PART I

Legal Framework

Understanding the legal framework through which employment-related laws are created, interpreted, and enforced is foundational for understanding specific legal requirements within the workplace.

Chapter 1 provides a brief historical overview of employment law—so we know how we got to where we are—and then explains how jurisdiction over employment law is divided between the federal and provincial/territorial governments. With a focus on Ontario, Chapter 1 provides a summary of key employment statutes and then explains the relevance of the two main areas of the common law (contract and tort) that affect the workplace. The impact of section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* on employment law, as well as the structures and legal processes through which legal disputes within the workplace are adjudicated, are also addressed.

Finally, Chapter 1 looks at the fundamental issue of how to distinguish between employees, dependent contractors, and independent contractors (who are in business for themselves), as well as the legal implications of those distinctions.

Overview of Legal Framework

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LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Identify the three main sources of employment law and their respective roles.
- Understand how and why employment law changes.
- Understand jurisdiction over employment law.
- Identify key employment-related statutes, with a particular focus on Ontario and federal law.
- Understand the relevance of the *Canadian Charter of Rights and Freedoms* to employment law.
- Understand the judicial and administrative systems that interpret employment laws.
- Distinguish between an employee, a dependent contractor, and an independent contractor.

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.

As an employment law text, the focus is on non-unionized employees—individuals whose terms and conditions of work are based on an individual contract of employment between them and their employer. Issues specific to unionized employees, whose terms and conditions of employment are collectively bargained for and governed by a collective agreement, are not, for the most part, covered.

Sources of Employment Law

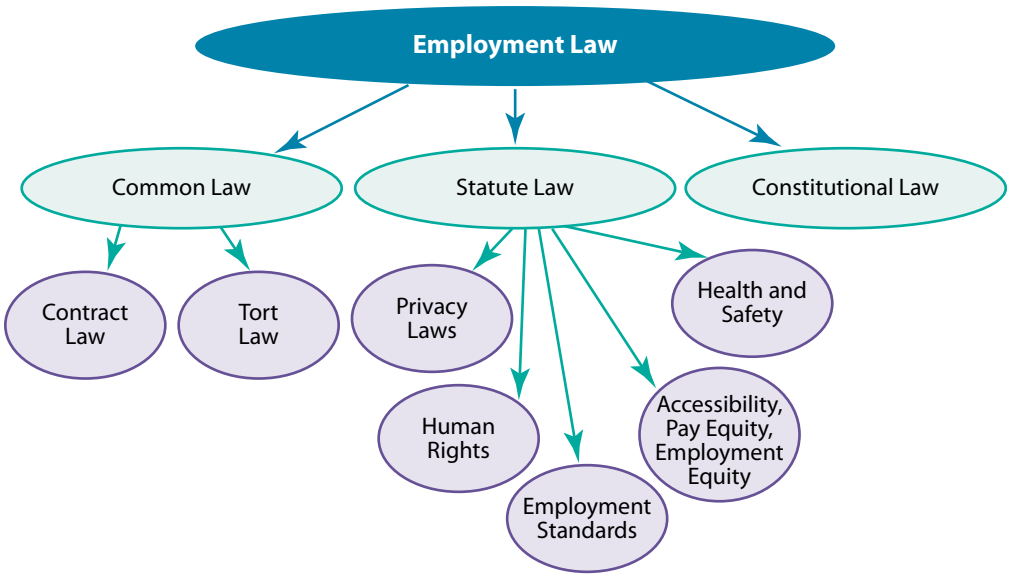
statute law
law passed by a government legislative body

constitutional law
in Canada, a body of written and unwritten laws that set out how the country will be governed, including the distribution of powers between the federal government and the provinces

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

There are three main sources of employment law in Canada: **statute law** (legislation passed by legislative bodies, such as Canada's Parliament), **constitutional law** (the *Canadian Charter of Rights and Freedoms*), and **common law** (judge-made law). See Figure 1.1. 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 often gradually adopts many statute-based principles. A discussion of statute, constitutional, and common law is set out below.

FIGURE 1.1 ***Visual of Legal Framework for Employment Law***



Generally speaking, most employee rights contained in statutes apply to unionized and non-unionized employees alike, while common law (judge-made) rights and remedies, such as the right to sue for wrongful dismissal, apply only to non-unionized employees.

Statute Law

What Is a Statute?

A statute is a law passed by the federal or provincial/territorial legislatures. Statutes are sometimes referred to as "legislation" or "acts." The Ontario *Human Rights Code* is an example of a statute.

Why Are Statutes Passed? Why Are They Amended?

Employment statutes are usually passed because the government of the day 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.

There is a wide range of factors that can lead to changes in employment law. Two of these are *demographic shifts* and *changing social attitudes*. One example that relates to both these factors is the dramatic increase in the number of women in the paid workforce over the past several decades, which has led to significant additional statutory requirements, including pay equity and increased pregnancy and parental leave. *Changes in technology* have drawn attention to the need for greater privacy protection and employer transparency, while *shifts within the economy and the nature of work* are beginning to result in laws to better protect workers in non-standard (e.g., temporary, "gig," or part-time) jobs. More recently, the almost complete shutdown of the economy due to the COVID-19 pandemic, starting in March 2020, led to a series of ongoing amendments to employment standards legislation, including the adoption of temporary paid sick leave.

Another factor that can lead to changes in employment laws occurs when there is a *change in the political party in power*. This can result in enhancements—or on occasion even a reversal—of worker rights. For example, effective April 2018 the then-Liberal government amended Ontario's *Employment Standards Act, 2000* to prohibit pay differences based on employment status (e.g., part-time versus full-time workers). However, when the Progressive Conservative Party came to power in June 2018, one of its first actions was to introduce legislation to repeal many of those amendments, including the equal pay provision. Thus the right of Ontarians who work part-time to be paid the same hourly rate as those working full-time if they are performing the same job (subject to certain exceptions) was eliminated after being in effect for only nine months.

Read online: "How Ontario Obtained Pay Equity Legislation"

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 (or possibly will not) be, effective in achieving that goal.

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Before There Were Employment Statutes ...

With the arrival of Europeans, Canada's economy was initially resource-based and agrarian; however, by the late 19th century, settler society was increasingly characterized by urbanization and industrialization. Working conditions in early factories were harsh—a 70- to 80-hour workweek was the norm—and unsafe. Meanwhile, workers faced many barriers to unionization, and there were very few protective employment statutes. Instead, 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.

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

Photo 12/Alamy Stock Photo.

Working conditions in the early years of industrialization were often extremely harsh.

SOURCE: Based on lecture notes by Professor David Doorey as part of his Employment Law 3420 course, 2009, York University, Toronto. See also "History of Employment Law in Canada" blog at Heritage Law Offices, posted on August 16, 2018, available at https://www.heritagelaw.com/blog/history-of-employment-law-in-canada/.

How Statutes and Regulations Are Made: The Legislative Process

A statute first takes the form of a written bill. (A bill is essentially an idea written into legal language and presented to the legislature for consideration.) In Ontario, a bill is introduced to the legislature by a member of the provincial Parliament (MPP), while federally it is introduced by a member of Parliament (MP). To become a provincial/territorial statute, a bill must pass three readings in the provincial/territorial legislature and then receive royal assent. 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 before receiving royal assent. The following description of the legislative process concerns provincial legislation because the provinces pass most laws related to employment.

There are two main types of bills: public bills and private bills.

1. *Public bills*. Public bills create laws that relate to matters of public interest; they do not just apply to a particular individual or group. Government (public) bills—the most common and well-known type of bill—are introduced in the legislature by the Cabinet minister (denoted by having the term "Honourable" or "Hon." before their name), 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 to a current statute or an entirely new piece of legislation. First reading introduces the bill. On second reading, members of provincial Parliament 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 by clause before reporting back to the legislature. Sometimes the bill is revised (amended) before its third and final reading to take into account input from the public or from opposition parties. After third reading, there is a vote in the legislature, and if a majority of MPPs vote in favour of the bill, it is passed.

   Figure 1.2 outlines the steps of how a bill becomes a law in Ontario.

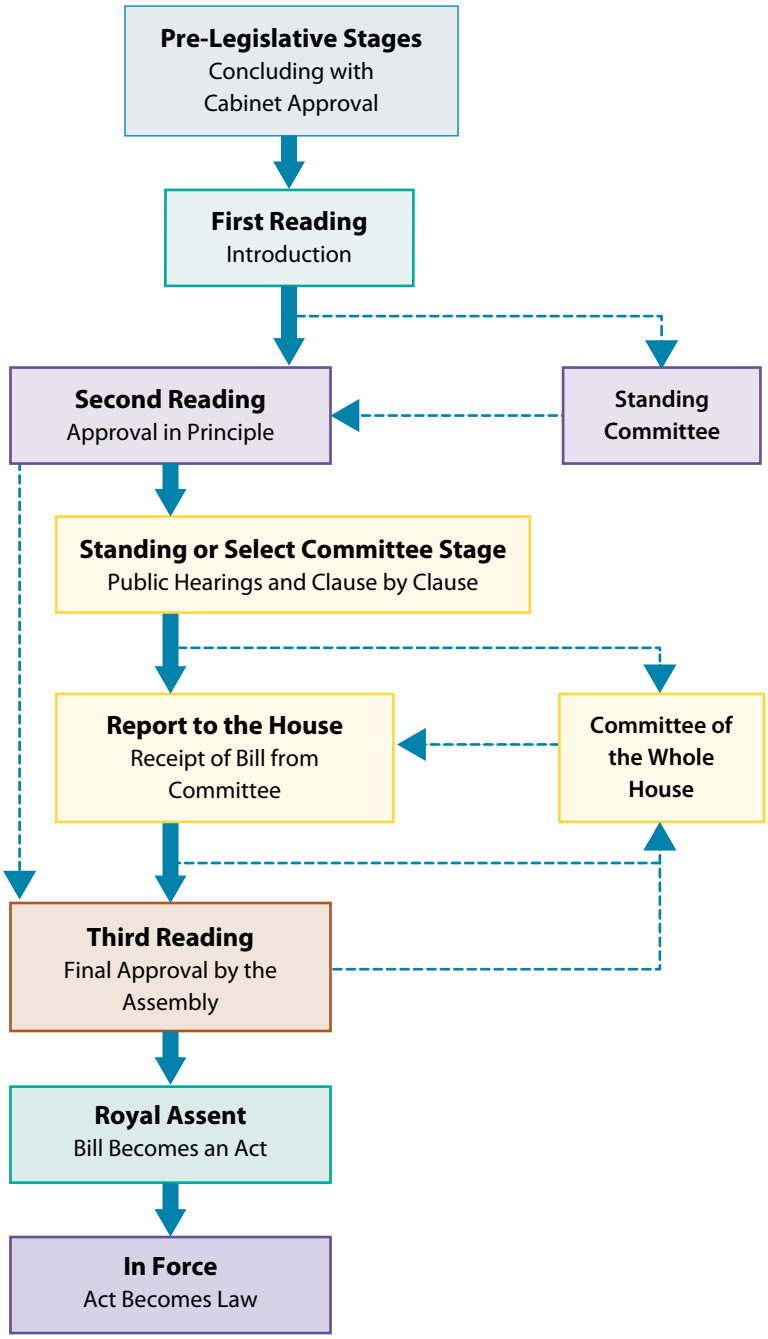
   A second type of public bill is called a "private member's bill." This rather confusing name results from the fact that while the bill relates to matters of public importance and applies to everyone—such as a proposed amendment to the *Human Rights Code*—it is put forward by a private member of the legislature, not by a Cabinet minister. As such, a private member's bill typically does not have much chance of becoming law and is often tabled to stimulate public debate on an issue or to make a political point. It usually, but not always, "dies on the order paper."

2. *Private bills*. Private bills relate to matters of particular interest to one specific individual or group—for example, a private bill that grants tax exemption status to a particular charity organization—and so are of limited scope and relevance. Private bills tend to be short in length, and they start with the prefix "PR" (e.g., Bill PR47). Any MPP (other than a minister) may introduce a private bill into the legislature.

WEBLINK

See https://www.ola.org/en/legislative-business/bills to view bills from past (since 1995) and current sessions of the Ontario legislature.

FIGURE 1.2 *How an Ontario Bill Becomes Law*



SOURCE: Adapted from https://www.ola.org/sites/default/files/common/how-bills-become-law-en.pdf.

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

- on royal assent: the statute comes into force without the need for additional steps;
- on a particular date: the statute itself names the date on which it comes into force; or
- on proclamation: the statute comes into force on a date to be 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.

royal assent
a largely symbolic process through which the English sovereign (the "Crown") or their representative formally approves a new law passed by a Canadian Parliament

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 Ontario Ministry of Labour, Immigration, Training, and Skills Development's website (http://www.labour.gov.on.ca) and the Canadian Legal Information Institute (CanLII; http://www.canlii.org) are two good places to find the most up-to-date version of employment-related statutes and Canadian cases.

While statutes contain the main requirements of the law, detailed rules on how to implement or administer a statute, or on exemptions, are often found in its regulations. **Regulations** (also known as delegated legislation) are rules made under the authority of a statute. For example, Ontario's *Employment Standards Act, 2000* states that there is a minimum wage for most occupations in Ontario. However, the exact dollar amount of that minimum wage for various occupations is found in the regulations that accompany the Act.

regulations
rules made under the authority of an enabling statute

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 (e.g., in Ontario in the *Ontario Gazette*) to ensure public awareness. Therefore, they are more easily made and amended than the actual statute itself.

Statutory Interpretation

Judges or members of administrative tribunals (adjudicators appointed pursuant to a statute) interpret legislation while adjudicating cases. They have developed a number of 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. *Jantunen v Ross* provides a good example of this approach to statutory interpretation.

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, or an introduction or preamble that explains a statute's purpose, can help the court in its interpretive role. For example, the broad preamble to Ontario's *Human Rights Code*, which includes as its aim "the creation of a climate of understanding and mutual respect for the dignity and worth of each person," 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 in interpreting statutes.

CASE IN POINT

Court Uses Mischief Rule to Interpret Statute

Jantunen v Ross, 1991 CanLII 7141, 85 DLR (4th) 461 (Ont Sup Ct J (Div Ct))

Facts

Ross, a waiter, borrowed money from the Jantunens, the plaintiffs. He never paid it back. The plaintiffs sued for repayment and obtained a judgment in their favour. Under Ontario's *Wages Act*, the plaintiffs had the right to garnishee (seize) 20 percent of Ross's wages; the other 80 percent was exempt from garnishment. Because Ross earned minimum wage, tips constituted a large portion of his earnings. The plaintiffs argued that they should be able to garnishee his tips, without regard to the 20 percent limit, since tips were not wages paid by his employer and therefore were not covered by the *Wages Act*. Ross argued that he needed his tips to pay his living expenses.

Relevant Issue

Whether tips qualify as wages for the purposes of the *Wages Act*.

Decision

Although tips are not mentioned in the *Wages Act*, they qualify as wages and are therefore protected. The Court interpreted the term "wages" in accordance with the "underlying intent and spirit" of the *Wages Act*—that is, to allow debtors to pay off creditors while still being able to support themselves. Since tips were a significant portion of Ross's earnings, garnishing them entirely would undermine Ross's ability to support himself. Thus, the Court's decision to include tips in the definition of "wages" addressed the mischief that the legislation was aimed at.

What Levels of Government Can Pass Employment-Related Statutes?

Canada is a federal state with three levels of government: federal, provincial/territorial, and municipal. Municipalities have no jurisdiction over employment, although they can pass by-laws on matters that affect the workplace, such as smoking.

The federal government has authority over only about 10 percent of employees in Canada. This is because in 1925 the Court ruled in *Toronto Electric Commissioners v Snider* that the federal government's legislative authority was limited to industries of national importance, such as banks and interprovincial communications. As a result of this decision, approximately 90 percent of employees in Canada are covered by provincial/territorial employment legislation. For this reason, this text focuses primarily on provincial/territorial employment legislation (with particular emphasis on Ontario) rather than on federal employment laws, which are touched upon briefly below.

Although employment laws in all the provinces are similar in principle, they vary in detail and should be referred to specifically when issues related to employees outside Ontario arise.

Key Ontario Employment Statutes

The following are the key employment statutes in Ontario:

- The *Employment Standards Act, 2000* sets out minimum rights and standards for employees, including minimum wages, overtime, hours of work, termination and severance pay, and numerous types of leaves, including pregnancy and parental leave, vacation, and public holidays. More recently, amendments requiring employers with 25 or more employees to develop policies on electronic monitoring of employees and on rights around disconnecting from work have been added.
- The *Human Rights Code* is aimed at preventing and remedying discrimination and harassment based on specified prohibited grounds.

- The *Labour Relations Act, 1995* deals with the rights of employees to unionize and the collective bargaining process.
- The *Occupational Health and Safety Act* (OHSA) outlines the requirements and responsibilities of parties in creating a safe workplace and preventing workplace injuries and accidents, and includes provisions related to workplace violence and harassment.
- The *Workplace Safety and Insurance Act, 1997* (formerly the *Workers' Compensation Act*) provides a no-fault insurance plan to compensate workers for work-related injuries and diseases. It also allows employers to limit their financial exposure to the costs of workplace accidents through a collective funding system.
- The *Pay Equity Act* addresses the issue of gender discrimination in compensation. It requires employers with ten or more employees to provide equal pay for work of equal value.
- The *Accessibility for Ontarians with Disabilities Act, 2005* provides the legal basis for the development of accessibility standards in five key areas: customer service, information and communications, employment, transportation, and the built environment (design of public spaces).

F Y I

Why Most Employees in Canada 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 Court 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 employees of the federal government and industries of national importance, such as national transportation and communication. Industries that are federally regulated include:

- navigation and shipping,
- interprovincial communications and telephone companies,
- interprovincial buses and railways,
- airlines,
- television and radio stations,
- the post office,
- the armed forces,
- departments and agencies of the federal government,
- Crown corporations, and
- chartered banks.

All other employers are provincially regulated.

Note that 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 a bank in Ontario is governed by the same federal employment statutes as a bank in Saskatchewan. In contrast, a provincially regulated employer that operates businesses throughout Canada will have its Ontario employees covered by Ontario's employment laws and its Saskatchewan employees covered by Saskatchewan's employment laws.

All of these statutes, except for the *Labour Relations Act*, are covered in this text. The *Labour Relations Act* deals with unionized workplaces and thus is dealt with only briefly in this book. However, for organizations that are unionized or face the real possibility of unionization, an understanding of the law setting out how unions organize, of employee rights during an organizing drive, and of the collective bargaining process is of critical importance.

Several different laws 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 that employee to return. However, an employee may be required to choose which law they will proceed under. For example, the Human Rights Tribunal has the power to defer hearing an **application** where the fact situation is the subject matter of another proceeding. Moreover, the Tribunal may dismiss an application if it decides that the substance of the application has already been appropriately dealt with in another proceeding.

application
a claim of a human rights violation

Federal Employment Statutes

As noted above, 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 collective bargaining (Part I); health and safety (Part II); and employment standards (Part III); and
- the *Canadian Human Rights Act*, which covers human rights and pay equity.

These statutes are similar in principle to their provincial counterparts, but there are some differences in the rights and protections granted. This text does not discuss these two statutes in detail because only 10 percent of employees in Canada are covered by them.

The following two federal statutes do not have provincial counterparts in Ontario. However, they are discussed in Chapters 6 and 10, respectively, because their concepts and requirements are relevant to provincially regulated employers:

- the *Employment Equity Act*, which requires affirmative action initiatives for visible minorities, women, people with disabilities, and Aboriginal (Indigenous) people; and
- the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which establishes rules concerning how organizations may collect, use, and disclose personal information. For federally regulated employers, this includes the personal information of clients, customers, suppliers, contractors, and employees. In Ontario, and in the other provinces where there is no general provincial legislation comparable to PIPEDA, provincially regulated employers must follow PIPEDA with regard to the personal information of their clients, customers, suppliers, and contractors (i.e., commercial relationships) but not for employees. This is due to the constitutional division of powers between the two levels of government. In contrast, in Alberta, British Columbia, and Quebec, where there is comparable provincial legislation, employers must comply with their own province's, rather than PIPEDA's, privacy requirements for all groups, including employees.

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

- the *Canada Pension Plan*, which provides qualifying employees with pension benefits on retirement and permanent disability; and

- the *Employment Insurance Act*, which provides qualifying employees with partial income replacement during periods of temporary unemployment, including certain leaves, most notably pregnancy and parental leaves.

Where to Find Employment Statutes

The federal and provincial/territorial 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.

Three useful Internet search sites are:

1. The Canadian Legal Information Institute
   - https://www.canlii.org
     To locate a provincial statute or regulation, choose the desired province under the "Primary Law" heading and then "Consolidated Statutes" or "Regulations" under the "Legislation" heading.
2. e-Laws
   - https://www.ontario.ca/laws
     e-Laws is a good source for Ontario statutes and regulations. The site is run by the Ontario government.
3. Justice Laws Website
   - https://laws.justice.gc.ca
     This Department of Justice Canada website is a good source for Canadian federal statutes and regulations.

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 is involved. They 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 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 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 an employment law perspective, the most important guarantee in the Charter 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 below, 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 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": in deciding if a law or government action is discriminatory it is the effect, not the intent, that matters. The test is whether the government has made a distinction that has the effect of perpetuating arbitrary disadvantage on someone because of their membership in an enumerated or analogous group. In short, if the government action "widens the gap between an historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory" (*Quebec (Attorney General) v A*).

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. This decision also illustrates the difference between "substantive" and "formal" equality rights.

In *Vriend*, the Supreme Court actually "read in" to 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" (para. 98). Similar reasoning would apply to grounds such as "gender identity," which while not generally considered when the Charter came into being, would now clearly qualify as an analogous ground.

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 legislation.

CASE IN POINT

Supreme Court of Canada Takes Expansive Approach to Equality Rights

Vriend v Alberta, [1998] 1 SCR 493, 1998 CanLII 816

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 and, 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 (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 due to its failure to include this ground. 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 formal equality argument that the IRPA was not discriminatory because it treated homosexuals and heterosexuals equally since neither one was protected from discrimination based on sexual orientation. The Court noted that, looking at the social reality of discrimination against gay men and lesbians, the omission of sexual orientation from the human rights statute clearly was far more likely to impact gay men and lesbians negatively than heterosexual persons. As a result, gay men and lesbians 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.

Impact of the Charter on Private Sector Employers

The Charter directly applies *only to government actions and conduct*, such as passing legislation, or where the employer is itself part of the **public sector**. It does not apply to the actions of individuals or **private sector** employers and employees. It is essentially a restraint on government power. 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 (i.e., government action) that is found to contravene the Charter. For example, in *Ontario Nurses' Association v Mount Sinai Hospital*, a disabled employee whose employer relied on a statutory exemption to refuse to pay her severance pay under the *Employment Standards Act* (ESA, now the *Employment Standards Act, 2000*) used the Charter to successfully challenge that exemption.

public sector
operations run by or through government

private sector
operations not run by or through government but by private enterprise

As a result of this decision, the Ontario government amended the ESA to allow employees whose employment is frustrated because of disability to receive both severance pay and pay in lieu of notice. These changes affect all employees, regardless of whether their employer is in the public or the private sector. For two other examples of Charter challenges to employment-related legislation, see the In the News box in this chapter on page 17 and the Case in Point on page 18.

Disabled Employee Challenges Denial of Statutory Severance Pay

CASE IN POINT

Ontario Nurses' Association v Mount Sinai Hospital, 2005 CanLII 14437, [2005] OJ No 1739 (QL) (CA)

Facts
Christine Tilley was hired as a nurse in the neonatal intensive care unit at Mount Sinai Hospital in 1985. Ten years later she seriously injured her knee in a waterskiing accident. Because of subsequent complications, including depression, she was unable to return to work and in 1998 the hospital terminated her employment on the ground of innocent absenteeism. The employer refused to pay Tilley statutory severance pay under the ESA because the Act contained an exception for employees whose ability to remain on the job has been "frustrated" (made impossible) as a result of an illness or injury. Tilley challenged this refusal, arguing that the exception violated her section 15 equality rights under the Charter. The employer countered that the legislation was not discriminatory because the

main purpose of statutory severance pay is prospective—to compensate employees as they move on to find new employment. It contended that employees whose employment has become frustrated because of severe injury or illness are unlikely to return to the workforce, and therefore it is not discriminatory to deny them this form of compensation.

Relevant Issue

Whether section 58(5)(c) of the ESA, which creates an exception to an employer's obligation to pay severance pay to employees whose contracts of employment have been frustrated because of illness or injury, contravenes section 15 of the Charter.

Decision

The Ontario Court of Appeal found that the denial of ESA severance pay to employees whose contracts have been frustrated because of illness or injury violated the Charter's equality rights provision. The Court held that even if it accepted the employer's argument that the dominant purpose of severance pay is prospective—to compensate those employees who will return to the workforce—this exception still contravenes section 15. This is because differential treatment based on disability is premised on the inaccurate stereotype that people with severe and prolonged disabilities will not return to the workforce. The Court concluded that this stereotype "can only have the effect of perpetuating and even promoting the view that disabled individuals are less capable and less worthy of recognition and value as human beings and as members of Canadian society" (para. 37).

As a result, section 58(5)(c) of the ESA was struck down and Tilley was entitled to statutory severance pay.

F Y I

Analyzing Charter Challenges: A Two-Step Process

When considering a Charter challenge, the first step is to decide whether a Charter right or protection has been violated.

If a Charter right or protection has been violated, the second step is to decide whether that violation is justifiable under section 1 as a reasonable limit in a free and democratic society.

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* [emphasis added].

In the watershed case of *R v Oakes*, the Supreme Court of Canada set out a two-part test (i.e., an "ends" part and a "means" part) 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 (the "ends" part of the test); 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 (the "means" part of the test).

Unless a law passes both parts of the *Oakes* test, the portion of the law that violates the Charter will be found to be unconstitutional. The burden of proof is on the party (i.e., the government) arguing that the infringement is justified.

For example, in the *Ontario Nurses' Association* decision discussed above, the employer argued that even if the ESA's exemption that denied statutory severance pay to disabled employees whose contracts of employment have been frustrated contravened section 15 of the Charter, it was saved by section 1. In the employer's view, it was a reasonable and justifiable limit because the government is entitled to balance the interests of employers and employees by limiting the availability of severance pay. However, the Court rejected this argument. First, it held that this objective (the "ends") was not sufficiently compelling to override the right of disabled persons to equal treatment in employment. Second, it found that there was no rational connection between the objective of granting severance pay to those employees who will rejoin the workforce and the law denying severance pay to employees whose contracts have been frustrated because of illness or injury.

IN THE NEWS

Charter Challenge to Workplace Laws

In 2008, Saskatchewan passed legislation to prohibit certain public service workers from taking strike action. These laws were challenged by the Saskatchewan Federation of Labour (https://sfl.sk.ca) and a group of other unions on the grounds that they infringed the Charter's guarantee of freedom of association.

The Supreme Court of Canada ruled that the Saskatchewan laws were unconstitutional because they interfered with the collective bargaining process in a meaningful way (*Saskatchewan Federation of Labour v Saskatchewan*). They exceeded what was reasonably necessary to protect essential public services during a strike. This was the first time the Court held that the right to strike is included in freedom of association (Department of Justice, 2022).

This decision was relied upon by Ontario's Superior Court of Justice in its 2022 decision that Bill 124—a provincial bill that placed a 1 percent cap on wage and other compensatory increases for certain public and quasi-public sector employees for a three-year period—was unconstitutional. Moreover, applying the *Oakes* test, the Court held that Bill 124 could not be justified as a reasonable limit on freedom of association in a free and democratic society (s. 1). As of the time of writing, the government has announced its intention to appeal the Court's decision to the Court of Appeal for Ontario.

In *Fraser v Canada (Attorney General),* the Supreme Court of Canada upheld a Charter claim and found that the violation of Charter rights could not be justified under section 1 as a reasonable limit to those rights.

CASE IN POINT

Charter's Rights Protect Job Sharers' Rights

Fraser v Canada (Attorney General), 2020 SCC 28

Facts

In 1997 the RCMP introduced a job-sharing program whereby employees could split the job duties of one full-time position for a certain period of time, at reduced pay. The claimants were three female RCMP members who, after returning from maternity leave, chose to participate in this program because of the flexibility it provided. Indeed, most job-sharing participants were women with young children. However, when the plaintiffs later asked if they could purchase their job-sharing services under the RCMP pension plan's buy-back provisions, they were told they could not do so because job-sharing was akin to part-time work, for which no buy-back was available under the employer's pension plan. In contrast, full-time members who had been suspended from work or had taken unpaid leaves were able to buy back all or a portion of those periods away from work.

The claimants brought an application in the Federal Court based on section 15(1) of the Charter, arguing that the pension consequences of job-sharing have an adverse impact on women. The Federal Court, and later the Federal Court of Appeal, held that section 15(1) was not violated because there was insufficient evidence that job-sharing was disadvantageous compared to unpaid leave. The claimants appealed to the Supreme Court of Canada.

Relevant Issue(s)

Whether the RCMP pension plan's treatment of the employees in its job-sharing program violated the section 15(1) equality provisions of the Charter.

Decision

The Supreme Court of Canada decided in favour of the claimants. The pension plan's treatment of participants in the job-sharing program created a distinction based on sex and imposed a burden (or denied a benefit) in a manner that had the effect of reinforcing, perpetuating, or exacerbating disadvantage on the basis of sex. Job-share participants were predominately women, and therefore requiring them to sacrifice pension benefits was adverse impact discrimination—that is, discrimination that arises when a seemingly neutral law has a disproportionate impact on members of a group protected under the Charter.

Furthermore, the Court held that the federal government had not identified a pressing and substantial policy concern, purpose, or principle that explained lack of eligibility, and therefore it could not be justified as a reasonable limit under section 1 of the Charter. In ordering the remedy, the Court held that facilitating buy-backs should have retroactive effect for both the claimants and for others who are similarly situated.

Note that the Charter was engaged in this case (i.e., government activity was involved) because the RCMP pension plan was established through federal legislation, unlike a private pension plan (Fremont et al., 2020a).

Section 33: The Notwithstanding Clause

A second potential limit on the Charter's rights and freedoms is found in section 33, the 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. Until recently, this section was rarely invoked because few governments wanted to admit to knowingly infringing Charter rights. However, some governments in Canada are now reaching for section 33 more readily. For example, Quebec invoked section 33's notwithstanding clause when it brought in the *Laicity Act*, the 2019 law that bans many civil servants, including police officers, prison guards, judges, and teachers, from wearing religious symbols at work. This includes crosses, turbans, hijabs, and yarmulkes.

Common Law

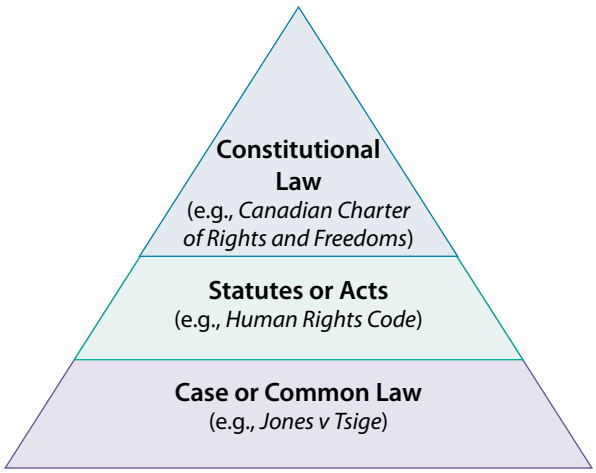
What Is the Common Law?

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 employees. (See the "Defining the Employment Relationship" section in this chapter for a further discussion of this topic.)

case law
law made by judges, rather than legislatures, that is usually based on the 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 with it. Regular statutes are in the middle. Common law is at the bottom since statute law takes precedence over judge-made law. Figure 1.3 illustrates this hierarchy.

FIGURE 1.3 ***Pyramid of Laws***



SOURCE: Adapted from Alexandrowicz et al. *Dimensions of Law: Canadian and International Law in the 21st Century* (Toronto: Emond Montgomery, 2004).

Within the bottom tier, law formulated by the Supreme Court of Canada is the most significant, followed (in Ontario) by law formulated by the Ontario Court of Appeal, then the Ontario Superior Court of Justice and the Ontario Court of Justice. 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

precedent
a legal decision that acts as a guide in subsequent cases

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

persuasive
term used for a precedent from another jurisdiction or from a lower court, convincing but not binding

distinguishable
term used for a precedent from a higher court that a lower court decides not to follow, usually because the facts in the case differ

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.

F Y I

Where the "Common Law" Comes From

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, p. 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.

cause of action
the factual basis on which a legal claim can be made

Occasionally there are watershed cases where 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. On occasion, a higher-level court may even decide to establish an entirely new **cause of action**. (See an example of such a case in Chapter 10 in Case in Point entitled "Ontario's Appellate Court Recognizes New Tort: 'Intrusion upon Seclusion.'")

Read online: "Ontario Court of Appeal Creates New Tort," about a key case in which Ontario's appeal court explicitly recognized a new legal claim for "intrusion upon seclusion."

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 an employer and a non-unionized employee is contractual.* An employer and a

prospective 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 employee–employer relationship exists and what remedies apply to a breach of the employment agreement.

One contract principle that has a significant impact on employment law in Canada relates to dismissal. All employment contracts, whether written or oral (unless the parties expressly agree otherwise), contain an implied term that an employee is entitled to reasonable notice of dismissal, or pay in lieu of notice, unless the dismissal is for **just cause** (very serious misconduct). In other words, absent an express and enforceable termination provision in the contract, the employer must provide reasonable advance notice of dismissal or pay instead of notice. 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 non-union employment relationship, including hiring, using written employment contracts, and managing job performance (Gilbert et al., 2000, p. 15). 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.

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

contract law
a branch of civil law (non-criminal law) that governs agreements between people or companies to purchase or provide goods or services

just cause
very serious employee misconduct or incompetence that warrants dismissal without notice

damages
losses suffered as a result of the other party's actions

plaintiff
in civil law, the party that brings an action

defendant
in civil law, the party against which an action is brought

tort law
a branch of civil law (non-criminal law) that governs wrongs for which a legal remedy is available independent of any contractual relationship

civil law
law that relates to private, non-criminal matters, such as property law, family law, and tort law; alternatively, law that evolved from Roman law, not English common law, and that is used in certain jurisdictions, such as Quebec

duty of care
a legal obligation to take reasonable care in the circumstances

F Y I

Standards of Proof

In civil (non-criminal) actions, the burden of proof is on the plaintiff to prove all the elements required for a successful claim on the "balance of probabilities." This standard of proof means that it is "more likely than not" that the plaintiff's position is correct (50 percent plus 1).

In contrast, the criminal standard of proof is much higher, requiring the Crown to prove its case beyond a "reasonable doubt": in other words, to the point where a reasonable person could not rationally or logically doubt the accused's guilt.

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 or a negligent action. To establish a negligent tort, the plaintiff must show that:

1. the defendant owed the plaintiff a **duty of care**;
2. the defendant breached that duty by falling below the standard of care required; and
3. the plaintiff suffered *foreseeable* damages as a result.

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 negligent tort occurs, for example, when an employer unintentionally but 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. For example, 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.

Where to Find Common Law Cases

Court decisions are found in a number of case reporters—national, regional, provincial, and topical. These are periodical publications containing judges' written decisions. Discussions of case law can be found in encyclopedic digests, textbooks, loose-leaf reporting series, and newsletters. *Increasingly, however, most legal searches are done online*. For example, CanLII is a free Internet database that contains thousands of legal decisions from across the country. The website (https://www.canlii.org) is run by the Federation of Law Societies of Canada, which is the umbrella organization of Canada's 14 law societies.

A typical neutral case citation looks as follows: *Howard v Benson Group*, 2015 ONSC 2638. This citation references a 2015 decision of the Ontario Superior Court. The "2638" refers to the unique identifier number assigned to this specific decision. The party bringing the action is the plaintiff (Howard), and the party named following the "v" (versus, but properly said out loud as "and") is the defendant (Benson Group). In an appeal case, the first party named is the **appellant** (the party requesting the appeal), and the party named after the "v" is the **respondent** (the party opposing the appeal).

appellant
the party appealing from a previous decision of a lower court or tribunal

respondent
the party opposing an appeal of a previous decision by a lower court or tribunal

Judicial Framework

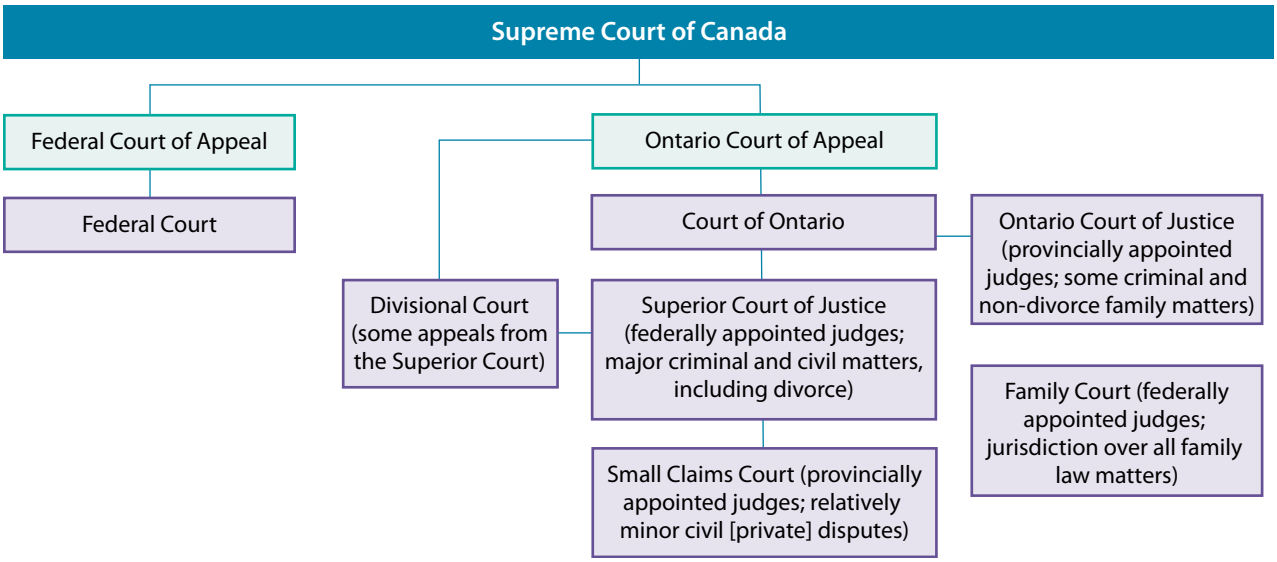
The Court System

The court structure in Canada is hierarchical, as indicated in Figure 1.4. 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 the various provincial court systems, the Federal Court of Appeal, and the Court Martial Appeal Court. 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 1.4 *The Structure of Federal and Ontario Courts*



SOURCE: Adapted from Alexandrowicz et al. (2004, p. 115).

Other Courts

Each province has a court of appeal that hears appeals from decisions of the provincial superior courts. In Ontario, for example, it is called the Court of Appeal for Ontario. Ontario's superior court consists of two divisions: the Superior Court of Justice (formerly the Ontario Court—General Division) and the Ontario Court of Justice (formerly the Ontario Court—Provincial Division). The Superior Court is the primary trial court in civil and most criminal matters and generally hears cases involving claims that exceed $35,000.

Each province also maintains courts of special jurisdiction. These courts preside over matters such as small claims, family law, juvenile offences, traffic violations, and trials of less serious criminal offences (Gilbert et al., 2000, p. 11).

In Canada, judges are not elected. They are appointed by the federal or provincial government, depending on the level of court.

The Administrative System

Administrative Tribunals

Administrative tribunals have been established to make decisions in specialized areas, such as employment standards or discrimination. 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.

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

Employment 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 (often lawyers) in employment matters. Tribunals are typically headed by a chair who, along with its other members (often called vice-chairs), are appointed by the government for fixed terms, with the possibility of renewal. Each individual case will typically be heard by one chair or vice-chair of the tribunal, but sometimes panels of multiple members of the tribunal are utilized.

privative clause
a term in a piece of legislation that attempts to restrict the right to review a tribunal's decision by a court

judicial review
the process where a party asks a court to reconsider a decision of an administrative tribunal to ensure that, for example, it observed the rules of natural justice

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

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., 2000, pp. 11–12).

A request to a court to review the decision of an administrative tribunal is called an application for **judicial review**. In Ontario it is the Divisional Court, a special branch of the Superior Court of Justice, that reviews the decisions of administrative tribunals. The Court will overturn a decision based on questions of fact or applying the facts to the law only if the decision was "unreasonable" (not simply incorrect). As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, 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." 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.

Because most decisions of employment-related administrative tribunals attract the "reasonableness" standard of review, significant judicial deference is given to these tribunals' decisions.

More information concerning specific administrative processes and tribunals can be found in the chapters of this book dealing with particular employment-related statutes (e.g., the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board, and the Workplace Safety and Insurance Appeals Tribunal are discussed in Chapters 5, 7, and 9 respectively).

Administrative Agencies

administrative agency
a body created by a statute to administer that statute; administrative agencies are empowered to investigate complaints, make rulings, and sometimes issue orders

complaint-based
an enforcement process initiated when one party files a complaint that sets out the basis for that party's legal claim

Below tribunals in the administrative hierarchy, there are usually **administrative agencies** staffed with inspectors or officers empowered to investigate complaints, make rulings, and sometimes issue orders. These agencies, or commissions, usually issue policy guidelines and have an educational role in furthering the goals of a statute. For example, the Ontario Human Rights Commission plays a key role in educating the public about human rights issues.

Individual employees may gain access to an administrative agency at no monetary cost to themselves. An agency may have an internal appeal procedure, usually with the possibility of a further appeal to a board or tribunal. For example, there is an internal appeal procedure within the Ontario Workplace Safety and Insurance Board.

Enforcement of most employment-related statutes is primarily **complaint-based**—meaning workers file a complaint to initiate a proceeding.

Read online: "Solicitor–Client Privilege," about confidentiality between lawyers and their clients.

Decision-Making Processes Under Ontario's Employment Statutes

Table 1.1 sets out the decision-making processes for appeals and requests for judicial review under Ontario's employment-related statutes.

TABLE 1.1 *Decision-Making Processes Under Ontario's Employment Statutes*

Statute	Initial decision	Appeal	Judicial review
Employment Standards Act, 2000	Employment standards officer, Ministry of Labour	Hearing before the Ontario Labour Relations Board (OLRB)	Limited right to Divisional Court
Human Rights Code	Human Rights Tribunal	Divisional Court on questions of law and fact	See Appeal (previous column)
Labour Relations Act, 1995	Ontario Labour Relations Board (OLRB)	Discretionary reconsideration by OLRB	Limited right to Divisional Court
Occupational Health and Safety Act	For routine inspections and investigations of accidents: Ontario health and safety inspector, Ministry of Labour; for reprisals for work refusals: OLRB	OLRB (although occupational health and safety offences involving injuries and deaths are litigated in the courts)	Limited right to Divisional Court
Pay Equity Act	Review services officer or Pay Equity Commission	Pay Equity Hearings Tribunal	Limited right to Divisional Court
Workplace Safety and Insurance Act	Claims adjudicator of Workplace Safety and Insurance Board (WSIB)	Hearings officer of WSIB and externally to Workplace Safety and Insurance Appeals Tribunal (WSIAT)	Limited right to Divisional Court

SOURCE: Compiled in part from information contained in Gilbert et al. (2000, pp. 394–397).

Defining the Employment Relationship

Before discussing particular employment laws, one threshold question must be addressed: When is an individual who is hired to perform work actually an "employee"? As noted above, for this question we look primarily to common law cases, rather than statute law, for the answer.

Read online: "Staying Current," about how to stay up to date on employment law.

Independent Contractors, Dependent Contractors, and Employees

Although an employee–employer relationship is the most common one when someone is hired to perform work, it is not the only possibility. Sometimes the organization hiring an individual decides that an independent contractor–principal relationship is better suited to its needs than a traditional employee–employer relationship. Since many statutory and common law entitlements are based on there being an employer–employee relationship, identifying the nature of the relationship is an important first step in understanding the respective rights and responsibilities of the parties.

In contrast to an employee, an **independent contractor** is a self-employed worker—a person in business on their own account—engaged by a **principal** to perform specific work. In some cases, the distinction between an independent contractor and an employee is obvious. For example, if homeowners hire an individual to paint their house, they are not hiring that person as an employee but rather as a self-employed contractor. However, there are other situations where it is much more difficult to make the distinction. For example, is a delivery driver who owns their own truck but delivers for only one business an employee of that business or an independent contractor? Despite the difficulty in some cases of distinguishing an employee–employer relationship from one of independent contractor–principal, the two relationships are treated very differently in law.

independent contractor
a self-employed worker engaged by a principal to perform specific work

principal
the party who contracts for the services of an independent contractor; the party who can be bound by its agent

The hallmarks of an independent contractor–principal relationship are discussed below. Also examined are the numerous legal pitfalls that the parties may encounter if they do not identify their relationship accurately. The legal rights and responsibilities of the parties depend on the nature of their relationship: a worker is not an independent contractor simply because the parties intend it to be so.

Indeed, there is always a risk that a relationship characterized by the parties as an independent contractor–principal relationship will be found to be an employee–employer relationship by a court or tribunal, thereby creating unintended liabilities.

dependent contractor
a worker who is not an employee, but who is still considered to be economically dependent on the organization they work for

Note that recently a third category of worker has been recognized by courts in most Canadian jurisdictions: a **dependent contractor**. Falling somewhere between an employee and an independent contractor, a dependent contractor is defined as a contractor who is economically dependent on their principal. In that case, the principal must provide the dependent contractor with reasonable notice of termination of the contract or payment in lieu of reasonable notice. The key criteria in determining whether a contractor is "dependent" is exclusivity—or near exclusivity—in that substantially more than 50 percent of the contractor's income must be earned from that principal (Green, 2020). See Figure 1.5 for a comparison of the different categories of workers: independent contractors, dependent contractors, and employees.

FIGURE 1.5 *Categories of Workers*

INDEPENDENT CONTRACTORS

In business for themselves.

Relationship is considered a commercial contract; therefore, the employment laws considered in this text and intended to govern the employment relationship do not apply.

Independent contractors may voluntarily opt into some social insurance schemes, such as workers' compensation and employment insurance.

Unlike employees, independent contractors are permitted to deduct business expenses under the Canadian *Income Tax Act*.

DEPENDENT CONTRACTORS

Workers who have more autonomy than an "employee," but who remain economically dependent on one primary customer.

- *Common Law Regime*
  - Entitled to implied "reasonable notice" of termination of contract.
- *Regulatory Standards Regime*
  - Coverage under some human rights, workers' compensation, and health and safety legislation.
- *Collective Bargaining Regime*
  - Full coverage under collective bargaining legislation.

EMPLOYEES

Subordinate to and economically dependent on their employer.

- *Common Law Regime*
  - Full law of the employment contract applies, including common law implied terms such as the entitlement to "reasonable notice of termination."
- *Regulatory Standards Regime*
  - Full coverage under employment-related statutes:
    - Employment standards.
    - Human rights.
    - Workers' compensation.
    - Occupational health and safety.
    - Pay equity/employment equity.
    - Employment insurance.
- *Collective Bargaining Regime*
  - Full coverage under collective bargaining legislation.

Employment laws *do not* apply — Employment laws *may* apply — Employment laws apply

SOURCE: Adapted from David J. Doorey, *Law of Work, 2nd Edition* (Toronto: Emond, 2020).

What Are the Advantages and Disadvantages of an Independent Contractor–Principal Relationship?

There is an increasing trend for organizations to hire individuals as independent contractors rather than as employees. Many organizations like the fact that this relationship presents fewer ongoing legal obligations, less paperwork, and often less expense than the employee–employer relationship. Reducing the "head count" is also a goal of many larger organizations. Conversely, this relationship puts some workers at a significant disadvantage since, as noted, many statutory protections are only afforded to "employees."

Consider the following obligations that employers have to employees but not to independent contractors:

1. *Providing statutory benefits*, such as vacations and overtime pay, and protections, such as pregnancy and parental leave, for employees. Independent contractors generally are not entitled to employee statutory benefits. The terms of their contract determine their entitlement to benefits.
2. *Paying premiums for workplace health and safety insurance.* Independent contractors must arrange their own coverage.
3. *Providing reasonable notice of termination or pay in lieu* (unless the employment contract limits the entitlement to something less, such as the legislated minimum notice of termination). Independent contractors are entitled to notice of termination only if their contract so provides. There is no implied right to reasonable notice. (As noted above, dependent contractors, while not employees, are entitled to receive reasonable notice of termination by virtue of having worked exclusively (or almost exclusively) and for a long period of time for a single organization. Courts have decided that their financial dependence on that single organization creates the duty to provide reasonable notice (*McKee v Reid's Heritage Homes Ltd*; *Marbry Distributors Ltd v Avrecan International Inc*). (See the FYI box entitled "Dependent Contractors: How Exclusive Does the Relationship Have to Be?" for a further discussion of this issue.)
4. *Remitting appropriate health and income taxes, and contributing to and remitting Canada Pension Plan (CPP) and employment insurance (EI) premiums.* Independent contractors remit their own statutory deductions and taxes. This reduces both costs and paperwork for the hiring organization. Also, the organization does not have to pay the "employer's" portion of CPP and EI premiums for independent contractors.
5. *Assuming liability for an employee's deliberate or negligent acts during the course of employment.* Independent contractors are generally liable to both the third-party victim and the hiring organization for misconduct or negligence while on the job (Levitt, 2002, pp. 1–23).

F Y I

Dependent Contractors: How Exclusive Does the Relationship Have to Be?

The Ontario Court of Appeal looked at the issue of exclusivity in the context of dependent contractors in *Keenan v Canac Kitchens Ltd*. In that case, Canac, a kitchen cabinet manufacturer, appealed the trial court's finding that the Keenans—a husband, Lawrence (aged 63), and wife, Marilyn (aged 61)—were dependent contractors who were each owed 26 months' reasonable notice of dismissal. Canac argued that the couple should not be characterized as dependent contractors because in the three years before their business relationship with Canac ended, the Keenans had earned a significant portion of their income (20 percent, 33.6 percent, and 27.4 percent in each of those years, respectively) working with a competitor.

The appellate court disagreed, noting that in considering status it is appropriate to look at the totality of the relationship, not just the most recent years. For most of their working lives (32 years for Lawrence and 26 years for Marilyn) the Keenans had worked with Canac exclusively; in fact, they had only begun working for its competitor in the previous few years because work from Canac had slowed down considerably. In that context, the Court of Appeal found sufficient economic reliance to characterize the Keenans as dependent contractors, despite reduced reliance in the most recent three years.

While for many workers the disadvantages of an independent contractor–principal relationship are evident, there are some potential downsides for the hiring organization as well. For example, it has less control—an independent contractor has the freedom to accept additional projects from others and can be less willing to make a long-term commitment to the organization. It may also be damaging to workplace morale (Sabri, 2019; Green, 2020).

Conversely, there are situations where the individual may actually prefer independent contractor status over that of employee. There are tax benefits available to the self-employed: deducting expenses against income, no withholding of income tax at source, and fewer statutory deductions (such as employment insurance premiums). Independent contractors also have greater flexibility in working for organizations other than the principal.

Why Is the Independent Contractor–Principal Designation Sometimes Challenged?

If both parties agree that they want to create an independent contractor–principal relationship, how does the nature of their relationship become a legal issue? The parties' initial characterization may be challenged before a court or tribunal in several ways. A government agency may question the parties' characterization because it thinks that statutory premiums for such programs as employment insurance, workplace safety and insurance, and the CPP should have been remitted. An individual initially designated as an independent contractor may subsequently wish to claim statutory benefits or protections that depend on employee status, such as employment insurance benefits, workplace safety and insurance coverage, or employment standards benefits. This issue may also arise when an individual is terminated and seeks wrongful dismissal damages. Only in an employment relationship (or as a "dependent contractor," as discussed above) do courts find an implied duty to provide reasonable notice of termination or pay in lieu of notice.

What Happens If a Tribunal Finds an Employee–Employer Relationship?

If a court or tribunal finds that the parties created an employment relationship, the "employer" may have to remit thousands of dollars to various government agencies for outstanding statutory premiums (potentially including those owed by the "employee"). It may

also have to pay the individual significant amounts of money for employment standards benefits, such as vacation and overtime premium pay or wrongful dismissal damages. At the same time, the individual will be liable for outstanding statutory premiums and income tax not deducted at source.

What Tests Establish an Employee–Employer Relationship?

As noted above, although several employment-related statutes contain a definition of "employee," the definitions are so brief that courts and tribunals fall back on the common law tests for distinguishing between an employee–employer and an independent contractor–principal relationship. The fundamental issue is whether the individual is an independent entrepreneur in business for themself or under the control and direction of the employer. The following tests have evolved under the common law to distinguish between an employee and an independent contractor. No single fact determines the matter; the facts of the case are assessed as a whole.

1. *Control test.* Does the organization control the individual's work, including where, when, and how it is performed? Is the individual free to hire others to perform the work or to have many clients? Does the individual report to the organization during the workday? If the individual does not have autonomy, and day-to-day control over the work is maintained by the organization, the individual is probably an employee.
2. *Chance-of-profit/risk-of-loss test.* How entrepreneurial is the worker? Does the individual have any expectation of profit (other than fixed commissions) or bear any risk of financial loss? For example, does the individual face the risk of not receiving payment for services performed? If not, that person is more likely to be considered an employee.
3. *Organization or integration test.* Are the services rendered by the individual an integral part of the business? For example, an individual who writes a manufacturing company's newsletter is less likely to be an employee than a tool and die maker whose duties are central to the company's operations.
4. *Tools test.* Does the individual provide their own tools? If so, this weighs in favour of independent contractor status, especially if a significant capital investment is involved, as in the case of a truck driver supplying their own truck. The tools test is probably the least significant of the tests, but it is still relevant.

In applying the common law tests, courts assign much greater weight to the substance of the relationship (what happened in practice) than to its form (what the written contract says). For example, the fact that an individual incorporates and declares themself to be self-employed for tax purposes is considered because it indicates their intent to be an independent contractor. However, this fact is not determinative if the other facts point to an employment relationship. *Belton v Liberty Insurance* demonstrates how courts look at the specific facts of a case and are not limited by the terms of a contract when deciding whether there is an employment relationship.

CASE IN POINT

When Is an Independent Contractor Not an Independent Contractor?

Belton v Liberty Insurance Co of Canada, 2004 CanLII 6668, [2004] OJ No 3358 (QL) (CA)

Facts

The plaintiffs were sales agents for Prudential Insurance. Although they were restricted to selling Prudential property and casualty insurance products, they had signed representative agreements acknowledging their status as independent contractors. After the defendant insurance company bought Prudential, it introduced a new compensation agreement for its sales agents. The plaintiffs refused to sign the new agreement. They were fired, and they subsequently sued for wrongful dismissal.

Relevant Issue

Whether the plaintiffs were employees, and thereby entitled to reasonable notice of termination, or independent contractors.

Decision

The Court found that the plaintiffs were employees, not independent contractors, on the basis of the facts of the case, and not the terms of the contract. It applied the following tests in considering the status of a commissioned agent:

1. *Was the agent limited to the exclusive service of the principal?* This factor was ambiguous because the plaintiffs sold life insurance for London Life and property and casualty insurance for the defendant. The plaintiffs, however, were not permitted to sell any property and casualty insurance other than that of the defendant.
2. *Was the agent subject to the control of the principal not only as to the product sold but also as to when and how it was sold?* The agents reported to managers at the insurance company.
3. *Did the agent have an investment or interest in the tools required for service?* The defendant provided the plaintiffs with office facilities, telephones, and fax machines.
4. *Did the agent undertake any business risk or have any expectation of profit (as distinct from receiving a fixed commission)?* The plaintiffs did not own their book of business and had no legal or other entitlement to their customers. That is, the customers belonged to Prudential, not them.
5. *Was the activity of the agent part of the business organization of the principal?* The plaintiffs' activities were integral to the defendant's business.

How to Maintain an Independent Contractor–Principal Characterization

The list below outlines several ways to minimize the risks of having an independent contractor relationship subsequently characterized by a court or government agency as an employment relationship. Keep in mind that no single fact alone determines status. All the facts will be viewed together. In a large majority of cases, relationships that are purported to be independent contractor–principal relationships will, if challenged, be found to be employee–employer relationships.

1. A clearly written contract should confirm the individual's independent contractor status. Although this statement is not conclusive, it indicates the original intent of the parties.
2. The contract should cover a fixed term and should include a fair mutual termination clause, because independent contractors are typically hired for a specific project or period, while employees are usually hired on an indefinite basis. Be specific about the compensation to be paid, the work to be done, and where it will be done.

3. The organization should not take any statutory deductions or remittances for income tax, CPP contributions, and EI contributions. The individual should acknowledge in the contract that the organization is not making these deductions and remittances.
4. The contract should include an indemnity provision stating that the independent contractor is responsible for any statutory remittances, such as for employment insurance or workplace safety and insurance premiums.
5. The contract should state that the independent contractor has no authority to create obligations on behalf of the organization, endorse cheques, or accept returns (Israel, 2003, p. 2997).
6. The organization should not provide vacation, holiday, or overtime pay; health care benefits; or employee benefits, such as stock options or bonuses. Similarly, the organization should not provide a company uniform; business cards; company car; bookkeeping services; or office equipment, such as a computer, desk, or other facilities.
7. The contract should not restrict the independent contractor from working for other clients, although it may require that the contractor dedicate a certain number of hours to the work being contracted for. (A contractor who works less than full-time hours, and on a non-exclusive basis, is also less likely to be considered a "dependent" contractor to whom reasonable notice of termination is required.)
8. The contract may have a non-disclosure provision if protection of confidential information is an issue, but it should not include a non-competition clause because this could restrict the individual's ability to have other clients (Landmann, 2012, p. 4).
9. The organization should avoid reimbursing the independent contractor for expenses.
10. The organization should avoid setting, in terms of scheduling, hours of work.
11. The independent contractor should work offsite as much as possible. This is not, however, a guarantee of independent contractor status if the contractor works for only one employer and reports on a regular basis, electronically or otherwise.
12. The independent contractor should be entitled to accept or decline work when it is offered by the organization.
13. The independent contractor should purchase their own liability insurance.
14. The contract should not provide for performance reviews or disciplinary measures.
15. An individual who is incorporated, has a GST number, and makes the appropriate tax returns is more likely to be seen as an independent contractor.
16. An individual who has the ability to assign others to do all or part of the work is more likely to be seen as an independent contractor.
17. The contract should reflect the reality of the relationship. If, for example, the organization exercises day-to-day control over the individual's work, that practical reality will undermine all the effort that went into preparing the contract.

Differing Results Are Possible in the Determination of the Relationship

In some cases, an individual may be considered an independent contractor for the purposes of taxes and government remittances and be designated an employee for the purpose of a wrongful dismissal action. This occurs when the facts of the case are not clear-cut, and various agencies weigh those facts and the common law tests somewhat differently. Some government agencies may also tend to find that individuals are employees because it is easier to collect remittances from one employer than from hundreds of independent contractors.

Similarly, courts may be reluctant to characterize an individual, especially one with long years of service, as an independent contractor if it means that they may be terminated without any notice. In *Dynamex Canada Inc v Mamona*, an individual who successfully claimed to be an independent contractor for income tax purposes also successfully claimed to be an employee for the purposes of claiming holiday and vacation pay under employment standards legislation.

F Y I

Recent Developments: What About Gig Platform Workers?

Nathan Denette/Canadian Press Images

Rapid changes in technology are having a profound effect on workers and workplaces alike, and nowhere is this truer than for app-based workers where jobs and workplaces have been completely decoupled. Are gig workers who perform digital platform work—think ride-hailing apps like Uber or food delivery services like SkipTheDishes—employees, dependent contractors, or independent contractors?

In these situations, the platform company typically denies that there is an employment relationship: it may argue it is simply a technology company that provides a platform for connecting customers and those who perform the service. This characterization not only denies these workers access to employment standards protections—it also affects their ability to organize and be represented by a union.

App-based workers have been challenging their status as independent contractors in numerous ways and jurisdictions. In March 2020, in its first decision related to gig platform workers, *Canadian Union of Postal Workers v Foodora Inc dba Foodora*, the Ontario Labour Relations Board applied the traditional test for distinguishing between employees and independent contractors in finding that Foodora Inc. couriers were *dependent* contractors and therefore eligible to unionize. Significant factors included that Foodora did not allow couriers to engage substitutes, it controlled when they could do work, it closely monitored their movements (including through use of GPS technology), and their work was heavily integrated into Foodora's business (Fremont et al., 2020b).

In another development, in February 2022 an Ontario Employment Standards Officer found that Uber had violated the *Employment Standards Act, 2000* by failing to provide one of its drivers with public holiday pay, among other things. Uber has indicated that it intends to appeal this decision. This case could also have further implications in an ongoing class action lawsuit against Uber Technologies Inc., involving roughly 50,000 people who are seeking the same designation as employees (McKenzie-Sutter, 2022).

Digital Platform Workers' Rights Act, 2022 (Awaiting Proclamation)

Finally, as various legal challenges continue, in April 2022 Ontario passed Bill 88 (the *Working for Workers Act, 2022*), which, once proclaimed in force, will introduce certain protections for gig workers who perform digital platform work through the *Digital Platform Workers' Rights Act, 2022* (DPWRA). The protections provided include:

- rights to information,
- recurring pay days and pay periods,
- minimum wage, and
- notice of removal from the digital platform.

In the meantime, a gig worker who is not an employee will have the rights that flow from their status as either an independent or dependent contractor (Lemoine, 2022). (See Chapter 7 for a further discussion of the DPWRA.)

For a critique of Bill 88, see "Does Bill 88 Work For App-Based Delivery Workers?" on the Gig Workers United website, at https://gigworkersunited.ca/bill88.html.

Agents

Another type of relationship is that of agent and principal. An **agent** is someone who represents another person (the principal) in dealings with a third party (Yates, 2010, p. 131). Agents can bind an organization to a contract with customers or other parties, even without the organization's knowledge. Common examples are real estate agents, travel agents, and insurance agents. An agent may be an independent contractor or an employee. For example, salespersons, buyers, and human resources managers who recruit employees are agents because they have the capacity to bind an organization in contracting with others. However, despite their agency status, they are usually categorized as employees and thus are eligible for reasonable notice of termination. Moreover, merely having a job title that includes the term "agent" does not make that individual an independent contractor. To determine whether an agent is an employee or an independent contractor, courts would look at the established tests discussed above.

agent
a party who has the capacity to bind another party in contracting with others

KEY TERMS

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RELATED WEBSITES

- https://www.canlii.org
  CanLII provides open online access to laws and legal decisions from all Canadian jurisdictions.
- https://www.e-laws.gov.on.ca
  E-Laws provides open online access to official copies of Ontario's statutes and regulations.
- https://laws.justice.gc.ca
  The Justice Laws website provides open online access to the consolidated acts and regulations of Canada in both official languages.
- https://www.lexology.com
  Lexology is an online legal research platform (free with registration) that provides updates in various areas, including Canadian employment law.

REVIEW AND DISCUSSION QUESTIONS

1. Name a significant current 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 government is involved. However, the Charter can indirectly affect private sector employers. How?
4. Describe two possible tools or rules that a judge can use in determining how to interpret a statute in a particular case.
5. Although the Ontario *Human Rights Code* was amended in 2006 to prohibit age-based discrimination against anyone aged 18 years or older, it also expressly stated that the right to equal treatment on the basis of age was not infringed by benefit plans that complied with the ESA. The ESA in turn continued to allow employee benefit plans that discriminated against workers age 65 or over. In 2008 the Ontario Nurses' Association filed a grievance against the Municipality of Chatham-Kent because, under the negotiated collective agreement, employees over the age of 64 received inferior benefits (e.g., no long-term disability coverage) compared with those received by employees under that age. The union argued that the statutory provisions that allowed these discriminatory distinctions violated the *Canadian Charter of Rights and Freedoms*.

   Based on the tests the courts use to interpret sections 15 and 1 of the Charter, discuss whether you think the union's argument would be successful.
6. Joanne and her husband were unable to have children and they decided to adopt. When their adopted baby daughter came into their care, Joanne applied for both pregnancy benefits (then 17 weeks) and parental benefits (then 35 weeks) under the federal government's employment insurance program. She was given parental benefits but denied pregnancy benefits on the basis that she was never pregnant. Joanne challenged this denial on the basis of the equality rights provision in the Charter.
   a. In your opinion, was denial of pregnancy benefits to an adoptive parent fair?
   b. Did it contravene section 15 of the Charter? Explain your answer.

7. You are hired for the summer to paint houses for CK Inc. As part of your arrangement with CK, you sign a contract that states you are an "independent contractor"—you're agreeing that you operate your own painting business. CK will advertise and bid for the painting jobs, as well as provide the materials, and you will perform the work in exchange for a fixed amount per contract. This arrangement works out for a while but after completing one major job, CK refuses to pay you because it alleges that your work was substandard. You tell CK's manager that you intend to file a complaint with the Ministry of Labour under the ESA. She responds, "How are you going to do that when you're not even an employee?" What are your rights in this situation?
8. Why might an employer prefer to hire an individual as an independent contractor rather than as an employee?
9. Why might an individual choose to work as an independent contractor rather than as an employee?
10. List ways that parties who want to create an independent contractor–principal relationship can minimize the risk that their relationship will be viewed as that of employee–employer.
11. Brad began working at Lay-Z-Guy in 1981 as a customer service manager. In 1995 his employer started requiring him and other salespeople to sign a series of one-year agreements that stated they could be terminated on 60 days' notice. Three years later it required Brad to incorporate, and from that point forward, the agreements were between Lay-Z-Guy and Brad's corporation. The agreements defined Brad, and later his corporation, as an "independent marketing consultant" and expressly stated that the relationship was not one of employment, but rather of an independent contractor–principal. Brad paid for his own office space and remitted his own income taxes and workers' compensation premiums. At the same time, Lay-Z-Guy set prices, territory, and promotional methods, and Brad was limited to servicing Lay-Z-Guy exclusively. In 2003, Lay-Z-Guy terminated the agreement with 60 days' notice. Brad sued for wrongful dismissal damages, alleging that he was an employee.
    a. What arguments could Brad make to support his position that he was an employee?
    b. What arguments could Lay-Z-Guy make to support its position that Brad was an independent contractor?
    c. Which side do you think would be successful?
12. Identify four areas of potential liability when an organization mischaracterizes an employee as an independent contractor.
13. Look up current bills by going to the Ontario Legislature's website at https://www.ola.org/en.
    - Click "Find Bills."
    - Click "Current."
    - Identify an example of each of the following (note the name and number of the Bill):
        a. A government public bill related to employment (i.e., introduced by a Cabinet minister). What is its main objective?
        b. A private member's bill related to employment (who is the private member and what political party are they from)? What is its main objective?
        c. A private bill (PR). What specific matter does it relate to?
14. Look up an Ontario employment statute and its regulations by going to https://www.e-laws.gov.on.ca.
    - Look up the *Employment Standards Act*.
    - Locate the regulations created under the ESA.
    - Go to Reg. 285/01: "When Work Deemed to Be Performed, Exemptions, and Special Rules" and identify three exemptions. Do you agree with them? Why or why not?
15. Barbara was a sole practitioner who had provided legal services to the Office of the Children's Lawyer (OCL) over a 13-year period, in a series of fixed-term contracts. These contracts were not automatically renewed; Barbara had to re-apply for a new contract when the previous one expired. There also was no guarantee of work, and the OCL reserved the right to cancel the contract at any time. However, Barbara's work for the OCL accounted for between 14.8 percent and 62.6 percent of her independent legal practice's annual earnings. The average was 39.9 percent, with her billings for OCL representing an increasingly larger portion of her income over time.

    When the last contract was not renewed in 2015, Barbara brought an action claiming she was a dependent contractor and, as such, was entitled to 20 months' notice of termination (Green, 2020).

    Was Barbara a dependent contractor and therefore eligible for reasonable notice damages? Explain your answer.
16. a. Should the law treat app platform-based gig workers as employees and not independent, self-employed contractors?
    b. Is there a "third way" to improve independent work while not eliminating it.