The Canadian Legal System: An Introduction for Regulated Professions

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The Canadian Legal System: An Introduction for Regulated Professions

Steve Coughlan* and Dale Darling**

To understand the influence of law on any regulated profession, one must first understand the influences on the creation of law. This introductory paper sets the context for that discussion of law by explaining the structural aspects of the legal system. Those aspects include the sources of law in Canada, the forms that law can take, and the parties who are primarily responsible for creating and shaping the law. This paper is structured around the discussion of four things: constitutional law, non-constitutional law, decision-makers in the legal system and, finally, a case study illustrating those features in action.

1. CONSTITUTIONAL LAW

(a) Introduction

The constitution of a country sets out the basic framework within which all other rules must be made. That point is explicit in the Constitution Act, 1982,¹ which provides that any law which is inconsistent with the Constitution is of no force or effect.² It is not, however, as clear as it could be in Canada exactly what constitutes the Constitution.

We are accustomed to thinking of a constitution as a single written document, but this is not the only form it can take, and it is not the form that Canada’s Constitution takes. Certainly written documents are central to it: the country was created with the British North America Act (since retitled the Constitution Act, 1867)³ and the Constitution Act, 1982 is also of great significance. However, various provinces joined the country after 1867 and other significant structural changes have taken place from time to time, so the written portion of our Constitution actually consists of at least 30 statutes.⁴ Further, our Constitution also relies on unwritten traditions: the office of

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¹ Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
² Section 52(1) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, provides that “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.”
⁴ Section 52(2) of the Constitution Act, 1982 states that “The Constitution of Canada includes (a) the Canada Act 1982, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or
Prime Minister, for example, is not mentioned in any constitutional document and exists only by
convention.\(^5\)

Fortunately, our discussion need not be overly concerned with most of those aspects of the
Constitution. Virtually all of the discussion here of constitutional law will focus on two docu-
ments, the *Constitution Act, 1867* and the *Constitution Act, 1982*. The former created a division
of powers between federal and provincial governments, while the latter created the *Canadian
Charter of Rights and Freedoms*.\(^6\)

(b) Division of Powers

The story goes that students in an international school were assigned an essay about elephants.
Students from various countries wrote about the elephant in industry, the elephant in war, the
love life of the elephant, and so on, according to stereotypes about their various nationalities.
The Canadian student’s paper was entitled “The Elephant: a Federal or Provincial Respon-
sibility?”\(^7\)

In Canada, virtually every legal issue at some point depends on the fact that we live in a fed-
eral state. Constitutional scholars disagree over the precise definition of “federalism”, but fortu-
nately for our purposes the intricacies of their disagreements are not important. The essence of
Canada’s constitutional structure is that we have two levels of government, federal and provin-
cial, neither of which is subordinate to the other. Rather, each level has legislative jurisdiction
over different things, and is supreme within its own sphere. These divisions were created at the
time of Confederation in the *Constitution Act, 1867*.\(^8\) Section 91 of that Act sets out the powers
given to the federal government (“Parliament”) and s. 92 sets out the powers given to the
provincial governments (“Legislatures”). A law which is properly within a level of govern-
ment’s law-making authority is said to be “intra vires” while one which falls outside it is “ul-
tra vires”: although the legal profession is gradually ridding itself of Latin terms, these two
are so entrenched that they are unlikely to be replaced.

\(^5\) On this point, and on the structure of the Constitution generally, see P.W. Hogg, *Constitutional Law of Canada*
(Toronto: Carswell, looseleaf edition), Chapter 1, “Sources”.


has been written by lawyers, because even the jokes are footnoted.

Over the years, courts in Canada and Great Britain have adopted a variety of approaches to interpreting the Constitution Act, 1867. Although on its face that Act seems to give a preference to federal power over provincial power, there have been long periods when the judges hearing final appeals favoured the view that the provinces should have the bulk of authority. At times courts have held the view that the areas of federal and provincial power were “watertight compartments” completely excluding one another, though the current view is that there is considerable room for overlap between federal and provincial jurisdiction. The result of various ebbs and flows in interpretation is that there remains considerable room for argument on virtually any question of importance in constitutional law. Nonetheless, some reasonably accurate generalizations can be made. Generally, provincial legislation will be more important than federal legislation in governing the professions and professional activity. Nonetheless, federal laws still play a significant role. A brief overview is in order, followed by a more detailed discussion of some particular issues.

The federal government has been assigned responsibility for a number of things by s. 91 of the Constitution Act, 1867, including trade and commerce, criminal law, and perhaps most significantly “the raising of money by any mode or system of taxation”. In addition, Parliament has general authority to pass laws for the “Peace, Order, and Good Government of Canada” and can legislate over any matter not “assigned exclusively to the Legislatures”. A great deal of judicial attention has been paid over the years to exactly what meaning to give to the Peace, Order and Good Government clause: whether it is a mere residual power covering matters not specifically assigned to either level of government, an emergency power, a power to legislate where a serious national interest is at stake or something else. That debate is not really resolved yet.

Provincial governments have jurisdiction only over those areas specifically assigned to them. Those areas include the establishment, maintenance and management of hospitals, property and civil rights in the province, and all matters “of a merely local or private nature in the province”. The assignment of these areas to the provinces has brought most professional activity under the direct jurisdiction of the provinces. “Property and civil rights” in particular has been interpreted quite broadly, to include most circumstances in which people pay for or provide services to one another (despite the fact that “the regulation of trade and commerce” was assigned to the federal government). Further, although the federal government has exclusive jurisdiction over criminal law, the provinces have the ability to enforce their own laws through the use of fines.

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9 Until 1949, appeals from decisions of the Supreme Court of Canada could be taken to the Judicial Committee of the Privy Council in Great Britain.

10 These powers are found in ss. 91(2), 91(15), 91(27) and 91(3), respectively, in the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3. Note that this Act is a British statute.

11 Ibid., ss. 92(7), 92(13), and 92(16) respectively.
penalties or imprisonment, and can use that ability in relation to their rules governing professions.\textsuperscript{12}

However, although the regulation of professions is generally provincial or territorial, there are relevant areas of law within federal jurisdiction which might be relevant to professionals. For example patents, copyright and banking, are all assigned to the federal government.\textsuperscript{13}

In principle, then, legislative authority in Canada depends on deciding what a law is about (its “pith and substance”), and then asking who has jurisdiction over that area. Provincial legislation therefore ought to be of the greatest significance to professionals, and generally speaking that is true. Given the broad scope of “property and civil rights”, provinces legislate regarding the practice of any profession or trade, and so the regulatory authorities for engineers, accountants, architects, lawyers and so on are created at the provincial or territorial level. The same is true for nurses, doctors, dentists or other health care professionals. In addition, because of their jurisdiction over hospitals and over property and civil rights, provinces have jurisdiction over hospital insurance and medicare schemes, and can legislate about hospital privileges, hospital services, and so on.

In practice, however, matters are not always straightforward. The fact that provinces have jurisdiction to regulate professions means that they are entitled to create qualifications which might be quite different from those anywhere else, including in other provinces. As a matter of fact, however, there has been a strong trend in the past few decades towards making those qualifications uniform across the country. As a result, although strictly jurisdiction to make the rules rests with each province or territory, the rules themselves are often the same nation-wide: see the discussion below of \textit{Ontario (Human Rights Commission) v. National Dental Examining Board of Canada}.\textsuperscript{14}

Another complication arises because of the federal government’s greater taxing ability, which typically provides it with more resources than a province. As a result, the federal government can offer to cost-share programs with provinces, providing services that the province could not otherwise afford. The federal government can then impose conditions on the cost-sharing arrangement, thereby having an indirect influence in areas over which it cannot legislate directly. Health insurance schemes in each province, for example, do not constitutionally have to comply with conditions set out in the \textit{Canada Health Act}, but if they do the province is eligible to receive

\begin{flushleft}
\textsuperscript{12} \textit{Ibid.}, s. 92(15).
\textsuperscript{13} \textit{Ibid.}, ss 91(22), (23), and (15).
\end{flushleft
financial contributions from the federal government.\textsuperscript{15} Such arrangements result in a reasonable degree of uniformity across the country, effectively created by the federal government, in areas of legislation within provincial authority.\textsuperscript{16}

Legislative jurisdiction is not always straightforward either. Consider, for example, Nova Scotia’s \textit{Medical Services Act} of 1989. The Act stated that its purpose was “to prohibit the privatization of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians”.\textsuperscript{17} Taken at face value, the Act was well within the province’s jurisdiction over hospitals or property and civil rights. It prohibited the medical services named in a regulation from being performed outside a hospital, and that regulation listed nine services, including, for example, arthroscopy, liposuction and abortion. It was this latter inclusion that created the legal issue.

The legal issue was what this law was really “about”. The impetus for the Act had been the announcement by Dr. Henry Morgentaler of his plans to create a free-standing abortion clinic in Halifax. Morgentaler opened his clinic and performed abortions despite the legislation, and was charged under the Act. At trial, the province argued that the legislation was \textit{intra vires}: that is, within its jurisdiction. The province argued that its authority over hospitals, over property and civil rights, and over matters of a local or private nature allowed it to legislate about rational health-care resource allocation. Morgentaler argued that the Act was \textit{ultra vires}: outside the area in which the province was allowed to legislate. His argument was that in reality the Act was aimed specifically at abortion, and, in particular, tried to prevent abortions because of a view that they were morally wrong. To prohibit actions because they are seen as morally wrong is to say that the behaviour is criminal, but only the federal government is allowed to create criminal law.

\textsuperscript{15} Section 7 of the \textit{Canada Health Act}, R.S.C. 1985, c. C-6 provides:

\begin{quote}
7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:
\begin{enumerate}
\item public administration;
\item comprehensiveness;
\item universality;
\item portability; and
\item accessibility.
\end{enumerate}
\end{quote}

Subsequent sections of the Act describe in greater detail what is needed to satisfy each of these criteria.

\textsuperscript{16} Similarly, the Canada Assistance Plan created several conditions to which provincial social assistance legislation had to conform if the province was to receive federal contributions. For discussion of the federal spending power, see P.W. Hogg, \textit{Constitutional Law of Canada} (Toronto: Carswell, looseleaf edition), s. 6.8(a).

\textsuperscript{17} \textit{Medical Services Act}, R.S.N.S. 1989, c. 281, s. 2.
Both at trial, and ultimately on appeal as far as the Supreme Court of Canada, the province’s argument lost.\textsuperscript{18} Courts agreed that health-care resource allocation was within the jurisdiction of the province, but also agreed that the Act was not really about that issue. Looking to the evidence around the passage of the Act — including the uncharacteristic lack of prior consultation with the medical profession, the failure to wait for the results of a provincial Royal Commission on resource allocation, and the statement by the Minister of Health in the Legislature that he was “not supportive of free-standing abortion clinics” and that the government “will do everything in our effort to stop them” — courts concluded that the Act was really a piece of criminal law. Since the provinces are not allowed to create criminal laws, the Act was \textit{ultra vires}. Because it was \textit{ultra vires}, it was declared invalid — “struck down” — and so Morgentaler was not guilty, because there no longer was any Act which he had violated.

The distinction between federal and provincial jurisdiction can also be significant without having such dramatic effects. Both the federal and provincial governments, for example, have the authority to create Human Rights Acts, and have done so, creating Human Rights Tribunals which can hear complaints about discrimination in employment or provision of services. However, each tribunal can only hear complaints on matters within its jurisdiction: a complaint about the Canadian National Railway as an employer would have to be taken to the Canadian Human Rights Commission, for example, since interprovincial railways are federally regulated,\textsuperscript{19} while most complaints about an employer would go to a provincial body, since provinces regulate property and civil rights.\textsuperscript{20}

In \textit{Ontario (Human Rights Commission) v. National Dental Examining Board of Canada}\textsuperscript{21} (“NDEB”), complaints about the NDEB were brought to the Commission by two dentists. The NDEB argued that as it was a national body, incorporated under federal rather than provincial legislation, a provincial human rights commission did not have jurisdiction to hear the complaints. The Supreme Court of Canada, however, rejected the argument, holding that:

The Board is not operating under the Peace, Order and Good Government clause or the trade and commerce power under s. 91 of the \textit{Constitution Act, 1867}, but is simply a federally incorporated board subject to provincial human rights legislation. Therefore, the

Ontario Human Rights Commission has jurisdiction over complaints that are the subject of this appeal.22

The NDEB is an example of the point made above, that cooperation among provinces and territories means that federal and provincial areas of jurisdiction are not always as clearly distinct as they might be in governing professionals. Dentists are regulated provincially, like any other profession. However, to be accredited to practise, a dentist in any province must pass the accreditation tests given by the NDEB, a board created by federal legislation. This seems at first glance like a contradiction, and one can understand it having led to the litigation noted above.

One level of government is not able to delegate its jurisdiction to another. Therefore, the federal government cannot allow a province to create rules governing interprovincial trucking, even if that would be convenient for everyone because the province was already regulating intra-provincial trucking. However, a province can create a board to regulate intra-provincial trucking and give that board the authority to create rules. The federal government can then adopt that board’s existing regulations and indeed adopt in advance any new rules that board creates. Separate constitutional jurisdiction is maintained in principle, though as a practical matter the task is carried out by one board.23

Something similar is true of the NDEB. Although the NDEB is created by federal legislation and its tests are used nationally, the source of its legislative authority is not federal. Rather, it a body which primarily consists of members of every provincial dental regulatory authority. When NDEB tests are required in a province that is because that province’s regulatory body has chosen to adopt these tests.

The NDEB shows that there can be overlapping jurisdiction between the federal and provincial governments, which is true in other areas as well. It is now accepted within division of powers analysis that many areas of law might legitimately be intra vires both levels of government. A provincial regulatory body could create rules concerning advertising by professionals, for example.24 Since provinces can enforce their laws with fines and penalties, a violation of those rules could lead to the professional being charged under the relevant provincial Act. But false advertising in general is forbidden under the federal Competition Act.25 Depending on the cir-

22 Ibid., at 122.
cumstances, therefore, a prosecution could be brought under either provincial or federal legislation.

(c) Canadian Charter of Rights and Freedoms

The other most significant portion of Canada’s Constitution is the Canadian Charter of Rights and Freedoms, enacted as part of the Constitution Act, 1982.26 The Charter, as it is generally known, provides a guarantee of various rights to people in Canada. It was not completely new in doing so: for example, Canada had earlier passed a Bill of Rights.27 Therefore, the great significance of the Charter was not so much the guarantees it made as the fact that it was part of the Constitution of the country. The Bill of Rights was simply another statute, which as a practical matter meant that its “guarantees” were not really guarantees at all; they had no greater status than any other law. The Constitution, however, is the “supreme law of Canada”, and so any law which is inconsistent with the Charter is, as with any other part of the Constitution, “to the extent of the inconsistency, of no force or effect”.28 That means that, in a way which was not true prior to 1982, certain rights are now guaranteed. Where federal or provincial laws do not adequately respect the rights in the Charter, those laws can be amended or even struck down.

A quick overview of the structure of the Charter is in order. The very first section of the Charter states that the rights contained in it are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”: that is, none of the rights are absolute, and limitations can be attached to them. The remaining parts of the Charter contain rights relevant to various contexts. “Fundamental Freedoms” guarantees things like freedom of expression, freedom of association or freedom of conscience. “Democratic Rights” guarantees the right to vote and contains rules governing Parliament and the provincial Legislatures. “Mobility Rights” deals with the ability of Canadians to move freely from province to province. “Legal Rights”, the largest and most litigated portion of the Charter, deals with rights relevant to the legal system. The “Equality Rights” provision, found in s. 15 of the Charter, is also very significant, guaranteeing in very general terms that everyone is equal under the law. Other parts of the Charter deal with language rights, both in general and in the context of minority-language education rights. In addition, s. 24 allows courts to grant remedies for an infringement of Charter rights.

The Charter only applies in the case of government action: one cannot assert a Charter claim against some other individual. A person who claims to have been dismissed from employment

28 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 52.
because of race or sex, therefore, cannot sue his or her former employer for an infringement of s. 15 of the Charter if the employer is not part of government. That person is not without a remedy: a complaint could be brought under federal or provincial human rights legislation. But for a s. 15 claim or any other Charter claim to be pursued, there must be some government action involved: a claim, for example, that the Old Age Security Act\textsuperscript{29} discriminated on the basis of sexual orientation, because spousal benefits were available to common law heterosexual couples but not to common law homosexual couples.\textsuperscript{30} Still, given the level of governmental action in Canadian society, there is a great deal of scope for the Charter to have an influence.

Section 7 of the Charter, for example, is a very broad provision, contained within the “Legal Rights” section. It provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. One significant effect of this provision is to allow other laws to be struck down if they violate this section. In an earlier case involving Dr. Henry Morgentaler than that discussed above, the Supreme Court of Canada considered the abortion law which was then in Canada’s Criminal Code,\textsuperscript{31} outlawing abortions unless they were approved by a therapeutic abortion committee. The Court found that refusing an abortion to a woman who wanted one violated her security of the person. That would be permissible under s. 7 if it were done in accordance with the principles of fundamental justice, but the Court concluded that the rules around therapeutic abortion committees were so inconsistent and ambiguous that they were unfair; accordingly, the law was struck down.\textsuperscript{32}

Section 7 has also been held by some courts to be relevant to health professionals’ ability to practise, on the basis that holding a disciplinary proceeding or refusing to grant a billing number might violate the liberty of an individual.\textsuperscript{33} This finding is controversial, because in general s. 7 is not intended to protect economic interests, and a denial of the right to bill a government plan seems like an economic right. However, some courts have suggested that the right to practise a profession involves more than economic interests, and therefore might attract s. 7 protection.\textsuperscript{34} To date, the Supreme Court of Canada has not endorsed this approach, but it has also not explicitly rejected it.

Section 7 and the other “Legal Rights” are most relevant in the criminal law context, but are applicable elsewhere. The guarantee in s. 8 of freedom from unreasonable search and seizure, for example, does not merely concern situations where the police appear at one’s door with a search warrant. Typically, governing legislation for professionals allows for investigations into a broad range of matters, often but not necessarily relating to disciplinary issues. Power might be given to inspectors to actually enter a professional’s premises, or simply to require a professional to produce records. Each of these actions would constitute a search. That of course does not automatically mean that the search would be “unreasonable” within the meaning of s. 8, but it is possible to consider this question and challenge the power in the context of investigations by regulatory bodies.\(^{35}\)

An example will illustrate the way in which Charter claims are considered. In Rocket v. Royal College of Dental Surgeons of Ontario,\(^{36}\) two dentists were charged with having advertised their services in a way which contravened regulations passed under the Ontario Health Disciplines Act.\(^{37}\) Those regulations were very broad in the restrictions they imposed. The general rule was that no advertising was allowed, although limited exceptions permitted announcements such as a change in location of practice.\(^{38}\) In defending themselves, the dentists argued that the regulations violated the Charter and should be struck down; because if the regulations were struck down, then of course the dentists would have broken no rules. In particular, the dentists claimed that the effective ban on advertising violated s. 2(b) of the Charter, which provides that:

2. Everyone has the following fundamental freedoms:

.....

(b) freedom of thought, belief, opinion and expression ...

The first task for the Supreme Court of Canada in deciding the claim was to determine whether the regulations were inconsistent with s. 2(b) in the first place. If they were not, then the Charter claim would fail immediately. In fact, however, the Court found the regulations did violate s. 2(b), because of the meaning that had been given to that section in other cases.

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\(^{37}\) R.R.O. 1980, Reg. 447, s. 37(39), (40), under the Health Disciplines Act, R.S.O. 1980, c. 196.

\(^{38}\) For other cases relating to advertising and professionals, see for example Canada (Attorney General) v. Law Society (British Columbia), [1982] 2 S.C.R. 307, or Assie v. Institute of Chartered Accountants (Saskatchewan), 2001 SKQB 396.
It would have been possible, for example, to decide that “free expression” did not protect “commercial expression” (i.e., advertising a service in order to make a profit from providing it). The right could have been limited to protecting more important aspects of free speech such as political debate. In fact, however, the Court had earlier decided and reiterated here that commercial speech is also protected by s. 2(b). The court held that the freedom of expression guarantee does not depend on what a person wants to say or why they want to say it.\textsuperscript{39} Rather, a right to free expression means exactly that — the right to say what one wants.\textsuperscript{40} Any law which restricts that right violates free expression. Since the \textit{Health Disciplines Act} regulations did attach limits to the things dentists were allowed to say, they violated s. 2(b) of the Charter.

However, it then became necessary to look at s. 1 of the Charter, to decide whether those limits were “reasonable ... in a free and democratic society”. In other words, showing that a Charter right has been violated is not sufficient; it must also be the case that the violation cannot be “saved” by s. 1.

The Court has developed a test for deciding the question under s. 1, which is aimed at balancing the rights of individuals, guaranteed by the various provisions of the Charter, against the legitimate interests of society.\textsuperscript{41} At the simplest level, a law restricting someone in the audience from yelling “fire” in a crowded theatre violates free expression, but no one would argue that such a law could not be justified.

The Court focuses on two main questions in deciding whether a violation is saved. First, is there a sufficiently important objective motivating the violation? Second, is the violation of individual Charter rights proportional to the societal interests protected? Essentially, on balance, is it worth violating the Charter right in this way? In the \textit{Rocket}\textsuperscript{42} case, the Court held that there were legitimate interests motivating limitations on advertising by dentists. It was reasonable to want to maintain a high standard of professionalism, rather than commercialism, in the dental profession, and it was also reasonable to want to protect the public from irresponsible and misleading advertising. But although that meant some limits could be justified, it did not justify the actual limits created by the regulations. The complete prohibition with limited exceptions, the Court held, prohibited more than needed to be prohibited to protect the interests of society. Thus, although


\textsuperscript{40} It is not important to this example, but in fact free expression includes more than “saying” what one wants. The Court has held that anything intended to convey meaning counts as expression, so that, for example, parking one’s car in a particular location as a way of protesting parking restrictions would be a form of expression. See \textit{Irwin Toy Ltd. v. Quebec (Attorney General)}, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).


the limitation served a sufficiently important objective, it was not proportional, because some information which would be useful to the public was restricted without justification. Accordingly, the s. 2(b) violation was not saved by s. 1.

The Court therefore struck down the regulations. The effect of this was not that no limits on advertising could be created, but rather that any new regulations would have to better balance the interests at stake.

To conclude the discussion of the Charter it is worth commenting briefly on s. 33, generally referred to as the “notwithstanding” clause. This section allows Parliament and the Legislatures to expressly declare in a law that that law will operate “notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”. Any such declaration lasts for only five years, following which either Parliament or the Legislature must re-enact the declaration or the law in question becomes subject to the Charter. The notwithstanding clause is always politically controversial, and so far it has been invoked very infrequently outside Quebec, and not there in quite some time.

2. NON-CONSTITUTIONAL LAW

(a) Introduction

We have so far discussed the Constitution, the “supreme” law of the land. In this part, we turn to an overview of the structure of the rest of the law of the land. Several distinctions are worth talking about: statutes versus regulations, statutes versus common law, and common law versus civil law.

(b) Statutes versus Regulations

A distinction is drawn between legislation and “subordinate legislation”. Both are written forms of law: there are many intricacies which need not be pursued here, but a general understanding of the difference between the two is worthwhile.

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43 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 33.
44 The government of Quebec initially reacted to the Charter, which was part of a package of constitutional reforms to which they had not agreed, by invoking s. 33 with regard to all of their laws. However, those declarations have long since expired, and Quebec did not continue that practice. The notwithstanding clause has been occasionally used by governments when they have brought in “back to work” legislation ending a strike, in order to avoid litigation over whether such legislation violates a Charter right.
Statutes are what most people think of as “law”. Statutes can be created by Parliament and by the Legislatures, in accordance with their respective jurisdictions as explained earlier in this paper. From the perspective of the public, they can create prohibitions, such as the *Criminal Code*,45 impose obligations, such as the *Income Tax Act*,46 create benefit schemes, such as Nunavut’s *Hospital Insurance and Health and Social Services Administration Act*,47 provide protections within society, such as British Columbia’s *Human Rights Code*,48 regulate an activity or profession, such as Prince Edward Island’s *Veterinary Profession Act*,49 or do many other things.

As noted above there are of course particular provincial statutes regulating most professions. Also the *Criminal Code* contains a provision requiring reasonable skill from those undertaking surgical or medical treatment that could endanger the life of another person, as well as a provision requiring everyone who directs how another person does work to take reasonable steps to prevent bodily harm.50 For the most part, however, the statutory law of Canada and the various provinces is of no greater relevance to professionals than to any other member of the public. Nonetheless, there are some areas of that law which are worth noting.

As people who provide services in society, for example, professionals ought to be familiar with the human rights acts in their province. As discussed above, s. 15 of the Charter is directed towards guaranteeing equality in treatment by the law, but is only applicable where government action is involved. In private dealings between individuals, the protection is found in provincial legislation. Each province has its own Human Rights Code and they differ in details, but the essence of each is that in prescribed private dealings no one is allowed to discriminate based on various characteristics: for example, the British Columbia statute prohibits denying a service because of the “race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons”.51 Typically the list of private dealings in which discrimination is forbidden is quite extensive, and includes employment, wages, selling or renting property, or any “service or facility customarily available to the public”.52 These statutes create Human Rights Commissions, which have the power to establish tribunals to investigate complaints and grant remedies. A refusal to provide professional services is a matter that could be investigated by a Human Rights Commission, and could call for some remedy if it were based on a prohibited cri-
Human rights claims could also be made with regard to licensing requirements themselves, or other actions on the part of professionals. For a statute to become law, a Bill must be introduced in Parliament or a Legislature, it will be debated in the House and in committees (and the Senate, federally), and eventually it must be approved by a majority vote. It must then receive royal assent. The important points to note are that this process is a public one and, generally, a long one.

Regulations, on the other hand, are spoken of as “delegated legislation”. Statutes set out a general framework for an area, but will often leave details that are better sorted out by people with particular expertise in the area in question. Sometimes these will be matters which need to be changed on a reasonably regular and expeditious basis. In other cases, they will be matters of detail too fine to be appropriate for a statute. In those circumstances the statute will therefore include a provision giving some other body the authority to make regulations under the Act. Typically, this power is given to the federal or provincial cabinet, to the Minister in charge of that area, or to a regulatory agency which oversees administration of the statute. Regulations can be changed more easily and quickly than a statute, but the process is not as public.

So, for example, the Newfoundland and Labrador Architects Act, 2008 governs architects in that province, and includes provisions creating the Architects Licensing Board, as well as providing that a person can only be an architect by passing the prescribed examinations and other requirements and paying the appropriate fees. In addition, it sets out the general procedures to be used when a complaint (referred to as an “allegation”) is brought against an architect, including who can hear the complaint, the rules of evidence, and what results might flow (ranging from dismissal of the complaint to a $10,000 fine and/or continuing education or medical treatment or counselling). The Act also gives the Board the authority to make regulations about licensing, and about the time limits for dealing with allegations. Those regulations made by the Board then detail things like how many hours of work experience an applicant must have, or how many days an architect has to respond to an allegation. This approach allows the basic ground rules to be clear and remain relatively consistent, while allowing for reasonably expeditious change with regard to details. If the whole scheme were contained with the statute, it would be necessary to go through the entire process of amending the legislation just to, for example, change from requiring 5600 hours of experience to 5800 hours, or to allow 45 rather than 30 days to respond to allegations.

53 See for example Arroyo v. Assn. of Professional Engineers & Geoscientists (British Columbia), 2010 BCHRT 241, raising the question of additional requirements imposed on foreign-trained engineers, or Saskatchewan (Human Rights Commission) v. Engineering Students’ Society (1984), 5 C.H.R.R. D/2074, finding an engineering students’ society and several individual students to have violated the Human Rights Code by ridiculing and belittling women in a student newspaper.

a complaint. On the other hand if the whole scheme were in the regulations, the Board of Architects would have the ability to unilaterally decide, for example, that allegations simply could not be brought at all. The division between statutes and regulations is intended to protect the public interest through making legislators generally accountable for overseeing the areas within their jurisdiction, while at the same time allowing for some efficiencies.

The distinction between legislation and regulations is not a mere formality, and has practical consequences. For example, in July of 2000, the Ontario Court of Appeal struck down the offence of simple possession of marijuana which existed at the time on the grounds that the statute violated the Charter because it did not provide an exemption for medical use. Rather than striking down the statute immediately, however, the court held that the government had one year to fix the Charter breach and only if the problem remained after that time would the legislation be struck down. Parliament quickly added, by way of regulation, a medical exemption to the possession offence. In January of 2003, however, a different court held that this action did not amount to fixing the Charter breach and therefore that the legislation was invalid under the earlier decision. The reasoning of the later court was, in part, that the medical exemption was not sufficiently guaranteed when it only existed in a regulation. Since the process of changing regulations was so simple and straightforward, Parliament could abolish the medical exemption on a moment’s notice. Therefore, it could not be said that the Charter breach had really been fixed.

Further, because regulations are created by parties who do not have the original power to create laws (that is, not by Parliament or the Legislatures), they have only the power specifically delegated to them. The result of this is that a regulatory body cannot create just any rule it wants for the people or field it is regulating: it can only create the type of rules it is authorized to create. If, for example, a regulation were created under the Newfoundland Architects Act, 2008 setting out the fees architects could charge, that regulation would be struck down as invalid. The legislature did not delegate to the Board any authority to make regulations about that subject, and so any such regulation would be invalid.

It was noted at the start of this section that we tend to think of the law as contained in statutes, while regulations tend to be relatively invisible to most of us. It is therefore worth concluding by noting that regulations in fact make up the overwhelming majority of laws in Canada. Regulatory standards govern the houses we live in, the buildings we work in, the transportation we use, the food we eat, the products we buy as well as the labels on them, and virtually every

other aspect of our lives. While the *Criminal Code*, for example, contains a few hundred provisions, there are hundreds of thousands of regulations. As the Supreme Court of Canada has noted, “it is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole”.

(c) Statutes versus Common Law

The previous section discussed two types of “written” law, and there is a natural tendency to assume that law equates to legislation. Certainly that is true for very many things. Regulatory bodies are created by statute, the criminal law is set out in the *Criminal Code*, Human Rights Acts set up schemes to protect the interests of individuals in society, the *Income Tax Act* sets out our obligations to pay tax, and so on. However, there are also very significant areas of law which are governed not by statute, but by “common law”. In most of the country the fields of contract law and tort law are primarily determined in this way, and both, particularly the latter, are potentially very relevant to a professional’s interaction with the legal system. Contract law governs the agreement between a professional and a client; tort law considers broader obligations which all people have to act with care, particularly towards those to whom one has a “duty of care”, which a professional relationship often creates.

Common law is also sometimes referred to as “judge-made law”. It reflects a practice that is nearly 1,000 years old, dating roughly to the Norman conquest of England. The King, and later courts appointed by the King, would decide disputes among individuals in various parts of the country. Some of these disputes were decided according to local customs, while others were determined by rules which were common across the country — by the “common law”. These rules were not set down in writing. Rather, judges of the courts acted on the basis that they were required to follow their own previous decisions and the decisions of other judges, so that a system of “precedents” was created. In other words, the law was not created by Parliament, but by the increasing body of decisions handed down by the courts, each of which gave guidance to later courts on how to decide subsequent disputes.

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59 In *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 at 221 (S.C.C.), the Supreme Court estimated that in 1983 there were approximately 300,000 regulatory offences in Canada, and that the number was continuing to rise.
62 R.S.C. 1985, c. 1 (5th Supp.).
In practice, this means that when a dispute concerns an area which is governed by the common law, the decision is made based on prior decisions. When new situations arise, courts tend to look for prior analogous situations, to try to develop the law in as consistent a manner as possible. This is effective, though within some limits. No two situations are ever exactly alike, so there is nearly always scope for a court to decide that the dispute in front of it is not settled by previous authority. On the other hand, courts also get to decide which previous situations they will consider analogous, and so to a certain extent can pick the rules they choose to be bound by. As a consequence of these facts, courts have some discretion in deciding when and how they are bound by previous rules. Still, on the whole the system remains fairly workable, with a reasonable balance between predictability and adaptability.

An example will show how the common law can develop. Contract law deals with the legal relationship between people who have negotiated an agreement with one another, by which each undertakes some specified obligation to the other: at a simple level, I undertake to give a store one dollar, and the store undertakes to give me an apple. Tort law deals with the legal obligation of one person not to cause injury to another person, either intentionally or through negligence. If I fall asleep at the wheel and drive my car through the store’s front window, it is under tort law that I will be held responsible. A noteworthy difference between the two is that tort law does not require any contact or communication between the parties beforehand for the legal obligation to arise, whereas contract law does.

Both contracts and torts are areas of law which were originally developed through, and are still largely governed by, the common law. In contract law, various decisions have laid down the requirements from each party for a valid contract, and have created rules as to what kind of actions will count as an offer or an acceptance, as well as about what constitutes breaching a contract. Similarly, the rules settling tort actions, and in particular rules around negligence, were originally created at common law, and that is still the primary source of law in that field.

One potential drawback of the common law is that it is only reactive. That is, a statute can anticipate issues and set out rules in advance, but the common law only decides questions after they arise: as a result, it is possible for there to be “gaps” in the law, where it is clear that there is a question to be answered, but a factual situation requiring that question to be answered has not yet arisen.64

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64 This problem can also arise with statutes where, for example, a word could be interpreted in two different ways, but no situation has yet arisen where the distinction would have made a difference. It is a more problem which arises more frequently with the common law, however.
For example, a question which remained unsettled for a long time in Canada was whether an individual could be liable to another individual in both contract and tort at the same time for the same behaviour, or whether the existence of a contract limited actions to suing for a breach of its terms. The Supreme Court of Canada did not settle this point until the 1980s. To reach their conclusion, the Court looked at a number of previous decisions of other courts, for example, *Edwards v. Mallan*, a case decided in England in 1908. In that case a patient was suing a dentist for an unskillful extraction of a tooth, and the question was in which court she was allowed to proceed. If her legal action was in contract she was limited to one court, but if it was in tort she could sue in a different court. *Edwards v. Mallan* was used in the 1970s by the Ontario Court of Appeal, to help decide that architects and engineers who each had contracts with a third party could rely on Ontario’s *Negligence Act* to make tort claims against one another. Finally, in *Central Trust Co. v. Rafuse*, the Supreme Court of Canada relied upon both of these cases, and many others, to decide that a lawyer who was hired in connection with a property transaction could be liable to his client not only under the contract by which he was hired, but also in tort if he negligently performed the duties he was hired to perform. That decision has been taken to settle that concurrent liability in both tort and contract is generally possible, not just in that situation.

Although this section began by contrasting common law with “written” law, of course the common law is itself also written down. However, where statutes are a relatively comprehensive source of the law on the subject in question and are readily available (e.g., on government websites), common law is not so easily discovered. Various series of books are published many times a year, setting out decisions from various courts, or in various provinces, or on various subjects. In addition, decisions are available online through sources such as the Supreme Court of Canada’s judgments website or Canlii. Determining what the common law says about a specific issue is therefore generally a more complex task than determining what a statute says.

Finally, it is worth noting that statutes take precedence over the common law: that is, Parliament or a legislature can change the law in any area governed by the common law by passing a

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65 [1908] 1 K.B. 1002.
69 For example, the Supreme Court Reports (S.C.R.) or the Quebec Appeal Cases (Q.A.C.).
70 For example, the British Columbia Law Reports (B.C.L.R.) or the Ontario Law Reports (O.R.).
71 For example, the Canadian Cases on the Law of Torts (C.C.L.T.) or the Administrative Law Reports (Admin. L.R.).
72 Supreme Court of Canada website, online at: <https://scc-csc.lexum.com/scc-csc/en/nav.do> (last accessed June 29, 2018).
73 Canadian Legal Information Institute Website, online at https://www.canlii.org/en/ (last accessed June 29, 2018).
statute (by the same token, as noted above the constitution takes precedence over other legislation, and so any such statute would have to be consistent with both the Charter and the division of powers). This can happen when, for example, the common law seems to operate unfairly, or where it is thought that greater clarity is needed. As a result, areas which are ordinarily governed by the common law might nonetheless also have relevant statutes.74

(d) Common Law versus Civil Law

Countries which have adopted the “common law” tradition are referred to as common law countries. Generally speaking, these are the countries that inherited their legal system from Great Britain.75 The common law system can be contrasted with one of the other major legal systems in the world, civil law. Although common law dates to the Norman Conquest, in a sense the civil law tradition is older still, tracing its roots to a Code created by the Roman Emperor Justinian in the sixth century A.D. Although current codes do not trace back in an unbroken line to Justinian, his Code was the model for the current civil law approach, by which what are, in principle, all the rules governing relations between individuals are set out in a single statute, that is, a Civil Code.76 While most provinces and territories in Canada use the common law, Quebec is a civil law province.

In a common law jurisdiction courts look to previous judicial decisions to resolve the dispute in front of them, but in a civil law jurisdiction courts look to the Civil Code. In common law jurisdictions, for example, much of the law of negligence stems from a 1932 decision of the English House of Lords concerning a young woman named Donoghue, who drank most of a bottle of ginger beer prepared by the Stevenson lemonade and ginger beer factory, before finding a partly decomposed snail in it.77 Courts in common law jurisdictions today look to a line of cases based on Donoghue v. Stevenson to determine whether there has been negligence in a particular case before them. A Quebec court, on the other hand, would look to s. 1457 of the Civil Code of Quebec, which states in part:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

75 Scotland, however, is a civil law jurisdiction.
76 Justinian’s Code fell into disuse as the Roman Empire fell. However, it was revived and adapted in parts of Europe in the twelfth century. See the discussion under the heading “Romano-Germanic Family” in R. David & J.E.C. Brierley, eds., Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law (London: Stevens & Sons, 1985).
Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.78

There is nothing to prevent the rules set out in the Civil Code and the principles developed through the common law leading to similar conclusions in similar cases, and they often do. However, courts in common law and civil law jurisdictions come to their conclusions by different routes.

It must be noted here that there is potential for confusion over the use of the word “civil” in describing legal systems. First, there are “civil law jurisdictions” and the “Civil Code”. As noted above, the Civil Code is a Code establishing the rules governing relations between individuals, and civil law jurisdictions are jurisdictions that operate under a Civil Code. Second, there is “civil litigation”. This refers to lawsuits brought by individuals (or organizations) against other individuals (or organizations). These lawsuits will be resolved through the common law in common law jurisdictions, and the Civil Code in civil law jurisdictions.

3. DECISION-MAKERS IN THE LEGAL SYSTEM

(a) Introduction

There are two major types of decision-makers within the legal system: courts and administrative bodies. Courts are headed by judges, who are legally trained. Administrative bodies deal with specialized areas: they are frequently staffed by people with expertise in the area in question, but nonetheless appointment to a tribunal is more open than to a court. There are two senses in which administrative bodies can be decision-makers: both in creating the initial regulations concerning an area and in settling individual disputes within that area.

(b) Courts79

Under the Constitution, both the federal and provincial governments have the authority to create courts. Like many matters depending on our Constitution, it is therefore quite complex. Perhaps the most important thing to know is the way in which the system is not arranged: it is not the case that provincial courts deal only with provincial areas of law while federal courts deal only with federal areas of law.

78 S.Q. 1991, c. 64.
Provinces have the authority to create courts and appoint judges, and all provinces have done so. These courts are given a specialized jurisdiction, defined either by subject matter or monetary amount as in, for example, Small Claims Courts, Youth Courts and Family Courts. These courts, which are limited to dealing with the kinds of matters explicitly assigned to them, are often described as “inferior courts”. Their jurisdiction is not necessarily limited to matters over which the provinces can legislate. For example, provincially appointed courts deal with the great majority of criminal law matters in Canada, even though criminal law is within federal jurisdiction. However, there are some limits on the jurisdiction of provincially appointed bodies, which are primarily of relevance to tribunals rather than courts.

Most other courts also have jurisdiction only within a single province, but they are not “provincial courts”. That is, although they are courts for a particular province (such as the Supreme Court of Newfoundland and Labrador) constitutionally they are federal courts: the federal government creates the courts and appoints the judges. Every province has a “superior court” (variously called the Supreme Court (Trial Division), the Court of Queen’s Bench, the Cour Supérieure or the Superior Court of Justice) which has open-ended jurisdiction to hear any type of dispute, unless that jurisdiction has been explicitly removed. Most civil litigation disputes arising within a province — lawsuits alleging negligence, breach of contract, and so on — will have their trials held in this court.

In addition, each province has a Court of Appeal, where the judges are also federally appointed, and which hears appeals from not only the superior but also the inferior courts within that province. Appeal courts, as a general rule, are not entitled to revisit the facts of a dispute, which are reserved for a trial judge. The trial judge hears the witnesses personally, and so is in a better position to assess credibility and decide whether to believe one person or the other, or whether the true state of affairs lies somewhere in between the versions presented. (Where a trial

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80 Jurisdiction over family law matters is more complicated than this in some provinces. Some matters, like divorce, could only be dealt with by federally appointed judges, while provincially appointed judges had jurisdiction over many similar issues, such as custody, access or maintenance matters concerning the children of couples who were separating but not divorcing. This divided jurisdiction can create difficulties, and so through co-operation between federal and provincial governments some provinces have created “unified family courts” having jurisdiction over all federal and provincial aspects of family law.

81 Section 96 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, gives the Governor General (that is, the federal government, rather than a province) the authority to appoint judges of the Superior, District and County Courts of each province. This provision has been interpreted to render invalid the creation by any province of an administrative body that is intended to perform the functions that were performed by Superior, District or County Courts in 1867. See the discussion in P.W. Hogg, Constitutional Law of Canada (Toronto: Carswell, looseleaf edition) at s. 7.3(a).

82 This statement is a generalization, in that there can sometimes be intermediate levels of appeal between an inferior court, or an administrative tribunal, and the court of appeal.
is by jury, the jury makes this determination, but jury trials are quite uncommon.) Appeals instead focus on issues of law, asking whether, assuming that the facts are as determined at trial, the relevant statutes or common law were correctly applied.

In addition to these courts, there are other federally appointed courts, of which the Federal Court and the Federal Court of Appeal are the most noteworthy. These courts hear claims from parties suing the federal government, and deal with cases in some areas which are legislatively within the competence of Parliament, such as immigration or patents. However, as noted above, they do not hear all matters within federal jurisdiction, since criminal law cases are dealt with by inferior courts and provincial superior courts. The jurisdiction of these courts is therefore relatively specialized, and most people involved in court action will find themselves in an inferior or superior court of a province.

Above all these courts, and also federally appointed, is the Supreme Court of Canada. This Court consists of nine judges, of whom three must be from Quebec, while by tradition three others are from Ontario, two are from the West, and one is from the Atlantic provinces. Cases can reach the Supreme Court of Canada in several ways. The most usual way for a non-criminal case to reach the Supreme Court is when that Court grants permission to the parties to appeal. It does this only when it sees the issue concerned as one of sufficient public importance to warrant its involvement. Another way is for Parliament to refer to the Court the question of whether a law is valid. This is done very rarely.

Court proceedings tend to be quite formalized and structured. The Canadian legal system is built around what is known as the “adversary system”. Much has been written about exactly what is entailed by that label, but in general it is characterized by three features: a neutral and passive decision-maker, presentation of the evidence by the parties and formal rules, in particular, rules around what evidence is admissible. The adversary system is usually contrasted with the “inquisitorial system”, in use through most of continental Europe. Under that other system, the judge has primary responsibility for pursuing the evidence and the investigation.

What adoption of the adversary system amounts to in practice is that a judge in Canada is not to take a very active role in the process. Rather, the judge’s job is to listen to the evidence presented by the parties. The theory underlying the adversary system is that having two opposing

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parties, acting out of their own self-interest to present as much evidence as possible supporting their positions, is the best way to guarantee that all relevant information will come to the judge’s attention. The judge is then responsible for weighing that evidence, and only that evidence, in reaching a decision. The judge is specifically not permitted to rely on any other information he or she might have, other than matters of very common knowledge (that Ottawa is in Canada, for example).

(c) Administrative Bodies

Professions are generally governed by administrative bodies, which have delegated to them the ability to create many of the rules for that profession. The result is that those bodies make initial decisions setting out ground rules, make other types of decisions about that profession such as whether to license a particular person to practise, and can settle disputes such as whether a complaint against a member is justified. In addition to this kind of direct regulation of professions, administrative decision-makers are also frequently central in many other contexts, including billing systems for health services provided by the government, or other government benefit schemes.

An illustrative example of the kind of decision-making undertaken by administrative bodies can be found in the Alberta Health Professions Act, which creates the basic structure for the organization of many professions in Alberta. It creates, for example, the Alberta Dental Association and College, with the mandate to “provide direction to and regulate the practice of” dentistry in a manner that protects the public interest. It creates a Council, which consists primarily of licensed members of the Association, but is also required to have at least 25 per cent of its members drawn from the general public. The Council creates various other bodies, such as a Registration Committee and a Competence Committee, to make decisions and carry out various other responsibilities. The Competence Committee, for example, makes recommendations on continuing competence requirements, possibly including practice visits. In addition, the Act creates a Complaint Review Committee, which must have at least two registered members, and again must have at least 25 per cent public representation.

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This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding judge assuming the role of a research director: it is a forum established for the purpose of providing justice for the litigants.

87 Ibid., s. 3(1).
The Registration Committee or Competence Committee are primarily concerned with making decisions to govern the profession as a whole, and so in a sense are analogous to legislators. The Complaint Review Committee in overseeing the complaint process, on the other hand, is concerned with decision-making in individual cases, and is therefore more analogous in its role to a court. However, the complaint process, as is typical of procedures in front of administrative bodies, is much less formal and structured than court proceedings. First of all, there are various options available short of a hearing, including informal resolution of a complaint by the complaints director, referral of the dispute to an alternative complaint resolution process or dismissal of the complaint. If these options are not taken, a more complete investigation of a complaint can be ordered.

In the event of a more complete investigation, the first step is a process more analogous to an inquisitorial one than an adversarial one. The investigator personally looks into the complaint, and has the power to require anyone to answer questions or turn over documents or other things. Following this investigation, the complaints director might dismiss the complaint or send it to a hearing. At such a hearing the investigated person can be represented by counsel, can examine witnesses, and so on. Although this hearing is much more structured than any of the informal measures potentially available earlier, it still remains less formal than a court hearing: the rules of evidence at a judicial proceeding do not apply, for example.

The process, if the complaint is not dismissed, can result in a number of potential consequences for the person investigated, including a caution or reprimand, conditions being imposed on the right to practise (such as being supervised, or not practising in areas of the profession), or suspension or cancellation of a licence. In addition, the person could be ordered to pay the costs of the investigation, a fine, or both. The decision from a hearing can be appealed to the Council, while the Council’s decision can in turn be appealed to a court.

Overall, then, the Health Professions Act creates scope for decision-making at the initial regulatory stage, with rules that govern the profession generally, and at the individual stage, with decisions about the behaviour of members of the profession.

(c) Proceedings before Decision-makers

88 Ibid., s. 55.
89 Ibid., s. 63.
90 Ibid., s. 79(5).
91 Ibid., s. 82.
92 Ibid., ss. 86 and 90.
As noted above, the nature of proceedings can vary in approach and formality, depending on whether a court, tribunal or agent of an administrative body is conducting them. This section looks briefly at the direct impact of these various procedures on those appearing before the different bodies.

Professionals can be required to testify either before a court or in the course of an administrative proceeding. This can arise in many contexts: in the course of a disciplinary proceeding or a court proceeding where a client has complained about services provided; in a court proceeding where one party is claiming compensation for negligence or breach of contract; where expert testimony is required about some aspect of a professional service which is at issue in the case; or in many other contexts. A professional might appear as a party to the proceeding or as a witness.

Sometimes professionals are asked to testify on behalf of a patient. In the case of court proceedings this might well result in the professional being asked to attend a “discovery”. At a discovery, the lawyer representing the other side asks questions and reviews documentation. Discovery is used to try to get as much information as possible about what evidence will be brought out at trial. Testimony at a discovery is tape-recorded and a transcript is produced, and that testimony is sometimes used at trial to show that a witness is saying something different there than at the discovery.

When one is a witness the first indication of any legal proceedings might be the arrival of a process server with a subpoena. A subpoena can be issued by either a court or a tribunal, and requires a person to be present at a hearing to give evidence. The subpoena should specify time, place and what the proceeding is about, such as below:

**WHEREAS** it has been made to appear that you are likely to give material evidence respecting the above-cited matter, you are hereby summoned and required to appear on **Thursday, the 28th day of June, 2018**, at the Generic Hotel, Anywhere, Ontario, commencing at 9:30 in the forenoon, and so on from day to day until the matter is heard, to give evidence.

Failure by you without adequate excuse to obey this subpoena may be deemed a contempt of court and render you liable to arrest and imprisonment.

Some subpoenas are what are called *duces tecum*, in which case they will also contain a clause like the one below:

You are also required to bring with you and to produce at the above hearing all documents in your possession pertaining to John Doe.
This means that the lawyer issuing the subpoena is also requesting that the professional bring the client file to the hearing. This raises the issue of how one complies with a subpoena without violating client confidentiality.

The Supreme Court of Canada has addressed the issue of confidentiality of records, in the specific context of medical records, in the case of McInerney v. MacDonald.\footnote{[1992] S.C.J. No. 57, [1992] 2 S.C.R. 138 (S.C.C.).} In that case the patient requested a copy of her complete medical file. Her doctor provided copies of the material she had prepared herself, but refused to provide the patient with material prepared by other physicians, claiming that they were the property of those physicians.

The Supreme Court ruled that the special relationship of trust and confidence between doctor and patient gave rise to a duty on the part of the doctor to allow the patient to have access to her own medical record. As a result, in the absence of legislation prohibiting such production, the Court held that, on request, the patient was entitled to inspect and copy any material in her file, and that the physician would have to justify withholding the information from the patient.

What that means is that the information in the client file is held for the benefit of the patient, with an expectation that the patient’s interest in and control of the information will continue. It is therefore inappropriate for a professional to release information except to the patient or to another person with a signed release from the patient. A subpoena does mean that a professional is required to comply with its terms and should take the file to court or the tribunal. However, the subpoena does not automatically entitle anyone to the information in the file prior to the court or tribunal proceedings, and so the file should not be released in advance without the client’s permission.

At a trial, witnesses (and this term includes the parties themselves) are placed under oath and testify before the court: even though tribunal hearings are less formal in some ways, this is likely to be true there as well. To be placed under oath a witness either swears on some religious text or simply affirms to tell the truth. Witnesses are first questioned by the lawyer who has asked that witness to be there, in what is called “direct examination”. This is followed by questioning from the lawyer for the other side, in “cross-examination”. On occasions there is also re-examination by the first lawyer, to clarify an issue that arose during cross-examination, but re-examination, if any, is usually brief.

In direct examination one party is, in accordance with the adversary process, trying to use the witness to help establish his or her case. Questions during direct examination will be open-ended, generally requiring more than yes or no answers. However, witnesses are not advocates for one
side or another: they are there to give the court the information they have in a simple, matter-of-fact fashion. Witnesses ought to review the facts of a case before testifying, though not in an attempt to memorize answers in advance.\textsuperscript{94} It is most helpful in front of a court or tribunal with lay people as decision-makers when witnesses who have a particular expertise, such as professionals, avoid jargon and technical terms or explain those terms so that a lay person can understand. Witnesses must also answer truthfully and as accurately as possible, without exaggeration. Documents are sometimes shown to a witness for identification, so that they can be entered as “exhibits” in the proceeding. Witnesses therefore should be able to describe the nature of any documents that might be introduced, and be able to indicate who authored it, for example, or to identify any signatures. If a witness takes a document to the stand, it is likely that he or she will be asked to produce that document to the other side in the dispute, which leads to the generally more involved topic of cross-examination.

In cross-examination, the lawyer for a party who did not call the witness is also seeking to strengthen that party’s case. Cross-examination is often used to try to weaken or cast doubt on the testimony a witness has just given, but can also be used to get evidence from the witness on different matters that might assist the other party’s case. Questions during cross-examination tend to be more in the nature of suggestions put to the witness for agreement. These are referred to as “leading questions”, and the main difference between direct and cross-examination is that leading questions are generally only permitted in the latter.

A witness being cross-examined does not have to agree with the lawyer asking the questions, and should not assume that because something is suggested in a question, there is a factual basis for the suggestion. Witnesses should not guess in answers, and should say only what they know or can remember: it is appropriate to say “I don’t know” or “I don’t remember”. But by the same token, a witness who is sure should be careful not to use language suggesting he or she is unsure. The witness’ testimony is what the decision-maker must rely on in reaching a decision, and there is a significant difference between “I guess it was sunny”, “I think it was sunny”, and “it was sunny”.

Witnesses are expected to answer all questions asked unless an objection is made by the other lawyer. If an objection is made, the witness should not answer the question until the decision-maker has ruled on whether the question is proper. But witnesses can ask for clarification of a question that they do not understand. Witnesses ought not to try to determine the strategy of the questions, but should simply answer them honestly. Often, yes or no will be sufficient; if it is not, witnesses are entitled to complete the answer. Witnesses should not make assumptions in

\textsuperscript{94} See in general the useful discussion on these issues in J. Sack, Q.C., \textit{Winning Cases at Grievance Arbitration} (Toronto: Lancaster House, 1994).
giving answers, and should make their answers as clear as possible, including by giving the proper factual background. At the same time, it is usually best in cross-examination not to volunteer information that is not asked for. Witnesses are well advised to listen carefully to the question and answer it completely, but not to stray into irrelevant areas exceeding the question posed.

Witnesses are under oath throughout their testimony, and they are not allowed to discuss their evidence with anyone during breaks in the proceedings.

4. **CONCLUSION: A CASE STUDY**

A case from Alberta provides an interesting and helpful example of a variety of the issues discussed above, that is, the role of administrative bodies and courts and the relationship between the two, the interplay between statutes and regulation, and the notion of striking down legislation either on grounds of jurisdiction or on grounds of fairness.

In *Brown v. Alberta Dental Assn.*, the applicant dentist had entered an agreement with a corporation called Apple Orthodontix Inc., under which he assigned all his business assets to Apple, which subleased them back to him. The agreement contained a number of other terms, including the requirements that Brown pay Apple $33,000 per month for management services, that he continue in a particular mode of practice for at least 66 months, and that he not retain an employee or partner who did not enter into parallel agreements. Thirteen orthodontists complained that this agreement violated s. 13 of the *Dental Profession Regulations*, which said that:

> no dentist shall, except with the written consent of the Board, engage in the practice of dentistry under the control, express or implied, or for the benefit, profit or advantage of any person who is not a dentist or in any way that, directly or indirectly, any such person derives or may thereby derive any benefit, profit or advantage.

Brown thereupon applied to the Board (now called the Council) for either a declaration that his agreement did not amount to acting under the control of Apple, or for the Board’s written consent to the arrangement. The Board declined to consent, and also decided that Brown’s arrangement did violate s. 13.

Brown therefore took the Board’s decision to the Alberta Court of Queen’s Bench, which decided in his favour. The Dental Association in turn appealed that decision to the Alberta Court of

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95 [2002] A.J. No. 142, 41 Admin. L.R. (3d) 1 (Alta. C.A.). This decision was decided under the legislation just prior to the *Health Professions Act*, R.S.A. 2000, c. H-7, which came into force on December 31, 2002. The fact that the specific legislation has changed does not interfere with its usefulness as an example.

96 *Dental Profession Regulations*, Alta. Reg. 328/84.
Appeal. On the appeal there were many issues, three of which are of particular interest. First, Brown argued that the Board, which had been delegated the authority to make regulations, had acted beyond its authority in creating s. 13 of the regulations. Further, he argued that the regulation was unenforceably vague. Finally, there was an issue over how much “deference” the court should show to the decision of the board in reviewing its decision: that is, to what extent should the court, as a generalist legal body, be inclined to accept the decisions of the specialist administrative body.

As discussed above, in exercising delegated authority the Board could only make regulations concerning matters they were authorized to regulate. Here, their authority included “prescribing standards for the practice of dentistry”. Brown’s argument was that the limitation in this provision to making rules about “the practice of dentistry” only permitted them to create rules specifically around dental work (i.e., treatment of a patient’s jaw and teeth), not rules concerning the business aspects of a dentist’s operations. The Alberta Court of Appeal acknowledged that in some contexts that could be the correct interpretation of the phrase, but held that given the need to protect the public, in this context the phrase should be given a broader meaning which included the rules the Board had created here.

Brown also relied on cases which had been decided under the Canadian Charter of Rights and Freedoms to argue that a law which is too vague is not enforceable. His claim was that the rule saying a dentist cannot operate under the control of a non-dentist did not give fair notice to the people governed by the rule as to what they were or were not allowed to do. The Court of Appeal rejected this argument as well, holding that the legal test for striking down a provision on the ground that it was overly vague, which had been developed in a series of previous cases, had not been met.

Finally, then, the issue was whether to interfere with the Board’s decision on the merits that Brown had violated s. 13 of the Regulations. The issue of most interest here is the Court of Appeal’s comments on what is called “standard of review”: the extent to which a court will or will not defer to the decision of an administrative body. In some cases courts use a standard of review called “correctness”, which shows relatively little deference: in essence, the court decides whether it would have reached the same conclusion as the administrative body. However, there are also higher standards, and in some cases the court will show a high degree of deference to the administrative body. Here, the Alberta Court of Appeal considered a number of factors, including the

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99 Brown’s actual claim was based on an administrative law concept of vagueness rather than a claim that there was a Charter violation, but Charter cases were cited to help describe the standard.
purpose of the Act and whether the decision was a factual question or a decision about law. They gave particular emphasis to the specialized nature of the Board:

This issue involves a consideration of the business environment in which dentistry is practiced. This is a matter over which the Board has a high level of expertise. It is formed predominately of dentists, who are well situated to understand the overall nature of the business of dentistry and the nuances of practice. They have an appreciation as to how most dental practices operate, and how the arrangement in question may differ from the norm. Relative to the Board, the court has a low level of expertise in this area.  

Accordingly, the court decided that the Board’s decision should stand unless it were shown that the decision was “patently unreasonable”: that is, whether the court would or would not have reached the same decision, the decision should not be overturned unless it was “clearly irrational”. Since this was not the case, the Alberta Court of Appeal held that the court below had been incorrect to grant an appeal, and they restored the Board’s decision. The exception to the Regulations was not authorized, and the complaint was upheld.

Indeed, Brown also contains a hidden illustration of the nature of common law and statutes and the relationship between them. At the time it was decided, the Supreme Court had created three standards of review: correctness, unreasonableness, and patent unreasonableness. Those standards had been created at common law, and eventually – after Brown – the Supreme Court decided that it was impractical to try to draw a distinction between unreasonableness and patent unreasonableness, and so they eliminated the latter standard. Were Brown to be decided today the question would simply be whether the Board’s decision was unreasonable. However, in some provinces the standard of review is set out in a statute, and some of those statutes had adopted the “patent unreasonableness” standard before it was eliminated from the common law. As a result, although patent unreasonableness is not relevant where the standard of review is governed by the common law, it is relevant in those provinces where it is set out in legislation.

In conclusion, then, Brown v. Alberta Dental Assn. shows in action most of the features of the legal system discussed in this paper. It demonstrates the use of both Charter and jurisdiction principles. It illustrates the distinction between statutes and regulations, and the need for specific

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103 See for example the Administrative Tribunals Act, S.B.C. 2004, c. 45.

104 See for example British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25.
authority to create the rules in question, without acting in a way that will be *ultra vires*. It shows the use of statutory interpretation to decide what is and is not permitted, but also shows the use of the common law to decide a legal test, as well as the relationship between the common law and legislation. Finally, it shows the different levels of authority of regulatory bodies and courts, and the relationship between them.