CANADA'S SYSTEM OF JUSTICE

(from the website of the Canadian Department of Justice,

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

FOREWORD

The law affects Canadians every day. There are, we know, laws against crimes such as robbery or murder. But there are also laws that apply to us when we pursue everyday activities, such as driving a car, renting an apartment, getting a job or getting married. In fact, there are laws concerning almost every aspect of our daily lives.

Many people believe that our laws are too difficult to be understood, except by lawyers. It is true that in a complex world the laws can be lengthy and technical. If a person needs help in understanding how the law applies to a specific problem, he or she can always consult a lawyer. But the fundamentals of Canadian law are based on common sense. These ideas and principles concern every Canadian and are something every Canadian should strive to understand. What is the "law"? Where does it come from? What is it for? How does it operate?

This booklet does not give exhaustive answers to these questions. Rather, it provides a brief outline of Canada's system of law and justice in an attempt to demystify it and stimulate thought and discussion. As members of society, we must decide what our laws will be. But, when creating new laws or changing old ones, it is important to understand the basic principles of our legal heritage.

A law is more than a command: it is an attempt to balance fairly the rights and obligations that people share as members of society. For example, when a law gives a person a legal right, it may also impose a legal duty upon that person, or upon another. It is the overall apportionment of rights, duties, privileges and powers, and how they are administered, that make up our legal system.

Our system of justice can function well only if people understand their legal rights. But people must also live up to their legal responsibilities, such as being willing to serve on a jury or coming forward to testify at a trial. Above all, citizens in our democratic society have a duty to learn as much as they can about the laws and about how the system of justice works. That is one of the purposes of this booklet.

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

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 the disabled.

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.

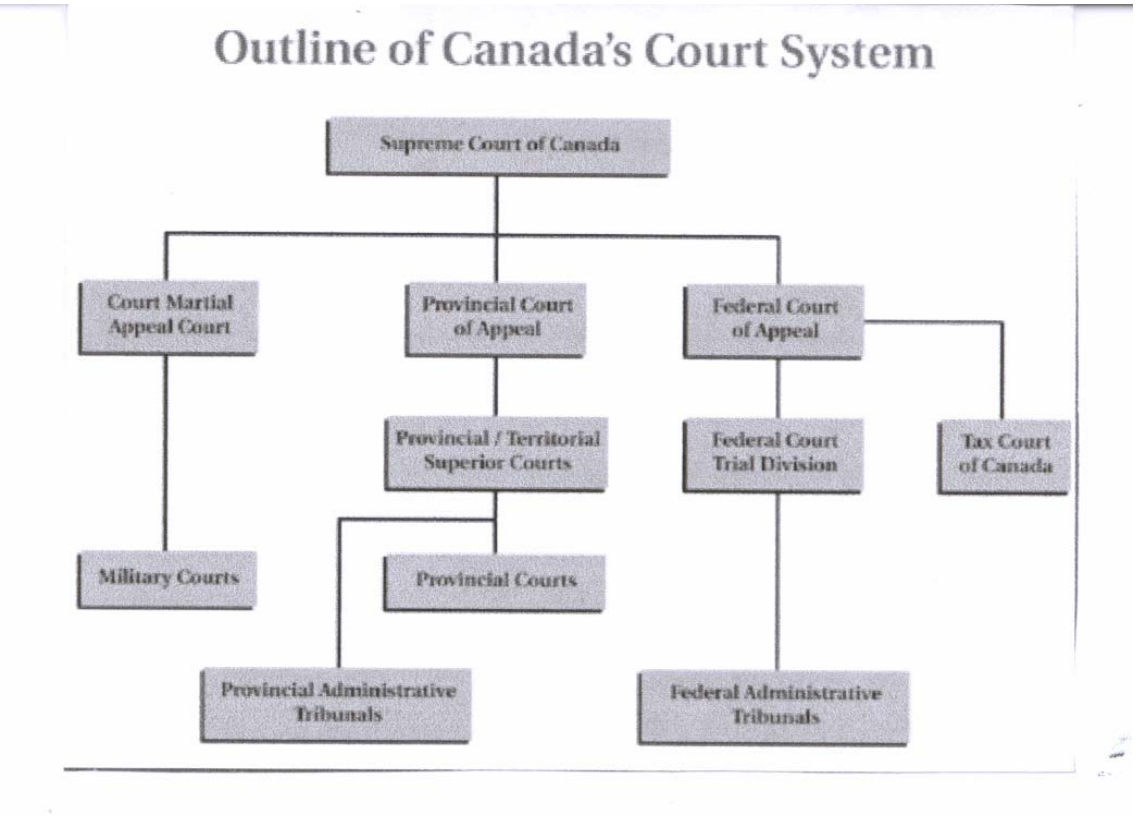
The Constitution affirms that we are a multicultural country and that Charter rights must be interpreted consistently with this ideal.

THE LAW IN ACTION

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 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.

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

Special considerations come into play when young people commit acts that are considered criminal. This is why Parliament passed the **Young Offenders Act**. It applies to young people aged 12 to 17 years inclusive. The Act recognizes that young persons must be held accountable for criminal acts, although they need not always be held accountable in the same manner or to

the same extent as adults. It is in society's interest to ensure that as many young offenders as possible are rehabilitated and become productive members of society.

The Act also extends rights and safeguards to youths that go beyond those enjoyed by adults. As well, the Act recognizes that youths, because of their adolescence, have special needs and circumstances that must be considered when any decision is made under the Act. These principles are set out in the Act's Declaration of Principle.

Proceedings under the Act are conducted in special youth courts. While young persons cannot have a trial by jury, they are given the same rights and protections as adults, such as the presumption of innocence and the onus on the prosecution to prove its case beyond a reasonable doubt. As well, youths are entitled to be represented by a lawyer.

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

Young persons convicted of offences pursuant to the Act receive a "disposition" (or sentence), which can range through an absolute discharge, a fine of up to $1,000, an order for restitution or compensation, an order of up to 240 hours of community service, an order of up to two years' probation, and an order of custody combined with community supervision for up to five years less a day.

For more serious offences, a young person who is 14 years of age or more can be transferred to adult court. If a youth court judge orders transfer, there will be a trial in adult court. If there is a conviction in adult court, sentencing will be in accordance with the principles applicable to adults. This includes life imprisonment if a young person is convicted of an offence for which an adult would get a life sentence.

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.

THE CITIZEN AND THE LAW

It is important to understand that every Canadian is part of the justice system, and that justice is not only the business of police, lawyers, judges and lawmakers. Individual citizens must play their part in the justice system if the law is to work and justice is to be done.

Jury Duty

The jury is one of the oldest institutions of our criminal justice system. It entitles those who have been charged with a criminal offence to be tried by a group of fellow citizens. In Canada, a jury is made up of 12 persons who have been selected from among citizens of the province or territory in which the court is located. The precise method of selecting citizens for jury duty is determined by the laws of the various provinces. Generally, the qualifications for jury duty are Canadian citizenship and age of majority.

Although most cases in Canada are tried by judges without a jury, the Charter states that any person who is charged with a criminal offence for which there can be a prison sentence of five years or more has the right to a trial by jury. In some cases, a person who is charged with a criminal offence for which there can be a prison sentence of less than five years may have a right to choose a trial by jury. In some jurisdictions, some civil cases can also be tried by judge and jury.

A citizen who is called for jury duty is obliged to attend, unless excused by the laws of the province. Being called for jury duty does not necessarily mean that a person will be selected to serve as a juror; either the prosecutor or the defence counsel may object to the choice of a particular juror if they believe there is a reason why he or she should be disqualified.

In the course of the trial, jurors must not allow themselves to be influenced by anything except the evidence presented in court. Jurors must make up their own minds about the accuracy or honesty of the testimony given by witnesses in the trial. Finally, when both sides have called their witnesses and presented their arguments, and the judge has instructed the jury on the law and on what they must take into account when making their decision, the jurors meet by themselves in a room outside the courtroom. This is where they must decide: in a criminal case, whether the prosecution has proven beyond a reasonable doubt that the accused person is guilty; or in a civil case, whether the plaintiff has proven on a balance of probabilities that the defendant is liable.

Regardless of the jury's verdict, it must be unanimous. That is, the jurors must all agree on it. If they cannot agree, the judge may discharge the jury, freeing them from further duties, and direct that a new jury be empanelled. After the trial, no juror is permitted to inform other people about the discussions that took place in the jury room.

Testifying in Court

A person may be called to give evidence in a civil or criminal trial because he or she has information that either party in the case believes to be useful. For example, someone might have witnessed an offence, know something that is important to the case, or possess a key document. A person may also be called as an "expert witness". An expert witness is a person whose knowledge about a particular subject can help the court obtain answers to technical questions.

Usually, persons come forward voluntarily when they have information that they believe is related to the case. An individual may also be summoned by "subpoena" to give evidence in court. A subpoena is a command by the court to testify, whether or not the person has volunteered. It is used when the prosecution, plaintiff, accused or defendant wishes to call a person as a witness in the trial. Persons have a duty to testify in court when required to do so, and a person subpoenaed must comply with the order or face a penalty.

Witnesses' testimony is taken under oath or by affirmation. Witnesses are required to answer all questions they are asked, unless the judge decides that a question need not be answered for some reason: for example, because it is irrelevant. Testifying in court is essential to making Canada's justice system work as it should.

Knowing the Law

Individuals do not have to be experts in the law: that is the responsibility of lawyers. However, in our system of law, ignorance of the law is no defence. This means that persons charged with offences cannot be excused simply by claiming that they did not know they were breaking the law, although the court will consider honest mistakes of fact. Further, because our laws are publicly debated before being passed in Parliament or a provincial legislature, the public is expected to know what is permitted and what is not.

Knowing the law means that citizens should take reasonable steps to be sure they are acting legally. Information is available from federal and provincial government offices, public libraries, and the police. If, after consulting these sources of information, a person is still uncertain about the law, then a lawyer should be consulted.

The Canadian Judicial System

(from the website of the Supreme Court of Canada
http://www.scc-csc.gc.ca/aboutcourt/system/index_e.asp

The Constitutional Framework

The organization of Canada's judicial system is a function of Canada's Constitution, and particularly of the *Constitution Act, 1867*. By virtue of that *Act*, authority for the judicial system in Canada is divided between the federal, or national, government and the ten provincial governments. The latter are given jurisdiction over "the administration of justice" in the provinces, which includes "the constitution, organization and maintenance" of the courts, both civil and criminal, in the province, as well as civil procedure in those courts. However, this jurisdiction does not extend to the appointment of the judges of all of these courts. The power to appoint the judges of the superior courts in the provinces - which includes the provincial courts of appeal as well as the trial courts of general jurisdiction - is given to the federal government, as is the obligation to provide for the remuneration of those judges and the authority to remove them. This latter authority is a limited one and, in fact, has never been exercised.

The federal government is also given the authority to establish "a General Court of Appeal for Canada and any Additional Courts for the better Administration of the Laws of Canada". It has used this authority to create the Supreme Court of Canada as well as the Federal Court, which has both a Trial Division and an Appellate Division, and the Tax Court. The federal government also has, as part of its jurisdiction over criminal law, exclusive authority over the procedure in courts of criminal jurisdiction.

What emerges from these allocations of jurisdiction in the Constitution is a court system in which provincial governments have jurisdiction over both the constitution, organization and maintenance of, and the appointment of judges to, the lowest level of courts (generally known simply as "provincial courts"), while the federal government has authority over the constitution, organization and maintenance of, and the appointment of judges to, the Supreme Court of Canada, the Federal Court and the Tax Court. Authority over the superior courts in each province is shared between the provincial and federal governments; the provinces have jurisdiction over the constitution, organization and maintenance of these courts, while the federal government has authority to appoint the judges. The fact that jurisdiction over these courts is divided in this way means that, in order for these courts to function properly, the federal and provincial governments are required to cooperate in the exercise of their respective authorities.

Organization of Courts

The courts in Canada are organized in a four-tiered structure. The Supreme Court of Canada sits at the apex of the structure and, consistent with its role as "a General Court of Appeal for Canada", hears appeals from both the federal court system, headed by the Appeal Division of the Federal Court of Canada, and the provincial court systems, headed in each province by that

province's Court of Appeal. In contrast to its counterpart in the United States, therefore, the Supreme Court of Canada functions as a *national*, and not merely *federal*, court of last resort. The next tier down from the Supreme Court of Canada consists of the Appeal Division of the Federal Court of Canada and the various provincial courts of appeal. Two of these latter courts, it should be noted, also function as the courts of appeal for the three federal territories in northern Canada, the Yukon Territory, the Northwest Territories, and the Nunavut Territory.

The next tier down consists of the Trial Division of the Federal Court of Canada and the provincial and territorial superior courts of general jurisdiction. These latter courts can fairly be described as the lynchpin of the Canadian judicial system since, reflecting the role of their English counterparts, on which they were modelled, they are the only courts in the system with inherent jurisdiction in addition to jurisdiction granted by federal and provincial statutes.
At the bottom of the hierarchy are the courts typically described as provincial courts. These courts are generally divided within each province into various divisions defined by the subject matter of their respective jurisdictions; hence, one usually finds a Traffic Division, a Small Claims Division, a Family Division, a Criminal Division, and so on.

Court Locations

There are approximately 750 court locations in Canada. The Supreme Court of Canada sits only in Ottawa, although teleconferencing facilities to locations across the country are available. Hence it is possible for the parties to litigation before that Court to make their arguments in locations other than Ottawa, and to have those arguments transmitted to the main courtroom of the Supreme Court of Canada via satellite. The other two federally established courts, the Federal Court, with both its Appeal Division and its Trial Division, and the Tax Court, altogether have offices at twenty-two permanent locations. The provincial and territorial courts sit at over 700 locations. These include fourteen permanent provincial and territorial appellate court sitting locations - one in each province and territory except for Quebec and Alberta, which have two each.

The Supreme Court of Canada

The Supreme Court of Canada was constituted in 1875 by an act of Parliament and is now governed by the *Supreme Court Act*. It is comprised of a Chief Justice and eight puisne judges (puisne meaning ranked after), all appointed by the Governor-in-Council for terms of "good behaviour", with a minimum of three judges coming from Quebec. Supreme Court judges must live within forty kilometres of the National Capital Region.

The Supreme Court is a general court of appeal from all other Canadian courts of law. It, therefore, has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and private law.

In most cases, appeals are heard by the Court only if leave is first given. Such leave will be given by the Court when a case involves a question of public importance, or if it raises an important issue of law or of mixed law and fact, or if the matter is, for any other reason, of such a nature or

significance as to warrant consideration of the Court. Leave to appeal to the Court may also be given by a federal or provincial appellate court.

There are cases where leave is not required. In criminal cases, the *Criminal Code* gives a right of appeal where acquittal has been set aside in the provincial court of appeal or where, in the provincial court of appeal, one judge dissents on a point of law.

The Supreme Court does have a special kind of "reference" jurisdiction, original in character, given by s. 53 of the *Supreme Court Act*. The Governor-in-Council may refer to the Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution, the constitutionality or interpretation of any federal or provincial legislation, or the powers of Parliament or of the provincial legislatures or their respective governments or any other important question of law or fact concerning any matter. Where the government of any province has any special interest in any question put in reference, the Attorney General of the province shall be notified in order that he or she may be heard. Canada is the only country with a common law system that has this "reference" jurisdiction.

Constitutional questions may also be raised in regular appeals involving individual litigants or governments or governmental agencies. In such cases the federal and provincial governments are notified of the constitutional question and may intervene to argue it.

In light of the broad scope of the Supreme Court of Canada's jurisdiction, it is clear that the Canadian judicial system differs from that of many continental European and Latin and South American countries, where it is not unusual for there to be separate courts of last resort for both constitutional law and administrative law cases in addition to a general court of appeal.

Federal Court of Canada

The Federal Court of Canada with its two divisions, the Trial Division and the Appeal Division, came into existence in 1971. Its predecessor, known as the Exchequer Court, had had jurisdiction only over revenue, the Crown in Right of Canada as litigant, industrial and intellectual property, admiralty and a few other subject matters regulated by federal legislation. The Federal Court was given jurisdiction over these matters, but in addition was given the power of judicial review with respect to decisions of federal administrative tribunals and jurisdiction over claims with respect to several other matters falling within federal legislative jurisdiction, including inter-provincial transportation and communication undertakings, bills of exchange and aeronautics. These latter grants of new jurisdiction have spawned a good deal of litigation regarding the nature and scope of the federal government's authority to grant jurisdiction to courts of its own making. Generally speaking, the Supreme Court of Canada has interpreted that power narrowly, with the result that the Federal Court now exercises jurisdiction over a somewhat narrower range of disputes than was initially intended. Although there are some analogies to be drawn, therefore, between the Federal Court of Canada and the federal court system in the United States, the courts are by no means mirror images of each other.

Tax Court of Canada

The Tax Court of Canada was established very recently, in 1983, and has as its primary, responsibility the hearing of appeals in the area of income tax. Its predecessor, the Tax Review Board, was an administrative tribunal.

Provincial Superior Courts

The superior courts of each province include both a court of general trial jurisdiction and a provincial court of appeal. A significant feature of these courts insofar as their jurisdiction is concerned is that that jurisdiction is not limited to matters over which the provincial governments have legislative jurisdiction. In this respect, they are very different from the state courts in the United States. Hence these courts have jurisdiction over disputes arising in many of the areas over which the federal government is granted legislative jurisdiction in the *Constitution Act, 1867* - for example, criminal law and banking. Moreover, the power to decide disputes in such areas does not have to be explicitly assigned to these courts by the federal government in order for these courts to have jurisdiction over them. Hence, if federal legislation calls for the exercise at some point of judicial authority, but says nothing about which body is to exercise that authority, it is assumed that that authority will reside with these courts.

As noted above, therefore, these courts can fairly be described as the lynchpin of the Canadian judicial system.

Provincial Courts

Although at the bottom of the hierarchy, these courts handle the overwhelming majority of cases that come into the Canadian court system. They deal with a broad range of criminal matters, much of the litigation in the area of family law, and all of the civil litigation in which the amount at issue is relatively small. If the average citizen has occasion to become involved in a dispute that requires adjudication on the part of a court, the likelihood is that he or she will appear before one of these courts.

Administrative Tribunals

Although not formally part of the Canadian judicial system, because they are not in a formal sense "courts", administrative tribunals are an integral component of the system that has been created in Canada by government to resolve disputes. No description of the latter system would be complete without mention being made of these important bodies. Some areas - for example, labour relations (both in the unionized and in the non-unionized sectors of the economy) and individual claims of discrimination in areas like employment, housing and access to services and facilities customarily available to the public - are dealt with almost exclusively by them.

In the case of some of these administrative tribunals, the courts are limited in their supervisory jurisdiction to ensuring that the tribunals do not exceed the jurisdiction given them by their enabling statutes; insofar as these tribunals are concerned, the final say on questions of law that arise within their jurisdiction rests with them, not with the courts. This is generally true in the case of labour relation tribunals. In the case of other tribunals, such as those established to deal with claims of discrimination, the courts exercise a broader supervisory authority which extends not only to ensuring that jurisdiction is not exceeded, but also to reviewing decisions on questions of law that arise within jurisdiction. However, even in the case of these latter tribunals, the courts have often, at least in recent years, tended to show a good deal of deference to these tribunals when reviewing decisions of the latter kind.

The Judiciary

All members of the judiciary in Canada, regardless of the court, are drawn from the legal profession. In the case of those judges appointed by the federal government, which includes the judges of all of the courts apart from those at the bottom of the hierarchy and described generally as provincial courts, are required by federal statute to have been a member of a provincial or territorial bar for at least ten years. Lawyers wishing to become judges must apply to do so and their applications are vetted initially by committees established within the various jurisdictions for that purpose, with the ultimate power of decision residing with the federal cabinet. Analogous systems operate within the respective provinces for appointments to the provincial courts.

All judges in Canada are subject to mandatory retirement. In the case of some of the judges appointed by the federal government, the age of retirement is fixed by the *Constitution Act, 1867*, at 75. In the case of all other judges, both federally and provincially appointed, the age is fixed by statute, at either 75 or 70, depending on the court.

The independence of the judiciary in Canada is guaranteed both explicitly and implicitly by different parts of the Constitution of Canada. This independence is understood to consist in security of tenure, security of financial remuneration and institutional administrative independence.

CANADA'S COURT SYSTEM

(from the website of the Canadian Department of Justice,
http://canada.justice.gc.ca/en/dept/pub/trib/page3.html

FOREWORD

This booklet provides a general description of the court system in Canada – the types and levels of courts and their responsibilities. It is not intended as a user's guide for going to court. For information on the justice system as a whole we recommend consulting the companion booklet, *Canada's System of Justice*, also available from the Department of Justice.

INTRODUCTION

The basic role of courts in Canada is to help people resolve disputes fairly and with justice, whether the matter is between individuals or between individuals and the state. In the process, courts interpret and establish law, set standards, and raise questions that affect all aspects of Canadian society.

It is worth noting that most disputes do not in fact end up in the courts at all. People tend to settle their differences informally – through alternative dispute resolution, for instance, or before boards and tribunals – though often with the idea of "going to court" in the background. Even when things never get to court, the courts influence people's choices and actions. Court decisions provide guidance on what is acceptable conduct and on the nature and limits of the law.

Canada's system of courts is complex – like the society it serves. There are several levels and types of court, and questions of jurisdiction can be difficult to sort out, especially since courts that share the same functions may go by different names. Both the federal government and the provincial and territorial governments pass laws, and they also share the administration of justice, but the relationship is not simple. For instance, the provinces and territories are responsible for providing everything necessary for their courts, from building and maintaining the courthouses, to providing staff and resources such as interpreters, court reporters to prepare transcripts, sheriffs, and registry services, to paying provincial court judges; yet the judges for the superior courts are appointed and paid by the federal government. Administration of the Supreme Court of Canada and federally created courts is the responsibility of the federal government.

The pages that follow focus mostly on the structure of the system – on how the courts are organized and how the various elements relate to one another. A final section looks at some of the principles and institutions that help keep Canada's court system fair and efficient.

HOW THE COURTS ARE ORGANIZED

There are basically four levels of court in Canada. First there are provincial courts, which handle the great majority of cases that come into the system. Second are the provincial and territorial superior courts. These courts deal with more serious crimes and also take appeals from

provincial court judgments. On the same level, but responsible for different issues, is the Federal Court, Trial Division. At the next level are the provincial courts of appeal and the Federal Court of Appeal, while the highest level is occupied by the Supreme Court of Canada.

PROVINCIAL COURTS

Each province and territory has a provincial court, and these courts hear cases involving either federal or provincial laws. The names and divisions of these courts may vary from place to place, but their role is the same. Provincial courts deal with most criminal offences, family law matters (except divorce), young offenders (from 12 to 17 years old), traffic violations, provincial regulatory offences, and claims involving money, up to a certain amount (set by the province in question). Private disputes involving limited sums of money may also be dealt with at this level in Small Claims courts. In addition, all preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases – take place before the provincial courts.

A number of courts at the provincial level are dedicated exclusively to particular types of offences or groups of offenders. A recent example is the Drug Treatment Courts program, which has been set up in Toronto and Vancouver. The object is to address the needs of non-violent offenders who are charged with criminal offences that were motivated by their addiction. Those who qualify are offered an intensive combination of judicial supervision and treatment for their dependence, drawing on a range of community support services.

Youth courts handle cases where a young person, from 12 to 17 years old, is charged with an offence under federal young offenders laws. Procedures in youth court provide protections appropriate to the age of the accused, including privacy protections. Courts at either the provincial or superior court level can be designated youth courts.

Some provinces and territories (such as Ontario, Manitoba, Alberta and the Yukon) have established Domestic Violence Court programs. These programs provide various services to victims, including specialized investigations by the police, prosecution of repeat offenders by specially trained Crown attorneys, and support through the Victim/Witness Assistance Program. When a case does go to trial, it is held before a provincial court judge.

PROVINCIAL/TERRITORIAL SUPERIOR COURTS

Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), High Court of Justice, and Court of Queen's Bench. But while the names may differ, the court system is essentially the same across the country.

The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to a lower court. The superior courts try the most serious criminal and civil cases, including divorce cases and cases that involve large amounts of money (the minimum is set by the province in question).

In most provinces, the superior court has special divisions, such as the family division. Some provinces have established specialized family courts at the superior court level to deal

exclusively with certain family law matters, including divorce and property claims. The superior courts also act as a court of first appeal for the underlying court system that provinces and territories maintain.

Although superior courts are administered by the provinces and territories, the judges are appointed and paid by the federal government.

COURTS OF APPEAL

Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts and provincial courts. The number of judges on these courts may vary from one province to another, but a court of appeal usually sits as a panel of three. The courts of appeal also hear constitutional questions that may be raised in appeals involving individual litigants, or governments or governmental agencies.

THE FEDERAL COURT OF CANADA

The Federal Court of Canada (FCC) is a court of law, equity and admiralty; it is essentially a superior court with civil jurisdiction. However, since the FCC was created by an Act of Parliament, it can only deal with matters specified in federal statutes. In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute.

The FCC is organized into a Trial Division and an Appeal Division. While based in Ottawa, the judges of both divisions conduct hearings across the country. The FCC's jurisdiction includes interprovincial and federal-provincial disputes, intellectual property proceedings (e.g. copyright), citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments of the Government of Canada. As well, only the FCC can review decisions, orders and other administrative actions of federal boards, commissions and tribunals; these bodies may refer any question of law, jurisdiction or practice to the FCC at any stage of a proceeding.

For certain matters, such as maritime law, a case may be brought before either the FCC or a provincial or territorial superior court. In this respect, the FCC and the superior courts share jurisdiction.

SPECIALIZED FEDERAL COURTS

In order to deal more effectively with certain areas of the law, the federal government has created specialized courts, notably the Tax Court of Canada and courts that serve the Military Justice System. These courts have been created by statute and can only decide matters that fall within the jurisdiction given to them by statute.

The Tax Court of Canada

The Tax Court of Canada gives individuals and companies an opportunity to settle disagreements with the federal government on matters arising under federal tax and revenue legislation. The Tax Court of Canada primarily hears disputes between the federal government and taxpayers after the taxpayer has gone through all other options provided for by the *Income Tax Act*. The Tax Court is independent of the Canada Customs and Revenue Agency and all other government

departments. Its headquarters are in Ottawa, and it has regional offices in Montreal, Toronto and Vancouver.

Military Courts

Military courts, or courts martial, were established under the *National Defence Act* to hear cases involving the Code of Service Discipline. The Code applies to all members of the Canadian Armed Forces as well as civilians who accompany the Armed Forces on active service. It lays out a system of disciplinary offences designed to further the good order and proper functioning of the Armed Forces.

The Court Martial Appeal Court hears appeals from military courts. Its function is comparable to that of a provincial appeal court, and it has the same powers as a superior court. Judges in the Court Martial Appeal Court are selected from the Federal Court of Canada and other superior courts throughout the country. Like other courts of appeal, the Court Martial Appeal Court hears cases as a panel of three.

THE SUPREME COURT OF CANADA

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law.

The Court consists of a Chief Justice and eight other judges, all appointed by the federal government. *The Supreme Court Act* requires that at least three judges must come from Quebec. Traditionally, of the other six judges, three come from Ontario, two from western Canada, and one from the Atlantic provinces. The Supreme Court sits in Ottawa for three sessions a year – winter, spring and fall.

Before a case can reach the Supreme Court, it must have used up all available appeals at other levels of court. Even then, the Court must grant permission or "leave" to appeal before it will hear the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the Supreme Court.

In certain situations, however, the right to appeal is automatic. For instance, no leave is required in criminal cases where a judge of a court of appeal has dissented on how the law should be interpreted. Similarly, where a court of appeal has found someone guilty who had been acquitted at the original trial, that person automatically has the right to appeal to the Supreme Court.

The Supreme Court of Canada also plays a special role as adviser to the federal government. The government may ask the Court to consider questions on (a) any important matter of law or fact, especially concerning the interpretation of the Constitution, and (b) the interpretation of any federal or provincial legislation or the powers of Parliament or the provincial legislatures or their respective governments. (Provincial and territorial courts of appeal may also be asked to hear references from the provincial and territorial governments.)

NEW APPROACHES

The Nunavut Court of Justice

When the new territory of Nunavut was established in 1999, a new kind of court in Canada was created as well. The Nunavut Court of Justice combines the power of the superior trial court and the territorial court so that the same judge can hear all cases that arise in the territory. In Nunavut, most of the communities are small and isolated from the capital of Iqaluit, so the court travels to them "on circuit." The circuit court includes a judge, a clerk, a court reporter, a prosecutor, and at least one defence attorney. Court workers and victim/witness assistants might also travel with the circuit court, depending on the cases to be heard. Interpreters are hired in the communities when possible, or travel with the circuit court when necessary. In addition to holding regular sessions in Iqaluit, the court flies to most communities in Nunavut at intervals that range from six weeks to two years, depending on the number of cases.

Unified Family Courts

Unified family courts, found in several provinces, permit all aspects of family law to be dealt with in a single court with specialized judges and services. The unified family courts consist of superior court judges, who hear matters of both provincial and federal jurisdiction. These courts encourage the use of constructive, non-adversarial techniques to resolve issues, and provide access to a range of support services, often through community organizations. These services differ from province to province but typically include such programs as parent-education sessions, mediation, and counselling.

Sentencing Circles

Sentencing circles, pioneered in the Yukon Territorial Court in the early 1990s, are now used in much of the country, mostly at the provincial court level and in cases involving Aboriginal offenders and victims. While sentencing circles are not courts themselves, they can be a valuable means of getting input and advice from the community to help the judge set an appropriate and effective sentence.

Sentencing circles generally operate as follows: After a finding or admission of guilt, the court invites interested members of the community to join the judge, prosecutor, defence counsel, police, social service providers, community elders, along with the offender, the victim and their families and supporters, and meet in a circle to discuss the offence, factors that may have contributed to it, sentencing options, and ways of reintegrating the offender into the community. Everyone is given the chance to speak. Often the circle will suggest a restorative community sentence involving some form of restitution to the victim, community service, and/or treatment or counselling. Sometimes members of the circle will offer to help ensure that the offender lives up to the obligations of the community sentence, while others may offer to provide support to the victim.

It is important to note, though, that sentencing circles do sometimes recommend a period of custody. Moreover, the judge is not bound to accept the circle's recommendations.

THE COURTS AND RELATED PROCESSES

There are many elements in the Canadian justice system which are closely related to the courts but are not strictly part of the court system. Two prominent examples are administrative tribunals and alternative dispute resolution.

Administrative Tribunals

Many disputes over administrative rules and regulations – relating, for instance, to employment insurance, disability benefits, refugee claims or human rights – are dealt with outside the court system by various tribunals and boards. Administrative tribunals may resemble courts, but they are not in fact part of the court system. Nonetheless, they play an essential role in resolving disputes in Canadian society.

The procedure before administrative bodies is usually less formal than that in the courts. However, the courts exercise a supervisory role over administrative tribunals, which may in turn refer questions to the courts. The courts ensure that tribunals remain within their responsibilities under the law and that their procedures are fair.

Alternative Dispute Resolution Systems

Alternative Dispute Resolution (ADR) refers to the wide variety of methods by which conflicts and disputes are resolved outside the courtroom. ADR allows people to settle their differences through means that are more informal, less expensive, and often quicker than court proceedings, such as mediation and arbitration. As with administrative tribunals, the relationship between the courts and ADR is complementary. The courts themselves often make use of ADR – for example, some provinces now insist on mediation as part of the litigation process. At the same time, for serious or violent crimes, or when mediation or arbitration is rejected, the formal court system remains indispensable.

The Lawyer's Role

A publication of the Iowa Bar Association

http://www.iowabar.org/pamphlet.nsf/0/9ddc378dc30ca5d886256544006b26f2?OpenDocument

The Lawyer is, basically, a counselor and adviser to people with problems which involve law or legal relationships; and he or she engages in research and in collecting and analyzing information which is used to advise clients wisely. A great part of the lawyer's time is spent on preventive law in an effort to anticipate and prevent legal problems before they arise. Whether the problem is preventive or corrective, the lawyer is, first of all, a counselor and adviser to people with legal problems.

Because of the dramatic portrayal of the lawyer as an advocate representing and defending clients in court, many people always picture the lawyer in this role. Many lawyers never appear in court, preferring to limit their activities to the office activities of the profession. Numerous lawyers, both men and women, find employment and an outlet for their talents in corporate legal departments, in various agencies in state, federal and local government, or in allied fields such as abstracting land titles, real state or insurance, banking and trust administration.

The lawyer serves as an advocate when he or she assists in the administration of justice arguing the client's case as an officer of the court, in the belief that the ultimate truth is best discovered through the adversary process. Our courts provide an impartial tribunal where every person accused of wrong-doing has a fair hearing, is represented by counsel of his or her choice and in a criminal proceeding is considered innocent until proved guilty. A lawyer has the duty to represent the interest of the client to the best of his or her ability, whether the cause be civil or criminal, even though the lawyer is representing an unpopular client and knows that his or her name may, however unfairly, become associated in the public mind with the case the lawyer is advocating.

Lawyers have always been leaders in public affairs in America. In terms of community service, lawyers serve as legislators, leaders in every branch of public life, and as judges on every governmental level. The lawyer's work is directed toward solving the problems of other people in all areas and stations of life. Roscoe Pound, formerly Dean of the Harvard Law School, speaks of his profession in this way: "It's a long, hard grind to become a lawyer, but it's worth it. I know of no other profession that offers a young person so much opportunity for achieving wealth and prestige and, at the same time, affords him such possibilities for rendering real service to his Community, his State, and even his Country."

Pre-legal and professional education It takes a lot of hard work to become a good lawyer and a lawyer's education is never-ending. Lawyers are perpetual students of the changing fields of procedural and substantive law and are continually inquiring into other areas of knowledge as various cases present themselves. Four years of pre-legal college work are required for admission to a law school. There are no prescribed pre-legal subjects but legal educators agree that the program should be geared toward the development of a broad cultural background, habits of thoroughness, intellectual curiosity and scholarship, and the ability to organize materials and communicate the results orally and in writing.

A few universities and colleges have combined programs, either within their own framework or in cooperation with other colleges, whereby an undergraduate degree and a law degree can be earned in a total of six years. The law school usually does not confer the B.A. or B.S. degree and arrangements for the combined program must be made with the dean of the undergraduate college. The law course itself is generally three years.

The majority of law schools require above average undergraduate grades for admission and require the applicant to take the Law School Admission Test administered by the Educational Testing Service, Princeton, New Jersey.

Upon graduation, the degree of Juris Doctor (J.D.) is awarded by most schools. Advanced study is sometimes pursued by those planning to specialized in one branch of the law or to engage in research and law teaching. After graduation it is necessary to obtain admission to the Bar. Although some reciprocity does exist, admission to practice in one state does not automatically entitle one to practice law in any other state. The state Bar examination itself is the ultimate test toward which all law students are directing themselves during their formal legal education. Once that examination is passed an attorney is admitted to the general practice of law in his or her state.

Economics The law is a profession rather than an occupation. The amount of financial return is not the accepted measure of success. In view of the fact that the lawyer works harder for longer hours, and must apply greater intellectual competence than those in many other fields, average earnings of the profession seem low. Nevertheless, the opportunity for a substantial financial success exists as well as the opportunity for distinguished professional achievement.

The legal profession repays its dedicated practitioner with the highest reward - the personal satisfaction that properly belongs to those who dedicate their lives to the benefit of others. There is a continuing and growing need for new and highly qualified members of the profession.

Desirable Personal Traits. Character, common sense, self-reliance, patience, courage, and the ability to think logically and write clearly are all traits of person having the aptitude to become a good lawyer. Perseverance, integrity and courage are severely tested by the law. The ethical standards of the profession are extremely high and are, at times, difficult to live up to. A lawyer works on his or her own without supervision, and the taskmaster is the lawyer's own conscience.

His or her courage is severely tested when he or she is called upon to defend the oppressed, to advocate the causes of the poor, and to combat the burdens of prejudice, discrimination and public agitation.

A mental trait which distinguishes lawyers is the ability to work with abstract ideas as opposed to concrete things or symbols which define them. Whereas the engineer, the doctor or the businessman has tangible evidence of his or her productiveness, the lawyer never sees the direct result of much of the work since he or she is constantly working to prevent legal problems from arising in the future.

It is essential that the lawyer have the ability to reason inductively, the ability to pick out pertinent facts from an array of data, and the ability to apply common sense toward a logical result. Above all, he or she must have an affinity for words, the tools with which he or she works and the ability to communicate thoughts both orally and in writing.