

# Canadian Top 40

## *What you need to know about Canada's legal system*



Canada and the United States share the longest undefended border in the world. We also share a number of common cultural, social, and legal traditions. Yet differences exist. And for American law librarians needing to research Canadian law, it might help to have a broad overview of some of the similarities and differences between our legal systems. So without further ado, here are 40 things every law librarian should know about the Canadian legal system.

### **Canadian Legal History**

There have been three major cultural/ethnic influences on Canada's legal system: aboriginal, French, and British.

**1. First Nations.** Before European settlers came to what is now Canada, the region was occupied by a large number of aboriginal people, including the West Coast Salish and Haida; the centrally located Iroquois, Blackfoot, and Huron; the Inuit people to the north; and the Mi'kmaq in the east. However, disease brought by the European settlers decimated the aboriginal population, and land claims treaties later marginalized many of the First Nations population. There is some movement now to amend the current federal *Indian Act* to remove some of its more patronizing features. In addition, a fairly recent renaissance in aboriginal legal scholarship has helped draw attention to self-government, land claims disputes, and reparations for physical and sexual abuse of aboriginal persons forcibly sent to residential schools.

**2. British System, with Civil Law in Québec.** French settlers came to Canada in the early 1500s. They were followed by British settlers. Colonies sprung up, and with trade and expansion came a number of wars between the French and British settlers, culminating in Britain's victory over the French on the Plains of Abraham. This battle resulted in France ceding the Canadian territory to the British with the Treaty of Paris (1763). Britain later made concessions to the French-occupied territory such that French "civil law" would apply in the province of Québec. To this day, tensions between the "English" and the "French" in Canada still exist, including (from time-to-time) the possible threat of Québec secession.

**3. Confederation.** Canada became a country on July 1, 1867, with the confederation of the then-existing Province of Canada (Ontario and Québec), New Brunswick, and Nova Scotia. Other provinces joined later. British influence remains strong on the Canadian legal system, both in its legislative and judicial systems. Québec remains a mixed jurisdiction, however, combining both "civil" law for provincial matters and federal statute and "common law" for matters

under federal jurisdiction. However, the average "common law" lawyer in Canada outside of Québec usually needs to know very little about Québec's civil law system.

### **Political/Executive Branch**

The British system has greatly influenced the political/executive branch of Canada's government. But one major difference between Canada and England is that Canada is a federation made up of federal and provincial governments, each with separate legislative powers.

**4. Long Live the Queen!** Canada is a constitutional monarchy, which means that Canadians recognize Her Majesty Elizabeth II, queen of Canada, as the head of state. This is now largely a symbolic gesture with the queen having no real juridical power. However, Canada still enacts laws in the name of the queen, who is represented in Canada federally by the governor-general and provincially by lieutenant-governors.

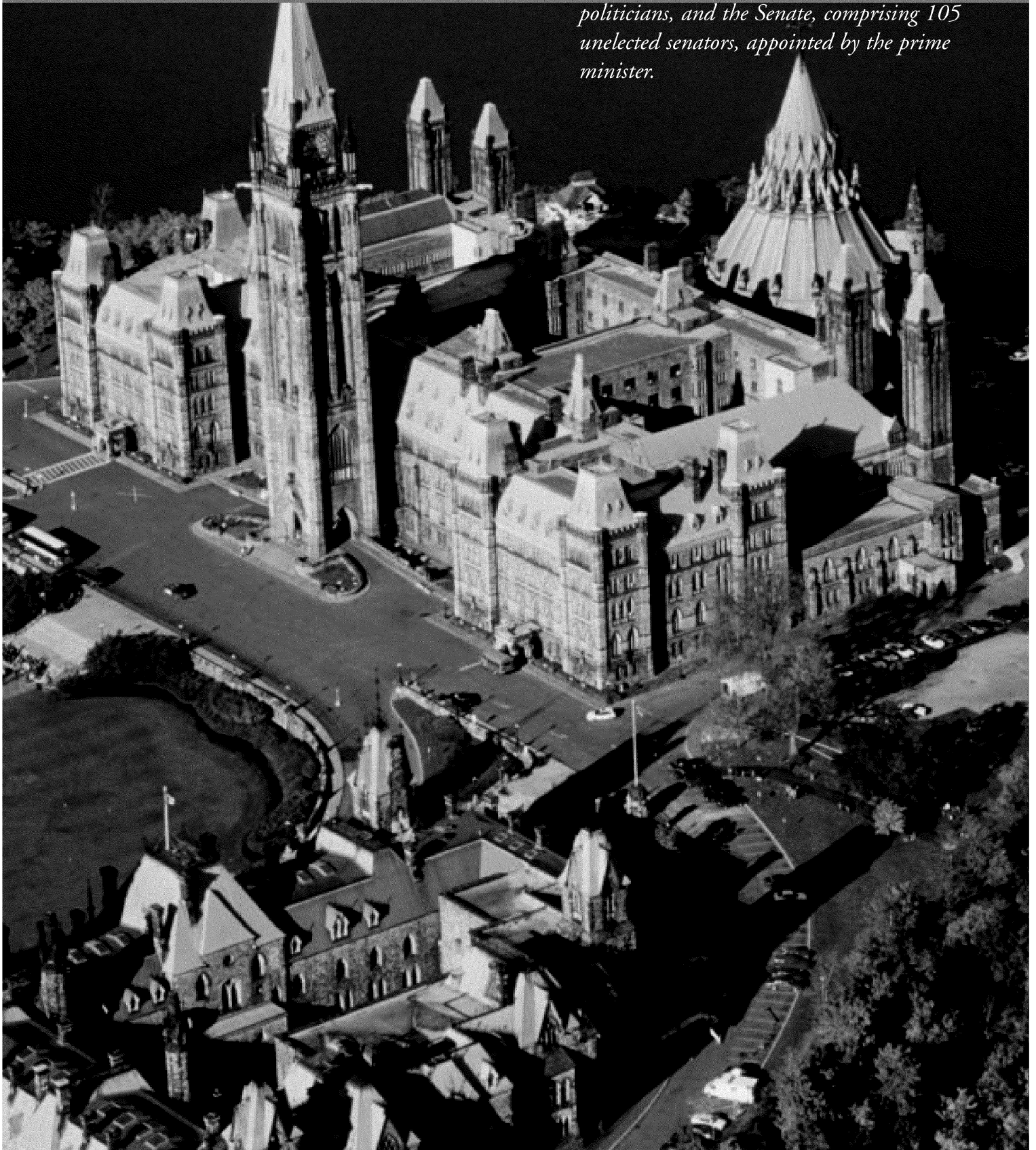
**5. Canada's Constitution.** Under s. 52 of Canada's *Constitution Act*, 1982, the Canadian Constitution is the supreme law of the land. Part I of this act is its *Charter of Rights and Freedoms*, which guarantees Canadians basic legal and human rights. Although Canada had an earlier "Bill of Rights," its *Charter* is relatively recent (1982) compared to the U.S. Constitution. The *Charter* has had a major impact on public law litigation, including recent court decisions that have struck down laws restricting marriage to the union between a man and a woman as being unconstitutional, violating the rights of same-sex couples.

**6. Parliament.** The federal Parliament of Canada, modeled after the British Parliament, has two chambers: the House of Commons, comprising 308 elected politicians, and the Senate, comprising 105 unelected senators, appointed by the prime minister. Either chamber can initiate bills, but the Senate cannot initiate financial legislation. The issue of Canada's Senate being unelected is controversial for some, and talk of reforming the Senate is constantly brewing.

**7. Prime Minister.** Canadians do not vote directly for the prime minister. Instead, they vote for their politician of choice in their local riding—one of 308 voting areas

by Ted Tjaden

*Arial view of Parliament Hill. The federal Parliament of Canada, modeled after the British Parliament, has two chambers: the House of Commons, comprising 308 elected politicians, and the Senate, comprising 105 unelected senators, appointed by the prime minister.*





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or districts across the country, based roughly on population and size. The candidate in that riding with the most votes represents that riding among the 308 seats in the House of Commons. The political party with the most seats in the House of Commons forms the government. The leader of that political party becomes the prime minister.

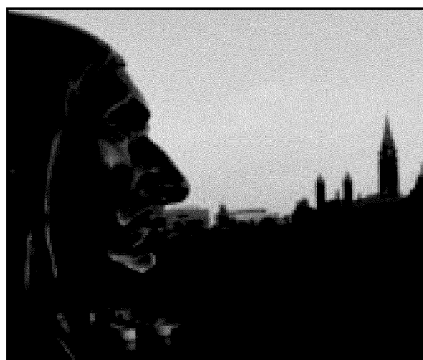
Canada's current prime minister is the Honorable Paul Martin, leader of the Liberal party of Canada. Currently, the liberals only hold 133 of these seats, short of a majority of 155 seats. As such, this is a "minority government," which must rely on votes from the opposition party in order to pass legislation. Responsibility for the operations of the government of Canada rest with the prime minister and his Cabinet, consisting of close to 40 members of the Liberal party, each of whom is usually also a minister in charge of a government department (e.g., minister of the environment). Unlike the U.S. president, our prime minister does not have veto power.

**8. Political Parties.** Most federal and provincial elections in Canada tend to have three broad categories of political parties: a liberal party (the Liberal party of Canada, similar to the Democrats), a conservative party (the Conservative party of Canada, similar to the Republicans) and a (moderately) socialist party (the New Democratic party). Variations exist.

**9. Provincial Politics.** The political system above describes Canada's federal political system. Each of the 10 provinces and three territories has its own form of provincial or territorial government that

operates on similar principles. However, at the provincial or territorial level, there is only a single chamber.

**10. Canada Online.** The government of Canada Web site is [www.gc.ca](http://www.gc.ca).



Indian statue with Parliament Hill in background. Before Europeans settled Canada, the region was occupied by a large number of aboriginal people.

## The Canadian Judicial System

There are probably more similarities than differences between the Canadian and American judicial systems.

### 11. Supreme Court of Canada.

Canada's top court of nine judges sits in Ottawa, Ontario. The chief justice is the Rt. Hon. Beverley McLachlin, P.C. Representation on the court is roughly regional. There are currently four female judges on our top court. Due to the volume of appeals, this court usually only hears matters of national importance or matters involving important constitutional issues; as

such, "leave" to be heard by the court must be granted by the court (similar to America's certiorari process). Prior to 1949 it was possible to appeal a decision of this court to the Judicial Committee of the Privy Council in England, but that avenue of appeal was removed in 1949.

**12. Judicial Hierarchy.** There are generally three levels of court in Canada, similar to many American jurisdictions: a trial court, sitting with a single judge who hears live witnesses; a provincial or federal appeals court, sitting usually with three judges who hear the appeal based on a written trial record; and the national Supreme Court of Canada, which generally sits as either seven or nine judges, depending on the matter being heard.

**13. Three Court Systems.** Simply put (and it is not simple!), there are three court systems in Canada: (1) superior courts, where the judges are appointed by the federal government (these judges generally have unlimited jurisdiction), (2) provincial courts, where the judges are appointed by the provincial government (these judges generally only have the powers given to them by provincial statute), and (3) federal courts, where the judges are appointed by the federal government. Federal Court of Canada judges have a jurisdiction limited to matters involving federal law, including intellectual property disputes, maritime law, and claims against the government. Compared to the U.S. federal court system, the Canadian federal court system is very sleepy, and many Canadian litigators never appear in the Federal Court of Canada due to its limited jurisdiction.

**14. Here Comes the Judge!** Judges in Canada are appointed by the federal government (or by the provincial governments for provincial courts). For most jurisdictions, and particularly for federally appointed judges, a judge must have been a member of the bar for at least 10 years prior to his or her appointment. Federal judges are given tenure until age 75.

**15. Gowning for Court.** For trials in most superior courts in Canada, lawyers must wear black robes or gowns (but not wigs, thankfully), which is a throwback to the country's British heritage and is meant to emphasize both respect for the court and the fact that the lawyer is playing a particular role within the justice system. Lower courts, such as small claims courts, are more informal, and business attire is all that is required.

**16. Contingency Fee Agreements?** Canada was traditionally quite conservative in not allowing contingency fee agreements

in civil matters for some time, due to the appearance of impropriety by the lawyer having an interest in the litigation. For example, Ontario only officially allowed contingency fee agreements as late as 2002. Now most Canadian jurisdictions allow clients to pay their lawyers pursuant to a written contingency fee agreement (subject to review by the court for unfairness). In most Canadian courts, there is also a default rule that the losing party in a civil lawsuit must pay the winning party's costs. Generally, these costs are not a total indemnification but instead represent anywhere from 50 percent to 65 percent of the actual costs incurred by the winning party, as set out in various tariffs and schedules in the applicable court rules.

#### 17. Decreasing Use of Jury Trials.

Jury trials are likely less common in Canada than in the United States, especially in civil matters. Excessive jury awards in Canadian civil trials are also unlikely due to judicial rules we have that set upper limits for non-pecuniary damages. Jury trials in Canada are more likely to happen in criminal prosecutions where the accused, when charged with a serious criminal offence, generally has a right to a jury trial.

**18. Case Law Reporting.** In Canada, we are not too concerned about official

reporters (the *Supreme Court Reports* and the *Federal Court Reports* are technically the only official reporters here; reporters such as the *Dominion Law Reports* are unofficial but widely used by most lawyers and judges). There are many case law reporters in print, ranging from regional reporters (e.g., *Alberta Law Reports*) to topical reporters (e.g., *Canadian Cases on the Law of Torts*).

#### 19. Commercial Online Databases.

Quicklaw was one of the earliest commercial providers of online legal information in Canada (1973), if not North America. In 2002, LexisNexis Butterworths Canada purchased Quicklaw. For now, they remain separate databases but are expected to be merged in due course. The other major commercial provider in Canada is Thomson, which provides WestlawCARSWELL in Canada, a modified version of Westlaw with a Canadian homepage and customized content. Other Canadian publishers provide useful commercial services, including Canada Law Book, Maritime Law Book, CCH Canadian, and SOQUIJ (for Québec legal content).

**20. CanLII.** The best free access to Canadian court decisions (and legislation) is via the Canadian Legal Information Institute (CanLII) at [www.canlii.org](http://www.canlii.org). The depth of coverage is not that great,

depending on the court or jurisdiction involved, but improvements and new content are constantly being made. Links are also provided directly to individual courts and legislatures.

#### The Canadian Legislative System

The most difficult challenge in researching Canadian legislation is knowing whether a particular subject matter is one of federal or provincial jurisdiction.

#### 21. Charter of Rights and Freedoms.

Canada's *Charter of Rights and Freedoms* came into force in 1982 (with the equality provisions coming into force in 1985). It guarantees basic rights and freedoms (freedom of religion, for example). Unlike the U.S. Constitution, Canada's *Charter* has an express limiting clause in s. 1 that guarantees the rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As such, if a Canadian court finds that a right or freedom has been infringed, the court then must determine if that infringement is a reasonable limit.

**22. Federal and Provincial Legislative Powers.** Under s. 91 of Canada's *Constitution Act, 1867*, the federal government has exclusive legislative power

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over such areas as the military, the postal system, currency and banks, and other matters of national concern. Under s. 92, the provincial governments have exclusive legislative power over a number of areas that fall into more local matters. As a result, legislation governing municipalities, for example, tends to be provincial legislation.

**23. Municipal Legislation.** In addition to federal and provincial legislation, there is a third level—in the form of bylaws—at the municipal level that can vary from city to city. Researching bylaws in Canada can be difficult since many cities have not yet put their bylaws online in an easy-to-use format.

**24. Publication of Legislation.** Legislation in Canada is officially published by the applicable federal or provincial queen's printer. Governments here have been slow to officially authorize their online versions of legislation. Legislation published in print in many Canadian jurisdictions is periodically revised by the government and issued as a new set. The federal statutes, for example, were last revised as a set as the *Revised Statutes of Canada, 1985*.

Within a set, statutes are generally published alphabetically by title, not by topic. Between sets, the government publishes new statutes in annual volumes. Updating Canadian statutes in print is therefore quite cumbersome and involves

using both the last revised set and checking the most recent "Table of Public Statutes" to find any amendments in subsequent annual volumes. Variations exist in different provinces.

**25. Unofficial Annotated/Consolidated Statutes.** Because officially published government statutes are cumbersome and subject to publishing delays, the commercial legal publishers publish annual annotated or consolidated statutes, which most lawyers use in practice, despite their unofficial status.

**26. Regulations.** Canadian regulations (federal and provincial) are ugly to research using print resources. Don't ask. The advent of online databases has made regulatory research easier, since the online services are generally up-to-date. It is important not to overlook the possible application of regulations when conducting legislative research.

**27. Legislation on the Internet.** Canadian federal and provincial governments have been relatively slow at making their legislation available online. Our federal statutes, for example, are often six months or more out of date. The Ontario government, on the other hand, has an ambitious "e-Laws" project that will promise Ontario statutes and regulations online, current to within 24 hours. A useful chart of links to Canadian federal and provincial legislation is available online at [www.law-lib.utoronto.ca/resources/locate/canleg.htm](http://www.law-lib.utoronto.ca/resources/locate/canleg.htm).

**28. Commercial Sources of Canadian Legislation.** Depending on the jurisdiction involved and how current the government Web site is, Canadian law librarians often now use free government Web sites for Canadian legislative research. However, Quicklaw, Lexis, and Westlaw®CARSWELL (and Canada Law Book) each has very good legislative databases with value-added features. CCH Online also has an excellent "bills tracking" service for Canada called Legislative Pulse.

**29. Bills, Bills, Bills.** Draft legislation in the form of bills must pass three readings, both federally and provincially, and then be given Royal Assent before it is generally in force as law. In addition, federal bills must pass three readings in both the House of Commons and the Senate in addition to receiving Royal Assent and being published in the *Canada Gazette* before they are in force. Accessing bills and their status is generally quite easy using free government Web sites.

**30. Statutory Interpretation.** When conducting legislative research in Canada, it is always important to check to see if the section you are researching has been

interpreted or ruled unconstitutional by a court. Carswell's *Canada Statute Citations* is one service that allows you to look for cases that have interpreted particular sections of a statute (this feature is also available on Westlaw®CARSWELL).

## Important Legal Tidbits about Canada

**31. Canadian Law Schools.** There are only 20 law schools in Canada. As with American law schools, most Canadian law schools require an undergraduate degree and a strong LSAT score. Graduates of our law schools receive an LLB degree. This is confusing to some Americans because the Canadian LLB is not like the four-year undergraduate LLB awarded in England and Australia, but is instead really the same as a JD degree (in fact, the University of Toronto law school is now calling its degree a JD). To practice law, a graduate of a Canadian law school must article, or apprentice, for one year at a firm during (or after) which time he or she must also write the applicable provincial bar exam (there is no federal bar examination here).

**32. Canadian Library Schools.** There are currently only seven ALA-accredited library schools in Canada. Two of them—Dalhousie and Toronto—offer a combined law/librarianship degree (a four-year program instead of five years if the degrees are done separately).

**33. Differences in the Law.** Criminal law in Canada is regulated largely by its federal *Criminal Code*, unlike in the United States where most criminal law is state law. Employment law in Canada does not recognize the American concept of employment at will; instead, most employees in Canada are entitled to statutory or common law "reasonable notice" before their employment is terminated. Differences also exist in copyright law, securities law, family law, and constitutional law, to name a few areas.

**34. Canadian Legal Classification.** The Library of Congress classification scheme for Canada is the KE Class, which did not exist prior to the 1970s. As such, some of the larger academic law libraries in Canada modified the American KF Class before the KE Class existed and adapted it for Canadian/Commonwealth materials. This system, still used by York University in Toronto, is called KF Modified. Other Canadian law libraries use the KE Class.

**35. Books.** There is a relatively healthy book industry in Canadian legal publishing,

## Further Exploration

Fitzgerald, Patrick and Barry Wright. *Looking at Law: Canada's Legal System*, 5th ed. (Toronto: Butterworths, 2000).

Forsey, Eugene. *How Canadians Govern Themselves*, 5th ed. Available online: [www.parl.gc.ca/information/library/idb/forsey/index-e.asp](http://www.parl.gc.ca/information/library/idb/forsey/index-e.asp).

Gall, Gerald L. *The Canadian Legal System*, 5th ed. (Toronto: Carswell, 2004).

Tjaden, Ted. *Doing Legal Research in Canada* (LLRX). Available online: [www.llrx.com/features/ca.htm](http://www.llrx.com/features/ca.htm). Last updated: January 19, 2004.

Tjaden, Ted. *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004).

Waddams, S.M. *Introduction to the Study of Law*, 6th ed. (Toronto: Carswell, 2004).

with a variety of monographs and loose-leaf services. Major Canadian legal publishers include Carswell, Butterworths Canada, Canada Law Book, CCH Canadian, Irwin Law, Wilson and LaFleur, and Yvon Blais.

**36. Journals.** There are two major journal indices in Canada: the *Index to Canadian Legal Literature* (also on Westlaw and on Quicklaw) and the *Index to Canadian Legal Periodical Literature* (print only). There are more than 15 Canadian journal titles on HeinOnline (with more to be added); both Lexis and Westlaw also have fairly good full-text coverage of Canadian law journals.

**37. Encyclopedias.** The Canadian equivalent of *American Jurisprudence* or *Corpus Juris Secundum* is the *Canadian Encyclopedic Digest* or *CED* (Carswell), which is also available on Westlaw and on CD-ROM.

**38. Digests.** The major Canadian case law digest service is Carswell's *Canadian Abridgment* (print and on Westlaw and CD-ROM). It organizes summaries of cases by topic, similar to West's *Decennial Digests*. Maritime Law Book also has its national reporter system, modeled on a key number system similar to the West system.

**39. McGill Guide.** The Canadian equivalent of The Bluebook is the (red) *Canadian Guide to Uniform Legal Citation*,



*Changing of the guard on Parliament Hill. The British system has greatly influenced the political/executive branch of Canada's government.*

5th ed. (Carswell), known as the "McGill Guide" because it is prepared by the editors of the *McGill Law Journal*.

**40. CALL/ACBD.** Most law librarians in Canada are members of the Canadian Association of Law Libraries ([www.callacbd.ca](http://www.callacbd.ca)). Our annual conference this year is in St.

John's, Newfoundland in mid-May. Come join us! ■

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