

New Law Librarians' Institute 2014

In June, I had the privilege of travelling to the National Capital Region and attending the 2014 [New Law Librarians' Institute \(NLLI\)](#). The Institute, sponsored annually by the [Canadian Association of Law Libraries](#), was held at the [Brian Dickson Law Library](#) at the University of Ottawa.

The institute describes itself as “an intensive, week-long program aimed at developing librarians' skills in the key competencies of law librarianship.” NLLI is a boot camp style introduction to all areas of Canadian law. As a new information professional I was excited to attend. Twenty other law librarians from across Canada attended as well.

Knowledgeable professors from the University of Ottawa Faculty of Law lectured throughout the week on key areas such as criminal law, tort law, constitutional law, civil law, and Aboriginal law.



This year NLLI was hosted by the Brian Dickson Law Library. I would like to thank the Brian Dickson Law Library, the Canadian Association of Law Libraries, and all those who made the 2014 institute possible.



Other legal topics covered at the 2014 institute included:

- Finding and Updating Legislation
- Introduction to Property Law
- Introduction to Family Law
- Finding and Updating Case Law
- Researching Secondary Legal Literature
- Introduction to Quebec Civil Law
- Statute Construction
- Introduction to Intellectual Property

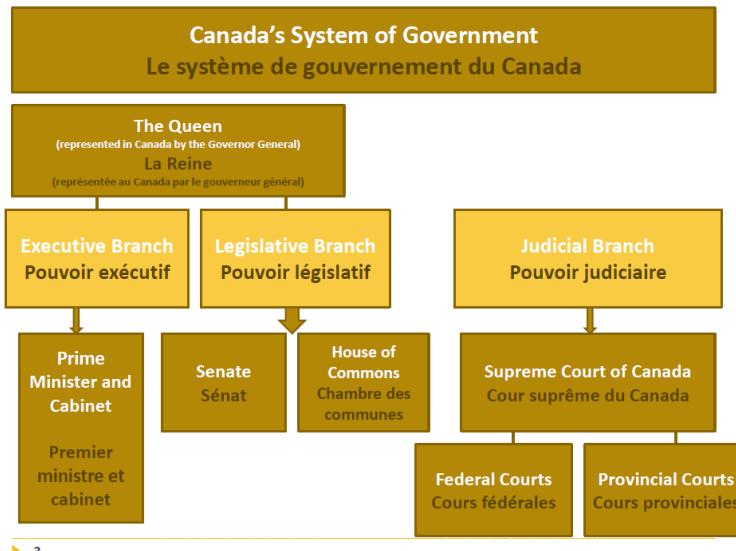
Please find my detailed notes from the New Law Librarians' Institute below. Please let me know if you have any questions.

New Law Librarians' Institute 2014 Notes

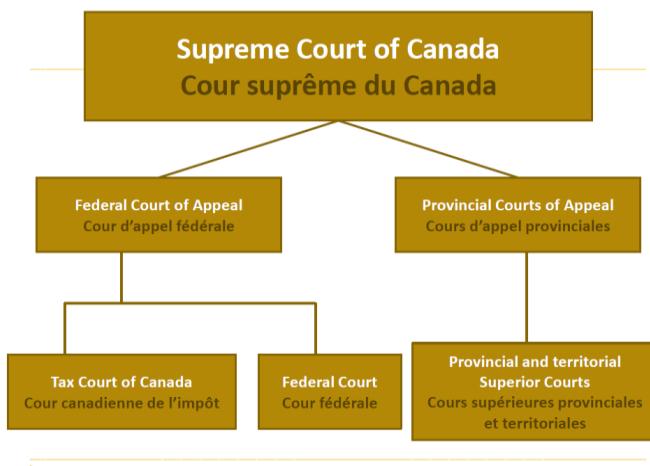
Keynote Address (900am 9 June 2014)	3
What is Canadian Constitutional Law? (1030am 9 June 2014)	8
Brian Dickson Law Library Website Tour (100pm 9 June 2014)	12
Finding and Updating Legislation (245pm 9 June 2014)	14
Introduction to Torts (900am 10 June 2014)	19
Introduction to Property Law (1030am 10 June 2014)	25
Introduction to Family Law (100pm 10 June 2014)	27
Finding and Updating Case Law (245pm 10 June 2014)	33
Introduction to Contracts Law (900am 11 June 2014)	38
Aboriginal Law: Overview (1045am 11 June 2014)	42
Criminal Law 101 (100pm 11 June 2014)	48
Researching Secondary Legal Literature (245pm 11 June 2014)	54
Introduction to Quebec Civil Law (900am 12 June 2014)	56
Statutory Construction – Different Approaches (1030am 12 June 2014)	60
Intellectual Property Law (100pm 12 June 2014)	64

Keynote Address (900am 9 June 2014)

- *Barabara Kincaid – General Counsel, Supreme Court of Canada*
- *Rosalie Fox – Head Librarian, Supreme Court of Canada*
- ***Barabara Kincaid – The Legal System in Canada***
 - Canada's System of Government



- Supreme Court of Canada (SCC)– Apex of the Canadian Judicial System
- Tension exists between the Judicial and Executive branch – Justice Nadon appointment of for example



- Minor criminal offences are dealt with in provincial court

- More serious criminal offences are dealt with in Superior courts – superior court judges have a broad range of powers
- Federal courts - Maritime, transportation, cross border, tax issues, etc.
- Federal judges have a limited and narrow range of powers
- SCC is the final court of appeal for all Canadians – the last judicial resort for all litigants – whether individuals or government
 - SCC was created in 1875 by the Supreme Court Act
 - SCC hears appeals from the decision of the highest courts of final resort of the provinces and territories as well as from the Federal Court of Appeal
 - SCC has very broad and generous jurisdiction
- SCC Appeal Sources (Three Sources):
 - Applications for leave to appeal
(Raise Questions of Public Importance)
 - Appeals as a right
(Leave to appeal is not required – appeals in the criminal code)
 - References
(Opinion – not a judgment - The court is required to give an opinion on the a question referred to it)
- SCC receives an average of 500-600 applications for leave to appeal per year
 - 10% of the applications are granted per year
 - In certain cases, the right to appeal is automatic and leave is not required

- ***Rosalie Fox – Law Librarianship in Canada – Overview of Issues***
 - The General public is unevenly served with access to legal information
 - Law libraries don't always have a clear mandate to serve the public
 - The SCC library reports to the Court Operations Sector
 - The SCC library is embedded in the business of the SCC
 - This allows the SCC library to be more responsive to judges and lawyers – More connections made

- Trends in Law Libraries:
 - Information management, knowledge management
 - Shorter staffed
 - Broader interests – staff pulled in many different directions
- Legal citation
 - Citation work is important
 - Stems from the courts – many courts have specific citation rules and official sources
 - There is no one official Canadian citation guide – many use the McGill guide. Others use a hybrid citation system
 - Accurate citations allow you to trace what the judge looked at when they made their decision
 - Allows you to follow the logic behind the decision making of judges
 - Citations are fundamental to the common law process
 - Citation accuracy is important – the persistence of a citation
- Law Reports
 - Important role for law reporters
 - Two official law reports in Canada:
 - SCC Reports
 - Federal Court Reports
 - The Federal Court Reports are the official reporter of the Federal Court and the Federal Court of Appeal
 - Only decisions of significant importance are reported in the Federal Court Reports
 - Question: Do we have a comprehensive list of unreported cases anywhere in Canada?
 - Since 1980, the SCC reports have reported/included every SCC case
- Why are cases reported?

- All cases which introduce a new principle or rule, or modify an existing rule, are typically reported
- A case is reported if, for any reason, it is unique or instructive
- Cases that are repetitious of previously reported decisions and not instructive are not reported
- Cases that feature substantial repetition and are valueless are not reported
- Law reporters must conduct a selection process and decide which cases to report

- Neutral Citations

- Canada was an early adopter of the neutral citation
- The United States was not – outsourced citations to big publishers – publishers were resistant to neutral citations

- Importance of Law Reports

- If the common law depends on precedent – If law reports and citations are not reliable and accurate – who knows what the law is?
- If you don't know the law exactly – you can buy the law
- Who is to say what is right and wrong
- In jurisdictions where law reporting is in its infancy – corruption is a problem
- Jamaica and Kenya for example
- The Law Society of Jamaica doesn't have the funds to publish law reports – systemic barriers to publishing judgments in Jamaica
- Corruption among judges is widespread and the system is bogged down with getting judgments out to the lawyers and the public

- Print Versus Electronic Debate

- Books play a fundamental role in legal research
- Textbooks used frequently – however most start legal research electronically now
- The SCC library committed to keeping print law reports on the shelves

- SCC judges insisted on print subscription to the SCC reports
- Some academic libraries are looking at storage of print law books
- Are last copy agreements an option? Microfilming legal material?
- Citations can only be made to print law reports
- Question: Should we rely on the print version of the SCC law reports, the SCC website, or CanLII?
 - Do judges insist on print citations or a print copy of a case? – look at the court rules
 - How do you like to read content? - Is it easier to read long decision in print?
 - PDF's of the SCC law reports are on the SCC website

What is Canadian Constitutional Law? (1030am 9 June 2014)

- *Professor Adam Dodek*
- A constitution - the glue that holds the country together
- It is more than just a document or a set of rules and words
- You can read the rules and still not get a sense of what the game is about
- The rules are a starting point – What do the rules actually mean?
- A constitution as an idea – can arouse great passion and anger
- A constitution as an iceberg – The words just tell you a minimal amount – the tip of the iceberg
- The words only reflect a fraction of what goes on in constitutional law
- A democratic culture is like oxygen – It's necessary for us to survive – this is true for a constitution as well
- The words of a constitution can just remain on the paper if not supported by a democratic culture
- The idea of a constitution:
 - Foundational Law
 - Rulebook for a country
 - Rule of recognition
 - Who can make the ordinary law of the land?
 - What are the limits on the content of the ordinary law?
 - Structures of State
 - Legislature make law
 - Judiciary interprets the law
 - Executive implements the law
 - Social Contract
 - Symbolic device
- What comprises the constitution of Canada?
- We don't have a single document called "the constitution"
- Section 52(2) of the *Constitution Act, 1982* states that the constitution of Canada includes:
 - Canada Act, 1982, including this act
 - Constitution Act, 1867
 - Constitution Act, 1982 (The Green Book)
 - The acts and orders referred to in the schedule (other constitutional documents)
 - Any amendments to any act or order referred to in paragraph a or b

- The schedule to the *Constitution Act, 1982* lists over thirty acts:
 - British North America Act
 - Parliament of Canada Act, 1875
 - Saskatchewan Act, 1905
 - Newfoundland Act, 1949
 - Statute of Westminster, 1931
 - Etc.
- Statute of Westminster, 1931:
 - Recognized in law, the legal autonomy of the dominions and restricted the power of the British parliament to legislate for those dominions
 - A critical legal marker
- But wait, there's more: A constitution = written + unwritten principles
 - Written
 - Unwritten = **unwritten constitution principles and constitutional conventions**
- Quebec Referendum in 1995:
 - The Federal government referred several questions to the SCC
 - Was there a right to secede under the constitution or under international law?
- SCC response to the referendum:
 - The SCC explained that unwritten constitutional principles (UCP) exist
 - UCP explain what is going on in the constitution
 - The constitution embraces unwritten rules.
 - UCP are the lifeblood of the con
 - UCP infuse our constitution and breathe life into it
 - UCP don't appear in the constitution and are not expressly set out in words
- Four supporting UCP emerged from the Quebec Referendum:
 - Federalism
 - Democracy
 - Constitutionalism and the rule of law
 - Respect for minorities
- UCP help us to deal with problems, like the Quebec referendum, and understand what is going on
- UCP were created to deal with the Quebec crisis – a national crisis
- Some lawyers challenged the UCP
- UCP – last recourse in court – if you have to rely on UCP in court, you are in serious trouble
- SCC was clear – UCP cannot override written constitution – UCP are meant to fill in the gaps
- Constitutional Conventions:

- Some political actors have formal political and legal power
- Who has all of the power under the constitution - the Queen and the Governor General
- The Prime Minister does not appear in the constitution until 1982
- Constitutional conventions are political agreements and understandings that limit the formal power of the Queen and the Governor General and say that other actors – like the Prime Minister – are going to exercise the political power
- Constitutional Conventions are the rules of political morality
- Constitutional Conventions Examples:
 - The Governor General has all of the power under the constitution
 - However, convention dictates that the Governor General only acts on the command/advice of the Prime Minister
 - The Senate has the power to veto legislation passed by the house
 - Very strong convention that the Senate defers to the House of Commons
 - Convention during elections is that the power of the executive branch is limited
 - No big purchases, discussion, or contracts during an election
- The basis for constitutional conventions is based on democratic legitimacy
- Power should be exercised by those who enjoy the democratic sanction of the electorate – not the Queen or the Governor General
- Seen as illegitimate for the senate or Governor General to veto legislation
- What is the constitution again?
 - Constitution Act, 1867 (old constitution)
 - Constitution Act, 1862 (the charter plus some other stuff)
 - List of statutes in the schedule
 - Part of the Supreme Court Act
 - Unwritten Constitution Principles (UCP)
 - Constitution conventions
 - Other stuff?
- Constitutional Law texts, case law, and resources:
 - Quicklaw
 - Westlaw
 - CanLII
 - SCR
 - Lexum
 - SCC website

- thecourt.ca
- There is no difference between the print SCR and the online version
- Eugene Meehan's Supreme Court Advocacy Newsletter – A good resource
- Constitutional Law of Canada – Two volume loose leaf by Peter Hogg*
 - The bible of Canadian constitutional law
- Closing Remarks:
 - The constitution is the story of Canada
 - A living tree that grows with the times
 - The famous “persons” case from 1929
 - 5 women “famous five” challenged the definition of personhood
 - The Federal government referred this question to the SCC
 - The SCC clarified that women were not persons under the constitution
 - The famous five appealed to the Privy Council
 - The Privy Council clarified that women were persons under the law

Brian Dickson Law Library Website Tour (100pm 9 June 2014)

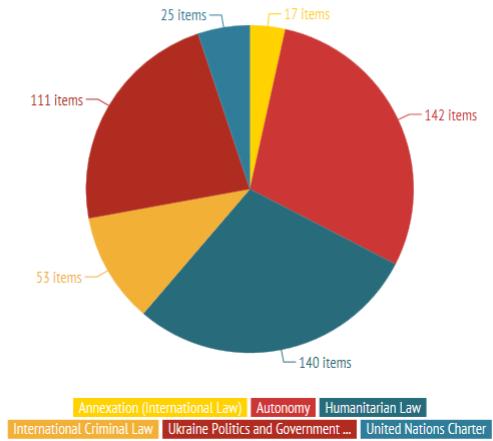
- *Margo Jeske – Director, Brian Dickson Law Library*
- Brian Dickson Law Library
 - Built in 1974
 - Named after former Chief Justice of the SCC – Brian Dickson
 - Reflects the bijural nature (common law and civil law) of the faculty
- Largest law school in Canada – 1000 new students per year
- Common law and civil law programs in the faculty
- Over 300 000 volumes in the library
- Collaborative offsite storage in the works with Western, U of T, and Queens
- Ebook purchases passed print purchases at the University of Ottawa this year
- Brian Dickson Law Library Website Elements:
 - Principles of Legal Research
 - New Titles
 - Research Guides
 - Infographics and the Law
 - Virtual Tour
 - Law 101
- [Principles of Legal Research*](#)
 - Online learning modules: Search Strategies, Keywords and Boolean Logic; Secondary Sources; Case Citations; and Ontario Legislation.
 - Quizzes, activities, etc.

 The Research Process Learn the importance of developing a good search strategy in order to quickly and effectively answer legal questions. View Table of Contents	 Using CanLII CanLII, the Canadian Legal Information Institute, is a not-for-profit organization which supports permanent open access to Canadian law. View Table of Contents
 Searching Using Keywords and Boolean Logic Learn about Boolean operators and other tips and tricks to be a more efficient researcher. View Table of Contents	 Federal Legislation How does a bill progress through the House of Commons? Where are federal laws published? Learn about the process of making and creating federal laws and regulations. View Table of Contents
 Secondary Sources Go beyond the textbook! Learn about some of the key secondary resources used in law. View Table of Contents	 Ontario Legislation How does a bill progress through the House of Commons? Where are federal laws published? Learn about the process of making and creating federal laws and regulations. View Table of Contents
 Legal Journals & Periodicals Learn more about the various, major legal databases to which the University of Ottawa has a subscription, and how you can effectively use them in your legal research projects. View Table of Contents	 Legal Citations Learn about the citation formats required in Canadian Common Law, and figure out, once and for all, where those pesky commas should go. View Table of Contents
 Case Law and the Canadian Abridgment Learn how case law comes into being, and the importance of legal precedent. Also learn how to use the Canadian Abridgment, the key resource for indexing and organizing Canadian case law. View Table of Contents	

- Many similar legal research initiatives from other academic law libraries – Goal is to put as much legal research information out there
- New Titles
 - page on the website updated weekly
 - By subject, title
 - Get information about new titles to students and faculty
- Legal Research Guides
 - Research guides are a starting point for research on legal topics and will allow you to find different print and electronic resources which will help you in your search.
- Infographics and the Law
 - Visualization of data – engage library users
 - A way to collect and present data
 - highlights available online and print collections related to a current affairs topic of interest
 - For example, international disputes between Russia and Ukraine:

Law Library:

Subject Headings



- Virtual Tour
 - Of the Brian Dickson Law Library
- Law 101 Library Research Guide
 - Where to begin legal research
 - Information about databases
 - Dictionaries
 - Encyclopedia
 - Electronic Resources

Finding and Updating Legislation (245pm 9 June 2014)

- *Emily Landriault, Law Librarian, University of Ottawa*
- What is meant by legislation?
 - Bills
 - Proposed law not yet passed through the legislative process
 - Two types of Bills:
 - Enacting bill – Creating a new law that didn't exist before
 - Amending bill – Bill amending an act that already exists
 - Law/Statute/Act
 - All of these are the same thing
 - Once a bill is passed at third reading and is given royal assent – it becomes law
 - Regulations
 - Subordinate legislation
 - Provide extra details about a law
 - Always attached to a particular law
- Legislative Process
 - First Reading
 - Second Reading
 - Committee Stage
 - Third Reading
- Coming into Force – “a bill is not enforced until it is in force”
- Once a bill is law
 - It is published in the Canada Gazette Part Three, the Annual Statutes of Canada, and the web
- Annual Statutes
 - A collection of the acts introduced in a particular year
 - Not the whole act, just the amending act
- Revised Statutes of Canada (RSC)
 - 1985, 1970, 1952, 1927, 1906, etc.
 - Published by parliament “from time to time”
 - Codification of all laws currently in force
 - New chapter numbers assigned in each new revision

- Repealed sections are removed and those that remain are renumbered
 - For example, *The Copyright Act, Section 51*
 - Repealed, 1992, c 1 s.48
 - Section 51 was repealed in 1992 – but the empty section still exists until the next revision
- Reading Law Citations – *Access to Information Act*
 - R.S.C 1985 c. A-1
 - You are looking at the current version of the act
 - The section numbers assigned to the act are the last numbers assigned in 1985
 - C. A-1 – first act that begins with A in the R.S.C 1985
 - S.C. 2004 c.15, s.60
 - This citation let us know the numbers assigned to the sections are the same as in 2004
 - C.15 – Annual statutes numbered when they get royal assent
- How to Find Federal Legislation: Bills, Laws, and Regulations

Bills	Format	Official Source
	Print	Print Bills
	Electronic	Legisinfo

- When is a bill going to the next reading or coming into force?
 - Contact the appropriate ministry to find out

Laws	Format	Official Source	Non-Official Source
	Print	Annual Statutes R.S.C Canada Gazette Pt. 3	Annotated Acts
	Electronic	Justice Laws Website Consolidated Statutes Annual Statutes	Westlaw Quicklaw CanLII

- All laws found on the Justice Laws website have been considered official legislation:
 - Since 2009

Regulations	Format	Official Source	Non-Official Source
	Print	Canada Gazette Pt. 2	Annotated Regs
	Electronic	Justice Laws Website	Westlaw Quicklaw CanLII

- Updating Legislation
 - What? You need to make sure that the legislation you are working with includes any recent amendments that have been made
 - Why? Even legislation online might not include the most recent amendments. This is also important if you are doing point in time legislation
- How to Update laws
 - Official Source – [Table of Public Statutes and Responsible Ministers](#)
 - S.77 1992 c.21 s.5, 2006 c.9 s163
 - Section 77 of the Access to Information Act was amended in 1992 and 2006
 - Unofficial Source – CanLII, Westlaw, and QuickLaw
 - But – the Table of Public Statutes is more up to date than the unofficial sources
- How to Update Regulations
 - Official Source – [Consolidated Index of Statutory Instruments](#) – Published three times per year
 - For very recent amendments, you might need to consult the Canada Gazette Part 2
 - For example, select [E](#) from the Consolidated Index of Statutory Instruments

LAW GAZETTE INDEX	
Canada Shipping Act, 2001	
Eastern Townships Wood Producers' Levies (Interprovincial and Export Trade) Order	
Agricultural Products Marketing Act	
Eastport Marine Protected Areas Regulations	
Oceans Act	
Educational Program, Work and Other Subject-matter Record-keeping Regulations	
Copyright Act	
EEC Aged Cheddar Cheese Export Regulations	
Canadian Dairy Commission Act	
Egg Regulations	→
Canada Agricultural Products Act	
Eggplants and Tomatoes Production (Central Saanich) Restriction Regulations	
Plant Protection Act	
Egmont Group of Financial Intelligence Units Privileges and Immunities Order	
Foreign Missions and International Organizations Act	
EID Electronics Identification Systems Ltd. Share Acquisition Order	

- Egg Regulations are enabled under the Canada Agricultural Products Act

[Egg Regulations, C.R.C., c. 284](#)
 [Œufs – Règlement]
 LONG TITLE, SOR/90-299, s. 17[F]
 s. 2, "Act", replaced, SOR/90-110, s. 1
 s. 2, "adulterated", added, SOR/92-12, s. 1; repealed, SOR/2011-205, s. 1
 s. 2, "Agency", added, SOR/97-292, s. 1
 s. 2, "boîte à œufs", added [F], SOR/98-131, s. 1
 s. 2, "carton", replaced, SOR/90-299, s. 1; repealed [F], SOR/98-131, s. 1; SOR/98-131, s. 1[E]
 s. 2, "code de producteur", SOR/95-250, s. 1[F]
 s. 2, "code mark", SOR/2000-184, s. 1; repealed, SOR/2002-354, s. 1
 s. 2, "container", SOR/98-131, s. 1
 s. 2, "contaminated", added SOR/02-12, s. 1; repealed SOR/02-17, s. 1

- Noting Up Legislation
 - What? Check how a piece of legislation has been used or treated in court
 - This involves bringing up a list of all cases that have cited a piece of legislation
 - Why? It is important to ensure that legislation hasn't been given a negative treatment or found unconstitutional by the courts
 - How? QuickLaw, Westlaw, or CanLII
 - For example, section 210 of the Criminal Code given a negative treatment by the courts "body house section" – This section deemed unconstitutional
 - Would not recommend using CanLII to note up legislation
 - CanLII just gives you a list of cases – it does not tell you how these cases have treated the legislation – No treatment information
- Point-in-Time Legislation
 - What did this action or regulation look like on a certain date?
 - Consolidated versions of legislation can be found from 2003 onward:
 - [Justice Laws site](#)
 - CanLII
 - QuickLaw
- Session handout on the following page:

Useful Definitions

Annual Statutes: A collection of the acts in the form in which they were originally enacted by Parliament in a given calendar year. They include new Acts as well as Acts that amend existing Acts.

Revised Statutes: Volumes published and printed by parliament/legislature from time to time that contain codifications of all laws currently in force.

Coming into Force: The information that states when a law, which has received Royal Assent, comes into effect or may be enforced.

Noting Up: Searching for a list of cases that have cited a piece of legislation, as well as how the legislation was treated in the case. Verifying that the legislation was not given a negative treatment by the judge.

Finding Legislation

Type of Legislation	Format	Official Source	Non-Official Source
Bills	Print	Print Bills	N/A
	Electronic	LegisInfo (http://www.parl.gc.ca/LEGISinfo)	N/A
Laws	Print	Annual Statutes of Canada Revised Statutes of Canada Canada Gazette, Part III	Annotated Acts
	Electronic	Justice Laws Website (laws.justice.gc.ca)	Westlaw Quicklaw CanLII (canlii.org)
Regulations	Print	Canada Gazette, Part II	Annotated Regulations
	Electronic	Justice Laws Website (laws.justice.gc.ca)	Westlaw Quicklaw CanLII (canlii.org)
Updating Laws	Updating Regulations	Noting Up Legislation	Point-in-Time Legislation
Official method: Table of Public Statutes and Responsible Ministers (in print or online) (http://laws.justice.gc.ca/eng/TablePublicStatutes/index.html)	Official Method: Consolidated Index of Statutory Instruments (http://www.gazette.gc.ca/rp-pr/p2/2014/d-ic-eng.html) For very recent amendments, you might need to consult the Canada Gazette Part II	Use: <ul style="list-style-type: none">Quickcite on Quicklaw - found on main search page or under the "legislation" tab, on the left-hand sideKeycite on Westlaw - found on main search page as option to "Keycite" a search.CanLII - found on main page under "note up" search field	Versions from 2003 to present are found on: <ul style="list-style-type: none">Justice Law Site - After finding the law, look for the "previous versions" link in the table of contentsCanLII - After finding the law, a list appears at the top of the page.Quicklaw - Under "legislation" tab, there is a search option "Select version"
Unofficial method: Within the text of the law itself on either Westlaw, Quicklaw, CanLII	Unofficial Method: The text of the regulation itself on CanLII, Quicklaw or Westlaw		

Introduction to Torts (900am 10 June 2014)

- *Professor Heather McLeod-Kilmurray*
- Tort – something that happens frequently
- Tort - a civil wrong , other than a breach of contract, which the law will readdress by an award of damages
- Torts are usually between 2 individual people - no one else
- The most common tort is negligence:
 - Medical malpractice
 - Slip and Fall
 - Car Accident
- Torts are largely about compensation – People want to be put back in the position they were before an accident
 - Trying your best to put the person back in the position they were before the accident that occurred
- Torts are not just about compensation – They are also about prevention, deterrence, education, and social policy
 - Prevention and deterrence – We want to deter people from committing similar acts that lead to torts
 - Education + social policy – Social harms – A victim may want to sue for harms they have suffered and have their day in court
 - Pollution example – A public interest group may bring a tort case against a polluter because of the risk from pollution
- Tort law is private law rather than public law
 - For example, a tort case would be between individual two drivers – no one else
 - Domestic abuse could be a tort
 - The government can be a plaintiff or a defendant in a tort case

- Two main categories of torts are:
 - Negligence
 - Intentional Torts
- Another important distinction:
 - Torts against the person
 - Torts to Property
 - Both of these can be found in negligence and/or intentional torts
- For example:
 - Someone intentionally punches you – intention tort against the person
 - Someone accidentally hits you with their car – negligence tort against the person
 - A neighbor intentionally pulls up your flowers – intentional tort against property
 - A neighbor accidentally lets their dog pull up your flowers – negligence tort against property
- Less discussed torts:
 - Toxic torts (pollution)
 - Online torts (cyber bullying)
- Negligence
 - A spectrum from intentional to an unforeseeable accident:

Intentional		Unforeseeable
“Intentionally punch someone”		“A bird hit me in the head while I was driving and I hit you with my car”

- Could you have been more careful in that incident where you hit a pedestrian with your car? Were you negligent?
- If you should have been more careful, the cost of compensation falls on you
- If the accident was totally unforeseeable (A bird hit you in the head while you were driving) and you were as careful as you could have been, the cost falls on the victim
- Classic case: *Donoghue v. Stevenson (1932) UKHL 100*

- You need to think about your neighbor – a general principle – if someone fell below a standard of care when they owe a duty of care to you
- **The Five Elements of Negligence:**
 - 1. Duty of Care
 - 2. Standard of Care
 - 3. Factual Causation
 - 4. Remoteness (Legal Causation)
 - 5. Defenses
 - 6. *If the tort case gets this far, the court must consider remedies*
 - Examples:
 - A person is rushed to the emergency room and is not treated right away. The person dies from arsenic poisoning in the waiting room. The emergency room staff had a duty of care and they were careless. They also failed the standard of care by not treating the patient in a reasonable amount of time. However, it was determined the patient would have died anyway even if the staff had responded immediately. So there is no factual cause for negligence.
 - If all five elements of negligence are not met – then a person is not liable for negligence
 - If a lifeguard attempts to rescue you – and you still end up drowning – as long as the lifeguard tried to the best of his ability to save you, he met a reasonable standard of care and will not be held liable for negligence
 - 1. Duty of Care:
 - The plaintiff needs to show that the defendant had a duty of care and that a relationship of proximity existed
 - The burden is very high on the plaintiff to demonstrate that the defendant had a duty of care – if there is no duty of care then it is not negligence
 - Is there an acceptable level of danger and risk? When driving a car?
 - I owed you a duty of care, yet I was careless – Did I also fail to meet the standard of care?
 - Is there a duty between a mother and her unborn child?
 - Should hosts be responsible for a drunken person who leaves their party and drives?

- In 90% percent of cases – we know whether there is a duty or not
- In 10% of cases – we need to decide whether to create a new duty of care
 - *Childs v. Desormeaux 2006 SCC 18*
Social Host Liability
- 2. Standard of Care:
 - Based on a reasonable person - What would a reasonable person do?
 - The learned hand formula: raise and lower standard
 - What would a reasonable eight year old do versus a reasonable brain surgeon?
 - The customs in the industry or practice influence the standard of care
 - For example, it is custom for doctors to wash their hands before surgery
 - Special standards of care: disabled children, professionals, experts in a particular area
- 3. Factual Causation:
 - “But for” test – if you hadn’t done it, would it still have happened?
 - I hit you with my car, would the accident still have happened if I didn’t hit you?
 - This puts the bar very high on the plaintiff to prove causation
 - A polluting factory – can you prove that the pollution is dangerous and causes cancer?
- 4. Remoteness (Legal Causation):
 - Reasonable foreseeability
 - (*Mustapha v. Culligan 2008 SCC 27*)
 - Even if an accident happened, if the accident was not reasonably foreseeable, we’re not going to blame you
 - Factually, we know you caused the accident. However, the accident was not reasonably foreseeable. So, legally we are not going to blame you.

- Would a reasonable person have foreseen that this result was probable?
- 5. Defenses
 - Contributory negligence – did the plaintiff contribute?
 - For example, did the plaintiff fail to wear a seat belt? Did the plaintiff consent?
 - Was the accident inevitable?
 - If the defendant can prove any of these defenses, they will not be held liable
- **Intentional Torts (On Purpose)**
 - Some key differences from negligence
 - This is easier for the plaintiff to prove – there is more burden on the defendant to provide a viable defense
 - You do not need to prove physical harm
 - For example, battery, assault, false imprisonment, malicious prosecution, abuse of process, infliction of nervous shock
 - Battery – the intentional infliction upon the body of another of a harmful or offensive contact
 - Battery involves direct physical contact
 - Assault - intentional creation in the mind of another of a reasonable threat of violence
 - Consent in particular contexts is important – interpersonal violence, contact sports, sexual relationships, medical treatments
 - Should consent be more or less easily implied in any of these situations?
 - Challenging consent in medical cases:
 - Malette v. Shulman (1990) 72 OR (2d) 417 ONCA
 - Starson v Swayze 2003 SCC 32

- A person has autonomy over their own body – if you would rather die than have a blood transfusion, then that is up to you.
- A doctor held liable for giving a blood transfusion to a Jehovah's Witness in the emergency room
- Can you force someone to take medication? Does a person suffering from schizophrenia have the capacity to refuse medication?

Introduction to Property Law (1030am 10 June 2014)

- *Professor Joseph Roach*
- 90% of people only come into contact with a lawyer when they purchase a house or have to do something with an estate
- Property Law – It all comes back to the year 1066 and the writ system
- Writs were rules that expressed exactly what the law was
- The Common law eventually emerged from the system of writs
- The first writs dealt with real property and personal property – property law developed from these writs
- System of writs in 1066 – If you had a complaint, you needed to find an appropriate writ and register it with the sheriff – the sheriff would then issue that writ to the complainant
- In 1066 someone disposed of their land could obtain a writ from court to get their land back or obtain damages and compensation
- A writ had to fit the facts of the case exactly – if the writ did not fit in to the facts of the case – you must acquit
- In 1066 the Doctrine of Tenure emerged in England with the Norman conquest
- William the Conqueror explained that all land in England belonged to the crown and that the population was the crown's tenant
- The king often gave land in return for services to the crown
- If a tenant died, the land would return to the crown rather than passing on to a spouse or descendants
- In 1791 – in Ontario – the Doctrine of Tenure came to Canada
- In 1290 Doctrine of Estates emerged from the statue of *Quia Emptores*
- This doctrine granted that every free man could sell his land at his own pleasure independent of the crown

- The crown disappeared from the chain of buying and selling land
- Mortgages – the owner pledges the house to the bank to guarantee the loan
- Foreclosure occurs when the owner does not pay the loan – the bank can sell the property to a third party

Introduction to Family Law (100pm 10 June 2014)

- *Professor Adriana Doyle*
- **Introduction:**
 - Three main issues in Family Law:
 - Custody/Access
 - Property
 - Support
 - Framework for Family Law (Federal legislation and provincial legislation)
 - Federal – *The Divorce Act*: the only legislation that permits divorce
 - Provincial – *Family Law Act And Children's Law Reform Act*: deals with custody, access, support, and property issues
 - 2 sets of family courts exist in Ontario
 - Superior Court (SCT)
 - Ontario Court of Justice (OCJ)
 - SCT takes precedence over the OCJ
 - It can take over a year to make your way through the court system
 - in the meantime, you can ask the court to make an interim order
 - Judge makes an interim order on affidavits
 - Affidavits involves statements of facts prepared by lawyers
 - International Law aspect – We have a convention that deals with children that are taken out of their jurisdiction - in order to protect children. Not all countries have signed this convention
 - Family law dovetails with all other areas of the law
 - Tax
 - Accounting
 - Psychological
 - Violence
 - Abuse
 - Family Law - an individual dealing with the most traumatic thing they might have to deal with in their life

- Family law involves lots of negotiations between lawyers – lots of back and forth – ironing out the details
- **Mediation in Family Law:**
 - People want to resolve their disputes - You and your spouse can talk to a mediator and try to settle the issues outside of court
 - Most courts in Ontario have mediators right in the court house
 - Mediators sit with the parties – mediation is closed and off the record – it results in a signed document
 - Mediation involves compromise
 - Mediation is better than dealing with a judge – lawyers are mandated to encourage their clients to resolve issues through mediation
 - Mediation is far cheaper than court. Typical lawyers cost \$500 per hour. New lawyers charge \$100 per hour. Legal Aid only provides support to those who make less than \$15000 a year
 - Any agreement reached in mediation has to be reached voluntarily – spouses cannot be intimidated or forced to sign
 - Lawyers play a role in mediations – lawyers should review all agreements signed in mediation
- **Arbitration in Family Law:**
 - Provincial legislation – Family Law Act
 - Arbitrations can be binding – just like a court order
 - Two advantages to arbitration
 - You get to select who makes the decisions in arbitration
 - Get issues resolved quicker than in the court system
- **In the End(After these Processes)**
 - You want a *separation agreement* or a *final court order*
 - These apply the same to heterosexual and same sex couples

- These do not apply the same to married and non-married couples
- Separation Agreement:
 - A contract
 - Parties understanding and conclusion of the issues
 - This agreement can change over time – as kids get older or income changes for example
 - Once a separation is done - you might want a divorce
 - Material change in circumstances – can lead to a change in the separation agreement – income of one party changes
- The Issues - everything is basically the same whether you are married or common law
 - Custody
 - Children
- The courts governing principle is the *best interests of the child*
- **Custody**
 - Can be sole custody or joint custody or shared custody
 - Custody deals with the decision making about the child
 - Joint Custody
 - Making decisions together
 - NOT equal time
 - Parties make decisions together about medical, dental, and education
 - Sole Custody
 - One person gets to make all the decisions about the child
 - Most often – parties want joint custody – lawyers encourage people to look at joint custody
 - If parties are not able to agree on custody in mediation – it goes to court
 - Judge looks at spouses - communication, location, mental health, and the interests of the child and makes a decision
 - A court is going to look at all the issues
 - In Ontario – there is a Children's Lawyers Office
 - When a judge thinks it is important for a child to have a voice - they will appoint a lawyer to the child
 - The Court will seek and consider child's input

- Once a child is 14 or 15 – the child usually gets to decide who they stay with
- Shared Custody
 - Fifty/Fifty
 - Child has two homes
- It is not ideal for a child to have two homes – but studies show that if parents can be civil and work things out – the children will be okay
 - The child should be encouraged to have a good relationship with either parent – stated by the Divorce Act
- Separation occurs at the moment there is no reasonable chance of reconciliation
 - Parties can continue to live together after separation – fairly common
- **Child Support**
 - Amount of child support is based on guidelines – federal and provincial
 - Federal Child Support Guidelines/Tables:
 - Based on income
 - Tables dictate child support amount
 - Food, clothing, shelter
 - No tax on child support
 - Extra expenses – parents share extra costs proportionally based on income – violin lessons, karate classes, etc.
 - One parent often say the child doesn't need violin lessons – extra expenses often lead to arguments
 - Child support changes somewhat if it is shared custody
- **Spousal Support (Alimony)**
 - There are no tables for spousal support
 - In Ontario - Spousal Support Advisory Guidelines
 - Courts have to consider these – but can ignore them
 - Divorcemate
 - Software Program
 - Input data – tells you child support and spousal support amount

- Marriage contracts
 - Rich person plus young non business person – one may not want to give up property
 - 2nd marriage – common for parties to not want to give up property
- **Common Law Couples**
 - Can ask for division of property upon separation
 - Based on constructive trust principles – stems from the law of equity
 - Parties can sue under these trust principles
 - Party must be together for three years before they can sue for spousal support
- **Divorce**
 - Divide equally what was accumulated through the marriage
 - You can exclude gifts – do not have to share your inheritance with your spouse

\$100 worth when I married	\$400 increase during my marriage
\$500 worth when I divorced	
The other party gets half of the increase: \$200	

- Determine Net Family Property (NFP) – Value of Property at Divorce:
 - 1. Property at Date of Separation
 - Home
 - Pension
 - RRSP
 - Debts
 - 2. Deduct Property at Date of Marriage
- Session handout on the following page:

Recommendations from Adriana Doyle: Introduction to Family Law

Websites:

Justice Canada <http://www.justice.gc.ca/eng/>

Ministry of the Attorney General of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/>

CLEO (Community Legal Education Ontario) <http://www.cleo.on.ca/en>

The Law Society of Upper Canada <http://www.cleo.on.ca/en>

Legal Aid Ontario <http://www.cleo.on.ca/en>

Ontario Collaborative Family Law Federation <http://www.oclf.ca/>

Ontario Association for Family Mediation <https://www.oafm.on.ca/>

Books

Ontario Family Law Practice. Markham, Ont.: Butterworths, 2014. (Annual publication with forms provided on accompanying CD-ROM)

Payne, Julien D. and Marilyn Payne. *Child Support Guidelines in Canada*. Toronto: Irwin Law, 2012 (also available as an e-book. Publisher's note: This is a companion volume to Payne & Payne, *Canadian Family law*, 4th ed. (Irwin Law, 2011).

Property rights and obligations under Ontario family law / Robert M. Halpern, editor and contributing author Toronto : Canada Law Book, c2012.

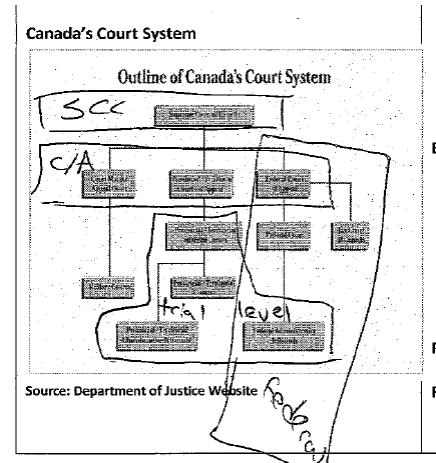
This Week in Family Law on WestlawNext Canada Example:

<http://www.westlawnextcanada.com/blog/insider/news-and-views-this-week-in-family-law-140/>

June 2014

Finding and Updating Case Law (245pm 10 June 2014)

- *Nathalie Leonard, Reference Librarian, University of Ottawa*
- **Five Sources of Legal Information:**
 - 1. Secondary Sources
 - Books
 - Legal Encyclopedias
 - Legal Journals
 - Etc.
 - Use secondary sources to define and understand legal issues
 - 2. Legislation
 - Bills
 - Statutes
 - Regulations
 - *For civil law lawyers, legislation is the first source of legal information*
 - 3. Case Law
 - CanLII
 - QuickLaw
 - Westlaw
 - *For common law lawyers, case law is the first source of legal information*
 - 4. Updating selected legislation and case law
 - 5. If necessary, consider the law of other jurisdictions
- **Canadian Judicial System (4 Levels):**
 - Trial Level
 - Court of Appeal Level
 - Supreme Court of Canada Level
 - Federal Court Level
 - Trial Level
 - Administration
 - Hear witnesses
 - Consider evidence
 - Handle provincial violation of law
 - Any questions about divorce



- Decisions at this level are often not published
- Court of Appeal Level
 - Deal with procedural law
 - All decisions available in print and online
 - Court of Appeal not there to hear witnesses or go back to evidence
- Supreme Court of Canada Level
 - Constitutional Issues
 - Charter Issues
 - Questions of Public Importance
 - Hear appeals from the decisions of the highest courts of final resort of the provinces
 - All decisions published online and in print
- Federal Level
 - Deals with very specific issues
 - Limited and narrow scope
 - Copyright law
 - Maritime law
 - Anything to do with the government
 - Decisions available in print in the Federal Law Reports
- **Stare Decisis (Judicial Precedent)**
 - In common law jurisdictions, judges need to pay attention to decisions from judges of the higher courts
 - Judges are bound by decisions of higher courts
 - All Supreme Court of Canada decisions are binding on all other levels of court
- **How is Case Law Published?**
 - Trial level
 - Most often only an oral decision – no written reasons provided
 - Possibly a short note in the court file
 - If the case deals with a complex issue – a judge may provide written reasons
 - If a written reason is provided – it may take the judge sometime to provide it
 - Published cases include
 - Name of parties
 - Date
 - Docket number

- Neutral Citation (2004 BCSC 754)
 - Full name of parties
 - The decision
 - You need to read the entire decision to get an idea of what the case is about
- Case Law Reports
 - Usually arranged by topic, jurisdiction, and court level
 - WWR, SCR, BCLR
 - Publishers have to make choices about what cases to include in the case law report as so many cases take place every year
 - Cases that feature a new topic, new aspect of legal principle, or challenge other decisions are added to law reports
 - Decisions that simply apply the law – not adding to the common law body – are not added to law reports
 - Law reports include headnotes
 - Headnotes summarize the legal issues of the decision and include a list of cases considered, statutes considered, and textbooks/articles the judge read
 - Headnotes can give you a great idea if you want to read an entire case
 - Decisions are also available online
- Unpublished cases
 - Where should you go?
 - 95% of decisions are not published

- **Finding Relevant Case Law**
 - 1. Books and Treatises
 - Just need to make sure it is still good law
 - Lawyers have already done the research to write that textbook
 - 2. Journal Articles
 - Online databases or print sources
 - 3. Legal Encyclopedias
 - Short explanations of the topic
 - Relevant cases
 - Halsburys
 - CED
 - 4. Word and Phrases
 - Dictionary of Canadian Law
 - Canadian Abridgement

- Carswell Word and Phrases
- 5. Case Law Digests
 - Canadian Abridgement
 - Canadian Case Citations
 - Find more cases on the same legal issue
- 6. Print Indexes
- 7. Newspapers
- 8. Online Legal Databases
 - CanLII is not great about telling you how a citing case treats/talks about your case
 - QuickLaw and Westlaw are better for noting up cases – they tell you how citing cases treat your case
- Session handout on the following page

Publication of Case Law- Finding and Updating Cases	
<p>Some facts</p> <ul style="list-style-type: none"> Case Law is made up of the written decisions of judges in courts, cases and tribunals. In the common law in Canada, judges must follow the principle of stare decisis, which requires that judges follow the previous rulings (precedents) of other judges in higher courts in their province or territory and the SCC on the same issue. Not all cases are reported. Noteworthy decisions that provide significant interpretation of legal principles are disseminated more widely in published case reporters (in more than one reporter). 	<p>Where to find relevant cases</p> <ul style="list-style-type: none"> Textbooks – look at the footnotes where authors generally make reference to key cases that illustrate the points of law they are discussing. Journal authors often refer to important cases in the footnotes. Legal Encyclopaedias are organized by topic, with articles or paragraphs that synthesize and comment on specific points of law. Citations to cases that support the principles discussed accompany each entry. Topic case reporters contain indices organized by subject and case name. Online legal databases enable full text searching of case law by keyword, subject or case name. Digests arranged by topic provide summaries of important cases, with citations to full-text case reports.
<p>Canada's Court System</p> <p>Outline of Canada's Court System</p>	<p>Books</p> <ul style="list-style-type: none"> Fitzgerald, <i>Legal Problem Solving – Reasoning, Research and Writing</i>, 5th ed. (Toronto: LexisNexis Canada, 2010). Iosipescu & Whitehead, <i>Legal Writing and Research Manual</i>, 6th ed. (Toronto: LexisNexis Butterworths, 2004). MacEliven, <i>Legal Research Handbook</i>, 5th ed. (Toronto: LexisNexis Canada, 2003). McCormack, Papalopoulou & Cotter, <i>The Practical Guide to Canadian Legal Research</i>, 3rd ed. (Toronto: Thomson Reuters Canada, 2010). Tjaden, <i>Legal Research and Writing</i>, 3rd ed. (Toronto: Irwin Law, 2010). Companion website: www.legalresearchandwriting.ca
<p>Readings</p> <p>Research Guides</p> <ul style="list-style-type: none"> Best Guide: http://www.legalresearch.org/ Law Society of Upper Canada, 	<p>Great Library: http://greatguides.issue-on.ca/canadiancaseslaw/</p> <p>Queen's University Faculty of Law, <u>Legal Research Materials</u>.</p> <p>Tjaden, Ted Doing <u>Legal Research in Canada</u>.</p> <p>University of Ottawa, Brian Dickson Law Library, <u>Principles of Legal Research</u> http://web5.uottawa.ca/www2/r1/Ir/eng/learning_modules.html</p> <p>University of Toronto, Bora Laskin Law Library, <u>Legal Research Tutorial</u> http://library.law.utoronto.ca/step-2-primary-sources-law-canadian-cases-law-0</p>
<p>Source: Department of Justice Website </p>	<p>Canadian Guide to Uniform Legal Citation, 8th ed (Toronto: Carswell, 2014)</p>

Introduction to Contracts Law (900am 11 June 2014)

- *Professor Anthony Daims*
- **Introduction**
 - Everything seems to be a contract these days
 - Taking the bus
 - Buying a coffee
 - Updating your software
 - Exchanging gifts at Christmas
 - Secret Santa in the Office
 - Three key contract terms
 - Offer
 - Acceptance
 - Consideration (formal exchange of value)
 - These points are particular to common law - Quebec contract law is slightly different
- **Consideration**
 - Consideration (formal exchange of value) seems superficial at first – common law created the idea of consideration
 - Common law courts were courts of convenience – they wanted contracts to go quickly through the court system
 - It can be difficult to figure out if there was a contract without consideration
 - Consideration made the enforceability of contracts easier in court – was there a consideration for a contract?
 - Why did this person give you ten dollars to mow their lawn? This exchange of money is a consideration – a starting point to determine if there was a contract
- **Contracts rest on two points**
 - Agreement
 - Exchange
 - Agreement
 - Not all agreements lead to contracts
 - An agreement on what?

- You should never call anything a contract if it's not enforceable
 - If it's not enforceable, then it's not a contract – it's just an agreement
- Exchange
 - Must be an exchange of value
 - Consideration – What someone pays for an agreement has legal value
 - A consideration does not need to be a good deal
 - A contract is still enforceable even it's a bad deal
 - \$10 dollars to mow 1000 acres of land is probably a bad deal – this consideration still has legal value though
 - Regardless of whether it is a good or bad deal – if there is a consideration – it has legal value
 - Would you mow an entire lawn for a pepper corn? Well a pepper corn has legal value even though it's a bad deal
- **Promises**
 - The contract is an exchanges of promises
 - The promise to mow a lawn, the promise to paint a house, etc.
 - Two types of promises – *Bi-lateral* and *Unilateral*
- **Bi-lateral Agreements**
 - By-two
 - Most contracts are about two promises
 - The promise to paint a house and a promise to paint pay \$100 for painting the house
 - Majority of contracts are bi-lateral
 - Promise for a promise
- **Unilateral Agreements**
 - Only one promise - and something else – an action
 - Promise for an action
 - In unilateral agreements, offer and acceptance only happen when the action happens
 - If the action does not happen, the acceptance does not happen – so I can revoke my offer at any point prior to the action
 - *Unilateral Agreement Situation:*
 - If you show up on Monday and mow my lawn, I'll pay you \$100 – I'm merely saying that - if on Monday you mow my lawn – I'll pay you
 - What if tomorrow, someone else comes along and says I'll mow your lawn for only twenty dollars?
 - Because the action has not happened – acceptance has not happened - I can revoke my original offer at any point

- A valuable tool for businesses
 - If you want certainty and want to lock in a contract – do a bi-lateral agreement
 - For a business – making a unilateral agreement gives you the flexibility to look for a better deal
- **Capacity and Legality**
 - Capacity – Who is legally allowed to enter into a contact?
 - Look at the facts of the situation when there is a question of capacity
- **Minors**
 - Minors lack legal capacity to enter into contracts
 - Under ten years
 - Minors cannot enter into any contract – maybe a pack of gum – nothing more than a couple of dollars
 - Fourteen to Sixteen
 - Minors are allowed to enter into more day-to-day transaction
 - Sixteen to Eighteen
 - If you are a minor that lives on his own – emancipated – then you could enter certain contracts
 - Could a seventeen year old buy a new truck? Fact Specific
- **Mental Capacity**
 - Is the person mentally incapable of entering into a contact?
 - If it is obvious there is a mental incapacity – then there is no way the individual can enter a contract
 - If the person has a slight mental incapacity and you did not know they had a mental incapacity – then the situation is more unclear – Fact Specific
 - Does an intoxicated person lack mental capacity to enter a contract?
 - If you are stumbling drunk – a contract is likely not enforceable
 - If you buy or sell a farm while drunk – that contract is likely not enforceable
- **Illegality**
 - The contacts of a contract must be legal
 - Gambling between individuals is illegal

- If you lose \$1000 to your buddy in an illegal gambling game and he refuses to pay – it is not an enforceable contract
- **Key Contract Concepts**
 - Consideration
 - Exchange of value
 - Legal capacity to enter contract
 - Contents of contract must be legal
- **Some Examples**
 - Ten year old purchases a 70 inch television at Future Shop
 - Parents tries to return television
 - Child has a tantrum and smashes the television
 - What is the effect of a minor entering into a contract?
 - If you lack the capacity – you were never allowed to enter into a contract
 - The contract was never allowed to happen in the first place
 - Future Shop should give the money back
 - Ten year old purchases a 70 inch television online from Future Shop
 - Did Future Shop ask the age of the online shopper?
 - Did the child lie
 - If Future Shop makes every effort to verify age, the court may not make the company suffer if a sneaky child purchases a television
 - What about advertisements?
 - Historic case from 1900 – carbolic smoke balls
 - “If you buy our smoke ball – you will not catch the flu. If you do – we will pay you \$100. Here is our bank account number”
 - Court looked at this case and said it looked like an offer
 - Advertisements are not generally offers – but they can be
 - Elements of an offer: clarity, seriousness, definite, communicated
 - Courts look at the context of an advertisement and decide if something is an offer
 - Would an objective listener think something is an offer?
 - Is an advertisement definite enough? Probably not
- **Contract Law Resources**
 - Irwin Law Contract Laws Book
 - Contract Law by Waddams

Aboriginal Law: Overview (1045am 11 June 2014)

- *Sebastian Grammond*
- Difficult to understand an aspect of aboriginal law if you don't understand the whole of aboriginal law
- **The Early Period**
- Indigenous people lived in North America without any interference from Europeans
- See a situation in the beginning where mutual independence existed
- Indigenous people were not subject to the king of England or France
- Indigenous people continued to exercise sovereignty
- European powers recognized the independence and sovereignty of the indigenous people and dealt with them on that basis
- France and England needed the Indigenous for the fur trade network and the European powers did not intervene in the internal matters of the Indigenous people
- This all began to change when the European powers enlarged their empires
- There was a gradual application of European criminal law to the Indigenous
- European powers were forced by circumstance at first to recognize the Indigenous people – eventually they wanted to bring them into the crown
- British colonies were agricultural – they needed land for settlers
- This brought the British into conflict with the Indigenous
- Treaties – The Crown acted as an intermediary between the Indigenous and the British settlers
- This is where we first see the development of aboriginal law
- The crown recognized Indigenous land rights

- Transaction involving Indigenous land rights were to be conducted by the crown – not by individuals
- **1763 Royal Proclamation**
 - Foundational document
 - Included a chapter on Indigenous people
 - Proclamation based on the assumption that the Crown had sovereignty over North America
 - Unilateral exercise of crown power and sovereignty
- Aboriginal law followed the power imbalance between the Indigenous and the Europeans
- Relationship was no longer equal – it was becoming more difficult for the Indigenous to assert their independence
- Royal Proclamation also said that colonization was to be stopped temporarily
- Proclamation restated that Indigenous land rights were recognized and that all land transactions were to be regulation by the crown
- Principles of non-interference were hinted at in the proclamation
- In 1764, the Crown's chief Indigenous diplomat went to Niagara and summoned Indigenous leaders to present the proclamation
- Historical events can be interpreted in various ways
- Is the proclamation a treaty rather than a unilateral exercise of crown power
- Legal status of the proclamation – it used to be a constitutional document
- Not considered to be part of the constitution today and it is invoked less frequently in legal cases
- The proclamation has important legal status though
- **Aftermath of the 1763 Royal Proclamation**
- The Indigenous lost their importance after the War of 1812

- The balance of power between the Indigenous and the settlers changed drastically and the law followed
- Indigenous increasingly viewed as a problem to be dealt with
- What should we do to assimilate these people?
- First large scale land treaties took place in 1850 – set the template for future treaties
- Large purchases of land with the exception of small reserves
- In exchange – the Indigenous received a sum of money and the right to hunt and fish over the whole territory
- consequence – the concentration of Indigenous people in reserve and increasing government bureaucracy
- Easier for the government to control the Indigenous population
- **1867 Confederation**
- Power of government divided between the federal and provincial governments
- Indigenous assigned to the federal government – the task of protecting the Indigenous
- More treaties negotiated in the west
- One problem with the treaties – text signed and published only tell one view of the story
- Ask elders who were witness to the negotiations
- Instead of surrendering – it was about sharing land
- This disconnect was revealed by research started in the 1970s
- No treaties in Quebec, BC, or the Maritimes
- In theory the Indigenous never surrendered their land rights there
- Government adopted the Indian Act

- Two purposes to Indian Act
 - Long term – Goal of assimilation
 - Short term – Protect Indigenous from the bad influence of the settlers
- Act concerned with the protection of reserve land – Who could live on reserve land? – Assignment of Indian status
- If you have an Indian father you can live on a reserve
- If you have an Indian mother – you lose your status
- A mechanism in the act to strip the Indigenous of their status once educated and assimilated
- The act has a paternalistic focus – no right to vote, drink alcohol, subject to a pass system
- The first real consultation about the act took place in the 1940s
- Residential schools were an important component of federal policy
- A network of schools – aim of assimilation – First school opened in 1890
- The policy of assimilation was a failure when measured against the stated goals – Residential schools did not allow the Indigenous to integrate into the economy or take their share of wealth in society
- Schools were chronically underfunded and in poor condition
- Death in large numbers – physical and sexual abuse was common
- Most schools were closed in the 1960s and 1970s
- Last school closed in 1996
- Impact of schools felt across several generations
- Successful in destroying self-pride, culture, and language
- Very destructive effect on Indigenous communities
- Truth and Reconciliation commission set up – apology from Prime Minister in 2008

- **The Modern Period**
- 1982 Constitution Act - Section 35 of the act deals with Indigenous rights
- It recognizes existing Indigenous and treaty rights – became the legal basis for 2/3 of litigation dealing with Indigenous people
- Supreme Court of Canada Case in 1973 – *Calder* –Clarified that Indigenous right to land is still there and was never extinguished
 - Confirmed that Indigenous land title is not surrendered until the Indigenous choose to surrender it through a treaty. If no treaty exists – the land title still belongs to the Indigenous people
- Indigenous rights – Vander Peet Case
- Indigenous Title – Delgamuukw Case
- The constitution protects treaty rights as well
 - Hunting and fishing rights granted by a treaty in 1890 – protected by the constitution today
- The Cree obtained an injunction preventing Hydro Quebec from building a dam in Northern Quebec – led to the 1970 James Bay Treaty
- Model for other treaties that followed
- Courts are increasingly relying on oral histories today
- A consequence of constitutional protection is that the court must perform a balancing test
 - The idea is that when the court finds that an Indigenous right has been breached – it must balance Indigenous interests and the public interest
- It is difficult for Indigenous groups to prove a right has been breached – legal fees, overwhelming burden of proof, etc.
- Duty to consult – Government has a duty to consult Indigenous groups before resource extraction

- Haida Nation – Supreme Court of Canada Case – 2004
 - Lowered the burden of proof – as long as you have some evidence that an Indigenous right has been breached – the government has a duty to consult
- United Nations Decree on the Rights of Indigenous Peoples emerged in 2007
- Do Indigenous people have a right to veto projects when the government consults them about resource extraction?
 - In Canada, probably not
- **Governance Issues**
- Do Indigenous people have a constitutional right to self-government?
- Reform of the Indian Act?
- Band governance issues?
- Membership issues?
- Does the duty to consult extend to legislation?
- What about the Metis?
 - Community of mixed Origins
 - Various groups around the country claim to be Metis
- Recent ruling – Metis fall under Federal jurisdiction

Criminal Law 101 (100pm 11 June 2014)

- *Daphene Gilbert, dgilbert@uottawa.ca*
- We are moving towards understanding punishable crimes as something that harms society
- A harm based conception of criminal law
- For example, Prostitution
 - Old laws were based on morality view of not appreciating commercial sex
 - Shift to criminalizing prostitution for the harm it causes to women, minorities – not because we morally disapprove of prostitution
- Criminal law is a federal responsibility in Canada
 - Federal legislation – Criminal Code of Canada
- In the United States, criminal law is a state responsibility
- Criminal law is exclusively in the jurisdiction of the Federal government
 - Section 91 of the British North America Act set this out
- However, each province gets to decide how to organize policing, how to set up courts, court procedures, and the number of judges
 - Courts are provincially run but they administer federal statutes
 - The law is federal – but it is administered by the provinces
- For example, the prostitution case worked its way up through the Ontario court system
 - The Ontario Court of Appeal struck down the prostitution law – said it was unconstitutional
 - The law was only unconstitutional in Ontario – each province had to decide if they were going to do the same
 - A varied response from all the provinces
 - Now at the Supreme Court of Canada

- The constitution is the supreme law of the land
 - Section 52 of the *Canada Act*, 1982
- This allows the court to declare a law is null and void if it conflicts with the constitution
- This power of judicial review comes from section 52 – Allows the SCC to weigh in on prostitution and the right to die for example
- *Canada Act*, 1982 created the Charter of Rights and Freedoms
- **Charter of Rights and Freedoms**
 - Quick over view of the Charter
 - *Section 7 to 11* of the charter are devoted to your legal rights when accused of a crime
 - Criminal law rights are engaged when you are accused of a crime
 - Criminal law in Canada looks radically different after the Charter
 - *Section 7*
 - Everyone has the right to liberty and you can't be deprived of this liberty unless in accordance with the principles of fundamental justice
 - Section 7 is a big catch all in the Charter
 - *Section 8*
 - Everyone has the right to be secure against unreasonable search and seizure
 - Unless a warrant is issued by a judge
 - Power of warrants – a hot button issue
 - *Section 9*
 - Right not to be arbitrarily detained or imprisoned
 - Has to be a reason why you are being detained
 - Road side stops – Police can stop every car – Yet they have to have reasonable grounds you have been drinking before they can have you take a Breathalyzer
 - *Section 10*
 - Right to counsel without delay after you have been arrested or detained
 - *Section 11- b, c, d, e*
 - Rights that happen once criminal justice process is under way - Trial rights for example

- *Section 11 (b)*
 - Tried within a reasonable amount of time
 - Statute of limitations – Mostly for civil matters
 - Limits when you can bring in a law suit
 - You only have so long to sue for an injury – at a certain point of you cannot be held accountable for a breach of contract
 - Criminal Law has very few statutes of limitations
- *Section 11(c)*
 - Not compelled to be a witness in proceedings against themselves
 - In most criminal cases, defendants do not testify
- *Section 11 (d)*
 - Presumed innocent until proven guilty beyond a reasonable doubt
 - Benefit of doubt in favor of the accused
 - If you don't know they are guilty – they are acquitted
 - Only convict when 100% sure
- *Section 11 (e)*
 - Right not to be denied reasonable bail
 - Flows from your right to be presumed innocent
- *Section 12*
 - Right not to be subject to cruel and unusual punishment
 - Used to challenge prison conditions
- *Section 14*
 - Right to a translator or an interpreter
- Crown should not convict unless it is absolutely certain person is guilty
- 96% of charges plead out – Defendants lawyer negotiates a plea bargain - a lesser sentence
- Far more acquittals than convictions
- Pleas bargains are highly controversial
- Province can only impose a sentence of two years less a day
- Legal Aid is only available for serious offences and if you makes less than \$15,000

- Very difficult to obtain legal aid – Contributes to the increase in self-represented litigants and delays in the system
- **The Actors**
 - Accused Person – charged with an offence
 - Defense Lawyer – Must vigorously present every available defense to the crime. They cannot lie or mislead the court
 - Crown Attorney – Represents the public interest and not specifically the victim
 - Judge – Many trials are held before a judge alone. If so, the judge decides both on what facts are relevant and have been proven beyond doubt and how to interpret the law
 - Jury – Judge is the trier of the law and will instruct the jury on the application of the law. The jury is the trier of fact and will apply the law to the facts as they see fit.
 - Evidence – To be admitted in a court of law. It must be relevant and material. Evidence is presented through witnesses. Both the crown and defense can call witness
- **Process**
 - Crown presents its case first calling all of its witness and evidence. Examines witness by asking questions
 - Defense may cross examine witnesses to test the story and prod for inconsistencies and expose weaknesses
 - Once the crown closes its case, the defense proceeds to call its witnesses. Crown has a right of cross examination
 - The burden of proof is on the Crown alone. It is very high and the proof must be beyond a reasonable doubt
- **Criminal Code (RSC, 1985, c. c-4)**
 - Code is the most amended piece of legislation in Canada
 - Murder – Section 229

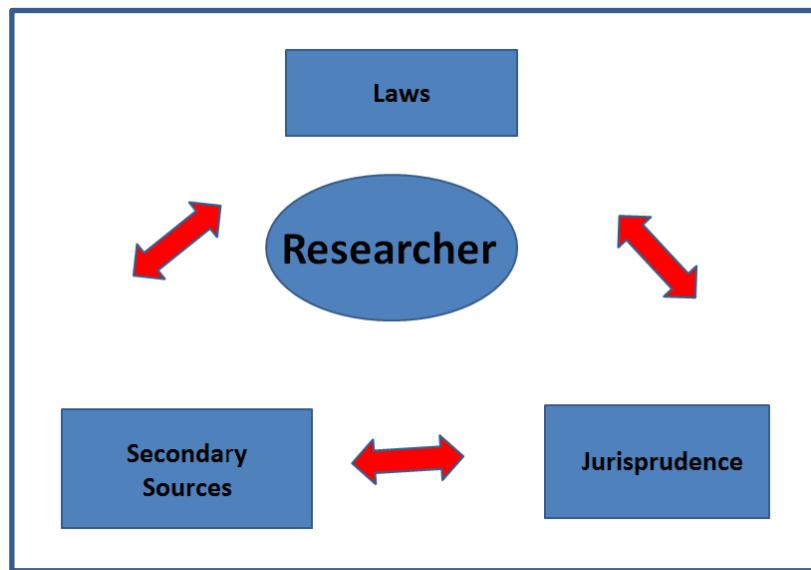
- 1st and 2nd degree Murder – Section 231
- Murder is 1st degree when planned and deliberate'
- Irrespective of whether murder is planned – murder is always 1st degree when the victim is a police officer, warden, or prison guard
- A number of other morally reprehensible offences are automatically 1st degree murder – hijacking an aircraft, sexual assault, etc.
- Mandatory life sentence for 1st and 2nd degree murder
- Parole eligibility – 1ST degree after 25 years and 2nd degree after 10 years
- Code has value judgments about how some crimes should be punished
- Makes it much more serious crime to kill a police officer – want to deter people from doing this
- Parole – belief that everyone can be redeemed and that everyone should be given the chance to be redeemed

- **Elements of a Criminal Offence**
 - Actus Reus – the act
 - Men Rea – the mental element
 - These elements have to be proven by the crown beyond a reasonable doubt
 - Section 229 of the Code criminalizes the causing of death (the actus reus)
 - You have to *mean* to cause death or bodily harm that would likely cause death (the mental element)
- **Defenses**
 - Six common defenses if you admit you committed a crime
 - *Self Defense (Section 34)*
 - If accepted – you are completely acquitted of the crime – strict set of rules govern this
 - *Duress*
 - If accepted – completely exonerates you of the crime

- *The Excuse of Necessity*
 - People who committed cannibalism to survive after a ship wreck?
 - Kill your mentally disabled daughter
 - Break into a cabin while stranded in the woods
- *Provocation*
 - Does not acquit you completely
 - Reduces your culpability to manslaughter
 - Manslaughter has a severely reduced sentence
 - “A wrongful insult as to be sufficient to deprive an ordinary person of the power of self-control”
- *NCR – Not Criminally Responsible*
 - Suffer from a mental disorder that has rendered you incapable of appreciating the nature of your crime
 - Burden of proof that an accused person is suffering from a mental disorder is on the party that raises the issues
 - Mental disorder is not defined in the criminal code
- *Automatism*
 - Act without knowing what you are doing
 - Sleep walking case –no control over his movements

Researching Secondary Legal Literature (245pm 11 June 2014)

- *Rick Harkin, Reference Librarian, University of Ottawa, rjharkin@uottawa.ca*
- Secondary legal literature Issues:
 - A glut – too much information out there
 - A question of quality of secondary sources
 - Everything is moving towards more interconnection
- Given the glut of information – it's hard to know where to start with legal research
- Quality of peer reviewed journals is a concern in North America – look at the authority of the law journal
- Legal research process:



- There should be a structure to the legal research process - Generally, you start legal research with secondary material – do not start with case law
- Encourage students to start with secondary sources – Once you know more about the issues, you can move to case law
- **Prominent secondary legal sources:**
- Legal Source
 - American index that covers American, Canadian, British, Australian law back to the 19th century

- Legal Trac
 - 800 legal publications from the US, Canada, Australia, UK
 - Major law reviews
- Le Doctrinal Plus
 - French law journals
- CED
 - Excellent resources
 - Since Halsbury was published by Lexum, it has forced Carswell to improve the quality of the CED
- Westlaw vs. Quicklaw – Which is better?
 - WL has a better format and structure
 - QL has access to a more comprehensive collection of material
 - If you are looking for a needles in a haystack – start with QL

Introduction to Quebec Civil Law (900am 12 June 2014)

- *Anne-Francosie Debruche*
- Mixed system in Quebec
 - Interaction between Civil law and Common law
- New France – 1763 – war between British and French – the British won
 - Treaty of Paris - France lost New France
- What did this mean for law in Quebec?
 - Royal Proclamation of 1763 said Common law would be applicable in Quebec from now on
 - This led to resistance from Quebec
- Act of Quebec 1774 – Gave back to Quebec – the laws of Canada with property and civil law
 - What are the laws of Canada?
 - The law of Canada – the law in Quebec before 1763
- What was the law in Quebec before 1763?
 - Customary law – the Custom of Paris
 - Most Customs of Paris put down in writing
 - Turn to Roman law when you cannot find an applicable law in the Customs of Paris
 - Also Ecclesial law
 - And some Royal Ordinances from the King of France
- A mixed law in terms of sources – no single source of law
- This is the law given back in 1774 – but only in terms of property and civil law
 - This was private law – relationships between private individuals
- Public law in Quebec was still Common law
 - Private Law – Civil Code
 - Public Law – Common Law
 - Civil law judges are common law judges when it comes to public law
- What is the main part of civil law? Civil Code
 - Law of person
 - Family law
 - Torts
 - Contracts
 - Etc.

- Commercial law and Civil Proceedings are not a part of civil law – other codes for commercial law and civil proceedings
- 1763 and 1774 – gave birth to mixed law system in Quebec
- Civil Code:
 - Civil Code – French Napoleonic Code of 1804
 - Roman law and Cannon Law – an important source
 - Civil Code of Lower Canada 1866
 - Quebec did not want to come into the Dominion without sorting out their civil code
 - Put civil code in order before entering the Dominion of Canada
 - To write all private laws in a single clear source
 - Prior to 1866 – all the mixed sources were somewhat unclear – the civil code if 1866 made the law in Quebec much clearer
- Sections/Pillars in the Civil Code
 - The right of ownership – put in the civil code when France did away with Feudalism
 - Contracts – Once parties conclude a contract –the state recognizes and enforces it
 - Torts – Fault plus damage
- Civil Code of Lower Canada
 - Bilingual
 - Translation problems – We feel them acutely
 - In bijural countries – the English translation is not as written as well as the French
- Civil Code of Lower Canada
 - Contained a book on commercial law
 - It is not a natural situation to have commercial law situated within a civil code in a civil law country
 - Clear division between commercial and civil law in Europe and South America
- Civil Code of Lower Canada, 1866 grew progressively outdated -
 - There are two ways to update a civil code
 - Amend the code bit by bit – what they do in France, Germany, and Belgium
 - Adopt a new civil code – write a new one from scratch – a daunting task
- Easier to modify a code bit by bit – but may accidentally introduce contradictions into the code

- Civil Code of Quebec 1994
 - Product of many sources of inspiration
 - Old code is still in force sometimes – When a situation comes before a judge that occurred before 1994
 - Old code and new code applied side by side
- Judges were stripped of any creative power during the French Revolution
 - Judges do not create laws
 - Judges are impersonalized
 - Statutes are the only source of law – the expression of popular will
 - What is to be the role of judges in the civil law then?
- Judges have to help the application of the civil code
 - Judges are not able to make new law – but they can help with their interpretation of the law
 - Judges interpretations of the code are considered a secondary source of law
- Civil Code rest upon abstract general concepts that are non-factual
- The Criminal Code – rests upon factual cases – *it is not a true code*
- Judges can be creative in their interpretation of the civil code
 - The only source of law is statute
 - Attitude of judges in civil and common law is different
 - Civil law judges respect the civil code
 - Spirit of interpretation of the civil code is the only avenue for judges – because the code only includes abstract non-factual general concepts
 - Creativity through interpretation
 - In civil law tradition – judges do not create law
- Natural interplay between public and private law
 - Public law influences private law
 - Common law influence
 - Common law manner of interpreting statutes has influenced the interpretation of Quebec Statutes
 - Global persuasiveness of common law legal culture
- Judge is always the master of interpretation – even if a higher courts makes a different interpretation

- Practically, jurisprudence is useful – judges do not have time to continually reinterpret civil law
- So, they look to the interpretation of higher courts
- The ambiguous state of jurisprudence in civil law – everyone knows it's important – but you can't say it's important

Statutory Construction – Different Approaches (1030am 12 June 2014)

- *Mistrale Goudreau*
- How do you read statutes?
 - This question is viewed differently in Common Law and Civil Law
- Literal interpretation
 - Read the ordinary meaning of the words and reach a conclusion
 - Is the literal interpretation at odds with the purpose of a statute?
 - If you look at the purpose of a statute, should you read it literally?
- **Methods to Interpret Statutes: Overview**
 - Methods based on a textual approach
 - Ordinary meaning of words – look at the dictionary or popular meaning of the words
 - Contextual and logical methods – look at the words in context
 - Methods based on legislative purpose (intentionalism)
 - Purposive methods associated with the statute
 - Presumptions of legislative intent
 - Do not attach yourself too much to the words
 - You can use your reasoning to read the text
- **Common Law – Three Distinct Approaches:**
 - 1. **Purposive** – Mischief Rule
 - What was the common law before the making of the act?
 - Presume that the statute does not alter the common law unless it expressly alters the common law
 - 2. **Literal** – Plain Meaning Rule
 - The only rule for the construction of acts of parliament is that they should be constructed according to the intent of parliament which passed the act
 - 3. **Logical** – Golden Rule
 - The plain meaning will be adhered to unless doing so leads to absurdity
- These are not really rules – No compulsion to apply these rules

- There is little consistency in their application
- They are tools rather than rules – flexible tools – to reach the proper application of the statute
- Plain meaning rule has been criticized
- The reader of text reconstructs the meaning of text
 - It is always the reader that reconstructs the meaning – not the writer
 - Readers can reach different conclusions
- In legislation – the message is often complex and subtle
- Why the three approaches in common law?
 - History
 - Each rule reflects the tendency of the political structure at a particular time in history in the UK
- Driedger believed all three rules were fused and that there was only one modern method to interpret statutes
 - Application of **Driedger's principle** accepted by the Supreme Court of Canada in 1983
- Civil law interpretation influenced by common law
 - Common law is very precise – detailed – fact oriented
 - Civil law contains general principles – not the details
 - Driedger thought common law was much better than civil law
 - People tended to make too much of the differences between the systems
- Session handout on the following page:

Statutory Construction of Statutes – Civil Law and Common Law Approaches

Mistrale Goudreau, Faculty of Law, Civil Law Section, University of Ottawa

Introduction

- How to read legislative provisions ? An exercice
- Methods of Interpretation: An Overview

Part I - A history of statutory interpretation in England and in Canada

- Three distinct common law approaches to the construction of statutes
 - o Purposive - Mischief Rule
 - o Heydon's Case (1584), 3 Co. Rep. 7 a; 76 E.R. 637
 - Presumption against alteration of the common law or against alteration of the law (*City of Calgary v. United Taxi Drivers' Fellowship of Southern Alberta*, [2004] 1 S.C.R. 485)
 - o Literal - Plain Meaning Rule
 - o Sussex Peperage Case (1844), 11 Cl. & Fin. 85, 8 E.R. 1034
 - o Logical - Golden Rule
 - o Grey v. Pearson (1857), 6 H.L.C. 61 (U.K. H.L.), 10 E.R. 1216

Richard TREMBLAY, *L'essentiel de l'interprétation des lois*, Cowansville, Éditions Y. Blais, 2004, p. 11-13

Terence Ingman, *The English Legal Process*, 13th Edition, Oxford University Press, Oxford, 2010, p. 166

Richard Ward and Amanda Akhtar, *Walker & Walker's English Legal System* 11th ed, Oxford, Oxford University Press, 2011, p. 39

Ruth Sullivan, *Sullivan on the Construction of Statutes*, Markham LexisNexis Canada, p. 12-21

Maunsell v Olins [1975] AC 373, 382 (HL)

English and Scottish Law Commissions, 1969 Report on the Interpretation of Statutes, p. 49

P.A. Côté, P.A. Coté, *The Interpretation of Legislation in Canada*, 4th ed., Scarborough, Ont., Carswell, p. 40-41
Interpretation Act, R.S.C., c. I-21

Theodore F.T. PLUCKNETT, "L'interprétation des lois (statuts)", in *Introduction à l'étude du droit comparé*, recueil d'études Édouard Lambert, vol. 1, Glashütten im Taunus : D. Auvermann, 1973, p. 434- 449

Sir Peter B. Maxwell., *Maxwell on the Interpretation of Statutes*, 121th ed., Sweet & Maxwell. London, 1969, p. 236.

John Hamilton BAKER, *An Introduction to English Legal History*, London: Butterworths, 1979, p. 183.

The Law Commission and The Scottish Law Commission (LAW COM. No. 21) (SCOT. LAW COM. No. 11), *The interpretation of Statutes* (1969)

Nothman v. Barnet London Borough Council, [1978] 1 WLR 220 (CA), p. 228 (Denning J.)

R (on the application of Quintavalle) v Secretary of State for Health, [2003] 2 All England Law Reports 113 (Steyn J.)

E.A. DRIEDGER, *Legislative drafting style : Civil law versus Common law*, in Conseil supérieur de la langue française, *The Language of the Law and Translation*, 1982 <http://www.csfl.gouv.qc.ca/publications/pubf104/f104p1ch1.html>

Stéphane Beaulac, *Handbook on Statutory Interpretation - General Methodology, Canadian Charter and International Law*, Toronto: LexisNexis, 2007, p. 33-39.

Part II - A history of statutory interpretation in France

A - A history of statutory interpretation in pre-codified France

Andrew West, *French Legal System*, London: Hyperion Books, 1992, p. 9-20

Bernard Vonglis, *La lettre et l'esprit de la loi dans la jurisprudence classique et la rhétorique*, Paris, Sirey, 1968, p. 79, 123

Jacques Krynen, «Le problème et la querelle de l'interprétation de la loi, en France, avant la Révolution: (essai de rétrospective médiévale et moderne)», (2008) no2 Revue historique de droit français et étranger, p. 161-197

Yves-Louis Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, Paris: Presses universitaires de France, 1965.

B - The impact of the codification

Preliminary Address on the First Draft of the Civil Code by Jean-Étienne-Marie Portalis,
<http://justice.gc.ca/eng/pi/icg-gci/code/index.html>

s. 4-5 French Civil Code

Claire M. Germain, "Approaches to Statutory Interpretation and Legislative History in France," (2003). 3 *Duke Journal of Comparative & International Law* 195-206

Part III Comparison between the civil law and common law approaches

A - Of the oversimplification of the civil law tradition

E.A. DRIEDGER, Legislative drafting style : Civil law versus Common law, in Conseil supérieur de la langue française, The Language of the Law and Translation, 1982 <http://www.csif.gouv.qc.ca/publications/pubf104/f104p1ch1.html>

Philippe Malaurie & Patrick Morvan, *Introduction générale*, Paris, Deffrénois, 2003, p. 289, 293, 299-300

Gérard Cornu, *Droit civil – Introduction au droit* 13 ed. Paris Monschrestien. 2007, p. 205.

B - Systemic tendencies and systemic reluctances: one example

A pari, a fortiori, a contrario arguments

Minister of Transport for Ontario *v. Phoenix Assurance Co*, (1974) 39 D.L.R. 481 (Ont. C.A.)

Bergström v. La Reine, [1981] 1 S.C.R. 539

65302 British Columbia Ltd *v. Canada*, [1999] 3 S.C.R. 804

P.A. Coté, *The Interpretation of Legislation in Canada*, 4th ed., Scarborough, Ont., Carswell, p. 356-357

Intellectual Property Law (100pm 12 June 2014)

- *David Fewer, CIPPIC*
- CIPPIC is an academic law clinic
 - Intervene on behalf of the public interest at the intersection of law and technology
 - Public interest advocacy work, client work, student work
- The big three areas of intellectual property law
 - Copyright
 - Patents
 - Trademarks
- **Copyright**
 - Public interest works as a limit on the artist's interests – to ensure a vibrant and healthy public domain
 - To be eligible for copyright protection
 - Has to be an expression of an idea
 - Not just facts or ideas
 - Titles and slogans do not have enough authorship to be an expression
 - Public domain
 - The justification for copyright
 - We want to fill up the public domain in order to encourage new works
 - A certain level of skill and judgment must go into a work
 - Copyright has to be fixed in a tangible medium
 - Key rights only attach to a substantial part of the work
 - What's not in the act? – Nothing about the reading or use of a copyrighted work
 - No formalities or registration are required for copyright
 - How do you enforce copyright?
 - Infringement
 - There are a number of defenses to infringement
 - Denial of one of the elements of copyright protection
 - Key defense – fair dealing

- A number of other exceptions in the act for libraries, archives, and museums
- Fair Dealing
 - User rights are positive rights - a large and liberal interpretation to counter owner right
- A song on the radio – Three separate Intellectual Property Rights
 - Work
 - Performer’s Performance
 - Sound Recording
- Copyright is collectively administered
- Moral rights – go to the author
 - Moral rights can be waived – but not assigned to anyone other than the author
- Copyright – very active in Canada these days
 - Ten cases in the last decade
 - Theberge – first case to say “We are going to do copyright differently in this country”
 - CCH – if you have time to read one case – read this one
- **Patents**
 - Promote innovation – Invention
 - Prohibited subject matter
 - Criteria for patent eligibility:
 - Novelty
 - Utility
 - Non-obvious
 - Unlike copyright, patents must be registered
 - Patent claim must be registered with the Canadian Patent Office
 - Patents have an international focus
 - Formally regulated through international treaties
 - Defenses
 - Denying requirements of patentability
 - The Bolar Defense

- **Trademarks**

- Trademarks are an arrow pointing back to something
- Trademark owners own the trademark – there is no author when it comes to own the trademark
- Trademarks cover
 - Words
 - Sounds
 - Images
 - Colours
- Key concept – Distinctiveness
 - You have to show you were the first to use your trademark
- There is no fair dealing when it comes to trademarks
 - Problematic when it comes to parody
- You cannot trademark official marks - Prohibited
 - Canadian flag
 - Canada Post Seal
 - Etc.