactly and entirely equal before the criminal law.

**Fact:** Many comments have been made by various people that while everyone is subject to the criminal law, it tends to be lower income people who are involved with it, and that they are less likely than upper income people to know their legal rights and to be able to exercise them.

For example, a high income person is more likely than a low income person to know the name of a lawyer, to insist on calling a lawyer, to remain silent or to be able to explain a situation to the police, to make a good appearance in court, to testify articulately and to be believed and to receive a moderate sentence. One person expressed it briefly: "When an upper income person is involved with the criminal law, his advantages begin to multiply. When a low income person is involved with the criminal law, his disadvantages begin to multiply."

**Mistake:** All persons charged with an offence have a trial and most trials are jury trials.

**People who are questioned long enough or who are put under pressure, may break down and confess to almost anything — including (maybe) the truth.**

**Fact:** Television programs and movies create this impression, but it is not an accurate picture of what really happens. Most people charged with criminal offences plead guilty, so that no trial is necessary. (The purpose of a trial is to decide guilt or innocence. If the accused person admits guilt, there is no need for a trial.) No more than 10 per cent of all accused people plead "not guilty" and only a few of them choose trial by jury.

Jury trials can be chosen only in some indictable (more serious) matters. Jury trials are not available on all offences.

**Mistake:** All criminal cases must receive publicity in newspapers.

**Fact:** There is very little law on the subject of publicity. However, it is clear that newspapers and other media are able to print at least the names of accused persons at any

stage of a criminal matter.

There is no law that newspapers must publish any names. The names which actually appear in a newspaper depends on such things as the space available in the paper and the number of reporters at the courts.

**Mistake:** No one thinks of the victim. The accused person has all the rights.

**Fact:** It is true that victims of crime often are not fully compensated for their injuries or loss. Perhaps the injury just cannot be fully corrected or the criminal is not worth suing because he or she has nothing restitution of damaged property isn't possible.

But victims do have rights. In some parts of Canada, crime victims can apply for compensation for losses as a result of a crime.

And victims of crime may sue the persons who cause them injury or loss. All victims should obtain legal advice about this and other possible actions they might take. There is a lot of discussion going on now about how criminals might be able to help their victims or somehow correct what has been done, rather than the law simply putting the criminal in jail or making him or her pay a fine.

**Mistake:** Being arrested and questioned by the police is such an unpleasant experience that it is always best to go to court and plead guilty as soon as possible in order to avoid more unpleasantness.

**Fact:** For most people it is an embarrassing and fearful thing to be arrested by the police (especially if it is at one's own home) and it is often the desire of people who have been charged with breaking the law to want to get it over with as soon as possible. This feeling is understandable, but it is not wise to make final decisions in such a state of mind.

Every person is entitled in law to obtain the advice of a lawyer and it is wise to do so as soon as possible if a person is charged or is liable to be charged. Advice should be obtained no matter how hopeless the situation may seem to be.

**Mistake:** A person should not plead guilty if there were good reasons why he or she broke the law.

**Fact:** A person accused of a crime should obtain the advice of a Lawyer. Lawyers often find that people confuse the question of guilt or innocence with the question of sentencing. A person may have excellent reasons for

If the person's evidence may incriminate him or her, the person may ask for the protection of the Canada Evidence Act. That law says that any person given the protection of the Act cannot have the evidence used against him or her in a later criminal case (except on a charge of perjury).

**Mistake:** You tell how good a criminal lawyer is solely by the number of cases he or she wins and loses.

**Fact:** If you think along the lines of most television programs and you define a "win" only by a not guilty decision, then you won't find any criminal lawyers who are any good! Over 90 per cent of people accused of a crime end up being convicted, either because they plead guilty, or because they are found guilty after a trial.

A criminal lawyer's job is to represent clients to the best of his or her ability, given the facts of each case. More often than not, the lawyer is trying to make the best of a bad situation, and a conviction for manslaughter may be a "win," because the original charge was murder. Or a client sentenced to one year in prison may be thankful that it wasn't two years, and the lawyer may regard this as the best that could have been done for the client.

In judging the skill of a criminal lawyer, there is more involved than just adding up convictions and acquittals.

**Mistake:** A lawyer is not necessary if a person knows he or she is guilty and wants to plead guilty.

**Fact:** Everybody is entitled to consult a lawyer and everyone should consult a lawyer to be sure of what the law is, and to find out what can happen if he or she pleads guilty or is found guilty after a trial. Lawyers can advise accused persons of whether they have a defence, and of what facts about the person should be mentioned in court.

**Mistake:** People who feel guilty often are not allowed by their lawyers to plead guilty.

**Fact:** A lawyer's job is to take instructions, not to give them. If a person wants to plead guilty, it is his or her privilege to do so — and to instruct the lawyer that way. If the lawyer is unable to accept the instructions or if the client is not able to accept the advice of the

lawyer, either one of them may decide to end their relationship: the lawyer may refuse to act or the client may seek another lawyer.

People sometimes confuse moral guilt with legal guilt. An accused person may feel guilty about the event which resulted in a criminal charge, but the person may not be guilty in law. For example: a person may feel guilty about having been with someone who robbed another person. But the law says a person is not necessarily guilty just because he or she is present when a crime is committed.

One of a lawyer's duties to a client is to explain the law — and sometimes that includes explaining the difference between moral and legal guilt.

**Mistake:** Judges, police and lawyers are "above the law." They can do things that other people can't do and get away with it.

**Fact:** Everyone is subject to the law. A person cannot commit a criminal offence, such as assault or fraud, and get away with it just because of his or her occupation.

All judges, police and lawyers are accountable to other people (like other judges, police and lawyers!) just like everyone else in our society.

**Mistake:** Being arrested and questioned by the police is such an unpleasant experience that it is always best to go to court and plead guilty as soon as possible in order to avoid more unpleasantness.

**Fact:** For most people it is an embarrassing and fearful thing to be arrested by the police (especially if it is at one's own home) and it is often the desire of people who have been charged with breaking the law to want to get it over with as soon as possible. This feeling is understandable, but it is not wise to make final decisions in such a state of mind.

Every person is entitled in law to obtain the advice of a lawyer and it is wise to do so as soon as possible if a person is charged or is liable to be charged. Advice should be obtained no matter how hopeless the situation may seem to be.

**Mistake:** A person should not plead guilty if there were good reasons why he or she broke the law.

**Fact:** A person accused of a crime should obtain the advice of a Lawyer. Lawyers often find that people confuse the question of guilt or innocence with the question of sentencing. A person may have excellent reasons for

having done something, but those reasons are in most (not all) cases separate from the law's first concern: is the person guilty or innocent of what he or she is accused? If the thing was done, then the law considers the reasons.

For example, a drunk person drives his car in order to get someone to a hospital in an emergency situation. He may very well be found guilty of impaired driving (if he were charged in the first place) but his reason for doing it might result in a very moderate sentence.

The explanation for breaking a law is usually called a mitigating circumstance.

**Mistake:** Any person charged with breaking the law is fingerprinted and photographed.

**Fact:** The Identification of Criminals Act of Canada says that a person accused (not convicted) or an indictable (more serious) criminal offence under the Criminal Code can be fingerprinted and photographed. Persons charged with summary convictions (less serious) offences under the Criminal Code or under other laws cannot be fingerprinted or photographed unless they agree to it.

**Mistake:** The law does not allow a person to be discriminated against because of a criminal record — especially if the record is made up of minor matters.

**Over 90 per cent of people accused of a crime end up being convicted, either because they plead guilty, or because they are found guilty after a trial.**

**Fact:** There are laws forbidding discrimination based on race, sex, religion and so on. But there is no law forbidding discrimination based on a criminal record. For example, a person can get a job or be able to rent a house despite having a criminal record.

A criminal record can be erased by the granting of a pardon. The pardon must be applied for by the person with a record.

**Mistake:** When the police say "you'll have to come with me," you have no choice but to go.

**The Law** says, in effect, that the police cannot insist on a person going with them unless the person is under arrest. The person has the right to be told that he or she is under arrest and (where the reason isn't obvious)

the reason why.

**Mistake:** Every person arrested by the police is entitled to one telephone call.

**Fact:** Whether or not a person in police custody is allowed a telephone call is pretty well up to the police. There is no law requiring it.

In breathalyzer cases, there are court decisions which have established that a person can call a lawyer for advice before blowing into the machine. But a request to make the call must be made to the police by the person. If the call is not then allowed, the person has a lawful excuse for refusing the test. But if the call is requested and refused and the test then taken, the results can be used in court.

**Mistake:** Statements made to the police cannot be used in court unless the statements are written down and signed.

**Fact:** Any statement made to the police whether spoken or written down — and whether signed or not — may be used in court at a later time, if the judge is satisfied that statement was made voluntarily.

**Mistake:** Every person from whom the police wish to take a statement must be given the "police warning" or "caution": "You do not have to make a statement, but anything you say may be taken down in writing and

used at your trial."

**Fact:** There is no law in Canada requiring that the caution be given, but courts have often said it is preferable that the warning be given to help make sure any statement given to the police is voluntary.

**Mistake:** If people are accused by the police or charged with breaking the law, the people must be guilty. Innocent people are not charged.

**Fact:** Police, lawyers and judges each have a particular job to do. One of the jobs of the police is to investigate possible crimes and to lay charges. Though they are entitled to their own opinions, the job of the police is not to decide whether people are guilty (that's the judge's job) or to advise people whether to plead guilty (that's the lawyer's job).

In our criminal law, a person is presumed innocent until proven guilty. The laying of a charge by the police is not, by itself, proof of guilt. The question of guilt or innocence is for the courts to decide.

**Laws which you learn from American TV shows will not protect you in Canada.**

**Mistake:** All questioning done by the police must be done at police headquarters.

**Fact:** There is no law requiring the police to do all questioning at a place of their choosing, but that's often the way it happens. It is said to be more convenient for the police to take suspects and witnesses to a police station for questioning. Of course there is a psychological advantage in having a person in one's own territory.

**Mistake:** The police have the right to refuse to allow a person to consult his lawyer until after they have finished questioning him.

**Fact:** A person has a legal right to the assistance and advice of counsel at the earliest possible opportunity. If the police refuse to allow the person to speak to his lawyer, that person is entitled to refuse to say anything at all until he has been afforded the opportunity of speaking with a lawyer.

This article originally appeared in slightly different form in the November issue of Manitoba High, a high school newspaper.

