PART I

The Basics

Chapter 1 Introduction
Chapter 2 Sources of Evidence Law
Chapter 3 Considerations When Commencing Proceedings

Introduction

1

I. The Importance of Evidence 4

II. The Structure of the Court and Tribunal System in Canada 7

A. The Principle of Stare Decisis 7

B. Decisions of Higher Courts When Acting as Trial Courts 9

C. Conflicting Appellate Decisions 10

D. Privy Council and House of Lords Decisions 11

III. The Standard of Proof and Burden of Proof 13

Chapter Summary 17

Key Terms 17

Review Questions 17

Short Answer 17

Apply Your Knowledge 17

Learning Outcomes

After reading this chapter, you will be able to:

- Explain the importance of evidence in a legal proceeding.
- Explain a motion for non-suit or directed verdict.
- Differentiate between binding and non-binding court decisions.
- Understand the burdens and standards of proof applicable to different kinds of legal proceedings.

Members of the Judicial Committee of the Privy Council on the occasion of returning to Downing Street for the first time since the premises were damaged by a bombing on October 14, 1940. Depicted are MR Jayaker, Lord Du Parcq, Lord Goddard (Lord Chief Justice), Lord Simonds, Lord Macmillan, Viscount Simon, the Lord Chancellor (Lord Jowitt), Lord Thankerton, Lord Porter, Lord Uthwatt, Sir Madhavan Nair, and Sir John Beaumont. The photo was taken on June 18, 1946.

evidence
documents, testimony, physical objects, or other things used by parties to cause the finder of fact in a trial or hearing to believe a certain version of the facts that a party desires the finder of fact to accept

I. The Importance of Evidence

Evidence has been defined as

> any species of proof of probative matter legally presented by the acts of parties and through the medium of witnesses, records, documents, exhibits, or other concrete objects for the purpose of inducing belief in the minds of the court or jury as to their content.[1]

BOX 1.1

AN EXAMPLE OF THE USE OF EVIDENCE

Small Claims Court
a statutory court continued as a branch of the Superior Court of Justice whose jurisdiction is limited to the award of damages or the return of personal property, subject to a prescribed maximum value of $50,000

As an example of the use of evidence, a homeowner and a contractor in a **Small Claims Court** case might dispute whether renovations were of good and workmanlike quality. Both parties could call expert witnesses—usually experienced tradespeople who are familiar with the acceptable industry standards for the work which is alleged to be defective—to give evidence about whether the work performed by the contractor was of acceptable quality. This is an example of using evidence to try to sway the deputy judge to accept either the contractor's assertion that the contractor's work was of acceptable quality or the homeowner's assertion that it was not. Based on which party's version of the facts the deputy judge decides that

1 Steve Coughlan, Catherine Cotter & John Yogis, *Canadian Law Dictionary*, 7th ed (Lancaster: Barron's Educational Series, 2013) at 123-24.

the evidence supports, the deputy judge would form an opinion as to the work's quality or lack thereof. In turn, this finding would help the deputy judge to decide whether or not to dismiss the action or find a **cause of action** such as negligence or breach of contract was made out so as to justify awarding damages to one of the parties or deciding to dismiss the action.

cause of action
the facts giving rise to the legal basis for seeking relief in a civil court

Evidence is an indispensable part of any trial or hearing. A party that bears the burden of proving its case in a lawsuit or a prosecution for an offence must supply evidence that proves the factual allegations made by that party. Likewise, the party responding to or defending against another person's case will likely wish to introduce evidence that tends to disprove the facts alleged by the other party.

If a party fails to produce evidence substantiating all of the elements of a crime, civil cause of action, or other legal rule relevant to the outcome, or if the evidence produced by the party is ruled inadmissible, it can be fatal to the party's case.

It is crucial for advocates to be able to understand and apply the rules surrounding the use of evidence in legal proceedings. Being able to provide an abundance of evidence that corroborates a party's factual allegations provides the necessary basis to argue for the legal result that is desired, such as a conviction, an acquittal, or a decision on liability in a civil or administrative action. Conversely, if a party's evidence is ruled inadmissible, that party may be left unable to substantiate the facts necessary to convince a judge or other decision-maker that they should prevail in their legal proceeding.

BOX 1.2

EVIDENCE IN A PROVINCIAL OFFENCE PROSECUTION

Imagine that James is charged with careless driving contrary to section 130(1) of the *Highway Traffic Act*[2] after colliding with another vehicle driven by Dean. Some of the elements that the prosecution must prove include that:

1. the defendant was driving;
2. the defendant was driving a vehicle;
3. the vehicle being driven was on a highway; and
4. the act described above occurred without due care and attention or without reasonable consideration for other persons using the highway.

In addition, the prosecution must prove:

5. the date of the offence, without which it is impossible to know whether the offence was committed after the offence of careless driving was enacted;
6. the place where the offence occurred, without which it is impossible to determine whether the laws of Ontario apply and whether the prosecution is occurring in the right jurisdiction; and
7. the identity of the driver to establish that the defendant is the same person as the person who was accused of driving the vehicle carelessly.

In this scenario, James is a stranger to Dean, but a police officer attended the scene of the accident and determined James's identity by looking at his driver's licence and

2 RSO 1990, c H.8.

being satisfied that the person pictured on the driver's licence and the driver were one and the same. The police officer then served James with a **summons** requiring James to attend in court to face a charge of careless driving, and the police officer laid an **information** against James before a justice of the peace to confirm the summons.

The prosecution has two witnesses that it intends to call at trial: Dean, who witnessed James's driving, was involved in the collision, and can give evidence about elements one through six above; and the investigating police officer, who can identify James to establish element seven. On the day of the trial, the police officer is away on training and is unavailable to give evidence. Furthermore, James hires a licensed paralegal to represent him and elects not to testify in his own defence. In addition, his paralegal advises him not to attend court so as to avoid the potential of being identified by the prosecution's witness. As a result, when Dean testifies in court, he cannot even point to a person in court whom he can allege was the driver of the vehicle that collided with his own so as to identify James. At the close of the prosecution's case, James's representative makes a motion for non-suit; the Court dismisses the prosecution's case; and James is acquitted without requiring the defence to present a case or hear closing arguments about whether Dean's evidence should be believed.

summons
a document used to compel a person to attend a court or tribunal

information
a document used in criminal and quasi-criminal proceedings to commence a prosecution

motion for non-suit
a motion brought by the defending or responding party asserting that the prosecuting or suing party has not introduced admissible evidence that can support all of the elements of the offence or cause of action being pursued; if successful, the court will dismiss the prosecuting or suing party's case

motion for directed verdict
the same as a motion for non-suit but used in the context of jury trials; the courts have largely used the two terms interchangeably and the distinction in wording is of no consequence to the test for the relief sought

BOX 1.3

MOTIONS FOR NON-SUIT

A **motion for non-suit** (referred to as a **motion for a directed verdict** in jury trials)[3] will be successful where the party bringing its case—whether a prosecutor, a plaintiff, or an applicant—has failed to establish one or more elements of a cause of action, offence, or other ground for proving legal liability of the defending or responding party.[4]

While such motions are most often used in criminal or quasi-criminal cases, or in civil trials before a jury, motions for non-suit may also be heard in civil or administrative non-jury matters. For example, the Divisional Court has held that the Small Claims Court has jurisdiction to entertain such motions.[5] The procedure has also been permitted in the context of Ontario's administrative tribunals.[6]

The key difference between a motion for non-suit in a criminal or quasi-criminal case and one in a civil case is that in a criminal or quasi-criminal case the defence may still call evidence if its motion fails. In a civil case, it is customary that the defence is required to elect whether to call evidence at the time of bringing the motion for non-suit. If its motion is unsuccessful, the defence cannot call evidence to rebut the plaintiff's case.[7] If the defence elects to call evidence, the motion will be considered after the evidence is introduced, which gives the plaintiff an opportunity to marshal further evidence by cross-examining the defence's witnesses. This might prove fatal to a motion for non-suit.

3 Some courts have held that the phrases "non-suit" and "directed verdict" should be used for civil and criminal cases, respectively (see e.g. *JJ v School District No 43 (Coquitlam)*, 2011 BCCA 343 at para 24). Many cases refer to a directed verdict in the context of jury trials since the trial judge is overriding any power the jury might have to convict by pre-empting their verdict with an acquittal. On the other hand, the Supreme Court of Canada has used the term "non-suit" to describe this kind of motion in the context of a criminal jury trial (see e.g. *Arthurs v R*, 1972 CanLII 27 (SCC)). The test is the same regardless of the name of the motion, and misnaming it when making such a motion would not have any material impact on the outcome.

4 See *D'Addario v Smith*, 2018 ONCA 163 at para 22; see also *R v Litchfield*, 1993 CanLII 44 (SCC).

5 *Mundenchira Inc v Punnasseril*, 2022 ONSC 311 at paras 28-32.

6 See e.g. *Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 v Great Atlantic & Pacific Company of Canada*, 1994 CanLII 9868 (OLRB).

7 *FL Receivables Trust 2002-A v Cobrand Foods Ltd*, 2007 ONCA 425 at para 13.

The remainder of the chapter explains the structure of the court and tribunal system in Canada and the standard of proof and burden of proof.

II. The Structure of the Court and Tribunal System in Canada

> "Because legal principles may be described (however roughly) as norms or rules, the survival of the fittest in their case is a kind of moral success. The environment in which they must survive is an unruly one. It is the order of relations between man and man and between citizen and State. Over time, if—a big if, no doubt—freedom, reason and fairness are cornerstones of the State's political philosophy, the effect of *stare decisis* is to hone and refine the law to reflect these cornerstones, to give them concrete form, and to make them more and more robust in their unruly environment. This is a moral process; that is to say, it is a process which enhances conscientious dealings between man and man and between citizen and State."
>
> —Sir John Laws[8]

To understand the structure of the court and tribunal system in Canada, it is necessary to examine the principle of *stare decisis*, what occurs when higher courts sit as trial courts, how to approach conflicting appellate decisions, and the relevance of decisions of the Privy Council and House of Lords.

A. The Principle of Stare Decisis

To understand the sources of law surrounding the rules of evidence, it is important to recognize that the laws of evidence in Ontario, and most of Canada, are deeply rooted in the English common law. Canada, like many countries with an English legal heritage, follows the principle of ***stare decisis***. Courts are bound by legal rulings issued by higher courts, which is known as **vertical *stare decisis***. For example, if the Court of Appeal for Ontario establishes a rule as to when a certain type of evidence may be admitted in a quasi-criminal trial, a justice of the peace hearing a case in a provincial offence matter before the Ontario Court of Justice must follow that rule as the Ontario Court of Justice is lower in the judicial hierarchy than the Court of Appeal. A lower court is free to point out why it believes a higher court's ruling is problematic, but it must nonetheless follow the ruling and cannot overrule it even though it may have good reason to disagree.[9]

stare decisis
the legal doctrine under which courts should follow prior decisions

vertical *stare decisis*
the legal doctrine under which courts should follow prior decisions of courts positioned above them in the judicial hierarchy

For the purpose of vertical *stare decisis*, a higher court is one which has authority to hear an appeal or application for judicial review from a lower court or tribunal and change the lower court or tribunal's decision. This means that lower courts in Ontario such as the Ontario Court of Justice or the Small Claims Court are not bound to follow the decisions from other provinces' superior courts or courts of appeal.[10] Likewise, while federal tribunals and courts are bound by decisions of the Federal Court of

8 Sir John Laws, Lord Justice of Appeal, "Our Lady of the Common Law" (ICLR Lecture, 1 March 2012) at para 10, online (pdf): <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-laws-speech-our-lady-of-common-law.pdf> (emphasis in original).

9 See *Canada v Craig*, 2012 SCC 43 at para 21.

10 *Xerox Canada Inc v Neary*, 1984 CanLII 2212 (ONPC (CD)).

Appeal, provincial courts are not.[11] Such decisions may nonetheless have persuasive value, and lower courts are free to follow them as long as the decision from another jurisdiction does not contradict a binding decision on the same issue.

In Ontario, appeals and applications for judicial review from administrative tribunals and the Small Claims Court are generally heard by the Divisional Court.[12] However, there are some cases where such appellate or judicial review proceedings may occur in the Superior Court of Justice instead.[13] In the case of administrative tribunals at the federal level, such as the Canadian Human Rights Tribunal and the Immigration and Refugee Board of Canada, parties may apply to the Federal Court for judicial review of an administrative tribunal's decisions.[14] These are all examples of higher courts having authority to determine the law that lower courts and tribunals must follow.

horizontal *stare decisis*
the legal doctrine under which courts should follow prior decisions at the same level of court

Supreme Court of Canada
presently the highest court in Canada; all other Canadian courts are bound by its decisions

Usually, courts must also follow decisions from the same level, which is known as **horizontal *stare decisis***, although there are some situations in which a court may decline to follow a prior decision of the same court.[15] Administrative tribunals are not required to follow previous decisions from the same tribunal, but the **Supreme Court of Canada** has held that it is desirable that administrative tribunals do so in order to achieve consistency, equality, and predictability in the application of the law.[16] The looser adherence to precedent on the part of administrative tribunals is typical of the generally less formal and more streamlined nature of litigation in administrative tribunals than in courts, a concept that will be discussed further in Chapter 11. Table 1.1 provides an overview of how the principle of *stare decisis* is applied in Ontario courts.

TABLE 1.1 Stare Decisis in Ontario's Courts

	Criminal Cases Before 1933	Civil Cases Before 1950	Criminal Cases After 1933	Civil Cases After 1950
Privy Council and House of Lords*	✓	✓	●	●
Supreme Court of Canada	✓	✓	✓	✓
Ontario Court of Appeal	✓	✓	✓	✓
Ontario's superior court	✓	✓	✓	✓
Ontario's inferior courts and tribunals†	✗	✗	✗	✗

✓: Binding on all of the courts below.
✗: Not binding.
●: Not binding on the courts below, but the courts below may voluntarily adopt these cases as good law.

* As discussed further in this chapter, the reference to cases of the Privy Council as binding should only be taken to refer to cases arising as appeals from Canada. Furthermore, decisions of the

11 *Bedard v Isaac*, 1971 CanLII 601 (ON H Ct J).

12 See *Judicial Review Procedure Act*, RSO 1990, c J.1, s 6(1); *Courts of Justice Act*, RSO 1990, c C.43, s 31.

13 See e.g. *Judicial Review Procedure Act*, s 6(2); *Building Code Act, 1992*, SO 1992, c 23, s 15.3(4).

14 *Federal Courts Act*, RSC 1985, c F-7, s 18.1(3).

15 See *Hansard Spruce Mills Limited (Re)*, 1954 CanLII 253 (BCSC), cited with approval in *R v Sullivan*, 2022 SCC 19.

16 See *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC); see also *Gill v Human Rights Tribunal of Ontario*, 2014 ONSC 1840 at para 15.

House of Lords would only be applied in Canadian courts as binding if they related to debates in Canadian courts as to the nature of an English common law rule in order to avoid conflicts in interpretations of the common law between the highest courts, the Privy Council, and the House of Lords, for Canada and the United Kingdom, respectively. The decisions of the Privy Council are broader in jurisdiction in that its rulings were relied upon by Canadian courts for the interpretation and constitutionality of Canadian statutes, and not just the common law.

Since the years 1933 and 1950 refer to when the right of appeal was abolished for new cases, the dates in this chart are offered as a general guide only, as there are some exceptions. The legislation abolishing the right to appeal was not retrospective, meaning that there were some Canadian cases for which a right to appeal at the Privy Council already existed at the time the legislation came into force and so a decision was rendered after these dates. This means that there were some Privy Council decisions binding on Canadian courts that were rendered after the Parliament of Canada abolished the right of appeal to the Privy Council. The final decision of the Privy Council binding upon Canada's courts was delivered on October 7, 1959. See *Ponoka-Calmar Oils Ltd v Earl F Wakefield Co*, 1959 CanLII 427 (UK JCPC).

† Examples include provincially established administrative tribunals such as the Landlord and Tenant Board and the Human Rights Tribunal of Ontario, as well as courts presided over by provincially appointed judicial officials such as the Ontario Court of Justice and Small Claims Court.

B. Decisions of Higher Courts When Acting as Trial Courts

Sometimes, a court may be empowered to act both as a **court of first instance**, in which it serves as a trial court, and as a court of appeal or a court that exercises a judicial review function. One example of this is the Ontario Court of Justice. A defendant charged under the *Provincial Offences Act*[17] might be tried before a justice of the peace. An appeal would usually lie to a provincial judge of the Ontario Court of Justice. That same provincial judge could also preside over the trial of a person charged under the *Criminal Code*[18] in the case of many federal offences.

court of first instance
a court that initially hears a legal dispute before it becomes subject to appellate or judicial review proceedings; often also called a trial court

Another example is the Superior Court of Justice. While the Divisional Court generally hears appeals and applications for judicial review from the Small Claims Court, the Superior Court of Justice may, as mentioned previously, hear applications in limited circumstances for judicial review from inferior courts and tribunals instead of the Divisional Court. Thus, the Superior Court of Justice has the power to review orders arising from civil proceedings at the Small Claims Court under certain circumstances[19] and may also preside over trials regarding the same subject matter at the first instance. For example, a lawsuit for $50,000 could be brought before a deputy judge or judge of the Small Claims Court under the *Rules of the Small Claims Court*,[20] or by a judge of the Superior Court of Justice under the *Rules of Civil Procedure*.[21]

What is the effect on lower courts of the decision of a higher court that sits as a trial court, rather than an appellate or reviewing court? For example, if a trial judge in the

17 RSO 1990, c P.33.

18 RSC 1985, c C-46.

19 For an explanation of when applications for judicial review may be heard from orders of the Small Claims Court, see *Peck v Residential Property Management Inc*, 2009 CanLII 38504 (ONSC (Div Ct)).

20 O Reg 258/98.

21 RRO 1990, Reg 194. Leave is required to bring such a case in the Superior Court of Justice, but it will nonetheless remain a possibility. See *Courts of Justice Act*, s 23(1.1). For a discussion of some of the factors that make it desirable for the Superior Court of Justice to hear a civil action that is within the monetary jurisdiction of the Small Claims Court, see *Horvat v Goldstein*, 2024 ONSC 486.

Superior Court of Justice rules on an issue of contract law, would that decision bind the Small Claims Court faced with the same legal issue during a trial even though the decision from the higher court was not an appeal from the Small Claims Court? The answer is that Ontario's courts have debated this question for at least half a century. While some courts have held that the lower court would be bound by the higher court when the higher court is sitting as a trial court, others have held that the lower court would only be bound if the decision of the higher court was rendered while it was hearing an appeal of a decision from the lower court.[22] No decision has been rendered by the Court of Appeal or the Supreme Court that would answer the question in Ontario one way or the other. But, at the minimum, a lower court tends to treat the decision of a higher court sitting in its capacity as a trial court as being highly persuasive.

C. Conflicting Appellate Decisions

In addition to the hierarchy of courts described in Table 1.1 above, there may be hierarchies applicable specifically to inferior courts. Examples in the provincial offences context in Box 1.4 demonstrate why understanding the application of *stare decisis* is important for substantive legal issues, for the admissibility or weight of evidence, and for procedural issues that may arise during a case.

BOX 1.4

SPEEDING CHARGES AND SECTION 11(B) DELAY: CONFLICTING APPELLATE DECISIONS

Appeals arising out of a decision by a justice of the peace under the *Provincial Offences Act* in the Ontario Court of Justice are usually heard by a provincial judge still sitting in the Ontario Court of Justice.[23] Having many judges in different places around Ontario deciding appeals can result in different opinions on the same legal issue. Two examples in the provincial offences context—speeding charges and a section 11(b)[24] delay—demonstrate how to approach conflicting appellate decisions.

Speeding charges present a common situation in the provincial offences context. While one line of decisions holds that a police officer's non-compliance with a radar manual is fatal to a charge for speeding, another line of cases holds that the officer's non-compliance must be shown to have negatively affected the accuracy or reliability of the readings for the non-compliance to result in an acquittal.[25]

What should a lower court do when two higher courts of equal rank have issued conflicting opinions on the same legal question? The answer is that a lower court is free to choose to apply either line of authorities. Advocates must nonetheless remember that they have an ethical duty to present the court with all binding authorities of which they are aware on both sides of an issue even if the authorities

22 See *Sumner v Crease*, 2012 CanLII 98397 at para 21 (ON Sm Cl Ct) for a summary of the jurisprudence on this issue.

23 See the *Provincial Offences Act*, ss 116(2)(a), 135(1).

24 See the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

25 See *R v Dore*, 2017 ONCJ 434 for a helpful summary of the two lines of authority.

take the side that the advocate believes is incorrect.[26] There is a convincing argument that even non-binding authorities that are of relevance must be disclosed as part of the general duty of candour owed by advocates to courts and tribunals.[27]

This can result in some uncertainty in the state of the law until an even higher court issues a decision resolving the legal debate. Such an instance, again in the provincial offences context, occurred when multiple lines of authority developed interpreting section 11(b) of the Charter differently.[28] One line of authority held that the constitutionally acceptable period of delay in quasi-criminal prosecutions under part I of the *Provincial Offences Act* was shorter than the 18 months' post-charge delay prescribed by the Supreme Court for criminal prosecutions in criminal court[29] while another held that there should be no distinction between provincial and criminal matters for the purposes of interpreting the Supreme Court's decisions. The Court of Appeal decided in favour of an 18 months' post-charge delay in 2020.[30]

D. Privy Council and House of Lords Decisions

1. Privy Council Decisions

From the beginning of Canada's Confederation in 1867, the highest appellate body to which Canadian courts and tribunals were subject was the **Judicial Committee of the Privy Council** (often referred to simply as the "Privy Council"), which had final appellate jurisdiction over all of Britain's colonial courts since 1844.[31] Decisions of the Privy Council that resulted from appeals from courts in other countries that fell under its jurisdiction, such as Australia, may be treated as persuasive. However, they are not binding, and Canadian courts may decline to follow them.[32]

The Privy Council still hears appeals from certain **Commonwealth** countries that were formerly a part of the British Empire as well as all British Overseas Territories (such as Bermuda and the Falkland Islands) and all Crown Dependencies (such as the Isle of Man). However, Canada amended the *Criminal Code* to abolish the right of appeal to the Privy Council for criminal cases on July 1, 1933.[33] For all other cases, the right of

Judicial Committee of the Privy Council
formerly the highest court of appeal for Canadian legal disputes and still the highest court of appeal for many other Commonwealth countries; its role as the supreme appellate authority for Canada has been replaced by the Supreme Court

Commonwealth
in this context, short for the Commonwealth of Nations, an international association of countries that are mostly former members of the British Empire; the member states tend to have certain things in common such as English as an official language, a common law legal system, and a Westminster-style democracy, though there are exceptions to this

26 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022) at r 4.01(5)(d), online: <https://www.lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct/complete-paralegal-rules-of-conduct>; Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014; amendments current to 28 June 2022) at r 5.1-2(i), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>.

27 *Paralegal Rules of Conduct*, rr 4.01(1), (5.1); *Rules of Professional Conduct*, rr 5.1-1, 5.1-3; *Kapoor v The Law Society of Saskatchewan*, 2019 SKCA 85.

28 See *York (Regional Municipality) v Tomovski*, 2017 ONCJ 785; *R v El-Nasrallah*, 2018 ONCJ 161; *R v Debono*, 2019 ONCJ 298.

29 *R v Jordan*, 2016 SCC 27.

30 *R v Nguyen*, 2020 ONCA 609.

31 See the *Judicial Committee Act 1844* (UK), 7 & 8 Vict, c 69. There was a period of time that criminal appeals to the Privy Council were abolished in Canada by *An Act further to amend the law respecting Procedure in Criminal Cases, 1888* (UK), 51 Vict c 43, s 1. This attempt to end the right of appeal to the Privy Council was found to be beyond the power of the Parliament of Canada to implement (see *R v Nadan (Nos 1 and 2)*, 1926 CanLII 276 (UK JCPC)), and criminal appeals were restored as a result of striking down the 1888 law. It was ultimately the enactment of the *Statute of Westminster 1931* (UK), 22 & 23 Geo 5 c 4 that allowed Canada to abolish appeals to the Privy Council if it so chose.

32 See *Negro v Pietro's Bread Co Ltd*, [1933] OJ No 310 (QL) at para 17, 1933 CanLII 146 (CA).

33 See *An Act to amend the Criminal Code*, SC 1932-33, c 53, ss 17, 18.

appeal from Canadian courts to the Privy Council was abolished on January 14, 1950.[34] Consequently, today the Supreme Court is the highest court of appeal in Canada.

As the Supreme Court is now the highest court in Canada, it may choose to review previous decisions of the Privy Council, just as it may review past Supreme Court decisions.[35] Absent such a review, Privy Council decisions that arose from appeals from Canada remain binding on Canadian courts, and the Supreme Court has generally not been asked to use its powers to reverse Privy Council decisions even where it may have held a different view from the Privy Council in the past. Perhaps the most famous and important example of the permanency of Privy Council decisions is the "Persons Case,"[36] in which the Supreme Court held in 1928 that women were not "persons" within the meaning of the *Constitution Act, 1867*[37] (then known as the *British North America Act, 1867*) for the purpose of appointment to the Senate of Canada. The Privy Council overturned the Supreme Court's decision in 1929 and confirmed that women were indeed eligible to become senators.[38] The guarantee of equality under the law did not become constitutionally entrenched until the coming into force of the equality rights provisions of the Charter in 1985.[39] Nevertheless, between 1950, when the Supreme Court became free to reverse civil precedents set by the Privy Council, and 1985, when equality under the law became a constitutional right, the right of women to be appointed to the Senate of Canada continued to be protected by the Privy Council's 1929 ruling.

2. House of Lords Decisions

The Privy Council was not the highest court for cases originating in the United Kingdom itself. During most of Canada's post-confederation history, that role fell to an Appellate Committee of the House of Lords.[40] There was a theory of a "single monolithic common law,"[41] an idea that the common law of England and Wales should be consistent with the rest of the colonies, including those that would ultimately be confederated into what is now Canada. As a result, decisions of the House of Lords were considered to be equally authoritative in Canada to decisions of the Privy Council when Canadian courts were subject to the oversight of the Privy Council.[42] Some famous examples of decisions of the House of Lords from that era continue to be regularly cited by Canadian courts as good law. These include:

- *Rylands v Fletcher*,[43] which discusses situations in which property owners may be strictly liable in tort for harm caused by dangerous things escaping their land;

34 See *An Act to amend the Supreme Court Act*, SC 1949 (2nd Sess), c 37, s 3; (14 January 1950) C Gaz, vol 84, no 2 at 110.

35 See *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1256-57, 1978 CanLII 10.

36 *Reference re meaning of the word "Persons" in s 24 of British North America Act*, 1928 CanLII 55 (SCC).

37 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

38 *Edwards v Canada (AG)*, 1929 CanLII 438 (UK JCPC).

39 Charter, s 32(2); Elizabeth R, Proclamation, 17 April 1982, SI/82-97, reprinted in RSC 1985, App II, No 45.

40 See the *Appellate Jurisdiction Act, 1876* (UK), 39 & 40 Vict, c 59, s 3. The House of Lords' role as the highest appellate court for cases originating in the United Kingdom ended when it was replaced by the Supreme Court of the United Kingdom in 2009 as a result of the *Constitutional Reform Act 2005* (UK), 2005, c 4.

41 *Goodman v Rossi*, [1994] OJ No 2778 (QL) at para 14 (Div Ct) (rev'd on unrelated grounds in [1995] OJ No 1906 (QL) (CA)).

42 See *Robins v National Trust Company*, 1927 CanLII 469 at 100 (UK JCPC); *Goodman v Rossi*, *supra* note 41.

43 (UK) (1868), LR 3 HL 330.

- *Donoghue v Stevenson*,[44] where the concept of the duty of care in negligence was developed; and
- *Browne v Dunn*,[45] which establishes rules on how to ensure that conflicting evidence given by different witnesses in a trial is put to each witness.

Even though the highest Canadian judicial authority in the 21st century is the Supreme Court, it is necessary to appreciate the evolving role of decisions of the Privy Council and House of Lords to understand when the prior decisions rendered by non-Canadian courts may be binding on Canadian courts.

III. The Standard of Proof and Burden of Proof

Two other key concepts when discussing the law of evidence are the standard of proof and the burden of proof as they apply in various kinds of legal proceedings.

The **standard of proof** is the threshold that the evidence must meet for a party to convince a decision-maker that it has made out its case. The **burden of proof**, or onus, describes who has the obligation to prove or disprove a legal issue. In a criminal proceeding, the prosecution bears the burden of proof to establish that a person is guilty of a crime. In a civil proceeding, the plaintiff or applicant bears the burden of proof to establish liability. However, burdens of proof may shift at different stages of a proceeding, such as when certain types of defences are raised. A third, less common standard which has been created by statute is that of clear and convincing evidence.

standard of proof
the standard that a party must meet in order to discharge its burden of proof

burden of proof
also called the "onus," the burden of proof refers to who has the obligation of proving a legal issue

In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof that applies to a proceeding is a **balance of probabilities**.[46] Sometimes, this is referred to as a "preponderance of the evidence," and it means that a party has proved that it is more likely than not that they have established liability. For example, a customer who slips and injures themself on a floor in a shop and wishes to be compensated in a civil court need only prove that it was more likely than not that the shopkeeper was guilty of negligence, not that the shopkeeper was negligent beyond a reasonable doubt.

balance of probabilities
a standard of proof meaning "more likely than not"

An example of a statutory provision rebutting the presumption of a balance of probabilities standard of proof in administrative matters can be found in Ontario's *Community Safety and Policing Act, 2019*,[47] which requires "clear and convincing evidence" to impose liability in police disciplinary hearings.[48] The courts have held that such language creates a higher standard of proof than the ordinary civil standard of a balance of probabilities.[49]

In criminal and quasi-criminal cases, the burden of proving that an accused person is guilty of an offence rests on the prosecution, and the standard of proof requires guilt to be proved **beyond a reasonable doubt**.[50] This standard of proof has been

beyond a reasonable doubt
a standard of proof that has been described as being much closer to an absolute certainty than simply being more likely than not

44 1932 CanLII 536 (FOREP).

45 1893 CanLII 65 (FOREP).

46 See *Stetler v Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2005] OJ No 2817 (QL) at para 79, 2005 CanLII 24217 (CA).

47 SO 2019, c 1, Schedule 1.

48 *Community Safety and Policing Act, 2019*, ss 201(10), 202(9), 202(10).

49 See *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 60.

50 *Woolmington v DPP*, [1935] AC 462 at 481 (HL), [1935] UKHL 1; *R v W (D)*, 1991 CanLII 93 (SCC).

described as being much closer to an absolute certainty than simply being more likely than not.[51]

Some courts, such as the Superior Court of Justice, may hear both criminal and civil cases. As a result, the same judge will apply a different standard to the evidence presented in court based on whether the case is a prosecution for an offence or a lawsuit seeking a civil remedy. The differing standard of proof between civil and administrative matters, on the one hand, and criminal and quasi-criminal matters, on the other hand, can be readily explained by the importance of the consequences to the parties involved. In a civil trial, a party usually only faces monetary or other property-related consequences if found liable. By contrast, a criminal trial can result in a life-changing criminal record, a custodial sentence (including life sentences for certain offences in Canada), and at the time that the courts established the required standard of proof as being one of guilt beyond a reasonable doubt, a trip to the gallows. In fact, it was not until September 1, 1999 that Canada finally abolished the availability of capital punishment from all of its statute books.[52] For persons charged with offences in common law jurisdictions such as Canada, the courts have decided that higher stakes merit imposing a higher standard of proof on the prosecution.

More than one burden of proof and standard of proof may apply during a trial or a hearing. For example, in a criminal or quasi-criminal trial, although the prosecution has the burden of proving guilt beyond a reasonable doubt, an accused person who wishes to argue that the offence with which they are charged infringes the Charter has the burden of proving to the court on a balance of probabilities that the challenged law infringes a Charter right. If the accused is able to convince the court that the law infringes a Charter right, the burden shifts back to the prosecution to satisfy the court on a balance of probabilities that the infringement is a reasonable limit on that right, or the court will find that the law is unconstitutional.[53] Another common example of the multiple burdens and standards that may apply in quasi-criminal provincial offence trials is that in trials for strict liability offences, the prosecution must prove all of the elements of the *actus reus* beyond a reasonable doubt, but if the defendant wishes to assert a due diligence defence, the burden is on the defendant to make out that defence on a balance of probabilities.[54] An overview of the burden of proof and standard of proof required in different types of proceedings is provided in Table 1.2.

51 *R v Starr*, 2000 SCC 40 at para 242, departed from on unrelated grounds in *R v Khelawon*, 2006 SCC 57.

52 See *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35; *Order Fixing September 1, 1999 as the Date of the Coming into Force of Certain Sections of the Act*, 8 July 1999, PC 1999-1304 (21 July 1999) C Gaz II, vol 133, no 15 at 1960, online (pdf): <https://gazette.gc.ca/rp-pr/p2/1999/1999-07-21/pdf/g2-13315.pdf>.

53 *R v Oakes*, 1986 CanLII 46 (SCC).

54 *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1325, 1978 CanLII 11.

TABLE 1.2 Standards and Burdens of Proof in Legal Proceedings

Type of Proceeding	Standard of Proof	Burden of Proof
Administrative	Presumptively a balance of probabilities but may be displaced by statute; few administrative tribunals depart from the balance of probabilities standard	Statute-specific; some statutes require a party to disprove liability but generally the party seeking to prove liability bears the burden of proof*
Civil	Balance of probabilities	The plaintiff, applicant, or complainant
Criminal and Quasi-Criminal	Beyond a reasonable doubt	The prosecution

* An example of a statute requiring a party to disprove liability can be found in the *Employment Standards Act, 2000*, SO 2000, c 41, s 74(2), which states that the burden of proving that an employer did not commit a reprisal under s 74(1) rests on the employer.

TABLE 1.3 Names of the Federal, Provincial, and Territorial Superior Courts*

Jurisdiction	Name of Court
Canada (Federal)	Federal Court
Alberta	Court of King's Bench
British Columbia	Supreme Court
Manitoba	Court of King's Bench
New Brunswick	Court of King's Bench
Newfoundland and Labrador	Supreme Court
Northwest Territories	Supreme Court
Nova Scotia	Supreme Court
Nunavut	Court of Justice
Ontario	Superior Court of Justice
Prince Edward Island	Supreme Court
Quebec	Superior Court
Saskatchewan	Court of King's Bench
Yukon	Supreme Court

* Where the geographical name of the location of the court forms an official part of its name, it is omitted as a redundancy. For example, the current official name of the superior court for Alberta is the "Court of King's Bench of Alberta," but "of Alberta" is omitted in this chart. In addition, the phrase "Supreme Court" refers to the name of the courts established by the provinces as their superior courts, not to the Supreme Court of Canada.

FACT SCENARIO

Mr Smith represents the plaintiff in a Small Claims Court proceeding. Ms Jones represents the defendant to the plaintiff's claim, who has also brought a defendant's claim against a client represented by Mr Roberts. All three legal representatives have a different opinion about how the Court should resolve a rule of contract law. Mr Smith submits a case from the Privy Council decided in 1964. Ms Jones submits a Small Claims Court appeal case from the Divisional Court from 2014. Mr Roberts submits a case from the Federal Court of Appeal from 2023. Each case establishes a different rule about the same contested legal issue. Who has submitted case law that will decide which legal rule the Small Claims Court will apply to the issue before it?

CHAPTER SUMMARY

- Evidence is needed for a party to prove its case in a legal proceeding.
- A failure to present evidence, including because it is deemed inadmissible, can lead to adverse consequences for a party.
- Where a party bringing a prosecution or a lawsuit fails to produce admissible evidence of one or more elements of an offence or cause of action, its case can be dismissed by way of a motion for non-suit.
- Courts in Canada are bound by *stare decisis*, a principle requiring them to follow decisions of higher courts.
- The Privy Council was once the highest appellate court for Canada. Its decisions remain binding unless overturned by the Supreme Court, which is now the highest appellate court for Canada.
- Decisions from other jurisdictions can be persuasive in Ontario but are not binding, even if from a high court in those jurisdictions, such as another province's court of appeal.
- Because federal courts and provincial courts follow two separate hierarchies, decisions of the Federal Court of Appeal are not binding on provincial courts or tribunals, and decisions of provincial courts of appeal are not binding on federal courts or tribunals.
- Civil proceedings are generally subject to the balance of probabilities standard of proof.
- Criminal proceedings require a higher standard of proof, proof beyond a reasonable doubt.

KEY TERMS

balance of probabilities, **13**
beyond a reasonable doubt, **13**
burden of proof, **13**
cause of action, **5**
Commonwealth, **11**
court of first instance, **9**
evidence, **4**
horizontal *stare decisis*, **8**
information, **6**
Judicial Committee of the Privy Council, **11**
motion for directed verdict, **6**
motion for non-suit, **6**
Small Claims Court, **4**
standard of proof, **13**
stare decisis, **7**
summons, **6**
Supreme Court of Canada, **8**
vertical *stare decisis*, **7**

REVIEW QUESTIONS

Short Answer

1. What is the standard of proof applicable to criminal proceedings?
2. What is the usual standard of proof applicable to civil and administrative proceedings?
3. What was the highest court of appeal for Canadian legal disputes before the Supreme Court assumed that role?
4. What type of motion can be brought by a defending or responding party when the prosecuting or suing party fails to introduce evidence for each essential element of a cause of action or offence?
5. In what year did Canada completely remove the death penalty from all of its statutes?
6. What is the highest court of appeal in Ontario before the Supreme Court?

Apply Your Knowledge

Ms Harris, a landlord, and Mr Anderson, a tenant, are self-represented parties appearing before the Landlord and Tenant Board. Ms Harris has brought an application seeking damages and an order to terminate the tenancy, alleging that Mr Anderson engaged in illegal acts by committing various by-law offences for which he was also charged and prosecuted by the municipal authorities.

Mr Anderson intends to argue to the member of the Board presiding over the application that Mr Anderson was acquitted by the Ontario Court of Justice of the charges related to the by-law offences, which found that it was more likely than not that Mr Anderson committed the offences, but that the Court had reasonable doubt and was obligated to acquit. Therefore, Mr Anderson intends to argue that the Board should find that the issue has already been adjudicated and side with Mr Anderson. Mr Anderson

has sent Ms Harris a decision he found from the Board in which a similar argument was made by a tenant and the Board agreed with the tenant. Mr Anderson will argue that the Board, too, should find a reasonable doubt and dismiss Ms Harris's application.

Mr Anderson also intends to argue that the illegal acts of which he is accused are less serious and that the Board should not terminate him for illegal acts unless they are serious ones such as criminal offences.

Ms Harris decides to hire a paralegal, Ms Jackson. Ms Jackson locates a Divisional Court case that holds that not all illegal acts are grounds for terminating the tenancy. However, Ms Jackson also locates a second Divisional Court case that holds the opposite—that any illegal act, no matter how trivial, is sufficient cause for terminating a tenancy.

Ms Harris tells Ms Jackson that she thinks her application will be successful because Mr Anderson cannot disprove the allegations made by Ms Harris.

1. Should the Board dismiss Ms Harris's application on the grounds that it has a reasonable doubt about the case Ms Harris has brought?
2. Is the Board required to follow the previous decision relied upon by Mr Anderson and dismiss Ms Harris's application because the issues were similar?
3. Of the two conflicting Divisional Court decisions regarding the consequences of an illegal act on an application for the termination of a tenancy, which one binds the Board?
4. Ms Jackson is preparing a book of authorities to submit to the Board which will be relied upon at the hearing of Ms Harris's application. Ms Jackson knows that there are two conflicting Divisional Court cases but only includes the case that is helpful to Ms Harris's application and does not think it will be a problem because Mr Anderson has not filed the adverse decision of the Divisional Court with any of his materials. What, if anything, is wrong with Ms Jackson's strategy?
5. How should the Board rule if Ms Harris argues that she should succeed with her application if Mr Anderson cannot disprove the allegations against him?