TRY JUDGING™

B. Resource Materials

I. The Structure of Canada's Courts

Canada's constitution creates two interrelated court systems, each with distinct powers and jurisdiction over specific types of cases. The federal government is responsible for courts of superior jurisdiction, the highest echelons of our courts. These consist of the nation's highest court, the Supreme Court of Canada, provincial courts of appeal and the superior court—the top level of trial court—in each province. The federal government appoints and pays the judges who serve on these courts. The provinces and territories are responsible for inferior courts, which have limited powers and jurisdiction and form the lower tiers of the court system. Inferior courts deal, for the most part, with minor crimes, offences under provincial statutes and civil claims involving small amounts of money. Judges of these courts are appointed and paid by the provincial or territorial government.

Provinces and territories are responsible for the day-to-day operation of all courts, superior and inferior, within their borders, and provide court facilities and support staff. As a result, superior and inferior courts are often housed within the same courthouse and may share courtrooms. [A chart showing the structure of Canada's courts is available on the Justice Canada website, at http://canada.justice.gc.ca/en/dept/pub/trib/page3.html]

a) Supreme Court of Canada

The Supreme Court of Canada is the last stop in Canada's justice system. It can hear cases involving any area of the law and is the final court of appeal for cases originating in other courts. This Ottawa-based court consists of a chief justice and eight judges. At least three of its judges must come from Quebec and, by tradition, three come from Ontario, two from western Canada and one from the Atlantic Provinces. Its members are usually judges promoted from a provincial court of appeal. The Supreme Court hears between 75 and 100 cases a year—only those of national significance or where the law is evolving or unclear. Most parties must apply to the court for leave, or permission, to have an appeal heard. Through a procedure known as a reference, the federal government may ask the Supreme Court to interpret whether a law is consistent with the constitution.

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b) Superior Courts

Each province and territory has two levels of superior court—one to hear trials, the other to handle appeals. The court of appeal, sometimes known as the appeal division, is the highest court within the province or territory. One tier below is the trial court of superior jurisdiction, which has various names—in Quebec, it is referred to as the Superior Court and, in Ontario, as the Superior Court of Justice; in Nova Scotia, Prince Edward Island, Newfoundland, British Columbia, the Northwest Territories and The Yukon, it is known as the Supreme Court; it is called the Court of Queen's Bench in New Brunswick, Manitoba, Alberta and Saskatchewan; in Nunavut, it is the Court of Justice. Superior trial

courts have inherent jurisdiction, which means they can deal with any case not specifically assigned to a lower court. They conduct trials in most serious criminal offences and civil cases, and hear constitutional challenges to laws or government policies. In most provinces, a specialized division known as a unified family court deals with divorces and other family law matters. Judges of the superior trial court also hear appeals from some decisions of lower courts and administrative tribunals.

c) Provincially Appointed Courts

Courts made up of judges appointed by provincial or territorial governments form the entry level of the justice system. The Provincial Court handles pre-trial proceedings and hearings in all criminal cases and can conduct trials in any case except murder. This court can also deal with narcotics offences and charges laid under federal and provincial laws. Judges of this court hear trials without juries. The Small Claims Court hears civil claims involving modest amounts of money. Youth Courts deal with minors between the ages of 12 and 18 who charged with crimes, applying special procedures set out in the *Youth Criminal Justice Act.* In provinces that have not established a unified court to deal with family law cases, a Family Court deals with issues such as child custody and access and applications to have children at risk put into foster care.

d) Other Courts and Tribunals

The **Federal Court** is an Ottawa-based superior court that deals with issues that arise under federal laws. It has a trial and an appeal division and hears disputes between Ottawa and the provinces, immigration and tax cases, allegations that copyright or patent laws have been violated, and cases involving federal Crown corporations or departments. It also deals with disputes over ships and salvage claims and reviews the decisions of federal boards, commissions and tribunals. **Military courts** preside over the trials of anyone charged under the military's *Code of Service Discipline,* the law that governs the conduct of Armed Forces members as well as civilians who accompany the forces on missions. While the *Code of Service Discipline* includes criminal offences, armed forces members accused of serious offences like murder, manslaughter or sexual assault are dealt with in the civilian courts if the crime has been committed in Canada. The federal and provincial governments have created **administrative tribunals** to settle disputes outside the court system. Tribunals are known as quasi-judicial bodies and, like courts, they convene hearings, review evidence and make rulings. Disputes over employment insurance benefits, claims of refugee status and allegations of human rights violations are among the issues dealt with by federal tribunals. Tribunals at the provincial level specialize in matters such as workplace standards, claims for workers' compensation, power rate increases and police misconduct.

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2. The Adversarial System of Justice

Under our system of justice, criminal and civil cases are resolved through a contest between opposing sides. An independent examination of evidence presented by each party involved in a dispute is seen as the best method of uncovering the truth. The Supreme Court of Canada has said this "adversarial" approach "helps guarantee that issues are well and fully argued by parties who have a stake in the outcome." Each party and its lawyers decide how their case will be pursued, what evidence and legal arguments they will seek to present to the court, and how witnesses will be questioned.

a) The Role of the Judge

In this contest between adversaries, the judge acts as a neutral umpire. The judge is the central figure in the courtroom and decides how the law applies,

whether *Charter* rights have been breached, how a case or trial should proceed and whether evidence is admissible in court. In cases heard without a jury, the judge must assess whether there is enough evidence to prove defendants guilty of a crime or, in civil cases, whether plaintiffs have established their claims. The judge decides which witnesses are believable and how much credence should be given to documents and other pieces of evidence put before the court. This role is known as the "trier of fact." When a person is convicted of a crime, it is the judge's duty to impose punishment. When a civil action is successful at trial, the judge decides the amount of damages or other measures required to compensate the plaintiff.

The judge also oversees the proceedings. He or she maintains order in the courtroom and ensures hearings and trials run smoothly and efficiently. Judges rarely question witnesses and avoid commenting on testimony or the strength of a litigant's case until all the evidence has been heard, so no one questions their impartiality. Section 11(d) of the *Charter* enshrines the right of persons accused of crimes to have their cases heard "by an independent and impartial tribunal."

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Judges, like anyone else, can make mistakes. In the course of a hearing or trial, the judge is called upon to make any number of decisions. Is certain evidence admissible? Have procedural rules been followed? How does a law or precedent apply to the issues before the court? Were someone's *Charter* rights breached? Was the jury properly instructed about how the law applied to the allegations before the court? The losing party has the right to file an appeal in an effort to have the decisions reversed or a new trial ordered.

The role of appeal court judges is to review such decisions and to decide whether they are sound in law. An appeal is not a second trial—appeal courts review the trial judge's rulings, transcripts of the trial or hearing, and the legal arguments of the lawyers for each side. Appeal courts hear additional evidence only if the information could affect the outcome of the case and was not discovered until after the trial was held. It is the job of the trial judge (or the jury, in jury cases) to decide what happened and whether witnesses have told the truth. Appeal courts rarely disturb such findings.

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If a serious error has been made, an appeal court has the power to overturn a criminal conviction or verdict in a civil case and to order a new trial. The court also may conclude that the error is not serious enough to affect the outcome, and allow the verdict or decision to stand. In criminal cases, if the court finds there is not enough evidence to support a conviction, it has the power to acquit the defendant. But if the Crown appeals a verdict of not guilty, the appeal court must either uphold the acquittal or order a new trial; an appeal court does not have the power to convict a person who has been acquitted at trial.

b) Judges and Juries

For centuries, juries have given citizens an opportunity to play a role in the administration of justice. Serving on a jury is a civic duty and helps members of the public to better understand the justice system and the trial process. Jurors are not expected to know the law and, in fact, lawyers and law students are disqualified from serving. The jury system developed in Britain as a way to balance the power of governments to prosecute individuals and the injustices that may occur from a strict interpretation of the law. Jurors bring a commonsense approach to the search for justice, and have the right to acquit someone of a crime if the person's conduct, while in breach of the letter of the law, does not appear to

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The *Charter* guarantees the right to a jury trial to every person charged with a serious crime that can be punished by five years or more in prison. (Many defendants do not exercise this right and judges hear most trials.) The jury in a criminal case consists of 12 people chosen by the Crown attorney and defence lawyer at the outset of the trial. Juries also hear a limited number of civil actions, including lawsuits alleging defamation and malicious prosecution. Jurors must be Canadian citizens and at least 18 years of age. Besides lawyers and law students, others exempt from jury duty are police officers, court officials, politicians, members of the armed forces and anyone who has served more than two years in prison for a crime. Friends and relatives of anyone involved in a case will be asked to declare such conflicts and will not be allowed to serve on the jury.

Jurors assume the role of triers of fact. They assess all of the evidence to determine what happened and, when there are two versions of events, they decide who is telling the truth. They swear an oath to be impartial and to return a verdict based solely on the evidence presented in the courtroom. Once all evidence has been heard, the judge instructs jurors on the law to be applied to the facts in order to reach a verdict. In criminal cases, the verdict must be unanimous or the case will end in a hung jury and the defendant will stand trial a second time. In civil cases, juries decide if a case has been proven and how much money should be awarded as damages if the plaintiff is successful.

c) Lawyers and Prosecutors

Crown attorneys or Crown prosecutors are lawyers who prosecute crimes and federal and provincial offences on behalf of the government. They decide whether it is in the public interest to pursue charges, and must withdraw the allegations if it does not appear there is enough evidence to convict the accused. In British Columbia, Quebec and New Brunswick, prosecutors decide whether criminal charges will be laid. Federal prosecutors and those in the remaining provinces and territories assume control of a case only after the police have filed charges. Prosecutors do not act on behalf of the police or victims of crime and have a duty to conduct cases with fairness and integrity. Despite the competitive nature of the adversarial system of justice, the Supreme Court of Canada has said that the role of prosecutor "excludes any notion of winning or losing."

Lawyers acting for the plaintiff or defendant in a civil action, or for a person accused of a crime, have a duty to ensure the court hears all evidence and legal arguments that could advance their client's case. The conduct of lawyers is governed by the ethical rules of the legal profession and they cannot mislead a judge, present evidence they know is false, or break the law. People who cannot afford to hire a lawyer may qualify for assistance from a legal aid program, which will provide a lawyer at public expense. Money for legal aid is limited and assistance is usually provided only in criminal cases and for parents whose children have been taken into protective custody. Since many people earn too much money to qualify for legal aid but not enough to cover a lawyer's fee, the number of persons representing themselves in court in civil and criminal cases is increasing.

3. Procedural Rules

Civil and criminal cases are conducted according to well-established rules of procedure. These rules govern what documents the parties must file with the court, the form they should take, and when they must be filed. Other rules set out the order in which hearings will take place, when evidence or legal arguments will be heard and how a case will unfold in the courtroom.

For instance, for the most part the documents that formally launch an appeal must be filed with the court no more than 30 days after the date of the ruling that is being challenged, ensuring the appeal is dealt with promptly. In certain civil actions, rules may require a plaintiff to give a defendant advance notice that a lawsuit will be filed. Lawyers must adhere to these rules in pursuing cases on their clients' behalf. If there is a dispute over how the rules apply, or if one party accuses the other of breaking or ignoring the rules, it is up to the judge to interpret and enforce them.

4. Rules of Evidence and Admissibility

The information used as evidence in court must be relevant. A fact, statement or event must have a logical connection to the specific allegations or claims involved in a case. In legal terms, the evidence must be "probative"—it must provide proof of matters that are important to establishing the position of a party involved in the case. This generally means that a defendant's background or a plaintiff's reputation is not put before the judge or jury, since the issue to be decided at trial is not *who* is before the court but *what* happened and how it should be dealt with under the law. Judges and juries receive most of their information in the form of direct evidence, which is what each witness saw, heard or experienced. Circumstantial evidence—something that links the accused to the offence—may also be admissible. For instance, a person accused of being involved in a hit-and-run accident may have been seen driving in the area shortly before the accident, and then seen by other witnesses driving away from the area at high speed. This testimony alone may not be sufficient to prove the defendant was involved in the hit and run, but it is circumstantial evidence that a judge or jury may be entitled to consider.

Documents, photographs, weapons, clothing worn by a victim or suspect and other physical items may be used as evidence if they are relevant to the case. A witness will have to identify each item, explain its origins and assure the court it is genuine. Witnesses are not permitted to offer opinions on what may have happened, with the exception of specialists in fields such as medicine, science or forensic techniques. Once a judge reviews their credentials and accepts them as experts, these witnesses can explain the results of scientific tests or offer opinions that are based on the evidence before the court.

Second-hand information, known as hearsay—what a witness overheard other people saying about an incident or someone's conduct—is generally not usable in court. Parties are required to present witnesses who have first-hand knowledge of events or who actually saw or heard what happened.

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The *Canada Evidence Act,* the law that sets out what kind of information can be used in court, prevents a person from being forced to incriminate themselves or from being forced to testify against their spouse. Judges also undertake a careful review of any statement that a person accused of a crime has made to a police officer or other person in a position of authority. Judges must ensure an interrogation was conducted properly and confessions or other statements were made voluntarily. If a statement is found to have been made as a result of promises or threats, or as a result of prolonged or aggressive questioning, a judge may refuse to allow it to be used as evidence.

5. How a Trial Unfolds

Trials unfold in essentially the same fashion at all levels of court, with the exception of the special procedures required if a jury is hearing the case. (In the description that follows, the proce-

dure for a jury case has been added in brackets.)

a) Civil Cases

Courts in some provinces require the parties involved in civil disputes to take part in pre-trial conferences, chaired by a judge, to explore the possibility of an out-of-court-settlement. If no agreement is reached, the case proceeds to trial.

The plaintiff presents his or her case first. (The plaintiff's lawyer may make an opening statement to the jury). Each witness is called to the stand, takes an oath swearing to tell the truth, and is asked what they know about the allegations before the court. The defence lawyer then has an opportunity to question each witness—a process known as cross-examination—to challenge the evidence presented or to draw out information favourable to the defendant. The questioning procedure is reversed once it is the defence's turn to call evidence.

Once all the evidence has been heard, each side makes a closing address summarizing its case. The final stage of the trial is the verdict. The judge may adjourn the case for days or weeks before returning to court to outline the findings of fact and whether the plaintiff's case has been proven on a balance of probabilities. If the plaintiff succeeds, the judge decides the amount of damages or other remedy awarded against the defendant. (In jury trials, after closing arguments, the judge delivers the instructions or "charge" to the jury, reviewing the evidence and explaining how the law applies to the allegations before the court. At the conclusion of these instructions, jurors leave the courtroom to discuss the evidence in secret as they decide whether the plaintiff's case has been proven. If jurors find for the plaintiff, they are asked to decide on the amount of damages to be awarded.)

b) Criminal Cases

A criminal trial begins with the reading of the charge or indictment. If the defendant has yet to enter a plea, he or she will plead not guilty at this point. (In jury trials, the prosecutor and defence lawyer select the jury and then the indictment is read and the defendant pleads not guilty in the jury's presence.)

The prosecution presents its case first. (Before calling witnesses, the prosecutor usually makes an opening statement to the jury outlining the evidence against the defendant.) Each prosecution witness testifies and is cross-examined by the defence lawyer.

Once the Crown rests its case, it is the defence's turn. If the prosecution's case appears to be weak, the defence can ask the judge to find the accused person not guilty, but such motions are rarely made and rarely succeed. While defendants have the right to silence and are under no obligation to present evidence, the defence usually calls witnesses and it is common for the accused person to testify. If the Crown has established a *prima facie* case—evidence that is sufficient, on its face, to prove the allegations beyond a reasonable doubt—a defendant who offers no evidence to contradict those facts is almost certain to be convicted. (Defence lawyers can make an opening statement to the jury outlining their position and introducing the witnesses to be called.) The prosecutor has the right to cross-examine all defence witnesses, including the defendant.

The judge may find it necessary to declare a mistrial if it appears the accused person's right to a fair trial has been compromised. (In jury trials, mistrials are usually declared if jurors have been exposed to inadmissible evidence or prejudicial information about the accused person, either through media reports or improper statements made in the courtroom.) If a mistrial is declared, the accused person will be required to stand trial before a new jury unless the prosecution withdraws the charges. Once all evidence has been presented, law-

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yers for each side give their closing addresses—speeches analysing the evidence and suggesting how it supports the accused person's guilt or innocence. If the defence decides not to call evidence, the prosecutor is the first to present a closing argument. When defence evidence has been called, however, the order is reversed—the defence lawyer goes first and the prosecutor makes the final submission.

The final stage of the trial is the verdict. The judge may adjourn the case for days or weeks before returning to court to outline the findings of fact and whether the defendant has been found guilty or not guilty. (In jury trials, after closing arguments the judge delivers the instructions or "charge" to the jury, reviewing the evidence and explaining how the law applies to the allegations before the court. At the conclusion of these instructions, jurors leave the courtroom to discuss the evidence in secret as they try to reach a verdict. While jurors are allowed to return home each night during the trial, once deliberations begin they are sequestered—kept away from outsiders—and billeted overnight in a hotel, if necessary, until a verdict is reached. Jurors must return a unanimous verdict; a deadlock—known as a hung jury—means that a new trial will be held unless the Crown decides to withdraw the charges.)

A person found not guilty is free to go and can only be tried again on the same charges if an appeal court overturns the verdict and orders a new trial. If the defendant is convicted, the final step in the trial process is for the judge to impose a sentence.