

Legal systems in Canada: overview

Christopher Somerville, Wendy Sun
Affleck Greene McMurtry LLP

global.practicallaw.com/w-013-0460

CONSTITUTION Form

1. What form does your constitution take?

Canada has a federal constitution primarily set out in the:

- Constitution Act 1867.
- Constitution Act 1982.

The Canadian constitution also has unwritten aspects, in that certain constitutional features are contained in sources outside these two Constitution Acts.

Most significantly, the preamble to the Constitution Act 1867 states that Canada shall have "a Constitution similar in Principle to that of the United Kingdom". Therefore, fundamental features of the UK's constitution, such as judicial independence, also apply in Canada.

General constitutional features

2. What system of governance is provided for?

System

Canada's government is both a constitutional monarchy and a federal parliamentary democracy. Canada has a national government (called the federal government) as well as distinct provincial governments for each of Canada's ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan). Canada also has three northern territories, each with its own territorial government (the Northwest Territories, Nunavut, and Yukon), but these fall under the federal government's jurisdiction.

Head of state

Canada's head of state is the reigning monarch of Canada, currently Queen Elizabeth II. Although Canada shares its monarch with the UK and the other Commonwealth realms, Canada's monarchy is legally distinct. The Canadian monarch plays no political role in Canada's government, and the monarch's ceremonial role is mostly delegated to a Governor General (in relation to the federal government) and Lieutenant Governors (in relation to each provincial government).

Structure

Federal level. At the federal level, Canada has a bi-cameral parliamentary legislature comprised of the House of Commons, the Senate, and the Queen. Members of the House of Commons are elected from 338 single-member constituencies for a four-year term. They are styled "Member of Parliament" or "MP". Senators are appointed by the Governor General on the advice of the Prime Minister. They sit until they reach the retirement age of 75.

The federal executive ceremonially includes the monarch represented by the Governor General, but all political decisions are made by the Governor in Council, meaning that the Governor General only takes executive action on advice from the parliamentary Cabinet. Current Parliamentary tradition is that most Cabinet ministers are members of the House of Commons, although Senators can be appointed to Cabinet and have been in the past. The Prime Minister and Cabinet are appointed by the Governor General. The Prime Minister is usually, but not always, the leader of the political party that wins the most seats in the House of Commons. Cabinet Ministers are appointed by the Governor General on the advice of the Prime Minister.

Provincial level. At the provincial level, each province has a unicameral legislative assembly. The provincial executive includes the monarch represented by the province's Lieutenant Governor but, as in the federal government, political decisions are made by the Lieutenant Governor in Council, based on advice to the Lieutenant Governor from the Premier (by convention, first ministers of the provinces are termed "Premier", and the first minister of the federal government, "Prime Minister") and the Premier's Cabinet, who are elected members of the legislative assembly.

3. Does the constitution provide for a separation of powers?

Canada's constitution provides for a division of powers between the federal and provincial governments. Each level of government has its own distinct powers specifically enumerated in the Constitution Act 1867. The judiciary enforces this division through judicial review (see *Question 5*) to ensure that both federal and provincial laws comply with the separation of powers.

Within each level of government, there is no strict separation between the executive and legislative branches. The executive branch is responsible to the legislative branch, by virtue of members of Cabinet being members of the legislature. As a result, all executive decisions are directed by democratically-elected members of either the federal House of Commons or the provincial legislative assemblies.

The constitutional principle of judicial independence separates the judiciary from the other branches of government. Judges of the Supreme Court of Canada and the courts of appeal and superior courts in each province are appointed by the federal government, while judges of provincial courts are appointed by provincial governments. Once appointed, however, judges can only be removed for cause, and after a disciplinary proceeding before a tribunal consisting of other judges (such panels may also include lawyers and community members for provincially-appointed judges).

4. What is the general legislative process?

Proposal and drafting

The federal and provincial legislatures enact laws in the form of statutes. The executive can also enact laws in the form of regulations without resort to the legislative process, provided that the authority to make regulations has been granted by statute.

Statutes are proposed in the legislatures as "bills". Members of the legislature can introduce bills, but they generally do not become law unless they have Cabinet support. Before being introduced, bills with Cabinet support are typically drafted by unelected civil servants employed by the government with expertise in drafting legislation.

The initial proposal of a bill to the legislative chamber is known as the first reading.

Scrutiny

After the first reading, the legislative chamber debates and scrutinises the bill in a process called the second reading. Following debate, the chamber votes on the bill. If the bill carries, the chamber then refers the bill to a committee of legislative members for further scrutiny and possible revision. After the committee has completed its review, the chamber votes on whether the bill can proceed to the third reading, in which the chamber considers the bill in its final form.

At the federal level, if a bill passes the third reading in one chamber (usually the House of Commons), then it must also be introduced in the other chamber (usually the Senate), where the bill must again receive first, second, and third readings before it can proceed to enactment. While the Senate is unelected, it does have the power to terminate bills approved by the House of Commons. These instances are rare because Senators generally appreciate the political damage of defying the elected members of the House.

A federal bill can proceed to enactment once it has passed the third reading in both chambers. A provincial bill can proceed to enactment immediately after the initial third reading, as each province has only one legislative chamber.

Enactment

A bill that has passed the third reading becomes enacted as a statute once it receives Royal Assent by the Governor General (for federal legislation) or the Lieutenant Governor (for provincial legislation). In keeping with their ceremonial roles, the Governor General and Lieutenant Governors will abide by the will of the legislature in granting Royal Assent to legislation.

5. Is there a doctrine by which the judiciary can review legislative and executive actions?

All laws in Canada are subject to judicial review in accordance with the Canadian constitution. Canada's courts frequently invalidate laws deemed unconstitutional, which the government revises or withdraws in deference to the judiciary, provided there is no appeal. Before ruling on a law's constitutionality, the courts receive extensive submissions from the litigant(s) opposing the law as well as from the government and other interested parties.

6. Are certain emergency powers reserved for the executive?

Under the constitution, national emergencies are under federal jurisdiction. The federal Emergencies Act sets out the executive's powers during an emergency. These powers vary depending on the

type of emergency taking place (whether public welfare, public order, international, or war emergency), and may include travel restrictions, confiscation of property, deportation, and orders to provide essential services. However, the executive must officially declare an emergency to exercise such powers, and this declaration is reviewable by the parliament, which can revoke the declaration. All orders under the Emergencies Act are also subject to judicial review under the constitution and the Canadian Charter of Rights and Freedoms (see *Question 7*).

7. Are human rights constitutionally protected?

The Canadian constitution protects human rights in Part I of the Constitution Act 1982, which contains the Canadian Charter of Rights and Freedoms. However, these protections only extend to government action. The Charter does not concern human rights compliance by private businesses. That is addressed by sub-constitutional human rights codes enacted as federal or provincial legislation.

The Charter protects a wide range of rights including:

- Fundamental freedoms (that is, freedoms of religion, expression, assembly, and association).
- Democratic rights for citizens (that is, the right to vote and run for office).
- Mobility rights within Canada.
- Legal rights (that is, the right to life, liberty, and security of the person subject to fundamental justice).
- Equality before and under the law.
- Special language rights for English and French speakers.

However, section 1 of the Charter provides that these rights are guaranteed subject to "reasonable limits", which means that the rights can be curtailed in a principled manner defined by constitutional case law.

In addition, the Constitution Act 1982 includes special protection for the rights of Canada's indigenous peoples above and beyond the Charter of Rights and Freedoms. Section 35(1) of the Constitution Act 1982 states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognised and affirmed. Canadian courts have interpreted these rights broadly, and their influence on the Canadian legal system continues to expand, particularly following the conclusions of Canada's Truth and Reconciliation Commission in 2015.

Amendment

8. By what means can the constitution be amended?

The Constitution Act 1982 sets out Canada's constitutional amendment mechanism, which operates differently depending on the type of amendment being made.

Section 38(1) sets out the general procedure, which requires approval from the House of Commons and Senate as well as from the legislative assemblies of at least two-thirds of all provinces, provided those provinces have at least half the population of all provinces. Under this procedure, dissenting provinces can legally reject application of the amendment to their jurisdiction.

Under section 41, a small number of amendments can only be made with the unanimous consent of the federal and provincial governments (for example, amendments affecting the office of the monarch). Other amendments that only affect specific jurisdictions can be made by the federal or provincial governments alone, or by some other combination thereof.

Constitutional amendments in Canada do not require a referendum or a special majority of any particular legislative chamber, unless a particular legislature chooses to require such a measure in a particular instance.

LEGAL SYSTEM

Form

9. What form does your legal system take?

Canada has a mixed legal system. Across all provinces and territories, public law (such as criminal law and administrative law) is based on the British common law tradition, with distinct Canadian characteristics. Private law (such as property law, contract law) is also based on the common law tradition in all provinces except Quebec, where it is based on a distinct civil law tradition.

Main sources of law

10. What are the main domestic sources of law?

The highest source of law is the Canadian constitution. The constitution defines the other sources of law according to subject matter and jurisdiction. Section 91 of the Constitution Act 1867 specifically sets out subject areas governed by federal law (such as criminal law, bankruptcy law, patent law), while section 92 sets out the subjects governed by provincial law (such as property and civil rights, municipal law, the administration of justice and the court system).

Therefore, below the constitution, the highest laws are statutes passed by the federal or provincial governments within their respective jurisdictions.

Where the law has not been defined by statute, the common law, as noted above, applies in all jurisdictions except Quebec, which has its own civil code rooted in its constitutional jurisdiction over property and civil rights.

11. To what extent do international sources of law apply?

International treaties must be incorporated into federal or provincial law, depending on the jurisdiction impacted by the treaty, before they have direct legal effect in Canada. However, Canadian courts will avoid reaching decisions that breach an unimplemented treaty, unless they are compelled to by statute. Similarly, Canadian courts apply the common law in conformity with customary international law where applicable, again except where statute provides otherwise. In this regard, Canada's approach to applying international law is similar to the UK's.

Court structure and hierarchy

12. What is the general court structure and hierarchy?

Canada's highest court is the Supreme Court of Canada, which has the power to hear an appeal from appeal courts in each province and territory and, in limited circumstances, from trial level courts. Except in criminal cases, the Supreme Court generally will not agree to hear appeals unless they are considered to be nationally significant.

Below the Supreme Court, each jurisdiction in Canada has its own court system. The federal government has established specific courts to decide cases concerning federal law, including the Federal Court and the Federal Court of Appeal. However, the

federal courts are based on statute and have no jurisdiction to decide cases outside their statutory parameters.

By contrast, each province and territory has courts of "inherent jurisdiction" with constitutional authority to decide almost any type of case arising in that province or territory. These are the provincial and territorial superior courts, and they are named as such in certain provinces (such as in Ontario and Quebec). Other provinces name them "supreme" courts (such as British Columbia and Nova Scotia), or the courts of "Queen's Bench" (such as in Alberta and Manitoba). Decisions from all of these courts are reviewable by separate courts of appeal that are specific to their particular jurisdiction, such as Alberta's Court of Appeal, the Court of Appeal for Ontario, and the Court of Appeal of Quebec. Decisions of provincial courts of appeal are in turn reviewable by the Supreme Court of Canada.

The provinces and territories also have courts of limited jurisdiction to decide specific cases, especially less complex criminal and family matters. However, the jurisdiction of these courts resides in legislation, rather than the constitution. Depending on the type of proceeding before the provincial court, the presiding officer may also not be a judge but a justice of the peace, whose appointment does not require formal legal training.

13. To what extent are lower courts bound by the decisions of higher courts?

All courts in Canada are bound by decisions by the Supreme Court of Canada. Below the Supreme Court, courts in each province and territory are bound only by higher courts in the same province or territory. In some provinces (such as British Columbia) judges are bound by earlier decisions of the same court. Decisions from courts in other provinces or territories may have persuasive value, as do decisions from other common law jurisdictions such as the UK, Australia, and the US.

14. Are there specialist courts for certain legal areas?

Specialist courts exist at both the federal and provincial levels in Canada. For example, the federal government established the specialist Tax Court of Canada to decide most Canadian tax disputes. At the provincial level, Ontario's Superior Court of Justice, for example, has special branches for bankruptcy, commercial law, family law, and estates matters.

15. Are other quasi-legal authorities commonly used?

Quasi-legal authorities such as administrative tribunals are widespread and very significant in the Canadian legal system. The jurisdiction of these authorities arises from either federal or provincial legislation. All decisions by these authorities are reviewable by the courts, although the courts frequently defer to the expertise of these specialist decision-makers and uphold their rulings unless they contain serious flaws.

Administrative tribunals have authority in a wide range of areas. Prominent examples at the federal level include the Competition Tribunal, whose jurisdiction is limited to certain aspects of anti-trust law, and the Canadian International Trade Tribunal, whose jurisdiction includes tariff appeals. Significant tribunals at the provincial level range from the securities and financial services commissions, which regulate the capital markets and insurance industries, to environmental protection and land use tribunals.

Both the federal and provincial governments also have specialist labour relations and human rights tribunals within their respective jurisdictions.

Legislation has also empowered self-governing professional bodies to create disciplinary tribunals for their members. Prominent examples of these self-regulatory organisations are the various provincial and territorial law societies regulating lawyers, the provincial and territorial colleges of physicians and surgeons, and the Investment Industry Regulatory Organization of Canada, which regulates a wide range of financial professionals.

16. Does the constitution provide for an independent judiciary?

Canada's Constitution Act 1867 adopts the British constitutional principle of an independent judiciary, reaching back to the Act of Settlement 1701. Also, section 11(d) of the Charter of Rights and Freedoms from the Constitution Act 1982 guarantees that anyone charged with an offence has the right to be tried "by an independent and impartial tribunal".

17. How are members of the judiciary typically appointed?

Appointment

The federal government appoints all judges of the Supreme Court of Canada, the federal courts, the provincial superior courts, and the provincial courts of appeal. The provincial and territorial governments appoint the judges of provincial and territorial courts without inherent jurisdiction.

Qualifications

The primary qualification is that all judges must have practised as lawyers for at least five to 10 years before appointment, depending on the jurisdiction. Other qualifications reflect the preferences and priorities of the advisory bodies that recommend particular candidates to the federal and provincial Cabinets. Typical considerations include merit, competence, and the promotion of diversity.

Litigation (civil and criminal)

18. Do the courts use an adversarial, non-adversarial or other system?

Answers for Questions 18 to 27 apply specifically to Ontario. Other common law jurisdictions in Canada have similar rules and procedures.

The courts in Canada use an adversarial system. Judges make decisions based on evidence presented by the parties. While they can ask questions of a witness during a hearing, the judge is not permitted to descend into the fray and take on the role of counsel.

19. Who is responsible for gathering evidence?

In criminal cases, the burden of proof rests with the Crown (the state), represented by a prosecutor from the Ministry of the Attorney General. The Crown must call any evidence necessary to prove the charges against the accused beyond a reasonable doubt.

The accused is not obliged to call evidence of their own, but in many circumstances defence evidence may be necessary to raise reasonable doubt. The accused cannot be required by the prosecution to give evidence.

In civil cases, each party is responsible for gathering their own evidence.

Judges do not gather evidence independently in either criminal or civil cases.

20. Is evidence independently examined before a trial?

In civil cases, each party is responsible for examining the evidence produced by the opposing party. The process for examination of evidence depends on the method by which the proceedings are brought. For instance, in Ontario, a party can choose to commence the proceedings by way of action or application. An action commences by a statement of claim (or notice of action, counterclaim, crossclaim and so on), and is followed by an exchange of documents and ends with a trial.

For proceedings which are brought by way of action, each party is entitled to an examination for discovery before the trial, the purpose of which is to clarify the claim and the defence and examine each other's evidence that is intended to be used in court. Discovery is conducted orally, under oath, and the transcript of the discovery can be used as evidence at trial. Individuals who can be examined in the discovery process are limited to the parties themselves or, in cases where the party is a corporation, the director, officer, or employee of that corporation.

An application, commenced by a notice of application, is for special types of relief such as the interpretation of a contract or a remedy under the Canadian Charter of Rights and Freedoms. Under an application, evidence is tendered in the form of an affidavit, and the opposing party is entitled to cross-examine the affiant.

In criminal proceedings, the state must disclose all materials and information in its possession or control that was created in the course of the investigation of the accused, regardless of whether the evidence is inculpatory or exculpatory, and regardless of whether the state intends to introduce the information as evidence. The state must provide disclosure as soon as defence counsel requests, typically in writing without the need to obtain the court's approval. Generally, the accused has no disclosure obligation, subject to a few exceptions. For instance, the defence must provide the state with a copy of its expert report (or a summary if the report is not available). Defence counsel must also give notice of their arguments when seeking relief under the Charter.

Where an accused is charged with an indictable offence (felony), a preliminary inquiry is generally conducted before a criminal trial by a judge or a justice of peace, to ensure that the state has sufficient evidence to put the accused on trial. For the defence, the preliminary inquiry is similar to a discovery in a civil proceeding, where the accused can obtain information as to the nature and details of the state's case. Witnesses can be called at the preliminary inquiry, and evidence can also be taken on the record outside of the hearing with consent from the court. The accused has the opportunity to cross-examine the state's witnesses. Further, written or recorded statements that are otherwise inadmissible, but are "credible and trustworthy", are also admissible at the preliminary inquiry, provided that the party seeking to tender the evidence gives reasonable notice and a copy of the evidence to the opposing party.

21. Are trials/hearings open to the public?

Civil law

Civil trials are open to the public, unless the court orders otherwise.

Criminal law

Criminal trials are open to the public, unless the court orders otherwise under special circumstances, such as for national security reasons.

22. Are reporting restrictions typically imposed in relation to a trial?

Civil law

In civil law, publication bans can be ordered at any stage of the proceeding. These bans are mostly governed by common law. Courts have the authority to order publication bans where it is necessary to prevent a serious risk to the proper administration of justice and where reasonably alternative measures will not prevent the risk. For example, a *voir dire* (a separate hearing within a trial where evidence must be called to resolve a preliminary question of fact before the judge can make a ruling) in a civil jury trial is restricted from being published or broadcast until deliberations begin. In addition, judges can restrict coverage to protect the safety of a witness or a child, or certain proprietary information. The threshold for a publication ban order in a civil action is high.

Criminal law

Pre-trial. Section 539 of the Criminal Code allows defence counsel to seek an order prohibiting the publication of any evidence from the preliminary hearing. The purpose of seeking a publication ban is to protect the accused's right to a fair trial and untainted jury. The publication ban order stays in effect until the accused is discharged, if the charges are stayed or when the trial ends. Publication of a confession of the accused, or the fact that a confession was tendered, is prohibited, even in the absence of a publication ban order. Similarly, Section 517 of the Criminal Code gives a justice of the peace the power to delay any broadcast or publication of the bail proceedings. The publication ban order covers the evidence taken, the information given, or the representations made and the reasons, if any, given or to be given by the justice. The decision to release or detain is permitted to be published, without reference to the reasons for the decision. A judge can also order a publication ban on the evidence disclosed at a preliminary inquiry in certain sexual offences cases.

During trial. Under subsection 486.4 of the Criminal Code, a justice of the peace or judge can prohibit publication, broadcasting, or transmission of any information that could identify the complainant or a witness for certain offences. These requests are usually sought by the prosecutor to protect the witness or the complainant. Subsection 648(1) of the Criminal Code imposes a publication ban on any information about a portion of the trial for which the jury was not present. The order remains in force until after the jurors retire to begin their deliberations.

Post-trial. Aside from temporary publication bans (such as provided for in section 517 of the Criminal Code), all publication ban orders remain in effect even after the trial.

23. What is the main function of the trial and who are the main parties to it?

The main function of the trial is for a judge and/or jury to independently examine evidence in order to determine an outcome. Witnesses are first examined by the party introducing the witness, then cross-examined by the opposing party, and can be re-examined. Main parties include the judiciary, the parties (plaintiff, defendant and third party in civil proceedings, the state and the accused in criminal proceedings), legal counsel for each party, and the jury if applicable.

24. What is the main role of the judge and counsel in a trial?

Role of judiciary

Judges are impartial decision-makers who provide an independent and unbiased assessment of facts and the law applicable to those facts, in order to determine whether a civil claim has been made out, or whether the accused is guilty in a criminal proceeding. Judges do not interrogate witnesses, but are free to ask questions during the trial.

In a criminal proceeding, the presiding judge at the preliminary inquiry who determines whether the state has sufficient evidence to put the accused on a trial will be different from the judge ultimately appointed for the trial. The accused can make an application for recusal where they can demonstrate that there is a reasonable apprehension of bias on the part of the trial judge. The fact that a judge made certain findings in a *voir dire* may not be sufficient to give rise to a reasonable apprehension of bias. Sometimes, judges assigned for a bail application or a judicial pre-trial involving the same allegations against the accused can choose to recuse themselves from hearing the trial, even if a reasonable apprehension of bias has not been raised, provided that there is another judge available to conduct the trial.

In a civil proceeding, the judge who conducts a pre-trial conference will not preside at the trial.

Role of legal counsel

Legal counsel are advocates for the party that they represent and deliver opening and closing statements and introduce evidence by conducting examinations in chief and cross examinations. Legal counsel are also officers of the court, therefore they have a duty to uphold the integrity of the judicial process and the administration of justice, both inside and outside the courtroom.

25. To what extent are juries used?

Civil law

A jury is not available for proceedings commenced by way of application. For actions, the parties may decide whether the trial will proceed before a judge and jury, subject to each province's statutory provisions regulating the availability of a jury trial. A jury can determine issues of fact and/or damages. A jury trial is not available for certain actions (including for injunctions, a partition or sale of real property, a foreclosure or redemption of a mortgage, specific performance of a contract, declaratory relief or other equitable relief). The party opting for a jury trial must deliver a jury notice to the opposing party. There are also situations where a jury trial is not prohibited by statute but where they are nevertheless deemed inappropriate by the court, such as situations where the case involves complex issues of law, and few issues of fact.

The composition and selection of juries vary between provinces. In Ontario, a jury is composed of six persons selected in accordance with the Juries Act. Those ineligible to serve as jurors include:

- Those under 18.
- Anyone who has attended court for jury duty in the previous three years.
- Federal and provincial cabinet ministers and legislators.
- Lawyers and students-at-law.
- Health practitioners and veterinary surgeons actively engaged in practice.
- Coroners.

- All law enforcement officers.
- Those convicted of certain criminal offences.

Prospective jurors can make a deferral or excusal request prior to the summons date. Alternatively, they can also let the judge know if they have difficulties attending court on the date of their summons.

The names of the six prospective jurors are randomly drawn. Counsel for both parties can challenge any of the jurors. The challenged juror is replaced by another randomly selected juror. A party can also bring a motion to strike the jury for strategic reasons.

Only five out of the six jurors need to agree on the verdict, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer.

Criminal law

For indictable offences listed in section 553 of the Criminal Code (which are less serious offences), the accused is automatically tried by the provincial court and will not have an election for a jury trial.

Indictable offences listed in section 469 of the Criminal Code (which include some of the most serious offences such as murder), are presumptively tried by a judge sitting with a jury, unless the Attorney General consents to have the offence tried by judge alone.

For all other indictable offences, the accused can elect to be tried either with or without a jury in the superior court (such as, in Ontario, the Superior Court of Justice). In some cases, the accused can be able to elect to be tried by a judge and jury under certain provisions of the Criminal Code. The accused can have the option to re-elect, either with or without the consent of the prosecutor, depending on the timing of the re-election. Notwithstanding any elections or re-elections by the accused, the Attorney General can require a jury trial where the offence is punishable by more than five years' imprisonment, provided that a preliminary inquiry is held (section 568, Criminal Code).

The initial selection of prospective jurors in a criminal proceeding is the same as the civil proceeding. Jurors are randomly drawn by the clerk of the court from the panel of prospective jurors until there is a sufficient number of prospective jurors to provide a full jury. The trial judge will decide whether to have one or two alternative jurors and 12 sworn jurors, or to have 13 or 14 jurors sworn instead. A prospective juror can be excused from jury duty at any time prior to the start of the trial on the grounds of:

- Having a personal interest in the case.
- Having a relationship with the judge, the state, the accused, counsel for the accused or a prospective witness.
- Personal hardship or any other reasonable cause that warrants excuse.

The accused and the state will each have a number of peremptory challenges (objection to the juror without reason) depending on the offence being tried. Alternatively, each party can also challenge the juror for cause. The challenge for cause procedure allows the party seeking to challenge to question the potential jurors in situations where there could be significant prejudice. The two most recently sworn jurors will determine whether the challenge for cause has been made out. The state and the accused take turns in challenging or accepting a juror until all the jurors are selected.

26. What restrictions exist as to the evidence that can be heard by the court?

Certain evidence may be inadmissible in court. For example, evidence offered solely to show the general bad character of the accused is inadmissible in a criminal case, unless the accused has already put character at issue. Similarly, in civil proceedings,

character evidence is not admissible by either side, with the exception of similar fact evidence, which is a type of character evidence used to prove that a person engaged in certain conduct based on past conduct so strikingly similar that it must be more than mere coincidence.

Parties are not permitted to ask questions or lead evidence solely to bolster the credibility of their own witness, unless it is for exceptional purposes such as re-direct examination (where counsel can ask their witness to clarify the testimony given during cross-examination) or expert witness examination.

Hearsay evidence, or statements made out of court tendered for the truth of their contents, is presumptively not admissible. There are a number of specific judicially-recognised exceptions such as spontaneous declarations and statements against interest. Canadian courts have also adopted a principled approach to determine the admissibility of hearsay evidence, whereby the evidence avoids the rule against hearsay if a statement is necessary, reliable, and has probative value outweighing its potential for prejudice. In civil proceedings, hearsay statements made in an examination for discovery are admissible as an admission against interest if the statement is introduced by the opposing party.

Evidentiary rules are in place to ensure that the role of the jury has not been usurped by the introduction of unnecessary or unreliable evidence. For instance, credibility evidence is presumptively inadmissible because the jurors are competent to determine the credibility of a witness on their own without external assistance. In addition, the admissibility of a hearsay statement is determined in a *voir dire* to show that the statement meets the criteria of necessity and reliability. The evidence adduced in a *voir dire* cannot be applied to the trial unless both counsel agree to it. Proper jury instruction must be given in circumstances where evidence is ruled inadmissible.

27. Which party has the burden of proof in a trial and at what standard is this burden met?

Civil law

Typically, the plaintiff bears the burden of proof and the standard is the balance of probabilities.

Criminal law

The Crown bears the burden of proof and the standard is beyond a reasonable doubt.

Some defences have a reverse onus, requiring the accused to prove the defence on a balance of probabilities. Similarly, an accused claiming a breach of the Charter of Rights and Freedoms, has the onus of establishing the breach on a balance of probabilities.

28. What verdicts can the court give?

Civil law

The court can rule in favour of the plaintiff or dismiss the claim by ruling in favour of the defendant.

Criminal law

The court will give a verdict of guilty or not guilty (in which case the accused will be acquitted and released).

29. What range of penalties/relief can the court order upon a verdict?

Civil law

The court can order monetary relief, declaratory remedies, and interlocutory or permanent injunctions.

Criminal law

When the accused is found not guilty, the accused is to be acquitted and released immediately.

When the accused is found guilty, the accused is convicted of the offence and sentenced. The sentence may be one or a combination of different penalties, including a fine, restitution, probation, community service, or imprisonment, depending on the penalties provided for in the legislation creating the offence. For less serious indictable offences, the court has the option of discharging the accused, either absolutely or conditionally, in which case the accused is not considered to have been convicted.

ONLINE RESOURCES

Canadian Department of Justice

W <http://laws-lois.justice.gc.ca/eng/>

Description. Official website of the Canadian Department of Justice, with links to Canada's constitutional documents and consolidated federal laws. Information is up to date and considered official.

Parliament of Canada

W www.parl.gc.ca/Default.aspx?Language=E

Description. Official website of the Parliament of Canada, with links to the House of Commons, Senate, and bills before Parliament. Information is up to date.

Ontario Ministry of Attorney General

W www.attorneygeneral.jus.gov.on.ca/english/justice-ont/lawsuits_disputes.php

Description. Official website of the Ontario Ministry of Attorney General, with general information on civil lawsuits. Information is up to date.

Criminal Code of Canada

W <http://laws-lois.justice.gc.ca/eng/acts/C-46/>

Description. Online version of the full *Criminal Code of Canada*. Information is up to date.

Canadian Legal Information Institute

W <https://www.canlii.org>

Description. This site provides access to a virtual library of Canadian legal information, and includes both legislation and decisions of courts and tribunals from across the country.

Practical Law Contributor profiles

Christopher Somerville, Associate

Affleck Greene McMurtry LLP

T +1 (416) 360-2838
F +1 (416) 360-5960
E csomerville@agmlawyers.com
W www.agmlawyers.com

Wendy Sun, Associate

Affleck Greene McMurtry LLP

T +1 416-360-1485
F +1 416-366-5960
E wsun@agmlawyers.com
W www.agmlawyers.com/

Professional qualifications. Ontario, Canada, Barrister and Solicitor.

Areas of practice. Civil and commercial litigation; securities litigation; administrative law

Professional associates/memberships. Advocates' Society

Professional qualifications. Ontario, Canada, Barrister and Solicitor.

Areas of practice. Commercial litigation; competition law

Non-professional qualifications. Bachelor of Environmental Studies

Languages. English, Mandarin

Professional associates/memberships. Advocates' Society; Federation of Asian Canadian Lawyers

