



Chapter Four

The Processes of Law

Each of the many legal systems operating in today's world is one of three main **branches** of law:

- (1) **Municipal Law** consists of those laws that are specific to a particular nation and as such govern only the people living within that nation, such as Canada;
- (2) **International Law** affects the world as a whole and governs relationships between nations. (*This law is characterized by treaties - such as Free Trade, The Law of the Sea, The Geneva Convention, etc., and is enforced through an International Court sitting at The Hague in Switzerland; as well as the United Nations and International agencies such as the Red Cross and the Red Crescent*); and
- (3) **Religious Law** controls behaviour of members within specific religious faiths such as Roman Catholic, Anglican and Jewish. (*This law deals with the rules that may govern the family through marriage, divorce, baptism, burial, etc.*) As a result, Canada's legal system is actually the Common Law system which in turn is a branch of Municipal Law.

In turn, **Municipal Law** is subdivided into four clearly delineated **systems**. These systems of law include:

(1) **Oriental Systems of Law:** Countries such as Thailand, Cambodia, etc. all have developed legal systems deal with rules specific to the demands of their cultures. These rules pertain to the family, marriage, and each culture in general. Often these laws describe the role of the elders in the community, the influence exercised by the religion, land usage, etc. All of these are seen as being significantly different from our Common Law system. Even roles are different. For

example, some oriental countries see the police as "friends and advisors" not aggressors; lawyers do not exist as a profession - in fact are even banned; etc.

(2) **Modified Socialist Systems of Law:** This system affects those countries that were under the umbrella of communist or socialist systems of government. For example, former Warsaw Pact nations such as Russia, Bulgaria and China each have laws that used to reflect the "classless", "unmaterialistic", "co-operative" nature of their socialist societies. The role of the state in the societies was supreme as was the role of the "watch-dogs" of the state such as the Secret Service and Police in maintaining the socialistic way of life. For the most part, these systems are now in flux and are undergoing dramatic change as they fall in line with a more democratized society. These systems, however, are keeping many of their laws, their system of trial and legal processes. But, they are eliminating the supremacy of the state and its police. In essence, they are slowly emerging as a system with elements similar to the civil and common law systems familiar in neighbouring countries.

(3) **Civil Systems of Law:** Over the centuries, countries such as France, Germany, Austria, Turkey and Japan have developed a legal system which is based on the old Roman Law (*jus civile*). This form of law traces its root back to the 12th century where it was studied along with theology and medicine in European universities. At that time, each kingdom had its own local or *municipal* laws. Rather than study these, the students studied law in an abstract, general, idealistic sort of way.

As Europe grew, so to grew these kingdoms into

empires and there was a demand for more specific laws. This demand got greater during periods such as the “Inquisition,” the “Glorious Revolution,” and the “Holy Roman Empire.” To answer this need, this earlier Roman law was written into local law codes and evolved into a civil law code possessing a common ancestry. But, it had features and laws unique to each kingdom and empire that eventually became a country. As European influence spread across the world into the orient and North America, this legal system spread with the explorers and thus has remained until this day. The Province of Quebec, for instance, was originally a colony of France and still retains the “**Le Droit Civil**” today.

(4) Common Law Systems: As we have already seen, our system has evolved from that of the England. Unlike Europe which was a continental land mass housing many different countries and peoples, England was a country, small and isolated. In the beginning dozens of warring tribes lived on the island and were conquered by Rome that introduced Roman Law. After the fall of Rome, the law remained and slowly changed to meet the needs of changing times as these tribes fell under the control of one king, Alfred the Great.

After the William the Conqueror, in 1066, the Common Law system became more complex as a result of the work of circuit judges sent out to handle disputes throughout the kingdom. So, unlike civil law that stemmed from the universities, common law came from the judges themselves who gradually established uniform laws that were applicable to all people living on the island.

Naturally, as the Kingdom of England evolved into the British Empire, so did the laws on England follow explorers and conquering armies across the globe. At one point, 25% of the earth was under the control of the British. It can thus be argued that this same percentage have legal systems originating from England.

The **Common Law system** which has evolved and which dominates Canada today is subdivided into three different *areas* of law. These are Substantive Law, Law of Evidence and Procedural Law.

Procedural Law, as the name implies, deals with the enforcement of laws which have been created to govern our behaviour within the society. Procedural Law deals with the form and bureaucracy of the legal process, the arrest process and the processes involved as a case winds its way through the courts. This area of law is dealt with in greater detail later in this chapter.

The **Law of Evidence** governs the kind of evidence that is admissible during the trial process. Further, it establishes what kinds of proof are required for the substantiation of a case, how witnesses are to be examined and cross-examined, the rights of the accused and guarantees against self-incrimination.

Evidence in all trials in Nova Scotia as well as Canada is governed by very complex rules which have been in existence for decades. These rules vary from

trial to trial, but most are governed by three basic rules of evidence:

(1) The evidence must be relevant in that it must clearly relate to the issue in dispute before the court;

(2) Evidence must be factual and not opinionated. However exceptions are permitted in the case of expert witnesses giving evidence within their field of knowledge;

(3) Evidence must be from first-hand knowledge and it must be useful to prove something directly. Hearsay and rumour are not permitted.

Where evidence is questioned during a trial, often a **voir dire** is heard. A voir dire is a “trial within a trial” which is conducted to determine whether or not certain statements which are attributed to the accused ought to be heard by the court. Another reason for a voir dire surrounds the admissibility of wiretap evidence. In this instance, the voir dire will determine whether or not the wiretapped conversations were obtained in a legally accepted way. If there is a problem with evidence presented, the court may not permit it to be included as part of the case.

Finally, we have the most extensive and complex area of law - **Substantive Law**. This area specifies exactly what rights, privileges and duties we have in our society and in relation to others. Unlike procedural law which deals with enforcement of our laws, substantive law specifies what laws are to be enforced. For example, **tax law** is a type of substantive law that specifies what taxes we are required to pay, how these taxes are to be paid; how they are to be collected, etc. Meanwhile, the Law of Tax Procedure outlines the procedures to be followed in reviewing tax accounts, as well as the trial process of an offender who breaks these laws. The same is true for **Criminal Law**, also a type of substantive law, which specifies what types of activities are considered contrary to the wishes, demands or needs of society. Meanwhile, the Law of Criminal Procedure outlines the Crown and trial procedures to be followed in the event someone violates one of the laws contained in the Criminal Code.

Substantive Law addresses the specific legal concerns within our society. In this chapter, several of these areas are dealt with in subsequent chapters. In summary, some of the types of substantive law in Canada include:

1. Criminal Law: This type is the most well-known and perhaps the most important. It falls under a **category** referred to as Public Law (Public Law consists of several sub-categories. Three of the most well-known are: [1] Constitutional Law, [2] Administrative Law and [3] Criminal Law.)

In earlier chapters we defined the term: “crime” and established that such behaviour are contrary to our society and must be dealt with by our legal system. These offences include those affecting the rights and safety of others or their property, offences against the state, dishonesty, nuisance, etc. Further, this type of law deals

with compensation, protection and punishment as well as damages and fines. All key players in our legal system such as the lawyer, police, victim and court officials are involved in this type of law. Searching both property and the person, the guaranteed rights of individuals under the Constitution, arrest and interrogation, defences under the law (youth, mentally disabled, ignorance, insanity, provocation, intoxication, automatism and accident) are just a few of the many facets of the broad field of Criminal Law.

The key expression with regard to liability in criminal acts is "*actus non facit reum nisi mens sit rea*" which simply means that a person is not guilty of an action unless the mind of that person is also guilty. Thus, in criminal law a crime has two distinct elements - (1) the *actus rea* (the physical elements of the crime) and (2) the *mens rea* (the intention, knowledge, and mental processes involved in the actus rea). Criminal law is that part of our legal system which affects the most people and draws the most attention of the public through the media.

2. Civil Law: Unlike criminal law which deals with a "crime" as dictated by the rules and regulations set down by society, **civil law** deals with "wrongs" committed by one individual, a group of individuals, a business, a corporation, etc. against another individual, a group of individuals, a business, a corporation, etc. This type of law is sometimes fits under the category of Private Law. (Most of the types of substantive law such as Tort Law, Labour Law and Administrative Law fit within Private Law.)

Civil disputes are divided into three categories. First, there are breaches of contracts wherein one party fails to live up to their agreed relationship in fulfilling an obligation to a second party. For example, a bricklayer bound by a contract to use Grade 2 red brick in constructing house uses a substandard grade 3 contrary to an agreement between the homeowner and the bricklayer.

Next, there are breaches of trust wherein one party abuses their position to the detriment of a second party. For example, a municipal politician "tips off" a developer and political backer as to the location of a new factory so the developer can buy the land nearby on speculation of increasing land prices. The politician, in this instance, has breached the trust of placed in him by those who elected him to office.

And finally, there are torts. Torts are the largest body of civil law and are dealt with independently in the next section.

3. Torts: The word "tort" is French for "wrong." Ideally, a tort occurs where one individual or a group of individuals adversely affects another individual or a group of individuals as a result of their actions. Such action does not involve "contract" or "trust" and more often is of a physical nature. Tortuous actions involve things as a neighbour's dog causing another neighbour mental stress; the injury of a passer-by on an icy sidewalk in front of another party's address; or actual physical damages to another individual or their property as

the result of a criminal act. Tort Law deals with the actor and victim, punishment and compensation, rights, accidents, injuries and losses, self-inflicted injuries, physical and financial losses, faults, negligent behavior and liability.

4. Family Law: This type of substantive law deals with the family unit. It covers areas such as marriage, divorce, separation, wills and inheritance, and the role of the "Family Court" etc. This type of law deals with the legal status of the child in the family, the child's legal rights and obligations, as well as the parent's legal rights and obligations to their children.

5. Property Law: In Canada, as is the case in most countries throughout the world, property is divided into two categories - *real* property- land, houses, buildings, etc.; and *personal* property - material items such as art, television sets, cars, etc. In between these two types are leaseholds which affects people involved with items in real property or in personal property. In addition, this type of law touches on community or public property, liability, copyrights and patents, legal title, landlord-tenant relations, freedom of property use, transfer of property, bequeathing of property, as well as the duties and rights of property owners and their tenants.

6. Administrative Law: This type of law deals with the activities of various agencies of government at all three levels. It deals with legal areas such as planning (zoning, development plans, sub-divisions), government services, boards of health, building codes as well as the powers and structures of agencies at each level such as the Canadian Broadcasting Corporation, the Nova Scotia Liquor License Board and local school boards are all governed by the type of law.

7. Tax Law: The famous American novelist Samuel Clemens once said: "Two things are certain in life - death and taxes." For centuries members of a society have been "taxed" by the state. A tax is merely a compulsory contribution required from every individual, group of individuals, organization, business or corporate entity existing in a country to the government. This tax is to be used for the providing of services such as defence, education, health care etc. to the society as a whole. The laws that govern this tax process form yet another type of substantive law - Tax Law.

Tax Law deals with the legislative process required for the imposition of taxes, methods of taxation, payment of taxes, tax sales, assessments (how assessment is made and how it can be appealed) and the rights of each level of government to impose taxes in which area and/or on what commodity or service.

8. Corporate Law: This type of substantive law deals with the legal contractual obligations between individuals and a business as well as obligation between businesses and governments at all levels. This type of law deals with bonds, agreements, deeds, offers, guarantees, credit sales, bargains, tickets, standard forms, bills of sale and tickets, role of agents,

cooling-off periods, promises and problems of consideration.

In addition, corporate law deals with the concepts of sole proprietorship, partnership and acts of incorporation, private and public companies, prospectus, memorandum of association, shareholders and Board of Directors, monopolies and restrictive practices, etc.

9. Consumer Law: This type of law addresses with the rights of the consumer, the merchant, and the manufacturer in relation to each other. Areas such as corporate and personal transactions, payment for goods and services, bailments, guarantees, consumer protection agencies, implications of “bargain” sales and illegally - obtained merchandise, loans, insurance, mortgages, etc. are all addressed by this type of substantive law.

10. Labour Law: This type of law deals with private employment contracts, collective agreements, types of dismissal and hiring practices, union, the bargaining process, employee-employer relations, arbitration, court injunctions, damages for breach of contracts, lockouts, workmen’s compensation, rules and rights of both the employee and the employer.

11. Constitutional Law: In recent years, this type of law has become more important in Canada with the passage of the Constitution Act in 1980 and subsequent amendments in 1982. In essence, this type of law deals with the Canadian governmental system, and where each type of government and agency fits within the Canadian governmental structure. The structure and powers of the federal parliament, provincial assemblies and municipal councils are all governed under administrative law. Finally, the process of law-making and law review falls in this realm as well.

Although this type of law can be seen to encompass several of the other types of law, it tends to stress the interpretation, modification and intent of the constitution. Further it defines what is meant by a “human right” and a “personal right”; natural and legal rights; protection of human rights through the constitution; judicial enforcement; acts and legislation. In addition, the role of the ombudsman, human rights commissions, affirmative action groups and societies. Discrimination, contrary to the rights of all Canadians, on the basis of age, sex, colour, religion, etc., are all addressed under Constitutional Law.

12. Admiralty Law: In the past, this type of law was considered very important considering the fact that thousands of small ships traded throughout the world. Today, with large bulk carriers and container ships as well as off-shore factory ships, the number of ships at sea have become more specialized. However, the rules that govern ships at sea, behaviour aboard ships, the powers and jurisdiction of the ship’s officers, etc. are all governed under **Admiralty Law**.

This law is enforced through the Federal Court of Canada. Further, the “sea-going” action specified in the Criminal Code of Canada is the act of “Piracy” or certain capital offences. All other actions at sea are gov-

erned under this very specialized type of law.

13. Military Law: Like Admiralty Law, Military Law is a specialized field that is a part of public law in that the military is a public entity. Once an individual joins the air, land or sea elements of the Canadian Armed Forces, they are instantly subjected to the rules of military law. In essence, military law is no different from other types of law we have seen except the trial process is different; the rights of the accused are less and the punishments are often harsher. In civilian life, we are guided by the Criminal Code of Canada and selected statutes. In the military, the Queens Regulations and Orders (QR&O’s), The Canadian Forces Administrative Orders (CFAO’s) and orders made by local base or unit commanding officers (Routine Orders) are the main laws in effect. The punishments are different and involve loss of pay, demotion, imprisonment, etc.

All these types of substantive law aside, let us now return to **Procedural Law**. As we discussed earlier, this area of law is divided into two types: (1) Criminal Procedure - which deals with the criminal process and (2) Civil Procedure - which deals with processes involved in a civil litigation. At the centre of Procedural Law are the courts in Canada.

In Canada, the basic role of our courts are to provide a fair and just resolution of the various problems and conflicts which end up there. The resolution of these disputes or offences is the product of fair and impartial proceedings. In Canada, the legal community maintains that only through procedural fairness can the quest for true justice be attained.

Many Canadians see their law courts as being both “stuffy” and “stiff”. Our courts tend to be highly formal, complete with judicial robes, black gowns, and formalities of address such as “Your Honour” or “My Lord”. Most members of the legal community maintain that such features gives the court the prestige it deserves. They have no desire to change what they see has become a time-honoured and proven tradition that, in turn, allows our judicial system to engage in its two basic fundamental tasks: fairness and justice for all, and the search for the truth.

In pursuit of these two objectives, the Canadian courts have no interest in showmanship, dramatics, flamboyance and sensationalism. Such activities are reserved for television drama, which in many cases give an inaccurate picture of courtroom procedure. Judges and lawyers, in Canada, feel that in order to properly achieve fairness and justice, the court should never stoop to dealing with frivolous matters or cases that have little or no substance.

Equally, they feel, the court should be conducted in such a way that the search for truth and justice is carried out devoid of sensationalism, dramatics or showmanship. Rather, they see the atmosphere of the court

as having a certain amount of dignity and decorum. Regretfully, the media gives the illusion of our courts being almost theatrical in a appearance. While many of our American counterparts have courts which operate with flamboyance and dramatics, in Canada our courts tend to follow a serious procedural vein. In Canada, the law is seen as serious business. People's careers, their futures and their lives are affected by the decisions of the courts.

So, Canada's courts have **two fundamental objectives**: (1) to ensure that fairness and justice for all is achieved; (2) to ensure that proceedings are conducted as a search for truth and justice. Critical to the attainment of these two objectives is the atmosphere of our courts. In addition, our **courts** are said to **have two features**: (1) Proceedings are held openly and in public; (2) Proceedings are conducted in an atmosphere of decorum and dignity reflecting the seriousness and the importance of the work underway.

There are those, however, who express concern over the cost of "the public's rights to know." Often, in an effort to protect the victim or defendant from embarrassment within the community, counsel will apply to the court that the proceedings be held **in camera**. This means that the public will not be permitted to watch the case nor will the media be permitted to report on the case until after the trial. A second method used to protect innocent parties involved in a litigation is to place a **ban on publication**. This means that anything concerning the case cannot be released to the media until the trial has concluded and the judge or jury has given their finding.

But how do the courts conduct their search for the truth?

First, our courts operate under the **adversarial system**. Secondly, our courts are seen to have an **adjudicative role** especially in the resolution of disputes between two parties in civil cases.

The **adversarial** system is precisely what the name implies - namely a system pitting the two sides of a legal dispute against each other in a legal contest designed to determine which side has the strongest case. The referee in this contest is the judge, or the jury, who decides on the winning side after all the facts and evidence in the case have been presented. The adversarial system is based on lawyers representing each side presenting evidence in the form of witnesses, physical evidence and facts regarding the case. Then, the other side "attacks" this evidence through the cross-examination process and presentation of other witnesses to provide proof why the evidence is weak or to present evidence to the contrary. This, in turn, is "attacked" by the other side throughout the legal contest.

The process of **adjudication** is designed to settle disputes that occur between "**parties**" or individuals or an individual and a group or organization of individuals

(i.e. a corporation, organization, etc.). This process usually comes about as the result of "civil" disputes rather than "criminal" offences. This process allows both sides to reach a resolution through a third party, namely a judge. The decision is made on the facts presented and is imposed upon both parties in the dispute.

Mediation is another form of adjudication at one extreme wherein both parties work out a resolution to the problem through a mediator. This was explored in detail in Chapter Three - People and the Law. It should be noted that in many areas, mediation is becoming much more popular as a means of settlement.

As we shall see later in this chapter, at the other extreme in the adjudication process are the courts. Of these, only the Small Claims Court is involved in the adjudication process, and this involves minor civil litigations of under \$5000.00. Those over that amount go before the Supreme Court.

In the Small Claims Court, a lawyer, serving as an adjudicator, hears both sides and makes a decision based upon the evidence presented. At the other extreme are the higher courts wherein a judge, upon hearing all of the evidence (through an adversarial process) makes a decision which forces one party in the dispute to either withdraw and/or to compensate the other in some fashion.

Under adjudication, both of the parties in the action have the right to prepare a case in a manner they see fit and, in their opinion, best represents their "side" of the dispute.

Having laws and various methods which these laws may be interpreted and enforced is still not enough. Laws must be **applied** to different problems placed before the courts.

In order to provide easy access for the people in order that the law may be applied, Canada's courts are arranged at three basic levels: the lower courts, the higher courts and the appeal courts. Each of these levels has three courts, each of which is responsible to apply justice to a particular area under the court's jurisdiction.

The lower courts are the Family Court, Small Claims Court and the Provincial Court.

Family Court deals with problems which are a result of family relationships and juvenile matters such as maintenance, custody and family violence as well as all cases involving child protection.

This court does not have totally exclusive jurisdiction in these areas. For example, there are times, albeit rare, that the Supreme Court of Nova Scotia can also hear child custody cases.

An action commences in Family Court when the **Intake Officer** completes the necessary forms required to initiate a court action. Often, the Intake Officer may provide counseling to those involved or may be able to mediate a dispute, thus making a formal trial unnecessary. Once the forms are completed, the **Senior Court Officer** will affix the trial date and the wheels of justice commence to turn.

At the Family Court, there are several court officials who perform a variety of duties. The Family Court judge sits alone on the bench, hearing the various cases brought before the court. Assisting the judge is the court reporter keeps a record of proceedings and may also swear in witnesses. The court reporter sits at the front and to one side of the judge. In addition, the parties involved in the legal matter and their respective lawyers are also present, sitting together at tables facing the judge.

Procedure in Family Court is quite simple. Once the case is called, the judge first calls upon the party who started the action to give evidence and call witnesses. Following this, the judge calls upon the other party in the litigation to do the same. After the evidence has been presented, the judge will give his finding. If it is not guilty, the case is dismissed and the accused released. If the finding is guilty, the judge has **several types of punishment** at his disposal.

In the case of maintenance, he can order an amount of maintenance (where the accused will have to provide money to look after the financial implications of the decision - usually in child custody cases) to be paid to the other spouse. He can award custody of children to either spouse.

When there are criminal matters involving young offenders, the accused appear in the **Young Offender's Court**. It is seen as part of the Family Court. Offences under the Young Offender's Act are heard under the direction of a Judge of the Family Court following the processes as outlined above or in an Adult Court before a Judge of the Provincial Court. Cases involving young people between the ages of 12 and 14 are normally heard before a Family Court judge. Here, the judge has several options including fine (in amounts up to \$2000.00); incarceration (incarceration for up to six months), probation (the accused is released and is supervised in the community by a Probation Officer or Youth Worker for up to two years); restitution (the offender must replace or pay for losses incurred by the victim); or community service (the judge may order a set number of hours of service to the community such as cleaning public buildings, streets, etc.). These and other punishments will be explored in greater length in the next chapter- "Criminal Law."

If the offender is more than 14 years of age and is involved in a serious crime such as murder, the case will be transferred to adult court, the process to be followed is the same for the young offender as it would be for other offenders brought before the court.

Although rare, appeals are possible on decisions made in a Family Court. Individuals may appeal the decisions of a Family Court judge to the Supreme Court of Nova Scotia. However, this appeal may only on questions of law and it is rare that the Supreme Court of Nova Scotia would order a new trial.

The next court is the **Small Claims Court** which deals with physical and financial disputes between two parties in matters involving less than \$5000.00 in damages.

Generally, the jurisdiction of the Small Claims Court

is limited to those disputes which arise from torts, contracts or the return of personal property. Even so, there are other limitations placed on the jurisdiction of the Small Claims Court. For example, landlord-tenant relations and property law matters such as recovery of land are not dealt with by this court. Finally, the court is designed for individuals, not businesses, even though the latter may use the court on occasion. The court may restrict a business as to the number of cases brought before it in a given year so as to not take up valuable court time at a cost to individual cases waiting to be heard.

To initiate a Small Claims Court action, the **claimant** files a claim form with the **Clerk of the Court** where the matter is to be heard. The proper location is determined as to where the defendant lives, carries on business, or has caused the claimant's alleged problem. The **claim form** identifies the parties, what is being claimed and the basic facts of the claim. A fee is charged by the court for administration. Presently, this fee is \$50.00 and the claimant of the litigation can request to be reimbursed for this cost from the defendant, should the claimant be successful in this case.

After the claim is filed, a trial date is set. The claimant must be in court on that date. Further, a claimant gets a copy of the claim to be served by the claimant to the **defendant**. In turn, upon receipt of the claim, the defendant may wish to file a **denial of claim** or a **counterclaim**. If any of these are done, the defendant, in turn, must serve a copy of either of these on the claimant.

Besides the parties involved in the litigation and witnesses, other people in Small Claims Court include the Adjudicator, the Court Clerk and Lawyers. The **adjudicator** serves as a judge although they do not carry that title. An adjudicator is a practicing lawyer in the community and are appointed by the provincial government for a specific term of office. They do not wear special robes in court.

The **Court Clerk** or the **Clerk of the Small Claims Court** assists the adjudicator in processing the business of the court such as calling witnesses, swearing witnesses, marking exhibits, and making notes on case files as to their disposition. Lawyers may be present either in an active or advisory capacity. However, it is the intention of this court to have the claimant and defendant present their cases and, at times, the use of lawyers in the court may not be advisable or even practical.

The procedure in Small Claims Court is relatively simple. The atmosphere is relaxed and many of the formalities which are common in other courts do not exist. The adjudicator asks the claimant to present his or her evidence first. Besides documents or similar items, evidence is usually given through the question and answer process. Questioning is done by the claimant or by the adjudicator. Once finished, the defendant may cross-examine the witness. Next the defendant gives his or her evidence and calls witnesses. Equally, the claimant is allowed to cross-examine the witnesses called by the defendant. Once all the evidence has been presented, each party is given an opportunity to make a summation or a concluding statement which summarizes the evi-

dence and the case presented by each party.

After this, the adjudicator makes a decision. This decision could be made right away or the adjudicator could decide to reserve his or her decision for up to thirty days. Besides the payment of damages, the decision may involve an order that one party is to pay costs incurred by the successful party such as costs involved in the filing of the claim, witness fees (\$5.00 per day), etc. However, fees assessed by the adjudicator do not include the cost of hiring a lawyer.

Once a decision is made, either party has up to thirty days to appeal the decision to the Supreme Court of Nova Scotia. This is the last court of appeal for Small Claims. The case cannot proceed any further.

The Provincial Court is seen as a major point of encounter, under the adversarial system of justice, between society and the criminal justice system. This court deals exclusively with offences that have allegedly been committed against statute law enacted by governments primarily at the municipal and provincial levels. The Provincial Court focuses on criminal disputes usually of a minor nature ranging from drinking and driving, break and enter as well as theft. Generally, all cases involving a maximum prison sentence of less than five years are heard before this court. Some cases with slightly lengthier periods of incarceration are also heard, at times, by judges of the Provincial Court.

In addition, the court performs the function of taking pleas and holding preliminary hearings of other criminal accusations which may eventually be heard by another of the trial courts in the justice system. Other legal matters brought before this court include various federal and provincial laws which prohibit certain kinds of activity.

Offences against laws such as the Federal Income Tax Act, the Provincial Lands and Forests Act, for example, come before this court. Also, the Provincial Court hears matters concerning offences against municipal laws, referred to as **ordinances or by-laws**. In some cases an actual appearance in this court may not be necessary because of ticketing procedures which allow a person to plead guilty by simply paying a fine. However, the court is available for anyone who wish to contest any alleged violation.

Generally, there are **two methods by which an accused may be brought before this court.**

- 1. by information and summons. An **information** is a sworn complaint to a Justice of the Peace that a certain person committed a particular illegal act. This is usually made by a peace officer. The justice decides whether the court should hear the charge, and also has the power to ensure that the accused does appear in court by issuing a **summons** or an appearance notice.
- 2. when the police have someone in custody who may or may not be charged for breaking the law. In this case, the accused is brought before the judge as soon as possible, usually within the first day of detention. At that time, an information must be sworn against the person, and cause must be shown by the Crown why the person should continue to be deprived of their freedom.

If the person is released, there may be certain restrictions placed on the release such as curfew. This procedure is known as a **judicial interim release** or **bail** and is normally not granted to any person accused of serious offences such as treason. If granted, the accused is required to give a promise or an undertaking that he or she will appear in court at a later date. At times, the judge may require that money be put up as a guarantee that the accused will appear in court at the appointed time. Bail is discussed in more detail in the next chapter - "Criminal Law".

As was the case with the two other courts as this level, only **one judge** presides over this court. The judge is assisted by a Court Orderly or **Court Clerk** who sometimes may also serve as the **Court Reporter**. Both these jobs have the same duties as in the Family Court. They sit in front of the judge facing the court.

Other people are also in this court as well such as lawyers, accused, witnesses etc. During the trial, the accused sits on a bench on one side of the courtroom. The lawyers sit at tables facing the judge. Lawyers are not required to wear robes or gowns in this court. The witnesses and the general public sit in the rear of the courtroom in the public gallery. **Witnesses** give their sworn evidence from a chair located near the judge. **Police officers** may also be present in the court, either as witnesses or for security. Generally, they sit in the rear of the courtroom. The Sheriff is usually sitting on the side of the courtroom near the judge and the accused.

Generally, there are **three basic processes that occur in the Provincial Court**. These reflect the different functions that this court performs in the Nova Scotia judicial system. These three are an **arraignment** or first appearance, a **trial** and a **preliminary hearing**.

The first of these processes is the arraignment. During an **arraignment** or first appearance, the accused is called forward and the charge is called aloud, usually by the Court Clerk. The accused person will be asked if he or she is ready to plead, and if so, how. A person may wish to reserve a plea if there has not been an opportunity to obtain legal advice.

If the charge is for a summary conviction offence and the accused pleads not guilty, a trial will be scheduled for a time agreed to by both the parties (the Crown and the defence) and the judge. A **summary conviction offence** is considered as a less serious offence, generally where the penalty is less than a \$3000.00 fine or six months imprisonment. In Nova Scotia, the Provincial Court hears all summary conviction offences. It has what is called "**absolute jurisdiction**" over these matters. No other court may hear these cases, unless an appeal is entered into.

If the charge is for an indictable offence, depending on the nature of the offence, the accused may have the right to "elect" which court will hear the case. An **indictable offence** is a an offence which is much more serious than a summary conviction offence. An indictable offence ranges from theft to murder. By "electing" the accused chooses **trial by judge** alone (in

Provincial Court), by **judge alone** (in the Supreme Court of Nova Scotia), or by **judge and jury** (in the Supreme Court of Nova Scotia). For very serious offences, such as murder, only the Supreme Court can hear and decide the case. The choice may also determine whether there will be a preliminary hearing of the case.

When the plea is guilty, and the judge has jurisdiction to decide the penalty, the Crown Attorney will outline the circumstances of the offence for the court, and perhaps comment on previous convictions of the accused. Both sides may speak about an appropriate penalty before the judge makes a decision. As well either side may call oral evidence on oath, if they wish. The judge may choose to wait for a **pre-sentence report** to be prepared about the accused by a **Probation or Corrections Officer**.

The pre-sentence report provides the judge with a full background study of the accused, discusses any prior convictions and provides recommendations as to the best punishment for the accused.

The second process in a Provincial Court is **the trial**. Once a matter goes to trial in the Provincial Court, the procedure is almost identical to that seen in the other two courts at this level except that it is much more formal.

- First, the **Crown Prosecutor** will call witnesses who are asked to answer questions which will form testimony that proves the guilt of the accused beyond a reasonable doubt. The defence, or the accused person, may cross-examine each witness in order to disprove the Crown's case.
- After the Crown concludes, the **Defence Counsel** or the accused may give evidence or call witnesses in order to raise any doubts concerning the validity of the Crown's case.
- If this is done, the Crown has an opportunity to cross-examine these witnesses.
- Once all the evidence is given, the Crown, then the accused or their Defence Counsel, will have a chance to summarize the case, from their point of view before the judge decides on the question of guilt or innocence.

The third and final process in the Provincial Court is the **preliminary hearing or inquiry**. The preliminary hearing is conducted very much like a trial except that the question of guilt is not decided, rather the question here is whether or not there is sufficient evidence to justify going to trial and thus taking up valuable time in the Supreme Court.

At the end of this hearing, the judge decides whether the case will be referred to a higher court for trial or whether the charges laid against the accused should be dropped.

In addition, during this process, it is not uncommon to see a judge order a **ban on publication**, following a request by one of the parties involved, of the evidence presented at a preliminary hearing. This was discussed earlier in this chapter.

A final note on the Provincial Court deals with **pun-**

ishments. Generally, judges at this level have a wide range of penalties at their disposal. The penalty for breaking the law varies from offence to offence. The maximum sentences are listed in the Criminal Code of Canada, as well as various statutes. Besides **fin**es and **imprisonment**, the judge may also order **community service work** or the judge may even **discharge** the accused without any penalty.

The **Youth Court** is also seen as a part of the Provincial Court. Offences committed under the Youth Services Act by individuals between the ages of 15 and 18 are usually heard before a Judge of the Provincial Court.

Normally, a case which centers around a serious indictable offence such as murder, manslaughter, armed robbery, etc. is usually automatically transferred to an adult court.

Factors involved in the transfer of an offender's case from a Youth Court to an adult court include:

- (1) the offender must be 14 years of age or more at the time the offence was committed;
- (2) the young person's maturity;
- (3) the character of the young person;
- (4) any previous record of criminal activity;
- (5) suitability and availability of certain treatment and or correctional services.

Punishment in a Youth Court tend to be same as Family Court with fines levied up \$2000.00, incarceration of up to five years, probation for two years, etc. Punishment for a young offender heard in adult court are the exactly the same as an adult, with incarceration from six months to life.

Naturally, in the event of a case transferred to adult court, the process to be followed is the same for the young offender as it would be for other offenders brought before the court.

However, if the accused or the Crown is not satisfied with the decision of the judge on either the question of guilt or on the penalty imposed, an appeal may be entered into by either party.

The appeal must address a question of the interpretation or application of the law by the Provincial Court judge. Normally, cases from Provincial Court are appealed to the Supreme Court of Nova Scotia.

First, let's look at the **Probate Court**. This is a very specialized court in that it deals only with the law and the administration of the estates of deceased individuals. Nova Scotians are served with numerous Probate Courts each serving one or more counties. Each of these courts has a Registrar, who is responsible for the day to day administration of the court with duties similar to those of a Judge.

The procedures followed by this court are quite simple. If the deceased had a will, it will name an **Executor or Executrix** whom the deceased had appointed to carry out the provisions of the will.

The Executor or Executrix must apply to the Probate Court in the county of residence of the deceased. This is done by filing the will and a document known as a **peti-**

tion for probate. In addition, one of the two witnesses, who were party to the signing of the will by the deceased, must swear an affidavit attesting the signing of the will. If the will remains uncontested, no court appearances will be necessary.

All that occurs is that the Registrar will issue another document referred to as **Letters Testamentary** to the Executor or Executrix. This document provides the Executor or Executrix authorization to collect all assets of the deceased, settle all bills and debts of the deceased and to distribute the residue of the estate to the beneficiaries.

Any will may be challenged on the grounds that someone claims and feels they have sufficient evidence to attest to the fact that the will was improperly signed or that the deceased was mentally incompetent at the time of the signing or that the deceased was coerced when the will was drawn up. If a challenge to a will occurs, then a formal hearing is held before the Registrar. In this instance, the Executor or the Executrix must prove the validity of the will.

However, even if a will is valid, it can still be challenged if someone maintains that the terms of the will are unclear or uncertain. If this occurs, the Executor or Executrix must apply to the Nova Scotia Supreme Court. It is this court that will provide the necessary clarification and instructions. However, the will must be probated before this stage. In addition, the Nova Scotia Supreme Court may also hear from any individual who was a dependent of the deceased, but was omitted from the will. This individual may also apply to the Supreme Court of Nova Scotia for consideration if they feel they were unfairly treated. The court may rule that a something be added to the will granting such an individual a bequest.

However, some people die without ever making up a will. In this case, the closest living relative to the accused, who wishes to bear the responsibility of settling the estate, may apply to the Probate Court to be appointed as the **administrator** of the deceased estate. As was the case with the Executor, if there is no challenge to this appointment, no court appearance is necessary. Once appointed, the administrator performs duties similar to that of an executor except that the administrator must follow procedures set down by the **Intestate Succession Act**. Under this act, a surviving spouse inherits the first \$50,000.00 of the estate with the balance going first to the children of the deceased. If there are no children, the money goes to the surviving parents, next to brothers and sisters and so on. Expenses incurred in handling an estate without a will are considerably more than an estate with a will.

However, sometimes there are complications in the settlement of an estate.

What happens, for instance, if an executor named in the will is either dead or refuses to act in that capacity?

No one is forced to become either an executor or administrator of an estate. If either of these cases exist, then the closest living relative willing to accept this task applies to become an administrator. In the event that no

one wants the task, The Public Trustee for the Province of Nova Scotia may take on the duties and settle the estate.

Once probate has been granted to the executor/executrix or the administrator/ administratrix by the Probate Court, then this person must advertise in the **Royal Gazette** for creditors, pay all bills, collect all assets, keep careful records of receipts and disbursements, etc. In essence, they wind up the affairs of the deceased. Things like tax returns, pensions and insurance funds all must to be dealt with. Once this process is complete, the executor files an inventory of the deceased person's estate with the Probate Court.

The final step in the process is when the executor goes back to the Probate Court and requests to have the estate "**closed**". This step relieves the executor of any further personal liability in the handling of the estate. The Probate Court reviews all records especially the financial documents as well as the lawyer's bill. If the Court feels the lawyer's fees are too excessive, the court has the power to amend the fees. Often, a brief court hearing is required to close an estate.

Although the process to settle an estate appears to be long and drawn out, it should be noted that not all estates go through this full process.

Small simple estates do not have to be closed. Only if an estate may have some problems in the future does closure become necessary.

In most cases an executor may be able to handle the settlement of an estate by him or herself without requiring the services of a lawyer. In addition, in small centres, like Yarmouth, the officials with the Probate Court are often available to assist you with your task. However, in big centres, such as Halifax, Probate officials are often overworked and cannot assist you too much in dealing with the fine details or processes involved in settling the estate. In this instance, a lawyer may be able to assist the estate to expedite matters.

In practice it takes between nine months to a year to settle an estate. As well, all wills and documents surrounding and estate are filed with the Probate Court. All these documents are public and are open to public scrutiny after paying a nominal fee.

The next court at this level is the **Supreme Court of Nova Scotia**. As we have seen, the courts of Nova Scotia are all part of an elaborate legal system which allows individual cases to be dealt with by smaller local courts. True, the Supreme Court of Nova Scotia is the highest trial court in this province, and as such, is given a wide jurisdiction allowing it to hear any matter which affects any Nova Scotian's legal rights. The only exception is if another court has been given exclusive jurisdiction by law over specific areas such as Family Court, Probate Court, etc.

Naturally, the Justices of the Supreme Court cannot hear every trial in the Province of Nova Scotia. In most cases this court restricts its activities to legal issues or problems which are beyond the jurisdiction of the lower courts.

Every trial brought before this court is heard by one of ten Judges who are appointed by the federal government. Judges are addressed as “My Lord” or My Lady”. One of the ten Judges is designated as the Chief Justice.

The Supreme Court of Nova Scotia deals with both civil and criminal matters. Civil disputes usually include things as bankruptcies, divorces and litigations between two parties with damages in excess of \$5000.00. In addition, this court unlike the lower courts can issue an **injunction** which is a court order compelling a person or a group to do or not to do something for a set period of time. As far as criminal offences are concerned, this court deals with more serious criminal offences such as treason, murder, piracy, etc. If the accused wishes to be tried by judge and jury, then the case must be brought before this court.

Just as was the case in the times of King Henry, the Supreme Court is a travelling court. The two most common places of sitting in Nova Scotia is at Halifax and Sydney. Besides these, the court has regular two week sittings in eight other locations: Amherst Bridgewater, Truro, Windsor, Antigonish, Kentville, Pictou and Yarmouth. It may also sit in other locations, if there is business to be conducted by the Court.

All of the criminal cases brought to this court are for indictable offences. If the accused wishes, he or she may be tried in this court, with a justice sitting alone, or with a full jury. The only exceptions are for serious indictable offences such as for murder or crimes against the state, such as treason, in which life in prison is the minimum penalty. In that case, there is no choice, a jury is mandatory.

But, generally the business of this court mainly centres around three areas: civil cases, criminal cases and appeals.

In **civil cases**, this court follows “**The Civil Procedure Rules**” which are written by Judges of the Supreme Court of Nova Scotia. Under these rules, a civil action is initiated by the delivery of an originating notice and statement of claim to the local **Prothonotary**.

The **originating notice** identifies the parties involved in the dispute and explains the reasons why the claim is being made.

The **statement of claim** outlines the damages being sought. The person who files this claim is referred to as the **plaintiff**.

In addition, the plaintiff must deliver a copy of the originating notice to the person against whom the claim is made, the **defendant**.

The defendant has ten days to file a defence to the claim and, if the defendant so wishes, to file a counterclaim with the Prothonotary. Naturally, the defendant must serve the plaintiff with the counterclaim. The originating notice, statement of claim, defence, counterclaim and defence to a counterclaim are called the **pleadings**.

Before the case goes to trial, each side in the lawsuit may try to examine the strengths and weaknesses of each other’s position by various means. These include discovery, interrogatories and Chambers.

- **Discovery** hearings are the most common. It is here that witnesses are called and examined by the opposing side in the case. Such evidence can be used as background information at a trial held later or it may be used to show any inconsistencies in evidence in comparison with that entered at the later trial.
- **Interrogatories** serve the same purpose except that these are written questions and answers under oath providing information on each others case.
- **Chambers** are merely pre-trial conferences. These may be called by the parties involved in the litigation or by the court itself. The idea behind Chambers is to allow the parties to appear in court before a trial to argue some preliminary point of law, or to obtain a court order concerning some aspect of the dispute. The court may call such conferences in order to simplify the issues raised by the pleadings. In some cases, any of these three processes may eliminate the need for any trial after one side sees the strength of the other side and realizes the futility of proceeding with the case. However, if both parties decide to continue with the case, they are required to present **certificates of readiness** to the Prothonotary and court time will be arranged.

The second area handled by this court deals with **criminal cases**. As mentioned earlier, these are indictable offences only. The process followed is quite simple. First, an **information** is sworn out against the accused person. The information describes the alleged offence and background information. Next, once the information is filed with the Prothonotary, the accused appears in Provincial Court for an arraignment, election, plea and later a preliminary hearing. If the accused pleads not guilty and elects to be tried by judge alone, then the accused returns to the Supreme Court of Nova Scotia and a trial date is set.

The third and final area addressed by this court are **appeals**.

Special forms are available from the Prothonotaries to appeal rulings made in the Family, Small Claims or the Provincial Courts. These applications identifies the court and the disputed decision, the legal issues and the remedy sought by the dissatisfied party. Once completed and filed, the appeal is examined and, if warranted, is heard by a justice of the Supreme Court of Nova Scotia.

Generally, the support staff in the Nova Scotia Supreme Court are much the same as those in the Provincial Court. The judge is assisted by a clerk which is properly referred to as a **Prothonotary** and a **Court Reporter** who have similar duties to those outlined in the Provincial Court. The prothonotary and the reporter are required to wear black gowns in this court. The **Sheriff** and/or his assistant are present to open and to maintain security in this court. As well, the Sheriff is charged to call in the parties involved in the litigation

and the witnesses who may be waiting outside the court when their presence is required. The Sheriff and his Officers do not wear robes.

Also in the courtroom are the lawyers and the parties involved in the legal matter. Although it is permitted, it is rare to see a person appear in this court without a lawyer. Here, lawyers conduct their case from tables placed in the middle of the courtroom. They are required to wear robes in this court. The accused sits on a bench towards the rear of the courtroom in front of the public gallery but behind the lawyers. In civil cases, the parties involved in the litigation sit in the public seats at the back of the courtroom.

At the actual appeal, the procedure is similar to the Provincial Court. **In criminal matters, the procedures are set out in the Criminal Code of Canada.**

The Crown begins first by trying to prove its case against the accused. Through cross-examination, the accused or his or her lawyer will try to identify any inconsistencies and gaps in the Crown's case. The accused, in Canada, has no obligation to prove innocence. That is assumed. You are innocent until proven guilty. The inconsistencies and gaps in the Crown's case are very important because if the judge has any doubt about guilt, after hearing all of the evidence, the accused must be allowed to go free.

In civil matters, the outcome of the trial depends two main factors: (1) the amount and quality of evidence brought forth, and (2) what facts or information are allowed "on the record" of the trial from which the judge may determine his or her judgement.

As far as procedure goes, the plaintiff traditionally presents his evidence first to the court. Naturally, as is the case in a criminal matter, the defendant may cross-examine each witness in order to test the validity of the evidence.

The defendant may choose to merely try to disprove the plaintiff's case by careful cross-examination which could show the court that the evidence presented is not sufficient in order for the Judge to make a finding in favour of the plaintiff. In addition, the defendant may also call his own evidence which presents his side of the story. This evidence adds a new dimension to the trial. The plaintiff may cross-examine the defendant's witnesses as well. If the defendant is making a counterclaim in the civil litigation, then the defendant must present evidence to "prove" the counterclaim. After all evidence and facts surrounding the case are presented, the Judge will make his decision on what is referred to as **the balance of probabilities**. This means that the Judge will decide the successful party in the suit based on which side was more likely correct in the presentation of their facts and the law surrounding the case.

Justices of the Supreme Court of Nova Scotia may give their decisions either at the conclusion of the case or they may decide to reserve their decision until they have had ample opportunity to review all of the evidence and facts presented. When the judgement is final made, several steps are followed. In a civil case the

decision is written up by the Judge, prepared by his staff, signed by the Judge as a court order, and filed with the Prothonotary. This order may be given to the Sheriff if enforcement of the order is required.

In criminal matters, if the guilty verdict is given, the judge may adjourn the court until another date for sentencing. The intention of this delay is to allow a probation officer time to prepare a pre-sentence report which is a document which reveals the convicted person's character, background, education, work record, and discusses how the convicted person has, or may respond to, correctional efforts. This document is usually prepared for first-time offenders.

If either party in a civil or criminal case desires, they may appeal the decision of this court to the Nova Scotia Court of Appeal. Appeals are launched on issues of law which, in the opinion of one of the parties in the case, were not dealt with or resolved satisfactorily at trial in the earlier court.

Another area exclusively handled by this court concerns **divorce**. The Supreme Court of Nova Scotia is the only court in Nova Scotia which has the power to terminate marriages as well as to resolve any other confrontations linked to a marriage relationship. Unlike the Family Court which looks after maintenance, care of children, etc., only this court shall grant divorces, divide marital assets and make final decisions on maintenance and custody of children.

A divorce is initiated by filing a petition for divorce with the local Prothonotary. The spouse who files the petition or initiates the action is referred to as the petitioner. The other partner in the relationship is referred to as the respondent. This petition may be opposed by the respondent who in turn may file either a response or a counterpetition. Once all these documents are collected, a hearing before a Justice of the Supreme Court of Nova Scotia may be scheduled. The hearing can be very brief (in the case of an uncontested petition) or very lengthy (in the case of a hotly contested petition).

Besides the Justice in these courts, there are several other officials in the court performing duties similar to those we have seen in other courts. The Judge is assisted by a court clerk and a court reporter. However, unlike the other courts, both these officials must wear black gowns in the courtroom. The Sheriff and/or his assistant may be present for security in the courtroom but are not required to wear gowns. Although possible, it is highly unusual for a party to appear before the Supreme Court without a lawyer. Lawyers who may be in the courtroom are required to wear full gowns and sit at long tables facing the Judge.

Unlike the other courts, many of the cases heard at this level are heard before a **jury**. Juries sit in both criminal and civil cases. However, the presence of a jury in a civil case is rare although permissible. A criminal jury has twelve members while a civil jury has seven members. In civil cases, a mere majority of the jury members is sufficient for a decision. However, in criminal cases there must be unanimous agreement in

order for the jury to reach a verdict. If such an agreement is not possible, then a new trial of the evidence will have to be ordered and a new jury chosen.

Jurors are selected from a list of local citizens prepared by the **Jury Committee**. This committee is made up of local municipal representatives and the local Prothonotary. When a jury is required, a Judge will select at random names from the Committee's list. The Prothonotary notifies the people selected and from this group a proper number will be called. However, each juror may be challenged by either of the two parties in a case. A juror may be challenged for cause if one of the parties in the litigation believes that the juror will not discharge their duties and obligations fairly. Other prospective jurors may be asked to "stand aside". This means they are not going to be considered. However, once everyone on the jury list has been called and there is still an incomplete jury, then those jurors who have been asked to "stand aside" may be reconsidered. Once selected, the jury hears the evidence and makes a decision.

After the trial concludes and the verdict has been made, the Judge will often write the reasons for the decision. In a civil case, however, the main resultant document is the **court order**. This document is written up by the winning side based on the Judge's decision. The Judge reads the court order and if he approves and thus signs it, it is filed with the Prothonotary. Once the order is filed, the winning side obtains **judgement**. A judgement, if necessary, can be delivered to the Sheriff who is charged to enforce it.

In criminal cases where the guilty verdict has been rendered, the judge will often delay the determination of a penalty until the pre-sentence report has been filed by the Probation Officer.

Appeal is possible from this court to the Nova Scotia Court of Appeals as long as it is based on some question of interpretation or application of the law by the earlier trial court. As well, appeal is possible if the sentence is deemed unfair and excessive in comparison to similar convictions elsewhere in Canada.

The final court to be examined at this level is **The Federal Court of Canada**. Prior to 1970, this court used to be known as the Exchequer Court. It has two divisions: the **Trial Division** and the **Appeal Division**.

The **Federal Court of Canada - Trial Division** is commonly involved with cases which involve civil claims by, or against, the federal government, one or more of its agencies or Crown Corporations. In addition, this court has jurisdiction over conflicts with copyrights, patent law, trade marks, maritime law and aeronautics. In addition, cases involving appeals of decisions made under the Income Tax Act and the Canadian Citizenship Act are also heard by the Trial Division of the Federal Court of Canada.

This court may sit anywhere in Canada that it may deem necessary in order to hear a case. Usually, this court sits in Ottawa. There are local offices of the Federal Court in Canada, such as the one in Halifax, in order to assist individuals who are involved in a case.

The procedures followed by this court are governed by the Federal Court Rules which are very similar to the Civil Procedure Rules which govern civil litigations in Nova Scotia.

- To commence a legal action with the Federal Court, a person with a claim, referred to as the **plaintiff**, files a statement of claim with the court registry. In Nova Scotia, this can be done either in Halifax or in Ottawa. Copies of the statement of claim must be given to the other parties involved in the action, referred to as the **defendants**.
- Next, the defendant must file a defence to the claim.
- In turn, the plaintiff may be required to file an answer to the defendant's documents. Known as the reply, the plaintiff admits to those facts alleged by the defendant as being true. In addition, the plaintiff identifies any new points of disagreement between the parties.

All of these documents are known as the pleadings.

As was the case with other civil actions, both parties may enter into a discovery phase where they may "discover" evidence held by the other party through direct examination, written questioning before the trial (interrogatories) as well as the production of documents. Pre-trial conferences may be held in order to simplify or clarify legal questions brought before the court.

- Next comes the trial. Again, this is similar to the other civil procedures we have studied. First, the plaintiff begins with a short opening statement about the facts in the case as well as how the law supports the claim. Next, the plaintiff brings forth evidence as described in the opening statement. The defendant proceeds with its opening statement and the presentation of evidence. After the defendant is finished, the plaintiff may respond to any counter-claim brought forth by the defendant.

In some cases, especially those concerning Admiralty Law, the trial might have to adjourn in order for the court to determine a strictly factual question. In this instance, the court will appoint an **assessor** determine and report on certain defined facts, such as the damage inflicted on one ship by another.

After all the proceedings have come to a close, a judge makes his or her decision on the case. This decision is in written form and is filed with the Registry of the Court. This makes the order of the court legally enforceable by the Sheriff if necessary.

Each case brought before the Federal Court of Canada-Trial Division is heard by one judge. However, three out of the six judges in the Appeal Division must sit in judgement of each case involved in the appeal process. One of the ten Trial Division judges is designated as the head of the Trial Division and is referred to as the **Associate Chief Justice of the Federal Court**. The same is true for one of the six Appeal Division judges with one of them designated as the head of the Appeal Division and the **Chief Justice of the Federal Court**. In some cases, the Associate Chief Justice of the

Federal Court may also hear appeals.

Besides the judges, there is a **Court Registrar** who assists the judge in the courtroom and who has custody of all exhibits, documents and evidence brought forth during the trial. In addition, there is a **court reporter** who keeps a written record of all proceedings. There is also an **Administrator of the Federal Court** who assists the Associate Chief Justice with his non-judicial duties as well as arranges for interpreters, ushers and sheriff's officers to be present during the trial.

As was the case with other courts, a lawyer usually represents a party during the trial. Although it is not necessary to have a lawyer, it is usually recommended given the complexity of the cases and procedures involved. Lawyers must wear gowns in court. Most sittings of the Federal Court of Canada are open to the public. As is the case with all other courts in Canada, the public are required to maintain respectful attitude, remain silent and to refrain from showing any disapproval or approval of the proceedings.

The third level of courts consists of the Nova Scotia Court of Appeals and the Federal-Court of Canada-Appeals Division.

The highest court in Nova Scotia is the **Nova Scotia Court of Appeals**. Unlike other courts we have examined thus far, the only real issues that come before this court centre around how the trial court has used law in formulating its decision. The role of the appeal court is to ensure that the trial court has used the correct kind of law in the proper way in making its decision in a case.

In Nova Scotia, the Nova Scotia Court of Appeal sits in Halifax with at least three out of the eight Appeal Court justices sitting in judgement of each appeal

The court hears appeals stemming from any lower trial court decision or, the court may also rule on a procedure used by a trial court in a case which has not yet concluded.

Justices are appointed by the Federal Government with one out of the eight to be designated as Chief Justice. The court sits five terms a year, with each term lasting about five weeks. Appeals are heard during one of these five terms.

Both civil and criminal appeals are heard by this court. The procedure used at the appeal level is somewhat different from that used in the trial courts.

In civil matters, the appeal is initiated when one of the two parties in the case file a notice of appeal with the **Registrar of the Court**. The Registrar also serves as the Prothonotary of the Nova Scotia Court of Appeal in Halifax. In the notice of appeal, the appealing party (referred to as the **appellant**) clearly states the decision made at the trial, notes why he or she is in disagreement with this decision, and also states what he or she thinks is the proper response to the particular legal problem which is the basis for the appeal. Normally, the notice of appeal must be filed within one month of the trial decision. A copy of the notice of appeal must be given

to all other parties involved in the original dispute.

The other parties, referred to as **respondents**, are permitted to take part in the appeal after they have provided written notice of their intention to do so. They do this by either supporting the initial trial order, making a **cross-appeal** or by simply arguing that the trial order should be varied in some way.

The next stage requires the appellant to prepare an **appeal book** which contains all pleadings, documents and evidence which directly relates to the trial. This evidence section of this volume may be a transcript of all of the trial evidence or it could simply be a short statement of the facts in the case which have been agreed to by both parties. Tradition dictates that the appeal book is to have a grey cover.

Next, both sides in the case will prepare written legal arguments concerning the issues raised in the case. Known as **factums**, these arguments are to be presented to each other and the court. The appellant's factum is to have a buff or yellow cover while the respondent's factum is to be bound in green or blue.

Once the appellant's factum has been properly filed and distributed, a time will be set for hearing all oral arguments based on the legal research which is contained in the factum. If the appellant wishes, he or she may ask the court to deal with an administrative issue such as suspending the effects of a trial order until the appeal court has rendered its decision. Motions of this type are usually heard in chambers.

After the arguments are made, the Appeal Court justices may either give their judgement at the close of the hearing without providing detailed reasons why they have decided the way they did or the Appeal Justices may chose to reserve their decision. In the case of the latter which is also the more common route followed by Appeal Court justices in Nova Scotia, the justices prepare a written decision supported with their reasons. This judgement is filed with the Registrar who in turn distributes it to the parties involved in the appeal. It should be noted that the Appeal Court justices may make any order they wish or may give any judgement which they feel should be made in the case. In any event, the order of the appeal court is the final decision and is to be treated as the order of the trial court which made the initial decision.

If either party is dissatisfied with the ruling made by the Nova Scotia Court of Appeal, they may apply for permission to appeal the decision to the Supreme Court of Canada. The party may also apply directly to the Supreme Court of Canada for permission to appeal. A request for permission to appeal is required in all civil matters but such permission is not required in criminal matters.

Besides the three out of eight Judges sitting at each case in the Nova Scotia Court of Appeals there is also the **Prothonotary** and counsel. As was the case in the other courts, the court clerk is responsible to call the Court to order, keep accurate and proper records of the proceedings, and assists in processing the business before the court. Lawyers usually handle most appeal cases and they sit at tables in the middle of the courtroom. Counsel must be gowned. The parties involved in

the appeal sit in the general public gallery at the rear of the courtroom.

There may also be appeals from the Federal Court of Canada - Trial Division or a federal administrative tribunal, such as a Citizenship Court or the National Parole Board, to the **Federal Court of Canada - Appeal Division**. Appeals are initiated when the appellant files a notice of appeal in the Registry of the Federal Court. The Registry will then prepare a record of all documents, exhibits and evidence submitted to the court during the dispute. This record is referred to as the Appeal Book. Next, each of the parties involved in the case usually prepare a memorandum on both the law and the facts involved in the case. This memorandum forms the basis of their arguments to the Appeal Division of the Federal Court.

If, after the appeal is heard and the finding given, one of the parties is still not satisfied, a further appeal may still be made to the Supreme Court of Canada.

The final level of courts in Canada is the Supreme Court of Canada.

In Canada, the highest authority on legal questions is the **Supreme Court of Canada**. This court serves as the final court of appeal in Canada for all appeals stemming from various other courts across the nation.

In addition, the Supreme Court of Canada has the final say on appeals brought from the Federal Court of Canada and on legal issues that have been argued or raised in both federal houses of Parliament.

The Supreme Court of Canada has nine judges with one designated as the Chief Justice. All appeals brought to this court must be heard by a minimum of five judges, although all nine judges may sit in judgement of one case. This court sits in Ottawa three sessions a year.

There are several ways in which a case may be brought before the Supreme Court of Canada. An appeal brought before the Court is a costly and drawn out affair. So, in many cases, the parties in a suit, rather than spend a great deal of money and wait for months or years for a decision, may elect to let the matter rest after the decision has been rendered by the Court of Appeal of each province.

In most cases, it should be noted, the parties involved in a litigation must be granted permission to appeal their case by either the provincial or federal court. In addition, the Court of Appeal of a province may also grant permission (referred to as **leave**) to appeal to the Supreme Court of Canada if this court feels that a very important question of law is involved which requires study by the higher court. If the Appeal Court of the provincial Supreme Court refuses to grant leave on this basis, that very decision may be appealed to the Supreme Court of Canada. All that aside, leave to appeal may be requested directly from the Supreme Court of Canada without first going to the Appeal Division of the provincial Supreme Court.

However, in criminal matters, leave to appeal is not required in order to bring the case before the Supreme

Court of Canada. And lastly, the Supreme Court of Canada may be asked to deliver an opinion on an existing or potential legal problem. These usually come from the federal government, House of Commons or Senate who will refer a legal question to the Court. In most cases, these legal questions centre around constitutional questions. This procedure is called a **reference**.

Once the leave to appeal has been granted, the **appellant** files the notice of appeal with the **Registrar of the Supreme Court**. The Registrar's role is to receive all documents that are brought before the court, to supervise staff, maintain the library of the Court and to ensure accurate publishing of the Court's decisions.

The notice of appeal must be accompanied by some form of security, usually cash, to the amount of \$500.00. This serves as a guarantee for all the costs incurred in hearing the appeal. However, if the appellant is considered to have personal value less than \$1500.00 and cannot pay the \$500.00, the court may allow the appeal to proceed "**in forma pauperis**". This means that no security is needed to initiate the appeal.

The notice of appeal must be delivered to the other parties involved in the appeal, referred to as the **respondents**. Next, the appellant must give the Registrar an Ottawa address where the appellant and/or his lawyer may receive various court documents. This address is entered into the **Agent's Book**. In Ottawa, many lawyers merely serve as agents for law firms and individuals who are from outside of the Ottawa area. The individual and his or her lawyer use the agent as a glorified mailroom.

The appeal is based on a document which is prepared by the appellant. Known as the "**case**", this book contains the original pleadings, evidence, exhibits, judgements and reasons for the judgements made in all lower court proceedings. A copy of the "**case**" goes to the respondent who is to agree with everything that is included in this book. After that agreement is reached, the appellant is required to then print a number of copies and will deliver them to the court and other parties involved in the appeal. The "**case**" is identified by its grey cover and must be in the hands of all parties about two months before the case is to be heard by the Court.

The written legal arguments of the people involved in the appeal are referred to as **factums**. Each factum outlines the facts of the case, the supposed errors of the lower court, how the law should apply to the facts and what a party involved in the appeal wants the Supreme Court of Canada to do. The appellant's factums must be complete and ready to be distributed at least six weeks before the Court is to hear the case. The respondent has three weeks to prepare his or her factum in response to that of the appellant. This response may also include a cross appeal. Then, the appellant may choose to prepare a response to the respondent's factum and the cross-appeal. Throughout this phase, the cover of appellant's factum is tan or buff in colour while the factum of the respondent is green.

Once all these supporting documents are in order, the Registrar of the Court will set the date and time for the

hearing of the appeal on the court schedule which is referred to as the **docket**. This must be done at least two weeks before the session of the Court opens.

Further, if translation services are required, the parties in the appeal must request same within fifteen days of the actual hearing of the case.

During the time that the action has been initiated and up until the actual hearing, the parties may be involved in arguments before the Registrar or a Judge in Chambers over a number of motions needed to clarify any difficulties, interpretations or even settle the appeal before it comes before the court. Any such motion is written up on special forms and comes with a memorandum or a legal research paper supporting one side in the motion.

Finally, private groups or individuals may apply for **intervenor status** in an appeal before the court if the case involves others and their intervention may assist the court in its examination of the issues involved. For example, in constitutional questions, provincial governments may appear before the court. Such status is not always granted and is at the discretion of the court.

The procedure at the formal hearing is somewhat similar to other appeal courts we have examined thus far. Physically, the five to nine judges sit in a row at the front of the courtroom. They traditionally wear red robes trimmed in white fur. But, usually they are dressed the same as provincial Supreme Court justices. All lawyers must be gowned in this court and sit facing the judges. The public sit at the rear of the courtroom.

The appellant presents his or her arguments based on the factum prepared and distributed before the hearing. Next, the respondent does the same. During this process, the lawyers may interrupt each other in order to discuss, question or argue a point of law. Sometimes, the Court may require witnesses, further evidence by the way of documents, etc. This is done by having these entered into as evidence by bringing them before the Registrar or a Judge separate and apart from the actual hearing. In Admiralty cases, this is conducted before an Assessor.

Once the case has been heard, the Supreme Court has two options available to it in order to settle the matter. First, it can dismiss the appeal on the grounds that the Court could find no error with the lower court. Second, it may agree that an error does exist with the lower court, but this error did not affect the actual outcome of the case. In this case, the Court could uphold the decision of the lower court. If an error is found, the Court will be required to correct it by giving its new final decision on the case or by ordering a new trial. All decisions are made in writing and are referred to as a **judgement**. These decisions are drafted in the form of a court order by either a Judge or the Registrar at a Chambers Hearing.

In all cases, the Canadian justice system comes to an end at the **Supreme Court of Canada**.

But, how busy is the caseload each court level?

In Canada, trial by jury is an option generally available to the accused if the penalty for the commission of the offence could result in incarceration for more than five years. In spite of this, the number of jury trials is low compared to other types of trial.

According to recent statistics, there were more than 47,000 trials in Canada each year. Of these, about 800 were heard before a judge and jury. About 1700 were heard by a judge without a jury at the Supreme Court level. And, around 21,500 were heard by a Provincial Court judge without the accused having the option not to do so.

These were mainly summary offences such as traffic violations, etc. The remaining 23,000 cases were also heard by a Provincial Court judge at the request of the accused.

These cases were preliminary hearings or minor offences which the accused elected to be tried at the lower level rather than moving into the Supreme Court.

So as you can see, the busiest court level is the Provincial Court hearing more than 90% of all trials in Canada. This adds credence to what we have discussed which was the lower the court the heavier the docket. The higher you go up the court ladder the less likelihood that the average Canadian will be involved.

However, these statistics are not intended to give you the impression that the other courts have an easy time of it. True, there are less actual cases at the Supreme Court levels, but these cases are more intense and lengthier in deliberations. A Provincial Court judge may hear several trials in one day while a case before the Supreme Court of Canada could go on for a week or more.

Things are particularly slow at the Supreme Court of Canada level. As we have discussed, this court sits three terms a year. In an average year, this Court hears about seventy cases. But, it takes the Court about ten months to render a decision. Many lawyers are critical of this. They claim that in the past decisions only took three months. But, today's justices maintain that they do not want any split decisions. They want to always present a unified decision on any given case before the court.

In comparison, our Supreme Court fares poorly in comparison to the Supreme Court of the United States which handles 140-150 decisions a year. Presently, various legal groups are asking for speedier delivery of cases. However, it will take years before the wheels of justice, especially at the higher levels will move any faster. Equity and fairness has its price, as far as the higher courts are concerned, time could be that price.

However, it is important to realize that the nine courts we have examined in this study are not the only legal facilities or agencies in Canada.

Most municipal, provincial and federal governments have a number of **regulatory agencies** which help reg-

ulate various aspects of Canadian life on a day to day basis. At the municipal level we have various planning boards and special commissions which have some limited power to decide on issues as building permits, development licenses, fire regulations, etc. However, the main power for regulatory agencies exist at the provincial and federal levels.

In Nova Scotia, some examples of these **provincial regulatory agencies** are the Nova Scotia Labour Relations Board, Residential Tenancies Board, Public Utilities Board, Worker's Compensation Board, Nova Scotia Liquor License Board, etc.

Examples of **federal regulatory agencies** in Nova Scotia are the Canadian Radio Television and Telecommunications Commission, National Energy Board, Canadian Labour Relations Board and the National Parole Board.

These agencies make decisions for the public good after a hearing has been held to consider an application by an individual or group to do something within the mandate of the regulatory agency. For example, if a company wants to build a tavern in Yarmouth, it will have to go before the Nova Scotia Liquor License Board. This Board will hear the application and advertises for interested parties to come forth to either support or oppose the application. Once all facets of the applications have been examined, the Board will make a decision.

However, all decisions may be appealed. In the case of a provincial regulatory agency, appeals are heard by the Nova Scotia Court of Appeal. As for federal regula-

tory agencies, appeals are heard by the Federal Court of Canada. Ultimately, the decision may go through the appeal process and end up with the Supreme Court of Canada.

Two other alternatives to court action are self-help and mediation.

Self-help basically involves an individual seeking assistance in order to settle dispute. The ultimate goal is to get both parties in an action to sit down and calmly discuss the problem involved. To assist in the process, agencies such as the Human Rights Commission and the Ombudsman are available to help people cut through the bureaucracy and red tape often associate with the settlement of a problem.

In many cases, **mediation** has proven successful and has spared parties the considerable time and money which is involved in a legal action. Mediation is seen as a voluntary system in which both parties come together with an impartial third party or mediator in an effort to resolve the dispute. Once both sides have reached an agreement, the mediator will often put this in writing as either a simple statement of understanding or as a binding legal contract.

Everyone in Canada is subject to the law, no matter how rich, important or even powerful they may be. No one in Canada is above the law. Not even the Queen, Prime Minister, Governor - General, Premiers, members of police or the armed forces may go above our laws. If there were exceptions to our laws, then our whole system of justice could break down.