

The ABCs of Canada's Judicial System

An ongoing project
dedicated to raising
awareness about
Canada's legal
institutions



GLOCAL
FOUNDATION OF CANADA

YouCount.ca 

Intent

This toolkit is intended to act as a basic roadmap to increasing awareness of Canada's judicial system, including the hierarchy and roles of various courts, legal traditions, and Indigenous law. This project is an ongoing effort to increase legal and civic literacy, and welcomes any input or concerns from the public, and is for informational purposes, not legal advice.



GLOCAL
FOUNDATION OF CANADA



Outline

What is the law?

- Canada's legal traditions: Common law vs. Civil law
- Types of law: Criminal vs. Civil

Canada's Courts

- Court hierarchy and roles

Supreme Court of Canada

- The Charter of Rights and Freedoms

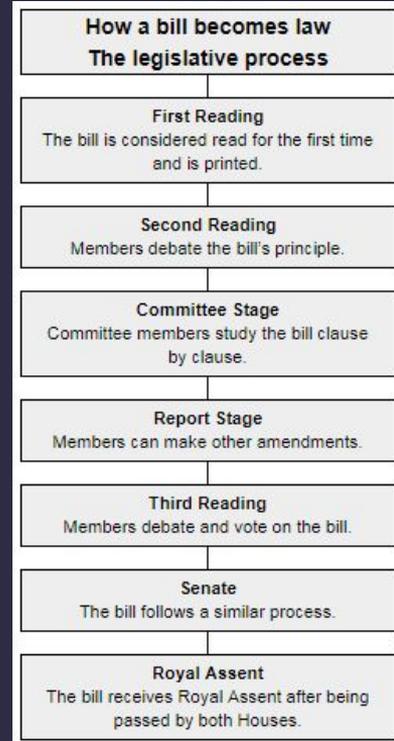
Indigenous Law

What is the law?

Broadly, Canadians are subject to a series of rules which exist to protect rights, resolve disputes, and maintain order

Bills are introduced by elected representatives in provincial/territorial and federal legislatures, and are then debated and amended before being passed or rejected.

Laws are codified in documents such as the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*.

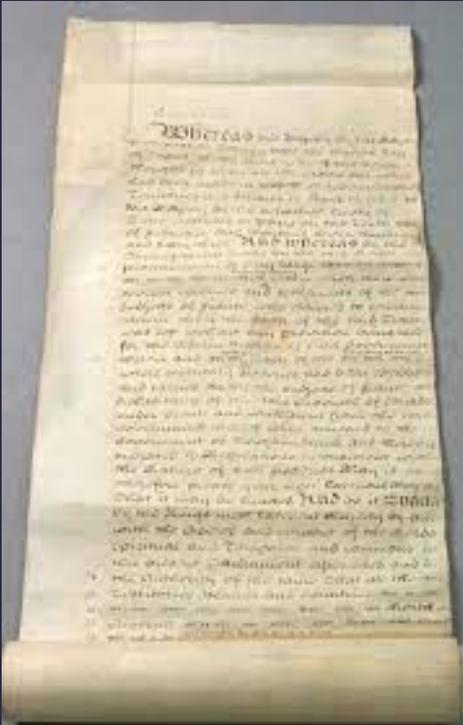


Judges

Judges: Judges interpret the law, assess evidence, and decide cases. To ensure they remain independent of the other branches of government, there are a number of steps taken

- Judges are appointed by provincial and federal governments
- Judges are paid competitively to prevent them from taking bribes
- Judges are granted security of tenure—they may serve until the retirement age of 70 or 75 (depending on the province or territory)
- There is a lengthy removal process that protects judges who may make unpopular decisions from being fired

Common law vs. Civil Law



Canada is home to two distinct legal traditions: the **Civil** legal code, which is used in Quebec, and **Common** law, which is used in the rest of Canada. The coexistence of two legal traditions means that Canada is a bijural country.

The separation dates back to 1774, when the British government granted Quebec a number of freedoms, as well as permission to use Civil Law.

Common law vs. Civil Law

Common Law

- originated in England in 1066
- based on judicial precedent, meaning that lawyers and judges draw parallels with previous cases to reach conclusions
- Can be understood as unwritten law based on judicial precedent

Civil Law

- derives from Roman law
- Judges apply law as set out in written documents
 - In Quebec, judges apply the *Quebec Civil Code*
- Is used in France, Germany, Spain, and much of Central and South America

Criminal Law vs. Civil Law

Canadian jurisprudence is split into two categories: **criminal** law and **civil** law (not to be confused with the civil legal system, which was just discussed).

Civil Law is used when attempting to resolve a private dispute between individuals

- This encompasses a wide variety of disputes, such as divorce, personal or property damage, or contract violation

Criminal Law is used when an individual or group commits an act in contravention of the *Criminal Code*.

- Crimes are treated as offences against the public, and are therefore prosecuted by the Crown

Provincial Courts (Lower and Superior)

Lower courts: these deal with the bulk of cases in the Canadian court system, and can be divided by their various jurisdictions (such as family courts and youth courts)

- Operated by provincial/territorial governments
- Handle a diverse range of subject matter, including some criminal law and claims involving money up to a certain provincially-set amount

Superior Provincial/Territorial courts: These deal with the most serious civil and criminal cases in the system, including divorce

Provincial/Territorial Courts of Appeal: These have inherent jurisdiction and can try all cases except where statute expressly prohibits it

- Administered jointly by provincial/territorial and federal governments

Federal Courts

The federal court system runs parallel to provincial/territorial courts.

Federal Courts: rules on issues delegated to it by Parliament, or when there exists federal legislation pertaining to the issue

- Funded and administered by the federal government
- Can sit anywhere in Canada – the court has offices in all major Canadian cities

Federal Courts of Appeal: hears appeals from the Federal Court and the Tax Court of Canada

- hears cases in both English and French (a bijural court)
- Composed of thirteen judges
- Hears judicial review applications from federal boards and tribunals

Specialized Courts

Tax Court of Canada: hears cases about issues that arise under federal tax and revenue legislation

- superior court → only hears disputes when all other options have been exhausted
- composed of 23 judges in total, including a Chief Justice and an Associate Chief Justice

Courts Martial: deals with serious offences by those party to the *Code of Service Discipline* under the *National Defence Act*

- general Court Martial is composed of a military judge and five Armed Forces members
- Operates in parallel with Canadian civil courts

The Supreme Court of Canada

The Supreme Court is the highest court in Canada, and operates in both French and English.

Functions:

- Operates as a national court of appeal, and hears appeals from provincial/territorial superior courts and the Federal Court of Appeal
 - The court controls its own docket through a process called granting leave
- Drafts references: Parliament and provincial and territorial legislatures ask the court's opinion on a question of law



The Supreme Court of Canada



Composition:

- Nine judges in total, including one Chief Justice
 - The current chief justice is Justice Richard Wagner, who has been in the role since 2017
- As outlined in the *Supreme Court Act*, 3 judges must be from Quebec so as to represent the civil law tradition
- By custom, three other judges come from Ontario, one from the Atlantic provinces, and one from the Western provinces

The Charter of Rights and Freedoms

The Canadian *Charter of Rights and Freedoms* was ratified by Parliament in 1982, and constitutionally enshrines a number of rights, such as freedom of speech, freedom of association, and religious freedom.

Before the passage of the *Charter*, Parliament had supreme authority, and was responsible for legislating moral and social issues.

After the passage of the *Charter*, judges were asked to decide cases on issues regarding equality, giving it the power to strike down legislation in contravention of Canadians' rights. This means that Courts, whose job it is to interpret legal documents, can make value-based decisions and supercede legislation passed by Parliament.

The Supreme Court and the *Charter*

There are two conditions that must be satisfied to successfully prove that a right has been violated under the *Charter*.

- 1) The applicant must prove that their Charter right has been violated
- 2) The crown must prove that the violation was reasonable and justified in a free and democratic society

Even if a court concludes that a right has been violated under the *Charter*, the government at the provincial/territorial and federal level can invoke the **Notwithstanding Clause**, which allows the government to bypass a provision of the *Charter* for up to five years.

Why should I care about the *Charter*?

As Canadians, we have gained many important rights thanks to others who challenged the government on the basis of the *Charter*. For example:

- *R v. Morgentaler* (1988) led to the decriminalization of abortion
- *R v. Askov* (1990) enshrined the accused's right to be tried within a reasonable period of time
- *Hunter v. Southam Inc.* (1984) held that warrantless searches are unreasonable



Indigenous Legal Traditions

Though Indigenous peoples currently fall within the jurisdiction of Canadian law, there existed rich Indigenous legal traditions prior to colonization.

Many Indigenous practices, such as gift-giving and extension of credit, were then adopted by European settlers.

Recently, there have been efforts to revive Indigenous legal traditions, both within and outside of the Canadian judicial context.

- **Sentencing circles:** Indigenous people who commit minor crimes can gather with other members of the community to discuss why the offence had occurred and how to prevent similar crimes in the future.
- Some nations have developed their own justice systems, which include community-building and restorative healing

Researchers

The research and presentation of this e-toolkit was conducted by researcher Nina Russell, with the guidance of research director Dr. Carla Caruana.

Further Resources

1. **Canadian Legal Information Institute**, to find published decisions from courts and legislators across Canada at every level
<https://www.canlii.org/en/info/about.html>
2. **Justice Laws Website**, for a list of Canadian Government resources across the legal system, including case law, constitutional questions, frequently asked questions, and tax and labour codes
<https://laws-lois.justice.gc.ca/eng/RelatedResources/>
3. **Federation of Law Societies in Canada**, for access to information on the legal profession in Canada and relevant resources
<https://flsc.ca/>
4. **Canadian Journal of Law and Society**, for access to scholarship on Canada's legal landscape
<https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/latest-issue>
5. **The Canadian Law List**, to find a lawyer anywhere in Canada
<https://www.canadianlawlist.com/>
6. **Justice Education Society of Canada**, improving the legal capabilities of the general public across various issues and jurisdictions
<https://www.justiceeducation.ca/>

Works Cited

Allard, F. (2001). *The Supreme Court of Canada and its impact on the expression of Bijuralism*. Department of Justice Canada.

Borrows, J. (2005). *Indigenous legal traditions in Canada*. *Wash. UJL & Pol'y*, 19, 167.

Canadian Superior Courts Judges Association (2018). *The Rule of Law*. Ottawa, Ontario.
<https://cscja.ca/justice-system/the-rule-of-law/>

Constitution Act. (1982). Part I: *Canadian charter of rights and freedoms*. <https://laws-lois.justice.gc.ca/eng/const/>

Department of Justice Canada. (2015). *Canada's Court System*.
<https://canada.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf>

Department of Justice Canada (2017). *The Judicial Structure*. <https://www.justice.gc.ca/eng/csj-sjc/just/07.html>

Fowler, D. B. (1973). *The Canadian Bill of Rights-A Compromise Between Parliamentary and Judicial Supremacy*. *The American Journal of Comparative Law*, 712-746.

Gray, Jeff. (2021). *How Ontario's election-advertising rules will change the political landscape*. *The Globe and Mail*.
<https://www.theglobeandmail.com/canada/article-how-ontarios-election-advertising-rules-will-change-the-political/>

Works Cited

Greenwood, M. (1995). I, Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will 1774-1866. *Man. LJ*, 23, 132

Gunn, B. L. (2007). Protecting indigenous peoples' lands: Making room for the application of indigenous peoples' laws within the canadian legal system. *Indigenous Law Journal* , 6(1), 31-70.

Hand, Carol A., Judith Hanks & Toni House (2012) Restorative justice: the indigenous justice system, *Contemporary Justice Review*, 15:4, 449-467, DOI: 10.1080/10282580.2012.734576

Heard, A. D. (1991). The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal. *Canadian Journal of Political Science/Revue canadienne de science politique*, 24(2), 289-307.

Hovius, B., & Martin, R. (1983). The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada. *Can. B. Rev.*, 61, 354.

Iacobucci, F. (2002). The Supreme Court of Canada: its history, powers and responsibilities. *J. App. Prac. & Process*, 4, 27.

Judges Act (R.S.C., 1985, c. J-1) <https://laws-lois.justice.gc.ca/eng/acts/j-1/index.html>

Law Commission of Canada. (2008). *Indigenous Legal Traditions* (Vol. 6). UBC Press.

Works Cited

Lepofsky, M. D. (1992). *The Canadian judicial approach to equality rights: Freedom ride or roller coaster?*. *Law and Contemporary Problems*, 55(1), 167-199.

McLachlin, B. M. (1991). *The Charter: A new role for the judiciary*. *Alta. L. Rev.*, 29, 540.

Morton, F. L. (2002). *Law, politics and the judicial process in Canada*. University of Calgary Press.

National Defence Act (R.S.C., 1985, c. N-5)

Opperman, V. K. (2000). *The Pros and Cons of ADR, Including ADR/Litigation Hybrids*. In *Sedona Conf. J.* (Vol. 1, p. 79).

Oxford Analytica. (2021). *Supreme Court affirms federal role in climate policy*. *Emerald Expert Briefings*, (oxan-db).

Palys, P., & Victor, W. (2007). *Getting to a Better Place: Qwi: qwelstm, the St: lo and Self-Determination*. *Indigenous Legal Traditions*. Law Commission of Canada.

Ryder, B., Lawrence, E., & Faria, C. (2004). *What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions*. *An Empirical Overview of Charter Equality Rights Decisions (June 1, 2004)*, 24.

Supreme Court of Canada (2021). *Guide*. <https://www.scc-csc.ca/unrep-nonrep/app-dem/guide-eng.aspx>

Works Cited

Supreme Court of Canada (2021). *Role of the Court*. <https://www.scc-csc.ca/court-cour/role-eng.aspx>

Tax Court of Canada Act (R.S.C., 1985, c. T-2)

Walker, J. W. S. G. (Ed.). (2006). *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies*. Wilfrid Laurier Univ. Press.



GLOCAL

FOUNDATION OF CANADA

Together we can.

Go local. Go global.

<https://glocalfoundation.ca/>