PART I

The Legal Framework

The opening chapter of this textbook provides you with an overview of important concepts in employment law. You will learn about key statutes, how law is made and evolves, and the role that judges and administrative tribunals play in interpretation and enforcement. Workers in **Alberta** and **British Columbia** (**BC**) are protected by different laws depending on where they live; what kind of work they do; and whether they are classified as employees, contractors, unionized, or non-unionized. You will learn about the concept of jurisdiction and that employers in certain industries are covered by federal rather than provincial legislation.

Chapter 2 discusses judge-made employment law, which is called "common law." The chapter reviews the differences between employees and independent contractors and the legal implications of that distinction.

While the primary focus of this textbook is on non-unionized workplaces, employers in **Alberta** and **BC** should be aware of important differences that exist when employees are unionized or are attempting to become unionized. Chapter 3, therefore, explores the labour relations codes in both provinces. These codes regulate the process of unionization, collective bargaining, strikes, and other issues that may arise between employers and their unionized employees.

Chapter 4 is the final chapter in Part I and provides an overview of the *Canada Labour Code*, which protects employees who work in industries that are of national interest, such as transportation, telecommunications, banking, and the government of Canada. You will learn that the *Canada Labour Code* is unique in that it includes sections addressing both union and non-union workplaces, occupational health and safety, and minimum employment standards.

Overview of Employment Law 1

LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Review the three main sources of employment law.
- Consider how and why employment law changes.
- Distinguish between provincial and federal employment law jurisdiction.
- Consider the relevance of the *Canadian Charter of Rights and Freedoms*.
- Review key employment-related statutes in **British Columbia** and **Alberta**, and in federal law.
- Look at the judicial and administrative systems that interpret employment laws.
- Learn how to locate relevant statutes and case law.

Introduction

Although most of this book looks at specific employment laws, Chapter 1 provides you with an overview of the legislative and judicial framework within which those employment laws are created. Knowing who makes, interprets, and enforces these laws is essential to understanding and applying them in the workplace. This chapter is intended to provide a context for everything else that you will learn in this book. If you are unfamiliar with some of the terms you find in this chapter or the rest of the book, such as "Cabinet," please consult <https://emond.ca/For-Students/Paralegal/Glossary-of-Legal-Terms>.

Sources of Employment Law

statute law
a statute is a law passed (i.e., created) by the federal or provincial government

constitutional law
the *Canadian Charter of Rights and Freedoms*; the "supreme law of the land"

common law
law that has developed over the years through court decisions

There are three main sources of employment law in Canada: **statute law** (legislation passed by the government), **constitutional law** (in particular, the *Canadian Charter of Rights and Freedoms* [Charter][1]), and **common law** (judge-made law). The relative importance of each source depends on the particular area of law under consideration. Wrongful dismissal actions, for example, are based on the common law, while minimum employment standards and anti-discrimination laws are provided through statutes, though the common law gradually adopts many statute-based principles. A discussion of statute, constitutional, and common law is set out below.

Generally speaking, constitutional law and most employee rights contained in statutes apply to unionized and non-unionized employees alike. Common law rights and remedies, such as the right to sue for wrongful dismissal, normally apply only to non-unionized employees. Rights and remedies available only to unionized employees are contained within labour relations codes, collective agreements, and arbitral jurisprudence (decisions made by labour arbitrators)—see Chapter 3.

Statute Law

What Is a Statute?

A statute is a law created and passed by the federal or provincial government. Statutes are sometimes referred to as "legislation," "codes," or "acts." The ***Alberta*** *Human Rights Act*[2] and the **BC** *Human Rights Code*[3] are examples of statutes.

Why Are Statutes Passed? Why Are They Amended?

Employment statutes are usually passed because the government decides that employees require protections or rights beyond those that currently exist. Historically, employment legislation has provided minimum acceptable standards and working conditions, such as minimum wages and vacation entitlements. More recently, governments have implemented statutory requirements and protections, such as anti-discrimination legislation, that affect many facets of the employment relationship.

1 You can download a copy of the Charter from <https://www.canada.ca/en/canadian-heritage/services/download-order-charter-bill.html>.
2 Access the full Act at <http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>.
3 Access the full Act at <http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01>.

Factors that motivate change in employment law often relate to demographic shifts in society and changing social values. For example, the dramatic increase in the number of women in the paid workforce has led to significant new statutory requirements over the past 30 years, such as pay equity and pay transparency,[4] increased pregnancy and parental leave, and prohibitions on discriminatory hiring and firing practices based on gender or family status. Recent years have also seen greater recognition of Indigenous rights, including the creation of a new statutory holiday to honour the National Day for Truth and Reconciliation.[5] The global COVID-19 pandemic raised questions about mask mandates and vaccination requirements and challenged conventional thinking about how we work. Changes in technology and the evolution of artificial intelligence and social media have led to enhanced privacy protection laws and new expectations for how technology is used in the workplace.

F Y I

Before There Were Employment Statutes ...

During the 19th and early 20th centuries, there were very few employment statutes; the relationship between an employer and employee was based almost entirely on the common law of contract. Under the common law, the parties were free to negotiate whatever terms of employment they could mutually agree on. But because an employee typically has much less bargaining power than an employer, in practice this freedom of contract usually meant that the employer was free to set the terms it wanted. The employer was also free to select or discriminate against anyone it chose. Moreover, when legal disputes between an employer and employee arose, courts saw their role as strictly one of interpreting the existing employment agreement, not as one of trying to achieve a fairer balance between the parties' interests. Early court decisions often reflected on the employment relationship as one of "master and servant."

Over time, governments became convinced that leaving the employment relationship entirely to labour market forces (supply and demand) was unacceptable, and they intervened by passing laws in a broad range of areas. These included laws setting minimum employment standards, regulating workplace health and safety, prohibiting discrimination based on key grounds, and creating a labour relations system that established the right of employees to join a union so they could bargain with the employer collectively.

Today, although the non-union employment relationship is still premised on the basic principles of the common law of contract, the relationship between employers and employees is a highly regulated one, with numerous statutes affecting that relationship. The legal constructs that make up modern employment law are now much more focused on the relationship between employers and employees instead of purely an economic arrangement.

SOURCE: Based on lecture notes by Professor David Doorey as part of his Employment Law 3420 course, 2009, York University, Toronto.

Another factor prompting legislative change is a shift in the political party in power. For example, in the fall of 2002, the then-elected **BC** Liberal government made significant

4 **British Columbia** introduced the *Pay Transparency Act*, which came into effect in November 2023. This Act seeks to improve pay equity and create a more transparent approach to compensation (e.g., requiring disclosure of pay levels and preventing employers from asking job candidates about current salaries or requiring current employees to keep their pay secret).

5 The National Day for Truth and Reconciliation was added as a statutory holiday for federally regulated employees in 2021 and for provincially regulated employees in **BC** in 2023. Other provinces have or are contemplating doing the same.

revisions to virtually every act relating to employment law. In 2017, the New Democratic Party (NDP) was elected to government and has once again made significant changes to **BC**'s employment legislation, including the **BC** *Employment Standards Act*, the **BC** *Human Rights Code*, the *Workers Compensation Act*, and the **BC** *Labour Relations Code*, and introduced the *Pay Transparency Act* in 2023. This includes establishing a schedule for annual increases to the minimum wage, extending the timelines to file a human rights complaint, re-establishing the **BC** Human Rights Commission, creating requirements for greater pay transparency and pay equity, strengthening union successorship rights, and simplifying the union certification process. These amendments will be discussed in later chapters.

In **Alberta**, the NDP, elected in 2015, made many changes to minimum employment standards and occupational health and safety regulations, as well as the *Labour Relations Code*. For example, they increased the minimum wage rate to $15 per hour. In 2019, the United Conservative Party was elected and immediately tabled a bill to roll back some of those changes, including a reduction in the minimum wage for workers under the age of 18. The *Act to Make **Alberta** Open for Business* (2019) and the *Restoring Balance in **Alberta**'s Workplaces Act* (2020) eliminated many of the NDP changes to make conditions more favourable for employers and more difficult for unions to organize workers. The *Ensuring Safety and Cutting Red Tape Act* (2020) was also implemented, which significantly narrowed the grounds to refuse unsafe work in response to a rising number of refusals related to COVID-19.

As various employment laws are discussed in this book, consider the policy issue that the law is meant to address; the goal of the legislation; and then the extent to which the law has been, or probably will be, effective in achieving that goal.

How Statutes Are Made: The Legislative Process

A statute first takes the form of a written bill. As in other provinces, a bill must pass three readings in the legislature to become a provincial statute in **BC** or **Alberta**. To become a federal statute, a bill must pass three readings in the House of Commons and must also be passed by the Senate in Ottawa. The following description of the legislative process concerns provincial legislation because the provinces pass most laws related to employment. (See Chapter 4 for a notable exception: employees governed by the federal *Canada Labour Code*.)

There are three types of bills. Although the majority of bills of general application are public bills, there are two other kinds of bills: private bills and private members' bills.[6]

1. *Public bills*. Public bills are introduced in the legislature by the Cabinet minister who is responsible for the relevant subject matter. For example, bills concerning employment law are typically put forward by the minister of labour. A bill may contain either proposed amendments (changes) to a current statute or an entirely new piece of legislation. First reading introduces the bill. On second reading, the elected members of the legislative assembly (MLAs) debate the principles of the bill. If the bill passes second reading through a vote in the legislature, it goes to a committee of the legislature. Committees may hear witnesses and consider the bill clause

6 The public can read or view webcasts of the debates and discussions about these bills in publicly available Legislative Assembly documents and records. **Alberta** Hansard (transcripts of debates) and Votes and Proceedings (under House Records) are available at <http://www.assembly.ab.ca/net/index.aspx?p=adr_home>, and select webcasts for past sittings are available at <http://assemblyonline.assembly.ab.ca/Harmony>. In **BC**, Debates (Hansard) are available at <https://www.leg.bc.ca>.

by clause before reporting back to the legislature. Sometimes the bill is amended (revised) before its third and final reading to take into account input from the public or opposition parties. After third reading, there is a vote in the legislature, and if a majority of MLAs vote in favour of the bill, it is passed.

2. *Private bills*. Private bills cover non-public matters, such as changing corporate charters, and so are of limited scope and relevance.
3. *Private members' bills*. Private members' bills may deal with matters of public importance, but they are put forward by a private member of the legislature, not by a Cabinet minister. Therefore, they typically do not have much chance of becoming law and are often tabled to stimulate public debate on an issue or make a political point. Unless such bills win the support of the governing party, they usually "die on the order paper," which means they never become law.

A bill becomes a statute once it receives royal assent. A statute may come into force in one of three ways:

1. *On royal assent*. The statute comes into force without the need for additional steps.
2. *On a particular date.* The statute itself names the date on which it comes into force.
3. *On proclamation.* The statute comes into force on a date chosen by the Cabinet and announced later. Different sections of the statute may come into force at different times. For example, when additional time is required to prepare the regulations necessary to implement certain provisions of the law, those provisions may be proclaimed at a later date or the date may be set out in the statute.

When you are reading a statute, make sure that you have the current version. Statutes can be amended extensively, and sometimes entire sections are repealed (deleted) or added. The Canadian Legal Information Institute (CanLII, <http://www.canlii.org>) is a good place to find the most up-to-date version of employment-related statutes for each province. The site also contains past versions of the statutes and highlights changes enacted over time.

While statutes contain the main requirements of the law, detailed rules on how to implement or administer the statute are often found in **regulations**. Regulations (also known as "delegated legislation") are rules made under the authority of a statute. For example, the **BC** *Employment Standards Act* and the **Alberta** *Employment Standards Code* state that there is a minimum wage for most occupations in **BC** and **Alberta**, respectively. However, the exact dollar amount of that minimum wage for various occupations is found in the regulations that accompany both statutes.

Although regulations are as legally binding as the statute that enables them, they are not made by a legislature. They are made by government officials and published in the ***British Columbia*** *Gazette* and the ***Alberta*** *Gazette*. Therefore, they are more easily made and amended than the actual statute itself.

regulations
rules made under the authority of a statute

members of administrative tribunals
adjudicators appointed pursuant to a statute

jurisdiction
the authority granted to a legal body to administer justice within a defined area of responsibility; legislation applies only to a specific jurisdiction (area of responsibility), and courts and tribunals are limited to making decisions about issues that fall within a specific jurisdiction

Statutory Jurisdiction and Interpretation

Judges or **members of administrative tribunals** (adjudicators appointed pursuant to a statute, such as the **BC** Human Rights Tribunal) interpret legislation while adjudicating cases. There are two important points to note about the adjudication of legislation: whether the court or tribunal has jurisdiction and how it goes about the act of interpreting.

Jurisdiction

Judges and tribunal members have a limited scope of authority or **jurisdiction**. Their jurisdiction is established by statute and restricts decision-making authority to specific issues

and geographic areas. For example, the ***Alberta*** *Human Rights Act* applies only to the province of **Alberta**, and the **Alberta** Human Rights Commission may address only human rights issues. This means that the commission in **Alberta** cannot decide a case where the employer and employee are in **BC** at the time of the alleged violation. Conversely, the **BC** Human Rights Tribunal cannot hear cases involving violations that occur in **Alberta**. Their jurisdiction is also limited to the subject matters set out in the legislation. The Human Rights Commission and Tribunal are prohibited from deciding a case related to an occupational health and safety issue, since separate statutes govern these issues. However, several statutes may apply to a single situation. For example, an employee who is injured in the workplace and who wants to return to their pre-accident job may have remedies under both workers' compensation and human rights legislation against an employer who refuses to allow them to return. Whether or not a judge or administrative tribunal member has authority to decide a case may be a preliminary issue that is hotly debated by legal counsel prior to the main case being heard. Normally, the judge or tribunal member will decide whether they have the jurisdiction to hear the case.

Interpretation

Judges' interpretations of legislation, and to some extent those of tribunal members, may become precedents that influence later interpretations of the legislation. The first thing a judge will do when dealing with legislation is to look at past court decisions involving the same legislation and similar fact situations. Where a clear precedent does not exist, the judge must interpret and apply the legislation. When interpreting legislation, judges and tribunal members have developed several rules—such as the "mischief rule"—to help them. When using the mischief rule, they examine the problem, or mischief, that a statute was intended to correct and apply the corrective rationale to the issue. This approach seeks to ensure an appropriate context is applied when interpreting legislation. *1254582* ***Alberta*** *Ltd v Miscellaneous Employees Teamsters Local Union 987 of* ***Alberta*** provides a good example of this approach to statutory interpretation.

CASE IN POINT

Court Uses Mischief Rule to Interpret Statute

1254582 ***Alberta*** *Ltd v Miscellaneous Employees Teamsters Local Union 987 of* ***Alberta***, 2009 ABQB 127

Facts

In hopes of becoming the bargaining unit for airport taxi drivers in Edmonton, the Miscellaneous Employees Teamsters Local Union 987 of **Alberta** made a certification application under the **Alberta** *Labour Relations Code*. The application failed because of a lack of sufficient employee support, but the company that hired the drivers, Airport Taxi Service (ATS), objected to the classification of its drivers as employees in the first place. It claimed that the drivers were independent contractors. The **Alberta** Labour Relations Board and, upon judicial review, the **Alberta** Court of Queen's Bench considered the mischief rule to establish the appropriate classification of the taxi drivers as employees who were either in receipt of wages or entitled to wages, a requirement of the Code.

Relevant Issues

Whether the drivers working for ATS qualify as employees for the purposes of the Code, and whether passenger fares qualify as wages for the purposes of the Code.

Decision

The **Alberta** Court of Queen's Bench ruled that the Board's decision was reasonable when it determined that the ATS taxi drivers were employees, because ATS "controls the queue, controls the number of drivers, controls their vacation leaves, controls car use, and generally dictates the terms of

their relationship" (at para 20). Similarly, the Board was reasonable when it found that passenger fares qualified as wages to the taxi drivers when the mischief rule or purposive approach was applied to the Code's definition of wages: wages "includes any salary, pay, overtime pay and any other remuneration for work or services however computed or paid, but does not include tips and other gratuities" (s 1(a)).

The mischief rule was particularly useful in identifying the intent of the legislation. Both the Board and the Court quoted with approval a Nova Scotia case, which said:

> [The mischief rule] applies on the understanding that most legislative schemes that distinguish between employees and independent contractors are directed at providing needed benefits to employees. Therefore, it is understandable that the law should lean toward classification as an employee, at least in those cases where conventional analysis leads to an indeterminate conclusion. Everyone is aware that it is to the benefit of employers to outsource work traditionally undertaken by employees and this is the mischief that decision-makers must consider. (*Joey's Delivery Service v New Brunswick (Workplace Health Safety and Compensation Commission)* at para 98)

Courts and tribunals also use "internal aids" found in the statute itself to assist in its interpretation. Sections of a statute that define important terms (often called a definition section), or an introduction or preamble that explains a statute's purpose, can help with interpretation. For example, the broad preamble to the ***Alberta*** *Human Rights Act*, which includes as its aim the "recognition of the inherent dignity and the equal and inalienable rights of all persons" (at 2), has led to an expansive interpretation of the rights contained in that statute.

External aids, such as legal dictionaries and scholarly articles, are also used to help interpret statutes.

What Level of Government Can Pass Employment-Related Statutes?

Canada is a federal state with three levels of government: federal, provincial, and municipal. Municipalities have no jurisdiction over employment, although they can pass by-laws on matters that affect the workplace, such as restrictions related to smoking, or as we saw during the height of the pandemic, requirements to wear a mask.

The federal government has authority over only about 6 percent of employees in Canada. This is because in 1925 the Judicial Committee of the Privy Council (JCPC) ruled in *Toronto Electric Commissioners v Snider* that the federal government's legislative authority was limited to industries of national importance, such as banking, pipelines, telecommunications, railways, and transportation. Chapter 4 discusses the *Canada Labour Code*, which is the main employment legislation for employees in these federally regulated industries.[7]

The remainder of this text focuses primarily on provincial employment legislation in **Alberta** and **BC**. Although employment laws in all the provinces are similar in principle, they vary in detail, and the applicable statute should be referred to when issues related to employment arise.

Key BC and Alberta Employment Statutes

The following are the key employment statutes applied in **BC** and **Alberta**:

- The **BC** *Employment Standards Act* and the **Alberta** *Employment Standards Code* set out minimum rights and standards for employees, including minimum wages,

7 A complete list of federally regulated business sectors is available on the Employment and Social Development Canada website at <https://www.canada.ca/en/employment-social-development/programs/employment-equity/regulated-industries.html>.

overtime, hours of work, termination notice or termination pay, pregnancy and parental leave, vacation, and statutory holidays.

- The **BC** *Human Rights Code* and the ***Alberta*** *Human Rights Act* are aimed at promoting equity and preventing and remedying discrimination and harassment based on specified prohibited grounds.
- The **BC** *Labour Relations Code* and the **Alberta** *Labour Relations Code* deal with the right of employees to unionize and the collective bargaining process.
- The **BC** *Occupational Health and Safety Regulation* and the **Alberta** *Occupational Health and Safety Act* outline requirements and responsibilities for creating a safe workplace and preventing workplace injuries and accidents.
- The **BC** *Workers Compensation Act* and the **Alberta** *Workers' Compensation Act* provide no-fault insurance plans to compensate workers for work-related injuries and diseases. They also allow employers to limit their financial exposure to the costs of workplace accidents through a collective funding system.
- The **BC** *Personal Information Protection Act* and the **Alberta** *Personal Information Protection Act* establish rules for private sector employers about the collection, use, and disclosure of employee information.
- The *Pay Transparency Act* came into effect in **BC** in November 2023 and is intended to address systemic discrimination as it relates to compensation to foster pay equity. There is currently no equivalent act in **Alberta**.

Federal Employment Statutes

As noted above, the federal government's legislative authority is limited to industries of national importance. Thus, federal employment law covers employees who work for a federally regulated company such as a bank or airline. The two main federal employment statutes are:

- the *Canada Labour Code*, which covers employment standards, collective bargaining, and health and safety (see Chapter 4); and
- the *Canadian Human Rights Act*, which covers human rights and pay equity.

F Y I

Why Most Employees in British Columbia and Alberta Are Governed by Provincial, and Not Federal, Employment Law

When Canada became a nation on July 1, 1867, its founding document, the *Constitution Act, 1867*, set out the division of powers between the federal and provincial governments. However, it made no specific reference to employment matters. In the 1920s, a federal employment law was challenged in the courts in *Toronto Electric Commissioners v Snider* on the basis that the federal government did not have the constitutional authority to pass it. The JCPC held that employment law fell within the provinces' jurisdiction over "property and civil rights." As a result, federal jurisdiction over employment law became limited to industries of national importance, such as national transportation and communication. All other employers are provincially regulated.

Whether a company is federally or provincially incorporated does not determine whether it is provincially or federally regulated, nor does a company's location affect the source of its regulation. Banks are federally regulated, and therefore the same federal employment statutes govern banks in **Alberta** and **BC** (it is noteworthy that most credit

unions are provincially regulated because they do not meet the definition of a "bank"). In contrast, a provincially regulated employer that operates businesses throughout Canada will have its **Alberta** employees covered by **Alberta**'s employment laws and its **BC** employees covered by **BC**'s employment laws.

These statutes are similar in principle to their provincial counterparts, but there are some differences in the rights and protections granted.

The following federal laws apply to both federally and provincially regulated industries:

- *Canada Pension Plan*, which provides qualifying employees with pension benefits on retirement and permanent disability.
- *Employment Insurance Act*, which provides qualifying employees with income replacement during periods of temporary unemployment.

Constitutional Law

The Canadian Charter of Rights and Freedoms

Guaranteed Rights and Freedoms

One special statute that affects employment law in Canada is the *Canadian Charter of Rights and Freedoms*, which was adopted as part of the Constitution in 1982. Although the Charter does not address employment law specifically, it does set out guaranteed rights and freedoms that can affect the workplace whenever government action or legislation is involved. These include freedom of religion, association, and expression; democratic rights; mobility rights; legal rights; and equality rights.

As a constitutional document, the Charter is part of the "supreme law of the land." This means that other statutes must be in accord with its principles. If a court finds that any law violates one of the rights or freedoms listed in the Charter, it may strike down (rule invalid and unenforceable) part or all of the law and direct the government to change or repeal it. Before the Charter, the only basis on which the courts could overturn a law passed by a legislative body was a lack of legislative authority on the part of that body. The Charter has therefore greatly expanded the courts' role in reviewing legislation. From the perspective of employment law, the most important guarantee is the equality rights provision in section 15:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Note that section 15(1) includes the words "in particular" before the list of protected grounds. Consequently, these grounds have been found not to be an exhaustive list of groups protected under the section; as seen in the *Vriend v **Alberta*** case, courts will add analogous (or comparable) grounds to protect members of groups who are seen as being historically disadvantaged.

The equality rights set out in section 15 also go beyond conferring the right to "formal" equality—that is, the right to be treated the same as others. The Supreme Court of Canada has repeatedly stated that the goal is "substantive equality." This means that in deciding if a

law or government action is discriminatory, the courts should focus on the effect, not the intent. The test is whether the government has made a distinction that has the effect of perpetuating an arbitrary disadvantage on someone because of their membership in an enumerated or analogous group. In short, if the government action "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory" (*Quebec (AG) v A* [2013] at para 332).

In one of the leading decisions on section 15, *Vriend v* ***Alberta***, the Supreme Court of Canada had to decide whether the failure of **Alberta**'s human rights legislation to include sexual orientation as a prohibited ground of discrimination was itself an infringement of the Charter's equality rights guarantee under section 15. This decision also illustrates the difference between "substantive" and "formal" equality rights.

CASE IN POINT

The Supreme Court of Canada Takes an Expansive Approach to Equality Rights

Vriend v ***Alberta***, [1998] 1 SCR 493

Facts

Vriend was employed as a laboratory coordinator by a Christian college in **Alberta** where he consistently received positive evaluations and salary increases. However, shortly after he disclosed that he was gay, the college requested his resignation. When he refused, he was terminated. His subsequent attempt to file a complaint with the **Alberta** Human Rights Commission was unsuccessful because the province's human rights legislation at that time, the *Individual's Rights Protection Act* (IRPA), did not include sexual orientation as a protected ground. Vriend filed a motion for declaratory relief that the IRPA violated section 15 of the Charter because of its failure to include this ground. This means that Vriend was arguing that the IRPA was in conflict with the supreme law, the Charter. The trial judge agreed, but on appeal that decision was overturned. Vriend successfully applied to have his case heard by the Supreme Court of Canada.

Relevant Issue

Whether the omission of sexual orientation as a prohibited ground of discrimination under **Alberta**'s human rights legislation violated section 15 of the Charter and was therefore unconstitutional.

Decision

The Supreme Court of Canada allowed Vriend's appeal, holding that sexual orientation should be "**read into**" **Alberta**'s human rights law as a protected ground. In reaching this conclusion, the Court rejected the **Alberta** government's argument that the IRPA was not discriminatory because it treated homosexuals and heterosexuals equally since neither one was protected from discrimination on the basis of sexual orientation (i.e., formal equality). The Court noted that, looking at the social reality of discrimination against gay and lesbian Canadians, the omission of "sexual orientation" from the human rights statute clearly was far more likely to affect homosexual individuals negatively than heterosexual people. As a consequence, 2SLGBTQ+ people were denied "the right to the equal protection and equal benefit of the law" as guaranteed by section 15(1), on the basis of a personal characteristic that was analogous to those grounds enumerated in the provision.

read into
when it is determined there is extra meaning in the language of a piece of legislation, which may not have been originally intended

In *Vriend*, the Supreme Court actually read into a human rights law a category of people (based on sexual orientation) that a provincial legislature had previously excluded. In taking this activist approach, the Court commented that "[t]he denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion" (at para 98). As a decision of the Supreme Court, *Vriend* applied to other provinces, too. However, the **BC** government

had, in 1992, already amended its human rights legislation to expressly prohibit discrimination on the basis of sexual orientation. After *Vriend*, the **Alberta** government also added sexual orientation to its statute.

While the *Vriend* decision involved the courts reading in words to a statute, most successful challenges based on section 15 equality rights result in the courts striking down (nullifying) parts of the legislation. One example is the Supreme Court of Canada's 1999 decision in *M v H*. Although the facts of *M v H* had nothing to do with the workplace, the case has had a significant impact on employment law. As a result of this ruling, the provincial and federal governments were forced to change the definition of "spouse" to include same-sex partners in many pieces of legislation, including employment-related statutes.

Definition of "Spouse" in the Family Law Act Violates Section 15 Charter Rights

CASE IN POINT

M v H, [1999] 2 SCR 3

Facts

Two lesbian women, M and H, lived in a spousal relationship for several years. When they separated, M sought support payments on the basis of the role she had played in managing the home and assisting H with their advertising business during their years together. The Ontario *Family Law Act* provided that a spouse is entitled to support payments when a relationship ends. However, the definition of "spouse" was limited to married or cohabiting heterosexual couples.

Relevant Issue

Whether the *Family Law Act*'s definition of "spouse" contravened M's equality rights under section 15 of the Charter.

Decision

The Supreme Court of Canada held that the definition of "spouse" discriminated against same-sex partners and violated their equality rights. The purpose of the *Family Law Act* was to provide financial support for spouses whose relationship broke down, and excluding same-sex partners was contrary to the purpose of the law.

Accordingly, the word "spouse" is now defined in the **BC** *Family Law Act* to be gender-neutral: it includes married couples (which now include same-sex couples) and anyone in a "marriage-like relationship," regardless of gender. Its predecessor, the *Family Relations Act*, had been more explicit, specifying that the "marriage-like relationship may be between persons of the same gender." In **Alberta**, section 3(1) of the *Adult Interdependent Relationships Act* includes persons considered to be in a committed relationship other than marriage. The **Alberta** *Adult Interdependent Relationships Act* affirms that provincial legislation where partner status may be relevant applies to married and non-married interdependent couples regardless of sexual orientation. An example of this would be access to workers' compensation benefits for the partner of an employee who is injured or dies on the job.

Impact of the Charter on Private Sector Employers

The Charter directly applies only to government actions and conduct, such as passing legislation. It does not apply to the actions of individuals or private sector employers and employees. Therefore, an employee cannot use the Charter directly to challenge a private sector employer's employment decision or policy. However, an employee may be able to achieve the same result if the employer's decision or policy is based on, or allowed by, legislation

that is found to contravene the Charter. For example, in the 1990 case *Douglas/Kwantlen Faculty Assn v Douglas College*, two faculty members wanted to prevent their employer from requiring them to retire at age 65 pursuant to its mandatory retirement policy as contained in the collective agreement. They challenged the constitutionality of **BC**'s *Human Rights Code* because it failed to prohibit age-based discrimination in employment after age 64. This, they argued, contravened the Charter's equality rights provision. If they had succeeded in their argument, the Code's ceiling on age would have been declared unconstitutional, and the mandatory retirement policies of private and public sector employers would no longer be allowed. The Supreme Court of Canada agreed that the Code violated the equality rights in section 15 of the Charter. However, the faculty members were unsuccessful in their challenge at that time because of the "reasonable limits" provision found in section 1 of the Charter, which is discussed below.

Section 1: Charter Rights Subject to Reasonable Limits

The rights and freedoms guaranteed by the Charter are not unlimited. The courts may uphold violations of Charter rights if they fall within the provisions of section 1 of the Charter:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the watershed case of *R v Oakes* (1986), the Supreme Court of Canada set out a new test for determining when a law that limits a Charter right is a reasonable limit and therefore saved by section 1. A limitation of Charter rights is justifiable if:

1. the law relates to a pressing and substantial government objective; and
2. the means chosen to achieve the objective are "proportional" in that:
   a. they are rationally connected to the objective,
   b. they impair the Charter right or freedom as little as possible ("minimal impairment"), and
   c. the benefits of the limit outweigh its harmful effects (in other words, the more severe the harmful effects of a measure, the more important the objective must be to justify it).

burden of proof
the obligation to prove a fact, a proposition, guilt, or innocence

Unless a law passes all parts of the test, the portion of the law that violates the Charter will be found to be unconstitutional. The **burden of proof** (i.e., the obligation to prove) lies with the government to show that the infringement is justified.

The application of the *Oakes* test is contextual and may evolve over time to reflect an appropriate balance between the rights of the individual and social objectives. For example, in the 2008 case *Association of Justices of the Peace of Ontario v Ontario (Attorney General)*, Strathy J of the Superior Court in Ontario reached a different conclusion than the Supreme Court reached in *Douglas/Kwantlen Faculty Assn v Douglas College* and similar mandatory retirement cases. Justice Strathy found that although mandatory retirement was related to a pressing and substantial social objective, it failed the proportionality test. Minimal impairment was not established, and the harm was disproportionate to the desired objective. Justice Strathy's analysis (paras 177, 178) considered that the circumstances and views of Canadians had changed over the past two decades:

> [S]ociety's understanding of age discrimination, prohibited by the Charter, has evolved to the extent that practices considered acceptable 20 years ago are now prohibited. Our appreciation of the insidious effects of age discrimination has expanded. … [P]eople are living longer and they are working longer. While it is true that "everyone ages" and that there is, in general, a correlation between advancing age and physical and mental decline, improvements in medicine, physical and mental fitness and changed social attitudes have allowed people to make useful contributions to society well beyond the age that was once considered to be the time of retirement.

Mandatory retirement is a form of discrimination in both **Alberta** and **BC**, although this type of discrimination may be possible if an employer can show that it is a bona fide occupational requirement of a particular occupation (as has been the case with some roles in fire departments). Other aspects of age-based discrimination are covered in Chapter 7.

Section 33: The Notwithstanding Clause

The Charter contains a second potential limit on rights and freedoms through an override provision. Section 33 allows the federal or provincial governments to enact legislation "notwithstanding" (in spite of) a violation of the Charter. To invoke section 33, the government must declare that the law in question will operate notwithstanding the Charter, and this declaration must be renewed every five years. This section has rarely been invoked because few governments want to admit to knowingly infringing Charter rights. One of its rare uses occurred in June 2019, when Quebec passed Bill 21, *An Act respecting the laicity of the State*. Bill 21 is intended to maintain separation of church and state and prohibits employees in public sector positions (teachers, police officers, etc.) from wearing religious symbols while at work. This highly contested legislation discriminates based on religion and had previously been halted by an injunction that stated the law would cause "irreparable harm." It was subsequently revised and the notwithstanding clause of the Charter was invoked to make legal challenges more difficult. Nonetheless, a constitutional challenge was filed immediately after the Bill was passed. While the Quebec Superior Court struck down parts of Bill 21, an appeal of that decision is still pending before the Quebec Court of Appeal. Given the complexities of this case, many believe that no matter the outcome of this appeal, the issues will likely end up before the Supreme Court of Canada. The legal fate and workplace impact of Bill 21 are yet to be determined.

Common Law

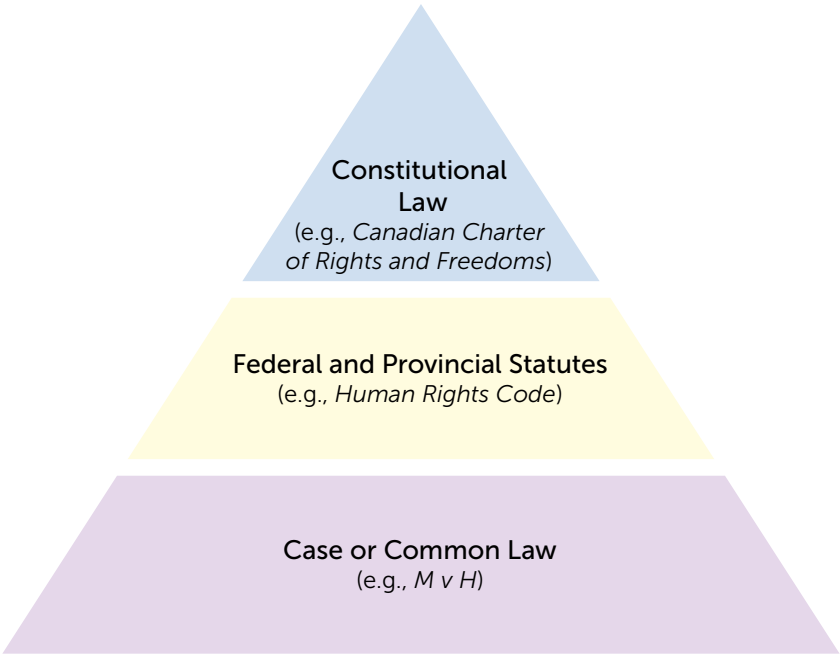
What Is the Common Law?

The third source of employment law is the common law, which is that part of the law that has developed over the years through court decisions. The common law is applied where there is no statute covering a particular area or where a governing statute is silent on a relevant point. For example, because most employment-related statutes define the term "employee" in general terms, judges and tribunals often look to previous **case law** to determine when an employment relationship exists and whether an individual is entitled to the statutory protections afforded to employees. As noted above, even where legislation does exist, the courts' interpretations of the legislation form a body of case law that courts use to decide future cases involving that legislation.

case law
law made by judges, rather than legislatures, that is usually based on previous decisions of other judges

You can think of the sources of employment law as forming a pyramid with the Constitution (including the Charter) at the top, because all statutes must conform to it. Regular statutes are in the middle. Common law is at the bottom because statute law takes precedence over judge-made law. Figure 1.1 illustrates this hierarchy.

FIGURE 1.1 ***Pyramid of Laws***



precedent
what previous courts have decided in cases involving similar circumstances and principles

binding
requiring a lower court to follow a precedent from a higher court in the same jurisdiction (see also *stare decisis*)

stare decisis
a common law principle that requires lower courts to follow precedents emanating from higher courts in the same jurisdiction; Latin for "to stand by things decided"

persuasive
when a court is persuaded to follow a precedent from another jurisdiction or from a lower court, although it is not bound to do so

Law formulated by the Supreme Court of Canada is the most significant. In **BC**, this is followed by law formulated by the **British Columbia** Court of Appeal, then the **British Columbia** Supreme Court, and finally the Provincial Court of **British Columbia**. In **Alberta**, a similarly tiered court structure exists, consisting of the **Alberta** Court of Appeal, the **Alberta** Court of King's Bench, and the Provincial Court of **Alberta**. Before the coronation of King Charles in 2023, the Court of King's Bench was referred to as the Court of Queen's Bench, and references to cases prior to the coronation will retain the reference to the Court of Queen's Bench. More detail about Canadian courts is provided below under the heading "Judicial Framework."

Common Law Rules of Decision-Making

English-speaking Canada inherited the common law system from the British legal system, where it evolved over centuries.

To understand how the common law is applied, it is important to understand several principles of judicial decision-making. Under the common law, cases are decided by judges on the basis of **precedent**—that is, what previous courts have decided in cases involving similar circumstances and principles. Decisions made by higher courts are **binding** on lower courts in the same jurisdiction if the circumstances of the cases are similar. This principle is called ***stare decisis***, which means "to stand by things decided." A decision is considered **persuasive**, rather than binding, when a court is persuaded to follow a precedent from another jurisdiction or from a lower court, although it is not bound to do so.

In considering the weight to be given to previous cases, recent decisions tend to have more authority than older ones, and higher courts have more authority than lower ones. Where a lower court decides not to follow a previous decision from a higher court in the

same jurisdiction, it may do so on the basis that the earlier case is **distinguishable**. In other words, it finds that the facts or other elements in the previous case are so different from those of the current case that the legal principle in the previous decision should not apply.

distinguishable when the facts or other elements in the previous case are so different from those of the current case that the legal principle in the previous decision should not apply

F Y I

The Origin of Common Law

In the 12th century, King Henry II of England tried to bring greater consistency and fairness to the justice system. He trained a group of circuit judges who went from place to place and held assizes, or travelling courts, to hear local cases. Over time, these judges noted similarities in certain types of cases that allowed for similar judgments to be made and penalties to be assigned. At some point they began to write down their decisions and the reasons for them so that other judges could consult them. This became what we know today as case law or common law, because it allowed the law to be applied in a common fashion throughout the country (Alexandrowicz et al, 2004, at 42).

Generally speaking, the principle of *stare decisis* promotes predictability and consistency in decision-making. This means that when a legal issue arises, a lawyer knowledgeable in the field can usually predict the outcome (or range of outcomes) of the case based on the existing body of case law. However, consistency is not always achieved. For example, seemingly minor factual differences may lead to different legal results. Where, in a court's view, the application of case law would lead to an inappropriate result, the court may try to circumvent legal precedent, thus leading to apparent inconsistencies. When decisions are appealed to higher courts, the law may be clarified; otherwise, it remains unsettled until a similar case reaches an appellate court.

Occasionally there are watershed cases in which a high court decides to expand the boundaries of previous rulings or to depart entirely from a line of cases because, for example, it believes the cases no longer reflect social norms or economic realities. For example, in ***British Columbia*** *(Public Service Employee Relations Commission) v* ***BC****GSEU* (known as the *Meiorin* case), the Supreme Court of Canada reached a watershed decision in 1999 when it created a new, higher standard for employers defending a discriminatory job rule. In *Meiorin*, the Court criticized the way it and lower courts had previously analyzed discrimination cases under human rights legislation, and it redirected its interpretation. Among other things, the Court decided that an employer must accommodate employees affected by a discriminatory work rule or requirement, unless it is impossible to do so without undue hardship to the employer. Details of the case and the new approach taken by the Supreme Court are provided in Chapter 7 under the heading "Essential Requirements of the Job."

While the *Meiorin* decision is a particularly dramatic example of a case that changes the direction of the law, watershed decisions occur with some frequency in the employment arena. Changes in the composition of higher courts through the appointment of new judges may also lead to changes in the direction of case law.

Branches of the Common Law That Affect Employment

Two branches of the common law that affect employment are contract law and tort law.

Contract Law

The common law of contracts is fundamental to employment law because the legal relationship between employers and employees is contractual. An employer and a prospective

non-unionized employee negotiate the terms and conditions of employment, and subject to legislative requirements their agreement forms the basis of their employment relationship. General principles of **contract law** determine whether an employer–employee relationship exists and what remedies apply to a breach of the employment agreement. While the relationship between the employer and unionized employees is also contractual, the interpretation and application of their employment contract (known as a collective agreement) is unique and covered in detail in Chapter 3. The discussion below illustrates that there are important differences between individual employment contracts and collective agreements.

contract law
an area of civil law that governs agreements between people or companies to purchase or provide goods or services

Most non-union employment contracts, whether written or oral (unless the parties expressly agree otherwise), contain a number of **implied terms**. Implied terms are default or mandatory rules that the courts assume are part of an employment agreement, even if they haven't been expressly included in the employment contract. Examples include an employee's duty to be honest with the employer, and an employer's duty to provide a safe workplace. Implied terms are discussed more thoroughly in Chapter 5.

implied terms
default or mandatory rules that the courts assume are part of an employment agreement, even if they have not been expressly included in the employment contract

One of the implied terms that has a significant impact on individual employment law in Canada relates to dismissal. Employees in non-union, provincially regulated workplaces are entitled to reasonable notice of dismissal, or **pay in lieu of notice**, unless the dismissal is for **just cause** (serious misconduct). In other words, the employer must provide advance notice of dismissal or pay in lieu. Economic necessity does not relieve the employer of this obligation; employees who are laid off because of a shortage of work are entitled to reasonable notice or pay in lieu as well. This implied contractual term affects the Canadian approach to the entire employment relationship, including hiring, using written employment contracts, and managing job performance (Gilbert et al, 2011). It can be contrasted to the American approach, where in many states employees are employed "at will," meaning that employment can be terminated without notice or cause.

pay in lieu of notice
when an employer wishes to terminate an employee without just cause, they must either provide advanced notice (reasonable notice) or the equivalent of this notice in compensation; when an employee receives compensation from an employer instead of working through a notice period, this is called pay in lieu

just cause
serious employee misconduct that warrants dismissal without notice

In a successful lawsuit based on an individual employment contract, damages in the form of monetary compensation are awarded so that the plaintiff (the party suing) is placed in the same position they would have been in if the defendant (the party being sued—i.e., the employer) had not breached the contract. In a wrongful dismissal action, for example, damages are awarded to reflect the wages and benefits that the plaintiff would have received had the employer provided reasonable notice of the termination.

The legal situation is different for unionized employees and those in federally regulated industries. Collective agreements require that the employer have just cause before disciplining or terminating an employee. The *Canada Labour Code* also has a just cause requirement for dismissals, which has been affirmed by the Supreme Court of Canada (see Chapter 4, Case in Point: *Wilson v Atomic Energy of Canada Ltd* [2016]). In a non-unionized or provincially regulated workplace, the employer may end the employment relationship for any reason as long as the reason is not discriminatory and as long as the employer gives sufficient notice or pay in lieu of notice. In a unionized or federally regulated workplace, the employee must have engaged in misconduct before the employer can end the employment relationship.

The remedies available to an employee who is discharged without just cause are also different in the unionized or federal sectors. In a non-union environment, the remedies are normally monetary. In a unionized workplace they can be monetary, but the preferred remedy is to reinstate the employee to their original position. Reinstatement is rarely a remedy available to non-unionized employees in provincially regulated industries.

Tort Law

A tort is a wrong for which there is a legal remedy. **Tort law** is a branch of **civil law** (non-criminal law) and covers wrongs and damages that one person or company causes to another, independent of any contractual relationship between them. A tort can be either a deliberate action (intentional) or a negligent action (often considered careless). To establish the tort of negligence, the plaintiff must show that:

1. the defendant owed the plaintiff a duty of care,
2. the defendant breached that duty and did not meet the expected standard of care,
3. the defendant's actions (or inaction) caused some or all of the harm suffered by the plaintiff (causal link), and
4. the plaintiff suffered foreseeable harm and experienced a loss (which could be physical harm, property damage, etc.) as a result.

tort law
a branch of civil law (non-criminal law) that covers wrongs and damages that one person or company causes to another, independent of any contractual relationship between them

civil law
law that relates to private, non-criminal matters, such as property law, family law, and tort law; alternatively, law of jurisdictions, such as Quebec, that is not based on English common law

Although tort law is typically applied when there is no contractual relationship, it may still have an impact at the workplace. An intentional tort is committed, for example, when an employer deliberately provides an unfair and inaccurate employment reference for a former employee. In this case, the former employee can sue the employer for committing the tort of defamation. A tort of negligence occurs, for example, when an employer carelessly misleads a prospective employee about the job during the hiring process and the employee suffers losses as a result of relying on the misrepresentation.

In a successful tort action, damages are awarded to the plaintiff for losses suffered as a result of the defendant's conduct. In the negligent misrepresentation situation, damages can be awarded to compensate the plaintiff for the costs of relocation (including losses on real estate) if the new job involves moving to a different city, the costs of a job search, and the emotional costs of distress.

Judicial Framework

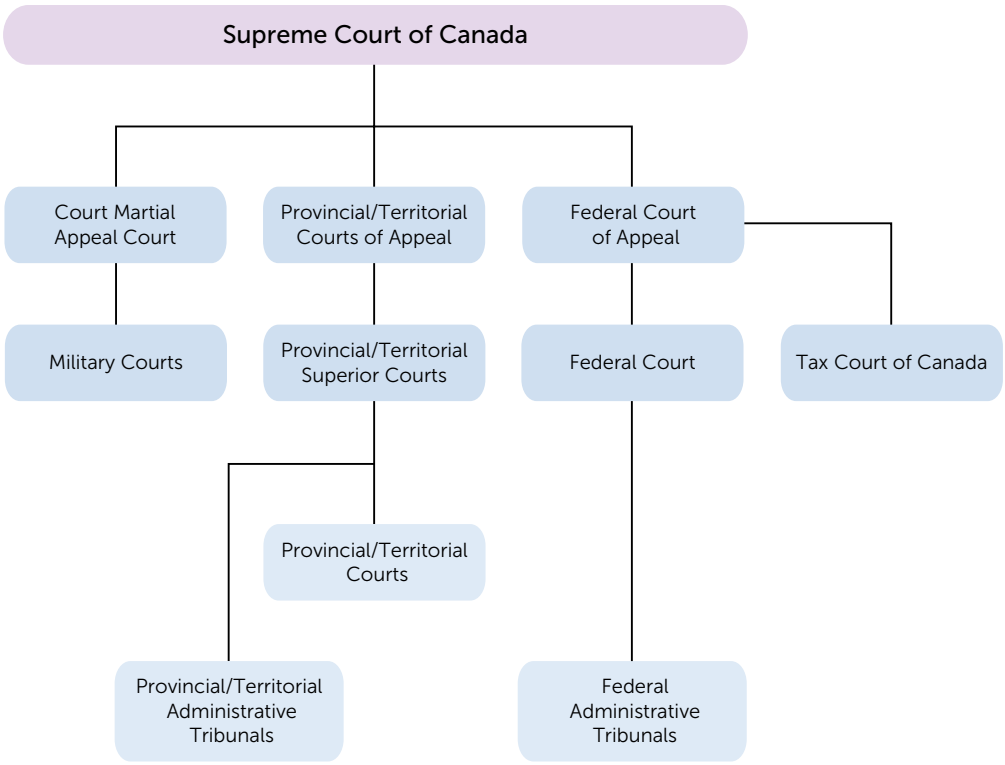
The Court System

The court structure in Canada is hierarchical, as indicated in Figure 1.2. There are various levels of courts, the lowest being provincial courts and the highest being the Supreme Court of Canada. Parties who dislike the decision they receive in a lower court may appeal that decision under certain circumstances. The appeal system assists in the creation of consistent laws because a higher court may overturn the decision of a lower court that has failed to follow precedent.

The Supreme Court of Canada

Located in Ottawa, the Supreme Court of Canada is the final court of appeal. It hears cases from provincial courts of appeal and from the Federal Court of Appeal. However, it hears appeals only if it has granted leave to appeal. Because of its heavy workload, it grants leave to appeal only when a case is of general public importance or where the law requires clarification. Decisions of the Supreme Court of Canada bind all lower courts across Canada.

FIGURE 1.2 *The Structure of Federal and Provincial Court of Law*



Other Courts

Each province has a court of appeal that hears appeals from decisions of the provincial superior courts. In **BC**, the court of appeal is called the **British Columbia** Court of Appeal, and in **Alberta**, it is called the **Alberta** Court of Appeal. The provinces' superior courts are the **BC** Supreme Court and the **Alberta** Court of King's Bench. Both have civil as well as criminal jurisdiction and are the primary trial courts. They generally hear cases involving serious criminal offences, commercial or family matters, and appeals from lower courts for claims that exceed $35,000 in **BC** and $100,000 in **Alberta**.

Each province also maintains courts of special jurisdiction. These preside over matters such as small claims, family law (excluding divorce), juvenile offences, traffic violations, and trials of less serious criminal offences (Gilbert et al, 2011). As of 2015, **BC** introduced an online Civil Resolution Tribunal designed to resolve disputes up to $5,000.

In Canada, judges are not elected. The federal or provincial government, depending on the level of court, appoints judges.

The Administrative System

Administrative Tribunals

administrative tribunals
a quasi-judicial authority whose rules are typically governed by a subject-specific statute

Administrative tribunals have been established to make decisions in specialized areas, such as employment standards (e.g., the **BC** Employment Standards Tribunal) or discrimination (e.g., the **Alberta** Human Rights Commission). In employment law, administrative tribunals have primary jurisdiction over most matters. The main exception is the common law of wrongful dismissal, where disputes are heard in the traditional court system.

Tribunals act in a quasi-judicial manner, meaning that they observe the rules of procedural fairness and provide a full hearing, but they are less formal than courts and their members are experts in employment matters. Although administrative tribunals are technically subordinate to the courts, appeals to the courts from their decisions are usually limited by statute in a provision called a **privative clause**. However, privative clauses do not displace the jurisdiction of the courts entirely, and courts may also overturn a tribunal's decision if it exceeded its jurisdiction, showed bias, or denied a party natural justice (Gilbert et al, 2011).

privative clause
a provision limiting appeals to the courts from decisions of administrative tribunals

A request to a court to review the decision of an administrative tribunal is called an application for **judicial review**. The **Alberta** Court of King's Bench and **BC** Supreme Court conduct judicial reviews. In **Alberta**, the Labour Relations Board became the appeal body for some parts of the *Occupational Health and Safety Act* and for the *Employment Standards Code* in 2019. In any appeal a decision may be overturned based on questions of fact or applying the facts to the law only if the decision was "unreasonable" (the stricter standard of "correctness" is only used in certain circumstances—see below). As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick* [2008], a decision will be found to be unreasonable only if it falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 5). In other words, the reviewing court does not have to agree with the tribunal's decision as long as it is justifiable and supported with reasoning. This is a very deferential **standard of review** that recognizes the experience and expertise of specialized administrative bodies and the authority conferred on them by the legislature. However, for those relatively few cases that turn on a question of law that is outside the tribunal's area of expertise, such as constitutional law, reviewing courts will apply the "correctness" standard. This means that the court will substitute its own view if it does not agree with the tribunal's result.

judicial review
a request to a court to review the decision of an administrative tribunal

standard of review
the level of scrutiny that an appeal court will apply to the decision of a lower court or tribunal

More information concerning specific administrative processes and tribunals can be found in the chapters dealing with the related employment statutes.

Administrative Agencies

Below tribunals in the administrative hierarchy there are usually **administrative agencies** empowered to investigate complaints, make rulings, and sometimes issue orders. These agencies, or commissions, usually issue policy guidelines and perform an educational role in furthering the goals of a statute. For example, the Employment Standards Branch in **BC** and the Employment Standards Agency in **Alberta** play a key role in educating employers and employees about workplace issues and in administering the system in each province. There are also agencies and tribunals responsible for the physical well-being of employees, empowered under workers' compensation and occupational health and safety legislation (see Chapters 8 and 9).

administrative agencies
lower tribunals in the administrative hierarchy empowered to investigate complaints, make rulings, and sometimes issue orders

Individual employees may gain access to an administrative agency at no monetary cost to themselves; once a claim or complaint is initiated, the agency pursues the claim on behalf of the employee. An agency may have an internal appeal procedure, usually with the possibility of a further appeal to a board or tribunal (Gilbert et al, 2011). For example, in **BC**, there is an internal appeal procedure from a decision of the director of employment standards to the Employment Standards Tribunal, as set out in part 13 of the *Employment Standards Act*.

Where to Find Employment Laws

Common Law

Court decisions are found in a number of case reporters—national, regional, provincial, and topical (see Table 1.1). These are periodical publications containing judges' written decisions. Because it is expensive to purchase case reporters, the Internet, including powerful

search engines like CanLII, are now the primary tool to conduct legal research. Discussions of case law can also be found in encyclopedic digests, textbooks, loose-leaf reporting series, blogs, and newsletters. Links to a number of legal blogs specializing in Canadian labour and employment can be found at <http://www.lawblogs.ca/category/labour-employment>.

TABLE 1.1 *Summary of Key Sources of Employment Law*

Legal Source	Cause of Action	Initial Decision-Making
Individual employment contracts	Violating terms and conditions of individual employment contract—e.g., wrongful dismissal	BC & Alberta Small Claims Courts BC Supreme Court Court of King's Bench
Collective agreements	Violating terms and conditions of a collective agreement—e.g., unjust dismissal grievance	Arbitration board
Provincial employment standards legislation	Violating minimum employment standards—e.g., hours of work, vacation, minimum wage	Employment standards officer
Provincial human rights legislation	Discrimination in employment based on specified grounds—e.g., race or disability	Human Rights Tribunal
Provincial labour codes	Violation of the labour code by unions or employers—e.g., failing to bargain in good faith	Labour Relations Board
Canada Labour Code (federal)	Violation of the Code affecting occupational health and safety, labour relations, and minimum employment standards	Canada Industrial Relations Board, adjudicator, or inspector
Provincial occupational health and safety legislation	Violating occupational health and safety legislation	Health and safety inspector
Provincial workers' compensation legislation	Provision of income replacement benefits to an employee with an illness or injury occurring at work	Workers' compensation board claims adjudicator
Provincial privacy legislation	Inappropriately accessing or releasing private employee information	Privacy Commissioner

case citation
a reference for locating a case that sets out the case name, year in which the decision was made or in which it was published in a case reporter, volume number of the case reporter, series number, page number, and court

Reading and interpreting case citations is an important skill for researching legal cases. A **case citation** tells you how to locate a specific case. It sets out the case name, year in which the decision was made or in which it was published in the case reporter, volume number of the case reporter, series number, page number, and court. Consider the following case citation:

***Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570**

appellant
the party requesting the appeal

- *Douglas/Kwantlen Faculty Assn v Douglas College*. Douglas/Kwantlen Faculty Assn is the plaintiff, and Douglas College is the defendant. In reports of older appeal cases, the first party named is the **appellant** (the party requesting the appeal), and the party

named after the "v" ("versus") is the **respondent** (the party opposing the appeal), but courts have begun to simplify citations by always keeping the plaintiff's name first and the defendant's name after the "v" even on appeal cases—regardless of who is appealing.

respondent the party opposing the appeal

- [1990]. Square brackets indicate the year that the case reporter volume was published. Sometimes parentheses are used in case citations to indicate the year in which a case was decided if that year is different from the reporter year.
- 3 SCR. This refers to the case reporter volume and name. It indicates that the case can be found in the third volume of the 1990 Supreme Court Reports.
- 570. This is the page number.

A case may be published in several different case reporters, so you may see several alternate citations called **parallel citations**. However, these are less important today given the use of Internet databases such as CanLII for finding cases and the adoption of neutral citations (see below).

parallel citations references to a case published in two or more different case reporters

Many Internet citations, especially for provincial and territorial courts, use the following form or a variation of it:

***R v Tschetter* (7 May 2009), 080092455P10101-012 (ABPC)**

This citation refers to a criminal case heard in the **Alberta** Provincial Court where judgment was issued on May 7, 2009. The number 080092455P10101-012 is a docket reference to the list of cases tried in **Alberta**. "R" refers to the Crown and is an abbreviation of "Regina" (the Queen) or "Rex" (the King).

Most Canadian courts have adopted a new method of citing judicial decisions. Since 2001, cases are assigned a **neutral citation**, which gives a unique identifier but does not refer to any case reporter. This neutral citation standard has three main parts: the traditional case name; the core of the citation, containing the year of the decision, a court or tribunal identifier, and a number assigned to the decision; and possible optional elements, such as paragraph numbers or notes. Consider the following example:

neutral citation a form of citation that includes the traditional case name; the core of the citation, containing the year of the decision, a court or tribunal identifier, and a number assigned to the decision; and possible optional elements, such as paragraph numbers or notes

***Starson v Swayze*, 2003 SCC 32**

In this example, *Starson v Swayze* is the case name; 2003 is the year the decision was rendered; SCC (Supreme Court of Canada) is the court identifier; and 32 is the number of the decision—that is, the 32nd decision of the Supreme Court in 2003. The numbering sequence usually restarts each January 1.

Statute Law

The federal and provincial governments each publish their statutes and regulations. These can be purchased from the King's Printer and found in most public libraries and on the Internet.

Four useful Internet search sites are as follows:

- <http://www.canlii.org/en>
  The Canadian Legal Information Institute (CanLII) is a good source for federal and provincial statutes and regulations, as well as cases. The site is run by the Federation of Law Societies of Canada, which is the umbrella organization of Canada's 14 law societies.

- <http://laws.justice.gc.ca/eng>
  The federal Department of Justice offers a consolidation of federal statutes and regulations in a side-by-side bilingual PDF version. It also provides links to "Amendments Not in Force" and "Related Provisions."
- <http://www.bclaws.gov.bc.ca>
  The **BC** government's website provides statutes and regulations for the province, kept current to within two or three weeks (as noted at the top of each statute on the site).
- <https://kings-printer.alberta.ca/laws_online.cfm>
  The **Alberta** government's website provides statutes and regulations for the province.

Staying Current

It is important to keep abreast of changes in the law. Newsworthy cases are often reported in newspaper articles, but you need legally focused sources as well, such as law firm newsletters, industry association publications, and employment reporting services.

KEY TERMS

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REVIEW AND DISCUSSION QUESTIONS

1. Name a significant current social or demographic trend, and discuss the effect that it might have on employment law in the future.
2. In your opinion, what are some of the strengths and weaknesses of the common law system?
3. The *Canadian Charter of Rights and Freedoms* applies only where the government is involved. However, the Charter can indirectly affect private sector employers. How?
4. Describe two possible tools or rules that a judge or tribunal adjudicator can use in determining how to interpret a statute.
5. For each of the following situations, discuss what law (statute, common law, or constitutional law) applies. Do you believe the individual has a legitimate legal complaint? Why or why not? What do you think is the likely outcome and remedy if the employee files a complaint and is successful?
   a. Sheila worked at a **BC** location of a national restaurant chain for two years (making just above minimum wage). She has no written employment contract and is suddenly let go with no notice and no pay in lieu of notice. The employer simply says they are downsizing.
   b. Viktor is an engineer working for Big Oil Drilling Company in **Alberta**. He is discharged shortly after telling his employer he suffers from alcoholism. The reason Viktor admitted he had an alcohol addiction was because he had missed quite a lot of work recently and had been placed on an absence management program.
   c. Janice is a unionized registered nurse. She applied for another position in her hospital in **BC** but lost out to a male colleague. Janice has more experience and stronger qualifications.
   d. Bob is a senior sales manager who is let go after 12 years with his **Alberta**-based IT company. He has a contract that specifies notice well in excess of statutory minimums in addition to a severance package. Bob is not awarded the notice period, pay in lieu of notice, or the severance specified in his contract. The employer alleges just cause for poor performance, but all Bob's reviews were satisfactory.
   e. Sahana, a non-unionized window washer in **Alberta**, is suspended for one month without pay because she refused to work at a building until the harness on the washer's scaffolding was replaced. She felt the system was unsafe.
   f. Felix has been discharged from his job as a truck driver for a company that transports goods across the country. Although he has tried to be discreet, Felix gets fired within two weeks of attempting to organize his co-workers to become unionized. The employer does not provide a reason for the termination but provides pay in lieu of notice to Felix.

RELATED WEBSITES

The Canadian Legal Information Institute <http://www.canlii.org/en>

Federal legislation on the Justice Laws Website <http://laws.justice.gc.ca/eng>

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