

**A COMPARATIVE STUDY OF COURT SYSTEMS
IN CHINA AND CANADA: CHENGDU AND
MANITOBA**

By

Yuxin WU

A Thesis

**Submitted to the Faculty of Graduate Studies
In Partial Fulfillment of the Requirements for the Degree of**

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**The Faculty of Graduate Studies
500 University Centre, University of Manitoba
Winnipeg, Manitoba R3T 2N2**

**Phone: (204) 474 9377
Fax: (204) 474 7553
graduate_studies@umanitoba.ca**

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FACULTY OF GRADUATE STUDIES

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of

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Master Of Laws

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Abstract

The thesis is a comparative study of court systems in China and Canada. It illuminates similarities and differences by exploring how each country's courts conduct litigation, how courts are expected to function and operate, as well as the relationships between the judiciaries and related social entities like the governing political party, the legislature, the executive and the professional lawyers. The courts' different roles in conducting the litigation process is not only caused by differences in trial modes or step-by-step proceedings, but in a court's stature in the community and in the individual judge's privileged position in each judicial system.

First, a country's legal environment defines a court's stature within governmental structures and the court's relations to other powers: can courts serve to check or balance other agencies, or just act as another instrument of government, aiming at applying existing law to particular cases? Secondly, jurisdictional capacity provided by convention or written law is another factor that decides a court's authority in particular cases. For example, if a court has the power to review actions of any entity or institution for constitutionality or legitimacy or use compulsory means to compel anybody to obey a court order, its decision will not be defied. Lastly, the function and operation of a court itself depends on sources of judicial funding, the appointment and discipline processes, which define the individual judge's situation in the judicial system. For example, in a judicial system where each judge is equal (one to another) and each judge's tenure and remuneration is secured, an individual judge will independently carry out his/her own decisions without fear of pressure from the senior judge, chief judge or a higher court.

The thesis has three major parts: the comparison of legal environments within which each country's courts operate, the comparison of the functioning and operation of each court system, and the comparison of the busiest, grassroots court's role in conducting the litigation process. Each part is divided into objective points, and either country's practice is contrasted with that of the other country in immediate ways. In order to form a sharp contrast, a lot of examples and cases are cited.

Throughout the whole thesis, my comparison is targeted on four words: uniformity, authority (including capacity and competence), bureaucracy and independence. The Chinese judiciary is like a uniform bureaucratic system, while the Canadian judiciary has more independence and authority. As a result, Chinese courts act like an instrument of government, aiming at applying existing law to particular cases, while Canadian courts do the same while they also serve as a check or balance on other governmental powers.

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Introduction

Comparison is the best way to illuminate similarities and differences in the ways different countries form their legal systems. In this thesis, I study court systems in China and Canada to discover how each country's courts conduct litigation, how courts actually function, as well as the relationship and interaction between the judiciary and related social entities like the governing political party, the legislature, the executive and the procuracy. Behind this topic, my comparison is targeted on four words: uniformity, authority (including capacity and competence), bureaucracy and independence.

My thesis has three major parts: the comparison of legal environments within which each country's courts operate, the comparison of each court system, and the comparison of the busiest, grassroots court's role in conducting litigation process.

I. Legal Environments

Differences in court systems start from differences in state structures. China is a unitary country with power concentrated in its central level of authority: their provincial, municipal, and local governments are dependent on the national government. This centralized structure extends to the Chinese court system, in its uniformity and bureaucracy. All courts are created under the same authority: the *Constitution* and *Organizational Law of People's Courts*. When it comes to composition, organization, management style, funding, administration, judicial appointments and litigation process, all courts in mainland China are similar, with the exception of Hong Kong and Macau. Lower-higher court relationships are analogous to superior-inferior administrative agencies, with the lower court being subject to higher court's intervention in many internal affairs, such as administration, personnel arrangement and other daily work.

By contrast, Canada is a federal country with separation of powers between national and provincial governments: every province or territory has the right to enact statutes establishing and administering its provincial or territorial courts. The Canadian courts vary from one province to another in terms of name, composition, jurisdiction, administration, judicial appointments and litigation process, especially civil procedure. Lower courts function independently from higher courts, with a higher court not having continuous supervision over the case flow and trial work of a lower court.

In the second place, differences of political structures contribute to differences of legal environments within which courts operate. China is a Party-state with its CPC monopolizing the political life and personnel placement of all the state institutions, including the courts. Working in such a highly-politicized structure, in which the Party holds unchallengeable leadership over almost all the domains of state sovereignty, Chinese courts often lose the political neutrality and judicial independence that characterizes Canadian courts. Chinese courts lack the ability to impose meaningful restraints on the state and on powerful individual members of the ruling elite. By contrast, Canada is a country with separation of political parties and the state. One rises to power only through winning an election and is held accountable to the voters: its policies and proposals are open to a wide range of challenges; its cabinet is subject to a vote on a motion of censure or want of confidence. In addition, beneath the cabinet level, other governmental officials or civil servants do not necessarily have Party affiliation. Therefore, its policy or platform does not necessarily affect any other individual or entity outside the party, unless it is passed by the scrutiny of parliament and proclaimed as part of the law. Working in such a structure, under which the Party and State is separated,

Canadian courts can be independent of any political party and considerably neutral in partisan politics. Each party is subject to the rule of law.

Thirdly, the arrangement of state power and a court's position in the governmental structure is crucial to whether it can serve as a check or balance on executive or legislative power or just act like an instrument of government aiming at applying existing law to particular cases. Compared to its Canadian counterparts, Chinese courts have much less authority. Within the PRC governmental structure, the judiciary is relatively weak. On the one hand, courts have a lot of constraints from the CPC, the executive government, and other state institutions: the Party controls judicial appointments; executive government controls a large part of court funding; the legislature examines court work reports and can even exercise influence on the outcome of specific cases by making inquiries or suggestions; and the procuracy can supervise the judicial activities of the courts for conformity with the law and even challenge a final court decision by petitioning to have criminal, civil and administrative litigations reconsidered.

On the other hand, the powers granted to courts are limited: having no power to make law; having no power to conduct constitutional review; having no plenary powers to hold the executive in check by reviewing administrative actions. As a result, Chinese courts can become an instrument of government, while adjudicating specific cases. By contrast, Canadian courts serve as a check or balance on the executive and the legislature. On the one hand, the judiciary is not accountable to any electorate or government for its decisions. Instead, legislative and executive powers are brought under the supervision of the judicial power. Under the parliamentary-cabinet government, what prevails in Canada is the supremacy of law, not the supremacy of parliament or the executive. Constitutional

review is the best safeguard for supremacy of law and the power of review vests with the judiciary. The actions of any political party, legislature, executive government and other social entity are all subject to judicial review. Courts can strike down any legislation or action which it deems to be in violation of the Constitution and other laws. On the other hand, many issues vital to the courts and judges, such as appointment and remuneration, are insulated from the direct control of a political party, legislature and executive government. With compulsory recourse to an independent third party, like the Judicial Council or Advisory Committee, for judicial appointment and remuneration, the legislature, government or party cannot pressure a judge by manipulating the judge's position or livelihood.

II. Court Systems

Differences in the ways courts are formed and operate result in different degrees of uniformity, competency, authority, independence and bureaucracy. To illustrate, the following dimensions are discussed in detail: court structure and hierarchy, functional capacity, jurisdictional capacity, qualification of judges, judicial appointment, removal, promotion and discipline, judicial hierarchy, court funding and judicial remuneration.

III. Morphology of Litigation

Once we understand differences externally and internally for court systems, we can identify differences in how Chinese and Canadian grassroots courts conduct litigation processes. Differences in authority, bureaucracy, independence (*i.e.*, relation to other institutions), as well as modes of trial and legal culture will be illustrated in both civil and criminal litigation.

CHAPTER ONE: CONTRASTING LEGAL ENVIRONMENTS WITHIN WHICH THE COURTS OPERATE

Section 1: Comparison of State Structure and Its Relation to Its Court System

Part 1: The Unitary System of China and the Uniformity of Chinese Courts

The People's Republic of China is a unitary state with considerable degrees of decentralization.¹ Subject to its Constitution, local units of government at various levels have powers over affairs in their respective geographical areas, *e.g.*, promoting the economy, education and public health, enacting local regulations, appointing civil servants and judges.² However, the powers that local governments enjoy varies from ordinary provinces to autonomous areas, where ethnic minorities live in concentrated communities such as Tibet and Xinjiang, to special administrative regions like Hong Kong and Macau. Under the policy of the 'One Country, Two Systems',³ Hong Kong and Macau at present enjoy a considerable degree of autonomy from the central government, each with its own currency, customs, immigration and legal system.⁴ Governments of autonomous areas, second only to those of special administrative regions, enjoy extensive self-governmental rights beyond those held by other local governments at the same level. These include administering the internal affairs of ethnic minority groups, having independent control of local revenue, and independently arranging and managing construction, education, science, culture, public health and other community undertakings.⁵

Though all local governments enjoy varying degrees of autonomy, China is still a unitary country with power concentrated in its central level of authority.⁶ First of all, jurisdictions of central and local governments are similar. In other words, functions of

central and local governments remain similar in form and content, only different in scale. Secondly, local government has constitutional recognition but not delineated authorities or functions. So, there is no formal division of authorities between the center and the provinces or between the provinces and their counties and cities. Instead, the relationship among central, provincial, and local governments is thrashed out in case-by-case agreements that are subject to renegotiation as conditions and needs change.⁷ To some extent, part of the discretion and power in local governments comes from grants or conferrals by the central government. And this kind of granted or conferred power can be abolished or varied by a decision of the central government. Normally speaking, the power granted or conferred by central government concentrates on issues concerning finance, the economy, trade, education, public health, culture, sports, employment and social welfare. In issues regarding political and social stability, deemed to be of vital national concern, such as major infrastructural construction, key scientific and research institutes and universities, the central government retains dominant control. Actually, central government sets general policies and goals on almost all the important issues and leaves implementation to local governments. Thirdly, the hierarchical system unifies the governments at various levels under the leadership of the central authority. On the one hand, superior authority reserves the power of appointment, expenditure budgets, taxation, and resource re-distribution as levers in controlling inferior units;⁸ on the other hand, lower level governments must be answerable and obedient to higher-level governments. Whenever the local regulations and national laws conflict, the national law prevails; whatever national policies, laws and resolutions are made, local governments must accept and carry them out. Under this system, there are no provincial, municipal, or local

governments functioning independently of the national government, except for Hong Kong and Macau.

This centralized structure extends to the Chinese court system, in its uniformity and bureaucracy. On the one hand, except for Hong Kong and Macau, all courts in mainland China are similar when it comes to composition, organization, management, funding, administration, judicial appointments and litigation proceedings. Any two courts at the same level are identical versions of each other. Why? Because all the courts are created by the same authority: *Constitution Act* and the *Organizational Law of People's Courts*.⁹ On the other hand, as to a lower-level court, the higher-level court is not only a court of appeal, but also of supervision and superintendence. Higher-level courts have the right to intervene in many internal affairs of lower courts, such as administration, personnel arrangement and other daily work. Lower courts must be subject to decisions of higher courts or at least give them considerable weight. This so-called “supervisory power of higher courts” is recognized in both the *Constitution Act* and the *Organizational Law of People's Courts*.¹⁰

Part 2: The Federal System of Canada and the Diversity of Canadian Courts

Unlike China, Canada is a federal country with separation of powers between national and provincial governments. Provincial governments have their own independent, constitutionally guaranteed authority which the federal government cannot take over. Neither can one intervene in the “subject matters” exclusively assigned to the jurisdiction of the other.¹¹ Even on subject matters over which both the federal parliament and provincial legislatures share powers, national law does not always prevail. On some concurrent issues like immigration and natural resources, the national law prevails; but on

issues like old age, disability and survivors pensions, the provincial law prevails.¹²

This federal system makes the Canadian court system characterized by diversity. In Canada, there is no uniform procedural code applying all over the country to formulate a court. Rather, every province has the right to enact statutes establishing and administering its provincial courts.¹³ The Canadian courts vary from one province to another in terms of name, composition, jurisdiction, administration, judicial appointments and litigation process, especially the civil procedure. On the other hand, compared to their Chinese counterparts, courts in Canada have fewer bureaucratic characteristics: provincial courts are separate from federal courts; except for reviewing trial decisions on appeal, higher-level courts have little or no influence over lower-level court affairs, *e.g.*, budgets, courtroom personnel, management style. By nature, lower-level courts in Anglo-American system have more independence but less constraints from higher-level courts.¹⁴ However, this is also partially due to the separation of power between national and provincial governments. In Canada, a Provincial Court's right derives from the exclusive authority of the province in which it resides; therefore, any higher level court established by federal statute has neither statutory nor inherent power to interfere with the case flow and day-to-day work of a lower Provincial Court. In total, the Canadian court system is more complex, while the Chinese court system is more streamlined, simplified and uniform.

Section 2: Comparison of Parties in Power and Its Relation to Court Systems

Part 1: Party-State of China

The People's Republic of China is a country of many political parties: communist and non-communist. However, the Communist Party of China (CPC) is the sole party in power. It has no opposition party in government and congress. As the ruling party, the CPC is not elected; nor is the CPC subject to a vote of no-confidence.¹⁵ In China, there is no contested multi-party election for forming the government; rather, the CPC's pervasive authority has already been fixed in the Constitution.¹⁶ The other eight non-communist parties are neither parties out of office, nor opposition parties, but friendly parties that are closely aligned with the ruling regime under its supervision and leadership. The CPC cooperates with these parties through a special conference, called the "Chinese People's Political Consultative Conference" (C.P.P.C.C.) led by the Chinese government, rather than through elections.¹⁷ Nevertheless, the effect of the other parties on the government remains minimal. As an advisory body to the CPC without real power, the C.P.P.C.C is quite symbolic.¹⁸

Basically, any Chinese citizen at eighteen years of age is entitled to apply for membership in the CPC.¹⁹ Now with around 62 million members,²⁰ the CPC is a unified entity organized by central and local party congresses and committees at different levels. The highest leading body of the CPC is the national party congress, held once every five years, and the party's central committee elected at the national party congress. The leading bodies of local party organizations are the party congresses at their respective levels and the party committees elected by them.²¹

The CPC's domination over mainland China is full scale: politically, economically, ideologically, militarily and organizationally. Any form of social activities in China, including legislation, law enforcement, governmental operation, foreign

relations, education, armed forces and mass media, are under the leadership and supervision of the CPC. It is not an exaggeration to address China as a “party-state”.²²

First of all, the key function of setting governmental policy in China since 1949 lies outside the government entirely and is monopolized by the Communist Party. The government must carry out the critical decisions made by the CPC.²³ Almost all of the key party leaders also occupy senior positions in the government, and non-party members in senior leadership positions are still less than 10%.²⁴ Moreover, all officials must work within the constraint of a single party system. In that sense, the civil service is far from the politically neutral civil services of other states.²⁵ Chinese government has always been subordinate to the centralized control of CPC.

Secondly, the party has the power of appointment, since at each governmental level appointments are the responsibility of the Party organization from the level just above.²⁶ For example, provincial officials are appointed by the central Party organizations; provincial Party organizations, in turn, appoint officials at the county and city levels.²⁷ The key appointments are subject to Party approval too, including central-level approval of the chairman, vice-chairman, and members of the Standing Committee of the NPC, the president and vice-president of the Supreme People’s Court, the presidents of provincial-level High People’s Courts as well as their counterparts in the High People’s Procuracy.²⁸

Thirdly, the CPC has created an organizational structure operating in parallel to that of the governmental bureaucracy so that Party members oversee the work of bureaucrats at every level.²⁹ In other words, the governing structure of the PRC consists of two systems: the Communist Party and the state government. This dual system of

control creates a parallel structure of party organizations at each level of government.³⁰ People's Congresses, local governments, administrative agencies, and the courts are responsible horizontally to Party Committees and vertically to their superiors in the relevant hierarchy.³¹ The performance of officials appointed by the Party is then monitored by Party organizations.³² In Mao's era, Party organizations even expanded to various walks of life in the country. Almost all the state-owned schools, companies, factories and armed forces have an organization or branch of the CPC. In the last 25 years, the Party groups have progressively retreated from the non-governmental entities, but continue to exist within the government, courts, procuracy and troops.

The Party's political authority has been progressively undermined over the last thirty years. Allegations of their leaders' corruption and their policies' irrationality have created uncertainty and distrust in their people, as the Party has failed to put forward a new vision for China's future.³³ Also, economic reforms have resulted in undeniable decentralization and fragmentation of authority.³⁴ The last twenty years have witnessed a growing separation of the Party and State in practice; and retreat of the party has resulted in the transfer of power from the Party both to the State and to society.³⁵ However, this retreat is by no means complete. Neither the Party nor the State is in danger of withering away any time soon.³⁶ In a bid to shift towards political liberalization, contested elections are now being held at the village level and legislatures have shown some assertiveness from time to time.³⁷ However, the Party retains effective control over governmental appointments and takes appropriate measures against groups and individuals who threaten its control and stability.³⁸ Working in this highly politicized structure, in which

the Party holds powerful leadership, Chinese courts can often have little political neutrality and judicial independence.

First of all, courts remain subject to the dual leadership system, like any other state entity.³⁹ As discussed above, courts are subject to the Party Committee and other Party organizations at the same level, as well as to supervision by higher-level courts. Like any governmental office, a court official must be subject to the single party system and many judges are also Party members. The Party influences the courts externally through its Party Committee and the Organization Department, and internally through the Party Group which is composed of all the party members of the court.⁴⁰ In the Mao era, the Party reviewed any judge's individual case decisions as a matter of course. Today, the Party rarely becomes involved in determining the outcomes of specific cases; however, it is actively involved in judicial appointments and promotions.⁴¹ According to the *Judges Act*, the People's Congress at each level elects the president of the court. The president then nominates the vice-presidents, members of the adjudicative committees, division chiefs, and vice-chiefs. In reality, however, all appointments must be approved or vetoed by the Party Organization Department.⁴²

Secondly, under the influence of the Party, the Chinese judiciary plays an active role in transmitting and promoting Party policies and ideologies. On the one hand, the Party constantly conducts educational programs to ensure conformity to Party ideology. On the other hand, from time to time, the Party may initiate such campaigns like "crack down on crime" or "anti-corruption" and require the courts to consider their underlying macro-policies when handling certain types of cases.⁴³ In response to these policies or ideologies, as announced by the Party and government, the Supreme People's Court will

issue policy statements or guidelines to the lower courts for reference.⁴⁴ Such campaigns are not necessarily inconsistent with the rule of law.⁴⁵ However, in China, Party organizations often get carried away in their efforts to carry out their objectives, like a crackdown on crime, rooting out corruption, promoting economics and putting pressure on the courts to meet quotas. Consequently, judges may feel that they are being urged to deny the accused their rights, or at least that professional judgment is being sacrificed to satisfy political objectives.⁴⁶

Thirdly, because many judges wear two hats, they have to adhere and consider the Party's position on important cases that involve issues of the Party-State, although their professional ethics would expect them to identify more with their court positions than their party affiliations.⁴⁷ In some cases, particularly individuals suing the administrative government, judges voluntarily take into account the substantive normative principles set by state leaders, such as upholding the four cardinal principles⁴⁸ and ensuring economic growth and social stability. The Party-State definitely requires the Chinese legal system to emphasize more the law's role in serving the interests of the State and ensuring social stability and somewhat less the law's role in protecting individual rights.

Part 2: Separation of Party and State in Canada

Unlike China's centralized one-party system, Canada has a multi-party system at both its federal and provincial levels of government. At the federal level, over a long period of time, the Canadian party system has been dominated by the Liberal and Conservative parties, with the New Democratic Party as a perpetual third party.⁴⁹ However, this traditional "two-plus-one" brokerage-style party system broke down after the 1993 general election.⁵⁰ In that election, the entry and electoral success of two new

parties, the Reform Party and Bloc Quebecois, transformed the Canadian party system into a multiparty system.⁵¹ Each of the ten provinces in Canada has its own distinct party system too. Some provincial parties are similar in name and affiliation to the federal parties. In Nova Scotia and Prince Edward Island, for example, most electoral races are contested by just the Liberal and Conservative parties. In other provinces though, parties that have little success on a national level have greater provincial power. This was the case in Alberta where the Social Credit Party, which never received more than twelve percent of the popular vote in a national election, was in control of the government for thirty-six consecutive years.⁵²

The most important characteristic of the Canadian party system is that it is a competitive party system. Some parties achieve great success and others are always in the opposition, but none ever monopolizes power in the way that the CPC does in China. Canada has a parliamentary form of government, in which political parties win power based upon the result of a general election held at least once every five years.⁵³ The party that wins the largest number of seats in a general election ordinarily forms the Government.⁵⁴ The government is held accountable to the voters. It can only remain in office as long as it has the support of a majority of members in the House of Commons.⁵⁵

The party with the second largest number of votes becomes the "Official Opposition".⁵⁶ The opposition party is entitled to many privileges, such as participating in parliamentary committees which can influence governmental policy, challenging the government's policies and proposals, having offices and secretaries paid for by taxpayers, and so on. Other political parties or voluntary associations are free to vote with the governmental party or with the opposition at any time. With many parties in an election,

however, sometimes it is difficult for one party to win a majority. In this case, the party with the most seats can form a minority government or (together with one or more opposition parties or independent members) a coalition government, with the approval of the Governor-General,⁵⁷ who is the Queen's official agent in what remains in Canada of symbolic membership under the British monarchy.

In this competitive multi-party system, no Canadian political party is as powerful as the CPC in China, in terms of comprehensive control over all the country. Unlike China, Canada is a country with the separation of parties and state. The co-existence and competition of multi-parties presupposes the checks and balances of each other.

First of all, in Canada, any party is subject to the vote of a general election. The ruling status of a party for a fixed term is won by election, not named in the constitution. Canadians can decide which candidate to vote for, based on which party they wish to form the government.⁵⁸

Secondly, the governmental party's proposals and policies are open to a wide range of challenges. In Canada, an opposition party is not one of a coalition of parties forming the government. The role of an opposition party is to oppose the government by criticizing governmental policies, suggesting alternatives and keeping the public informed about issues relating to governmental administration. One rule of politics in Canada is the principle that there should be ample time provided in the House of Commons for the Opposition to criticize governmental policy. No matter how urgent the governmental policy may seem at the time, the Opposition is always guaranteed at least some opportunity to debate any issue. Although the constitution does not specify exactly how much time, even in the case where government has the power to limit debate, the

Opposition must still be given a substantial opportunity to make its views known in Parliament.⁵⁹ Further, the cabinet formed by the governing party could even be defeated in the House of Commons on a motion of censure or want of confidence. Under this circumstance, the Cabinet must either resign (the Governor-General can then ask the Leader of the Opposition to form a new Cabinet), or ask for a dissolution of Parliament and a fresh election.⁶⁰

Thirdly, the governing party and government itself is separated, even though the Cabinet (Prime Minister and other ministers) are composed of the Party members. Under the cabinet, the other civil servants do not necessarily have Party affiliation. Nor are the Party leaders necessarily the head of any governmental office. The governing party's policy or platform does not necessarily affect any other individual or entity outside the party, unless it is passed by the scrutiny of parliament and proclaimed as part of the law.

Working in the current structure under which the Party and State is separated, Canadian courts are independent of any political party and considerably neutral in partisan politics. This independence and neutrality can be largely ascribed to the Canadian system of selecting and screening judges. On the one hand, no Canadian judge is elected, or must run for re-election.⁶¹ No Canadian judge has appointment subject to confirmation votes by a majority of elected politicians. Thus, Canadian judges can freely ground their decision-making in their own values, priorities and understanding of the law, rather than in one party's philosophy. On the other hand, the involvement of judicial councils and nominating commissions in the selection and screening of potential judges has substantially reduced political patronage in the judicial appointment process.⁶² Under the *Constitution Act* of 1867, the prerogative for federal judicial appointments rests with

the Minister of Justice of Canada. However, since 1994, the Minister of Justice publicly undertakes not to appoint any person who has not been recommended by a provincial committee.⁶³ This practice, of course, to a great extent shifts the power of selecting and screening judges from the government to the more professionalized committees, though the politicians who control judicial appointments always tend to be interested in the policy orientation of the persons they appoint. But this political constraint does not mean compromising the standards of competence, or seeking signed pledges, or making furtive calls on important cases. In Canada, political attacks on judges and their courts, by politicians or by the media, are generally regarded as improper attempts to influence the process of impartial adjudication.⁶⁴

Part 3: Contrast

Embedded within such a “Socialist Party-State”, China’s judiciary is weak and dependant on the Party. No court of law has ability to impose meaningful restraints on the state and on powerful individual members of the ruling elite, especially senior Party leaders. For instance, when it comes to cases involving senior Party members and top governmental officials, the practice is still to remove it from the courts and to rely on a Party discipline committee to curb corruption.⁶⁵ During the last twenty years, although Party control of the State has weakened, the institutional ties between the Party and State remain in place.⁶⁶ While Party leaders have acknowledged the need for the rule of law and to rebuild the legal system, they are reluctant to unleash political and legal reforms that threaten the survivability and supremacy of the Party. On the one hand, the Party remains hostile to genuine democracy defined by multi-party elections at all levels of government.⁶⁷ It continues to arrest dissidents, impose limits on the press or to tighten

control on associations or unions. On the other hand, it does not give priority to the supremacy of law over the leading role of the Party.⁶⁸ Though a number of provisions in the 1982 Constitution declare the subservience of the Communist Party to the laws of the state,⁶⁹ and the independence of the judiciary from any interference,⁷⁰ it also incorporates another provision like "the Party must see to it that the legislative, judicial and administrative institutions of the State and the economic, cultural and people's organizations work actively and with initiative, independence, responsibility and in harmony."⁷¹ These provisions plant a contradiction. If the Party is subject to the state's laws, it cannot legitimately supervise the State as a lawmaking body. Official Party pronouncements such as these reflect an ambivalent attitude towards the rule of law. When contradictions between Party policy and law exist, it is not clear whether such contradictions will be resolved by following the Party policy, the law, or handling them on a case-by-case basis.⁷²

By contrast, Canada's separation of Party and State ensures the supremacy of law and the independence of any court from political interference. In Canada, everyone is subject to the law. No one, no matter how important or powerful, is above the law: not the government, its Prime Minister, or any other minister; not the Queen or Governor General or any lieutenant-governor; not the most powerful bureaucrat; not the armed forces; not Parliament itself, or any provincial legislature.⁷³ In addition, the judiciary is clearly distinguished and insulated from any direct responsibility to either the political party or the other branches of government. In Canada today, judges are protected from arbitrary whims of politicians.⁷⁴ Judges of the highest courts (the Supreme Court of Canada and the Federal Court) and also the most important provincial courts (the

Superior Court of Quebec, the highest courts of the other provinces, and the provincial courts of appeal) are removable only by an address to the Governor General by both houses of Parliament.⁷⁵ Supremacy of law and the independent judiciary is the most important constitutional constraint upon the assumption and exercise of power by a political party, especially the executive government they form. According to Section 15 of the *Canadian Charter of Rights and Freedoms, 1982*, every individual is equal before and under the law. This means that the normative content of legal rules is to be applied without discrimination and without exception in relation to race, religion, sex, social class, political connections or convictions, wealth or ethnic origin. All similar cases should be treated similarly.

Section 3: Comparison of “Checks and Balances” Regarding Court Systems

Part 1: China’s Institutional Framework

In accordance with articles 57 & 58 of the *Constitution Act, 1982*, the political system of China creates and organizes the government with the legislature, the National People’s Congress (NPC), as the supreme source of state authority.⁷⁶ The functions and powers exercised by the NPC and its Standing Committee are wide open, including making laws, appointing governmental officials, approving budgets, deciding wars and examining work reports of other arms of government, and so on.⁷⁷ There are three primary institutional branches created under the NPC, to administer the central government: the State Council (which through its ministries acts in an executive capacity), the Supreme People’s Procuracy (which acts as prosecutor and supervisor of the law), and the Supreme People’s Court. All these institutions are responsible to the NPC and

operate under its supervision.⁷⁸ Although each is ranked equally, in fact the leader of the State Council is ranked one level above the President of the Court and Attorney General, who are bureaucratically ranked equivalent to a vice premier.⁷⁹

On the local level, the political structure of any territorial unit, like provinces, prefectures and cities, is the same as that of the center. A local People's Congress is the legitimate source of governing authority and enjoys nominal supremacy: government, court and procuracy at each corresponding level are created under it and supposed to report to its supervision.⁸⁰

(A) Legislative Authority and the Judiciary

Though the National People's Congress and its Standing Committee is the major legislature, legislative authority in China is widely dispersed. The NPC is big and unwieldy. With some 3,000 delegates,⁸¹ it only meets in session once in a year,⁸² usually in March for two weeks to a month. Therefore, there is no way it can meet all of the needs throughout the year for regulations created by economic reforms.⁸³ In fact, the NPC has to delegate part of its authority to the Supreme People's Court, the Supreme People's Procuracy, the State Council and its subordinate ministries and agencies for making and interpreting many regulations.⁸⁴ Excessive dispersion of law-making authority is a problem in China. While other countries also provide their executives with inherent rule-making authority, in China too many entities have been given expansive and vaguely defined rule-making authority. As a result, the quality of much legislation remains low. Many laws and regulations are poorly drafted, due partly to the lack of practical experience and low level of competence of the drafters, especially at local levels.⁸⁵ Perhaps more worrisome, however, is the astounding high level of inconsistency

between low level and higher level legislation and the lack of effective channels to sort out conflicts and then rectify the problem.⁸⁶

As mentioned before, NPC is not only the legislature, but also the highest institution of state power. The other institutions, like the judiciary, the procuracy and the executive are all held accountable to the external check from the People's Congress. On the other hand, however, having expansive power on written paper does not necessarily mean the supreme authority in real life. Actually, the NPC has been regarded as a rubber stamp for a long time. From Mao's era until very recently, every proposal initiated by the Party and drafted by the executive branch has received nearly unanimous approval by the three-thousand-odd delegates to the NPC at their annual meeting in March.⁸⁷ The NPC has now grown increasingly assertive. The delegates to the NPC have taken to speaking out during NPC meetings; and, at their 1995 session, up to a third of them cast negative votes, once an unheard-of act of defiance, against governmental measures and candidates they found unacceptable.⁸⁸ Plus, the outcome of the legislative process is increasingly determined by factors other than the dictates of the CPC.⁸⁹ While People's Congresses have begun to shed their rubber-stamp image, they are still relatively weak. On the one hand, a congress does not have routine oversight and comprehensive budgetary control over the work of the executive, judicial and prosecutorial branch of the government. On the other hand, while the NPC has gained increased authority and independence, the imperative of Party control has remained ever present.⁹⁰

First, the NPC itself does not function effectively. This could be elaborated from two dimensions. Number 1: Because of the nature of the electoral process, People's Congresses do not enjoy the legitimacy and stature that legislatures in other countries

do.⁹¹ Delegates to the NPC are elected to a five-year term, but not directly by the constituents whom they represent. The process is indirect: delegates to people's congresses at the city or county level are directly elected by constituents; and, in addition to these, congress delegates are selected to represent local organizations and interest groups; these local congresses elect delegates to provincial congresses; and delegates to the NPC are elected by these provincial congresses or by national organizations and interest groups.⁹² However, elections to the People's Congress are not fully democratic affairs. Many "honorary" deputies are appointed, and the selection of Party-approved candidates is frequently a foregone conclusion, regardless of nominal opposition for the candidate roles.⁹³ Number 2: the ability of a People's Congress to rein in governmental and administrative agencies is undercut by their low level of commitment and professionalism. Most NPC delegates hold other posts. As a consequence, many delegates are pre-occupied with other matters. Requiring delegates to devote themselves full-time to their legislative duties could improve the quality and stature of the NPC, though there are no signs that such a change is forthcoming any time soon.⁹⁴

Secondly, the NPC never loses its subservience to Party power, though it has, recently, begun to act vigorously as a balance in legislative debates, as contending institutions and individuals have engaged in bargaining in order to ensure favorable legislative outcomes.⁹⁵ The Party's impact on legislative bodies firstly occurs on the ideological front, with its policies being transformed into laws and regulations to be legally binding. Legislation, as an instrument for policy generally, must reflect the goals and priorities of the Party and State. In fact, legislation has been seen as proceeding necessarily from assessments about national conditions, which remain subject to

determination and assessment by the Party-State.⁹⁶ Today, even though the Party's role in determining the law reform agenda is considerably diminished, it still controls various mechanisms for influencing the legislative process. These means include pre-approval of the legislative agenda, pressure on legislative leaders to push bills forward, and the review of drafts of laws.⁹⁷ The most important means of CPC control, however, remain the *nomenklatura* system of appointments.⁹⁸ Although people's congresses formally have the power to make election, appointment and removal to important positions in the government, judiciary, procuracy and military,⁹⁹ real authority lies with the Party. For example, the Henan Provincial People's Congress approved all but 6 out of 548 nominees for government posts between 1986 and 1993. Since 1993, only 1 of 684 has been rejected.¹⁰⁰

Thirdly, as a result of its own subservience to the Party, a People's Congress does not exercise its checking function effectively. Legislative supervision of the administration, judiciary and procuracy takes a variety of forms, including hearing and reviewing or approving work reports, controlling the budget of administrative agencies, making appointment and removal decisions, monitoring law enforcement, issuing interpretations of legislation, and legislative review of local governmental rules for consistency with higher-level legislation.¹⁰¹ While all of these means are potentially useful, they all have inherent limitations.¹⁰² For instance, hearing and approving work reports allows the legislature to express dissatisfaction with the executive, judiciary and procuracy. In some cases, criticisms by the NPC and local congresses have resulted in actual changes in practice.¹⁰³ However, a People's Congress only hears a relatively small number of work reports in a year,¹⁰⁴ and their power to effect change is limited largely to

moral censure.¹⁰⁵ In a way, a congress's capacity of examination and approval reduces itself to only learning about governmental policies and work reports. Similarly, the NPC has the authority to approve and supervise the budgets of executive offices, military troops, courts and procuracy, but more than half of administrative spending in China is off budget.¹⁰⁶ And while potentially useful, China has not made much use of oversight committees to date, though some provinces have been more aggressive than others.¹⁰⁷

So far, people's congresses are relatively weak, so they have not had much influence on courts. The NPC may exercise influence over the judiciary through its role in the appointment and approval process, but real power lies with the Party.¹⁰⁸ A People's Congress may also conduct studies of the implementation of major laws,¹⁰⁹ as well as address inquiries to the courts regarding general issues;¹¹⁰ however, they seldom do it.¹¹¹ Much more common, and controversial, is their role in supervising individual cases.¹¹² On the one hand, people's congress can supervise the outcome of specific cases by making inquiries or suggestions, upon "petition or visit" of concerned parties or request of an NPC representative; on the other hand, however, there are no sufficient procedural safeguards.¹¹³ Out of concern for a People's Congress's interference into specific cases under the guise of supervision, particularly in the absence of sufficient procedural safeguards, some scholars propose that legislative supervision should be subject to limits;¹¹⁴ for instance, the scope of investigations should be restricted to the legality of the decision (as opposed to its appropriateness) or perhaps even the narrow issue of whether the court's decision was negligent or due to corruption.

(B) Executive Authority and the Judiciary

The executive branch of Chinese governance is headed by a State Council, or cabinet, whose members are the heads of the ten commissions and thirty-one ministries that make up the 4.5 million-strong central bureaucracy.¹¹⁵ Ministries, commissions, the People's Bank of China and administrations are departments that make up the State Council. Under the unified leadership of the State Council, they are in charge of directing and administering the administrative affairs in their respective areas and exercise prescribed state administrative powers. The focus of most ministries and commissions is the economy, its reform, and its relations with the world economy, *e.g.*, the case of Ministry of Finance and State Planning Commission.¹¹⁶ There are, in addition, ministries devoted to non-economic functions, such as public health, justice and foreign affairs.

Centralization is the primary feature of the administrative system in China. On the one hand, the State Council exercises unified leadership over local executive governments at various levels throughout the country, regulating the specific division of power and function of the local governments and even annulling inappropriate decisions and orders of local governments.¹¹⁷ Each ministry or commission of the State Council stands at the top of a system of bureaus and offices located in provincial capitals and county seats.¹¹⁸ On the other hand, local people's governments at various levels are responsible and report on their work to the administrative government at the next higher level.¹¹⁹

All local governments throughout the country must be subordinate to the State Council; however, this does not necessarily mean that the State Council can exercise its unified leadership effectively. The smooth operation of these vertical systems is complicated by the fact that bureaus and offices of central ministries and commissions

report not only to them, but also to the local government of which they form a part.¹²⁰ Over the past few years, provincial and local governments have become more assertive in advancing their interests, while often at odds with central rules or policies. The Shanghai education bureau, for example, reports both to the Shanghai municipal governments and to the State Education Commission: its staff appointments are made by the latter, but its budget is set by the former. When push comes to shove, the interests of the local government often take precedence over those of the central ministry or commission.¹²¹ Indeed, the tensions between central and local governments have even caused the problem of local protectionism. The economic market in China remains segregated; provincial governments tend to impose barriers to the inward trade of goods and services from other regions in order to protect their own localized industries, in order to maximize their tax revenues.¹²² Due to the supremacy of local interests, this has bred inconsistency in law enforcement. This is especially true when a local court is faced with enforcing a judgment against a local party, and the court may delay the enforcement when it involves a case with a court from a different jurisdiction. Believe it or not, enforcement of civil judgments and arbitral awards is notoriously difficult in China, with as many as fifty percent of judgments and awards going unenforced.¹²³ Why? Because the local-level government is subject to protectionist sentiment. With funding and other resources beholden to local governments, courts are likely to have a greater interest in local companies.

Under the Constitution, People's Congresses could hold State Council and local executive governments in check.¹²⁴ In reality, the executive is, however, the most powerful institution. On the one hand, administrative officials have too much discretion

and resources. Due to a lot of factors like incompetent legislators (low level of professionalism, commitment and infrequent gathering), poorly-drafted or impractical existing laws, rapidly changing economics, widespread variations in local conditions, administrative officials in China must be afforded considerable discretion with respect to rule-making.¹²⁵ As a result, more laws and regulations are passed by the State Council than those passed by the National People's Congress. Low-level administrative agencies can also issue rules and normative documents. However, this regulatory power is easily abused. Administrative agencies frequently get involved in commercial activities, using their regulatory power to benefit the company in which they have an interest.¹²⁶ This incomplete separation of government and enterprises can contribute to widespread predatory behavior by local governments and the growth of clientelism.¹²⁷ In the absence of clearly defined property rights and a court system capable of enforcing them, private, collective, and state-owned firms have sought to cultivate relations with the government.¹²⁸ Plus, the government controls key resources such as access to technology and loans, is responsible for a variety of approvals that are required to do business, and may at times be in a better position to broker a settlement or enforce contractual obligations than any law court or other public institution.¹²⁹ On the other hand, PRC mechanisms for reining in the bureaucracy are relatively weak.¹³⁰ First, as discussed more fully in the previous section, legislative supervision of the administration has inherent limitations. Secondly, courts cannot always protect the rights and freedoms of individuals against administrative over-reaching.¹³¹ Thirdly, as for the Party supervision, it does have the advantage of being able to reach high-level officials, provided the CPC approves.

However, the party has not been aggressive in investigating and punishing its own members, notwithstanding its get-tough rhetoric produced for public consumption.¹³²

Courts and congresses are often unable to hold the government in check, but governmental officials are able to interfere with specific cases, pressuring judges to find in favor of the executive in administrative litigation cases or of local companies in commercial disputes.¹³³ Why? Because the independence of the courts is undermined by the way in which courts are funded. Courts in China are largely financed by executive governments at the same level. Thus, local courts have to rely on local governments for such basic necessities as the cost of court buildings, computers, and other equipment, as well as the housing, salaries, bonuses, medical insurance, and other welfare benefits of judges and staff.¹³⁴ Indeed, interference from governmental officials is one of the most common forms of external interference and a much more serious threat to the independence of the courts in the vast majority of cases, particularly administrative and commercial cases, than the Party. According to a survey of 280 judges published in 1993, while almost 70% of the judges claimed that as a rule they were subject to outside interference, they cited the CPC as the source in only 8% of the cases. In contrast, governmental agencies were the source of interference in 26% of the cases and social contacts in 29%.¹³⁵

(C) Prosecutorial Authority and the Judiciary

As mentioned before, under the Constitution, the People's Procuracy, together with courts and administrative governments at various levels, are the three major governmental branches responsible to the People's Congress at various levels. Hence although much of the work of the procuracy in China is equivalent to that of the

governmental department responsible for prosecution of criminal offenses in many countries, the constitutional status of the Chinese procuracy is at least in legal theory higher than their counterparts in these countries.¹³⁶ Actually, the People's Procuracies in China have no direct analog in a common law regime. They are more than prosecution offices; they are also the legal supervisory institutions of the State.¹³⁷ In these capacities, Chinese procurators are empowered to perform a wide range of legal functions, including approving arrests, launching prosecutions, supervising the work of the courts and general legality of the activities of the police, detention centres and the labor reform (prison) authorities.¹³⁸

In the relationship between the procuracy and judiciary, the procuracy is designed to act as "a watchdog" of the court.¹³⁹ Ever since the Chinese Communist Party rose to power in 1949, China has transplanted from Russia the Soviet institutional arrangement whereby the Procuracy plays a supervisory role in the legal system. After half a century's codification and delineation,¹⁴⁰ the supervisory power of the People's Procuracy has become fairly broad, especially in criminal proceedings; while acting in its capacity as both supervisor and procurator, the Procuracy is in charge of investigation, prosecution and supervision. On the one hand, it can supervise activities of the police, courts, detention centers and prisons, *e.g.*, investigating claims of extortion or confession by torture or other illegal means, reviewing the legality of the composition of an adjudicating panel, the fairness of proceedings in a trial, as well as decisions regarding arrest, bail and other pretrial or post-verdict motions.¹⁴¹ On the other hand, it can extend its supervision to the non-state participants of the judicial proceeding, including

defendants, witnesses, and legal counsels. Activities subject to supervision include fabrication, concealment and destruction of evidence.¹⁴²

In sum, the theory of prosecutorial involvement in supervision, at least partially, is to monitor and maintain the quality of law and law enforcement and to ensure compliance with government and Party directives in that responsibility.¹⁴³ However, this prosecutorial supervisory power has exacerbated the tension between the procuracy and the courts, and undermined the independence and authority of the judiciary.¹⁴⁴

First, the Procuracy exercises “supervision over the judicial activities of the people’s courts to determine whether they conform to the law.”¹⁴⁵ In criminal cases, the procurators appear before the court as a party to settle a dispute. They must adhere and follow the rules and orders of the court. But on the other hand, they have conflicting roles: they can act as the courtroom’s supervisor and also be a plaintiff in the lawsuit. Due to this conflict of interest, the Procuracy and the court often clash over which is supervisor, with each striving to protect its turf. Why? Because the Procuracy’s supervisory role in a litigation proceeding can challenge the court’s authority to command respect in the courtroom. Actually, procurators have been accused of failing to cooperate with judges in trials by not appearing when they are supposed to or not turning over evidence or documents as requested.¹⁴⁶

Secondly, the Procuracy may supervise the outcome of individual cases by challenging final court decisions, even after the normal appeal process has been completed. In other words, procurates may petition to have criminal, civil and administrative litigations reconsidered.¹⁴⁷ Until recently, prosecutorial petitions were relatively uncommon, particularly in civil matters. In light of the new emphasis on

supervision, however, the Procuracy is apparently taking its responsibility more seriously and regularly challenging court decisions, even in civil cases.¹⁴⁸ In 1998, procuracies all across China handled 131,859 petitions for adjudicative supervision in civil cases, examining 54,492 of them and lodging protests against the court's decision in 11,925 cases, while offering suggestions in 8,082 cases.¹⁴⁹ In 1999, procuracies protested court judgments in 14,069 cases, out of a total of over 5.5 million. Courts ended up revising the judgment in 3,185 cases, while upholding the judgment in 3,751 cases.¹⁵⁰ Such zeal on the part of the Procuracy threatens to undermine further the independence and the authority of the courts, and again raises the issue of who will supervise the supervisors?¹⁵¹ In my view, the Procuracy's right to supervise the courts by challenging specific case decisions outside the normal appeal process should be eliminated. Why? Because the authority of a trial judgment is undermined by this system in which the judgments are still held in challenge, even after becoming legally effective. Plus, re-trying a case in effect can fail the procedural law about case closure and make cases drag on for years.

(D) Judicial Authority in the Government

Within the PRC governmental structure, the judiciary remains weak, especially when compared to the powerful Party and executive, despite considerable progress in judicial reform recently, such as the creation of a broad legal framework, the growing activity of the courts, the promotion of legal professionalism, increased transparency of judicial process and so on.¹⁵² On the one hand, courts have institutional dependence from executive government, the CPC and other institutions; on the other hand, the powers granted to courts are still limited.

Judicial dependence on other powers can be identified in four dimensions. First, the courts are administratively and institutionally accountable to the corresponding level of people's congresses that created them, as stated in Article 128 of the *Constitution Act*, 1982.¹⁵³ Secondly, courts are subject to the leadership of the Party, especially in judicial appointments and removals. Thirdly, the procuracy exercises supervision over the judiciary, in dual roles, while being subjected to the authority of the court as a prosecutor while overseeing the court's demeanor in conducting litigation processes and challenging the decisions the court makes in the cases.¹⁵⁴ Fourthly, due to financial dependence on the executive government, a court finds it hard to ignore or resist the pressure or interference from governmental officials.

A law court's limited authority can be understood in three ways. First, a Chinese court has no power to make law; even the Supreme People's Court's limited power to issue interpretations on existing law is confined to a small scope, which is called "pure judicial interpretation."¹⁵⁵ By contrast, administrative agencies are granted broad interpretive powers. In practice, PRC courts often have to refer or at least give considerable weight to regulations, rules and even normative documents issued by administrative agencies, because there is often no superior legislation on point coming from congresses.¹⁵⁶

Secondly, in China the power of deciding the validity of legislation is left to a People's Congress, and a court has no power to conduct "judicial review on constitutionality" and overrule legislation that it thinks conflicts with the constitution.¹⁵⁷ In this sense, a Chinese court does not go beyond a purely adjudicative role, not to mention holding the executive and the legislature in check.

Thirdly, courts do not have plenary powers of judicial review over administrative actions. Despite provisions supporting judicial review of administrative conduct, the *Administrative Procedure Law* contains a number of problematic provisions that dilute its effectiveness.¹⁵⁸ Number 1, Chinese courts may only review “concrete administrative actions” involving abuse of power, error in application of law and *ultra vires* activities (*i.e.*, actions in excess of their statutory rights). However, courts have no power to interpret or review administrative rules or regulations (so-called “abstract administrative actions”) or any exercise of administrative discretion.¹⁵⁹ In other words, the courts are barred from making a judgment on the logic of the administrative regulations. As a result, the court can overturn a decision made by an administrative agency only if the decision is in violation of the agency’s own rules; but the legality and interpretation of these rules remains at the discretion of the agency. Number 2, the *Administrative Procedure Law* limits the scope of challengeable administrative actions to infringement of personal or property rights but excludes other important rights, most notably political rights such as the rights to march and to demonstrate, freedom of association and assembly, and rights of free speech and free publication.¹⁶⁰ Number 3, the forms of remedy that a Chinese court can adopt to protect the injured party are few. According to the law, virtually the only available remedy is to initiate litigation to annul the administrative action or order a new action.¹⁶¹ Generally speaking, however, courts cannot substitute their own judgment for that of the administrative agencies.¹⁶²

Part 2: Canada’s Institutional Framework

Canada is a constitutional monarchy with a parliamentary-cabinet form of government. Defined originally by the *British North America Act* of 1867, Canada has a

government “similar in principle to that of the United Kingdom.”¹⁶³ This means, *prima facie*, that the supremacy of parliament is a substantive principle for the Canadian regime. There is no real separation of powers as in the American presidential-congressional regime;¹⁶⁴ rather, the legislative branch directly creates and controls the executive.¹⁶⁵ On the other hand, unlike England, there are some limitations on the supremacy of the Canadian parliament.¹⁶⁶ The most important one is judicial authority to conduct judicial review. Because the institutional structure of each provincial government is almost structurally identical to the federal government, only the branches of the federal government will be described in this thesis.

(A) Legislative Authority and the Judiciary

As a federal state, legislative powers in Canada divide between two levels of government, federal and provincial.¹⁶⁷ Federal legislative authority is vested in the Parliament of Canada, which is a bi-cameral institution: a lower house (the House of Commons) and upper house (the Senate). The lower house is designed to be closest to the people, based on relatively frequent popular elections.¹⁶⁸ The upper house is designed to check the power of popular passion and so is an appointed body.¹⁶⁹

The *British North America Act* of 1867 defined the powers of parliament and of the provincial legislatures. Parliament makes laws and controls the federal budget. The government, as the Prime Minister and the Cabinet are generally known, introduces budgets and most of the bills that become law. All budgets and bills must be approved by both Commons and the Senate and receive royal assent from the governor-general in order to become law.¹⁷⁰ According to the *BNA Act*, 1867, parliament also has exclusive federal power over taxation, national defense, citizenship, banking, criminal law, Indians

and Indian lands, trade and commerce, and fisheries.¹⁷¹ Section 92 of the *BNA Act* also lists sixteen specific areas of provincial responsibility, including education, hospital and municipal institutions. Besides these above-mentioned exclusive powers, Parliament shares jurisdiction with the provinces on issues such as immigration, agriculture and social policy. Provincial powers have grown, and there is a significant overlap and interlocking of activities between the federal and provincial governments in Canada.¹⁷²

Making law (passing legislation) is one of the major functions that Canadian parliament has. In addition to it, Parliament has a *system-maintenance function* that contributes to the working and legitimacy of other parts of the political system and the state itself.¹⁷³ One of parliament's duties is to maintain responsible government by holding the Prime Minister and Cabinet accountable to the people of Canada. In Canada, the Prime Minister and every other minister must by convention, though not by law, be a member of one house or the other, or get a seat in one House or the other within a short time after appointment.¹⁷⁴ All governmental bills must be introduced by a minister or someone speaking on his or her behalf, and ministers must appear in parliament to defend governmental bills, answer daily questions on governmental actions or policies, and rebut attacks on such actions or policies.¹⁷⁵ There are occasions during each parliamentary session when each opposition party is allowed to introduce motions of "no confidence" in the government. *MPs* (the abbreviation for a member of parliament in the Commons) can present such a motion in response to the Speech from the Throne, which outlines the government's legislative program. Members of Commons can also present a motion in response to the budget speech, which reviews the government's economic record, taxation, and expenditure plans, and to supply motions, which concern budgets for

individual departments.¹⁷⁶ As long as the government can keep the support of a majority in the House of Commons, it can pass any legislation it sees fit, unless an adverse majority in the Senate refuses to pass the bill (which rarely happens nowadays).¹⁷⁷ On the other hand, the House of Commons can withdraw its support by voting down a significant governmental proposal or by approving a specific motion of “no confidence” in the government. If a majority of MPs support a no-confidence motion, the government must either resign (*i.e.*, make way for a government of the opposite party) or call a fresh election (*i.e.*, seek a dissolution of Parliament to have the conflict resolved by an election). Therefore, the government and the House of Commons cannot be at odds for more than a few weeks at a time. If they differ on any matter of importance, then promptly there is either a new government or a new House of Commons.¹⁷⁸ The government can only remain in office as long as it has the support of a majority of the members of Commons.

On the one hand, Parliament can hold the Prime Minister and Cabinet accountable; on the other hand, however, Parliament and parliamentarians must respect the judicial process and judicial independence. Like parliamentary privilege, judicial independence is a principle of constitutional importance as well.¹⁷⁹ It implies that Parliament and parliamentarians cannot interfere with the process of judicial decision-making. Once the courts have rendered their decision, it may be perfectly legitimate for Parliament to discuss and criticize the decision and, if it sees fit, change the law. However, when a matter is before the courts – *sub judice* – Parliament and parliamentarians must refrain from seeking to influence in any way the courts’ decision.¹⁸⁰ Mutually, a law court cannot intervene in proceedings before Parliament either. Though a Canadian court has the

power to review the product of parliamentary decision-making, for example, how a particular law is to be interpreted or whether a particular law is constitutional, it cannot, however, review or oversee the process of parliamentary decision-making. In history, precedential decisions in common law have established inherent privileges enjoyed by Parliament collectively, for example, necessary immunity from civil proceedings with respect to matters arising from the duties of a member of the Parliament, freedom of speech, exclusive control over the parliamentary proceedings, the right to eject strangers from Parliament and the right to control the publication of debates.¹⁸¹

(B) Executive Authority and the Judiciary

Canada's constitutional heritage from Britain includes an executive with two parts. The formal executive, comprised of the Crown,¹⁸² Monarchy and Governor General, performs largely ceremonial functions. The political executive, comprised of the Prime Minister, ministries and cabinet, is concerned with leadership and the realities of power in contemporary Canadian politics.¹⁸³ A large network of committees and agencies supports the political executive in its work, such as the Treasury Board, Aboriginal Affairs Committee, domestic affairs committees, and so on.

Following the British tradition, governmental functions in Canada are carried out in the name of the Crown. The reigning Monarch, currently Queen Elizabeth II, is the personal embodiment of the Crown.¹⁸⁴ In Canada, most monarchical functions are performed in the Queen's name by her representatives, who are the Governor General at the national level and the Lieutenant Governors at the provincial level. The Queen and her representatives have prerogative authority,¹⁸⁵ including the use of the Great Seal of Canada, the appointment of judges, commissioners, diplomats, ministers of the crown,

along with the power to dismiss or suspend them, and the power to summon, prorogue and dissolve parliament.¹⁸⁶ In addition to these prerogative powers, there are certain other powers that are ceded to the Governor-General by the *BNA Act*. The Governor General has authority to appoint senators and the Speaker of the Senate, to recommend legislation involving the spending of public money or the imposition of a tax, prevent a bill from becoming law by withholding assent or by reserving the bill “for the signification of the Queen’s pleasure.”¹⁸⁷ By virtue of the *BNA Act* and the prerogatives, the Governor General is empowered with a great deal of executive authority; however, in reality almost all executive decisions are made by the Prime Minister and his cabinet, and are rubber-stamped by the Governor-General. Actually, in performing the Queen’s ‘dignified’ roles in Canada, the Governor General makes little practical input into the political process. In accordance with the principles of responsible government recognized at the core of the Canadian constitution by convention, the Governor General is bound to act on practically every piece of advice by His/Her ministers, except for the reserve powers which continue to be exercised without formal constitutional notice such as summoning, proroguing or dissolving the Parliament of Canada.¹⁸⁸

In real practice, the Prime Minister is the central figure in the executive branch of the Canadian federal government.¹⁸⁹ The Canadian Prime Minister provides leadership and direction to the government with the support of a cabinet, which is the key decision-making forum in Canadian government. As a council of ministers chaired by the Prime Minister, the cabinet has immense amounts of power in the Canadian system, *e.g.*, approving draft legislation, developing policy, managing the country’s finances, and so

on.¹⁹⁰ Below the Prime Minister and Cabinet, there are ministries consisting of both full ministers of the Crown and secretaries of state.¹⁹¹

The Prime Minister and the Cabinet are appointed by the Governor General. However, it does not necessarily mean that the Governor General has any discretion on appointments, or that he (she) can hold the Prime Minister and Cabinet in check through appointment. In fact, the source of power for the Prime Minister in Canada is as leader of a political party with the greatest number of seats in Commons.¹⁹² If the Opposition wins more than half the seats in an election, or if the government is defeated in the House of Commons and resigns, the Governor General must, obliged by convention, call on the leader of the Opposition to form a new government.¹⁹³ Similarly, though the Cabinet is normally appointed by the Governor General, it is in practice selected by the Prime Minister. He decides on the size of cabinet and selects cabinet ministers and assigns their departmental responsibilities and portfolios.¹⁹⁴

Because the executive power is gained by winning the election, therefore ministerial responsibility to the parliament is at the heart of the Canadian system. There are two parts to the doctrine of ministerial responsibility: collective and individual.¹⁹⁵ Collective ministerial responsibility requires the Prime Minister and the Cabinet to maintain the confidence and support of the House of Commons. As already discussed, Parliament can keep the Prime Minister and the Cabinet accountable by voting down a significant governmental proposal or by approving a specific motion of "no confidence" in the government. In addition to collective ministerial responsibility, each cabinet minister also has individual ministerial responsibility, or is obliged to answer for the performance of the department he or she leads. Ministers are expected to introduce and

defend new legislation regarding their portfolio within the House and answer questions on their job performance from the Opposition, for example, in the daily Question Period.¹⁹⁶ In theory, if a minister fails to explain adequately significant mistakes made by his or her department, Commons can force the minister to resign from the Cabinet. In practice, however, Commons no longer forces ministers to resign when unwanted developments take place in their departments. Instead, the Prime Minister decides the fate of such ministers and only demands that a minister resign if he or she is a liability to the government.¹⁹⁷

In the meanwhile, the actions of the executive government are subject to judicial review. Courts perform a “watchdog” role to ensure that the actions of the government are taken in accordance with the law, adjudicating claims between and against the executive and legislative officials, as well as claims against and between individuals. Especially after entrenchment of the *Charter*, judicial review of administrative action has developed dramatically. First, the fact that the Supreme Court of Canada is able to strike down government-made laws has made governments more careful in drafting legislation since 1982.¹⁹⁸ Secondly, especially in the field of administrative review, judicial decisions may hamper the execution of important governmental policies. Why? Because judicial review involves a “vindication of the legality of the administrative decision-making process”.¹⁹⁹

(C) Prosecutorial Authority and the Judiciary

In Canada the prosecutor’s office is set up within an executive council, which is called the Ministry (Department) of Justice. The Department of Justice has a wide range of responsibilities, including providing legal advice and drafting laws, superintending the

administration of justice, conducting prosecutions and so on. The Department helps the federal government to develop policy and to draft and reform laws as needed. At the same time, it acts as the government's law firm, providing legal advice, prosecuting cases under federal law, and representing the government of Canada in court.²⁰⁰ The Department's responsibilities reflect the double role of the Minister of Justice, who is also the Attorney General of Canada: while the Minister is concerned with questions of policy and their relation to the justice system, the Attorney General is the chief law officer of the Crown; while the Minister is concerned with criminal prosecutions, the Attorney General is the defense lawyer for the government in court.²⁰¹ An important part of the Crown's, and thus the Attorney General's, responsibility in conducting criminal prosecutions is associated with the duty to represent the public interest, which includes not only the community as a whole and the victim, but also the accused. This responsibility is to present the case fairly, not necessarily to convict.²⁰² Thus, the Attorney General's responsibility for individual criminal prosecutions must be undertaken, and seen to be undertaken, on strictly objective and legal criteria, free of any political considerations.²⁰³ In court, a Crown Attorney has the same status as a lawyer in private practice, because a fundamental concept of Canadian criminal law is "Whether to initiate or stay a criminal proceeding is not an issue of governmental policy".²⁰⁴ This responsibility has been characterized as a matter of the Attorney General acting as the Queen's Attorney, not as a Minister of the government of the day.²⁰⁵

(D) Judicial Authority in the Government

In Canada, courts and judges occupy a uniquely protected place within the system of government. They are not subject to interference by any governmental or

private forces in the making of decisions. Unlike the other two branches, the judiciary is not accountable to any electorate or government for its decisions. Instead, legislative and executive powers are brought under supervision of the judicial power.

First of all, Canadian courts have a wide range of authority to conduct judicial review of actions taken by a governmental body or by the parliament and provincial legislatures, for example, for constitutionality;²⁰⁶ and if they find that it is not in compliance with the Constitution, they can declare it to be unconstitutional.²⁰⁷ Actually, the power of judicial review is a longstanding tradition in Canada, and has recently been given textual recognition in the Constitution.²⁰⁸ In addition, since 1982, the *Charter of Rights and Freedoms* has greatly expanded powers in the judiciary. Under the *Charter*, the Supreme Court of Canada can overrule legislation and executive acts of government, not only on the ground that they violate the federal division of power, but also on the ground that they violate fundamental rights and freedoms of citizens.²⁰⁹ Courts have the power to review the decisions or actions of governmental officials, administrative boards or tribunals and even parliament itself.²¹⁰ They have the power to strike down that law, to overturn the executive action, or order a public official to act in a certain manner, if a court believes the law or action to be unconstitutional or to be contrary to law in a free and democratic society.

Secondly, the Canadian judiciary is insulated from any direct accountability to either of the other two branches. Though the parliament or executive government has certain powers of judicial appointment, promotion, removal and remuneration, there is the “judicial council” or “advisory committee” approach, which applies to all stages of the process including selection, screening, inquiry, investigation and voting; and this has

excluded or minimized the control of the legislature, government or party on those issues vital to the courts and judges. Plus, the rule of “judicial independence” has been grounded in laws and conventions. In Canada, the constitutional source of judicial independence flows from Sections 96 to 101 of the *BNA Act, 1867*. Section 99 states that superior court judges shall hold office during “good behavior” up to the age of seventy-five, implying that a judge cannot be dismissed for incompetence or laziness but only for a criminal offence.²¹¹ Section 99 also provides that a judge is removable only by the Governor General on a joint resolution by the Senate and the House of Commons. This means that the executive can remove a judge only at the request of both houses of the Canadian parliament; and the practice has evolved that even this is undertaken only after a judicial inquiry into the person’s alleged wrongdoings.²¹²

In 1971, the Canadian Judicial Council was created. This body, composed of the chief justices and the associate chief justices of all of the provincial superior courts, is chaired by the chief justice of the Supreme Court of Canada.²¹³ The role of the council is to investigate complaints about alleged judicial misconduct. If the council concludes that there has indeed been serious misconduct, it has the power to remove county and district court judges directly, and to recommend such action to parliament where the impugned judge is from a superior court.²¹⁴ In addition, the salary of a judge is set by statute, so that it is not possible for the judge to become involved in bargaining with the executive for salary increments, nor is it possible for the executive to pressure a judge by controlling the judge’s livelihood.²¹⁵

Part 3: Contrast

First, the substance of both Chinese and Canadian constitutions is fundamentally

concerned with three political problems corresponding to the three functional classifications of allocative outputs of the political system: legislative, executive, and adjudicative. In both China and Canada, the three output functions of government are performed not by one but by several sovereign governments. Under both the Chinese and the Canadian constitutions, the political branches of government are kept separate from the judicial branch. In China, in principle, a system of separation of powers, if not checks and balances, is in place. However, the constitutional relationships among these branches vary a great deal, between the Chinese political system and the Canadian. In China, there are no mutual checks among political entities. In theory, a People's Congress enjoys unchallengeable "congressional supremacy", which is, though, nominal. The executive, judiciary and procuracy are all held accountable to congress but the legislation passed by congress is beyond the check of any other institutions. In Canada, the legislature, executive and judicial can hold each other in check. Parliament has the power to pass a "no-confidence" motion and therefore force the government to resign. On the other hand, Prime Minister and cabinet can seek a dissolution of parliament to have the conflict resolved by a fresh election. And to some degree, both Parliament and its executive are held in check by the judiciary because a court is authorized to conduct "judicial review" of legislation and administrative actions.

Secondly, in Canada, legislative authority has a check system implemented. The internal check system audits the internal environment to prevent abuse. The Parliament is divided into two branches with different modes of membership and different principles of action; thus each is independent of one another.²¹⁶ By doing so, the legislature has a check within itself as well as making sure that provinces are represented proportionately

and equitably. By contrast, a People's Congress in China might not be the legislature in the sense that we use the term in the western political arena. Due to the absence of genuine adversarial elections at all but the lowest levels, Chinese citizens have few avenues for public participation in politics.

Thirdly, both in Canada and China, the executive branch is held accountable to the supervision of a parliament (congress). However, circumstances have enhanced the importance of executive functions. The increasing complexity of society, the exigencies of war, the control of domestic economies and international trading relationships, have all evoked the exercise of executive power to make speedy adjustments to regulatory regimes.²¹⁷ As a result, executive policy has become the primary objective for the government and its legislation, but it merely serves as an adjunct to the implementation of executive policy. The model of a powerful executive, responsible to but in substantial control of the parliament (congress), is familiar to both Canadians and Chinese. For example, in Canada, there is no fixed date for parliamentary elections. Instead, the Prime Minister usually determines when an election will be held. Thus, the Prime Minister can call for a general election any time within the five-year maximum life of each parliament. The Prime Minister can use this power to put opposition parties at a disadvantage, by choosing a time when the governmental party is most popular.²¹⁸ The Prime Minister can even stifle dissent in his or her own party, since the election of a new parliament dissolves the old one and MPs of all parties have to campaign to win re-election.²¹⁹ In China, legislative supervision of the administration and judiciary is actually weaker. For instance, under the Constitution, a People's Congress has the power to hear and approve work reports of administrative agencies, courts and the procuracy. However, the

People's Congress can only hear a relatively small number of work reports in a year, and their power to effect change is limited largely to moral censure. In a way, the Congress's power of examination and approval just becomes a learning process about governmental policies and work reports.

Fourthly, the authority of the judiciary varies a lot from Canada to China. In Canada, courts can hold legislative and executive officials in check by conducting judicial review. On the other hand, courts are insulated from any direct responsibility to either of the other two branches. Recently, the *Charter of Rights and Freedoms* has strengthened the courts by inviting, indeed compelling, them to assume a degree of political power, for example, dictating public policy.²²⁰ Actually, a public expectation is fostered that the courts, rather than the parliament, will be the ultimate protectors of the public good and of individual freedoms and interests. Why? Because the judicial check on executive and legislative powers provides reassurance that the coercive powers of the state are subject to lawful authority, impartially assessed.²²¹

By contrast, a Chinese court is more like an instrument of government aiming at applying existing law to particular cases.²²² On the one hand, a court has institutional dependence on the legislative, executive, the CPC and even the procuracy. On the other hand, the powers granted to courts are limited. Courts cannot make law by drawing out legal principles from cases, nor conduct constitutional review to declare acts of a People's Congress or regulations of the executive unconstitutional, or *ultra vires* and therefore void. Even its authority to review administrative actions is confined to a small range. As a result, within the Chinese regime, the stature of the judiciary and judges has been low and vulnerable. Courts cannot act as a check or a balance on the bureaucracy or

legislatures; rather, the congress, executive government and the Party hold it in check.

Fifthly, the stature of the Procuracy is different between Canada and China. In China, the Procuracy is not a department of the executive council. Instead, it is an institution directly under the NPC and parallel to court and executive governments. Unlike the Minister of Justice in Canada, the Chinese Procuracy does not have to counsel government to ensure the rule of law is maintained and that administrative actions are legally and constitutionally valid; nor does it help government departments to draft, develop, reform, and interpret laws. Though it is not the government's legal advisor, it is, however, both a prosecutor in the courtroom and supervisor of the same court. This constitutionally granted double-role leads the Procuracy sometimes to challenge a judge's authority in court and even tries to overturn a court's ruling after the normal appeal process has been completed. Unfortunately, the Procuracy's conflicting function as both supervisor and lawsuit participant has exacerbated the tension between the procuracy and the courts and undermined the independence and authority of the court.

CHAPTER TWO: COURT SYSTEMS IN CHINA AND CANADA

Section 1: Structure and Hierarchy

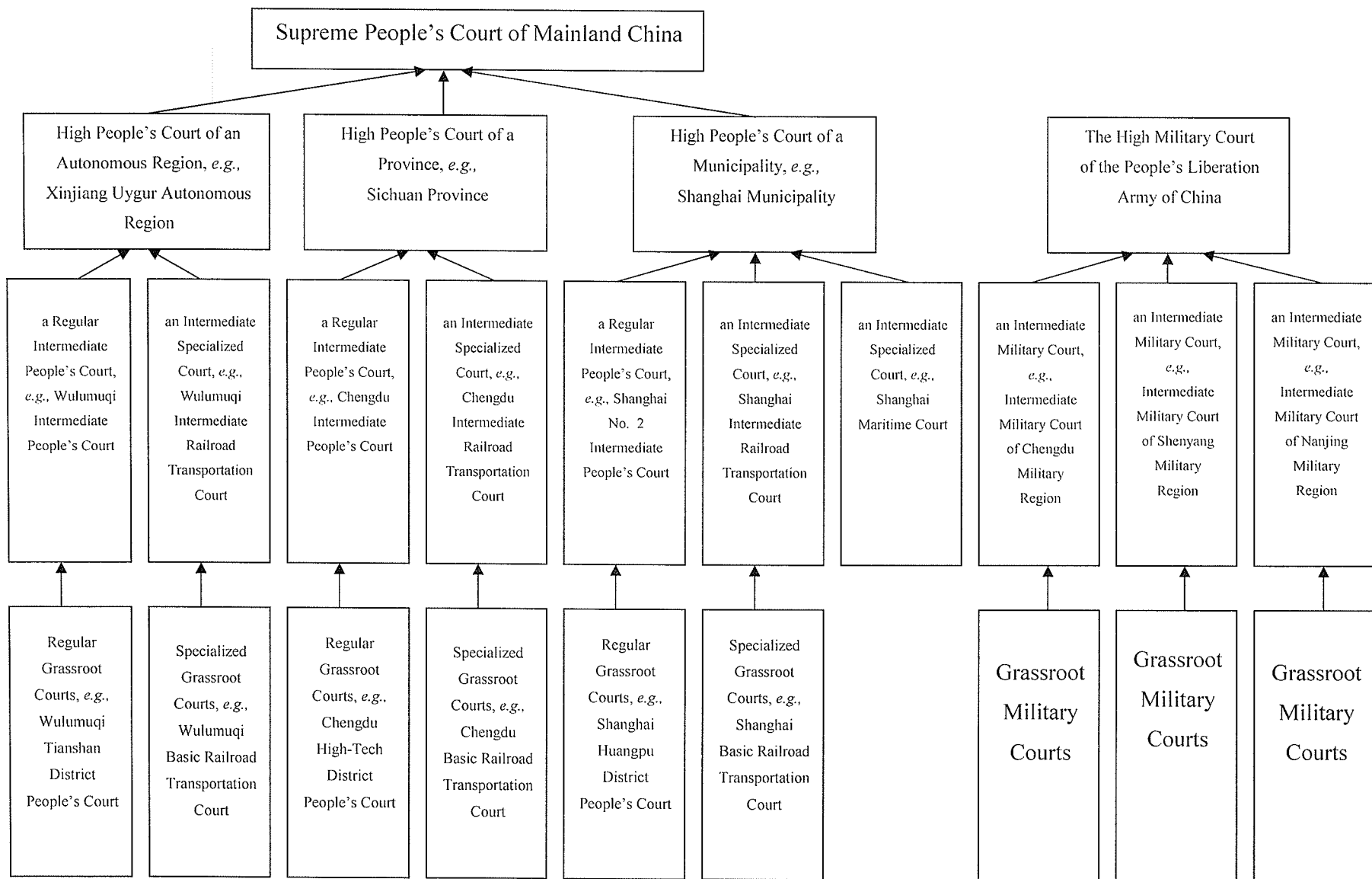
Part 1: Chinese Courts

There are four levels of courts in Mainland China: the Supreme People's Court (SPC), High People's Courts (HPC), Intermediate People's Courts (IPC), and Basic People's Courts (BPC).¹ The Supreme People's Court is at the top, supervising all local courts and overseeing the administration of justice.² HPCs are supreme courts at the provincial level established in the capital cities of provinces, directly administered centers such as Beijing or Shanghai, and in autonomous regions such as Tibet or Xinjiang. However, an HPC has no power of final adjudication; its decision can be appealed to the Supreme People's Court. In this sense, the Chinese court system is unified. There are almost 400 IPCs, established at city levels with district and prefecture jurisdictions. There are over 3,000 BPCs established at county levels such as the county, autonomous county, the city without district divisions and the district of a city.³ As the grass-root courts, BPCs have the vast majority of judicial personnel and handle the largest volume of cases.

In addition to the regular system, there are specialized courts that handle specific types of cases, such as maritime, military and railroad transportation.⁴ Specialized courts only sit on two levels, at the grass-root level and intermediate level; but military courts sit on three levels. Below the intermediate level, specialized courts (except for military courts) have their own separate hierarchies, *e.g.*, a decision from a grass-root railroad transportation court must be appealed to the intermediate railroad transportation court. However, above the intermediate level, specialized courts (except for military courts) are unified into the regular system. To illustrate, the appellate court of an intermediate

specialized court is the higher people's court of the province in which it resides. And any specialized court (except for a military court) is subject to the supervision and leadership of the Supreme People's Court. Again the exceptional circumstance of the military court places them outside of the regular system. A case related to military personnel will end at the Higher Military Court, without going up to the Supreme People's Court.

In the PRC, higher-level courts are responsible for supervising lower-level courts, with supervision taking various forms.⁵ Like courts everywhere, PRC courts directly supervise the work of lower courts by reviewing their decisions on appeal. Further, higher courts may also play a role in the appointment, promotion, and disciplining processes of judges, particularly senior judges, in lower courts.⁶ In addition, higher courts often engage in a longstanding practice of responding to inquiries from lower courts for advice regarding legal issues in particular cases currently before the lower court.⁷ Lower court judges may request advice formally in writing or sometimes less formally by telephone. The lower courts are not bound by the higher court's answer, though in most cases the higher court's advice will be followed or at least given great weight.⁸ Scholars have criticized the practice for depriving the litigant of the right to appeal, since the higher court will already have decided key issues, albeit in the absence of a complete record and without the parties having had the opportunity to present their cases.⁹ Despite scholarly opposition, the practice is likely to continue. However, recently lower-level courts reportedly are seeking instruction from higher courts less and less, with the frequency varying from court to court and judge to judge.¹⁰ On the one hand, judges are not required to seek instruction from higher courts; on the other hand, many judges choose to be more independent and autonomous in terms of deciding cases.



Under the Constitution, the Supreme People's Court acts as the head of the Chinese court system and plays a leading role in adjudication and judicial administration. All lower courts are subordinate to it, although much of the work of the lower court falls within their own boundaries of power and jurisdiction and is unreviewed by the SPC. China uses the system of "finality" of judgment by two trials, that is, a party may exhaust his right of appeal by appealing only once to the next higher level of court.¹¹ So, regularly a judicial procedure will be brought to an end by two trials unless exceptional circumstances warrant the "supervisory review" or "death sentence review".¹² Thus, most cases end with one appellate trial, without going all the way to Supreme People's Court.

The primary responsibilities of the Supreme People's Court as the head of the court system are to:¹³ (1) administer the courts, such as issuing internal regulations, setting policies, providing judicial training, establishing or upgrading new divisions, *e.g.*, enforcement office; (2) interpret law, for example, issuing a number of general interpretations of key laws enacted by the National People's Congress (NPC) and its Standing Committee, (like the "*Court's Opinion on Various Questions Regarding the Implementation of the General Principles of Civil Law*"¹⁴), promulgating interpretations of the application of the laws, *e.g.*, to provide law summaries, including cases, laws, and regulations so that lower court judges may know and follow the correct law; (3) adjudicate, largely as a means of supervising the correctness of lower court decisions; *e.g.*, reviewing cases coming to it under appeals or adjudication supervision, or other important or difficult cases that are brought to it, including review of certain death sentence cases; and (4) participate in law-making preparation, where the Court may participate in a significant but subordinate way in the drafting processes in conjunction

with NPC's Standing Committee's Commission on Legislative Affairs (CLA) or on occasion, the State Council's Bureau of Legislative Affairs. For example, in 1995 the Supreme People's Court had two of its departments drafting regulations implementing the new *Judges Act*, while it was merely participating with the CLA in its on-going drafting of the new *Organizational Law of People's Courts*.¹⁵

In real practice, the Supreme People's Court, as head, provides direction to the lower courts, generally through the HPC at the provincial level, who thereafter pass on to their subordinate courts within the jurisdiction. In this sense, the relationship between the Supreme People's Court and the lower courts also can be seen as that of titular head of a rather loose confederation of courts, which operate more in the realm of governmental boundaries in provinces or municipalities or autonomous regions.¹⁶

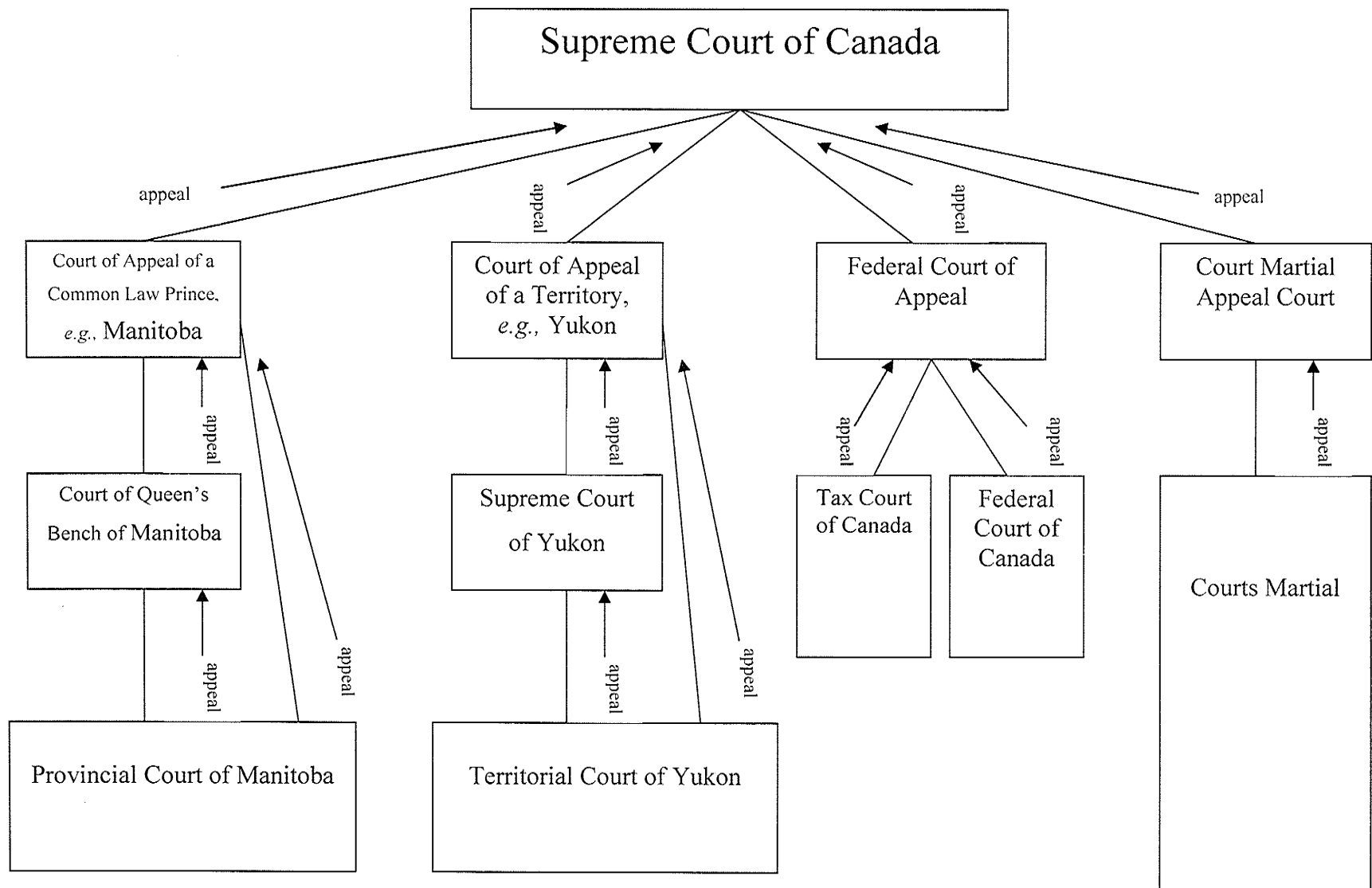
Part 2: Canadian Courts

There are basically four levels of courts in Canada. At the bottom is the magistrate court, known in Manitoba as the Provincial Court, which handles the great majority of routine cases that involve less serious possible outcomes.¹⁷ Generally, these provincial inferior courts are divided into functional divisions: criminal division, youth and family division, civil or small claims¹⁸ division. Provincial courts are accessible high-volume, low-delay courts, geographically dispersed all around Canada. More than half of all judges in Canada serve on these courts, and they conduct trials and hearings in more than eight hundred centers.¹⁹

Above the provincial inferior courts stand the provincial and territorial superior trial courts, variously named in the different provinces: Cour Supérieur in Quebec, Court of Queen's Bench in the prairie provinces like Saskatchewan and Manitoba, Ontario

Court of Justice (General Division) in that province and the Supreme Court of British Columbia.²⁰ These courts deal with less routine and more serious cases and also take appeals from provincial inferior court judgments. On the same level, but responsible for different issues, is the Federal Court, Trial Division. A federal court, formerly called the Exchequer Court, has always been used to deal with matters outside the territorial jurisdiction of any province, such as certain questions of admiralty law. The court has for many years also heard cases involving specialized areas of federal law including income tax, patents, immigration and customs law (but not, for example, bankruptcy law).²¹ Actions against the government of Canada are also heard by the Federal Court. So are actions arising out of the activities of federal administrative agencies.²²

At the next level stand the provincial courts of appeal and the Federal Court of Appeal. The apex of the court system of each province is its court of appeal. Each province and territory has its appellate division that hears appeals from decisions of its provincial superior trial courts and provincial inferior courts.²³ The number of judges on these courts may vary from one province to another, but a court of appeal usually sits as a panel of three.²⁴ All provincial superior appeal courts also have a limited original jurisdiction (which means that they can conduct the trial and give the first judicial determination, subject to appeal), significant but infrequently invoked, in the form of the reference process, which allows the provincial attorney general to refer an abstract question of law directly to the highest provincial court.²⁵ Generally, the Federal Court of Appeal hears appeals from the decisions of the federal trial court, but some appeals from inferior tribunals, and some actions to set aside decisions of inferior tribunals, can proceed directly to the Federal Court of Appeal.²⁶



The highest level is occupied by the Supreme Court of Canada, established in 1875 by the *Supreme and Exchequer Court Act* as a general court of appeal for Canada.²⁷ The court has, since 1949, been the ultimate court of appeal for Canada.²⁸ The Court is comprised of a chief justice and eight puisne judges (puisne meaning ranked after), all appointed by the federal government. The Supreme Court of Canada sits in Ottawa for three sessions a year (winter, spring and fall).²⁹

As the court sitting on the summit of this hierarchical pyramid, the Supreme Court of Canada is also a supervisory and advisory tribunal, not just an appellate tribunal in the traditional sense. The role of the Supreme Court of Canada is to promote uniformity in the application of law across the country, overseeing the judicial work of all courts of law and giving guidance in articulated reasons on issues of national concern or development of law.³⁰ As a court of appeal, its jurisdiction is all encompassing. Unlike the Supreme Court of the United States, which is barred from hearing appeals from decisions on matters of state or local law, the Supreme Court of Canada hears appeals from decisions on all legal matters, local, provincial, and national. Even parking tickets can theoretically be appealed all the way to this Court.³¹ Secondly, The Supreme Court of Canada administers both common law and civil law, because it hears appeals from the courts of appeal from each common law province and Quebec.³² Thirdly, The Supreme Court of Canada also plays a special role as adviser to the federal government.³³ The federal government may ask the Court to decide a question that has not arisen in any actual case. References are usually on constitutional questions, such as the validity of a particular piece of draft legislation. This device enables the validity of legislation to be determined as soon as it is placed in doubt and has the advantage of putting uncertainty to rest

without waiting for the point to be raised in actual litigation.³⁴

In addition to the regular court system, the Canadian federal government has created specialized courts, notably the Tax Court of Canada and courts that serve the military justice system.³⁵ Tax and military courts have been created by statute and can only decide matters that fall within the jurisdiction given to them by statute.³⁶ The Tax Court of Canada gives individuals and companies an opportunity to settle disagreements with the federal government on matters arising under federal tax and revenue legislation.³⁷ Military courts, or courts martial, were established under the *National Defence Act* to hear cases involving the *Code of Service Discipline*.³⁸ The Code applies to all members of the Canadian Armed Forces as well as civilians who accompany the Armed Forces on active service.³⁹ The Military Court of Appeal hears appeals from military trial courts and its decisions can be appealed to the Supreme Court of Canada in a procedure similar to appeals in ordinary criminal matters. In this sense, its function is comparable to that of a provincial superior appeal court, and it has the same powers as such a superior court.⁴⁰

In the Canadian court system, the superior court also plays a supervisory role over an inferior court. However, this supervisory function is accomplished in reviewing trial decisions on appeal, rather than engaging in activities that can affect the adjudication, administration and operation of an inferior court. As a general rule, all parties are entitled to appeal the first determination of a case. Further and subsequent appeals usually require leave (*i.e.*, permission) of the court, although this leave is frequently granted.⁴¹ Theoretically, any decision on a minor case of grass-root provincial court can be appealed all the way to the Supreme Court of Canada. In reality, however, before a case can reach

that Court, it must have used up all available appeals at other levels. Even then, the Court must grant permission or "leave" to appeal before it will hear the case.⁴² Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision.⁴³ Leave to appeal is not given routinely. It is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the Court.⁴⁴

Part 3: Contrast

First, Chinese courts and Canadian courts get their authority from different sources. All Chinese courts are established and governed under two statutory authorities: *Constitution Act* and *Organizational Law of People's Courts*.⁴⁵ As a result, the Chinese courts of the same level always have the same structure in terms of court composition, administration and jurisdiction. On the contrary, Canada's *BNA Act* (1867) did not create any courts. It simply gave constitutional permission to provinces and the parliament of Canada for provincial and federal courts to be created.⁴⁶ So Canadian courts are established or governed by different statutes. The Supreme Court of Canada is established by the *Supreme and Exchequer Court Act* (1875), provincial superior trial courts find their authority from inherent jurisdiction and the *BNA Act* (1867), federal courts from the same *BNA Act* (1867) and the *Federal Court Act* (1971), provincial inferior courts from their provincial enabling acts. In a word, behind every Canadian court, there is an enabling statute to establish, govern and mandate it and even grant it jurisdiction. That's why the precise detail of the respective name, jurisdiction, composition and administration can vary from one province to another. The Canadian

court system is more complex, while the Chinese court system is more streamlined, simplified and generalized.

Secondly, both Chinese and Canadian court structures are like a unified pyramid, with a wide base of courts linked by the upward arrows of appeal and narrowing to a sharp point with a national “supreme court” at the apex, providing leadership and overseeing the judicial work. In a way, the Canadian court system is more integrated than the Chinese court system, whereby the decision of even a military court can be appealed to The Supreme Court of Canada; while in China, military justice is an independent system staying outside the supervision of the Supreme People’s Court. However, below The Supreme Court of Canada, there are two parallel court systems (federal and provincial), each with a full repertoire of trial and appeal courts. When it comes to the Chinese court structure, this single pyramid structure is more streamlined and simplified. Below the Supreme People’s Court, jurisdiction is geographically dispersed into all provincial or territorial courts. There is no other court system (except for the Supreme People’s Court) that stays beyond the jurisdiction of provincial courts and concerns itself with inter-provincial matters.

Thirdly, the relations between higher- and lower-level courts are different in China and Canada. The structural hierarchy of Canada’s court system is imperfectly developed compared to the judicial hierarchy of China. As I have mentioned before, in the PRC, higher-level courts are responsible for supervising lower-level courts, with supervision taking various forms, for example, reviewing their decisions on appeal, playing a role in the appointment, promotion, and disciplining processes of judges, particularly senior judges, in lower courts, and even responding to inquiries from lower

courts for advice regarding legal issues in particular cases currently before the lower court. In a way, the Chinese court system is strongly bureaucratic because higher courts are hierarchic superiors to lower courts. By contrast, no higher-level court in Canada can exercise such power on a lower-level court, except for the review of a trial decision on appeal. It is not the responsibility of supreme courts to ensure systematic quality control over the decisions made by lower trial courts.⁴⁷ Nor do the higher courts exercise continuous supervision over day-to-day work of lower courts. In a fully developed judicial hierarchy like China, review by a judicial superior would be both more frequent (more appeals) and more routine (built into normal procedures, *e.g.*, supervisory review process, rather than triggered by the dissatisfaction of litigants). Accordingly, a Chinese superior court always has a greater workload and more judges than a Canadian superior court does. For example, the Supreme People's Court had more than one hundred judges completing 3587 cases (including appeals, reviews of death penalty and supervisory reviews of decided cases) in the year 2003.⁴⁸ By contrast, the Supreme Court of Canada has only nine judges. In 2003, their total workload was as follows: 562 cases filed, 609 leave applications submitted, 82 appeals heard and 81 judgments released.⁴⁹

Section 2: Functions

Part 1: Courts in China

Generally speaking, courts in China serve three functions: adjudication, judicial interpretation and judgment execution.

(A) Adjudication

Adjudication is the number one responsibility for courts of law. Judges usually adjudicate in a collegial panel of three to five, though under the procedure of first

instance there also is the alternative to have one judge and two law assessors, and in a summary procedure usually there will be only one judge.⁵⁰ In a collegiate panel, there is always one responsible judge who oversees the trial and writes the final judgment.

Adjudication in China has three unique features: (1) the involvement of court officials and an adjudicative committee in deciding cases; (2) the challenge of court judgment by initiating “adjudicative supervision”; and, (3) the emphasis on formal mediation in proceedings.

(a) Court Officials and Adjudicative Committees

In Chinese courts, judges are in three adjudicative divisions (criminal, civil and administrative). However, not only the judges who hear the case have the power to decide the case; court officials and some senior judges can exercise certain influence on the outcome of a case, though this kind of intervention becomes less and less frequent. In the past, the collegiate panel often had to obtain approval of the division chief, court president, or adjudicative committee before issuing the final judgment. However, since 1999, new rules were issued to give more power to the judge(s) who hear the cases.⁵¹ The collegiate panel or single judge now has the right to decide most cases, and the president is not allowed to interfere.⁵² However, approval is still needed in major or difficult cases, such as death penalty cases or economic cases involving large sums of money, or where there are major differences of opinion within the collegiate panel.⁵³ In addition, court officials have so called “supervisory power” to ensure the quality of adjudication. Once the decision is made, if the president finds definite error in the determination of facts or the application of law on the part of the collegiate panel, he may submit the case to the Adjudicative Committee for review and discussion.⁵⁴ In short, despite the above

mentioned discretion left to court official, their personal intervention in on-going cases is decreasing dramatically. Why? As I mentioned above, the recent reform has shifted the power of making the decision from an individual official to presiding judges and the adjudicative committee. Now, court officials often refer to the “adjudicative committee” for discussing or deciding only major cases instead of personally jumping into the litigation proceedings.⁵⁵

Existence of an “adjudicative committee” within every court is a characteristic of the judiciary in China. This is a group consisting of the president of the court, vice-presidents, division chiefs, and senior judges of different divisions. Adjudicative committee members will get together from time to time to make decisions on some important issues such as the identification of facts and application of law in complicated or major cases, the withdrawal of judges from certain cases and the assignment of personnel in the court.⁵⁶ Any decision of an adjudicative committee has supreme authority over the court. Once an adjudicative committee has determined a case, the trial judges must follow its decision.

Adjudicative committees can get involved in cases and direct the trial outcome before or after proceedings, with the reference of the president or trial judge. Adjudicative committee conferences are convened and presided over by the president of the court, and his secretary is in charge of taking notes of the discussion. Typically, the adjudicative committee will meet regularly, perhaps once a week depending on the caseload, and decide a number of cases or other issues each time.⁵⁷ The adjudicative committee decides cases by a majority vote, usually on the basis of an oral or written report by the responsible judge of the collegiate panel that heard the case. Usually, the

presiding judge in the case will give a summary presentation and the committee decision will be based on that and any documents presented. Thus, the president cannot necessarily determine the outcome.⁵⁸ The original purpose of establishing the “adjudicative committee” was to ensure quality control in light of the low level of competence of many judges. However, under this system, the judges who decide the case are not the ones who hear it. Accordingly, the judges who do hear the case feel they have no power and then lose incentive or sense of responsibility to work through the issues themselves.⁵⁹ Many PRC legal scholars oppose the system and advocate the abolition of the adjudicative committee.⁶⁰ Objections of legal scholars notwithstanding, the likelihood of abolishing the adjudicative committee in the near future is low.⁶¹

(b) Supervisory Review

China uses the system of “finality” of judgment by two trials. However, two trials will not necessarily bring a judicial procedure to an end. There are exceptions under certain circumstances. On the one hand, each judgment of the death penalty must be reviewed and approved by the Supreme People’s Court, even after the appellate trial.⁶² On the other hand, China also provides judicial and prosecutorial supervisory procedures as an additional route to appeal for court review.⁶³ This procedure may be initiated by interested parties (by way of petition), the procuracy (by way of protest) or even by the court itself, based on legal criteria defining the bases for review.⁶⁴ Under the *Organizational Law of People’s Courts* (1983), courts have authority to conduct “adjudicative supervision” to review certain adjudicated cases which have exhausted all the appeal avenues and whose “final” judgment have become “legally effective.”⁶⁵ Where the president of a law court discovers error in the determination of facts or application of

law in legally effective judgments and orders, and deems it necessary to have the case retried, he/she shall refer the matter to the adjudicative committee for “discussion and decision”; and, where a higher court or the Supreme People’s Court deems it necessary, it may thereafter reconsider or re-try the case or direct a court at a lower level to re-try the case.⁶⁶ Because this supervisory procedure offers the litigants an option to bring an error to the attention of a higher-level court, including the Supreme People’s Court, disgruntled parties (or their lawyers) would challenge a “final” decision after appeal by petitioning to the decision-made court or any of its superior courts (including the SPC) for supervisory review, which means, in other words, to leave aside the original decision (in civil cases) and conduct a re-trial.⁶⁷ In addition, as mentioned in Chapter 1, the procuracy at various levels are also given the power as part of their supervisory responsibilities to review the decided cases and lodge protests against virtually all effective judicial decisions.⁶⁸ The party’s petition or application for retrial might not necessarily initiate an adjudicatory review by the court; the court must, however, form a collegiate panel for retrial upon the procuracy’s protest.⁶⁹

In China, every court has an “adjudicative supervision” division specifically dealing with this kind of “re-trial” claim. Judges in the adjudicative supervision division only examine the “re-trial” petition, for example, deciding whether to approve or dismiss it, or even referring it to the adjudicative committee for decision. However, they will not directly re-try the case. In fact, cases will be sent back to adjudicative divisions (criminal, civil and administrative) for re-trial. Under the Laws of Procedure, a new collegiate panel shall be formed to re-adjudicate the case in accordance with the procedure of first or second instance, depending on where the case originated.⁷⁰

The aim of this review is to ensure that erroneous or unjust judgments are corrected, and it is also one method of addressing the shortcoming of "local protectionism."⁷¹ On the other hand, however, the authority of a trial judgment can be undermined by this system in which the judgments are still held in challenge, even after becoming legally effective. Plus, this supervisory review can fail the procedural law about case closure and make cases drag on for years. In 1995, for example, there were a reported 70,000 re-tried cases under adjudicative supervision.⁷²

(c) Mediation

The emphasis on formal mediation in a proceeding is a distinctive Chinese judicial feature. The responsible judge in charge of a civil case typically will attempt to mediate the dispute and encourage the parties to settle.⁷³ As a matter of fact, well over half of all civil and economic disputes brought to the courts are mediated.⁷⁴ Reaching a settlement agreement is considered the best way to end a civil dispute, especially a divorce. Only when the disputing parties refuse to reconcile or fail to reconcile, will judges make a judgment. Chinese judges have strong reasons for preferring mediation. On the one hand, mediation generally decreases the workload of the judges, who are able to dispose of cases without the formal trial or written judgment. On the other hand, a settlement agreement is not appealable. If a dispute ends with a settlement agreement, the judge is relieved of the risk that his/her judgment might be overruled. In the practice of Chinese courts, if a judgment is overruled on appeal or supervisory review, the judges, especially the presiding judge, will be held accountable, which is a form of punishment within his/her court. His/her bonus can be reduced and his/her reputation can be damaged. He/she will lose face before colleagues.⁷⁵

According to the law, mediation must be based on the free will of both parties.⁷⁶ In other words, if one party refuses to reconcile with the other, the judge(s) must conduct the formal trial rather than push them to settle.⁷⁷ In real practice, some judges may give parties certain pressure to settle, like harsh words, menacing faces and so on.⁷⁸ However, this kind of pressure becomes less threatening with the strengthening of the judge's discipline. Once the parties feel that they are ill-treated or threatened by the judge, they may complain to court officials.⁷⁹

(B) Judicial Interpretation

As in some civil law countries, Chinese courts are not authorized to "make" law. The court's job is to apply the law to the specific factual situation, not to create new law. Even the Supreme People's Court judgment does not have precedential value, although in practice lower court judges are keen to follow or at least give weight to these decisions on adjudicated cases when deciding similar cases. To begin with, previous judgments of a superior court cannot be cited directly in a trial verdict. And more importantly, lower courts are not bound by the judgment of higher courts; if they refuse to follow, it is not a breach of law.

On the other hand, the Supreme People's Court has power to interpret law, and such interpretations are then taken as binding in the particular case and on lower courts in subsequent cases.⁸⁰ However, this interpretative authority is limited. First of all, the Court is supposed to limit its interpretation to purely "judicial matters". Under the Constitution, the National People's Congress is the legislature and its Standing Committee has the exclusive authority to interpret laws enacted by the NPC and the Standing Committee itself.⁸¹ Though this so-called "legislative interpretation" is exclusively granted and

reserved by the Standing Committee of the NPC, as a practical matter, however, it only makes interpretations of small amounts of law and delegates part of its interpretative authority to other institutions, such as the Supreme People's Court, the Supreme People's Procuracy, and the State Council.⁸² For example, a lot of administrative regulations, which often contain "clarifications" and function as an administrative interpretation of the law, are issued through the State Council and ministries.⁸³ By contrast, "judicial interpretations" are to be made by the Supreme People's Court and the Supreme People's Procuracy, though, as a practical matter, it is primarily the SPC that makes these "judicial interpretations."⁸⁴ However, a provision in the *Organizational Law of People's Courts* (1983) confines Supreme People's Court's authority of interpretation to specific application of laws and decrees in judicial proceedings.⁸⁵ Thus, the court is only delegated the right to interpret laws where necessary for judicial work. That is, the Court is supposed to limit its interpretation to that which is necessary to decide issues that have arisen, or arguably are likely to arise, in specific cases.⁸⁶ Secondly, the NPC does not delegate to the SPC the right to interpret the Constitution. Thus, neither the SPC nor any other court has the authority to conduct judicial review and strike down laws or regulations on the ground of unconstitutionality.⁸⁷ Indeed, neither the SPC nor any other court has the right to interpret or declare invalid administrative regulations or regulations passed by the people's governments or people's congresses at the local level, although courts may refuse to enforce a regulation contrary to national law.⁸⁸

In real practice, the SPC has pushed the limits of its restricted interpretative power, issuing a number of general interpretations of key laws enacted by the NPC and its Standing Committee.⁸⁹ For example, the "Court's Opinion on Various Questions

Regarding the Implementation of the General Principles of Civil Law” consisted of some 200 articles, whereas the original statute “General Principles of Civil Law” itself only contained 156 articles.⁹⁰ The Supreme People’s Court sometimes even joins with other administrative institutions, such as the Supreme People’s Procuracy or ministries under the State Council, issuing interpretive administrative documents, which function like legislation.⁹¹ However, this kind of practice of issuing general interpretations of laws has no basis in law and the SPC can only be excused for overstepping its authority if the NPCSC fails to issue such interpretations, as contemplated in the Constitution and left to fill a vacuum.⁹² Plus, the other courts in China are not authorized to issue any “judicial interpretations”. Some judges may write into the judgment his/her own understanding about certain laws, which he/she is applying; this kind of interpretation, however, has no binding power.

(C) Judgment-Enforcement

In contrast to other countries that assign the task of enforcing court judgments and orders to a sheriff or the police, PRC courts are responsible for enforcing their own judgments.⁹³ Thus, every court has an enforcement division and enforcement officers to carry on this responsibility.⁹⁴ The law in China also provides penalties for non-compliance with a judgment and empowers a court to take measures against defiant parties.⁹⁵ However, as mentioned in Chapter 1, a large percentage of judgments and orders, particularly in economic cases (with as many as 50 percent) go unenforced.⁹⁶ The primary reason for such wide-spread non-compliance, and thus non-enforcement of the law, is the wide-spread lack of credibility. For example, according to law, inability to pay is a circumstance warranting the termination or suspension of “enforcement.”⁹⁷ Thus

in many cases, a disgruntled party takes advantage of this provision by concealing the property. The court may “issue a search warrant” to locate the property;⁹⁸ however, if the concealed property is not located, a court has nothing to do but suspend or terminate the execution. Currently, the notion of credit history has not been introduced into China, nor can anyone’s credit record be tracked down. The disgruntled party will not face unfavourable constraint on future business activity, even if failing to perform the duties assigned by the court judgment. In addition, insufficient court funding and “local protectionism” could be another reason for non-enforcement.⁹⁹ The latter may arise when a local court is faced with enforcing a judgment against a local party, either in a case from its own jurisdiction or, pursuant to the law of procedure, from a court in a different jurisdiction.¹⁰⁰

The difficulties courts have in enforcing their own judgments and rulings is a serious threat to the authority, prestige, and image of the Chinese judiciary. Many scholars argue that enforcement is not a judicial function, but should be left to public security services (police) and to the “winner”, as in other countries.¹⁰¹ However, this will lead to the change of institutional arrangement outlined in the Constitution. What a court can do must not exceed its scope of authority. Since 1995, the SPC has tried to shift some responsibility for appointments, funding, and decision-making to higher-level courts in order to cut off interference by local governments.¹⁰² In 1995, the SPC passed a notice whereby the SPC claimed the right to make final decisions for whether to refuse enforcement of arbitral awards.¹⁰³ In accordance with the provisions in this notice, if an IPC intends to refuse to recognize or enforce a foreign or foreign-related award, it must first submit a report to the HPC. If the HPC agrees with the IPC that the award should not

be enforced, the HPC must report the case to the SPC. Only after the SPC approves may the IPC refuse to recognize or enforce the award.¹⁰⁴ When lower-level courts, bowing to local pressure, undermine the notice by simply sitting on an award, the SPC also can become more aggressive, issuing regulations imposing time deadlines and addressing a number of other obstacles to enforcement.¹⁰⁵

Part 2: Courts in Canada

By contrast, Canadian courts have four functions: (1) adjudicating cases; (2) judicial law-making (*i.e.*, precedential case law); (3) conducting constitutional review; and (4) advising governments (*i.e.*, references).

(A) Adjudication

Like a Chinese court, the essential function of a Canadian judicial body is public adjudication of two-party disputes. In a Canadian courtroom, adjudication is basically conducted in the context of an adversarial system.¹⁰⁶ However, on occasion, judges and courts also engage in activities such as mediation, conciliation or negotiation to settle the dispute.¹⁰⁷ For example, in a criminal court, judges are often concerned with processing requests for adjournments and bail. In a civil court, judges sometimes do not act as adjudicators hearing the arguments and determining legal rights, but as mediators trying to guide the parties to a compromise out-of-court solution which will induce a settled agreement.¹⁰⁸ Family court judges may well be found assisting families and social agencies to find some better means of keeping a young person out of trouble, and small claims court judges involve themselves in counseling individuals on management of their debts.¹⁰⁹ For example, under the “case management” rule of Quebec’s Superior Family Court, mediation in divorce proceedings is mandatory.¹¹⁰

(B) Judicial Law-Making

A major characteristic of the Canadian judiciary is that judges can make law through adjudication. As a common law country, the decision of any Canadian court can be recognized as legal precedent binding on itself and courts of lower jurisdiction, and thus become a rule of law. For example, the Judicial Committee of the Privy Council's and the Supreme Court of Canada's interpretation of Canada's Constitution has become part of the law of the Canadian constitution.¹¹¹

According to common law philosophy, law has the feature of inescapable generality. No body of rules could ever be comprehensive and detailed enough to anticipate explicitly the circumstances of the specific disputes which may arise under a legal system.¹¹² Plus, many disputes that come before the courts involve a number of legal arguments based on different and compelling legal rules and principles.¹¹³ In applying the law to new and unforeseeable circumstances and in sorting out priorities between competing legal rules and principles, judges must put flesh on the bare skeleton of the law by making interpretations; and in the process, this interpretation shapes the substance of the law.¹¹⁴

In Canada, not only Supreme Court of Canada justices can shape and develop the law in the process of settling a dispute about it; trial courts also have their major impact on development of law and public policy through their day-to-day, case-by case decision-making.

(C) Constitutional Review

In addition to the authority of making law through adjudication, Canadian courts are empowered to veto legislation or executive activities which, in the judiciary's view,

violate the law of the Constitution.¹¹⁵ This judicial power of reviewing the constitutionality of governmental activity has been well entrenched by common law convention since the country's earliest days.¹¹⁶ And as noted in Chapter 1, since 1982 the power of judicial review has been recognized and expanded in the text of the Constitution. Section 52(1) of the *Constitution Act* 1982 clearly established the legal supremacy of the Constitution: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with provisions of the Constitution is, to the extent of the inconsistency, of no force or no effect." And Section 24(1) of *Charter of Rights and Freedoms* greatly expands the judiciary's capacity and inclination to check government: the Supreme Court of Canada can overrule legislation and executive acts of government, not only on the ground that they violate the federal division of powers but also on the ground that they violate fundamental rights and freedoms of citizens.

Accordingly, both by long-standing convention and the constitution, Canadian courts have the power to conduct judicial review of decisions or actions taken by a governmental body or by the parliament and provincial legislatures, and if they find that it is not in compliance with the Constitution, to overrule it, *i.e.*, strike down legislation or overturn the executive action, or order a public official to act in a certain manner and thus hold legislatures and bureaucracies in check. Under provisions in the *BNA Act* (1867), both the federal parliament and the provincial legislatures have powers over the jurisdiction of courts.¹¹⁷ But this power does not enable either level of a legislature to pass legislation which is immune from constitutional review in the courts.¹¹⁸ In history, there were few occasions when governments attempted to prevent the courts from reviewing the constitutional validity of legislation. However, these efforts to bar judicial

review all failed.¹¹⁹ As Barry Strayer sums up: "In the struggle between judicial review and the prerogative, judicial review has emerged supreme."¹²⁰

(D) Policy-Formation

In addition to performing its essential function of adjudication, Canadian courts and judges also serve some political functions. This political capacity of the Canadian judiciary can be understood in two dimensions. On the one hand, superior courts (*i.e.*, The Supreme Court of Canada and provincial appellate courts) play a special role as advisors to the government. The federal government may ask The Supreme Court of Canada to decide a question that has not arisen in any actual case.¹²¹ References are usually on constitutional questions, such as the validity of a particular piece of actual or proposed legislation.¹²² A striking example is *Ref. re Amendment of the Constitution of Canada* (Nos. 1, 2 & 3) (1981), 125 D.L.R. (3d) 1 (S.C.C.). The federal government put proposed constitutional changes before the Court and compelled it to determine their constitutional validity.¹²³ The provincial governments have a corresponding power to refer questions to their provincial superior appeal courts.¹²⁴ This pre-emptive device enables the validity of legislation and other matters to be determined by putting uncertainty to rest before the point can be raised in subsequent litigation.¹²⁵

On the other hand, judges in Canada can exercise important political functions off the bench and outside the court house, in contexts which involve them with other actors and institutions in the political system. This function is achieved through the practice of assigning judges to royal commissions and commissions of inquiry. In Canada, as in Britain and other Commonwealth countries, judges are frequently appointed by the executive branch of government to serve on commissions to inquire into and make

recommendations on matters of public concern and political controversy.¹²⁶ The subjects investigated by commissions, whether they be major policy issues such as federal-provincial relations or medicare, or the improprieties of cabinet ministers, or allegations of illegal activities by the national police and security service, are usually topics of great political interest and partisan debate.¹²⁷ When serious charges have been made about the misconduct of ministers or officials, or when there is need to review a public policy, governments in parliamentary systems have often favored appointing a royal commission rather than permitting the matter to be investigated by legislative committees.¹²⁸ There are two obvious reasons for appointing judges to a royal commission. First, from a technical point of view, they are experienced in conducting proceedings in which contending views are given a fair hearing.¹²⁹ Secondly, from a political point of view, the judge has an aura of impartiality which lends credibility and authority to any inquiry.¹³⁰

The reference procedure and the participation of judges in royal commissions have been criticized for contributing to the politicization of the judiciary.¹³¹ Despite scholarly criticism of a court's political role, this tendency in the Canadian political system to rely on the judicial process as a means of preventing abuse of power and protecting rights is likely to continue. Why? Because Canadians may still believe in the liberal notion of building checks and balances into their system of government.

Part 3: Contrast

Compared with the Chinese judiciary, Canadian judges have more capacity, exercise more influence on law development and policy-formation, and enjoy more prestige, power and authority.

First, a Canadian judge's law-making role allows judicial decisions in particular cases to add to the substance of law and exercises tremendous influence on the policies and rights established through the other sources of law (executive-made law and legislature-made law).¹³²

Secondly, a court's power to conduct judicial review of the constitutionality of other legislation and governmental activities gives it a central word in debates about constitutional issues and holds legislatures and bureaucracies to account. In recent years, the spread of judicial review based on written constitutions has increased the political significance of judicial law-making.

Thirdly, a Canadian judge's participation in royal commissions and commissions of inquiry strengthens their pre-eminent status in the rule of law system. In the meantime, a judge's extra-judicial work helps shape public policies, and so does the superior court's practice of giving answers to the public issues referred by governments.

By contrast, a Chinese court has no power to make law; even the Supreme People's Court's limited power to issue interpretations on existing law is confined to a small scope, which is called "pure judicial interpretation." Plus, in China, the power of deciding the validity of legislation is left to the highly political People's Congress, and a court has no power to conduct "judicial review on constitutionality" and overrule the legislation that it thinks conflicts with the constitution. In this sense, a Chinese court does not go beyond a purely adjudicative role and claim a role to hold governments and legislatures in check. All in all, Canadian courts are not only components of the legal system, but also they are, at the same time, vital and independent institutions in society at large that combine "legislative", "adjudicative" and "political" capacities.¹³³ By contrast,

a Chinese court is more like an instrument of government aiming at applying existing law to particular cases. Even though in practice, the Supreme People's Court has been publishing decisions in its Gazette since 1985 and circulating decisions to the lower courts through internal channels, these are instructive examples merely for guidance or educational value, but not for citation: they are not binding and are not supposed to be considered a source of law.¹³⁴

Section 3: Jurisdictions

Jurisdiction of any court has two dimensions: first, subject matter competence; second, territorial competence. Here, "subject matter" competence means the human acts and negligences for which a court has authority to offer punishment, remedy or redress; "territorial competence" means the geographical area and limits of a court's jurisdiction that depend on a connection between (a) the territory or legal system of the state in which the court is established, and (b) a party to a proceeding in the court or the facts on which that proceeding is based.¹³⁵

Part 1: Chinese Courts

(A) Subject Matter

Basically speaking, except for a couple of special courts, any court in China has comprehensive jurisdiction over criminal and civil disputes and judicial review of administrative action.¹³⁶ Chinese courts have no power to conduct constitutional review; the *Constitution Act of China* is not indictable. And except for the grass-root courts, any higher-level courts, including the SPC, have jurisdiction over both first-instance cases and appeals.¹³⁷ Like any other country, the original jurisdiction of a superior court always focuses on major cases of more importance and complexity.¹³⁸

(B) Territorial

In China, the territorial jurisdiction of courts is distributed by the laws of procedure (criminal, civil and administrative) on the basis of geographical location.¹³⁹ In other words, the distribution of jurisdiction is parallel to the hierarchical and territorial divisions of administrative units in which a court is established, like a province, city or district. Normally, a court has jurisdiction over all the lawsuits having connection with the subject matter that falls within the geographical territory of its administrative unit at the same level.

In China, higher courts always have more authority and jurisdiction; but compared to higher courts, a lower court's jurisdiction is limited. First, the laws of procedure for civil, criminal, and administrative litigations all specifically exclude jurisdiction of grass-root courts on certain subject matters.¹⁴⁰ Secondly, where the right of jurisdiction is in dispute between several courts, it shall be resolved through an agreement with the two parties involved; where the agreement has failed, these courts request their common superior court to designate the jurisdiction.¹⁴¹ In addition, under certain circumstances, the jurisdiction of courts at different levels can be transferred in and out. It is up to the superior court to decide whether to take or refuse the transfer of a proceeding. For example, if the case is of "major importance", lower courts may request transfer to a higher court's jurisdiction; moreover, a superior people's court has the right to conduct at first instance the trial of a case upward, which is under the original jurisdiction of an inferior people's court; it may also assign a case downward, under its own jurisdiction of first instance to an inferior people's court for trial.¹⁴²

Part 2: Canadian Courts

Unlike their Chinese counterparts, Canadian courts find their jurisdictions from a variety of authorities, such as their mandating statutes, inherent practice and even precedential rulings. Why? As I have mentioned before, Canadian courts are not established or governed by a single statute applying all across the country. Therefore, one must look to many different sources in defining the jurisdiction of particular courts.¹⁴³

(A) Subject Matter

First, Canadian courts (*i.e.*, only designated courts of regular jurisdiction) have jurisdiction on four categories of subject matter: criminal cases, civil cases, constitutional issues (whether constitutional questions are the only issues raised or whether they are raised in the context of another issue) and judicial review of administrative actions. Courts of any level have the power to deal with the first three categories; however, the process of judicial review of administrative actions is conducted in accordance with an inherent jurisdiction vested in courts of superior jurisdiction to grant prerogative remedies which, traditionally in English common law were four: *certiorari*, *mandamus*, *prohibition*, and *quo warranto*.¹⁴⁴ For provincially constituted administrative tribunals, an application for judicial review is made to the court of superior jurisdiction in the province.¹⁴⁵ In particular, these applications are made to the trial division of the supreme court of a province.¹⁴⁶ For federally constituted administrative tribunals, such application is made to the Federal Court.¹⁴⁷

Secondly, there is a separation of subject matter between jurisdictions of federal and provincial courts. In Canada the administration of justice generally is entrusted to the provinces, while the federal court system is not as fully developed as in the United

States.¹⁴⁸ Most provincial and territorial superior courts existed prior to confederation; thus they have inherent jurisdiction, which means unlimited power on all criminal and civil matters except those specifically excluded by statute.¹⁴⁹ Plus, by provincial and federal statutes, they may also be given jurisdiction to deal with particular matters, for example, constitutional questions.¹⁵⁰ By contrast, since the Federal Court of Canada (FCC) was created by an act of parliament, it lacks the “inherent” jurisdiction of the provincial superior courts. It obtains its jurisdiction from the *Federal Court Act* or from other federal statutes, so it can only deal with matters specified in these federal statutes, which involve federal institutions or arise out of federal law, for example, inter-provincial and federal-provincial disputes, intellectual property proceedings (*e.g.*, copyright, patent, trademark), citizenship appeals, *Competition Act* cases and cases involving Crown corporations or departments of the Government of Canada.¹⁵¹ In addition, the Federal Court has the power of judicial review for decisions, orders and other administrative actions of federal boards, commissions and tribunals; these bodies may refer any question of law, jurisdiction or practice to the FCC at any stage of a proceeding.¹⁵² For certain matters, such as maritime law or constitutional issues, a case may be brought before either the FCC or a provincial or territorial superior court. In this respect, the FCC and the superior courts share jurisdiction.¹⁵³ Federal court can only deal with matters specified in federal statutes while provincial and territorial superior courts can hear cases of any area except those specifically excluded by a statute.¹⁵⁴

Thirdly, there is separation of subject matter between a superior court and inferior court. Generally speaking, the superior courts try the most serious criminal and civil cases, including divorce cases and cases that involve large amounts of money (the

minimum is set by each province).¹⁵⁵ Provincial inferior courts deal with most criminal offences, family law matters (except divorce), young offenders (from 12 to 17 years old), traffic violations, provincial regulatory offences, and claims involving money up to a certain amount (set by each province).¹⁵⁶ In addition, all preliminary inquiries (hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases) take place before the provincial courts.¹⁵⁷ Although it is true that “lesser” matters are dealt with by the lower courts, it is not correct to assume that the more important matters are excluded. For example, under the *Criminal Code* serious crimes called “indictable offences” are defined as offences for which the maximum penalty is greater than six months in prison and/or a fine of two thousand dollars. Persons accused of such crimes (except for murder and a short list of exotic crimes like piracy, which must be tried in the provincial superior court) have the right to “elect” the method of their trial (by provincial court judge alone, provincial superior judge alone, or provincial superior judge and jury).¹⁵⁸ The consequence of this opportunity to choose is that these lower courts “exercise a vast criminal jurisdiction which appears to be unmatched by the lower criminal courts of any other liberal democracy”.¹⁵⁹

Fourthly, besides the federal specialized courts (tax and military courts), many special courts or special divisions of a court are created within the regular provincial court system. For example, in the new territory of Nunavut, the Nunavut Court of Justice combines the power of the superior trial court and the territorial court so that the same judge can hear all cases that arise in the territory.¹⁶⁰ And some provinces have established special unified family courts at the superior court level to deal exclusively with certain family law matters, including divorce and property claims.¹⁶¹ A number of courts at the

provincial inferior level are dedicated exclusively to particular types of offences or groups of offenders.¹⁶² A recent example is the Drug Treatment Courts program, set up in Toronto and Vancouver.¹⁶³

(B) Territorial

Like a Chinese court, Canadian courts also define their territorial jurisdictions on the basis of the geographical territory of an area in which the court is established. Normally, a court has jurisdiction over all the disputes having connection with subject matter that falls within the geographical limits of the area in which the court presides.

Part 3: Contrast

First, the mainstream in both countries' court systems is toward consolidation and universalism, with the vast majority of courts dealing with all types of matters. The numbers of specialized courts that handle specific types of cases remains few and focused (in Canada: tax court and military court; in China: military court, railroad transportation court, and maritime court). In Canada, some courts at the lower level may have specified divisions with a confined jurisdiction on specific types of subject matter; however, all the higher courts have general jurisdiction.

Secondly, the "subject matter" jurisdiction of Chinese and Canadian courts is different. Chinese courts (even the Supreme People's Court) have no power to conduct constitutional review, nor do they have plenary power of judicial review of administrative actions. On the one hand, Chinese courts have very limited review powers. Chinese courts may only review "concrete administrative actions" involving abuse of power, error in application of law, *ultra vires* actions, and so on. However, courts have no power to interpret or review administrative rules or regulations (so-called "abstract administrative

actions”) or exercise of administrative discretion.¹⁶⁴ On the other hand, the forms of remedy that a Chinese court can adopt to protect the injured party are few. In Chinese law, virtually the only available remedy is to introduce litigation to annul the administrative action or order a new action. Generally speaking, however, courts cannot substitute their own judgment for that of the administrative agencies.¹⁶⁵

On the contrary, Canadian courts have plenary jurisdiction on criminal cases, civil cases and judicial review of constitutional issues and administrative actions. On the one hand, the actions and decisions of all administrative tribunals, irrespective of the categorization of their particular functions (a “legislative” or “administrative” or “ministerial” or “quasi-judicial” function) are subject to challenge on a wide range of grounds and might be quashed by courts of superior jurisdiction.¹⁶⁶ On the other hand, upon the applicant’s request, courts can grant various types of prerogative remedies which are appropriate in different circumstances. For example, the granting of a writ of *certiorari* or, in some provinces, an order in the nature of *certiorari*, quashes the decision of an administrative tribunal; a writ of *mandamus* compels a public official to perform an act which he has a statutory duty to perform; a writ of *quo warranto* prevents the continued exercise of unlawful authority or power on the part of a public official.¹⁶⁷

The discrepancy in the “judicial review” power of Chinese courts and Canadian courts reflects two different constitutional arrangements for separation of the institutions. China has not adopted the principle of separation of state power. The judicial review system has not been designed as a tool to ensure the constitutionality and legality of all other state powers. Thus, no Chinese court has been granted complete “judicial review” power. By contrast, checks and balances have been built into the Canadian system. Over

a long period of time, the Canadian political system has been relying on the judicial process as a means of preventing abuses of executive, legislative and administrative power and protecting individual rights. That's why Canadian courts are granted more competent judicial powers for review of constitutional issues and administrative actions.

Thirdly, in China, the "subject matter" jurisdiction of courts at the same level is almost the same. That's because Chinese courts are established by the same legislation (*Constitution Act* 1982 and *Organizational Law of People's Courts* 1979) and granted jurisdiction from the same authority (civil, criminal, administrative procedure laws). Plus, there is no separation of federal and provincial jurisdiction. Thus, subject matters are geographically dispersed into the court established in the different area. On the contrary, in Canada, the precise details of jurisdiction and procedure vary from one court to another. On the one hand, the subject matters under provincial and federal jurisdictions are different. Federal Court can only deal with matters specified in federal statutes while provincial and territorial superior courts have jurisdiction in all matters of any area except those specifically excluded by a statute.¹⁶⁸ On the other hand, provincial and territorial courts (both superior and inferior) are established by provincial legislation, so it is difficult to describe, at least in respect of provincially constituted courts across Canada, the specific functions of those courts, although they do share certain common functions.¹⁶⁹ Actually, the uniformity of a Chinese court's jurisdiction is the reflection of China's unitary structure and codified civilian tradition; while the diversity of a Canadian court's jurisdiction is the reflection of Canada's federalism and common law tradition.

Fourthly, in China, appellate courts can conduct trials of many first-instance cases. Even the Supreme People's Court has original jurisdiction on subject matters

which are, of its own opinion, important. In Canada, appellate courts do not have original jurisdiction to try litigated disputes. Even in the “reference” procedure, the questions referred to a provincial superior appeal court or The Supreme Court of Canada are not raised from any actual case.

Section 4: Court Personnel

Part 1: Composition

(A) China

In China, a law court is run by judges and their administrative staff. Judges are defined as adjudicatory personnel who exercise state judicial authority in accordance with the law;¹⁷⁰ however, not everyone who is designated a “judge” will try a case. Some are assigned to do the research or registration or judgment-enforcement work. In a way, being a judge is more a matter of rank. What kind of work a judge really engages in totally depends on the arrangement of his/her court. A judge can be transferred from an adjudicative post to non-adjudicative posts by court officials or the adjudicative committee. Normally, the judge corps includes “presidents, vice presidents, members of adjudicative committees, division chiefs, judges and associate judges.”¹⁷¹ Administrative staff outnumber judges, including court clerks, court police officers (equivalent to bailiffs) and other supporting staff (for example, a typist, secretary and computer technician). In China, court administrative staff are governmental employees; staffing level decisions are made by the State Organ Staffing Commission under the Personnel Ministry, which is under the State Council.¹⁷² The Supreme People’s Court is seeking reforms that would allow it more control over financial and staffing members.¹⁷³ Currently, some courts at the front of this reformation like Chengdu High-Tech District Court are recruiting

administrative staff on the basis of a one-to-one contract.¹⁷⁴

The workforce varies from court to court; for example, Chengdu High-Tech District Court has nearly 24 judges (including one president, three vice presidents) and 37 administrative staff;¹⁷⁵ while the Supreme People's Court has nearly 600 employees, including one president, eight vice presidents, 80 judges, 120 assistant judges, 50 judicial police (equivalent to bailiff) and other staff.¹⁷⁶

(B) Canada

Canadian courts are run by judicial personnel and court service staff as well. In 2000/01, 11,900 employees (full-time equivalents) were employed in Canadian provincial, territorial and federal courts, which has remained stable since 1998/99. Of the total number of employees, 9,890 (83%) were employed as court staff and 2,011 (17%) were judges.¹⁷⁷

In Canadian courts, judicial personnel have two categories: full time and supernumerary justices. Full-time include all full-time judges appointed by the Minister of Justice Canada or by a province. Supernumerary include all non-retired, active judges over the age of 65 years. Eighty-eight percent (1,771) of all judges work full-time while the remaining 12% (240) are employed in a supernumerary, usually part-time capacity.¹⁷⁸

Court staff includes any staff employee in the court services branch not presiding over court functions, such as administrators, security, registrars, court clerks, law library and legal research staff, sheriffs, judicial officers and judge's secretaries.¹⁷⁹ Some administrative staff, such as justices of the peace, masters and court clerks can perform certain quasi-judicial functions.¹⁸⁰

In Canadian courts, the administrative staff also outnumbers judicial staff. The

proportion of personnel accounted for by judges is generally lower for the federal courts and the territories than for the provinces. The proportion of judges ranges from 6% of the total personnel at The Supreme Court of Canada to 15% in the Tax Court of Canada.¹⁸¹ Among the provinces, the proportion of personnel accounted for by judges ranges from 14% in British Columbia and Nova Scotia, to 25% in Saskatchewan and 27% in Newfoundland and Labrador.¹⁸²

(C) Contrast

In China, judges may fulfill a variety of administrative or non-judicial functions while in Canada, there is an unbreachable boundary between those who judge and those who administer. A Canadian judge can never be transferred from adjudicative to non-adjudicative posts.

Part 2: Prerequisites for Being a Judge

(A) China

In China, the prerequisites for a judge include citizenship (a PRC national), age (23 years or older), physical status (healthy) and political integrity (advocates of the Constitution).¹⁸³ Party membership is not necessarily required, although in reality many judges join the party to take advantage of opportunities for personal advancement.¹⁸⁴ However, the influence of party membership on personal promotion is decreasing dramatically. More and more emphasis is given to educational background and work experience.¹⁸⁵

Prior to the 1995 *Judges Act*, there were no prerequisites of technical competence (legal skill) for being a judge. Until recently, many judges in Chinese courts did not hold a law degree.¹⁸⁶ What is more, over a long period of time, since the courts were

considered an instrument of state control, Chinese courts recruited a lot of retired military officers with no legal background, on the basis of their allegiance towards the Chinese Communist Party.

Recently, China has taken steps to promote the professionalism of judges. The SPC has called for an end to the practice of promoting administrative personnel to judgeships, and the number of former military officers acting in a judicial capacity has already decreased.¹⁸⁷ Under the 1995 *Judges Act*, all new judges are required to have a college education and pass a public examination.¹⁸⁸ In 2001, the amended *Judges Act* even upgraded the standards to a higher level. For example, new judges must have a bachelor's degree in law or a bachelor's degree in some other subject combined with a knowledge of law, plus two years of experience in legal work to become a judge in a lower court, or three years of work experience to be appointed to an HPC or the SPC.¹⁸⁹ In addition, new judges must take a unified national judicial examination, which is not easy. Once they pass that exam, new judges are required to undergo three months' training before assuming their post.¹⁹⁰ The *Judges Act* also addresses the issue of existing judges who lack sufficient legal training, requiring that they either meet the standards for incoming judges within a definite period of time or be removed.¹⁹¹ According to the SPC's five-year plan announced in 1998, unqualified judges are to be dismissed or transferred to non-adjudicatory posts.¹⁹² As a result, current judges who do not meet the standards are eager to undergo remedial training to raise their level of competence. The SPC has also intensified efforts to provide judicial training. For example, it has established a formal training program at Beijing University and at People's University,

where judges attend courses for from one to three years.¹⁹³ In addition, its 2001-05 Plan requires that all judges undergo at least one month of legal training every three years.¹⁹⁴

(B) Canada

Canadian ideology about selecting judges is that appointment is part of the process of recruiting a society's governing elite. Thus the legal professional background is decisive for judicial recruitment. Canadian judges are appointed from the ranks of practising lawyers.¹⁹⁵ The practice of selecting judges from the bar was adopted in Canada from England as soon as there were barristers available and incorporated in the *Constitution Act* 1867 for all federally appointed Section 96 judges.¹⁹⁶ It has been applied by statute to the federal courts established under Section 101 and, in more recent years, to the lower provincial courts.¹⁹⁷ Today in most provinces it is a statutory requirement that, to be eligible for appointment to the provincial court, a person must be a practicing lawyer. And it is now normal to require at least five and, more typically, ten years of practice as a lawyer before appointment.¹⁹⁸ So, aside from lay justices of the peace who hear cases involving traffic violations and other summary offences, the judges of all provincial courts, except those of Alberta and Newfoundland, are required by statute to be members of the bar.¹⁹⁹ Even in Alberta and Newfoundland, it is the custom to appoint persons with experience in professional practice.²⁰⁰

In the past, provincial judges (or "magistrates" as they were usually called) did not have to be lawyers. However, the professionalization of the magistracy has nearly eliminated the lay judge in Canada.²⁰¹ "Grandfather clauses" in the new legislation have enabled a few non-lawyers to survive on the provincial bench; but they will soon reach retirement.²⁰² The only place where lay persons continue to perform an adjudicative role

are in those provinces and territories that use justices of the peace to try minor offences.²⁰³

(C) Contrast

While China is still struggling with the promotion of professionalism of its judges, Canada has been served by a highly qualified judicial workforce for decades.

Part 3: Appointment, Promotion, Discipline, Removal

(A) China

In contrast to many countries, PRC judges do not enjoy life tenure. Rather, they are appointed for an open term and continue to serve until they are removed or voluntarily resign.²⁰⁴ The *Judges Act* does not set out the term of office for judges. In real practice, only the president of the court serves a term of years, with a 5-year limit, once renewable.²⁰⁵ All other senior and junior judges serve like civil servants, once appointed to be a judge, rarely removed unless engaging in severe misconduct.²⁰⁶ However, this does not necessarily mean that they are protected by the security of life tenure. Chinese judges are subject to annual appraisal which aims at examining and assessing their achievement in judicial work, legal skills, professional competence and moral character.²⁰⁷ The result of appraisal is taken as a basis for reward, discipline, promotion, training, dismissal and for readjustment of his/her grade and salary.²⁰⁸

(a) Appointment

According to the *Judges Act*, the authority to appoint and dismiss judges is granted to the People's Congress and its Standing Committee. However, the real power lies with the Party. For example, the *Judges Act* (1995), Article 11 stipulates that the People's Congress at the same level elect and dismiss the president of the court. The

president then nominates the other judges of his/her court to the approval process of the corresponding level's standing committee of the People's Congress, including vice-presidents, members of the adjudicative committee, division chiefs, vice-chiefs and other senior judges with the exception of assistant judges. Assistant judges are appointed and dismissed by the presidents of their courts.²⁰⁹ In reality, however, CPC officials name for local people's congresses the candidates to select for the judiciary, and all appointments must be approved or vetoed by the Party Organization Department.²¹⁰ The rank of the judge determines the level of the Party Organization Department and the degree of scrutiny.²¹¹ In some cases the approval of the Party organ at a higher level is required; in some cases, approval of the Party organ at the same level is sufficient; while for lower level judges, simply submitting the appointment to the Organization Department for the record is sufficient, although even in that case the Organization Department can still veto the appointments, though it rarely does.²¹² To illustrate, the president of a provincial-level HPC has a bureau chief rank. Thus, the appointment must be approved by the Central Party Organization Department.²¹³ The vice-president of an HPC has a vice-bureau chief rank, and thus is approved by the Organization Department at the provincial level, with the appointment filed for the record with the Central Organization Department.²¹⁴ After the candidate has been selected, the Organization Department then collects information on the recommendees and prepares the file where approval is necessary. Once the Party vetoing hurdle is cleared, the People's Congress at the same level formally appoints the president, and the People's Congress standing committee formally appoints the vice-presidents, division chief, vice-chiefs and other senior judges.²¹⁵

As indicated earlier, the current selection of a new and assistant judge is to be

based on the educational background and a unified national judicial examination.²¹⁶ Work experience is also needed, though not the crucial prerequisite. Fresh graduates can be recruited into the court first as a senior judge's assistant, then after one or two years articling with the court, once they pass the national examination, they can be appointed as a judge with the nomination of the president.²¹⁷ On the other hand, for the position of senior judge or a court official, like president or vice president, being a member of the adjudicative committee, division chief, professional experience is important. For example, supreme and higher court judges are now to be selected from lower level judges with at least five years' experience, and from academics and elite lawyers.²¹⁸ As of 2001, BPC presidents are to be selected from among the best judges in the court, and should be at least thirty-five years old, with at least five years of trial experience.²¹⁹

(b) Promotion

In China, there is a regular career path through the various levels of the judicial hierarchy. A young person can enter the judicial service immediately following university graduation in law at the bottom of the judicial ladder and gradually work his/her way up toward a higher position in the judicial hierarchy, *e.g.*, from assistant judge to judge of lower rank to judge of higher rank. In addition, an ordinary judge, if found to have outstanding performance, can be promoted to the position of chief judge (president) of his/her court or to the position in a higher-level court. The result of annual appraisal is taken as a basis for reward, promotion, demotion and other disciplinary measures. However, as indicated earlier, Party approval remains an important factor in judicial promotion, especially in selecting chief justices or chief judges (often, president of a court).

(c) Discipline

The *Judges Act* creates standards of performance and conduct and sets out various sanctions for judges, including a disciplinary warning, a recorded demerit, demotion and even dismissal.²²⁰ Judges today are subject to annual “examination” and “assessment”, which include “work performance, professional competence, moral character and legal skill”. This annual appraisal is conducted by a committee which is established in the court and made up of court officials, division chiefs and some senior judges.²²¹ If a judge is found to lack competence or career ethics in an appraisal, he/she may be given a disciplinary warning or demotion or deprived of allowances.²²² In addition, judges may be given more severe sanctions such as criminal penalty or even dismissed for engaging in various forms of misconduct such as embezzling money, accepting a bribe, extorting confessions by torture or falsifying evidence.²²³ Some grounds for dismissal involve political considerations, such as divulging state secrets, spreading statements that damage the prestige of the state, joining illegal organizations, participating in assemblies, processions, demonstrations, or strikes against the state and the catch-all “failing to perform a judge’s duty.”²²⁴ However, judges may challenge a decision to impose sanctions or dismissal through an internal appeal process, appealing first to the organ that made the decision and then to the next highest level.²²⁵

(d) Removal

Because Chinese judges are not protected by security of tenure, they can, if found incompetent or in poor health or engaging in serious misconduct such as corruption, be removed or dismissed from office. In China, judicial removal is imposed on disqualified judges. When it comes to judicial removal, the People’s Congress at each level is

responsible for removing judges, while their standing committee may remove vice-presidents and division chiefs and other judges.²²⁶ The authority and process of judicial removal is the same as for judicial appointment.²²⁷ However, like the appointment process, all dismissals must be approved or vetoed by the Party Organization Department as well. As a matter of fact, few judges have been dismissed for incompetence or corruption.²²⁸

(B) Canada

Though it is a federal country with separation of powers between national and provincial governments, Canada has a centralized control over judicial appointments

(a) Appointment

In the broad perspective, the Canadian system of selecting and appointing judges is based on the practice developed in England.²²⁹ This system has two basic features: first, the judges are appointed by those who head the executive branch of government; and secondly, the judges are selected from the practicing bar.²³⁰ Precisely speaking, this system of executive appointment of practising lawyers can be understood from three dimensions.

First, there is separation of "appointment" power between federal and provincial governments. The complement of Canadian judges has three main components. The largest group is made up of judges appointed by provincial and territorial governments.²³¹ These judges preside in the provincial and territorial inferior courts. Next numerically are Section 96 judges. These judges are appointed by the federal government and preside over the provincial or territorial superior trial courts and courts of appeal.²³² Finally, a much smaller group of federally appointed judges serve on the Federal Trial Court,

Federal Court of Appeal, Supreme Court of Canada and specialized courts (Tax Court and military courts).²³³

Secondly, there may be no uniformity in the processes of judicial appointment in Canada.²³⁴ Essentially, there are eleven, not one, processes of appointment.²³⁵ First, there is the single federal process of appointment of justices to The Supreme Court of Canada, to the federal courts and to courts of superior jurisdiction in the provinces.²³⁶ In addition, each of the ten provinces has its own process of appointment of provincial judges to the provincial courts, though the requirements for provincial appointments are similar.²³⁷ For example, among twelve judicial councils established in Canada, only seven perform a role in the appointing process.²³⁸ The council established at the federal level, the Canadian Judicial Council, is involved only in discipline and education.²³⁹ Similarly, the judicial councils of Manitoba, New Brunswick, Nova Scotia, and Quebec play no part in appointments.²⁴⁰ However, in British Columbia, the judicial council acts as a true nominating commission: the council, not the minister, has the primary responsibility for collecting names and establishing a bank of good prospects for the provincial judiciary.²⁴¹ And the *Provincial Court Act* of British Columbia stipulates that the cabinet may appoint only persons who have been recommended by the British Columbia Judicial Council.²⁴² While in some provinces, such as Ontario and Saskatchewan, the judicial council's role in appointments has been much more passive, closer to the screening function performed by the Canadian Bar Association's National Committee on the Judiciary in federal appointments.²⁴³

Thirdly, political patronage has been a factor in appointing judges in at least two ways. The federal governing majority party can defer to choices suggested by its

provincial agents and, of course, a judicial candidate's prior membership or support for the party in power can help. In the past, most judges appointed by both federal and provincial Liberal governments were Liberal, judges appointed by Conservative governments were Conservative, and the general trend was merely qualified by the minor disturbance constituted by cross-party and non-political appointments.²⁴⁴ Today, the political component in the appointment process has substantially been reduced. Recently, public disclosures and scholarly research has revealed that the proportion of appointed judges overtly involved in politics has significantly declined.²⁴⁵ However, the influence of political power on judicial appointments will never be completely eliminated in a parliamentary system. Why?

Number 1: in Canada, at both the federal and provincial levels, appointment to the judiciary is made by the representative of the crown and the cabinet: the governor general or the lieutenant-governor in council.²⁴⁶ However, the selection and screening of candidates are under the control of cabinet and its individual ministers. More specifically, the Canadian system concentrates the responsibility for judicial appointment in the hands of the federal Minister of Justice and Prime Minister. At this level, both are responsible for submitting a recommendation to cabinet; the person to fill a judgeship by the Minister of Justice and for a chief justiceship, by the Prime Minister.²⁴⁷ In 1967, when Pierre Trudeau became minister of justice, he began to adopt the practice of seeking the opinion of a committee of the Canadian Bar Association before appointing any judge.²⁴⁸ However, the role of the Canadian Bar's judiciary committee is based on an informal arrangement. It has no statutory basis and its composition has evolved considerably over the years.²⁴⁹ This committee comes into play in the middle of the selection process: after candidates

for appointment have been identified by a minister of justice but before the minister makes his recommendation to the cabinet.²⁵⁰ The committee members would conduct inquiries or investigations and then report individually to the chairman about the candidate's legal ability, temperament, character, health and so on.²⁵¹ The chairman may check back with members if there appears to be a serious disagreement among the appraisals.²⁵² The committee does not vote on nominees, nor does it compare candidates for a particular vacancy or rank them.²⁵³ In each case the chairman, on the basis of members' reports, arrives at a determination of whether a candidate is "qualified", "highly-qualified," or "not qualified."²⁵⁴ The chairman's report is given to the minister on a confidential basis.²⁵⁵ This practice of intervening in the appointment process at a later stage, and carrying out the investigation after the government may be strongly committed to a candidate, of course, decreases the impact of the C.B.A.'s Judiciary Committee; but it increases the political forces that can be brought to bear on the selection of judges.²⁵⁶ As William Angus has pointed out: "Behind the closed door of a cabinet meeting, the considered recommendations of the Minister of Justice or Attorney General may go for nought in the face of local, ethnic, partisan, personal or other considerations."²⁵⁷ The control by the cabinet also means that individual ministers, especially the minister in charge of patronage for the province in which an appointment is to be made, have frequently intervened in the appointment process, sometimes to the point of having a veto over appointments.²⁵⁸ The federal approach of selecting and screening judges has been roughly duplicated by the provinces, so the Provincial Court appointment was controlled by the provincial cabinet too. Of course, this brought a good deal of political patronage at provincial level.

Number 2: in the last thirty years, Canada has taken some steps to reform the judicial appointment process. The involvement of judicial councils and nominating commissions in the selection and screening of potential judges is the most significant reform that has been made in the Canadian system of appointing judges. Since the 1980s, a new system of judicial appointment at the federal level has been conducted.²⁵⁹ The new process abolishes the C.B.A. Judicial Appointments Committee and replaces it with provincial and territorial committees mandated with the responsibility of screening names of prospective nominees.²⁶⁰ Each committee consists of a nominee of the provincial or territorial branch of the Canadian Bar Association, a puisne judge of one of the federally appointed courts, nominated by the Chief Justice, a nominee of the provincial Attorney General or territorial Minister of Justice, and a nominee of the federal Minister of Justice, and the latter must be a lay person.²⁶¹ A candidate for judicial office may be nominated by himself or others.²⁶² Upon nomination, the candidate's name is forwarded to the appropriate committee for a determination as to whether the candidate is "qualified" or "not qualified".²⁶³ If determined to be "qualified", the name will be retained by the Commissioner for the Federal Judicial Affairs for a two-year period, during which the candidate remains eligible for appointment by the Minister of Justice.²⁶⁴

This new process alters the means by which names of prospective appointees come to the Minister. Since 1994, the Minister of Justice publicly undertakes not to appoint any person who has not been recommended by a provincial committee.²⁶⁵ This practice, of course, to a great extent shifts the power of selecting and screening judges from the government to the committee. This reform is a belated response to growing public distaste for blatant patronage.²⁶⁶ However, the new appointment process does not

alter the basic constitutional fact that under the *Constitution Act* of 1867, the prerogative of federal judicial appointments rests with the Minister of Justice of Canada. Actually, the final decision still rests in the hands of members of the political executive, typically the prime minister/premier and the minister of justice/attorney general, individuals who are accustomed as a matter of routine to balancing official obligations with party considerations.²⁶⁷ So, the new process has blunted rather than broken the edge of patronage appointments.²⁶⁸ The influence of political power on judicial appointments can never be completely eliminated.

(b) Promotion

In the Canadian judicial system, unlike the Chinese or French, there is no “judge school” and a lawyer does not enter the judicial service immediately following graduation, at the bottom of the judicial ladder to gradually work toward the top.²⁶⁹ In this sense there is no regular career path through the various levels of the judicial hierarchy.²⁷⁰ Although there is no regular system of promotion within the Canadian judicial system, promotions do occur. They are not usually referred to as such; the less indelicate term “elevation” is favoured.²⁷¹

In Canada, there are two kinds of judicial elevations. One is the promotion of judges of a lower court to positions in a higher court.²⁷² The other is the promotion of ordinary judges, or puisne judges as they are called, to the position of chief judge or chief justice.²⁷³

In terms of promoting judges from a lower court to a higher court, most occur within the Section 96 courts.²⁷⁴ Canada follows the English and American patterns of drawing heavily on judges from superior trial courts for appointments to courts of

appeal.²⁷⁵ Bouthiller's study of the Quebec judiciary, for example, shows that nearly half (thirty-four out of seventy-four) judges have served on Quebec's Court of Appeal after promotion from the Superior Court.²⁷⁶ And The Supreme Court of Canada has filled the highest proportion of its vacancies by promoting judges from a lower court.²⁷⁷ Thirty-six of the sixty-two justices who have served on that Court between its founding in 1875 and 1984 had previous judicial experience on the highest provincial trial court, a provincial court of appeal, or the Federal Court of Canada.²⁷⁸ On the other hand, the least frequent kind of promotion or elevation is from the provincially appointed lower (magistrate) courts to the higher, Section 96 courts.²⁷⁹ William Klein found that only thirty (4 percent) of the 749 judges who served on the Section 96 courts of Manitoba, Ontario, and Quebec between 1905 and 1970 had begun their judicial careers as magistrates or judges in provincially appointed courts.²⁸⁰

As for the upgrading of judges, the positions of chief justice are most frequently filled by promotion within a court.²⁸¹ A study reported that of the eighteen chief justices appointed during John Turner's and Otto Lang's periods as justice minister (1968-1975) fourteen came from within the court (or the bench at another level) and only four came directly from practice.²⁸² Very little is known about the process of selecting chief justices or chief judges.²⁸³ At the federal level, the appointment of a chief justice is the prerogative of the Prime Minister.²⁸⁴ Provincial chief judges are appointed by the provincial cabinet.²⁸⁵ No doubt at both levels the minister of justice and attorney general play important roles in identifying candidates.²⁸⁶

(c) Discipline

Aside from removal, Canadian judges who enjoy security of tenure are also under other “professional responsibilities” to live up to the standards of professional conduct that justify such a privilege. In recent years a formal mechanism has been established in Canada for responding to complaints of all kinds of common misconduct about judges.²⁸⁷ That mechanism is the judicial councils across Canada. While the functions performed by a judicial council vary considerably from jurisdiction to jurisdiction, one function common to all is the investigation of complaints about misconduct.²⁸⁸ Most statutes establishing judicial councils also provide judges who are under investigation with the right to a fair hearing.²⁸⁹ The ways judicial councils conduct inquiry and investigation vary from jurisdiction to jurisdiction. In the Canadian Judicial Council, most of the work in relation to complaints is done by a small executive committee established within the judicial council. This committee considers all complaints and identifies those which are serious enough to merit a formal inquiry.²⁹⁰ Then, the full council votes on whether a formal inquiry should take place.²⁹¹

The only sanction provided for in the *Judges Act*, aside from removal, is termination of a judge’s salary.²⁹² However, in dealing with conduct which is serious enough to be questioned and reviewed but not to justify removal, the Judicial Council has found it more appropriate to adopt “sanctions” that are more educational and conciliatory in nature.²⁹³ As for alternative sanctions to removal, a number of provinces provide for an official reprimand by their judicial council and most provide for suspension of the judge during the course of an inquiry that might lead to removal.²⁹⁴

(d) Removal

In Canada judges have been reasonably well protected from removal by political authorities who might be displeased by their decisions.²⁹⁵ Since Confederation, a basic degree of security of tenure for the federally appointed senior judiciary has been provided in law.²⁹⁶ Later, the legislation protecting the lower court judges' security of tenure also came in.²⁹⁷ Thus, there are only two limitations on a Canadian judge's tenure of office: mandatory retirement and the requirement of "good behaviour".²⁹⁸

Federally appointed judges may remain in office during "good behaviour" until the age of retirement, for judges serving on The Supreme Court of Canada and the Federal Court of Canada at seventy-five years, pursuant to provisions contained, respectively, in the *Supreme Court Act*, R.S.C. 1985, c. S-26, and the *Federal Court Act*, R.S.C. 1985, c. F-7.²⁹⁹ For judges serving on courts of superior jurisdiction in the provinces, the age of compulsory retirement is seventy-five years, pursuant to S. 99(2) of the *Constitution Act* of 1867.³⁰⁰ Judges serving on the county or district court benches are compulsorily retired at the age of seventy-five years pursuant to S. 8 of the *Judges Act*, R.S.C. 1985, c. J-1.³⁰¹ Finally, judges serving on provincial court benches are compulsorily retired in accordance with provisions contained in the enabling provincial statutes establishing those courts.³⁰² However, in some provinces, for example, Manitoba, there is no mandatory retirement age for Provincial Court judges.³⁰³

Aside from mandatory retirement, the only other grounds for removing a judge from his/her office is "misbehaviour". There is no test common to all courts as to what constitutes good behavior and, therefore, it is necessary to consult the various enabling statutes.³⁰⁴ According to S. 65(2) of the *Judges Act*,³⁰⁵ a recommendation for removing a judge from office might be based on the following four grounds: (a) age or infirmity; (b)

having been found guilty of misconduct; (3) having failed in the due execution of the office; (4) having been placed, by conduct or otherwise, in a position incompatible with the due execution of the office. The grounds set out in provincial and territorial statutes for removal of lower court judges resemble those in the federal *Judges Act*.³⁰⁶ Although no two jurisdictions have exactly the same wording, the grounds that are covered include physical and mental infirmity, neglect of duty, and scandalous conduct or, to use the language of Quebec's *Courts of Justice Act*, "an act derogatory to the honour, dignity or integrity of the magistracy."³⁰⁷

More important than the wording of the statutory criteria for removal are the mechanisms through which these terms are applied, and the judgment of those who operate these mechanisms.³⁰⁸ For judges who serve in the upper echelon of Canadian courts (the courts included in the *Judges Act* definition of superior and territorial courts of appeal and the superior trial courts), the removal procedure involves a most intricate system of checks and balances in which all three branches of government participate.³⁰⁹ The judiciary is now involved at the beginning of the process: the Canadian Judicial Council, established by parliament in 1971 and made up of the chief justices and associate chief justices of the superior courts and given the responsibility of investigating complaints that might lead to removal of a county or superior court judge, is responsible for investigating any alleged wrong which may lead to removal.³¹⁰ Under the federal *Judges Act*, the Council must investigate if requested to do so by the minister of justice and may do so in response to a complaint from any other source.³¹¹ The Council may (and in most cases probably will) establish a committee to carry out the investigation. When the investigation has been completed, the full Council reports its conclusions to the

Minister of Justice.³¹² Should the Council find a judge's behavior constitutes grounds for removal, the Minister might proceed with a resolution in parliament to have a select committee consider the Judicial Council's report and conduct its own inquiry; alternatively, the Minister might immediately proceed with a motion for a joint address of parliament requesting the Governor General to remove the judge.³¹³ In response to such a request presumably the Governor General will remove the judge.³¹⁴ Theoretically a judge could be removed by the Governor General after the whole process passes; in reality, however, this complex removal procedure has rarely been taken to the final stage. Often, a judge will resign from office in anticipation of the invocation of the impeachment process or even die before that.³¹⁵

Provincial and territorial inferior court judges have always been subject to a simpler removal procedure. However, as the *Valente* case was proceeding through the courts, the practice of adopting an independent review process in judicial removal has been built into all the provinces and territories.³¹⁶ In most provinces and territories, judges can be removed by the provincial cabinet following an inquiry by an independent judge or judicial council.³¹⁷ Ontario has gone even further: it requires a vote of its provincial legislature to remove Provincial Court judges.³¹⁸

(C) Contrast

First of all, China is a unitary country with a powerful central government. Ironically, however, Canada has a more centralized control over judicial appointments. Judges of the highest provincial courts as well as the judges of the federal courts and The Supreme Court of Canada are all appointed by the central government. In China, authority for judicial appointment is more evenly dispersed into governments at all levels.

Chinese judges are appointed by the People's Congress at the corresponding level; only judges of the Supreme People's Court are appointed by the National People's Congress.

Secondly, both in China and Canada, political patronage has some influence. However, in Canada the partisan role appears to have declined dramatically. The requirement of a selection or screening by a judicial council or an advisory nominating committee as a pre-condition of appointment meets the basic institutional requirement for judicial independence. In China, one party control of the appointing process has led to a kind of ideological manipulation of the bench, but this also appears to be declining.

Thirdly, staffing the Canadian judiciary is guided by two concerns: professionalism and democracy. On the one hand, Canadian judicial recruitment relies exclusively on experienced lawyers. On the other hand, the judicial council or advisory committee approach applies to all stages in the process. Without the involvement of an independent council or committee in selection, screening, inquiry, investigation and voting, any decision about appointing, removing, disciplining, or promoting judges can not be made. On the contrary, China is still struggling with promoting the professionalism of its judges. And in China, none of the appointing, removing, promoting or disciplining processes are consonant with judicial independence. Rather, all these processes depend on a partisan system. Unlike Canada, China has not adopted any independent review process such as a "judicial council" or "advisory committee" approach to exclude or minimize the control of government or party on judicial appointment, promotion, discipline and dismissal.

Fourthly, in the Chinese judicial system, a young person can enter the judicial service immediately following graduation at the bottom of the judicial ladder and

gradually work his/her way up toward a higher position in the judicial hierarchy, *e.g.*, from assistant judge to judge of low rank to judge of higher rank and if possible, even to the top, chief justice of Supreme People's Court. In Canada, there is no such regular career path through the various levels of a judicial hierarchy. Canadian judges will either be promoted to the position of chief judge or justice of a higher court, or most often stay at the same position for an entire career.

Fifthly, Canadian judges enjoy life tenure and Chinese judges do not. Though in both countries, the numbers of judges being dismissed or removed are few, a Chinese judge has to be more concerned with how to keep the position than his/her Canadian counterpart does. For a Canadian judge, as long as he/she meets the proper standard of professional conduct, he/she can remain office until retirement. On the contrary, a Chinese judge can be sanctioned, disqualified or even removed from office for many reasons such as lack of competence, health or political allegiance. In addition, as indicated earlier, in China, having a "judge" title does not necessarily mean exercising adjudicative power. What kind of work a judge really engages in totally depends on the arrangement of his/her court. If compared to their Canadian counterparts, Chinese judges are just like judicial cadres.³¹⁹ They can be transferred from adjudicative posts to administrative or other non-adjudicative posts, *e.g.*, research or registration (case filing) or judgment-enforcement.³²⁰ Under this circumstance, he/she is still identified as a member of judicial crew and can be transferred back to an adjudicative post at any time; therefore, it is not a removal. However, they are, in fact, deprived of adjudicative power. In China, a judge who is viewed as professionally incompetent or comes into conflict with or attempts to resist interference by a court official, local party or government

officials may face the risk of being transferred away,³²¹ if not removed.

Sixthly, uniformity is the feature of the judicial process in China. All jurisdictions follow the same approach and procedure in appointing, removing, promoting and disciplining judges. These processes in Canada are more diversified. Different provinces or territories can have different approaches.

Part 4: Hierarchy

(A) China

Judges hold different positions in the hierarchy. According to the *Judges Act*, Chinese judges are divided into twelve ranks, with the president of SPC “ranked at the top, and chief judges, senior judges, and judges...classified from 2d to 12th ranks.”³²² In accordance with the evaluation criteria provided in Articles 17 & 18 of the same *Act*, various factors are considered when deciding the rank of a judge, including the judge’s work performance, legal skills, seniority and moral character. According to official statistics, there is now one Chief Grand Justice, 41 Grand Justices, 30,000 senior judges and 180,000 other judges across the country.³²³

In the Chinese language, there are no two similar but distinguishable terms like “justice” and “judge” in English language. Judges of various rank are addressed the same in court. On the other hand, the rank of judge is somehow related to the level of court they work with. Normally, the judges of a grass-root court are at the lowest level of the hierarchy. For example, the president of Chengdu High-Tech District Court, who is also the chief judge of the court, is only a third degree senior. His colleagues are below him in rank. It does not necessarily mean that a judge who holds a higher position in the hierarchy has more authority than others below him/her in rank. When judges at different

levels constitute a panel to try a case, they are equal in hearing and judging. The higher rank does not necessarily lead to a predominant position on the bench, though as a matter of fact a senior judge's opinion is more likely to be valued than that of a junior judge. On the other hand, the administrative rank of judges has been important within the court, because senior judges can exercise influence over the promotion of junior judges.

(B) Canada

Canadian judges also have different positions in a judicial hierarchy. According to the interpretation of terms given by the federal *Judges Act*, "judge" includes a chief justice, senior associate chief justice, associate chief justice, supernumerary judge, chief judge, associate chief judge, senior judge and regional senior judge.³²⁴

Generally speaking, judges of the higher courts (including The Supreme Court of Canada, Federal Court, Tax Court, Provincial Superior Courts) have the title of "Chief Justice", "Senior Associate Chief Justice", "Associate Chief Justice", "Justice of Appeal" and "Puisne Justices".³²⁵ Judges of lower courts (*e.g.*, provincial magistrate courts) are addressed as "Chief Judge", "Associate Chief-Judge" and "Judge". However, "chief" cannot be applied to the courts of three territories (including Supreme Court of Yukon, Supreme Court of Northwest Territories, Nunavut Court of Justice), where the judges can only be distinguished as "Senior Judge" and "Judge".³²⁶

Canadian Judges were traditionally addressed as "your honor" in benches of a lower court, and "my lord" or "my lady" in the higher courts. However, this distinction is avoided today. Some lower courts still make the request that its judges be addressed "my lord" or "my lady".³²⁷

Moving from the position of an ordinary judge of a lower court to chief judge of

the same court or to justice of a higher court is promotion. Chief judges have administrative responsibility, *e.g.*, assigning judges to cases and courtrooms or circuits. Senior Justices often join in judicial councils which can have a word on many affairs with respect to the appointment and removal of a judge, the continuing education of judges, the court administration, and so on. Plus, serving in the position of chief-judge or justice of a higher court does lead to differentials of remuneration and social status.

(C) Contrast

First of all, either a Canadian judge or a Chinese judge can find his/her position in the judicial hierarchy. However, unlike China, Canada does not have a ranking system to divide its judges into groups with respective grades. In a way, the Chinese ranking system is the career ladder: a junior judge enters the judicial service immediately following graduation at the bottom of the judicial ladder and gradually works up toward the higher rank. Though most lower-court judges will not be promoted into a higher court, their judicial rank, however, will be promoted after certain years of service. While in Canada, “judge” or “chief judge”, “justice” or “chief justice” is more a matter of title than of rank which recognizes the professional achievement of judges. A judge will not necessarily move up to the higher position simply after long-time service.

Secondly, both in China and Canada, judges of a higher position can exercise certain influence on the appointment, promotion and removal of judges of lower rank. However, Chinese low ranking judges are often subject to high ranking judges in deciding the outcome of cases, even though under the law all judges of the panel are equal. The reason is that in China, court officials (who are at the same time, the high-ranking judges of the court) have a great deal of power in the benefits, discipline,

promotion and even working situations of judges. In a way, this explicit hierarchy of judicial posts reflects a Chinese law court's position as one of many bureaucratic "systems", but not superior to, all others.³²⁸ This integration of courts into the entire Chinese bureaucracy causes adjudication to be different from that of a jurisdiction in common law countries. As Professor Stanley B. Lubman sums up: "Chinese judicial decision-making is more of an administrative process than a judicial one, especially if the criteria are judicial independence and the judge's individual responsibility for the decision".³²⁹ By contrast, Canadian judges are more independent-minded. By nature, judges in the common law countries tend to enjoy more internal independence. In Canadian legal culture, the ideal of judicial independence means not only court as a whole has independence, but also each judge is equal—one to another.³³⁰ Plus, the requirement of an inquiry by a commission or judicial council as a pre-condition of appointment or discipline or removal minimizes the influence of a chief-judge on the benefits, discipline, education and other working situations of judges in his/her court.

Section 5: Court Administration

Part 1: Internal Organization

(A) China

Internally, almost all PRC courts are divided into substantive and administrative divisions. The substantive divisions deal with adjudication related work while the administrative divisions exist to support the substantive work.³³¹

Generally speaking, the substantive divisions include three adjudicative divisions (criminal, civil, administrative),³³² case filing, judicial supervision and enforcement

divisions.³³³ Administrative divisions include a research office, planning and finance section and a political department, which is involved in ideological work, policy, and personnel matters.³³⁴ Some courts of the higher level may, with SPC approval, establish additional divisions such as bankruptcy, real estate, intellectual property, or juvenile division.³³⁵ As a supervisory body sitting on the top, Supreme People's Court has one specific division for petitions and appeals.³³⁶ Each division has a division chief and may have one vice-chief; above these division chiefs are the president and vice-presidents of the courts.

Besides these divisions, every court has an adjudicative committee and a party group (party cell). An adjudicative committee consists of the president of the court, vice-presidents, division chiefs, and senior judges of different divisions.³³⁷ The Communist Party group (party cell) within each court is composed of all the party members of the court, generally headed by the highest or second highest-ranking Party official, who is, in most cases, the president of the court.³³⁸ Over a long period of time, the political fact in China has been that within any entity, *e.g.*, government, court, school or factory, there must be a party group which internally organizes all party members and externally answers to the party branch at higher levels for the partisan work of that entity. In the past, this kind of party group had supreme authority within the entity in which it resided. However, in the last twenty years, the authority of the Party group has been in decline with the retreat of the CPC.³³⁹ Today, an adjudicative committee rather than Party group holds the supreme authority within a court. Adjudicative committee members will meet regularly to make decisions on important issues, such as the identification of facts and application of law in complicated or important cases, the withdrawal of judges from

certain cases and the arrangement of personnel in the court. The adjudicative committee handles most cases on its own without the involvement of Party Organization and all the court personnel (party members and non-party members) are bound by its decision. By contrast, a party group is now confined to ideological work, policy dissemination and implementation, and supervision and punishment of Party personnel for violations of Party discipline.³⁴⁰ Currently, the Party Group within a court rarely becomes involved in handling particular cases. Nor can it do anything unfavorable to non-partisan judges or administrative staff. In today's China, the position of a judge is increasingly based on legal skill and education, rather than party affiliation (membership).

Criminal, civil and administrative adjudicative divisions deal with the adjudication of cases. According to the different degrees of complexity and importance, cases are heard by a panel of judges or a judge alone. However, even under the adjudication of a panel, only one judge, more specifically, the presiding judge of the case, will be held responsible if the judgment is overruled by an appellate court.³⁴¹ Normally, judges hear cases in the appropriate divisions, *e.g.*, criminal adjudicators hear criminal cases, civil hear civil, administrative hear administrative. But sometimes a criminal adjudicator can be a member of a civil or administrative panel, if the other civil or administrative adjudicators are unavailable.³⁴² Likewise, a civil or administrative adjudicator can also be a member of a criminal panel. The difference is that a criminal adjudicator cannot be the presiding judge of a civil or administrative case, nor can the civil or administrative adjudicators preside in criminal cases. In a way, these sitting judges are in a silent role. They do not make final decisions, nor do they answer for judgments over-ruled by an appellate court.³⁴³

Some judges work in other substantive or administrative divisions, such as a law research office, case filing office, judicial supervision division, judgment enforcement division or political department. In this case, they have the title of judge but they do not adjudicate cases. However, they can also turn into adjudicators under the appointment of the adjudicative committee.³⁴⁴ Likewise, the incumbent adjudicators can be transferred to the law research office or the lawsuit registration office.

(B) Canada

In Canada, the internal organization of a court varies from jurisdiction to jurisdiction. Some courts, like Quebec's Superior Court and the Saskatchewan Queen's Bench,³⁴⁵ concentrate the jurisdiction on one general adjudication division for dealing with all types of matters; while other courts, like Ontario's Supreme Court and Alberta's Provincial Inferior Court,³⁴⁶ divide jurisdiction into several adjudicative divisions for handling a specific type of case, such as small claims, family, civil, youth and criminal. Other provincial courts, like the Provincial Court of Manitoba, are only established for criminal and family divisions.³⁴⁷

(C) Contrast

The most salient difference between the internal organization of a Canadian court and Chinese court is that the Canadian court does not have its own administrative service division; rather, this is supplied by the executive Ministry of Justice. Unlike a Chinese court, Canadian courts are not administrative agencies for themselves.³⁴⁸ Moreover, judicial administration varies from higher court to lower court.

The judiciary in Canada consists of judges who only exercise the adjudicative function, including chief judge, associate chief judge and other judges.³⁴⁹ Some courts,

e.g., Queen's Bench of Manitoba,³⁵⁰ may have masters to hear motion proceedings such as enforcement of support orders, bankruptcy, assessing the value of marital property and so on. The administrative and management staff, including administrator, court clerk, judge's secretary, magistrate, sheriff and registrar are not judicial personnel. Rather, they are all members of the provincial civil service, falling within the governmental department called Justice, within a subdivision of Court Service.³⁵¹ By contrast, Chinese court's built-in administrative division reflects a fact that the main responsibility for court administration also vests in the judiciary.

Though court service staff is not a part of the Canadian judiciary, some of them, however, do exercise quasi-judicial powers. For example, magistrates (justices of the peace) may hear, try and determine prosecutions, charges, matters and proceedings under municipal by-laws and certain parts of the *Criminal Code*, which are always offenses of less severity.³⁵²

Part 2: Court Operations

(A) China

Every Chinese court is headed by a president. There are also several vice-presidents, each one in charge of certain matters. Chengdu High-Tech District Court, for example, has one president and three vice-presidents. One vice-president is in charge of criminal and civil adjudication, one is in charge of administrative adjudication and supervisory review, the third is responsible for political and administrative matters. The president and vice-presidents are the court officials. The president is also the chief judge of his/her court. However, the president is always busy in the management of the court so he rarely tries a case. In fact, the president spends much of his time outside the court

attending meetings, so the vice-presidents handle much of the work of supervising daily operations.³⁵³

The president has *carte blanche* when engaged as chief of the court in interacting with other external institutions, organizations or entities, including the local government, congress, procuracy and Party organizations (branch). However, within the court, the president himself cannot monopolize administration, though he can exercise considerable power on many issues, for example, deciding whether to submit cases to the adjudicative committee, playing a role in assigning cases, having an important voice, though not necessarily the decisive one, in recruitment, promotions, transfers, and removals.³⁵⁴ Today, an adjudicative committee holds the supreme authority. Almost all the major issues, such as deciding cases, selecting judicial candidates, promoting judges and so on must go through the discussion of an adjudicative committee.

Below president and vice president are the division chiefs and vice-chiefs. They are in charge of management of his/her division and, generally speaking, hold a higher rank than other junior judges or administrative staff. However, the power granted to these division chiefs is limited, though they will have their voice as adjudicative committee members on some issues. On the other hand, division chiefs can exercise some influence on the rewards, promotion or discipline of subordinates by way of making comment at the annual appraisal. This kind of influence is limited too. If a judge really has outstanding achievement and makes contributions to judicial work, his/her division chief has no way to conceal his/her accomplishment. Actually, chiefs of a civil, criminal or administrative division have the same power as other judges when they constitute a panel

to try a case. The outcome of the case is up to the presiding (responsible) judge of the panel, not necessarily to the division chief.

(B) Canada

Canadian judges at both federal and provincial levels work within a structure in which adjudicative power belongs to the court, while administrative services are organized by the outsider (Department of Justice or Office of Commissioner for Federal Judicial Affairs). Thus, the Chief Justice (Judge) becomes the liaison with the administrative staff and ideally the judges are to be in control of the court processes established by its enabling act or by the rules of court.

Court officers, such as its registrar, court clerk or administrator play an important role in the functioning of court. Normally speaking, the administrator is responsible for the overall administrative and case processing activities of the court. The Registrar may process, record and direct the flow of all documents filed by the parties, and record all events which take place during the life of a case. The court clerk may have power to administer oaths, take affidavits and statutory declarations, receive affirmations and examine parties and witnesses, as the court may direct.

Every court is headed by a chief judge. The role of the chief judge has three main parts: judge, administrator of the court, and a public representative for the court. As an adjudicator, the chief judge presides at all sittings of the court at which he or she is present. Under the administrative capacity, the chief judge is responsible for the judicial functioning of the court, including direction over sittings of the court and the assignment of judicial duties. Internally, a chief judge has general supervisory powers in respect of judges, magistrates, justices of the peace and other staff in matters that are assigned by

law to the court. Externally, a chief judge acts as a deputy to the public and government, generally representing the judges of his/her court and advocating on behalf of his/her court.

Some courts have Associate Chief Justices (Judges) to assist their Chief Justice (Judge) in managing the business of the court. For example, there are three Associate Chief Judges in the Provincial Court of Manitoba, each having an area of primary responsibility, *e.g.*, youth, regional courts, and justices of the peace,³⁵⁵ and two Associate Chief Justices in Manitoba's Court of Queen's Bench.

Theoretically, judges do not have to engage in the running of the court. But practically, at the present time, the judges intervene in issues they feel are important. For example, presently the Manitoba Provincial Court judges are taking over the layout of courtrooms and types of procedures for how cases run through the system.³⁵⁶ Similar to many law firms, this court has a management committee consisting of the Chief Judge, the Associate Chief Judges and several other members of the judiciary.³⁵⁷ In some courts there are also formal Rules which have been developed as to the judge's involvement with the running of the courts and procedures.

The chief Justice shall, whenever necessary and at least once in each year, convene a meeting of the judges for the purpose of dealing with matters relating to the administration of and practice in the courts or for any purpose relating to the administration of justice or the purposes of an Act of the Legislature.³⁵⁸

(C) Contrast

As indicated in Chapter 1, China's unitary structure extends to its court system, in its uniformity and bureaucracy. First of all, Chinese courts have a lot of autonomy in matters of administration and day-to-day operations, except for funding and remuneration.

The Ministry of Justice is charged with supervising personnel management, training, and fiscal planning. However, control of most court services vests with the judiciary. In a way, courts are organized and have operated like administrative bureaus.³⁵⁹ During the Mao era and even to a considerable extent today, administration has been a heavy part of a court's work. But the operational mechanism of the court is not scientific. Why? Because adjudicative work is not completely differentiated from administration and court operation, with no legal guarantee of financial support.³⁶⁰ As Ronald C. Brown sums up: "as a law court does its business, it approaches its judicial functions in a way recognizable as a bureaucratic administrative agency charged with enforcing the law and resolving legal disputes".³⁶¹ By contrast, Canadian courts are administered by the outsider. In Canada, adjudication is differentiated from other activities and is conducted by professional specialists.

Secondly, courts in mainland China have achieved a great degree of uniformity in composition, operation and administration as well as many other respects like funding, judicial appointments and litigation proceedings. Any two courts at the same level are identical versions of each other. By contrast, the administration and operation of Canadian courts vary from one jurisdiction to another, especially between higher and lower levels. And generally speaking, provincial and territory courts don't enjoy the same benefits and independence the federal courts enjoy.³⁶²

Number 1, on the provincial inferior (magistrate) court level, the administration of judicial power is given to the executive governments throughout all provinces of Canada.³⁶³ More explicitly, the support functions, such as sheriff services, human resource management, financial and administrative services, are provided by the Ministry

of Justice.³⁶⁴ Court services division within a Ministry of Justice manages all the court offices in communities across the jurisdictional territory: court staff schedule court cases, maintain court records and files, collect fines and fees, enforce civil orders, provide justice information to the public, and facilitate the delivery of other justice services, including civil and family mediation programs, victims' services and legal aid services.³⁶⁵ Under this institutional arrangement, the Minister of Justice, who is also Attorney General, superintends all matters connected with the running of courts.³⁶⁶

However, an executive government's control over court services raises some problems as well. In the first place, the relationship of court staff with its employer government and the judiciary is ambivalent. On the one hand, the staff are civil servants appointed or recruited by the minister of the government, the Attorney General (Minister of Justice). The minister also provides working instructions, job descriptions, trainings, appraisals, promotions and other directives or policies. Therefore, they must be primarily answerable to the Minister.³⁶⁷ On the other hand, court staff must take directions and instructions from the chief judge and other judges as well.³⁶⁸ Their mission is to provide court services and co-operate with judges to carry out the adjudicative work. However, ambivalence arises at this point. To whom a staff should give faithful allegiance, the judge or the minister, especially when their directions conflict with one another? In the second place, the Attorney General's responsibility for court administration and budget competes with his many other roles, such as the public prosecutor, the principal legal advisor of the government and the key law-making body within the government. If an Attorney's General's functions of public prosecution and court services are not separated, how can he/she balance these interests with one another?³⁶⁹

Number 2, on the federal and provincial superior court levels, the Office of Commissioner for Federal Judicial Affairs acts as deputy to the Minister of Justice in performing duties and functions in relation to the administration of federally appointed judges, within the responsibility of the Minister.³⁷⁰ The Commission was established in 1978 under Section 73 of the *Judges Act*, to safeguard the independence of the judiciary and to put federally appointed judges at arm's length from the Department of Justice.³⁷¹ For the courts at this level, the Ministry of Justice still provides administrative arrangements with regard to equipment and supplies, services and staff; and the Minister of Justice still supervises administration and management. However, since 1978, the Commission has taken over from the Department of Justice the administration of personnel matters with respect to all federally appointed judges, except the judges of The Supreme Court of Canada.³⁷² The Commissioner's duties include the administration of salaries, allowances and annuities and survivor beneficiaries' benefits for the judges, leaves of absence, moving expenses and opting for early retirement or supernumerary status.³⁷³ All these details of personnel management must be worked out with individual judges.³⁷⁴ It was felt that judges should not be negotiating these matters with officials from a government department which frequently appears in cases before them. The Commissioner acts as a deputy of the minister but he and his staff are not part of the Department of Justice. He/she is appointed by the Cabinet after consultation with the Canadian Judicial Council to serve as a buffer between these judges and the executive branch.³⁷⁵

Number 3, for The Supreme Court of Canada, most court services and staff are provided by the federal Ministry of Justice, but the Minister does not supervise

administrative matters. Rather, it is the Registrar who superintends the officers, clerks and employees appointed to the Court and also manages the library and registry.³⁷⁶ What is more, the registrar is subject only to the direction of the Chief Justice.³⁷⁷

Part 3: Court Funding and Judicial Remuneration

(A) Court Funding

(a) China

China has no specific legislation regarding court funding like some countries do.³⁷⁸ In practice, courts have various sources of funding, which include an annual budget, supplementary budget appropriations, percentages of fines and court service fees.³⁷⁹

First, governments are in charge of all court budgets. Budgets for any court are submitted by the executive government for approval of the People's Congress at each corresponding level.³⁸⁰ Judges and courts have relatively little involvement in their own budgetary process. Rather, the Ministry of Justice at various levels is responsible for fiscal planning of the whole system, including budgets.³⁸¹ Courts are represented by the responsible minister in negotiation with other ministers or in governmental discussions. As a matter of fact, budgetary resources are rarely adequate for running a court.³⁸²

Secondly, Chinese courts are beholden to the various levels of central, provincial, municipal/county governments for additional funds to meet operating expenditures. For example, financial and judicial institutions at the provincial level (including the Ministry of Finance, People's Court, People's Procuracy, Ministry of Justice, Ministry of Public Security) could jointly apply to the National Ministry of Finance for additional costs for specific items such as office supplies and technical equipment.³⁸³ Also, local courts may apply to the Ministry of Finance at each

corresponding level for extra funding to handle cases of great importance or complexity. To some extent, these kinds of additional funding are a big help to insufficiently funded courts. However, supplementary funds are not as reliable as the regular budgetary appropriation. Rather, approving or declining a court's request for extra-budgetary resources is totally up to the availability and willingness of the local government.

Thirdly, fines and court service fees are significant sources for court funding.³⁸⁴ In practice, courts have to submit the fines and fees to an exclusive account in the Ministry of Finance at each corresponding level and then get rewarded with the return of a certain percentage.³⁸⁵ In this process of re-distributing revenues, a large amount could be concentrated in the Supreme People's Court and Provincial Higher People's Court for equipping courts nationwide or funding the courts in remote areas.³⁸⁶

(b) Canada

In Canada, a court's budget is part of funds voted by legislatures to their departments of justice.³⁸⁷ The judges are not directly involved with budget negotiations. It is therefore essential that the Court be represented by the responsible minister (Attorney General) in negotiation with other ministers or in Cabinet discussions. For example, in Manitoba, the Assistant Deputy Minister responsible for the Court Services Division of the Manitoba Department of Justice would be the budgetary planner for the courts in Manitoba, putting forward proposals, for example, for any projects that a court wishes to undertake, and overall in advising how the budget requested would be allocated among the various court services.³⁸⁸

Besides the voted budget, there is no other source for supplementary funding. Fines and court fees are all paid to the Minister of Finance, meaning that such fines and

fees go into the general revenue fund for the executive government.³⁸⁹ It does not get directed to the Courts Division or even designated to the Department of Justice.

(B) Judicial Remuneration

(a) China

A Chinese judge's overall compensation package has several varieties depending on the court he/she is serving on. First, base salaries and benefits come from the court's budget and apply to all the judges across the country. On this base compensation level, judges are paid the same as civil servants in government. Secondly, judges can be granted additional benefits, *e.g.*, allowances from the executive governments at each corresponding level. The amount of this non-budgetary remuneration varies from jurisdiction to jurisdiction, because it depends totally on the availability and willingness of local government. Even within the same jurisdiction, the amount is variable from year to year.³⁹⁰ As a matter of fact, local governments tend to expect courts to be a source of revenue. Courts have to submit fines and fees to the local revenue fund and get partially rewarded in the form of benefits and allowances. For example, from 1997 to 2000, Chengdu High-Tech District Court was rewarded a lot from its submission to the revenue fund for its operating expenditure and judge's allowances. But in 2001, the district government cut down the reward rate because of jealousy and disagreement from other civil servants.³⁹¹

(b) Canada

When it comes to judicial remuneration in Canada, the systematic differential between the remuneration of federally and provincially appointed judges must be noted.

First, the salaries, allowances, and pensions of all federally-appointed judges are established by act of Parliament of Canada.³⁹² By contrast, the level of compensation for provincially-appointed judges is left to the executive discretion of each province or territory.³⁹³

The *Judges Act* fixes the base yearly salary level of all federally appointed judges.³⁹⁴ This Act has provided periodic amendments, after review, to accommodate judicial remuneration with inflationary increases. A remedy to inflexibility was introduced in 1981 when the *Judges Act* was amended to provide for automatic annual adjustments equal to the increase in the industrial composite index of prices or 7 per cent, whichever is lower.³⁹⁵

In all provinces and territories except Ontario, the final determination of judge's salaries, pensions and benefits invariably rests with political branches of government.³⁹⁶ In the *Valente* case, The Supreme Court of Canada rejected the argument that this arrangement violated the guarantee of judicial independence in Section 11(d) of the Charter.³⁹⁷ The province of Ontario has incorporated into its *Courts of Justice Act* a framework agreement between the judiciary and the executive which establishes a binding process for the determination of judge's compensation and promotes co-operation between the executive branch and the judiciary. Under this agreement, Crown and the judges' association may designate one or more persons acting on their behalf to constitute a Provincial Judges Remuneration Commission, for conducting inquiries respecting the compensation package of provincial judges and making recommendations related to judge's salary, pension, allowance and other benefits.³⁹⁸ This commission's decision on appropriate base level of salaries is final and binding on the Crown and the

judges' associations.³⁹⁹

Secondly, at both federal and provincial levels, a third party is established as an independent mechanism for determining judicial compensation. Since 1981, the Triennial Commission process has introduced a process to examine and make recommendations with respect to the adequacy of the salaries and benefits of federally appointed judges every three years.⁴⁰⁰ As for the remuneration of provincial judges, on 18 September 1997, The Supreme Court of Canada released a series of key decision relating to the constitutional requirement of financial security of judges: *Reference Re: Remuneration of Judges of the Provincial Court of P.E.I.*; *Reference re Independence and Impartiality of Judges of the Provincial Court of P.E.I.*; *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*.⁴⁰¹ These decisions reinforced the principle of judicial independence and stated that there must be an independent, objective and effective commission that makes recommendations on all aspects of judicial compensation. Any salary reduction without recourse to such independent, objective and effective process is unconstitutional.⁴⁰²

(C) Contrast

On the one hand, both Chinese and Canadian courts have challenges arising from issues of funding because neither has control over its budget. In China, because of the lack of funds, effective judicial administration is hampered and more subject to corruption where "outside" economic support may induce court officials to seek political and economic supports. Actually, there are reports of sporadic inadequate funding and related attempts at political influence.⁴⁰³ Under the Canadian system, there are no guarantees that court services will be fully or even adequately funded either. In Canada,

Minister of Justice has a duty to prepare and defend a budget for the operation of his department and its functions. The minister has a duty to represent all of his or her departmental interests and the public, ensuring that all funds voted to the department and all revenues generated by departmental programs are completely accounted for and that all expenditures are properly authorized and made in accordance with applicable governmental policies.⁴⁰⁴ However, it is unlikely a minister will obtain all the budget requested. The minister must at that point decide where the departmental priorities lie. The result may be restrictions on its judicial obligations if the minister chooses to direct scarce funds away from the court. For example, a reduced budget may lead to reduced court administrators with the resulting reduction in docket schedules.

On the other hand, compared to the Canadian judiciary, the Chinese judiciary has way more fiscal dependence on executive governments. First, Canadian judges have enjoyed a certain degree of financial security. With the compulsory recourse to an independent commission that makes recommendations on judicial compensation, the paymasters cannot use their power over the purse strings to interfere with judicial decision-making, for example, by reducing the salary of a judge who consistently decides against claims of the government. By contrast, without the safeguards by such an independent third party, Chinese judges have to rely on governments for additional allowances and benefits. Secondly, besides the voted budget, Canadian courts have no other supplementary funding from government. Chinese courts, however, may ask the executive for non-budgetary appropriations. Court's reliance on government for funding makes it hard to overcome the interference of the latter. "Local protectionism" and inconsistent enforcement are two current endemic problems.⁴⁰⁵

China is a big country with huge regional differences in geographic and economic terms; some local governments have much more revenues than others. This regional income disparity can lead to disparity among court funding and judicial remuneration. In China, the courts of more economically developed regions are better equipped and its judges are better remunerated. Out of consideration for its own benefits, courts also worry that enforcement of an adverse judgment or award could result in the loss of key equipment or the closing of a factory and eventually the decline of the tax revenues generated from local companies. Therefore, courts are often subject to local governmental officials' pressure to decide a commercial dispute in favor of local companies or deny an outsider's application for enforcement. Plus, due to this institutional arrangement whereby the local government funds the courts, local governments can hold courts in check. Thus, in administrative litigation cases, courts are more likely to make decisions in favor of the administrative agencies.

CHAPTER THREE: MORPHOLOGY OF LITIGATION

Section 1: Court's Role in Conducting Civil Process

China, a unitary state in the modern civil law tradition, regulates civil litigation proceedings with a unified code that applies to all jurisdictions, namely its *Civil Procedure Law*.¹ Basically, except for a couple of specialized courts, any court in China has comprehensive jurisdiction over criminal and civil disputes, and judicial review of administrative action.² All of these jurisdictions follow the same rule in managing and conducting litigation, which means that all civil cases, no matter in which court they are litigated, pass through the same procedural mould, respecting different kinds of proceedings and differences between cases which make certain parts of the rules relevant to some cases and not to others.

By contrast, Canada is a federal state with a common law system (except for civil pleadings in Quebec). Each jurisdiction has its own legislation that establishes the court system, defines its substantive jurisdictions, provides for certain basic procedural and substantive rules respecting civil actions and, perhaps most importantly, provides for a procedure by which rules of civil procedure may be enacted from time to time by regulation instead of statute.³ In Manitoba, these tasks are accomplished in the *Court of Queen's Bench Act* and *Court of Queen's Bench Rules*. Why? Because Queen's Bench has first-instance jurisdiction over civil pleadings across Manitoba. The theory and form of Manitoba's *Court of Queen's Bench Rules* (hereinafter QBRM) is similar and, in many respects, even identical to the rules in other Canadian provinces.

So, to compare each country's court process for civil litigation, I choose Chengdu High-Tech District Court and Manitoba's Court of Queen's Bench.

Part 1: Canadian Practice

A fundamental feature of Canadian civil procedure is its distinction between pre-trial and trial, between discovering evidence and presenting it. Normally speaking, a typical civil case can go through five stages: pleadings, discovery, pre-trial conference, trial and decision-making.

(A) Pre-Trial

Under the Canadian adversarial system, pre-trial proceedings not only mean a series of steps or stages that must be gone through before a trial, but also the compulsory stop to certain matters. In other words, after proceeding to trial, whatever is not accomplished or completed in pre-trial stages cannot be newly introduced at trial. For example, after the closure of pleadings, the parties are not allowed to submit extra claims after the discovery is done, nor can a party present new evidence which was not disclosed to the adverse party without leave of the court.

(a) Pleading

All civil proceedings commence with the issuing of an originating process by a court registrar, unless the rules or a statute otherwise provide.⁴ Basically, there are two kinds of proceedings: action and application.⁵

The originating process for commencement of an action is a Statement of Claim;⁶ the originating process for commencement of an application is a notice of application.⁷ In this thesis, I focus my research on action proceedings because an action is a civil dispute

between opposing parties, while an application is about a single party's request for a court-ordered implementation of certain civil rights.

Normally speaking, a Statement of Claim indicates the names of all parties, informs the defendant of the time limitation for response and possible consequence (*i.e.*, default judgment) for non-response, and identifies the specific claim(s) and the relief(s) sought, if any.⁸ The Statement of Claim should be served on the defendant by the plaintiff within six months after it is issued,⁹ and the defendant needs to file a statement of defense within the prescribed time (currently, in most cases, 20 days).¹⁰ When the plaintiff has filed a reply to every defense in the action, or the time for filing a reply has expired, pleadings in an action are closed.¹¹ In this pleading process, the court itself does not even scratch the surface of a case, except for the registration work. After preparation of the Statement of Claim, the plaintiff, or his/her counsel, should take it to the court registry for issuance. The registrar will issue it by signature, date and number.¹² A copy will be kept for the court's case file, which is thereby opened.

This does not necessarily mean that the court's authority is not being applied in the pleading process. More accurately, the court intervenes in pleadings in a passive way. It does not initiate any intervention, but it does employ its discretion to decide some issues upon the party's request. For example, if the defendant fails to file a statement of defense within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, require the registrar to note the defendant in default.¹³ A defendant who has been noted in default is deemed to have admitted the truth of all allegations of fact made in the Statement of Claim and then cannot file a statement of defense later or take any other step in the action, unless there is a rule to the contrary.¹⁴ The plaintiff can

next move, or require, a default judgment against the defendant from the court.¹⁵ However, both the noting of default and the default judgment itself can be set aside later by the court on such terms as are just.¹⁶

(b) Discovery

After delivery of pleadings, litigation proceeds to the discovery stage, to enable parties to exchange information and evidence relevant before the trial. There are mainly four types of discovery: discovery of documents, examination for discovery, inspection of property, and mental examination of the parties.¹⁷ Just like the pleading process, litigants or their counsel perform all of these disclosures and examinations, involving the court only when they perceive a problem with the progress of their case.

(i.) Disclosure

The parties must make full disclosure of all relevant documents after the pleadings are served.¹⁸ Each party must serve an affidavit listing every document, whether or not privilege is claimed, "relating to any matter in issue"¹⁹ that is or was in the party's possession, power or control.²⁰ Rule 30.04 further provides that by serving another party with a request to inspect documents, a party is entitled to see any document that is not privileged and that is referred to in the other party's affidavit of documents and pleadings, if it is in that party's possession, control, or power.²¹ In order to enable parties to change information and evidence before trial, the document must be produced if it has "some semblance" of relevance.²² On the other hand, any dispute over documents withheld on the basis of privilege are at the discretion of the Manitoba Court of Queen's Bench. Where privilege is claimed for a document, the court may inspect the document to determine the validity of the privilege claim.²³ Plus, there is no *prima facie* right in

Manitoba to secure documents and depositions directly from non-parties. Rules only provide the parties with the automatic right to inspect a relevant unprivileged document that is in the possession, control and power of the other adverse party(ies). A relevant document in possession, control or power of a non-party must be inspected with leave of the court. The court may, on the motion by a party, order that a non-party produce a relevant document where it would be unfair for the moving party to proceed to trial without that document.²⁴

(ii.) Examination for Discovery

After disclosure of documents, the parties proceed to inspect and examine the credentials behind the evidence. An examination for discovery can take the form of an oral examination, or by interrogatories, or both, in Manitoba.²⁵ Basically, the *Rules* provide that either side, without leave of the court, may, on reasonable notice, examine the other party on oath before trial.²⁶ The time and place of the examination can be arranged by consent of the parties, but the examination does not take place in a court room. Normally, the examination will be held at a lawyer's office and before a court reporter or official examiner.²⁷ After oral examination commences, examination and cross-examination proceed as at the trial. The examining party or lawyer is entitled to ask the opposing party any question relating to any matter in issue, as defined by the written pleadings in the action, or to any matter made discoverable by the rules, such as names and addresses of possible witnesses, findings, opinions and conclusions of an expert and insurance policy.²⁸ The court recorder or official examiner will record every examination and the certified transcript of the examination for discovery can be used in evidence at trial.²⁹ An examination for discovery can also be conducted in the form of interrogatories,

which are a list of questions which are to be answered by one party under oath by an affidavit.³⁰

Though litigants or their counsel basically control the pace and scope of examination for discovery, many issues are still left to the court's discretion. First, generally a party can only examine the other party once. If he/she wants to examine the other party more than one time, he/she must apply to the court to grant leave.³¹ Secondly, Manitoba does not permit non-party oral discovery without leave of the court. There is only the automatic right to examine each individual party and one representative of each corporate party. Additional witnesses can be examined with leave of the court, but such leave can be difficult to obtain.³² Thirdly, where any person neglects or refuses to attend for examination or to answer any proper question, the court may, at the request of the moving party, order or permit the person being examined to re-attend at the person's own expense and answer the question, or even dismiss the action where such person is the plaintiff or strike out the defense where such person is a defendant.³³

(iii.) Inspection for Property

Generally the inspection of property is commenced by consent of the parties and also exercised by the parties themselves. If the consent is not forthcoming, the *QBRM* provide that the court may on motion make an order for inspection of real or personal property, where it appears to be necessary for the proper determination of an issue in a proceeding.³⁴ The court may authorize the entry into or taking of temporary possession of any property, and also permit the measuring, surveying or photographing of the property, or the taking of a sample, the making of observations, or the conducting of tests on the property.³⁵ The order for inspection of property may be made in respect of the property

that is in possession either of a party or a non-party.³⁶

(iv.) Physical / Mental Exams

A physical or mental examination can be conducted at the consent in writing of the parties.³⁷ The *Court of Queen's Bench Act* provides that, where the physical or mental condition of a party is in question, the court, on motion, may order the party to undergo a physical or mental examination. The order will not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.³⁸

(c) Pre-Trial Conference

After discovery, litigation proceeds to a pre-trial conference. In Manitoba, the formal pre-trial conference is required in all cases unless the court orders otherwise.³⁹ Mandatory pre-trial conference is also a form of case management adopted in Manitoba. The typical pre-trial conference is a conference attended by counsel and a judge or other judicial officer a few weeks before the trial date.⁴⁰ Pre-trial conference is normally initiated by parties, though in family proceedings it may be initiated at any time by either party or the court.⁴¹ *Rule 48.01(1)* provides that any party may initiate the procedure for setting a case down for trial as soon as it is ready for trial. This party needs to file a trial record and pre-trial brief, obtain a date for a pre-trial conference from the court and then serve the notice for the pre-trial conference within prescribed days on each party to the proceeding.⁴²

During the whole conference, the pre-trial judge's participation in discussion and negotiation is active. He/she monitors and manages progress, encouraging the parties to effect a settlement and even compelling counsels to narrow and define the issues

preparatory to trial.⁴³ It is usual to start with the statement of claim and to ascertain what matters are agreed and what contested.⁴⁴ The second matter for consideration is the listing of documents, the admission of copies or originals and the making of admissions as to the sending and receipt of such documents. The third matter for discussion is whether there is a preliminary question of law which can be submitted and decided in advance of the trial.⁴⁵ The fourth question which arises at times is whether, in cases where there are questions both of liability and damages, the trial can be split.⁴⁶

After discussion has taken place concerning the various matters raised, the judge can issue a memorandum setting out the results of the conference and indicate the issues that are resolved and the issues requiring a trial or hearing; and the judge may, by order, give such directions necessary or advisable for purposes of the proceeding.⁴⁷ This memorandum or order normally constitutes part of the official file or record of the case and is binding on the parties, unless the judge presiding at the trial or hearing orders otherwise to prevent an injustice.⁴⁸ In light of it, we can conclude that conference is an ideal forum for discussion of a settlement; however, the primary aim of the pre-trial conference is to narrow and define the issues, obtain admissions of facts and documents, explore other matters which may avoid unnecessary proof and therefore shorten any subsequent trial.⁴⁹

Under Manitoba procedure, a judge who presides at a pre-trial conference in a proceeding shall not, except with consent of the parties, preside at the trial or the hearing. In the pre-trial conference there should be a full discussion of the issue and of possible settlements between the parties.⁵⁰ Since the pre-trial judge has been involved, it would be difficult to remain impartial and uncommitted during the trial. Therefore, *Rule 50.01(9)*

provides that discussions at a pre-trial conference are without prejudice and cannot be mentioned in any subsequent motion or at trial. On this point, the practice dramatically differs from what occurs in China.

At the end of the conference, if the judge considers that the action is ready for trial, he or she will fix the date and place.⁵¹

(B) Trial

The Canadian legal system provides for two modes of trial: by a judge alone or by a judge sitting with a jury.⁵² However, the types of civil cases allowed for trial by judge and jury in Canada generally are limited. In Manitoba, only civil action for defamation, malicious arrest, malicious prosecution or false imprisonment can be tried with a jury. All other actions shall be tried, and damages determined, by a judge without a jury.⁵³

(a) Oral and Documentary Evidences

One basic premise of the Canadian civil litigation system is that it is the parties who forward the evidence, not the judge. Usually, in pre-trial conference the parties identify all witnesses, documents, records and other physical evidences that will appear in the court.⁵⁴ At trial, in the opening statement, the party or counsel states the facts of the case, the evidence he/she has to adduce and its effect on proving the case, with remarks upon any point of law involved in the case.⁵⁵

Normally, after the opening address, the parties call witnesses, adduce evidences and carry out examinations. The lawyer presents evidence by asking questions of each witness and obtaining answers on oath. The evidences adduced in trial should be marked as exhibits by a court clerk.⁵⁶ The pre-conducted examination for discovery can be used at trial too. There are two basic ways in which an examination for discovery may be used

at trial. First, a party may *read into evidence* any part of the examination for discovery of an adverse party (if otherwise admissible);⁵⁷ secondly, the evidence given on an examination may be used for the *purpose of impeaching* the deponent in the same manner as any previous inconsistent statement.⁵⁸ To ensure fairness, where only part of the examination is used in evidence, the trial judge may direct the introduction of any other part that qualifies the part used.⁵⁹

Under the adversarial litigation system, the oral testimony of witnesses is extremely important to the fact-gathering, and either side yearns to have its witnesses. In Canada, it is the party who calls the witness to trial and pays the witness for attendance, and even provides an interpreter if the witness does not understand the language or is deaf or mute.⁶⁰ After the pre-trial conference, a party needs to serve all witnesses with a subpoena and pay the required attendance money to them, if the party requires their appearance at the trial⁶¹ (except those who will surely appear at the trial, such as the paid expert). Rule 53.04(2) defines how a subpoena is issued: at the request of a party or a lawyer, and on payment of the prescribed fee, a court registrar shall sign, seal, and issue a blank subpoena bearing the file number and the title of the proceeding.⁶² The party or counsel then completes the subpoena by inserting the names of any number of witnesses, etc. The party or the counsel serves the subpoena on witnesses personally and the service of a subpoena and the payment of attendance money may be approved by affidavit.⁶³

The scope of witnesses is wide. In Manitoba, parties have a broad range of rights to call an expert and even an adverse party as a witness at trial. A party who intends to call an expert witness at trial shall include as part of the party's pre-trial brief a copy of a report, signed by the expert, setting out the expert's name, address and qualifications, and

the substance of the proposed testimony.⁶⁴ Generally, this kind of expert report is admissible in evidence.⁶⁵ And a party may also secure the attendance of an adverse party as a witness at a trial by serving the person with a subpoena.⁶⁶ The adverse party's failure to testify may bring an unfavorable judgment or adjournment of the trial.⁶⁷

(b) Direct-Examination and Cross-Examination

Examination is the main undertaking of a trial because the adversarial system assumes that the self-interest of parties makes direct and cross examination the best fact-finding mechanism. The examination of witnesses by the lawyer for the party calling them is known as *direct-examination* or *examination in chief*. On the other hand, the examination conducted by the lawyer for an adverse party is called *cross-examination*. In a trial, after the opening statement, counsel for the plaintiff will call witnesses (perhaps including the plaintiff⁶⁸) and examine them about the matters in issue. After the plaintiff's counsel has examined a witness in-chief, the defendant's counsel has the opportunity to cross-examine that witness. Following that cross-examination, should there be any point that the plaintiff's lawyer wishes to clarify, the witness may be *re-examined* on new matters raised in cross-examination.⁶⁹ This procedure will repeat for each witness called to support the plaintiff's case, until the evidence is concluded. When plaintiff's evidences are concluded, the defendant may make an opening address and begin to call his/her witnesses and adduce evidences. Then, defendant (or counsel) will examine a witness in chief, and plaintiff (or counsel) will cross-examine him/her and the same procedure will repeat for each witness as well.⁷⁰

The object of direct-examination is to get the witness to tell the story, while counsel stays in the background and controls the direction and flow of the examination.⁷¹

Mostly, counsel cannot use leading questions on materially disputed matters in direct-examination because “A leading question is one that suggests to the witness the answer desired by the examiner.”⁷² However, the judge has discretion to permit a leading question if it is considered necessary. The situation is set out in the QBRM:

Rule 53.01(2):

Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine the witness by means of leading questions.

On the other hand, the main purpose of cross-examination is to test the veracity of the witness and to obtain answers which assist the case of the cross-examining party. Therefore, a leading question can be used as a test in cross-examination. Counsel for the adverse party may ask questions intended to test the truthfulness of the witness or to test the ability of a witness to perceive things.⁷³ In the adversarial system, cross-examination is regarded as a particularly important device, in terms of clarifying the fact and disfranchising evidence, so it is full of lawyer’s art. For example, in *Alan Williams v. Darryl Brocker & Ellison Cartage Ltd.*, because defendant’s counsel Mr. Kravetsky’s cross-examination made it clear that Dr. MacDonald (plaintiff’s witness) was basing his opinion (the accident exacerbated the plaintiff’s left knee condition) on the plaintiff’s report to him, as to what happened in the accident, and was unaware that the plaintiff had a pre-existing condition, the judge later decided to dismiss Dr. MacDonald’s conclusion on the ground that it was based on incomplete or wrong information.⁷⁴

After all the evidence is examined and witnesses are testified, both plaintiff and defense make their closing arguments. In their closing arguments, each side sums up their case.

(c) Judge's Role

Generally speaking, the role of the judge during trial is essentially passive and peace-keeping. The judge always comes to the trial with only a very general picture of the case, which is usually derived from reading the pleading and the pre-trial conference memorandum.⁷⁵ As a result, he/she is not familiar with either party's detailed story before trial begins. However, a judge's intervention in trial examination is not in depth either. His/her part in all this is to hearken to the evidence, only asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure.⁷⁶ Common law's conception of an adversarial trial is that a judge must not go beyond the role of an impartial umpire and wear the robe of an inquisitor or advocate.⁷⁷

On the other hand, being passive, dispassionate and impartial does not necessarily mean that a judge has no authority in a trial. It is the judge who ensures that proceedings are conducted in an orderly and efficient manner. Briefly speaking, a Canadian judge's authority in controlling the sequence of events is widely applied in three aspects.

First, the judge has authority to compel the attendance of witnesses at trial. Where a witness whose evidence is material to an action is served with a subpoena, and the proper attendance money is paid or tendered to him or her, and the witness fails to attend at the trial or to remain in attendance in accordance with the requirements of the subpoena, the presiding judge may, by a warrant for arrest, cause the witness to be apprehended anywhere within Manitoba and forthwith brought before the court.⁷⁸ A judge even can, either on motion by a party or on his/her own initiative, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.⁷⁹

Secondly, when a party is examining or cross-examining a witness, if the adverse party raises an objection, the judge has authority to stop the questioning or allow it to proceed. For example, in *Alan Williams v. Darryl Brocker & Ellison Cartage Ltd.*, when plaintiff's counsel Mr. Slobodzian was leading the plaintiff to tell the story of his post-accident hearing loss, defendant's counsel raised an objection on the ground that plaintiff's hearing loss was not related to the accident. However, the judge allowed the plaintiff's counsel to continue asking questions about hearing problems that plaintiff was experiencing.⁸⁰ And as I indicated at a prior point, the judge has discretion to justify some exceptional situations, *e.g.*, approving a "leading question", if it is considered necessary.

Thirdly, a judge can influence the jury by expressing an opinion with regard to what evidence is believable and what evidence is not, when delivering his/her *charge* to the jury.⁸¹ And the judge must instruct the jury on the law that they must apply to the facts as they find them. Where the jury disagrees, or makes no finding of fact on which judgment can be granted, the trial judge may direct that the action be re-tried with another jury at the same or any subsequent sitting.⁸²

(C) Decision-Making

After both parties have presented all of their evidences and arguments, the judge will render the judgment. For Canadian judges, independence and impartiality is the primary doctrine to uphold in decision-making.

First of all, a judge must be, and be seen to be, free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.⁸³ In Canada, judicial independence is an unwritten norm, recognized and affirmed by the preamble to the

Constitution Act, 1867.⁸⁴ As indicated in Chapters 1 & 2, Canada's political structure (the separation of party and state), rule of law regime (separation of powers, checks and balances, supremacy of law), and institutional arrangement for judicial remuneration and appointment, ensure that judges reject any attempt to influence their decisions in any matter before the court. On the other hand, judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independence and impartial decision-making by each and every judge.⁸⁵ The judge's duty is to apply the law as he or she understands it without fear or favor and without regard to whether the decision is popular or not. Even the chief justice, as senior judge in the same court or a higher court, cannot exert any influence on the trial judge in decision-making.

Secondly, judges must be and should appear to be impartial with respect to their decisions and decision-making. On the one hand, judicial independence is the cornerstone, a necessary prerequisite for judicial impartiality.⁸⁶ On the other hand, impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and pre-judgment.⁸⁷ Therefore, judges have an obligation to treat all parties fairly and evenhandedly and to avoid creating in the mind of a reasonable, fair minded and informed person any impression of pre-judgment and intemperate behavior.⁸⁸ On this point, the Canadian adversary system permits the judge to remain unbiased as between the parties throughout the proceedings. Number 1, the trial judge is not presented with any evidence until the case is heard by him.⁸⁹ So he/she always comes to the trial with only a general picture of the case based solely on information supplied in the case file, to not bias the judge towards one side or other. Number 2, the trial judge is not responsible for any investigation of facts upon which he/she is to rest his/her judgment.⁹⁰ Therefore,

the judge does not need to form certain tentative hypotheses about the asserted reality in the case; and as a result, if a witness seems evasive, disrespectful, hostile in the court, the judge should not become antagonistic towards that witness or tend to discredit his/her testimony.⁹¹ Number 3, the judge shall reject *ex parte* efforts by litigants or others to influence his/her decisions in matters under litigation before him/her. Any attempts to influence a court must only be made publicly in a court room by advocates or litigants.⁹² On the one hand, a judge shall not have any *ex parte* contact with a litigant; on the other hand, any submission to the court must be served by a copy to the adverse party.⁹³ Number 4, the judge must be specific and exhaustive in explaining his/her decision.⁹⁴ Because the evidences, testimonies and applicable laws submitted by parties are always competing, the judge must give detailed explanations for his/her acceptance or denial of evidence and selection of each legal rule, to make sure that balance in the case remains.

(D) Enforcement of Judgment

The judgment of the court is the final determination of the lawsuit, subject to any appeal. Under the *Manitoba Q.B.R.*, an appeal to the Court of Appeal does not operate as an automatic stay of execution for the judgment appealed from.⁹⁵ The party wishing to delay implementation needs to apply separately for a stay, pending an appeal.

In many cases, the judgment will be in the form of an award of money that the loser is required to pay.⁹⁶ The fact that the winner has been awarded damages is of little significance unless the winner can collect. The burden lies on the winner to take appropriate, lawful procedures to collect his/her money.

After judgment is obtained, a judgment creditor may apply to start enforcement proceedings. Upon the judgment creditor's request, the trial court may issue writs and

other orders to compel fulfillment of its award against the judgment debtor. The measures of enforcement vary in accordance with the different type of orders. If the judgment is an order for payment or recovery of money, it can be enforced by a writ of seizure and sale, a notice of garnishment, or the appointment of a receiver.⁹⁷

(a) Writ of Seizure and Sale

A judgment creditor is entitled to have a writ of seizure and sale at any time within six years of the date of the order.⁹⁸ After six years have elapsed, or some change has taken place in the parties entitled to enforce or be liable under the order, the judgment creditor must obtain leave of the court.⁹⁹ The writ of seizure and sale is issued to one court officer, usually the sheriff, to seize the debtor's unencumbered property and, if necessary, to sell it at a public sale and use the proceeds to satisfy the creditor's award.¹⁰⁰ In this case, the debtor might conceal or make away with property to shirk responsibility. In light of it, *Manitoba Court of Queen's Bench Rules* provide the creditor with a right to conduct an examination in aid of execution to obtain information about the judgment debtor's ability to satisfy the judgment. A creditor may examine either the debtor or any person who has knowledge of the matters, after obtaining an order from the court.¹⁰¹ If the person who is served with an order for examination in aid of execution fails to attend at the time and place set out in the order, court may issue a contempt order to compel his/her attendance.¹⁰² Where it appears from such examination that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may also make a contempt order against the debtor.¹⁰³

(b) Notice of Garnishment

The method of garnishment permits a creditor to seize or attach a debt owed by a third party (a garnishee) to the debtor. The common targets for garnishment are the debtor's wages or bank accounts. Leave of the court is not required for obtaining a notice of garnishment. All the creditor has to do is to file with the court's registrar two copies of a notice of garnishment and an affidavit stating the issued judgment for payment and the amount payable, including interest.¹⁰⁴ On filing the required notices of garnishment and affidavit, the registrar shall issue a notice of garnishment.¹⁰⁵ A garnishee served by the notice must respond either by paying into the court the full amount shown in the notice, or paying into the court a lesser amount, or no amount while filing with the court a completed garnishee's statement disputing his liability to pay the full amount.¹⁰⁶ If the garnishee fails to respond, the court may make an order or motion against the garnishee for payment of the amount owing to the debtor.¹⁰⁷

(c) Appointment of a Receiver

A receiver¹⁰⁸ is a third party having no interest in the assets of the debtor, appointed by the court having equitable jurisdiction on the motion of an interested party or parties. The receiver's function is to receive and hold the property.

Beyond these three alternative orders there is also an order for the recovery of personal property other than money, which may be enforced by a writ of delivery.¹⁰⁹ If the property is not delivered under a writ of delivery, the order may be enforced by a contempt order.¹¹⁰

Similarly, an order for the recovery or delivery of the possession of land is enforced by a writ of possession.¹¹¹ A writ of possession is issued only with leave of the court.¹¹² The execution of a writ of possession is done by a sheriff.

And there is also a case where the plaintiff's recovery takes the form of an order requiring the defendant to stop doing something, known as an injunction. This judgment is said to be against the defendant's person. If the defendant fails to obey, the plaintiff may apply to have the defendant found in *contempt of court*,¹¹³ and, if so found, the defendant may be punished by a fine or imprisonment.¹¹⁴

Part 2: Chinese Practice

Under the Chinese civil inquisitorial system, there is no clear distinction between pre-trial and trial, between discovering evidence and presenting it. Trial amounts to a series of hearings that are not necessarily continuous. There is no closure of pleadings, discovery and conference, as under the Canadian adversarial system. In practice, parties are allowed to submit claims and evidences from pleading stage until after the trial is started.

(A) Pre-Trial

Strictly speaking, there is no such kind of pre-trial proceeding as defined under the Canadian adversarial system. Before the first hearing starts, all the steps the court and parties have gone through fit into pre-trial process. However, in different cases, whatever the court and parties have accomplished before opening that first hearing can be different. For example, in some cases, the judge may conduct a conference among parties to seek settlement before trial; while in other cases, the parties may not even meet until the first hearing. Because the *Civil Procedure Law* does not give specific provisions about what steps shall be completed prior to trial, therefore, the judge can schedule a hearing for any

time he/she thinks necessary; and whatever is not completed before the trial will be continued during trial proceedings.

(a) Pleadings

The plaintiff or his/her counsel commences a civil lawsuit in China with a complaint, either a written statement of claim or an oral complaint. Like its Canadian counterpart, the Chinese complaint narrates the key facts, frames the legal issues, lists evidences, and asks for a remedy or other specific relief.¹¹⁵ Unlike its Canadian counterpart, the Chinese complaint is served on the defendant by the court clerk within five days after it is filed; and the defendant needs to submit a statement of defense within the prescribed time, which in most cases is 15 days.¹¹⁶ Then court serves the statement of defense on the plaintiff within five days after it is filed.¹¹⁷ Upon receiving the defendant's statement, plaintiff can either reply or ignore it. If a plaintiff wants to react to a defense, he/she can file a reply even after the trial is started. And parties are even allowed to add, deduct, change or even withdraw claims during and after a hearing.¹¹⁸ So there is no closure of pleadings, as in Canada.

As soon as plaintiff's complaint is filed, the court starts to put its finger on the case. In China, not every complaint is acceptable to the court. A registry will not file the case for hearing until it has examined a complaint and is satisfied that it meets the criteria for acceptance.¹¹⁹ If a complaint fails, the court shall issue a ruling rejecting the complaint with reasons briefly given and the plaintiff may appeal against the decision.¹²⁰

(b) Discovery

Under the Chinese inquisitorial civilian system, digging for facts is part of the work of judges. Though it has become a principle of civil litigation that parties shall be

primarily responsible to present evidence to support their own allegations or assertions, on the other hand, if a party fails to obtain certain evidence related to the case or if a court feels it needs to clarify a fact, the party can start a motion to request the court to collect evidence; or the court itself, under certain circumstances, will initiate an investigation and collection of evidence.¹²¹ Discovery is not only a fixed pre-trial proceeding, it extends all through the trial, especially after a hearing, when some points of fact might be found to be unclear; then judges may announce a recess and schedule the next hearing to allow parties and the court itself more time to collect evidence.¹²²

Motivated by the client's interest, both plaintiff's and defendant's counsels work hard to conduct significant searches for witnesses or other evidence unknown to his/her client; however, they do not have as wide a range of power as their Canadian counterparts do. On the one hand, no party is under liability to disclose evidence or a witness to his/her opponent prior to trial. Whatever a party submits to the court is not required to be serviced on the adverse party. Though court may, on a motion of a party or out of its own decision, conduct a pre-hearing meeting for information exchange,¹²³ one rationale behind the Chinese civil litigation system is to seek the truth and this truth-seeking purpose allows the acceptance of evidence disclosed later during trial hearings.¹²⁴ Therefore, parties and their counsels like to throw in key evidence in a trial hearing and make opponents dumbfounded. As a result, a party or counsel does not really know his/her adverse party's case until the very last minute. On the other hand, a lawyer cannot compel a witness to present evidence or attend a hearing or even answer a questionnaire. If a party refuses to present the evidence unfavorable to him/her, his/her adverse party can request the court to rule that that evidence is against him/her and then quash the

related statement or assertion alleged by him/her.¹²⁵ But if a witness other than the other party refuses to present evidence or appear in court, lawyers basically can do nothing except ask the court to collect it. Evidence in the possession of banks or state agencies cannot be obtained by parties directly, and as a result it is sometimes necessary for judges to travel to collect evidence.¹²⁶

In contrast with its Canadian counterparts, Chinese judges have extensive power to conduct an independent investigation into the merits of each case, such as questioning or examining a witness, assigning an expert to appraise or evaluate the technical issue in controversy, having an on-location inspection, and so on.¹²⁷ However, the court's active intervention in discovery does not necessarily mean that the truth of the matter will be clarified. The law just says that a witness shall provide information and evidence when questioned or examined by the court.¹²⁸ It does not delineate how to secure a witness to fulfill his/her duty. If an agency or entity does not give assistance when requested to help the court investigate or collect evidence, *e.g.*, a bank refuses to answer a court's inquiry about a party's deposit, the court may impose a fine on its head.¹²⁹ But if an individual witness refuses to provide evidence or information, the court cannot impose any punishment against him/her.¹³⁰ There is no subpoena used on an individual witness other than one of the two parties, and "contempt of court" citation is also not available against a witness.

(c) Pre-Trial Meeting

The pre-trial meeting is not a formal, compulsory step in the civil litigation process. It is up to the trial judge to decide whether or not to have one or several meetings

with parties before the trial hearing. If so, the pre-trial judge is also the judge who presides at the trial and makes the judgment.¹³¹

Normally speaking, there are mainly two agendas in a pre-trial meeting. The first aim is to let the parties exchange information and sift evidence. After the information is disclosed and exchanged, the judge records the agreed facts and indicates the evidences in dispute.¹³² But unlike the pre-trial conference in Manitoba civil proceedings, this pre-trial meeting is not to define or enter issues and evidences. It does not confine the scope of issues and evidences to be brought to trial. The truth-seeking concept behind the Chinese inquisitorial system allows the acceptance of evidence disclosed later in the hearing. And parties are even allowed to add, deduct or change claims after the trial is started.¹³³ In this respect, a pre-trial meeting only plays a limited role in facilitating the future trial. The second aim served by a pre-trial meeting is to bring parties to a settlement agreement. In China, reaching a settlement agreement is considered the best way to end a civil dispute, especially in a divorce.¹³⁴ If a settlement agreement is reached, the trial will be saved and the judge does not have to make a judgment. Often, judges will suggest avenues of compromise and urge parties to reach a settlement agreement.

(B) Trial

The Chinese legal system provides two modes of trial: by a single judge or by a collegiate panel (bench). Generally speaking, civil cases in which summary procedure is followed are tried by a single judge alone; all the other cases are tried by a collegiate panel (bench).¹³⁵ Unlike its Canadian counterpart, there is no jury trial in Chinese civil proceedings.

Trial amounts to a series of hearings that are not necessarily continuous. As

already indicated, under Chinese civil procedure there is no clear distinction between pre-trial and trial, between discovering evidence and presenting it. Trial is not only designed for evidence-presentation, witness-examination and party-to-party debate. On the contrary, discovery (evidence-gathering), pleading and mediation often extends to trial proceedings.¹³⁶ In a hearing, when a point of fact is found to be unclear or a party requests summoning a new witness or starting a new investigation, the judge may announce a recess for further collection of evidence and adjourn the hearing to a later time. That's why proceedings in a difficult case may often require several hearings across many months.

(a) Oral and Documentary Evidences

Presenting evidence happens not only in situations where both parties are present, for example, a trial hearing or pre-trial meeting.¹³⁷ Nevertheless, the court hearing is the most important chance for parties to get to know each other's case. Why? Because whatever a party separately submits will not be served on the adverse party, as in Manitoba civil proceeding; but during court hearings, all these submissions must be exhibited and examined. Often, counsels will request time to read the file during an adjournment and this request is always approved.¹³⁸

The evidences collected by the judge shall also be exhibited and examined in the court hearing. Like parties, the trial judge carries out evidence-presentation by reading signed written testimony (if the witness is absent), asking the witness questions and exhibiting other documentary evidence like photographs, written records of inspection and expert statements.

It is primarily the litigant's duty to provide evidence at the initial court hearing to

support his/her allegations. But unlike their Canadian counterparts, parties can neither control the scope of evidence nor secure the attendance of a witness. First, only the court in China summons each participant, including the parties, their agents *ad litem*, and witnesses to attend the hearing by serving them notices of appearance.¹³⁹ Therefore, if a party wants to bring a witness to the court hearing, he/she must get the judge's approval. Second, a party (or counsel) may, out of consideration for his/her own interest, choose not to present certain evidence that might be unfavorable to him/her or call a specific witness to appear in the court. But if the judge deems that evidence or witness is important for clarifying the facts of a case, he/she can collect and exhibit that evidence by himself/herself and even summon that witness to attend the hearing without the consent of the party. Why? Because the Chinese civil procedural system is designed primarily to seek the "objective truth".¹⁴⁰ Guided by this concept, judges are required to base their judgments on the truth that is supposed to be completely consistent with the facts. To achieve this end, the judge must check all the facts relevant to the case, even those not claimed or undisputed.¹⁴¹ This truth-seeking priority entrusts to each judge a kind of "investigator" role and drives the judge to go beyond any submission by the parties. Third, even the court cannot secure the attendance of an individual witness. If a defendant keeps refusing to attend the trial after having been served two subpoenas, the court may take him/her into custody and compel appearance in the court hearing.¹⁴² But if an individual witness other than the defendant refuses to testify in a court hearing, the court can do nothing about it. There is no compulsory measure available to be used on an individual witness: no subpoena, no "contempt of court" order, no imprisonment, neither corporal nor monetary punishment. As a result, what happens more often in a Chinese

civil court is that the judge and parties examine signed written testimonies instead of directly questioning the witness.¹⁴³ Unlike his/her Canadian counterpart, a Chinese witness does not have to testify or give evidence under oath. China has no such practice or legislation.

(b) Examination

Like its Canadian counter-part, the Chinese inquisitorial system also requires that all the evidence, including testimony of witnesses, statements of experts, records of inspection and audio-visual materials shall be subject to the test and examination of both sides at trial.¹⁴⁴ But unlike its Canadian counter-part, counsel does not play a prominent role in examination.

First, the trial judge instead of counsel is the main examiner. After both parties address opening statements¹⁴⁵ and present evidence, the judge will proceed to examination. In practice, the judge will call the witness to the hearing and ask him/her questions. After finishing the questioning, counsels can ask additional questions with the permission of the judge. When testing the credibility of documentary evidence, such as signed written testimony, a record of inspection or audio-visual materials, the judge will exhibit or read it out and ask whether counsels have questions or opinions about it. Then counsel might make comments on the evidence, such as challenging its credibility or pointing out its defects and even suggesting further proofs. For example, if an issue of technical difficulty arises on which the judge or counsel wish to obtain the views of an expert, the judge will, at the request of counsel or by his own decision, select the expert to evaluate or appraise the technical point at issue.¹⁴⁶ After the expert's conclusion comes out, the judge may organize another hearing to examine it. In this way, non-adversarial

proof-taking alternates with adversarial dialogue across as many hearings as are necessary. Like its Canadian counterpart, examination is also the most important part of Chinese civil procedure because it merges the investigatory and evidence-presenting functions.¹⁴⁷

Second, there is no strict requirement as to the manner of questioning. Compared to its Canadian counter-part, the examination in a Chinese court does not follow the direct-and cross-examination model. There is distinction but no separation between the plaintiff's and defendant's cases. Examination means moving from one evidence to another, until the last one is exhibited and discussed.¹⁴⁸ The judge is the examiner-in-chief for each evidence; and counsels just ask supplementary questions after the judge finishes his/her questioning. Nor is there any prohibition on counsel or the judge in terms of asking questions; for example, leading questions are not forbidden.¹⁴⁹ In China, the credibility of testimony or other evidence is not tested by an adversarial cross-examination, as in common law countries like Canada. Rather, it is the judge who evaluates each single testimony or evidence in relation to other evidence in a case, to decide whether it can be used as a basis for proving or disapproving an alleged existence of fact.¹⁵⁰

(c) Debate

After examination, the trial proceeds to debate, when the parties can make closing statements and ask each other questions to set forth one's own points and rebut the opponent's case. Usually, the order is plaintiff, defendant, and the third party, if any.¹⁵¹ In practice, plaintiff (or counsel) may first stand up to make a closing speech, re-elaborating his/her viewpoint, reviewing the strongest part of the evidence in his/her

favor and challenging the defendant's or third party's assertions. After plaintiff announces the completion of his/her speech, the defendant (or counsel) will respond to plaintiff's challenge, pointing out the defects in the plaintiff's evidence, denying causation in the facts alleged by plaintiff, asking plaintiff questions and even querying the validity of the plaintiff's statements.¹⁵² Like the examination stage, the court debate must remain under the control of the judge and be recorded by the court clerk. For example, a judge may interrupt the speaker if the debate becomes a kind of verbal fight or personal attack or if a question raised is not relevant to the case.

At the end of the court debate, the presiding judge will ask whether the parties still want mediation. But this time, unlike in the pre-trial meeting, the judge will not push parties to reach a settlement agreement. If one party does not want mediation, the judge will announce an adjournment so that he/she can have some time to make the judgment.¹⁵³

(d) Judge's Role

Judges play an active role at trial. Actually, he/she is more than a judge by any common law definition. In Chinese civil procedure, the judge combines the role of adjudicator and investigator. Chinese inquisitorial system entrusts a judge with extensive powers in adjudication. He/she not only decides issues of law but also those of fact; and his/her determinations of fact are not restricted to the evidences presented by litigants. In recent years they have shown considerable interest in placing the burden of proof on the parties; however, it does not change the existing judge-dominated model. The judge can gather evidence from any individuals or organizations and may also obtain assistance on

specialized issues from an “appraisal authority”.¹⁵⁴ Actually, he/she controls and shapes each stage of the civil litigation.

When a judge comes to trial, he/she already has an outline in mind. He/she knows what undertakings shall be made at trial, such as what kind of questions should be asked, which witness should testify, and which facts should be clarified and corroborated. Before trial, a judge should have already carefully read the file, checked each litigant’s submissions, talked with parties and witnesses, and even conducted a property inspection. As a result, the judge knows exactly which issues, both factual and legal, are in dispute and he/she is prepared to tackle these problems at trial. In some simple civil cases, especially those with evident facts and clear rights and obligations, and where the disputes are trivial in character, the judge might already have an understanding of the likely result of the litigation before the trial commences, making the hearing into a “show trial”.¹⁵⁵

During the trial, the judge is the examiner-in-chief. He/she controls the process, dominates the examination, defines the focus of legal issues or facts in dispute, and directs parties and witnesses to follow the court’s way of thinking. To some extent, the judge’s extensive power in trial examination weakens the party’s opportunity for defense. Litigants or their counsels may not bring a witness or expert to the court without the judge’s permission. Though they are allowed to challenge any evidence offered by the judge, nevertheless, due to their lack of power in discovery and examination, they may not be able to find enough opposing evidence to use at trial to discredit or quash the judge’s evidence. For example, a judge can stop a litigant (or counsel) when he/she is questioning a witness. Even in the debate stage, when parties are addressing closing

statements or asking each other questions, the judge can interrupt whenever he/she deems necessary.

(C) Decision-Making

Required by the *Basic Ethical Norms for Judges 2001*,¹⁵⁶ a judge must perform judicial duties independently and impartially. In reality, however, when making decisions, judges often are subject to external pressure or at least give weight to influence from outsiders.

First of all, though institutional independence of the court has been written into the *Constitution Act* since 1982,¹⁵⁷ however, as discussed in the first two chapters, China's political structure (the Party State), the court's weak status in relation to other institutions (*i.e.*, court's accountability to Congress for judicial work, dependence on executive government for funding, subservience to the Party for judicial appointment and even fear of the procuracy for supervisory challenges) and limited rule of law (*i.e.*, supremacy of Party leadership, lack of constitutional review, inadequate checks and balances) make judges vulnerable to outside interference. So far, most interference comes from local executive government. Governmental officials actively interfere with specific cases and pressure judges to find in favor of the administrative agency in administrative litigation cases or of local companies in commercial disputes because they have an interest in it.¹⁵⁸

By contrast, the Communist Party and People's Congress seem not to be much of a threat to courts because now they rarely interfere with individual cases. However, due to their privileged constitutional superiority over the court, it is not possible to eliminate their potential obstruction to judicial independence. On the one hand, a court must be

subject to Party leadership, which means ideologically and actively responding to Party policies,¹⁵⁹ and in judicial appointments, subject to Party nominations,¹⁶⁰ and in individual cases, subservient to Party suggestions or decisions in cases that are politically sensitive.¹⁶¹ On the other hand, according to the Constitution, one major function of the People's Congresses and their standing committees is to oversee the work of the courts.¹⁶² But indeed, no law defines the actual scope and form of supervision by the Congress. Nor does any law provide for any procedural safeguards for such supervision. In practice, some local people's congresses even occasionally interfere in individual cases by addressing opinions, making suggestions or inquiring into adjudication of a particular case.¹⁶³ At first glance, the inquiry of Congress into the adjudicative process seems to be useful to superintend judges to uphold some kind of social justice, for example, the rights and interests of a disadvantaged party. But we can sense a problem: will the autonomy and independence of judges be infringed upon? Can Congress exercise effective supervision if Congress interferes with individual cases under the guise of supervision, particularly where members of a Congress have a stake or potential conflict of interest?¹⁶⁴

Secondly, in addition to external interferences, a Chinese judge also has to face the intervention of insiders, such as court officials, the Adjudicative Committee and senior judges of a higher court.¹⁶⁵ Sometimes, these interventions are imposed on a presiding judge without his/her consent; for example, in some cases that are politically sensitive or legally complex or socially influential, the court president or division chief or higher court judge might inquire into the proceedings, issue approval for the judge's decision, or even take the case away from the judge and re-assign it to the Adjudicative Committee of his/her court for discussion and final decision.¹⁶⁶ But since 1999, new rules

exist to give more power to the judges who hear the case, so this kind of initial interference from these officials or senior judges should become less and less frequent.¹⁶⁷ Actually, what happens most often now is that presiding judge(s) actively invite or request their Adjudicative Committee to offer guidelines on cases.¹⁶⁸ Why? Because there is an unwritten rule applied to the courts all across China: “judges must be liable for erroneous judgment”. Until now, the exact definition or scope of an “erroneous judgment” has not been clear,¹⁶⁹ but in practice, within the court system, the overruled judgments or rulings have also been taken as a kind of “erroneous judgment”. If the judgment of first instance is overruled by the appellate court, the judges, especially the presiding judge of the first instance will be held accountable, in the form of economic punishment (such as fines or reduction in bonus) or employment-related sanctions (such as suspension of promotion or removal from the judicial post) within his/her own court. If a judge often has his/her decision overruled by a court of appeal, his/her professional competence will be belittled and he/she will lose face before colleagues. That’s why a Chinese judge likes to urge parties to reach a settlement agreement or refer a case to the Adjudicative Committee of his/her court for decision, especially if one is not confident about the outcome.¹⁷⁰ On the one hand, a settlement agreement is not appealable; on the other hand, if an Adjudicative Committee’s decision on a case is overruled by an appellate court, the trial judge(s) is exempt from any liability. However, as indicated in Chapter 2, this Adjudicative Committee system separates the real decider from the adjudicative bench: the committee members who decide the case are not the judges who hear it. Accordingly, the judges who do hear the case often feel they have displaceable power, losing the incentive or sense of responsibility to work through the issues themselves.

Thirdly, it is really hard for Chinese judges to remain impartial with respect to their decisions and decision-making. On the one hand, as already indicated, judicial independence is a necessary prerequisite for judicial impartiality, which can be subject to interference of powerful outsiders and insiders. On the other hand, under the Chinese inquisitorial procedure, judges are likely to become biased or prejudiced as between the parties throughout the proceedings. Number 1, the trial judge is presented with a file of elaborate evidence before the case is heard.¹⁷¹ So he/she always comes to the trial with a fairly clear picture of the case, and the information supplied in the file might bias the judge towards one side or other. Number 2, the trial judge is, at least partially, responsible for the investigation of facts upon which he/she is to rest his/her judgment. Therefore, the judge will either deliberately or unconsciously form certain tentative hypotheses about the facts and, as a result, if a witness seems to be evasive, disrespectful, hostile, or in some way does not live up to the expectation of the judge, the judge might become antagonistic towards that witness or tend to discredit his/her testimony.¹⁷² Number 3, though a judge theoretically cannot have *ex parte* contact with either party or counsel, in real practice, a Chinese judge's *ex parte* meetings with litigants or witnesses are inevitable. Because Chinese law requires judges to conduct independent investigations to seek the "objective truth" on which the judgment will be based, meeting with the parties or witnesses constitutes an essential part of such discovery. Plus, as indicated previously, each party is allowed to keep submitting evidence to the court throughout the proceedings but not required to serve a copy of such submissions to the adverse party. So, until the trial officially starts, a party does not know the adverse party's case well and therefore cannot immediately respond to its attack. With one party's

competition missing for a period of time, a judge is likely to be affected by *ex-parte* efforts by litigants or others to influence his/her decisions in the matters under litigation before him/her.¹⁷³ Number 4, there is no formal requirement for a written judgment.¹⁷⁴ In the past, the judgments were unbelievably simple: judges didn't even give explanations for their decisions. During the last ten years, this has improved a lot. Now a judge must give explanations to his/her acceptance or denial of evidence and selection of one legal rule instead of another. However, compared to Canadian judges, Chinese judges are not specific or exhaustive in writing their judgments.¹⁷⁵

(D) Enforcement of Judgment

After a judgment is obtained, a judgment creditor may apply to start execution proceedings. Upon the judgment creditor's request, a court may issue rulings and other orders to compel compliance by the judgment debtor. As already indicated in Chapter 2, PRC courts are responsible for enforcing their own judgments and rulings.¹⁷⁶ Thus, every court has an enforcement division, with enforcement officers to carry out this responsibility. And as in Canada, the measures of enforcement also vary in accordance with the different type of orders.

(a) Garnishment

If the judgment orders payment or recovery of money, it can be enforced by a ruling of garnishment.¹⁷⁷ Like Canada, the common targets for garnishment are also the debtor's wages or bank accounts. But unlike its Canadian counterpart, a creditor cannot start a garnishment by himself/herself. The leave of court is the prerequisite for obtaining an order of garnishment. Besides, the court will issue a notice for assistance in execution to the garnishees, who are, in most cases, the banks, as well as the employer of the debtor.

A garnishee must comply with the notice. If they refuse to fulfill assistance obligations, according to the *Civil Procedure Law*, a people's court may impose a fine.¹⁷⁸

(b) Seizure, Confiscation, Sale

Like its Canadian counterparts, the writs of seizure, confiscation and sale are issued to a court officer in the execution division, usually the sheriff, to seize debtor's unencumbered property and, if necessary, to sell it at a public sale and use the proceeds to satisfy the creditor's award.¹⁷⁹ In this case, Chinese debtors also might conceal or make away with property to avoid responsibility. In light of it, the *Civil Procedure Law* empowers a court to issue a search warrant against his/her domicile or the place where the property may be concealed.¹⁸⁰ According to Article 102 of the *Civil Procedure Law 1991*, any person concealing, transferring, selling or damaging property already sealed up or confiscated, may be, according to the seriousness of the act, subject to a monetary fine, or detained, or penalized for criminal responsibility.

(c) Compulsory Eviction

Compulsory eviction from a building or a plot of land requires a public notice signed and issued by the president of a court, instructing the person subjected to execution to comply within a specified period of time. If the person subjected to execution fails to do so, upon the expiration of the period, a compulsory eviction shall be carried out by the officer in the execution division, who is, usually the sheriff.¹⁸¹

(d) Enforcement of Order to Do or Not Do

If the debtor fails to perform acts prescribed in a judgment or ruling, the court may carry out compulsory execution or commission a relevant entity or another person to do so at the expense of the disobedient party.¹⁸²

Though the law in China also provides penalties for non-compliance with a judgment, and empowers a court to take measures against defiant parties, large percentages of judgments particularly in economic cases (as many as 50 percent) go unenforced.¹⁸³ As explained in Chapter 2, the primary reason for such wide-spread, non-enforcement of judgments and thus non-enforcement of the law, is a lack of public respect for authority. For example, according to the law, an inability to pay is a circumstance warranting the termination or suspension of “enforcement”.¹⁸⁴ Thus in many cases a disgruntled party takes advantage of this provision by concealing the property. The court may “issue a search warrant” to locate the property; however, if the concealed property is not located, a court has nothing to do but suspend or terminate the execution. Currently, the notion of credit history has not been introduced into China, nor can anyone’s credit record be tracked down. The disgruntled party will not face unfavourable constraint on future business activity, even if failing to perform the duties assigned by the court judgment. In addition, insufficient court funding and “local protectionism” could be other reasons for non-enforcement. The latter may arise when a local court is faced with enforcing a judgment against a local party, either in a case from its own jurisdiction or, pursuant to the law of procedure, from a court in a different jurisdiction.¹⁸⁵ In many cases, State-owned enterprises, those companies affiliated with the army and local authorities, are often the most difficult to collect outstanding debts from.¹⁸⁶

Part 3: Contrast

Comparing the Canadian and Chinese court roles in conducting civil process, we can conclude that a Chinese court has more intervention into civil cases but that a Canadian court has more authority.

First, the discrepancy between a Canadian and Chinese judge's role in conducting civil process could be primarily ascribed to differences in civil procedural systems applied in these two countries, which are, respectively, adversarial and inquisitorial. Under the Canadian adversarial system, courts only play a passive role throughout litigation. It is the parties who shape the case and drive the process. Litigants or their counsel control the pace of litigation, only involving the court when they perceive a problem with the progress of their case. From the time a Statement of Claim is filed, litigants work through the steps of the litigation process - from pleadings, to disclosure, to examination for discovery, through to the trial itself - at their own pace.¹⁸⁷ While all cases make use of some of the court's services and resources, there is less opportunity in the Canadian justice system to manage the progress of cases. This has begun to change over the last twenty years and many jurisdictions have adopted some kind of case management to supervise the progress of cases, *e.g.*, the mandatory pre-trial conference, expedited trial, and mediation;¹⁸⁸ however, this still has not changed the fact that litigants and counsel determine when activities, events and dispositions will occur. The court only obtains information on case status when a case is ready to be set for trial. In practice, many cases still drag along for years.¹⁸⁹

By contrast, under the Chinese inquisitorial system, judge(s) control the progress of the case and in a major way shape it. Ever since the complaint stage, judge(s) start to check the claims, collect the evidence and contact parties and witnesses. At trial, judge(s)

act as the main examiner and they can expand examinations beyond either party's claims, submissions and disputes. Under the judge's direction, parties or their counsels examine the evidence and question each other and the witnesses. Unlike its Canadian counterpart, Chinese law has a time limit for processing a case. Generally, a civil case shall be concluded within six months from the day it is filed,¹⁹⁰ which means that judges are under statutory liability to bring the end to an action within the given time limit. Therefore, the court must manage the progress of cases and determine when activities, events and dispositions will occur. If a judge allows counsel to proceed at his/her own pace, that court cannot meet the requirement of law.

On the other hand, although Chinese courts have extensive involvement with their litigation throughout the proceedings, they still seem weak when there is resistance. If an individual witness refuses to provide evidence or information, no law empowers a court to impose any punishment against him/her. Plus, though courts are required by law to "independently exercise the right of adjudication",¹⁹¹ however, China's political structure and a court's weak status in the institutional structure make judges vulnerable to outside interference in making decisions and enforcing judgments. By contrast, a Canadian court has more power to fight such resistance. First, the judge has authority to compel witnesses to attend the discovery, trial and presenting of evidence. Where a witness is served with a subpoena and the proper attendance money is paid or tendered to him or her, and the witness fails to attend at the discovery or trial and remain in attendance in accordance with the requirements of the subpoena, the judge may, by a warrant for arrest, cause the witness to be apprehended. Secondly, the judge has powers to enforce a judgment or an order. If a judgment debtor fails to fulfill his/her liability prescribed by a

judgment or an order, the creditor may apply to have the defendant found in “contempt of court”, and, if so found, the defendant may be punished by a fine or imprisonment. Thirdly, Canada’s political structure, rule of law regime, and institutional arrangement for judicial remuneration and appointment, insulate judges from any attempt to influence their decisions in any matter before the court, outside the controlled process of the court.

In addition to external interferences, a Chinese judge also has to face the interference of insiders, such as court officials, adjudicative committee and senior judges of a higher court. The People’s Courts are required by law to “independently exercise the right of adjudication,” but in current Chinese view this means that the court *as a whole entity* shall be independent, not the individual judge.¹⁹² While in Canadian legal culture, the ideal of judicial independence means not only court as a whole has independence, but also each judge is equal—one to another—and that the role of the Chief Judge is one of leadership of his/her peers, and equally one of representing the views of the court as a whole in dealing with the executive.¹⁹³ Therefore, when adjudicating a case, an individual judge is exempted from any pressure from the senior judge, chief judge or a higher court.

Section 2: Court’s Role in Conducting Criminal Process

For regulating criminal proceedings, both China and Canada have a unified code applied to all jurisdictions, which are respectively the *Criminal Procedure Law* and the *Criminal Code*. However, due to their different state structures (unitary state versus federal state), these two countries achieve different degrees of uniformity in the implementation of their national codes. Except for a couple of specialized courts, any regular court in China has comprehensive jurisdiction over criminal and civil disputes, as

well as judicial review of administrative actions. And like the uniformity achieved in civil practice, all these jurisdictions follow the same rule (*i.e.*, provisions in the *Criminal Procedure Law*) in managing and conducting criminal litigation. By contrast, in Canada the constitutional division of powers, federal and provincial, results in the provinces “administering” the criminal law.¹⁹⁴ In practice, each province creates its own courts of criminal jurisdiction and its own prosecution office (Attorney General’s Department). There is therefore no necessary uniformity in the provinces and territories. Plus, the *Criminal Code* is not exhaustive as to criminal procedure. It only has basic rules which are supplemented by provincial practice. In order to have an understanding of practice and procedure within the province, it is important not only to know the procedure set out in the *Criminal Code*, but to be aware of how it is implemented within each province.¹⁹⁵ So, for comparing the court’s conduct of criminal litigation, I choose Chengdu High-Tech District Court and Manitoba’s Provincial Court and Queen’s Bench. Why? Because the Provincial Court and Queen’s Bench have the first-instance jurisdiction over criminal cases across Manitoba.¹⁹⁶

Part 1: Canadian Practice

The most distinctive feature of Canadian criminal procedure is that the “due process” principle infuses and permeates the entire fabric of criminal proceedings.¹⁹⁷ Canadian criminal procedure provides extensive protection for individual rights, which limits governmental power and safeguards against arbitrary and unfair state procedures. This includes the right to counsel, right to remain silent, protection against self-crimination, presumption of innocence and the right to a fair hearing.¹⁹⁸

(A) Pre-Trial

After being arrested, a person is formally charged with an offence and may appear in court a number of times before the actual trial: to attend a bail hearing, make a plea of guilty or not guilty, attend a preliminary inquiry or any other pre-trial hearings or motions, and set a date for trial.

(a) Charge

The police may lay a charge if, based on reasonable grounds, they believe a person has committed a crime.¹⁹⁹ In Canada, less serious charges are referred to as summary offences, while more serious offences are referred to as indictable offences; all are identified in its *Criminal Code*, first enacted in 1892.

When the police lay a charge, they complete an information package describing all of the evidence and deliver the information to the crown attorney. This information package is also served upon the accused person. In addition, the police deliver to the court a list of charges against the accused person.²⁰⁰

At the point of charging an individual, police usually do not arrest the person but serve an appearance notice or a summons, both of which obligate the individual to appear in court to answer the charge.²⁰¹ Arrests are made when an accused is considered to be at high risk of not appearing in court to answer the charge.

(b) Arrest

There are two kinds of arrest in Canada: arrest without a warrant and arrest with a warrant.

The power to arrest an individual in Canada is given to all citizens, although peace officers are generally given wider powers of arrest. A citizen may arrest a person

found committing an indictable offence or whom he/or she believes has committed a criminal offence and is escaping from and freshly pursued by persons with lawful authority to arrest.²⁰² Because an arrest always involves the taking of physical control or custody of a person with intent to detain him or her, a citizen who arrests a person without a warrant must forthwith deliver that person to a peace officer.²⁰³ A peace officer has broader powers to arrest than does a citizen and may arrest without warrant: anyone the peace officer knows has committed an indictable offence; anyone the peace officer, on reasonable and probable grounds, believes has committed an indictable offence; anyone the peace officer, on reasonable and probable grounds, believes is about to commit an indictable offence; anyone found committing any criminal offence; or anyone the peace officer, on reasonable and probable grounds, believes has an arrest warrant outstanding that is valid within the jurisdiction where the suspect is found.²⁰⁴

On the other hand, there are instances in which the issuance of a warrant for the arrest of a named person will be authorized.²⁰⁵ A warrant to arrest is a written order of the court commanding peace officers within the issuing jurisdiction to arrest the person named or described, for the events set out in the warrant, and to bring that person before a justice with jurisdiction.²⁰⁶ For example, a judge or justice may issue a warrant authorizing a peace officer to enter a dwelling house to arrest or apprehend a person identified or identifiable by the warrant, if certain conditions are met.²⁰⁷

During arrest or detention, there is a requirement on the police to comply with Section 10 of the *Charter*. The police will be required to advise a detainee of his or her rights under S.10.²⁰⁸ This can be inferred from the majority decision in *R. v. Elshaw*.²⁰⁹ Elshaw was detained in the police cruiser and asked a few questions concerning an

alleged sexual assault. The majority of the Supreme Court of Canada ruled that the answers to the questions could not be admitted at trial because the accused's rights under S. 10(b) had been violated, and that to admit the evidence would affect the fairness of the trial.²¹⁰

(c) Judicial Interim Release

When a person is arrested and charged, a police officer is faced with two options: either release him/her from custody or bring him/her before a justice within 24 hours or as soon as possible, at which the Provincial Court judge will decide if the arrested is to be released or remain in custody until trial.²¹¹ Normally speaking, a person arrested will be released, either by a police officer or the judge, from custody and required to appear in court at a later time, as a condition of a process which may include a summons, an appearance notice, a promise to appear, an undertaking or a recognizance.²¹²

(i) Release by the Police

Canada's *Criminal Code* provides that in certain situations police officers may release an accused. This is normally done through the use of an appearance notice which may contain directions to the accused to attend under the *Identification of Criminals Act*, for fingerprinting and photographing, or a summons which has an order to the accused to attend court hearing on a particular date.²¹³ Failure to attend for identification or hearing will result in a warrant being issued for the accused person's arrest.

An appearance notice or summons is often used for minor offences. For more serious offences, a police officer-in-charge may release an accused person from custody under paragraph 499(2) of the *Criminal Code* and might impose a condition as part of that release. For example, the accused may be required to abstain from communicating

with any alleged victim, or from going to a place specified in the undertaking or from possessing a firearm, and to surrender any firearm in his/her possession.²¹⁴

(ii.) Release by the Judge

If the police do not release an accused upon process such as an appearance notice, they must bring him/her before a justice for a bail hearing within twenty hours or as soon as possible.²¹⁵

In the bail hearing, if the police are not opposed to release of the accused, they will advise the justice of that fact and may request that the justice impose sureties or conditions. A crown attorney is also available to discuss release applications.²¹⁶ According to the presumption of innocence, the legislation contemplates accused persons being released unconditionally, unless and until the crown establishes that conditions or sureties are called for. Section 515(10) of *Criminal Code* makes it clear that the onus is on the crown to secure detention. In the words of the section, the crown is generally required to show cause why the court should not release the accused without conditions. However, under certain circumstances (set out in S. 515(6)) the accused must show cause why detention in custody is not justified under the primary and secondary grounds. For example, if an accused is charged with an indictable offense allegedly committed while on some form of release for another indictable offence, or is not ordinarily resident in Canada, then the reverse onus section applies.²¹⁷

Although the *Code* contemplates unconditional release as the primary option, the practical reality is that certain types of conditions or sureties appear to be imposed routinely. For example, the accused may be released on condition that he or she reports to the bail supervision program periodically, such as once per week. If the accused fails to

report, a warrant to arrest will issue. In *R. v. Erron Troy Hogg*, the Manitoba Provincial Court Judge, Garfinkel, released the accused Mr. Hogg on a recognizance with ten conditions and a five-thousand-dollar surety.²¹⁸

(d) Discovery

Pre-trial discovery in Canadian criminal process has two parts: investigation and disclosure. Prosecutors (crown) have an army of investigative agents, *e.g.*, state and provincial police, sheriffs and treasury agents to gather information that can make its way into evidence. On the other hand, the result of the crown's investigation must be disclosed to the defendant or his/her counsel prior to trial.

In Canada, the investigative apparatus of the state is in police hands. For preventing and detecting a crime, police may use surveillance, interrogation, search, seizure and other compulsory measures. However, because the defendant in a criminal case has certain constitutional safeguards, such as the right against self-incrimination and the presumption of innocence, the police face lawful limitations in using investigative powers. First, the defendant's right to remain silent, and not to testify against himself/herself,²¹⁹ means that neither the police nor the court can force a defendant to answer questions in a criminal investigation. Secondly, due to respect for the value of protection of the individual from oppression, the court (a judge or magistrate) is often brought into the pre-trial discovery to rule on a broad range of motions regarding issues such as the sufficiency of the charging instrument, the scope of discovery, search, seizure and other mandatory disclosure requirements.

Because the Canadian adversarial system employs a contest model of proof, the defense counsel plays an active role in pre-trial discovery and Canadian courts have been

consistent in assisting the defendant to exercise his/her right to counsel.²²⁰ The defense lawyer can carry out his/her own investigation or hire a trained investigator, contacting the client, interviewing witnesses, visiting the relevant scene and engaging expert help. In addition, the defense has the right to discover information in the possession of the prosecution and/or its agents particularly, when such information is favorable to the accused. The government, upon a request by the defendant or his/her counsel, must disclose evidence (*e.g.*, the police's reports or medical reports) in the possession, custody or control of the government, subject to certain limitations such as the work product exemption. During pre-trial inquiry, crown must disclose the prosecutor's case to the defense. If not, the defense may seek and obtain a formal court order instructing the prosecution to reveal investigative information to the defense.

(i). Search

Like arrest, there is also the distinction between search with a warrant and warrantless search.

Canadian courts have recognized a warrantless search power incidental to a lawful detention. For example, *Cloutier v. Langlois* sets out the parameters of a search incidental to a lawful arrest. In this case, the Supreme Court of Canada recognized three valid objectives for such a search: safety, preservation of evidence, and discovery of evidence.²²¹ Later, in *R. v. Caslake* the Supreme Court of Canada noted that, for a search to be valid, the officer must have one of these objectives in mind at the time of the search; and the officer's belief that one of these purposes will be served must be reasonable.²²²

However, since the search is an extreme interference with a person's liberty or property, it follows that there should be restrictions on a peace officer's right of search. A

number of statutory provisions prohibit searches to take place without a warrant.²²³ A judge's power to issue a search warrant is found in S. 487 of the *Criminal Code*. Under this section, before issuing a warrant, a justice must decide whether there are reasonable grounds to believe that objects will be found at the place indicated and that these objects will afford evidence of the commission of an offence.²²⁴ The purpose of the warrant provision is to ensure that the individual's privacy is respected, unless a justice has made a judicial determination that a search should take place. In order for a search warrant to be issued, the justice must be presented with an information, which is sworn by the informant and sets out preliminary evidence.²²⁵

(ii) Preliminary Inquiry

Preliminary inquiry is not a mandatory stage of criminal proceedings. An accused charged with an indictable offense generally has the right to elect his or her mode of trial: (a) to be tried by a Provincial Court judge without a jury, and without having had a preliminary inquiry, or (b) to have a preliminary inquiry but to be tried by a judge without a jury, or (c) to have a preliminary inquiry and to be tried by a court composed of a judge and jury.²²⁶

In many ways the procedure at a preliminary inquiry is similar to and anticipates the trial. At the preliminary hearing, the crown attorney is entitled to present critical elements of the evidence against the accused and even call the witnesses. The accused or his/her counsel is allowed to cross-examine in precisely the same fashion as at trial. Legal issues relating to matters such as the admissibility of evidence, the relevance of evidence and the substantive elements of the charge are dealt with by the judge in the same fashion as at trial.²²⁷ Therefore, preliminary inquiry is an opportunity for disclosure and discovery:

the crown is obliged to disclose all the material it proposes to use at trial;²²⁸ both the accused and the Crown will know what each witness will say and assess the evidence after observing the witness. On the other hand, due to the protection against self-incrimination, there is no reciprocal obligation on the accused to assist the prosecution. The accused is not required to disclose, except where they plan to use expert evidence or alibis.²²⁹

While the procedure at a preliminary hearing is outwardly similar to that at trial, it is, however, intrinsically different. Unlike trial, there is no determination of guilt at the conclusion of the preliminary inquiry. The accused is not required to enter a plea of guilty or answer to the charge, nor will the judge make any decision regarding the innocence or guilt of the accused.²³⁰ Rather, the Provincial Court judge has only two options: issue an order to stand trial if the crown has presented sufficient evidence to put the accused on trial for an indictable offence, or discharge the accused if no sufficient case is made to put the accused on trial. So, whether there is a case which the accused should be required to meet at a trial is the key problem that must be solved at the Preliminary Inquiry.²³¹

Depending on the province, preliminary inquiries are usually held before a Provincial Court judge or justice of the peace. But the judge who hears the Preliminary Inquiry will not conduct the trial.²³² During a preliminary hearing, the judge may proceed with the charges, drop the charges, downgrade the charges, or upgrade the charges.²³³ In most cases the judge will find that there is enough evidence to proceed with the charges and will order a trial. If the judge finds that there is not enough evidence to try the accused on the charges that have been laid, the charges against the accused will be dropped. In some cases a judge may rule that the evidence does not warrant the actual

charges laid; and, in such cases, the judge may downgrade the charges. For example, the judge may find that the evidence warrants a manslaughter charge rather than a second-degree murder charge. As well, if the evidence warrants it, charges could be upgraded.²³⁴

(e) Prosecution

Crown prosecutors represent the state in criminal prosecutions and are given the task of proving that accused persons are guilty beyond a reasonable doubt.²³⁵ When deciding whether to go ahead with a prosecution, they will take two factors into consideration: first, is there strong evidence to obtain a conviction? Secondly, is it in the public interest to proceed?

(f) Pre-Trial Conference

This is a mandatory stage in Canadian criminal procedure.²³⁶ A pre-trial conference occurs in both trial courts (Provincial Court and the Court of Queen's Bench) and it is a meeting of the crown attorney and defense counsel with the judge, to ensure that the case is ready for trial. In Manitoba, pre-trial conference shall be held before the trial judge or another judge of the court at least two months before the date fixed for a jury trial.²³⁷

Preliminary Inquiry is a public hearing while Pre-Trial Conference is a meeting not open to the public. Unlike the Preliminary Inquiry, mainly a disclosure mechanism for screening out "weak" cases,²³⁸ Pre-Trial Conference is a procedural device used to consider matters which will promote a fair and expeditious trial. So, witnesses will not attend the Pre-Trial Conference, crown's evidence will not be heard, and no examination or cross-examination will be taken. Crown attorney and defense counsel are not required to discuss the facts of the case; rather, they try to settle procedural questions, for example,

narrowing and defining issues to be tried, determining the number of trial days that will be needed, or possibly obtaining admissions which would facilitate the trial hearing.²³⁹ At the conclusion of a conference the court prepares and files a memorandum of the matters agreed upon.²⁴⁰ However, the judge who conducts the pre-trial conference will not be the trial judge.²⁴¹

(g) Pleading

Often the accused will have to make several appearances before getting to trial. When the accused appears in court on the date set, a procedure called "arraignment", takes place. At this court appearance, the charge is read to the accused. After receiving the complaint or information against him/her, the defendant is then asked to enter a plea of guilty or not guilty, or the special pleas of *autre fois acquit*, *autre fois convict*, and *pardon*.²⁴² And where an accused refuses to plead or does not answer directly, the court can order the clerk of the court to enter a plea of not guilty.²⁴³

In the criminal process the plea is an integral element. The remainder of the procedure in a criminal trial very much depends on the plea. A not guilty plea will result in a complete trial; a guilty plea leads directly to a summary process for sentencing.²⁴⁴

By entering a guilty plea, the accused admits to having committed the offence and consents to a conviction being entered without the necessity of a trial to prove the charge.²⁴⁵ Thus, the court can deal with sentencing right away or set another date for it. However, a plea of guilty does not necessarily mean that the accused accepts each and every fact alleged by the crown, but only such facts as constitute the material elements of the offence. Thus an accused may plead guilty to an offence and still be at liberty on sentencing to demand that the crown prove beyond a reasonable doubt any aggravating

circumstances that the crown alleges are present.²⁴⁶ By contrast, by entering a not-guilty plea, the accused denies guilt or asserts that he/she did not commit the offense, necessitating a trial for proving the charge against him/her. In the case of a not guilty plea on an indictable offence, the person may choose trial by judge alone, or by judge and jury.

In practice, as criminal courts become ever more crowded, prosecutors and judges feel increased pressure to move cases quickly through the system. To avoid a trial, crown counsel may offer a deal containing the promise of some benefit as an incentive for an accused to plead guilty under certain considerations. This negotiation between the crown and the defense is called "plea bargaining". The advantage to the defendant may be a reduction of the charges, a lenient sentence, or (in the case of multiple charges) the dismissal of some charges.²⁴⁷ For the exchange, the defendant is often required to perform particular duties, such as pleading guilty on a particular date, cooperating in the investigation of another offense, or testifying against a co-defendant.²⁴⁸ The advantage to the prosecution is that a conviction is obtained without the time and expense of lengthy trial proceedings, especially in doubtful situations where there is evidentiary weakness, or cooperation by the accused in other matters, or witness availability.

A plea bargain creates a contract between the prosecutor and the defendant, and both parties are required to comply with its terms.²⁴⁹ If the defendant fails to satisfy his/her duties, the crown may revoke the plea bargain. On the other hand, if the crown breaks a deal with a defendant, the defendant may seek to have his plea set aside, or may seek a court order requiring the crown to respect the plea bargain.

Court does not attend plea negotiation but must respect the agreement struck by the crown and defendant. Generally, the court cannot override what has been agreed to by

counsels. While the law is clear that a judge is not bound by the agreement, as a non-party to it, the judge is only entitled to depart from it for clear and cogent reasons.²⁵⁰ This position was recently reiterated by the Manitoba Court of Appeal in *R. v. Thomas*. In this case, the court made clear that if a judge is contemplating rejecting a plea agreement he or she should disclose this to counsel prior to delivering reasons and afford counsel an opportunity to make further submissions.²⁵¹

(B) Trial

Like its civil trial system, the Canadian criminal trial is also organized by the adversarial/accusatorial model of dispute resolution: the citizen and the state confront each other as opponents, or adversaries; the judge has a relatively passive and neutral role; counsels are the active players; the accuser (crown, plaintiff) assumes the burden of proof within a framework of exclusionary rules of evidence; trial by jury is available for serious criminal cases.

(a) Oral and Documentary Evidences

As in its civil litigation system, the parties, not the judge, forward the evidence. Both the prosecution and defense are given equal opportunity to present respective cases. On the other hand, a criminal trial is a serious matter for the accused because life and liberty, as well as the stigma of a criminal conviction, are at stake. Therefore, common law and the *Charter* provide special protections for the accused. For example, under the principle of “presumption of innocence” and “protection against self-incrimination”, the burden of proof is solely on the state. The prosecution must prove that the offense occurred and the accused committed it in a criminal matter. The proof must meet the criminal standard, whereby proof of guilt must be to such a high degree that no

reasonable person would have a real doubt as to its truth.²⁵² By contrast, an accused person presents evidence only out of his/her own choice. The prosecution cannot require the accused to give evidence. The accused can take the witness stand, but only if he or she consents to testify.²⁵³ If he/she chooses not to testify, his/her refusal cannot and will not be used in determining his/her guilt or innocence.

Like a civil trial, it is the party who calls the witnesses to trial and pays for their attendance. Where a person is likely to give material evidence in a proceeding, a subpoena is served on him/her in a similar manner as in civil proceedings. Sections 698, 699 & 700 of *Criminal Code* empower a justice or a Provincial Court judge to issue a subpoena requiring the witness to attend the hearing, give evidence and even bring with him/her anything in his/her possession or under his/her control relating to the subject-matter of the proceedings. A peace officer will serve the subpoena on witnesses personally and the service of a subpoena may be approved by affidavit.²⁵⁴

A witness who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails without lawful excuse to do so or to remain in attendance, accordingly is guilty of contempt of court and liable to a fine or imprisonment.²⁵⁵ Where a person who is served with a subpoena and is likely to give material evidence will not attend in response to a subpoena, or is evading service of a subpoena, a justice or Provincial Court judge may issue a warrant to cause that person to be arrested, brought to give evidence and even detained in custody for a period of time.²⁵⁶ Those who have been bound by a recognizance to attend to give evidence in any proceeding and who do not attend, or do not remain in attendance, the court, judge,

justice or Provincial Court judge may issue a warrant for the arrest of that person, even without serving a subpoena.²⁵⁷

(b) Direct-Examination and Cross-Examination

As in civil proceedings, evidence shall be examined and witnesses shall testify, with those for the prosecution testifying first. Then defense witnesses testify and any rebuttal witnesses testify last. The process starts with the direct-examination by the moving party, followed by cross-examination by the opposing party. When being questioned, each witness is sworn to tell the truth, under threat of a criminal perjury charge for failure to do so.

At the conclusion of cross-examination, the first lawyer (either crown attorney or defense counsel) is given a chance to question the witness again. This is done if the witness's evidence needs to be made clearer. During re-examination, the witness may be questioned on new matters raised in cross-examination, so as to clear them up.

In a criminal case, the burden of proof is solely on the crown. The defense may decide not to present any evidence at all. Therefore, cross-examination of a crown's witness and evidence is particularly important for clarifying the alleged fact. In Canada there are very few rules that limit the scope of cross-examination. Counsel is not restricted to cross-examining on issues raised in direct examination but are given wide freedom to question a witness on issues of credibility or integrity.²⁵⁸

Criminal lawyers (both crown attorney and defense counsel) cannot use leading questions on materially disputed matters in direct-examination, because a leading question is suggestive of the answer. On the other hand, a leading question can be used as a test in cross-examination because the main purpose of cross-examination is to test the

veracity of the witness and to obtain answers which assist the case of the cross-examining party. In practice, if these rules are not followed, the opposing party may properly object and, if the question is improper,²⁵⁹ the judge will sustain the objection, which means that the question cannot be answered. If the question is proper, the judge will overrule the objection and the answer must be given.

After all the evidence is examined and witness testimony presented, both crown and defense make closing arguments, designed to sum up each case.

(c) Judge's Role

The judge's role in a criminal case depends firstly on whether he or she is on a trial with a jury or not. If the accused is tried by judge alone, then the role of the judge is no different than in a civil case: hearing the evidence, ruling on whether certain evidences will be heard, then applying the law to the evidence, determining if the accused is guilty of the offence as charged. In this judge-alone trial mode, the role of the judge is essentially passive and peace-keeping. But at the same time, a judge still has enough authority to control the sequence, for example, compelling the attendance of a witness at hearings and ruling on the objections raised in examination and cross-examination. In addition, the judge also has a positive duty to put questions to a witness in order to clarify an obscure answer, a misunderstanding of a question put to the witness, or an omission by legal counsel of a question that the judge believes is relevant to the issues in the case.²⁶⁰

If the trial is judge and jury, then the judge's role is to determine whether certain evidence will be admissible (a hearing in this regard is called a "*voir dire*" and the jury is not present), ensure the fair treatment of the accused, and at the end of the evidence the

judge gives instructions (sometimes called a jury charge) to the jury on the law that applies to that case.²⁶¹ In this jury plus judge trial mode, respective functions of the judge and jury are kept clearly separate: the judge determines the applicable law and expounds it to the jury in the charge; the jury then decides the verdict based upon the evidence they have heard and the law which they have been instructed by the judge to apply.

Although all issues of fact are left for the twelve jurors to determine, the judge must, however, assist the jury in its determination of the facts by reviewing the evidence and by relating the evidence to the issues and to the law.²⁶² Because the judge has the duty to assist the jury in its assessment of the evidence, it may be necessary for him/her to give jurors a personal opinion on the evidence, *e.g.*, the importance of various pieces of evidence, or the credibility of a witness, though the jury is not bound to accept his/her opinion regarding the facts, including credibility of the witnesses. In addition, the judges must also present and explain any respective theories of the prosecution and the defense in the charge to the jury.

Besides instructing the jury on the law and evidence, a judge is also responsible for making sure that the trial process proceeds in a fair manner, especially for the accused.²⁶³ In practice, the most important safeguard for a fair trial is the judge's exclusion of inadmissible evidence.²⁶⁴ Generally speaking, evidence obtained through a *Charter* violation, especially a breach of Sections 10(b), 24(2), 7 and 8, should usually be excluded if its admission adversely affects the fairness of the trial. Why? Because these illegally acquired evidences would not have been discovered but for the accused's compelled assistance.²⁶⁵ During a trial, the exclusion of inadmissible evidence is usually done by counsel's request. For example, a lawyer may make a motion to strike certain

testimony because it was not properly received. If the judge orders the testimony stricken, the jury must disregard it and may not consider it during deliberations. A lawyer may also make a motion to prevent a witness from testifying. These motions are usually heard by the judge alone, after the jury has been sent to the jury room.²⁶⁶

(C) Sentencing

Once an accused is found guilty in a judge alone trial or by the jury's unanimous verdict, the same judge will decide the sentence.²⁶⁷ The law gives a judge a great deal of discretion with respect to the type and severity of sentences that they can impose: for most offences, the *Criminal Code* prescribes only a maximum penalty, and the rest is left to the individual judge.

When determining a sentence, judges usually rely strongly on precedents (previous decisions in similar cases), which prevent different courts from deciding similar cases in contradictory ways, ensuring some measure of certainty and consistency in the law. And as in civil lawsuits, Canada's political structure (the separation of party and state), rule of law regime (separation of powers, checks and balances, supremacy of law), institutional arrangements for judicial remuneration and appointment, and the trial mode (adversarial competition, judge's relatively passive role, separation of pre-trial and trial proceedings) ensure a Canadian criminal judge's independence and impartiality in such decision-making.

Part 2: Chinese Practice

Before recent reforms of criminal procedure, the Chinese criminal justice system has long been plagued by violations of basic human rights. The Chinese government

revised its *Criminal Procedure Law* in 1996 and its *Criminal Law* in 1997.²⁶⁸ These sweeping revisions and amendments promise increased protection for criminal suspects and defendants, and a fairer trial process, including an expansion of the accused's right to counsel, an enhanced opportunity for defense lawyers during the pre-trial and trial stages, limits on the prosecution's non-judicial determinations of guilt, separation of pre-trial and trial, and a reduced role for judges in criminal proceedings.²⁶⁹ However, such reforms still fail to address other key deficiencies in the Chinese criminal justice system. For example, the revised CPL does not fully recognize a presumption of innocence. It does not provide adequate safeguards against the use of evidence gathered through torture and other illegal means.²⁷⁰

(A) Pre-Trial

Prior to reform of the original 1979 *Criminal Procedure Law*, there was no separation between pre-trial and trial stages. Having received a case from the procuracy, a court was only to begin the trial after it had carried out a thorough examination into the substance of the case, *e.g.*, the happening of the crime, its impact on a victim, the proceeds of crime and the mitigating or aggravating circumstances that made the facts of the case "clear" and the evidence "sufficient."²⁷¹ In fact, this pre-trial examination essentially amounted to a determination of guilt prior to trial. During the trial, the court may return the criminal case to the procuracy for supplementary investigation, if the evidence was deemed insufficient to warrant a conviction.²⁷² Under the revised CPL, the court's pre-trial role has now been limited to a procedural review of the materials submitted by the prosecutor.²⁷³ The court's former power to return a case to the procuracy for supplementary investigation has also been eliminated. Ever since the

revision, a criminal case may, generally speaking, proceed to trial after having gone through three stages: detention, investigation, and prosecution.

(a) Detention

There are five so-called “coercive measures” provided for in the revised *Criminal Procedure Law* involving deprivation of personal liberty prior to conviction: compulsory summons, “taking a guarantee and awaiting trial”, “supervised residence”, pre-arrest detention, and arrest. Among them, the first three measures are non-custodial.²⁷⁴ Therefore, according to Chinese usage, only persons subjected to the last two of these measures, pre-arrest detention and arrest, are considered to be “in detention” According to international standards, however, a “detained person” is “any person deprived of personal liberty except as a result of conviction for an offence.”²⁷⁵ So, if we apply international standards to China’s *Criminal Procedure Law*, all of these five coercive measures should properly be viewed as different forms of pre-trial detention.

Chinese law gives the police enormous discretion to dispose of suspected criminals. A police officer may detain an active criminal or suspect under many conditions; for instance, one who is found committing a criminal offence, or believed to have committed a criminal offence, or believed to be about to commit an indictable offence, and even one believed to be not telling the true name, address and identity.²⁷⁶ In fact, Chinese law is notably vague on the definition of “suspect”. Police have a power to impose restrictions on any suspect. If he/she has reasonable or probable grounds, for instance, some (not necessarily sufficient) evidence suggesting a significant connection between the detainee and the alleged crime, he/she can hold the suspect under pre-arrest detention or arrest. On the other hand, if he/she doesn’t have this kind of evidence to

justify pre-arrest detention or arrest, he/she is allowed to impose non-custodial forms of restriction on the suspect, such as a compulsory summons, "taking a guarantee and awaiting trial" or "supervised residence".²⁷⁷ Of these five forms of pre-trial detentions authorized under the revised *Criminal Procedure Law*, the only one subject to external check is arrest, which must be approved by the prosecutor.²⁷⁸ So, in the other four forms of pre-trial detention, police do not have to deliver an information package describing all of the evidence and charges to any outsider, either to the court or procuracy. International law requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."²⁷⁹ The *CPL* lacks any such procedure. Chinese courts may order any form of detentions on their own motion,²⁸⁰ but they play no role reviewing police detention orders, including arrest. The police do not have to request court approval in ordering any form of detention.

The revised *CPL* provides that a detained suspect has the right to apply to "take a guarantee and await trial" as the condition for being released or exempted from custodial detention. On the other hand, this does not necessarily mean that he/she is entitled to release pending trial, because the police retain complete discretion to approve or reject the application.²⁸¹ In China, a person deprived of his/her liberty by arrest or any other form of detention under the revised *CPL* is likewise denied the right to bring a *habeas corpus* or bail proceeding, whereby a court decides without delay on the lawfulness of his/her detention, and to order his/her release if the detention is not lawful.²⁸² The only circumstance under which a suspect can seek release is when detention has exceeded the legally stipulated time periods. Prior to that point, he or she has no right to contest the lawfulness of the detention order itself.²⁸³ The revised *CPL* is notably vague on the

question of to whom the suspect should direct his or her demand for release; but there is no provision for any judicial role in reviewing the response. The general principle that the procuracy is to notify the police to correct any "illegal circumstances" occurring during the investigation phase²⁸⁴ suggests that the only conceivable way to force the release of a suspect held in detention beyond a maximum time period would be via the procuracy.²⁸⁵

Under the 1979 original *Criminal Procedure Law*, a defendant had no right to legal counsel prior to seven days before the start of the trial. Under the revised *Criminal Procedure Law*, defendants may retain counsel much earlier in the criminal process: after the first interrogation or from the day he or she is first subjected to "coercive measures" (e.g., pre-arrest detention (*juliu*) and arrest (*daibu*)).²⁸⁶ However, having a right to retain counsel on paper does not necessarily mean that the defendant will be notified of such a right and allowed to remain silent. In the early stage of a criminal case, for example, at the point of detention or investigation, the police do not have an obligation to give suspects immediate notice of their right to counsel.²⁸⁷ Under the revised *CPL*, all suspected criminals are to be notified of their right to counsel on the day when their cases are transferred from the police to the prosecutor, for a decision on whether or not to prosecute.²⁸⁸ As a result, due to ignorance of the law, many suspects do not have assistance from counsel during the detention and investigation phases, when most in need of legal assistance. Still, some knowledgeable suspects are well aware of their right to counsel and do get some legal assistance after the first time they have been questioned by the police or placed in some form of pre-trial detention. However, the lawyer's role and powers in the detention and investigation phases are more limited than at a later stage.²⁸⁹ More ominously, Chinese law grants the police unreviewable power to block a lawyer's

early involvement in cases involving under-defined "state secrets". In cases involving "state secrets," a term that police can construe expansively, a lawyer must first obtain approval from the relevant investigating authority before meeting with his or her client.²⁹⁰ The police frequently invoke "state secrets" to deny a suspect access to a lawyer during the investigation phase.²⁹¹ When actually allowed to meet with their clients, defense lawyers generally get only one brief meeting, which is usually monitored and sometimes recorded by investigators.²⁹²

(b) Investigation

Investigation is also under-defined in Chinese criminal justice system. Neither the original nor the revised *Criminal Procedure Law* provides for definition and scope of investigation. If considered as gathering evidence to prove or disqualify an alleged fact, the police, the procuracy and even the court have such powers.²⁹³ If considered as taking coercive measures to obtain evidence to prove a suspect guilty or innocent, or to prove the crime to be minor or grave, only the police and procuracy have such authority.²⁹⁴

The investigative apparatus of the state is mainly in the hands of the police. For preventing and detecting a crime, police may question the suspect and witnesses, examine the sites and objects, search the person and residence, seize material and documentary evidences, assign an expert to give evaluations, and even issue a wanted order if a defendant who should be arrested is a fugitive.²⁹⁵ Procuracy have the same investigative powers when conducting their own investigations of cases directly filed to and accepted by it.²⁹⁶ Due to the lack of constitutional safeguards for the defendant in a criminal case regarding self-incrimination, the presumption of innocence,²⁹⁷ and the exclusion of illegally-obtained evidences such as confession under torture,²⁹⁸ the police and procuracy

face almost no external checks in using their investigative powers. First, the court is not involved in pre-trial investigation. Neither the police nor procuracy is obliged to request court approval in their taking of any investigative measure. All investigations are warrant-less. Secondly, the defendant has no right to remain silent or not to testify against himself/herself. As a result, the use of torture, threat or enticement to obtain confessions during the investigation stage of the criminal process remains a problem in China.

During the investigation, some suspects are held in custody. Because detention and investigation are such an extreme interference with a person's liberty or property, the *Criminal Procedure Law* empowers the procuracy to review the legality of police actions at the point when it reviews decisions to arrest and decides to prosecute.²⁹⁹ In the mean while, the suspect or defendant can only seek the help of the procuracy for correcting the actions of the investigators which infringe procedural rights or dignity. For example, literally, the time limit for holding the criminal suspect in custody during investigation after arrest shall not exceed two month. If the case is complex and cannot be concluded within the time limit, an extension ranging from one month to a maximum of five months must be approved by the procuracy at the next higher level.³⁰⁰ If his/her detention has exceeded the legally stipulated time limits, a suspect can request the procuracy for release. Procuracy's procedural safeguard role matches its constitutional status as the "watch dog" of law enforcement. On the other hand, however, neither the *CPL* nor any other law provides a mechanism by which the procuracy can be forced to carry out its responsibilities as legal watchdog. Thus the procuracy has unfettered discretion to decide whether and how to act in response to a suspect's complaint that his or her rights have been violated. This becomes particularly problematic when the violator is the procuracy

itself (*e.g.*, when conducting its own investigations), since the other legal institutions do not have authority to compel the procuracy to act or to investigate such matters themselves.³⁰¹

On the one hand, police take primary responsibility for gathering, testing, and evaluating evidence relevant to the dispute. On the other hand, the role of the defense lawyer is extremely passive throughout the pre-trial discovery. Even though the 1996 *CPL* tried to balance the power between the procuracy and the defense, by allowing earlier participation by the defense counsel and delineating their legal rights, the current authorization of the defense lawyer's right to investigate is still narrow and ambivalent for effective investigation. First, lawyers have no state mandate to carry out discovery. As indicated earlier, during the detention and investigation phases, the lawyer's role is limited to meet with a detained suspect to learn the circumstances of the case, provide legal advice, file petitions and complaints, and, on the client's behalf, apply for "taking a guarantee and awaiting trial."³⁰² At this stage, counsel has no access to the defendant's file, nor to any information or evidence in possession, custody or control of the prosecution and/or its agents, like the police, vehicle transportation bureau, medical test centre, etc. Secondly, in order to collect evidence from other parties, *e.g.*, the victim or victim's witness, the defense must obtain their consent or apply to the court or procuracy to act on its behalf.³⁰³ By contrast, all individuals and institutions have a duty to comply with requests from the police, court, and the procuracy for evidence.³⁰⁴

(c) Prosecution

After investigation, the police send the results of its findings to the procuracy with a recommendation whether or not to prosecute. The procurator will then review the case

and interrogate the suspect. Here, interrogating the suspect differs from having a plea negotiation with the suspect. Procurators may just ask the criminal suspect some questions, and then heed the opinions of the victim and of the persons entrusted by the criminal suspect and the victim.³⁰⁵ There is no plea bargaining in the Chinese criminal justice system. In cases which the procuracy has investigated, it will make the decision whether to prosecute or not.

Like their Canadian crown counterparts, Chinese prosecutors represent the state in criminal prosecutions and are also given the task of proving the case that an accused is guilty. But unlike their Canadian crown counterparts, when deciding whether to go ahead with a prosecution, the Chinese prosecutors will firstly consider whether or not, according to the criminal law, any criminal sanction (penalty) shall be imposed on the suspect.³⁰⁶ In cases of minor crimes for which the criminal law either does not require criminal sanction or permit the defendant to be “exempted from punishment,” the procuracy now has the discretion to decide “not to prosecute.” They are less concerned with whether or not there is strong evidence to prove a conviction. Why? Because even if the evidence gathered is not sufficient to prove the alleged facts, the prosecutor may remand the case to the police for supplementary investigation or conduct the supplementary investigation itself.³⁰⁷ Supplementary investigation must be completed within one month and may be conducted twice at most.³⁰⁸ Until after the supplementary investigation has been completed, if the procuracy still believes that the evidence is insufficient and the case does not meet the conditions for initiation of a prosecution, the procuracy may decide not to initiate a prosecution.³⁰⁹

In light of it, we can conclude that the procuracy’s approach to “prosecute” or

“not to prosecute” comes via the pre-determination of guilt and sentencing. Actually, the revised *CPL* has already limited the procuracy’s non-judicial determinations of guilt. Under the original *CPL*, prosecutors had the power to exempt suspects from prosecution whose crimes were minor or involved a variety of mitigating circumstances.³¹⁰ Although couched in terms of leniency, decisions to “exempt from prosecution” constituted a unilateral prosecutorial determination of guilt without benefit of a trial.³¹¹ The revised *CPL* eliminates the term “exemption from prosecution” and explicitly states that no person should be determined guilty except pursuant to a lawful court verdict.³¹² As a result, the procuracy now has only two options: either bring a case to trial or dismiss it altogether. Procurators can no longer use “exemption from prosecution” as a third alternative, to pin a guilty label on suspects against whom they lack sufficient evidence to bring to trial.

If the procuracy decides not to initiate a prosecution, it delivers the decision in writing to the police. Upon being served the notice of “not to prosecute”, the suspect in custody shall be released immediately.³¹³ If the decision to prosecute is made, the procuracy initiates a public prosecution by preparing a bill of prosecution (equivalent to indictment) and filing a lawsuit in a People’s Court. From the date on which the procuracy begins to examine a case for prosecution, the defense lawyer may meet and correspond with the criminal suspect in custody and even access the defendant’s file, reading, extracting and duplicating the litigation documents pertaining to the current case and the technical verification material.³¹⁴ However, until the prosecution stage, defense counsel’s access to the defendant’s file is not total.³¹⁵

(B) Trial

The previous criminal justice system used an inquest model of trial: prior to trial, judges conducted a thorough pre-trial examination of criminal cases that essentially amounted to a determination of guilt;³¹⁶ at trial, judges took the lead in questioning the defendant and witnesses, producing evidence, and summing up the case. However, since 1996, the revised *Criminal Procedure Law* has made far-reaching changes and incorporated some elements of the adversarial system into the trial model. Under the revised *CPL*, the court's pre-trial role has been limited to a procedural review of the materials submitted by the prosecutor.³¹⁷ And since the substance of the case is no longer to be examined ahead of time, the court takes a decidedly more passive role at trial. The principal burden of producing evidence and arguing the case is now principally assumed by the prosecutor and defense counsel.³¹⁸

Like civil cases, criminal cases are conducted either by a single-judge bench or a collegiate panel.³¹⁹ There is no jury trial in Chinese criminal proceedings.

(a) Oral and Documentary Evidences

As mentioned earlier, under the current trial mode it is primarily the party's liability to provide evidence at the court hearing to support his/her own allegations. This does not necessarily mean that a court plays no role at trial. Actually, it is the court which serves a copy of the indictment on the defendant, appoints a defender for the defendant (if he/she has no counsel) and summons participants other than the procuracy, including the defendant, defendant's counsel, and witnesses to attend the hearing by serving them notices of appearance.³²⁰

The defense counsel does not have a status equal to that of the prosecutor during

trial proceedings. Despite the introduction of elements of the adversarial system, the revised trial process still privileges the state. First, the defense must obtain the court's approval to call new witnesses, introduce additional physical evidence or seek further expert evaluations.³²¹ This is contrary to Canadian practice, whereby the defendant is entitled to obtain witnesses under the same conditions as the crown. Secondly, the *CPL* still recognizes no right to remain silent or not to testify against oneself. Trial proceedings under both the original and the revised *CPL* list questioning of the defendant as the first matter of business after the prosecutor has read the indictment.³²² Both judge and procurator may interrogate the defendant at trial. Thirdly, the revised *Criminal Procedure Law* fails to identify a standard of proof common to both sides. On the one hand, the trial process reinforces the prosecution's duty to gather and produce all relevant evidence, but it does not establish a quantum or standard of proof required to convict.³²³ Rather, the Chinese criminal justice system only recognizes "objective truth" as the standard for admitting evidence or warranting a conviction.³²⁴

However, there has been a widening gap between the ideal of objective truth and the ability to achieve it within existing methods and procedures. It is unrealistic to require finding of absolute truth about a past crime. What can be discovered is partial and, at most, an estimate of probabilities. Unfortunately, Chinese law lacks such a quantum or mechanism to estimate the probabilities of a criminal conviction happening. On the other hand, neither the original nor revised *CPL* provides adequate safeguards against the use of evidence gathered through torture, threat or other illegal means. Coupled with the state's broad investigative power during pre-trial proceedings, the procuracy may produce a lot of evidence unfavourable to the defendant and present everything at trial.

However, due to the lack of proof standard and exclusion of illegally-gathered evidence, the fairness of the pre-trial proceedings and the fairness of the criminal trial itself have not become integral parts for a defense lawyer's representation of the accused.³²⁵ He/she often tends to not challenge a prosecutor's incriminating evidence on the grounds of "reasonable doubt" or "illegal means" because it is not necessarily the effective way to discredit or quash such evidence. In a way, the scope of criminal defense is limited to the presentation of exculpatory evidence for acquittal or mitigating evidence for less severe sentencing or evidence of "objective truth" for excluding a prosecutor's false findings.³²⁶

Both the original and revised *Criminal Procedure Law* require that anyone with information about a case shall have a duty to testify.³²⁷ In real practice, however, testimony is mainly given in written form rather than in person. Witness cooperation has been a serious problem in China. The duty to testify is just an unsecured obligation. If an individual witness intentionally gives false testimony or falsifies, conceals or even destroys criminal evidence, he will be held accountable for sanctions.³²⁸ But if he/she refuses to open the mouth, neither the court nor the procuracy can secure his/her attendance at trial or force him/her to testify. For the stubborn witness, no compulsory measures are applicable: no subpoena, no "contempt of court" order, no imprisonment, neither corporal nor monetary punishment. In most cases, concerns have been expressed for the safety of witnesses. The revised *Criminal Procedure Law* has added a new article (Art. 49) on the punishment for an attack on a witness, which appears designed to encourage more direct evidence; however, it still has not provided adequate compulsory protection for a witness from physical harm or an incentive to protect them from financial loss. Due to the lack of witness cooperation, the revised *CPL* retains unchanged the

provision in the original law permitting the use in court of transcripts rather than the live testimony of witnesses and experts.³²⁹

(b) Examination

Ever since the 1997 revision, a trial judge is no longer the main examiner. Now it is the prosecutor and defense counsel who play a prominent role in examination. On the other hand, however, the revised *Criminal Procedure Law* retains some features of the previous trial mode.

First, there is no strict requirement as to the way of questioning. Compared to its Canadian counter-part, examination in a Chinese criminal court does not follow the direct- and cross-examination modes. On the one hand, there is no distinction between procuracy's and defendant's cases. Examination starts with the procurator reading the prosecution bill (equivalent to indictment); then the defendant may argue about the crime(s) accused in the bill of prosecution; then the prosecutor may interrogate the defendant and the defendant may defend himself/herself.³³⁰ The examination moves from one evidence to another, until the last one is exhibited and discussed. There is no prohibition on the way of questioning and the leading question is not forbidden.

Secondly, examination is not a separate phase of the trial proceeding; rather, it alternates with investigation and new-evidence presentation. During examination, defense counsel may, upon approval of the judge, call new witnesses, introduce additional physical evidence or seek further expert evaluations.³³¹ Similarly, the procurator may, with approval of the judge, request a supplementary investigation to collect more evidence or clarify an alleged fact.³³² Once the result of the investigation or the new conclusion of an expert comes out, the judge may organize another hearing to examine it.

In this way, non-adversarial proof-taking alternates with adversarial dialogue across as many hearings as are necessary.

Thirdly, it is still hard for defense counsel to present an effective defense at trial. On the one hand, defense counsel often does not have adequate time or investigative power for preparation of the defense. It is only at the point when the court gives notice of trial that defense counsel receives full access to the evidence against his/her client and other details of the prosecution's case.³³³ On the other hand, the non-appearance of a witness and the use of written testimony rule out any possibility of cross-examination by the defense. In addition, because of the lack of a proof standard and of an exclusion of illegally-obtained evidence, the credibility of testimony or other evidence is not tested by defense counsel's adversarial cross-examination, as in common law countries like Canada. Rather, it is required that the judge should evaluate each single testimony or evidence in relation to other evidence in a case, to decide whether it can be used as a basis for proving or disapproving an alleged existence of fact.

(c) Debate

After all the evidence is examined and witnesses have testified, the trial will proceed to debate. With permission of the presiding judge, the public prosecutor, the victim and the defendant(s) or their counsels may state their views on the evidence and the case, and they may debate with each other.³³⁴ After the presiding judge has declared conclusion for the debate, the defendant shall have the right to present a closing statement.³³⁵

(d) Judge's Role

Since the 1997 reform introduced some elements of the adversarial system to China's criminal trial mode, the role of the judge during trial has become essentially peace-keeping. Currently, the judge comes to the trial with a general picture of the case, usually derived from reading the indictment and the list of evidence. As a result, he/she is not familiar with either party's detailed story before the trial begins. During the trial, the judge refrains from active inquiries, no longer acting as the main examiner or officially eliciting the evidence. In addition, the revised *Criminal Procedure Law* has shifted the judge's role from cooperating with the prosecutor to identify criminals to impartially hearing and adjudicating a case.³³⁶ The court's former power to return a case, on the court's own motion, to the procuracy for either supplementary investigation or withdrawal has been eliminated. Now if a prosecutor does not have sufficient evidence to justify a conviction, the judge will issue a verdict of not guilty and release the defendant.³³⁷

However, being passive, dispassionate and impartial does not necessarily mean that the judge has no authoritative role in the trial. It is the judge who ensures that proceedings are conducted in an orderly and efficient manner. Plus, due to the ideal of seeking "objective truth", the judge is empowered to conduct an investigation if he/she feels that the case has some doubts. Briefly speaking, a Chinese criminal judge's authority in conducting a trial is widely applied in four aspects.

First, a judge may interrogate the defendant and ask the witness or expert questions if he/she has some doubts or feels it is necessary to clear up any point that has been overlooked or left obscure.³³⁸

Secondly, a judge has control over the sequence. Both the public prosecutor and

the defendant or his/her counsel must obtain the judge's approval before questioning witnesses or expert evaluators.³³⁹ In addition, if they want to move from one phase in trial proceedings to another, for example, proceeding to debate and making comments on the opposing party's evidence and statement, they must ask for permission of the court.³⁴⁰

Thirdly, during a court hearing, if the collegial panel of judges has doubts about the evidence, it may announce an adjournment, in order to carry out an investigation and verification.³⁴¹ When doing so, the People's Court may conduct such measures as inquest, examination, seizure, expert evaluation, as well as inquiry and the freezing of assets.³⁴²

Fourthly, a judge has discretion on motions proposed by both parties concerning evidence and other issues. For example, the defense must obtain the court's approval to call new witnesses, introduce additional physical evidence or seek further expert evaluations.³⁴³ On the other hand, if a public prosecutor wants to bring more evidence to support his/her indictment, he/she must request the judge to allow a supplementary investigation.³⁴⁴

(C) Sentencing

When determining a sentence, judges will, at first, rely on the provisions in criminal law, but with broad discretion with respect to the type and severity of sentences that can be imposed. For most offences, the criminal law prescribes both maximum and minimum penalties, leaving a wide range of options in between to the discretion of individual judge. Secondly, a judge will refer to related legislative and judicial interpretations issued by the National People's Congress and Supreme People's Court for additional citation. Thirdly, in addition to written law, the judge will take into consideration legal precedents, especially precedents of the Supreme People's Court.

However, giving weight to previous decisions in similar cases does not necessarily mean that previous judgments have precedential value. Lower courts are not bound by the judgment of any higher court. Even judgments of the Supreme Court of China cannot be cited directly in a trial verdict.

When deciding a criminal case, a judge will not have as much external pressure as in civil cases because, generally speaking, the economic interest of a local government is not involved in a criminal matter. However, criminal judges still have pressures from the procuracy and court officials. As discussed in Chapter 1, the procurate is designated to act as “watchdog” of the justice system. The 1996 *CPL* also gives specific authorization for the People’s Procuracy to supervise criminal proceedings.³⁴⁵ Accordingly, the procuracy has the power to review the legality of the composition of a trial panel, the fairness of trial proceedings, as well as some court orders regarding commutation of sentence or parole, and even to suggest that the court correct an improper decision or action.³⁴⁶

However, in a criminal proceeding, the accusatory function is primary for the procuracy: it appears before the court as a party representing the interest of the state and the public. This status as a party requires that it must observe the rules of the court and obey the court’s orders. As a result, the procuracy’s conflicting function as both supervisor and lawsuit participant has caused it and the court often to clash, with each striving to protect its turf. Since the judge’s conduct is subject to the supervision of the procurator, it becomes questionable whether the judge can remain impartial in a trial. In addition, the procuracy may supervise the outcome of individual cases by challenging final court decisions, even after the normal appeals process has been completed. In other

words, procuracy may petition to have decided cases reconsidered. This potential threat undermines the independence and authority of any trial judge. As mentioned before, in the practice of Chinese courts, if the judgment is reconsidered and overruled on appeal or supervisory review, the judges, especially the presiding judge, will be held accountable, which is a form of punishment within his/her court. His/her bonus may be reduced and his/her reputation damaged. He/she will lose face before colleagues. In order to avoid this risk, the presiding judge often chooses to refer a difficult case, or a case in which he/she strongly disagrees with the procuracy, to the court official or Adjudicative Committee for a decision.

Part 3: Contrast

Canadian and Chinese courts conduct the criminal justice process differently. The Canadian judge acts more like a referee, while a Chinese judge is both referee and investigator. Both, in the end, must judge the facts and apply the law. However, having a double role does not necessarily mean that the Chinese judge has more power to intervene or authority in overseeing criminal proceedings. Rather, the Canadian judge has more intervention and authority.

First, Canada applies a complete adversarial model to its criminal process, while China only incorporates some elements of this adversarial mode. This means a more passive role throughout criminal proceedings. In Canada, the parties shape the case and drive the process. Crown and defendant (or counsel) control the pace of criminal litigation, only involving the court when they perceive a problem with the progress of their case. Crown attorney and defense counsel determine when activities, events and

disposition will occur; and the court only obtains information on case status when it is ready to be set for trial. In China, the criminal process still reflects the dominance of procedural actions by state officials, with the dominant powers in the police and procuracy, not the court.³⁴⁷ Though the 1996 *Criminal Procedure Law* tried to balance the power between the procuracy and defense by allowing earlier participation by defense counsels and delineating their legal rights, the bigger institutional framework in China has remained the same. The procuracy carries the mandate of the State, enjoys superiority over the defendant and other lawsuit participants, and determines almost all the pre-trial procedural issues such as arrest, detention, and other compulsory disclosure. The judge does not enter the contest arena at pre-trial stages and has no discretion on pre-trial matters, nor the power to issue an order to remedy procedural violations. As a result, the defendant and other parties in the criminal process have to show humble deference to procuratorial actions because there is no formal hearing conducted by a judge for each side to present its arguments. By contrast, a Canadian court has much earlier judicial involvement during pre-trial stages. A judge or magistrate is often brought into the pre-trial discovery to rule on a broad range of motions regarding issues such as the sufficiency of the charging instrument, the scope of discovery, search, seizure and other mandatory disclosure.

Secondly, a Chinese court has less authority when facing resistance. If an individual witness refuses to provide evidence or testify, the law does not empower a court to impose punishment or coercive measure against him/her. Plus, in China's political structure, a court's weak status and the lack of rule of law makes criminal judges vulnerable to external interference, especially pressure from the procuracy. In China, the

People's Procuracy has long enjoyed equal status with the court itself, if not higher at certain points in history. People's Procuracy has a constitutional right to supervise criminal proceedings, reviewing the legality of the composition of a trial panel, the fairness of trial proceedings, as well as court judgments and other orders regarding commutation of sentence or parole; and if it deems improper, it can even suggest how the court should correct its decision or action. Combined with its accusatory role, procuracy has a tendency to abuse its tremendous supervisory power to put the defendant into a disfavorable situation. However, since the judge's conduct is subject to the supervision of the procuracy, courts have little sufficient power to remain unaffected by the procuracy's displeasure.³⁴⁸

By contrast, a Canadian court has more authority to fight resistance. On the one hand, a judge has authority to compel witnesses to attend the discovery and trial and to present evidence. Where a witness is served with a subpoena, and the proper attendance money is paid or tendered to him or her, and the witness fails to attend at the discovery or trial or to remain in attendance in accordance with requirements of the subpoena, the judge may issue a warrant for arrest to cause the witness to be apprehended. On the other hand, as indicated in Chapter 2, Canada's political structure, rule of law regime, and institutional arrangement for judicial remuneration and appointment ensure that judges can reject any attempt to influence their decisions in any matter before the court outside the proper process. In Canada, the prosecutor's office is set up within an executive council, which is called the Ministry (Department) of Justice. The Minister of Justice as Attorney General has a double role: while concerned with questions of policy and their relation to the justice system, he/she is the chief law officer of the Crown; while

concerned with criminal prosecutions, he/she is the defense lawyer for the government in court. In criminal court, however, a crown attorney has the same status as a lawyer in private practice, because a fundamental concept of Canadian criminal law is: "Whether to initiate or stay a criminal proceeding is not an issue of governmental policy".³⁴⁹ Accordingly, in criminal proceedings, both crown and defendant counsel are under the leadership of the court and subject to its orders; indeed both are sworn to be officers of the court.

Thirdly, due to the ideal of seeking "objective-truth", the law grants a Chinese criminal judge some investigatory power. At trial hearing, if the collegial panel has doubts about the evidence, it may announce an adjournment, in order to carry out its own investigation and verification in respect of evidence. When carrying out such an investigation to verify evidence, the People's Court may conduct such measures as inquest, examination, seizure, expert evaluation, as well as inquiry and the freezing of assets. However, since the reform has, more or less, tilted Chinese criminal process from the inquisitorial towards the adversarial system, judges no longer have such zeal to adjourn the on-going trial to conduct an investigation by themselves. Now if a prosecutor does not have sufficient evidence to justify a conviction, the judge will tend to issue a verdict of not guilty and release the defendant.³⁵⁰ On the other hand, Canadian criminal judges do not have such investigative powers. Canadian understanding of truth is estimating the probabilities, rather than seeking the absolutes. Therefore, Canadian judges are neutral adjudicators instead of adjudicator-investigators. If they have reasonable doubts, they may either exclude the evidence or downgrade its admissibility according to the proof standard.

Fourthly, due to Chinese court's bureaucratic administrative nature, a Chinese criminal judge has to face the interference of insiders, such as court officials, adjudicative committee and senior judges of a higher court. By contrast, because of the equality between higher-lower courts and the equality between senior-junior judges, an individual Canadian judge is exempted from any pressure from the senior judge, chief judge or a higher court when conducting criminal process.

REFERENCES

Notes to Chapter 1:

1. For a full discussion of centralization and decentralization of state powers, see United Nations Economic and Social Commission for Asia and the Pacific, "Local Government in Asia and the Pacific, Country Paper: A Comparative Study (Country Paper: China)", available at <http://www.unescap.org/huset/lgstudy/country/china/china.html>.
2. *Constitution Act*, 1982, Articles 99-101, 107. [Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982; later, revised four times on April 12, 1988 (at the First Session of the Seventh National People's Congress), on March 29, 1993 (at the First Session of the Eighth National People's Congress), on March 15, 1999 (at the Second Session of the Ninth National People's Congress), on March 14, 2004 (at the Second Session of the Tenth National People's Congress)]. [Source: Legislative Affairs Commission of the Standing Committee of the National People's Congress; English translation courtesy of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC; Appendix to Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997)]; for the functions and authorities of local governments, also, *ibid*.
3. This means that mainland China carries out a socialist system and Hong Kong, Macao and Taiwan a capitalist system. But in international affairs, the PRC is the only country representing China; for a full discussion of the "One Country, Two Systems" policy, see *supra* note 1.
4. *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Articles 2, 8, 16, 17 & 19. (Adopted at the Third Session of the Seventh National People's Congress of the People's Republic of China on 4 April 1990 and put into effect as of 1 July 1997); also, *The Basic Law of the Macau Special Administrative Region of the People's Republic of China*, Articles 2, 12, 16, 17 & 19. (Adopted at the First Session of the Eighth National People's Congress of the People's Republic of China on 31 March 1993 and put into effect on 20 December 1999).
5. *Constitution Act*, 1982, Articles 115-119; also *National Minority Regional Autonomy Act*, 1984, Articles 2 & 19-45. (Adopted at the Second Session of the Sixth National People's Congress on 31 May 1984 and put into effect as of 1 October 1984); also, *supra* note 1.
6. The exceptions of Hong Kong and Macau do not affect China's unitary system.
7. John Bryan Starr, *Understanding China: A Guide to China's Economy, History, and Political Structure*, 1st ed. (New York: Hill and Wang, 1997), at p. 71.

8. For more details about division of authority between the center and regions, *ibid.*, pp. 72-73 & 152-157.

9. Both of them are national codes passed by the National People's Congress. In China, province has no right to enact statutes establishing a court.

10. *Constitution Act*, 1982, art. 127; also *Organizational Law of People's Court*, 1983, arts. 17 & 30. (Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, and revised according to the decision Concerning the Revision of the Organizational Law of the People's Court passed at the Second Meeting of the Sixth National People's Congress Standing Committee on 2 September 1983).

11. The national parliament has power "to make laws for the peace, order and good government of Canada," except for "subjects assigned exclusively to the legislatures of the provinces." Each provincial legislature has power over direct taxation in the province for provincial purposes, natural resources, prisons (except federal penitentiaries), charitable institutions, hospitals (except marine hospitals), municipal institutions, licences for provincial and municipal revenue purposes, local works and undertakings (with certain exceptions), incorporation of provincial companies, solemnization of marriage, property and civil rights in the province, the creation of courts and the administration of justice, fines and penalties for breaking provincial laws, matters of a merely local or private nature in the province, and education (subject to certain rights of Protestant and Roman Catholic minorities in any province, and of particular denominations in Newfoundland): Eugene A. Forsey, *How Canadians Govern Themselves*, 3rd ed. (Ottawa: Minister of Supply and Services Canada, 1991), at p. 19.

12. *Ibid.*, at p. 20.

13. According to s. 91 of *BNA Act* 1867 (U.K.), 30 & 31 Victoria., c. 3, the exclusive legislative authority of the Parliament of Canada extends to the Criminal Law, except for the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters. On the other hand, however, in each Province the legislature may exclusively make laws in relation to the administration of Justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts (s. 92).

14. Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao*, (Stanford, California: Stanford University Press, 1999), at p. 295; also, *infra* Chapter 2.

15. The CPC is not a party in the western sense of political parties. It is not a vote-getting mechanism nor is it a part of a pluralistic whole. The CCP claims to represent the whole of Chinese society. It asserts the right to determine the general perspectives for the development of society and the course of domestic and foreign policy: Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), at p. 216; also Ralph H. Folsom & John H. Minan, *Law and Politics in the People's Republic of China in a Nutshell* (St. Paul, Minn.: West Publishing

Co, 1992), at p. 89.

16. The Preamble to the *Constitution Act*, 1982 states that each citizen is obligated to uphold the four basic principles: party leadership, socialism, dictatorship of the proletariat, and Marxism-Leninism-Mao Zedong Thought.

17. Preamble of *Constitution Act*, 1982.

18. There is no interaction among or between political parties, for the CPC succeeded long ago in eliminating its rivals and has effectively prevented the emergence of any force that could even begin to be a nucleus for political opposition: John Bryan Starr, *supra* note 7, at p. 61.

19. *Constitution of the Communist Party of China*, 2002, art. 1. (Amended and adopted at the 16th CPC National Congress on 14 November 2002). Source: Beijing Xinhua in English-----China's official news service for English-language audiences (Beijing: Xinhua News Agency, 18 November 2002).

20. There were 62 million members in 1998, amounting to 5% of the population: Randall Peerenboom, *supra* note 15, at p. 210.

21. *Constitution of the Communist Party of China*, 2002, art. 10(3).

22. For a full account of "party-state", see John Bryan Starr, *supra* note 7, at p. 66

23. *Ibid.*, at p. 61.

24. Randall Peerenboom, *supra* note 15, pp. 209-210.

25. *Ibid.*, at p. 205.

26. John Bryan Starr, *supra* note 7, at p. 65

27. *Ibid.*

28. Randall Peerenboom, *supra* note 15, at p. 191.

29. John Bryan Starr, *supra* note 7, at p. 61.

30. For a full account, see Randall Peerenboom, *supra* note 15, at p. 214.

31. *Ibid.*, at p. 191.

32. John Bryan Starr, *supra* note 7, at p. 65.

33. For a full account, see Randall Peerenboom, *supra* note 15, pp. 190-211.

34. *Ibid.*, at p. 210.

35. *Ibid.*, at p. 188.

36. *Ibid.*, at p. 189.

37. *Ibid.*, pp. 203 & 215.

38. *Ibid.*, pp. 206-208, 212-213 & 224-226.

39. For a full account of the Party's influence on the judiciary, see Randall Peerenboom, *ibid.*, pp. 280 & 302-309.

40. *Ibid.*, at p. 302.

41. *Ibid.*, at p. 305.

42. *Ibid.*

43. *Ibid.*, pp. 303-304.

44. For instance, on 3 March 2000, the SPC issued the "Opinions on Playing Fully the Role of Adjudication to Provide Judicial Protection and Legal Services for Economic Development." (File No. 2000-6), available at (http://www.chinacourt.org/flwk/show1.php?file_id=34650&str1=%D7%EE%B8%DF%); for more details, see Randall Peerenboom, *ibid.*, at p. 304.

45. Randall Peerenboom, *ibid.*, at p. 303.

46. *Ibid.*, at p. 304.

47. For a full account of the Party's involvement in politically sensitive cases, see Randall Peerenboom, *ibid.*, pp. 306-307.

48. The Four Cardinal Principles were put forward by Deng Xiaoping in 1979 as the basic principles for the Communist regime. These are the principle of upholding the socialist path, the principle of upholding the people's democratic dictatorship, the principle of upholding the leadership of Chinese Communist Party and the principle of upholding Marxist-Leninist-Mao Zedong thought. On the one hand, the four cardinal principles actually marked a relaxation of control over ideology in many fields; on the other hand, however, debate on these four issues was not allowed within the People's Republic of China. See Deng Xiaoping, "Uphold the Four Cardinal Principles", in *Selected Works of Deng Xiaoping*, vol. 2 (1975-1982), edited by People's Daily Online, available at (<http://english.people.com.cn/dengxp/>).

49. Kenneth Carty, Williams Cross & Lisa Young, "A New Canadian Party System" in

Political Parties, Representation, and Electoral Democracy in Canada, William Cross, ed. (Toronto: Oxford University Press, 2002), at p. 31.

50. Elisabeth Gidengil, Andre Blais, Richard Nadeau & Neil Nevitte, "Changes in the Party System and Anti-Party Sentiment", in *ibid.*, at p. 68.

51. *Ibid.*

52. Christina Orsini*, *Canada: The Party System from 1963 to 2000*, (*Participant in Northwestern University's Summer Camp for Political Party Research, June-August, 2000), available at (<http://www.janda.org/ICPP/ICPP2000/Countries/0-AngloAmerica/04-Canada/Canada63-00.htm>).

53. Elections must be called within five years of the last election. Traditionally governments have waited four years between elections, but under Jean Chrétien's Liberal government elections have been held every three and half years. Parties generally only wait the maximum of five years between elections if they expect to lose and hope a postponement will allow more time for things to change in their favour. For a full discussion, see "Elections in Canada" at Wikipedia (the free encyclopedia), available at (http://en.wikipedia.org/wiki/Canadian_federal_election).

54. The leader of that party is asked by the Governor-General to become Prime Minister. The Prime Minister then chooses other ministers to form a new Cabinet: Eugene A. Forsey, *supra* note 11, pp. 4-5.

55. If the government in office before an election comes out of the election without a clear majority, it has two choices. It can resign, in which case the Governor-General or provincially the Lieutenant-Governor will call on the leader of the largest opposition party to form a Cabinet. Or the Cabinet already in office can choose to stay in office and meet the newly elected House of Commons and see whether it can get enough support from the minor parties to give it a majority. In this case, it is the people's representatives in the newly elected house who will decide whether the "minority" government (one whose own party has fewer than half the seats) shall stay in office or be thrown out: Eugene A. Forsey, *ibid.*, pp. 5 & 33-34.

56. *Ibid.*, pp. 33-34.

57. *Ibid.*, at p. 5.

58. Each party in a multi-party system has some specific platform or interest. Since each party would represent a different specific idea, the system would provide the electorate with a wide range of choices and better represent them in the government. For a full account, see Nelson Thomson Learning, "Political Parties in Canada", available at (<http://www.nelson.com/nelson/polisci/parties.html>).

59. Richard J. Van Loon & Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process*, 4th ed. (Toronto: McGraw-Hill Ryerson Limited, 1987), at p. 169.
60. Eugene A. Forsey, *supra* note 11, at p. 5.
61. Michael Code, "Political and media bias about the Supreme Court of Canada: Dispelling the big lie that the court is 'soft on crime'", in *Canada Watch* (Toronto: Emond Montgomery Publications, September-October 1999), Vol. 7, No.s 4-5; also, available at (http://www.yorku.ca/robarts/projects/canada-watch/pdf/vol_7_4-5/code.pdf).
62. Judicial appointment in Canada is discussed in detail *infra*, Chapter 2.
63. Gerald L. Gall, *The Canadian Legal System*, 4th ed. (Scarborough: Carswell, 1995), pp. 274-276.
64. Michael Code, *supra* note 61.
65. Randall Peerenboom, *supra* note 15, at p. 162.
66. *Ibid.*, at p. 190.
67. *Ibid.*, pp. 207 & 212.
68. *Ibid.*, pp. 212-214.
69. *Constitution Act*, 1982, art. 5; also, 1999 amendment to the Constitution, art. 13.
70. *Constitution Act*, 1982, art. 126.
71. Preamble to *Constitution Act*, 1982.
72. Ralph H. Folsom & John H. Minan, *supra* note 15, pp. 76-93.
73. Eugene A. Forsey, *supra* note 11, at p.29.
74. Robert J. Jackson & Doreen Jackson, *Canadian Government In Transition*, 3rd ed. (Toronto: Prentice Hall, 2002), at p. 197.
75. *Ibid.*
76. *Constitution Act*, 1982, art. 57 stats that the National People's Congress of the People's Republic of China is the highest institution of state power; art. 58 states that the National People's Congress and its Standing Committee exercise the legislative power of the state; also, Ronald C. Brown, *supra* note 2, at p. 31.

77. *Constitution Act*, 1982, arts. 58, 62, 63 & 67.
78. *Constitution Act*, 1982, art. 3; also, Ronald C. Brown, *supra* note 2, at p. 31.
79. Ronald C. Brown, *supra* note 2, at p. 31.
80. *Constitution Act*, 1982, arts. 96, 105, 110, 128 & 133.
81. Randall Peerenboom, *supra* note 15, pp. 269-270.
82. *Constitution Act*, 1982, Article 61.
83. Randall Peerenboom, *supra* note 15, at p. 412.
84. For the dispersion of law-making authority, see *infra* Chapter 2, pp. 65-67.
85. For a full account of quality of the legislation, see Randall Peerenboom, *supra* note 15, pp. 247-252.
86. *Ibid.*, pp. 13 & 259-261.
87. John Bryan Starr, *supra* note 7, pp. 67-68.
88. John Bryan Starr, *ibid.*, at p. 68.
89. The law-making process now involves considerable bargaining between various constituencies. There is more opportunity for participation by different interest groups, particularly with respect to national laws. For instance, the draft of the United Contract Law was widely circulated, including to foreign law firms and the American Chamber of Commerce: Randall Peerenboom, *supra* note 15, pp. 215 & 235.
90. Pitman B. Potter, *The Chinese Legal System: Globalization & Local Legal Culture*, (London: Routledge, 2001), at p. 20.
91. Randall Peerenboom, *supra* note 15, pp. 414-415.
92. John Bryan Starr, *supra* note 7, at p. 69.
93. Pitman B. Potter, *supra* note 90, at p. 17.
94. Randall Peerenboom, *supra* note 15, pp. 269-270.
95. Randall Peerenboom, *supra* note 15, pp. 215 & 269-270; also, Pitman B. Potter, *supra* note 90, pp. 17-19; and, John Bryan Starr, *supra* note 7, pp. 67-69.
96. Pitman B. Potter, *supra* note 90, at p. 20.

97. Randall Peerenboom, *supra* note 15, pp. 215 & 234.

98. *Ibid.*

99. *Constitution Act*, 1982, Articles 62, 63, 67 & 101.

100. Randall Peerenboom, *supra* note 15, at p. 415.

101. *Ibid.*, at p. 414.

102. *Ibid.*

103. *Ibid.*, for example, in 2001, the work report of Shenyang Intermediate People's Court failed by the vote of disapproval of the Fourth Session of the Twelfth Shenyang People's Congress (*People's Daily*, overseas edition, 15 February 2001); later, the president of this court was dismissed from office by Shen Yang People's Congress Standing Committee on 27 March 2001, (available at <http://dailynews.sina.com.cn/c/218471.html>).

104. The NPC heard twelve work reports in 1992, fourteen in 1993, seven in 1994, ten in 1995, and eight in 1996. The Sichuan People's Congress heard eighteen in 1992, twenty-five in 1993, twenty in 1994, twenty-seven in 1995, and eighteen in 1996. For a full account, see Randall Peerenboom, *ibid.*, pp. 414 & 444.

105. Randall Peerenboom, *ibid.*, pp. 414 & 444.

106. Randall Peerenboom, *ibid.*, at p. 414; also, for a full account of NPC's budgetary supervision over other arms of government, see Michael W. Dowdle, "The Constitutional Development and Operations of the National People's Congress" in *Columbia Journal of Asian Law* 1997, vol. 11, No. 1, pp. 90-95 (New York: Columbia University School of Law, 1997).

107. Randall Peerenboom, *ibid.*, pp. 414 & 444; also, Linda Chelan Li reports that a People's Congress in Guangdong conducted more than 800 appraisals of government officials since 1992, resulting in removal of five elected officials and several hundred non-elected officials: "The 'Rule of Law' Policy in Guangdong: Continuity or Departure? Meaning, Significance, and Processes," in *The China Quarterly*, 2000, No. 161, pp. 199-220 (London, etc. : Contemporary China Institute of the School of Oriental and African Studies, London University, etc).

108. Randall Peerenboom, *ibid.*, at p. 309.

109. Randall Peerenboom, *ibid.*, at p. 309; also, in 1993, the National People's Congress Standing Committee adopted a document on "Strengthening the Inspection of Legal Implementation" (passed at the Third Meeting of the Eighth National People's Congress Standing Committee on 2 September 1993, available at

(http://www.chinacourt.org/flwk/show1.php?file_id=18005&str1=%BC%D3%C7%BF). Between 1993 and 1997, it has inspected the implementation of a total of twenty-one pieces of legislation and resolutions on legal issues: Dingjian Cai, "Functions of the People's Congress in the Process of Implementation of Law", in *Implementation of Law in the People's Republic of China*, edited by Jianfu Chen, *et al.* (The Hague: Kluwer Law International, 2002), at p. 45.

110. Randall Peerenboom, *ibid.*, at p. 309; also, *Constitution Act 1982*, art. 71 states that the National People's Congress and its Standing Committee may, when deemed necessary, appoint committees of inquiry into specific questions. All institutions of state, public organizations and individual citizens concerned are obliged to furnish the necessary information to the committees of inquiry when they conduct investigations.

111. Randall Peerenboom, *ibid.*, at p. 309; also, SPC president Xiao Yang claims that the SPC responded to 123 suggestions, proposals, and motions from the NPC and CPPCC in 2000. See the *2001 SPC Work Report*, presented to the Fourth Session of the Ninth National People's Congress on March 10, 2001, addressed by Supreme Court President Xiao Yang, available at (<http://www.court.gov.cn/work/200302120015.htm>).

Given the broad jurisdiction and capacity of both Supreme People's Court and National People's Congress, 123 is not a big number at all. Also during my one year stay at Chengdu High-Tech District Court as an associate judge, I never heard that High-Tech District People's Congress (the congress at the corresponding level) made any inquiry to my court.

112. Randall Peerenboom, *ibid.*, at p. 310.

113. *Ibid.*, pp. 310 & 338; also, the SPC has issued some regulations laying out some ground rules for legislative supervision, for instance, *SPC Opinion Concerning the Acceptance by People's Courts of Supervision by People's Congresses and People's Congress Standing Committees*, (24 December 1998, available at http://www.chinacourt.org/flwk/show1.php?file_id=31901&str1=%B7%A8%D4%BA&str2=%BC%E0%B6%BD); *Decision of the Supreme People's Court Concerning Strengthening Liaison Work with Members of People's Congresses*, (29 December 2000, File No. 2000-32, available at http://www.chinacourt.org/flwk/show1.php?file_id=36493&str1=%C8%CB%B4%F3&str2=%B7%A8%D4%BA&str2=%BC%D3%C7%BF); *Provisional Regulations Concerning the Handling of Letters from Members of the NPC by People's Courts*, (29 December 2000, File No. 2000-32, available at http://www.chinacourt.org/flwk/show1.php?file_id=36492&str1=%B7%A8%D4%BA&str2=%C0%B4%D0%C5&str2=%C8%CB%B4%F3). However, all these provisions are just about how the Court co-operates with Congress during the supervision, not about how a people's congress conducts supervision within procedural safeguards, such as the procedure to decide which case to investigate or how many votes are needed for approving a decision to intervene into the outcome of a specific case.

114. Randall Peerenboom, *ibid.*, at p. 310.

115. John Bryan Starr, *supra* note 7, at pp. 66-67.
116. *Ibid.*
117. *Constitution Act*, 1982, art. 89(4)(14).
118. John Bryan Starr, *supra* note 7, at p. 67.
119. *Constitution Act*, 1982, Articles 108 & 110.
120. John Bryan Starr, *supra* note 7, at p. 67.
121. *Ibid.*
122. For the regionalism problem in China, see John Bryan Starr, *ibid.*, pp. 149-166; also, Randall Peerenboom, *supra* note 15, at p. 429;
123. Randall Peerenboom, *supra* note 15, at p. 287. For a critical assessment of China's efficacy on enforcement, see also Randall Peerenboom, "Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC" in the *American Journal of Comparative Law*, 2001, vol. 49, pp. 251-264; also Stanley B. Lubman, *supra* note 14, pp. 266-268.
124. *Constitution Act*, 1982, Articles. 92 & 110.
125. Randall Peerenboom, *supra* note 15, pp. 412-413.
126. They may pass regulations that limit competition, refuse to approve the establishment of competitors, or force companies to joint venture with their affiliates if they are to gain approval and access to the PRC market. For instance, in 1997, the Ministry of Agriculture pushed through new regulations to protect domestic seed companies, including the Ministry's own affiliated entity, the National Seed Group Corporation (NSC). The new regulations limited foreign investment to a minority share in seed crop joint ventures. See *Administration of the Examination, Approval and Registration of Foreign-Invested Crop Seed Enterprises Procedures* (issued jointly by the Ministry of Agriculture, State Planning Commission, Ministry of Foreign Trade and Economic Cooperation, and the State Administration of Industry and Commerce, 1997). For precise discussion about executive abuses of regulatory power, see Randall Peerenboom, *supra* note 15, pp. 409, 410 & 443.
127. Randall Peerenboom, *ibid.*, pp. 409-410; for a full discussion of growing clientelism, see also Stanley B. Lubman, *supra* note 14, pp. 113-114.
128. Randall Peerenboom, *ibid.*, at p. 410; for the weakness and ambiguity of property rights, see also Stanley B. Lubman, *ibid.*, pp. 116-118.

129. Randall Peerenboom, *ibid.*, at p. 410.

130. For a full account, see Randall Peerenboom, *ibid.*, pp. 414-424.

131. Randall Peerenboom, *ibid.*, pp. 420-424; also, *infra* Chapter 1, pp. 32-33 & *infra* Chapter 2, pp. 80-81.

132. Randall Peerenboom, *ibid.*, pp. 415-417.

133. The use of *guanxi* ("relationships") to influence outcomes is common enough to cause Chinese judges to refer to cases whose result was influenced by a relationship between judges and local officials or others as "*guanxi* cases", as if they were an entirely separate type of case. For instance, Paul Lee, a Chinese-American investor in a school in the Special Economic Zone of Shenzhen, on the Hong Kong-Guangdong border, claimed that when he wanted to develop the land on which the school was operating, Shenzhen officials persuaded him to enter into a land development agreement with a mysterious Chinese company that turned out to be affiliated with the Ministry of State Security. After Lee charged that a crucial document relating to the development of the land that had been filed with the local Land Management Bureau had been forged by his new Chinese partner, he was physically attacked in his office and injured by toughs. In ensuing litigation, the local court ignored evidence of the forgery. Lee turned to the Shenzhen branch of the China International Economic and Trade Arbitration Commission (CIETAC), China's arbitration mechanism for resolving Sino-foreign commercial disputes. Contrary to CIETAC's own rules, he was told that he could not appoint a foreign arbitrator from the designated panel of arbitrators from whom litigants may ordinarily choose; the CIETAC tribunal that was chosen also ignored the proffered evidence of the forged document. In July 2000, officials of the Land Management Bureau of Shenzhen were charged with corruption, and Lee was still trying to overturn the decisions against him. See "The Business Ideal Desecrated by Graft", in *South China Morning Post*, 13 July 2000; also Stanley Lubman, "Bird in a Cage: Chinese Law Reform after Twenty Years", (Northwestern School of Law Journal of International Law & Business: 2000), available at (<http://www.freechina.net/2004/comment/00012.htm>).

134. For a full discussion of court funding, see *infra* Chapter 2, pp. 119-120.

135. Randall Peerenboom, *supra* note 15, at p. 307.

136. Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths Asia, 1992), at p. 124.

137. *Constitution Act*, 1982, Articles 129 & 132.

138. *Organizational law of People's Procuracy*, 1983, arts. 1, 4 and 5; *Constitution Act*, 1982, art. 129 & 132; *Criminal Procedure Law*, 1996, arts. 8, 136, 169, 181, 205 & 224; *Civil Procedure Law*, 1991, arts. 14 & 185; and *Administrative Procedure Law*, 1989, arts. 10 & 64.

139. *Constitution Act*, 1982, art. 129; also, Ronald C. Brown, *supra* note 2, pp. 142-143.
140. The art. 1 of 1979 *Organizational Law of the People's Procuracy* stipulated that the People's Procuracy was the State's legal supervisory institution. In 1982, this setup was officially incorporated into the art. 129 of PRC *Constitution*. The 1996 *Criminal Procedure Law* also gives specific authorization for the People's Procuracy to supervise criminal proceedings.
141. For the Procuracy's role in criminal proceedings, see *infra* Chapter 3.
142. Chen Guangzhong, *Criminal Procedure*, (Beijing: China Univ. Law & Politics Press, 1999), at p. 68.
143. Ronald C. Brown, *supra* note 2, pp. 142-143.
144. Randall Peerenboom, *supra* note 15, pp. 312-314.
145. *Organizational Law of People's Procuracy*, 1983, Article 5(4).
146. Randall Peerenboom, *supra* note 15, at p. 313.
147. See *Criminal Procedure Law*, 1996, art. 205; *Civil Procedure Law*, 1991, art. 185 and *Administrative Procedure Law*, 1989, art. 64. These provisions state that the procuracy has power to lodge protests against virtually all judicial decisions. Common law attorneys will find it remarkable that Chinese procuracy can intervene in civil litigation in order to exercise supervisory powers. The procuracy, for example, can intervene in any private family, contractual or property litigation—the most common forms of civil litigation in China. Such intervention involves presenting the procuracy's views as to proper outcomes. This often results in securing an ideologically or politically correct solution, and is especially prevalent in litigation which has broad significance to the public or Party. For a full discussion of procuratorial review, see Stanley B. Lubman, *supra* note 14, pp. 271-272; also, Randall Peerenboom, *ibid.*, at p. 313.
148. Randall Peerenboom, *ibid.*, at p. 313.
149. Randall Peerenboom, *ibid.*, at p. 339; also, *Supreme People's Procuracy Work Report* (1999), presented at the Second Session of the Ninth National People's Congress on 10 March 1999, addressed by Han Shubin, president of the Supreme Procuracy, available at (<http://www.spp.gov.cn/baogao/>).
150. Randall Peerenboom, *ibid.*, pp. 313-314; also, *2000 SPC Report to NPC*. (presented at the Third Session of the Ninth National People's Congress on 10 March 2000, addressed by Xiao Yang, president of the Supreme Court, available at (<http://www.court.gov.cn/work/200302120014.htm>)).

151. Randall Peerenboom, *ibid.*, at p. 314; for prosecutorial review, see also Stanley B. Lubman, *supra* note 14, at p. 271.

152. Currently, China is in the midst of a transformation from personal dictatorship to some form of 'rule of law'. The efforts that the Chinese state has made during the last two decades to build legal institutions have been extensive. For a detailed review, see Stanley B. Lubman, *supra* note 133, available at (<http://www.freechina.net/2004/comment/00012.htm>). In his article, Mr. Lubman noted three principal accomplishments: law has been made a major instrument of governance, a legal framework for a marketizing economy has been created, and a judicial system has been constructed.

153. *Constitution Act*, 1982, art. 128 stated: "The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local People's courts at various levels are responsible to the institutions of state power which created them"; also, Randall Peerenboom, *supra* note 15, at p. 280.

154. Randall Peerenboom, *ibid.*, pp. 280 & 312-314.

155. Ronald C. Brown, *supra* note 2, at p. 68; also, Randall Peerenboom, *ibid.*, pp. 316-317.

156. Randall Peerenboom, *ibid.*, at p. 422.

157. For a full account, see Randall Peerenboom, *ibid.*, pp. 264 & 317; also, Ronald C. Brown, *supra* note 2, pp. 127 & 137.

158. Randall Peerenboom, *supra* note 15, pp. 420-424; also, Pitman B. Potter, "The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform", in *Domestic Law Reforms in Post-Mao China*, edited by Pitman B. Potter (Armonk: M. E. Sharpe Inc., 1994), pp. 270-271 & 274-290.

159. *Administrative Procedure Law*, 1989, Articles 11 & 12. For more details about judicial review of abuses of discretion by officials, see also Stanley B. Lubman, *supra* note 14, pp. 212-216.

160. *Administrative Procedure Law*, 1989, arts. 11 & 12; also, Randall Peerenboom, *supra* note 15, at p. 420.

161. According to the *Administrative Procedure Law*, 1989, art. 54(2), the court is authorized to annul, or remand for reconsidering, administrative decisions if the agency makes its decision without sufficient essential evidence, incorrectly applies law or regulations, violates legal procedures, exceeds its authority, or abuses its authority; see Randall Peerenboom, *ibid.*, at p. 422.

162. The final text permitted judicial amendment of administrative decisions only in cases of administrative penalties that are deemed manifestly unfair (See *Administrative Procedure Law*, 1989, Article 54(iv)); also, Randall Peerenboom, *ibid.*, at pp. 447-448.

163. Preamble to *British North America Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

164. The Constitution of the United States explicitly states not only that there is to be a functional distinction among the three branches of government, but also that each of these functions should be vested in separate persons or groups of people. This principle, which is known as *the separation of power*, originated with the writings of Montesquieu, and it means, in the American case, that no individual is permitted to hold office in more than one branch of government at the same time. Hence, for example, the president cannot be a member of the Senate or the House of Representatives during the term of office, nor can a member of Congress be a judge at the same time as being in the House or in the Senate. The logic behind the separation of powers is that the concentration of too much power in one person, or, for that matter, in one constitution, is a corruptive influence. In an attempt to insure a good and just form of government, the drafters of the United States constitution tried to insure that no person would be tempted by the possession of too much governmental power. Just to make sure, the principle of the separation of powers was given an added twist: to prevent the abuse of any of the three powers by occupants of the respective branches, an elaborate system of *checks and balances* was woven into the relationship among branches. Thus, for instance, the president can veto any legislation passed by Congress, the Supreme Court can declare acts of Congress unconstitutional, the president appoints all members of the Supreme Court with the consent of the Senate, and Congress can impeach the president or override the president's veto by a two-thirds majority; see Richard J. Van Loon & Michael S. Whittington, *supra* note 59, pp. 174-175.

165. The Canadian Constitution brings the repositories of legislative and executive power together in the Parliament in order to make the executive government responsible to the Parliament in conformity with the Westminster system: Eugene A. Forsey, *supra* note 11, pp. 3-6 & 23-28.

166. For a full account of functional limitations on parliamentary supremacy, see Richard J. Van Loon & Michael S. Whittington, *supra* note 59, pp. 594-603.

167. Sections 91 & 92, *BNA Act* 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

168. In each of the country's 301 constituencies, or ridings, the candidate who gets the largest number of votes is elected to the House of Commons, even if his or her vote is less than half the total: Eugene A. Forsey, *supra* note 11, at p. 33.

169. The Senators are appointed by the Governor General on recommendation of the Prime Minister: Eugene A. Forsey, *ibid.*, at p. 32.

170. All legislation passes through six stages in parliament to be enacted into Canadian law: first reading-----second reading-----committee stage-----third reading-----consideration by the Senate-----royal assent. See Suzanne Gordon & Sherifa Elkhadem, *The Law Workbook: Developing Skills for Legal Research and Writing*, (Toronto: Emond Montgomery Publications Limited, 2001), pp. 45-50: (a) First Reading: the bill is introduced by indicating the title of the bill and perhaps a brief statement about the bill's subject matter. There is no debate at this stage. (b) Second Reading: here the initial debate on the bill takes place. Passage on second reading gives the bill "approval in principle." The bill cannot be amended but must be accepted or rejected in total. This is the major debate of a bill, for once it is approved in principle, it becomes difficult, if not impossible, to defeat it at a later stage. (c) The Committee Stage: here the bill is sent to a standing committee for detailed, clause-by-clause review. Here the bill can be amended for the first time. Witnesses, both pro and con, may be called to testify. (d) Third Reading: once the committee is finished with a bill, it is sent back to the full House for third reading. The committee may have made changes in the bill, but the full House, sitting as Committee-of-the-Whole, has the right to accept or reject such revisions. Opposition parties may debate a controversial bill at length in third reading, trying to force the government to end debate through closure. (e) The Other House Consideration: once a bill is passed by one House, the same basic steps are repeated by the other House. Because bills, as passed by the House of Commons and the Senate, must be identical any revisions must be sent back to the initiating House for approval. Either House may initially consider any bill, except for money bills, which must originate in the Commons. (f) Royal Assent: this sixth final stage concerns approval by the formal executive through the royal assent procedure, which takes place in the Senate chamber. The bill usually becomes law as soon as royal assent has been granted. However, in some instances, a bill may not become operative until it is proclaimed in accordance with a timetable included in the bill.

171. Section 91, *BNA Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; also, Eugene A. Forsey, *supra* note 11, at p. 20.

172. See Parliament, Canadian," Microsoft® Encarta® Online Encyclopedia 2004, available at (http://encarta.msn.com/text_761553359__2/Canadian_Parliament.html).

173. Robert J. Jackson & Doreen Jackson, *supra* note 74, at p. 152

174. Since Confederation, 70 men who were not members of either House have been appointed to the Cabinet, but they had to get seats in the House or the Senate within a reasonable time, or resign from the Cabinet. General McNaughton was Minister of National Defence for nine months without a seat in either House; but after he had twice failed to get elected to the Commons, he had to resign. Senators can be members of the Cabinet; the first Cabinet, of 13 members, had five senators. But since 1911, usually, there has been only one Cabinet minister in the Senate, and that without portfolio, the leader of the government in the Senate. For a detailed discussion, Eugene A. Forsey, *supra* note 11, pp. 24 & 35.

175. Eugene A. Forsey, *ibid.*, at p. 24.

176. See "Parliament, Canadian," Microsoft® Encarta® Online Encyclopedia 2004, available at (http://encarta.msn.com/text_761553359___3/Canadian_Parliament.html).

177. Eugene A. Forsey, *supra* note 11, at p. 26

178. *Ibid.*, pp. 24-27.

179. *Ell v. Alberta*, 2003 SCC 35, paras. 18. In this paragraph, the judge stated that judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies".

180. Rt. Hon. Beverley McLachlin, "Reflections on the Autonomy of Parliament" in *Canadian Parliamentary Review*, vol. 27, no. 1, 2004, pp. 4-7, (Ottawa: Parliament of Canada, 2004).

181. *Supra* note 180. In this article, Chief Justice McLachlin reviewed two court decisions on which allocation of powers in Canada rests: one English and one Canadian. The first is an 1839 decision of the English Court of Queen's Bench in the case of *Stockdale v. Hansard*, (1839) 112 E.R. 1112, at p. 1154. The second is an 1993 decision of Supreme Court of Canada in the case of *New Brunswick Broadcasting v. The Speaker of the Nova Scotia House of Assembly* [1993] 1 S.C.R. 319, pp. 384-385.

182. Here, the term "the Crown" is used to describe the collectivity of executive powers that, in a monarchy, are exercised by or in the name of the sovereign; also *BNA Act*, 1867, s. 9 stated "the Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

183. Robert J. Jackson & Doreen Jackson, *supra* note 74, pp. 127-128.

184. *Ibid.*, at p. 128.

185. Prerogative authority means powers of a monarch or his/her representatives that have not been bypassed by constitutional or statute law. It can be traced to the period of more authoritarian rule in Great Britain when the Crown possessed wide discretionary powers. Nowadays, these powers have been eroded to a very few reserve powers: *ibid.*, at p. 128.

186. Peter W. Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Sripnoon Publications, 1998), pp. 75-77.

187. Section 55, *BNA Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

188. As to political duties, the Governor General is bound to act on practically every piece of advice received by his or her ministers. But certain functions are the Governor General's alone. The most important of these stem from the prerogative powers left to the monarch: Peter W. Noonan, *supra* note 186, pp. 77 & 216; also, Robert J. Jackson & Doreen Jackson, *supra* note 74, at p. 130.

189. Although the role of Prime Minister in Canada is not defined by any law or constitutional document, it is the most powerful role in Canadian politics: Robert J. Jackson & Doreen Jackson, *supra* note 74, pp. 131 & 134-135.

190. *Ibid.*, pp. 136-140.

191. Compared to the ministry, the cabinet is a smaller body of the most powerful ministers, and acts in the name of the Privy Council: *ibid.*, at p. 136.

192. *Ibid.*, at p. 131.

193. Eugene A. Forsey, *supra* note 11, at p. 35.

194. Each minister is not only responsible for advising the Prime Minister and other ministers on any and all political matters, but also administering one or more specific portfolios. The Prime Minister often assigns a minister to be responsible for a specific problem or initiative that may cut across departmental boundaries. This is usually described as *having the file*. For a fully discussion, see Cabinet of Canada at Wikipedia, the free encyclopedia, available at (http://en.wikipedia.org/wiki/Canadian_Cabinet).

195. See "Parliament, Canadian," Microsoft® Encarta® Online Encyclopedia 2004, available at (http://encarta.msn.com/text_761553359___3/Canadian_Parliament.html).

196. Cabinet ministers can disagree within the privacy of the Cabinet, but once a decision is made, they must loyally support and defend the government's position or resign. Individual cabinet ministers must not announce new policy or changes in policy without the Cabinet's approval. They must carry out cabinet approved policies with respect to their own departments, whether or not they agree with such policies. Finally, they are expected to vote with the government always. The prime minister enforces cabinet solidarity. He or she can ask ministers to resign or can ask the governor-general remove them if they refuse. See "Parliament, Canadian," Microsoft® Encarta® Online Encyclopedia, available at (http://encarta.msn.com/text_761553359___1/Canadian_Parliament.html).

197. See "Parliament, Canadian," Microsoft® Encarta® Online Encyclopedia, available at (http://encarta.msn.com/text_761553359___3/Canadian_Parliament.html).

198. Robert J. Jackson & Doreen Jackson, *supra* note 74, at p. 203.

199. The Hon Justice McHugh AC, "Tensions between the Executive and the Judiciary", a speech addressed at Australian Bar Association Conference on 10 July 2002, available at (http://www.hcourt.gov.au/speeches/mchughj/mchughj_paris.htm).

200. See Department of Justice Canada at (<http://canada.justice.gc.ca/en/dept/pub/about/>).

201. *Ibid.*

202. Ministry of Attorney General, "Roles and Responsibilities of Attorney General", available at (<http://www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.asp>).

203. *Ibid.*

204. *Ibid.*

205. *Ibid.*

206. The notion that governmental action has to comply with the requirements of the Constitution in order to be valid has become known as the principle of constitutionalism: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385.

207. The Constitutional Law Group in *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 2003), at p. 29.

208. Since 1982, the power of judicial review has been given recognition in the text of the Constitution. Section 52(1) of the *Constitution Act 1982* (U.K.), 1982, c.11, which is applicable to the entire Constitution, provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect": *Ibid.*, at p. 30.

209. Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides that "anyone whose rights of freedom, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." See Robert J. Jackson & Doreen Jackson, *supra* note 74, pp. 202-205; also, The Constitutional Law Group, *ibid.*, at p. 30.

210. In Canada, as well as in many other constitutional democracies, there are two types of 'judicial review' – judicial review on administrative actions, and judicial review on the constitutionality of legislation. Both types of 'judicial review' are based on the idea of the rule of law. This idea means that not only citizens, but also governments' officials, are subject to the law. If these officials do something that the law does not allow them to do, the courts are allowed to nullify their actions. For a fully discussion, see judicial review online at (http://www.law.ualberta.ca/ccskeywords/judicial_rvw.html).

211. Richard J. Van Loon & Michael S. Whittington, *supra* note 59, at p. 183.

212. *Ibid.*, at p. 184; and see *infra* Chapter 2.

213. *Ibid.*, at p. 184.

214. *Ibid.*

215. *Ibid.*, at p. 184; and see *infra* Chapter 2.

216. The House of Commons is elected directly by the people in their constituencies, while the Senate is appointed by the government; House of Commons initiates most bills, while the Senate acts as a chamber of “sober, second thought” to protect minorities.

217. For expanding executives in the modern world, see The Hon Sir Gerard Brennan (Chief Justice of Australia), “The Parliament, The Executive And The Courts: Roles And Immunities”, a speech made at School of Law, Bond University, on Saturday, 21 February, 1998, available at (http://www.hcourt.gov.au/speeches/brennanj/brennanj_bond2.htm).

218. See, Experts: Canada online at (<http://experts.about.com/q/2764/3199111.htm>).

219. See, Canadian Parliament online at (http://encarta.msn.com/text_761553359___9/Canadian_Parliament.html).

220. For a full discussion, see Martha Jackman, “Separate but not Apart: The Role of the Courts in Canada’s Post-Charter Democracy”, in *Canadian Constitutional Dilemmas Revisited*, Denis N. Magnusson & Daniel A. Soberman, editors, (Kingston, Ontario: Institute of Intergovernmental Relations, 1997), pp. 31-41.

221. Tom Cromwell, “Judicial Independence and Justice: The Pillars and the Temple”, in *ibid.*, at p. 167.

222. For a law court’s weak stature in Chinese institutional arrangements, see Stanley B. Lubman, *supra* note 14, pp. 31-32 & 292-297; also, Randall Peerenboom, *supra* note 15, Chapter 7 “The Judiciary: in Search of Independence, Authority, and Competence”, pp. 280-330.

Notes to Chapter 2:

1. *Organizational Law of People's Courts* (1983), Article 2. (Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, and revised according to the Decision Concerning the Revision of the Organizational Law of the People's Courts adopted at the Second Meeting of the Sixth National People's Congress on 2 September 1983). [Source: Legislative Affairs Commission of the Standing Committee of the National People's Congress; English translation courtesy of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC; Appendix to Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997)]; also, Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge: Cambridge University Press, 2002), at p. 283.
2. *Constitution Act* (1982), Article 127.
3. Randall Peerenboom, *supra* note 1, at p. 283.
4. For specialized courts, see Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths Asia, 1992), at p. 108; also, Ronald C. Brown, *supra* note 1, at p. 36.
5. *Supra* note 1, Article 17 stated "...judicial work of the lower courts shall be subject to supervision by the people's courts at higher levels"; also, Randall Peerenboom, *supra* note 1, at p. 314.
6. Randall Peerenboom, *supra* note 1, at p. 314.
7. *Ibid.*
8. *Ibid.*
9. For instance, Chief Justice Xiao Yang, the president of the Supreme People's Court, recommended that lower-level courts assume more responsibility in deciding cases on their own in order to speed up trials and to ensure that the rights of the parties are better protected: Randall Peerenboom, *supra* note 1, pp. 314-315.
10. Randall Peerenboom, *supra* note 1, at p. 315.
11. *Organizational Law of People's Courts* (1983), Article 12; *Criminal Procedure Law* (1996), Article 10; *Civil Procedure Law* (1991), Article 10; *Administrative Procedure Law* (1989), Article 6.
12. For a brief discussion of "death sentence review and supervisory review", see *infra* Chapter 2, pp. 62-64.

13. Ronald C. Brown, *supra* note 1, at p. 37.
14. *Ibid.*, at p. 68.
15. *Ibid.*, at p. 37.
16. *Ibid.*, at p. 144.
17. These provincial inferior courts are the workhorses of the system, resolving about 95 percent of all cases that enter the judicial process: Peter McCormick, *Canada's Courts* (Toronto: James Lorimer & Company Ltd., 1994), at p. 27.
18. In Manitoba, New Brunswick, and Prince Edward Island, and in Ontario since 1989, this function is assigned to the provincial superior trial court: Peter McCormick, *supra* note 17, pp. 25 & 198.
19. Peter McCormick, *ibid.*, at p. 25.
20. Peter McCormick, *ibid.*, at p. 27.
21. S. M. Waddams, *Introduction to the Study of Law*, 5th ed. (Scarborough, Ontario: Carswell, 1997), at p. 110.
22. *Ibid.*
23. See Department of Justice Canada, "Canada's Court System", electronical version at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>).
24. *Ibid.*
25. Peter McCormick, *supra* note 17, at p. 29.
26. *The Canadian Encyclopedia*, 2000 Edition (Toronto: McClelland & Stewart Inc., 1999), at p. 578.
27. *Supreme and Exchequer Court Act*, S.C. 1875, c.11.
28. Prior to 1949, the final appellate tribunal was the Judicial Committee of the Privy Council, Downing Street, London/Westminster. For a full account of the creation and beginnings of the court, see Supreme Court of Canada online at (http://www.scc-csc.gc.ca/AboutCourt/creation/index_e.asp).
29. *Supra* note 23.
30. Peter McCormick, *supra* note 17, pp. 31-32; also S. M. Waddams, *supra* note 21, pp. 106-110.

31. Peter McCormick, *supra* note 17, at p. 31.
32. S. M. Waddams, *supra* note 21, at p. 106.
33. Provincial and territorial courts of appeal may also be asked to hear references from the provincial and territorial governments: *supra* note 23.
34. S. M. Waddams, *supra* note 21, at p. 106.
35. Besides the Tax Court and military courts-martial, there are also some newly-created courts that are different from the regular courts, for example, the Nunavut Court of Justice in the new territory of Nunavut and Unified Family Courts in several provinces: *supra* note 23.
36. *Ibid.*
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*
41. Under certain situations, however, the right to appeal is automatic. For instance, no leave is required in criminal cases where a judge of a court of appeal has dissented on how the law should be interpreted. Similarly, where a court of appeal has found someone guilty who had been acquitted at the original trial, that person automatically has the right to appeal to the Supreme Court of Canada; see *supra* note 23.
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*
45. *Constitution Act* (1982), arts. 123 & 124; *Organizational Law of People's Courts* (1983), arts. 1 & 2.
46. Sections 92.14 & 101, *BNA Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
47. Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999), at p. 295.

48. See its annual report presented to Second Session of the Tenth National People's Congress on March 10, 2004, addressed by President of Chinese Supreme People's Court, Xiao Yang, in Beijing, available at (<http://www.court.gov.cn/work/200403220012.htm>); also, Ronald C. Brown, *supra* note 1, pp. 45-46.

49. See statistics 1993-2003, by Supreme Court of Canada, available at (http://www.scc-csc.gc.ca/information/statistics/HTML/intro_e.asp).

50. *Civil Procedure Law* (1991), arts. 40 & 145. (Adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1991, promulgated by Order No. 44 of the President of the People's Republic of China on 9 April 1991, and effective as of 9 April 1991); *Criminal Procedure Law* (1996), arts. 147 & 174 (Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, and revised at the Fourth Session of the Eighth National People's Congress on 17 March 1996); *Administrative Procedure Law* (1989), article 46. (Adopted at the Second Session of the Seventh National People's Congress on 4 April 1989, promulgated by Order No. 16 of the President of the People's Republic of China on 4 April 1989, and effective as of 1 October 1990); [Source: Legislative Affairs Commission of the Standing Committee of the National People's Congress; English translation courtesy of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC; Appendix to Ronald C. Brown, *supra* note 1].

51. In the past, a presiding-judge system has been adopted in many courts. The main purpose is to shift the power of making decisions from court officials to the presiding judge, who is, in summary proceedings, the sole judge, in a collegiate panel, the one overseeing the trial and being primarily responsible for the judgment. According to the 2001 SPC Work Report, all HPCs and IPCs and fifty percent of BPCs had implemented the new presiding-judge system as of the end of 2000. For more details, see Randall Peerenboom, *supra* note 1, pp. 286 & 332.

52. Prior to amendment of the *Criminal Procedure Law* in 1996, the president of the court could take what he considered to be major or difficult cases away from the collegiate panel and reassign them to the Adjudicative Committee. Under the revised *Criminal Procedure Law* (1996), the collegiate panel is given the right to refer difficult, complex, or major cases to the president who will then decide whether to assign the case to the Adjudicative Committee: Randall Peerenboom, *supra* note 1, pp. 286 & 332.

53. "Trial measures for the Selection and Appointment of Presiding Judges in People's Courts", Article 5 (passed by the SPC on 11 July 2000, available at http://www.chinacourt.org/flwk/show1.php?file_id=35470); also, Randall Peerenboom, *supra* note 1, pp. 286 & 332.

54. *Organizational Law of People's Courts* (1983), Article 14; *Criminal Procedure Law* (1996), Article 205; *Civil Procedure Law* (1991), Article 177; *Administrative Procedure Law* (1989), Article 63.

55. Based on my experience as an associate judge in Chengdu High-Tech District Court, from August 2000 to July 2001.

56. *Organizational Law of People's Courts* (1983), Article 11.

57. *Supra* note 55.

58. Randall Peerenboom, *supra* note 1, at p. 287.

59. Randall Peerenboom, *supra* note 1, pp. 323-324.

60. Margaret Y. K. Woo, "Adjudicative Supervision and Judicial Independence in the PRC", (1991) *American Journal of Comparative Law*, vol. 39, pp. 95-119; also, Randall Peerenboom, *supra* note 1, at p. 324.

61. Randall Peerenboom, *supra* note 1, at p. 324.

62. The Law of Criminal Procedure establishes as additional review procedure for death sentences, which under the law, must be approved by the Supreme People's Court. (*Criminal Procedure Law* 1979, article 144; *Criminal Procedure Law* 1996, arts. 199-200.) In 1983, this provision was modified under the *Organizational Law of People's Courts* (article 13) to authorize the Supreme People's Court to delegate to Higher People's Courts the power to approve many of the death sentences including for such crimes as "homicide, rape, robbery, causing explosions, and other gravely endangering public security and disrupting social order. For review of death sentences, see Ronald C. Brown, *supra* note 1, pp. 63-64.

63. For example, in 1996, law courts across China tried 2,248 criminal cases appealed by the procuracy in accordance with the second instance procedures, and 167 other criminal cases were appealed by the procuracy under adjudicative supervision. Of the total 2,475 cases, 683 cases were amended due to error, 1,089 were affirmed, and 643 were sent for re-trial or appeals were withdrawn. See *1996 Supreme People's Court Work Reports*, presented at the Fourth Session of the Eighth National People's Congress on 12 March 1996, addressed by Supreme Court president Ren Jianxin, in Beijing, available at (<http://www.court.gov.cn/work/200302120010.htm>). See also Ronald C. Brown, *Supra* note 1, pp. 57-58.

64. *Criminal Procedure Law* (1996), Articles 203, 204 & 205; *Civil Procedure Law* (1991), Articles 177, 178, 179, 185 & 186; *Administrative Procedure Law* (1989), Articles 62, 63 & 64; also Ronald C. Brown, *supra* note 1, pp. 57-63 & 74.

65. *Organizational Law of People's Courts* (1983), Article 14.

66. *Criminal Procedure Law* (1996), Article 205; *Civil Procedure Law* (1991), Article 177; *Administrative Procedure Law* (1989), Article 63; Ronald C. Brown, *supra* note 1, pp. 60-61.

67. *Criminal Procedure Law* (1996), Articles 203 & 204; *Civil Procedure Law* (1991), Articles 183, 178 & 179, *Administrative Procedure Law* (1989), Article 62; Ronald C. Brown, *supra* note 1, pp. 59-60.

68. *Criminal Procedure Law* (1996), article 205, *Civil Procedure Law* (1991), articles 185 & 186, *Administrative Procedure Law* (1989), article 64. For prosecutorial review, see Stanley B. Lubman, *supra* note 47, pp. 271-272; also, Ronald C. Brown, *supra* note 1, pp. 61-63.

69. *Criminal Procedure Law* (1996), Article 205; *Civil Procedure Law* (1991), Article 186.

70. *Criminal Procedure Law* (1996), Article 206; *Civil Procedure Law* (1991), Article 184; also, Ronald C. Brown, *supra* note 1, at p. 75.

71. Ronald C. Brown, *supra* note 1, pp. 57, 58 & 74.

72. *Ibid.*, at p. 74.

73. *Civil Procedure Law* (1991), Articles 86-87. For mediation, see Stanley B. Lubman, *supra* note 47, pp. 272-277; also Albert H.Y. Chen, *supra* note 4, at p. 171; Randall Peerenboom, *supra* note 1, at p. 288; also, Ronald C. Brown, *supra* note 1, at p. 16.

74. In the mid-1980s the Ministry of Justice expected the courts to conclude no less than 80 percent of all civil disputes by means of mediated settlement. Statistics for recent years indicate that although the percentage is now lower, it is still closer to 60 percent: Stanley B. Lubman, *supra* note 47, pp. 272-273; also based on my experience as an associate judge in Chengdu High-Tech District Court, the percentage was between 50-60 percent.

75. Based on my experience in Chengdu High-Tech District Court; for pressure on the courts to mediate, see Stanley B. Lubman, *supra* note 47, pp. 274-276.

76. *Civil Procedure Law* (1991), Articles 85 & 88.

77. *Civil Procedure Law* (1991), Article 91.

78. Based on my experience as an associate judge in Chengdu High-Tech District Court.

79. Based on my correspondence with ex-colleagues in the past two years.

80. For judicial interpretation, see Ronald C. Brown, *supra* note 1, pp. 67-70; also Randall Peerenboom, *supra* note 1, pp. 316-318 & 326; also Stanley B. Lubman, *supra* note 47, pp. 282-285.

81. *Constitution Act* (1982), Article 67(4).

82. Resolution of NPC Standing Committee Providing an Improved Interpretation of the Law (adopted at the 19th Meeting of the Standing Committee of the 5th National People's Congress on 10 June 1981, available at (http://www.chinacourt.org/flwk/show1.php?file_id=1906&str1=%BC%D3%C7%BF%B7%A8%C2%C9%BD%E2%CA%CD). The hierarchical legal order is set out in the *Constitution Act* 1982 (articles 5, 89(1), 100, 62(11), 67(7)(8) & 89(13), with priorities being the Constitution, central government laws, and central government administrative regulations. NPC may annul decisions of the Standing Committee which can annul administrative regulations or local regulations; the State Council can annul rules issued by ministries. In addition, in the later Resolution Concerning the Strengthening of Legal Interpretative Work (adopted 19 June 1981), NPC Standing Committee stated that interpretation of questions involving specific application of laws and decrees in court trials shall be provided by the Supreme People's Court. Ronald C. Brown, *supra* note 1, at p. 68; also, Randall Peerenboom, *supra* note 1, pp. 317 & 339.

83. Ronald C. Brown, *supra* note 1, at p. 67.

84. *Ibid.*, pp. 67-68.

85. *Organizational Law of People's Courts* (1983), Article 33.

86. Randall Peerenboom, *supra* note 1, at p. 317; on the limited authority of the Supreme People's Court to interpret the law, see also Stanley B. Lubman, *supra* note 47, pp. 282-284.

87. *Ibid.*

88. *Ibid.*

89. *Ibid.*

90. Randall Peerenboom, *supra* note 1, at p. 317; also Ronald C. Brown, *supra* note 1, at p. 68.

91. *E.g.*, "Notice of the Supreme People's Court, the Supreme People's Procuratoracy, the Ministry of Public Security, the Ministry of Civil Affairs, the Ministry of Justice, and All China Women's Federation on 'the Strict Control of the Criminal Activities of Abduction of Women and Children'" (issued on 20 March 2000, available at http://www.chinacourt.org/flwk/show1.php?file_id=34749). Compare with, Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children (Adopted at the 21st Meeting of the Standing Committee of the Seventh National People's Congress on 4 September 1991, available at http://www.chinacourt.org/flwk/show1.php?file_id=13442); Ronald C. Brown, *supra* note 1, pp. 68-69.

92. Randall Peerenboom, *supra* note 1, at p. 317.

93. *Civil Procedure Law* (1991), Articles 207-236; *Criminal Procedure Law* (1996), Articles 208-224 (execution of sentences); *Administrative Procedure Law* (1989), Articles 65 and 66; also, Randall Peerenboom, *supra* note 1, at p. 287.

94. *Organizational Law of People's Courts* (1983), Article 41.

95. For example, the court is empowered to direct inquiries to banks, credit cooperatives and other savings units about the deposits of the person subject to execution, and shall have the power to freeze or transfer the deposits of such person, provided that such inquiry, freezing or transfer does not exceed the scope of the obligation to be performed by the person subject to execution (*Civil Procedure Law* 1991, art. 221). Further, the court may garnish revenue of the party or "auction off or sell off a portion of the property of the person subject to the execution sufficient to cover the obligation" (*Civil Procedure law* 1991, arts. 222 & 223) Where there is failure to perform and the party conceals property, the court may "issue a search warrant" to locate the property (*Civil Procedure Law* 1991, art. 227); Ronald C. Brown, *supra* note 1, at p. 84.

96. Randall Peerenboom, *supra* note 1, at p. 287. For a critical assessment of China's efficacy on enforcement, see also Randall Peerenboom, "Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC", vol. 49, 2001 *American Journal of Comparative Law*, pp. 251-264; also Stanley B. Lubman, *supra* note 47, pp. 266-268.

97. *Civil Procedure Law* (1991), Article 235.

98. *Civil Procedure Law* (1991), Article 227.

99. For a full discussion of court funding and "local protectionism", see *infra* Chapter 1, pp. 28 & 32.

100. Ronald C. Brown, *supra* note 1, at p. 83; also Stanley B. Lubman, *supra* note 47, pp. 263-268.

101. Randall Peerenboom, *supra* note 1, at p. 288.

102. *Ibid.*, at p. 326.

103. Notice of the Supreme People's Court Regarding Several Issues Relating to the People's Courts' Handling of Foreign-Related and Foreign Arbitration Matters (28 Aug. 1995, File No. 1995-18, available at http://www.chinacourt.org/flwk/show1.php?file_id=23376); also, Randall Peerenboom, *supra* note 1, pp. 326 & 340.

104. Randall Peerenboom, *supra* note 1, at p. 340.

105. SPC Provisions on Certain Issues Relating to the People's Courts' Enforcement Work Regulation (Trial Implementation) (passed at the 992nd Meeting of the Adjudicative Committee of Supreme People's Court on 8 July 1998, File No. 1998-15, available at http://www.chinacourt.org/flwk/show1.php?file_id=30857); Regulation of the Supreme People's Court Regarding the Problems of Collecting Fees and Time Limits for Review of Recognition and Enforcement of Foreign Arbitral Awards (passed at the 1029th Meeting of the Adjudicative Committee of Supreme People's Court on 21 Oct. 1998, File No. 1998-28, available at http://www.chinacourt.org/flwk/show1.php?file_id=31581). See Peerenboom, *supra* note 1, pp. 326 & 340-341; also Randall Peerenboom, *supra* note 96, pp. 320-324.

106. Gerald L. Gall, *The Canadian Legal System*, 4th ed. (Toronto: Carswell, 1995), at p. 168.

107. For the non-adjudicative functions of the Canadian judiciary, see Peter H. Russell, *The Judiciary in Canada: the Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987), pp. 10-13.

108. *Ibid.*, at p. 10.

109. *Ibid.*

110. Mediation and other alternatives to formal litigation are important features of Canada's evolving family law system. For instance, Quebec's legislation requires that married and unmarried parents attend an information session on mediation before the courts will hear their applications in disputes over child custody, access, support, or other matrimonial rights. For more details, see Department of Justice Canada, "*Children Come First: a Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines*", available at: (http://canada.justice.gc.ca/en/ps/sup/pub/rp/volume_2_9.html).

111. Peter H. Russell, *supra* note 107, at p. 15.

112. *Ibid.*, at p. 13; a classic enunciation of this point can be found in H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), Ch. 7: "Formalism and Rule-Scepticism", pp. 120-150.

113. Peter H. Russell, *supra* note 107, at p. 14.

114. *Ibid.*, pp. 13-15.

115. *Ibid.*, at p. 93.

116. For the entrenchment of judicial review, *ibid.*, pp. 93-95.

117. Sections 101 & 92(14), *BNA Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

118. Under S. 33 of the *Canadian Charter of Rights and Freedoms 1982*, parliament or a provincial legislature may enact legislation that shall operate for five years, notwithstanding a conflict with S. 2 or Ss. 7 to 15 of the *Charter*. The courts can review legislation purporting to rest on S. 33 to see whether it falls within the powers conferred by this section of the Constitution. The blanket use of this power by the Quebec legislature was struck down by the Quebec Court of Appeal on 14 June 1985 in the *Alliance des Professeurs de Montreal v. Attorney-General of Quebec* (1985) 21 D.L.R. (4th) 354, pp. 354-366; also, Peter H. Russell, *supra* note 107, pp. 94 and 102.

119. For example, *Ottawa Valley Power Co. v. A.-G. ONT. et al.* [1936] 4 D.L.R. 594, at p. 603; *B.C. Power Corp. v. B.C. Electric Co.* [1962] S.C.R. 642; *Operation Dismantle v. R.* [1985] 1 S.C.R. 441, pp. 455-456; see Peter H. Russell, *supra* note 107, pp. 94 and 102.

120. Barry Strayer, *The Canadian Constitution and the Courts: the Function and Scope of Judicial Review*, 2nd ed. (Toronto: Butterworths, 1983), at p. 124.

121. S. M. Waddams, *supra* note 21, at p. 106.

122. *Ibid.* Original in character, given by S. 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, "The Governor in Council by the provision, may refer to the Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution Acts, the constitutionality or interpretation of any federal or provincial legislation, or the powers of Parliament or of the provincial legislatures or their respective governments or any other important question of law or fact concerning any matter."

123. S. M. Waddams, *supra* note 21, at p. 106.

124. *Ibid.*

125. *Ibid.*

126. Peter H. Russell, *supra* note 107, at p. 12; see also John Courtney, "Judges as Royal Commissioners," *Dalhousie Review* (1964-65), pp. 413-417. For a discussion of judges as royal commissioners in England, see Fred Morrison, *Courts and the Political Process in England*, vol. 3 (Beverly Hills, California: Sage Publications, 1973), pp. 183-188.

127. Peter H. Russell, *supra* note 107, at p. 13.

128. *Ibid.*, at p. 12.

129. *Ibid.*, pp. 12-13.

130. *Ibid.*

131. *Ibid.*, at p. 13.
132. For the influence of adjudication on law and policy, *ibid.*, pp. 13-17.
133. Gerald L. Gall, *supra* note 106, pp. 166-172.
134. Stanley B. Lubman, *supra* note 47, pp. 284-285; Ronald C. Brown, *supra* note 1, pp. 35 & 127; also Randall Peerenboom, *supra* note 1, at p. 301.
135. *Black's Law Dictionary*, 7th ed., by Bryan A. Garner (Minn, St. Paul: West Group, 1999), at p. 857.
136. The "subject matters" which a dissatisfied party can instigate in an administrative lawsuit are limited to some "concrete administrative actions" involving a limited range of grounds, such as error in application of law or abuse of power or *ultra vires* enabling legislation: *Administrative Procedure Law 1989*, Articles 11 & 12.
137. *Organizational Law of People's Courts* (1983), Articles 25, 28 & 32; *Criminal Procedure Law 1996*, Articles 19-22; *Civil Procedure Law 1991*, Articles 18-21; *Administrative Procedure Law 1989*, Articles 13-16.
138. *Criminal Procedure Law 1996*, Articles 20, 21 & 22; *Civil Procedure Law 1991*, Articles 19, 20 & 21; *Administrative Procedure Law 1989*, Articles 14, 15 & 16.
139. *Criminal Procedure Law 1996*, Articles. 19 & 24; *Civil Procedure Law 1991*, Articles 18 & 22; *Administrative Procedure Law 1989*, Articles 13 & 17.
140. For instance, among criminal "subject matters", excluded from the grass-root court's jurisdiction are criminal cases that carry the penalty of life imprisonment or death and "important" foreign related civil cases. See *Criminal Procedure Law 1996*, Articles 19 & 20; for the exclusion of civil "subject matters", see *Civil Procedure Law 1991*, Articles 18 & 19; for the exclusion of administrative "subject matters", see *Administrative Procedure Law 1989*, Articles 13 & 14.
141. *Civil Procedure Law 1991*, Article 37; *Administrative Procedure Law 1989*, Article 22.
142. *Civil Procedure Law 1991*, Article 39; *Criminal Procedure Law 1996*, Articles 23 & 26; *Administrative Procedure Law 1989*, Article 23.
143. Gerald L. Gall, *supra* note 106, pp. 185-186.
144. *Ibid.*, pp. 449-459.
145. *Ibid.*, pp. 448 & 458-459; for example, according to the provisions of the *Judicial Review Procedure Act*, S.O. 1971, c. 48 and the *Judicature Amendment Act*, S.O. 1970, c.

97, and the *Judicature Amendment Act*, S.O. 1971, c. 57, a new division was created in the Supreme Court of Ontario, namely, the Divisional Court, in order to specifically deal with the judicial review of administrative action.

146. Gerald L. Gall, *supra* note 106, at p. 448.

147. *Ibid.*, pp. 448 & 454-458; According to *Federal Court Act 1989*, the trial division of the Federal Court will have a general supervisory jurisdiction to conduct judicial review of most federal tribunals, with the exception of several federal tribunals (courts of record) which are subject to the supervisory jurisdiction of the Federal Court of Appeal.

148. S. M. Waddams, *supra* note 21, at p. 110.

149. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); see also S. M. Waddams, *supra* note 21, at p. 105; Peter H. Russell, *supra* note 107, pp. 255-260; and, The Constitutional Law Group, *Canadian Constitutional Law*, 3rd edition (Toronto: Emond Montgomery Publications Ltd., 2003), pp. 470-471.

150. The Constitutional Law Group, *supra* note 149, pp. 471 & 473.

151. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); see also *Federal Courts Act*, ss. 19-26, (R.S., 1985, c. F-7, s. 1; 2002, c. 8, s. 14); also The Constitutional Law Group, *supra* note 149, pp. 471-472; also Peter H. Russell, *supra* note 107, pp. 315-319.

152. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); *Federal Courts Act*, Ss. 18.1, 18.3 and 18, (R.S., 1985, c. F-7, s. 1; 2002, c. 8, s. 14); Gerald L. Gall, *supra* note 106, pp. 454-458; also Peter H. Russell, *supra* note 107, pp. 313, 314, 318 & 320.

153. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>).

154. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); also, The Constitutional Law Group, *supra* note 149, pp. 470-473; and, Peter McCormick, *supra* note 17, pp. 27-33; S.M. Waddams, *supra* note 21, pp. 105 & 110-112; Peter H. Russell, *supra* note 107, at p. 312.

155. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); also, Peter McCormick, *supra* note 17, pp. 27-29.

156. See Canada's court system on line at (<http://canada.justice.gc.ca/en/dept/pub/trib/page3.html>); also, Peter McCormick, *supra* note 17, pp. 25-27; S. M. Waddams, *supra* note 21, at p. 111.

157. *Supra* note 153.

158. Peter McCormick, *supra* note 17, at p. 26.

159. *Ibid.*, at p. 26; also, Peter H. Russell, *supra* note 107, at p. 204.

160. *Supra* note 153.

161. *Ibid.*

162. *Ibid.*

163. *Ibid.* The object is to address the needs of non-violent offenders who are charged with criminal offences that were motivated by their addiction. Those who qualify are offered an intensive combination of judicial supervision and treatment for their dependence, drawing on a range of community support services.

164. *Administrative Procedure Law*, 1989, Articles 11 & 12. For more details about judicial review of abuses of discretion by officials, see also Stanley B. Lubman, *supra* note 47, pp. 212-216.

165. According to the *Administrative Procedure Law*, 1989, art. 54(2), the court is authorized to annul, or remand for reconsidering, administrative decisions if the agency makes its decision without sufficient essential evidence, incorrectly applies law or regulations, violates legal procedures, exceeds its authority, or abuses its authority. The final text permitted judicial amendment of administrative decisions only in cases of administrative penalties that are deemed manifestly unfair (See *Administrative Procedure Law*, 1989, Article 54(iv)); also, Randall Peerenboom, *supra* note 1, at pp. 422 & 447-448.

166. In the case of administrative tribunals exercising a "legislative" or "ministerial" function, Canadian courts can intervene where such a tribunal has exceeded its statutory jurisdiction, failed to perform its statutory duties or abused its powers or erred in keeping a record of its proceedings; and they can quash its decision. In the case of a tribunal exercising an "administrative" function, Canadian courts can intervene and quash its decision on similar grounds. Gerald L. Gall, *supra* note 106, pp. 438-450.

167. For prerogative remedies, *ibid.*, at p. 449.

168. *Supra* note 154.

169. Gerald L. Gall, *supra* note 106, pp. 185-186.

170. *Judges Act* (1995), Article 2. (Adopted at the 12th Meeting of the Standing Committee of the Eighth National People's Congress on 28 February 1995, promulgated by Order No. 38 of the President of the People's Republic of China on 28 February 1995, and effective as of the date of 1 July 1995; later, revised at the 22nd Meeting of the Standing Committee of the Ninth National People's Congress on 30 June 2001).

171. *Ibid.*

172. Ronald C. Brown, *supra* note 1, at p. 37; also, Susan Finder, "The Supreme People's Court of the People's Republic of China" in *Journal of Chinese Law*, vol. 7, (Lincoln, Neb.: Center for Chinese Legal Studies, Columbia University School of Law, 1993), pp. 145-153.

173. *Ibid.*

174. Based on my experience as an associate judge in Chengdu High-Tech District Court.

175. *Ibid.*

176. Ronald C. Brown, *supra* note 1, pp. 45-46.

177. Statistics Canada (Canadian Center for Justice Statistics), *Court Personnel and Expenditures 2000/01*, (Ottawa: Minister of Industry, 2002).

178. *Ibid.*

179. Based on my interview with Mrs. Karen Fulham, the Executive Assistant to the Chief Justices and Chief Judge of each of the courts in Manitoba (Court of Appeal, Court of Queen's Bench and Provincial Court).

180. *Ibid.*

181. *Supra* note 177.

182. *Ibid.*

183. *Judges Act* (1995), Article 9.

184. For example, in Chengdu High-Tech District Court, almost eighty percent of the judges are Communist Party members.

185. When I was working in Chengdu High-Tech District Court, I was encouraged to join the Communist Party; after I refused this offer, I did not encounter any negative treatment from the court.

186. In the past, judgeships were open to candidates with or without any legal educational background, including: law school graduates, law professors, legal researchers, civil servants of other governmental institution, and administrative personnel of the courts. At the end of 1995, 80% of judges had at least *dazhuan* qualifications, which require a minimum of two years of legal training at college level. However, only 5% had the equivalent of a four-year bachelor degree in law, and only 0.25% had graduate degrees; Randall Peerenboom, *supra* note 1, at p. 290; also, "China- Open Recruitment to Select Best Judges" in *China Daily*, 2 March 1999.

187. Randall Peerenboom, *supra* note 1, at p. 292.

188. *Judges Act* (1995), Articles 9(6) & 12.

189. Amended *Judges Act* 2001, Article 9(6); also, Randall Peerenboom, *supra* note 1, at p. 291.

190. Amended *Judges Act* 2001, Article 12; also, Randall Peerenboom, *supra* note 1, at p. 291.

191. Randall Peerenboom, *supra* note 1, at p. 291.

192. *Ibid.*

193. For judicial training programs organized by the Supreme People's Court, see Stanley B. Lubman, *supra* note 47, pp. 253-254; also, Randall Peerenboom, *supra* note 1, at p. 293.

194. Randall Peerenboom, *supra* note 1, pp. 293 & 335.

195. Peter McCormick, *supra* note 17, at p. 105.

196. Peter H. Russell, *supra* note 107, at p. 110.

197. *Ibid.*

198. *Supra* note 179.

199. *Supra* note 196.

200. *Ibid.*

201. Peter H. Russell, *supra* note 107, at p. 127.

202. *Ibid.*

203. *Ibid.*

204. Randall Peerenboom, *supra* note 1, at p. 294.
205. Ronald C. Brown, *supra* note 1, at p. 47; see also *Constitution Act* 1982, art. 124.
206. Ronald C. Brown, *supra* note 1, at p. 47.
207. *Judges Act* 1995, Articles 19, 20 & 21.
208. *Judges Act* 1995, Article 22; also Ronald C. Brown, *supra* note 1, pp. 47-48; and Stanley B. Lubman, *supra* note 47, at p. 257.
209. *Judges Act* 1995, Article 11; also Ronald C. Brown, *supra* note 1, at p. 46; and Randall Peerenboom, *supra* note 1, at p. 305.
210. Randall Peerenboom, *supra* note 1, at p. 305; also Stanley B. Lubman, *supra* note 47, at p. 256.
211. *Ibid.*
212. *Ibid.*
213. *Ibid.*
214. *Ibid.*
215. Randall Peerenboom, *supra* note 1, at p. 306.
216. Amended *Judges Act* 2001, Articles 9(6) & 12.
217. Based on my experience as an associate judge in Chengdu High-Tech District Court.
218. Randall Peerenboom, *supra* note 1, pp. 292 & 334; On 20 October 1999, the SPC adopted a five year plan to promote the professionalism of judges (available at http://www.chinacourt.org/flwk/show1.php?file_id=33814). In 1999, the SPC also declared an open-recruitment policy and announced that in looking for ten senior judges, it would subject them to strict examination. But it also seemed to require that the judges have Beijing residence. For a full account, see "China- Open Recruitment to Select Best Judges" in *China Daily*, 2 March 1999; also in *Beijing Youth*, 2 March 1999, available at (<http://www.bjyouth.com.cn/Bqb/19990302/GB/3809^D0302B10.htm>).
219. Randall Peerenboom, *supra* note 1, at p. 292.
220. *Judges Act* (1995), Articles 13, 30 and 38.
221. *Judges Act* (1995), Article 19; also based on my experience as an associate judge in Chengdu High-Tech District Court.

222. *Judges Act* (1995), Articles 31 & 32.

223. *Judges Act* (1995), Articles 31, 38 & 32; also, Randall Peerenboom, *supra* note 1, at p. 294.

224. *Judges Act* (1995), Articles 13, 30, 31 & 38; also, Randall Peerenboom, *supra* note 1, at p. 294.

225. *Judges Act* (1995), Article 42; also, Randall Peerenboom, *supra* note 1, at p. 294.

226. *Judges Act* (1995), Article 11; also Randall Peerenboom, *supra* note 1, at p. 294.

227. *Judges Act* (1995), Article 11.

228. Randall Peerenboom, *supra* note 1, at p. 294.

229. Peter H. Russell, *supra* note 107, at p. 107.

230. *Ibid.*, at p. 108.

231. *Supra* note 229.

232. *Ibid.*

233. *Ibid.*

234. Gerald L. Gall, *supra* note 106, at p. 271.

235. *Ibid.*

236. *Ibid.*

237. *Ibid.*

238. Peter H. Russell, *supra* note 107, pp. 127 & 146; for a more empirical account of the councils, see Peter McCormick, "Judicial Councils for Provincial Judges: A Comparison of the Experience of the Five Western Provinces." Paper presented at the annual meeting of the Canadian Political Science Association, Montreal, June 1980.

239. Peter H. Russell, *supra* note 107, at p. 127.

240. *Ibid.*

241. *Ibid.*, at p. 128.

242. *Ibid.*, pp. 127 & 128.

243. This basically has been the role of Ontario's judicial council, the first to be established, and would also appear to be the role of Saskatchewan's. Council does not collect information about candidates in the same way as the bar committee. They rely more on the personal, first-hand knowledge which members, especially judicial members, may have of the nominee, and, at least in Ontario, on an interview: Peter H. Russell, *supra* note 107, at p. 128.

244. Peter McCormick, *supra* note 17, at p. 109; also, Peter H. Russell, *supra* note 107, at p. 115.

245. For example, Guy Bouthillier investigated the careers of the seventy-four persons appointed to the Quebec courts of appeal from 1867 to 1972 and found that forty of them (54 percent) had been cabinet ministers or members of the legislature at the federal or provincial level. However, the proportion overtly involved in politics declined from 78.5 percent between Confederation and World War One to 22 percent for the period since World War II. Similarly, Bouthillier's study of Quebec's Superior Court revealed that while 34 percent of the judges appointed to this court between 1849 and 1974 had been elected politicians, the proportion declined to just under one-eighth for those appointed since 1962: Peter H. Russell, *supra* note 107, pp. 114-115; also, Gerald L. Gall, *supra* note 106, pp. 271-274.

246. Peter H. Russell, *supra* note 107, at p. 112.

247. *Ibid.*

248. *Ibid.*, pp. 118 & 144; also, Trudeau announced this practice at the September 1967 meeting of the Canadian Bar Association and explained it in the House of Commons: House of Commons, *Debates*, 30 Nov. 1968, pp. 4895-96.

249. Peter H. Russell, *supra* note 107, at p. 118.

250. *Ibid.*

251. *Ibid.*

252. *Ibid.*

253. *Ibid.*

254. *Ibid.*

255. *Ibid.*

256. *Ibid.*, pp. 112-113.

257. *Ibid.*, at p. 113.

258. *Ibid.*, at p. 113; also, *Report of the Canadian Bar Association Committee on the Appointment of Judges* (Ottawa: Canadian Bar Foundation, 1985), pp. 35-52 & 12-13.

259. Gerald L. Gall, *supra* note 106, pp. 274-275; also, see "A New Judicial Appointment Process", Department of Justice of Canada, Ottawa 1988 and "Judicial Appointment: Information Guide", Commissioner for Federal Judicial Affairs, Ottawa 1988. It is also noteworthy that similar initiatives have occurred at the provincial level. For example, the province of Ontario has established a new appointments process with respect to provincial court judges that is similar to the federal model described in the above publications: *The Globe & Mail*, 30th January 1987, 6th February 1988, 20th February 1988, 6th May 1988 and 16th December 1988.

260. Gerald L. Gall, *supra* note 106, at p. 275.

261. *Ibid.*, at p. 275.

262. *Ibid.*

263. *Ibid.*

264. *Ibid.*

265. *Ibid.*, at p. 276; in 1994, the new Minister of Justice, Allan Rock, publicly undertook not to appoint any person who had not been recommended by a committee.

266. Peter McCormick, *supra* note 17, at p. 109.

267. *Ibid.*

268. *Ibid.*

269. Peter H. Russell, *supra* note 107, at p. 135.

270. *Ibid.*

271. *Ibid.*

272. *Ibid.*

273. *Ibid.*, at p. 140.

274. *Ibid.*, at p. 136.

275. *Ibid.*

276. *Ibid.*

277. *Ibid.*

278. *Ibid.*, pp. 136, 138 & 139.

279. *Ibid.*, at p. 135.

280. *Ibid.*, at p. 135; also, William Klein, "Judicial Recruitment in Manitoba, Ontario, and Quebec 1905-1970" (A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy in the University of Toronto, 1975), at p. 312.

281. Peter H. Russell, *supra* note 107, at p. 140.

282. *Ibid.*, at p. 140; also, Canadian Institute for the Administration of Justice, *A Compendium of Information on the Status and Role of the Chief Justice in Canada* (Montreal, 1987), at p. 9.

283. Peter H. Russell, *ibid.*, at p. 141.

284. *Ibid.*

285. *Ibid.*

286. *Ibid.*

287. *Ibid.*, pp. 182-185.

288. *Ibid.*, at p. 182.

289. *Ibid.*, pp. 183 & 196.

290. *Ibid.*, at p. 183.

291. *Ibid.*

292. The cabinet must suspend a judge's salary if the Canadian Judicial Council so recommends: Peter H. Russell, *ibid.*, at p. 184.

293. *Ibid.*, at p. 184.

294. *Ibid.*

295. *Ibid.*, at p. 175.

296. *Ibid.*

297. *Ibid.*

298. For judicial removal, *ibid.*, pp. 175-181; also, Gerald L. Gall, *supra* note 106, pp. 279-294.

299. Gerald L. Gall, *supra* note 106, at p. 279.

300. *Ibid.*

301. *Ibid.*

302. *Ibid.*

303. Based on my interview with Mrs. Karen Fulham.

304. Gerald L. Gall, *supra* note 106, at p. 279.

305. Am. R.S.C. 1985, c. 27 (2nd Supp.), s. 5.

306. Peter H. Russell, *supra* note 107, at p. 178.

307. *Ibid.*; also SQ 1978, c. 19, s 33. This is now s. 271(c) of the *Quebec's Courts of Justice Act*.

308. Peter H. Russell, *supra* note 107, at p. 178.

309. *Ibid.*

310. *Ibid.* This is now Ss. 60(2) & 63 of the *Judges Act*, R.S. 1985, c. J-1.

311. *Ibid.*

312. Peter H. Russell, *supra* note 107, at p. 179; This is now s. 65(1) of the *Judges Act*, R.S.C., 1985, c. J-1.

313. Peter H. Russell, *ibid.*, pp. 179 & 195.

314. *Ibid.*, at p. 179.

315. This occurred in British Columbia with respect to two superior court justices, one convicted for a second time of impaired driving, and the other allegedly involved in a morals impropriety: Gerald L. Gall, *supra* note 106, at p. 292; also the *Edmonton Journal*, Southam Press Ltd, 12th May 1981; in Manitoba, with respect to Chief Justice Edmund Burke Wood, who was the subject of a lengthy petition to parliament in 1881. Before parliament could establish a select committee to investigate these complaints, Chief Justice Wood suffered a stroke while hearing a case and died: Peter H. Russell, *supra* note 107, at p. 179; also, Dale and Lee Gibson, *Substantial Justice*, Winnipeg: Peguis, 1972, pp. 138-139.

316. *Valente v. The Queen*, [1985] 2 S.C.R. 673 [hereinafter *Valente*]. In this case, Mr. Justice Le Dain identified three “essential conditions” for judicial independence: security of tenure, financial security, and the institutional independence of judicial tribunals regarding matters directly affecting adjudication. In order to possess security of tenure, a judge must have an appointment which “is secure against interference by the executive or other appointing authority in a discretionary or arbitrary fashion”(at p. 698). In order for such security to be achieved, judges may be “removable only for cause” as recommended by an independent review process which affords judges a fair hearing (at p. 698). For the one case, see William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville* (Toronto: Osgoode Society for Canadian Legal History, 1996).

317. British Columbia has gone the furthest in judicializing the entire removal procedure. There the attorney general may order an inquiry, but the tribunal of inquiry which, depending on the preference of the judge under investigation, may be the provincial judicial council or a judge of the province’s Supreme Court, has the power to order removal. There is an appeal from the tribunal’s decision to remove but it is to the Court of Appeal, not to the legislature: Peter H. Russell, *supra* note 107, at p. 181.

318. Peter H. Russell, *ibid.*, at p. 181.

319. Albert H.Y. Chen, *supra* note 4, at p. 122.

320. Based on my experience as an associate judge in Chengdu High-Tech District Court; also, Albert H.Y. Chen, *supra* note 4, pp. 122-123.

321. *Ibid.*

322. *Judges Act* (1995), Article 16.

323. “China Promotes Professionalism of Judges” in *Xinhua News Agency* (Beijing, July 7, 2002), available at (<http://www.china.org.cn/english/2002/Jul/36380.htm>).

324. Section 2, *Judges Act*, R.S. 1985, c. J-1.

325. Sections 9-21, *Judges Act*, R.S. 1985, c. J-1.

326. Section 22, *Judges Act*, R.S. 1985, c. J-1. In this section, “senior judge” means the judge with the earlier date of appointment to the court in question or, in the case of more than one judge appointed on the same day, the judge that the Governor in Council may designate as the senior judge.

327. Based on my participation in the “judge shadowing” program at the Provincial Court of Manitoba, from January until May 2004, as part of the Manitoba Faculty of Law’s curriculum.

328. For a full account of a Chinese court's bureaucracy, see Stanley B. Lubman, *supra* note 47, pp. 294-295.

329. *Ibid.*, at p. 295.

330. *Ibid.*, at p. 295; also, Robb Tonn, "Behind the Scenes at the Supreme Court of Canada: a Personal Account of How Judicial Independence Was Won for the Provincial Court" in *The Provincial Judges Journal* (a quarterly publication of the Canadian Association of Provincial Court Judges) Vol. 21~No. 4, Winter 1998, pp. 27 & 33-34.

331. For a Chinese law court's internal organization, see Randall Peerenboom, *supra* note 1, pp. 283-285; also, Ronald C. Brown, *supra* note 1, pp. 41-44.

332. In the past, there was an economic division in addition to the civil division. The economic division has now been folded into the civil division. The distinction between economic and civil cases goes back to Soviet legal theories and a centrally planned economy, with economic cases involving vertical disputes between state-owned enterprise legal persons, within an administrative hierarchy, and civil cases involving horizontal disputes between equal parties. This anachronistic distinction makes little sense in a market economy that treats legal persons and natural persons the same with respect to the capacity to contract: Randall Peerenboom, *supra* note 1, pp. 283-284 & 331.

333. Randall Peerenboom, *ibid.*, pp. 283-284; also based on my experience in Chengdu High-Tech District Court.

334. *Ibid.*

335. *Ibid.*

336. Randall Peerenboom, *supra* note 1, pp. 283-284; see also the internal settings of Supreme People's Court at (<http://www.court.gov.cn/about/>).

337. Randall Peerenboom, *supra* note 1, at p. 284; also based on my experience as an associate judge in Chengdu High-Tech District Court.

338. Based on my experience as an associate judge in Chengdu High-Tech District Court.

339. For the retreat of the Party and the state, see Randall Peerenboom, *supra* note 1, Chapter 5, pp. 188-238.

340. However, the Party Group does not usually get involved in penalizing judges for incompetence or other demerits that do not constitute violations of Party discipline: Randall Peerenboom, *supra* note 1, pp. 303 & 337.

341. Since 1999, a new presiding-judge system has been adopted across the country; also based on my experience as an associate judge in Chengdu High-Tech District Court.

342. Based on my experience as an associate judge in Chengdu High-Tech District Court.

343. *Ibid.*

344. *Ibid.*; see also Albert H.Y. Chen, *supra* note 4, pp. 122-123.

345. Statistics Canada, *Profile of Courts in Canada 1997* (Ottawa: Canadian Centre for Justice Statistics, 1998), pp. 65, 124 & 125.

346. Statistics Canada, *ibid.*, pp. 86, 87, 88, 144 & 145.

347. The *Provincial Court Act*, C.C.S.M. c. C275, Sections 13(1), 13(2) & 16(1), 16(2).

348. Based on my e-mail correspondence with Judge Lynn Stannard, Provincial Court of Manitoba.

349. *Ibid.*

350. *The Court of Queen's Bench Act*, C.C.S.M. c. C280, Section 11.1.

351. *Supra* note 348.

352. Statistics Canada, *supra* note 345, pp. 111, 118, 165, 178 & 194.

353. Based on my experience as an associate judge in Chengdu High-Tech District Court; see also Randall Peerenboom, *supra* note 1, pp. 284-285.

354. *Ibid.*

355. *2002-2003 Annual Report of the Provincial Court of Manitoba*, at p. 44.

356. Based on my interview with Judge Lynn Stannard, Provincial Court of Manitoba, Winnipeg, 17 May 2004.

357. *Supra* note 355.

358. *The Court of Queen's Bench Act*, C.C.S.M. c. C280, Section 10 and *The Provincial Court Act*, C.C.S.M. c. C275, Section 11.3.

359. For a Chinese law court's administrative characteristic and bureaucracy, see Stanley B. Lubman, *supra* note 47, pp. 292-297; also, Randall Peerenboom, *supra* note 1, pp. 318-319; and Ronald C. Brown, *supra* note 1, pp. 4-5.

360. Stanley B. Lubman, *supra* note 47, at p. 296.

361. Ronald C. Brown, *supra* note 1, at p. 4.

362. Timothy Thomas Daley, "The Duties of the Chief Judges of Provincial and Territorial Courts and Their Impact on Judicial Independence" (A thesis submitted in conformity with the requirements for the LL.M. Degree in Dalhousie University, 1994, pp. 41-44.

363. Based on my e-mail correspondence with Judge Lynn Stannard, Provincial Court of Manitoba.

364. For example, s. 38 of Manitoba *Provincial Court Act* (C.C.S.M. c. C275) states:

The minister (of justice) may appoint an employee of the civil service as administrator for the purpose of performing the duties of the administrator under this Part, including: (a) providing administrative services for the council, the board and the Chief Judge with regard to the complaint process set out in this Part; (b) providing information to the public about the complaint process; (c) receiving and giving notices and other documents on behalf of the Chief Judge, the board or the council under this Part; (d) making the administrative arrangements necessary for convening the council for the purpose of holding a hearing; (e) assisting in the preparation of the annual reports under section 39.9; and (f) performing such other duties relating to the complaint process set out in this Part as the council, the board or the Chief Judge may require.

365. Based on my e-mail correspondence with Judge Lynn Stannard, Provincial Court of Manitoba; also, Manitoba Justice, *Annual Report 2002-2003*, pp. 35-39.

366. *Ibid.*

367. Timothy Thomas Daley, *supra* note 362, pp. 64-65.

368. For example, *The Nova Scotia Family Court Act*, s. 9(3) requires officers, clerks and employees of or associated with the Family Court shall be under the direction of the presiding judge of the Court and shall carry out such duties as are assigned by the presiding judge; also, Timothy Thomas Daley, *supra* note 362, at p. 65.

369. Jules Deschenes, *Maitres Chez Eux* (Masters in Their Own House), (Ottawa: Canadian Judicial Council, 1981), pp. 19-20; also, Timothy Thomas Daley, *supra* note 362, at p. 63.

370. Section 74(1)(a) of *Judges Act*, R.S. 1985, c. J-1.

371. Office of Commissioner for Federal Judicial Affairs online, available at (http://www.fja.gc.ca/roles/index_e.html).

372. Peter H. Russell, *supra* note 107, at p. 156.

373. *Ibid.*, at p. 156; also, Office of Commissioner for Federal Judicial Affairs online at (http://www.fja.gc.ca/roles/index_e.html).

374. Peter H. Russell, *supra* note 107, at p. 156.

375. *Ibid.*, pp. 156 & 158.

376. Section 75(1)(2) of *Judges Act*, R.S. 1985, c. J-1; and Ss. 15 & 16 of *Supreme Court Act*, R.S. 1985, c-S26; also, Peter H. Russell, *supra* note 107, at p. 156.

377. Sections 15 & 16 of *Supreme Court Act*, R.S. 1985, c-S26.

378. Great Britain, *Court Funds (Amendment) Rules 2003*, (The Stationery Office: 2003).

379. Here, court means regular court. The special courts generally are funded by their organizational heads, the Ministry of Railroads, Ministry of Transportation, and the People's Liberation Army, but the maritime courts appear to be funded both by the Ministry of Communications and local governments.

380. *Constitution Act*, 1982, Articles 89(5), 62(10), 99. Under Article 89(17) of the *Constitution*, the State Council (and its ministries) are responsible for financing of central state institutions. Capital expenditure also needs to be approved by the State Council.

381. The Chinese court system is not allocated a budget of its own and a local court is funded only from the budget of local administration, the amount of resources to be allocated to the court being controlled by local governments: Albert H.Y. Chen, *supra* note 4, at p. 123.

382. Some courts in rural areas do not even have a proper room to conduct a public trial. It is reported that one basic-level court president has to spend 70% of his time requesting funds from local government: Albert H.Y. Chen, *supra* note 4, at p. 123.

383. Ministry of Finance, "Notice of Granting Supplementary Funds to Local Justice on Costs for Specific Items", File No. 1993-740, available at (http://www.chinacourt.org/flwk/show1.php?file_id=18454).

384. More and more litigants complain about the cost of litigation. Although court fees are relatively low, courts often impose unauthorized additional fees, usually because they are inadequately funded. Based on my experience as an associate judge in Chengdu High-Tech District Court; also, Randall Peerenboom, *supra* note 1, at p. 285.

385. Ministry of Finance and the Supreme People's Court, "Joint Notice of Disposition of Court Fines and Fees", File No. 1996-4, available at (http://www.chinacourt.org/flwk/show1.php?file_id=24326).

386. *Ibid.*

387. The estimated budget for the Courts Division, along with the estimated budgets for the other branches that make up the Department of Justice, would then comprise the overall budget for the department. It is this budget for the department that the Minister of Justice requests from the Government to operate all of the services provided by his department: based on my e-mail correspondence with Mrs. Karen Fulham, the Executive Assistant to the Chief Justices and Chief Judge of each of the courts in Manitoba (Court of Appeal, Court of Queen's Bench and Provincial Court).

388. Based on my e-mail correspondence with Mrs. Karen Fulham; also, Manitoba Justice, *Annual Report 2002-2003*, pp. 10-12.

389. Based on e-mail correspondence with Mrs. Karen Fulham.

390. Based on my experience as an associate judge in Chengdu High-Tech District Court.

391. Based on my working experience as an associate judge in Chengdu High-Tech District Court during August 2000 until July 2001.

392. *Constitution Act 1867*, s. 100; see also Peter H. Russell, *supra* note 107, at p. 151.

393. For a full account of remuneration of provincially appointed judges, see Peter H. Russell, *supra* note 107, pp. 157-160.

394. *Judges Act*, (R.S. 1985, c. J-1), Sections 9-22.

395. *Judges Act*, (R.S. 1985, c. J-1), Section 25; also, Peter H. Russell, *supra* note 107, pp. 152-153.

396. At the provincial level, there is nothing like the Commissioner for Federal Judicial Affairs to serve as a buffer between judges and the executive branch. Provincial legislatures have delegated to the cabinet power to fix the salaries of provincially appointed judges by regulation: Peter H. Russell, *supra* note 107, pp. 157-158.

397. Justice Le Dain viewed it as "far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislature authority": *Valente v. R.* [1985] 2 S.C.R. 673, at p. 706; also, Peter H. Russell, *supra* note 107, at p. 158.

398. For more details, see *Courts of Justice Act*, (R.S.O. 1990, Chapter C.43), Appendix A & B of Framework Agreement, available at (http://www.canlii.org/on/laws/sta/c-43/20041104/whole.html#P2442_235805).

399. *Ibid.*

400. Peter H. Russell, *supra* note 107, at p. 152; also, see The Triennial Judicial Salary and Benefits Commission at: (<http://canada.justice.gc.ca/en/news/nr/1998/scottbcg.html>).

401. [1997] 3 S.C.R. 3.

402. *References*, [1997] 3 S.C.R. 3, paras. 166-185 & 217.

403. Albert H.Y. Chen, *supra* note 4, at p.123; also, Ronald C. Brown, *supra* note 1, pp. 37 & 130.

404. Manitoba Justice, *Annual Report 2002-2003*, at p. 12.

405. Ronald C. Brown, *supra* note 1, pp. 144-145.

Notes to Chapter 3:

1. *Civil Procedure Act* 1991, (Adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1999, promulgated by Order No. 44 of the President of the People's Republic on 9 April 1991, and effective as of 9 April 1991). [Source: Legislative Affairs Commission of the Standing Committee of the National People's Congress; English translation courtesy of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC; Appendix to Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997)].
2. For a brief discussion of jurisdiction, see *infra* Chapter 2, pp. 75-83.
3. Garry D. Watson & Janet E. Mosher, *The Civil Litigation Process: Cases and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Limited, 1999), at p. 286.
4. Rule 14.01(1), *Manitoba Court of Queens Bench Rules*, Reg. 553/88 (hereinafter QBRM).
5. QBRM, Rule 14.05(2).
6. QBRM, Rule 14.03.
7. QBRM, Rule 14.05(1).
8. Form 14(A), QBRM. For example, in *Alan Williams v. Darryl Bocker & Ellison Cartage Ltd.*, (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544), Mr. Harvey Slobodzian, the counsel for the plaintiff, filed a claim on 24 June 1994, stating that defendant Bocker's negligence caused a serious motor-vehicle collision to plaintiff and claiming against the defendant Bocker and Ellison Cartage Ltd., (Bocker's employer) jointly for injury, damage and loss.
9. Rule 14.07, QBRM.
10. Rule 18.01, QBRM. For example, in *supra* note 8, Mrs Lynne Wilson, counsel for the defendant, filed a statement of defense later, acknowledging that Bocker bore some responsibility for the accident but claiming that the plaintiff was equally responsible. As well, while the plaintiff suffered significant injury from the accident, the defendant disputed the extent of the injuries that the plaintiff claimed resulted from the accident.
11. Rule 25.05(a), QBRM.
12. For example, in *supra* note 8, N. K. Popadynetz, on the same day as plaintiff counsel submitted the claim (24 June 1994), the Deputy Registrar of Manitoba Queen's Bench Court signed and issued a statement of claim to defendant Bocker and Ellison Cartage Ltd., indicating that a legal proceeding has been commenced against them by the plaintiff,

advising them to, within prescribed days, file a statement of defense in required form and cautioning them that the failure to defend this proceeding might bring a default judgment against them in their absence.

13. Rule 19.01(1), *QBRM*.

14. Rule 19.02(1), *QBRM*.

15. Rule 19.05(1), *QBRM*.

16. Rules 19.03(1) & 19.08(1), *QBRM*.

17. Juan Li, "A Comparison of Civil Procedure between China and Manitoba" (unpublished LL.M. thesis), (Winnipeg, University of Manitoba, 1996), at p. 47.

18. Serving the pleadings means: (a) to make legal delivery of a notice or process; (b) to present a person with a notice or process as required by law: Bryan A. Garner (editor in chief), *Black's Law Dictionary*, 2nd pocket edition. (St. Paul, Minn., West Group, 2001), at p. 638.

19. The "matter[s] at issue" are defined by the pleadings. Under *QBRM*, "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device: Rule 30.01(1)(a), *QBRM*.

20. Rule 30.03(1) provides that a party to an action shall, within prescribed days (10 days after the close of pleadings), serve on every other party an affidavit of documents "disclosing to the full extent of the party's knowledge, information, and belief all relevant documents that are or have been in the party's possession, control, or power; and the affidavit shall sufficiently identify the documents".

21. Rule 30.04(1)(2)(3)(4), *QBRM*.

22. Rule 30.02(2), *QBRM*.

23. Rules 30.04(6) & 30.06(d), *QBRM*.

24. Rule 30.10(1), *QBRM*.

25. Rule 31.02, *QBRM*.

26. Rule 31.03(1), *QBRM*.

27. For example, in *supra* note 8, there are two oral examinations. The first was held on 16 February 2000, at the law office of Pullan Guld Kammerloch (plaintiff's counsel's office), before Ms. Barbara Dent, the official examiner of Queen's Bench. Three people

appeared: Mr. Harvey Slobodzian (counsel for the plaintiff), Ms. Lynne Wilson (counsel for the defendant), and defendant Darryl Brocker. The second one followed on 17 February 2000, at the offices of M.P.I. Bodily Injury Claim Centre, 1200—330 Portage Avenue, in the city of Winnipeg. Three people appeared: Mr. Harvey Slobodzian (counsel for the plaintiff), Ms. Lynne Wilson (counsel for the defendant), and plaintiff Mr. Alan Williams.

28. Rule 31.06, *QBRM*. For example, in *supra* note 8, the oral examination held on 16 February 2000 was an examination of defendant Mr. Darryl Brocker. During this examination, Mr. Harvey Slobodzian exhibited some photos and asked the defendant Brocker more than two hundred questions about where and how the accident happened (focus on defendant's negligence for not taking caution to slow down to check for oncoming traffic). Ms. Lynne Wilson asked some supplementary questions too. The following oral examination held on 17 February 2000 was an examination of the plaintiff Mr. Alan Williams. During this oral examination, defendant counsel Mrs. Lynne Wilson exhibited more than twenty medical records and asked plaintiff a lot of questions regarding his pre-and post accident physical condition, damages that resulted from injury, and where and how the accident happened (focus on plaintiff's negligence on reducing his speed when approaching an uncontrolled intersection). During these two examinations, counsels several times proposed to be off the record for a discussion. Discussion was held off the record. For more details, see transcripts of examinations on 16 & 17 February 2000 (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544).

29. Rules 34.15 & 34.17, *QBRM*. For example, in *supra* note 8, after the plaintiff counsel Mr. Harvey Slobodzian announced the closure of his examination on defendant Brocker on 16 February 2000, court official examiner Ms. Barbara J. Dent signed to certify that the foregoing typewritten pages were a true and accurate transcript of her stenotype notes as taken by her at the time and place hereinbefore set forth (see transcript of examination of Darryl Brocker, at p. 39); Similarly, on 17 February 2000, after the defendant counsel Mrs. Lynne Wilson announced the closure of her examination of plaintiff, court official examiner Robert Baty signed to certify that the foregoing pages of typewritten matter were taken by him on the stenomask at the time and place hereinbefore stated (see transcript of examination of Alan Williams, at p. 246).

30. Rule 35, *QBRM*.

31. Rule 31.03(1), *QBRM*.

32. The court grants leave for such examination subject to a number of rigid terms and tests. See Rules 31.10(1) & 31.10(2), *QBRM*; also based on my interview with Mrs. Karen Fulham, the Executive Assistant to the chief justices and chief judge of each of the courts in Manitoba (Court of Appeal, Court of Queen's Bench and Provincial Court).

33. Rule 34.14(1), *QBRM*.

34. Rule 32.01(1), *QBRM*; also Juan Li, *supra* note 17, pp. 50-51.
35. Rule 32.01(2), *QBRM*.
36. Rules 32.01(4) & 32.01(5), *QBRM*.
37. Rule 33.08, *QBRM*.
38. Sections 63(2) & 63(3), *The Court of Queen's Bench Act*, C. C. S. M. c. 280; also Juan Li, *supra* note 17, at p. 51.
39. Rule 48.01(3), *QBRM*.
40. Usually it is a conference with only the judge and counsel in attendance although in some conferences the parties may also be present. For example, in *supra* note 8, there are seven pre-trial conferences covering the period from 17 June 2002 until 20 January 2004. Each time, only plaintiff counsel Mr. Harvey Slobodzian, defendant counsel Mr. Rocky Kravetsky, and pre-trial judge B. Keyser attended the conference.
41. Rules 48.01(1) & 70.17, *QBRM*.
42. Rules 50.01(3) & 50.01(4), *QBRM*. For example, in *supra* note 8, Mr. Harvey Slobodzian, the counsel for the plaintiff, issued a notice of appointment for pre-trial conference to Rocky Kravetsky law office (counsel for the defendant) on 14 May 2002, indicating to them that the plaintiff was ready to proceed to trial and that the first pre-trial conference would be held on 17 June 2002 at 9:00 o'clock in the forenoon at the Law Courts Complex, Broadway Avenue and Kennedy Street, Winnipeg.
43. For comparison of pre-trial conference in Australia, see The New South Wales Law Reform Commission, "Pre-Trial Conferences in Civil Cases", in Consultants Paper 5 (1978) - Studies in Comparative Civil and Criminal Procedure: Volume 2 - Innovations in Civil and Criminal Procedure, available at (<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/CP5CHP3>).
44. *Ibid*.
45. *Ibid*.
46. For example, in *supra* note 8, all the issues discussed and negotiated in pre-trial conferences are about the apportionment of liability for both plaintiff and defendant, the causal relationship of injuries claimed by the plaintiff as arising from this accident, the admission of some medical reports and expert opinions and the possibility of splitting the case: pre-trial conference memoranda 1-7 (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544)

47. Rule 50.01(8), *QBRM*. For example, in *Alan Williams v. Darryl Brocker & Ellison Cartage Ltd.*, pre-trial judge B. Keyser indicated seven memoranda (one memorandum after every conference). All these memoranda are the record of changes of evidence and results of undertakings in conferences. Memorandum 1[#] indicated that the second pre-trial conference had been adjourned to 8 October 2002, at 9:00 a.m. and the defendant counsel still required some medical reports and income tax reports from plaintiff's counsel. Memorandum 2[#] indicated the third conference has been adjourned to 4 December 2002, at 9:00 a.m. and the plaintiff has provided medical reports and income tax reports. But plaintiff was awaiting receipt of one further medical report and defendant would obtain an expert report as to whether the knee injury was connected to the motor vehicle accident. Memorandum 3[#] indicated that the fourth conference would continue on 4 February 2003, at 9:00 a.m. and the matter had been scheduled for trial for 9 days: 17 to 27 June 2003 and counsel for the plaintiff had provided all of the medical reports on which he intended to rely. However, Counsel for the defendants was still awaiting one final medical report. Memorandum 4[#] indicated that the fifth conference would continue on 5 May 2003, at 9:00 a.m. and the medical report that defendant counsel was waiting for had been prepared and was being forwarded to plaintiff's counsel. And defendant's counsel Mr. Kravetsky would also be instructing an accident reconstruction expert and a draft was ready for him. Memorandum 5[#] indicated that the trial dates of 17 to 27 June 2003, had been cancelled and the trial re-scheduled for nine days: 2 to 12 February 2004. Also, the sixth pre-trial conference will reconvene on 20 October 2003, at 9:00 a.m. and counsels were still waiting for some medical reports and accident reconstruction report. Memorandum 6[#] indicated that the 7th conference would reconvene on 20 January 2004, at 9:00 a.m. and the time required for this trial had been increased and the matter was now scheduled for ten days: 2 to 13 February 2004. Memorandum 6[#] also provided a brief description of the action. It briefed the accident (this litigation arose out of a car accident that occurred in 1992 at an uncontrolled intersection) and framed the legal issue in dispute (the apportionment of liability for the defendants and the causal relationship of injuries claimed by the plaintiff as arising from this accident). Further, a list of witnesses was laid out in this memorandum. Memorandum 7[#] indicated that the trial dates of 2 to 13 February 2004 had been cancelled and the new trial dates scheduled for ten days: 17 to 21 May 2004, and 7 to 11 June 2004. Both counsels were comfortable that splitting the case in this manner would not prejudice the flow of the evidence. Memorandum 7[#] also crossed out the name of a doctor (Dr. Sekundial) who would not be called as a witness and added the name of another doctor (Dr. Laurence) who would appear by video conference.

48. Rule 50.01(8.1), *QBRM*.

49. Rule 50.01(1), *QBRM*.

50. Rule 50.01(10), *QBRM*. For example, in *supra* note 8, pre-trial conference Justice was J. Keyser while the presiding trial justice was Greenberg J.; also Juan Li, *supra* note 17, pp. 60-61.

51. Rule 48.01(4), *QBRM*. For example, in *supra* note 8, pre-trial conference Justice Keyser fixed the trial dates (17 to 21 May 2004, and 7 to 11 June 2004) in her last pre-trial conference memorandum.

52. In trials before a judge alone, the judge decides both law and fact. In jury trials, the jury decides any question of fact and the judge decides any question of law. In addition, the judge needs to give instructions to the jury about the law during the course of a trial; Garry D. Watson, Janet E. Mosher and W.A. Bogart, *supra* note 3, pp. 18 & 20.

53. Sections 64(1) & 64(2), *The Court of Queens Bench Act*, C.C.S.M. c. C280. For example, in *supra* note 8, trial was conducted by Madam Justice J. Greenberg alone.

54. For example, see memorandum 6[#] and 7[#] in *Alan Williams v. Darryl Brocker & Ellison Cartage Ltd*, *supra* note 8.

55. For example, in *supra* note 8, plaintiff's counsel Mr. Slobodzian made an opening statement at the beginning of trial. He briefed the legal issues (liability for the accident and the compensation for damages), stated the evidence he would like to adduce (agreed book of documents, some photographs and a lot of medical records) and the witnesses that would be called to the court (plaintiff Allan Williams, Dr. MacDonald and an accident reconstruction individual): see transcript of proceedings at trial on 17 May 2004, pp. 5-6. (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544).

56. Rules 52.04(1) & 52.04(2), *QBRM*. For example, in *supra* note 8, the parties tendered numerous exhibits.

57. Rule 31.11(1), *QBRM*. For example, in *supra* note 8, when cross-examining plaintiff's witness Dr. P. MacDonald, defendant's counsel Mr. Kravetsky was reading some paragraphs of Dr. MacDonald's first report transferred back to plaintiff's family doctor, Dr. Lawrence, to reveal that Dr. MacDonald based his conclusion (collision was an aggravating or exacerbating factor of Allan William's knee problem) on the plaintiff's assertion (right knee impacted the steering column and the left knee impacted the door) rather than on medical research: see transcript of proceedings at trial on 19 May 2004, pp. 119-126 (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544).

58. Rule 31.11(2), *QBRM*. It is the principle that permits the "impeachment use" of discovery answers. According to this rule, any witness who has given evidence at trial may be impeached by use of a prior, inconsistent statement. This can come from any source, *e.g.*, a conversation at a cocktail party, a statement made in an affidavit, or a statement made in prior correspondence. For example, in *supra* note 8, in direct examination, the plaintiff Allan Williams alleged that he was traveling at between 55 and 60 km. when proceeding north past the first farmhouse to the west. Because the trees along the north edge of Road 99 created a blind corner when approaching the uncontrolled intersection, after the farm (600 feet back from the intersection) he slowed down to about 40 kilometers per hour. In cross-examination, however, defendant's counsel Mr. Kravetsky impeached him by using prior inconsistent statements made by

him, immediately after the accident but before interviewing his counsel, Mrs. Wilson, which were in the Traffic Accident Report and a Sketch of the Accident Scene. In both statements, Williams confessed that his speed was about 55 to 60 kilometers per hour but did not say that he slowed down to 40 kilometers per hour when reaching that uncontrolled intersection: see transcripts of proceedings at trial on 17 May 2004, pp. 46-56 & on 18 May 2004, pp. 60-80 (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544).

59. Rule 31.11(3), *QBRM*.

60. Rules 52.03(4), 52.03(9) & 53.01(3), 53.01(4), *QBRM*.

61. Rule 53.04(1), *QBRM*. For example, in *supra* note 8, defendant's counsel Mr. Rocky Kravetsky filed a requisition for a blank subpoena on 10 December 2003; plaintiff's counsel Mr. Harvey Slobodzian filed a requisition for a blank subpoena on 08 July 2003 and one more such requisition on 12 May 2004.

62. For example, in *Williams v. Brocker & Ellison*, the charge for a blank subpoena was \$20.00.

63. Rules 53.04(4) & 53.04(5), *QBRM*.

64. Rule 53.03(1), *QBRM*.

65. Rule 53.03(2), *QBRM*.

66. Rules 53.07(1) & 53.07(2), *QBRM*.

67. Rule 53.07(6), *QBRM*.

68. For example, in *supra* note 8, plaintiff Allan Williams was also a witness of his counsel Harvey Slobodzian and being examined and cross-examined at trial: see transcripts of proceedings at trial on 17, 18 & 19 May 2004 (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. CI94-01-81544).

69. For example, in *supra* note 8, after defendant's counsel Mr. R. Kravetsky finished his cross-examination of plaintiff Allan Williams, plaintiff's counsel Mr. Harvey Slobodzian started a brief re-examination of Allan Williams: see transcript of proceedings at trial on 19 May 2004, pp. 101-104.

70. For more details, see Rule 52.07(1), *QBRM*.

71. John Sopinka, *The Trial of an Action* (Toronto: Butterworth, 1981), at p. 63. For example, in *supra* note 8, in direct examination of plaintiff Allan Williams, his counsel Mr. Harvey Slobodzian started with how and where the accident happened (particularly the speed and blind corner), then proceeded to bodily injuries (especially the contrast of

pre-and-post accident state of health), then to some special damages (e.g., the therapy, mileage and nutritional supplements) and then ended up with income losses (the pre-accident annual income and the post-accident handicapped status): see transcripts of proceedings at trial on 17 & 18 May 2004.

72. L. Stuesser, *An Advocacy Primer* (Toronto: Carswell, 1990), at p. 91; also Li Juan, *supra* note 17, at p. 75.

73. For example, in *supra* note 8, in cross-examination, defendant's counsel Mr. Kravetsky indicated discrepancies between the evidence which the plaintiff gave at trial and the evidence he gave at discovery (the different description of the way he drove to that uncontrolled intersection) to challenge the credibility of plaintiff: see transcript of proceedings at trial on 18 May 2004, pp. 60-95.

74. *Ibid.*, transcript of trial on 19 May 2004, pp. 119-136 and the written judgment issued on 15 September 2004, pp. 15-22.

75. For a full account of the judge's role in a civil trial, see John Sopinka, *supra* note 71, at p. 117; also Juan Li, *supra* note 17, at p. 79.

76. *Ibid.*; in *supra* note 8, the trial judge only interrupted examinations and cross-examinations when she was not hearing clearly. And she only asked plaintiff a couple of questions to clarify when plaintiff had the photographs of his legs taken: transcripts of proceedings at trial on 19 May 2004, pp. 104-105; on 18 May 2004, at p. 33; on 17 May 2004, pp. 138-139.

77. John Sopinka, *supra* note 71, at p. 117; also Juan Li, *supra* note 17, at p. 80.

78. Rule 53.04(7), *QBRM*.

79. Rule 52.03(1), *QBRM*. Of course, if a judge calls a witness he must ensure that the parties have an opportunity to test the testimony of the witness and to call rebutting evidence or he might be open to the charge that he is shaping the record.

80. *Supra* note 8, transcript of proceedings at trial on 17 May 2004, pp. 98-100.

81. However, the judge must caution the jury that members are to keep an open mind and that they can accept or reject the judge's comments with regard to the credibility of witnesses, according to their own view of the evidence: Garry D. Watson, Janet E. Mosher and W.A. Bogart, *supra* note 3, at p. 20.

82. Rule 52.08(1), *QBRM*.

83. For a full account of requirement for an independent judiciary, see Canadian Judicial Council, *Ethical Principles For Judges*, pp. 7-11.

84. In *References*, Justice Lamer C. J. traced the roots of judicial independence to an unwritten constitutional principle: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*; *R. v. Campbell*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] S.C.J. No. 75, at para. 109; also, Gerald T.G. Seniuk, "Judicial Independence and the Supreme Court of Canada", in *Canadian Bar Review*, vol. 77 (Ottawa: Canadian Bar Association, 1998), at p. 384.

85. Canadian Judicial Council, *Ethical Principles For Judges*, at p. 8. In *Valente v. The Queen*, Le Dain, J. noted that "...judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government." He concluded that "...judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions...": *Valente v. The Queen*, [1985] 2 S.C.R. 673, paras. 18-23. The objective conditions and guarantees include, for example, security of tenure, security of remuneration and immunity from civil liability for judicial acts. For more details, see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*; *R. v. Campbell*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] S.C.J. No. 75, paras. 106, 133, 343 & 166-185; also, *Beauregard v. R.*, [1986] 2 S.C.R. 56, paras. 69, 72 and 73.

86. Canadian Judicial Council, *Ethical Principles For Judges*, at p. 31. Lamer C.J.C. put it this way in *R. v. Lippe*: The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality; *R. v. Lippe*, [1991] 2 S.C.R. 114 at para. 48.

87. Canadian Judicial Council, *Ethical Principles For Judges*, at p. 31. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpre, J. put it in *Committee for Justice and Liberty v. National Energy Board*, the test is whether "an informed person, viewing the matter realistically and practically----and having thought the matter through---" would apprehend a lack of impartiality in the decision maker. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person. See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, most recently endorsed in *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, *per* Cory, J. paras. 109-111 and *per* L'Heureux-Dube and McLachlin, JJ, at para. 31.

88. Canadian Judicial Council, *Ethical Principles For Judges*, pp. 31-32.

89. For example, in *supra* note 8, Judge Greenberg read only the pleadings and the pre-trial conference memoranda before the trial. The documents bearing detailed information, such as the record of oral-examination of witnesses for discovery, the plaintiff's book of authority and defendant's submission as to plaintiff's pecuniary loss claim were submitted when the trial began; other evidentiary items were not presented and examined until after trial began.

90. *Ibid.*, where examination and cross-examination were conducted by counsels. Judge Greenberg only interrupted and asked a couple of questions when it was necessary to clear up a point overlooked or left obscure.

91. Canadian Judicial Council, *Ethical Principles For Judges*, pp. 27-33.

92. *Ibid.*, at p. 9.

93. In *Williams v. Brocker & Ellison*, *supra* note 8, basically each party knew whatever the adverse party submitted to the court.

94. Written judgments often form a big book. For example, the written judgment in *References* can run more than 350 pages, and a minor one like *Williams v. Brocker & Ellison*, runs 45 pages long.

95. Rule 63.01(1), *QBRM*; also Juan Li, *supra* note 17, at p. 89.

96. However, a money award represents only one type of judgment that may be given by the court. In an appropriate case, the court may make a declaration of rights between parties, order the specific recovery of property, or make an order requiring or prohibiting some future activity. For example, a person might ask for a declaration that his/her *Charter* rights had been violated or even for a mandatory order of the court, *e.g.*, an injunction to require the police to warn potential targets of known rapists.

97. Rule 60.02(1), *QBRM*.

98. Rule 60.07(1) & 60.07(2), *QBRM*.

99. Rule 60.07(2), *QBRM*.

100. Rule 60.07(10) & 60.07(11), *QBRM*.

101. Rule 60.17(2) & 60.17(6), *QBRM*.

102. Rule 60.17(8), *QBRM*.

103. Rule 60.17(5), *QBRM*.

104. Rule 60.08(3), *QBRM*.
105. Rule 60.08(5), *QBRM*.
106. Rules 60.08(9), 60.08(11), 60.08(11.1) & 60.08(11.2), *QBRM*.
107. Rules 60.08(13) & 60.08(30), *QBRM*.
108. Juan Li, *supra* note 17, at p. 108.
109. Rule 60.04(1), *QBRM*.
110. Rule 60.04(2), *QBRM*.
111. Rule 60.03, *QBRM*.
112. Rule 60.09(1), *QBRM*.
113. Rule 60.10(1), *QBRM*.
114. Rule 60.10(5), *QBRM*.
115. Article 110, *Civil Procedure Law 1991*.
116. *Ibid.*, Article 113.
117. *Ibid.*
118. Article 126 of *Civil Procedure Law 1991* permits parties to submit additional claims and counterclaims after the trial is started. For example, as in a car collision case, the plaintiff filed his written reply to defendant's statement and added a claim in the second hearing. The judge accepted it and answered it in judgment.
119. Article 111 of *Civil Procedure Law 1991* enumerates the situations that are unacceptable to the court. For example, in disputes which, according to the law, shall be dealt with by other institutions, the court shall dismiss the complaint and advise the plaintiff to apply to the relevant institution for settlement; also Juan Li, *supra* note 17, at p. 34.
120. Article 112, *Civil Procedure Law 1991*; also Juan Li, *supra* note 17, at p. 34.
121. Articles 64 & 116 of *Civil Procedure Law 1991* provide that if, for objective reasons, a party and his agent *ad litem* are unable to collect the evidence by themselves, or if the court considers the evidence necessary for the trial of the case, the court shall investigate and collect it. And the Supreme People's Court in 2001 issued its *Interpretation on Evidences in Civil Procedure*, to explain what is "evidence necessary"

in general. According to this explanation (Article 15), when it comes to evidence that might be necessary for proving an alleged infringement of interests of the state, the public interest and the lawful rights and interests of other individuals, a court shall initiate investigation. And according to another judicial interpretation issued by Supreme People's Court in 1992, the court may also investigate and collect its own evidence if the evidence presented by the parties is conflicting and unascertainable or in any other situations where the court believes it should collect evidence by itself. Such provision is prescribed in Article 73, *Supreme People's Court's Opinion on Application of Civil Procedure Law 1992*, (passed at the 528th meeting of the Adjudicative Committee of the Supreme People's Court on July 14th, 1992, file No. 1992-22, available at http://www.chinacourt.org/flwk/show1.php?file_id=15390); For gathering evidence, see also Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao*, (Stanford: Stanford University Press, 1999), at p. 259.

122. For example, I have seen in a case dealing with breach of contract, the judge adjourned the hearing twice for further collection of evidence, in the Chengdu High-Tech District Court in 2001.

123. Articles 37-39, *Supreme People's Court's Interpretation on Evidences Found in Civil Litigation 2001*, (passed at the 1201st meeting of the Adjudicative Committee of the Supreme People's Court on 6 December 2001, promulgated on 21 December 2001, and effective as 1 April 2002; File No. 2001-33, available at http://www.chinacourt.org/flwk/show1.php?file_id=38863).

124. Article 125 of *Civil Procedure Law 1991* permits parties to keep submitting newly-found evidence in hearing.

125. *Supreme People's Court's Interpretation on Evidences Found in Civil Litigation 2001*, Articles 2, 25 & 75.

126. Stanley B. Lubman, *supra* note 121, at p. 259.

127. Articles 65, 72, 73 & 74, *Civil Procedure Law 1991*.

128. Article 65 of *Civil Procedure Law 1991* states that the court shall have the right to conduct investigation and collect its own evidence from the relevant agencies or individuals; such agencies or individuals may not refuse to provide information and evidence.

129. Article 103, *Civil Procedure Law 1991*.

130. For example, in a case dealing with libel and slander, a witness refused to provide evidence out of fear for revenge threatened by the defendant. The judge spent more than half an hour trying to persuade her to appear in the hearing, but she just kept saying no. Nor did she agree to sign on written testimony. Eventually, the judge had to give up.

131. In the *Civil Procedure Law*, there is no requirement that the trial judge be different from the pre-trial judge. Based on my experience as an associate judge in Chengdu High-Tech District Court, I know that the pre-trial judge usually presides at trial.

132. *Supreme People's Court's Interpretation on Evidences Found in Civil Litigation, 2001*, Article 39.

133. Article 125 of *Civil Procedure Law 1991* permits parties to disclose new evidence in a hearing. And Article 126 permits parties to submit additional claims and counterclaims after trial is started.

134. For a divorce case, mediation is mandatory. Only when no settlement agreement is reached will the case proceed to trial. For other civil actions, each party is free to decide whether or not to proceed to mediation: *Civil Procedure Act Law*, Article 85.

135. According to the *Civil Procedure Law*, a collegial panel may include lay assessors, although since the last ten years the panels are generally composed of three judges: Article 40, *Civil Procedure Law 1991*; also Stanley B. Lubman, *supra* note 121, at p. 258. Actually, during my one-year stay in Chengdu High-Tech District Court, I never saw a panel formed by a judge and lay assessors. In my memory, all collegial panels were composed of judges.

136. The *Civil Procedure Law 1991* does not forbid the parties and court from conducting discovery after trial is started. And the truth-seeking concept behind the Chinese inquisitional system allows the acceptance of claims and evidence submitted right up to the end of the trial.

137. Actually, parties can separately submit evidences at almost any time during the proceedings, which means, from the initial pleading stage until the late stage of trial. Though *Supreme People's Court's Interpretation on Evidences in Civil Procedure 2001* empowers a judge to impose a deadline or time limit for evidence-presentation (Article 34), no legislation in China allows the rejection of new additional evidence disclosed or presented beyond the limitation period. Rather, Article 125 of the *Civil Procedure Law 1991*, a legislation of higher authority, permits parties to keep submitting additional claims, counterclaims and evidence after the trial is started. In practice, parties often submit some newly found evidence after the time limit and the judge has to accept and evaluate it out of the consideration for "truth-seeking".

138. All submissions of counsel, and all evidence-gathering, will be entered into the file, which is open to counsel's inspection. In China, lawyer's access to the file is guaranteed by Article 30 of *The Lawyers Act 1996* (adopted at the 19th Meeting of the Standing Committee of the Eighth National People's Congress on 15 May 1996, promulgated by Order No. 67 of the President of the People's Republic of China on 15 May, and effective as of 1 January 1997, revised at the 25th Meeting of the Standing Committee of the Ninth National People's Congress on 29 December 2001).

139. *Civil Procedure Law 1991*, Article 122. In practice, the court clerk will serve these participants notices of appearance three days prior to hearing.

140. *Civil Procedure Law 1991*, Article 2; also Article 7 of same act requires that courts base their judgment on fact and take the law as the criterion.

141. For example, in a case dealing with payment of a loan, the plaintiff and defendant were lovers before having a falling-out. Plaintiff sued defendant for not paying back the money she loaned him for purchasing a house. Defendant denied, claiming that the money was from his own pocket. Because there was no written agreement between the two parties, plaintiff could not present evidence to support her allegation. On the other hand, neither could the defendant present any evidence to prove the money was from another source, like a business profit or salary income (he had no job). The judge had sympathy for the plaintiff and believed the defendant was a swindler, as plaintiff alleged. So, the judge conducted a discovery by herself to collect evidence. She first visited some of the defendant's friends and they confirmed that the defendant did say something like: she was such a stupid woman and I easily cheated her out of her money. Then the judge inquired into the defendant's bank account and it turned out that defendant had no steady monthly income, but all of sudden had deposited a big amount of money into his account. The judge questioned defendant at trial and the defendant just kept denying that he borrowed money from the plaintiff; but, on the other hand, he could not explain where the money was from. Eventually, based on her discovery, the judge made a judgment against the defendant.

142. *Civil Procedure Law 1991*, Article 100.

143. Based on my experience as an associate judge in Chengdu High-Tech District Court.

144. Article 66, *The Civil Procedure Law 1991*; also Juan Li, *supra* note 17, pp. 81-82.

145. Like their Canadian counter-part, in the opening statement the party or counsel states the facts of the case, the evidence he/she has to adduce and its effect on proving the case, with remarks upon any point of law involved in the case.

146. Based on my experience as an associate judge in Chengdu High-Tech District Court.

147. *Ibid.*; for comparison of German Civil Procedure, see Garry D. Watson & Janet E. Mosher, *supra* note 3, at p. 163.

148. *Ibid.*

149. *Ibid.*; also Juan Li, *supra* note 17, at p. 69.

150. The judge's duty to examine the relevancy and veracity of evidence is contained in Articles 64 & 71 of *The Civil Procedure Law 1991*; also Juan Li, *supra* note 17, at p. 69.

151. Article 127, *The Civil Procedure Law 1991*; based on my experience as an associate judge in Chengdu High-Tech District Court; also Juan Li, *supra* note 17, at p. 68.

152. Based on my experience as an associate judge in Chengdu High-Tech District Court.

153. Article 128, *The Civil Procedure Law 1991*; based on my experience as an associate judge in Chengdu High-Tech District Court; also, Stanley B. Lubman, *supra* note 121, at p. 260.

154. Article 72, *The Civil Procedure Law 1991*; also, Stanley B. Lubman, *supra* note 121, at p. 259.

155. For example, in a simple divorce case I experienced as an associate judge in Chendu High-Tech District Court, plaintiff and defendant were not arguing such issues like the support of their child and the split of family property but just that the defendant refused the divorce. The judge effectively had written a decision about the outcome of this case before trial. And after trial, the judge copied her pre-trial decision into an official judgment without even changing a word; also, for comparison to a German judge's Role in civil procedure, see Garry D. Watson & Janet E. Mosher, *supra* note 3, pp. 162-169.

156. See Articles 1-11 of *Basic Ethical Norms for Judges*, issued by the Supreme People's Court year on 18 October 2001, available at (http://www.chinacourt.org/flwk/show1.php?file_id=38390&str1=%B7%A8%B9%D9%D6%B0%D2%B5%B5%C0%B5%C2).

157. *Constitution Act 1982*, Article 126. From the viewpoint of the text, the Chinese judiciary appears to have the authority to exercise its judicial power independently, and therefore is not subject to interference by any administrative institution, public organization or individual.

158. Indeed, governmental officials are the most common sources of external interference and a much more serious threat to the independence of the courts in the vast majority of cases, particularly administrative and commercial cases, than the Party. According to a survey of 280 judges published in 1993, almost 70% of the judges claimed that they were subject to outside interference, citing the CCP as the source in only 8% of the cases. In contrast, governmental agencies were the source of interference in 26% of cases and social contacts in 29%: Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge: Cambridge University Press, 2002), at p. 307. Another example, Jilin Provincial Government announced that ninety-four major enterprises within its province would have "special protection", which means, free from any liability in debt collection actions: "Courts Face Hurdles in Backlog", *CHINA DAILY*, 30 November 1993.

159. For example, the Party often set overall policy guidelines (such as attacking the "6 evils" in 1989 and the anti-corruption directives in the mid-1990s); and the SPC will promote these policies by issuing policy statements or guidelines to lower courts to consider when handling certain type of cases. For instance, on March 3 2000, the SPC

issued the “Opinions on Playing Fully the Role of Adjudication to Provide Judicial Protection and Legal Services for Economic Development.” (File No. 2000-6, available at http://www.chinacourt.org/flwk/show1.php?file_id=34650).

160. In China, the power to appoint and dismiss judges lies with the Party; for a brief discussion, see *infra* Chapter 2, pp. 88-90.

161. Nanping Liu, “A Vulnerable Justice: Finality of Civil Judgments in China”, in *Columbia Journal of Asian Law*, vol. 13 (New York, NY: Columbia University School of Law, 1999), pp. 85-89.

162. *Constitution Act 1982*, Articles 62(2), 67(1), 67(6) & 128.

163. For a full account of people’s congress’ supervision over judicial work, see *infra* Chapters 1 & 2; also, Laifan Lin, “Judicial Independence in Japan: A Re-investigation for China”, in *Columbia Journal of Asian Law*, vol. 13 (New York, NY: Columbia University School of Law, 1999), pp.198-199.

164. *Ibid.*

165. For a brief discussion about interference, especially the supervisory position of adjudicative committees and the relationship between higher and lower courts, see *infra* Chapter 2, pp. 49-51 & 58-63; also Stanley B. Lubman, *supra* note 121, pp. 269-271.

166. I recall that in a case where the issue in dispute was about a tenant’s priority in purchasing a landlord’s house, the defendant (competitor of plaintiff tenant in this purchase) sent a message to the appellate court before the completion of the trial of first instance. In a few days, a civil judge of the appellate court (Chengdu Intermediate People’s Court) phoned the presiding trial judge for an inquiry and addressed the appellate court’s viewpoints on this legal issue.

167. In past years, a presiding-judge system has been adopted in many courts. The main purpose is to shift the power of decision-making from court officials to the presiding judge, who is, in summary proceedings, the sole judge, in a collegiate panel, where the one overseeing the trial is primarily responsible for the judgment. According to the 2001 SPC Work Report, all HPCs and IPCs and 50 percent of BPCs had implemented the new presiding-judge system as of the end of 2000. And since the Supreme People’s Court issued its *Basic Ethical Norms for Judges* in 2001, senior judges of a higher court are not allowed to presumptuously intervene or inquire into a case being conducted by a lower court (Article 13). So, ever since then, initial interference from court officials, senior judges or a higher court has become less and less frequent. For a full account, see Randall Peerenboom, *supra* note 158, pp. 286 & 332.

168. An adjudicative committee consists of the president of the court, vice-presidents, division chiefs, and senior judges of different divisions. Today, an adjudicative committee rather than some individual official or Party group holds the supreme authority

within a court. Adjudicative committee members will meet regularly to make decisions on important issues, such as the identification of facts and application of law in complicated or important cases, the withdrawal of judges from certain cases and the arrangement of personnel in the court. Once an adjudicative committee has determined a case, the trial judges must follow its decision. For a more detailed discussion of Adjudicative Committee, see *infra* Chapter 2, pp. 60-62.

169. There is no law giving a comprehensive interpretation to “erroneous judgments”. Based on some related legislation like the *Law of the People’s Republic of China on State Compensation 1994* (Articles 15 & 31), “erroneous judgments” might include illegal coercive measures, wrongful execution of judgment and other decisions which infringe upon the legal rights of citizens, entities or other organizations. In practice, the scope of “erroneous judgments” is even wider, *e.g.*, the overruled judgment or ruling is also taken as a kind of erroneous judgments. Those responsible for making an erroneous judgment are, in varying degrees, subject to different forms of penalties, from criminal liability to economic punishment to suspension of promotion; for a full account of “erroneous judgments”, see also Stanley B. Lubman, *supra* note 121, pp. 270 & 271.

170. Again, in the case dealing with tenant’s priority in purchasing the landlord’s house, *supra* note 166, the appellate court (Chengdu Intermediate People’s Court) interfered and stated its viewpoint during the trial process. This interference put the trial judge in the court of first instance (Chengdu High-Tech District Court) in a dilemma. On the one hand, he disagreed with the appellate court and insisted on giving his own decision. But on the other hand he was also afraid that the judgment might be overruled if appealed to the appellate court. So he kept suggesting that the parties go to mediation and planned to report the case to the adjudicative committee if a settlement agreement was not reached. But just about one month before the time limit for the case’s conclusion, the plaintiff withdrew her claims. The judge immediately approved plaintiff’s withdrawal, dismissed the case and breathed a sigh of relief.

171. As indicated earlier, parties can keep submitting evidence to the judge throughout the proceedings. Plus, a judge often acquires more evidence from his/her own discovery. Therefore, before the trial starts, a judge can form his/her own understanding of the case.

172. For a comparative study of how the adversarial system counteracts bias in decision-making, see Garry D. Watson & Janet E. Mosher, *supra* note 3, pp. 104-105.

173. Article 8 of *Basic Ethical Norms for Judges 2001*; it is considered normal practice for judges to meet with counsel in the judge’s office, without opposing counsel being present. This is not considered to be a violation of the prohibition in the *Judges Law* on judges meeting privately with litigants or their agents. For a full account of *ex-parte* meetings, see Stanley B. Lubman, *supra* note 121, at p. 260.

174. For a full account of judgment style, see Ronald C. Brown, *supra* note 1, at p. 78.

175. Compared to its Canadian counterpart, the written judgments issued from a Chinese court are like a thin pamphlet. Most only run several pages and even those of complicated cases run less than thirty or forty pages. For example, many alleged facts might be denied on such simple grounds as “the supporting evidence is not sufficient” or “it is not related to the case”. But as to the question of “why”, the judge may not explain.

176. *Civil Procedure Law 1991*, Articles 207-236; *Criminal Procedure Law 1996*, Articles 208-224 (execution of sentences); *Administrative Procedure Law 1989*, Articles 65 & 66.

177. *Civil Procedure Law 1991*, Article 222.

178. Article 103, *Civil Procedure Law 1991*.

179. Article 223, *Civil Procedure Law 1991*.

180. Article 227, *Civil Procedure Law 1991*.

181. Article 229, *Civil Procedure Law 1991*; also Juan Li, *supra* note 17, at p. 102.

182. Article 231, *Civil Procedure Law 1991*; also Juan Li, *supra* note 17, pp. 102-103.

183. For a critical assessment of China’s efficacy on enforcement, see *infra* Chapters 1 & 2.

184. *Civil Procedure Law 1991*, Article 235.

185. Ronald C. Brown, *supra* note 1, at p. 83.

186. For instance, Chongqing Special Steel Corp. (CSSC), the largest steel company in China owed 700 million yuan (US \$ 84 million) to a creditor. When the court executed the judgment against CSSC, the Chongqing Government refused to let CSSC be treated like a bankrupt business: “Courts Face Hurdles in Backlog”, *CHINA DAILY*, 30 November 1993.

187. For a full account, see Doris I. Wilson, “Managing Litigation in Canada”, presented at *Canadian Forum on Civil Justice*, available at (http://www.cfcj-fcjc.org/issue_5/n5-dwilson.htm).

188. *Ibid.*; for a review of the use of traditional case management procedures, see *Civil Justice Project: The Use of Time Limits and Notification in Civil Case Management* (Ottawa: Canadian Centre for Justice Statistics, 1999), available at (<http://www.statcan.ca.proxy1.lib.umanitoba.ca/english/freepub/85-547-XIE/85-547-XIE1998001.pdf>); also, Garry D. Watson & Janet E. Mosher, *supra* note 3, pp. 173-175.

189. Doris I. Wilson, *supra* note 187; for example, in *Alan Williams v. Darryl Brocker & Ellison Cartage Ltd.* (*supra* note 8), from the pleading filed until the judgment issued, the whole process covers ten years.

190. Generally, a civil case shall be concluded within six months from the day it is filed. But under special circumstances the time limitation may be extended by another six months, with the approval of the president of the court; but approval from the people's court at the higher level is needed for any further extension: *Civil Procedure Law 1991*, Article 135.

191. *Constitution Act 1982*, Article 126.

192. This collective responsibility is derived from the principle of democratic centralism, which has often been stated to be as basic as an administrative principle for the judiciary as it is for all the other institutions of the Party-state, and which means that the work of the Chinese courts is conceived of quite differently from adjudication in Western courts. For a full discussion, see Stanley B. Lubman, *supra* note 121, pp. 262 & 369.

193. Robb Tonn, "Behind the Scenes at the Supreme Court of Canada: a Personal Account of How Judicial Independence Was Won for the Provincial Court" in *The Provincial Judges Journal* (a quarterly publication of the Canadian Association of Provincial Court Judges) Vol. 21~No. 4, Winter 1998, pp. 27 & 33-34.

194. The *Constitution Act 1867* divides legislative authority in criminal procedure. Section 91(27) confers on the federal parliament the power to make laws in relation to: "The Criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." Section 92(14) grants to the provinces legislative power in respect of: "The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts".

195. In addition to the unified *Criminal Code 1982*, each provincial jurisdiction has its own procedural rules, e.g., *Court of Queen's Bench of Alberta Criminal Practice Notes*, *Court of Queen's Bench of Manitoba Criminal Rules*, and *Ontario Court of Justice Criminal Proceedings Rules*; see also Heather Leonoff, "An Overview of Criminal Procedure", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 1-5

196. The *Criminal Code* divides offences into three categories: indictable offences, summary conviction offences and hybrid offences. Most *Criminal Code* offences are "hybrid", meaning they are either indictable or summary, at the option of the Crown. Indictable offences are more serious. Some indictable offences, e.g., first and second degree murders, are within the **exclusive** jurisdiction of the Manitoba Court of Queen's Bench (See ss. 468 & 469, *The Criminal Code*, R.S.C. 1985, c. C-46). Other indictable offences are within the **absolute** jurisdiction of the Manitoba Provincial Court. For instance, Section 553 of the *Criminal Code* reserves many common property offences to

the absolute jurisdiction of the provincial judge, including theft under \$5,000.00, false pretences under \$5,000.00, possession of goods obtained by crime under \$5,000.00, mischief under \$5,000.00. Plus, all summary trials are held in Provincial Court (see Part XXVII of *The Criminal Code*, R.S.C. 1985, c. C-46). In addition, if an offence is not found in S. 469 (exclusive jurisdiction of the Court of Queen's Bench) or in S. 553 (absolute jurisdiction of the Provincial Court), then it is electable and the accused, in accordance with S. 536 of the *Criminal Code*, has an option of three modes of trial: trial by a Provincial Court judge, in Queen's Bench by a judge alone, or in Queen's Bench by judge and jury. For more details, see Heather Leonoff, *supra* note 195, pp. 1-1, 1-2 & 1-3.

197. "Due process" was first mentioned in two places in the United States Constitution: in the 5th Amendment (1791) and in the 14th Amendment (1866). The text of the 5th Amendment is as follows: "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a *Grand Jury*, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation". The text of section 1, 14th Amendment, is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws". *Black's Law Dictionary*, 7th ed., by Bryan A. Garner (Minn, St. Paul: West Group, 1999), pp. 516-517 and 6th ed., by Henry Campbell Black (Minn, St. Paul: West Publishing Co., 1990), pp. 500, 501, 1203 & 1429; also, see "due process of law" at Wikipedia, the free encyclopedia, available at (http://en.wikipedia.org/wiki/Due_process).

198. The legal systems of many nations embrace some variant of "due process", such as the concept of fundamental justice in Canada. The *Canadian Bill of Rights* (1970) by Section 1(a) stated that there existed, and shall continue to exist, the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof *except by due process of law*. In the later *Canadian Charter of Rights and Freedoms* 1982, this "due process" notion was replaced by fundamental justice (Section 7). According to ss. 7-14, fundamental justice, in the context of Canada, signifies those basic rights of a defendant in criminal proceedings and the requisites for a fair trial. Generally speaking, it includes: (1) timely notice of a hearing or trial that informs the accused of the charges against him or her; (2) the opportunity to confront accusers and to present evidence on the accused's own behalf before an impartial jury or judge; (3) the presumption of innocence under which guilt must be proven by legally obtained evidence and the verdict must be supported by the evidence presented; (4) the right of an accused to be warned of constitutional rights at the earliest stage of the criminal process; (5) protection against self-incrimination; (6) assistance of counsel at

every critical stage of the criminal process; and (7) the guarantee that an individual will not be tried more than once for the same offense (double jeopardy).

199. For example, in *R. v. Erron Troy Hogg*, (Manitoba Court of Queen's Bench, Winnipeg Centre, File No. 03-01-23919), the accused, Mr. Erron Hogg allegedly assaulted the victim (Mr. Marasco) on the evening of 22 August 2001. On the same date, police laid three charges: aggravated assault, assault with weapon, and possession of a weapon dangerous to public peace.

200. For example, in *R. v. Erron Troy Hogg*, *supra* note 199, Winnipeg Police officer W. Haines delivered information containing three charges to the Provincial Court on 22 August 2001.

201. For a full account, see Canadian Criminal Law at (<http://www.sasked.gov.sk.ca/docs/social/law30/unit02/unit02.html>).

202. Section 494(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

203. Section 494(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

204. Section 495(1) of the *Criminal Code*, R.S.C. 1985, c. C-46; also, Heather Leonoff, "Powers of Detention, Arrest, Release", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 2-9.

205. There is a limit on the powers of a peace officer to arrest. A peace officer shall not arrest a person without warrant for: an indictable offence within the absolute jurisdiction of a Provincial Court judge, *i.e.*, those offences listed in s. 553 of the *Criminal Code*; a hybrid offence, *i.e.*, one punishable by indictment or on summary conviction at the option of the crown; or a summary conviction offence. For a full account, see Heather Leonoff, in *ibid.*, at p. 2-9.

206. Section 511(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

207. Section 529.1 of the *Criminal Code*, R.S.C. 1985, c. C-46; also, Heather Leonoff, *supra* note 204, at p. 2-12.

208. Section 10 of *Canadian Charter of Rights and Freedoms 1982*:

Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

209. *R. v. Elshaw*, [1991] 3 S.C.R. 24; also, Heather Leonoff, *supra* note 204, pp. 2-7 & 2-8.

210. *R. v. Elshaw*, [1991] 3 S.C.R. 24, at p. 26.

211. Ss. 499 & 503, *Criminal Code*, R.S.C. 1985, c. C-46; also, Killeen Chapman, "Judicial Interim Release", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), pp. 2-12 & 2-13.

212. Killeen Chapman, *ibid.*, pp. 2-12, 2-13, 2-14, 2-15 & 2-16.

213. Ss. 497-499, *Criminal Code*, R.S.C. 1985, c. C-46; also, Killeen Chapman, *ibid.*, at p. 2-12.

214. Killeen Chapman, *ibid.*, at p. 2-13.

215. A bail hearing is a procedure where a judge or a justice of the peace determines whether a person charged with an offence should be released or held in custody pending trial. The basic provision dealing with judicial interim release is s. 515 of the *Criminal Code*. Note that it uses the term "justice" which, in Manitoba, may mean a justice of the peace, a magistrate, or a Provincial Court judge or even a justice of the Court of Queen's Bench, if an accused is charged with an offence listed in s. 469. Powers of the justice of the peace and a Provincial Court judge are identical under the *Criminal Code*: for example, in *R. v. Erron Troy Hogg*, *supra* note 199, a bail hearing was conducted by Manitoba Provincial Court Judge Garfinkel on 24 August 2001, two days after the alleged assault and police charges. For a full account, see Killeen Chapman, *ibid.*, pp. 2-13 & 2-14; also, Ron Jourard (Criminal Lawyer, Toronto), "Bail and Release from Custody", available at (<http://www.criminal-lawyer.on.ca/bail-1.html>).

216. Killeen Chapman, *supra* note 211, at p. 2-13.

217. Killeen Chapman, *ibid.*, at p. 2-16.

218. In *R. v. Erron Troy Hogg*, *supra* note 199, the accused's mother agreed to monitor the accused up until the time of trial and to be indebted to Her Majesty the Queen in a particular sum of money (\$5,000.00) if the accused did not attend for trial and other hearings. Upon the taking of this surety, Manitoba Provincial Court Judge Garfinkel released the accused and issued a recognizance requiring him to appear in court on each remand date and notify the court of any change in his address. In addition, the accused was required to keep the peace and be of good behavior, and abstain absolutely from the consumption or possession of alcohol and a firearm.

219. In *R. v. Manninen* (1987), the Court held that Section 10(b) of the *Charter* also imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a "reasonable opportunity" to obtain advice from counsel as to how to exercise his right: [1987] 1 S.C.R. 1233, *paras.* 23-26.

220. In *R. v. Brydges* (1990), the Supreme Court of Canada indicated that, where an accused person in effect requests the assistance of counsel, a police officer is under a duty

to facilitate contact with counsel by giving him a "reasonable opportunity" to exercise his right to counsel. Furthermore, where the person expresses a concern that he is unable to afford a lawyer, the officer has a duty to inform him of the availability of legal aid: [1990] 1 S.C.R. 190, *paras.* 13-27; In *R. v. Manninen* (1987), *supra* note 216, the Supreme Court of Canada decided that it is not necessary for an accused person to make an express request to use the telephone to contact counsel, the arresting officer has the duty to facilitate contact with counsel which includes the duty to offer use of a telephone: [1987] 1 S.C.R. 1233, at *para.* 25.

221. *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; also Heather Leonoff, *supra* note 204, at p. 2-6.

222. *R. v. Caslake*, [1998] 1 S.C.R. 51; also Heather Leonoff, *ibid.*

223. For example, the general warrants in s. 487.01(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, the video surveillance warrants contained in s. 487.01(4)(5), tracking beeper warrants in s. 492.1, telephone recorder warrants in s. 492.2, and D.N.A. sample warrant in s. 487.05.

224. Heather Leonoff, *supra* note 204, pp. 2-11 & 2-12.

225. This information is set out in Form 1 of Part XXVIII of the *Criminal Code*, R.S.C. 1985, c. C-46.

226. The election is set out in s. 536(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. In *R. v. Erron Troy Hogg*, *supra* note 199, the accused Mr. Hogg elected trial by a Queen's Bench judge and jury.

227. Killeen Chapman, "The Preliminary Inquiry", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 2-20; in *R. v. Erron Troy Hogg*, *supra* note 199, preliminary inquiry was held before Manitoba Provincial Court Judge Miller on 13 January 2003, 22 January 2003 and 6 February 2003. Crown Attorney Mr. Cutler and defense counsel Mr. Pinx attended the preliminary inquiry. At inquiry, crown disclosed a lot of medical material and the accused and his counsel admitted it. On the other hand, the defense counsel said that the accused would not contest crown's request for a committal on aggravated assault, so he would have no submission to make in this respect: see transcripts of proceedings at preliminary inquiry, *supra* note 199.

228. Since the decision of the Supreme Court of Canada in *Stinchcombe* in 1991, the prosecution has a legal duty to disclose all relevant information to an accused. Prosecution disclosure is to occur before the accused is called upon to elect a mode of trial or to plead: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, *paras.* 11, 17 & 13; for example, in *R. v. Erron Troy Hogg*, *supra* note 196, crown's witnesses were examined and cross-examined at preliminary inquiry on 13 & 22 January 2003: see the transcripts, *supra* note 199.

229. As the Court stated, *ibid.*, at para.12, by way of obiter in *R. v. Stinchcombe*:

The defense has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

In *R. v. Erron Troy Hogg*, *supra* note 199, no defense's witness was called at preliminary inquiry: *supra* note 199.

230. The Provincial Court judge is not to weigh the evidence, to test its quality or reliability, nor to draw inferences of fact from the evidence before him. Those functions are for the trier of fact, the jury. A preliminary hearing judge's only role is to decide whether to order the accused to stand trial or discharge him, based on sufficient or insufficient evidence or no evidence: Section 548 of the *Criminal Code*, R.S.C. 1985, c. C-46; also, Killeen Chapman, *supra* note 227, pp. 2-20 & 2-21.

231. Killeen Chapman, *supra* note 227, at p. 2-19.

232. In *R. v. Erron Troy Hogg*, *supra* note 199, the preliminary inquiry was held before Manitoba Provincial Court Judge Miller; but the later sentencing hearing was conducted by Manitoba Queen's Bench Justice Scurfield.

233. "A Victim's Guide to the Canadian Criminal Justice System: Questions and Answers", prepared by the Canadian Resource Centre for Victims of Crime, available at (<http://www.crcvc.ca/docs/VictimsGuidetotheCJS.pdf>).

234. *Ibid.*

235. Based on my interview with Mrs. Karen Fulham, the Executive Assistant to the Chief justices and Chief judge of each of the courts in Manitoba (Court of Appeal, Court of Queen's Bench and Provincial Court).

236. Section 625.1(2), *Criminal Code*, R.S.C. 1985, c. C-46; and my e-mail correspondence with Mrs. Karen Fulham.

237. Section 9.01(1), *Manitoba Court of Queen's Bench Rules (Criminal)* SI/92-35 (Canada); and my e-mail correspondence with Mrs. Karen Fulham.

238. Which means, if the Crown does not have sufficient evidence, the judge will not warrant a full trial of the accused.

239. E-mail correspondence with Mrs. Karen Fulham.

240. In *R. v. Erron Troy Hogg*, *supra* note 199, after the first conference finished, Judge Keyser made a conference memorandum recording the discussions on resolution, the next conference date and trial date.

241. In *R. v. Erron Troy Hogg*, *supra* note 199, the judge who conducted the pre-trial conference was Keyser, while the judge who heard the sentence hearing was Justice Scurfield.

242. Sections 606(1) & 607(1), *Criminal Code*, R.S.C. 1985, c. C-46.

243. Section 606(2), *Criminal Code*, R.S.C. 1985, c. C-46.

244. In *R. v. Erron Troy Hogg*, *supra* note 199, the accused Mr. Hogg pleaded guilty. So, the issue became not whether Mr. Hogg deserved to be sentenced to imprisonment, but where he should serve that sentence and for how long. This case did not go to trial. Rather, it ended with a sentence hearing that took only one day (10 December 2003).

245. *Adgey v. The Queen* (1973), [1975] 2 S.C.R. 426; also, Heather Leonoff, "The Plea" in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 3-1.

246. In *R. v. Erron Troy Hogg*, *supra* note 199, the accused Mr. Hogg pleaded guilty to the major charge, which was aggravated assault. In the following sentence hearing, the argument about aggravating circumstances was targeted on whether the assault was just an incident (random act of violence) or the accused had violent tendency. Crown Attorney Mr. Cutler and defense counsel Mr. Pinx carried out the examination and cross-examination of Mr. Simcoe (an experienced probation officer and case planner in the Restorative Resolutions Program) and his Restorative Resolution Report, to review whether the accused was a good candidate for a non-custodial sentence. In addition, Mr. Cutler submitted Victim Impact Statements of Mr. Michael Marasco to reveal the gravity of the offence. Mr. Pinx submitted the written statements of the accused's acquaintance, ex-employer and ex-football coach to show the court that he was a nice, reliable, pleasant person with a low risk of re-offending. For more details, see the excerpt from proceedings on 10 December 2003 (Court of Appeal of Manitoba, File No. AR04-30-05779).

247. *Black's Law Dictionary*, 7th ed., by Bryan A. Garner (Minn, St. Paul: West Group, 1999), at p. 1173; in *R. v. Erron Troy Hogg*, *supra* note 199, there were originally three charges on the crown's indictment: aggravated assault, assault with a weapon and possession of a weapon dangerous to public peace. However, the accused pleaded guilty to aggravated assault on 11 June 2003. Later, on 9 July 2003, the crown decided to have the other two charges stayed.

248. Interview with Mrs. Karen Fulham.

249. Heather Leonoff, "Plea Bargaining: A Process of Discussion and Agreement", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), pp. 3-9 & 3-10.

250. Heather Leonoff, *ibid.*, at p. 3-9.

251. In *R. v. Thomas*, Scott C.J.M. on behalf of the court stated at paragraph 6:
"Pleas bargaining is an important, if not essential, component of the criminal justice process. The integrity of the system requires that judges, before rejecting a negotiated plea in circumstances such as this, have good reasons for doing so."

See *R. v. Thomas* (2000), 153 Man. R. (2d) 98 (C.A.); also, *R. v. Romolo*, [2002] M.J. No. 209 (C.A.); also Heather Leonoff, *supra* note 249.

252. *R. v Russell* [2000] 2 S.C.R. 731; and, *R. v Lifchus*, [1997] 3 S.C.R. 320.

253. See Department of Justice Canada, "The Law in Action", available at (http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page19.html).

254. Section 701, *Criminal Code*, R.S.C. 1985, c. C-46.

255. Section 708(1)(2), *Criminal Code*, R.S.C. 1985, c. C-46.

256. Sections 698(2), 705(1) & 706, *Criminal Code*, R.S.C. 1985, c. C-46.

257. Section 705(2), *Criminal Code*, R.S.C. 1985, c. C-46.

258. *R. v. Krause* [1986] 2 S.C.R. 466; also, Heather Leonoff, "Practical Tips for Conducting a Successful Cross-Examination", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 3-16.

259. Professor Lee Stuesser, "Trial Preparation, Cross-Examination and Impeachment", in *Criminal Procedure*, (looseleaf, published by the Law Society of Manitoba, 2002), at p. 3-27; For example, trouble often awaits when counsel asks: What do you mean? Explain that? Why do you say that? How could you have seen that?

260. Christopher Granger, *The Criminal Jury Trial in Canada*, 2nd ed. (Ontario: Carswell, 1996), pp. 216-219.

261. E-mail correspondence with Mrs. Karen Fulham.

262. Canadian legal thinking regards this judicial guidance to the jury as significant in the mitigation of any prejudices held by members of the jury: Christopher Granger, *supra* note 260, Chapter 8: "Charge to the Jury", pp. 243-281.

263. A “fair trial” has been defined as one which satisfies the public interest in getting at the truth while preserving basic procedural fairness to the accused: *R. v. Harrer*, [1995] 3 S.C.R. 562.

264. Trial judge’s duty to exclude inadmissible evidence is made clear: “in a criminal trial there is a duty on the trial judge to exclude inadmissible evidence even though adduced by counsel for the accused or not objected to, and should inadmissible evidence be adduced, the trial Judge should either instruct the jury immediately to disregard it or, if it is of so prejudicial a nature that the jury would not have the capability of disregarding it, he should discharge the jury and order a new trial”: *R. v. Ambrose*, (1975), 25 C.C.C. (2d) 90 (N.B. C.A.), at 91-92; also, Christopher Granger, *supra* note 260, pp. 253-254.

265. “The primary objective in considering trial fairness factors in the s. 24(2) analysis is to prevent an accused person from being forced to provide evidence in the form of confessions, statements, or bodily samples for the benefit of the state. It is because the accused is compelled as a result of a *Charter* breach to participate in the creation or discovery of self-incriminating evidence in such forms that the admission of that evidence would generally tend to render the trial unfair.”: *R. v. Stillman* [1997] 1 S.C.R. 607, paras. 73 & 93; “Breaches of s. 10(b) tend to impact directly on adjudicative fairness because evidence thereby obtained may infringe an accused’s privilege against self-incrimination, one of the fundamental tenets of a fair trial, and a right that might have been protected had the accused been given a proper opportunity to consult counsel.”: *R. v. Bartle* [1994] 3 S.C.R. 173, paras. 33, 34 & 73; “Trial fairness can also be adversely affected by the admission of evidence obtained through violations of ss. 7 & 8 of the *Charter*. For example, evidence obtained through a significant compelled intrusion of the body without consent or statutory authorization will have an adverse impact on the fairness of the trial and therefore should generally be excluded.”: *R. v. Stillman* [1997] 1 S.C.R. 607 at para. 93; also, Gerard Mitchell, “The Supreme Court of Canada on Excluding Evidence under S-s. 24(2) of *The Charter*”, available at (<http://www.gov.pe.ca/photos/original/section24.pdf>).

266. During a trial, a juror may notice the judge call the lawyers to the bench, or the lawyers may request to approach the bench to discuss a point of the case out of the hearing of the jury. Such discussions, commonly referred to as **side bar** discussions, are most often between the judge and lawyers and often concern matters of law or procedure.

267. The jury does not deal with sentencing. The only provision (section 745.2) in the *Criminal Code* where the jury is involved in sentencing is when a person is convicted of 2nd degree murder and sentenced to life imprisonment, and the jury is asked if they have a recommendation as to the time that he or she will serve before being eligible to apply for parole (the section 745.4 says that the minimum to be served before being able to apply for parole is 10 years but it could be a maximum of 25 years). However, this is only a recommendation, and again, in the end, the judge will decide this matter of parole eligibility; based on my e-mail correspondence with Mrs. Karen Fulham.

268. *Criminal Procedure Law*, People's Republic of China, adopted 1 July 1979, amended 17 March 1996, [hereinafter "*Criminal Procedure Law*"]; *Criminal Law*, People's Republic of China, adopted 1 July 1979, amended 14 March 1997, [hereinafter "*Criminal Law*"].

269. Lawyers Committee for Human Rights, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law*, (New York: October 1996), pp. 19-59. [hereinafter, "LCHR, *Opening to Reform?*"]

270. *Ibid.*, pp. 60-64 & 67-69.

271. 1979 original *Criminal Procedure Law*, Article 108.

272. *Ibid.*

273. In the 1996 amendments, Article 108 is changed to be Article 150 and revised as follows: "After a People's Court has examined a case in which public prosecution was initiated, it shall decide to open the trial session, if the bill of prosecution contains clear facts of the crime accused and, in addition, there are a list of evidence and a list of witnesses as well as duplicates or photos of major evidence attached to it": 1996 *Criminal Procedure Law*, Article 150.

274. Under compulsory summons, the police may require a suspected criminal to appear for questioning (Revised *CPL*, art. 92); suspects who "take a guarantee and await trial" shall bring a guarantor or certain amount of money pending trial and promise to be present in time at a court when summoned and not to leave their city or county of residence without police permission (Revised *CPL*, arts. 53 & 56); while those under "supervised residence" are restricted to their homes or, if they have no fixed abode, to a designated location and must be present in time at a court when summoned (Revised *CPL*, art. 57).

275. "Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment", General Assembly resolution 43/179, 9 December 1998 [hereinafter "Body of Principles on Detention"], para. 2(b); see Lawyers Committee for Human Rights, *supra* note 269, at p. 20.

276. Revised *Criminal Procedure Law*, art. 61.

277. *Ibid.*, Articles 50, 51, 65 & 69.

278. *Ibid.*, Articles 66, 67 & 68.

279. International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1996, entered into force 23 March 1976 [hereinafter ICCPR], art. 9(3).

280. According to provisions of the revised *Criminal Procedure Law*, Articles 50, 51, 59 & 72, court may order any form of detention, including arrest, pre-arrest detention, compulsory summons, “taking a guarantee and awaiting trial” and “supervised residence”. This often happens in cases of private prosecution or when a criminal offender is seized and delivered to the court by common citizens.

281. Lawyers Committee for Human Rights, *supra* note 269, pp. 29 & 33; also revised *Criminal Procedure Law*, Articles 52, 53 & 96.

282. Lawyers Committee for Human Rights, *supra* note 269, at p. 33.

283. Lawyers Committee for Human Rights, *supra* note 269, pp. 30 & 33; also 1979 *Criminal Procedure Law*, art. 48(2); Revised *Criminal Procedure Law*, art. 75.

284. Revised *Criminal Procedure Law*, art. 76; also, Lawyers Committee for Human Rights, *supra* note 269, pp. 71-76.

285. Lawyers Committee for Human Rights, *supra* note 269, pp. 33-34.

286. Revised *Criminal Procedure Law*, art. 96; also, Lawyers Committee for Human Rights, *supra* note 269, at p. 39.

287. Lawyers Committee for Human Rights, *supra* note 269, at p. 41; also, Stanley B. Lubman, *supra* note 121, at p. 166.

288. Revised *Criminal Procedure Law*, art. 33.

289. During the detention and investigation phase, the lawyer’s role is to meet with a detained suspect to learn the circumstances of the case, provide legal advice, file petitions and complaints, and, on the client’s behalf, apply for “taking a guarantee and awaiting trial.” By contrast, the lawyer’s powers at the later stage includes the right to read and copy “litigation documents and technical evaluation materials” related to the case and to meet and correspond with the suspect in custody”: Revised *Criminal Procedure Law*, articles 96 and 36; also Lawyers Committee for Human Rights, *supra* note 269, pp. 39-40.

290. Revised *Criminal Procedure Law*, art. 96.

291. Lawyers Committee for Human Rights, *supra* note 269, at p. 41.

292. Revised *Criminal Procedure Law*, art. 96.

293. *Ibid.*, art. 45.

294. Procuracy is empowered to carry out the investigation, collect and obtain evidence in cases directly filed to and accepted by the procuracy, without going through the police: *ibid.*, art. 131.

295. *Ibid.*, Articles 89-123.

296. *Ibid.*, art. 131.

297. China's domestic laws on the criminal process make no provision for presumption of innocence. Technically, Chinese law recognizes no presumption of either guilt or innocence. Rather, the guiding principle at all stages of the process is "taking the facts as the basis and the law as the criterion." Plus, many other key rights that give substance to the presumption continue to be severely restricted or completely absent. Suspected criminals may still be subjected to long pre-trial detention with no right to bail or *habeas corpus*. The non-custodial forms of detention can be applied without any showing of cause whatsoever. The *CPL* still recognizes no right to remain silent, no exclusion of illegally-gathered evidence, and no right to testify against oneself: Lawyers Committee for Human Rights, *supra* note 269, pp. 60-63; also Stanley B. Lubman, *supra* note 121, at p. 167.

298. The 1996 NPC Decision made no significant changes to the *CPL*'s rules on illegally-gathered evidence. Article 43 of the revised *Criminal Procedure Law* retains the prohibition on torture and other illegal means of gathering evidence, but provides no mechanism for its exclusion. Though Articles 76 & 137(5) of Revised *Criminal Procedure Law* provide that procuracy shall raise and seek correction of illegal actions occurring during criminal investigations, this in no way ensures that any evidence gathered as a result of such actions will be excluded at trial: Lawyers Committee for Human Rights, *supra* note 269, pp. 68-69.

299. 1979 original *Criminal Procedure Law*, arts. 52, 96(5) and 1996 revised *Criminal Procedure Law*, arts. 76, 137(5).

300. Revised *Criminal Procedure Law*, Articles 124-127.

301. Lawyers Committee for Human Rights, *supra* note 269, pp. 72-75.

302. Revised *Criminal Procedure Law*, art. 36.

303. *Ibid.*, art. 37.

304. *Ibid.*, art. 45.

305. *Ibid.*, art. 139.

306. *Ibid.*, Articles 137(3) & 142.

307. *Ibid.*, art. 140(1)(2).

308. *Ibid.*, art. 140(3).

309. *Ibid.*, art. 140(4).

310. Under art. 101 of 1979 original *Criminal Procedure Law*, “exemption from prosecution” was extended to all crimes for which the substantive criminal law either did not require criminal sanction or permitted the defendant to be “exempted from punishment”. Under art. 32 of 1979 original *Criminal Law*, criminal sanction is not required if the “circumstances of the crime are minor”; and under arts. 7, 16, 17(2), 18(2), 19(2), 21(2), 24(2), 25 & 63, “exemption from punishment” can be granted in cases involving a number of mitigating circumstances, such as a physical deficiency, acting in self-defense, discontinuation of the criminal act, demonstration of remonstrance, etc: original *Criminal Law*, adopted 1 July 1979.

311. Lawyers Committee for Human Rights, *supra* note 269, pp. 43-45.

312. Revised *Criminal Procedure Law*, art. 12 states that “in the absence of a lawful verdict of the people’s court, no person should be determined guilty.”

313. *Ibid.*, arts. 143 & 144.

314. *Ibid.*, art. 36(1).

315. “Litigation documents” refer to such formal documents as the decision to investigate, the decision to arrest or apply other coercive measures, and the recommendation to indict. They do not include the testimony of witnesses or other specific evidence against the suspect. Such evidentiary materials are not made available to defense counsel until the case is received by the court: Article 36(2), Revised 1996 *Criminal Procedure Law*.

316. Under Article 108 of 1979 original *Criminal Procedure Law*, the standard which the courts used to decide if a case was ready for trial was “the facts are clear and the evidence is sufficient.” In fact, this standard was essentially the same as the standard for conviction: Lawyers Committee for Human Rights, *supra* note 269, pp. 51-52.

317. Now in order to open a trial, the court needs only to conduct a procedural review of the case. Specifically, if the court determines that the indictment presents the facts of the crime charged, and is accompanied by a list of the evidence and the witnesses, and photocopies or photographs of the major evidence, then it should open the trial: Revised *Criminal Procedure Law*, art. 150.

318. *Ibid.*, arts. 155-160. Noted that the revised *CPL* also provides for new summary trial procedures under which the role of prosecutor and defense counsel would be considerably more limited (arts. 174-179). At the initiative or with the consent of the

procuracy, these summary procedures can be applied to cases where “the facts are clear and the evidence is sufficient” and the possible sentence is three years’ imprisonment or less: art. 174(1); For a full account, see Lawyers Committee for Human Rights, *supra* note 269, at p. 56.

319. Revised *Criminal Procedure Law*, art. 147. A collegial panel can be formed by either pure judges or judge and lay assessors, although since the last ten years the panels are generally composed of judges.

320. *Ibid.*, art. 151.

321. *Ibid.*, art. 159.

322. 1979 original *CPL*, art. 114; revised *CPL*, art. 155.

323. Lawyers Committee for Human Rights, *supra* note 269, pp. 63-64.

324. Among legal academics and practitioners in China, the dominant definition of truth is “objective truth”. All law school textbooks in China set “objective truth” as the standard of proof in criminal proceedings and it is believed that discovery of “objective truth” is not only necessary, but also “absolutely possible”: Yi Sheng, “A Promise Unfulfilled: The Impact of China’s 1996 Criminal-Procedure Reform On China’s Criminal Defense Lawyers’ Role At The Pre-Trial Stage”, available at (http://chinalaw.law.yale.edu/3a_ShengYi.pdf).

325. *E.g.*, Mingyuan Wang, “Procedural Defense in Criminal Defense”, in *Legal Daily*, available at (<http://chinalawinfo.com/fzdt/xwnr.asp?id=4325>).

326. For defense counsel’s limited role in criminal procedure, see Stanley B. Lubman, *supra* note 121, pp. 164-168.

327. 1979 original *CPL*, art. 37; revised 1996 *CPL*, art. 48.

328. 1979 original *CPL*, arts. 34 & 115; revised 1996 *CPL*, arts. 45 & 156.

329. 1979 *CPL*, art. 116 and revised *CPL*, art. 157. As in the original law, the revised *CPL* sets out the general principle that a witness’s testimony, but not the witness him or herself, must be present in court and subject to questioning by both prosecution and defense before the testimony can be used as a basis for deciding a case: also, Lawyers Committee for Human Rights, *supra* note 269, at p. 58.

330. Revised *CPL*, arts. 155 & 160.

331. 1979 original *CPL*, art. 117; Revised 1996 *CPL*, art. 159.

332. 1979 original *CPL*, art. 123(2); Revised 1996 *CPL*, art. 165(2).

333. Revised *Criminal Procedure Law*, art. 36(2); also, Lawyers Committee for Human Rights, *supra* note 269, pp. 38-40.

334. Revised *Criminal Procedure Law*, art. 160.

335. *Ibid.*, art. 160.

336. For a full account of the increased professionalization and institutional differentiation within the court, procuracy and police, see Stanley B. Lubman, *supra* note 121, pp. 165-168.

337. Revised *Criminal Procedure Law*, art. 162(3).

338. *Ibid.*, arts. 155 & 156.

339. *Ibid.*, art. 156.

340. *Ibid.*, art. 160.

341. *Ibid.*, art. 158(1).

342. *Ibid.*, art. 158(2).

343. *Ibid.*, art. 159.

344. *Ibid.*, art. 165.

345. *Ibid.*, art. 8.

346. *Ibid.*, arts. 169 & 222.

347. Stanley B. Lubman, *supra* note 121, pp. 163-172.

348. Yi Sheng, *supra* note 324, available at (http://chinalaw.law.yale.edu/3a_ShengYi.pdf).

349. Ministry of Attorney General, "Roles and Responsibilities of the Attorney General", available at (<http://www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.asp>).

350. Based on my experience as an associate judge in Chengdu High-Tech District Court.

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