

Instructor's Manual

Chapter 1

The Canadian Legal System

Teaching Suggestions

I usually take about 2 to 3 hours of a 12-week course (3 hours per week) to go over this portion of the text. I start by looking at Civil law. I mention briefly the history (Justinian's Code and Code Napoleon) and then examine the importance of the Code, emphasizing how it sets out general principles of law that judges then apply to the cases before them and the relative lesser importance of case precedents, which are persuasive rather than binding in such a system.

Then I go through the history of the development of the common law of England. (I have found that unless I go over the history students have a difficult time understanding the relationship between common law, equity and statutes.) If time permits I mention William the Conqueror, emphasizing the on-going struggle for power between the council of nobles and the king, which led to the struggle between parliament and the king. I discuss the development of the three common law courts, the writ system, the development of the Court of Chancery, and the law of equity to relieve the harshness and inadequacies of the common law. I explain that this developed from the practice of petitioning the king who then gave the job to his chancellor and eventually to vice chancellors constituted in the form of the court of chancery. I usually give examples of equitable remedies such as the injunction to illustrate the difference. I then point out the victory of parliament over the king in the English Civil war with the result that Parliament becomes the supreme law making power. Thus statutes override judge made law. Finally I note the passage of the Judicature Acts merging the courts.

I bring the process into Canada by first looking at the *BNA Act* which creates the dominion of Canada and gives Canada a constitution like that of the United Kingdom. I closely examine (using examples) the division of powers between the federal and provincial governments under section 91 and 92 and emphasize that these are not exclusive water tight categories but sources of power resulting in some practical overlap of law making powers. I point out what happens in the event of conflict between federal and provincial jurisdictions and that the *BNA Act* is still in force in Canada in the form of the *Constitution Act (1867)*. We then look at the *Constitution Act (1982)*, which ended the last remaining tie to the British Parliament (not to the Queen) and enacted the *Charter of Rights and Freedoms*. I spend some time discussing the development of human rights legislation at the provincial and federal levels pointing out that these statutes didn't protect people from government and also giving examples of human rights abuses by the Canadian government. I usually start by pointing to the limitations of the *Charter* -- that it only applies to government, that parts can be overridden (Section 33) and that reasonable exceptions are allowed (Section 1). I then look at each area of the *Charter* so that the students get a feeling for what is covered, though I don't typically look at the sections in detail. Finally I emphasize that the *Charter* is constitutionally entrenched (the supreme law of Canada) and that it cannot be easily changed. I usually conclude by pointing out the importance of the *Charter* and that it gives more power to the courts at the expense of

Parliament limiting the idea of supremacy of Parliament. I also mention the problems that followed Meech Lake and Charlottetown accords, the failed referendum to amend the constitution, the resulting problems in Quebec and the separation referendum.

I then turn my attention to the courts. I illustrate the court structure in my province (B.C.) similar to the one included in the text. I point out the difference between appeal courts and trial courts and also the difference between the criminal and civil function. I look at the federal level courts and provincial level courts and the relationships between them. I then look at the function of each court body in some detail and also introduce the idea of administrative tribunals. (Often I separate the discussion of administrative tribunals and government regulation and leave it until the end of the course where the students are better able to understand the legal principles.) I then go through the civil litigation process at the superior court level. I point out the delays and the pressure exerted by each process to get the parties to settle and avoid a trial or at least to reduce the matters that have to be examined at trial. I also look at the trial process itself and what follows: the process of enforcing a judgment and the various remedies available. I also look at the criminal process to a limited extent and end by looking at alternatives to the litigation process. My examination of ADR concentrates on the advantages and disadvantages of negotiation mediation and arbitration compared to the litigation process and to some extent the option of laying a criminal complaint. Obviously the presentation of this information is primarily by lecture and I find the time well spent as it lays a foundation for building the rest of the course material.

Chapter Summary

History

Knowledge of law is vital for business

Definition: law consists of rules enforceable in court or by other government agencies

Law and morality should not be confused

Quebec uses the Civil Code

Other provinces use common law

Common law is based on cases

Judges are bound to follow cases (stare decisis)

Common law was developed by the common law courts in England

Equity was developed by Court of Chancery

Statutes are passed by Parliament or legislatures

Our law is based on a combination of common law, equity, and statutes

The Law in Canada

BNA Act creates Canada with constitution like Britain's

Constitution Act (1867) (BNA Act) divides powers between federal and provincial governments

Federal law to be followed where provincial and federal laws conflict

Statute created by first, second, and third reading in Parliament and Royal Assent

Statutes published and online

Regulations also qualify as law

Constitutional Law

Constitution Act (1982) gives Canada independence from Britain

Federal and provincial statutes protect human rights

Charter protects individuals and businesses from rights abuses by government

Section 1 limitation allows for reasonable exceptions

Section 33 limitations allow opting out of sections 2 and 7-15

Charter protects fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights and language rights

Charter limited to government actions

The Courts

Court structure varies between provinces

Provincial court divisions: Small claims, Family, Criminal

Superior court highest trial court in province

Superior court of appeal final court of appeal in province

Right to Trial by Jury guaranteed by *Charter*

Supreme Court of Canada highest court in Canada

Federal Court deals with disputes in federal arena

Litigation

Service of Notice of Civil Claim commences process

Notice of Civil Claim identifies facts and issues

Response to Civil Claim defines area of contention

Discovery process: discloses documents, examination for discovery produces statements under oath

Payment into court and offers to settle encourage settlement

Class actions involve many plaintiffs represented in one procedure

At trial, the plaintiff goes first, then the defendant

The case must be proved “upon balance of probabilities”

Judge instructs the jury in law, but the jury decides facts

Damages and other remedies awarded

The plaintiff (now judgment creditor) must enforce judgment

ADR

Alternatives to litigation provide advantages

Negotiation avoids conflict

Mediator helps parties to reach a decision

Arbitrators make binding decisions

ADR provides flexibility

Administrative Law

Dealing with regulatory bodies

Administrative decisions must be within jurisdiction and compliant with *Charter of Rights*

Procedural fairness required in administrative hearing

Court may review process

Criminal Law

In a criminal action the state prosecutes the accused

Power to make criminal law resides exclusively with federal government

Provinces have power to enforce statutes creating provincial offences or quasi-criminal law
Provincial offences and criminal law are very similar
Federal criminal law is found in *Criminal Code* and other federal statutes
Criminal standard “beyond a reasonable doubt”
Prosecution must prove not only the act took place but also intent.
Due diligence is the only defence to strict liability offence
Note that *Charter of Rights* protections in criminal process
A private citizen has less power to arrest than a police officer
Justice can issue a search warrant, arrest warrant, and summons to appear
Police can arrest or issue an appearance notice
Accused must be brought to judge within 24 hours of arrest
Summary conviction for minor offences
Indictment for serious offences
Prosecutor has choice with hybrid offences
Accused can choose trial before provincial court judge, superior court judge, or judge and jury
Plea-bargaining can avoid trial
Criminal trial similar to civil trial
Note suspended sentence and absolute discharge.
Aiding, acting as an accessory, counseling, and conspiracy are also crimes

Questions for Review

1. Why is it important for a business student to understand the law and our legal system?

Answer: The law and our legal system set out and enforce the rules of interaction that govern business relationships.

2. Define law and distinguish between substantive and procedural law.

Answer: Law as used in this text is defined as the body of rules enforced by courts or by other government agencies. Substantive rules are the normative rules that govern behaviour, while procedural rules are concerned with how the normative rules are enforced and how remedies are obtained.

3. Explain the origin and function of the *Constitution Act (1867)* formerly the *BNA Act*, and its importance with respect to how Canada is governed.

Answer: The *BNA Act* was an act of the English Parliament that created Canada as an independent nation and established and empowered our various institutions. For our purposes the primary importance today are the provisions in the *Constitution Act (1867)*, as it is now called, that divide the power to make law between the federal and the provincial legislative bodies. (Primarily found in Section 91 and Section 92)

4. Explain parliamentary supremacy and its place in our legal system.

Answer: As a result of the English civil war where Parliament prevailed over the King, Parliament became the supreme force in our system. Thus a rule passed by Parliament will override any judge made law.

5. Indicate the importance of the *Constitution Act (1982)*, and explain why it was important to the development of Canada.

Answer: The provisions of the *Charter of Rights and Freedoms* found in the *Constitution Act (1982)* are the most significant component of the Act. The *Charter* protects people and businesses in Canada in their relations with government, and because it has constitutional status it is the supreme law of Canada. All legislation passed must conform to its principles. It can also be argued that it has modified the traditional role of parliament, giving the courts power to declare statutory enactments passed unconstitutional and void where they are inconsistent with the *Charter* provisions.

6. How are individual human rights protected in Canada?

Answer: The rights of individuals in their relationships with private organizations and other individuals are protected by specific provincial and federal human rights statutes. The statutes establish commissions or other bodies that hear complaints of discrimination and other abuses and have the power to provide remedies.

7. Explain the significance of the *Charter of Rights and Freedoms* and identify three limitations on its application.

Answer: By enshrining certain rights in the Constitution, the *Charter* empowers the courts to declare void federal or provincial laws that are in contravention of the *Charter*. The limitations are threefold. First, the *Charter* only applies to our relations with government and government agencies. Second, Section 1 allows for reasonable exceptions when government statutes do contravene rights set out in the *Charter*. Third, under Section 33 certain provisions of the *Charter* can be overridden by parliament or the legislature.

8. Describe the basic rights and freedoms protected in the *Charter*.

Answer: Section 2 protects basic freedoms such as freedom of religion, the press and freedom of expression. Sections 3-5 protect democratic rights including the right to vote and to seek elected office. Section 6 guarantees the right to enter leave and reside anywhere in Canada. Sections 7- 14 set out such legal rights as the right to be told the reason for arrest and the right to a fair trial. Section 15 sets out the right to be treated equally without discrimination. Section 23 also sets out certain French and English language rights.

9. Describe the court structure in place in your province.

Answer: this will vary from province to province.

10. Contrast the nature and function of the provincial court and superior trial court in your province and distinguish between the roles of trial courts and courts of appeal including the Supreme Court of Canada.

Answer: This also may vary from province to province, but essentially the provincial court will deal with less serious criminal matters, family matters and civil claims falling within the small claims monetary jurisdiction. The superior courts will include the higher trial level court dealing with more serious criminal and civil matters and the provincial court of appeal. The procedure in the superior courts will be more involved generally than will be the case in the provincial court of the province.

The provincial courts of appeal and the Supreme Court of Canada act as a “court of review” and review the correctness of a trial court decision based on a written record of that proceeding. As such, except in very limited situations, a court of appeal will not conduct a new trial or receive further or new evidence. Rather, it will review the written record of evidence before the trial court. The vast majority of appeals are decided on the basis of whether the trial judge correctly stated and applied the legal principles to the evidence. Only in very exceptional cases will a court of appeal “overturn” a decision on the basis that the trial judge misunderstood the evidence. The Supreme Court of Canada functions in the same way except that it reviews the written record of evidence from the trial court and whether the trial judge and/or the provincial court of appeal properly understood and applied the proper legal principles to the evidence presented in the case.

11. Explain the purpose of the Federal Court, and the role it plays in the Canadian judicial process.

Answer: The Federal Court is composed of a trial and appeal division and deals primarily with disputes arising from those matters that are assigned to the federal government under the *Constitution Act (1867)*.

12. How is a civil action commenced?

Answer: A civil action is begun when a Notice of Civil Claim or Notice of Action is issued.

13. Explain the nature and role of a Response to Civil Claim, a Counterclaim, and the discovery process.

Answer: The Response to Civil Claim is the response to the Notice of Civil Claim and sets out the facts alleged by the defence in the action. The Counterclaim is issued by the defence and is in effect a Notice of Civil Claim on behalf of the Defendant when they claim the Plaintiff was is liable for damages suffered by the Defendant. The discovery process involves the disclosure of documents held by both sides to the other and the examination of the parties under oath all designed to get information out on the table to assist the parties to settle the matter without a trial or at least to make the trial much more efficient.

14. Contrast the process and the requirements of proof required in a civil as opposed to a criminal action.

Answer: The process in both requires disclosure to the other side and encourages settlement or plea bargaining. The standard of proof required in a civil action is that the matter be proved on the balance of probabilities and in a criminal matter the case must be established beyond a reasonable doubt - a much higher standard.

15. Compare the roles played by a judge and a jury in a trial.

Answer: When a jury is present in a civil or criminal trial the function of the jury is to determine questions of fact. (That is, what took place between the parties or what happened.) The judge decides questions of law (the legal rules and how they apply to the case in question or what should have been done). In a trial involving a judge alone the judge must decide matters of law and of fact.

16. Explain how a judgment can be enforced.

Answer: In a civil action, an award of damages can be enforced by seizing and selling the property of the judgment debtor. Normally, a hearing will take place to determine what assets the judgment debtor has and then steps will be taken to garnishee wages and bank accounts, and to seize other assets such as cars boats and other chattels and have them sold at auction. Real property can also be seized and sold to satisfy judgment.

17. Distinguish between negotiation, mediation, and arbitration, and indicate the advantages and disadvantages of alternate dispute resolution over litigation.

Answer: Negotiation involves discussions between the parties where they try to reach a mutually acceptable settlement of their dispute. Mediation adds a neutral third party who tries to assist the parties to reach such an agreement. Arbitration involves a third party who is given the power to make a decision that is binding on both parties. In negotiation the parties deal with each other, in mediation a third party helps them reach a settlement and in arbitration the arbitrator decides and the parties are bound by that decision. In many instances ADR methods are more flexible, less costly, and less time-consuming than litigation. They are also private and less adversarial. Litigated cases protect the rights of the parties and follow precedent decisions.

18. Explain the nature of regulations and their legal status.

Answer: Regulations are created by bureaucrats under the authority of statutes usually designed to implement the principles set out in the statutes. If they are properly passed and approved by the governor general in council (the cabinet), go no further than is authorized in the statute and are consistent with the provisions of the *Charter*, the *Constitution Act (1867)* and other constitutional enactments, they have the force of a properly passed statute.

19. Explain the nature of administrative tribunals and their relationship to our legal system.

Answer: They include individuals or panels of government-appointed decision makers with authority to act under statutory power, but are required to follow certain rules of procedural justice.

20. Distinguish between criminal and regulatory offences.

Answer: All criminal law is passed by the federal government and most, but not all, is contained in the *Criminal Code of Canada* and has a moral foundation. Regulatory offences are created under provincial legislation or special federal statutes and may also impose penalties but the object is to accomplish the purpose of the legislation as authorized under the *Constitution Act (1867)* rather than to directly enforce some moral standard.

21. Explain the difference between a criminal and a strict liability offence.

Answer: A criminal offence requires the accused to be proven guilty beyond a reasonable doubt. This puts a considerable onus upon the prosecutor to prove their case including a mental element called *mens rea*. In a strict liability offence, once the facts have been established, the onus is on the accused to show they took reasonable steps to avoid the prohibited events from taking place. This is called due diligence.

22. Distinguish between summary conviction and indictable offences and explain the various options of the parties involved

Answer: Generally, the summary conviction process involves more minor offences and involves a shorter, simpler process. The indictable process is used for more serious offences and often involves a pre-trial hearing known as a preliminary inquiry. As well, a person charged with an indictable offence often has the right to a trial by jury if they chose that option. There are a number of offences where the prosecutor has a choice and can proceed either way usually depending on the seriousness of what has happened and whether people have been injured. Similarly, the accused in a more serious matter usually can choose to proceed summarily or go the more complicated route.

Questions for Further Discussion

1. Discuss the relationship between law, morality, and ethics. How does one determine what is ethical behaviour and what is not if you can't use the law as the test? What would be the outcome if the courts tried to set a social or personal moral standard? [What role should morality and ethics play in business decisions?](#)

Comment: Most will say that ethics and morality are the same. It has been suggested by some that morals are personal standards whereas ethics refer to the standards required of a group. Laws on the other hand are simply rules that are enforced in court or by other government agencies and may or may not reflect an ethical or moral standard. I usually use a Venn diagram to illustrate the point. One circle represents morality, the other the law and where they overlap is the area where law can be said to be a reflection of morality. Some laws have a moral component and others are unrelated to moral values. Some morals are enforced by laws, others are personal choices

- The object here is to drive home the point that business people cannot be sure they are acting morally simply because their actions are within the law.
- It is possible for an action to be immoral or unethical although lawful and it may also be possible for an action to be moral although prohibited by the law or even for a law to be immoral, although this would depend on the philosophical approach adopted by the parties to the discussion.

[Some commentators strongly believe that for the courts to get any more involved in moral and social issues than they do would likely lead to more confusion and conflict than we already experience in our multi-dimensional society. More recent commentators have just as strongly advocated for strong moral and ethical business practices and standards and judicial enforcement of the same to ensure that the practices that have led to recent business failures and](#)

[“scams” threatening the global economy not be repeated: e.g. “Enron, too big to fail”.](#)

2. Canada has a tradition of Parliamentary Supremacy inherited from Great Britain. But that has been modified somewhat by the passage of the *Charter of Rights and Freedoms*. Explain how parliamentary supremacy has been limited by the *Charter*, how that affects the role of the courts, and whether these changes enhance or are detrimental to Canada as a democracy.

Comment: This question is meant to encourage a discussion about the principle of the supremacy of parliament and how the passage of the *Charter of Rights and Freedoms* has affected it. It should be emphasised that the passage of the *Charter* and its constitutional entrenchment has shifted power away from Parliament to the courts, which can now hold that some actions by government are beyond their power and void. Thus Parliament cannot be supreme in the sense that its enactments will prevail in the courts if the courts have the power to override those enactments by declaring them invalid because of the provisions of the *Charter*. That is the start of the discussion, but of course, the students then should talk about the operation of Section 1 and Section 33 and given those limitation is there really a significant limitation on the operation of the supremacy of parliament in Canada? It can be helpful to encourage students to compare the situation in Canada, Great Britain and the United States.

3. The process leading to trial is long, involved, and costly. Most jurisdictions are trying to change the procedures to alleviate delays and costs. How successful are they and what other changes would be appropriate? Keep in mind the benefits of the current system; do they outweigh the disadvantages? In your discussion consider the advantages and disadvantages of alternate dispute resolution methods.

Comment: The point to be emphasized here is that there are advantages to this complex and lengthy process. Each step is designed to get more information onto the table and to pressure the parties to settle their dispute without going to court. Emphasize how many disputes are settled out of court. There are several systems that are in place to make the process more efficient: e.g. having a trial based on depositions (no witnesses) or doing away with the discovery process. Discussion can revolve around the advantages of that compared to what will be lost. You might emphasize the quicker, cheaper process, but is it worth the loss of all that information? Does it lead to more cases going to trial or less? Is it more or less costly in the long run? Also the question encourages the review of ADR and how it can supplement and complement the legal system.

4. Government boards and tribunals may be considered an appropriate forum for dispute resolution. Is it appropriate for the courts to be able to exercise review powers over their decisions? Are there enough safeguards in place to protect the rights of people and businesses who are affected by administrative decisions?

Comment: This question presents the classic problem of big government and the exercise of government power versus the rights and interests of the “little guy”. The advantage is that such tribunals are much more efficient than courts

in dealing with the matters assigned to them, but that is usually at the sacrifice of one's right to challenge the decision in court. What about the rules of natural justice and the Charter with the power of the courts to review? Why should the courts have the power to overturn such decisions when the very purpose of the tribunal is to take the matter out of the hands of the courts? The problem is to achieve a balance of government power and more efficiency as opposed to the danger of the abuse of such power and the right to go to the courts to ensure against such abuse. [Most provinces and territories have recently introduced legislation to ensure "fair and due process" before such tribunals and given courts the power to review such tribunal decisions to ensure that those processes are properly carried out.](#)

5. Describe the essential difference between a criminal prosecution and a civil action, and discuss the advantages and challenges associated with each process. Consider when a business person might have to choose between them and what factors would affect that decision.

Comment: The main difference is that the prosecution process is initiated and controlled by the crown rather than a private individual that is prosecuting the action. The status of the victim is little more than a witness. The rights and protections afforded to the accused should be emphasized including *Charter* rights and the requirement of proof beyond a reasonable doubt. All of these facts make it much harder to proceed against an accused using the criminal model. The advantage, of course, is that the victim does not have to bear the costs of the process and the police will bring their investigative expertise into the matter. In a civil model the person bringing the action against the wrongdoer will bear the costs and shoulder the burden of suing the wrongdoer. They will also have to do their own investigation work and gather sufficient evidence to proceed to trial. On the other hand it is not nearly so difficult to succeed and the business person can insure that such a civil action will proceed even where the case is weak. In contrast, in a criminal prosecution the business person has little actual say as to whether charges are proceeded with or even laid in the first place.

Cases for Discussion

1. **Isen v. Simms** S.C.C., 2006 SCC 41; [2006] 2 S.C.R. 349

Mr. Isen was the owner of a 17-foot pleasure boat. After a day of boating on the lake and loading the boat on its trailer in preparation for transporting it on the highway was securing the boat with the help of Dr. Simms. Mr. Isen was stretching a bungee cord over the engine when it slipped and hit Dr. Simms causing an eye injury. He and his wife sued in the Ontario Superior Court for \$2.2 million. Mr. Isen brought an application before the federal court for a declaration that the federal maritime law applied and the *Canada Shipping Act* imposed a \$1 million limitation on damages in this situation. Explain whether the limitation imposed in the federal statute should apply in this situation and why.

Decision: The Court ruled that the actions giving rise to Dr. Simms' injuries were not governed by federal maritime law, but rather, were governed by provincial

law. Accordingly, the *Canada Shipping Act* was not constitutionally applicable in this case and Mr. Isen could not claim the benefit of the limitation of liability provided in that Act. While Parliament's jurisdiction over navigation and shipping pursuant to s. 91(10) of the *Constitution Act, 1867* includes the tortious liability of owners of pleasure craft for negligent launching into, navigation on and removal from Canadian waterways, the mere involvement of a pleasure craft in an incident is not sufficient to ground federal jurisdiction. Rather, the factual context must be examined to determine whether the allegedly negligent act is integrally connected with the act of navigating the pleasure craft on Canadian waterways such that it is a practical necessity for Parliament to have jurisdiction over the matter. Here, the securing of the engine cover for transport by highway had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario's highways. Once the boat was being secured for road transport, it was no different than any other type of cargo that is transported on the highway and the provincial legislature has jurisdiction. Therefore, the law concerning the standard of care and Mr. Isen's liability should be that applied to other users of Ontario roads who make preparations to transport some form of cargo.

2. **Ramsden v. Peterborough (City)** [1993] 2 S.C.R. 1094, 106 D.L.R. (4th) 233 (SCC)

This is a classic case dealing with freedom of expression. The City of Peterborough had passed a bylaw prohibiting the posting of any material on city property. The bylaw prohibited the posting of "any bill, poster or other advertisement of any nature," on any "tree . . . pole, post, stanchion or other object . . ." within the city limits. Ramsden put up advertising posters on several hydro poles to advertise an upcoming concert for his band. He was charged with committing an offence under the bylaw. It is not disputed that he posted the bills on the hydro pole. Indicate what defences he might have to the charge and the arguments for both sides and likely outcome.

Decision: First the court had to deal with whether such postering was a means of expression protected under the *Charter*. It was clear that postering is an inexpensive and historically accepted way to convey information whether it is advertising or political, social, or cultural commentary. As such, the court found that it was protected under Section 2(b) of the *Charter*. The court then had to decide whether the bylaw prohibition was a reasonable limit under Section 1. The purpose of the bylaw was not to curtail public expression in any particular area, but to control littering, considered a positive objective. The problem was that the bylaw went too far. It prohibited all postering. The Supreme Court decision quoted from the Ontario Court of Appeal judgment "as between a total restriction of this important right and some litter, surely some litter must be tolerated". The court concluded that the bylaw imposed a limit on freedom of expression as protected in section 2b of the *Charter* and that the limitation could not be justified under section 1 as it "is overly broad and its impact on freedom of expression is disproportionate to its objectives."

3. **Lawton's Drug Stores Ltd. v. Mifflin** (1995) 402 A.P.R. 33, 38 C.P.C. (3d) 135, 129 Nfld. & P.E.I. R. 33 (Nfld. T.D.)

When Mifflin sold their business to Lawton's Drug Stores, the contract included a clause restricting them from opening a similar business in competition. Lawton's had paid extra for customer goodwill, which would be lost if Mifflin were to start up a

business in competition and recapture that customer loyalty. Six months later Mifflin did open up a business in competition, and Lawton's sued for breach of contract. As part of the pre-trial discovery process, Lawton's demanded a copy of Mifflin's customer list. Such lists are extremely confidential and must be kept out of the hands of competitors at all costs, so Mifflin refused. Assuming the list was relevant to the proceedings, what rights do the parties have in these circumstances? What should Lawton's do? Is there any way to compromise in these circumstances?

Decision: This case provides a good example of how useful and important the pre-trial discovery process is to the parties involved. In this matter the Court ruled that Mifflin was required to produce the customer lists for two reasons: to allow Lawton's to discover not only who Mifflin's customers were but also when those customers were acquired, and; to discover the amount of sales to those customers so that Lawton's could calculate how much Mifflin should pay Lawton's if they were successful in their claim against Mifflin. To protect Mifflin's legitimate "privacy claims" and ensure that Lawton's could not simply use the customer lists for other business related purposes, the Court directed that Lawton's lawyers were to keep possession of the list and that no copies could be made. Faced with the prospect of having to disclose their customer list, Mifflin has the option of pursuing a settlement with Lawton's as an alternative to continuing with the litigation process and disclosure obligation. As such, this case also provides a good example of how pre-trial processes create instances when settlement will be seriously considered as an alternative to pressing on with the litigation process.

4. **Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters**
S.C.C., 2009 SCC 53; 2009; 313 D.L.R. (4th) 285

Consolidated Fastfrate operated a freight-forwarding business with branches across Canada. Their business consisted of picking up freight in one province, consolidating it into containers, arranging for transportation to the destination province, and distributing that freight to various locations in the province. The business was managed and rates set at a regional or national level. The branch employees did not cross provincial boundaries, and third-party carriers transferred the containers between branches. A union representing the employees in branches in Alberta, Saskatchewan, and Manitoba applied to the Canada Industrial Labour Relations Board for certification, and in this action the union was applying for a declaration whether the employees should be federally or provincially certified.

Explain the arguments for both sides and the likely decision.

Decision: The Court ruled that the employees of Fastfrate Calgary are subject to provincial jurisdiction. The question whether an undertaking, service or business is a federal one depends on the nature of its operation. An undertaking that performs consolidation and deconsolidation and local pickup and delivery services does not become an interprovincial undertaking simply because it has an integrated national corporate structure and contracts with third-party interprovincial carriers. Fastfrate's operations are entirely intraprovincial. Neither Fastfrate employees, nor its equipment, are involved in any actual interprovincial transport. Section 92(10)(a) of the *Constitution Act, 1867* and the jurisprudence interpreting it do not contemplate that a mere contractual relationship between a shipper and an interprovincial carrier would qualify Fastfrate as an undertaking connecting the provinces or extending beyond the limits of the province. Rather, it is the carriers that physically transport the freight

interprovincially that constitute federal transportation works and undertakings. There is no indication that contracting alone can make intraprovincial undertakings subject to federal jurisdiction. The operational reality of Fastfrate is that it depends on third-party interprovincial carriers to conduct its business. Fastfrate remains a shipper. Its presence at both the originating and terminating ends may mean that it can provide a comprehensive service to its customers, but this does not change the fact that it is still only a shipper using an interprovincial railway or trucking company

As a result, the employees of Fastfrate are subject to provincial laws as to certification as s. 92(13) provincial head of power over “Property and Civil Rights” in the provinces includes labour relations.

5. Wong v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia 2005 BCCA 509, [2005] 260 D.L.R. (4th) 329

Mr. Wong was employed as the registrar for the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, an organization and position established pursuant to the statute in British Columbia. He had been hired to implement an accounting system and an audit determined that he failed to do so. He had also failed to record any of the financial transactions in the previous year. An accounting firm was hired to prepare financial statements as required by the by-laws and to investigate. The firm prepared a report showing that Wong had committed several irregularities including improper overtime pay and expenses and diversion of property belonging to the college. Mr. Wong was not shown the report; rather the board sent him a letter terminating his employment. His solicitor sent a letter wishing to initiate negotiations, which was ignored. Explain any basis Mr. Wong might have to challenge the decision. Explain the likely outcome. Would it make any difference to your answer to know that the findings of misconduct in the report were accurate?

Decision: This case provides a good example of the administrative law rule of “procedural fairness”. The Court of Appeal reversed the Trial Judge’s decision confirming Mr. Wong’s dismissal. The Court of Appeal reversed the decision as the Trial Judge made an “error of law” by failing to consider that Mr. Wong had not been given a copy of the audit report nor an opportunity to respond to that report before the College Board made its decision to terminate him from his position. (It is important to understand that Mr. Wong was entitled to procedural fairness as he was a statutory appointment.) As such, the Court of Appeal reinstated Mr. Wong to his position. In doing so, the Court of Appeal noted that it expected the College Board to reconvene to properly consider its decision to terminate Mr. Wong and that Mr. Wong would be provided a copy of the audit report and an opportunity to “make his case” before the College Board. It is important to keep in mind that the Court of Appeal did not fetter the College Board’s right to determine the matter on this second hearing. Rather, the Court of Appeal reinstated Mr. Wong to ensure that the rule of procedural fairness was followed vis-à-vis Mr. Wong. As such, this case also provides a good example of how “procedural rules” are as important as the “substantive law”. Mr. Wong was reinstated regardless of whether the findings of misconduct in the report were accurate. At the same time, so long as the College Board exercised procedural fairness in dealing with the matter a second time, the Board could still properly decide to terminate Mr. Wong after having provided him his “right to be heard”.

Sample Examination Questions

Multiple Choice Questions

1. Which one of the following statements is not accurate with respect to the Canadian legal system?
 - a. The three major components of present Canadian law are the common law, equity and statutes.
 - b. The traditional supremacy of Parliament to make law has been limited to some extent by the *Charter of Rights and Freedoms*.
 - c. The full normal route of an appeal of a civil action is from a provincial trial court to a provincial Court of Appeal to the Supreme Court of Canada.
 - d. The principle of *stare decisis* provides that courts within a province are bound to follow previous decisions by any other court in that province.
 - e. The original Canadian Constitution is now known as the *Constitution Act (1867)*.

Answer: D

2. (Modify this question for your province) Which of the following is false with respect to our court system?
 - a. A negligence action, where the extent of damage is \$3500, would most likely begin in the B.C. Provincial Court, small claims division.
 - b. The lawyer arguing before the B.C. Supreme Court could cite a British case, but the judge is not bound to follow it.
 - c. A judge on the B.C. Court of Appeal is bound to follow the decision of a judge on the B.C. Supreme Court on an identical case.
 - d. There is no monetary limitation on the B.C. Supreme Court, i.e. the case may involve any amount of money.
 - e. The consequence of the merger of the common law courts with the courts of equity is that the courts now apply both the legal and equitable principles and remedies.

Answer: C

3. Which of the following is incorrect with respect to the Charter and Constitution?
 - a. The *B.N.A. Act (Constitution Act 1867)* divides power between the federal and provincial governments
 - b. The most significant accomplishment of the Constitution Act (1982) was to create a new court structure for Canada.
 - c. The provisions of the *Charter of Rights and Freedoms* guarantees us rights and freedoms that restrict both federal and provincial government.
 - d. Canada is no longer required to go to the Parliament of England for any constitutional change.
 - e. Such rights as freedom of expression are now constitutionally guaranteed.

Answer: B

4. With regard to the process of a civil law suit in a superior court, which of the following is false?
 - a. The plaintiff must prove his case on the balance of probabilities, whereas a prosecutor in a criminal action has to prove his case beyond a reasonable doubt.

- b. A defendant in a civil action might also be charged in a criminal action for the same act, e.g. a battery.
- c. If the defendant makes a payment into court and the eventual award of damages is greater the plaintiff must bear all of the costs of the action.
- d. Failure of the defendant to enter an appearance can result in judgment being taken against him without the court having heard his side of the argument.
- e. If, in the examination for discovery, the defendant admits facts set out in the plaintiff's statement of claim, the plaintiff does not have to prove those facts at trial; he merely reads the admissions from the transcript of the examinations.

Answer: C

5. Which of the following will not override a particular provincial common-law rule as articulated by a trial-court judge in a Small claims court in the province?
- a. A contrary subsequent ruling by the Court of Appeal of the province
 - b. A new provincial statute to the contrary
 - c. A contrary subsequent ruling by the Supreme Court of Canada
 - d. A contrary subsequent ruling by an Appeal court judge in another province
 - e. A contrary subsequent ruling by the superior trial level court of the province.

Answer: D

6. Which one of the following statements is false with respect to Canadian constitutional law?
- a. The *Charter of Rights and Freedoms* sets out basic rights and freedoms of Canadians that cannot be limited in any way
 - b. The Canadian Constitution can now be amended by Canadians without having to seek the cooperation of the British Parliament.
 - c. The final word on the meaning of the provisions of the Canadian Constitution is left to the Supreme Court of Canada.
 - d. The federal Parliament and the provincial legislatures have separate, exclusive legislative powers
 - e. The federal or provincial legislatures may pass legislation contrary to some sections of the Charter of Rights and Freedoms if they say that they are doing so.

Answer: A

7. Which of the following is not one of the requirements of natural justice?
- a. Notice of the hearing
 - b. An opportunity to present your side
 - c. The rules of evidence be adhered to
 - d. The decision be made free from bias
 - e. That the evidence be heard by the person making the decision

Answer: C

8. A privative clause is which of the following?

- a. A privative clause is a provision in a statute attempting to prevent the courts from reviewing the decision of an administrative tribunal
- b. A privative clause is an attempt to restrict the decision-making powers of administrative tribunals to a closely confined area
- c. Privative clauses restrict certain people from participating in administrative tribunals
- d. The privative clause refers to the section of the *Charter of Rights and Freedoms* that prevents the Charter from applying to private or non-governmental matters
- e. A privative clause creates an actionable tort in various privacy statutes

Answer: A

Short Answer Questions

1. Explain what is meant by the phrase *stare decisis*?

Answer: This means essentially “let the decision stand” and involves the process existing in the common-law system whereby a judge must follow another judge’s decision. This makes the law consistent and predictable.

2. What role does the decision made by an Ontario Court of Appeal judge have on a B.C. Supreme Court judge?

Answer: The decision is merely persuasive. It is not binding since that judge is not in the same court hierarchy (i.e. B.C. Court of Appeal, Supreme Court of Canada).

3. Explain the relationship between regulations and statutes?

Answer: Often a statute will empower a particular government department to develop regulations to enforce the provisions of that statute: e.g. the *Employment Insurance Act*, *Workers Compensation Act*, etc. These regulations have the force of legislation if they are passed properly pursuant to the statutes.

4. Canada's Constitution is embodied in the *British North America Act*. Explain the accuracy of that statement?

Answer: This is incorrect. Canada has a constitution similar to Great Britain, which is an unwritten constitution that includes a great many separate constitutional documents such as the Magna Carta, English Bill of Rights, etc. *The British North America Act* is just one of the elements of that constitution. The *British North America Act* is now referred to as the *Constitution Act (1867)*.

5. Explain the origin of equity in our legal system

Answer: Equity refers to that body of law created by the courts of chancery designed to compensate for the harshness and limitations of the common law.

6. What is the significance of the *Constitution Act (1867)*?

Answer: It created the Dominion of Canada and it divides powers between the Federal and Provincial governments.

7. Explain the limitations on the application of the *Charter of Rights and Freedoms*?

Answer: The *Charter* only applies to public matters such as government and the laws they create. This applies to the federal provincial and municipal levels of government and all government agencies. Also, Section 33 allows the opting out of some of the provisions of the *Charter* and Section 1 allows for reasonable exceptions.

8. Indicate the function and nature of a Notice of Civil Claim.

Answer: The Notice of Civil Claim is the document where the allegations which must be established in the court action are set out. This gives notice to the defendant as to what case he must meet. It is not an argument, rather just a summary of allegations.

9. Explain why the Examination for Discovery can be so important in any court action?

Answer: Often admissions are made in the examination for discovery process, which cause the action to be abandoned or clarify matters so as to encourage settlement. Since this information is taken under oath it can be used later at the trial.

10. Distinguish between mediation and arbitration.

Answer: Mediation refers to a situation where a third party assists the two principle parties to come to an agreement. The decision and recommendations of a mediator are not binding on those parties. An arbitrator is also an independent third party who hears submissions from both sides, but acting much like a judge and in contrast to the very limited functions of a mediator, makes a decision that is binding on both parties.

11. Indicate three of the requirements of the rules of natural justice.

Answer: A fair hearing, notice, that the decision be heard by the decision-maker and that the decision-maker be free of bias.

12. What constitutes a fair hearing?

Answer: What constitutes a fair hearing will vary with the circumstances and it might be all the way from an opportunity to put your case before the decision-maker in person to merely the right to write a letter. In any case, it requires that you be notified as to a decision that's going to affect you and to be given an opportunity to put your case forward.

Essay Topics

1. Explain the relationship between common law equity and statutes in the development of our legal system.
2. Explain the role the *British North America Act* played in Canada's constitutional history.
3. Discuss the significance of the passage of the *Charter of Rights and Freedoms* in Canada's legal system. In your answer consider any limitation on its application.
4. One of the greatest weaknesses in our court system is the unreasonable delay when one person sues another. Discuss the validity of that statement.
5. Discuss the options that are available to a successful litigant in enforcing that judgment, against the loser.
6. Consider the alternatives to going to court and suing someone that are available and discuss the relative merits of these different courses of action.
7. Discuss what constitutes a fair hearing.