Framework 1.2 – Sources and Categories of Law

Original or Primary Sources of Law

The original sources of Canadian law pre-date the current components of the legal system which are written down as statute law, case law, or legal procedures. They include influences such as religion, morality, historic legal systems, customs, conventions, and philosophies.

Religion and Morality

Many Canadians would consider God to be the original source of law. The Jewish faith is based on the Torah, which describes how Moses received the Ten Commandments from God. The Torah is contained in the Old Testament which forms part of the Christian Bible. This **Judeo-Christian tradition** was brought to Canada by settlers in the 16th and 17th centuries and may be referred to as **biblical law, Hebrew law, or Mosaic law**. References to the **supremacy of God** can still be found in many Canadian laws and procedures today.

In addition to religious teachings, Canadian law can also be traced back to a cultural acceptance of **morality and ethics**. These may be thought of as views about what is right and what is wrong that are based on **reasoning** as opposed to religious edicts. Atheists, for example, who do not believe in God, may be as capable of following the Ten Commandments as a religious person due to their sense of morality.

In 1906, the government of Sir Wilfred Laurier passed the **Lord's Day Act** which contained a prohibition of commercial transactions on Sunday. This law remained in force until the passage of the Canadian Charter of Rights and Freedoms in 1982. Shortly thereafter, the law was challenged as being unconstitutional and was struck down. Sunday shopping has been a part of our lives ever since.

Historical Legal Systems

The earliest legal systems would have been based on laws passed orally from generation to generation. At some point in their histories, though, some societies developed both the inclination and the means to codify or write down their laws to make them more consistent and accessible. One very early example was the **Code of Hammurabi**. Hammurabi (1792-1750 BCE) was the King of Babylon, which was located in present-day Iraq. His laws were attributed to the gods to encourage compliance.

Ancient Greece is recognized as the origin of **democratic** participation in society. This included **voting** in political matters and **trials** by jury in which the members would vote on the facts as well as any sentence handed out. Similar democratic principles are now entrenched in the Charter.

In about 440 BCE, the ancient **Romans** inscribed twelve plaques with a **code** made up of traditional Roman laws, including the presumption of innocence in criminal matters and recognition of the rule of law. This codification is now known as the **Law of the Twelve Tables**. The tables were made available to the public so that every citizen could be aware of the law. Over time, however, the code became more complex, with more laws and more interpretations needing to be considered. It then became

necessary to have experts in the law to advise citizens. These experts filled the role that **lawyers** do today. The use of codes and lawyers are two features of the Roman legal system that are now integral to the Canadian legal system. Centuries later, Roman law had become so complex that Emperor Justinian I (527-565) decided to reform and clarify it with the codification known as **Justinian's Code**. Not only did this emperor give us the word "justice", but elements of this code can be found in the current legal systems of many European countries.

Many aspects of the legal systems of ancient Greece and Rome were first adopted by **Britain** long before being inherited by Canada. In medieval England, there were different legal systems operating in different parts of the country, many of which would be considered nonsensical or barbaric by today's standards. Two infamous examples of medieval justice were **trial by combat** and **trial by ordeal**, where, in each case, the accused person was placed in a very dangerous predicament on the assumption that God would perform a miracle to protect them if they were innocent. It was not until **King Henry II** tried to bring greater consistency in the 12th century that many current legal practices started coming into effect. He trained a group of circuit judges who would travel the country, rendering decisions in travelling courts called **assizes**. They then started writing down **reports** of their decisions for other judges to reference. Henry's son, **John**, took power in 1199. King John then signed the **Magna Carta** in 1215**,** which improved the fortunes of accused persons by granting them such rights as trial by jury and innocence until proof of guilt. The Magna Carta also recognized the rule of law.

Quebec was settled by the **French** and therefore inherited parts of the French legal system. In 1774, the Quebec Act was passed by the British government which established British criminal law in the province, but allowed Quebecers to keep French civil law. This was in the form of a code, the most influential version of which was known as the **Napoleonic Code** or the **French Civil Code**, which had been commissioned by Napoleon in 1804, after he had won control of France. Today, the **Civil Code of Quebec** is still in use. It operates differently than the common law systems in use in the rest of Canada, as it does not require adherence to precedents set by judges in previous decisions. Instead, judges must primarily rely on the Code itself when making their decisions.

Canada's **Aboriginal** peoples were established long before European settlement, and they have managed to maintain their cultures in many respects including parts of their legal systems. Many Aboriginal communities have the authority under the federal **Indian Act** to create and enforce their own municipal by-laws. Some communities have also negotiated the rights to make and enforce the equivalent of provincial laws. For example, the Inuit peoples of Nunavut have been granted broad rights of self-government; their legislature follows the Inuit tradition a making decisions through **consensus** rather than by a majority voting system.

Customs and Conventions

Customs and conventions are long standing traditions or ways of doing things that may be given the force of law even though they are not written down as law or included in any contract. This is due to the fact that there is a reasonable expectation that they will continue, and they would therefore be relied upon. An example of a **custom** upheld by law is that of **easements**. People may be granted an easement or a right of way through another person's property if it can be established that the land had been used

for that purpose for a long time and that there is no easy alternative. **Conventions** are customs that are practiced in professional or political contexts. One famous instance where a political convention was recognized by the court took place when some of the provinces mounted court challenges when the federal government announced their plans to amend the constitution in the early 1980's. The Supreme Court of Canada held that there was a convention requiring the federal government to obtain "a substantial measure of provincial consent" before amending the constitution in any way that might affect provincial powers. The convention was not given the force of law, but its recognition was enough to bring the federal government back to the bargaining table.

Social and Political Philosophies

Another primary source of law is changes in social or political philosophy. For example, public reaction to the persecution of Jewish people during World War II and the advances made by the civil rights movement in the US prompted the federal government to pass the **Canadian Human Rights Act, 1977**. Another example was brought about by the financial devastation of the Great Depression in the 1930's. The **socialist ideals** that gained momentum during that time eventually led to legislation that provided greater social security, unemployment insurance, and worker's compensation benefits in Canada.

Secondary Sources of Canadian Law

Secondary sources include the constitution, statute law, and case law. The constitution is the most important secondary source. If any statute is found to be unconstitutional, then it must be amended or repealed. In turn, statute law takes precedence over any case law with which it conflicts. The only time that case law may overrule statute law is when a court decides that a statute is unconstitutional.

The Constitution

The Canadian constitution consists of several documents. The first is the **Constitution Act, 1867**, formerly known as the **British North America Act**. This Act created the Dominion of Canada, divided powers between the federal and provincial governments, and stated that Canada was to have "a Constitution similar in Principle to that of the United Kingdom". Two important constitutional principles inherited from Britain are **judicial independence** and **parliamentary supremacy**. The Canadian constitution was amended many times. At first, these amendments were made by the British parliament. However, in 1982 the constitution was **patriated**, meaning from that time forward it could be amended in Canada. The **Constitution Act, 1982** also included the Canadian Charter of Rights and Freedoms which entrenched fundamental human rights and gave the courts more ways to determine statutes unconstitutional:

s.52(1) of the Constitution Act, 1982:

> The constitution of Canada is **the supreme law of Canada**, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This does not, however, require courts to follow the constitution blindly. The Charter includes an escape clause:

s.1 of the Canadian Charter of Rights and Freedoms:

> 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.

Statute Law

A statute is a law passed by the federal or provincial governments. **Section 91** of the Constitution Act, 1867 gave the federal government jurisdiction in certain areas including currency, national defence, the postal service, and criminal law. **Section 92** gave provincial governments jurisdiction over other areas including hospitals, property and civil rights, and municipalities. If a government passes a law that is outside its scope, a court will find that it had acted **ultra vires**, or beyond its authority. Governments act **intra vires** when they pass legislation that is within their authority.

It is ultimately up to the courts to decide how a piece of legislation should be applied in a matter before them. Judges will rely on principles of **statutory interpretation**, such as the **"mischief rule"** whereby they focus on the problem that the legislation was intended to fix. They will also look to **"internal aids"**, such as the preamble or definitions contained in the statute, as well as **"external aids"**, such as legal dictionaries or articles written by legal scholars.

Case Law

Case law is comprised of the reports written by judges of the facts, findings, and rationale behind their decisions. These reports are crucial to our legal system due to the principle of **stare decisis**. This requires courts to consider previous decisions when ruling on a case with similar circumstances. Any such **precedent** set by a higher court must be followed by a lower court when similar circumstances arise. When judges do have the option and they choose to not follow a previous ruling, they are said to **distinguish** the precedent, and will give an explanation in their decision. Reasons may include the fact that the precedent was set in a different jurisdiction or that the facts of the cases are substantially different.

Lawyers must research case law when drafting their arguments, and judges refer to case law when rendering their decisions. Case law may be found in **law reports**, which are either hardcopy or online periodicals, organized by jurisdiction or by topic, or in large databases. Books and articles written by **legal scholars** are also excellent sources, as the authors typically have greater knowledge of the case law in their area of expertise than other lawyers or even judges.

Categories of Law

Laws can be organized into categories and sub-categories, some of which overlap:

Substantive vs. Procedural Law: Substantive laws relate to rights and duties of people or other legal entities, whereas procedural laws relate to the procedures that must be followed when enforcing substantive laws.

Domestic vs. International Law: Domestic law governs activities only within the country where it is passed, but international law has jurisdiction in more than one country.

Public vs. Private Law: Domestic law can be subdivided into public and private law. Public law covers relationships between people and their government and includes constitutional law and administrative law, where individual rights are balanced with the state, and criminal law, where certain behaviours are prohibited and punished. Private law or civil law regulates disputes between individuals, businesses, or organizations. Private law may be further subdivided into categories including family law, contract law, wills and estates, property law, and tort law, which covers disputes where one individual or corporation sues another for damages.

There are many other categories of law that may be identified as areas of study or practice, and with advances in technology and social philosophy, that list will continue to grow.