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# CANADA: A brief look at the nature of the Federation, the Administration of Justice and the Judicial System

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## **CANADA: A brief look at the nature of the Federation, the Administration of Justice and the Judicial System**

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*by Charles E. Flam*

### **Canada, a Federal Constitutional Monarchy**

Canada is a federal state comprised of ten provinces and three largely self-governing territories, but is also a constitutional monarchy. Queen Elizabeth II is Queen of Canada and Canada's Head of State. The Governor General, appointed upon the advice of Canada's Prime Minister, is the representative of the Queen in Canada and also is the nation's commander-in-chief. A Lieutenant-Governor, also appointed upon the advice of Canada's Prime Minister, represents the Queen in each province.

The Parliament of Canada consists of two chambers, the elected House of Commons and an appointed Senate. For each province there is an elected legislature.

### **Canada's Written Constitution**

The *British North America Act, 1867*, a law of the British Parliament, brought the Canadian federation into existence as a new nation in 1867 and remains the basic element of Canada's written Constitution. In 1982, under the *Constitution Act, 1982*, the original 1867 British law and subsequent amendments became the *Constitution Acts, 1867 to 1975*. These laws now are known as "Canada's written constitution". A final law of the British Parliament, the *Canada Act, 1982* provided for the termination of the British Parliament's power over Canada and for the "patriation" of Canada's Constitution. The *Constitution Act, 1982*, also adopted the [Canadian Charter of Rights and Freedoms](#), a Charter that neither Canada's Parliament nor any provincial legislature, acting alone, can modify.

## **Division of Legislative Authority**

Canada's written constitution grants legislative authority to the Parliament of Canada and to the legislatures of the provinces and empowers Parliament and the legislatures to make laws in relation to matters coming within classes of subjects assigned to one, the other, or both of them. Very broadly speaking, Parliament was assigned classes of subjects of national importance, whereas the legislatures of the provinces were assigned classes of subjects of local importance. Some classes of subjects are divided between Parliament and the provincial legislatures.

## **The Administration of Justice**

The Administration of Justice is one such class of subjects with regard to which the distribution of legislative power is divided between Parliament and the provincial legislatures. In each province the legislature may make **exclusively** laws in relation to: "Administration of Justice in the Province, including the Constitution, Maintenance, and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts". "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" comes within the **exclusive** jurisdiction of the Parliament of Canada.

Penitentiaries come within the exclusive jurisdiction of Parliament whereas prisons come within provincial jurisdiction. The distinction between the two institutions is that inmates of penitentiaries are serving sentences of 2 years or more whereas persons serving sentences of less than two years are incarcerated in prisons. "Property and Civil Rights", generally characterized as civil (as opposed to criminal) law comes within the jurisdiction of the provinces and territories.

## **The Judiciary**

All judges of "Superior, District and County Courts" in each province and territory are appointed by the Governor General, i.e., the federal government, even though the courts over which they preside are constituted, maintained and organized by the legislature of the province in which they sit. The salaries of all federally-appointed judges are fixed and provided for by the Parliament of Canada.

## **The Courts**

In each province and territory, the courts of original general jurisdiction which qualify as "Superior, District or County Courts", are presided over by federally-appointed judges. In most provinces there is a single court of original general jurisdiction, although the court may be comprised of more than one division. This court hears in first instance every civil suit not assigned exclusively to another court by specific provision of law. Such "other courts" are provincial courts, with provincially-appointed judges, to which matters wherein the sum claimed is less than a threshold amount, eg., \$70,000. Family cases, regardless of the claim or recourse sought, cannot be assigned to such provincial courts. As well, equitable remedies such as injunctions cannot be assigned to provincial courts.

In each province and territory, there is a single general appeal tribunal which hears appeals from any judgment from which an appeal lies. All judges on all courts of appeal are federally-appointed.

The courts of appeal and superior courts of original jurisdiction in each province and territory are noted below.[\[1\]](#)

In addition to the courts of original general jurisdiction and the courts of appeal constituted for each province and territory, there are a number of other courts constituted by the Parliament of Canada. First and foremost is the **Supreme Court of Canada**, the nation's highest tribunal, which hears appeals from all provincial courts of appeal and federal courts of appeal and is the last judicial resort for all litigants, whether individuals or governments.

There are three other federally-constituted courts of importance, the Federal Court of Appeal, the Federal Court of Canada and the Tax Court of Canada. The Federal Court of Appeal hears appeals from decisions of the Federal Court of Canada and the Tax Court of Canada.

The Federal Court of Canada is a national trial court which hears and decides legal disputes arising exclusively in the federal domain, including claims against the Government of Canada, civil suits in federally-regulated areas such as Maritime Law and challenges to the decisions of federal administrative tribunals. It does not have jurisdiction over the vast majority of disputes between persons, corporations, provinces and foreign governments.

The Tax Court of Canada is a court of original jurisdiction which hears appeals from assessments under the *Income Tax Act*, the *Excise Tax Act* (Goods and Services Tax "GST"), the *Employment Insurance Act* and the *Canada Pension Plan*, among others.

### **Criminal Jurisdiction**

The Criminal Law of Canada, the exclusive domain of the Parliament of Canada, is codified in a Criminal Code.

Criminal offenses generally may be divided into offenses punishable on summary conviction and indictable offenses. All summary conviction offenses are tried by a judge alone, there being no possibility of a jury trial. Such offenses are tried before courts constituted by the provinces and territories before judges appointed by the government in such province or territory ("provincial courts").

Lesser indictable offenses are tried exclusively before provincial courts by a judge alone. Except for the most serious indictable offenses (treason, piracy, murder, sedition, bribery of holders of a judicial office, intimidation of Parliament, alarming the Queen, etc ("most serious offenses"), a person accused of all other indictable offenses has the option to be tried by a judge alone before a provincial court, by a judge alone before a superior court (all judges of superior courts being appointed by the federal government), or by a superior court composed of a judge and a jury. Every accused charged with one of the most serious offenses must be tried before a superior

court composed of a judge and jury, unless both the accused and the Attorney General consent to a trial before a superior court without a jury.

Unlike the United States, Canada permits appeals from acquittals on questions of law. In the event that the appellate court grants the appeal, the acquittal is quashed and a new trial is ordered. As well, there is no 5<sup>th</sup> Amendment-like protection afforded to a witness in Canada. A witness may object to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding, but is compelled to answer. The answer so given, however, cannot be used or be admissible in evidence in any criminal or civil trial against him thereafter taking place.

### **Civil Jurisdiction**

As mentioned above, Canada is a federation of ten provinces and three territories. The civil laws for each province and territory fall within the exclusive jurisdiction of each province or territory. It is important to note that the civil laws of the Province of Quebec are based on French civil law. These laws are codified in a Civil Code the origins of which are found in the Napoleonic Civil Code. The laws of all other provinces and territories find their origins in English common law and are based on common law concepts.

Canada is a bilingual country. All federal laws are drafted in the nation's two official languages: English and French. Three provinces are officially bilingual: Quebec, New Brunswick and Manitoba. Therefore, all laws in these three provinces are drafted both in English and in French. Proceedings before all courts in the Province of Quebec take place in either language, the languages often being used interchangeably. Cases before the Federal Court of Canada, the Federal Court of Appeal, the Tax Court of Canada and the Supreme Court of Canada may be pleaded in either language.

### **Civil Juries**

The right to a jury trial for litigants in civil cases in Canada is much more restricted than the rights enjoyed by litigants in the U.S. Civil jury trials were abolished in the Province of Quebec in 1976 for actions subsequently instituted. The last civil jury trial in Quebec was pleaded by my partner Claude-Armand Sheppard (*Snyder v. Montreal Gazette Ltd.*) in 1978, although the case was decided finally by the Supreme Court of Canada only in 1988 ([1988] 1 S.C.R.494).

Civil jury trials still exist, although rare, in the other provinces of Canada. Generally, jury trials are permitted, indeed sometimes mandated unless waived by the parties, in actions such as those for defamation, slander, malicious arrest, malicious prosecution and false imprisonment.

In the Province of Ontario, Section 108 of the *Courts of Justice Act* permits a party to a civil action to require "that the issues of fact be tried or the damages assessed, or both, by a jury", unless other provisions of law otherwise provide. Some of the exclusions to this general rule are claims seeking relief by way of injunction or mandatory order, partition or sale of real property, foreclosure or redemption of a mortgage, specific performance of a contract, dissolution of a partnership, declaratory relief, other equitable relief and relief against a municipality.

## **Enforcement of Foreign Money Judgments**

The laws of all provinces and territories provide for the enforcement therein of final judgments rendered in another province or territory. Such judgments are enforced generally by presenting before the superior court of the province or territory in which enforcement is sought a proceeding seeking recognition and enforcement of the judgment. The same procedure is available for recognition and enforcement of final foreign judgments. In all provinces except for Quebec, reciprocal enforcement of judgments legislation exists which simplifies the recognition and enforcement of judgments rendered in other provinces. Reciprocal legislation also exists between some Canadian provinces and some U.S. states, as well as between some provinces and other countries such as Australia, Germany, Austria and the United Kingdom.

Canadian courts are very receptive to the enforcement of final and conclusive foreign money judgments subject to certain statutory exceptions and procedural requirements. Generally, a Canadian court will not examine the merits of the extra-provincial or foreign decision, confining itself to verifying that the foreign court had jurisdiction, that the decision was not rendered in contravention of fundamental principles of procedure, and that the outcome of the foreign decision is not manifestly inconsistent with public order as understood in international relations. Most Canadian courts, however, will not enforce obligations arising from the tax laws of a foreign country, unless that country enforces obligations arising from Canadian tax laws.

Montreal, Quebec

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[\[1\]](#) British Columbia: Court of Appeal of British Columbia

Supreme Court of British Columbia

Alberta: Court of Appeal of Alberta

Court of Queen's Bench of Alberta

Saskatchewan: Court of Appeal of Saskatchewan

Court of Queen's Bench of Saskatchewan

Manitoba: Court of Appeal of Manitoba

Court of Queen's Bench of Manitoba

Ontario: Court of Appeal of Ontario

Superior Court of Justice

Quebec: Court of Appeal of Quebec

Superior Court of Quebec

New Brunswick: Court of Appeal of New Brunswick

Court of Queen's Bench of New Brunswick

Prince Edward Island: Prince Edward Island Court of Appeal

Supreme Court of Prince Edward Island

Nova Scotia: Court of Appeal of Nova Scotia

Supreme Court of Nova Scotia

Newfoundland and Labrador: Supreme Court of Newfoundland and Labrador

Court of Appeal and Trial Division

Yukon Territory: Court of Appeal of Yukon Territory

Supreme Court of Yukon Territory

Nunavut Territory: Court of Appeal of Nunavut Territory

Nunavut Court of Justice

Northwest Territories: Court of Appeal of Northwest Territories

Supreme Court of Northwest Territories