

Chapter 2

Introduction to the Legal System

Learning Objectives

- Define “law” and identify the types of law that exist in Canada
- Distinguish between the civil law and common law legal systems found in Canada
- Identify the sources of Canadian law
- Isolate the three elements of Canada’s Constitution
- Explain how legislative power is divided in the Constitution
- Detail how legislation is created in the parliamentary system
- Describe the rights and freedoms protected by the *Charter of Rights and Freedoms*
- List the areas and grounds upon which human rights legislation prohibits discrimination

Discussion

DETERMINE A WORKABLE DEFINITION OF “LAW”

Although creating a comprehensive definition of the law is difficult, a workable definition for our purposes is: “Law is that body of rules which can be enforced by the courts or by other government agencies.” An essential aspect of rules being considered as law is that they can be enforced by the judicial system or through administrative process.

IDENTIFY THE CATEGORIES OF LAW THAT EXIST IN CANADA

Substantive Law – rules that establish rights and place limits on individual conduct
Procedural Law – rules governing how the substantive law will be enforced
Public Law – rules that govern an individual’s relationship with government (e.g. the Constitution)
Private Law – rules that govern personal, social and business relationships which can be enforced by one person suing another

DISTINGUISH BETWEEN COMMON LAW AND CIVIL LAW

The two main legal systems in place in the western world are civil law and common law. The civil law originated with the Romans and finds its modern place in the Napoleonic Code of France and other civil codes, including the Quebec Civil Code. The Common law is used in England and other jurisdictions where the English conquered and colonized. In a civil law jurisdiction, the basic rules and general principles are embodied in a central code and the function of judges is to apply the code to the specific cases that come before them. In such a system prior cases or precedents are merely persuasive and play a much less significant role than in the common law system, which has as its main characteristic the principle of *stare decisis* or the application of precedent cases. In the common law system, prior cases in the same court system with similar facts are binding on subsequent decision makers. Both the civil law and common law system provide predictability, which facilitates stability in a society.

IDENTIFY THE SOURCES OF CANADIAN LAW

As judges created the body of laws known as the common law, they borrowed from several sources including the traditions of communities where court was conducted, including canon (Church) law, the law merchant, and the civil law of Rome. Due to the strictures of *stare decisis*, there was extreme difficulty modifying common law precedents. As a result the courts of equity were separately developed to provide relief from the inadequacies of the common law system. A considerable amount of conflict developed between the two courts until they were eventually merged by the *Judicature Acts* in 1873-1875. However the two bodies of law remain distinct, and each can be applied by a single judge in a case.. The principle of supremacy of Parliament, developed in England and brought into Canada, means acts of Parliament or of a Provincial Legislature e will override any conflicting rule developed by either the common law, rules of equity, or a prior statute. Today in Canada, in order to determine what law should be applied to a particular situation, we must look to common law, to equity, and to statutes.

IDENTIFY THE THREE ELEMENTS OF CANADA'S CONSTITUTION

1. Statutes, such as the *Constitution Act, 1867 BNA ACT*), and the *Constitution Act, 1982*, including the Charter of Rights and Freedoms,
2. Conventions and traditions, which are unwritten customs and rules dictating how the government is to operate. They include the rule of law, the office of Prime Minister and political parties.
3. Case law on constitutional issues, such as whether the federal or provincial government has jurisdiction to create certain statutes.

DESCRIBE THE CONSTITUTION ACT, 1867, AND EXPLAIN HOW LEGISLATIVE POWER IS DIVIDED IN THE CONSTITUTION

It was often necessary to turn to the U.K. Parliament to amend or change the *Constitution Act, 1867* until 1982. It was then that the *Canada Act* was enacted in the U.K. (called the *Constitution Act, 1982* in Canada). It gave Canada the power to always amend its own constitution and contained the *Charter of Rights and Freedoms*. Until this time the principle of supremacy of Parliament prevailed and while a court could determine which level of government had the power to pass particular legislation, the court could not say the legislation was beyond the power of both levels of government. With the *Charter of Rights and Freedoms*, however, that power is now given to the court.

The *Constitution Act, 1867* assigned different legislative powers to the federal and provincial governments. The powers of the federal government are set out primarily in section 91 of the *Constitution Act, 1867*, and those of the provincial governments in section 92. The federal government has power over matters of broader national concern such as banking, currency, the postal service, criminal law (although not its administration and enforcement), and the appointment of judges in the federal and higher-level courts of the provinces. The provinces have jurisdiction over such matters as hospitals, education, the administration of the justices, and commercial activities carried on at the provincial level.

DETAIL HOW LEGISLATION IS CREATED IN THE PARLIAMENTARY SYSTEM

Legislation is created by both the federal and provincial governments. The process involves the drafting and presentation of a Bill in either the federal House of Commons or the provincial Legislative Assembly. When introduced, a Bill will be given a first reading and is normally passed with

little debate. If there is a will among the members to move the Bill forward, it will then be presented to the legislature for a second reading. There it is debated by the members of the house and either approved or rejected. If the Bill is approved it will generally go to a committee of members for review for possible amendment. When the Bill is in final form, it is presented to the legislature for Third Reading which involves a final debate and a vote. If the Bill passes all the votes, it is submitted to either the Governor General or the Lieutenant Governor for Royal Assent. Once assent is given the new legislation will either come into effect immediately or more commonly now, later upon further proclamation by Cabinet.

DESCRIBE THE RIGHTS AND FREEDOMS PROTECTED BY THE CHARTER OF RIGHTS AND FREEDOMS

The *Canadian Bill of Rights* was a largely ineffective attempt to protect the basic rights of citizens from interference by government. However, the *Charter of Rights and Freedoms*, being constitutionally entrenched, is very effective. The *Charter* sets out certain basic rights, privileges and freedoms possessed variously by Canadians, non-Canadians in Canada, and corporations that cannot be interfered with by any level of government or government official without a constitutional amendment. The *Charter* is applicable to any relationships existing between individuals and governments or government agencies and covers personal freedoms (freedom of speech), democratic rights (the right to vote), mobility rights, legal rights (a fair trial), equality rights (racial discrimination) and language rights (French and English).

There are **three** important qualifications on the operation of the *Charter of Rights and Freedoms*. **First** the operation of the charter is restricted to an individual's dealings with governments and government agencies. The **second** allows the provinces or the federal government in many areas to opt out of the operation of the Charter and the **third** allows exceptions where "reasonable" in a free and democratic society. The effect of the *Charter* is to transfer the burden of protecting our basic rights and freedoms from our parliamentarians to our courts. These last two exceptions shift the burden back to a degree and restore some supremacy of Parliament. The *Charter* does not protect an individual's rights from violation by other individuals or non-government institutions. Such human rights disputes between individuals are handled by human rights commissions created under comprehensive provincial and federal human rights statutes. That is, the *Charter* protects us from government, and human rights legislation protects us from each other.

LIST THE AREAS AND GROUNDS UPON WHICH HUMAN RIGHTS LEGISLATION PROHIBITS DISCRIMINATION

Not all discrimination is illegal. Human rights legislation prohibits discrimination on certain grounds, such as gender, religion, ethnic origin, race, age and disabilities. The legislation only prohibits this discrimination in certain areas, such as employment, tenancies, public facilities, services, and signs. Outside of these grounds and areas, discrimination can still legally occur. Sometimes positive action must be taken to avoid discrimination. That is there is a duty to accommodate different genders, the disabled and etc. when there is not undue hardship to do so.

Answers to Questions

1. Why is it difficult to come up with a satisfactory definition of law?

The main point that students should raise is that a definition of “law” varies with the perception and preferences of the person being asked the question. Someone committed to an empirical approach might adopt the definition of the legal positivist. That is, law is determined by the authority of the body that passed it. A pragmatist would lean toward the American legal realist’s definition. That is, law is whatever a judge is willing to enforce. The point is that the student should understand that the definition of law cannot be separated from the philosophical stance of the person responding to the question.

2. Where do we look to predict the outcome of a legal dispute?

(a) In a common law system?

Predictability of the law is determined by precedent-making cases.

(b) In a civil law system?

Predictability of the law is determined by the central civil code.

3. Explain how the use of previous decisions differs in civil law and common law jurisdictions.

In a civil law jurisdiction only the code is binding on the judge. Cases decided by other judges are merely persuasive. They can be turned to for guidance but the judge is not bound by them. However, cases in a common law jurisdiction are the binding aspect of the law and, therefore, if a particular case qualifies as a precedent the judge faced with that precedent must follow it.

4. Describe what is meant by the statement, “Common law judges did not make the law, they found it.”

When the common law was originally introduced in England it was the legal structure that was imposed, not the rules of law themselves. The judges merely applied the law or rules that were already in place with the “common people” in the local jurisdictions. From this arose the concept that the common law was not imposed but merely found. In reality this can only be applied to a small portion of the common law. In fact, as the common law developed, judges borrowed from many different sources, such as civil law, canon law, the law merchant, etc. As well, statutes have been passed which considerably alter judge made law.

5. Describe the advantages and disadvantages of the system of *stare decisis*.

The main advantage to *stare decisis* (or the process of following precedent) is the stability and predictability that it provides for the legal system. It is not always necessary for someone to go to court to find out how the law will be applied in a given situation. Precedent cases can supply that information, and the parties may avoid the cost and difficulties associated with a court action by settling the dispute. Another advantage to the system is that where there is no precedent covering a particular situation before the court, the court then is free to make such precedent. The main disadvantage of the *stare decisis* process is that, as the number of precedents grows, the courts are unable to change and adapt as the attitudes of society alter. The courts often find themselves applying rules established centuries earlier

which (other than the fact that they form a precedent) may have no justification for being applied in a modern situation. Happily statutes have altered many laws set by precedent and which no longer have a modern use.

6. Describe the problems with the common law system that led to the development of the law of equity.

Because of *stare decisis* among other things the common law became rigid in its procedure and inflexible in the rules that were applied. Similarly, the remedies that were applied were limited. The problems were not corrected internally and, therefore, the courts of chancery developed to provide relief in those situations where it was warranted.

7. Detail what was accomplished by the *Judicature Acts* of 1873-75.

The *Judicature Acts* (1873-75) rationalized the various different court structures in place in England before this time into one central court system called the English High Court of Justice. Thus the separate courts of chancery and common law ceased to exist, although the separate bodies of law developed by them continued to exist.

8. Explain what is meant by the phrase, “the supremacy of Parliament.”

In the English and Canadian legal system Parliament is supreme. A statute enacted by Parliament becomes the definitive law of the land overriding any other rule or law, such as common law, precedent, etc. This must be contrasted to the American system which has a system of checks and balances between the executive, legislative and judicial branches of government and under various circumstances each branch of government can override what the other does. In Canada the supremacy of Parliament is now subject to the operation of the *Charter of Rights and Freedoms*.

9. What effect will a properly passed statute have on inconsistent judge-made law (case law)?

Because of the principle of supremacy of Parliament such a “properly passed” statute will override any inconsistent judge-made law.

10. Outline how a parliamentary bill becomes law.

A new law goes through a process of introduction in the form of a bill, debate, modification, and approval referred to as first, second and third reading and then receives royal assent from the Governor General or Lieutenant Governors.

11. Using the principles of *stare decisis*, explain how judges determine whether or not they are bound by another judge’s decision in a similar case.

Judges are bound by the precedent-making decision of other judges who are in the same judicial system at the same or a higher rank.. Thus a Supreme Court of Canada decision is binding on the Ontario Superior Court of Justice and an Alberta Court of Appeal decision is binding on a Court of Queen’s Bench of Alberta judge. However an Ontario Superior Court of Justice decision is not binding on a judge in the courts of any other province. Secondly, the judge must determine whether the case presented as a precedent covers essentially the same facts or whether it can be distinguished. If the facts can be distinguished or differentiated the case is not a binding precedent.

12. What is included in Canada's Constitution?

Legislation, conventions and court decisions considering the constitution form Canada's Constitution. The British North America Act (now Constitution Act, 1867) is part of the legislation in the Canadian constitution. The legislation in the Canadian constitution also contains many subsequent important documents, such as: the Statute of Westminster (1931), the Constitution Act (1982) including the Charter of Rights and Freedoms, plus any amendments that have taken place. The various statutes having constitutional standing in Canada are now listed in an appendix to the Constitution Act (1982). In addition to these, the Canadian constitution contains all of the great provisions of England's constitution, such as: the Magna Carta, the English Bill of Rights, and the many unwritten constitutional conventions, such as the principle of the rule of law. Court decisions considering the constitution form binding precedents that become part of the Canada's constitution.

13. What is the effect of sections 91 and 92 of the *Constitution Act, 1867* formerly the *British North America Act*?

Sections 91 and 92 of the *Constitution Act, 1867* divide powers between the federal and provincial governments. Section 91 assigns certain areas of legislative power to the federal government and Section 92 assigns other powers to the provincial governments. It is this separation of powers between the federal and provincial governments that is the foundation of our federal system.

14. How did the *Constitution Act, 1867* limit the power of the federal and provincial governments? How is it possible, given that division of powers, to have identical provisions in both federal and provincial legislation and have both be valid?

The *Constitution Act, 1867* originally referred to as the *British North America Act*, assigns certain areas of governmental control to either the federal or provincial governments for their exclusive jurisdiction. Since the *Act* deals with types of legislation there may be overlap between the powers of the two levels of government. For example, the provincial government can pass legislation making a particular type of activity illegal because it interferes with health and the federal government can make that same activity illegal because it is a crime.

15. Explain what is meant by the doctrine of paramouncy. When does the doctrine apply?

Since it is possible to have valid federal and valid provincial legislation dealing with the same activity, it is also possible to have conflict. When it is not possible for a person to obey both laws the doctrine of paramouncy declares that the federal legislation must be obeyed and that the provincial legislation is inoperative to the extent of the conflict.

16. Describe the limitations on the federal or provincial governments' power to delegate their authority to make laws.

The federal and provincial governments cannot delegate their power to make laws. They can delegate the administration of the laws to another body, such as an administrative tribunal.

17. Identify the limitations of human rights legislation. Does it address all discrimination?

It only addresses the grounds for discrimination in the areas of society which are described in the legislation. For example, in most jurisdictions a restaurant is legally able to only hire

attractive servers, so long as they do not discriminate against any applicants on any of the prohibited grounds such as age or physical disability..

18. Explain how the *Constitution Act, 1982*, including the *Charter of Rights and Freedoms* affects the doctrine of supremacy of Parliament.

The Constitution Act, 1982, including the *Charter of Rights and Freedoms*, places many areas beyond the power of either the provincial or federal governments. Many important rights and freedoms as set out in the *Charter* cannot be changed or modified without a constitutional amendment, so in those areas Parliament is no longer supreme. The courts now have the power to declare legislation passed by either the provincial or federal governments as unconstitutional, not because it encroaches on the other's jurisdiction but simply because it is inconsistent with the *Charter of Rights and Freedoms*.

19. Explain any limitations that apply to the rights and freedoms listed in the *Charter*.

Section 1 limits our rights when reasonable to do so in a free and democratic society. Section 33 allows government to pass legislation contrary to certain sections of the *Charter* as long as they state they are doing so at the time. The exemption lasts for only five years but may be renewed at the end of that period.

20. Give examples of democratic rights, mobility rights, legal rights, and equality rights as protected under the *Charter*. Give examples of three other types of rights protected under the *Charter*.

Democratic rights - right to vote, that elections be held. Mobility rights - the right for citizens to live, work and travel freely in Canada. Legal rights - right to life, liberty, security. Equality rights - the right not to be discriminated against on the basis of sex, religion, race, national origin, etc. Personal freedoms - freedom of conscience, religion, belief, opinion, expression. Language rights - French and English are guaranteed as the official languages of Canada.

21. How do human rights codes differ in their application from the *Charter of Rights and Freedoms*.

The *Charter* only deals with our relationships with government and government institutions. The human rights codes govern our relationships with each other and non governmental institutions such as corporations.

Solutions to Cases

1. *R. v. Clough*, 2001 BCCA 613 (CanLII)

Clough could argue the trial judge was to take in consideration the court's judgment for Kozma to receive a conditional sentence. The trial judge was not supposed to pass his own judgment on the court's ruling of Kozma. Clough could then argue that her circumstances were similar to Kozma and trial judge should impose the same conditional sentencing. Clough could argue on the principle of *stare decisis* that the judge of the BC court should be bound by the decision of the judge of the BC Appeals court since they are in the same judicial system.

2. ***R. v. Spratt*, [2008] B.C.J. No. 1669 (B.C.C.A.), 2008 BCCA 340 (CanLII); application for leave to appeal to S.C.C. dismissed June 18, 2009.**

The British Columbia Court of Appeal held that the intent of the *Access to Abortion Services Act* to allow safe access to health care services justified a limitation on the freedom of expression protected under Section 2 of the *Charter*. The court pointed out it was only small limitation and therefore the rights of the patients were found to be paramount.

3. ***McKay-Panos v. Air Canada*, [2006] F.C.J. No. 28; 2006 FCA 8, [2006] 4 FCR 3 (CanLII).**

The Federal Court of Appeal held that the seat is an “obstacle” under the *Canada Transportation Act*. The obese appellant was found to have a disability under the *Act*. This finding of a “disability” would be a precedent to be argued if an accommodation is sought under the *Canada Human Rights Act*.