**The Rule of Law:**

Societies are molded by their rules, and those rules are often in the form of laws.

Law orders society and communities.

*“The rule of law is the keystone for order, and the key to prosperity, in all our communities. The propositions are as follows:*

*1. that law, not force, or even the power of a personality, should regulate our lives;*

*2. that the law that regulates our lives is a body of rules to which at least a majority of*

*us, in any community, has assented, and which are intended, as much as is possible,*

*to balance competing public and individual interests;*

*3. that no one, including government, is above the law, meaning that, unless expressly*

*excepted, all rules bind all people to whom they could apply;*

*4. that everyone is equal before the law, meaning that all rules apply the same way to*

*all people;*

*5. that judges must be impartial and independent, meaning that they must not pre-judge*

*the matters they must decide and that their judgments must result from thoughtful*

*consideration only of the evidence led and arguments made before them…” (from Gordon Turriff QC’s 2009 lecture on the necessity of lawyer’s self-governance in Canada)*

**Examples of breakdown in the rule of law**

Vigilantism

Corruption

Police misconduct

Laws that go unchanged despite high public opposition to them

**Adversarial Process:**

One in which one side is pitted against the other in search of justice.

The focus is on procedural fairness and individual rights of participants, sometimes at the expense of finding the truth.

Style of Cause in criminal proceeding

**Independent Arbiter:**

A decision maker that has no relationship to either/any of the parties in the case and no interest in the outcome of the dispute.

We call those persons judges in Canada, and where a jury is empanelled to render a verdict, the jury must be an impartial arbiter too. Each individual juror must meet the same criteria as a judge.

**Certainty, consistency, and predictability:**

These are fundamental to the current Canadian idea of the *Rule of Law*; that laws are written and because written, then certain, and if certain, then can be applied consistently, and if applied consistently, then an outcome can be predicted from circumstances.

These features are part of the common law, a legal tradition in Canada, but note that First Nations peoples may not have a written set of laws and may follow the oral tradition.

**Fairness:**

This may be the preeminent feature of the Canadian criminal justice system, an ideal to which we aspire in every criminal proceeding.

R v Harrer – Supreme Court of Canada

*41 Every person tried in Canada is entitled to a fair trial.  The right to a fair trial is the foundation upon which our criminal justice system rests.  It can neither be denied nor compromised.  The common law has for centuries proclaimed it, and the*[*Canadian Charter*](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)*confirms it.*[*Section 11*](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#sec11_smooth)*(d) provides that "Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".  The right to a fair trial is also a "principle of fundamental justice" which*[*s. 7*](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#sec7_smooth)*of the*[*Charter*](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)*requires to be observed where the liberty of the subject is at stake: R. v. Seaboyer,*[*1991 CanLII 76 (SCC)*](https://www.canlii.org/en/ca/scc/doc/1991/1991canlii76/1991canlii76.html)*, [1991] 2 S.C.R. 577, at p. 603; Re B.C. Motor Vehicle Act,*[*1985 CanLII 81 (SCC)*](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii81/1985canlii81.html)*, [1985] 2 S.C.R. 486.*

*45               At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community.  A fair trial must not be confused with the most advantageous trial possible from the accused's point of view….  Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained.  A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused. R. v. Harrer 1995 CanLII 70 (SCC)*

**Source of Laws in Canada:**

**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.

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.

Thou shalt not kill

Thou shalt not intentionally kill

Thou shalt not intentionally kill except to defend oneself

Thou shalt not intentionally kill except to defend oneself or another

Thou shalt not intentionally kill except to defend oneself or another if holding a reasonable belief that your life or that of another is at risk…

This is the evolution of law.

**The role of the courts in making law**

***Criminal negligence***

*219 (1) Every one is criminally negligent who*

*(a) in doing anything, or*

*(b) in omitting to do anything that it is his duty to do,*

*shows wanton or reckless disregard for the lives or safety of other persons.*

***Definition of “duty”***

*(2) For the purposes of this section,****"duty"****means a duty imposed by law.*

Statutory interpretation: what does *wanton or reckless disregard* *for the lives or safety of other person* mean*?*