

THE CANADIAN LEGAL SYSTEM

Introduction

The material in this section provides a foundational overview of the Canadian Legal system. It is structured into four topic areas which are discussed in varying detail below:

- [I] Foundations of the Canadian Legal System: The Constitution;
- [II] Legitimacy of the Canadian Legal System and Constitution;
- [III] Sources of Law;
- [IV] The Common Law System in Operation.

A number of readings are included, as well as diagrams. Subject matters covered include: the main sources of law in Canada (legislation and case law) and how they interact;

the basic categories of law (e.g. international and domestic, public and private);

the institutional processes by which each type of law is created, interpreted and applied (legislative enactment and judicial decision-making);

and the constitutional framework that underwrites these institutions and formally validates their creation of law.

The material provided in this section is relevant not only to the other sessions of Academic Orientation but also to all of your courses in first year.

[I] Foundations of the Canadian Legal System: The Constitution

The Canadian constitutional framework is foundational to the contemporary Canadian legal system. This section provides a brief introduction to that framework.

Governance is about systems of social organization and control and governmental power is the capacity to establish and maintain such systems. The 'constitution' of a society has been defined as the collection of important rules, principles and practices relating to the

governance of society.¹ This definition is deliberately vague and indicates that the collection of rules, principles and practices is open-ended and never entirely static or fixed. Further, it recognizes that positive law (that is, law that has been formally and validly created by an institution of government) is not the only source of the rules, principles and practices by which social organization and control are established and maintained. Many important rules, principles and practices of social organization and control arise from custom and tradition and may be only partially reflected in positive law. For instance, the role and power of the Prime Minister of Canada is not mentioned in our written constitutional documents and yet this position is central to the operation of governance in Canada.

Nevertheless, positive law is an important vehicle for the exercise of governmental power and constitutions typically establish a legal system in order that positive law may be made, implemented and applied. In many societies (including Canada) the principle institutions of the legal system are basically the same and correspond to these aspects of governance by positive law. That is, the institution of the legislature (e.g., the Parliament of Canada) is primarily responsible for making positive law, the institution of executive/administration (e.g., the Prime Minister and Cabinet and the Ministries of the public service) is primarily responsible for implementing positive law, and the institution of the judiciary (e.g., the Supreme court of Canada) is primarily responsible for resolving conflicts about the application of positive law. The separation of responsibilities in this way is referred to as the Separation of Powers although, as you will see in your first year courses, there is actually a significant degree of shared and overlapping power.

In establishing a legal system suitable for governance by positive law, constitutions also empower that system and in that sense underwrite the validity and legitimacy of the positive law produced by the system. At the same time, because constitutions are foundational to the system of positive law (and so cannot be validated by it) the validity and legitimacy of the rules, principles and practices in which constitutions consist generally needs to be found in a combination of customary and positive international law, social acceptance or acquiescence and, in some cases, strength of numbers and brute force. At any rate, once the general legitimacy and validity of a constitution, and the legal system it establishes, is secured, the validity and legitimacy of positive law depends, in the first place at least, upon compliance with the constitutionally defined process of law-making. However, as you will see in your courses (particularly Access to Justice), there are powerful arguments that the validity and legitimacy of positive law depends not only upon its procedural pedigree but also upon its substantive content.

¹ See Macklem et al, *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery, 2002) at 3.

In Canada, there is a collection of written documents that form an important part of the broader constitution and, because they originated as or resemble positive law, are given particular significance in the Canadian legal system. Of foundational importance is the *Constitution Act, 1867* (which, until 1982, was called the *British North America Act, 1867*). This established and defined a new governmental and legal system for Canada, which essentially prevails to this day. The *Constitution Act, 1867* thus empowered a new system for governance by positive law in Canada. At the same time, having originated as an enactment of the British Imperial Parliament, it is itself an instance of positive law, albeit a special and foundational instance.

The chief attributes of the system expressly established in the *Constitution Act, 1867* are:

1. a Constitutional Monarchy (i.e., a monarch is the formal head-of-state, but his/her powers are largely controlled by the constitutional document)
2. a Federal State (i.e., governmental and legal power is divided between one national and several regionally-defined provincial governments @ this is known as the Division of Powers);
3. a Representative Democracy (i.e., the people hold and share underlying sovereign power, exercised through elected representatives (apart from the federal Senate));
4. a partial Separation of Powers (i.e., a partial separation of legislative, executive/administrative and judicial power in that, while the courts are separate, the executive (PM and Cabinet) is drawn from the legislature).

Illustrating the point that positive law constitutional documents usually do not contain all the important rules, principles and practices related to governance, the operation of the system established by the *Constitution Act, 1867* clearly presumed and depended upon an acceptance of other important organizing principles and practices such as the Westminster Parliamentary System and Responsible Government, as well as the Rule of Law. Further, not long after this system was established, the practice of Judicial Review evolved, principally to adjudicate disputes over the division of legislative powers between the federal government and the provinces (for more on the Division of Powers, see Reading #1, below). Most recently, with the process of repatriation in 1982 (by which the final formal ties to Britain were severed), a variety of express additions were made to the Canadian constitution (see the *Constitution Act, 1982*), including the *Charter of Rights and Freedoms*, which extended the ambit of judicial review and placed additional constraints, based in human rights norms, upon the exercise of governmental and legal power.

This section has provided only a brief snapshot of some of the most basic attributes of the Canadian constitutional framework. You will learn much more about the elements and

operation of this framework, and its animating ideas, in your Constitutional Law and Access to Justice courses. For now, the main point is that the existence, operation and validity of the Canadian legal system, and of positive law in Canada, is founded upon the collection of rules, principles and practices that form the constitution of Canada and that an important part of that constitution are the written legal documents such as the *Constitution Act, 1867*.

[II] Legitimacy of the Canadian Legal System and Constitution

While the legitimacy of the contemporary Canadian legal system, and the positive law that emanates from it, depends in part upon its continued adherence to its constitutional framework, it also depends upon the historical (and, some would argue, continuing) process of displacement, disempowerment and colonization of the First Nations of Canada. You will learn more about this process, its legal ‘justification’, and the contemporary legal measures being undertaken in response to it, in your Access to Justice, Constitutional Law and Property Law courses. For now, suffice to say that, many First Nations people and communities, who occupied what is now Canada for generations before the arrival of Europeans under their own constitutional systems, contest the historical and continuing legitimacy of the Canadian legal system and constitutional framework. At least part of their argument is that the establishment of the Canadian legal system and constitutional framework did not comply with the doctrines of international law (contained in both positive law and custom) that purportedly prevailed at the time. They further argue that successive Canadian governments have failed to comply with the terms of the Treaties they entered into with First Nations peoples in the process of establishing and maintaining their occupation of Canada.

Though by no means in the same position as Canada’s First Nations, it should also be acknowledged that many Quebecois also maintain reservations about the legitimacy of the Canadian legal system and constitutional framework, particularly in relation to the process and substance of the 1982 repatriation.

Finally, it should be recognized that the persistence of inequality, disadvantage and discrimination across the spectrum of civil, political, social, economic and cultural institutions and practices, much of which was initiated through law, and some of which is still perpetuated by law, casts a shadow over the legitimacy of the Canadian legal system and constitutional framework for many individuals and groups, such as women, visible minorities and immigrants, the disabled, gays and lesbians and those living in poverty.

[III] Sources of Law

In the Canadian legal system the two main sources of law are legislation and case law. This section contains four readings that describe various aspects of these sources. In addition, please consult Diagram 1 (which situates these sources of law in relation to other sources of law) and Diagram 2 (which sets out the main categories of law, which are dealt with in both legislation and case law). [All diagrams are located at the end of this section of readings on the Canadian Legal System.]

Reading #1 gives an overview of the sources of law, including a description of legislation (and where it can be found – an issue you will return to in much greater depth in Legal Research & Writing), the division of powers and the legislative process (see also Diagram 3 on the legislative process). This first reading then goes on to define case law, and discuss its identity, structure and mechanics. It concludes with a discussion of the substance of case law that begins with a consideration of one of the two main traditions of case law, namely, the common law, which is fundamental to your study of areas such as Criminal, Contract and Property Law.

Reading #2 then continues this discussion of common law by describing the origins of the common law and addressing the issue of the reception of British law in Canada. The second reading then proceeds into a discussion of the other main tradition of case law, namely, the law of equity. The equitable tradition will form an important part of your study of areas such as Contract and Property Law.

Reading #3 deals with the issue of the relationship between legislation and case law, which is fundamental to all the areas of law you will study in first year.

Reading #4 provides a brief overview of the differences between the common law system of English-speaking Canada and the civil law system of Quebec.

Note that the term ‘common law’ has at least three uses: first, it can be used to refer to that law which originates in the decisions of judges (judge-made law), rather than in legislation; second, it can be used to refer to one of the two more specific traditions of judge-made law, the other being the law of equity; third, it can be used to refer to the type of legal system in which a central role is given to judicial elaboration and interpretation of law, as opposed to other types of systems, such as civil law, in which the emphasis is on codified law and the judiciary occupies a less central role.

READING #1:

Excerpted from F.C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (Markham, Ontario: Butterworth's, 2001) pp. 56-61. Footnotes excluded.

* Legislation

Until fairly recently, legislation was not a significant resource simply because the body of statute law was not that sizable. Over the past 100 or so years, however, there has been a tremendous growth in legislation. In consequences, in most matters, members of the legal community look first to statutory materials which, at any moment, will concern whatever matters capture the imagination and will of legislators. Simply stated, a *statute* is an act of some legislature which declares, commands or prohibits something and which otherwise conforms with the procedures required by the rules constituting the legislature. Typically, statutes begin with words of enactments (as in "Her Majesty, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows") which are followed first (but not always) by a section containing the short title of the act, next (and almost always) by a section containing the definition of certain words as they are used in the act, and then (always) by the parts, sections, subsections and paragraphs which comprise the body of the act. We will begin with the matter of procedure before going on to the identity of legislatures.

In Canada, a federal state, the authority to legislate is divided as between the federal Parliament and the provincial legislatures. By virtue of ss. 91 and 92 of the *Constitution Act, 1867*, each is given exclusive authority over certain matters and shared authority over other matters. For instance, authority to legislate on matters such as national defence, currency, trade and commerce, patents and copyright, marriage and divorce and criminal law resides exclusively in the federal Parliament, and on matters relating to education, health, direct taxation and property and civil rights with the provincial legislatures. In addition, legislative power with respect to a number of matters is shared between the levels of government. If either level of government invades, directly or indirectly, a jurisdiction reserved for the other level of government, the legislation is beyond the competence of the legislature and if it is challenged in the courts, will be declared *ultra vires* — beyond the powers of — the legislating body and of no force or effect. If a provincial and federal law are both valid yet deal with the same subject matter in an inconsistent manner, then the provincial law is of no force or effect to the extent of the inconsistency. These constitutive rules, however, do not adequately describe the process of legislation. For even where a legislature has substantive authority over a matter, it still

must exercise that authority in conformity with a complex of rules and conventions which lawyers know as parliamentary procedure.

Proposals for new statutory law are called “bills”. A bill becomes law — a statute — when it is passed by a majority vote of a competent legislative body. Bills are transformed into law in three stages. Generally, it is the government, federal or provincial, which introduces a bill to its legislature through a process called “first reading” which makes the proposal available in printed form for public commentary. For a variety of reasons — not least of which is negative public reaction — many bills die at first reading. Those which do survive proceed to “second reading” at which stage the bill is reintroduced by the minister whose department is responsible for the subject matter of the bill and becomes a matter of full parliamentary debate particularly as regards the reasons for and consequences of the proposal. Second reading culminates in a vote, and if the bill passes, it is considered approved in principle and is generally then sent to the appropriate standing committee of the legislature/Parliament for further study and sometimes public hearings. Often, a committee will recommend amendments to the bill which are then debated when the bill is reintroduced for final approval at “third reading.”

In the provinces, if a bill passes final reading, it becomes law — and is henceforth called an “act” or an “enactment” — immediately upon receiving Royal Assent which, in Canada, means approval by the Lieutenant Governor of the province. Royal Assent is, of course, a formality, and never delays the coming into force of a statute. Some statutes have a provision that delays their coming into force until a particular date or grants the government discretion as to the date of coming into force. Where the latter sort of provision governs, the act will have force and effect only from the date at which the government formally proclaims its coming into force. Federally, matters are somewhat more complicated since bills passed by the House of Commons have then to go to the Senate where the entire process of readings is repeated. If a bill passes in the Senate, it becomes law upon receiving Royal Assent, in this case from the Governor General. If the bill fails to pass or if the Senate amends it, the bill is referred back to the House of Commons.

All federal and provincial statutes are publicized, first in the respective government’s “gazette” — *Canada Gazette*, *Alberta Gazette*, and so on — and subsequently in annual volumes, both of which are printed by the Queen’s Printer, an office created by provincial and federal statute. The gazette is the official publication of the government, federal or provincial, which records all acts of state including especially the passage of bills into law. Acts appear in the annual volumes as numbered chapters (for example, in Alberta, the *Interpretation Act* is identified as c. I-7). Since many statutes are in fact amendments to existing acts, provincial and federal Queen’s Printers periodically consolidate revisions in volumes which are called revised statutes (as in the *Revised Statutes of Ontario* or the *Revised Statutes of Canada*). Since the period between consolidations is often lengthy, in

order correctly to identify statutory law, it is often necessary to consult several annual volumes. Many provinces now issue looseleaf editions of statutes in force which are ongoing consolidations and in most jurisdictions, consolidations are also accessible electronically. Of course many laws, both provincial and federal, can now also be found on-line though one must be careful to ensure that the on-line version corresponds to the official version as published in the gazette.

Though “the legislature” is initially the legislature of a province or Parliament, either assembly may by statute identify some other body or office or officer as its delegate and authorize it to legislate further on its behalf with respect to some matter. This process is known as *statutory delegation*, the act as a *statutory instrument*, and the delegated or indirect legislation which results as *regulation*. In the simplest case, legislation will identify a minister of the Crown as its delegate and authorize the minister to issue regulations without further legislative debate. More complex cases involve the creation of some body or commission or tribunal — say, a school or university board or a human rights commission or a regulatory tribunal like a labour relations board — with authority over some matter, including sometimes adjudicative authority. Like statutes, regulations are first published in the federal or provincial gazettes and subsequently in annual volumes and consolidations. In many jurisdictions, regulations also are available electronically.

With the proliferation of statutes, regulations have permeated very nearly every aspect of contemporary life. Though statutory delegation makes intuitive sense — legislatures are spared having to deal with the details which in any event might only emerge through experience — there is the danger that statutory delegates will insinuate themselves improperly into the lives of citizens. For just this reason, the age of legislation has compelled the development of a new body of law called *administrative law* which seeks to constrain the powers of the state when it acts through statutory delegates. Like the legislatures who parent them, statutory delegates can only properly act within the grant of their authority. If the *ultra vires* or beyond their authority, then their actions have no legal validity.

* Case Law

DEFINITION, IDENTITY AND STRUCTURE

Case law is the aggregate of written judicial decisions, most of which are reported, on the law as it exists and applies to particular facts. Cases have been reported for the past 500 years of Anglo-North American legal history. Though the methods of reporting have varied, cases have always been identified and structured in certain ways. They are identified according to the names of the parties. In private law litigation, the parties are the persons,

individual or corporate, whose relations gave rise to the case. In the court of first instance, they are called the *plaintiff* (the party that brought the action) and the *defendant* (the party against whom the action is brought and who is defending against the action) and their names — the last names or persons and the names of companies and corporations — constitute what lawyers call the *style of cause*. Some famous private causes with which every law student becomes familiar are *Carlill v. Carbolic Smoke Ball Company*, *Rylands and Horrocks v. Fletcher*, and *Donoghue v. Stevenson*. When the trial court's determination of the matter is appealed, the parties are known, depending upon which initiated the appeal, as the *appellant* and *respondent*.

The style of cause is different in criminal matters. In Canada, the parties are identified as "The Queen" and "the accused" — though when speaking, lawyers refer to "The Crown" and never to "The Queen" — and the style is "Regina v. X" (last name of the accused) or "R. v. X". When an accused appeals a trial decision, the style of cause becomes "X v. The Queen". The practice is different elsewhere. In the United States, the accused is called a defendant and the style of cause is "The People of [name of state] v. X" or sometimes "The Commonwealth of [name of state] v. X". In England, the accused remains the accused, but the accuser is not "The Queen" but the "D.P.P." or "Director of Public Prosecutions".

So far as their structure is concerned, cases always contain a recitation of the relevant facts, a statement of the law governing those facts, and an application of the law to the facts, all of which then results in a statement of the court's judgment in the matter.

MECHANICS

Case law is found in law reports. They can now also be found on-line, though again one has to be careful to ensure that the on-line version corresponds to the version found in law reports. Though at one time many cases remained unreported because they involved no significant or novel point of law, with the proliferation of specialized law reports, a great many decisions — and very nearly all the decisions of superior courts — are now reported. In Canada, there are reports that publish the decisions of the courts in both the federal and provincial court systems. Decisions of both the Supreme Court and the Federal Court are reported in official reports called *Canada: Supreme Court Reports* and *Canada: Federal Court Reports* which are published by the Queen's Printer for Canada. Supreme Court decisions and important decisions of the federal courts also appear in national reporting series, such as the *Dominion Law Reports* and the *National Reporter*, which are published commercially. Decisions of the provincial superior courts appear in provincial law reports, in regional law reports in the *Dominion Law Reports* and in specialized reports, all of which are commercially produced. Examples of the provincial reports are the *Alberta Law Reports* and the *Ontario Reports* and of the regional reports, the *Western Weekly Reports* and the *Atlantic Provinces Reports*. Decisions of the inferior provincial courts and of federal and provincial tribunals, boards and commissions are generally reported, if at all, in

specialized reports. This massive case law is accessible, in a variety of different reports, through a variety of manual and electronic means which will not be recounted here. Anyone contemplating the study of law should note, however, that mastering those means — with which so much of their later professional lives will be occupied — is a central burden and obligation of law students, particularly in first year. You will become thoroughly familiar with researching statutes and cases in your Legal Research and Writing course.

SUBSTANCE

So far as its substance, case law may concern either legislation or judge-made law. Where the former is the case, case law most often concerns the competence or the interpretation or the application of some statute. When no statute is at play, cases report judicial decisions as regards the identity, interpretation, or application of some area of judge-made law. In the Anglo-North American system, judge-made law is itself divided into two bodies of law, common law and equity, which are briefly described below.

COMMON LAW

Common law is that body of law which owes its authenticity and authority to the judgments of courts recognizing, over time, certain rules as rules of law. These rules give rise to causes of action which do not depend upon statute.

Common law remains a central resource for both legal practice and education. First-year law students undertake a systematic study of the common law canon, and the practices of most lawyers and virtually all judges would be unthinkable without the common law. The categories of the common law concern the most basic of social relations. The common law of torts governs which harms to persons and property give rise to an entitlement for remedy. The common law of contract governs which failed promises give rise to entitlement. The common law of property determines who may and may not use resources and under what conditions. The common law also includes other categories of law which govern, both substantially and procedurally, other aspects of our relationships. At one time, it included categories of law which in Canada are now governed by statute.

READING #2:

**Excerpted from G. Gall, *The Canadian Legal System*,
4th ed. (Toronto: Carswell, 1995), pp. 52-7. Footnotes excluded.**

THE RECEPTION OF ENGLISH LAW IN CANADA

1. THE ORIGIN OF THE COMMON LAW

The common law system of law originated in feudal England at about the time of the Norman conquest. It became a practice at that time that the King, in the course of travelling throughout England, would listen to complaints of his subjects and resolve disputes in accordance with the particular customs of that local area of the country. Customs which were not local, but rather were known throughout the land, were called “common customs”.

Eventually, responsibility for this adjudication fell to the King’s body of advisors, who established three types of courts. First, there was the Court of Common Pleas, for the adjudication of private disputes, one individual against another. Secondly, there was the Court of King’s Bench, for criminal matters. Finally, there was the Exchequer Court, in which monetary matters were resolved. The decisions of these courts subsequently became known and were regarded as the “common customs” or “common law” of the land. Eventually, they began to take on a formal aspect and the judges of the various courts held themselves bound by past decisions, and therein lay the origin of the common law as a body of jurisprudence or past decisions upon which judges rely in deciding the cases before them.

The common law of England subsequently spread to the colonies of the British Empire, including the British colonies in North America. Of the two major systems of law in the world, the common law system is not as extensively followed as the civil law system. However, the common law system governs the law in most of the English speaking world (except Scotland) and in many parts of the non-English speaking world, encompassing those nations that are presently or were formerly part of the British Commonwealth. The common tradition linking the common law world is this reliance on a body of case law that developed over centuries of judicial decision-making in solving current problems before the courts.

The mechanism by which the British colonies in North America adopted the common law system in general and the English law, as it existed at the time, specifically, is somewhat complicated. Generally speaking, the method by which English law was received in a British colony depended upon how that colony was acquired by Great Britain. If it had been acquired by settlement, one set of rules would apply. And if it had been acquired by treaty to cession, yet another set of rules would apply. In Canada, the reception of English law in the territories and in each of the provinces differed. No attempt will be made in this text to consider the complicated history of the reception of English law in detail. However, set out below is a brief and summary review of that history. In addition, interested readers may consult various writings which consider the history of the reception of English law in Canada in considerable detail.

2. CONFEDERATION

Under the provisions of the British North America Act of 1867 (since renamed the Constitution Act of 1867), the Dominion of Canada was created. The original B.N.A. Act provided for a union of the then existing provinces of Canada, Nova Scotia and New Brunswick. Upon union, the province of Canada was divided into the province of Ontario (formerly called the province of Upper Canada) and the province of Quebec (formerly the province of Lower Canada), and these two provinces were united with Nova Scotia and New Brunswick. In addition, the original B.N.A. Act provided for the possibility of future admission of the provinces of Newfoundland, Prince Edward Island and British Columbia, as well as Rupert's Land and the North-Western Territory.

3. WESTERN PROVINCES

English law was first brought to the Canadian west by the Hudson's Bay Company under its Charter of 3rd May 1670. When British subjects settled a colony, they brought with them the existing English common law and statutory law.

Under the combined operation of the Rupert's Land Act, 1868 (U.K.), c. 105, the Manitoba Act, S.C. 1870, c. 3, and the Order in Council of 23rd June 1870, the Hudson's Bay Company surrendered its land to the new Dominion, Rupert's Land and the North-Western Territory were admitted into the Dominion, and the province of Manitoba was created. The admission into the Dominion of Rupert's Land and the North-Western Territory and the creation of the province of Manitoba all became effective on 15th July 1870. That date is significant, moreover, for reason that it is the date when the province of Manitoba and the North-Western Territory received English law, as it existed at that time.

By virtue of an 1871 amendment to the Constitution Act of 1867, the Parliament of Canada had legislative authority to create new provinces out of the existing territories. Pursuant to that authority the Alberta Act, S.C. 1905, c. 3, created the province of Alberta and the

Saskatchewan Act, S.C. 1905, c. 42, established the province of Saskatchewan. Under those statutes, there was provisions for the continuance of the law as it existed in the territories, and the reader will recall that in the territories, English law was received as it existed on 15th July 1870. As a result the effective date of the reception of English law in the provinces of Alberta and Saskatchewan as also 15th July 1870.

Generally speaking, the date of reception of English law for those colonies acquired by settlement is the date at which the colonial legislature, once established, enacted its first statute. The province of British Columbia acquired English law by settlement. The Law and Equity Act, R.S.B.C. 1979, c. 224, expressly provides for a reception of English law as it existed on 19th November 1858.

4. MARITIME PROVINCES

The Maritime provinces were also acquired by settlement and, therefore, the date for reception of English law is the date at which each of the colonial legislatures were instituted. For the provinces of New Brunswick and Nova Scotia, this occurred in 1758; for the province of Newfoundland, in 1832. In Prince Edward Island, the colonial legislature was instituted in 1773; however, English law was actually received in 1763 pursuant to a royal proclamation.

5. CENTRAL CANADA

Although the province of Quebec is presently a civil law jurisdiction, for a short time it was rules by English law. After Quebec fell to the British, English civil law and criminal law were introduced by the Royal Proclamation of 1763. Subsequently, although English criminal law remained, French civil law was reinstated by virtue of the Quebec Act, S.C. 1774, c. 83.

Under the Constitutional Act, S.C. 1791, c. 31, the provinces of Upper Canada and Lower Canada were created. In Ontario (Upper Canada), following the above enactment, a legislature was created and it enacted its first statute in 1792, under which the English civil law was made applicable to the new province. That Act was assented to on 15th October 1792, and that date is generally regarded as the date for the reception of English law in the province of Ontario.

6. OTHER SIGNIFICANT DATES

After the reception of English law in the “colonies” English legislation affected the “colonies” only if it was applicable to and intended to apply to the colony. Conversely, no colonial statute could be repugnant to any British statute or common law, and it would be inoperative to the extent of any repugnancy. However, upon the enactment of the Colonial

Laws Validity Act, 1865 (28 & 29 Vict., c. 63), the above doctrine of repugnancy applied only to colonial statutes which were repugnant to British statutes specifically directed at the colonies.

Significantly, following the enactment of the Statute of Westminster, 1931 (22 & 23 Geo. 5, c. 4), the British Parliament had no further capacity to legislate for Canada, unless Canada so requested. The English common law, however, still had a significant impact so long as Canadian courts considered themselves bound by decisions of the higher English courts under the doctrine of *stare decisis*. This was particularly so until the Supreme Court of Canada became the final court of appeal in respect to all criminal and civil matters in 1949.

THE LAW OF EQUITY

With the reception of English law, Canada inherited not only the English common law but also the law of equity. Historically, the various courts established by the King's advisors, referred to earlier in this chapter, became very formal and rigid in applying the law and in providing the appropriate remedies in the course of adjudicating particular disputes. As a result many subjects would petition the King for extraordinary remedies, as the King was regarded as the fountainhead of justice. The King, in response to these petitions, would provide these extraordinary remedies in the appropriate circumstances. However, as this responsibility became increasingly burdensome, he transferred this jurisdiction for providing extraordinary remedies to his Chancellor. The Chancellor would then receive the various petitions and would dispense these remedies in the appropriate circumstances. By reference to "appropriate circumstances", one means, first, that owing to the rigidity of the rules under which the regular courts operated, they could not provide a remedy in a particular circumstance. Secondly, the petitioners had to fulfill certain preconditions. Eventually, the Chancellor, too, found this responsibility burdensome, and accordingly he transferred jurisdiction to special courts established for the sole purpose of granting those extraordinary remedies. These courts became known as the courts of chancery. After a period of time, these courts, like the King's courts, became somewhat formalized and operated under a regime of rigid rules to which subjects had to adhere before the granting of these extraordinary remedies would be permitted.

In essence, what developed then were two systems of courts in England: the King's regular courts or courts of common law, and the courts of chancery or, alternatively expressed, the courts of equity. The reader will recall the various connotations given to the term "common law". This is yet another connotation, for here the term "common law" means a system of courts of common law providing common law remedies, as opposed to a system of courts of equity providing what are known as equitable remedies.

Parallel with the development of the two systems of courts was the development of two systems of law. The common law courts concerned themselves with the common law,

while the courts of chancery concerned themselves with what became known as the law of equity. The extraordinary remedies dispensed by the latter system of courts became known as equitable remedies and the preconditions that had to be fulfilled before the courts of chancery would entertain a petition for an equitable remedy became known as the rules of equity. Probably the most important rule of equity is that a petitioner will not receive an equitable remedy unless he comes to the court "with clean hands". This means, essentially, that he must not taint his case by any wrongdoing whatsoever on his part. Examples of the more important of the equitable remedies are those of rescission and specific performance in the law of contract, but there are several others as well.

In the latter part of the last century, by virtue of the enactment of the Judicature Acts by the Parliament of Great Britain and by the legislative assemblies of the provinces of Canada, the courts of common law and the courts of equity emerged, with the result that we now have only one system of courts dispensing both common law and equitable remedies. However, since a court will not now entertain an application for an equitable remedy unless the applicant has satisfied the various rules of equity referred to above, the distinction between law and equity is still important.

READING #3:

**Excerpted from G. Gall, *The Canadian Legal System*,
4th ed. (Toronto: Carswell, 1995), pp. 41. Footnotes excluded.**

3. PARLIAMENTARY SOVEREIGNTY AND THE RELATION OF CASES TO STATUTES

Under the British doctrine of parliamentary sovereignty, Parliament can make or unmake any laws provided, in the Canadian context, that Parliament or a provincial legislature does so in accordance with constitutional limitations. We have thus far defined the two major sources of law — statutory enactment and case law. The question then becomes: What is the relationship between the two? By virtue of the operation of the doctrine of parliamentary sovereignty, Parliament has the authority to repeal or modify any principles set out in the case law. Accordingly, in the event that a particular common law rule is antiquated or somehow in need of reform, the sovereign legislative body can enact legislation in effect to repeal, modify or alter (or perhaps codify) that common law rule. The various interpretation statutes do, however, contain provisions to the effect that a statute is remedial (rather than confirmatory) of an existing common law rule. Even if a common law rule is modified by statute, that statute, however, must conform to the standards required under the Charter of Rights and Freedoms which you will discuss at length in your Constitutional Law Course.

READING #4:

**Excerpted from G. Gall, *The Canadian Legal System*,
4th ed. (Toronto: Carswell, 1995), pp. 30-1. Footnotes excluded.**

2. THE DIFFERENCES BETWEEN THE COMMON LAW AND CIVIL LAW SYSTEMS

Nine provinces in Canada are said to be common law provinces; that is, the private law of those provinces is administered in accordance with principles associated with “common law” systems of law. On the other hand, Quebec’s private law is administered in accordance with principles associated with “civil law” systems of law.

The common law and civil law systems have developed similarities, but their fundamental approaches to the law are substantially different. The civil law system begins with an accepted set of principles. These principles are set out in the civil code. Individual cases are then decided in accordance with these basic tenets. In contrast, the common law approach is to scrutinize the judgments of previous cases and extract general principles to be applied to particular problems at hand. This difference in approach helps to explain the different manner in which the two systems regard the doctrine of *stare decisis*. Owing to the doctrine of *stare decisis*, judges in a common law system are bound to follow precedent cases, decided by judges of higher courts, given a similar fact situation in the precedent case and the case at hand. In contrast, however, in the civil law system, the codified principles, and not the cases, are supreme. As a result, theoretically at least, judges are not bound by previous decisions and may differ in their interpretation of the civil code. In deciding cases, a civil law judge is essentially applying the various codified principles to the cases at hand. In doing so, he must, of course, interpret those principles. But he need not rely on prior interpretation in a “precedent” case. Instead, he can choose to conduct his interpretation in accordance with the dictates of justice. He may even consider that an instant case is an exception to a particular codified principle.

Practically speaking, however, civil law judges do not ignore previous cases. There are several reasons for this. First, once a given principle, as set out in the civil code, has been given the same interpretation a number of times, a civil law judge would be risking reversal on appeal if he entertained a new analysis in interpreting the same principle. Secondly, judges do, in fact, follow previously decided cases because of the necessity of providing an element of predictability in the law. As will be seen at a later point in the book, the interests of certainty and predictability play an important role as rationales for the doctrines of precedent and *stare decisis* in the common law provinces.

It has been said that another major distinction between the two systems is that the civil law system is codified while the common law system is not. However, with the tremendous increase in the amount of legislation (both primary and subordinate legislation) in common law jurisdictions, that observation is no longer valid. The true difference between the common law and civil law systems may be found in the approach described above. Notwithstanding this, legislation in common law jurisdictions is not intended to be self-contained. In contrast, codified civil law is expected to replace all that has gone before and is intended to be a conclusive statement of the law. This attitude was demonstrated in the very beginnings of the civil law.

Fundamentally, the difference between the civil law system and the common system relates not only to the importance of precedent in the common law system and the relative lack of importance of precedent in the civil law system, but also to the general approach taken by the courts in the two systems. In a common law system, the courts extract existing principle of law from decisions of previous cases, while in the civil law system, the courts look to the civil code to determine a given principle and they then apply the facts of an instant case to that principle. If the code is silent in respect of a given matter, a judge will then attempt to apply general principles contained in the code to the specific fact situation before him.

[IV] The Common Law System in Operation

As a type of legal system, a common law system gives a central role to judicial elaboration and interpretation of law. Courts are not only entrusted with establishing, maintaining, developing and applying the common law (or judge-made law) but also with the interpretation and application of legislation and the Constitution. Ultimately, this means that courts are an important law-making institution in a common law system and over time they have developed distinct practices and methodologies of decision-making. The readings in this section address various elements of the practices, methodology and institutional organization of courts in the Canadian common law system. You will consider these practices and methodology in greater detail in Access to Justice and they inform much of what you will do in Legal Research & Writing. Further, the operation of the common law system is fundamental to all areas of law you will study.

Reading #5 provides a brief introduction to the common law method and emphasizes the fundamental importance of the doctrine of *stare decisis* and practice of abiding by precedents.

Reading #6 provides an overview of the Canadian court structure and of the court hierarchy. (See also the Figure internal to the reading (Figure 2.1 – Structure of Canadian Courts)) and Diagram 4 on the Ontario court structure).

Reading #7 then turns to the substance of judicial decisions, with particular emphasis upon the practice of precedent and its reliance upon the formulation of *ratio decidendi* or rulings. This reading then continues into the more particular judicial task and methods of statutory interpretation. It concludes with a brief discussion of the role of customs and values.

READING #5:

**Excerpted from A. C. Hutchinson, *The Law School Book: Succeeding at Law School*, 2nd ed. (Toronto: Irwin, 2000), pp. 38-9.
Footnotes excluded.**

The depiction of the common law as a practice of law-making is as important as the body of legal decisions it produces. It is the distinguishing characteristics of the Canadian legal process. Common law is understood as much as an intellectual mind-set to law-making as a technical practice, and lawyers have transformed a natural tendency to use past performance as a guide to future conduct into an institutional imperative. By way of the doctrine of *stare decisis* (see later), the common law method insists that past decisions are not only to be considered by future decision-makers but are to be followed and treated as binding. One way to understand this process is to imagine the body of legal decisions as being the product of a continuing and sprawling “chain-novel” exercise. Judges approach the task of giving reasons for judgment in particular cases as if they had been asked to read the many chapters of earlier judgments that have already been written and to contribute a chapter of their own that in some significant way continues the story of the common law. While this process places judges under certain constraints, it also leaves them, like the creative writer, with considerable leeway to interpret what has gone before and to add a few twists and turns of their own. Law is to be found in the unfolding struggle between the openings of decisional freedom and the closings of precedential constraint.

Although the common law method may be seen as giving extraordinary powers to judges, it is defended as providing citizens with a necessary check against the exercise of arbitrary judicial authority in deciding cases, and as supplying people with a predictable baseline against which to organize their own affairs. However, like most matters, the theory of what is supposed to or is said to happen is not always congruent with what actually does happen. The challenge for the courts in a rapidly changing world has been to operate the system of precedent wisely so that the need for stability is balance against the demand for progress: the courts must not allow certainty to eclipse justice. The success of such an undertaking cannot be judged in technical terms alone, but calls upon the discourse of ideals and ideology.

With the establishment of a thorough system to reporting court decisions accurately, an elaborate body of rules and principles has been developed by the courts around the functioning of this doctrine of precedent. The basic operating premise is that “like cases are to be treated alike,” so that the reported reasons for deciding a case are binding on inferior courts in deciding later cases that involve fact situations that are similar. The force

of a precedent, therefore, is determined by the authority of the deciding court, the ruling in the case, and its subsequent history. In order to understand how this practice works, three essential topics need to be clarified — the system of case reporting, the hierarchy of the courts, and the ruling in cases.

Note: You will discuss some of the methods or principles of interpretation that have become central to the common law system in your Access to Justice and other courses.

READING #6:

Excerpted from F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies*, (Markham, Ontario: Butterworths, 2001), pp. 24-30. Footnotes excluded.

B. THE JUDICIAL BRANCH

The judicial branch of the legal community owes its structure to a variety of constitutive and jurisdictional rules which we will canvass in some detail. These rules implicate two other matters — namely, judicial hierarchy and the appointment and discipline of judges — on which we must also dwell.

STRUCTURE

The Canadian judicial branch is complex. Our courts are constituted by different rules, have different jurisdictions and names, and relate to one another in terms of a specific hierarchy. Happily, this maze is made manageable through classification. Every court in Canada belongs to one of four categories of courts. Together these categories constitute and establish the structure of the judicial branch. The categories are: provincial superior courts, provincial inferior courts, the Federal Court and the Supreme Court of Canada. We shall consider each in turn.

PROVINCIAL SUPERIOR COURTS

Consistent with the overall complexity of the system, there are two kinds of superior provincial courts — the provincial superior trial courts and the provincial superior appeal courts — which are constituted by one means and staffed by another. Both courts are constituted by virtue of the provincial power over “the administration of justice in the province” which resides in s. 92(14) of the *Constitution Act, 1867*. In Alberta, for example, the provincial superior trial court is constituted by the *Court of Queen’s Bench Act* and the superior appeal court by the *Court of Appeal Act*. However, the power to appoint judges to these courts — and the obligation to pay them — resides with the federal government under s. 96 of the *Constitution Act, 1867* and, for this means, lawyers commonly refer to these courts as “section 96 courts”.

Both “section 96 courts” are courts of *general jurisdiction*, which means that they have unlimited legal right to hear any matter of law except where a statute expressly confers

jurisdiction over a particular class of cases to some other tribunal. Tribunals of this latter sort are, therefore, constituted with limited — as opposed to general — jurisdiction which is typically confined to some area of expertise. For instance, the jurisdiction of the labour relations tribunals which are constituted by various provincial statutes is limited to matters relating to trade unions and the relations between organized labour and management; and the jurisdiction of the Canadian Radio-television and Telecommunications Commission, a creature of federal statute, is limited to matters having to do with regulation of broadcasting.

The name of the provincial superior trial courts varies by province. In Alberta, Saskatchewan, Manitoba and New Brunswick, the court is called the Court of Queen's Bench. In Ontario, it is known as the Superior Court of Justice. In all other provinces, save Quebec, it is called the Superior Court (Trial Division). In Quebec, the court is known as the *Cour Supérieure*. But whatever they are called, the provincial superior trial courts are the cornerstone of the court structure in Canada. This is so because of their relationship to the courts below and above, because of their history, and because they try all serious cases, civil and criminal.

In each province, the decisions of the provincial superior trial court may be appealed to the provincial court of appeal. Though for this very reason, "section 96 appeal courts" are superior to "section 96 trial courts", the trial courts remain at the very heart of the structure because their jurisdiction, unlike the jurisdiction of the appeal courts, is *original*. This means that the superior trial courts have jurisdiction at the inception of matters — lawyers call this jurisdiction *in first instance* — and having taken cognizance of a matter, they may try it and deliver a judgment on the facts and law at issue. The jurisdiction of appeal courts, on the other hand, is not original simply because it is parasitic upon the jurisdiction of the trial courts. Only if a matter has first been decided by a trial court and only if one or both of the parties asks the appeal court to review the outcome, does the appeal court become seized of jurisdiction. Lawyers call this jurisdiction *appellate*.

The centrality of the provincial superior courts of original jurisdiction is also a result of legal history. For these courts are the successors to the original 18th century courts of common law and equity. All other courts — appeal courts at all levels and inferior courts — are the invention of later legal history and were consciously additions to the core structure provided by the superior courts of original jurisdiction. This history is critically important. Though these courts are constituted by legislation, they are not contingent on that legislation and they do not depend upon political or governmental sufferance. Their existence and status is derived, rather, from the reception of legal history and from the recognition that societies such as ours require courts of this sort, courts with the inherent jurisdiction to hear citizens on all matter of fact and law. So, if these courts are dependent upon anything, they are dependent not upon political will, but upon our society continuing as a liberal democratic one.

PROVINCIAL INFERIOR COURTS

The provincial inferior courts are constituted by provincial legislation — the authority for which resides in s. 92(14) of the *Constitution Act, 1867* — and their judges are both appointed and paid by the provincial governments. The structure of the inferior courts varies from province to province. In every province, the provincial court has a civil and a criminal division. At a minimum, the civil division includes a small claims court. The criminal division may also have a specialized traffic court. Some provinces also have specialized youth and family divisions of provincial court.

Provincial courts have absolute jurisdiction over all offences created by provincial statute, for instance, highway traffic offences and offences arising out of land use and environmental regulation. In addition, the provincial courts have overlapping jurisdiction with the provincial superior trial courts on civil and criminal matters. The jurisdiction of the inferior court in civil matters — which are everywhere tried in small claims courts — varies by province according to the amount of money involved in any claim. Whatever the details of these provisions, the jurisdiction of the provincial inferior courts in civil matters is confined to minor cases.

Jurisdiction in criminal matters is somewhat more complicated. The *Criminal Code* of Canada defines three types of offences — summary conviction offences, indictable offences and hybrid offences — the first two of which impact and, in certain cases, determine the question of jurisdiction as between the provincial inferior courts and provincial superior trial courts. Indictable offences are more serious offences, summary conviction offences less serious ones. For instance, murder, robbery and break and entry are indictable offences, and indecent exposure, communication for the purposes of prostitution and causing a disturbance in a public place are summary conviction offences. A person who stands accused of a indictable offence — which, prior to recent amendments to the *Criminal Code*, was easily defined as one having a maximum penalty greater than six months imprisonment and/or a fine of \$2,000 — may, with certain exceptions, elect to be tried by provincial inferior court or by provincial superior trial judge or by provincial superior trial judge and jury. Excepted are those offences — for example, murder and treason — listed in the *Criminal Code* as within the absolute jurisdiction of the superior court. Excepted as well are those indictable offenses which recent amendments to the *Criminal Code* place in the absolute jurisdiction of the inferior courts. So, these exceptions aside, as regards indictable offences, jurisdiction turns on election by the accused and is, in consequence, overlapping as between the superior and inferior courts. Jurisdiction over summary conviction offenses, on the other hand, resides absolutely with the inferior court.

To summarize then: a) the inferior provincial courts have absolute jurisdiction over all provincially created offences, over all federally created summary conviction criminal offences, and over those federally created indictable offences which the *Criminal Code*

identifies as falling to their jurisdiction; and b) the inferior provincial courts have contingent jurisdiction on other federally created indictable offences and limited jurisdiction on civil matters.

Civil and criminal judgments of the provincial inferior courts are, of course, appealable to the provincial superior courts on grounds and by procedures which vary by province.

THE FEDERAL COURT

Section 101 of the *Constitution Act, 1867* authorizes the federal government to constitute “a general court of appeal for Canada”. Passed pursuant to this power in 1875, the *Supreme Court Act* constituted the Supreme Court of Canada, the role and importance, of which we shall consider shortly. Section 101 also empowers the federal government to establish “additional courts for the better administration of the laws of Canada”. In 1970, the Federal Court of Canada was created under this residual s. 101 power.

The Federal Court has a Trial Division and a Court of Appeal, and its judges are appointed and paid by the federal government. Either division of the Court may sit in any place in Canada. The Court’s jurisdiction is limited to purely federal law, though, of course, no all federal law, most notably the *Criminal Code*, comes under its purview. The Federal Court, rather, as a court of *exceptional jurisdiction*, hears cases arising from specialized areas of federal law such as patents, immigration and customs and income tax law. In addition, the Court hears matters arising out of the conduct and decisions of federally created administrative tribunals and agencies as well as actions against the federal government.

THE SUPREME COURT OF CANADA

Though the Supreme Court of Canada has existed since 1875, it did not really become “supreme” until 1949. Prior to the amendments to the *Supreme Court Act* of that year, decisions of the Supreme Court were subject to further appeal to the Judicial Committee of the Privy Council in Britain. Moreover, appeals from the decisions of the provincial appeal courts could proceed directly to the Privy Council without any involvement by the Supreme Court. The 1949 amendments abolished the rights of appeal to Britain and thereafter the Supreme Court of Canada became “supreme” in fact as well as in name — its exercise of its general jurisdiction on matters of law became final and binding on all other courts. From that point indeed, the Supreme Court of Canada became more “supreme” than similar courts in many other states because of the nature of its jurisdiction. First, because s. 101 of the *Constitution Act, 1867* defines the Supreme Court as a general court of appeal, the Canadian Court — unlike, say, its American counterpart — has jurisdiction over all matters of law, federal, provincial and municipal, and including all administrative agencies or tribunals created under any of those bodies of law. Second, the Supreme Court’s jurisdiction includes both the law of the common law provinces and the civil law of Quebec.

The Supreme Court hears appeals from the provincial superior courts and from the Federal Court of Appeal. Since 1974, leave is required for most appeals. Leave may be granted by the Supreme Court itself or, notionally at least, by a provincial court of appeal. In either case, whether leave is granted turns most often upon whether a case involves matters of national significance. In addition to appeals from these sources, the Supreme Court also hears references cases directed to it by the federal government. Reference cases generally involve the constitutional validity of some federal statute.

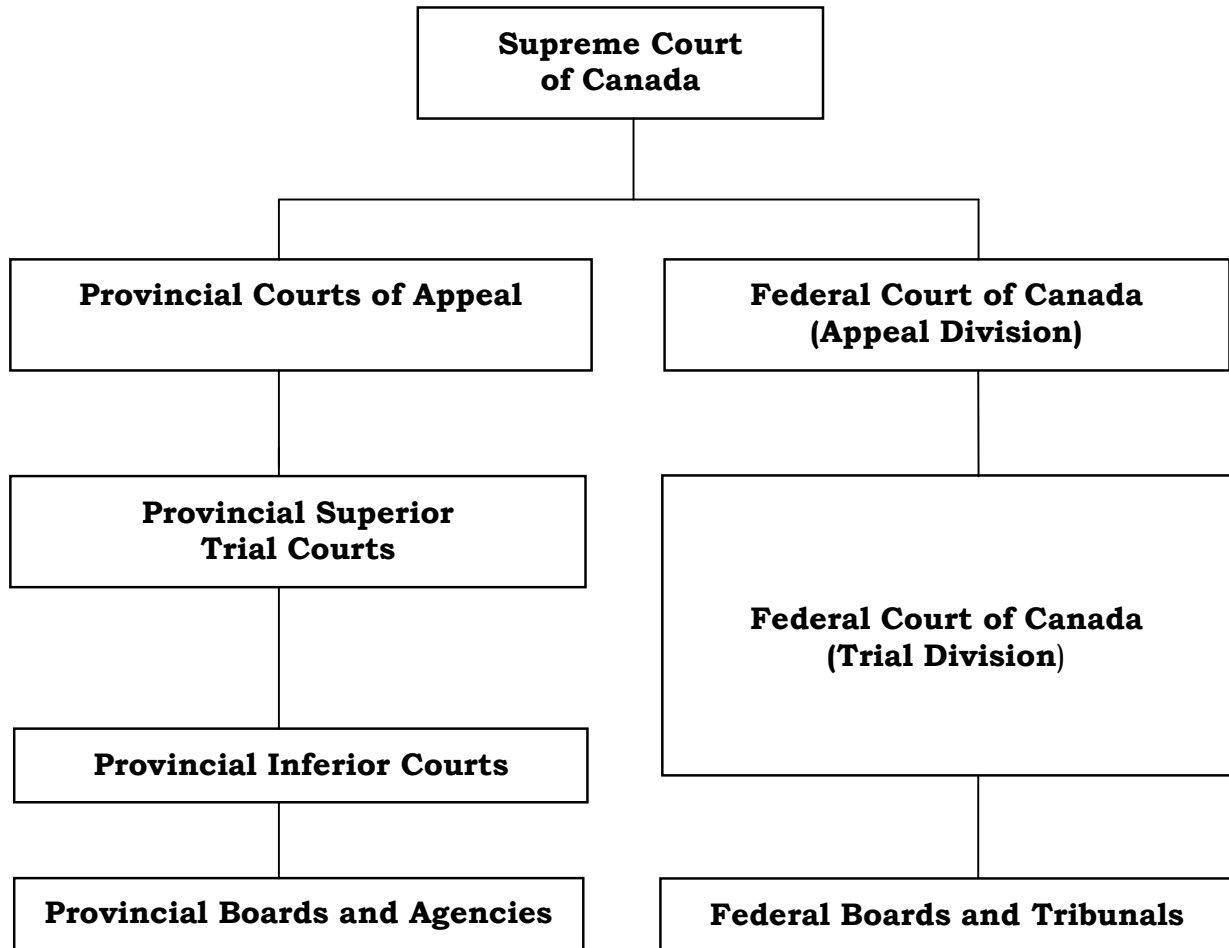
The Supreme Court consists of nine judges who are appointed and paid by the federal government. The *Supreme Court Act* requires that three of the judges be from Quebec. Over time, a convention has become established with respect to the provincial location, at the time of appointment, of the remaining six justices: three of the justices are appointed from Ontario, two from the four Western provinces, and one from Atlantic Canada. The Chief Justice of the Supreme Court is selected from among the nine justices by the federal government and is the Chief Justice of Canada.

HIERARCHY

We have already touched on the judicial hierarchy which is created by this structure. But since how courts relate to one another is very much a defining characteristic of the judicial branch, it is important to be precise. The following chart offers a simplified view of the hierarchal structure of the entire judicial branch in Canada.

Figure 2.1

STRUCTURE OF CANADIAN COURTS



As we have seen, courts exist to render authoritative determinations of the identity, meaning and application of legal rules. It is important to recognize, however, that the reach of their authority depends upon their place in this hierarchy. The Supreme Court of Canada's authority is *final* as regards the parties to the case, and it is *binding* on all lower courts as regards all future determinations by those courts. The authority of all other courts is confined in both of these respects. Because the decisions of provincial courts — superior as well as inferior — are subject to appeal, their authority to bind the parties is much less significant. The force of their decisions in this respect does, of course, increase with the place of the court in this hierarchy. Decisions of the provincial superior appeal

courts are much more binding than the decisions of superior trial courts and the provincial inferior courts simply because they may be appealed only with leave. But that aside, the authority of these courts to bind citizens is by definition circumscribed.

The authority of all courts other than the Supreme Court to bind other courts is also limited. Even where they are not appealed to the Supreme Court, the determinations of a provincial appeal court, for instance, bind only courts subordinate to it within its province. As regards courts in other jurisdictions, an appeal court's decisions may merely persuade, and this turns on many factors, not the least of which is the status and reputation of the court within the legal community. The reputations of courts waft and wane according to their membership at any point in time. The same holds for the decisions of superior trial courts. Though they bind only inferior courts in the same jurisdiction, they might yet have persuasive force in other jurisdictions depending upon the reputation of the judge. There have been judges, in Canada and elsewhere, whose reputations for judicial competence and honour were so well established that their influence on the law far exceeded their subordinate station and that of their contemporaries in the courts above them.

Judicial titles and forms of address replicate in a very public way this structural hierarchy. Until quite recently, judges of the superior provincial courts, the Federal Courts, and the Supreme Court of Canada were addressed in court as "My Lord" or "My Lady". Though this continues to be proper practice as regards the first two, in October, 2000, the Supreme Court renounced those titles in favour of "Justice". Use of "My Lord" and "My Lady" arises from the British practice, despite the fact that Canada, unlike Britain, neither has a system of peerage nor designates its superior court judges as peers. This curious anachronism is not, however, carried over into the titles of these judges who are known not as "Lord" or "Lady", but simply instead as "Mr. Justice" or "Madame Justice" and who, outside of court, are addressed as "The Honourable Mr. Justice" or "The Honourable Madame Justice." In law reports and scholarly writing, they are referred to differently still. In those contexts, these judges — except for chief justices — are identified with a simple "J." behind their surname or, in the case of appeal court judges, with a "J." followed by the letter "A" for "appeal". Thus, in Alberta, a Queen's Bench judge is identified as, say, Moreau J. and a judge of the Court of Appeal as, for example, Foisey J.A. The Chief Justice of Canada is identified as C.J.C. and the provincial chief justices as C.J. followed by the first letter of their province. Judges of the provincial inferior courts, especially those in the criminal division, are generally addressed simply as "Your Honour."

READING #7:

Excerpted from A. C. Hutchinson, *The Law School Book: Succeeding at Law School*, 2nd ed. (Toronto: Irwin, 2000), pp. 45-7, 50-3. Footnotes excluded.

THE RULING

Up to now, the doctrine of precedent has been quite mechanical and easy to follow; it simply involves becoming familiar with the reporting of cases and the hierarchical organization of the courts. However, the next two steps — extracting a decision's ruling and the techniques of avoidance — are much less simple to explain and grasp. They require the development of sophisticated analytical skills and go to the very heart of the common law method. As primary components of the lawyering craft, these skills will be fully acquired only with substantial practice; they cannot be taught or learnt in abstraction. As with so much in law, the skill of extracting a ruling from a case is always a matter of context — the material to be analysed and the purpose of the analysis. The astute student is one who recognizes that the task of locating the ruling in a judgment and making a compelling case for its recognition cannot be carried out mechanically or acquired by rote learning; a case never stands for only one ruling that is the same for all purposes at all times. Accordingly, it is necessary to nurture one's sense of judgment, creative imagination, and talent for persuasion if one is to become an accomplished lawyer. The good lawyer is someone who not only knows the basic techniques of lawyering, but also is able to deploy them with style and flair.

Nevertheless, there are certain basic instructions that can be conveyed and comprehended about the task of extracting rulings from decisions. The most basic lesson is the distinction between the *ratio decidendi* and the *obiter dicta*. There has been much ink spilt and more than a little nonsense talked about the drawing of this admittedly important distinction. While it is often depicted as a kind of scientific procedure that can be performed with cold logic and objective rigour, it is much more an art that is not defined exclusively by its logical quality or achievement. As most law professors and commentators are wont to remind students, if only to forget it themselves, "the life of the law is not logic, but experience." This observation starkly and correctly suggests that the good lawyer is one who knows that law is a human and warm-blooded pursuit that draws on much more than the cold tools of the logician; it requires a good measure of judgment about values, purposes, and equity.

In fathoming the operation of precedent, it is important to understand that it is not all the reasons that go to make up the judgment that are binding on later and lower courts. Rather, a distinction can be made:

- The *ratio decidendi* or *rationes decidendi* (literally, the reason(s) for the decision) are the explicit or implicit legal reason(s) used by the judge to decide the particular factual dispute before her or him and, without which, the decision would be incomplete or deficient. To fix upon the *ratio*, it is necessary to distil the decision down to its bare legal and factual essentials.
- Everything else is *obiter dicta* (literally, “words by the way”); they are reasons and ideas expressed by the judge that are not essential to the actual decision made. Although they do not have the same precedential pull as the ratio, they should be accorded some argumentative respect; they possess some persuasive authority whose strength will depend on the precise issue and the uttering court or judge.

Of course, the drawing of a distinction between *ratio* and *obiter* is a process that is not guaranteed to reach an obvious or shared consensus among different legal analysts. Moreover, this task is compounded by the fact that not only will there likely be more than a single reason in each case, but there will often be more than one judgment in each case. Accordingly, despite the technical sounding terms, the distinction between *ratio* and *obiter* should not be expected to be drawn or reached simply or straightforwardly; it is the stuff of legal debate.

In order to ensure that the common law does not grind to a halt and begin to slide into irrelevance and injustice under the weight of its own backward-looking mind-set, the courts have developed a number of techniques that allow them to avoid the binding force of precedent. In a manner of speaking, institutional necessity has been the parent of judicial invention. Some of the more important and acknowledged devices that courts use to circumvent inconvenient or undesirable precedents include:

- the court that rendered the earlier decision was not a superior court;
- the precedent was given per incuriam; (this explanation means that insufficient care had been taken to consider binding statutory or judicial authority. An example is the admonition of the Court of Appeal by the Supreme Court of Canada in the *Horsley* case)
- the precedent has been subsequently overruled or doubted in other cases;
- the precedent was based on a faulty interpretation of earlier cases;

- the scope of the precedent is unclear;
- the precedent can be distinguished;
- social conditions have changed; and
- the precedent has been criticized by academic commentators. (this reasoning may be wishful thinking by academics, but judges seem to be citing scholarly books and articles more often to justify their decisions and arguments generally)

It is vital to remember that no case has a ruling waiting to be discovered; rulings are not so much found as created. Of course, you are not free to claim that a judgment stands for just any ruling or to ignore it at whim, but you are by no means as constrained as you might think. Legal analysis never takes place in a substantive vacuum; it is always situated within a particular context of circumstances and objectives. Except in the occasional classroom, it is never reasonable to ask what a case does or does not stand for in isolation. As a practical activity, legal analysis is concerned with how one situation or judgment relates to another situation or judgment; there is a very pragmatic and focused reasons for asking what is the ruling of any particular decision. The common law method makes sense only when understood as a way of solving discrete disputes, not as a general process of intellectual reflection. In isolating the ruling of a decision or a set of judgments, you ought not to drive yourself to distraction by viewing yourself as an explorer in search of some sunken treasure. Instead, you would do better to heed the slightly cryptic but wonderfully sage wisdom of a scientist: “The footsteps that we will find on the shores of the future will be our own.”

Consequently, the rule of a decision is to be identified and understood relative to the purpose or purposes for which that identification is being done. One way to grasp this relationship is to think of a judgment as an answer whose precise meaning and scope will change depending on the question that is asked; the nature of the question that is posed will influence the nature of the answer as well as its perceived persuasiveness. For instance, in the famous case of *Donoghue v. Stevenson*, the question for the court was whether a ginger beer manufacturer could be liable to someone who became ill after drinking some ginger beer with a dead snail in it, but who had had the drink bought for them. It is entirely ridiculous to contend that the House of Lords’ judgment gives rise to any one overriding *ratio* or ruling. Depending on the context in which the inquiry is made, the leading judgment of Lord Atkin can be convincingly and legitimately analysed to produce a vast array of rulings. What does it tell us about liability for omissions or failure to act? What does it tell us about recovery for loss of profits? The answer to each of these answers will emphasize a different facet of the judgment and suggest different shading of meaning. For instance, even in a most general way, Lord Atkin’s judgment can be (and has been) not unreasonably interpreted to support a range of rulings that run from “Scottish

manufacturers in the late 1920s of opaque bottles of ginger beer are expected to check that dead snails are not left in them” through “all persons who make goods or offer services to the public must ensure that they are fit for their intended purpose” to “everyone should act with due care in their interactions with others.” An extended account of how this process of legal analysis works is the subject of chapter 5.

STATUTORY INTERPRETATION

In an age of statutes, the judicial struggle to enforce or enfeeble statutes is at the heart of the legal and judicial process. Although the nature of the various obligations and responsibilities imposed on the different arms of government has varied considerably, the friction between statute and common law has been constant and pivotal. Even though the courts accept that legislatures have institutional priority over them, it is not the words of the statute that are law, but the courts, particular exposition of those words: legislatures make the law, but judges say what it means. Consequently, statutory interpretation is a battleground not only for litigants but also for the institutions of government. In theory and in contrast to the common law’s inductive approach, statutory interpretation should be more deductive in method, as it involves the application of a canonical statement of the law to the particular facts of discrete disputes. However, both systems turn out to be much the same in practice; the judicial struggle with late twentieth-century legislation continues to be fought with the age-old weapons of the common law.

In the name of democratic legitimacy, unelected judges attempt to follow the directives of their elected colleagues in government; they do not stand in judgment on the wisdom of the statute or, at least, they are not supposed to. Most forms of statutory interpretation are archaeological in method and ambition; they seek to discover and apply the original legislative intent. All judicial approaches rely on some larger understanding of what amounts to justification and legitimacy in a liberal democracy (see chapter 2). Following the age-old tradition of the English courts, the Canadian courts still claim to use three basic methods of statutory interpretation. Whereas the first two confine themselves to the text of the statute, the third looks to the legislature’s purpose(s) in enacting the particular legislation. These approaches are:

- *The literal rule.* Courts follow the plain and ordinary meaning of the statute’s words as understood at the time of the enactment, without concerning themselves with the social impact or desirability of their decision. In interpreting literally a statutory provision that “no vehicles are allowed in the park,” a judge might decide that an ambulance or a bicycle is a vehicle and that a horse or an airplane is not. In light of the increasing sophistication of legislation, the complexity of modern society, and the general scepticism about there being “literal meanings,” this approach has lost judicial favour.

- *The golden rule.* Courts will strive to follow the plain and ordinary meaning of the statute's words, though if necessary they will construe the statute's words in such a way as to avoid absurdity or injustice. In assessing "absurdity" or "injustice," courts will be guided by the larger context of the overall statute. In interpreting the rule that "no vehicles are allowed in the park," a judge might decide that it is absurd to treat an ambulance as a vehicle and an airplane as not.
- *The mischief rule.* Courts will strive to interpret the statute's words in light of the legislature's purpose for enacting the legislation such that the mischief to be addressed is effectively remedied. In interpreting the rule that "no vehicles are allowed in the park," a judge might conclude that, as the purpose of the enactment was to permit people to relax or play in the park without worrying about their safety, the use of skateboards and roller-blades falls within the spirit of the prohibition.

While the first two approaches are not without their judicial and academic champions, it is the third approach that is most predominant. Although no longer tied to the search for the mischief to be remedied, the basic thrust of most statutory interpretations is the judicial effort to fulfil legislative expectations, at least as understood by the courts. Indeed, all three approaches have tended to fuse together. As one Canadian authority observes, "first it was the spirit and not the letter, then the letter and not the spirit, and now the spirit and the letter." However, the received view in Canada remains that courts cannot use legislative debates to elicit that intent; it is to be gleaned from the overall text and structure of the statute. If this rule ever had any validity, it is difficult to find a convincing contemporary rationale. The reporting of parliamentary debates is no longer deficient, and they are available almost immediately online. Although this evidence is by no means exhaustive or clear, it seems to be a resource to which the courts should be permitted access. Nevertheless, the introduction of such resources in evidence will not bring to an end the problems of statutory interpretation. It is as likely to provide simply one more resource to be (mis)interpreted in the pursuit of the statutory meaning. Even the conservative House of Lords has begun to permit resort to evidence of legislative intent approach (see *Papp v. Hart*, [1993] A.C. 593).

Even if courts were correct in their assumption that this approach would best fulfil their democratic mandate, it is by no means clear that it is possible to generate a finding of what a large group of legislators would have wanted over time, after circumstances have changed, and in unanticipated disputes; the identification of past intentions, particularly of collective entities, remains doggedly resistant to present interpretation. Legislators rarely have a specific or exact intention in mind across a range of potential future disputes. The courts are obliged to engage in the most speculative of "what if" investigations — if legislators had thought about this problem, which they did not, how would they most likely have answered the problem. This approach also assumes that legislators would want their

general intention to bind future and specific inquiries. It is simply naive to believe that the legislature is filled with politicians who are a reasonable group of people engaged in pursuing reasonable goals reasonably and say what they mean. In hard cases, it is difficult to imagine how an imagined refinement of purpose can yield determinate answers. Any purpose or objective that is consistently attributable to legislatures is likely to be so general that it will be of little help in specific circumstances. In short, as the American critic Robert Post concluded, the judicial attempt to locate legislative intent is “frequently historically uncertain, practically indeterminate, politically repugnant, and conceptually incoherent.” Also, it is by no means obvious that democracy is best served by giving effect to the presumed views of older politicians and values; substantive justice demands much more than the slavish adherence by courts to the formal words of statutes.

In this effort to apply and interpret statutory provisions effectively and consistently, the courts have developed a series of maxims and presumptions that are intended to reduce the leeway for errant interpretation. These guidelines include:

- *ejusdem generis* — of the same kind or class;
- *expressio unius est exclusio alterius* — the inclusion of one is to the exclusion of another;
- *noscitur a sociis* — it is understood by the company it keeps;
- *generalia specialibus non derogant* — general provisions do not detract from particular ones;
- *pari materia* — similar statutes are to be treated similarly;
- penal and tax statutes are to be narrowly construed;
- statutes are to be interpreted to preserve their constitutionality;
- words and phrases are to be construed in the context of whole statute;
- statutes are not assumed to derogate from the common law; and
- statutes are not to be given retroactive effect.

Despite the rhetoric, therefore, the methodology of statutory interpretation does not limit the courts in what they can and cannot do. Although presented by the judges as a kind of constitutional compact in which they play junior partner to the legislature’s dominant lead, the judicial interpretation of legislation is in practice better understood as judges paying

lip-service to the formal arrangement in order to preserve and disguise the reality of the compact — legislators say what the law is, but judges say what it means. In most parts of the law, statutory interpretation is not simply a backward-looking exercise. Although interpretation is framed in terms of text and intentions, statutory interpretation is forward-looking in that it is often concerned as much with the facts, equities, and consequences of cases as with the nature of the statutory resources and the legislative mind-sets themselves. In so many ways, statutory interpretation goes on in much the same way that the common law method provides. It is dynamic, evolving, and value-laden. Although reluctant to admit it, the courts recognize that interpretation is not simply an effort to recreate past meanings. Instead, it is an attempt, as with the common law generally, to use the past to decide present issues in light of future concerns. Judges have little option but to engage in policy-making. Indeed, this approach might accord better with a democratic account of adjudication in the sense that the task of the court might be, like other government agencies and tribunals, to shape policy in such a way that it best serves a broad set of public values. As one of Canada's great jurists, John Willis, stated in 1938, "a court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it."

CUSTOMS AND VALUES

Apart from the more formal resources of law, the law is energized by reliance on customary and communal norms of behaviour. Law is not only a top-down enterprise but also a bottom-up exercise. As I said in the introduction to constitutional law, the task of deciding on the meaning of constitutional rules draws heavily on prevailing values and normative commitments in Canadian society. Indeed, while traditional sources of law are no longer as prominent, there are vast tracts of the law that have arisen organically from mercantile or administrative practices. They developed independently of the courts in their force and effect; it was only later that they received official recognition. Customs were accepted as having legal authority if they were continuous, certain, reasonable, and followed. The common law method is the crystallization of such a process and disposition. You will find that the courts rely extensively on custom in the area of civil obligations. For instance, in determining whether a professional or a manufacturer has acted reasonably, the courts have developed rules that make explicit reference to the accepted custom and usage in particular areas of expertise. Whereas conformity with general practice will usually rebuff an allegation of negligence, failure to adopt the common custom will indicate a want of care (see *Kauffman v. T.T.C.*, [1960] S.C.R. 251).

Encouraged by the advent of the *Charter of Rights and Freedoms*, Canadian courts have become much more open in the way and extent to which they incorporate arguments of policy into their judgments. In almost all cases, judges will justify their particular decision by reference to some consideration about its social, political, or institutional consequences

(see chapter 5). It is not so much rules that decide cases, but whatever set of ideas and values that courts accept and follow that is law. Indeed, some judges have gone so far as to suggest that it might be better to forgo resort to particular rules and instead deal directly with policy matters. In a torts case, Lord Denning said:

At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable — saying that they are, or are not, too remote — they do it as a matter of policy so as to limit the liability of the defendant.

...

The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: "There was no duty." In others I say: "The damage was too remote." So much so that I think the time has come to discard those tests which have proved to be elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable. [*Spartan Steel*, [1973] Q.B. 27 (C.A.).]

However, behind this apparently expansive or, some might say, cavalier attitude to policy, there often remains a very "black-letter" approach to decision-making — policy arguments are marshalled and used in a quite formalistic manner such that the instrumentalist nature of policy analysis is marginalized or lost. Judges tend to cite policy arguments in much the same way that they cite legal precedents; a potentially dynamic source of decision-making is reduced to a static mode of reasoning (see chapters 2 and 5). At bottom, the resort to policy is part of the attempt by most lawyers and judges to make good on the basic understanding that, in the final count, law is a matter of justice. Of course, this does not make for certainty or predictability, but it does place the emphasis where it should be. Ultimately, because law is about values, it is always important to ask not only what those values are, but also whose values they are and whose interests they benefit.