



Reach Canada™

**EQUALITY AND JUSTICE
FOR PEOPLE WITH DISABILITIES**

**ÉGALITÉ ET JUSTICE POUR
LES PERSONNES AYANT UN HANDICAP**

NAVIGATING THE LEGAL SYSTEM

FOR COMMUNITY SERVICE PROVIDERS:

A PRIMER

Funded by the Ontario Trillium Foundation



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WORKSHOP DESCRIPTION

Workshop Title:
Navigating the Legal System for Community Service Providers: A Primer
Workshop Date(s):
June 18, 2004 (English)
Description:
Navigating the Legal System is the first of a series of workshops on Canadian law, designed for community service providers who want to improve their basic understanding of legal concepts and issues that are part of their day-to-day work environment. This is an introductory course. It offers a plain language primer on basic legal concepts. It explains, for example, where laws come from, how people get involved and participate in the legal process, what are some of the aspects of the court process that can assist clients, and how is criminal law different from civil law. This workshop will enhance the participant's understanding, providing an important tool to better serve clients, service organizations and the community.
Topics Covered:
<ul style="list-style-type: none">• Origins of Law

- Sources of Law (e.g., constitutional law, legislation, case law)
- Legal Actors
- Legal/Court Process
- Court System

- Dispute Resolution (DR)
- Civil Law – Process – includes practical examples of civil law proceedings (e.g., contractual, family, administrative tribunal)
- Criminal Law – Process – includes practical examples of criminal law proceedings - perspectives – victim/accused
- Access to Justice/Lawyers – services and support

Presented By:

REACH Canada

Instructors:

Carole Willans-Théberge – Legal Counsel
 Mike Sousa – Legal Counsel
 Elissa Lieff – Legal Counsel

Course Hours:

8:30 a.m. – 4:30 p.m.

Who Should Attend:

Community service providers who interact with the legal system directly or indirectly and who want to obtain or enhance a basic understanding of the law

Contact:

For more information, please contact René Rivard at REACH (613) 236-6636 or at rene.rivard@reach.ca



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REACH CANADA PRESENTS

**NAVIGATING THE LEGAL SYSTEM FOR COMMUNITY SERVICE PROVIDERS:
A PRIMER**

A practical introduction to the law and legal process for community service providers

AGENDA

8:30 – 9:00	Registration
9:00 – 9:15	Introductions and explanation of the day’s agenda
9:15 – 10:30	Origins of Law Sources of Law (Constitutional law, legislation, jurisprudence) Legal Actors
10:30 – 10:45	Health Break
10:45 – 12:00	Legal/Court Process Court system Dispute Resolution
12:00 – 1:00	Lunch
1:00 – 2:30	Civil Law – Process Example in various civil law proceedings (contractual, family, administrative tribunal)
2:30 – 2:45	Health Break

2:45 – 4:00	Criminal Law – Process Example in criminal law proceedings Perspectives – Victim/Accused
4:00 – 4:15	Access to Justice/Lawyers – Services and Support
4:15 - 4:30	General Questions - Evaluations

Caveat: While every effort is made to ensure that the information contained in this document, as well in the oral workshop presentations, is current and accurate, it is highly recommended that a licensed attorney be consulted whenever legal advice is sought in relation to a specific case.

Origins of Law / Sources of Law / Legal Actors

SOURCE: http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page7.html

What is the Law?

Why Do We Need the Law?

Almost everything we do is governed by some set of rules. There are rules for games, for social clubs, for sports and for adults in the workplace. There are also rules imposed by morality and custom that play an important role in telling us what we should and should not do. However, some rules -- those made by the state or the courts -- are called "laws". Laws resemble morality because they are designed to control or alter our behaviour. But unlike rules of morality, laws are enforced by the courts; if you break a law -- whether you like that law or not -- you may be forced to pay a fine, pay damages, or go to prison.

Why are some rules so special that they are made into laws? Why do we need rules that **everyone** must obey? In short, what is the purpose of law?

If we did not live in a structured society with other people, laws would not be necessary. We would simply do as we please, with little regard for others. But ever since individuals began to associate with other people -- to live in society -- laws have been the glue that has kept society together. For example, the law in Canada states that we must drive our cars on the right-hand side of a two-way street. If people were allowed to choose at random which side of the street to drive on, driving would be dangerous and chaotic. Laws regulating our business affairs help to ensure that people keep their promises. Laws against criminal conduct help to safeguard our personal property and our lives.

Even in a well-ordered society, people have disagreements and conflicts arise. The law must provide a way to resolve these disputes peacefully. If two people claim to own the same piece of property, we do not want the matter settled by a duel: we turn to the law and to institutions like the courts to decide who is the real owner and to make sure that the real owner's rights are respected.

We need law, then, to ensure a safe and peaceful society in which individuals' rights are respected. But we expect even more from our law. Some totalitarian governments have cruel and arbitrary laws, enforced by police forces free to arrest and punish people without trial. Strong-arm tactics may provide a great deal of order, but we reject this form of control. The Canadian legal system respects individual rights while, at the same time, ensuring that society operates in an orderly manner. In Canada, we also believe in the Rule of Law, which means that the law applies to every person, including members of the police and other public officials, who must carry out their public duties in accordance with the law.

Goals of the Law

In our society, laws are not only designed to govern our conduct: they are also intended to give effect to social policies. For example, some laws provide for benefits when workers are injured on the job, for health care, as well as for loans to students who otherwise might not be able to go to university.

Another goal of the law is fairness. This means that the law should recognize and protect certain basic individual rights and freedoms, such as liberty and equality. The law also serves to ensure that strong groups and individuals do not use their powerful positions in society to take unfair advantage of weaker individuals.

However, despite the best intentions, laws are sometimes created that people later recognize as being unjust or unfair. In a democratic society like Canada, laws are not carved in stone, but must reflect the changing needs of society. In a democracy, anyone who feels that a particular law is flawed has the right to speak out publicly and to seek to change the law by lawful means.

The System of Law and Justice (Private vs. Public Law)

The law is a set of rules for society, designed to protect basic rights and freedoms, and to treat everyone fairly. These rules can be divided into two basic categories: public law and private law.

Public Law

Public law deals with matters that affect society as a whole. It includes areas of the law that are known as criminal, constitutional and administrative law. These are the laws that deal with the relationship between the individual and the state, or among jurisdictions. For example, if someone breaks a criminal law, it is regarded as a wrong against society as a whole, and the state takes steps to prosecute the offender.

Private Law

Private law, on the other hand, deals with the relationships between individuals in society and is used primarily to settle private disputes. Private law deals with such matters as contracts, property ownership, the rights and obligations of family members, and damage to one's person or property caused by others. When one individual sues another over some private dispute, this is a matter for private law. Private suits are also called "civil" suits.

Of course, there is more to Canada's system of law and justice than the laws themselves. Laws must be enforced, interpreted and applied if they are to be effective, and the legal system includes a number of institutions to carry out these duties. For example, we have police forces to ensure that the law is enforced. We have courts to interpret both private and public laws in specific cases, and to impose remedies, "sanctions" or penalties. Persons found guilty by a court of a criminal act can, for example, be discharged, placed on probation, or sentenced to a fine or a period of

imprisonment. Persons who violate rules of private law, such as failing to perform a contract, may be ordered to pay compensation and their property or salaries may be seized if they refuse to pay.

To understand Canada's legal system, we need to look at the way law is applied in practice -- at what happens to a person who violates a law. But first, we should examine our legal inheritance: just where did "the law" come from?

Sources of Canadian Law

English Law and the Code Napoléon

Canada's present 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 encroaching immigrant cultures began to prevail. After the English defeat of the French at 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 is called judge-made law because it is 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 in the world because it cannot be found in any "code" or "legislation"; it exists only in past decisions. However, this also makes it flexible and adaptable to changing circumstances.

The tradition of civil law is quite different. It is based on Roman law, which was consolidated by the Roman Emperor Justinian. The law in ancient Rome was scattered about in many places: in books, in statutes, in proclamations. Justinian ordered his legal experts to put all the law into a single book to avoid confusion. Ever since, the civil law has been associated with a "civil code", containing almost all private law. Quebec's Civil Code was first enacted in 1866, just before Confederation, and after periodic amendments, was recently 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 so as 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.

When discussing the law as it pertains to aboriginal people in Canada it is also necessary to consider aboriginal rights and treaty rights which are 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 between the Crown and a particular group of aboriginal people.

Law Reform: An Endless Cycle

Although much of our law has been 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, and the common law and civil law may evolve too slowly to meet this need. So, even as government ponderously enacts reforms designed to address changing ethics and morality, society continues to evolve dynamically ahead of the lawmakers, necessitating a never-ending cycle of law reform.

Making New Laws: Legislation

Democratic countries usually have what is called a "legislature" or "parliament", which has the power to make new laws or change old laws. In its political structure, Canada is a federation: a union of several provinces, with a central government. So, it has both a parliament in Ottawa to make laws for all of Canada, and a legislature in each province and territory to deal with local matters. Laws created at either level are called "statutes", "legislation", or "acts". When Parliament or a provincial legislature passes a statute, that statute takes the place of common law dealing with the same subject. In Quebec, much legislation exists to deal with specific problems not dealt with in the Civil Code.

Making laws through legislation 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, a draft of the proposed law would be made. This text would then have to be approved by the Cabinet, which is composed of members of Parliament chosen by the Prime Minister. This version would then be presented to Parliament as a "bill", and would 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 to make laws. Laws enacted by provincial legislatures are assented to by the Lieutenant Governor.

Because of the complexity of modern society, more laws are made 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 and provincial legislatures often pass general laws delegating authority to make more specific laws called "regulations". Regulations serve to carry out the purposes of or expand on the general laws but are limited in scope by such laws.

The Constitution

In a democracy with a written constitution, legislators cannot make 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 of government.

In many countries formed by revolution or some act of independence -- the United States, for example -- the preponderance of constitutional law is contained in a single document, usually referred to as "the constitution". In Canada's case, however, the country was formed by an act of the Parliament of Great Britain; consequently, it does not have a "constitution" per se. The closest thing to a constitutional document would be the British North America Act, 1867, by which the British colonial provinces of Canada (Upper and Lower), Nova Scotia and New Brunswick were united to create the Dominion of Canada.

Even so, although there is no single "constitution" in Canadian law, the Constitution Act, 1982, which is Schedule "B" to the Canada Act, 1982 -- by which Canada's constitution was finally patriated from Great Britain -- contains a definition of the constitution. Section 52 of the Act declares the Constitution of Canada to be the supreme law of Canada and states that it includes an itemized list of some 30 acts and orders enumerated in an attached schedule.

Confederation of the provinces 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. Far from codifying a new set of constitutional rules for Canada, the BNA Act did little more than provide for confederation, not even having the inclusion of an amending clause. For this reason, until 1982 any necessary amendments to the BNA Act were enacted by the Parliament in England.

The Constitution sets out the basic principles of democratic government in Canada. It also 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. But in our democratic society, it is a constitutional convention reflected in our fundamental laws that the real executive power rests with the Cabinet, which consists at the federal level of the Prime Minister and a number of ministers who are all answerable to Parliament for various government activities. As well, individual ministers are responsible for various 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 legislature, which at the federal level in Canada is called "Parliament", is made up of the House of Commons, the Senate, and the monarch. 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 "assent" to it. The same is true in each province, except that the Queen's provincial representative is called the Lieutenant Governor. The requirement of royal assent does not mean that the Queen is politically powerful: it is a constitutional convention that the monarch always follows the advice of the government.

Our constitution also provides for a "judiciary", which means the judges who preside over cases before the courts. The Constitution expressly provides only for federally appointed judges; provincial judges are appointed to office under provincial laws. 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 law, such as a dispute over a contract.

The Federal System

The Constitution defines a federal system of government for Canada. This means that the authority or "jurisdiction" to make laws is divided between the Parliament of Canada and the provincial legislatures. Parliament can make laws for the whole of Canada with respect to matters assigned to it by the Constitution. A provincial legislature, likewise, can make laws that come within the subject matter over which it has been assigned jurisdiction. But these laws are only effective within the province's borders. A number of other countries, such as Australia and the United States, also have federal systems. Jurisdiction in those countries is divided between the federal government and the various states. By contrast, Great Britain does not have a federal system; its Parliament has sole authority to pass laws for the entire country.

The Canadian Constitution gives the provinces authority to make laws concerning such matters as education, property, the administration of justice, hospitals, municipalities and other matters of a local and private nature within the provinces.

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.

As well, the federal Parliament has responsibility for Yukon Territory and the Northwest Territories. To ensure that the people in the territories can govern themselves on local matters, as the citizens of a province can, federal law provides for elected territorial councils with the power (similar to provincial powers) to pass laws.

There are also local or municipal governments. They are created under provincial laws and can make by-laws dealing with a variety of local matters, such as parking regulations and the issuance of construction permits.

Finally, particular arrangements have been developed for aboriginal peoples in the various regions of Canada. For example, Indian bands can exercise a range of governmental powers over reserve lands under the **Indian Act**. There are also several examples of aboriginal governments which exercise governmental powers as a result of specific agreements negotiated with the federal and provincial governments.

The Canadian Charter of Rights and Freedoms

In Canada, protection of the individual's rights and freedoms is a subject of both federal and provincial jurisdiction. The territorial governments also may legislate to protect human rights, since the federal government has delegated to them the powers to do so.

The **Canadian Bill of Rights**, which was passed in 1960, was the first federal legislative enactment to specifically set out fundamental human rights for Canadians. The **Canadian Human**

Rights Act (CHRA), which was first enacted in 1977, also protects human rights, particularly in the areas of employment, the provision of accommodation, and commercial premises. Unlike the Bill of Rights, the CHRA applies not only to the federal government but also to the private sector.

All provinces and territories also have human rights legislation that prohibits discrimination on various grounds with regard to employment matters and the provision of goods, services and facilities. This legislation applies to discrimination by individuals in the private sector and by provincial or territorial governments.

The protection provided by all of the above-mentioned legislation is limited. Because the Bill of Rights, the CHRA, and all provincial human rights codes are only statutes, they are always subject to repeal. It was not until the advent of the **Canadian Charter of Rights and Freedoms** that human rights in Canada were expressly protected in the Constitution.

When the Constitution was patriated in 1982, the **Canadian Charter of Rights and Freedoms** became a fundamental part of our Constitution. The Charter applies to the provincial legislatures as well as to Parliament. The Charter is paramount over other legislation because it is "entrenched" in the Constitution and is the supreme law of Canada. 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 in question to be invalid insofar as it conflicts with the Charter. In addition, courts may provide other appropriate remedies to individuals whose rights have been infringed.

However, the Charter also recognizes that, 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. In Canada, Parliament or a provincial legislature can limit fundamental rights, but only if that government can establish that the limit is reasonable, is prescribed by law, and can be justified in a free and democratic society. This allows for the balancing of the interests of society against the interests of individuals to determine if limits on individual rights can be justified.

Under the agreement between the federal and provincial governments that resulted in the **Constitution Act, 1982**, both Parliament and the provincial legislatures retain a limited power to pass laws that may violate certain Charter rights. Many believe that such a provision is consistent with our democratic principles because it gives the legislatures, whose members are elected, the last word, as opposed to the unelected judiciary. Nonetheless, it is limited in that Parliament or a provincial legislature must specifically declare that it is passing a law "notwithstanding" specified provisions of the Charter. Further, the declaration must be reviewed and re-enacted at least every five years; otherwise, it will not remain in force. These conditions act as a kind of warning to Canadians, and force the government that is invoking the notwithstanding clause to explain itself, to accept full responsibility for its actions, and to take the political consequences.

The Charter protects our rights and freedoms in the following areas.

Fundamental Freedoms The Charter constitutionally protects certain fundamental 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. Unlike the situation that exists in many totalitarian countries, the freedom of the media to print and broadcast news and other information is guaranteed in Canada.

Democratic Rights The tradition of democratic rights in Canada is specifically guaranteed by the Charter. This means that Canadian citizens have a constitutional right to vote in elections for members of Parliament and provincial legislatures, and to seek election themselves. A few restrictions on a citizen's right to vote or to run in an election have been found to be reasonable in a democratic society; for example, restrictions on minors or on certain election officials who may have to cast a deciding ballot.

Another democratic protection is that our governments cannot continue to hold power indefinitely without calling an election. The Charter requires governments to call an election at least once every five years. The only exception is in a time of national emergency, such as war. But, even then, two thirds of the members of Parliament or a legislature must agree to delay the election.

The Charter also provides that Parliament and the provincial legislatures must sit at least once a year. This ensures that our governments perform the work for which they were elected, and also that they will have to answer questions and explain themselves in public; they cannot govern in secret.

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. This includes the right to live in one province and work in another. Further, the Charter prevents provinces from distinguishing between residents and newcomers. For example, if a person is a qualified professional in a province, such as an accountant or a teacher, that province cannot prevent him or her from working there because that person resides elsewhere in the country. However, this does not prevent a province from making residency a requirement for certain social and welfare benefits, nor does it prevent the application of other laws or practices of general application in force in the province that do not discriminate. Also, a province in which the employment rate is below the national average has the right to undertake programs for socially and economically disadvantaged residents of the province.

Legal Rights The Charter requires government to act in accordance with specified rights and freedoms. These rights are designed to protect the individual and to ensure fairness during legal proceedings, particularly in criminal cases. The right to habeas corpus to challenge a detention, and to be presumed innocent until the contrary be proved, have always been recognized as part of our law, but those rights are now guaranteed in our constitution.

In Canada, everyone has a right to life, liberty and security of the person, and cannot be deprived of these rights except in accordance with fundamental justice. Canadians are protected against unreasonable searches and seizures; even where a search or seizure is authorized by law, the police cannot use excessive force in carrying it out. 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 detaining us.

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

When charged with an offence under federal or provincial law, we 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 one's 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; to be tried by a jury for serious charges; and not to be tried or punished twice for the same offence.

Everyone also has the right not to be subjected to any cruel and unusual punishment. Any witness at trial has the right to the assistance of an interpreter if he or she does not understand the language or is deaf. Witnesses also have the right not to have incriminating evidence used against them in subsequent proceedings.

Equality Rights

Under the Charter, every individual, regardless of race, religion, national or ethnic origin, colour, sex or age, as well as one who is physically or mentally disabled, is equal before and under the law and enjoys equal protection and benefit of the law. This means that laws and government programs, such as pension plans, must not be discriminatory. For example, practices that unfairly discriminate on the basis of religious observance are not permitted. However, the existence of the Charter does not mean that all people always have to be treated in exactly the same way. For example, it is constitutional to create special programs to favour individuals or groups who may be at a disadvantage in society, such as women, visible minorities or persons with disabilities.

Language Rights

The Charter recognizes English and French as Canada's official languages, as well as the official languages of New Brunswick. Both languages have equal status and equal rights and privileges as to their use in the institutions of the Parliament and Government of Canada, and the Legislature and Government of New Brunswick.

Everyone has the right to use English or French in the debates and proceedings of Parliament or of New Brunswick's legislature, 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 or in any court in New Brunswick. Moreover, members of the public have a right to communicate with and receive available services, in English or French, from the head or central offices of federal institutions and from other federal offices where there is a significant demand in either language, or where the nature of the office

makes it reasonable. The public has a right to communicate with and receive available services, in English and French, from all offices of New Brunswick legislative and governmental institutions.

The **Constitution Act, 1867** and the **Manitoba Act, 1870** give persons in Quebec and Manitoba, respectively, the right to use English and French in debates and proceedings of the legislatures and 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 nine predominantly English-speaking provinces and the territories, citizens whose mother tongue is French, or who attended French primary schools in Canada, or who have a child who has received or is receiving primary or secondary school instruction in French in Canada, have a constitutional right to send all their children to French schools.

In Quebec, citizens who received their primary instruction in English in Canada, or who have a child who was or is being instructed in English in Canada, have the constitutional right to send all their children to English schools.

The right to minority language instruction in English or French applies wherever in the respective province there are sufficient numbers of other children in the same situation to warrant the provision of such instruction, and includes, where the number of children warrant it, the right of those children to receive their instruction in minority language schools and educational facilities.

Aboriginal Rights

A number of provisions in the Charter, and other provisions in the Constitution, specifically provide for the protection of the rights of the aboriginal peoples of Canada who are defined as including Indian, Inuit and Metis. The purpose of these provisions is two-fold: first, to recognize and protect the aboriginal and treaty rights of aboriginal peoples and, secondly, to help aboriginal peoples preserve their cultures, identities, customs, traditions and languages. For instance, no provision in the Charter can be used to take away any rights that aboriginal peoples now have or may acquire in the future from, for example, the settlement of land claims.

The Charter and Other Rights

It would be wrong to think that the Charter embodies all our rights as Canadians; rather, the Charter only guarantees a basic minimum set of rights. We all have other rights that derive from federal, provincial, international and common law. And, of course, Parliament or a provincial legislature can always add to our rights.

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

Legal/Court Process / Court System / Dispute Resolution (DR)

SOURCE: http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page19.html

The Court Structure

Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments.

- The provinces have explicit jurisdiction over the administration of justice in the provinces; this includes the constitution, organization and maintenance of the provincial courts, both civil and criminal, and civil procedure in those courts.
- The federal government, on the other hand, has the exclusive authority to appoint and pay the judges of the superior 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 Tax Court. In addition, Parliament has, as part of its criminal-law power, exclusive authority over the procedure in courts of criminal jurisdiction. Federal authority for criminal law and procedure ensures fair and consistent treatment of criminal behaviour across the country.

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; that is, an action between private parties. A "criminal" case, on the other hand, involves a prosecution by the Crown pursuant to a public-law statute such as the **Criminal Code**, the **Narcotic Control Act** or the **Competition Act**. In Canada, our courts deal with both civil and criminal cases; in civil cases involving contracts, torts and the like, the courts apply common-law principles in nine provinces and two territories, and the "civil law" as embodied in the Quebec Civil Code in that province.

Provincial Court System

The names of the courts are not identical in each province, but the court system is roughly the same across Canada. The provinces divide their court system into two levels: provincial courts and superior courts.

Provincial Courts

Judges at the provincial court level are appointed by the provincial governments. Provincial courts deal with most criminal offences and, in some provinces, with civil cases involving smaller

amounts of money. The provincial court level may also include certain specialized courts, such as youth and family courts.

Superior Courts

Judges of the superior courts are appointed by the federal government. The salary levels of superior court judges are set by Parliament, and the mandatory retirement age for these judges is 75 years. Superior courts are the highest level of court in a province, with power to review the actions of the lower courts.

Superior courts are divided into two distinct levels: a trial level and an appeal level. There may be a single court, generally called a supreme court, with a trial division and an appeal division. Or, the superior court may be divided into two separate courts, with the trial court named the Supreme Court or the Court of Queen's Bench, and the appeal court called the Court of Appeal. The trial level hears the more serious civil and criminal cases and has authority to grant divorces. The appeal level hears civil and criminal appeals from the superior trial court.

Federal Court System

The **Constitution Act, 1867** authorizes Parliament to establish a general court of appeal for Canada, as well as any additional courts for the better administration of the laws of Canada. The Supreme Court of Canada was created under this authority and now serves as the final court of appeal in Canada. Its nine members represent the five major regions of the country; three of the nine judges must be from Quebec, in recognition of the civil law system.

The Supreme Court of Canada, as the country's highest court, hears appeals from decisions of the appeal courts in all the provinces and territories, as well as from the Federal Court of Appeal. Its judgments are final.

The Supreme Court is usually called upon to decide important questions of interpretation 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. Sometimes parties have a right to an appeal, as in certain criminal cases. More often, parties must ask the judges of the Supreme Court for permission, or leave, to appeal.

The Federal Court and the Tax Court were also established under the same provision of the **Constitution Act, 1867**. The jurisdiction of the Federal Court of Canada includes specialized areas such as copyrights and maritime law. It also reviews decisions of federally appointed administrative tribunals such as the Immigration Appeal Board and the National Parole Board. It has a trial division and an appeal division.

Procedure in Criminal Cases

Unlike a civil suit, a crime is not a dispute between individuals, even though individuals often suffer damage or are injured by the offenders. A crime is considered to be an offence against

society as a whole. This is why it is usually the state, and not an individual, who initiates a criminal prosecution. The person charged with a criminal offence is called the "accused".

Criminal offences are set out in the **Criminal Code** or in other federal legislation, and are divided into two categories: "summary conviction" offences and "indictable" offences. Some offences may be prosecuted either summarily or by indictment, at the discretion of the prosecutor; these are known as "elective" offences.

A person charged with a summary conviction offence will appear before a provincial court judge and the trial will normally proceed "summarily"; that is, in that court and without further procedures. The maximum penalty for this type of offence is normally a \$2,000 fine, six months in prison, or both. Offences prosecuted by indictment are more serious, and in most cases the accused person 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. If the charge is for an indictable offence, there may first be a "preliminary hearing". During this hearing, 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 necessarily be arrested by the police. 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. But if the accused is arrested, there are certain procedures that must be followed to protect his or her Charter rights. It must always be remembered that an accused person is presumed innocent until proven guilty.

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. They must also explain the reasons for the arrest or detention and the specific charge, if one is being made.

Anyone who is 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 the issue of pre-trial release or "bail" determined. Bail hearings are sometimes referred to as "show cause" hearings because the prosecutor must show why the accused should remain in custody. If a justice or judge decides to release an accused, the accused may be released with or without conditions. A judge will only refuse to release an accused on bail 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.

Trials in Criminal Cases

A criminal trial is a serious matter for the accused because life and liberty, as well as the stigma of a criminal conviction, are at stake. This is why common law and the Charter provide special protections. For example, the prosecution has the burden of proving that the accused is guilty of the charge beyond a reasonable doubt. Also, if any evidence introduced at the trial was obtained in a way that violates the accused's Charter rights, such as an unreasonable search and seizure, the

judge may refuse to admit the evidence if to do so would bring the administration of justice into disrepute.

In a criminal trial, an accused person cannot be required by the prosecution to give evidence. The accused can take the witness stand, but only if he or she consents to testify.

Decisions in Criminal Cases

If the accused in a criminal trial is found not guilty, the trial judge will acquit the accused, who is then free to go. But if the accused is found guilty of a crime, the judge must decide on the appropriate sentence.

When making this decision, the judge must consider many things, such as the seriousness of the crime, the range of sentences provided for by the **Criminal Code** or other statutes, the need to prevent or deter 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 different penalties. The sentence may include such penalties as:

fine: A sum of money that can run up to many thousands of dollars.

restitution: An order requiring the offender to make restitution 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 in a probation order.

community service: A court order that the offender perform a certain number of hours of volunteer work in the community.

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

However, the judge is not always required by law to enter a conviction upon a plea of guilty or a finding of guilt. Under certain circumstances, the judge can give the offender an absolute or conditional discharge. If it is a "conditional" discharge, the offender must obey certain conditions imposed by the judge; otherwise, he or she can be brought back to court and given a more severe sentence. A discharge will avoid ascribing a criminal record to the offender.

Right to Appeal

No system is ever perfect. Despite all precautions, it is always possible that a court may make an error in a trial. Therefore, the opportunity 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, or either affirm or reverse the original decision. In some cases, it will order a new trial. Both sides in a civil case may make such an

appeal, 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.

Administrative Boards and Tribunals

There are many administrative rules and regulations that are often dealt with outside the formal trial procedures. Disputes concerning such matters as broadcasting licences, unemployment insurance, occupational safety standards or health regulations, may be placed in the hands of federal or provincial government departments or left with special administrative boards. These include such institutions as the Unemployment Insurance Commission, the Canadian Radio-television and Telecommunications Commission, labour relations boards and refugee tribunals.

The 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 conferred upon them by law and that their procedures are fair, their decisions and proceedings may be reviewed by the courts. In the case of federal boards, this review is done by the Federal Court of Canada.

The Young Offenders Act / The Youth Criminal Justice Act

The *Young Offenders Act* has been replaced by the *Youth Criminal Justice Act (YCJA)*, which came into force on 1 April 2003. See Annex 1 for more information.

Getting Legal Advice

When someone runs into legal problems, obtaining legal advice may be important. After many years of education and training, lawyers are qualified to give this advice. Lawyers represent their clients in both civil and criminal cases. In addition, they provide help and advice to their clients in any situation where knowledge of the law is necessary, such as buying or selling a house.

In Quebec, the legal profession comprises both lawyers and notaries. Notaries concentrate on 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 practise in only one area of law. For example, some lawyers may specialize in criminal law; other lawyers may only give tax advice.

A lawyer's advice is especially important to someone accused of a crime, because a conviction can have serious consequences. However, sometimes an accused person is not able to pay for the services of a lawyer. To solve this problem, the federal and provincial governments have set up a program to share the cost of legal services for those who qualify for such assistance. Under this program, the provinces offer legal aid to any eligible person who is accused of a crime, when a conviction might mean a jail sentence or loss of livelihood. Some provinces also offer legal aid for civil cases, particularly in family-law matters.

Dispute Resolution (DR)

SOURCE FOR DR MATERIAL: <http://canada.justice.gc.ca/en/dept/pub/rd/index.html>

What is "Dispute Resolution"?

"Dispute Resolution" (DR) is the term used to describe a variety of ways of dealing with disputes, including the option of going to court.

"Alternative Dispute Resolution (ADR)," a term you may have heard before, refers to resolving disputes in ways other than going to court. This pamphlet uses the term DR rather than ADR to remind you that there is a broader range of dispute resolution options.

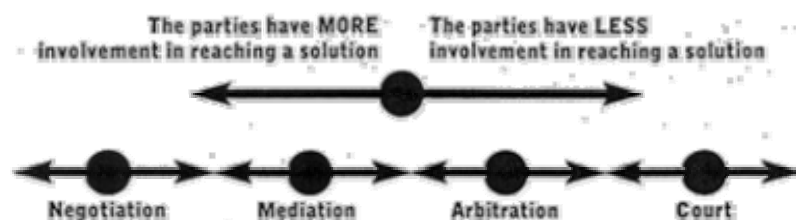
People get involved in many types of disputes. With the variety of DR options available, you can choose the best method for dealing with your particular situation. You may choose one way to deal with a child custody dispute whereas an employment problem or a dispute with your municipality might call for something different.

There are three commonly used methods of resolving disputes without going to court:

- negotiation
- mediation
- arbitration

These methods are described in this pamphlet and each involves a process. Although the formal court process is not discussed in here, it too is an option. In fact, sometimes the court will be the necessary route to follow. Remember that you may often be able to deal with your problem informally through discussions. Working together, you can try to reach an agreement that will suit you both.

Dispute resolution covers a range of choices, from negotiating a solution to going to court.



Each option should be viewed as a distinct process, but each can be used alone or in combination. For example, in a process combining mediation and arbitration (called "Med-Arb"), if the dispute is not settled through mediation it proceeds directly to arbitration. These processes offer choices for resolving your disputes.

In assessing which process may be appropriate for your dispute it is important to keep certain things in mind. For instance, where one side has power over the other or where one party feels intimidated or frightened it may not be possible to resolve disputes fairly through processes such as negotiation or mediation. Barriers arising out of gender or cultural differences may also make it difficult for the parties to resolve the issues themselves.

Negotiation

People who disagree can often get together to discuss the problem and reach a mutual agreement. When people sort out a problem themselves, they can work out a solution that best meets their own needs and interests.

Solving disputes through negotiation is a part of everyday life. For instance, in a situation where your teenager asks you for the car keys, after some discussion you reach an agreement on conditions for using the car and when to return home. This is an example of negotiation.

Effective negotiation skills and methods can be learned. You can read books or take courses to improve your negotiating technique. In some cases, you may also prefer to hire a lawyer, advocate, or counsellor who has the expertise to help you to negotiate or who can negotiate on your behalf.

Mediation

People involved in a dispute can ask a mediator, an unbiased and impartial person, to assist them in their negotiations. Where negotiation has not been successful, the mediator can often help to ease tension and encourage discussion between the parties. The mediator can help the parties themselves find a solution that can often result in a "win-win" situation, where everyone is satisfied with the result. Participation in mediation may or may not be voluntary. For example, some courts require that certain cases be referred to mediation before a trial can be scheduled. Either way, the mediator cannot force you to settle the dispute or to accept a particular solution.

A common reason for choosing mediation is that the mediator helps the parties reach an outcome that satisfies them rather than one aimed at proving right and wrong. Through mediation, parties are able to work together to reach a solution which can be more creative than that which a court would impose. Courts are somewhat limited in the remedies that they can provide to resolve disputes.

The cost of mediation is usually shared between the parties. In most cases it is not necessary for lawyers to be present during the mediation process.

Situations that lend themselves well to mediation are certain family disputes, business disagreements, contract disputes, insurance claims, as well as employment and environmental issues, to name a few.

If gender or cultural differences are making it difficult to resolve issues or conflicts or if there is such a clear inequality in bargaining power so as to make you question whether you could resolve your issues through mediation, talk to someone about your concerns. Choose the process that is

best for you. The section in this pamphlet entitled "Where to Get More Information" can help to put you in touch with people who can help you make this choice.

Arbitration

When people in a dispute cannot resolve the dispute themselves, either through face-to-face negotiation or with the assistance of a mediator, they can agree to refer the matter to arbitration. In arbitration, a neutral person or panel of people hears the facts and issues and makes a decision. Arbitrators are often people who are experts in a specific area of the law or a particular industry, especially in cases where the decision-maker needs to be knowledgeable about a particular subject matter or business practice.

The arbitrator or panel is usually chosen by the parties together. If they can't agree they can have an acceptable person or organization choose the arbitrator for them. Otherwise, each can choose an arbitrator, and the two arbitrators will then choose a third to make a panel of three. In some instances parties may prefer to have their matter heard before a panel.

Arbitration tends to be less formal and quicker than going to court. The parties can agree in advance on the ground rules for the arbitration (as opposed to court procedures which are fixed). One or both parties may have a representative speak for them at the arbitration hearing or they may speak for themselves.

The arbitrator then makes a decision based on the facts, any contract between the people, and the applicable laws. The arbitrator will explain how the decision was reached. If the applicable law allows, you can decide yourself in advance whether the arbitrator's decision will be final and binding or whether it should be subject to review by a court if a party disagrees with the decision.

The arbitrator may also make a decision on costs. Depending on how complex the case is and how long it takes to resolve, arbitration usually costs less than going to trial.

When Should You Consider DR?

The sooner, the better.

As time goes by, it may become harder to agree on a solution that satisfies everyone. Each side will become convinced they are "right" and the other side is "wrong."

Your lawyer, if you have one, may suggest you try mediation before going to court. Or, you may be advised that it would be cheaper and faster to have the dispute go to arbitration. The fact is that most court actions settle before trial. Using DR methods early can save both the time and money involved in taking a dispute to court.

Even if you're already in court or have begun the process of going to court, you can still use other DR options. In fact, many courts have established dispute resolution programs that require parties to participate in some other form of DR prior to proceeding with their court action. The court office or your lawyer should be able to inform you of any such program in your community.

How Do You Convince the Person You Disagree With to Participate?

Not everyone will immediately agree to participate in a mediation or other DR process. They may need more information about how the process works and whether it meets their needs. They may also need some time to realize the cost and time involved in taking the dispute to court.

Emotions are often highly charged. People may be angry or so intent on proving the other "wrong" that nothing other than having their day in court will appeal to them. Sometimes, merely waiting a few days or weeks can make a difference and parties may be more willing to discuss the options more calmly and openly.

If you need help to contact the other party to explain the advantages of using other DR options, consider consulting a third party who is trained to act as an impartial outsider to assist you. He or she can make a presentation on the benefits of DR and answer any questions about the processes (see *Where Can You Get More Information?*).

Don't be discouraged. Even if the other party insists on going to court, remember that DR processes can be used at any time - even after a lawsuit has been filed.

Benefits of DR

The following list indicates some advantages of using certain DR processes described in this pamphlet:

Flexibility

There is much more room for creativity when you resolve your dispute yourself or with the help of a third party. You can work together to arrive at a solution that meets the needs of all parties.

Control

You will have more control over both the process and the outcome.

Personal Satisfaction

You are more likely to be satisfied with both the process and outcome because you chose the DR process and played a more active role in resolving your dispute and designing a solution that is best for you.

Lower Costs/Less Time

DR processes may save you both time and money. They are generally faster and less complex than proceeding through the court system, and that can mean a savings in legal fees and court costs.

Confidentiality

Dispute resolution process and results can, in general, be kept confidential. (There are certain circumstances where the law does require disclosure of information though, such as

the "duty to report" suspected or confirmed child abuse required by the Child and Family Services Act in each province and territory.)

Getting at the Root of the Problem

Many disputes are the result of underlying problems. DR processes can get at the issues which contributed to creating the dispute. At the same time, they work towards a solution that is satisfactory for everyone involved.

Maintaining relationships

Disputes often involve parties who have a working or family relationship and will need to continue to live or work together after the dispute is resolved. These DR methods encourage people to work together at resolving the disagreement which often results in improved relationships and perhaps in fewer new disputes.

Agreements that last

Parties are more likely to comply with an agreement that they helped design rather than one that was imposed on them.

When Should Disputes Be Left to the Courts to decide:

- The issue of violence itself is not mediable. The courts may provide better protection for parties who have been the victim of violence or threats of violence. Further, where a power imbalance between the parties is so pronounced that it cannot be properly managed, even by an experienced mediator, the courts may be better equipped to handle the matter.
- DR processes are generally confidential and therefore are not appropriate if one of the parties wants the issue to be publicized or wants the outcome to be seen as an example for other similar disputes.
- Where there is a need to establish precedent, where the outcome of the case could affect a great number of people or where a definite and broadly applicable solution is required, the court would be the appropriate forum to resolve the dispute.

Civil Law – Process

SOURCE: http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page19.html

Procedure in Civil Cases

A civil action or suit arises 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 occur because of damage done to private property or physical injury to an individual. For example, someone who suffers a broken leg when he or she slips on your icy stairwell may sue you 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, or "action", can be quite complex. Furthermore, the terminology describing steps in the process is not consistent throughout Canada. Generally, an action has three phases: pleadings, discovery, and the trial itself.

An action begins when the plaintiff files a pleading with the court, setting out the complaint against the defendant and the remedy that the plaintiff is seeking. Depending on the practice and procedure of the court in which the action is commenced, such a document may be called a writ of summons, a statement of claim, a declaration, or an application. For present purposes, it can be described as an originating document.

When an originating document is filed, a court officer "issues" the claim. This is done by affixing the seal of the court to the pleading and signing the document on behalf of the court. Copies, as issued, are then delivered to (or "served on") the defendant.

It is the defendant's responsibility to provide the court with a "statement of defence". If the defendant fails to do so, he or she risks losing the suit by default. The court will assume that if the defendant does not put up a defence, the allegations of the plaintiff must be true. If the facts justify the remedy the plaintiff is seeking, the court will hold the defendant legally responsible, or "liable".

When preparing a defence, the defendant may wish to consult a lawyer for advice and assistance. Lawyers representing each side will often discuss the lawsuit in an effort to "settle" it before a trial is necessary. If they succeed, this is called a "settlement". A settlement can be reached at any time before the judge makes his or her decision. In fact, only about two per cent of civil suits are actually tried before the courts.

After statements of claim and defence are filed, each party is entitled to a pre-trial session with the opposing party, known as an "examination for discovery". This session is intended to clarify the claim against the defendant, and to permit each side to examine the evidence that will be used in court by the other side.

After the examinations for discovery, the dispute will proceed to the trial stage. During the trial, it is up to the plaintiff to prove the facts necessary to support the claim against the defendant. In a

civil suit, the plaintiff must prove that it is more probable than not that the defendant is liable. The plaintiff does **not** have to prove this "beyond a reasonable doubt", as in a criminal case.

Trials in Civil Cases

The purpose of a civil trial is to determine whether there is some basis upon which the plaintiff is entitled to a remedy from the defendant and, if so, what the appropriate remedy might be. To achieve this purpose, the judge must listen to both sides and determine the facts of the case. The judge must then decide whether the facts disclose that the defendant has broken a rule of law: for example, the rule that we are bound to perform our contracts.

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

Throughout the trial, the judge must ensure that all of the evidence presented and all of 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 of the trial, both the plaintiff and the defendant present a summary of their arguments. The judge must then consider the evidence presented and make a decision, based on what has been proven to be most probable.

Depending on the subject matter of the action, and the court in which the action is taken, the defendant in a civil matter 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, while 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 in a civil case is found to have done nothing wrong, the judge will dismiss the case. However, if the defendant is found liable, the remedy to which the plaintiff is entitled must be considered. The remedy depends upon a number of factors: the relief sought at the pleadings, the facts, and the authority given to the court to grant specific relief.

Remedies fall generally into three categories: monetary remedies (damages), declaratory remedies, and orders requiring a person to do -- or refrain from doing -- some act.

Damages are the remedy most commonly available to the successful plaintiff. The amount of damages is normally fixed by the judge or jury that decided the case. In fixing damages, the judge or jury will take into account the out-of-pocket expenses incurred by the plaintiff and, where the law permits such recovery, an additional lump sum to compensate the plaintiff for the loss suffered and the loss that might be suffered in the future as a result of the wrongdoing of the defendant.

Although the judge or jury may take into consideration the amount demanded by the plaintiff in the originating document, they are not required to award that amount: they are free to award substantially less than the amount claimed.

In Canada, the main purpose of damages is to compensate the plaintiff for the loss caused by the defendant. However, a judge or jury may occasionally award "punitive" or "exemplary" damages in addition to those that would ordinarily be payable. Such damages are usually awarded when they are made available by statute or, in most jurisdictions, when the judge or jury feel that the conduct of the defendant was so reprehensible that an increased award is required to express the disapproval of the community.

Declaratory remedies are those in which the court states or declares the rights of the parties. For example, when a court interprets a will or a contract, its decision is declaratory in nature. Similarly, the decision of a court as to the ownership of personal property or land is also declaratory.

Many remedies require a person to do or to refrain from doing some act. The most common of such remedies is the "injunction". An injunction can prohibit or restrain someone from doing something, such as annoying his or her neighbours by burning garbage. It can also require someone to do something: for example, to remove their tired old jalopy from the plaintiff's property.

Another remedy that requires a person to do something is known as "specific performance". This remedy is most commonly available where the defendant has breached a contract with the plaintiff. For example, suppose the defendant, Mr. Jones, has broken his contract to sell his house to the plaintiff, Mrs. Smith. Instead of awarding damages, the judge could order Mr. Jones to honour his contract and sell the house to Mrs. Smith at the agreed price.

Injunctions and specific performance are remedies that are not given as a matter of course. In each case, the court has the discretion to make such an order or to award damages. The circumstances in which this discretion can be exercised are the subject of a vast body of judge-made law.

Civil Litigation in Ontario

From: <http://www.heydary.com/publications/lawyers/toronto/litigation-law/ontario-civil-litigation-process-p.html>

You have made all reasonable efforts to resolve a dispute with someone. You have talked to them, you have sent letters, you have contacted your lawyer and they have sent letters, and still you have not received an adequate response or resolved the dispute. What next? Often times, the next step is to begin a lawsuit. It is a fact that the costs of going to Court in Ontario can be very significant. However, what you may not realize is that there are three different "levels" of Court in Ontario (Superior Court of Justice, Simplified Rules in the Superior Court of Justice and Small Claims Court) and that the costs of going to Court can vary, depending on the level of Court that is selected. Why the difference? The reason why costs can vary from one level to another is because of the different rules and expectations that the Courts have on litigants. More detail on the different levels of Court is provided below.

Superior Court of Justice (Damages Over \$50,000.00)

The first and the most expensive level of Court to litigate in is the Superior Court of Justice when dispute is over an amount over \$50,000.00. If litigating in Toronto, all actions are case managed and a Judge or a Master is appointed to every case to ensure that it moves along in a timely manner. The basic steps in the process are as follows:

1. Issuing a Statement of Claim;
2. Replying to the Statement of Defence;
3. Attending a Mandatory Mediation;
4. Preparing an Affidavit of Documents;
5. Attending Examinations for Discovery;
6. Answering undertakings and dealing with motions before trial;
7. Attending a Trial Scheduling Court date;
8. Attending a Settlement conference;
9. Preparing for trial; and
10. Attending at trial.

Statement of Claim

The litigation process is commenced by issuing a Statement of Claim. The claim sets out the facts and the legal grounds that the Plaintiff is relying on in their claim against the Defendant. Once the claim is issued by the Court, it must be served on the Defendant. The Defendant has 20 day to respond to the Claim. If the Defendant does not respond to the claim, then the Plaintiff can move to obtain default judgment from the Defendant.

Replying to the Statement of Defence

Once the Defence has been provided to the Plaintiff, the Plaintiff has an opportunity to reply to the Statement of Defence.

Affidavit of Documents

After the parties have filed their claims, the first step in the process is for all parties to prepare, swear and serve their Affidavit of Documents. An Affidavit of Documents is a sworn document that contains all the documents that the party has in its position that are relevant to the litigation between the parties. For example, in a dispute over a contract, a copy of the contract, letters between the parties, invoices and cancelled cheques, would be some of the documents included in the Affidavit of Documents.

In more complicated litigation, a lawyer will often have to attend at the premises of his/her client and review all the documents to ensure that the Affidavit of Documents is accurate and complete.

Mandatory Mediation

The next step in the process is a Mandatory Mediation. At a Mandatory Mediation, the parties to the litigation attend, with their lawyers, in front of a neutral Mediator that attempts to resolve the dispute between the parties. Generally, the Mediator is an experienced lawyer or a retired Judge. Discussions at the Mandatory Mediation are confidential and any offers to settle that are exchanged during the Mediation cannot be raised in the future during the course of the litigation. Ultimately, at the Mandatory Mediation, it is up to the parties to resolve their dispute, with the assistance of the mediator and their lawyers. However, a mediator does not have the power to force a settlement.

Examinations for Discovery

If the parties are unable to resolve their dispute at the Mandatory Mediation, the next step in the process is an Examination for Discovery. As part of this process, the lawyer for the Plaintiff gets an opportunity to ask questions of the Defendant(s) under oath, and vice-versa.

The discovery process can be very expensive because a lawyer will have to prepare the client prior to the date of attendance at discovery. The discovery itself can be as short as one hour and can be as long as a few months depending on the complexity of the litigation and the number of issues involved.

Undertakings and Motions before trial

Quite often, during the course of discovery, there is information that the party answering questions cannot readily provide to the other side. As part of the discovery process, the parties can provide answers to questions or copies of documents in the time period following the discovery. When a party promises to do this, they are giving an undertaking. A party that does not comply or satisfy an undertaking can face the punishment of a Judge or Master.

On occasion, a lawyer, during the course of the discovery process, will refuse to allow his/her client to answer a question. The parties, rather than delay or waste time arguing about the issue at the discovery, can go to a Judge or Master after the discovery and force the party to answer the question if the Judge or Master believes the question was relevant and appropriate.

Trial Scheduling Court

Once all the refusals and undertakings are dealt with, the parties attend in front of a Judge to get a date for trial. The complexity and length of trial will determine how quickly the parties can have their matter(s) resolved. Currently, short trials (i.e. less than five days) can be booked within a few months. Receiving a hearing date for longer trials (i.e. more than five days) can take anywhere from six months to two years.

Settlement Conference

A settlement conference occurs before trial and takes place in front of a Judge. Usually, by the time the settlement conference takes place the parties will be ready to go to trial and will have the documents that they will be relying on and will have reports from their experts.

The lawyers for the parties, in advance of the conference, send the Judge a brief summary of their arguments along with any relevant documents. When the conference takes place, the Judge will listen to the lawyers (note: litigants do not attend) and try to achieve a settlement. Sometimes, the Judge will give an opinion on how he/she would decide the case if they were the presiding Judge at trial. It is important to know that the Judge that presides over the conference cannot be the same Judge that presides over the trial. This is necessary to ensure that the parties speak freely and openly. A Judge at a settlement conference cannot force a settlement.

Trial

Of all the steps that have been mentioned, the trial is generally the step that is not reached during the course of litigation. The vast majority of disputes settle before reaching trial. Trials are expensive.

In particular, first, the parties will have to pay their lawyers to prepare for trial. The general rule is that for every day of trial time, there will be two days of preparation. Therefore, if a trial is going to be five days long, often times the client will have to pay a lawyer for fifteen straight days of work (ten days preparation and five days of trial time). During the course of a trial, a lawyer will often work from early in the morning until late at night. The client will be responsible for paying all these costs.

In addition to the legal fees, the litigants will have to take time out of their schedules to prepare for the trial and to attend at the trial. This will result in lost time from the business that cannot be recovered.

Finally, trials are unpredictable and it is difficult to predict the outcome of a case. It is for the foregoing reasons that over ninety (90) percent of actions settle before the beginning of trial.

The Simplified Procedure

The next level of Court is the Simplified Procedure in the Superior Court of Justice. This level deals with cases involving claims between \$10,000.00 and \$50,000.00.

The Simplified Rules process eliminates some of the more costly steps that form part of the process in the Superior Court for actions over \$50,000.00. In particular, the Simplified Rules eliminates: Mandatory Mediations, Examinations for Discovery and the undertakings and refusals process. Instead, the parties are required to set out, in their Affidavit of Documents, the names of any witnesses that might have information on the dispute between the parties.

One important difference in the Simplified Rules is that the parties in addition to their lawyers will appear in the settlement conference (called a Pre-trial) in front of a Judge.

Generally, the conduct of litigation in the Simplified Rules is quicker and less expensive than the conduct of litigation for claims over \$50,000.00. Often times it may make more economic sense for a party that has a claim for \$51,000.00 to \$60,000.00 to select the Simplified Rules and to sue for \$50,000.00 because the legal costs involved in pursuing the full claim in the Superior Court may exceed the extra \$1,000.00 to \$9,000.00 that the party can recover.

For further information about the Simplified Rules, visit:

<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/rule76factsheet.asp>

Small Claims Court

The Small Claims Court is for claims between \$1.00 and \$10,000.00. It is the least expensive process and in most cases, the parties can represent themselves.

The only steps in the Small Claims Court are: the exchange of the Statement of Claim (called the Plaintiff's Claim) and the Defence. The Court requires the parties to include in their Claim and Defence all documents that they intend to rely on at trial to prove their claim. Accordingly, the parties do not exchange Affidavits of Documents, do not attend a Mandatory Mediation, or attend Examinations for Discovery.

The parties are required to attend a pre-trial in front of a Judge who will attempt to achieve a settlement. The opinions and suggestions of a Judge are not binding on the parties; however, it goes without saying that the opinion of the Judge should be given serious consideration in determining whether to continue or resolve the claim.

The trial process in the Small Claims Court is short and a trial can last anywhere from half an hour to a full day. It is rare for a Small Claims Court trial to take more than a full day.

For further information about the Small Claims Court, visit:

<http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc>

Criminal Law Process

Sources: http://www.educaloi.qc.ca/TLR_Law/00_Accueil/
<http://www.canadianlawsite.com/index.html> <http://canada.justice.gc.ca>

History

Canada's criminal law is rooted in the common law of England. The public policy advantages of codification began at the end of the 18th century in England where, in the words of Canadian Federal Court judge Allen Linden, criminal law had evolved into "a bottomless pit of complex case law, petty, anachronistic offences and harsh punishments."

When the Provinces of Canada were confederated in 1867, the first Prime Minister, Sir John A. Macdonald was adamant that Canada would not suffer the disparate criminal law system inherited from England for long (at that time, each province had its own criminal law). Macdonald believed strongly in the need for a single, uniform regime of criminal law for the entire country. In fact, the Canadian constitution which he helped write, gave the federal government the explicit authority to codify the criminal law.

The *Code* also sets out the procedure to be followed in criminal cases but, again, recourse has to be made to other laws in special cases such as the *Extradition Act* or the *Young Offenders Act*. Peculiarly, while the *Code* is a federal law, the administration of the criminal law justice system is left to the provinces. It is the latter that hires and supervises the work of public prosecutors and court officials.

Is it true that ignorance of the law is no excuse in Canada?

In Canada, ignorance of the law is neither a defence nor a justifiable excuse. In general, a person cannot plead ignorance of a law or a regulation, whether at the federal, provincial, or municipal level.

The difference between criminal law and penal law

Criminal law defines criminal acts and includes all the criminal offences in the Criminal Code and federal criminal laws. Penal law applies to provincial or federal laws and even provincial, federal, or municipal regulations. These laws are unique in that they impose punishments on offenders.

Choice of a trial language in criminal matters

Canada is a bilingual country which recognizes the equal importance of French and English. This importance is acknowledged through linguistic rights: the right to use an official language of one's choice in one's daily activities and relations with the government and institutions.

Since the federal government is competent in all matters relating to criminal law, it has ensured that an accused may have a trial before a judge and jury who understand his language, even though he belongs to a linguistic minority group in his province.

Criminal Law

Criminal law is concerned with acts or omissions deemed illegal by legislature. Criminal law offences range from crimes such as murder, assault, robbery and theft to driving with a blood alcohol level over the legal limit.

In Canada, criminal law is enacted by the Federal Parliament. Criminal procedure in Canada is concerned with:

- criminal proceedings in the criminal courts:
- conduct within the courtroom,
- competency of witnesses,
- oaths
- affirmations,
- presentation of evidence.
- pleading,
- evidence, and practice,
- rules in the Criminal Code which deal with police powers,
- right to counsel,
- search warrants,
- interim release, and
- witnesses, etc.

Unlike a civil suit, a crime is not a dispute between individuals, even though individuals often suffer damage or are injured by the offenders. A crime is considered to be an offence against society as a whole. This is why it is usually the state, and not an individual, who initiates a criminal prosecution. The person charged with a criminal offence is called the "accused".

Criminal offences are set out in the Criminal Code or in other federal legislation, and are divided into two categories: "summary conviction" offences and "indictable" offences. Some offences may be prosecuted either summarily or by indictment, at the discretion of the prosecutor; these are known as "elective" offences. "summary" and "indictable". Summary offences tend to be less serious ones, indictable more serious.

Procedure if an offence is Alleged

Complaint is Sworn

The police swear a complaint and present it to a judge. If the judge feels the person should be made to come and answer the accusation that has been made the judge will issue either a summons, or a warrant for arrest.

Summons

A summons is usually delivered personally by a police officer. It sets out what the charge is, and when the person must appear in court to answer the charge. If the offence charged is one that can be proceeded with by indictment, the person may also be told to go to the police station for finger-printing. Failure to show up for finger-printing can lead to a warrant for arrest being issued.

Arrest

An arrest can be made by the police under the following circumstances:

- if they find someone committing an indictable offence;
- if they see someone apparently fleeing from lawful pursuit after committing a crime;
- if they believe someone is about to commit an indictable offence;
- if they believe there is a warrant out on the person;
- If they have a warrant for the arrest of a person.

Conduct of Police after the Arrest

- The police have the right to search someone being arrested. The main justifications for this are to check for weapons, and for evidence of the alleged offence;
- Police can't arrest someone on mere suspicion, or just to help with an investigation;
- It is proper for the police to question anyone, and even to ask the person to voluntarily accompany them, to the police station;
- The person arrested must be told the reason for the arrest;
- If the offence is an indictable one, the police can fingerprint and photograph the person;
- The person must be told about his or her right to talk to a lawyer;
- If the person wishes to speak with a lawyer, the police must make a telephone available;
- Questioning should cease until there has been a reasonable opportunity for the person to get legal advice.

Conduct of Arrested Person

An arrested person is not obliged to answer questions put to him or her by the police. This is a right of the person and no blame or suspicion will be placed on the person for exercising this right. The best action the arrested person can take is to get advice from a lawyer as soon as possible, and before talking to the police.

Lawyers may recommend making a limited statement in some circumstances:

- someone who is a juvenile may want to let the police know this as soon as possible; and
- giving basic personal I.D. information (name, address, occupation, and so on).

First Appearance at Court

After a person has been arrested he is entitled to appear promptly before a judge to answer any charges that are being laid. The person is to appear before a judge within 24 hours. The person is entitled to have a lawyer to speak to whether the person should be released and, if so, whether there should be bail.

The first court appearance may result in the following:

- The judge may decide to order that the person remain in custody;
- The judge may require that the person deposit money or property with the court to ensure appearance in court if released;
- An adjournment to allow time for the person to speak with a lawyer or relatives or friends before pleading;
- In the case of a "guilty plea" on a "summary charge" the court can deal with sentencing right away or set another date to deal with sentencing;
- In the case of a "not guilty plea" on an "indictable offence" the person may choose trial by judge, or jury and the court will set the trial date or a preliminary hearing will be set.

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

The presumption of innocence

The right to a presumption of innocence is a fundamental concept of Canadian criminal law. It has been called the Golden Thread of our criminal law system.

It means that, if you are accused of a crime, you have a fundamental right to be presumed innocent, unless Crown prosecutors can prove, beyond a reasonable doubt, that you are guilty of the charges against you.

In fact, this fundamental right is protected by the Canadian Charter of Rights and Freedoms, which states "any person charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal."

Because of its importance, the presumption of innocence is the motivating factor behind some basic principles of law:

- the prosecution (the Crown) has the burden of proving the guilt of the accused beyond a reasonable doubt;
- the accused has a right to remain silent;
- the accused has a right to not incriminate himself or herself (the accused does not have to testify at his own trial);
- the accused has a right to be judged by an independent and impartial tribunal;
- the accused has a right to full answer and defence.

Why do we presume a person is innocent?

The right to be presumed innocent did not always exist in Canada. In fact, the reverse principle was applied. A person was presumed guilty until he could prove his own innocence.

Today, in Canada, we uphold the presumption of innocence to avoid convicting any innocent person. As a society, Canada has decided that it is better to allow a guilty man go free than to convict – and possibly imprison – an innocent man.

The presumption of innocence is testament to our belief that, until proven otherwise, people are basically honest and respectful of our laws.

It also aims to preserve the fundamental freedoms and human dignity of accused persons

Until proven guilty, who has the burden of proving the guilt of an accused person?

Logically, because an accused is presumed innocent, he should not have the burden of proving his innocence.

Instead, the Crown or State prosecutors have the burden of proving his guilt. To do so, they must prove, beyond a reasonable doubt, two things:

- that a crime was committed;
- that the accused is the perpetrator of this crime.
A right to presumption of innocence goes hand in hand with a right to the benefit of the doubt. At the end of a trial, if a doubt exists in the minds of the justice or jury as to the guilt of the accused, they must acquit him.

What essential elements are included in an offence?

The prosecution must prove the two essential elements included in the offence beyond a reasonable doubt before the court can convict someone:

- actus reus;
- mens rea.

The principle of “actus reus” is fairly easy to understand. It refers to the act or gesture prohibited by the Criminal Code. The prosecution must first prove that the accused did indeed commit the act of which he stands accused. It must then prove that the act of the accused is indeed prohibited by law. For example, if the accused is being tried for drinking and driving, the prosecution must prove that the alcohol blood level of the accused exceeded the amount allowed by the Criminal Code and that the accused had the care and control over his vehicle when the police intervened. The principle of “mens rea” is a little more complicated. It refers to the state of mind present when the act was committed. According to the principle of “mens rea”, the prosecution must prove what was happening in the mind of the accused during the commission of the offence. The “mens rea”, therefore, is the criminal intent of the accused. The degree of criminal intent (general or specific) varies from one offence to another in the Criminal Code.

In homicide, for example, the prosecution must prove more than the simple general intent to commit the crime. The prosecution must not only show that the accused intended to shoot the victim, but that he also intended to kill him.

Decisions in Criminal Cases

If the accused in a criminal trial is found not guilty, the trial judge will acquit the accused, who is then free to go. But if the accused is found guilty of a crime, the judge must decide on the appropriate sentence.

When making this decision, the judge must consider many things, such as the seriousness of the crime, the range of sentences provided for by the Criminal Code or other statutes, the need to prevent or deter 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 different penalties. The sentence may include such penalties as:

fine: A sum of money that can run up to many thousands of dollars.

restitution: An order requiring the offender to make restitution 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 in a probation order.

community service: A court order that the offender perform a certain number of hours of volunteer work in the community.

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

However, the judge is not always required by law to enter a conviction upon a plea of guilty or a finding of guilt. Under certain circumstances, the judge can give the offender an absolute or conditional discharge. If it is a "conditional" discharge, the offender must obey certain conditions imposed by the judge; otherwise, he or she can be brought back to court and given a more severe sentence. A discharge will avoid ascribing a criminal record to the offender.

Criminal Law and the Canadian Charter of Rights and Freedoms

The Charter of 1982 protects the legal rights of Canadians in their relation with the justice system. A criminal trial is a serious matter for the accused because life and liberty, as well as the stigma of a criminal conviction, are at stake. This is why common law and the Charter provide special protections. For example, the prosecution has the burden of proving that the accused is guilty of the charge beyond a reasonable doubt. Also, if any evidence introduced at the trial was obtained in a way that violates the accused's Charter rights, such as an unreasonable search and seizure, the judge may refuse to admit the evidence if to do so would bring the administration of justice into disrepute.

In a criminal trial, an accused person cannot be required by the prosecution to give evidence. The accused can take the witness stand, but only if he or she consents to testify.

Articles 7 to 14 of the Charter:

Legal Rights

Life, liberty
and security
of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or
seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or
imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or
detention

10. Everyone has the right on arrest or detention

- a) to be informed promptly of the reasons therefor;
- b) to retain and instruct counsel without delay and to be informed of that right;
- and
- c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings
in criminal
and penal
matters

11. Any person charged with an offence has the right

- a) to be informed without unreasonable delay of the specific offence;
- b) to be tried within a reasonable time;
- c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e) not to be denied reasonable bail without just cause;
- f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or
punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-
crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Young Persons (also see Annex 1)

When the Youth Criminal Justice Act Became Law

The Youth Criminal Justice Act came into effect on April 1, 2003. It introduces sweeping changes to the way in which the criminal justice system deals with young persons.

Who is Affected

The YCJA is applicable to young persons aged 12 to 17 at the time of the alleged offence.

What Offences are Included

The YCJA governs criminal law and is subject to the Federal Laws of Canada and not provincial law.

Major Provisions of The Youth Criminal Justice Act

allows an adult sentence for any youth 14 years old or more who is convicted of an offence punishable by more than two years in jail, if the Crown applies and the court finds it appropriate in the circumstances;

- expands the offences for which a young person convicted of an offence would be presumed to receive an adult sentence from murder, attempted murder, manslaughter and aggravated sexual assault to include a new category of a pattern of serious violent offences;
- lowers the age for youth who are presumed to receive an adult sentence for the above offences to include 14- and 15-year-olds;
- permits the publication of names of all youth who receive an adult sentence. Publication of the names of 14- to 17-year-olds who receive a youth sentence for murder, attempted murder, manslaughter, aggravated sexual assault or repeat serious violent offences will also be permitted;
- allows the Crown greater discretion in seeking adult sentences and publication of offenders' names;
- creates a special sentence for serious violent offenders who suffer from mental illness, psychological disorder or emotional disturbance that will include an individualized plan for custodial treatment and intensive control and supervision;

- promotes a constructive role for victims and communities, including ensuring they receive the information they need and have opportunities to be involved in the youth justice system;
- gives the courts more discretion to receive as evidence voluntary statements by youth to police;
- requires all periods of custody to be followed by a period of controlled supervision in the community to support safe and effective reintegration;
- permits tougher penalties for adults who wilfully fail to comply with an undertaking made to the court to properly supervise youth who have been denied bail and placed in their care. This responds to a proposal made by Chuck Cadman, M.P. (Surrey North) in a private member's bill;
- permits the provinces to require young people or their parents to pay for their legal counsel in cases where they are fully capable of paying;
- allows for and encourages the use of a full range of community-based sentences and effective alternatives to the justice system for youth who commit non-violent offences; and
- recognize the principles of the United Nation Convention on the Rights of the Child, to which Canada is a signatory.

Pardon

What They Do:

- A pardon allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens, to have their criminal record kept separate and apart from other criminal records.
- When a pardon is issued all information pertaining to convictions will be taken out of the Canadian Police Information Centre (CPIC) and may not be disclosed without permission from the Solicitor General of Canada.
- The Canadian Human Rights Act forbids discrimination based on a pardoned conviction. This includes services a person needs or the opportunity to work for a federal agency.
- The CRA states that no employment application form within the federal public service may ask any question that would require an applicant to disclose a pardoned conviction. This also applies to a Crown corporation, the Canadian Forces, or any business within the federal authority.

What They Don't Do:

- A pardon does not erase the fact that a person was convicted of an offence.
- A pardon does not guarantee entry or visa privileges to another country.
- If a person was pardoned for certain sexual offences, his record will be kept separate and apart, but his name will be flagged in the CPIC computer system. This means a person may be asked to let employers see his record if this person wants to work with children or with groups that are vulnerable because of their age or disability.
- A pardon will not cancel a driving or firearms prohibition order.

Youth Criminal Justice Act (YCJA)

SOURCE: http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page19.html

Canada's New Youth Criminal Justice Act

Introduction

The Government of Canada is working to establish a renewed youth justice system - one that commands respect, fosters values such as accountability and responsibility and makes it clear that criminal behaviour will lead to meaningful consequences. A renewed youth justice system must also make a distinction between violent and non-violent crime and ensure that youth face consequences that reflect the seriousness of their offence. Finally, it must make every effort possible to prevent youth crime and to support youth, if they do become involved in crime, to turn their lives around. Establishing a youth justice system that promotes accountability and is more effective and reflective of current social values is key to regaining public confidence.

These are the basic principles on which the Government of Canada has based its strategy for the renewal of youth justice. The strategy focuses on three key areas that work together to protect the public: preventing youth crime; ensuring there are meaningful consequences that encourage accountability for offences committed by youth; and improving rehabilitation and reintegration for youth who will return to the community.

Since the release of the Youth Justice Strategy in May, 1998, the Government of Canada has consulted widely with Canadians on specific proposals for a new youth justice system. These included a series of round-table discussions with experts across Canada, as well as consultations with the provinces, victims, police, the legal community, municipal representatives, community organizations and many others. These discussions have helped in developing a new law, the *Youth Criminal Justice Act*, which will replace the *Young Offenders Act*. The new Act, and the programs to support it, address the needs and concerns of all Canadians.

A new approach

The changes the government has proposed to the youth justice system share a number of important features:

Flexibility for the provinces. The government's reforms recognize the unique needs, problems and differences in approach that exist among the provinces. Within a framework that ensures the law is applied consistently across the country and that the objectives of the Youth Justice Strategy

are met, the government's proposals offer individual provinces a balanced, flexible approach that allows them to choose options in some areas that best meet their needs and suit their systems.

Treating violent and non-violent crimes differently. Not all offences committed by youth are the same. The reforms reflect the basic principle that different kinds of crime should be addressed in different ways and, particularly, that non-violent crimes should be treated differently than violent crimes. The proposals ensure that formal measures, including custody, are always available for offences that warrant this approach, but also encourage the use of informal responses that focus on accountability, involve communities, victims and families, and that are often more effective in dealing with less serious crimes.

A cooperative, integrated approach to youth crime. The proposals also reflect the need for a broader, more comprehensive approach to youth justice that looks beyond the justice system for solutions to youth crime. Experience has shown that the justice system is only one piece of the puzzle. Long-lasting solutions that address the causes of youth crime must involve a variety of individuals, organizations and governments in such areas as crime prevention, child welfare, mental health, education, social services and employment. Families, communities and victims will also have a larger role in addressing youth crime under the government's new strategy.

Children as a national priority. The new Youth Justice Strategy supports the government's national priorities of children and youth. The strategy has strong links to the National Children's Agenda and the Government of Canada's National Strategy on Community Safety and Crime Prevention. These programs are part of a broader federal commitment to improve the health, safety and well-being of Canada's children and youth so that they have the best possible opportunity to develop their full potential.

The Government of Canada's youth justice initiative has a number of components, including a new law and a new framework of supporting programs.

The Youth Criminal Justice Act

The new *Youth Criminal Justice Act* will improve the youth justice system in four ways:

- it promotes **accountability, responsibility and meaningful consequences** for the full range of youth crime;
- it supports more **constructive, long-term and sustainable solutions** to youth crime that: reinforce important social values like respect, responsibility and accountability; focus on the individual needs of youth in ways that are also sensitive to culture and gender; make clearer distinctions between violent and non-violent crimes, so that young people who have committed a crime face consequences that reflect the seriousness of their offence; involve communities in identifying and finding innovative solutions to their unique youth crime problems; expand the role of victims; and support improved rehabilitation and reintegration measures;

- it is more **consistent with national and international human rights** in protecting the interests of children while, at the same time, protecting public safety; and
- it promotes a more **flexible and streamlined** youth justice system that is less time-consuming, more responsive to the needs of victims and families, and permits provinces to develop measures that meet their unique needs.

The new legislation contains the following key elements:

Preamble and declaration of principle

The new legislation will contain a preamble and declaration of principle that make clear the purpose of the youth justice system. The preamble and principles underscore that protection of society is the primary objective of the youth justice system. The preamble will also underscore the rights and responsibilities of youth and society in addressing youth crime and reinforce societal values about children and youth. The preamble recognizes the United Nations Convention on the Rights of the Child, to which Canada is a signatory.

The core principles state that:

- protection of society is the paramount objective of the youth justice system, which is best achieved through prevention, meaningful consequences for youth crime and rehabilitation;
- young people should be treated separately from adults under criminal law and in a separate youth justice system that emphasizes fair and proportionate accountability, keeping in mind the dependency and level of development and maturity of youth. A separate youth justice system also includes special due process protections for youth as well as rehabilitation and reintegration;
- measures to address youth crime must: hold the offender accountable; address the offending behaviour of the youth; reinforce respect for social values; encourage repair of the harm done to victims and the community; respect gender, ethnic, cultural and linguistic differences; involve the family, community and other agencies; and be responsive to the circumstances of youth with special requirements; and
- parents and victims have a constructive role to play in the youth justice system, should be kept informed and encouraged to participate.

Sentencing

The new legislation will:

- give the youth justice court the power to impose adult sentences in appropriate cases;
- contain a statement that the purpose of sentencing is to hold young people accountable for their behaviour in a way that fits the seriousness of what they have done and their level of maturity. A key principle of sentencing under the new legislation is that the sentence a youth receives should be in proportion to the seriousness of the offence;
- allow an adult sentence for any youth 14 years old or more who is convicted of an offence punishable by more than two years in jail, if the crown successfully applies to the court;

- expand the offences for which a youth convicted of an offence is expected to be given an adult sentence to include a pattern of convictions for serious, violent offences. At present, only 16- and 17-year-olds accused of murder, attempted murder, manslaughter and aggravated sexual assault are presumed to be subject to adult sentences;
- extend the group of offenders who are expected to receive an adult sentence to include 14- and 15-year-olds;
- create an intensive custody and supervision sentence for the most high-risk youth who are repeat violent offenders or have committed murder, attempted murder, manslaughter or aggravated sexual assault. These sentences are intended for those with psychological, mental or emotional illness or disturbances. The sentence would require a plan for intensive treatment and supervision of these offenders and would require a court to make all decisions to release them under controlled reintegration programs;
- add a number of other sentencing options to deal with the full range of youth crime, including support and supervision and imposing conditions that the youth would have to meet in the community;
- encourage community-based sentences, where appropriate, such as compensation or restitution to the victim, community service or probation;
- permit harsher penalties for adults who wilfully fail to comply with an undertaking made to the court to properly supervise youth who have been denied bail and placed in their care by making this a criminal offence punishable through either summary conviction or indictment; and
- permit victim impact statements to be introduced in youth court.

Publication and records

The new legislation would:

- permit publication of the names of all youth convicted of a crime who receive an adult sentence. In addition, the names of 14-to 17-year-olds given a youth sentence for murder, attempted murder, manslaughter, aggravated sexual assault or repeat violent offences may be allowed. Publication would also be allowed if a youth is at large and is considered by a judge to be dangerous;
- permit the Crown to give notice at the beginning of a trial that it will not seek an adult sentence in a particular case. This means that the youth would receive a youth sentence and the youth's name would not be published; and
- treat the records of youth who receive adult sentences the same as the records of adult offenders. The new legislation would also clarify the record-keeping system for youth records and allow authorized people such as victims, police officers or school authorities to access youth records.

Custody and reintegration into the community

An important principle in the Youth Justice Strategy is that, while young people must be held accountable for their crimes, they are also more likely than adult offenders to be rehabilitated and become law-abiding citizens. Programs to help rehabilitate, supervise and control these youth as they return to their communities protect the public because they help prevent further crimes.

The custody and reintegration provisions of the new law would:

- for the first time, include a statement of purpose and principles emphasizing that custody and supervised reintegration contribute to the protection of society;
- place criteria on the use of custody for young people so that it is used appropriately;
- require, in general, that youth be held separately from adults to reduce the risk that they will be exposed to adult criminals;
- give provinces more flexibility in deciding where a young person who has been sentenced to custody should be placed as well as more flexibility in moving youth who reach adult age while still in custody into adult facilities. A maximum age of 20 would be established as the limit for the youth justice system, but the legislation would permit provincial authorities to retain an offender in the youth system beyond this age if it is appropriate;
- require the judge to impose a period of supervision in the community following custody that is equal to half the period of custody imposed. This would allow authorities to closely monitor and control the young person and to ensure that he or she receives the necessary treatment and programs to return successfully to the community. The current system does not require a period of community supervision;
- require a youth worker to work with a young person who is in custody to develop a reintegration plan setting out effective programs and treatment for the youth to be undertaken when he or she is in custody or serving the period of supervision in the community; and
- ensure that conditions are imposed on youth during periods of supervision. Mandatory conditions would include keeping the peace and reporting to authorities. Optional conditions would be targeted to a youth's particular circumstances and could include measures to establish structure in the young person's life like attending school, finding employment or obeying a curfew, and measures to address particular problems like abstaining from alcohol and drugs, attending treatment programs or counselling and not associating with gang members.

Changes to formal court procedures

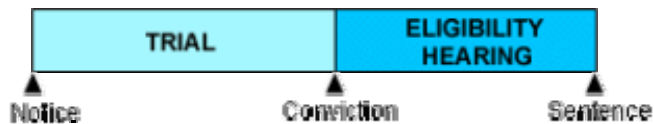
The new legislation will:

- replace the current process for transfer to adult court with a process that gives the youth justice court the power to impose adult sentences on conviction when certain criteria are met. This would result in a more efficient system that places less of a burden on victims and families, and would give any court hearing a case involving a youth the tools it needs to deal appropriately with the case

Relative Timeframes - Current Process



Relative Timeframes - Proposed Process



- allow a judge to decide on the admissibility of statements made by a youth to a person in authority, such as a police officer. This would reduce the legal and administrative difficulties that currently exist in youth justice legislation as well as the number of statements that are ruled inadmissible simply because of a legal technicality.

Measures Outside the Formal Court Process

Many young people are brought into the formal justice system for minor offences that, in many cases, could be more effectively dealt with in the community in less formal but meaningful ways that focus on repairing the harm done. These options are often faster and more effective because they can involve a variety of community organizations and services as well as the victim, the youth, parents and others. They can also be tailored for the particular needs of an individual young person.

The Youth Justice Strategy expands the options available for dealing with youth convicted of an offence, supporting the establishment of a range of programs and alternatives for less serious crimes while always reserving the formal court process for more serious offences where it is clearly needed. In all cases, the emphasis is on ensuring the youth is held accountable for his or her actions and faces meaningful consequences that teach important social values.

The range of options would include:

- verbal warnings and cautions from police;
- informal police diversion programs such as a referral to a "family group conference," a program that involves the youth, the youth's family, the victim and others in addressing the young person's offence; and
- formal programs requiring community service or repairing the harm done to the victim through, for example, compensation or restitution to the victim.

The proposed Act would also require police to consider all options, including informal alternatives to the court process, before laying charges and allow the provinces, if they choose to do so, to require Crown counsel to screen charges before they are laid against a youth. These measures help to ensure that the more expensive and formal court process is reserved for youth crimes that warrant it.

There are many community-based programs for youth and children at risk already operating successfully in Canadian communities. These include: the Ottawa-Carleton Police Youth Centre, which has been credited with contributing to a significant drop in drug-related charges in the Debra-Dynes public housing community it serves; the Sparwood Youth Assistance Program, a B. C. police diversion program which, through a conferencing model that involves the youth, family and victim, has established a low re-offending rate of only nine percent; the Atoskata Victims' Compensation Project in Regina, which provides work opportunities to youth with earnings directed to the victim; the EarlsCourt Outreach Program in Toronto, which offers successful treatment and mentoring programs to children under 12; and the Child and Youth Protection Centre in Quebec City, which offers an intensive probation program for young people convicted of an offence who would otherwise have been placed in custody. The program has reduced the reoffending rate among this group by more than 30 percent.

The law enforcement community is an important partner in informal community-based measures. Police officers, working on the front lines in neighbourhoods, schools and in the community, are often the first to deal directly with children at risk, youthful offenders and their families. The Government of Canada recognizes this important role and is working closely with law enforcement organizations in developing and implementing this key element of the Youth Justice Strategy.

Implementation

The Government of Canada is proposing a major restructuring of Canada's youth justice system. This process involves a number of partners at every level of government and in the community - the provinces and territories; the legal profession; law enforcement; social service and child welfare officials; parents; educators; and many others.

Such significant change requires consultation, cooperation and public accountability and openness. The Government of Canada will establish a five-to-six-year implementation phase to allow the federal government, the provinces and the territories to work together with organizations and communities on specific measures, informing the public and developing innovative programs to support the more collaborative, community-based approach of the Youth Justice Strategy.

Measures the government is taking during the implementation period include:

Youth Justice Reference Group

During consultations on the Youth Justice Strategy, many Canadians expressed an interest in how the strategy would be implemented and how they and the groups they represent could be involved in making the new system work. The government intends to create a Reference Group that reflects the broad range of partners involved in youth justice, including the provinces, territories and municipalities, police, boards of education, victims, child advocates, crime prevention experts, Aboriginal organizations, the judiciary and the legal profession. The Reference Group would be consulted on implementation issues and would encourage participation from many Canadians in addressing the complex problem of youth crime.

Consultations and training

Many professionals working in the system will need information on the government's new approach as well as training. They will also need to be consulted on implementation issues that affect their professional groups. The Government of Canada will be working with the law enforcement community, legal professionals, the judiciary, corrections officials, child welfare and social services organizations and many others to ensure they are involved in implementing the new system and that they have the training they need to make it work.

Public information and accountability

Canadians need accurate information about how their justice system, including the new youth justice system, works. They also need to be assured that the Government of Canada is meeting the objectives it has set for the new system. The federal government will develop a program to evaluate the new youth justice system, along with measures to ensure Canadians are informed about the Strategy, its objectives and its effectiveness. This will include a national public information program and regular national reports to Canadians on how the government's efforts to renew the system and make it more effective are progressing.

Funding

There has been significant cooperation between the federal government, the provinces and the territories on youth justice issues in recent years. The Government of Canada believes that a collaborative approach is essential to improving the youth justice system. The government has committed \$206 million over the first three years of the Youth Justice Strategy for implementation; most of these resources will be made available to the provinces and territories to support the objectives of the Youth Justice Strategy. The government is also committed to providing more long-term stability and equity in federal funding to the provinces and territories.

Dictionary – Criminal Law

Source: <http://jurist.law.utoronto.ca/dictionary.htm>

Abet: To encourage someone to commit a criminal offence;

Absolute Discharge: Instead of convicting an accused, a sentencing judge in a proper case may grant an absolute discharge, which has the effect of there never having been a conviction;

Act: A statute enacted by Parliament or a legislature;

Act of Settlement: A statute passed by the Parliament of the U.K. in 1701 which settled the succession to the throne of the U.K. and confirmed the independence of the judiciary;

Action: A civil law proceeding sometimes called a "lawsuit";

Actus Reus: The physical acts by which a criminal offence is committed; actually, with *mens rea*, one of the two major, essential ingredients of every criminal law offence;

Aid: To assist someone to commit a criminal offence;

Appearance: The document by which a defendant responds to a Writ of Summons or Petition in civil law proceedings;

Assize: A sitting of a common law court, usually to hear cases at locations away from the primary court centre;

At bar: An expression used to describe a case that is currently before a court, as in "the case at bar";

Attorney General: An elected member of the legislature and a member of the cabinet who is the chief law officer of the Crown responsible for the proper administration of justice in the Province. In the federal sphere, the Minister of Justice fills this role as Attorney General of Canada;

Automatism: A disassociative state where a person is not aware of his or her actions or the consequences;

Bail: Now described in the **Criminal Code** as "judicial interim release", a court order permitting the release from custody of an accused person pending trial, or of a convicted person pending appeal. See **Recognizance**;

Bigamy: A married person going through a ceremony of marriage with a person not his or her spouse;

Bill: A proposed Act or Statute prior to its enactment;

Blasphemous Libel: The publication of material that would shock and outrage the feelings of believing Christians;

Bona fide: A Latin phrase describing an honest and genuine state of mind, literally "good faith";

Break and Enter: Wrongfully breaking any part of any premises in order to enter, usually for the purpose of committing an offence;

Canadian Bill of Rights: A statute passed by Parliament in 1960 purporting to guarantee certain rights. It has been largely superseded by the *Canadian Charter of Rights and Freedoms*;

Canadian Charter of Rights and Freedoms: Since 1982, a part of the Constitution of Canada guaranteeing certain specific rights and protections against state action;

Caveat: Literally, a warning; also a document that may be filed in Land Titles Offices to warn about alleged or possible defects in the state of the title;

Certiorari: An "Extraordinary Remedy" used by a superior court to quash an order or decision made without jurisdiction by a court or tribunal of inferior jurisdiction;

Challenge for Cause: The right of a party to a jury trial to object to the empanelment of a juror for some reason such as interest or bias;

Chancery: The court administered by the Lord Chancellor for the exercise of equitable jurisdiction;

Circumstantial Evidence: As distinguished from direct evidence. Evidence which does not prove a fact in issue directly, but rather indirectly by inference from subsidiary facts such as when a witness says "I heard a shot and I saw the accused with a gun in his hand standing over a body lying on the ground." From these facts, if believed, a jury could infer that the accused shot the person lying on the ground;

Cite or Citation: A system, after "citing" or referring to a case or statute, of identifying where the "cited" case or statute may be found – e.g., [1989] 2 S.C.R. 1, means that the case is reported in the second volume of the Supreme Court of Canada Reports for 1989 at page 1;

Co-conspirator: A person, charged or uncharged, who is alleged to be a party to a conspiracy;

Code: A complete statement of the law in a given area. In Canada we have a **Criminal Code**, an Act of the Parliament of Canada which creates criminal offences, and prescribes the procedure for the conduct of criminal law proceedings. Quebec has a Code of civil laws;

Colour of right: An honestly held belief in entitlement to property; a defence to a charge of theft;

Common Law: The law as stated in the decisions of the judges from the earliest times to the present;

Compendium: A collection of writings;

Concurrent Sentence: Sentences for different offences that are served at the same time rather than consecutively;

Conditional Discharge: Instead of giving an absolute discharge, a sentencing judge may grant a conditional discharge. When the conditions are satisfied, the discharge becomes absolute;

Conditional Sentence: A sentence of less than two years ordered to be served in the community (without going to gaol) subject to a probation order;

Conscripted Evidence: Evidence obtained from a person against his or her interest, such as bodily fluids, or a confession or admission;

Consecutive Sentence: A sentence for an offence that must be served consecutively, rather than concurrently or at the same time, with another sentence;

Conspiracy: A criminal offence that is complete whenever two or more persons (other than a husband and wife) agree to do something that is unlawful, or something that is lawful by unlawful means;

Contemnor: A person who has been convicted of contempt of court;

Contempt of Court: A common law offence committed by one who disrupts court proceedings or interferes with the court's work, which the court may punish summarily;

Convention: An unwritten but generally understood principle of constitutional law;

Conversion: The wrongful taking or appropriation of property or rights;

Counsel: To encourage or persuade a person to commit an offence; or, a term used to describe a lawyer;

County and District Courts: Federally appointed courts of inferior jurisdiction that have all been merged into the senior superior trial court in each province. There are no longer any County or District Courts in Canada;

Court of King's (or Queen's) Bench: The senior common law court in the U.K. and the name of the senior, superior trial court in many Canadian provinces;

Criminal Rate of Interest: An annual rate of interest in excess of 60%;

Cross-Examination: The examination (asking questions), by opposing counsel after the completion of the examination in chief of a witness by the lawyer for a party that called the witness;

Culpable Homicide: Causing death by a wrongful act or criminal negligence or by the other means described in **Criminal Code** s. 222(5);

Defamatory Libel: Publishing material without lawful excuse that exposes anyone to hatred, contempt or ridicule;

Defendant: In civil proceedings, the person being sued; in criminal proceedings, more often called "the accused";

Denunciation: A principle of sentencing used to describe the view that one of the purposes of sentencing is to express society's emphatic disapproval of criminal conduct;

Direct Evidence: As distinguished from circumstantial evidence. Evidence that proves a fact in issue directly without relying upon an inference from other facts, such as when a witness says "I saw A shoot B.";

Discovery: The processes for the production and inspection of relevant documents, sworn answers to written questions (interrogatories) about facts in issue, or pre-trial cross-examination under oath of parties in civil law proceedings;

English Law Act: The first Ordinance (statute) passed after British Columbia became a Colony in 1859, which introduced English law into British Columbia except where inapplicable because of local conditions;

Equity: A system of laws parallel to the common law. Equity was developed to ameliorate the harshness of the common law which recognized only strict legal rights;

Et al.: Literally, "and others"; it is usually used after the name of the first party in a Style of Cause to indicate that there are other, unnamed parties;

Examination in chief: The process, sometimes called direct examination, where the lawyer calling the witness asks non-leading questions to have the witness give the court his or her evidence;

Executive Branch of Government: There are three branches of government: the Executive, comprising essentially the Cabinet and the Ministries; the Legislative Branch, being Parliament in the federal sphere and the legislatures in the provincial sphere; and the Judicial branch;

Extortion: Wrongfully by threats or violence causing any person to do anything;

Extraordinary Remedies: *Habeas Corpus*, *Certiorari*, *Prohibition* and *Mandamus*, which are the names of proceedings taken in a superior court to require courts and tribunals either to stay within

their proper jurisdiction, or to exercise properly the jurisdiction they have; in civil proceedings in B.C. These remedies are largely replaced by proceedings under the **Judicial Review Procedure Act**;

"Faint Hope" clause: Section 745(6) of the **Criminal Code**, which permits a person serving a life sentence without eligibility for parole for more than 15 years, to apply after serving at least 15 years to have a jury review such ineligibility. A jury's recommendation for reduced ineligibility is not binding on the Parole Board;

False pretence: A false representation of a past or present fact made by a person who knows it is false and intends that it be acted upon;

Firearm: Any barrelled weapon that is capable of causing death or injury;

First Degree Murder: Murder that is planned and deliberate, or murder committed by one or more of the means described in **Criminal Code** s. 231(3) or (4);

Forgery: The making of a false document fraudulently and with the intent that it be acted on;

Fraud: A knowingly wrong act or deceitful representation;

General Deterrence: A principle of sentencing that assumes a prison sentence for A will deter others from committing the same or other offences;

Genocide: Advocating the death or destruction of identifiable groups;

Governor General: The personal representative of the Sovereign in Canada and the largely ceremonial Head of State when the Queen of Canada is not in Canada;

Habeas Corpus: An "Extraordinary Remedy" which requires anyone detaining a person to justify such detention to a superior court. While generally used in criminal law proceedings, this ancient remedy also applies in a civil law context;

Hate Propaganda: The publication of material that advocates genocide or hatred of an identifiable group of citizens;

Her Majesty's Loyal Opposition or "the Opposition": The largest group of non-government members in Parliament or a legislature whose role is to oppose the government;

Homicide: Causing the death of a person;

In personam: A Latin phrase meaning that proceedings are being taken against a person in her or his individual capacity, "personally", as opposed to an action *in rem*, which would be directed at an asset such as a ship, real estate, or a fund of money;

Indictable Offence: One of the categories of offences created by the **Criminal Code** (the other being summary conviction offences);

Indictment: A document filed with the court at the start of a criminal trial that states with particularity the offence charged against the accused(s);

Infanticide: In criminal law, the causing of the death of a newly born child by its mother;

Inherent Jurisdiction: A well understood but unspecific, unwritten jurisdiction that gives superior, non-statutory courts authority to provide required remedies and to maintain their own authority such as by injunction, contempt and other proceedings;

Injunction: A court order requiring those "enjoined" from doing or continuing to do some act that the court considers they have no right to do, or, in the case of a Mandatory Injunction, requiring them to do what the court considers they are legally obliged to do;

Insane Automatism: A disassociative state caused by a disease of the mind where a person is not aware of his or her actions or the consequences;

Interlocutory Order: A procedural order that does not finally dispose of an action, made in the course of proceedings — e.g., an order to amend a pleading or to adjourn a trial;

Intermittent Sentence: A sentence of less than 90 days that can be served in segments, usually on weekends;

Intra Vires: Literally, within the powers. Valid, or within a body's jurisdiction, such as "legislation relating to substantive criminal law is *intra vires* the federal government";

Justice System: An unspecific and ill-defined term often used to describe one or all of the various components of the law-related institutions of the state, including courts, lawyers, police, parole, prisons and other corrections facilities;

Kienapple: The name of an important case that prevents an accused from being convicted (or punished) for more than one offence arising from the same set of facts. The name of this case, "Kienapple" is often used to describe this principle;

Law Reports: Verbatim reports or summaries of court decisions, usually published with an editorial summary called the "headnote";

Law Society: A statutory body created by the **Legal Professions Act** to which all lawyers must belong. The Society governs the admission of lawyers to the legal profession and disciplines them for misconduct. The society is operated by 28 Benchers elected by all the members of the Society to represent geographic regions of the province;

Leader of the Opposition: The leader of the Opposition in Parliament or a legislature;

Legislation: One or more statutes or Acts enacted by Parliament or a legislature;

Legislature: The provincial equivalent of the federal Parliament but with only one House, usually called the Legislative Assembly;

Lieutenant Governor: The provincial counterpart of the Governor General. There is a Lieutenant Governor in each province;

Long-time offender: An offender convicted of several offences who has shown a pattern of repetitive behaviour that shows a likelihood of future dangerousness or future harm, often of a sexual nature;

Lord Chancellor: The highest ranking judge in the U.K., who also presides in the judicial work of the House of Lords, is a member of the Cabinet, and discharges responsibilities equivalent to the Canadian Minister of Justice. His appointment as "L.C." is at the pleasure of the Prime Minister, but upon replacement he (there has never been a woman L.C.) continues as a "Law Lord," and can sit as a judge in the House of Lords, the highest court in the U.K.;

Magna Carta: An agreement, known as the "Great Charter", reached between King John and the Barons of England at Runnymede in 1215 whereby the King agreed to important and specific limitations upon the rights of the Crown. (See Chapter 1, Endnote 1);

Mandamus: An "Extraordinary Remedy" used by a superior court to require a court or tribunal of inferior jurisdiction to exercise a jurisdiction that it has;

Master: A provincially appointed officer of the Supreme Court of British Columbia who has jurisdiction to make procedural orders in the course of litigation, and other orders, other than final orders, as designated in the Rules of Court;

Maximum Sentence: The longest term of imprisonment or fine that can be imposed for a particular offence;

Mediation: A process in civil law proceedings involving a third party, sometimes a judge, meeting jointly and/or separately with parties and their lawyers with a view to settlement;

Mens Rea: Literally, a guilty mind; actually, with the *actus reus*, the other major, essential element of every criminal law prosecution;

Minimum Sentence: A sentence specified in the **Criminal Code** as the least sentence that can be imposed, but this does not usually preclude a higher sentence being imposed;

Ministry: A branch or department of a government, such as the Ministry of Citizenship and Immigration (federal), or the Ministry of Forests or Education (provincial);

Murder: Causing death with one of the intents or by one of the means described in **Criminal Code** sections 229 or 230, provided the accused has subjective foresight of death;

My Lord, Your Lordship, My Lady, Your Ladyship: The usual way of addressing superior court judges in court, as distinguished from "Your Honour", which is the usual term for addressing judges of the Provincial Court. Magistrates were formerly addressed as "Your Worship", but that term is no longer in common use except with reference to the Mayor of a City;

Nisi: An Order Nisi is a preliminary order to be followed by a final order, such as in an "Order Nisi of Foreclosure" or an "Order Nisi of Divorce";

Non-culpable homicide: Causing death in a manner not regarded as culpable under the **Code**;

Non-Insane Automatism: A disassociative state not caused by a disease of the mind where the person is not aware of his or her actions or the consequences of such actions;

Non obstante: A Latin expression meaning, literally, "notwithstanding". It is often used to refer to s. 33 of the *Charter*, which permits Parliament or a legislature to enact laws that are exempt from the *Charter*. The exemption lasts only five years unless renewed;

Offence: A culpable breach of a section of the **Criminal Code** creating a crime; in short, a crime;

Order in Council: A rule, regulation or decree made by the cabinet (technically the Lieutenant Governor in Council pursuant to legislative authority. (See "Regulation");

Pardon: The National Parole Board may grant a pardon to anyone who has served his or her sentence and has demonstrated that they are responsible citizens. Usually a waiting period of at least five years is required;

Parliament: The House of Commons and the Senate of Canada;

Parole: A legislated plan for the early release of persons serving sentences in prison;

Particulars: Detailed information or "particulars" of facts alleged in a more general pleading, or in a criminal charge;

Party: A person who is a party, i.e., a plaintiff or defendant in a civil law proceeding; or in criminal law, a person who actually commits an offence or who is liable as a party to an offence by reason of aiding or abetting or conspiring or counselling the commission of an offence;

Peace Officer: Usually, a police officer; but the **Criminal Code** provides a much broader definition that includes many public officers such as prison guards, game wardens and many others;

Peremptory Challenge: The right of any party to a jury trial to object to the empanelment of a juror without giving any cause or reason for the challenge;

Petition: An initiating document in civil law proceedings other than an action. A Petition generally raises an issue arising under a Statute, such as a Petition for Probate of a Will or for the winding-up of a company;

Petition of Right: An historic document in the form of a Petition by Parliament to the new King and Queen, William and Mary, in 1688 by which the new Monarchs agreed, among other things, that judges would be appointed for life, their salaries would be fixed by Parliament, and they could be removed only for breach of their promise of good behaviour. These arrangements were confirmed by the **Act of Settlement** in 1701 and in the Constitution of Canada;

Plaintiff(s): the person or persons who commence civil law proceedings, as distinguished from the defendant, who is the person(s) being sued;

Pleading: the documents exchanged between parties in a civil law suit that govern the scope of the proceedings; usually a writ, statement of claim, statement of defence, reply, and particulars; pleadings are filed in the court registry and form part of the formal record of the case;

Polygamy: The practice of having more than one husband or wife at the same time;

Possession: The personal possession of anything with knowledge what it is and some measure of control over it. There is an extensive definition of possession in **Criminal Code** s. 4(3);

Preliminary Inquiry: A hearing before a Provincial Court Judge to determine whether there is any evidence of the commission of an offence by an accused to go to trial;

Presumption of Innocence: A fundamental principle of criminal law that assumes every person charged with an offence is not guilty until a court is satisfied beyond reasonable doubt that that person is guilty;

Pre-Trial Conference: A meeting between lawyers with a judge before the commencement of a trial to settle procedural questions and possibly define issues to be tried;

Prima Facie: Literally, "at first appearance"; a Latin expression used to describe a proposition that, if unanswered, would be accepted as valid;

Privilege: A legal right to keep some very limited kinds of communications confidential and exempt from disclosure in civil and criminal law proceedings, such as some kinds of communications between solicitor and client, or between husband and wife;

Probation: a court order made as part of a sentence requiring the accused, in lieu of or in addition to a fine or term of imprisonment, to keep the peace and be of good behaviour and do such other things as the court requires;

Pro Bono: Done "for the public good" without charge, as in *pro bono* services provided by a lawyer;

Prohibited Weapon: Generally, a firearm or any device designed to muffle the sound of a firearm; a knife with a blade that opens automatically; a rapid fire firearm, or a sawed-off rifle or shotgun, more specifically defined in s. 84 of the **Criminal Code**;

Prohibition: An "Extraordinary Remedy" used by a superior court to prohibit a court or tribunal of inferior jurisdiction from exercising, or from continuing to exercise, a jurisdiction it does not have;

Provincial Court of British Columbia: A large, provincially established court of inferior jurisdiction that hears a great many of the less serious civil and criminal law cases, and some serious criminal cases with the consent of the accused;

Provocation: A wrongful act or insult sufficient to cause an ordinary person to lose self-control, which will permit a jury to convict an accused person of manslaughter instead of murder. This concept is described in **Criminal Code** s. 232;

Puisne Judge: A Norman-French name for a judge of a court who is not the Chief Justice or Associate Chief Justice;

Queen's Peace: An ancient term used to describe the normal state of tranquility breaches of which, such as violence of any kind, are usually offences. In an indictment, it is usually stated that the offence alleged is "against the Peace of our Sovereign Lady the Queen (in her representative capacity), her Crown and dignity";

R. v. (a name): R. in this context stands for "Regina" (Latin for "Queen") in whose name criminal law proceedings are brought. The "v." stands for "*versus*" or "against". Thus "R. v. Smith" would be the name of a criminal law case brought by the Crown against a person named Smith. When we had a King instead of a Queen, "R." stood for "Rex";

Reasonable Doubt: The test for guilt in a criminal law case; a doubt based on reason and common sense;

Recognizance: A bail document signed by the accused and sureties stating the terms and conditions upon which the accused is being released;

Reference: A process by which the government refers a legal or constitutional question, such as the validity of legislation, to a court for the purpose of obtaining a decision of the court on the question referred;

Registry: The office of a court where documents are filed and other clerical functions are discharged;

Regulations: Subsidiary, dependent legislation enacted by Order in Council, when authorized by legislation, for the purpose of carrying out the purpose of legislation. See **Order in Council**;

Rehabilitation: A principle of sentencing that assumes offenders can be "reformed" or rehabilitated and for that reason should not be sent to prison, or that any prison term should be less than would be the case without such potential for rehabilitation;

Res Gestae: The component facts of an incident; also, in the law of evidence, an exclamation or "excited utterance" accompanying and forming part of the incident, such as where a person saying, just before he dies, "A. just shot me!";

Res Judicata: Literally, "that which has been decided"; a principle that prevents a court from hearing or deciding the same case twice. It is usually raised as a defence by a person who has already litigated a matter to conclusion and should not be required to do so again;

Restricted Weapon: A firearm designed to be fired with one hand; a semi-automatic firearm; or a firearm designed to be fired when reduced by folding or telescoping;

Retribution: A principle of sentencing that is distinguishable from revenge but provides that sentences, amongst other things, should be reasonably proportionate to the culpability of the accused and the facts of the offence for which a sentence is to be imposed;

Robbery: Theft from a person with violence or a threat of violence or with weapons;

Royal Assent: The last procedural step in the enactment of legislation where the Queen's representative "consents" to the enactment;

Rule 18A: A Rule of the Supreme Court of British Columbia providing for the summary trial, on affidavits, of civil actions where a judge is able fairly to decide the case or an issue in the case, usually without hearing witnesses. This process is available only in British Columbia;

Rule of Law: A synonym for law and order; the principle that requires that the powers of the state and its servants shall be derived from and limited either by legislation enacted by Parliament or a legislature, or judicial decisions taken by independent courts. Law by definition is a body of rules of general application. The rule of law is to be contrasted with "rule of man", or "the rule of force" which implies arbitrary, or autocratic governance by an individual or individuals not responsible to the people of the state;

Rules of Court: The statute establishing every court makes provision for Rules of Court to govern proceedings in the Court. Originally these rules were made by the judges, but as the rules now provide schedules of fees that may be charged by lawyers for some kinds of court-related legal work, the judges agreed that it would be better for such rules to be made by Order in Council after consultation with the Chief Justice. Each court has a Rules Committee that advises on rule changes;

Scandalizing the Court: An ancient form of contempt committed by unjustified and scandalous criticisms of a court or judge. This form of contempt has not been alleged for many years;

Self-defence: Justified force used to defend oneself, one's property or dwelling or anyone under one's protection;

Serious personal injury offence: An indictable offence other than high treason or murder committed with violence that is likely to endanger life or safety or psychological damage; or a sexual assault, sexual assault with a weapon, aggravated sexual assault or threats or causing bodily harm to a person;

Solemnization of Marriage: The ceremony of marriage;

Specific Deterrence: A principle of sentencing, which in a proper case requires a term of imprisonment to deter the accused personally from re-offending;

Specific Performance: A remedy requiring a party to a contract to perform his or her contractual obligations, such as to complete a sale of land;

Stare decisis: This Latin expression means "to stand by opinion and not disturb settled matters". This principle requires judges to follow and apply previous binding decisions of their own court or any higher court;

Statement of Claim: A pleading in civil law proceedings whereby the plaintiff alleges the facts relied upon in support of the remedy claimed in the action;

Statement of Defence: The responding pleading to a Statement of Claim in civil law proceedings where the defendant alleges the facts relied upon in defence of the claim made in the action;

Statute: A law or Act enacted by Parliament or a Legislature;

Style of Cause: The Heading of a document in legal proceedings that describes the names of the parties, such as AB (Plaintiff) v. CD and EF(Defendants);

Superior Court: The superior courts whose judges are appointed by Canada, particularly the Supreme Court of Canada, the Federal Court of Canada, the provincial courts of appeal and the senior trial court in each province;

Supernumerary Judge: A federally appointed judge who has served 15 years and has attained 65 years (or 10 years and 70 years of age) who has elected to serve as a supernumerary or part time judge working about 50% of the time of a regular judge until retirement on pension at age 75. A supernumerary judge, may retire on pension at any time after making such an election as his or her pension is then earned by age and years of service;

Supra: A Latin expression meaning "above". It is usually found within brackets after the name of a case or statute without a citation, to indicate the citation has been given "above", or previously;

Supreme Law of Canada: The Constitution of Canada including the *Canadian Charter of Rights and Freedoms*;

Surety: In criminal law, a person who, with or without being required to post cash or security guarantees that an accused who was granted bail will appear for trial or his or her next scheduled court appearance;

Suspended Sentence: After conviction, a judge may suspend the passing of sentence for a fixed period with or without a probation order. Upon expiration of the period without further offences, there will be no sentence;

Theft: An offence committed when a person without colour of right fraudulently deprives a person of "anything" temporarily or permanently. A complete definition of the crime of theft is found in **Criminal Code** s. 322;

Treaty: An agreement reached between Canada and another country that usually requires legislation, or a multi-national agreement to which Canada may become a signatory, or an agreement between Canada and/or a province with an aboriginal people;

Trier of Fact: The trial judge, if sitting alone, or the jury if there is one, whose duty it is to decide questions of fact, as opposed to questions of law;

Trust: The relationship between persons where one person holds property on behalf of or for the benefit of another. A trust may be an "express trust", which is created by a trust agreement; an "implied trust", which the law infers from circumstances; a "resulting trust" by which trust property reverts to the original owner in special circumstances; or a "constructive trust", which is a recently developed remedy by which the law requires reimbursement for unjust enrichment, fraud or other legal wrong;

Ultra vires: Literally outside or beyond the powers. Invalid, as in invalid legislation, as opposed to *intra vires* or valid legislation;

Uttering: Usually using a false document;

Voir dire: The Norman French term for a trial or hearing within the course of a trial to determine whether evidence tendered by one side or the other is admissible. The law requires a *voir dire* hearing before a confession to a police officer or person in authority is admitted into evidence. If the statement is found inadmissible at the end of the *voir dire*, the trial continues but the statement is not admitted into evidence and it cannot be considered in deciding guilt or innocence;

Warrant Expiry: Upon being sentenced for an offence, a Warrant of Committal is signed by the Clerk of the Court certifying the conviction and the sentence that has been imposed. The warrant expiry date is the date when, because the sentence has expired, the warrant ceases to authorize the holding of the prisoner any longer;

Weapon: Anything used, designed to be used, or intended for use in causing death or injury, or for threatening or intimidating anyone, including a firearm;

Witchcraft: The fraudulent practice of sorcery or "crafty science" or the telling of fortunes fraudulently and for consideration;

Writ of Summons: In its larger context, a legal command given by the Court on behalf of the Sovereign giving notice of the commencement of proceedings and requiring those to whom it is directed to take steps in response. Thus it is sometimes referred to as the "Queen's Writ". In its most common usage, a writ is the originating document in civil proceedings. Thus following its historical source, a writ is a command, issued by the court on behalf of the Sovereign, in the name of the Plaintiff, giving notice to the Defendant that a claim is being made in the court requiring the Defendant to respond by filing a document (in British Columbia, an Appearance) acknowledging the authority of the court and precluding default proceedings;

Young Offenders Act: A federal statute that governs the prosecution of persons under the age of 18 years unless they are transferred to the regular courts, usually because of the seriousness of the alleged offence.