Focus Questions

- What is law? Why do societies have laws?
- What are the historical roots of Canadian law?
- Who is responsible for law making in Canada?
- How are Canadian laws interpreted, applied, and enforced?

Chapter at a Glance

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Figure 1-1

Infinity and beyond? International treaties prevent any one nation from claiming space. But as more space stations are built, the “law of space” will become an important issue. Speculate as to who will make space law.
1.1 Introduction

Society is fascinated with the law. Laws are everywhere and control much of what you do and how you behave. If a sensational trial or legal case happens to be in the news, most people will be talking about it. Law is also a popular theme in books, television, and films.

Most people have had direct experience with the law or know someone who has. Because laws and legal issues affect everyone, it is important to know your rights and responsibilities under the law. It is also important to understand why Canada has so many laws and what some of them are. Every country has a history and culture that have shaped its laws and punishments. What is legal in one country is not necessarily legal in another. Studying a nation’s legal system is very much like studying its language. Law tells a great deal about its past. It also reveals current values and beliefs.

Canada is a democracy, which means that its citizens elect law makers who make laws that suit the majority of Canadians. The law is constantly changing to reflect changing values and beliefs. By voting, Canadians choose politicians to make laws that best suit their needs and opinions at that time. These elected officials control the law-making process and its interpretation and enforcement.

In this chapter, you will begin to learn the language and history of law, how laws are made, and how they are interpreted and enforced.

1.2 What Is Law and Why Do We Have It?

What would happen if a game such as hockey were played without rules? Some players might use violence because there would be no penalty for injuring another player. They would take advantage of other players during the game. Referees would be useless because they could not keep order without rules. The game would deteriorate into a series of fights and injuries, and the spectators would probably leave. In the end, violence rather than skill would win games. In fact, sports mirror real life: Without rules to govern relations between people, disorder and conflict would arise.

Similarly, clubs and organizations need rules to run meetings, to encourage open and honest debate among members, and to reach agreement (by voting or a show of hands) on important decisions.

Whenever people form groups, they need to make some rules. Rules and laws are necessary to keep peace and order because people do not agree with each other all the time. Without clearly defined rules, the only law might be the survival of the strongest.
Rules or Laws?

Rules of a game or an organization apply only to participants in the game or members of the organization. A law, on the other hand, applies to all members of society at all times.

It is important to understand the difference between a rule and a law. If you want to become a member of a group, you have to follow its rules. For example, some schools have rules about wearing uniforms. Those rules apply only to those students who attend the school. A law is a legal rule made by the government. It must be obeyed by everyone who chooses to live in that society. If a member of society breaks the law, he or she is punished. Therefore, as an individual, you are free to do what you want, with one exception: You must not do those things the law forbids, or prohibits.

Although most people willingly accept laws that set speed limits on highways, restrict the use of certain drugs, and control pollution, some people do not. If Canadians do not agree with a law in this country, they can join pressure groups and lobby the government to change the law. Lobby groups try to raise public awareness about certain laws and pressure the government to change the law to reflect their opinions and needs. Lobby groups may also challenge laws by going through the courts or by organizing peaceful demonstrations. Canada is a free country, so people can oppose laws in a number of ways, but only up to a certain point. If protesters break the law, they can be arrested for their actions.

Why Do We Have Laws?

Janelle lived by herself on an island and did whatever seemed right to her. She did not need any laws. But Stacie was shipwrecked during a storm and landed on Janelle’s island. Now Janelle had to adjust her needs, desires, and actions to accommodate Stacie. Janelle and Stacie had a discussion and developed some rules. These rules became laws when the two agreed that certain rules would always control their actions. For example, the agreement, “We will always share all our food, so that each of us gets an equal portion” is a law. So is “Neither of us will make noise after the other has gone to sleep.” Laws usually create clear understandings about expected behaviour. They are necessary for people to live together peacefully in society.

Suppose more people are shipwrecked on the island. If the number of people increases, so will the need for laws. There might even be a need to write down the laws, so that they are available to everyone. Then, if people break the law, they cannot say that they did not know about it. Of course, as the number of laws increase, people will have less freedom to do what they want as individuals.
As a society grows, it needs more laws to control and limit the behaviour of its citizens. For example, taking someone else's property or life is against the law in most societies. So is cheating in business or speeding on a highway. To enforce these laws, a society introduces punishments for breaking the law. The harshness of these penalties will depend on the values and customs of each society. Stealing in Canadian society might result in a suspended sentence, a jail sentence, or some form of alternative justice, such as a healing circle. In other societies, the convicted person might have a hand amputated or might even be executed.

The Functions of Law: What Laws Do for Us

One important function of law is to settle disputes, or disagreements. If a dispute arises between two opposing teams during a sports event, it is usually resolved by consulting the rules of the game. Similarly, laws help to resolve disputes through discussion or negotiation, or through the courts. Laws help to create order and ensure that disagreements are solved peacefully and fairly.

Establishing Rules of Conduct

You live in fairly close contact with your neighbour—that is a part of living in society. Under such conditions, conflicts naturally arise. Laws exist to reduce or eliminate these conflicts and to create a safer place to live. For example, the provincial and territorial Highways Traffic Acts set minimum driving ages, speed limits, and competency tests for drivers' licences. Other traffic laws describe proper procedures for signalling, passing, and the use of safety restraints. If there were no such laws, the streets would be much less safe than they are.

Protecting Rights and Freedoms

Laws serve no purpose if they cannot be enforced. To enforce laws, we have the police and the courts. The Royal Canadian Mounted Police (RCMP), provincial police, and local police forces have the right to charge people who have broken the law. People who are charged with criminal offences must answer for their actions to the courts.

Criminal law is a branch of law that deals with illegal actions and their penalties. These laws are designed to discourage people from harming others. But law makers are not free to make any law they wish in order to control society. Both law makers and law enforcement agencies are limited by constitutional law, described on page 8. The Canadian Charter of Rights and Freedoms is part of Canada's Constitution. It ensures that limitations of individual rights are not taken too far.

Case

While on an environmental studies field trip, Jamie, Kirk, and Greg, three students from Crestview Secondary School, became trapped in a cave by a landslide. The three began to examine their situation. They noticed a trickle of water on the wall of the cave. Greg said he had learned in a science class that as long as there was water, they could live without food for about 30 days. They all noted that there was no animal or vegetable matter in the cave. However, Greg mentioned that if two of them reached a state...
of desperation and killed the third and ate his flesh, they could survive for nearly another two weeks. As Jamie had a calendar watch with a luminous dial, keeping track of time was no problem.

On the 27th day, Kirk suggested that they draw lots to determine who would be killed for the benefit of the other two. When lots were drawn later that day, Kirk lost. He pleaded with Jamie and Greg to reconsider, but they pointed out that he had suggested the draw and that they had all agreed to it. Just as they were about to strangle Kirk, a rescue team broke through to save him.

**For Discussion**

1. Did the boys pass a law? Explain your reasoning.
2. If Jamie and Greg had strangled Kirk, what could they have been charged with? What might have been their defence?
3. Suppose Jamie and Greg were found guilty of killing Kirk, and their lawyer pleaded for mercy. If you were the judge, what factors would you consider in allowing a plea for mercy?

**Protecting People**

Criminal activity is not the only reason we have laws. Laws also protect people in many other situations. For example, a business might be tempted to ask you to forget about school and work 18 hours a day during the holiday rush. However, labour laws usually limit the number of hours the employer can legally ask an employee to work. They also require the employer to pay a minimum wage and provide safe and clean working conditions. Contract law protects people in situations where they are asked to sign agreements that provide little or no benefit to them. The divisions of Canadian law that deal with each of these issues are discussed in greater detail in Section 1.3 of this chapter.

**Review Your Understanding** (Pages 3 to 6)

1. Explain why a knowledge of law is important.
2. Justify the importance of voting in a democracy.
3. Justify why laws and rules are necessary in society.
4. Distinguish between a rule and a law.
5. Identify factors that might cause laws to change.
6. Justify, with concrete examples, the importance of law enforcement in our society.
7. Describe how laws specifically protect individuals. In what ways do they protect society as a whole?

**1.3 The Divisions of Law**

Law can be divided into two basic types: substantive law and procedural law. Substantive law (the substance of the law) consists of all laws that list the rights and obligations (duties) of each person in society.

For example, one type of substantive law is property law. This law allows Canadians to own property and enjoy certain rights. Property owners have the right to
- expel trespassers
- sell the property
• use their property in any way they wish as long as it does not interfere with others
• sue those who damage or interfere with the enjoyment and use of the property

At the same time, property owners have the obligation, or duty, to
• maintain the property
• make sure it is safe for others to enter
• pay property tax

What happens when legal rights are not respected or legal duties are not performed? Procedural law (the process of law) outlines the steps involved in protecting the rights given under substantive law. For example, what if the owner of a woodlot finds that a local snowmobile rental business is providing rides on her land and damaging her newly planted trees? Substantive law gives her the right to do something about it. Procedural law outlines the steps she can take to stop the problem and get compensation for the damage.

Substantive Law
Substantive law is divided into public and private law. Each is discussed in this section.

Public Law
Public law controls the relationships between governments and the people who live in society. It represents laws that apply to all individuals. The main types of public law are criminal, constitutional, and administrative law.

Criminal Law  Canada’s criminal law is a set of rules passed by Parliament. These rules define acts called “crimes” that are considered to be offences against society. Crimes include murder, kidnapping, sexual assault, break and enter, and theft. The rules also set penalties for those who break the law. Most of Canada’s criminal law is found in the Criminal Code, where many criminal acts and their punishments are described. The Controlled Drugs and Substances Act and the Youth Criminal Justice Act are other examples of criminal law. The main purposes of criminal law are to punish offenders and to protect society and its members. You may come in contact with criminal law as a victim, a witness, a juror, or as an accused person.

When a crime has been committed against society, both the accused and society are represented by lawyers. Society is represented by a Crown attorney, who tries to prove the charges against the accused person (the defendant) beyond a reasonable doubt. The court must determine whether the person is “guilty” or “not guilty” of the crime of which he or she is accused. Criminal law is examined in greater detail in Unit 2.
II The Divisions of Canadian Law

Constitutional Law Government in Canada does not have unlimited power. The powers it does have are divided among several levels of government. The laws that set out the structure of the federal, provincial, and territorial governments and the division of powers among them is called constitutional law. Canada's Constitution, which outlines our most basic laws, is the Constitution Act, 1982. The Constitution will be discussed in more detail later in this chapter.

Administrative Law The area of law that controls the relationships between citizens and government agencies is administrative law. For example, liquor control boards manage the sale and consumption of alcoholic beverages and grant licences to serve them. The Canadian Radio-television and Telecommunications Commission (CRTC) controls broadcasting licences, cable television service, and telephone rates. The decisions of these government agencies have a major influence on our lives.

Private (Civil) Law

Private law outlines the legal relationships between private citizens, and between citizens and organizations (e.g., companies). Another name for private law is civil law. Its main purpose is to manage the behaviour of persons and organizations in conflict with each other and to pay damages to those who have been wronged.

There is no Crown attorney involved in civil actions or cases. Each person in a civil case is usually represented by a lawyer. The person who starts the case (the action or lawsuit) is called the plaintiff. The person whom the plaintiff is suing is called the defendant. The plaintiff sues because he or she believes that the defendant has caused him or her harm, loss, or injury.

There is a difference between the level of proof required in criminal law and civil law. In criminal law, the Crown attorney must prove the charges against the accused beyond a reasonable doubt. But in civil cases, the plaintiff has to prove that the defendant is at fault and caused damage. The defendant will try to produce evidence against this argument. The judge has to
decide which story contains more truth and is believable (the balance of probabilities) and make a judgment. Civil law is covered in more detail in Units 3 to 5.

It is possible for the same incident to result in both a criminal and a civil action. Suppose Alex, a private pilot, does not maintain his aircraft as recommended and the plane is forced down, injuring his passengers. Breath samples taken by police after the crash also show that Alex was intoxicated at the time of the accident. As a result of the crash, Alex could be charged by the police with a crime (operating an aircraft while impaired) and sued by his passengers in a civil action for negligence (because he did not keep the plane in proper repair). There is no particular order in which these two cases would be tried. Usually, whichever case is ready first will be tried first.

Private (civil) law can be further subdivided into family, contract, tort, property, and labour law.

**Family Law** Family law deals with the relationships between individuals living together as spouses or partners, and between parents and children. This area of law is constantly changing. Many recent issues deal with the increasing numbers of common-law and same-sex relationships. Other issues include unpaid support payments to spouses and children, separation and divorce, division of property, and child custody. Family law is discussed in greater detail in Unit 4.

**Contract Law** Contract law outlines the requirements for legally binding agreements. Such agreements impose rights and responsibilities on the parties involved. A contract may be something as simple as buying a CD (you offer to pay for it, and the store accepts your money), or as complicated as an agreement between a company and the government to build new aircraft for hundreds of millions of dollars. If someone does not fulfill the terms of a contract, there is a breach of contract and the legal agreement is broken. The injured party can take legal action in the courts and sue for damages. Contract law is discussed in greater detail in Unit 5.

**Tort Law** Tort law deals with wrongs, other than a breach of contract, that one person commits against another person. For example, a patient can sue a surgeon for malpractice or negligence (carelessness) that occurred during an operation. Negligence is the major cause of action in tort law. Tort law is discussed in greater detail in Unit 3.

**Property Law** Property is anything that has a cash value. Property law is a set of legal rules that controls the use, enjoyment, and rental of property. Many of the laws affecting property were established by the English courts hundreds of years ago. Property law is discussed in Chapter 18.

**Labour Law** Labour law governs the relationships between employers and employees. It is often called employment law. It deals with issues such as minimum wage, pay equity (equal pay for equal work), proper dismissal, working conditions, and workers' compensation. Labour law is discussed in greater detail in Chapter 19.
Review Your Understanding (Pages 6 to 9)

1. Distinguish between substantive and procedural law. Create examples to illustrate the distinction.

2. Distinguish between the parties in a criminal trial and the parties in a civil trial. To what extent are they similar or different?

3. You have been hired to present a summary of the divisions within Canadian law. Briefly describe the categories of public and private law and provide an example to illustrate each type of law.

14 The Early History of Law

The laws of ancient civilizations have had a great influence on the development of Canadian law. In early societies, local customs and beliefs were the law. Customs were traditionally accepted and were usually based on common sense. It was not necessary to write them down because everyone was aware of them and passed them on by word of mouth to future generations. As societies grew, the laws became more complex. It became too difficult for many citizens to know and understand these laws. Yet, for justice to be served, people had to be aware of them. It finally became necessary for existing laws to be written down in a permanent form.

The Code of Hammurabi

Hammurabi was a famous king who ruled Babylonia (now Iraq) about 3800 years ago. He decided to take nearly 300 laws and record them in a way that could be understood by his citizens. This set of laws, known as the Code of Hammurabi, was set into stone in a great monument. The laws were made known to everyone in his kingdom. At the beginning of the text were seven divine laws set down by the gods. The laws were then divided into 28 categories, which were further subdivided into 90 divisions.

The Law

Excerpts from the Code of Hammurabi (1750 B.C.E.)

<table>
<thead>
<tr>
<th>Excerpt</th>
<th>Translation</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. If a man has borne false witness in a trial, or has not established the statement that he has made, if that case be a capital [very serious] trial, that man shall be put to death.</td>
<td></td>
</tr>
<tr>
<td>46. If a man neglects to strengthen his dike, and a break is made in his dike, and he lets water carry away farmland, the man in whose dike the break has been made shall restore grain that he has damaged.</td>
<td></td>
</tr>
<tr>
<td>195. If a man has struck his father, his hands shall be cut off.</td>
<td></td>
</tr>
<tr>
<td>196. If a man destroy the eye of another man, they shall destroy his eye.</td>
<td></td>
</tr>
<tr>
<td>218. If a surgeon has operated with the bronze lancet on a patrician [aristocrat] for a serious injury, and has caused his death, or has removed a cataract for a patrician with a bronze lancet, and has made him lose his eye, his hands shall be cut off.</td>
<td></td>
</tr>
</tbody>
</table>

For Discussion

1. Express your immediate response to the punishments listed.
2. Identify the beliefs and values that are reflected in these laws.
3. Compare the values reflected in the Code of Hammurabi with our current values reflected in Canadian laws.
Hammurabi, is one of the most important and earliest records we have of written laws. Hammurabi had these laws carved in columns of stone, one of which was unearthed by an archaeologist in Susa, Iran, in 1901, and is now displayed in the Louvre Museum in Paris, France.

A code is simply a written collection of a country’s laws, arranged so that they can be used and understood. This process of preparing a code is called codification. The Code of Hammurabi was organized under headings such as family, criminal, labour, property, trade, and business. Babylonian judges could match a person’s offence and punishment by looking at the written law rather than deciding for themselves what punishment to pass. Crimes punishable by death required a trial by a panel of judges. The Code followed the principle that the strong should not injure the weak. Retribution was important because it was believed that for every crime there should be a deserved punishment: “An eye for an eye, a tooth for a tooth.”

Moses and Mosaic Law

Centuries after Hammurabi died, Moses gave laws to the Hebrew people. Many of these laws were similar to those listed in the Code of Hammurabi. This Mosaic law is set out in the first five books of the Old Testament. The Bible tells the story of Moses climbing Mount Sinai to receive from God the Ten Commandments engraved on two stone tablets. The Ten Commandments, which forbid such acts as killing, adultery, and bearing false witness, continue to hold a central position in the teachings of both the Jewish and Christian faiths. The punishments of Mosaic law were severe—for example, the punishment for adultery was execution by stoning (pasting a person to death with stones).

The Law

Mosaic Law

Excerpts from Exodus (1240 B.C.E.)

21:15 Whoever strikes his father or his mother shall be put to death.
21:17 Whoever curses his father or his mother shall be put to death.
21:29 When an ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner shall also be put to death.
22:1 If a man steals an ox or a sheep, and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, he shall be sold for his theft.

23:1 You shall not utter a false report. You shall not join hands with a wicked man to be a malicious witness.

For Discussion

1. Compare Mosaic law with the Code of Hammurabi. Identify the similarities and differences that exist.
2. Interpret from the excerpt the important beliefs of the ancient Hebrew people.
3. How have these beliefs contributed to Canadian law?
In our society, a person is usually punished for theft by paying a fine or serving a jail term. Mosaic law, on the other hand, required the offender to repay the victim for goods stolen. In recent years, some form of restitution has become a more common punishment and is discussed further in Chapter 9.

Roman Law

Roman law, the legal system that began in early Rome, became the basis of law for Western Europe, except England. As the Roman Empire grew, the number of laws increased and they became more complex. The Romans created a profession devoted to the study of legal matters. This marked the beginning of law as we know it today, and the role of lawyers.

By the year 100 c.e., the Roman Empire had spread over much of Europe, and it remained intact until the 5th century. As a result, Roman laws influenced most European countries. However, the emperor Constantine transferred the capital of the Empire to Byzantium, in what is now Turkey, in 324 c.e. The Byzantine emperor Justinian (527-564 c.e.) codified 1000 years of Roman laws and produced what is known as the Justinian Code. The Code was a collection of past laws, opinions from leading Roman legal experts, and new laws enacted by Justinian. These laws emphasized equity; the idea that law should be fair and just, and that all people are equal under the law, regardless of their wealth and power.

In 1804, after the French Revolution, Emperor Napoleon Bonaparte revised French law, which had been based on Roman law and the Justinian Code. This new set of civil laws was called the Napoleonic Code, or the French Civil Code. It also emphasized equity and justice for all. Because Napoleon conquered much of Europe in the early 1800s, this new set of laws became a model for many European countries. Today, it is the basis of law in many modern democratic countries. In Quebec, civil law is still based on the Napoleonic Code.

Review Your Understanding (Pages 10 to 12)

1. Explain the significance of the Code of Hammurabi.
2. Compare the concepts of retribution and restitution. Which concept is more likely to be considered in the area of criminal law?
3. What is the Justinian Code?
4. Explain the significance of the French Civil Code to the development of Canadian law.

The Development of Canadian Law

Canadian law is based upon the laws of France and England, the countries that colonized Canada. However, there are important differences between the legal systems of the two countries. Early on, French law was codified and written down. English law, on the other hand, was not codified or written...
down until quite late in England's history. Over hundreds of years, the English Parliament has passed laws codifying many of its court decisions and customs. However, much of English law has still not been written down.

**Feudalism and Common Law**

In 1066, William, Duke of Normandy (in what is now France), invaded England and conquered it. As the king of England, William introduced a system of government from Europe called feudalism. The king owned all the land and divided much of it among his lords and nobles. In return, the lords became the king's vassals (servants) and promised him loyalty and military service. In turn, these lords had vassals of their own who farmed the lands and gave

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**Looking Back**

A Verdict by God?

In medieval Europe and England, people were very religious. Everyone assumed that God would protect people from harm. So, when a legal case was hard to decide, the judge would sometimes order a new trial to be "decided" by God.

In a trial by fire, the accused had to hold a red-hot iron. The hand was then wrapped in cloth and uncovered after three days. If the burn had healed cleanly, the accused was judged innocent. But if the hand was infected, the accused was judged guilty. In a trial by water, the accused might be thrown into a pond or lake with his or her hands bound. If the accused sank, the verdict was innocent, but the accused often drowned before being rescued. An accused person who floated on the water was pronounced guilty because water was considered a symbol of purity that had rejected the accused.

Trial by combat was another method used to render a verdict or settle disputes. Nobles often fought this type of "trial" in the form of a duel. It was believed that God would help determine who was in the right. In a criminal case, if the accused was killed, the verdict was guilty. Even if the accused was only wounded but lost the duel, he would be hanged immediately if that was the punishment for the offence.

Another custom used to establish guilt or innocence was compurgation. Eleven persons would swear for the accused that he or she was innocent. These persons were called "compurgators," from an old word that means to swear an oath together before God. If the court was satisfied with the 11 compurgators, the accused would be released. However, if the accuser produced 11 witnesses of higher rank than those of the accused, the verdict would be guilty.

Trial by fire and trial by combat disappeared from the legal system centuries ago. But the idea behind compurgation survives in the 12-member jury that decides the guilt or innocence of some accused persons. At many trials today, the accused also presents character witnesses who testify that the accused is a person of good character (and therefore should be believed).

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**For Discussion**

1. Identify the values and beliefs that underlie the trials described in this Looking Back. Comment on their fairness from your point of view.
2. Generally, the wealthy and powerful settled cases through trial by combat. Explain why they would be more likely to use this trial method.
3. How do the beliefs of Canadians compare to those of medieval Europeans?
4. Compare the medieval system of compurgation with our jury system today.

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*Figure 1-7*

This medieval painting depicts a trial by combat.
part of their produce to the lords and the Church. Some of them also served in the armies of the lords. The feudal system in England formed the basis for our modern property laws.

A lord’s land was called his manor, or estate, and he ran it as he saw fit. For example, a lord acted as the judge in any trial of a vassal accused of breaking the law. Injustice often resulted. One lord might find a vassal guilty of theft and order repayment, plus compensation for trouble to the victim. Another might sentence the vassal to death for the same crime. In response to this unfairness, the king appointed a number of judges who travelled throughout England and held hearings and trials called assizes on controversial or disputed cases. These judges met regularly in London to discuss cases and share experiences. By the 13th century, the laws and punishments were more similar for both criminal and civil cases.

As judges developed regular punishments for specific crimes, these legal decisions became the basis of English common law, so called because it was common to the whole of England. Because the legal system had become more just, it earned new respect. This common-law system was introduced to North America by the colonists who first travelled here.

**Did You Know?**
Assizes were abolished in 1972.

**Did You Know?**
Sometimes the rule of precedent is known as *stare decisis*, a Latin phrase that means “to stand by earlier decisions.”

**Precedent**
Common law is based upon an important principle known as the rule of precedent. A “precedent” is something that has been done that can later serve as an example or rule for how other things should be done. The rule of precedent came about when a case and its decision became common knowledge in the English legal community. As a result, all judges who heard cases with similar facts would give similar decisions. By treating similar cases alike, English judges established the same standard of judging offences throughout the country. At first, these case decisions existed only in the judges’ memories and were known as “unwritten law.” But this system was considered to be an improvement over the right of a lord to judge cases however he chose. People who were dissatisfied with court decisions could appeal to the monarch, who had the authority to overrule judges’ decisions.

Today, lawyers and judges still refer to earlier decisions on cases that are identical or similar to the one they are dealing with as precedents. These earlier cases are considered examples that should be followed. They influence and guide judges when they reach a verdict and pass sentence.

The rule of precedent introduces a degree of certainty into the law. It means that everyone, including the accused, can examine previous similar cases and the arguments that were used and expect a somewhat similar result. Trial lawyers spend much time presenting earlier cases in the hopes of persuading the judge to reach a similar decision. Many older cases in this text are landmark judgments that set precedents that are still followed by the courts when reaching decisions in new cases.

Following precedent too closely can cause a problem if the precedent is not recent. For example, the traffic rules for horse-drawn buggies are not suitable for cars speeding along a modern expressway. Henry VIII of England
issued a law that cats should be allowed to roam at will (because of the huge numbers of rodents in England at the time). This law would not be a suitable precedent for the rules of a modern apartment complex.

Case Law
As the number of judges and cases increased, recording decisions became necessary. Many cases decided in court are recorded and published in paper and electronic form. Thus, common law is often called case law. You can retrieve these cases at law libraries by consulting such reporters as Canadian Criminal Cases (C.C.C.), Reports of Family Law (R.F.L.), or Supreme Court Reports (S.C.R.), or by searching with these key words on the Internet.

Each recorded case is given a title, or citation. The citation lists basic information: who is involved in the case, whether the case is public or private (civil) law, and the year the court decision was reached. It also identifies which court heard the case and the name of the law reporter in which the court decision appears. If the volumes of the law reporter are organized by year, that year may be different from the year of decision and will be added to the citation, placed within square brackets. This information makes it easy to locate the case in a law library.

II Elements of a Citation

Criminal Citation

<table>
<thead>
<tr>
<th>Regina or Rex (Latin for &quot;queen&quot; and &quot;king&quot;) represents society</th>
<th>versus (Latin for &quot;against&quot;)</th>
<th>defendant (accused)</th>
<th>year of decision</th>
<th>volume number</th>
<th>name of reporter where case is reported (e.g., Criminal Reports)</th>
<th>series</th>
<th>page number</th>
<th>jurisdiction (federal, province, or territory) and court (e.g., Ontario Court of Appeal)</th>
</tr>
</thead>
</table>

Civil Citation

<table>
<thead>
<tr>
<th>Langille et al. (plaintiff and others (Latin et alia for &quot;and others&quot;)</th>
<th>versus (Latin for &quot;against&quot;)</th>
<th>defendant (accused)</th>
<th>year of decision</th>
<th>volume number</th>
<th>name of reporter where case is reported (e.g., New Brunswick Reports)</th>
<th>series</th>
<th>page number</th>
<th>jurisdiction (federal, province, or territory) and court (e.g., New Brunswick Court of Queen's Bench)</th>
</tr>
</thead>
</table>

Figure 1-8
These charts show the elements of a citation for a criminal case and for a civil case. See Appendix C: Table of Cases, page 608, for how to cite cases found on the Internet.
Case

**R. v. Davis**

Alberta Provincial Court

One Friday evening the accused, Marlene Davis, and four female friends were partying at Eddy’s Lounge in Edmonton, Alberta. They arrived about 10:30 p.m. and shared pitchers of beer until 2:00 a.m., by which time the accused and some of her friends were well under the influence of alcohol.

About this time, Davis left her table with a mug of beer in hand, and walked toward the bar where she became involved in an argument with Darrin Huculak, a former boyfriend of one of her friends. In an attempt to temper this argument, a third person, Wayne Grant, stepped between the accused and Huculak at the bartender’s request. Davis spat at Huculak over Grant’s shoulder and then threw the contents of her beer mug at Huculak. However, the mug slipped and hit Grant in the mouth, causing him serious cuts and injuries. The accused was charged with assault with a weapon, but was found guilty of the lesser charge of common assault.

**For Discussion**

1. What type of law is involved in this case?
2. Explain each component of the citation for the case.
3. Interpret from the case study what actions would constitute an assault.
4. Why was Davis charged with assault with a weapon?
5. Evaluate whether there was an intent to injure.
6. What factors do you think the judge took into consideration in convicting Davis on the lesser charge of common assault?

Case

**Gauthier v. Beaumont**

[1998] 2 S.C.R. 3
Supreme Court of Canada

Gauthier was suspected of theft and was taken to a police station in a Quebec town. Here he was beaten and threatened with death by two police officers. He later spent a few days in hospital, but he did not give the real cause of his injuries. He feared for his life and left Quebec to live in Western Canada. Later he was contacted by a member of the Quebec Police Commission who asked him to testify against the officers. He testified before the commission under police protection. He was also a witness at the trial of the officers. Both officers were convicted and sent to prison.

More than six years after the beatings, Gauthier sought damages against both former police officers and the town that employed them. He stated that his rights, guaranteed under the Quebec Charter of Human Rights and Freedoms, had been trespassed upon and broken. At the trial, the judge asked why he had taken so long to sue for damages. He said that he had been so damaged by the beatings he had been unable psychologically to do so. Two psychiatrists supported his statement. The trial judge disagreed. He said Gauthier had waited too long to take legal action. Since he had testified before the police commission and the trials of the ex-police officers, he should have taken legal action at that time. The case was over the six-year legal limit, and so the judge dismissed it. Gauthier appealed his case to the Supreme Court of Canada, which ruled in his favour. He was entitled to damages.

**For Discussion**

1. Why did the trial judge dismiss Gauthier’s case? Was he right to do so?
2. What factors do you think the Supreme Court took into consideration in reversing the trial judge’s decision?
3. A Statute of Limitations is set up to prevent legal action after a certain time period. Identify arguments in favour of and against a six-year limitation period in a civil action.
In summary, the most significant meaning of the term "common law" is that it is the law based on judges' trial decisions, precedent, and reported case law. It is distinct from the statute law made by governments, and it serves as a major part of Canadian law today.

**The Rule of Law**

During the reign of England’s King John (1199–1216), an important development in the history of English law occurred. The king considered himself above the law and abused the power of his position. Eventually, the most powerful groups in the land (the nobility, the clergy, and free men) forced King John to sign the Magna Carta, the “Great Charter,” in 1215. This famous document recognized the principle of the rule of law.

As a result, King John and all rulers after him had to obey the law. The idea of equality became important for the first time. In addition, no ruler could restrict the freedoms of the people without reason, and the people’s legal rights could not be changed without their consent. The Magna Carta also guaranteed the right of *habeas corpus*, which means that any person who was imprisoned without an explanation was entitled to appear before the courts within a reasonable time. The accused could then be released if held unlawfully, or tried by peers (equals) if charged with an offence.

Canadians are governed by the rule of law. This means that every dispute must be settled by peaceful means, either by discussion and negotiation or by due process in the courts. Canadians, as well as citizens of other democracies, are not allowed to settle disputes through violence. Nor are its government officials allowed to make up or change the rules without consulting anyone else. The rule of law exists because our society believes that the concept of “might” is not right. Resolving disputes by peaceful means is better, not only for the individuals involved, but also for society itself. The rule of law brings order to people’s lives by preventing the use of violence and the abuse of human rights.

**Parliament and Statute Law**

Although King John and his successors had to obey the law, they still struggled for power with the English nobles. Around 1265, a group of nobles revolted against King Henry III to make him reform the English legal process. These nobles wanted to reduce the king’s power and acquire more power for themselves. As a result, representatives were called together from all parts of England, forming the first Parliament. The job of Parliament was to help make laws for the country. Over the next four centuries, Parliament struggled for power with the monarchs of Britain.
Parliament Replaces the King

A crisis arose in 1688 when King James II tried to gain more power at the expense of Parliament. He was trying to make England a more Catholic country, but most English people were strongly opposed to that. Both the nobles and the bishops of the Church of England revolted against him and forced him to flee. They made his daughter, Mary, and her husband, William, the queen and king of Britain. In 1689, Parliament passed the Bill of Rights guaranteeing free speech, free elections, and freedom of assembly.

This event came to be known as the “Glorious Revolution” because it was achieved with very little violence. Parliament had triumphed, and no future monarch could simply ignore Parliament’s wishes. Over the next three centuries, Parliament was increasingly seen as the institution that represented the people and their wishes. This was an important step in the development of democracy.

Statute Law

One of the most important functions of Parliament is to pass laws, or statutes. As British society changed, common law and case law could not provide answers to every legal situation. Parliament began to fill the gap and make new laws to deal with new situations. In addition, many common-law decisions made by the courts were codified by Parliament and became statute law. One important outcome was that members of the public could now read the laws and know what they said.

In making a decision in any case, courts must consider both the common law and the statute law. Canada’s substantive law represents common-law decisions and statute laws passed by government.

Review Your Understanding (Pages 12 to 18)

1. What is feudalism and how did it work?
2. Why were the king’s courts or assizes preferred to the manor courts of the feudal lords?
3. How is the rule of precedent used in today’s system of law?
4. Express an argument for the continued use of precedent in our legal system today. Counter this argument by examining a disadvantage of the precedent system.
5. How is a citation useful in law?
6. What is common law?
7. Explain the significance of statute law as a source of law.
1.6 The Development of Canada's Constitution

In Canada, the powers of government to make law, and the levels of government responsible for making law, are described in the Constitution. The British Parliament passed our first constitution, the *British North America Act* (BNA Act). It came into effect on July 1, 1867. A new country called the Dominion of Canada was born. At that time, it consisted of the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia. But Canada was not a fully independent country because Britain still controlled Canada's foreign affairs. For example, Canada could not make its own treaties with other countries. When Britain declared war, Canada was also automatically at war. In addition, the Judicial Committee of the Privy Council of Britain was Canada's highest court. It could overrule decisions made by the Canadian courts.

Gradually, Canada assumed more control over its own affairs. In 1931, the *Statute of Westminster*, passed by the British Parliament, gave Canada control over its foreign affairs. In 1949, the Supreme Court of Canada became Canada's highest court of appeal. But there was still one link to Britain that prevented Canada from being a truly independent country. Because the BNA Act was a British statute, it could only be changed or amended by the British Parliament. Canada had to ask Britain about any changes it wanted to make. For example, in 1940, when the Canadian federal government wanted to include unemployment insurance in the BNA Act as one of its powers, the British Parliament had to pass the amendment.

During the 20th century, Britain was more than willing to give Canada its own constitution and allow it to be a truly independent country. But for many decades, the federal and provincial governments were suspicious of each other and unwilling to risk losing any powers. Therefore, they could not agree on a formula to amend (change) the constitution, if change became necessary.

But in 1981, after many years of negotiation, Canada finally came up with a method of changing its constitution. The formula for change, called the *amending formula*, requires the consent of (1) the Canadian Parliament, and (2) two-thirds of the provinces with 50 percent of the population to approve any change. The constitution document was transferred to Canada from Britain on April 17, 1982, and Canada finally became an independent country.

The BNA Act was renamed the *Constitution Act, 1867*. Although the *Constitution Act, 1867*, is still the main part of the *Constitution Act, 1982*, key elements of the *Constitution Act, 1982*, include the amending formula and a new *Canadian Charter of Rights and Freedoms*. 

![Figure 1-11](image)

*The Queen signed the Constitution Act, 1982, in Ottawa.*
The Division of Powers

The *Constitution Act, 1867*, lists the powers of the federal, provincial, and territorial governments. It outlines which government has *jurisdiction*, or authority, to make laws in specific areas. The federal government's powers are outlined in section 91, while those of the provincial governments are outlined in section 92. Section 93 gives the provinces control over education.

Although the division of powers in the Constitution is spelled out clearly, many current issues create disputes between governments. For example, providing health care is a provincial responsibility. But the federal government tries to set Canada-wide legal standards to guarantee equal access for all Canadians. However, some provinces argue that if the federal government wishes to set legal standards, it should provide more money than it does to operate the provincial systems. Sometimes, these disputes between levels of governments end up in court.

Cities and Townships: A Third Level of Government

Although the *Constitution Act, 1867*, established only two levels of government, the provinces have given some of their powers to a third level, the local municipality. Municipalities include cities, towns, townships, villages, and counties. Most of the bylaws that govern the activities of a local community are passed by a municipality. These bylaws govern, for example, garbage collection, emergency services, building permits, water services, night-time noise, and even regulations about stray dogs and cats.

<table>
<thead>
<tr>
<th>Constitution Act, 1867—Division of Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Government Powers (Section 91)</td>
</tr>
<tr>
<td>• peace, order, and good government</td>
</tr>
<tr>
<td>• criminal law</td>
</tr>
<tr>
<td>• unemployment insurance</td>
</tr>
<tr>
<td>• banking, currency, and coinage</td>
</tr>
<tr>
<td>• federal penitentiaries</td>
</tr>
<tr>
<td>• marriage and divorce</td>
</tr>
<tr>
<td>• postal services</td>
</tr>
<tr>
<td>• Aboriginal peoples and their lands</td>
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<td></td>
</tr>
</tbody>
</table>

Review Your Understanding (Pages 19 to 20)

1. How did the *British North America Act* lay down the structure for the Canadian Constitution?
2. Discuss the importance of the *Statute of Westminster*.
3. Why did it take so long for Canada to get control of its own constitution?
4. Distinguish between the *Constitution Act, 1867*, and the *Constitution Act, 1982*.
5. Distinguish between sections 91 and 92 of the *Constitution Act, 1867*, by discussing the constitutional division of powers.
6. What is the third level of government in Canada? What type of laws does it pass?
How Laws Are Made in Canada

When Canadian governments want to make or change laws, they must consider what effect that might have. An unpopular law might cause a member of Parliament (MP) to be defeated in the next election. Before a law is changed or a new law is created, governments spend time and money researching the effects the law is likely to have. A law that the government has proposed is called a bill. Once it is passed, it becomes an act, or statute law.

How Federal Laws Are Passed

Parliament makes our federal laws. It is located in Ottawa, Canada’s capital city. It consists of three parts: the House of Commons, the Senate, and the governor general, who represents Canada’s Queen, Elizabeth II. The House of Commons is the part of Parliament that has the most important role in making laws. Its representatives are elected by the citizens of Canada.

Each member of Parliament is an elected representative of a riding. Canada is divided into ridings, each with approximately the same number of voters so that every geographical area is represented by an MP. The political party that has the largest number of members elected to the House of Commons forms the government. The other parties in the House are called opposition parties. There are 301 MPs in the House of Commons.

The leader of the party that has the largest number of elected members is the prime minister. He or she appoints elected members (MPs) of his or her party to the Cabinet. Cabinet ministers are the heads of government departments that employ thousands of civil servants. They see that federal

### Passage of a Bill into Law at the Federal Level

<table>
<thead>
<tr>
<th>Who</th>
<th>Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>House of Commons</td>
<td>First Reading</td>
</tr>
<tr>
<td></td>
<td>Bill introduced by a Cabinet minister or private member</td>
</tr>
<tr>
<td></td>
<td>First vote taken</td>
</tr>
<tr>
<td></td>
<td>Second Reading</td>
</tr>
<tr>
<td></td>
<td>Bill introduced again and debated in general</td>
</tr>
<tr>
<td></td>
<td>Second vote taken</td>
</tr>
<tr>
<td></td>
<td>Committee Stage</td>
</tr>
<tr>
<td></td>
<td>Bill usually sent to select committee, standing committee, or committee of the whole House</td>
</tr>
<tr>
<td></td>
<td>Bill studied in detail, and changes (amendments) often made; each section may be voted on separately</td>
</tr>
<tr>
<td></td>
<td>Third Reading</td>
</tr>
<tr>
<td></td>
<td>Bill briefly debated</td>
</tr>
<tr>
<td></td>
<td>Third vote taken</td>
</tr>
<tr>
<td>Senate</td>
<td>Bill goes through three readings and committees, as in the House of Commons</td>
</tr>
<tr>
<td>Governor General</td>
<td>Signs bill to become a law</td>
</tr>
</tbody>
</table>
laws are carried out (refer to Figure 1-12 for the list of federal powers).

When a government wants to introduce a new law in Canada, a Cabinet minister introduces a bill into the House of Commons. If the prime minister’s party has a majority government (more than half the elected MPs), there is usually no difficulty getting the bill passed. Once approved, it is sent to the Senate. If approved there, it is sent to the governor general, who signs it into law. When a bill becomes law, all Canadians have to obey it or face the consequences.

How Provincial Laws Are Passed

A provincial legislature passes a bill in much the same way as Parliament. However, provincial and territorial governments do not have a Senate. Once a bill passes through three readings in the provincial legislative assembly, it goes to the lieutenant-governor (the Queen’s provincial representative) for his or her signature.

How Municipal Bylaws Are Passed

In general, an elected council led by a mayor or reeve votes on municipal bylaws. The details of the procedure vary from one municipality to another.

Review Your Understanding (Pages 21 to 22)

1. Why is the House of Commons the most powerful part of Parliament?
2. What are the responsibilities of Cabinet ministers?
3. Compare the passage of federal legislation with that of provincial legislation. How are they similar? How are they different?
4. Think of a change you would like to see in the law. Describe the process by which this idea could become a reality. Clearly identify the steps needed to pass a bill into a law.

1.8 Canada and International Law

In recent times, we have been hearing a great deal about globalization. Globalization is the transformation of the world into a global community. It has occurred because of many events, including the end of the Cold War (1945–1990) between the West and East, the creation of new trading alliances among the nations, and the electronic revolution. Globalization has had legal consequences as well as social and economic ones. As interactions among nations have become more complex, more disagreements have arisen.
International law governs relationships between states. States must follow the rules of international law when they form relationships with each other. In international law, the term “state” refers to a group of people that (1) is recognized as an independent country, and (2) has territory ruled by a sovereign (independent) government that can enter into relations with other states. Canada is one of 191 sovereign states in the world today.

International law is based on three types of law: customary law, treaty law, and resolutions.

**Customary Law**

Over time, states establish practices that they follow consistently and which they assume are obligatory (required). Customary law is formed from these practices. It is not written down in formal codes, but is found in the written judgments in international court cases and in the writings of legal experts. Customary law recognizes the following basic principles, which are based on the idea that states have certain rights and obligations:

- **Sovereignty**
  A nation’s absolute right to govern itself is called sovereignty. There is no sovereign world government. Authority to govern rests in each of the 191 independent states that make up the world. Sovereignty implies a state’s control over its territory to the exclusion of other states, and the authority to govern that territory and apply the laws there. Under international law, sovereign states have equal status, regardless of their military or economic power, how much land they occupy, or the size of their population.

- **Recognition**
  New states gain recognition as sovereign nations by being recognized by other countries. However, such recognition is not guaranteed. For example, if Quebec or another part of Canada were to separate from Canada, it would have to convince other countries that it should be granted the status of a sovereign state. Other nations might not support this idea, especially if people in the breakaway territory didn’t truly support independence.

- **Consent**
  States are bound by new international laws only after they freely give their consent. If a nation signed an agreement because it was being threatened with invasion by another state, the international community would not recognize the agreement.

- **Good Faith**
  States are expected to conduct their affairs with reasonableness and common sense. They must show good faith in the way they interpret and use international laws.
- **Freedom of the Seas**
  States cannot claim ownership of any portion of the high seas. States are expected to use the high seas, the airspace above the high seas, and the seabed with due regard for the interests of other states. During wartime, states may interfere with each other’s shipping routes as a form of retaliation.

- **International Responsibility**
  A state that does not meet an international obligation has committed a wrongful act. It may face criminal penalties and/or the duty to compensate the wronged party. Examples of wrongful acts include unfair aggression against another state or causing an environmental catastrophe inside another state’s borders.

- **Self-Defence**
  The *Charter of the United Nations* declares that the threat or use of force against other states is unlawful. However, international law recognizes that states have the right to defend themselves against the hostile acts of other states.

- **Humanitarianism**
  Humanitarianism is respect for the interests of humankind. Examples of humanitarianism include providing famine relief to developing countries or disaster relief to countries that have experienced a natural disaster.

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**Treaty Law**

International treaties are another part of international law. These are binding written agreements, freely entered into by states, that spell out their rights and obligations to each other. Bilateral treaties are treaties made between two states. Multilateral treaties involve three or more states.

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**Five Steps in the Treaty-Making Process**

1. Negotiate the precise content and wording of the treaty.
2. Formally sign the treaty. This means that the state leaders who sign the treaty support it completely.
3. Ratify (approve) the treaty. This step commits all the states to follow the treaty.
4. Let the treaty “come into force.” This happens when a specified number of states ratifies the treaty.
5. Implement and enforce the treaty. These measures ensure that everyone complies with the terms of the treaty.

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Special classes of international treaties include:
- charters (treaties that establish international organizations)
- conventions (treaties that are negotiated by many countries, to which all countries of the world may become partners)
- protocols (treaties that add to earlier treaties on the same topic)

In 2001, representatives from 178 states, including Canada, formally adopted the 1997 Kyoto Protocol on global warming. The Kyoto Protocol called for
industrialized nations to reduce emissions of "greenhouse gases" linked to global warming to 5 percent below 1990 levels. The Kyoto agreement will come into force once 55 countries, including those nations responsible for most of the greenhouse emissions, have ratified the agreement.

The United States refused to endorse the Kyoto Protocol. The United States, which produces one-quarter of all greenhouse gases, claimed that the Kyoto Protocol was seriously flawed and would harm the U.S. economy. China and India also chose not to sign the agreement. In Canada, the Alberta government indicated that it would move to block Canada's ratification of the protocol. Alberta is Canada's main producer of oil and natural gas.

The Kyoto Protocol highlights the promise and limitations of international law. Success will depend on the willingness of the international community to cooperate. Such cooperation can be threatened when sovereign states put their national interests ahead of global interests.

Treaties are the main method for addressing international problems and conflicts. They deal with a wide range of matters, including the following:

• **Territory**
  The state has a fundamental interest in the rules that govern its right to define its territory and its international borders, including territorial limits off coastlines. Although almost all the world’s land mass is now owned by individual states, international treaties ban further seizure of territory in three areas: the world’s oceans, Antarctica, and outer space.

• **Diplomatic Law and Immunity**
  States carry on their relations through diplomats and envoys. These representatives have certain privileges and immunities—in other words, they have more leeway in their behaviour than average citizens and may not suffer the same penalties for breaking the law. These privileges and immunities are now codified in the 1961 Vienna Convention on Diplomatic Relations.

• **The Protection of Nationals Abroad**
  Foreign nationals (people travelling to other nations) are entitled to the protection of life, liberty, and property. However, international law recognizes the right of states to seize or nationalize private property in the national interest, provided the state offers prompt compensation.

• **Extradition and Asylum**
  States have made extradition treaties with each other. These treaties let nations bring home people who are trying to escape justice. To extradite someone is to return that person to his or her country to face the penalties there. In the absence of a treaty to the contrary, a state may grant asylum, or a safe place, in its own territory to any individual.

• **International Trade**
  Globalization has encouraged states to create several new international trade agreements, including the *North American Free Trade Agreement* (NAFTA). Canada, the United States, and Mexico formed this agreement in 1994 with the goal of gradually eliminating tariffs on goods and services traded among the three countries.

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**You Be the JUDGE**

Canada and the United States have an extradition treaty. However, in February 2001, the Supreme Court of Canada ruled that Canada's Constitution forbids the extradition of Canadian citizens and foreigners to the United States if they face a possible death penalty there.

• Do you think that the Supreme Court ruling could encourage American fugitives facing the death penalty to seek haven in Canada? Explain.

In January 2001, a Russian diplomat in Ottawa, Andrei Knyazev, killed a woman with his car. He refused a breath test, saying he had diplomatic immunity. He was expelled from Canada and returned to Moscow. International law bans the detention of diplomats and protects them from prosecution. Canadian courts have ruled that a breath test is detention.

• Should diplomats have the right to refuse the breath test? Explain.

• Research the final outcome of the Knyazev case and revise your explanation.
Major Achievements of the General Assembly

- **December 1948**
  Adopts the Universal Declaration of Human Rights

- **July 1951**
  Adopts the Convention Relating to the Status of Refugees

- **June 1968**
  Approves the Treaty on the Non-Proliferation of Nuclear Weapons and calls for its ratification

- **December 1979**
  Adopts the Convention on the Elimination of All Forms of Discrimination Against Women

- **November 1981**
  Adopts the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief

- **December 1982**

- **December 1984**
  Adopts the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment

- **September 1990**
  Adopts the Convention on the Rights of the Child

- **September 1996**
  Adopts the Comprehensive Nuclear Test Ban Treaty

- **Arms Control**
  During the Cold War, fear of global catastrophe prompted states to create treaties aimed at preventing nuclear war. Some of these treaties banned the testing of nuclear weapons in the atmosphere, prevented the spread of nuclear weapons, and reduced the number of nuclear warheads and missiles held by the major nuclear powers.
  In the case of both customary laws and treaties, sovereign states can agree among themselves to new international laws or change existing international laws as they see fit.

Resolutions

In international law, resolutions are considered “soft law” because they do not have the force of customary law or treaties. They are not considered binding on countries, even on those that vote for them. Despite these disadvantages, resolutions serve a purpose. They can be adopted fairly quickly and are often used to focus international attention on an issue or situation that demands quick action. Resolutions can also form the basis for later negotiations on treaties.

The Role of International Organizations

Today, several organizations are involved in developing and applying international laws and in resolving disputes between states.

The United Nations

The United Nations (UN) was established on October 24, 1945, following the end of World War II (1939–1945). Memories of that terrible conflict were still fresh. Fifty-one states signed the United Nations Charter, which committed them to preserving peace through international cooperation and collective security, and to promoting respect for human rights. Since its creation, the United Nations has played an important role in developing international law and in promoting cooperation among nations. Canada has been a major supporter of the United Nations and has contributed to its work in many ways.

The United Nations is not a world government, as some believe. It does not have sovereign authority to make laws. Rather, it passes resolutions. Success in transforming these resolutions into action rests on the willingness of the United Nation’s member states (189 as of the last count) to work together cooperatively.

The UN General Assembly

All UN member states are represented in the General Assembly, where each state has one vote. A two-thirds majority makes decisions on major matters such as international peace and security and the admission of new members. The General Assembly cannot demand action by a member state, but its resolutions carry strong moral authority, especially when a vote has been almost unanimous.

Figure 1-17

Identify the world issues addressed in the UN resolutions.
The UN Security Council  The Security Council is the body of the United Nations responsible for maintaining international peace and security. Under the UN Charter, member states are obligated to carry out the Council’s decisions. The Security Council has 15 members, five of which have the status of “permanent members.” These are China, France, Great Britain, the Russian Federation, and the United States. Permanent members have veto power over all decisions of the Council. The veto gives any permanent member the authority to stop the Security Council from taking an action.

In the event of warfare between two or more states, the Security Council will try to arrange a cease-fire. Once this occurs, the Council may send a peacekeeping mission to the area of conflict to help maintain the truce and to keep the opposing forces apart. On very rare occasions, the Security Council has used military action to enforce its decisions. The best example of this is the intervention of UN troops in the Korean War during 1950–1953. Canada contributed military forces to the UN operation.

In 1956, Lester Pearson, then Canada’s secretary of state for external affairs, was instrumental in bringing about the United Nation’s first major peacekeeping operation. British, French, and Israeli forces had invaded Egypt after Egyptian President Nasser had nationalized the Suez Canal. As Canada’s representative at the United Nations, Pearson persuaded the Security Council to approve the sending of a UN Emergency Force to Egypt to supervise the withdrawal of the invading forces. Pearson was awarded the 1957 Nobel Peace Prize in recognition of his efforts. Since 1956, Canada has participated in almost all UN peacekeeping missions.

The UN Charter also permits the Security Council to impose sanctions against states threatening or breaking the peace. Sanctions are a kind of penalty and can take a number of forms; for example, breaking of vital importing or exporting relationships with a nation.
In 1990, the UN Security Council imposed economic sanctions against Iraq after it invaded Kuwait and refused to withdraw its forces. Following the Persian Gulf War (1990–1991) and the restoration of Kuwait sovereignty, the Security Council voted to continue sanctions against Iraq. The United Nations had to be satisfied that Iraq had dismantled all weapons of mass destruction—and the facilities to develop them—before it withdrew sanctions.

In 2001, UN sanctions remained in effect, although restrictions had been eased for several years under an “oil for food” provision. This arrangement allowed Iraq to sell certain quantities of oil and oil products so it could buy some essential goods for its people. The Iraqi population has suffered malnutrition and other serious health problems because of the sanctions.

### The Law

#### The Charter of the United Nations

An excerpt from the *Charter of the United Nations*

**Chapter VII, Article 41**

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

**For Discussion**

1. How might sanctions affect a country’s population?
2. Should innocent civilians suffer under sanctions for the mistakes of their government?
3. What practical problems make enforcing sanctions difficult?

### The International Court of Justice

The International Court of Justice (ICJ), or World Court, is the judicial arm of the United Nations. Based in The Hague, the Netherlands, the ICJ hears only civil cases. Only member states of the United Nations can bring cases before the ICJ.

The International Court of Justice bases its decisions on international law. It has had limited success, hearing only a small number of cases since its creation in 1945. Many countries say they are not willing to submit themselves to the jurisdiction of the ICJ. On occasion, countries involved in a dispute have agreed to submit a dispute to the ICJ on a conditional basis. The effect of this is to make any ICJ decisions not binding.

### A Permanent International Criminal Court?

In 1945, when four nations established the International Military Tribunal in Nuremberg, Germany, they were taking the first step toward creating a permanent international criminal court. The Nuremberg Tribunal tried Nazi leaders for crimes punishable under international law. A trial of this nature had never been held before, and it established important new precedents in international law.
The Charter of the Nuremberg Tribunal defined three classes of international crimes:

- crimes against peace (planning or waging a war in violation of treaties or agreements)
- war crimes (violations of the customs of war, e.g., murder, slave labour, murder or ill-treatment of prisoners of war, killing of hostages, plunder of public or private property)
- crimes against humanity (murder, extermination, enslavement, deportation, or persecution on political, racial, or religious grounds)

During the 1990s, interest in establishing a permanent international court gained new support. Revelations about the horrors of "ethnic cleansing" in former Yugoslavia, where widespread killing and mistreatment of civilians took place, and genocide in Rwanda, shocked people around the world. In 1993, the UN Security Council established the International Criminal Tribunal in The Hague, the Netherlands. This court has the authority to prosecute persons responsible for committing serious criminal violations of international law in the former Yugoslavia and Rwanda. In 1996, Justice Louise Arbour of the Court of Appeal for Ontario was appointed to a four-year term as chief prosecutor for the International Criminal Tribunal. In 1998, at a conference in Rome, representatives from more than 140 countries signed a treaty to establish a permanent international criminal court located in The Hague, the court will hear cases related to war crimes.

**Check Your Understanding** (Pages 22 to 29)

1. How is sovereignty a key concept in international law?
2. Distinguish between customary law and treaties as sources of international law.
3. What matters do international treaties govern?
4. Outline the process by which international treaties are made.
5. Why is the United Nations such an important international organization? Evaluate the importance of the United Nations in terms of international security.
7. Should individuals, and not just states, be held accountable for wartime actions? Explain.
On September 11, 2001, international terrorists unleashed a series of attacks against the United States. Television images of the destruction were broadcast live to a global audience. Although these attacks were confined to American soil, people around the world expressed disbelief and outrage.

The chain of events began early in the morning, when teams of terrorists hijacked four American passenger jets shortly after takeoff from Boston and New York. At 8:45 a.m., the hijackers of American Airlines Flight 11 deliberately crashed the plane into the north tower of the World Trade Center (WTC) in New York City. At 9:03 a.m., a second hijacked airliner smashed into the WTC’s south tower. Although the 110-storey towers withstood the impact initially, they began to melt from the extreme heat of the burning jet fuel. At 10:05 a.m., the south tower collapsed, followed by the north tower at 10:28 a.m.

Meanwhile, at 9:43 a.m., American Airlines Flight 77 crashed into the Pentagon building near Washington, DC. Twenty minutes later, the fourth aircraft plunged into an empty field near Pittsburgh, Pennsylvania, as passengers battled with their hijackers to retake control. The total death toll from these attacks was 19 terrorists and more than 2600 innocent people.

On September 11, Canada responded quickly to the crisis, allowing 242 aircraft bound for the United States to be diverted to Canadian airports. Within weeks after the tragedy, Canada mounted its own defence against escalating global terrorism: a comprehensive and far-reaching anti-terrorism plan.

The stated objectives of Canada’s anti-terrorism plan are to protect Canadians from terrorist acts; stop terrorists from entering Canada; arrest and prosecute terrorists; work with American authorities to secure
the Canada–U.S. border; and cooperate with the international community to bring terrorists to justice. In brief, the anti-terrorism plan is Canada’s answer to the question: What must a country do to maintain its security in light of the events of September 11?

To accomplish these objectives, the federal government has taken a number of actions, including:

**Border Security:** increasing the number of immigration control officers overseas to detect fraudulent documents and identify criminals, terrorists, and others ineligible for entry before they reach Canada; introducing a fraud-resistant “resident card” for new residents; increasing security staff at ports of entry; streamlining deportation orders against those who violate Canada’s immigration laws; purchasing new equipment and other technologies to uncover and deter terrorist activities; and joining the United States as a full partner in integrated border enforcement teams.

**International Law Enforcement:** collaborating with international law enforcement agencies to identify and dismantle terrorist organizations and networks; freezing the assets of organizations in Canada that fund or facilitate international terrorism; and preventing these groups from raising money.

**Military Action:** sending a Canadian naval task group to the Arabian Sea in late 2001; and sending ground forces to Afghanistan in early 2002. Both initiatives supported U.S. operations against pro-terrorist forces in Afghanistan.

**New Laws:** introducing sweeping new legislation—such as the *Anti-Terrorism Act* and the *Public Safety Act*—to fight terrorism.

The *Anti-Terrorism Act* received royal assent on December 18, 2001. This legislation created ways to deter (prevent), disable, identify, prosecute, convict, and punish terrorist groups and their members operating in Canada. Highlights of the new law include:

- a legal definition of terrorism
- terrorist offences defined and added to the *Criminal Code*
- new investigative tools for law enforcement agencies, including more power to use electronic surveillance
- new powers for police to make preventive arrests of suspected terrorists, without charge. Police may also compel (pressure) individuals with information about a terrorist group or a terrorist offence to appear before a judge to provide that information
- changes to courtroom proceedings to protect classified information

In November 2001, the federal government proposed the *Public Safety Act*, the other cornerstone of its anti-terrorism legislation. The *Public Safety Act* will bring changes to numerous federal statutes, including the *Aeronautics Act*, the *Immigration Act*, and the *National Defence Act*. It will also make law the *Biological and Toxic Weapons Conventions Implementation Act*. Provisions of the *Public Safety Act* include the following:

- authority for Cabinet ministers to issue “interim orders” to deal with immediate threats and emergencies
- tighter security over aviation, explosives, pipelines, and transmission lines
- controls over the export and transfer of technologies sensitive to national security
- measures to prevent money laundering by terrorists and the proliferation (spread) of biological weapons
- powers to arrest and detain foreign nationals within Canada who cannot properly identify themselves
- declaration of hoaxes causing public danger or anxiety as criminal offences
- authority for the federal government to establish “military protection zones”

Some commentators have referred to the events of September 11 as the defining moment of the 21st century. Only history will tell if this is true. What is certain is that September 11 was a potent agent of change in Canada, resulting in increased government powers, changes in Canadian law and attitudes toward national security, and closer ties to the United States.

**For Discussion**

1. What new measures have been taken by border officials to increase security?

2. What new powers do law enforcement officials have under the *Anti-Terrorism Act*? Could these powers violate rights of law-abiding citizens? Explain.

3. Under the *Anti-Terrorism Act*, is compelling individuals to provide information a violation of individual rights? Explain.

4. Speculate on future developments to Canada’s anti-terrorism plan.
Mediation: Can It Replace the Courts?

Traditionally, courts have handled disputes over legal issues such as property damage, inheritance, or child custody. However, in recent years, overcrowding of the courts has created a backlog of cases. Delays can result in injustice for many; and the expense of court cases can deny justice to people with a low income. Alternatives to using the courts to solve disputes have become more popular.

Several methods of **alternative dispute resolution (ADR)** have been developed to settle legal conflicts outside the courts:

- **Negotiation:** Two parties communicate with each other until a decision is reached.
- **Mediation:** A third party (a mediator) listens to the two parties in the dispute and helps them make a decision that both will accept.
- **Arbitration:** A third party (an arbitrator) listens to the two parties and makes a decision. Often, the arbitrator is a respected expert, and the parties must agree in advance to accept the arbitrator’s decision.

The most commonly used method is mediation. Mediators are neutral parties who are trained to help the people involved in the dispute come up with solutions to their problems. The mediator hopes that if the parties find a solution that seems fair to both, they will abide by it.

Mediation is not new. It has long been used successfully to resolve disputes between labour and management. However, ADR programs are now finding their way into other areas of law. The Canadian Bar Association, the professional association of lawyers, has counselled its members to become experts in ADR methods. Its journal has referred to ADR as a “growth industry.”

![Dispute Resolution Methods Compared](image)

**Figure 1-20**

From war to ADR, this cartoon summarizes the options.
On One Side

Those who support mediation programs to deal with most conflict situations argue that the court system takes too long, is too expensive, and does not guarantee satisfaction.

They suggest that if people learn how to use ADR, including anger and stress management, they will come to accept and even expect to settle their differences through conflict resolution programs. As far as crime is concerned, they argue that the majority of crimes in Canada are nonviolent. Many of these cases could also be settled through mediation. This would relieve the criminal courts of a tremendous burden.

On the Other Side

Critics of ADR believe that mediation is fine for small disagreements, but not for legal battles. They argue that each party wants to win the case, and probably prefers to gamble on winning the case in court.

They also point out that ADR methods would not necessarily be cheaper because the same lawyers who would represent the disputants (the people involved in the dispute) in court now offer their services as mediators. They believe that ADR will just create another layer of bureaucracy and expense for disputants.

Instead of ADR, critics advocate speeding up the legal system and making it more efficient, by creating more courts and appointing more judges to handle the backlog of cases.

The Bottom Line

A solution for the long delays in Canada’s justice system must be found. Greedy landlords and employers, for example, sometimes depend on the fact that their victims cannot afford the long wait for justice from the civil courts. Charges against criminal suspects are sometimes dropped because delays violate the rights of the accused under the Canadian Charter of Rights and Freedoms (see habeas corpus, page 17). But dropping the charges violates the rights of the victim.

Activity

Visit www.law.nelson.com and follow the links to learn more about ADR as a mechanism for conflict resolution.

What Do You Think?

1. Assume that you have been consulted as a legal expert to offer your recommendation for which process is more appropriate to resolve a legal dispute. For each case, give a rationale for selecting either the mediation process or the court process.
   • Divorced parents both want sole custody of their child.
   • A divorcing couple can’t agree on who should get the car.
   • A woman accuses a man of stalking her, but he denies it.
   • A university student wants to move out of his apartment, but he has signed a lease.
   • A woman is charged with killing her spouse.
   • A teen is caught shoplifting a pair of jeans.
   • A man believes he has been wrongly dismissed from his job.

2. Assume that you are involved in a labour dispute over the issue of working conditions. Create an organizer that evaluates the advantages and disadvantages of each alternative dispute resolution method (negotiation, mediation, and arbitration) in resolving the labour dispute. Based on the information in your organizer, recommend one of the three approaches to resolve the dispute. For extended research, interview a labour union representative and report on his or her view of the merits of each method of dispute resolution.
Chapter Highlights

- Canada is a democracy. Its citizens elect law makers who make laws that suit the majority of Canadians.
- Rules and laws are necessary to keep peace, order, and fairness.
- Laws tell people what they can and cannot do, and settle disagreements.
- The Canadian Charter of Rights and Freedoms helps to protect the rights of Canadians.
- Public law controls the relationship between the government and the people.
- Criminal law defines offences against society.
- Constitutional law outlines the structure of the federal and provincial governments and their respective powers.
- Private (civil) law outlines the rights and responsibilities of private citizens and organizations.
- Old laws are often the basis of modern laws. Some important sources of modern law are the Code of Hammurabi, Mosaic law, Roman law, and the Napoleonic Code.
- Lawyers and judges refer to earlier court decisions called precedents.
- A law passed by Parliament is called a statute.
- Canada’s first constitution was called the British North America Act.
- The name of Canada’s Constitution today is the Constitution Act, 1982.
- The House of Commons is the most powerful branch of Parliament because it passes most laws.
- International law regulates the conduct of states and is based on customary laws, and international treaties and resolutions.
- The United Nations is the most prominent international organization in the world today.
- The International Court of Justice rules on civil disputes between states.

Review Key Terms

Name the key terms that are described below.

a) a state’s authority to govern itself
b) the legal right of a person who is imprisoned without explanation to appear in court within a reasonable time
c) agreement between states to return fugitives from justice to their home countries
d) lists basic facts in a legal case and makes it easy to locate the case in a law library
e) a political, social, and economic system that existed in Europe between the 9th and 15th centuries that was based on the relationship of lord and vassal
f) a person who is sued in a civil action or charged with a criminal offence
g) the basic rule that neither individuals nor the government is above the law
h) to seek to influence the government to make certain laws
i) a prosecutor in criminal matters who works on behalf of society
j) a court decision used to decide a similar case
k) penalties or restrictions imposed on a country
l) the procedure to change Canada’s Constitution
m) criminal acts that violate the customs of war
n) the authority or power to make laws
o) the person who sues in a civil action
p) a proposed law

Check Your Knowledge

1. Explain the importance of the common-law system of precedent to the development of our contemporary legal system.

2. How does the rule of law ensure a just and fair system of law today?

3. Differentiate between criminal law and civil law.

4. Identify one of the most important functions of Parliament.

Apply Your Learning

5. After a big argument over a family matter, a teenage son strikes his father, causing serious injury.
   a) Under Babylonian law, has the son committed an offence? If so, what would have been the punishment?
b) Under Mosaic law, what penalty would the son have received?
c) Under current Canadian law, what penalty might the son receive?

6. Your community institutes a voluntary “blue box” recycling program. In a television interview, Gina states that she does not intend to recycle because she does not have time to rinse her metal cans and plastic containers.
a) Why would Gina not be breaking the law?
b) How could the recycling program receive the status of a law?


The accused, Dudley and Stephens, along with Brooks and a 17-year-old boy, Parker, were shipwrecked some 2500 km from the Cape of Good Hope in an open boat. They had only two tins of turnip and no water. On the fourth day, they caught a turtle. After that, they had no more food. They managed to catch some rainwater in their oilskin caps.

On the 18th day, Dudley and Stephens spoke to Brooks about what should be done if no more food was obtained. They suggested that Parker, who was suffering the most and had no family, should be sacrificed to save the rest. Brooks disagreed.

On the 20th day, while Parker was asleep, Dudley made signs to Stephens and Brooks indicating the youth should be killed. Stephens agreed; Brooks dissented. Dudley offered a prayer and killed Parker. The three men then fed on the remains of the youth for four days, at which time a passing vessel picked them up. They were returned to England, where Dudley and Stephens were put on trial for murder.

The accused were found guilty of the charge, because there was no legal justification for their killing of Parker. However, Queen Victoria granted them royal mercy and commuted (changed) their death sentence to one of life imprisonment because of public sentiment and concern. The legal authorities then took further action and released Dudley and Stephens after six months' imprisonment.

a) Why wasn't Brooks charged with murder? Do you agree? Why or why not?
b) Should Dudley and Stephens have been charged with murder? Why or why not?
c) As the Crown attorney, outline your case against the accused.
d) Five judges tried this case. The argument presented by the defence dealt mainly with the necessity of the actions of the accused for their survival. Should necessity be a valid argument or defence? Explain.

8. In August 2001, the International Criminal Tribunal at The Hague convicted Radislav Krstic of genocide. Krstic is a former Bosnian Serb general. International law defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group."

Krstic was sentenced to 46 years in prison for his role in the massacre of more than 7000 unarmed Muslim men and boys in Srebrenica in July 1995. During the trial, prosecutors presented evidence of the crime, including accounts of survivors, documents from the Bosnian military, and photos of mass graves. The three presiding judges concluded that while Krstic did not order the assault on Srebrenica, he played a key role in the executions and deportations that followed.

a) Under what class of international crimes does genocide fall?
b) What evidence did prosecutors use to prove the case against Krstic?
c) Decide whether or not the sentence that Krstic received was fair. Justify your answer.

Communicate Your Understanding

9. The Magna Carta is now recognized as one of the most important documents in the development of democracy. Here are three of its clauses:
10. In pairs, select one of the topics below. One student will prepare an argument in favour of the statement and the other student will prepare a counterargument against the statement. Support your position with examples.

a) People are basically bad. They need laws and punishments to control them.

b) The crime rates in Canada are high because the punishments are too weak.

c) Canadian law makers should bring in punishments similar to those in the Code of Hammurabi and Mosaic law.

Develop Your Thinking

11. You have been asked to create a brief legal history lesson for students in an introductory history course at your high school. Create an organizer chart that identifies the various historical legal systems that have contributed to contemporary Canadian law. In your chart, identify the system, briefly summarize its main beliefs and values, and identify the influence on our current laws.

12. How have laws and rules affected your daily activities today? Develop your answer by clearly indicating examples where rules have influenced your actions and areas where laws have regulated your conduct.

13. Why are international laws important in the global society? Identify major obstacles to achieving international agreements and cooperation. Extend your research by providing examples from current print media or from news on the Internet.