***Source of Laws in Canada:***

*Constitutional Division of Powers to make Laws in Canada*

*What is a constitution? A mission statement for a nation. It (often) tells us what system of government we have, how we make our laws, how we apply and enforce them. It defines us as a nation. What we value. How we interact. In whom the authority rests.*

*The Canadian Constitution is made up of a number of documents including the* ***Constitution Act 1867*** *(what was called the* ***British North America Act*** *(****BNA Act****)), an ordinary piece of legislation passed by the United Kingdom parliament that helped lay the foundation to bring modern day Canada into being.*

*This document tells us of our system of government, and importantly sets out which level of government, federal or provincial/territorial has authority over what subject matters.*

*The Constitution Act 1867 (BNA Act) – Sections 91 and 92*

*s. 91(27) Federal responsibility –* ***Criminal law****, fish, taxation, customs, immigration*

*s. 92(13) Provincial responsibility – property and civil rights (real estate and motor vehicles)*

*The other key constitutional document is the* ***Canadian Charter of Rights and Freedoms****, a document that has served the change the law, and more specifically criminal law, more in the last 40 years than the law had ever changed before.*

*It is a document that grants to people within Canada individual rights and freedoms that are recognized before the rights of the many. Individual rights come first before the interests of society, though there is a balance that must be found.*

*Where an existing law whatever its source fails to respect the rights and freedoms of those persons under the protection of the Charter, law can be made or unmade which is more often the case; the law may be struck down as unconstitutional.*

*Where an existing law fails to recognize Charter rights and freedoms, then the law may be modified or reworded by a court to ensure it is compliant with (fits within) the Charter.*

*An important role of the courts in Canada is to make law, but the law made by the courts is an evolutionary process over time.*

***Common law (cases) and Statute law (legislation):***

* *There are, generally speaking, 2 sources of criminal law in Canada; the common law and statute law*

*Common/Case Law –*

* *This is judge-made law. Judges (and juries) hear trials and other proceedings and then they make decisions. Judges of appellate courts hear appeals about the results of trials and other proceedings and make decisions. When they do so, they apply legal principles to facts. The legal principles that apply to facts or to similar circumstances are case law and they form part of the common law.*
* *The common law usually changes only incrementally over time because we want to preserve the certainty and consistency and predictability features.*

*Legislation*

* *laws passed by Parliament or a Legislature of a province or territory*
* *drafted by and voted on and passed by some level of representative government*
* *essentially the persons who are elected by you are lawmakers, so take care choosing your preferred candidate*
* *We have a system of representative government. The elected member is to be representative of your riding. When he or she goes to Ottawa, they will be called upon to draft, to discuss and to consider, to vote for or against bills, and those bills, if passed by a majority of the membership of parliament, become laws. This is called legislation.*
* *Law-making is one of the most significant responsibilities of Parliament. As such, the legislative process takes up a significant portion of Parliament’s time.*

How to read a case:

Decisions of the court are called cases.

**Hierarchy of courts – B.C.**

Supreme Court of Canada – Highest

BC Court of Appeal

BC Supreme Court

BC Provincial Court - Lowest

**Stare decisis – to stand by things decided – literal “already decided”**

A body of law is called caselaw. One might say “the caselaw supports the proposition that..”

Cases are sometimes reported (reduced to writing and available through a reporting service. Most are now online and CanLII (canlii.org) is the most accessible.

Each case will have a name (the parties to the proceeding), a case number, a date, a location, the name of the judge or judges, counsels’ names, and often a title indicating what the decision is (for example, a pre-trial motion, a verdict, a sentence).

Each case will almost invariably begin by stating what the issue to be decided is, the facts or evidence upon which the case is based, a consideration of the law as it applies to the evidence or facts, and a decision.

R v Sipes

Re Hansard Spruce Mills

How to interpret legislation:

* Legislation is passed by Parliament (federal) or a legislature (provincial). If the subject matter is under section 91 of the Constitution Act 1867, then it is federal and if under section 92, provincial.
* If the legislation (called a statute or an Act) is federal, it will have the letters RSC (Revised Statutes of Canada) after it, while if provincial, it will have RS and abbreviation for the province or territory. In BC, it will be followed by RSBC.
* If the legislation is federal, it is in force throughout Canada. If provincial, only in the province.
* Every word in legislation is there for a reason and has meaning. You cannot ignore a word.
* “Shall” is mandatory and “may” is permissive.
* “Or” means in the alternative while “and” means each of the things or events must be satisfied
* When reading legislation, always read the whole section, and any references to any other sections within it.
* Words in legislation are often defined.
  + Sometimes they are defined in the section. The section will say something like “for the purposes of section 123, the word “x” means “blah blah”
  + Sometimes the words are defined at the beginning of the part of the legislation, so look in the index for what part the section you are looking at is in
  + Sometimes the words are defined for the whole piece of legislation, often called an Act (or in the case of the Criminal Code a “code”) and the section in which they are found is almost always section 2
  + If the word is not defined in the section or the part or in the Act, then you will want to go to the Interpretation Act (if the legislation is provincial then the provincial Interpretation Act and if federal the federal Interpretation Act; the Criminal Code is federal).

See Canada Interpretation Act section 35 and others

* If you do not find the word there, then search caselaw for the word.
* If you do not find it in the caselaw, then the word has its ordinary societal meaning, and you can use the COED or any other dictionary that applies to English (or French) language in Canada.

**Overview of the Canadian Court System:**

Levels of court and jurisdiction:

There are four levels of court for our purposes. There is a hierarchy in the court system. Lower courts must follow the law as set by higher courts. In ascending order there are the following:

British Columbia Provincial Court: This is the court at which the vast majority (95%) of criminal matters, proceedings in which the state (represented by Crown Counsel) has charged an individual or individuals with (an) offence(s) are adjudicated. This court also hears almost all applications relating to judicial interim release (bail) of an accused prior to trial. It has absolute jurisdiction over some *summary* criminal matters listed in section 553 of the Criminal Code.

The court also has jurisdiction over family law (largely custody and access to children but not divorce) and civil law (disputes between individuals, including societies and corporations up to a monetary value of $35000).

This is a trial court and evidence is introduced through witnesses who testify. A single judge hears proceedings and sits in judgment.

British Columbia Supreme Court: This court has exclusive jurisdiction (authority) over some criminal matters (listed in section 469 of the Criminal Code). The court has a shared jurisdiction with the provincial court over most *indictable* criminal matters.

It also has jurisdiction over divorce, including division of family assets, and all civil disputes of a monetary value over $35000.

This is both a trial court and an appeal court. The courts hears criminal appeals where one or other party takes legal issue with the conduct or results of the trial in the provincial court but only if the charge were *summary*.

This court sits with a single judge, or a judge and jury in some cases, where the judge is responsible for the application of the law, and the jury is responsible for considering the evidence and finding the facts.

British Columbia Court of Appeal: This is an appeal court having jurisdiction over all appeals from the BC Supreme Court and some criminal appeals directly from the provincial court, if the charge were *indictable*.

This court does not typically receive evidence from witnesses as an appeal is *on the record*. The material that goes before the court includes transcripts of testimony, submissions, copies of or actual exhibits, and legal argument including cases. The issue on appeal is always a legal one. It is not a retrial.

This court sits three or five judges so that there is a tie-breaker if the judges do not agree in the result.

Supreme Court of Canada: This court is the highest court in Canada. It hears appeals from the appeal courts in the provinces and territories. Those matters are generally ones that the court thinks have national importance.

This court does not receive evidence just like the provincial courts of appeal. It relies on the record of the trial from a province or territory.

Generally speaking, a *party* to a proceeding (a *litigant*) is not entitled to an appeal to the SCC. The party must seek *leave of the court*. However, if the appeal court does not agree in the result, then the appeal can be brought *as of right*.

The SCC sits 5, 7 or 9 judges, depending on the significance of the case, again because there must be an uneven number of judges in case there is disagreement.

Civil vs. criminal:

Criminal matters are those involving an allegation of a criminal act by the state against an individual. One party is Crown Counsel, the prosecutor representing the state (society), and the other is the individual accused. There may be a single accused and that may be an individual or a society or corporation or there may be multiple accused.

Civil matters are those involving a dispute between individuals. The issue is nearly always about money or money’s worth.

*Stare decisis*: Means “*already decided*” or a settled issue of law. This a critical to understanding the ideas of certainty, consistency and predictability. The best of the cases is *R. v. Sipes*.

Hansard Spruce Mills explains what the court ought to do if faced with a decision from the same level of court (in the same province of course).

1. If subsequent cases have cast doubt on the validity of the decision, then the court can depart from the decision
2. If applicable law had not been brought to the attention of the earlier court decision, then the court may make its own decision, or,
3. If the earlier decision was made nisi prius, (sometimes referred to as “off the cuff’), under time pressure so that it could not be fully considered, then the court may find its own way.

**The Fundamental Principles of the Criminal Law:**

Before we talk about the criminal law, we need to know what a crime is. Not all bad behaviour is crime. Not all offences are criminal.

What is a crime? It is an inherently wrongful act.

*A* ***crime*** *is an intentional wrongful act or omission that causes harm or a risk of harm to another and that society seeks to repress through a sanction.*

***The “Big 3” Principles***

**The presumption of innocence** – *Woolmington v. DPP: "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

**The right to silence** – *R. v. Turcotte*: “*Under the traditional common law rules, absent statutory compulsion, everyone has the right to be silent in the face of police questioning, even if he or she is not detained or arrested.  The right to silence, which is also protected by the*[*Canadian Charter of Rights and Freedoms*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-12/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-12.html)*, exists at all times against the state, whether or not the person asserting it is within its power or control.  Furthermore, a voluntary interaction with the police, even one initiated by an individual, does not constitute a waiver of the right to silence.  The right to choose whether to speak is retained throughout the interaction.”*

**The need for proof of guilt beyond a reasonable doubt** – *R. v. Lifchus: “The accused enters these proceedings presumed to be innocent.  That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.*

*What does the expression “beyond a reasonable doubt” mean?*

*The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice.  It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*

*A reasonable doubt is not an imaginary or frivolous doubt.  It must not be based upon sympathy or prejudice.  Rather, it is based on reason and common sense.  It is logically derived from the evidence or absence of evidence.*

*Even if you believe the accused is probably guilty or likely guilty, that is not sufficient.  In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.*

*On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so.  Such a standard of proof is impossibly high.*

*In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.*

Para 26 – what should be avoided?

26                              Finally, qualifications of the word “doubt”, other than by way of the adjective “reasonable”, should be avoided.  For instance, instructing the jury that a “reasonable doubt” is a “haunting” doubt, a “substantial” doubt or a “serious” doubt, may have the effect of misleading the jury (*Boucher v. The Queen*, [1954 CanLII 3 (SCC)](https://www.canlii.org/en/ca/scc/doc/1954/1954canlii3/1954canlii3.html), [1955] S.C.R. 16).  What may be considered to be “haunting”, “substantial” or “serious” is bound to vary with the background and perceptions of each individual juror.  As a result of the use of these words jurors will be likely to understand that they should apply a standard of proof that could be higher or lower than that required.  Similarly, to advise jurors that a “reasonable doubt” is a doubt which is so serious as to prevent them from eating or sleeping is manifestly misleading (*Girard*, *supra*; *R. v. Bergeron* (1996), [1996 CanLII 5695 (QC CA)](https://www.canlii.org/fr/qc/qcca/doc/1996/1996canlii5695/1996canlii5695.html), 109 C.C.C. (3d) 571 (Que. C.A.), at p. 576).  These words would lead a juror to set an unacceptably high standard of certainty.

R. v. Sanchez, 2017 ONCA 994 (CanLII)

[24]      Second, in concluding that she believed the evidence of L.H., the trial judge said, at para. 50:

There was no tendency in her evidence to exaggerate or to amplify her evidence as she went along. There was no apparent motive to lie.

[25]      It is recognized that whether a person does or does not have a motive to lie is not generally a reliable basis upon which to assess credibility.  Certainly the absence of any apparent motive to lie is an unreliable marker of credibility.  There are simply too many reasons why a person might not tell the truth, most of which will be unknown except to the person her/himself, to use it as a foundation to enhance the witness’ credibility.  Consequently, it is generally an unhelpful factor in assessing credibility: *R. v. L. (L.)* (2009), 96 O.R. (3d) 412 (C.A.), [2009 ONCA 413](https://www.canlii.org/en/on/onca/doc/2009/2009onca413/2009onca413.html), at para. [44](https://www.canlii.org/en/on/onca/doc/2009/2009onca413/2009onca413.html#par44).