COMMON LAW AND THE CONCEPT OF LEGAL PRECEDENT

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LEARNING OUTCOMES

After completing this chapter, you should be able to:

- Explain the process by which a body of common law develops to resolve a legal issue.
- Explain the concept of legal precedent.
- Describe the application of precedent to a novel legal issue.
- Describe the various levels of court in Canada and how they determine the value of cases as precedents.
- Explain how to locate a body of case law.
- Explain how to locate an individual case.
- Prepare a case brief.

HOW COMMON LAW WORKS

reasons for decision the written expression of a legal decision; some decisions include reasons from more than one judge or justice

Chapter 1 introduced the common law system and explained that judgments—or the written expression by judges of a legal decision provided in their **reasons for decision**—act as links in a chain of legal principles that make up various areas of law. But how does this work in practice? How does everyone keep track of the current state of the law and the direction in which it is growing?

HOW A LINK IS ADDED TO THE LEGAL CHAIN

It may help to explain that every new court judgment is only a *potential* link in the common law chain. In reality, many judgments are left out of the chain because:

- They don't really add anything new to the state of the law.
- They serve only to apply existing law to a novel set of facts without changing the existing law.
- In retrospect, the decision that was reached is considered by future decision-makers to be wrong and is explicitly **overruled**—that is, rejected or contradicted in a decision of a court of higher jurisdiction.
- The decision is for some reason unpopular, and while not actually overruled, it is ignored by future decision-makers.
- The decision is superseded by a decision of a higher court within the system of precedent.

overruled rejected or contradicted in a decision of a court of higher jurisdiction

The decision about whether a court decision will earn a place in the chain of the law is made through the process of citation. In presenting their arguments

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to the court, the parties in a case—usually plaintiff and defendant, or Crown and defence in criminal cases—support their conclusions by relying on prior decisions in the legal chain. A party (usually represented by a lawyer) typically makes a point and then *supports* that point by citing an **authority**—that is, a previously decided case in which the same point accepted by a judge supports a particular position or conclusion about a question of law. If the judge in the new case accepts the cited authority and mentions it in their judgment, the case has been cited with approval and lives on as part of the law.

authority
a previously decided case that supports a particular position or conclusion about a question of law

Often, only a few words of a case, generally described as the ***ratio decidendi*** (*reasons for decision*) or simply *ratio*, live on in this way. It is often used to describe the few words or phrases that form the most essential part of a legal decision for purposes of precedent. In many instances, a frequently cited *ratio* will take the form of a rule or test that can be successfully applied to fact situations that differ from the facts in the original case. Very strong *ratios* can live on for hundreds of years in this way and become as familiar as proverbs to the lawyers and judges specializing in a particular area of law.

ratio decidendi
Latin for "reasons for decision," but often used to describe the few words or phrases that form the most essential part of a legal decision for the purposes of precedent

Sometimes a party can't find an authority that fits their situation precisely. If this is the case, the lawyer must suggest an entirely new principle or propose an extension or modification of a principle set out in a pre-existing case that comes closest to their situation. If this new principle or extension of an existing principle is accepted by the judge and forms the basis for a judgment in that party's favour, a new link in the chain of common law has been made. If the new judgment, in turn, is cited by a future judge, the place of this new link in the chain of law is established.

HOW A LINK IS TESTED

A new link in the legal chain is a fragile thing. After all, the link earned its place through the actions of only a few people—the lawyer who suggested it, the judge who accepted it, and possibly another one or two lawyers or judges who cited it. Whether the new link will be popular in the wider legal community has yet to be tested.

The test comes when a new case arises in which it would make sense for the new link to be applied. The lawyers in this new case, if they have thoroughly executed their research, will come across the new link in online or printed reports of the case law (these will be discussed later in this chapter). If lawyers like the link and it supports their position, they will cite it. If they don't like it, either they will argue that their own situation is so different from the situation at issue when the earlier case was decided that this link in the legal chain should not be applied to their case (this is called distinguishing the case). Alternatively, they will argue that the case in the legal chain was decided incorrectly and should not be followed by the judge in the present case. It will be up to the judge to decide whether the link is binding on the new case. In theory, if a link in the legal chain

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has addressed the same issue as that before the present court, it is a binding precedent, and a judge cannot ignore it. They *must* acknowledge it as law and apply it to the new situation.

There are two important points to remember when considering whether a link is binding or not. First, the link must be from within the same territorial jurisdiction as the case in question. For example, a decision from a court in British Columbia is not binding on a court in Ontario, and vice versa. However, a decision from a court in another province may be successfully argued to be persuasive in a local court, particularly if the decision from another province is at a high level of court, such as the court of appeal. The decision from another province can be used to suggest the local court should follow the same legal decision-making as that from the other province, but the local court is not bound to follow the decision from the other province because it is not a binding precedent. Second, a link from a decision of an inferior (lower) court need not be followed by a higher court, either on appeal of the same case or in a totally new case. The court of higher jurisdiction has the power to reject the decision of a lower court, knocking it right out of the chain of precedent. A case that is knocked out in this manner is said to be overruled and should not thereafter be applied by any other court. Both points will be expanded upon in the remainder of this chapter.

THE ROLE OF JURISDICTION IN THE SYSTEM OF LEGAL PRECEDENT

As explained above, judges are not free to decide cases in any way that they want. They are bound by the system of legal precedent that forbids them to ignore principles that have been added to the chain of the common law. However, the binding nature of legal precedents (existing links) is limited by the level of jurisdiction in which those links were formed.

The binding power of an of an individual court decision becomes clear if you consider the structure of Canada's court system as summarized in Figure 3.1. The provincial and territorial trial courts, with the exception of Nunavut where the trial court has only one level, are divided into inferior trial courts and superior trial courts. The next level above the superior trial courts are the provincial and territorial courts of appeal.

The names of the provincial and territorial courts are listed in Table 3.1. A judge is bound by the decisions of all courts within the province or territory that are at a higher level and is also bound by the decisions of the Supreme Court of Canada. Therefore, all courts in the country except the Supreme Court of Canada are bound by the decisions of the Supreme Court of Canada; all courts in a specific province, except the province's court of appeal and the Supreme Court of Canada, are bound by the decisions of the province's court of appeal, and so on.

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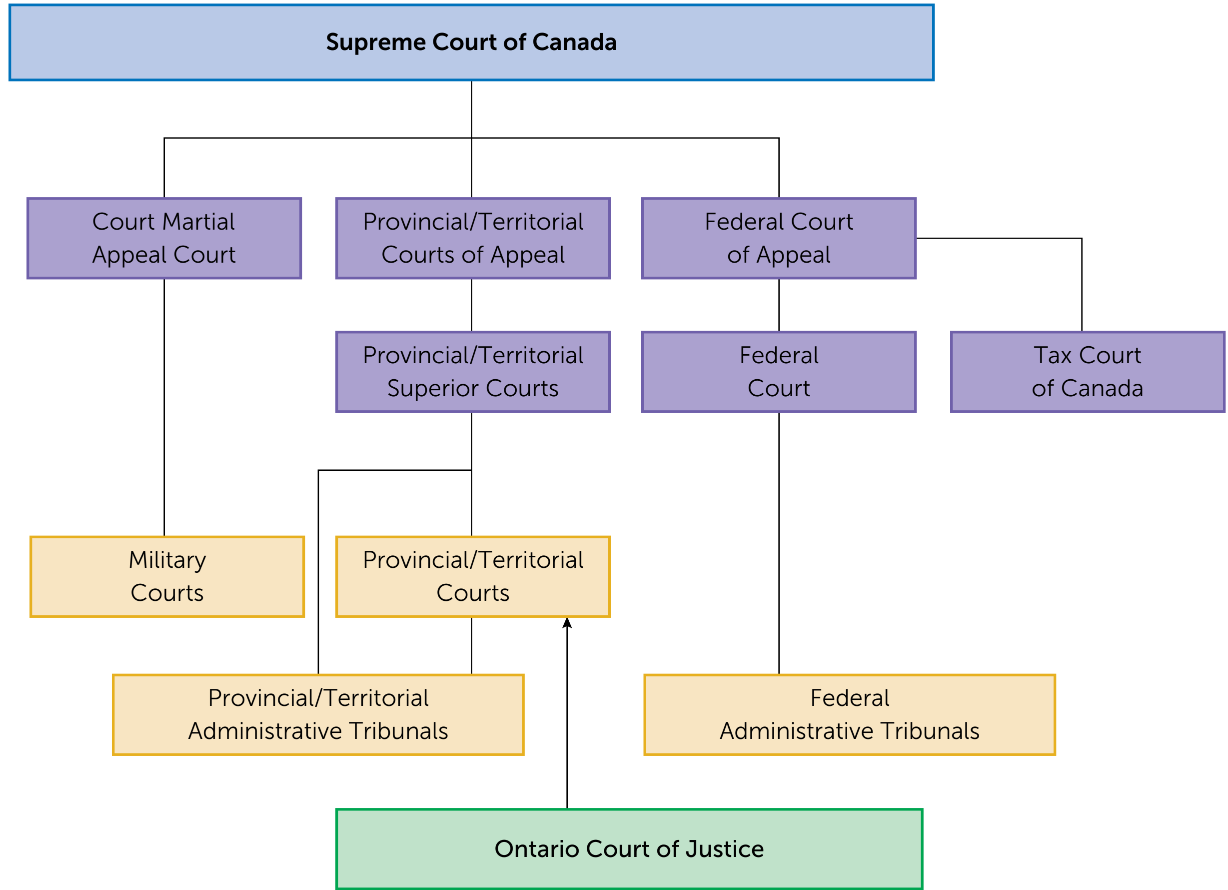
FIGURE 3.1 Outline of Canada's Court System



SOURCE: Adapted from Department of Justice, Canada's Court System (Ottawa: Government of Canada, 2014), online: <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html>. Adapted with the permission of the Department of Justice.

TABLE 3.1 Names of the Provincial and Territorial Courts in Canada

INFERIOR TRIAL COURT	SUPERIOR TRIAL COURT	APPEAL COURT
Provincial Court of British Columbia	Supreme Court of British Columbia	Court of Appeal of British Columbia
Provincial Court of Alberta	Court of Queen's Bench of Alberta	Court of Appeal of Alberta
Provincial Court of Saskatchewan	Court of Queen's Bench for Saskatchewan	Court of Appeal for Saskatchewan
Provincial Court of Manitoba	Court of Queen's Bench of Manitoba	Manitoba Court of Appeal
Ontario Court of Justice	Superior Court of Justice of Ontario	Court of Appeal for Ontario
Court of Quebec	Superior Court of Quebec	Court of Appeal of Quebec

(Continued on next page.)

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TABLE 3.1 Names of the Provincial and Territorial Courts in Canada (*Continued*)

INFERIOR TRIAL COURT	SUPERIOR TRIAL COURT	APPEAL COURT
Provincial Court of Newfoundland and Labrador	Supreme Court of Newfoundland and Labrador	Court of Appeal of Newfoundland and Labrador
Provincial Court of New Brunswick	Court of Queen's Bench of New Brunswick	Court of Appeal of New Brunswick
Provincial Court of Nova Scotia	Supreme Court of Nova Scotia	Court of Appeal of Nova Scotia
Provincial Court of Prince Edward Island	Supreme Court of Prince Edward Island	Prince Edward Island Court of Appeal
Territorial Court of Yukon	Supreme Court of Yukon	Court of Appeal of Yukon
Territorial Court of the Northwest Territories	Supreme Court of Northwest Territories	Court of Appeal of the Northwest Territories
Nunavut Court of Justice	Nunavut Court of Justice	Nunavut Court of Appeal

Disputes based on subject matter established by Canada's Parliament in the *Federal Courts* Act,[1] including immigration, intellectual property, national security, and maritime and admiralty law, are adjudicated first at the trial level of the Federal Court and then under certain conditions at the Federal Court of Appeal. Legal issues in the Canadian Armed Forces are adjudicated in a separate military justice system that includes trial courts, some decisions of which are eligible for **appeal**—that is, review or challenge of a legal decision in a court of higher jurisdiction—to the Court Martial Appeal Court. A level above these appellate levels of court is the Supreme Court of Canada, beyond which there is no further level of court available to appeal a decision.

appeal
a review or challenge of a legal decision in a court of higher jurisdiction

Administrative tribunals adjudicate a large proportion of disputes in Canada, and they exist somewhat apart from the court system. An example of a provincial administrative tribunal is the Ontario Civilian Police Commission that oversees public complaints about police services, policies, and conduct, whereas an example of a federal administrative tribunal is the Immigration and Refugee Board of Canada that determines which claimants are eligible for refugee protection. Some tribunal decisions are eligible for review under certain conditions by either provincial and territorial courts or by the Federal Court, depending on the jurisdiction of the tribunal, all the way up to the Supreme Court of Canada. See Box 3.1 for an overview of the role of administrative tribunals in the judicial system.

BOX 3.1 ADMINISTRATIVE TRIBUNALS

Not all decisions that affect the rights of Canadians are made within the court system. Instead, many disputes are resolved by administrative tribunals.

These tribunals are court-like bodies that are created by statutes or regulations to administer a particular legislative scheme. For example, the Landlord and

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Tenant Board is a tribunal in Ontario that administers the rules created by the Ontario *Residential Tenancies Act*.[2] Administrative tribunals exist at the municipal, provincial, and federal levels depending on the subject matter addressed by the tribunal.

Tribunals create a mechanism by which expert decision-makers, known as adjudicators, bring their specialized expertise to bear on the specific context of a tribunal hearing. They can also provide greater efficiency and result in lower costs for the parties involved. The way in which administrative tribunals make decisions varies widely—some tribunals are as formal as courts, while others have a more relaxed process. A set of rules generally exists to help participants understand how to bring their dispute before the tribunal.

The decisions of tribunals are meant to be final and binding on parties. Some sophisticated tribunals—for example, provincial labour relations boards—have multiple levels and an appeal system to deal with situations in which parties are not satisfied with an initial decision. In some cases, where a party has exhausted their right of appeal within a tribunal, they can seek what is called a judicial review, whereby a decision of a tribunal (or other administrative body) is brought before a traditional court of the justice system—for example, the Court of Appeal of New Brunswick—for review.

Because tribunal decision-makers are generally technical experts, judges in mainstream courts typically defer to tribunal decisions with respect to facts and only overturn cases in which there has been unfairness (for example, bias) or an error in applying the law.

Some examples of tribunals include:

- the Workers Compensation Board of Manitoba,
- the Nova Scotia Assessment Appeal Tribunal,
- the British Columbia Securities Commission, and
- the Parole Board of Canada.

LEVELS OF COURT IN CANADA

The concept of jurisdiction was introduced in the context of statute-making authority in the legislative system in Chapter 2. Jurisdiction also has a role to play in the judicial system, but here jurisdiction is quite different. While legislative jurisdiction is designed to facilitate the ordinary administration of government business and to reduce overlap in the subject matter of what is being legislated, judicial jurisdiction serves different functions. In the system of judicial jurisdiction, with the exception of certain special courts and tribunals designed to deal with specific types of cases (such as the federal Tax Court of Canada, the Family Court branch of Ontario's Superior Court of Justice, or the Ontario Human Rights Tribunal), subject matter is not important. Instead, the system is designed to sort cases based on how far along they are on the road to resolution and whether the parties deserve the opportunity to make use of the system and its resources to appeal decisions that they feel are not satisfactory.

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TRIAL COURTS

Each province and territory, with the exception of Nunavut, is divided into two levels of trial court: inferior trial court and superior trial court. Each level of trial court is further subdivided into various divisions based on the subject matter of the dispute or the monetary value of the dispute. In Ontario, there are separate courts for criminal law matters depending on the nature of the offence. Trials for less serious criminal offences and bail hearings are heard in the Ontario Court of Justice, while trials for the most serious criminal offences and all youth criminal justice matters, regardless of the nature of the offence, are heard in the Superior Court of Justice. In some limited situations, a plaintiff can appeal a decision of a lower trial court to a higher trial court. For example, the Small Claims Court in Ontario (where the amount of damages claimed by the plaintiff falls below $35,000) is a division of the Superior Court of Justice. Because of this, a judge's decision in Small Claims Court that meets specific criteria may be appealed to a judge of the Ontario Superior Court of Justice.

APPEAL COURTS

Each province has a court of appeal that represents the highest level of court in the province. Decisions made in trial courts can be appealed by either party to the court of appeal, where the decision will be reconsidered. (The rules regarding the right to appeal are more complicated in the context of criminal law and will be discussed in Chapter 9.) If the appeal is allowed, the lower-court decision will be reversed. If the appeal is denied, the lower-court decision will be preserved. In terms of precedent, courts must give greater persuasive weight to an appeal court decision than to a trial court decision.

THE SUPREME COURT OF CANADA

The Supreme Court of Canada is the highest level of court in the country. It decides only a limited number of cases every year, and there is no automatic right to appeal a civil (non-criminal) case to this court. There is an automatic right of appeal in certain criminal matters. Otherwise, only parties with cases of national importance and general public interest are granted permission to file an appeal, or **leave to appeal**, to the Supreme Court of Canada, and a decision rendered here creates a precedent that supersedes all lower-level judgments in all jurisdictions—it is the final word.

leave to appeal
permission to file an appeal

Because of the role of jurisdiction in creating precedents, a party or lawyer trying to argue a point of law in any level of court will strive to support their arguments with authorities from the highest possible level of court. This is an important consideration to keep in mind when doing legal research. An example of an administrative law case reaching the Supreme Court and resulting in a leading decision is *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners* that is discussed in the accompanying Case in Point.

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The Supreme Court of Canada, located in Ottawa, is the final court of appeal in Canada. Traditionally, the Supreme Court has only heard matters in Ottawa. However, in a historic first, the Court travelled to Winnipeg in 2019 to hear two cases in an effort to make the decisions of the Court more accessible to Canadians because of the significant impact they have on all aspects of Canadian society. While litigants have previously been permitted to submit oral arguments from remote locations to the Court in Ottawa by videoconference, this option was rarely exercised. This changed abruptly in response to the COVID-19 pandemic when, on June 9, 2020, the Supreme Court of Canada held its first-ever hearing by videoconference.

CASE IN POINT

"IT AIN'T OVER TILL IT'S OVER": THE SAME CASE CAN HAVE DIFFERENT OUTCOMES AT DIFFERENT LEVELS OF COURT

When a decision is made by a court, the legal principles established by the case must then be applied to future court decisions to be consistent with the legal precedent. However, if a case is appealed, it can have different outcomes at each level of court at which the case is heard. The decision that sets the legal precedent is the final decision at the highest level of court that the case reaches. An example of this is the Supreme Court of

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Canada decision in *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, a case that involved the termination of a constable employed by the regional police of Haldimand County after 15 months of employment without being provided with reasons for his dismissal. The employer's argument was that they were permitted to dismiss the constable because he had been employed for less than the 18-month probation period stipulated in his employment contract. The employer advised Nicholson of his termination in a letter from the Deputy Chief of Police of the Regional Municipality of Haldimand-Norfolk advising that "the Board of Commissioners of Police have approved the termination of your services effective June 4, 1974" (at 313). The constable's position was that he was entitled under the common law to be treated fairly and to be provided with reasons for his termination.

The police constable disagreed with the Board's decision and applied to the Divisional Court of Ontario Superior Court of Justice for a review of the Board's decision. The Divisional Court agreed with the constable's position and reversed the Board's decision. The Board disagreed, and an appeal was heard before the Ontario Court of Appeal. The judges of the Court of Appeal agreed with the Board, allowed the appeal, and restored the original decision of the Board terminating the constable without reasons. The constable then appealed this decision to the Supreme Court of Canada where the panel of judges agreed with the original decision of the Divisional Court and ruled that the constable should be given the opportunity to respond to his dismissal, even though he had not completed the 18-month probationary period.

The history of this case is a good example of how the same case can work its way through the hierarchy of the Canadian court system and experience very different outcomes at different stages. Because the dispute was ultimately heard by the Supreme Court of Canada, the final decision stands as an important legal precedent with regard to the level of procedural fairness an administrative tribunal is required to meet when reviewing a dispute. This outcome clearly had important implications for the police constable who was dismissed from his position. However, the case had an even greater impact on Canadian law because the final decision significantly expanded the scope of procedural fairness required in administrative law decisions.

Questions for Discussion

1. Based on your understanding of legal precedent, what would have been the outcome of the legal dispute if the parties had not chosen to pursue reviews or appeals of the decisions at each of the different stages in the matter?
2. The original decision of the Board of Commissioners of Police to dismiss the constable was in 1974. The final decision of the Supreme Court was issued in 1978 (although the decision was reported the following year in 1979). Subsequent legal decisions determined the officer was entitled to his wages from the original date of dismissal until the date of the second Board hearing in 1978. However, the constable was ultimately dismissed following a second Board hearing which found there had been work performance issues including being argumentative with his supervisor. The constable's application to quash the second Board decision was refused in 1983 by the Ontario Divisional Court which finally settled the matter of his employment for good. Given the nine years that elapsed between his original dismissal in 1974 and the final conclusion of the legal dispute in 1983, what do you think the constable would have to say about his experience with having different levels of court reach different decisions on his case?

SOURCES: *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311, 1978 CanLII 24; and *Nicholson v Haldimand-Norfolk Commissioners of Police*, [1983] OJ No 1245 (QL).

HOW TO FIND A BODY OF CASE LAW

Throughout this chapter, we have used the analogy of a chain of law, but most legal writers describe the bundle of judicial decisions on a particular legal issue or subject area as a body of law. One point to keep in mind during your research is that most legal decisions are not reported beyond communicating the decision to the parties involved because the decisions don't add

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anything new to the state of the existing law. For a decision to be reported, it typically addresses significant legal issues. This is independent of the level of court involved. For example, in *R v Ambrose*,[3] the Ontario Court of Justice determined an Apple Watch™ was "no less a source of distraction than a cell phone taped to someone's wrist" (at 10) and so met the definition of a hand-held communication device, the operation of which while driving is prohibited by section 78.1(1) of the *Highway Traffic Act*.[4] Even though the decision in *Ambrose* was reached at the province's inferior trial court, it had wide-ranging impacts because it settled how the Ontario courts would apply existing driving laws to a new technology. As a result, the decision was reported in several case reporters. This section explains how to find the particular body of law, or **case law**, that consists of reported decisions of judges from trials or appeals that are used to interpret a particular legal issue.

case law
reported decisions of judges from trials or appeals that are used to interpret the law

First, if the issue has a statutory connection and the relevant statute is already known (from using the instructions in Chapter 2), the first place to look for cases is under the statute. Cases that elaborate on a statutory provision can be found in online legal databases (more on these later) by conducting a keyword search for the statutory provision—for example, by searching for the text of the provision and/or the section number. Cases decided under a statute can also be found in legal encyclopedic sources, such as the *Canadian Abridgment* (Carswell). Encyclopedic sources include a section that lists statutes considered—that is, references to statutory material found within cases. Some frequently applied statutes, such as the *Criminal Code*,[5] are published in **annotated** form, which means they are available in an edition that contains supplementary references to relevant cases, and even summaries of the cases, directly below the statute provisions themselves.

annotate
to supplement published statutes by adding references to cases that have considered the application of statutory provisions

With no statute to start from, the researcher must perform a subject-matter or keyword search, either in an online database of cases or in an encyclopedic paper source such as the *Canadian Encyclopedic Digest* (Carswell) in a library.

HOW TO LOCATE A SPECIFIC CASE

Once a reference to a body of law dealing with a particular issue is found, the researcher will come across references to individual cases (usually the most important ones) within that body of law. These cases are referred to by the names of the two parties. In criminal law cases, one of the parties is always the Crown. The Crown is identified by the initial "R." The "R" stands for either "Regina," which is Latin for "the Queen," or "Rex," which is Latin for "the King." The latter is used if there is a king in power in the Commonwealth at the time a case is decided. Therefore, the case name in a criminal law case is typically "*R v* [*Name of accused*]" and is indexed under the name "[*Name of accused*]."

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The case name is immediately followed by the case citation that consists of a letter and number code that serves as a type of address for the case online or in print. This address is used to locate a copy of the case.

ONLINE LEGAL RESEARCH: THE NEW STARTING POINT

While legal research has been conducted using print sources for many centuries, it is now more common to search for cases online. Online versions of cases offer many useful innovations. For example, many online databases provide:

- information about whether a case has been appealed (with a link to the appeal decision(s));
- links to related decisions—for example, motion decisions (technical hearings within the main case) and sentencing decisions;
- information about whether the case has been cited in other decisions, which can help a researcher determine whether it has been overruled, or whether it has been relied upon in higher courts; and
- internal links to cases, statutes, and even academic articles or textbooks relied on by the judge in crafting the reasons for decision.

Case citations are neutral (more on this below), or else they direct the reader to a case reporting service—that is, an online database or a set of volumes published by a commercial publisher. Not every case is reported. Which cases are added to an online database or published in print depends on the decisions of an editorial board and what the publisher views as its reporting mandate.

NEUTRAL CITATIONS

neutral citation a form of citation for a case that is not tied to a particular report series or database, but includes the year of the decision, the court or tribunal that made the decision, and a number indicating the place in sequence of the decision

A **neutral citation** is a form of citation for a case that is not tied to a particular report series or database. It includes the year of the decision, the court or tribunal that made the decision, and a number indicating the place in sequence of the decision:

- the year in which the case was decided—for example, 2014;
- a court or tribunal identifier—for example, SCC (an abbreviation of Supreme Court of Canada); and
- a sequential number—for example, 77.

The examples above produce the following neutral citation:

- 2014 SCC 77.

In this example, the year of the decision is 2014; the court that made the decision is the Supreme Court of Canada; and the sequential number that helps make this

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citation unique is 77. The case name that corresponds to this particular neutral citation is *R v Fearon*, and so the parties to the case are the Crown and Fearon.

CASE REPORTER CITATIONS

Case reporters choose the cases they report based on particular criteria:

- Jurisdictional reporters, like the *Ontario Reports*, report significant or major cases decided in a certain geographical jurisdiction.
- Court-specific reporters, like the *Supreme Court Reports*, report cases decided in a particular court.
- Subject-specific reporters, like *Canadian Criminal Cases*, report cases that deal with a particular area of law.

Most case citations assigned by a case reporter contain the following elements:

- the case name—for example, *R v Ford*;
- a year in parentheses or square brackets—for example, (1982) or [1982]—which is either the year in which the case was decided (parentheses), or the year of the reporter volume in which it is reported (square brackets);
- a number that represents the volume number of the series of case reports in which the case is reported—for example, 65;
- letters that represent the initials of the case reports in which the case is reported—for example, "CCC" for *"Canadian Criminal Cases"* (see Appendix A); these initials may be followed by a series number if the case reporter has been published in more than one series—for example, "(2d)" means second series;
- the page number in the case reporter where the case can be found—for example, 392; and
- in parentheses, a short form of the name of the court from which the decision comes—for example, "SCC" for "Supreme Court of Canada"—if the court is not obvious from the name of the reporter.

The examples above produce the following case citation:

- *R v Ford* (1982), 65 CCC (2d) 392 (SCC).

This means that the case of *R v Ford*, which was decided by the Supreme Court of Canada in 1982, can be found in volume 65 of the second series of *Canadian Criminal Cases* at page 392.

Note that two or more different citations may be given for the same case, which means that it is reported in more than one place. For example, *R v Ford* can also be found at:

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- [1982] 1 SCR 231 (in the *Supreme Court Reports*), and
- (1982), 133 DLR (3d) 567 (in the *Dominion Law Reports*, third series).

ONLINE CASE LAW DATABASES

Online databases may use both the citations provided by case reporters and their own citation. By looking at the structure of the citation, the reader can often figure out which online database the case came from. For example, CanLII uses the following types of citations:

- the citation provided by a case reporter;
- a neutral citation (where one is issued by a court) that is the same as the court's citation except that "(CanLII)" is added to the end of the citation; and
- an original CanLII citation that consists of the case name, the year of the decision, "CanLII," a sequential number, and an abbreviation of the court or tribunal in parentheses.

Here are examples of each:

- *R v Ford* (1982), 65 CCC (2d) 392 (SCC);
- *R v Fearon*, 2014 SCC 77 (CanLII); and
- *R v Stone*, 1999 CanLII 688 (SCC).

It is clear from the structure of the last two citations that their online source is CanLII.

Figuring out what the initials for the name of the court or case reporter stand for can be a challenge. See Appendix A for a list of abbreviations. Most encyclopedic sources provide a list of case and statute reporter abbreviations. A law librarian can help find a name that isn't listed. Practising with a few different cases helps make the process clear.

HOW TO READ AND SUMMARIZE A CASE

Although some terms and phrases are unique to legal writing, legal judgments are usually quite readable and interesting. Most judges strive to present their judgments according to a logical organization, often providing a general statement of the facts, followed by an expression (sometimes even a list) of the issues to be decided, and finally the decision itself with an explanation of the legal principle or doctrine on which it is based.

Being able to grasp the meaning of a particular case often depends on how heavily the decision is influenced by earlier decisions (precedents) that the

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researcher may not have read. Where a case deals with issues that have a long common law history, the researcher may need to seek out and read earlier cases in the chain of reasoning to place that particular case in context. On the other hand, where a case is the first case decided under a particular statutory provision that the researcher has already looked up and read, it may make perfect sense. Remember that cases build on each other, so grasping them may require more searching.

The length of legal judgments varies enormously. Some are a page or two long; others can be over 100 pages and include decisions (sometimes conflicting) by more than one judge. Figuring out how to distill what's important—the *ratio decidendi*—from several pages of text is an essential research skill that is developed through practice. While a written judgment may provide a detailed history of the facts of the particular case—that is, the legal precedents, tests, and rules influencing the decision—the most important part of the judgment is the part that describes the reason for the judge's final decision. In cases where the common law rules are simply applied, this section may be only a sentence or two long—for example, it may be as simple as "Applying the common law test to the facts, I find that … ." On the other hand, it may be much more complex when the existing common law rule is changed, expanded, or amended in some way. This statement will live on as part of the development of the common law, and it will have a binding effect on subsequent cases.

To get a feel for how to isolate the *ratio* of a case, try this exercise:

1. Choose a case to read by locating a citation under an interesting *Criminal Code* provision in an annotated *Criminal Code*. Do not read the description of the case in the annotated *Criminal Code*.
2. Find the case on the library shelf or online and flip past the **headnote**—that is, the unofficial summary of reasons for decision that precedes the full text of the case in a commercial case reporter or an online legal database. (This is not an official part of the judgment; it is prepared by the editors of the case reporter.)
3. Read the case from beginning to end.
4. Read the headnote and consider how the case has been summarized. Which points did the editor seem to feel were most important? Do you agree?
5. Finally, read the even shorter summary of the case in an annotated *Criminal Code*.

headnote
an unofficial summary of reasons for decision that may precede the full text of a published case in a commercial case reporter or an online legal database

This process can help a person gain a basic understanding of how to reduce a legal decision to its most concise form. But remember: shorter is not always better. To understand a complicated legal issue *fully*, it often helps to review the full decision so that the result can be put into its factual context.

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PREPARING A SIMPLE CASE BRIEF

case brief
a summary of a legal judgment prepared for research purposes

Someone who will be reading multiple cases in the course of researching an issue may find that reading notes are needed to help them remember what is learned along the way. A particularly effective way to prepare reading notes is to write a **case brief** for each case that provides a summary of a legal judgment prepared for research purposes. A simple plan for a case brief follows, but for personal use, any model that best suits the researcher's needs is fine.

A basic case brief may contain the following:

1. the full name and citation for the case, including the court in which it was decided;
2. the names of all the parties to the decision;
3. the names of all the judges who wrote the judgment(s);
4. a short summary of the key facts and issues of the case;
5. the decision and concise reasons for it;
6. the verbatim wording of any new legal rule or test that was formulated by the decision;
7. any facts or details that make the case of particular interest to the researcher—for example, any facts that are particularly similar to or different from those of the fact situation that is being researched; and
8. any other information that the researcher wants to remember later.

For an example of a simple case brief, see Appendix B.

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CHAPTER SUMMARY

Under Canada's common law system, judges' written decisions act as links in a chain of legal principles that contribute to various areas of law. Each new decision is only a potential link in the chain and must earn a place in the chain of the law through the system of legal precedent. However, a new link is fragile and may be broken if, in a subsequent case, a judge finds that the case is not binding, and the case is then overruled or ignored. For a link to be binding, it must address the same issue as that before the present court, be heard in the same territorial jurisdiction as the case in question, and be issued by a court of superior jurisdiction.

Each province has two basic levels of court. The trial level is broken down by subject matter (for example, small claims, family, or criminal). The other level is the appeal level; the court of appeal hears appeals of cases from the trial level. A case from a provincial court of appeal may be appealed to the Supreme Court of Canada if the case satisfies the criteria for being heard at the highest court in Canada.

There are two main strategies for researching a body of case law. If the issue being researched has a statutory connection and the relevant statute is known, the researcher can find cases that discuss the statute using an online search or by consulting an encyclopedic source. If there is no statute to start from, the researcher can perform a subject-matter or keyword search in an online database of cases or in an encyclopedic paper source. Specific cases within a body of law are published by case reporters in report series that are available online or in print. Report series are categorized by jurisdiction, court, or subject matter. Citations assist the researcher in locating the case. Researchers who must read multiple cases often prepare reading notes in the form of a case brief to help them remember the important points in each case.

KEY TERMS

annotate, 51
appeal, 46
authority, 43
case brief, 56
case law, 51
headnote, 55
leave to appeal, 48
neutral citation, 52
overruled, 42
ratio decidendi, 43
reasons for decision, 42

NOTES

1 *Federal Courts Act, 1985*, RSC 1985, c F-7.
2 *Residential Tenancies Act, 2006*, SO 2006, c 17.
3 *R v Ambrose*, 2018 ONCJ 345.
4 *Highway Traffic Act*, RSO 1990, c H.8.
5 *Criminal Code*, RSC 1985, c C-46.

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EXERCISES

MULTIPLE CHOICE

1. Despite the principle of legal precedent, case law continues to evolve because:
   - **a.** no two fact situations are exactly the same
   - **b.** legislative provisions can intervene to change the course of the common law
   - **c.** the reasons for and effect of a particular decision may be interpreted and applied differently in different courts
   - **d.** a and c
   - **e.** all of the above
2. When considering the application of a current *Criminal Code* provision, it is important to review any court cases decided under the provision because:
   - **a.** the provision may have been overruled by a court
   - **b.** the provision may have been held not to apply to the current fact situation
   - **c.** other *Criminal Code* provisions may also apply to the fact situation
   - **d.** doing so may give the researcher insights into the meaning of ambiguous words in the provision
   - **e.** all of the above
3. A full case citation *does not* provide information about:
   - **a.** the year in which the case was decided or the year of the reporter volume
   - **b.** the judge who wrote the reasons for the decision
   - **c.** the case reporter in which the case is reported
   - **d.** the level of court at which the case was decided
   - **e.** the names of the parties to the case
4. The judge of a court is bound by the decisions of:
   - **a.** all courts within their province
   - **b.** only the court of appeal of their province
   - **c.** all courts within their province that are at a higher level
   - **d.** all courts within their province that are at a higher level and the Supreme Court of Canada
   - **e.** only the Supreme Court of Canada
5. A case name:
   - **a.** gives the names of the parties to the case
   - **b.** cites the case reporter in which the case can be found
   - **c.** gives the date of the case
   - **d.** indicates the court in which the case was tried
   - **e.** indicates the province in which the case was tried

TRUE OR FALSE?

____ **1.** A statutory rule is the product of the cooperation of many different people (including politicians, lobby groups, and legal drafters), but a common law rule can be created by a single judge.

____ **2.** A precedent created by the Supreme Court of Canada can never be changed.

____ **3.** When a party cannot find an authority that fits their situation precisely, the party's lawyer may propose a new principle.

____ **4.** The cases described in the annotations to a *Criminal Code* provision typically demonstrate the application of that statutory provision to particular fact situations.

____ **5.** Given an identical fact situation, a judge of the Ontario Superior Court of Justice must decide a legal issue in the same way that the issue was previously decided in the Ontario Court of Appeal.

____ **6.** The fact that a case can be found in a print reporter or online database means that the case has not been overruled by a court.

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_____ **7.** The newer a statute, the less likely it is that there will be cases decided under its provisions.

_____ **8.** When a judge finds that a statutory provision does not apply to the case they are deciding, their reasons for decision overrule the provision and it is no longer in effect.

_____ **9.** The decision of a dissenting judge, if any, should be included in the *ratio* of a case for the purpose of a case brief.

_____ **10.** The headnote of a case is written not by the judge, but by an editor who works for an online legal database or commercial print publisher.

SHORT ANSWER

1. Imagine that the Ontario Superior Court of Justice is hearing a case about an issue that has never been addressed before in the Ontario court system. The same issue *has*, however, been litigated up to the Court of Appeal level in British Columbia and New Brunswick, and at the trial level in Alberta. All three of these decisions are consistent with each other, and none of them has been further appealed.
   - **a.** Are the Court of Appeal decisions in the other provinces binding on the Ontario Superior Court of Justice?
   - **b.** Is the Alberta trial decision binding on the Ontario Superior Court of Justice?
   - **c.** If you answered "no" to questions a and b, do you believe that the Ontario judge will or should completely ignore the decisions from the other jurisdictions? Why or why not?
2. For reasons of clarity, this chapter did not discuss dissenting judgments. Do your own research to answer these questions:
   - **a.** What is a dissenting judgment?
   - **b.** Why do you think justices bother writing dissents?
3. What is it about subject-matter-specific administrative tribunals that makes them more efficient than generalist courts?
4. Why is it important for judges to write detailed reasons for decision, especially when deciding novel issues?

ACTIVITY

Choose a case mentioned in your annotated *Criminal Code*. Locate the full text of the decision in the library or online, read the case, and prepare a short case brief. How does your case affect or illustrate the application of the provision under which it was decided?

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