Community Legal Information

Empowerment Through Knowledge

A Guide to the Courts in Prince Edward Island

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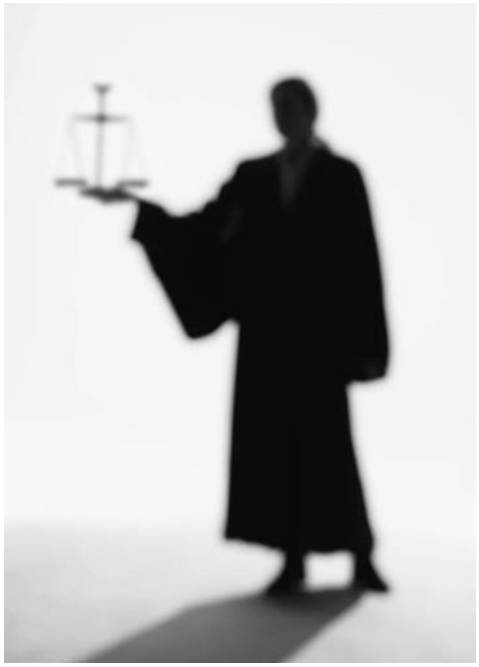
The Purpose and Structure of Our Court System

Court Participants and Procedures

Glossary – words in bold in the text are defined in the glossary…….

Part One: The Purpose of our Courts



This chapter answers basic questions about how our court system began and how court decisions are reached. This section also covers common law, statute law and the adversary system of justice. Finally, you'll see the impact of our constitution on our laws.

Why Do We Have Courts?
As civilizations grew, and large communities formed, people had conflicts with each other. Shared values and customs eventually became formal laws as disputes were settled. In time, courts were established to enforce those laws. The development of laws, with courts to enforce them, meant that similar actions were then treated in a similar way. People could understand, ahead of time, what the consequences of their actions would be.

Where Did Our Court System Begin?
The model for our court system in PEI comes from feudal England. Following the Norman conquest in 1066, the king began to hold court to listen to his subjects' complaints. Gradually, this responsibility was passed on to his advisers. They became judges in formal law courts: the Court of the King's Bench (for criminal cases); the Court of Common Pleas (for private conflicts) and the Exchequer Court (for monetary disputes). These courts are the basis of the English (and Canadian) court system.

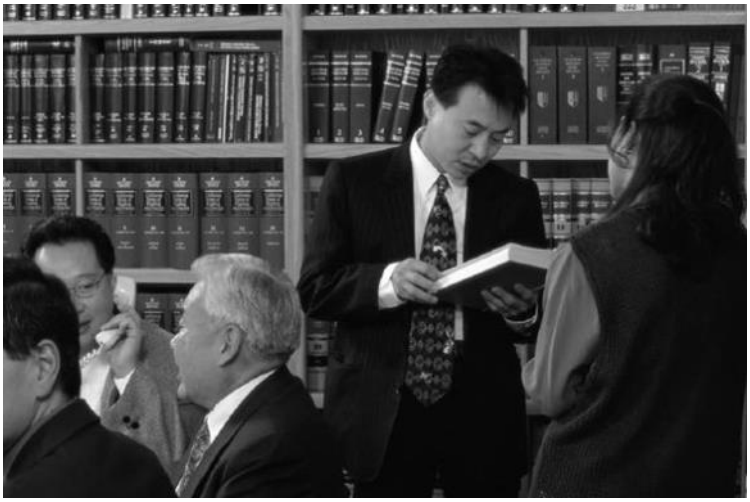
How Do Courts Make Decisions?
A court can make use of two sources of law: **common law** and **statute law**.

Common Law
When the King's courts were established in the 12th century, the judges decided individual cases on their merits and local customs. However, in time, as the judges compared notes, they began to decide similar cases in similar ways. They began to follow previous decisions. In this way, consistent and predictable decisions were introduced into law.

The law was no longer simply a matter of local custom. It became a system "common" to the whole country. This is what is meant by "common law".

Common law is judge-made law. It is a set of rules, or **precedents**, from hundreds of years of cases. The decisions in these cases are published in books called law reports. As these decisions add up, they gradually form principles of law. It's possible today for a judge to go back to a case decided in the 1840's to find the principle of law that decides the outcome of a case.

When a judge looks at past cases to decide a current case, he or she is applying one of the most basic principles of our legal system: like cases should be decided alike.



Statute Law
The other source of law that judges use to decide cases is statute law. Statute law is the law created by our elected governments. The Parliament of Canada creates federal laws (or statutes) for the whole country. An example of this is the ***Criminal Code of Canada***. The provincial legislature in Charlottetown creates laws for Prince Edward Island, such as the *Highway Traffic Act*. At the municipal level, local town and community councils enact bylaws about town matters, such as parking.

Some statutes put common law in writing. Others may change the common law. When there is no statute law on an issue, the courts use common law. Sometimes judges use both statutes and common law. For example, the wording of a statute might be interpreted in different ways. Then judges must look at previous cases (the common law) to make sense of the statute.

Our Courts
Courtrooms have a formal atmosphere. Judges and lawyers wear robes. Not so long ago, they wore wigs to court.

Most courts are open to the public. Allowing the public into the court is meant to ensure court decisions are open to public scrutiny. This way decisions are more likely to be fair and have the support of the public.

In certain cases, the courts can be closed to the public to protect the rights of individuals. The trials of young offenders are usually closed to the public. To protect the privacy of families, Family Court is closed to the public. The court can prohibit press coverage of preliminary criminal hearings in order to prevent the public from pre-judging an accused person.

Another feature of our court system is its independence, or impartiality. Once appointed, judges are difficult to remove from office. This allows them to be impartial and makes them less vulnerable to threats and bribes. A judge is an impartial decision-maker who comes to court with an open mind, ready to be persuaded by either side of a case.

The Adversary System of Justice
The adversary system is the structure of legal argument developed in our courts. It allows the judge to hear both sides argued vigorously. In the adversary system, each side tries to convince the court that its argument is the best. The adversary system is based on the idea that justice can be served by having opposing sides put forward their strongest case.

Judges rarely try to resolve differences between the opponents. The role of a judge in court is to ensure that all the procedures are properly followed, to listen to both sides of the case and to decide the outcome according to the law.

What Kinds of Cases Appear in Court?
In Canada, court cases are divided into two broad categories: civil and criminal.

Civil Law
Civil disputes always involve the private interests of individuals, groups or organizations, including the government. Civil law covers a wide range of disputes. A dispute may arise out of the common law or the interpretation of a particular statute, or both.

The courts only become involved in civil matters because an individual, group or organization has asked them to.

The participants in a civil suit are called "parties". The party starting a court action, or lawsuit, is known as the plaintiff or petitioner. The party accused of causing the damage or injury is known as the defendant or respondent.

Civil cases are generally identified by the names of the parties involved, with the plaintiff's or petitioner's name first. A case listed as MacDonald v. Arsenault might mean that MacDonald has filed suit for compensation against Arsenault claiming that Arsenault has caused him damage or injury.

The judge decides a civil case on "the balance of probabilities". If the evidence shows that it is more probable than not that Arsenault's dog bit the plaintiff MacDonald, the judge will order defendant Arsenault to pay MacDonald compensation.

Criminal Law
In a criminal case, it is the Crown (or state), representing the interests of the whole community, which accuses an individual or in some cases a company of committing a criminal offence. All criminal offences are written in a statute called The *Criminal Code.* Only the federal Parliament can designate what is a crime. Provincial and municipal governments create "quasi-criminal" offences, which have less serious penalties.

Because the court considers that society is injured by a crime, criminal actions are conducted in the name of Her Majesty the Queen who represents the interests of society. So if Arsenault was being charged with a criminal offence, the case would be known as Regina v. Arsenault. (Regina is the Latin word for queen.)

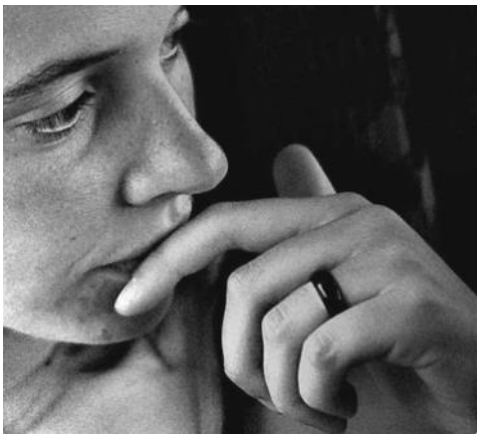
The lawyer representing the state or the community is called the Crown Attorney, Crown Prosecutor, Counsel for the Queen, or Crown Counsel. This lawyer **prosecutes** the case.
In a criminal case, the burden of proof is on the Crown. The Crown Attorney must present evidence in court that establishes the guilt of the accused beyond any reasonable doubt.

This is different from a civil action where the plaintiff only has to prove his or her case according to a balance of probabilities. The accused person is entitled to the benefit of reasonable doubt, because the consequences of convicting an innocent person are very serious. A person charged with a criminal offence will have a criminal record if convicted.

Most criminal offences are written in a book called the *Criminal Code of Canada*. Other federal statutes such as the *Controlled Drugs and Substances Act* and the *Fisheries Act* cover criminal offences such as possession of a narcotic or fishing lobster without a license.

Certain provincial statutes such as the *Liquor Control Act*, the *Highway Traffic Act*, and municipal bylaws such as parking regulations create offences known as **quasi-criminal offences**. Breaking a quasi-criminal law may result in a fine or a jail term even though the offender will not get a criminal record.

Sometimes criminal law and civil law overlap. For example, if Ms Smith was driving after drinking alcohol and her driving caused an accident, she could be charged with the criminal offence of impaired driving and she could also be sued in a civil action by the victims of the accident. Ms Smith might end up in two different courtrooms facing two different cases, one criminal and one civil, arising from the same incident.



Our Constitution and the Law

In order to understand the structure of our legal system, you have to know a little bit about the Canadian constitution. A constitution lays out the basic organizing principles for governing a country. Our constitution is a collection of written statutes and unwritten customs handed down through the years.

Under the original *British North America Act,* which dates from Confederation in 1867, powers to make laws were divided between the federal government and the provinces. Each division of government authority is called a **jurisdiction**.

The federal government was given the power to pass criminal laws and decide criminal court procedure. This is why we have a single set of criminal laws for the whole of Canada. The provinces were given the power to pass laws concerning "property and civil rights". That is why the provinces pass laws about buying or selling a house and about human rights.

Another section of the *British North America Act* gave the provinces the responsibility for the administration of justice within their own province.

Our Canadian constitution has undergone a dramatic change in recent years. Under the *Constitution Act, 1982*, the Parliament of the United Kingdom ceased to have any role in Canadian affairs. Now our constitution can only be changed if the federal and provincial governments agree.

An important addition to our constitution is the *Canadian Charter of Rights and Freedoms*, which guarantees certain democratic, legal and equality rights for all Canadians. Any law that is inconsistent with the Charter can be declared invalid by the courts. Since the Charter was introduced, the courts have been examining which laws may actually conflict with it.

In this chapter you've seen that when we talk about the courts interpreting the law, we're actually describing something quite complex. "The Law" is not a single entity. We have the common law, which we've inherited from England and further developed in this country. We have statute law, passed by legislation. Finally, we have the Constitution, which spells out the responsibilities of the federal and provincial governments in passing laws and which, under the Charter, guarantees us certain rights and freedoms.

You have seen that court cases can be divided into two broad areas: civil law and criminal law. Each area follows different procedures in order to deal with different kinds of legal problems.

You have also seen that our court system uses an adversary system of justice: each side puts forward the best evidence and arguments it can. The judge, acting as an impartial decision-maker, then determines the facts in the case and applies the law to those facts.

Finally, you have seen that our courts are open to the public, so that each of us can go along and see if the rights of the individual are being protected. One of your rights as a citizen is to be a court watcher. There are exceptions to this.

In order to really understand what is going on in court, you need to know something about the structure of our court system.

The Paper Process of the Law

Written documents are an important part of the legal process. In a civil action, the plaintiff prepares documents detailing the claim and describing the amount that he or she is seeking in compensation. The defendant also produces a document, outlining his or her position about the claim.
Documents are also important in a criminal proceeding. For example, the accused may make a statement, which can be introduced as evidence in court.

The paper process is essential, because it allows the various parties in the case to have the same information. It ensures the system's consistency, objectivity and rationality. Documents are used to begin an action, to bring witnesses into court, to present facts and to settle a case. It means that everyone involved doesn't have to gather in the same room every time one of them has something to say – paperwork can be exchanged instead.

Part Two: The Structure of our Court System

This chapter provides a quick tour of the court system, looking at the different levels of courts and the work that they do.

Why Do We Have Different Levels Of Courts?
Our court system allows for the law to be applied in the same way across Canada. Generally speaking, the least serious cases are dealt with at the lowest level of courts, the more serious cases go to the middle level, and the most serious cases go to the highest courts. The Supreme Court of Canada is the highest court in Canada. It is this court that unifies our legal system. All of the other courts are bound to follow what it decides.

The hierarchy of courts means that it is possible to appeal a decision. If we had only one level of courts, people who felt their cases had been improperly decided would have nowhere to go. In our system, the higher courts can change a lower court's decision on an appeal.

Each level of court has a specific area of authority, called its jurisdiction. The procedures for deciding which court has jurisdiction in a civil case have been set down by the provincial legislature. The federal Parliament has decided which courts will try the various kinds of criminal cases, and has established other courts to deal with matters within federal jurisdiction, such as taxation and immigration.

Each level of court also has its own rules for procedure. These rules cover the kinds of documents that must be used to start an action, the time limits that apply, and so on.

The Courts of Prince Edward Island

In PEI, all court hearings are open to the public unless the court orders otherwise. Sometimes a court hearing is not open, in order to prevent serious harm or injustice to a person involved in the case. Most documents filed in civil proceedings can be obtained from the court for a fee. However, a judge can order that a document be sealed for confidentiality.

Provincial Court
In criminal matters, there are certain offences over which Provincial Court has absolute jurisdiction. This means that the accused person has no choice in which court he or she will be tried. There are other criminal offences where the accused may elect to be tried in either Provincial Court or in the Supreme Court. There are no jury trials in Provincial Court. In Prince Edward Island, Provincial Courtrooms are found in the courthouses at Charlottetown, Summerside and Georgetown.

The Provincial Court on Prince Edward Island is served by three judges appointed by the provincial government. These judges must be lawyers in good standing with the Law Society of Prince Edward Island for at least five years before their appointment.

Provincial Court Judges are addressed in court as "Your Honour". One judge serves as the Chief Judge of the Provincial Court. The cases heard in Provincial Court involve criminal law or law that is referred to as quasi-criminal, such as offences under the provincial *Highway Traffic Act*. Provincial Court Judges also hear cases relating to federal statutes, such as the *Fisheries Act* or the *Controlled Drugs and Substances Act.*

The atmosphere in Provincial Court is less formal than the atmosphere in the Supreme Court. Lawyers appearing in Provincial Courts do not have to wear the black barristers' robes that must be worn in Supreme Court.

An appeal of a decision from a Provincial Court Judge will be heard in either the Supreme Court or the Court of Appeal depending on the nature of the offence. If there is an appeal from a **summary conviction offence** or less serious offence, the appeal will be heard by one judge of the Supreme Court. If there is an appeal from a conviction on an **indictable offence**, a serious offence, the appeal will be heard by three judges of the Court of Appeal.

Youth Court

On PEI, we also have a Youth Court which is set up under the federal *Youth Criminal Justice Act*. Our Youth Court sits weekly and is presided over by one of our three provincial court judges. Young people who are 12 years or older but under the age of 18 appear in Youth Court. At age 18 a person becomes an adult in the eyes of the law, and goes to the adult court system. The anonymity of young people charged in Youth Court is protected by the court. Their names may not be published in the papers or broadcast on radio or television. This is unlike normal Provincial Court or Supreme Court hearings where the accused's name may be published unless the judge orders a publication ban. A judge can allow the publication of the young person's name if he or she deems the young person to be a danger to public safety.

The Supreme Court of Prince Edward Island

The Supreme Court of Prince Edward Island is a superior court with the authority to hear civil and criminal cases. The Supreme Court has five judges, one of whom is named as Chief Justice. Supreme Court judges are appointed by the Prime Minister of Canada.

The Supreme Court of Prince Edward Island sits in Charlottetown and Summerside. There are two regular sittings of the Supreme Court each year for criminal and civil jury trials in each county.

For all other non-jury civil and criminal cases, the Supreme Court sits on a regular basis throughout the year. Normally, all proceedings in the Provincial and Supreme Courts of Prince Edward Island are open to the public, with the exception of Family Law cases. Cases in Supreme Court are heard by one judge.

While in the court room, judges of the Prince Edward Island Supreme Court are addressed as "My Lord" or "My Lady", "Your Lordship" or "Your Ladyship". This is a tradition which we have adopted from Britain.

The Supreme Court consists of four different sections:

- An **Estates** Section which deals with wills and estates.
- The **Family** Section which deals with marriage, divorce, property rights of spouses, support obligations, custody of children and other family matters.

- A **Small Claims** Section which has jurisdiction over all cases involving a debt or demand less than $16,000.00.
- The **General** Section which has jurisdiction over everything not covered by the other sections (both civil and criminal matters and some appeals from Provincial Court).

Court of Appeal
The Court of Appeal is the province's highest level court. The Chief Justice of PEI and at least two other judges sit together to hear appeals from decisions of the Supreme Court and sometimes directly from Provincial Court. There will always be an odd number of judges hearing an appeal. If the Chief Justice is not available, the next senior judge will act in his or her place. No judge sits on an appeal of their own decision.

In certain circumstances, permission must be obtained from the Court of Appeal before it will hear an appeal from the court below. The Court of Appeal is considered a lawyers' court because the accused or the parties involved in the dispute rarely present their own cases to the court. This is because appeals are very technical and are made on points of law, not on the facts of the case.

The Court of Appeal usually reviews the written transcript of lower court proceedings, rather than calling witnesses. Appeals can be based on the judge's decision, the sentence imposed, the facts of the case or, in civil cases, the amount of compensation awarded. The provincial government can also refer certain matters for decision directly to the Court of Appeal.

The Federal Courts

The Federal Court of Canada
The Federal Court is based in Ottawa, but its judges travel about the country "on circuit". The Federal Court deals with civil matters involving disputes between individuals, groups or provincial governments and the federal government of Canada. It also hears cases in specialized areas of federal law, including patents, customs and excise, immigration and maritime law.

The Federal Court is divided into a Trial Division and an Appeal Division. The Trial Division hears the initial dispute and its decision can then be appealed to the Appeal Division. Some cases (for example, Immigration Board or Tax Court cases), by-pass the Trial Division and go directly to the Appeal Division. Federal Court decisions can be appealed to the Supreme Court of Canada.

There is also the Tax Court of Canada, the Court Martial Court and the Court Martial Court of Appeal.

The Supreme Court of Canada
The Supreme Court of Canada was established in 1875 and is the final appeal court for the whole country. It can rule on all questions of law, including constitutional issues.

The Chief Justice of the Supreme Court and eight other judges head the judicial hierarchy in Canada. They are appointed by the federal cabinet and at least three of the nine justices must be from Quebec. This is because the court must hear appeals from Quebec courts under the Quebec Civil Code, which is different from the English tradition of common law found in the rest of Canada. Quebec's Civil Code comes from the French tradition which was based on Roman Law. The Quebec Civil Code has remained a separate system of law since 1763.

Other justices in the Supreme Court of Canada represent the Atlantic Provinces, Ontario and the West.

Cases that go to the Supreme Court are heard by three, seven or all nine members of the court.

The Supreme Court of Canada is very formal. The justices and staff are specially gowned, as are the lawyers who appear before the court. Like the PEI Court of Appeal, it is a lawyers' court because the accused or the parties involved in disputes rarely present their own cases to the court.

The Supreme Court of Canada hears a limited number and type of appeals. The court will normally hear an appeal only if the case involves an important application of the law that has national significance. Sometimes the court will hear disputes between provinces or between the provinces and the federal government.

The federal government can refer matters to the Supreme Court of Canada to resolve. Most often, these would deal with constitutional issues concerning the validity of a particular law.

Supreme Court of Canada decisions must be followed by all the other courts in Canada. These decisions usually establish legal principles of national importance.

Part Three: Who's Who

This chapter reviews the roles that judges, juries, lawyers, court staff and witnesses play in court.

The Courtroom Setting

The basic courtroom is a formal room where trials can be heard in a dignified atmosphere. Judges sit at a raised bench at the front of the room. A picture of the Queen or the provincial coat of arms behind the bench symbolizes the authority given to judges. In Prince Edward Island courts, a railing separates the public gallery from the area where the trial is conducted.

Seating arrangements in Provincial Court and the Supreme Court differ. This is mainly because the higher courts must accommodate juries. But the basic shape of the courtroom has developed so that the main participants -- judge, jury, accused, and witnesses -- can face one another. Lawyers are placed in the middle of the room so that they are free to question witnesses and speak to the judge and jury. This arrangement also allows everyone to hear what is being said and allows court reporters to get an exact record of the proceedings.

All Prince Edward Island courts are **courts of record**. This means that it is possible to get transcripts of the proceedings of most cases. The press is normally permitted to print the details of court cases in the newspaper. However, television cameras and tape recorders are not yet allowed inside the courtroom.

Judges
In court cases where there is no jury, the judge is the "finder of fact". This means that the judge has to decide what really happened. Only when the judge has fulfilled the role of "finder of fact" can he or she act as "finder of law". This means that the judge then has to decide how the law applies to these facts and has to make a judgment.

Our judicial system depends on the ability of judges to make independent, unbiased decisions. Judges cannot become involved in politics or private business. Judges represent the justice system and so their behaviour must be highly moral and beyond reproach.

Judges are expected to be cautious when they discuss past cases. They do not comment outside the courtroom about cases before them. If judges are aware of information that affects their attitude towards an accused or a party in a civil case, they must remove themselves from being the judge in the case.

If a judge loses the ability to make impartial, independent decisions, he or she can be removed from office.

Juries
Although most cases in P.E.I. are decided by a single judge, some cases are heard by a jury. A jury is a group of adult Canadian citizens, who have been chosen for jury duty. Juries of 12 people sit on serious criminal cases such as murder or treason. There are also other criminal cases in which the accused can "elect" or choose to be tried by a jury. Like a judge, jurors are expected to make up their minds independently and are not allowed to discuss the details of a case outside the courtroom.

In court, the role of the jury is to be the "finder of fact". The judge is the "finder of law". This role of the jury reflects our society's belief that the average adult has learned the various things that indicate whether or not another person is telling the truth.

The judge gives the jury some assistance in understanding the case. For example, a judge will sum up the evidence and explain points of law. Also, since the rules of evidence are complex, the judge will decide what evidence can be placed before the jury and what evidence must be kept out. In a criminal case, a judge will sometimes decide that the Crown has not presented enough evidence on all the points necessary to convict an accused, and will direct the jury to return a verdict of not guilty or dismiss the charge.

If the jury finds the accused guilty, it is the judge who decides what sentence will be imposed.

Lawyers
The Canadian constitutional system has created a complex network of federal, provincial, and municipal laws. Lawyers are often needed to sort these out. A lawyer has specialized knowledge to help people solve their legal problems.

Often these problems can be resolved before they go to court. A lawyer has a duty to obey his or her client's wishes as long as they are compatible with the standards of conduct set down by the legal

profession. In court, a lawyer has an obligation to introduce all the evidence and all of the legal arguments for the client.

Lawyers are also officers of the court and must help the court reach an honest and just decision. In court, they call one another "my friend" or "my learned friend" because they are both lawyers despite the fact that they may be adversaries in the present case.

In criminal cases, accused people can defend themselves. In civil disputes, parties may also represent themselves in court, especially in small claims court. Most people choose to have a lawyer represent them in order to put forward the best possible case.

Court Staff
The people who are responsible for the day-to-day operation of our courts play an important part in the administration of justice. Court clerks assist the judge in the conduct of a case. They look after documents and records, book the case and swear in witnesses. In Prince Edward Island they also make sure that an accurate record is kept of court proceedings. Sheriffs are responsible for court security and looking after juries and prisoners.

Witnesses
One of the best ways to prove the facts in a case is to **subpoena** a person who has special knowledge of the case. If subpoenaed, you must come to court and give evidence, or testify, under oath. Most witnesses are "compellable", which means that they have to obey this court order. However, accused persons cannot be made to take the stand and testify against themselves.

A witness must be "competent" which means they must be sound in mind and mature enough to be able to tell the court the facts. There are also certain rules which restrict the kinds of questions witnesses can be asked.

Part Four: What Happens in Court: Civil Procedure System

The rules and procedures governing civil trials are complex. The following is a summary of the general steps involved in starting a civil action and carrying it through to trial in the higher courts.

Starting the Action
At the beginning of a civil case, the parties exchange informal letters. If the matter is not settled, various documents pass through the court registry from one party to another. This exchange of documents in the

early stages of a civil case allows both sides to understand what's going on and to weigh the strength of each other's case. Many civil actions do not go beyond this.

In fact most often a compromise is reached before a civil suit goes to trial. This is very different from a criminal action where the victim of a crime will probably appear as a witness for the Crown, but has no personal control over the proceedings, and cannot stop them.

Proving the Claim
The plaintiff in a civil case does not have to prove the claim beyond a reasonable doubt, as the Crown must do in a criminal case. Instead, the court makes a decision "on a balance of probabilities." The court must find which side's evidence is more probably the truth, and apply the law to that.

The Civil Trial
The lawyer for the plaintiff makes an opening statement and calls witnesses to support the plaintiff's position.

After each witness gives evidence for the plaintiff, the defendant's lawyer has a chance to cross-examine them. Following this, the plaintiff's lawyer may re-examine the witness on any new matters which may have been raised by the defendant's lawyer during cross-examination. This is called a rebuttal.

At the end of the plaintiff's case, the defendant's lawyer can call witnesses to support the defendant's position. They are cross-examined by the plaintiff's lawyer. The defendant's lawyer is given the opportunity to re-examine the witnesses on new matters that may have been raised by the plaintiff's lawyer during cross-examination. After closing statements by the two lawyers, the judge or jury gives a verdict. A civil suit may be stopped at any time if the parties reach an out-of-court settlement. If they are unable to agree, the judge will decide the matter for them. In certain emergencies, or when the opposing side consents or fails to put up a defence, the court can look at the documents presented by the plaintiff's lawyer and grant an order or give judgment without a trial.

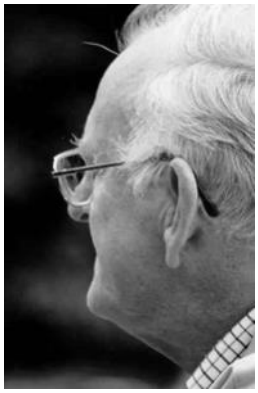
There are also some civil matters where, once the court has become involved in the action, an agreement by both sides may not be enough. For example, child custody and child support agreements may be reviewed by the court to ensure that the arrangements agreed to by both sides are adequate.

Part Five: What Happens in Court: Criminal Procedure

The rules and procedures covering criminal cases and those provincial offences called quasi-criminal offences are found in both the common law and statutory law. Annotated versions of the *Criminal Code of Canada* contain the wording of the offences and procedures and short descriptions of how the law has been applied in specific cases.

First Appearance
In most cases a person charged with an offence first appears in court before a Provincial Court judge. The accused is formally charged with the offence and asked if the charge is understood. At this stage, the court is concerned with three issues. If a choice is possible, what kind of court does the accused want to hear the case? If the Provincial Court has jurisdiction in this matter, how will the accused plead to the charge? If the accused is in custody, should he or she be released while awaiting trial?

Who Will Try the Accused?



The *Criminal Code* sets out the procedure that determines which courts try offences. There are three categories of offences: summary conviction offences, indictable offences, and **hybrid offences**, which are **mixed or dual procedure offences**.

In order to deal with these differences, the *Criminal Code* outlines different procedures for summary conviction and indictable offences. Hybrid offences are ones in which the Crown Attorney, or prosecutor, can proceed either way - by summary conviction or **indictment.** The consequences of proceeding by indictment may be more serious.

First Appearance (Summary Conviction Offence)

The accused is formally charged with the offence. This always happens in Provincial Court. The judge or court clerk asks the accused if he or she is ready to enter a plea. The accused can:

- plead guilty;
- plead not guilty; or
- ask for an adjournment, to seek legal advice.

If the accused pleads guilty, the judge may adjourn the matter to another date for sentencing, sentence the accused right away, or ask for a report to be prepared by a probation officer and set a later date for sentencing.

If the accused pleads not guilty, the judge will usually set a trial date.

If the accused asks for an adjournment, the judge will set another appearance date, in the near future.

If the accused is in custody, the first appearance may include a **show cause** hearing.

Provincial quasi-criminal offences, such as speeding or drinking under age, are tried in Provincial Court. All *Criminal Code* summary conviction offences such as disturbing the peace, and a few hybrid or mixed offences such as theft under $1,000.00 are also automatically tried in Provincial Court.

Indictable offences must be tried in Supreme Court. These include such offences as treason, piracy and murder. In the middle range of the scale are the hybrid offences which do not fall into the sole jurisdiction of either Provincial Court or Supreme Court.

If the Crown Attorney decides to proceed with indictment, the accused has a choice of courts. This choice is known as an "election". An accused who is charged with assault causing bodily harm, for example, has a choice of three court formats: Trial by Provincial Court judge, Supreme Court judge or Supreme Court judge and jury.

If a Provincial Court judge is chosen, the entire trial will be heard in Provincial Court. But if the accused chooses either of the other options there will normally be a preliminary hearing. In this case, the Provincial Court determines whether there is enough evidence to send the case on to a higher court.

The Plea

When the charge is read, the accused must decide whether to plead guilty or not guilty. If the trial is to proceed in Provincial Court, the accused may be asked to make this decision at the first appearance in court. The judge usually grants an adjournment of one or two weeks to allow the accused to seek the advice of a defence lawyer.

If the plea is "guilty", a sentencing hearing takes place. The Crown Attorney and the defence lawyer usually make recommendations about an appropriate sentence.

Sometimes a judge will refuse to accept a guilty plea if it appears that the accused does have a defence. In such cases the judge will enter a plea of not guilty and order a preliminary hearing or trial.

If the plea is "not guilty", the judge sets a trial date which is usually some weeks or months later. An accused who is not in custody is free to go about his or her business until that court date.

Release from Custody
Most people charged with minor criminal offences are not arrested by the police or are released shortly after their arrest on condition that they attend court at a later date. If the accused has been arrested and kept in jail, it is the Provincial Court judge who rules on **bail** or release from custody.

An accused person in custody has the right to a **show cause** hearing which determines whether the accused can be released before the trial, and on what terms. The "**judicial interim release**" laws set out in the *Criminal Code* give the court guidelines for the release of prisoners awaiting trial. The judge must order release unless the Crown Attorney can show why the accused should be kept in custody. However, people charged with very serious crimes or people already facing other charges have to convince the court that they should be released. The judge balances public risk against the principle that an accused person, who is innocent until proven guilty, should retain his or her freedom until conviction.

Often the accused is released on an **Undertaking to Appear** or a **Recognizance** with certain conditions attached. The accused may be ordered to report to the police or probation services at regular intervals, to avoid contact with certain people, to remain in the court's jurisdiction, and so on. A **surety** may also be required.

If the accused is not released, the court and the defence lawyer will attempt to get the earliest trial date possible in order to shorten the waiting period in jail. If the accused changes his or her mind and decides to plead guilty, the defence lawyer will try to get an early date for sentencing.

The Preliminary Hearing
A preliminary hearing or preliminary inquiry takes place when an accused who is charged by way of indictment chooses a trial in Supreme Court. The preliminary hearing is the first presentation of the Crown's case in court. Because the accused is considered innocent until proven guilty, the Crown must establish that there is enough evidence to justify a trial in Supreme Court. The accused does not have to enter a plea until the case goes to the higher court for trial.

If there is not enough evidence, the judge will discharge the accused. The accused is then free to go.

Proving the Charge at the Trial

At the trial it is up to the Crown Attorney to prove guilt beyond a reasonable doubt. If the Crown does not present the necessary evidence or if the defence succeeds in challenging the Crown's evidence, a judge or jury cannot convict.

A finding of not guilty may be based on the facts, or on a legal defence. Our criminal law tradition states that a guilty act must be accompanied by a guilty mind. A common legal defence, therefore, is the argument that insanity or intoxication made the accused not responsible for his or her actions.

In most first-degree murder trials, the Crown must prove that the accused planned and intended to murder the victim. But the defence lawyer may argue successfully that the accused was so drunk that he or she was unable to form an intention or plan to commit murder. This may result in a finding of second-degree murder or manslaughter, and a milder penalty.

The Criminal Trial

Criminal trials are similar in some ways to trials in civil courts. The Crown Attorney calls witnesses to prove the case against the accused and the defence lawyer has a chance to cross-examine them.

The Crown introduces evidence which is governed by strict procedural rules. Certain types of evidence are always excluded. Other types are excluded under particular circumstances. If either side disputes what information should be allowed, the judge may hold a **voir dire** to decide whether to allow it as evidence. In a jury trial, the jury will be sent out of the room during the voir dire and will only hear the evidence if the judge finds it acceptable.

Both the Crown Attorney and the defence must follow the rules of evidence when questioning witnesses. Neither the Crown nor the defence can ask leading questions of witnesses for its own side. A leading question suggests its own "yes' or "no" answer. Questions must allow witnesses to use their own words.

Leading questions are allowed when they are asked by the opposing side during cross-examination.

When the Crown has finished presenting its case, the defence may ask the court to dismiss the charge because the evidence is incomplete. The defence can also ask the judge to find the accused not guilty because the evidence is insufficient to establish the guilt of the accused beyond a reasonable doubt. If the judge denies the motion, the defence may call its own witnesses and the Crown may cross-examine them.

After the Crown and defence have finished presenting their case, the judge will hear closing arguments. If the accused has entered a defence by calling witnesses or testifying, the closing arguments for the defence must be presented first and the Crown has the last word. If the accused has not presented evidence, the Crown's argument is first and the defence follows.

If it is a trial by judge alone, the judge must decide whether the accused is guilty as charged, guilty of a lesser offence, or not guilty. If it is a jury trial, the judge sums up the case and instructs the jury on the law. Then the jury retires to decide the verdict.

If the accused is found guilty, the judge must then consider what sentence to impose. Broad guidelines for sentencing are set out in provincial statutes and the *Criminal Code*. The judge will also look at precedents, sentences passed by other judges in similar cases. Within these guidelines, a judge can hand out a wide range of sentences. Before deciding the sentence, both the Crown and the defence will make recommendations about what sentence is appropriate. The judge may delay the passing of sentence until a pre-sentence report or other assessment has been prepared by probation officers.

Conclusion

The court staff are public servants. When court is not in session, ask them what is happening. You have a right to know.

If you want further information, contact Community Legal Information at 902-892-0853 or 1-800-240-9798.

Glossary

Bail: This is the old term for the money an accused person promises to pay if she or he does not appear for trial. The word 'bail' is also commonly used to refer to the conditions that an accused person promises to obey from the time he or she is released after arrest, until the trial.

Common Law: The law based in decisions made by judges, or "judge made law". Originally it was the law based on the customs "common" to all England.

Court of Record: A court in which all proceedings are recorded word for word in a written record called a transcript.

Criminal Code: The federal statute that defines crimes, the maximum punishments for those crimes and the legal procedures for dealing with those crimes. The laws that make up the ***Criminal Code*** are passed by Parliament in Ottawa.

Estate: Usually property of a deceased (dead) person.

Hybrid Offence: A criminal offence that can go to court as either a summary conviction or an indictable matter. The decision is made by the Crown Attorney and is based on the seriousness of the offence.

Indictable Offence: The most serious type of offence.

Indictment: This is a formal procedure used to deal with the more serious charges. It allows for a judgement in higher court. Because of the more serious penalties for an indictable offence, the accused is granted wider protections, such as choice of a trial by judge and jury.

Judicial Interim Release: The legal procedure by which an accused person is released until trial, unless the Crown Attorney can show cause why the accused should be kept in custody.

Jurisdiction: The range of powers and/or territory over which a body may act. In the case of a court, jurisdiction concerns the type of case and the physical area over which the court has authority.

Mixed Offences: Another name for hybrid offences.

Precedents: Previously decided cases which are recognized as an authority for future cases.
Prosecute: to conduct proceedings in court against a person accused of a crime.

Quasi-criminal Offences: Provincial or municipal offences not covered under the *Criminal Code of Canada*. Examples are offences under the provincial *Highway Traffic Act* and *Liquor Control Act*. (quasi is Latin for 'as if'.)

Recognizance: The accused person's promise to pay a specific amount of money if he or she fails to comply with certain conditions laid down by the court.

Show Cause: A hearing at which the Crown Attorney has the opportunity to 'show cause' why the accused should be kept in custody until the trial date

Statute Law: The laws enacted by legislation.

Subpoena: A court order that requires a witness to attend court.

Summary Conviction Offences: Offences under provincial statutes and the less serious crimes in the *Criminal Code*. These matters are dealt with in Provincial Court.

Surety: A person who takes out a bond for a certain amount of money before a court on behalf of another person. The court makes this person responsible for making sure that an accused person appears in court, and abides by other conditions of behaviour imposed by the court. If the accused person doesn't comply, all or part of the bond is forfeit.

Undertaking to Appear: A document signed by an accused person promising to appear in court at a specified time and place. It may contain other promises too, such as requiring the accused to stay in the area, to report to police at regular intervals, or not to communicate with certain people. Breaking any of these promises may result in a further criminal charge.

Voir Dire: A trial within a trial, held to determine whether evidence can be admitted. In a jury trial, the jury will be sent out of the courtroom while both sides argue the case.

Community Legal Information
Empowerment Through Knowledge

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