COMMON LAW vs STATUTE LAW

Common Law Definition:

The collection of decisions made by courts over time, relating to a particular subject. Often referred to as "precedent".

Statute Law Definition:

Legislation as adopted by Parliament or a provincial legislature. Includes regulations made under the authority of the statute. Does not include "Guidelines".
History of Law Making:

- Our legal system originates in England where the King was the holder of absolute power and all law came from his pronouncements.

- The first restriction on the power of the King was the Magna Carta in 1215. It may have been the first statute. It set out rules for fair treatment of the King’s subjects and bound all persons, even the King.

- The King began to convene a Parliament, a body of representatives of certain classes of persons to advise him. Parliament began to enact laws as its way of voicing its opinion and had the power to levy taxes.

- The King retained control because he could convene and dissolve Parliament at will. The 1642 civil war, lead by Oliver Cromwell, against the Royalists, was the first major test of the power of the people as opposed to that of the Royalty. England was governed for a time without a King after Charles I was deposed.

- James II, in 1685, tried again to limit the power of Parliament. That was largely seen as a religion-based struggle since James was Catholic, so William and Mary, in 1689, took the throne to preserve the rule of the Protestants and Parliament therefore survived.
• John Locke was a philosopher in the 1600’s who believed that government exists only to protect the rights of its citizens, all of whom are entitled to fundamental natural rights such as life, liberty and property.

• He believed that citizens have the right to revolt if those rights are threatened.

• That line of thinking strengthened the role of Parliament as law maker and limited the power of the monarchy.

• The monarchs had, over time, delegated some authority to courts, to assist them in making and applying the law.

• The courts then evolved into a role of interpreting the statutes. Courts relied on the historic rules of the common law to apply the legislation. The common law is said to be a set of rules or principles which evolved from looking back at previous decisions made regarding similar issues. Courts used those rules to “discover the intention of Parliament” when the statute was created.

• Since then, and continuing today, is the tension between judge-made, or common law, and statute law, as enacted by Parliament.

• Statutes may be created to address a perceived problem with the existing law. Courts try to apply the legislation, which may then expose problems with the legislation, which the courts may try to address until the statute is revised.
• Courts respect the right of Parliament to legislate, but also see themselves as the guardians of fundamental rights of citizens against abuse or neglect by Parliament.

• Over time, decisions interpreting the statute are looked to in new disputes, so much “common law” is actually now made against the background of statute law, much as statute law began against the background of common law.

• How does one determine whether common law rules can be, or should be applied in any set of circumstances?
Issues:

1. Did the legislature intend to oust the common law?
2. If so, is the common law to be ousted entirely or only in part?
Principles of Statutory Interpretation:

1. Legislation is paramount over the common law where the two conflict.

2. There is a presumption that the common law was not meant to be changed by legislation.

3. The type, area and extent of the law the legislation deals with is relevant in determining whether the common law is supplanted.

4. The perceived adequacy of the common law in addressing the subject matter.
Analysis:

- The Legislature is presumed to respect "the law" so there is a presumption against wanting to change it.

- If the intent of the legislature is clear that it is intended to oust the common law, then the legislation will govern.

- Legislation is more likely to replace the common law in areas of public law than in private law fields such as contract and tort.

- The court will assess the adequacy of the legislation in terms of the appropriate outcome in the particular case.
Effects of Legislation on Common Law:

- Codification:
  - Embodies the common law, generally without change or exclusion.
  - Courts will look to old decisions for clarification when necessary.
8. [7] (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.
SALE OF GOODS ACT

57. (1) The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.
Modification:

- If there is an intention of the legislature to reform the common law because of changing social needs or demands, then a court should not look at old decisions which would undermine the intent of the statute.

- e.g. Family Law Act.
FAMILY LAW ACT

64. (1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respect as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.
Areas where the Common Law and the Statute Overlap:

- It is appropriate to ask whether the legislation is intended to be a code, but the answer is usually driven by the results desired by the court in the circumstances.

- Is the statute a comprehensive regulatory scheme which "occupies the field", so resort to common law rules is unnecessary?

- e.g. Planning Act.

- Common law rules are not excluded, if they are necessary to complement the statutory remedies. An injunction is an example of a common law remedy which Courts retain jurisdiction to grant, even in the absence of a statutory provision.
1.1 The purposes of this Act are,

(a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;

(b) to provide for a land use planning system led by provincial policy;

(c) to integrate matters of provincial interest in provincial and municipal planning decisions;

(d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;

(e) to encourage co-operation and coordination among various interests;

(f) to recognize the decision-making authority and accountability of municipal councils in planning.
Considerations:

- Start with a presumption against changing the common law.

- The presumption is rebutted by evidence of legislative intent to oust or change the common law.

- Whether there is evidence of an intent to provide comprehensive regulation of the subject matter, which intent may be express or implied.

- Whether the common law is unsatisfactory: e.g. the Drainage Act, where prior to the statute there was no right to an outlet, an owner could turn back the natural flow and the only remedy for being flooded by collected water was an action at law in nuisance.

- Courts will continue to resort to the common law if they feel that the legislation does not produce the proper result or to assist in a continued incremental development of the common law.
Question

Is the Drainage Act a code, a comprehensive regulatory scheme, or a statute to which common law principles still apply?
ANSWER

IT DEPENDS!!