

Chapter 2

The Canadian Legal System

by Shannon O’Byrne

DETAILED TABLE OF CONTENTS

Business Law in Practice	22
Introduction.....	23
The Canadian Constitution	25
The Legislative Branch of Government.....	25
Statute Law and Jurisdiction.....	26
The Executive Branch of Government	29
The Judicial Branch of Government.....	30
The System of Courts.....	31
The <i>Canadian Charter of Rights and Freedoms</i>	32
Sources of Law	38
Classifications of Law.....	40
Domestic versus International Law	40
Substantive versus Procedural Law	40
Public versus Private Law.....	40
Common Law versus Civil Law	41

Administrative Law and Business	42
Business Law in Practice Revisited	44
Chapter Summary	45
Key Terms and Concepts	46
Questions for Review.....	46
Questions for Critical Thinking	47
Situations for Discussion	47

I. TEACHING OBJECTIVES

After studying this chapter, students should have an understanding of

- • the impact of the Canadian legal system on business
- • the role of constitutional law in protecting commercial rights and freedoms
- • the government’s law-making powers under sections 91 and 92 of the *Constitution Act, 1867*
- • the executive’s formal and political functions in regulating business
- • the judiciary’s role in assessing the constitutionality of legislation
- • the classifications of law
- • how administrative law affects business

Whereas Chapter 1 dealt with the question “Why study the law in a business program?”

Chapter 2 explains what the law is and where the law comes from. In sum, the chapter provides students with grounding in the basics of governmental operations—legislative, executive, and judicial. Though this makes for a reasonably technical chapter, it is an important one because it introduces students to the regulatory or administrative context of doing business.

The teaching objective of this chapter is to help students understand the broad—and mandatory—relationship between business and government. So that students are not overwhelmed with generalities, the Business Law in Practice (involving James McCrae, the small convenience store owner) provides a straightforward example of how government regulates business. The scenario illustrates how tobacco retailers are affected by the following:

- • The legislative branch of government, which passes statute law, such as Nova Scotia’s *Tobacco Access Act*.

- • The political executive, which decides on the policy leading to Nova Scotia's legislation.

As another example of involvement by the political executive, federal regulations determine what the industry must show on the face of its cigarette packages.

- • The judicial branch of government, which determines, for example, whether or not the impeached legislation is constitutional.

The Business Law in Practice scenario is offered to students as an accessible—albeit partial—segue into the workings of government.

II. TEACHING STRATEGIES

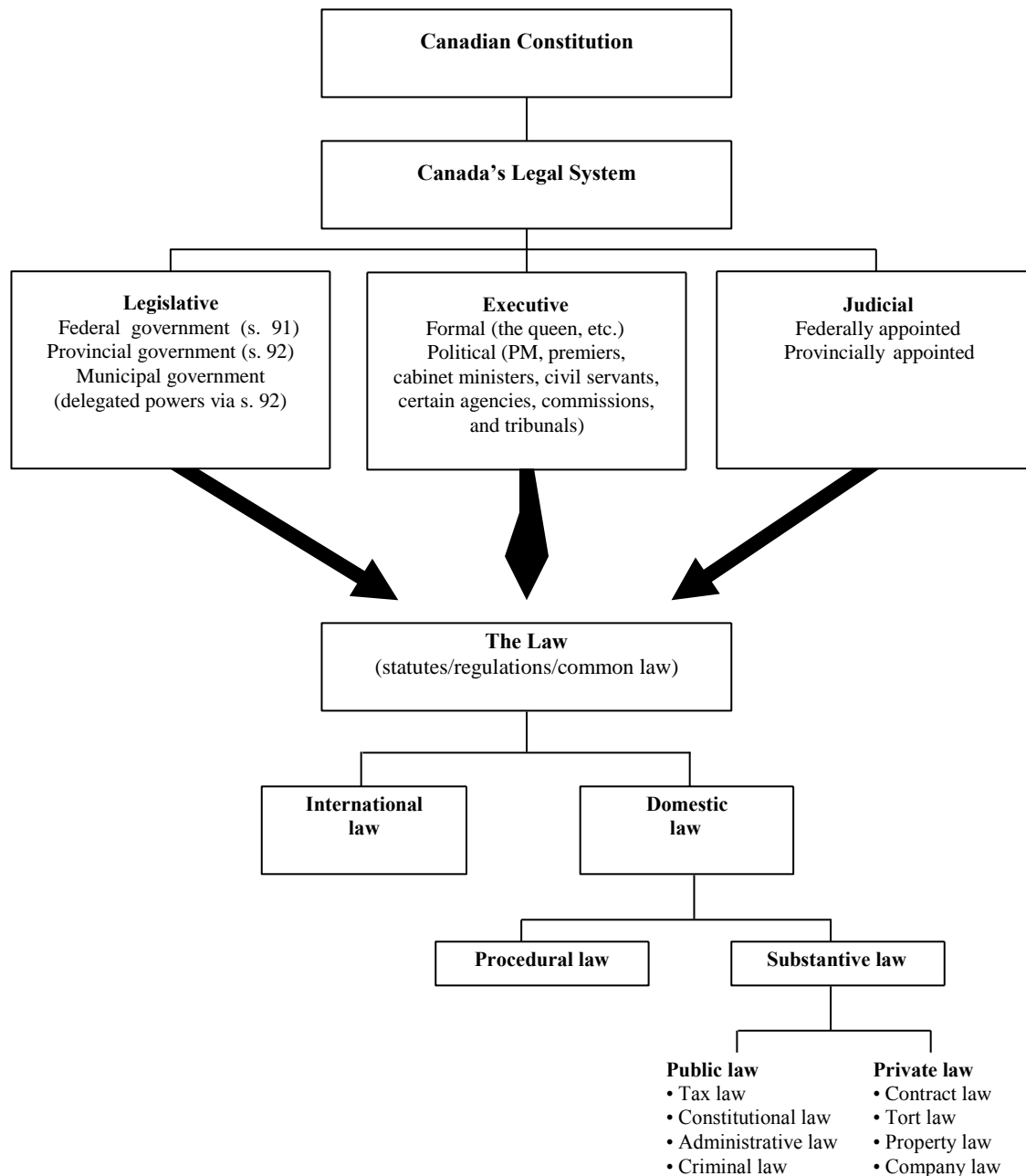
This chapter works best with a lecture format. It presents a considerable amount of information that will be new to many students, particularly given their diversity of educational backgrounds and the internationalization of the student body. Although the Business Law in Practice scenario provides some of context for discussion, a large part of this chapter is devoted to setting the groundwork and is not intended to spark a lot of debate.

One approach that has proven successful in explaining the sources and classification of the law is to incrementally explain Figure 2.8 in the textbook (page 43), which is reproduced on the next page. Figure 2.8 summarizes the following basic propositions introduced in the chapter:

- • The Canadian legal system takes its current form because of the Constitution.
- • The Constitution mandates Canada's legal system and therefore the three branches of government (legislative, executive, and judicial).
- • The Constitution creates two levels of government: federal and provincial. Municipal governments are the creatures of provincial delegation.
- • Each level of government has law-making powers.
- • Law made by government can be classified as international or domestic. (Note: Since the text focuses on domestic law, international law is only briefly mentioned. Furthermore, international law cannot be classified in the same way as domestic law and, accordingly, there is a real risk of confusing students by even attempting to explain the differences.)
- Domestic law can be broadly classified as procedural or substantive.
- • Within the category of substantive law, another broad distinction is made between public and private law. Public law includes taxation law, constitutional law, administrative law,

and criminal law. Private law includes contracts law, tort law, property law, and company law.

Figure 2.8 [from textbook]



It is helpful to point out to students, when reviewing the categories of law in Figure 2.8, that there is no discrete category known as “business law.” Business is concerned with *all* aspects of the law—and is not a self-contained area. During the course of business, people commit torts and crimes, enter into contracts, buy and sell property, and incorporate their operations. Additionally, they are taxed, can claim *Charter* rights from a constitutional perspective, and are subject to the jurisdiction of administrative tribunals.

Periodically involving the class in discussion is important, of course, and much of the end of chapter material has been drafted with this in mind. For example, question 1 in the Questions for Critical Thinking (Is Canada an over-governed state?) arises naturally in the context of Figure 2.8 in the textbook, as well as from Figure 2.9: Administrative Bodies and Officials Affecting Business (page 44 in the textbook). Figure 2.9 sets out examples of the variety of licences and permissions required to carry on business.

This chapter also provides some basic information on the operation of precedent and the notion of a judicial hierarchy. (Chapter 4 provides further information on the how the legal system works.) It also provides a brief introduction to administrative law and its relationship to business.

III. STUDENT ACTIVITIES

Task 1: To help students gain familiarity with how government works, ask them to research a discrete topic—such as the history of Parliament or the division of powers—through the resources provided on the textbook’s website, which provides links to a number of websites related to government.

Task 2: Situation for Discussion 2 describes a brawl at a bar in Halifax and the potential legislative aftermath. Ask the students to find other examples in which possible problems arising from business management/business activity might lead to new laws being enacted. (Examples include a lack of safety in drinking establishments leading to minimum drink prices being enacted in Alberta (see “Alberta mandates minimum booze prices,” *Calgary Herald* (3 July 2008) at <http://www.canada.com/topics/news/national/story.html?id=b05c84ea-76a5-41a6-beeb-7e7ef41006e8>) and in Nova Scotia (see Rachel Boomer, “Nova Scotia introduces minimum drink price,” *Metro* (19 December 2008) at <http://metronews.ca/news/halifax/82102/nova-scotia-introduces-minimum-drink-price/>); high greenhouse gas emissions from cars leading to commitments by the federal government to enact standards to reduce greenhouse gases from cars (see Situation for Discussion 3); and gender-based pricing leading an Ontario backbencher to introduce a bill banning the practice (see *Business and Legislation: Gender-Based Pricing*, page 37). Examples from Chapter 1 include the inhumane treatment of sled dogs (see *Ethical Considerations: Inhumane Killing of Sled Dog in British Columbia*, page 7) and underage tanning (see *Business and Legislation: Regulating the Tanning Industry*, page 10). There are short CBC news clips concerning these later two examples (“Sled Dog Repo” and “Victoria Tanning,” respectively) on the DVD supporting this Instructor’s Manual.

IV. EXPLANATION OF SELECTED FEATURES

Page 24

Photo caption: When Ontario’s tobacco display ban went into effect, some customers were unhappy, including Rene LaPointe. “It’s just another law for the government to throw at us,” says LaPointe. “They’re treating the adults like children.” Do you agree with his analysis? [footnote deleted]

With respect, Rene LaPointe is missing the point entirely. The idea of a tobacco display wall ban is to help ensure that children are not encouraged to take up smoking and that smoking is not normalized in their eyes. It may have the effect of reducing consumption in adults but that is not overriding purpose of the law. The government isn’t treating adults like children; it is trying to prevent children from smoking, whether now or as they grow older.

Page 27

Environmental Perspective: Concurrent Jurisdiction over the Environment

Critical Analysis: What are the advantages of concurrent jurisdiction over the environment? What are the disadvantages?

Concurrent jurisdiction over the environment is inevitable because it follows from the distinct powers that each level of government is given under the Constitution. For example, a source of the federal government’s power over the environment comes from its s. 91 power over navigation and shipping. One source of the provincial government’s power over the environment derives from its jurisdiction over such matters as property and civil rights. Therefore, concurrent jurisdiction has at least logic to recommend it and leaves environmental matters in the hands of the level of government that might be best equipped be able to assess and handle it. However,

this division can also lead to a regrettable lack of coordination on a variety of fronts, including the cleanup of contaminated soil, as well as regulatory complexity and inefficiencies.

A possible solution to this problem is for political executive at all levels of government to cooperate. For example, and as noted by Dianne Saxe and Jackie Campbell, the “provinces and federal government have an active but slow process of trying to harmonize their cleanup standards, through the Canadian Council of Ministers of the Environment.” For more analysis, see Dianne Saxe and Jackie Campbell, “Canadian environmental law: Quick intro,” at <http://envirolaw.com/quick-intro-canadian-environmental-law/>.

Page 29

International Perspective: Antismoking Treaty

Critical Analysis: How might a treaty ratified by multiple countries be more effective in reducing tobacco consumption than if each country simply worked in isolation? What are the advantages of global cooperation? What are the disadvantages?

Countries working together from an agreed-on template—such as is contained in a treaty—are likely to benefit from the increased efficiencies associated with this kind of cooperation. Instead of each country working in isolation, countries combine forces, share their knowledge base, and formulate a generalized solution. Such an efficiency counts as an advantage of global cooperation, as do the opportunities that emerge for cooperation on other related issues.

Cooperation also makes it easier for each country to resist the efforts of smoking lobbies and the tobacco industry. The disadvantages relate largely to a compromised ability to change course in how smoking is to be combated within a country.

Business and Legislation: Tobacco Regulation by the Federal Government

Photo caption: This image depicts Barb Tarbox who died of lung cancer caused by smoking. She was so addicted to cigarettes that she continued smoking until her death. One of her final wishes was that her dying image appear on cigarette packages as a warning to others. Are such images effective? [footnotes deleted]

For the moving back story about Barb Tarbox’s image on cigarette packages, see the DVD supplement containing the video entitled “Tobacco Two.” This clip will help the students answer the question.

Statistics Canada reports that smoking has declined dramatically over the last 10 years and particularly so among teens. As reported by the *Red Deer Advocate* (22 June 2012), Ottawa credits some of this success to its “its mandatory, graphic anti-smoking packaging for tobacco products.” The article goes on to note that “one in five Canadians aged 12 and over—5.8 million people—smoke on an occasional or a daily basis, down from 25.9 per cent in 2001. For teens aged 15 to 17, the rate fell over the same period to 9.4 per cent from 20.8 per cent. For those aged 18 to 19, the rate dropped to one in five from one in three.” Other factors that have presumably contributed to the decline in smoking rates include increased education programs, reports the *Red Deer Advocate*. Another contributing factor in the decline is the escalating cost of cigarettes because of increased levels of taxation. See *Red Deer Advocate*, “Gruesome images on cigarette packs seem to be working,” *Winnipeg Free Press* (22 June 2012) at <http://www.winnipegfreepress.com/opinion/westview/gruesome-images-on-cigarette-packs-seem-to-be-working-159983365.html>. There also appears to be evidence that people better remember health warnings on the cigarette packages when they are accompanied by a graphic

image. See “Graphic warning labels on cigarette packs ‘work better,’” *BBC News online* (14 June 2012) at <http://www.bbc.co.uk/news/health-18441497>.

Page 34

Business and Legislation: Store Owner Challenges Nova Scotia’s *Tobacco Access Act*

Critical Analysis: Do you support Gee’s decision to fight the legislation?

Students may be divided on this point. On the one hand, it seems reasonable for government to seek to reduce smoking, particularly in young people. Since power walls normalize smoking—at least to some extent—banning such walls is an important and relatively unobtrusive way of helping to ensure that young people never take up a habit that could kill them. As noted in the Business Law in Practice opening scenario, in countries that have banned tobacco displays, there has been an encouraging reduction in smoking by young people.

On the other hand, cigarettes are legal products and laws like the *Tobacco Access Act* are simply too intrusive. And those particularly familiar with Mr. Gee’s business will perhaps object on the basis offered by Halifax’s *Chronicle Herald*. In an editorial dated 24 August 2010, the paper observed that Mr. Gee’s store would have been exempt from the display ban under the *Tobacco Access Act* had Mr. Gee fit the definition of a tobacconist, that is, someone who *only* sells tobacco. However, he does not fit the definition since, admittedly, Gee sells a few other products beyond tobacco, such as candy and soft drinks. The editorial then states,

The ridiculous part of this saga is that it makes no practical difference whether Mr. Gee is a bona fide tobacconist or not. He obeys the law in every way that matters. He does not allow minors in his specialty shop. He does not advertise tobacco products outside his store. People know that his well-established business is a tobacco store, not a convenience store.

The editorial goes on to suggest that the province show some flexibility and allow retailers “who offer sundry items on the side, but whose *raison d’être* is tobacco sales, to be considered tobacconists under the law.”

This response by the *Chronicle Herald* creates its own set of problems because now, to apply the new distinction it advances, we have to ask if the vendor’s *raison d’être* is tobacco sales or not. This is a slippery standard whereas the existing legislation at least has clarity to recommend it. A person is a tobacconist or that person is not. Full stop. As well, it may be problematic to conclude, as the editorial does, that Gee obeys the law “in every way that matters.” Part of the legislative frameworks requires tobacco products not to be displayed unless the seller is a tobacconist. One could argue that this provision matters too.

Page 37

Business and Legislation: Gender-Based Pricing

Critical Analysis: Should government regulate price when it is discriminatory or should that be left to the free market? Do you think that hiring a lobbyist is a good risk management strategy?

Although government regulation is often mandated to fight discrimination, this is not necessarily one of those cases. A good argument can be made that pricing should be left to the marketplace, and companies who overcharge their customers will see the market consequences in the form of reduced patronage. The other view is that gender-based pricing is so entrenched that businesses are unlikely to ever change unless forced to do so by law. If this is the case, the only way women will be treated equally as consumers is for the gender-based pricing bill to be enacted.

Hiring a lobbyist is generally regarded as a good risk management strategy as lobbyists tend to bring an increased knowledge of and contract base to the problem.

Business and Legislation: Gender-Based Pricing

Photo caption: Is there any justification for gender-based pricing?

Women's haircuts are typically more costly than men's haircuts, doubtless because they are more time consuming for the stylist to produce. This seems to be a reasonable justification for an increased price. It is considerably less convincing to suggest, as some in the dry cleaning industry suggest, that automated technology is geared to larger items of clothing and therefore women's blouses need to be touched up by hand, driving up the service cost in that circumstance. Some critics have argued that automated technology could also be geared to smaller items of clothing. Put another way, are smaller people (more likely to be women) being forced to subsidize larger people (more likely to be men) because of a technology "bias"?

V. CHAPTER STUDY

Questions for Review, page 46

1. What is the key idea upon which the Canadian Constitution is based? Page 23

The Canadian Constitution is founded on the idea of individual freedom, which is associated with the political philosophy known as liberalism.

2. What does “jurisdiction” mean? Page 26

Jurisdiction refers to the power that a given level of government has to enact laws.

3. What is an example of a constitutional convention? Page 25

An example of a constitutional convention relates to the office of prime minister. This office is not mentioned anywhere in Canada’s written Constitution, yet no one doubts that the federal government is headed by such an officer.

4. Which document determines whether a government has the jurisdiction to pass a law or not? Page 26

The *Constitution Act, 1867*, formerly known as the *British North America Act*.

5. What is the doctrine of paramountcy? Page 28

The doctrine of paramountcy provides that federal laws prevail when there are conflicting or inconsistent federal and provincial laws.

6. Which level of government does paramountcy seem to favour? Page 28

Paramountcy seems to favour the federal government because when there is a conflict between federal and provincial laws, the federal law will prevail.

7. How does the authority of a municipal government come into existence? Page 26

All municipalities are created by provincial legislation. Their powers are given to them by the provincial government.

8. What is the difference between a regulation and a bylaw (or ordinance)?

Pages 29-30

The term “bylaw” is often used to refer to municipal law. Regulations come from the political executive of the federal or provincial level of government and are created pursuant to legislation.

9. What is the executive branch of government? Pages 29-30

The executive branch of government has both a formal function and a political one. Its formal function includes the giving of royal assent to legislation (by the queen’s representative). Its political function includes performing day-to-day operations: formulating and executing government policy, as well as administering all departments of government. Cabinet—all the ministers of the various government departments, as well as the prime minister or premier—is often empowered by legislation to pass regulations that provide detail to what the statute has enacted.

10. How is the executive branch different from the legislative branch? Pages 25, 29

The executive branch of government is responsible for the ceremonial features of government, and the legislative branch is concerned with lawmaking.

11. What is precedent? Why is a system of courts essential to its creation? Pages 38-40

Precedent refers to an earlier case that is used to resolve a current case because of its similarity. Since only a higher court can bind a lower court according to precedent, a system of courts is essential to the creation of precedent.

12. What are the two types of trial courts? Page 31

The two types of trial courts are inferior courts, in which judges are appointed by the provincial government, and superior courts, in which judges are appointed by the federal government.

13. What is the common law? Who creates it? Page 38

The common law comprises rules that are formulated or created by the judiciary.

14. What is the Canadian Charter of Rights and Freedoms? Page 32

The *Canadian Charter of Rights and Freedoms* is a guarantee of specific rights and freedoms enshrined in the Constitution and enforceable by the judiciary.

15. What can a judge do if he or she determines that a piece of legislation is unconstitutional? Page 39

The judiciary has considerable discretion in fashioning a remedy in the face of unconstitutional legislation. The remedy focused on in this text is the court’s power to strike down the legislation, that is, declare the law to be of no force or effect.

16. If a law is found to violate a person’s freedom of expression pursuant to the Charter, is it automatically struck down? Is there something in the Charter that might allow the government to justify violating that person’s freedom of expression? Pages 32-34

A law is not automatically struck down just because it violates a freedom guaranteed by the *Charter*—for example, if a violation of the right to freedom of expression under s. 2(b) of the *Charter* is found, it is not the end of the inquiry.

Section 1 of the *Charter* provides that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This section stipulates that once a protected right is violated, the government is required to justify why it is infringing a right, as well as to demonstrate that in doing so, it is restricting the right in question in a reasonably measured, controlled, and appropriate way. If the government is unable to do so, only then will the law in question be struck down.

17. What is the difference between public law and private law? Pages 40-41

Public law concerns areas of law that relate to, or regulate, the relationship between persons and governments at all levels. Private law concerns dealings between persons.

18. Which Canadian province operates under a civil law system? Page 41

Quebec is the only province that relies on a civil law system.

19. What is the role of equity? Page 39

Equity provides rules that focus on what would be fair given the specific circumstances of the case, as opposed to what the strict rules of common law might dictate.

20. What is one important function of administrative law? Pages 42-44

Administrative law refers to rules created and applied by those having governmental powers. These laws are applied by administrative bodies to address a specific activity, from licensing to zoning and subdivision.

Questions for Critical Thinking, page 47

1. Canada has often been described as an over-governed state. What features of Canada's system of government contribute to this opinion? Do you agree?

Several features of Canada's system of government may generate "over-governing." For example, the division of powers between s. 91 and s. 92 of the *Constitution Act, 1867* is not entirely distinct, and several areas overlap, environmental regulation being one of them.

Furthermore, incremental and ad hoc delegation by government to administrative tribunals can also be identified as a cause of over-government.

Concrete evidence of what may be regarded as over-regulation is found in Figure 2.9 in the textbook (*Administrative Bodies and Officials Affecting Business*, page 44): business must acquire a variety of licences, permits, and other permissions related to their activity.

There is no doubt that Canadians are subject to a considerable number of rules and regulations. Whether this is objectionable for being excessive clearly depends on one's political opinion.

2. There are several reasons traditionally offered for why commercial expression should be protected under s. 2 of the Charter. For example, such speech is seen as contributing to the “marketplace of ideas” and, furthermore, it is hard to separate out commercial speech from other “higher” forms of speech, such as political and social. Do you agree with these rationales? [footnotes deleted]

These kinds of rationales are at the core of why the judiciary protects freedom of expression so carefully and why, therefore, commercial expression is a protected form of speech. It seems persuasive that, in a free and democratic society, expression should be as unfettered as is reasonably possible, no matter who the speaker is and no matter what the words are. Indeed, the Supreme Court of Canada has emphasized the need to protect such expression:

[o]ver and above its intrinsic value as expression, commercial expression ... protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The court accordingly rejects the view that commercial expression serves no individual or society value in a free and democratic society and for this reason is undeserving of any constitutional protection. [See *Ford v Quebec (AG)* [1988] 2 SCR 712 at 767.]

It is easily possible to regard commercial expression as less constitutionally significant than political expression while at the same time acknowledging an inevitable link between them.

3. Under a common law system, judges follow precedent when making decisions or resolving disputes. What are the advantages of following precedent? Describe a situation where it might be inappropriate to follow precedent.

A system of precedent (*stare decisis*) is intended to promote certainty, predictability, consistency, and uniformity in the law—its informing principle being that “like” cases are to be treated alike. One disadvantage is that the application of precedent in a given case may create an injustice. A related problem is that, given the slowness with which the common law evolves, the legal system fails to keep pace with social, political, and economic change.

It is inappropriate for a judge to follow a precedent when that precedent has lost its reputation or flies in the face of public policy. For example, courts no longer apply the discredited view of equality set forth in *Bliss v A.G. Canada* [1979] 1 SCR 183. In *Bliss*, Mr. Justice Ritchie ruled that the *Unemployment Insurance Act* did not discriminate against pregnant women, though it required them to have a longer qualifying period for benefits than anyone else under the Act. According to Mr. Justice Ritchie, if the impugned provision in the Act

treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women ... any inequality between the sexes in this area is not created by legislation, but by nature.

An ironic way of encapsulating the flaw in Ritchie’s analysis is to observe that the *Unemployment Insurance Act* does not violate equality rights because it treats pregnant women and pregnant men in exactly the same way.

Bliss was overturned by the SCC in *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, which confirms that discrimination on the basis of pregnancy is discrimination on the basis of sex.

For further discussion of the rules governing *stare decisis*, see Edmund Kwaw, *Guide to Legal Analysis, Legal Methodology and Legal Writing*, 2nd ed. (Toronto: CCH, 2008).

4. Review Figure 2.3 on page 36. In your opinion, how has the Charter affected business activity?

The *Charter* has

- • made business subject to less legislative and regulatory intervention in several instances
- • permitted professionals to more easily communicate with the public, in face of unreasonable restrictions by their governing bodies
- • permitted business to operate more freely, including the freedom to open on Sundays

In other cases, however, the *Charter* has affirmed the right of the legislature to restrict business, including, in Quebec, how it advertises to children.

5. Do you think that the Charter strikes a good balance between protecting the rights of individual citizens and allowing governments to legislate for the benefit of larger groups, or even all members of society? Is section 1 of the Charter necessary, or should an individual's fundamental rights and freedoms be absolute?

Section 1 allows the courts to strike the balance between protecting the rights of the individual and allowing governments to legislate for the benefit of larger groups or even all members of society.

Section 1 of the *Charter* is necessary. Otherwise, if rights were absolute, a person could slander and hide behind the concept of freedom of speech, to name just one example.

6. Dozens of administrative tribunals, such as the Labour Relations Board, the Canadian Radio-television and Telecommunications Commission, various human rights tribunals, and the Occupational Health and Safety Commission, have been established by both the federal and provincial governments. Why do you think administrative tribunals are such a predominant feature in Canada? Why have they been established?

There are a number of reasons for the proliferation of administrative tribunals in Canada:

- the need for expertise in a particular area like atomic energy
- the need to take pressure off the judicial system
- the need for ADR in general
- the need to take care of a certain group in society, like workers injured on the job, regardless of fault

There is no unifying vision behind all the administrative tribunals operating in Canada. Historically, they simply appeared on a piecemeal basis in response to needs identified by government, such as those given above.

Situations for Discussion, pages 47-48

1. The government of Alberta has announced new regulations that include requirements that home inspection businesses be provincially licensed and carry \$1 million in errors and omission insurance. Beyond this, the province has mandated educational standards for home inspectors with the goal of improving the quality of work done by the home inspection industry. Opposition Liberal MLA Hugh MacDonald endorses the regulations as a means of clamping down on

some of these midnight home inspectors..... If I'm making an important decision to purchase a home based on information I'm getting from a home inspector, that person should be licensed and have minimum credentials."
[footnotes deleted]

Do you agree that government should regulate such an industry? What are the costs and benefits of such regulation to the consumer?

A housing purchase is one of the most expensive purchases most individuals make in their lifetime. An unregulated housing inspection industry means that consumers are more likely to run up against an incompetent or a dishonest home inspector and buy the wrong house. This can have utterly devastating financial consequences. As reported by Karen Kleiss ("Home buyers get more protection," *Edmonton Journal* (14 May 2011) at

<http://www2.canada.com/edmontonjournal/news/story.html?id=b33dcbc8-b96a-4f5c-bd78-f9f1a8862aa3>), Terry Fikowski (of HouseMaster Home Inspections) welcomes home inspector regulation, because "a lot of the requirements in the regulation are things that home inspectors already do. Those that don't probably shouldn't be in the industry." He adds: "A lot of operators do not have any formal training of any sort, so training is a big thing. It's going to make sure those people get the proper training and have the proper insurance."

On this basis, the benefits of regulation therefore include an increased likelihood of keeping members of public out of harm's way. The downside of the regulation, of course, is that home inspection will cost more. Presumably, the home inspector will pass on to customers the expenses related to regulatory compliance, including insurance and training.

2. A brawl at a popular Halifax nightclub called the Dome resulted in 38 arrests and the suspension of the Dome's liquor licence. Governmental officials believe that onedollar drinks offered by the Dome are one factor contributing to such violence.

“This has blown into a cultural problem, and one of the issues we have identified is low-price, deep-discount drinks,” said Barry Barnett, Nova Scotia’s Minister of Health Promotion and Protection. The Nova Scotia government says it hopes to develop recommendations to address problems associated with excess alcohol consumption. From a risk management perspective, how should local bar owners approach governmental concern over bar violence? [footnotes deleted]

Though a full risk management model is not presented until Chapter 3, students should still be able to suggest ways in which bar violence can be reduced or eliminated:

- • The industry might consider voluntarily ending discount drinks pre-emptively. This may help to reduce violence as it will help to reduce the number of people who are intoxicated. An industry-wide change deals with the problem of only some bars eliminating discount drinks.
- • Bar owners should consider better control and security within bars and nightclubs.
- • Bar owners should consider better training of their security personnel to prevent violence from occurring or escalating.
- • Bar owners should consider lifetime bans for troublemakers.
- • Bar owners should increase the number of video surveillance cameras.
- • Bar owners should ensure that service is cut off to those who are impaired (which is already required by law).

The idea is to proactively address the problem identified by government and work to eliminate or reduce it.

The CBC reports that as part of getting its liquor license back, the Dome committed to ending the practice of one-dollar drinks, installing more video cameras, handing out lifetime

bans to trouble makers, and doing the following:

- • Limiting the number of patrons to 80 per cent of bar capacity.
 - • Hiring at least four off-duty police on a busy night, up from two.
 - • Doubling security staff inside the bar.
 - • Hiring a consultant for security training.
 - • Doubling the number of video cameras to 64 and giving police access to them.
- When it comes to the lifetime ban for known troublemakers, the bar hopes to set a precedent.

See CBC News, “Bar to stop selling \$1 drinks after brawl” (28 December 2007) at

<http://www.cbc.ca/canada/nova-scotia/story/2007/12/28/dome-security.html>.

Note that several jurisdictions, now including Nova Scotia and Alberta, have enacted legislation on the same point. For analysis of Nova Scotia law and related commentary, see Rachel Boomer, “Nova Scotia introduces minimum drink prices,” *Metro* (19 December 2008) at <http://metronews.ca/news/halifax/82102/nova-scotia-introduces-minimum-drink-price/>.

For analysis of Alberta law and related commentary, see CBC News, “New rules for Alberta bar patrons kick in” (1 August 2008) at <http://www.cbc.ca/canada/calgary/story/2008/08/01/liquor-laws.html>.

3. Following legislative initiatives from California, the federal government of Canada announced its intentions to reduce greenhouse gas emissions from new vehicles, which would “harmonize with the mandatory national standards of the United States beginning with the 2011 model year” according to a 2010 press release. Part of the goal, as previously stated by the federal government, is to harmonize Canada’s climate change action with the U.S.’s regulatory environment so as to “protect the environment and ensure a level playing field for the automotive industry.” In the past, industry has lobbied government to reject California-style

regulation, saying that such regulation could cause damage to both the auto industry and the economy at large. Environmental research groups suggest that manufacturers are merely exaggerating their projected costs. What is the role of government in regulating industry and protecting the environment, particularly when doing so drives up the cost of the product? [footnotes deleted]

Governments have an important role in protecting the environment and in compelling industry to improve its performance—through voluntary codes and regulation. It is important for government to study the issue closely and consult with stakeholders, but, ultimately, it is the body that has the legislative authority to set targets and compel industry to meet those targets.

Note that the federal government did enact the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations SOR/2010-201* (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-201/page-1.html>), which is described by

Environment Canada in the following terms:

The *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, made pursuant to the *Canadian Environmental Protection Act, 1999* (CEPA 1999), came into force in 2010. These Regulations apply to passenger automobiles and light trucks of the 2011 to 2016 model years. These vehicles make up about 13 percent of Canada’s total GHG emissions and, as a result of these regulations, the average emission performance of new vehicles of the 2016 model year is projected to be about 25 percent lower than vehicles in 2008.

See Environment Canada, “Consultation document for discussion of the main elements of the proposed regulations under the *Canadian Environmental Protection Act, 1999* to further limit greenhouse gas emissions from new on-road light-duty vehicles” (16 November 2011) at <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=F24B936F-1>.

Such enhanced environmental protections would also appear to be consistent with the will of the Canadian electorate. An IBM survey conducted in 2007 is summarized as follows: “The vast

majority of Canadians feel the federal government is not doing enough to reduce air pollution (86 per cent) or greenhouse gas emissions (85 per cent). More than half of all Canadians also strongly agree industry and government, through stricter regulations, tax incentives and new programs, must do more to reduce greenhouse gas emissions.” See IBM News, “IBM survey: Canadians’ concern about environment rising” (15 May 2007) at <http://www.ibm.com/news/ca/en/2007/05/15/e906800g70704o22.html>.

4. The federal government recently proposed legislation that would establish a national securities committee to replace the patchwork of provincially constituted securities commissions. Does the federal government have the jurisdiction to do so under s. 91, or does the jurisdiction fall to the provinces under s. 92? [footnotes deleted]

Note that this is a complex question that should be approached conceptually, especially so early in the course.

The federal government did offer several compelling reasons as to *why* a national securities commission was a good legislative idea: in short, it would facilitate the end of the patchwork of provincially based securities commissions and help to meet the new challenges of global markets. According to Thomas Hockin, “One securities regulator against the storm,” *The Globe and Mail* (17 July 2012) at <http://www.theglobeandmail.com/commentary/one-securities-regulator-against-the-storm/article4420856/>,

a Canadian national regulator would reduce the red tape faced by market participants, create a more efficient and globally competitive capital market and strengthen enforcement to better protect investors. All of this would enhance productivity and create jobs, economic growth and long-term prosperity. It would also better prepare Canada to anticipate and deal with global systemic risks.

Those opposed to such a federal move, such as William Rice of the Alberta Securities Commission, suggest that a national securities commission would stifle “local needs or innovations” according to Marzena Czarnecka, “Securities showdown” *Expert Magazine* (May 2011) 40 at 42. It is possible, too, that provinces that oppose the legislation are worried about losing revenue. As noted by Czarnecka, “In each of 2009 and 2010, for example, the ASC [Alberta Securities Commission] reported more than \$24 million in revenue, and the BSSC [British Columbia Securities Commission] more than \$30 million in 2009/10. They spend most of it on salaries and other operational expenses. Most, but not all,” at page 42.

Several provinces, including Alberta, Quebec, and Manitoba, successfully challenged the constitutionality of proposed federal legislation to create a national securities regulator. The Supreme Court of Canada rejected the federal government’s argument that it had the jurisdiction to enact securities legislation under its trade and commerce power on the basis that securities market was now a national matter affecting Canada as a whole. Instead, the court ruled that such legislation treaded on the province’s jurisdiction over investment under property and civil rights because it regulated on a detailed basis all aspects of securities trading. This area has traditionally been regarded as a matter within the province’s purview.

Though there may be good reasons in theory as to why a national regulatory is preferable, the constitutional question here is not resolved on that basis but on the technicalities of jurisdiction alone. That said, the Supreme Court seemed to have very much encouraged cooperation between the two levels of government, stating toward the end of its judgment

[132] It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative

solutions that meet the needs of the country as a whole as well as its constituent parts.

See *Reference Re Securities Act* [2011] 3 SCR 837.

In the meantime, Finance Minister Jim Flaherty is intent on consulting with the provinces to achieve a national approach on a cooperative basis. See Janet McFarland, “Flaherty not giving up on securities regulatory,” *The Globe and Mail* (20 March 2012) at

<http://www.theglobeandmail.com/report-on-business/flaherty-not-giving-up-on-national-securities-regulator/article4096797/>.

5. An accounting student is researching the deductibility of business expenses. She has found an amendment to the federal Income Tax Act that states that certain expenses are not deductible. However, she has also found case law that states that the expenses are deductible. Which law prevails? What additional information do you require to answer this question?

First, the accounting student must first work out a chronology. Which is most recent: the statute or the judicial decision? Second, is the judicial decision interpreting the relevant provision of the most current legislation or a repealed version? Statute law trumps a common law decision provided the statute law is constitutional, both under the division of powers and under the *Charter*. Hence, if a judge says that an item is deductible but Parliament then passes a law saying that it is not deductible, then the statute prevails.

6. Several provinces have passed legislation that restricts the sale of violent video games to children. How could this legislation be challenged under the Charter?

Explain. Are there any ethical considerations when contemplating such a challenge?

[footnotes deleted]

Such legislation could be challenged under s. 2(b) of the *Charter* (freedom of expression) but the challenge would likely fail under s. 1. As an article in the *Lawyers Weekly* points out,

The protection of children from the potentially adverse effects of exposure to video game violence might be enough to support a s. 1 argument. Section 1 jurisprudence in Canada has not required definitive proof of actual harm; potential harm has been sufficient in the past—especially when children are involved.

The best example of this is *Irwin Toy Ltd. v. Quebec* [1989] S.C.J. No. 36, decided by the Supreme Court of Canada. The issue in that case was the constitutionality of Quebec consumer protection legislation which prohibited commercial advertising to children under the age of 13. The court ruled that the advertising was protected by section 2(b) of the *Charter*, but the Quebec limitations were justified under s. 1. The court's decision was not based on definitive proof that the advertising actually harmed children (there was conflicting evidence on this point), but the court was influenced by a report which concluded that children are not capable of recognising the persuasive intent of advertising.

See Chris Metcalfe and Chris Bennett “Commentary: Anti-violence legislation on video games passes easily under *Charter*,” *Lawyers Weekly* (9 March 2007) at

http://www.lexisnexis.com/ca/legal/results/docview/docview.do?docLinkInd=true&risb=21_T8578301891&format=GNBFULL&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T8578301894&cisb=22_T8578301893&treeMax=true&treeWidth=0&csi=281512&docNo=1.

