FORCESE:

Welcome back to our virtual orientation for the English Common Law Program at uOttawa. In this podcast we turn our attention to legal history – meaning two things.

First, as an introduction I’ll provide you with some insight and observations about the history of the English legal system inherited by the common law provinces. I will then interview Professor Constance Backhouse, discussing the relevance of legal history to your legal studies and your understanding of the law with a focus on how legal history informs not only past understandings of the law but is useful for understanding how the law may be shaped in the future.

Turning then first to the history of the common law system: The common law is inherited from the United Kingdom and what I will do here is to give a brief summary of the emergence of the common law system in the medieval and early modern period in the UK. The first thing that you need to understand is that in the common law tradition, courts – and specifically common law courts - are themselves law-givers.

They are the source of law, and historically probably the most important source of law, certainly in private law relations, and in fact in modern Candn jurisdiction the common law remains a major if not principal source of rules. The common law emerges from the politics of power in early medieval England…When Saxon England was conquered by William the Conqueror in 1066, and a system of Norman French feudalism was introduced into England, this was a system in which the king subdivided the land to the king’s barons who would then subdivide the land further to their underlings, etc etc.

Now this history is important in understanding real property, but it is also of significance in the development of the English legal system. Initially justice was bestowed by Manorial courts, courts of the Manor and these were courts of the local lord who held the land and were designed to deal with disputes among the tenants who occupied this land. And the laws they applied were very primitive; it often involved ordeals or rights of battle.

Eventually English monarchs came to the throne who were inclined to consolidate their power and so to strengthen their hands they created a new an competing system of royal courts that were the only ones allowed to deal with certain kinds of disputes, excluding therefore the manorial courts. And these courts became more accessible to the people by ensuring that they travelled around the country in “circuits”. In order to get in front of these courts you needed a “writ” which was originally a letter from the monarch ordering a person to do something.

With the passage of time writes became more formal and the Chancellor or royal secretary would pre-prepare writs, leaving only the names blank. And these different sorts of writs dealt with different sorts of disputes and if there was a new type of complaint the Chancellor would develop a new writ and if you didn’t have the correct writ, you would lose on procedural grounds in the royal courts.

So what did these royal courts do? For one thing, because they were nation-wide, they were the first courts to apply unified rules, ie rules that were common to all the people of England – they became “Common Law courts”. Now these courts weren’t supposed to make up rules; they were supposed to apply pre-existing Anglo-Saxon and Normal customs, but these customs weren’t written down, unlike in the Roman or civil law system that developed on the European continent. So while in theory the royal courts were there simply to declare pre-existing customs, in practice these courts would come up with new traditions and customs to cover new situations.

Nevertheless, the myth or “legal fiction” was that they were merely giving voice to a principle that was already in existence. While a myth, this doctrine served as a constraint on how creative the common law courts could be, how liberal they could be in unearthing these so-called preexisting customs and rules.

An aspect of this limit was the need for certainty and predictability. Parties to a dispute had to be able to predict with some measure of certainty the outcome. The exercise of court power could not be arbitrary. Now if the law is written down, certainty comes from a written code. But if it’s not, what then? Well, here arose the notion of precedent – or to use the Latin expression, “*stare decisis*”. The rule arose that common law courts were required to follow precedent. Litigants were to be able to predict what was likely to happen by looking at what happened in similar past cases.

And just as the judges would determine which precedents they were bound by, the litigant too could inspect these precedents and bring them to the attention of the court, show how these precedents applied to the facts in this case. But there was also flexibility in the system because the judge could determine that the precedent did not apply, the facts were not sufficiently similar and that the precedent in question could be “distinguished”.

In the to-and-fro between the monarchs and the English barons, in terms of the power struggle that animated early English society, there were efforts to undercut or undermine the power of the royal courts in favour of the manorial courts. And so for some time there was a moratorium on new writs being developed by the Chancellor for new types of legal complaints or new so-called “causes of action”

And so as the writ system began to break down, the common law system became progressively more and more moribund to the point that by the 14th century, the common law courts were stagnant and thrived on technicalities, not justice. In these circumstances something had to give. The monarch still had the inherent power to hear disputes, and the task of resolving these disputes was not entirely left to the courts.

People began coming to the monarch looking for justice where the common law courts had failed them. And the monarch eventually gave the task of hearing these complaints to the Chancellor. Eventually the hearing of these complaints by the Chancellor became formalized by the time of Henry the 7th into something known as the “Court of Chancery” And this court was designed to give relief from the rigidity of the common law courts. It administered a form of law known as “equity”.

And what was equity? At the beginning equity was law without rules. It was driven by a concern for fairness and justice. Because there were no rules and the Chancery basically resolved disputes according to what it saw as fair, the court of Chancery was heavily criticized. It was said that the justice dispensed by this court was unpredictable and variable and depended on the judge who heard the matter. There was no doctrine of *stare decisis*, no doctrine of precedent. The rules of equity, it was said, “varied with the size of the Chancellor’s foot”. In other words, they were as variable as the different shoe sizes of the different judges who heard the cases.

Of course, having two different systems of justice produced the prospect of conflict between the courts. A doctrine emerged that gave equity primacy over the common law in the event of conflict. Time passes and much happens in terms of English history and the development of Parliament, matters that we will discuss in another podcast. Common law courts eventually come to apply not only the common law rules developed by the courts themselves but also laws passed by Parliament and they also interpret the common law to restrict some of the powers of the monarch. Recognizing ultimately that Parliament is supreme – the doctrine of “parliamentary supremacy”, which is an important, indeed elemental, aspect of public law discussed in another podcast.

We get to the 19th century and at this juncture, we see reform in both the common law and courts of equity. In the early 19th c the vast majority of writs are abolished and procedures in the courts are simplified and the flexibility in the common law approach is re-introduced. The distinction between equity and common law begins to blur as each court applies doctrine from the other and in the UK in 1873 the common law and equity courts are unified, though the two bodies of law remain relatively distinct, albeit heavily influence by each other. That is essentially the system we have today in Canada, outside Quebec.

How did it come to Canada? The simple answer is that we adopted English Common Law because Canada was a British colony and the actual mechanisms by which common law was introduced in Canada varied from region to region. In Ontario, the Legislature of Upper Canada was created by the *Constitutional Act of 1791,* and that legislature passed its first statute in 1792. That statute essentially received English common law and equity and so English common law and equity are deemed to have been received in Ontario as of the 15th of October, 1792. And then in 1881 in Ontario the equity and common law systems were fused, much as had happened in the UK in the prior decade.

So, to come back to this concept of “common law”, what does it mean? The term common law means different things in different contexts. In early history, it was common law as opposed to manorial law – ie the justice bestowed by the royal courts that was common to all of England, as opposed to the idiosyncratic justice bestowed by the barons’ manorial law.

Common law is also distinguished from equity, in other words it is the law produced by the common law courts as versus the law that was generated by the courts of equity. And then in later history, it’s “common law” as opposed to statute law. And so, common law is the law unearthed and then applied through the doctrine of precedent or *stare decisis* by the common law courts as opposed to the law prescribed by the legislature in the form of statutes.

And so “common law” has a highly variable meaning but in all instances, we are preoccupied with judge-made law. Now I should alert you to one other aspect in which the term “common law” has significance in the Canadian legal parlance. As I’ve noted, all the provinces except Quebec inherited this UK common law tradition. Quebec, on the other hand, inherited what’s known as a “civil law” tradition. Civil law has its origins in Roman law and becomes the dominant legal tradition on the European continent.

And so one other way in which the term common law is used in Canadian legal parlance is to distinguish between the “common law provinces”, that is those provinces that inherited this judge-made law concept from the UK, as opposed to Quebec, which received the civil law tradition.

One note, however, on the use of the term “civil law”. Civil law can refer to that European continental tradition but there is also a concept of civil law that is a subset of common law. When we talk about “civil law” as common law lawyers, we generally mean that law that governs relations between individuals, sometimes otherwise known as private law. That’s why we would talk about a “civil action” brought in tort or a civil action for breach of contract. And so just be aware of the ever-mutable terminology otherwise it will be enormously confusing.

And just to further reinforce your understanding in this area, we will have apodcast on the Quebec civil law tradition so that you can deepen your understanding

So let me end this very brief discussion of the history of the common law by summarizing three key points:

Common Law judges are law-makers but they make law by supposedly unearthing customs and rules. They are not supposed to invent new principles from the ether.

Common law judges ensure consistency, continuity and certainty in the law by abiding by the doctrine of precedent, that is the concept of *stare decisis.* Common law courts, however, amend the law they make in this manner by distinguishing, reinterpreting or overhauling past decisions and by reinterpreting the requirements of *stare decisis* and the extent to which they are bound by their past decisions.

Thus, the common law is highly flexible and highly fluid and it has evolved enormously with the passage of time to reflect new social mores and new concepts and principles that animate the Canadian society.

And with that in mind I wish now to turn to an interview with Professor Constance Backhouse discussing how legal history can provide insight in understanding the fluid and sometimes quite unsatisfactory nature of the justice bestowed by Canadian law.