Common Law and Civil Law

Canada has inherited two systems of law: civil law from the French and common law from the English. This page will describe and give the history of each system as it relates to Canada

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British Common Law

Definition

British common law, also called traditional law, is law that has evolved from decisions of English courts going back to the Norman Conquest in 1066. These earlier decisions set "precedent," which are used in future cases of a similar nature. Precedent can be overruled by new laws, or statutes, passed by the appropriate government.

Today Common law is applied in most countries settled or ruled by the British. In Canada, law in all the provinces except Quebec is based on common law.

The Early History of Common Law

Canadian common law started in England, and until 1849, decisions and developments in English law were incorporated into Canadian common law. Other legislative documents and decrees also have an effect, going as far back as 800 years. As time passes and new laws are enacted, though, this influence decreases. Some examples:

- Magna Carta, 1215 (England)
- Petition of Right, 1629 (England)
- Bill of Rights, 1689 (England)
- Act of Settlement, 1701 (England)

According to British tradition, it has been the responsibility of Parliament to protect individual rights. This practice was followed in Canada until the passing of the *Constitution Act, 1982*, which set down individual rights along American lines in the *Canadian Charter of Rights and Freedoms*.

Common Law in Canada Before 1867

Newfoundland, Prince Edward Island, New Brunswick and Nova Scotia all followed common law before Confederation. The province of Canada, however, had begun as a French colony – New France – which used <u>civil law</u>.

After the conquest, the British guaranteed the survival of civil law in the *<u>Quebec Act, 1774</u>*. The *<u>Constitutional Act, 1791</u>,* however, split the province of Quebec into Upper and Lower Canada. Lower Canada retained civil law; Upper Canada quickly switched to common law.

Supporting documents in Early Canadiana Online:

<u>*An Act Introducing English Civil Law into Upper Canada, 1792*</u>

<u>*An Act Establishing Trial by Jury in Upper Canada, 1792*</u>

<u>*An Act Establishing a Court of King's Bench in Upper Canada, Jul 9th, 1794.*</u>

<u>*An Act Establishing District Courts in Upper Canada, 1794*</u>

<u>*Simcoe to Dorchester, March 9th, 1795*</u>
(Discusses how to deal with First Nations peoples.)

<u>*Act for the Further Introduction of English Criminal Law into Upper Canada, July 4th, 1800*</u>

Other Influences on Canadian Common Law

Normally courts are required to apply legislation as passed. However, the *Canadian Charter of Rights and Freedoms*, part of the <u>*Constitution Act, 1982*</u>, has given courts the responsibility of ensuring that legislation does not violate the individual rights.

The <u>Judicial Committee of the Privy Council</u> (JCPC) also played a part in common law. It took until 1949 for all appeals to the JCPC to end.

> To learn more about common law:
> - Visit the <u>Canadian Encyclopedia</u> and use the search terms "common law", "law", "civil procedure" and "constitutional law".
>   [link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A]

Civil Law

Definition

Civil law is the kind of law that evolved from Roman law, based on a written "civil code". This was adopted in France after the French Revolution in 1789. Called the Code Napoléon, it covered only matters of private law:

- The legal attributes of a person (e.g.: name, age of majority)
- The relationship between individuals (e.g.: marriage, adoption, parentage)
- Property (e.g.: possession, land boundaries)
- The legal institutions governing or administering these relationships (e.g.: wills, sales, leases, partnerships)

Through plain language and the specific nature of each regulation, civil codes are intended to be easy to understand and apply. It does not rely on precedent to the same extent as common law.

Civil law is used in many countries in Europe as well as in Quebec.

Civil Law in New France: the Custom of Paris

New France became a royal province in 1663, well before the Revolution. Louis XIV decreed that it would follow the Custom of Paris. This was the body of laws which governed the region around Paris (Île de France) at the time. There were different "customs" in different areas, but after 1580 the Custom of Paris was becoming more important in case of conflict between customs. Also important were royal ordinances and edicts and decisions from the Conseil Souverain (Sovereign Council) of New France. The code was changed to reflect circumstances in New France in 1667, 1678 and 1685.

Supporting documents in Early Canadiana Online:

> ***Proces Verbal contenant les modifications faites par le Conseil Supérieur à l'Ordonnance ou Code Civile de 1667, avec dite Ordonnance, 7 Novembre, 1678***
> (The civil code of 1667, with notes for changes.)

The administration of justice in New France was the responsibility of the intendant and followed the inquisitorial method. This meant that guilt was presumed until the accused could prove innocence. Trials lasted until the justice presiding decided that enough evidence had been heard to pass judgement. The system was relatively cheap, efficient and quick, with judgements and sentences sometimes being carried out the same day.

Justice was generally well administered as the officials were well trained and professional. The Conseil Souverain was the court of appeal.

Some texts in Early Canadiana Online on the Custom of Paris and its evolution in New France:

__An Abstract of the several royal edicts and declarations, and provincial regulations and ordinances, that were in force in the province of Quebec in the time of the French government: and of the commissions of the several governours-general and intendants of the said province, during the same period__

__An abstract of the Loix de police; or, Public regulations for the establishment of peace and good order, that were of force in the province of Quebec, in the time of the French government__

__An abstract of those parts of the custom of the viscounty and provostship of Paris, which were received and practised in the province of Quebec, in the time of the French government, 1772__

__The sequel of the abstract of those parts of the custom of the viscounty and provostship of Paris…, 1772__

__Notes sur la coutume de Paris: indiquant les articles encore en force avec tout le texte de la coutume à l'exception des articles relatifs aux fiefs et censives, les titres du retraitlignagen et de la garde noble et bourgeoise__

__Le droit civil canadien suivant l'ordre établi par les codes: précédé d'une histoire générale du droit canadien__

The Civil Code

A civil code sets out the organizing concepts, principles, rules and ideals of law. The development of a bilingual civil code for Canada East (still called Lower Canada in its title) began in 1857, and was intended to reconcile the problems that had developed from the mixing of British common law and the Custom of Paris. It also abolished the seigneurial system.

Inspired by the 1804 Code Napoléon, the *Civil Code of Lower Canada* was enacted in 1866. It had four books governing:

- Persons
- Property and its Different Modifications
- Acquisition and Exercise of Rights of Property
- Commercial Law

Supporting documents in Early Canadiana Online:

__Procédés du Comité sur le Code civil du Bas Canada__

__Analytical index to the Civil code of Lower-Canada__

__Code civil du Bas Canada: sixième et septième rapports et rapport supplémentaire__

__Code civil du Bas Canada: quatrième et cinquième rapports__

__Code civil du Bas-Canada: d'après le rôle amendé déposé dans le bureau du greffier du Conseil législatif, tel que prescrit par l'acte 29 Vict., chap. 41, 1865....__

The *Civil Code of Lower Canada* remained unchanged until 1955, when changes began to be made. By the late 1980s, it was realized that a major revision was required. A new *Civil Code of Quebec* came into force on February 1, 1994. It contains ten books:

1. **Persons** (e.g.: basic individual rights, residence rules, privacy))
2. **The Family** (e.g.: marriage, parentage, adoption)
3. **Successions** (e.g.: wills, inheritance, estates)
4. **Property** (e.g.: possession, land boundaries, right-of-way)
5. **Obligations** (e.g.: contract law, civil liability (tort law), sales, leasing)
6. **Hypothecs** (i.e.: mortgages and the sale of land)
7. **Evidence** (e.g.: burden of proof, rules of evidence)
8. **Prescription** (i.e.: statutes of limitations)
9. **Publication of Rights** (e.g.: registration of property)
10. **Private International Law** (governs the resolution of legal issues involving persons outside Canada)

This new code integrates some concepts from common law. It is still under debate as some of its regulations fall under the sphere of the federal government as determined by the *British North America Act, 1867* (now renamed *Constitution Act, 1867*) and *Constitution Act, 1982*.

> To learn more about the Civil Code:
> - Visit the Canadian Encyclopedia and use the search terms "civil code", "law", "civil procedure" and "constitutional law".
>   [link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A]

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