Overview of Legal Framework

1

Learning Outcomes

After completing this chapter, you will be able to:

- Identify the role of licensed paralegals in the provision of legal services relating to labour and employment law.
- Identify and describe the key sources of employment law and know where to find them.
- Understand the judicial framework within which labour and employment law is regulated.
- Define the nature of diverse employment relationships.

Introduction

In 2007, the Law Society of Ontario[1] began licensing and regulating paralegals in Ontario, similar to the regulation of lawyers, under the authority of the *Access to Justice Act, 2006*.[2] While the Act did not provide a definition of the term "access to justice," it did reference its purpose as the promotion of access to justice and required the Law Society to govern in accordance with the principles of maintaining and advancing the cause of justice.[3]

To become a licensed paralegal, a person is required to successfully complete a program of study at an accredited post-secondary institution, be of "good character," and successfully complete the licensing examination administered by the Law Society. Once licensed, paralegals have a limited scope of practice under Law Society of Ontario By-Law 4 to provide "legal services" in certain enumerated areas, including proceedings in the Small Claims Court, in the Ontario Court of Justice under the *Provincial Offences Act*,[4] and before a tribunal established under an act of the Ontario Legislature or an act of Parliament. Within the permitted scope of practice, licensed paralegals may give a party advice on their legal interests, rights, or responsibilities with respect to a proceeding or the subject matter of a proceeding, prepare all necessary documentation, and negotiate on the party's behalf.[5] Paralegals are subject to the Law Society's rules of conduct, by-laws, and guidelines regarding ethical behaviour and professional practice in the same fashion as lawyers.

With those parameters in mind, licensed paralegals are permitted to assist a person in the following areas of labour and employment law:

- a *Human Rights Code* application before the Human Rights Tribunal of Ontario,
- an employment standards complaint with the Ministry of Labour,
- a wrongful dismissal claim in Small Claims Court,
- representation before the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal,
- an appeal to the Ontario Labour Relations Board,
- grievance arbitration in unionized workplaces, and
- the prosecution or defence of a regulatory proceeding under the *Provincial Offences Act.*

Licensed paralegals may also assist a person in federally regulated industries (described below) before federal bodies with authority to enforce human rights, employment standards, and labour relations.

This text has been written for paralegals who are licensed by the Law Society of Ontario and who provide legal services in the area of labour and employment law. To effectively help a client, whether employer or employee, a paralegal must be able to (1) define the relationship and (2) identify the regulatory regime(s) under which it

1 On January 1, 2018 the Law Society of Upper Canada became the Law Society of Ontario.

2 SO 2006, c 21 – Bill 14 [AJA].

3 *Ibid*, s 4.2.

4 RSO 1990, c P.33.

5 Law Society of Ontario, By-Law 4 (amendments current to 2 March 2021), online: <https://www.lso.ca/about-lso/legislation-rules/by-laws>, s 6.

is governed. By doing so, paralegals will be able to lay out options that best meet the needs of their client.

In order to define the relationship and identify the regulatory regime, a licensed paralegal must ask the following questions:

- Is my client engaged in work in the public sector or private sector?
- Is the employer a federally or provincially regulated enterprise?
- Is my client subject to the terms of a collective agreement?
- What type of remedy or award might my employee client be seeking or be entitled to (for example, if suing for wrongful dismissal, is a Small Claims Court action appropriate, or should the client pursue a claim in the Superior Court of Justice)?

Before embarking on a course of action, these questions must be answered, or the paralegal may find themselves in the wrong forum and facing a limitation period or unable to obtain the remedies to which their client may be entitled.

Although most of this book looks at specific labour and employment laws (both statutory and common law), Chapter 1 provides an overview of the legislative and judicial framework within which those laws operate. This chapter is intended to provide a context for everything else you will learn in this book and addresses three key topics: (1) sources of employment law, (2) the judicial framework, and (3) defining the employment relationship.

CLARIFYING KEY TERMS IN LABOUR AND EMPLOYMENT LAW

We have already used some key terms that you will come across in labour and employment law. You may be wondering why the terms "labour" and "employment" are sometimes used alone and other times together. Traditionally, employment law deals with the legal implications of the relationship between employer and employee in a non-unionized work environment. "Labour law," "labour relations," or "industrial relations" refers to the legal framework governing the relationship between employer and employee in a unionized environment. Some regulatory provisions are restricted to either unionized or non-unionized workers, while other regulatory provisions apply to all. The "law of work" has also been used to reference all legal rules governing the relationship, whether through legislation, common law, or the collective bargaining environment.[6]

Sources of Employment Law

There are three main sources of employment law in Canada: **statute law** (legislation passed by the government and regulations enacted under the legislation), **constitutional law** (including the *Canadian Charter of Rights and Freedoms*),[7] and **common law** (judge-made law). The relative importance of each source depends on the particular

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

6 David J Doorey, *The Law of Work*, 2nd ed (Toronto: Emond, 2020) at 5.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

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. A discussion of statute, constitutional, and common law is set out below.

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

Statute Law

Employment statutes are created because the government decides that employees require protections or rights beyond those that currently exist. Historically, employment legislation outlined minimum acceptable standards and working conditions, such as minimum wages and vacation entitlements. Since the early 20th century, governments have stepped in and gradually implemented additional statutory requirements and protections, such as anti-discrimination legislation, that affect many facets of the employment relationship.

FYI

Before There Were Employment Statutes … and Freedom of Contract Reigned Supreme

During the 19th and early 20th centuries, there were very few employment statutes; the relationship between an employer and employee was based almost entirely on the common law of contract. Under the common law, the parties were free to negotiate whatever terms of employment they could mutually agree on. But because an employee typically has much less bargaining power than an employer, this freedom of contract in practice 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, regulating workplace health and safety, prohibiting discrimination based on key grounds, and creating a labour relations system that established the right of employees to join a union so 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.

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

A wide range of factors can lead to changes in employment law. One of these is a change in the political party in power. Between 1995 and 2003, when the Progressive Conservative party governed in Ontario, extensive changes were made to labour relations, workplace safety and insurance, and employment standards legislation. Significant changes were also made during the years of Liberal leadership from 2003 to 2018 and again when the Progressive Conservatives came to power in 2018.

New legislative requirements also often relate to demographic shifts in society, changing social values, the introduction of new technology, and new ways of doing business. For example, the dramatic increase in the number of women in the paid workforce led to significant new statutory requirements such as pay equity and increased pregnancy and parental leave. Similarly, changes in technology have led to enhanced privacy protection laws, while shifts within the economy and the nature of work have resulted in laws to better protect workers, such as those hired through temporary agencies, or workers considered independent contractors driving for Uber and similar businesses. As life expectancies have increased, legislation has enhanced leave-of-absence opportunities to allow employees to care for family members in their time of need. Lastly, unprecedented and devastating global events, such as the novel coronavirus (COVID-19) pandemic that resulted in the almost complete shutdown of the Ontario economy in March 2020 to all but essential services, necessitate quick action on the part of government to amend labour and employment legislation, among other things.

Regulations

While statutes contain the main requirements of the law, detailed rules on how to implement or administer a statute are often found in its regulations. **Regulations** (also known as delegated legislation) are rules made under the authority of a statute. For example, details about health and safety requirements in particular types of industries are contained in the regulations to the *Occupational Health and Safety Act*.[8]

regulations
rules made under the authority of an enabling statute

Regulations are as legally binding as the statute that enables them, but they are not made by a legislature. They are made by government officials and published in Ontario in the *Ontario Gazette* and federally in the *Canada Gazette*. Therefore, they are more easily made and amended than the statute itself.

Legislative Authority over Employment Law

Canada is a federal state with three levels of government: federal, provincial, and municipal. Municipalities have no jurisdiction over employment, although they can pass by-laws on matters that affect the workplace, such as 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*[9] that the federal government's legislative authority was limited to industries of national importance, such as banks, airlines, the post office, television and radio stations, the Internet, and interprovincial buses, railways, trucking, and communications. As a result of this decision, approximately 90 percent of employees in Canada are covered by provincial employment legislation. For this reason, this text focuses primarily on provincial labour and employment law—rights, responsibilities, and enforcement—rather than on federal employment laws, which are touched on briefly below.

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

8 RSO 1990, c O.1 [OHSA].

9 1925 CanLII 331, [1925] 2 DLR 5 (UKPC).

Key Ontario Employment Statutes

The following are the key employment statutes you may encounter as a licensed paralegal in Ontario and that are analyzed in this text:

- The *Employment Standards Act, 2000*[10] sets out minimum rights and standards for employees, including minimum wages, overtime, hours of work, termination and severance pay, pregnancy and parental leave, vacation, and public holidays (Chapters 2 and 3).
- The Ontario *Human Rights Code*[11] is aimed at preventing and remedying discrimination and harassment based on specified prohibited grounds (Chapters 9 and 10).
- The OHSA outlines the requirements and responsibilities of parties in creating a safe workplace and preventing workplace injuries and accidents (Chapter 11).
- The *Workplace Safety and Insurance Act, 1997*[12] 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 (Chapter 12).
- The *Labour Relations Act, 1995*[13] describes the collective bargaining process and the jurisdiction of the Ontario Labour Relations Board (Chapter 13).

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 that refuses to allow them 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, it may dismiss an application if it decides that the substance of the application has already been appropriately dealt with in another proceeding. A paralegal retained to assist an individual who believes that their rights have been violated must first identify the violation. Knowing how and where to pursue a remedy—by which a violation or breach is "fixed" or corrected—that best serves the client's needs is crucial.

application
a claim of a human rights violation

Key Federal Employment Statutes

As noted above, federal employment law covers employees who work for a federally regulated company, such as a bank or an airline. Approximately 10 percent of employees in Canada are covered by federal employment statutes.

Three important federal statutes are:

- the *Canada Labour Code*,[14] which covers employment standards, collective bargaining, and health and safety;

10 SO 2000, c 41 [ESA].

11 RSO 1990, c H.19.

12 SO 1997, c 16, Schedule A.

13 SO 1995, c 1, Schedule A.

14 RSC 1985, c L-2.

- the *Canadian Human Rights Act*,[15] which covers human rights and pay equity; and
- the *Employment Equity Act*,[16] which is intended to achieve equality in the workplace for "women, Aboriginal peoples, persons with disabilities and members of visible minorities."[17]

The *Canada Labour Code* and CHRA are similar in principle to their provincial counterparts, but there are some differences in the rights and protections granted. Ontario does not have legislation equivalent to the EEA.

CANADA LABOUR CODE

The *Canada Labour Code* is divided into three parts:

Part I—Industrial Relations (further subdivided into eight divisions addressing the Canada Industrial Relations Board, the acquisition and termination of bargaining rights, collective bargaining and collective agreements, conciliation and first agreements, obligations regarding strikes and lockouts, and prohibitions and enforcement and are similar to the contents of the Ontario *Labour Relations Act* discussed in detail in Chapter 13).

Part II—Occupational Health and Safety (similar to Ontario's OHSA, discussed in detail in Chapter 11).

Part III—Standard Hours, Wages, Vacations and Holidays. Part III is further subdivided into 25 divisions covering topics similar to the Ontario ESA, such as hours of work, minimum wage, breaks, vacation and holidays, leaves of absence, and termination and severance. It also includes matters not addressed in provincial legislation, such as leaves for traditional Aboriginal practices, long-term disability, and a prohibition against genetic testing.

Complaints alleging monetary and non-monetary violations of employment standards set out in the *Canada Labour Code* are filed with the Labour Program of Employment and Social Development Canada. Complaints must be filed within six months from the last date payment of wages or other moneys were due or within six months from the date on which the subject matter of the complaint arose.[18] If an inspector determines that a violation occurred, a letter will be sent to the employer requesting that it rectify the violation. If an employer refuses to pay money found to be owing to an employee, a Payment Order is issued for the moneys owed along with an administrative fee of $200 or 15 percent of the amount owed, whichever is greater.[19]

CANADIAN HUMAN RIGHTS ACT

The CHRA applies to all matters within the legislative jurisdiction of the federal government. The federal statute prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for

15 RSC 1985, c H-6 [CHRA].

16 SC 1995, c 44 [EEA].

17 *Ibid*, s 2.

18 "Filing a Labour Standards Complaint with the Labour Program" (28 October 2020), online: *Government of Canada* <https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/filing-complaint.html>.

19 *Ibid.* Complaint forms are available from Service Canada at <https://catalogue.servicecanada.gc.ca/content/EForms/en/Profile.html?Group=HRSDC/LAB/LS>.

which a pardon has been granted or in respect of which a record suspension has been ordered.[20]

Discriminatory practices that result in the denial of goods, services, facilities, and accommodations, commercial or residential accommodations, employment, and employee organizations are prohibited.[21] Harassment, sexual harassment, and retaliation are also prohibited.[22]

The Act also makes it a discriminatory practice "for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."[23] The value of work is based on "the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed."[24] A federal *Pay Equity Act*[25] received Royal Assent in December 2018 but has not been proclaimed in force (as of May 2021).

Allegations of discrimination are brought to the Canadian Human Rights Commission.[26] The Commission investigates the complaint and, if it is deemed to have merit, refers the complaint to the Canadian Human Rights Tribunal for adjudication.[27] If the complaint is substantiated through the hearing process, the tribunal has the power to order remedies, including compensation for lost wages and damages for pain and suffering not exceeding $20,000.[28]

EMPLOYMENT EQUITY ACT

The EEA applies to private-sector employers who employ 100 or more employees in connection with a federal work, undertaking, or business and public-sector employees, including the Canadian Forces and the Royal Canadian Mounted Police.[29] The Act obligates employers to implement employment equity by identifying and eliminating employment barriers against "women, Aboriginal peoples, persons with disabilities, and members of visible minorities"[30] by instituting positive policies and practices and making reasonable accommodations to

> ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in
>
> (i) the Canadian workforce, or

20 CHRA, s 3(1).

21 CHRA, ss 5, 6, 7, 9.

22 CHRA, ss 14, 14.1.

23 CHRA, s 11(1).

24 CHRA, s 11(2).

25 SC 2018, c 27, s 416.

26 "Complaints" (last accessed 3 May 2021), online: *Canadian Human Rights Commission* <https://www.chrc-ccdp.gc.ca/en/complaints/make-a-complaint>.

27 "Welcome to the Canadian Human Rights Tribunal" (last updated 21 April 2021), online: *Canadian Human Rights Tribunal* <https://www.chrt-tcdp.gc.ca/index-en.html>.

28 CHRA, s 53(2). The tribunal may award an additional amount not exceeding $20,000 if the person is found to have engaged in the discriminatory behaviour wilfully or recklessly (s 3(3)).

29 EEA, s 4(1).

30 EEA, s 2.

(ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography… .[31]

Employers must prepare employment equity plans, including short-term and long-term goals meant to correct underrepresentation of persons in the designated groups.[32]

The Canadian Human Rights Commission is responsible for enforcing employer obligations under the CHRA, and employment equity compliance review officers conduct compliance audits of employers with a guiding policy of resolving non-compliance through "persuasion and the negotiation of written undertakings."[33] Employers are required to file annual reports, including, among other things, the measures taken by the employer during the reporting period to implement employment equity and the results achieved.[34] Penalties for failing to report or to include the information required or for knowingly providing false or misleading information are fines up to $10,000 for a single violation and up to $50,000 for repeated or continued violations.[35]

Employment Equity Review Tribunals are established on an as-needed basis at an employer's request in circumstances where a compliance officer has notified the employer of non-compliance with a provision of the Act.

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

- the *Canada Pension Plan*,[36] which provides qualifying employees with pension benefits on retirement and permanent disability; and
- the *Employment Insurance Act*,[37] which provides qualifying employees with income replacement during periods of temporary unemployment.

Where to Find Statute Law

The federal and provincial governments each publish their statutes and regulations. The most reliable and up-to-date source for federal legislation and regulations is the Justice Laws Website at <http://laws.justice.gc.ca>. The most reliable and up-to-date source for provincial legislation and regulations is the Ontario government e-Laws website at <http://www.ontario.ca/laws>. Legislation is also available on the Canadian Legal Information Institute (CanLII) website at <http://www.canlii.org>. For the status of bills, search the Legislative Assembly of Ontario website at <https://www.ola.org/en/node/3771>.

Constitutional Law

The Canadian Charter of Rights and Freedoms

GUARANTEED RIGHTS AND FREEDOMS

One special statute that affects employment law in Canada is the Charter, which was adopted as part of the Constitution in 1982. Although the Charter does not address

31 EEA, s 5(b).

32 EEA, s 10.

33 EEA, s 22.

34 EEA, s 18.

35 EEA, s 36.

36 RSC 1985, c C-8 [CPP].

37 SC 1996, c 23.

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 (AG) v A*).[38]

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.

38 2013 SCC 5.

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*)[39] 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 gays and lesbians, the omission of sexual orientation from the human rights statute clearly was far more likely to impact homosexual persons negatively than heterosexual persons. As a result, gays 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.

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."

While the *Vriend* decision involved the Court "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. One example is the Supreme Court of Canada's decision in *M v H*.[40] Although the facts of *M v H* had nothing to do with the workplace, the case has had a significant impact on employment law. As a result of this ruling, the Ontario and federal governments were forced to change the definition of "spouse" to include same-sex partners in many pieces of legislation, including employment-related statutes. Same-sex partnership status was added as a prohibited ground of discrimination under Ontario's *Human Rights Code* in 1999, although it was later removed after

39 [IRPA]; a precursor to the *Alberta Human Rights Act*, RSA 2000, c A-25.5.

40 [1999] 2 SCR 3, 43 OR (3d) 254.

same-sex marriage became legal in Ontario, and it was therefore no longer required as a separate ground.

IMPACT OF THE CHARTER ON PRIVATE SECTOR EMPLOYERS

public sector
operations run by or through government

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

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 (that is, government action) that is found to contravene the Charter. For example, in *Ontario Nurses' Association v Mount Sinai Hospital*,[41] a disabled employee whose employer relied on a statutory exemption to refuse to pay her severance pay under the *Employment Standards Act* (now the *Employment Standards Act, 2000*) used the Charter to successfully challenge that exemption.

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 Case in Point box that follows.

CASE *in* POINT

DISABLED EMPLOYEE CHALLENGES DENIAL OF STATUTORY SEVERANCE PAY

Ontario Nurses' Association v Mount Sinai Hospital, 2005 CanLII 14437, 75 OR (3d) 245 (CA)

Facts

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 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

41 2005 CanLII 14437, 75 OR (3d) 245 (CA).

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."

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

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*,[42] the Supreme Court of Canada set out a two-part test (that is, an "ends" 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 (that is, 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.

42 [1986] 1 SCR 103, 1986 CanLII 46.

However, the Court rejected this argument. First, it held that this objective 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 Challenges to Employment Laws

In a unanimous decision, the Supreme Court of Canada decided that workers' compensation legislation in Nova Scotia infringed the Charter's equality rights by limiting benefits for chronic pain. The legislation provided sufferers of chronic pain with a treatment program that lasted only four weeks, after which time benefits were stopped. The Court found that this differential treatment, based on the nature of the disability, was discrimination on an enumerated ground (disability) because it dealt with chronic pain differently from other injuries. The Supreme Court's declaration of invalidity was postponed for six months from the date of judgment to allow the Nova Scotia legislature an opportunity to change the law.[43]

In 2002, the United Food and Commercial Workers Union launched a legal challenge to the exclusion of agricultural workers from coverage by Ontario's health and safety legislation.[44] It claimed that this exclusion infringes the equality provisions of the Charter because it denies rights to farm workers that are available to almost every other worker in Ontario. A regulation extending OHSA coverage to farming operations took effect on June 30, 2006.[45] It appears that this change in the government's position was a direct result of the Charter challenge.

In contrast, in the 1990 decision of *McKinney v University of Guelph*,[46] the Supreme Court of Canada found that an otherwise discriminatory provision was saved by section 1 of the Charter. In that case, several university professors challenged the constitutionality of Ontario's *Human Rights Code* because (at that time) it failed to prohibit age-based discrimination in employment after age 64. They argued that this contravened the Charter's equality rights provision. The Supreme Court found that, although allowing mandatory retirement policies violated the equality rights section of the Charter, such policies served a legitimate social interest—including opening up teaching positions—and were, therefore, a reasonable limit to those rights under section 1.[47]

The Supreme Court of Canada has dealt with Charter challenges in labour relations matters for a number of years. In 2015, the Court held that *The Public Service Essential Services Act*[48] passed in 2008 in Saskatchewan, which prohibited unilaterally designated "essential services employees" from participating in any strike action against

43 *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54.

44 "Farm Workers Want Protection," *Canadian HR Reporter* (14 July 2003) 2.

45 *Farming Operations*, O Reg 414/05.

46 [1990] 3 SCR 229, 2 OR (3d) 319.

47 The definition of "age" in the Ontario *Human Rights Code* has since been amended to mean 18 years of age and over.

48 SS 2008, c P-42.2, as repealed by *Statutes of Saskatchewan, 2014*, c 27.

their employer, substantially interfered with a meaningful process of collective bargaining and therefore violated section 2(d) of the Charter. Justice Abella, for the majority of the Court, stated:

> The right to strike is an essential part of a meaningful collective bargaining process … The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.[49]
>
> Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.[50]

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. This section has rarely been invoked because few governments want to admit to knowingly infringing Charter rights. One of its rare uses occurred when the Quebec government passed a law requiring signs to be in French only and invoked section 33 to avoid a Charter challenge in the courts.

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, where a governing statute is silent on a relevant point, or where the court has had to interpret the wording of a statute that is vague or unclear. 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 "Defining the Employment Relationship" in this chapter for a further discussion of this topic.)

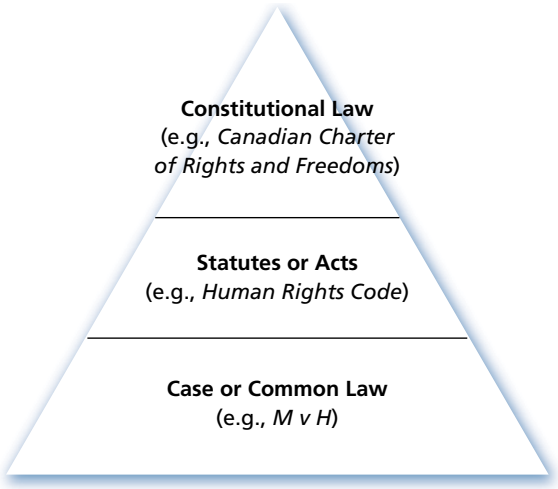
case law
law made by judges, rather than legislatures, that is usually based on the previous decisions of other judges

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 1.1 illustrates this hierarchy.

49 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3.

50 *Ibid* at para 75.

FIGURE 1.1 Pyramid of Laws



Within the bottom tier, law formulated by the Supreme Court of Canada is the most significant, followed (in Ontario) by law formulated by the Court of Appeal for Ontario, then the Ontario Superior Court of Justice and the Ontario Court of Justice. More detail about Canadian courts is provided in "Judicial Framework" in this chapter.

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
of 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

Common Law Rules of Decision-Making

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

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

In considering the weight to be given to previous cases, recent decisions tend to have more authority than older ones, and higher courts have more authority than lower ones.

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

Generally speaking, the principle of *stare decisis* promotes predictability and consistency in decision-making. It also assists when advising clients on the potential outcome of a legal proceeding. However, consistency is not always achieved. For example, seemingly minor factual differences may lead to different legal results. Where, in a court's view, the application of case law would lead to an inappropriate result, the

court may try to circumvent legal precedent, thus leading to apparent inconsistencies. When decisions are appealed to higher courts, the law may be clarified; otherwise, it remains unsettled until a similar case reaches an appellate court.

Occasionally, there are watershed cases 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**. For example, in 2012, the Court of Appeal for Ontario recognized a new legal claim for "intrusion upon seclusion" in the case of *Jones v Tsige*[51] (discussed in Chapter 5).

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

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. In a unionized environment, a third party negotiates the terms of the contract with the employer on behalf of a collective group of workers who then decide whether to accept or reject the terms of the agreement. A **collective agreement** will generally contain more detailed information about the relationship than a non-unionized contract of employment, including procedures to follow when there is an alleged violation of the agreement. Details of the relationship between worker, employer, and the union in a unionized workplace are outlined in Chapter 13.

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

collective agreement
a contract of employment between an employer and a union governing the terms of employment for a group of workers

One contract principle that has a significant impact on employment law in Ontario 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, the employer must provide advance notice of dismissal or pay instead of notice. Economic necessity does not relieve the employer of this obligation. The implied term to provide reasonable notice and the criteria used by courts for determining what that means is discussed in detail in Chapters 7 and 8.

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

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.

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

51 2012 ONCA 32.

TORT LAW

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

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, 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 carelessly misleads a prospective employee about the job during the hiring process, and the employee suffers losses as a result of relying on the misrepresentation.

In a successful tort action, damages are awarded to the plaintiff for losses suffered as a result of the defendant's conduct. In the negligent misrepresentation situation, damages can be awarded to compensate the plaintiff for the costs of relocation (including losses on real estate) if the new job involves moving to a different city, the costs of a job search, and the emotional costs of distress. Torts that may arise in the employment relationship are discussed in Chapter 6.

Where to Find Common Law

Court decisions are found in a number of case reporters—national, regional, provincial, and topical. Free online legal services include CanLII (<https://www.canlii.org/en/index.php>), Supreme Court of Canada decisions (<https://scc-csc.lexum.com/scc-csc/en/nav.do>), and Court of Appeal for Ontario decisions (<https://www.ontariocourts.ca/decisions_index/en>). Subscription services include Lexis Advance Quicklaw and WestlawNext Canada.

Discussions, interpretations, and analyses of case law can be found in secondary sources such as encyclopedic digests, textbooks, loose-leaf reporting series, newsletters, and legal blogs. Secondary sources are an excellent place to begin legal research when you know little about a topic, as they will direct you to primary sources of law—statutes, regulations, and case law—on the specific topic.

Judicial Framework

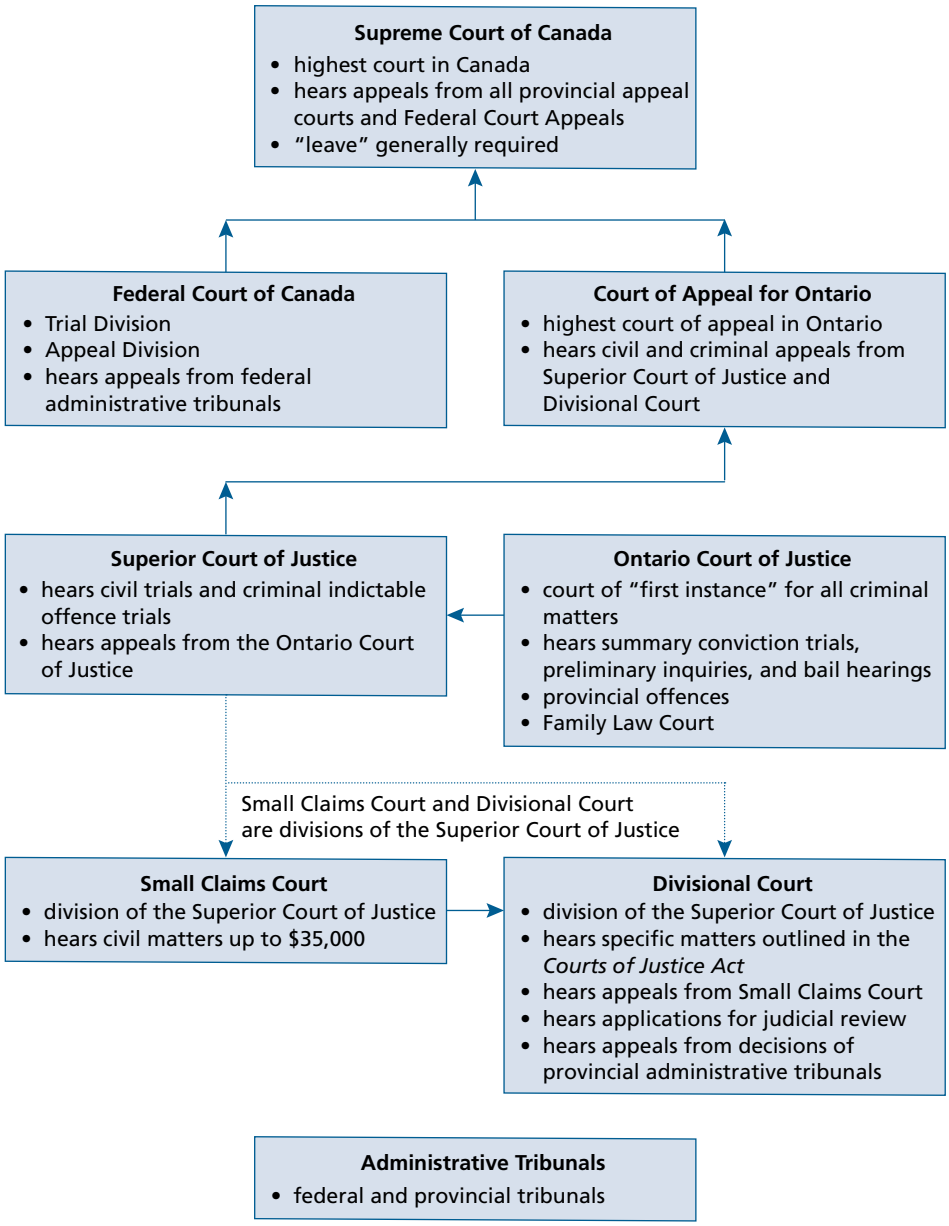
The Court System

The Supreme Court of Canada is the highest court in Canada. It hears appeals from provincial courts of appeal generally with leave (i.e., permission) only. Decisions of the Supreme Court of Canada are binding on all lower courts throughout Canada. The Court of Appeal for Ontario is the highest court in the province of Ontario. It hears appeals from decisions of the Superior Court of Justice and the Divisional Court, a division of the Superior Court of Justice that hears specific types of matters and appeals of the Small Claims Court and administrative tribunals.

The Ontario Small Claims Court is a division of the Superior Court of Justice and has jurisdiction to hear claims where the monetary amount does not exceed $35,000. Licensed paralegals may represent parties in Small Claims Court but not in the Court

of Appeal for Ontario, the Superior Court of Justice, or the Divisional Court. Figure 1.2 shows the structure of the federal and Ontario judicial system.

FIGURE 1.2 Federal and Ontario Judicial System



The Administrative System

Administrative tribunals have been established to make decisions in specialized areas, such as employment standards, industrial relations, 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

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

traditional court system. For this reason, it is imperative that a paralegal understands how and where to enforce an employment right.

Tribunals act in a quasi-judicial manner, meaning that they observe the rules of procedural fairness and provide a full hearing but are less formal than courts, and their members are experts in employment matters. Although administrative tribunals are technically subordinate to the courts, appeals to the courts from their decisions are usually limited by statute in a provision called a **privative clause**. However, privative clauses do not displace the jurisdiction of the courts entirely, and courts may also overturn a tribunal's decision if it exceeded its jurisdiction, showed bias, or denied a party natural justice.[52]

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

A request to a court to review the decision of an administrative tribunal is called an application for **judicial review**. In Ontario, the Divisional Court 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*,[53] 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.

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

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

judicial deference
willingness to accept the decisions of administrative tribunals based on the tribunal's expertise in a particular area

Provincial administrative tribunals, with decision-making authority over labour and employment law matters, include the Human Rights Tribunal of Ontario, the Workplace Safety and Insurance Appeals Tribunal, and the Ontario Labour Relations Board, discussed in detail in Chapters 10, 12, and 13, respectively. In addition to formal tribunals, the Ministry of Labour, Training and Skills Development employment standards officers issue orders regarding compliance with the ESA, and staff of the Workplace Safety and Insurance Board make decisions regarding benefits and appeals.

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.

52 Douglas Gilbert, Brian Burkett & Moira McCaskill, *Canadian Labour and Employment Law for the US Practitioner* (Washington, DC: Bureau of National Affairs, 2000) at 11-12.

53 2008 SCC 9.

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
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

Defining the Employment Relationship

Before a licensed paralegal can help a client with an employment problem, 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.

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. Because statutory and common law rights and responsibilities are based on an employer–employee relationship, the first step is to identify the nature of the relationship.

In contrast to an employee, an **independent contractor** is a self-employed worker 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 a homeowner hires an individual to paint their house, they are not hiring that person as an employee but rather as a self-employed contractor. If a dispute arises, it is a contract dispute, not an employment dispute. The statutory rules and common law regarding employment law do not apply. 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?

Between the categories of independent contractor and employee is the **dependent contractor** who falls closer to the side of employee. A dependent contractor–principal relationship is one where the worker's income is derived almost exclusively from the

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

dependent contractor
a worker whose income is derived almost exclusively from the principal

principal. A dependent contractor is treated in law as an employee and is entitled to reasonable notice of termination. The Court of Appeal for Ontario's decision in *Thurston v Ontario (Children's Lawyer)* summarized the criteria to consider in assessing the nature of the relationship as either dependent or independent contractor–principal.

CASE *in* POINT

THE FINE LINE BETWEEN DEPENDENT AND INDEPENDENT CONTRACTOR STATUS

Thurston v Ontario (Children's Lawyer), 2019 ONCA 640

Facts

Thurston was a lawyer who provided legal services to the Office of the Children's Lawyer (OCL) under several agreements over a 13-year period. OCL did not renew her last agreement, and Thurston claimed that, as a dependent contractor, she was entitled to common law notice of termination. On a motion for summary judgment, the judge concluded that Thurston was a dependent contractor. OCL appealed.

Relevant Issue

Whether Thurston was a dependent or an independent contractor.

Decision

The Court of Appeal for Ontario allowed the appeal. Referring to its earlier decision of *McKee v Reid's Heritage Homes Ltd*,[54] the Court stated that

> dependent contractor status is a non-employment relationship in which there is "a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity". "Minimum economic dependency" is a vaguely worded standard, and its application yields outcomes that are highly context-specific: *McKee*, at para. 38.[55]

Without ignoring the context of the relationship, exclusivity is the hallmark of dependent contractor status and is a "categorical concept—it poses an either/or question, and 'near-complete exclusivity' must be understood with this in mind."[56] The Court stated that near-exclusivity would require substantially more than 50 percent of Thurston's billings. Over the course of her agreements, Thurston averaged 39.9 percent of annual billings from OCL.

Despite the difficulty in some cases of distinguishing an employee–employer relationship from one of dependent or independent contractor–principal, the relationships are treated very differently in law. 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 sign a document that characterizes the role in that manner.

What Are the Advantages of an Employer–Employee Relationship?

There is an increasing trend for organizations to hire individuals as independent contractors rather than as employees or to hire a significant number of workers through temporary help agencies. Many organizations like the fact that this relationship presents fewer ongoing legal obligations, less paperwork, and less expense

54 2009 ONCA 916.

55 *Thurston* at para 23.

56 *Ibid* at para 30.

than the employee–employer relationship and allows for more flexibility in staffing. Unfortunately, this relationship puts a worker at a significant disadvantage because they cannot look to the statutory protections afforded to an employee.

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 a safe workplace.* Independent contractors may not be protected under the OHSA.
4. *Providing reasonable notice of termination or pay in lieu* (unless the employment contract states otherwise). Independent contractors are entitled to notice of termination only if their contract so provides. There is no implied right to reasonable notice.
5. *Remitting appropriate health and income taxes, and contributing to and remitting CPP and employment insurance 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.
6. *Assuming liability for an employee's deliberate or negligent acts during the course of employment.* In contrast, independent contractors are generally liable to both the third-party victim and the hiring organization for misconduct or negligence while on the job.[57]

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 themselves or under the control and direction of the employer. The traditional four-fold common law test to distinguish between an employee and an independent contractor, which has evolved over time, assessed the following factors:

1. *Control.* 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? Is the employee restricted to working only for that organization? If the individual does not have autonomy, and

57 Howard Levitt, *Quick Reference to Employment Law* (Toronto: International Reference Press, 2002) at 1-23.

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*. 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. *Tools*. 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.
4. *Total Relationship Between the Parties*. This part of the test considers things such as the extent to which the worker is integrated into the business; the durability, longevity, and exclusivity of the relationship; and any other particulars that assist in determining the nature of the relationship.

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 themselves 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. In 2001, the Supreme Court of Canada stated that "[t]he central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account."[58]

The ability to organize and to be represented by a union requires workers to be recognized as employees or dependent contractors, a difficult task with the growth of the gig economy, where workers juggle several different short-term, temporary jobs with different companies. Uber drivers around the world are challenging their classification as independent contractors. In March 2020, the Ontario Labour Relations Board ruled that Foodora couriers were dependent contractors and therefore were entitled to organize and be represented by a union in efforts to secure better working conditions from the company.[59] In determining that the relationship between Foodora couriers and the company fell more in line with an employment relationship, the Board held:

1. The App was the "lynchpin in the process to deliver food" and was owned by Foodora.[60] It generated customer lists and information, an inventory of restaurant customers, a mechanism that allows customers to place the order and the restaurant to fulfil the order, and the algorithm to assign the delivery to the courier. Foodora controlled payment by the customer, made payment to the restaurant, and calculated the amount earned by the courier.[61] While couriers owned the transportation used to complete deliveries, the App was considered the most valuable "tool" in the business.

58 *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at para 47.

59 *Canadian Union of Postal Workers v Foodora Inc dba Foodora*, 2020 CanLII 16750, 2020 CLLC 220-032 (Ont LRB) [*Foodora* cited to CanLII].

60 *Ibid* at paras 97-98.

61 *Ibid* at paras 97-98.

2. Foodora had significant control over how the work was performed, including using Global Positioning System (GPS) technology to monitor where couriers were; controlling the structure of shifts, when shifts were offered, the length of shifts and geographic zones; requiring couriers to accept and complete the delivery of orders once assigned; prohibiting the ability of couriers to hire others to complete deliveries.
3. Couriers were unable to negotiate or alter fees and received a standard rate (plus tips) for completing deliveries. While couriers were not prevented from taking on other employment, the Board concluded that many employees juggle several jobs and that the issue of economic dependence had to be considered in the context of the entire relationship.
4. Couriers were "heavily, if not entirely, integrated, into Foodora's business."[62]

The Board was careful in its conclusion to state that this was the

> first decision with respect to workers in what has been described by the parties and the media as "the gig economy". However, the services performed by Foodora couriers are nothing new to the Board and in many ways are similar to the circumstances of the Board's older cases. … The Board has been tasked with the same questions about dependent contractors in various sectors including transportation and construction. Such cases have always been fact-based inquiries that require a balancing of factors. This case is no different in many respects.[63]

Uber drivers globally are challenging their status as independent contractors.

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.[64] 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 a dependent or 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

62 *Ibid* at para 144.

63 *Ibid* at para 172.

64 Richard Yates, *Legal Fundamentals for Canadian Business*, 4th ed (Toronto: Pearson Canada, 2010).

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RELATED WEBSITES

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

Ontario government e-Laws website: <http://www.ontario.ca/laws>.

Justice Laws Website: <http://laws.justice.gc.ca>.

KEY TERMS

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REVIEW QUESTIONS

1. What is the difference between labour and employment law?
2. What is the difference between the private sector and the public sector?
3. What are the primary sources of employment law?
4. Name a significant demographic, economic, or global event or trend, and discuss the effect that it might have on employment law in the future.
5. Identify the key federal and provincial statutes relating to labour and employment law.
6. Why might an employer prefer to hire an individual as an independent contractor rather than as an employee or dependent contractor?
7. The *Canadian Charter of Rights and Freedoms* applies only where government is involved. However, the Charter can indirectly affect private sector employers. How?
8. Outline the permitted scope of practice for licensed paralegals in labour and employment law.

DISCUSSION QUESTIONS

1. Betty works as a teller at a CIBC branch in the city of Toronto, in the province of Ontario. If Betty has a dispute with her employer about her entitlement to overtime pay, would she look to federal or provincial employment legislation?
2. 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 *Employment Standards Act*. The ESA, in turn, continued to allow employee benefit plans that discriminated against workers aged 65 and 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 (for example, no long-term disability coverage) compared to those received by employees under that age. The union argued that the statutory provisions that allowed these discriminatory distinctions violated the Charter.

   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.
3. Seema and her husband were unable to have children, and they decided to adopt. When their adopted baby daughter came into their care, Seema applied for both pregnancy benefits (17 weeks) and parental benefits (at that time, 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. Seema challenged this denial on the basis of the equality rights provision in the Charter.
   a. In your opinion, was the denial of pregnancy benefits to an adoptive parent fair?
   b. Did it contravene section 15 of the Charter? Explain your answer.
4. 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 is 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?
5. Manny began working at Lay-Z-Guy in 1999 as a customer service manager. In 2013, 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 Manny to incorporate, and from that point forward, the agreements were between Lay-Z-Guy and Manny's corporation. The agreements defined Manny, 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. Manny 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 Manny was limited to servicing Lay-Z-Guy exclusively. In 2021, Lay-Z-Guy terminated the agreement with 60 days' notice. Manny sued for wrongful dismissal damages, alleging that he was an employee.
   a. What arguments could Manny make to support his position that he was an employee?
   b. What arguments could Lay-Z-Guy make to support its position that Manny was an independent contractor?
   c. Which side do you think would be successful?