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CANADA'S SYSTEM *of* JUSTICE

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CANADA'S SYSTEM *of* JUSTICE

Note to reader: This booklet provides general information about Canada's justice system. It is not intended as legal advice. If you have a legal problem, you should consult a lawyer or other qualified professional.

Contents

Introduction

The law affects nearly every aspect of our lives every day. On the one hand, we have laws to deal with crimes such as robbery or murder and other threats and challenges to society. On the other hand, laws regulate common activities such as driving a car, renting an apartment, getting a job or getting married.

Understanding the law, and the ideas and principles behind it, is every Canadian's business. This booklet will help readers understand what the law is, where it comes from, what it is for, and how it operates. It does not give complete answers to these questions, but offers a brief outline of Canada's laws and the whole justice system.

Another purpose of this booklet is to suggest that we need to take a wider view of the law. Laws are often thought of as commands, but they are more than that. A law balances individual rights with the obligations that people share as members of society. For example, when a law gives a person a legal right to drive, it may also restrict that right with traffic laws, and make it a duty for her or him to know how to drive.

Our legal system functions well when people both understand their legal rights and live up to their legal responsibilities. In fact, the basis of much of our law is common sense. But before we can create new laws or change old ones, we need to understand the basic principles of our legal heritage.

What is the Law?

Why we need laws

Almost everything we do has a set of rules. There are rules for games, for social clubs, for sports and for the workplace. Rules of morality and custom tell us what we should and should not do.

Rules made by government are called "laws." Laws are meant to control or change our behaviour and, unlike rules of morality, they are enforced by the courts. If you break a law – whether you like that law or not – you may have to pay a fine, pay for the damage you have done, or go to jail.

Ever since people began to live together in society laws have been necessary to hold that society together. Imagine the chaos – and the danger – if drivers just chose which side of the street to drive on. Imagine trying to buy and sell goods if no one had to keep promises or fulfill contracts. Imagine trying to hold onto your personal property or even to keep yourself safe if there were no laws against robbery or assault.

Even in a well-ordered society, people have disagreements, and conflicts arise; the law provides a way to resolve disputes peacefully. If two people claim the same piece of property, rather than fight they turn to the law and the courts to decide who is the real owner and how the owner's rights are to be protected.

Laws help to ensure a safe and peaceful society in which people's rights are respected. The Canadian legal system respects individual rights, while at the same time ensuring that our society operates in an orderly manner. An essential principle is that the same law applies to everybody, including the police, governments and public officials, who must carry out their public duties according to the law.

What other goals do laws achieve?

In Canada, laws not only govern our conduct; they are also intended to carry out social policies. For example, laws provide for benefits when workers are injured on the job, for insurance when workers are unemployed, for health care, and for loans to students.

Laws are also aimed at ensuring fairness. By recognizing and protecting basic individual rights and freedoms, such as liberty and equality, our laws ensure that stronger groups and individuals do not use their powerful positions to take unfair advantage of weaker groups or people.

Our legal system, based on a tradition of law and justice, gives Canadian society a valuable framework. The rule of law, freedom under the law, democratic principles, and respect for others form the foundations of this important heritage.

Public law and private law

Laws can be divided into public and private law. **Public law** is concerned with matters that affect society as a whole. It includes criminal, constitutional and administrative law. Public laws set the rules for the relationship between the individual and society or for the roles of different governments. For example, if someone breaks a criminal law, it is regarded as a wrong against society as a whole.

Private law, also called "civil law," deals with the relationships between individuals. Civil laws set the rules for contracts, property ownership, the rights and obligations of family members, damage to someone or to their property caused by others and so on. A civil case is an action between private parties, primarily to settle private disputes.

Where Our Legal System Comes From

The common-law tradition

Canada's legal system derives from various European systems brought to this continent in the 17th and 18th centuries by explorers and colonists. Although the indigenous peoples whom the Europeans encountered here each had their own system of laws and social controls, over the years the laws of the immigrant cultures became dominant. After the Battle of Quebec in 1759, the country fell almost exclusively under English law. Except for Quebec, where the civil law is based on the French Code Napoléon, Canada's criminal and civil law has its basis in English common and statutory law.

The common law, which developed in Great Britain after the Norman Conquest, was based on the decisions of judges in the royal courts. It evolved into a system of rules based on "precedent." Whenever a judge makes a decision that is to be legally enforced, this decision becomes a precedent: a rule that will guide judges in making subsequent decisions in similar cases. The common law is unique because it cannot be found in any code or body of legislation, but exists only in past decisions. At the same time, common law is flexible and adaptable to changing circumstances.

The civil-law tradition

The tradition of civil law is quite different. It is based on Roman law, which had been scattered about in many places – in books, in statutes, in proclamations – until the Emperor Justinian ordered his legal experts to consolidate all the laws into a single book to avoid confusion. Ever since, the civil law has been associated with a "civil code." Quebec's Civil Code, first enacted in 1866 just before Confederation and amended periodically, was recently thoroughly revised. Like all civil codes, such as the Code Napoléon in France, it contains a comprehensive statement of rules, many of which are framed as broad, general principles, to deal with any dispute that may arise. Unlike common-law courts, courts in a civil-law system first look to the Code, and then refer to previous decisions for consistency.

The two meanings of civil law

The term "civil law" is used to mean two quite different things, which can be a little confusing at first for people trying to understand the justice system. Sometimes the term is used in contrast to "common law" to refer to the legal system that is based on a civil code, such as the Justinian Code or the Civil Code of **Quebec. In its other sense, civil law refers to matters of private law as opposed to public law, and particularly criminal law, which is concerned with harm to society at large. It is usually clear from the context which type of civil law is intended.**

The *Quebec Act* of 1774 made Canada a "bijural" country, one with two types of law. The *Quebec Act* stated that common law was to be applied outside Quebec in matters of private law, while similar matters in Quebec were to be dealt with under Civil Code law. For public law, on the other hand, the common law was to be used in and outside Quebec.

Aboriginal traditions

Aboriginal peoples in Canada have also contributed to our legal system. Aboriginal rights and treaty rights are recognized and protected under the Constitution. Aboriginal rights are those related to the historical occupancy and use of the land by Aboriginal peoples; treaty rights are those set out in treaties entered into by the Crown and a particular group of Aboriginal people. Reserves, for example, are the responsibility of the federal government.

Aboriginal customs and traditions have also contributed to new ways of dealing with people, such as healing and sentencing circles, community justice and restorative justice.

Parliament

Democratic countries usually have a "legislature" or "parliament," which has the power to make new laws or change old ones. Since Canada is a federation (a union of several provinces with a central government), it has both a federal parliament in Ottawa to make laws for all of Canada and a legislature in each province and territory to deal with local matters. Laws enacted at either level are called "statutes," "legislation," or "acts." When Parliament or a provincial or territorial legislature passes a statute, that statute takes the place of common law or precedents dealing with the same subject. In Quebec as well, much legislation has been passed to deal with specific problems not covered by the Civil Code.

Making laws this way can be a complicated process. Suppose, for example, the federal government wanted to create a law that would help control pollution. First, government ministers or senior public servants would be asked to examine the problem carefully and suggest ways in which, under federal jurisdiction, a law could deal with pollution. Next, they would draft the proposed law. This would then have to be approved by the Cabinet, which is composed of Members of Parliament or Senators chosen by the Prime Minister. This version would then be presented to Parliament as a "bill" to be studied and debated by members. Bills only become laws if they are approved by a majority in both the House of Commons and the Senate and "assented to" by the Governor General in the name of the Queen.

A similar process is used in every province. Royal assent for laws enacted by provincial legislatures is provided by the Lieutenant Governor.

But law is more than a number of statutes, as we have seen from the description of common law. Judges develop common law, such as the laws of contracts, through referring to and setting precedents. They also interpret and apply the statutes.

Because of the complexity of modern society, more laws are being enacted today than ever before. If our lawmakers had to deal with all details of all laws, the task would be nearly impossible. To solve this problem, Parliament, provincial and territorial legislatures often pass general laws delegating authority to departments or other government organizations to make specific laws called "regulations." Regulations carry out the purposes of the general laws or expand on them, but are limited in scope by these laws.

Keeping the Law Up to Date

Law reform

Although much of our law was inherited from European legal traditions, as society grows and develops it cannot rely entirely on tradition. Sometimes there is an urgent need for new laws or for old laws to be changed. Even as government enacts reforms to address changing ethics and morality, society continues to evolve dynamically, making it necessary to reform laws constantly.

As Canadian society changes, we must make sure that our system of law and justice meets the challenges of our new society. Every day, we hear about social issues, medical developments, new types of technology – all of which may raise moral and legal questions. For example, we are increasingly becoming aware of the effects of modern society on our environment and of the immense threat of pollution and wasteful habits.

As people change the way they live and work, some laws may become obsolete or new situations may arise that are not dealt with by any existing law. For example, the same computer technology that enables one person to find information about another may also make it possible to "steal" information that was meant to be private. Old laws against theft did not foresee stealing computer files or indeed storing or moving information by such means. This kind of technological and social change makes it necessary to reform our laws.

More than just changing laws, we may need to change the system of law and justice itself. For instance, in our complex society it can take years to settle disputes. As our court system is stretched to the limit, other, less formal ways may help people settle their disputes. Some informal mediation methods, such as in landlord-tenant disputes, are already being used.

Changing laws

Government legal experts are constantly examining our laws, looking for ways to improve them. Law reform committees review laws and recommend changes. Lawyers bring questions of law to court to bring about change. Social action groups seek changes to laws that they consider unfair to members of Canadian society. Legislators at the federal, provincial and territorial governments respond by introducing new laws or amendments to old ones to be considered and debated in Parliament and the legislatures.

Ultimately, though, the responsibility for changing our laws is not left entirely to the lawyers, the experts or the interest groups. It is the people of Canada who elect the lawmakers; we need to decide what we want from the law and then make sure it reflects those wishes. Everyone has the right to point out flaws in the law and to work towards changing these laws – lawfully, of course.

The Canadian Constitution

In many countries formed by revolution or an act of independence – the United States is the best example – most constitutional law is contained in a single document. In a democracy with a written constitution, legislators cannot make just any laws they wish. A country's constitution, among other things, defines the powers and limits of powers that can be exercised by the different levels and branches of government.

Canada, in contrast, became a country by an act of the Parliament of Great Britain. Consequently, the closest thing to a constitutional document would be the ***British North America Act*** of 1867 (the BNA Act, now known as the *Constitution Act*, 1867), by which the British colonies of Upper and Lower Canada, Nova Scotia, and New Brunswick were united in a confederation called the Dominion of Canada. (Prince Edward Island, although a member of the team that shaped Confederation, did not join until later.)

Although there is no single constitution in Canadian law, the ***Constitution Act*** – a part of the ***Canada Act of 1982*** – finally "patriated" or brought home from Great Britain Canada's constitution as created by the BNA Act. The *Constitution Act* declares the Constitution of Canada to be the supreme law of Canada and includes some 30 acts and orders that are part of it. It reaffirms Canada's dual legal system by stating provinces have exclusive jurisdiction over property and civil rights. It also includes Aboriginal rights, those related to the historical occupancy and use of the land by Aboriginal peoples, treaty rights, agreements between the Crown and particular groups of Aboriginal people.

Bijuralism

Because of Canada's dual legal system (bijuralism), every federal law must be drafted in both official languages but it must also respect both the common-law and civil-law traditions in the provinces.

Confederation of the colonies into the Dominion of Canada did not involve any break with the Imperial government. The new country was still part of the British Empire, governed by authority appointed by the monarch on the advice of the British Colonial Secretary at Westminster. The BNA Act provided for confederation, but it did not codify a new set of constitutional rules for Canada or even include a clause for amending or changing the Act. For this reason, until 1982 any amendments to the BNA Act had to be enacted by the Parliament in England.

What type of government is described by our Constitution?

The Constitution sets out the basic principles of democratic government in Canada when it defines the powers of the three branches of government: **the executive, the legislative and the judicial.** The **executive** power in Canada is vested in the Queen. In our democratic society, this is only a constitutional

convention, as the real executive power rests with the Cabinet. The Cabinet, at the federal level, consists of the Prime Minister and Ministers who are answerable to Parliament for government activities. As well, Ministers are responsible for government departments, such as the Department of Finance and the Department of Justice. When we say "the government" in a general way, we are usually referring to the executive.

The **legislative** branch is Parliament, which consists of the House of Commons, the Senate and the Monarch or her representative, the Governor General. Most laws in Canada are first examined and discussed by the Cabinet, then presented for debate and approval by members of the House of Commons and the Senate. Before a bill becomes a law, the Queen or her representative, the Governor General, must also approve or "assent to" it. This requirement of royal assent does not mean that the Queen is politically powerful; by constitutional convention, the Monarch always follows the advice of the government.

In the provinces, the same process applies but the Queen's provincial representative is called the Lieutenant Governor.

Our Constitution also provides for a **judiciary**, the judges who preside over cases before the courts. The role of the judiciary is to interpret and apply the law and the Constitution, and to give impartial judgments in all cases, whether they involve public law, such as a criminal case, or private (civil) law, such as a dispute over a contract. They also contribute to the common law when they interpret previous decisions or set new precedents.

The Constitution provides only for federally appointed judges. Provincial judges are appointed to office under provincial laws.

The Department of Justice

The Minister of Justice is responsible for the Department of Justice, which provides legal services such as drafting laws and providing lawyers for the government and its departments. This department also develops policies and programs for victims, families, children and youth criminal justice. The Minister of Justice is also the Attorney General or chief law officer of Canada.

What is a federal system?

Under Canada's federal system of government the authority or "jurisdiction" to make laws is divided between the Parliament of Canada and the provincial and territorial legislatures. Parliament can make laws for all Canada, but only about matters assigned to it by the Constitution. A provincial or territorial legislature,

likewise, can make laws only about matters over which it has been assigned jurisdiction. This means these laws apply only within the province's borders.

Other federal systems

Australia and the United States also have federal systems in which jurisdiction is divided between the federal government and the various states. In contrast, in the United Kingdom Parliament has sole authority to pass laws for the entire country.

The federal Parliament deals, for the most part, with issues concerning Canada as a whole, such as trade between provinces, national defence, criminal law, money, patents and the postal service. It is responsible as well for the Yukon, the Northwest Territories and Nunavut.

The provinces have the authority to make laws concerning education, property, civil rights, the administration of justice, hospitals, municipalities and other matters of a local or private nature within the provinces. Federal law allows territories to elect councils with powers similar to those of the provincial legislatures, and citizens of territories thus govern themselves.

There are also local or municipal governments. They are created under provincial laws and can make bylaws regulating a variety of local matters, such as zoning, smoking, pesticide use, parking, business regulations, and construction permits.

Finally, Aboriginal peoples in Canada have different types of government. For example, Indian bands can have a range of governmental powers over reserve lands under the federal ***Indian Act***. Other Aboriginal governments, such as self-governments, exercise governmental powers as a result of specific agreements negotiated with the federal and provincial or territorial governments.

Rights and Freedoms in Canada

In Canada, both federal and provincial or territorial governments protect the individual's rights and freedoms. The territorial governments may also legislate to protect human rights, since the federal government has delegated those powers to them.

The ***Canadian Bill of Rights***, passed in 1960, was the first federal law that specifically set out fundamental human rights for Canadians. The ***Canadian Human Rights Act*** (CHRA), first enacted in 1977, also protects human rights, particularly in the areas of employment, housing and commercial premises. Unlike the *Canadian Bill of Rights*, the CHRA applies not only to the federal government but also to the private sector in matters that are regulated directly by the federal government, such as banking.

All provinces and territories also have human rights legislation to prohibit discrimination on various grounds with regard to employment and the provision of goods, services and facilities. The *Québec Charter of Human Rights and Freedoms*, passed in 1975, protects all fundamental human rights as well as some political, social and economic rights. In addition, Saskatchewan and Alberta enacted bills of rights in 1947 and 1972, respectively. This legislation applies to discrimination both by individuals in the private sector and by provincial or territorial governments.

Nevertheless, the protection provided by all of this legislation is limited. Because the *Canadian Bill of Rights*, the CHRA, and all provincial human rights codes are only legislation, it is possible to repeal them. It was not until the advent of the ***Canadian Charter of Rights and Freedoms*** that human rights in Canada were protected in the Constitution.

The role of the *Canadian Charter of Rights and Freedoms*

When the Constitution was patriated in 1982, the *Canadian Charter of Rights and Freedoms* became a fundamental part of it. The Charter takes precedence over other legislation because it is "entrenched" in the Constitution, the supreme law of Canada. It applies to the provincial legislatures as well as to Parliament. This means that when an individual who believes that Parliament or a legislature has violated guaranteed rights asks the courts for help, the courts may declare the law invalid as far as it conflicts with the Charter. In addition, courts may provide other appropriate remedies to individuals whose rights have been violated or infringed.

However, the Charter also recognizes that even in a democracy rights and freedoms are not absolute. For instance, freedom of expression is guaranteed, but no one is free to yell "fire" in a crowded theatre, to slander

someone, or to spread hate propaganda. Therefore, Parliament or a provincial legislature can limit fundamental rights, but only if that government can show that the limit is reasonable, is prescribed by law, and can be justified in a free and democratic society. The interests of society must be balanced against the interests of individuals to see if limits on individual rights can be justified.

The Constitution affirms that we are a multicultural country and that Charter rights must be interpreted consistently with this ideal.

Under the agreement between the federal and provincial governments that resulted in the *Constitution Act*, both Parliament and the provincial legislatures keep some limited power to pass laws that may violate Charter rights. This is democratic because it gives the elected legislatures the last word. However, their power is still limited because Parliament or a provincial legislature must specifically declare that it is passing a law "notwithstanding" specified provisions of the Charter. This declaration must be reviewed and re-enacted at least every five years or it will not remain in force. These limits act as a kind of warning to Canadians, and force the government to explain itself, to accept full responsibility for its actions, and to take the political consequences.

What rights does the Charter protect?

The Charter protects fundamental freedoms, democratic rights, the right to move from one province or territory to another in Canada, legal, equality and language rights, and Aboriginal rights.

- **Fundamental freedoms**
  The Charter gives constitutional protection to freedoms that custom and law over the years had made almost universal in our country. Everyone in Canada has a right to practise any religion or no religion at all. We are free to speak our minds, to gather peacefully into groups and to associate with whomever we wish, as long as we do not infringe the legal and constitutional rights of others. The freedom of the media to print and broadcast news and other information is guaranteed as well under the Charter.

- **Democratic rights**
  The Charter also guarantees our democratic tradition. Canadian citizens have a constitutional right to vote in elections for Members of Parliament and representatives in provincial and territorial legislatures, and to seek election themselves. A few restrictions – such as those on minors and the mentally incapacitated, or on election officials, who may have to cast a deciding ballot on a citizen's right to vote or to run in

an election – have been found to be reasonable in a democratic society. Another protection of democracy is that our elected governments cannot hold power indefinitely. The Charter requires governments to call an election at least once every five years. (The only exception is in a national emergency, such as war, if two-thirds of the Members of Parliament or a legislature agrees to delay the election.) The Charter also specifies that Parliament and legislatures must sit at least once a year. This ensures that our governments do the work for which they were elected, and that they have to answer questions and explain themselves in public.

- **Mobility rights**
  Canadian citizens have the right to enter, remain in or leave the country. Citizens and permanent residents have the constitutional right to live or seek work anywhere in Canada, including the right to live in one province and work in another. The Charter stops provinces and territories from discriminating against newcomers. For example, if a person is a qualified professional, such as an accountant, in one province, another province cannot prevent him or her from working there because that person does not live there. However, provinces can make a residency requirement for certain social and welfare benefits. Provinces with an employment rate below the national average may set up programs for socially and economically disadvantaged residents as well.

- **Legal rights**
  The Charter also protects the individual and ensures fairness during legal proceedings, particularly in criminal cases. The rights to *habeas corpus*, or the right to challenge being detained or held, and to be presumed innocent until proven guilty – always recognized as part of our law – are now guaranteed in our constitution.

  No one can be deprived of the right to liberty and security of his or her person except through proper legal procedures. Canadians are protected against unreasonable searches and seizures, and against police using excessive force, even when a search or seizure is authorized by law. We are also protected against being detained or arrested arbitrarily. In other words, a police officer must have a reasonable suspicion that we have committed a crime before holding us in custody.

  The Charter also protects us against arbitrary actions by law enforcement agencies. It guarantees our rights to be told why we are being arrested or detained, to consult a lawyer without delay, to be informed of this right, and to have a court determine quickly whether the detention is lawful.

If you are charged with an offence under federal or provincial law you also have the right

- to be told promptly of the offence,
- to be tried within a reasonable time,
- not to be compelled to testify at your own trial,
- to be presumed innocent until proven guilty beyond a reasonable doubt in a fair and public hearing by an independent and impartial tribunal,
- not to be denied reasonable bail without cause,
- not to be subjected to any cruel and unusual punishment,
- to be tried by a jury for serious charges, and
- not to be tried or punished twice for the same offence.

Any witness, as well as the accused, at trial has the right to an interpreter if he or she does not understand the language or is hearing-impaired. Witnesses also have the right not to have incriminating evidence used against them in later proceedings.

- **Equality rights**
  Everyone, regardless of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, is equal before the law and has equal protection and benefit of the law. This means that laws and government programs, such as pension plans, must not be discriminatory.

  The Charter does not require that all people always have to be treated in exactly the same way. For example, it is constitutional to create special programs for individuals or groups who may be at a disadvantage in society, such as women, visible minorities or people with disabilities.

- **Language rights**
  English and French are Canada's official languages, according to the Charter. Both languages have equal status and equal rights and privileges in Parliament and the Government of Canada. In addition, everyone has the right to use English or French in the debates and proceedings of Parliament, and all statutes and parliamentary records and journals must be printed and published in both languages. Everyone has the right to use English or French in proceedings before any court established by Parliament. Moreover, members of the public have a right to communicate with and receive services in English or French from the central offices of federal institutions and from other federal offices where there is a significant demand in either language or where it is reasonable.

  The same conditions apply on the provincial level in New Brunswick, the only province which is officially bilingual under the Charter. The public has the same right to services in English or French from all offices

of New Brunswick legislative and governmental institutions.

The *Constitution Act of 1867* and the *Manitoba Act in 1870* gave people in Quebec and Manitoba, respectively, the right to use English and French in debates and proceedings of the legislatures, in the courts of those provinces, and require that provincial laws be enacted and published in both languages. The Charter preserves these rights and obligations.

- **Minority-language educational rights**
  In the predominantly English-speaking provinces and all the territories, citizens whose mother tongue is French or who attended French-language primary schools, or whose child has or is receiving primary or secondary school instruction in French, have a constitutional right to send all their children to French-language schools. In Quebec, citizens who received their primary education in English, or who have a child who was or is being taught in English, have the constitutional right to send all their children to English-language schools.

  This right to minority-language instruction applies wherever there are enough other children in the same situation to warrant the provision of such instruction, and includes the right of those children to receive their education in minority-language schools and educational facilities.

- **Aboriginal rights**
  A number of provisions in the Charter, and elsewhere in the Constitution, specifically protect the rights of the Aboriginal peoples (Indian, Inuit, and Métis) of Canada. These provisions
  - recognize and protect the Aboriginal and treaty rights of Aboriginal peoples and
  - help Aboriginal peoples preserve their cultures, identities, customs, traditions and languages.

  The Charter specifically states that the rights and freedoms it guarantees cannot be used to take away any rights that Aboriginal peoples now have or may acquire in the future (for example, from the settlement of land claims).

Other rights

The Charter does not embody all our rights as Canadians; it only guarantees basic minimum rights. We all have other rights derived from federal, provincial, territorial, international and common law. Similarly, Parliament or a provincial or territorial legislature can always add to our rights.

The Judicial Structure

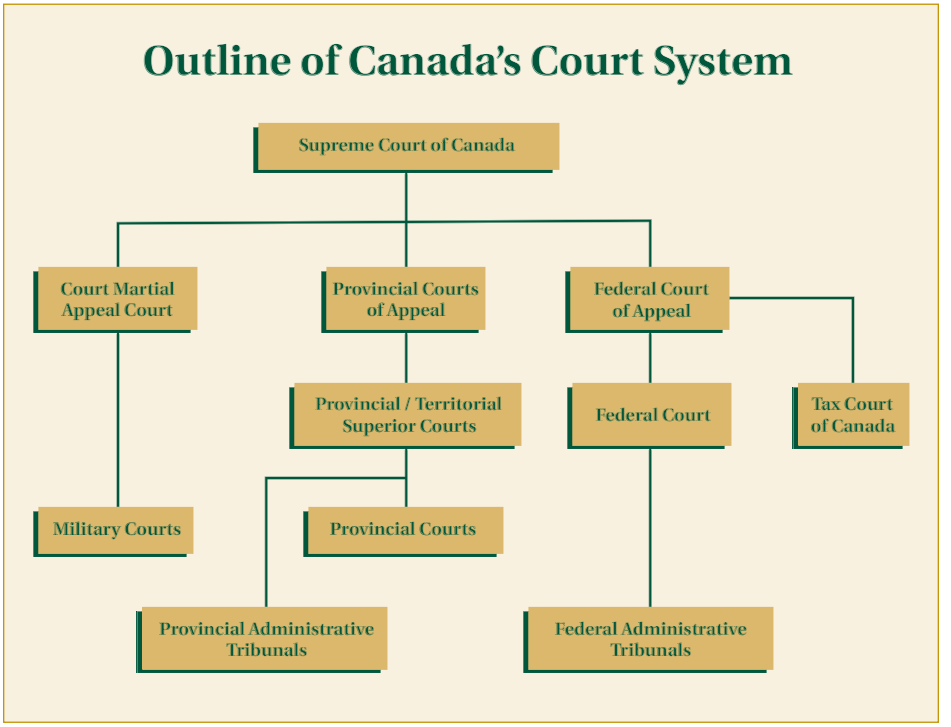
How the courts are organized

Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments in this way:

- The federal government has the exclusive authority to appoint and pay the judges of the superior or upper-level courts in the provinces. Parliament also has the authority to establish a general court of appeal and courts for the better administration of the laws of Canada. It has used this authority to create the Supreme Court of Canada, the Federal Court and the Federal Court of Appeal, as well as the Tax Court. In addition, as part of its criminal-law power, Parliament has exclusive authority over the procedure in criminal courts. Federal authority for criminal law and procedure ensures fair and consistent treatment of criminal behaviour across the country.
- The provinces have jurisdiction over the administration of justice in the provinces, including the organization and maintenance of the civil and criminal provincial courts and civil procedure in those courts.

What do the federal courts do?

The *Constitution Act* of 1867 authorized Parliament to establish a general court of appeal for Canada, as well as any



additional courts for better administration of the laws of Canada.

The Supreme Court of Canada serves as the final court of appeal in Canada. Its nine judges represent the five major regions of the country, but three of them must be from Quebec, in recognition of the civil law system. As the country's highest court, it hears appeals from decisions of the appeal courts in all the provinces and territories, as well as from the Federal Court of Appeal. Supreme Court judgments are final. Ordinarily, parties must apply to the judges of the Supreme Court for permission (or leave) to appeal. In certain criminal cases, the right to an appeal is assured.

The second function of the Supreme Court is to decide important questions concerning the Constitution and controversial or complicated areas of private and public law. The government can also ask the Supreme Court for its opinion on important legal questions.

The federal government also established the **Federal Court,** the **Federal Court of Appeal**, and the **Tax Court**. The Federal Court specializes in areas such as intellectual property and maritime law and federal-provincial disputes, while the Tax Court specializes in tax cases. The Federal Court of Appeal reviews decisions of both these courts, as well as federally appointed administrative tribunals such as the Immigration Appeal Board and the National Parole Board.

Provincial and territorial courts

Although the names of the courts are not identical in each province, the court system is roughly the same across Canada. There are two levels: provincial courts and superior courts.

Provincial courts

Provincial courts try most criminal offences and, in some provinces, civil cases involving small amounts of money. Provincial courts may also include specialized courts, such as youth courts, family courts and small claims court. The provincial governments appoint the judges for provincial courts.

Superior courts

Superior courts, the highest level in a province, have power to review the decisions of the provincial or lower courts. The federal government appoints the judges to these courts, and their salaries are set by Parliament.

Superior courts are divided into trial level and appeal level. The trial level hears civil and criminal cases and has authority to grant divorces. The appeal level hears civil and criminal appeals from the superior trial court. These levels may be arranged as two separate courts: the trial court named the Supreme Court or the Court of Queen's Bench and the appeal court called the Court of Appeal. In some provinces there is a single court, generally called a Supreme Court, with a trial division and an appeal division.

Do these courts try both civil and criminal cases?
In Canada, our courts deal with both civil and criminal cases. In civil or private cases involving breach of contract or other claims of harm (torts), the courts apply common-law principles in nine provinces and the territories. In Quebec, courts apply the *Quebec Civil Code*. In criminal, or public, cases, on the other hand, the common law is applied throughout Canada.

Administrative boards and tribunals

Many administrative rules and regulations are often dealt with outside formal trials. Disputes concerning such matters as broadcasting licences, employment insurance, occupational safety standards or health regulations, may be reviewed by federal, provincial or territorial government departments or by special administrative boards like the Canada Employment Insurance Commission, the Canadian Radio-Television and Telecommunications Commission, labour relations boards, tenancy tribunals, and refugee tribunals.

Procedure before these administrative bodies is usually simpler and less formal than in the courts. However, to ensure that such bodies exercise only the authority given to them by law and that their procedures are fair, the courts may review their decisions and proceedings. In the case of federal boards, the Federal Court and the Federal Court of Appeal do this review.

Civil and Criminal Cases

The difference between private and public law has already been described. Another important distinction is that between "civil" and "criminal" cases. A civil case is another way of referring to a private case or "suit" – that is, where someone sues someone else. A criminal case involves a prosecution by the Crown under a public-law statute such as the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Competition Act*.

How do civil cases proceed?

A civil action or suit can be started when individuals or corporations disagree on a legal matter, such as the terms of a contract or the ownership of a piece of property. A civil suit can also result from damage to private property or physical injury to someone. For example, someone who breaks a leg when he or she slips on an icy stairwell may sue for compensation. The person who sues is called the "plaintiff" and the person being sued is called the "defendant."

The procedure in a civil case can be complex, and the terminology describing the steps varies across Canada. Generally, a suit goes through pleadings, discovery, and the trial itself.

A suit begins when the plaintiff files a pleading with the court to set out the complaint against the defendant and the remedy the plaintiff is seeking. This pleading may be called a writ of summons, a statement of claim, a declaration or an application. When the pleading is filed, a court officer issues the claim by affixing the seal of the court and signing the pleading on behalf of the court. Copies are then delivered to, or "served on," the defendant.

The defendant is responsible to provide the court with a "statement of defence." If she or he does not, the court will assume that the plaintiff's allegations are true, and the defendant may thus lose by default.

Both the plaintiff and the defendant are entitled to consult a lawyer for assistance. Lawyers representing each side often discuss the lawsuit in an effort to settle it before a trial is necessary. A settlement can be reached at any time before the judge makes his or her decision. In fact, only about two percent of civil suits are actually tried before the courts.

After statements of claim and defence are filed, each party is entitled to an "examination for discovery" before the trial. This examination is intended to clarify the claim against the defendant and to let each side examine the evidence that the other side intends to use in court.

The dispute may then proceed to trial. During the trial, it is up to the plaintiff to present facts to support the claim against the defendant. In a civil suit, the plaintiff must prove that it is

probable that the defendant is legally responsible, or "liable," as a civil case is decided on a **balance of probabilities**.

If the facts justify the remedy the plaintiff is seeking, the court will hold the defendant liable.

What happens at a civil trial?

The trial begins with the plaintiff presenting evidence against the defendant. The plaintiff may call witnesses to testify to facts and present papers, photographs or other kinds of evidence. The defendant may cross-examine the plaintiff's witnesses to test their evidence. The defendant then presents his or her own evidence, including witnesses. The plaintiff has the same right to cross-examine.

Throughout the trial, the judge must make sure that all the evidence presented and all the questions asked are relevant to the case. For example, in most situations, the judge will not allow "hearsay" evidence, testimony based on what a witness has heard from another person.

At the conclusion, both the plaintiff and the defendant summarize their arguments. The judge must then consider the evidence presented before making a decision, based on what has been proven to be most probable. He or she must decide whether the facts show that the defendant has broken a civil law, such as a law that we are bound to fulfill our contracts.

Depending on what the suit is about and the court in which the action is taken, the defendant may have a right to a trial by judge and jury. In such cases, the jury must decide which version of the facts it believes. The judge decides what law applies. At the end of the trial, the judge will explain the evidence and the relevant laws to the jury. The jury must then consider the matter and reach a verdict.

Decisions in civil cases

If the defendant is found to be not legally responsible or liable on a balance of probabilities, the judge will dismiss the case. If the defendant is found liable, the judge or jury must consider the remedy that the plaintiff asked for in the pleadings, the facts, and the authority to grant specific relief before deciding how to compensate the plaintiff.

Remedies can be monetary, declaratory or injunctions. Monetary remedies, called "**damages**," are the most common. The judge or jury who decides the case normally fixes the amount of damages. The judge or jury will take into account the expenses incurred by the plaintiff and, where the law permits, an additional sum to compensate the plaintiff for the loss suffered or that might be suffered in the future as a result of the wrongdoing of the defendant.

The judge or jury is not required to award the amount asked for by the plaintiff; they may, in fact, award less than the amount claimed. In Canada, a judge or jury may occasionally award "punitive" or "exemplary" damages beyond compensation to the plaintiff. Such damages are usually awarded when possible under a law or when the judge or jury feels that the conduct of the defendant was so offensive that an increased award is required to express the disapproval of the community.

Declaratory remedies state the rights of the parties. For example, when a court interprets a will or a contract, its decision is declaratory. The court's decision on the ownership of personal property or land is also declaratory.

Some remedies require a person to do or not do something. The most common of these is the "**injunction**." An injunction can prohibit someone from doing something, such as annoying his or her neighbours by burning garbage. Injunctions can also make someone do something, such as remove a junk heap from the plaintiff's property.

Another remedy that requires a person to do something is known as "**specific performance**." This is most commonly applied when the defendant has breached a contract with the plaintiff. For example, if the defendant, Mr. Jones, has broken his contract to sell his house to the plaintiff, Mrs. Smith, the judge could order Mr. Jones to sell the house to Mrs. Smith at the agreed price.

Injunctions and specific performance remedies are not given automatically. In each case, the court has the discretion to make such an order or to award damages according to precedent.

How do criminal cases proceed?

Since a crime is considered to be an offence against society as a whole, it is usually the state that starts a criminal prosecution.

Criminal offences are set out in the *Criminal Code* or in other federal laws. They are divided into "summary conviction" and "indictable" offences. Some offences that may be prosecuted either summarily or by indictment are known as "hybrid" or "dual-procedure elective" offences.

The person charged with a criminal offence is called the "accused," and is always presumed innocent until proven guilty. If the accused is charged with a summary conviction offence, he or she will appear before a provincial court judge for a trial that will normally proceed "summarily," that is, without further procedures. The maximum penalty for this type of offence is normally a $2,000 fine, six months in prison, or both.

More serious offences are prosecuted by indictment. In most cases the accused may choose to be tried by a provincial court judge, by a superior court judge or by a judge of a superior court with a jury. For indictable offences, there may be a "preliminary hearing" during which a judge examines the case to decide if there is enough evidence to proceed with the trial. If the judge decides there is not enough evidence, the case will be dismissed. Otherwise, a full trial will be ordered.

A person accused of a crime may not always be arrested. The accused may simply receive a "summons" after a charge has been laid before the court. A summons is an order to appear in court at a certain time to answer to the charge.

If the accused is arrested by the police, certain procedures must be followed to protect his or her rights. When the police arrest or detain an individual, they must tell the person that he or she has the right to consult a lawyer without delay and explain the reasons for the arrest and the specific charge if one is being made.

Anyone arrested and held in custody has the right to appear before a justice of the peace or judge as soon as possible (usually within 24 hours unless released sooner by the police) to have pre-trial release or bail determined. Bail hearings are sometimes referred to as "show-cause" hearings because the prosecutor usually must show why the accused should remain in custody. However, in certain situations the accused must show why he or she should be released. If a judge decides on release, the accused may be released with or without conditions. Release on bail will only be refused if there are very strong reasons for doing so.

Anyone accused of a crime also has the right to stand trial within "a reasonable time."

What happens in a criminal trial?

A criminal trial is a particularly serious matter because liberty, as well as the stigma of a criminal conviction, is at stake for the accused. Recognizing this, both common law and the Charter provide appropriate protection. For example, the prosecution must prove that the accused is guilty of the charge **beyond a reasonable doubt**. Also, if any evidence is obtained in violation of the accused's Charter rights, such as through an unreasonable search and seizure, the judge may refuse to admit the evidence.

In a criminal trial, an accused person cannot be required by the prosecution to give evidence.

Victims of crime

Although the legal system appears to focus on the offender and the state, the

role of victims is also recognized, and legislation and services are in place that may help victims.

For example, under the *Criminal Code* the victim's safety must be considered in bail decisions; a victim's identity may be protected in appropriate circumstances; victim impact statements may be submitted and must be considered at sentencing; and offenders may be ordered to pay restitution (an amount of money to compensate the victim) as part of the sentence.

Decisions in criminal cases

If the accused is found not guilty, he or she will be acquitted and is then free to go.

If the accused is found guilty of a crime, the judge must decide the appropriate sentence. When making this decision, the judge must consider the seriousness of the crime, the range of sentences possible in the *Criminal Code* or other statutes, preventing or deterring the offender or others from committing similar crimes and the prospects for rehabilitation.

Judges may impose many different kinds of sentences or a combination of penalties that may include such penalties as:

- A fine (a sum of money),
- restitution (an order requiring the offender to compensate for injuries or to pay compensation for loss of or damage to property as a result of the offence),
- probation (release of the offender on the conditions prescribed), which may include community service,
- community service (an order that the offender perform a certain number of hours of volunteer work in the community), or
- imprisonment (confinement in a prison or penitentiary).

An offender who is sentenced to more than two years will be sent to a federal penitentiary; one who is sentenced to two years or less will go to a provincial prison.

However, the judge does not always have to convict, even if the accused person has pled guilty or been found guilty. The judge may give an offender an absolute or conditional discharge. Under a conditional discharge, the offender must obey conditions imposed by the judge or face a more severe sentence. An offender who is given a discharge will not get a criminal record for the offence.

Can a decision be appealed?

Because it is possible that a court may make an error in a trial, the right to appeal a court's decision is an important safeguard in our legal system.

In most civil and criminal cases, a decision made at one level of the court system can be appealed to a higher level. Where there is no right to appeal, permission or "leave" to appeal must be sought. The higher court may deny

leave to appeal, affirm or reverse the original decision. In some cases, it will order a new trial.

Both sides in a civil case and either the prosecution or the accused in a criminal case may appeal.

Sometimes, it is only the amount of damages or the severity of the sentence that is appealed. For example, the accused may ask a higher court to reduce a sentence, or the prosecution may ask to have the sentence increased.

How does restorative justice fit in?

Restorative justice, which has recently come into our system from Aboriginal justice traditions, is another way to respond to criminal acts. Restorative justice puts emphasis on the wrong done to a person as well as on the wrong done to the community. It recognizes that crime is both a violation of relationships between specific people and an offence against everyone (the state).

In restorative justice programs, the victim of the crime, the offender and, ideally, members of the community voluntarily participate in discussions. The goal is to restore the relationship, fix the damage that has been done, and prevent further crimes from occurring.

Restorative justice requires wrongdoers to recognize the harm they have caused, to accept responsibility for their actions and to be actively involved in improving the situation. Wrongdoers must make reparation to victims and the community.

Youth justice

Special considerations come into play when young people commit acts that are considered criminal. This is why Parliament passed the *Youth Criminal Justice Act* in 2003. It applies to young people aged 12 to 17 years, inclusive. The Act recognizes that young persons must be held accountable for criminal acts, although they need not always be held accountable in the same manner or to the same extent as adults. It is in society's interest to ensure that as many young offenders as possible are rehabilitated and become productive members of society.

The Act recognizes that young people lack the maturity of adults, and that the youth justice system should include enhanced procedural protections and measures of accountability that are consistent with this reduced level of maturity. The Act also recognizes that young people have special needs and circumstances that must be considered when any decision is made under the Act. These principles are set out in the Act's Declaration of Principle. To protect the rights of young people, youth justice proceedings require special guarantees: courtesy, compassion and respect for victims; the opportunity for victims to be informed and to participate; and assurance that parents

will be informed and encouraged to participate in addressing the young person's offending behaviour. Young persons are given the same rights and protections as adults, such as the presumption of innocence and the onus on the prosecution to prove its case beyond a reasonable doubt. Of course, young people are also entitled to be represented by a lawyer.

Proceedings under the Act are conducted in special youth courts. A youth court has the power to impose an adult sentence. For the most serious offences committed by a young person who is 14 years of age or more (this age varies from 14 to 16, as determined by each province), there is a presumption that an adult sentence will be imposed. The Crown may also choose to renounce the application of this presumption. In this case, the judge who finds the young person guilty has to impose a youth sentence.

The Act allows for youths to be dealt with outside the formal court system through the means of "extrajudicial measures." These measures are generally restricted to relatively minor, first offences. They are expeditious and often informal, and minimize the stigmatizing effects of an appearance in court. They also reserve the costlier court process for more serious cases.

The Act says that young people are to be held accountable in ways that are fair and in proportion to the seriousness of their offences. These interventions should reinforce respect for societal values, encourage the repair of harm done, be meaningful to the offender, respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons and of young persons with special requirements.

What are our duties under the law?

In Canada, law and justice is not only the business of Members of Parliament, judges, lawyers and police services. Each of us has a part in ensuring that the law works properly and justice is done.

Jury duty

Serving on a jury is one way a citizen can carry out his or her role. One of the oldest institutions of our justice system, a jury enables those who have been charged with a criminal offence to be tried by a group of fellow citizens. In Canada, a criminal law jury is made up of 12 jurors selected from among citizens of the province or territory in which the court is located. Generally, any adult Canadian citizen is qualified to be considered for jury duty. The provinces determine the precise way of selecting jurors.

A citizen who is called for jury duty must show up for selection. Being called for jury duty does not mean a person will be selected to serve as a juror. Some prospective jurors may not be required to do so by the laws of their province. Also, the prosecutor or the defence counsel may object to a particular juror if they believe there is a reason why he or she should be disqualified.

During the trial, jurors must not allow themselves to be influenced by anything except the evidence presented in court. Jurors must make up their own minds about the truth or honesty of the testimony given by witnesses.

Finally, after both sides have called all their witnesses and presented their arguments, the judge instructs the jury on the law and on what they must take into account when making their decision. Then the jurors meet by themselves in a room outside the courtroom to decide, in a criminal case, whether the prosecutor has proven beyond a reasonable doubt that the accused is guilty. In a civil case, they must decide whether the plaintiff has proven that the defendant is liable, or responsible, on a balance of probabilities.

All the jurors must agree on the decision or verdict – in other words, their decision must be unanimous. If they cannot all agree, the judge may discharge the jury and direct a new jury to be empanelled (chosen) for a new trial. After a trial, no juror is allowed to tell other people about the discussions that took place in the jury room.

A jury in a civil case is slightly different. It has, for example, only six jurors, and the decision does not have to be unanimous, as long as five of them agree on the verdict.

Trial by jury

Most civil cases in Canada are tried by judges without a jury. However,

- anyone charged with a criminal offence for which there can be a prison sentence of five years or more has the right to a trial by jury,
- in some cases, a person charged with a criminal offence for which there can be a prison sentence of less than five years may have the right to choose a trial by jury, and
- some civil cases can also be tried by judge and jury.

Testifying in court

A person who has information that either party in the case believes to be useful may be called to give evidence in a civil or criminal trial. For example, someone might have witnessed the event, know something that is important to the case, or have a document key to the trial. People whose knowledge about a particular subject can help the court with answers to technical questions may also be called as an expert witness. Usually, though, people come forward voluntarily when they have information they believe is related to the case. If they do not, they can be summoned by "subpoena" to give evidence in court. A person subpoenaed must testify or face a penalty.

Witnesses' testimony is taken under oath or by affirmation that they will tell the truth. Witnesses are required to answer all questions they are asked, unless the judge decides that a question is irrelevant or not necessary to the case.

Sitting on a jury or testifying in court gives citizens an opportunity to make sure Canada's justice system is working as it should.

Knowing the law

People do not have to be experts in the law. However, in our system, ignorance of the law is no excuse or defence. If you are charged with an offence, for example, you cannot be excused by claiming that you did not know you were breaking the law (although the court will consider honest mistakes of fact). Because our laws are publicly debated before being passed in Parliament or a legislature, the public is expected to know what is permitted or legal and what is not.

The duty to know the law means that citizens should take steps to be sure they are acting legally. Information is available from federal, provincial and territorial government offices, public libraries, public legal education and information associations, and the police. If, after consulting these sources of information, you are still uncertain about the law, then you should consult a lawyer.

Lawyers

Lawyers are qualified to give legal advice through many years of study and training. They may represent their clients in both civil and criminal cases. They can also help and advise their clients in any situation where knowledge of the law is necessary, such as buying or selling a house.

In Quebec, the legal profession consists of both lawyers and notaries. Notaries deal with contractual matters, especially in real estate, and cannot appear in court except in non-contentious matters. In the rest of the country, lawyers can provide any kind of legal service. However, many lawyers specialize in one type of law, such as criminal law, or only give tax advice.

A lawyer's advice is important to an accused since a conviction can have serious consequences, but some accused people are not able to pay for one. For this reason, the federal and provincial governments have set up a program to share the cost of legal services for those who qualify for such assistance. Any person who meets the financial criteria and who is accused of a crime for which a conviction might mean jail or loss of livelihood may get legal aid. Some provinces also offer legal aid for civil cases, particularly in family-law matters.