

Charles Mwewa Intro to Law Lecture Outlines

COMMON LAW IN CANADA

When you hear of the word “Law,” what immediately comes into your mind? Write down at least three things that come to your mind of what you think law is.

Law serves two functions in modern, western industrialized society:

- It orders and regulates the affairs of all persons (individuals, corporations and governments)
- It acts as the standard of conduct and morality

General sources of law:

- Royal prerogatives (the Crown has the power to pardon the convicted)
- Morality
- Customary conventions
- Writings of legal scholars

Legal sources of law in Canada:

- Statutes: law made by Parliament of Canada or the Provincial legislatures or territorial National Assemblies
- Case Law: law made by judges of appellate courts and the Supreme Court of Canada
- By-laws: laws made by the municipal governments

Traditionally, under the Doctrine of Parliamentary Sovereignty, statute law has always been viewed as being superior to Case Law. Judges themselves viewed that Parliament was superior to the court systems. Judges were required to make decisions within their powers. Such decisions are said to be INTRA VIRES – or within the power. But what if judges made decisions out of their powers? We shall see when we discuss Administrative Law that decisions made outside of the judges’ powers are said to be ULTRA VIRES. Another concept we shall develop further is the coming into Canadian legal system of the *Charter of Rights and Freedoms* (the “*Charter*”), and with that, can it said that the *Charter* conflicts with the Doctrine of Parliamentary Sovereignty.

Canada, a Bijural Nation

There is something very special about Canada’s legal system. Canada is said to have what is called a Bijural Legal System – where there is two different legal systems operating side by side. These are the Common Law and Civil Law. It should be established from the beginning that the phrase “Common Law” has two uses in Canadian legal tradition. As in this case, it differentiates the two legal systems operating side by side, Common and Civil laws. The legal tradition that originated from England called the Common Law is opposed to Civil law from France.

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In Canada, Common Law came from England while Civil Law came from France. Common Law, which is based on the traditions that developed from England, is practiced in all the provinces of Canada other than Quebec. Quebec has Civil Law from France.

The other use of the “Common Law” is in its use as distinguishing mark between two categorizations of Common Law (Civil) as opposed to Criminal Law.

Differences between Common Law and Civil Law

- Common law is based on PRECEDENT and the doctrine of *STARE DECISIS*: Precedent is the distinguished feature of the Common Law.
- Common law originated from England
- Civil law is codified into a Civil Codes
- Civil law originated from France and is used in Quebec.

Constitutional Act, 1867 (CA) and New Judicial Structure

- Section 91 of CA, 1867, Federal Government has the power over trade and commerce, banking and currency and coinage, taxation, the military and naval services, and criminal law, and to make “laws for the Peace, Order and Good Governance of Canada” or POGG.
- Section 92 of CA, 1867, provincial governments have the power over health, municipal institutions, property and civil rights, and the administration of justice in the provinces, and education under section 93
- Section 129 of CA, 1867 continued all former provincial courts
- Quebec’s Civil Legal System was to continue as well
- Section 96 of CA, 1867, Federal Government would appoint superior, district and county court judges in each Canadian province
- Section 97 of CA, 1867, judges of higher courts in Common law provinces would be selected from their respective bars
- Section 98 of CA, 1867, judges of higher courts in Quebec Province would be selected from Quebec bar
- Section 99 of CA, 1867, superior court judges would hold office “during good behavior” to ensure their judicial independence
- Section 100 of CA, 1867, these judges’ salaries would be provided by the Federal Government
- Section 101 of CA, 1867, provided for the creation of the Supreme Court; to set up a “General Court of Appeal for Canada.” Before then, the highest court of appeal for Canada was the Judicial Committee of the Privy Council in Britain. In 1949, the Supreme Court of Canada became Canada’s final court of appeal.

Problems with the CA, 1867

- Imperial statute

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- Absence of Bill of Rights
- Rigid divisions between federal and provincial powers
- *Federalism* – in Canada the division of state powers between the federal Parliament and the legislatures of the provinces and territories

Patriation of Canada's CA, 1867 from England

- Appeals to Privy Council ended in 1949
- Rise of civil rights movements in the 1960s
- Prime Minister John Diefenbaker enacted the *Canadian Bill of Rights Act* in 1960: weak because it applied only to Federal Government, did not safeguard civil liberties and it was not part of the Constitution
- *Patriation*: Process of ending Canada's need to go to England for changes to the *British North America Act (BNA) Act*
- Prime Minister Pierre Trudeau wanted to patriate the BNA Act to Canada
- Trudeau's efforts were successful when the English Parliament passed the *Canada Act, 1982* which stopped Britain from amending Canada's constitution
- *Canada Act, 1982* also contained the *Constitutional Act, 1982* signed by Queen Elizabeth on April 17th, 1982 which gave to Canada the *Charter of Rights and Freedoms*, which is Part I of the *Constitution Act, 1982*.
- Section 52(1) of the *Constitution* states, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

THE SUPREME COURT OF CANADA: JUDICIAL OPERATION AND THE COURT'S NATIONAL IMPORTANCE

- **Appellant**: A person who brings an appeal; the other side is called the Respondent
- **Leave to Appeal**: Permission to appeal to the Supreme Court
- **Appeal as a Right**: In criminal cases, appeal is a right
- **On Reference**: The Supreme Court, on request, may advise the Federal Government on an issue, usually constitutional in nature
- *Ratio Decidendi*: Reasons for the decision
- *Orbiter Dicta*: Words by the way side
- **Factums**: Documents containing parties' written arguments and the law supporting them, required by appellate courts