

Chapter Two

The Canadian Legal System

by Shannon O'Byrne

DETAILED TABLE OF CONTENTS

Business Law in Practice	22
Introduction.....	23
The Canadian Constitution	24
The Legislative Branch of Government.....	25
Statute Law and Jurisdiction	25
The Executive Branch of Government	30
The Judicial Branch of Government.....	31
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 versus Civil Law	41
Administrative Law and Business	43

Business Law in Practice Revisited	45
Chapter Summary	46
Key Terms and Concepts	47
Questions for Review.....	47
Questions for Critical Thinking	48
Situations for Discussion	48

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 s. 91 and s. 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 the first chapter dealt with the question “Why study the law in a business programme?” this chapter accounts for what the law is and where the law comes from. In sum, Chapter 2 provides students with a grounding in the basics of governmental operations—legislative, executive, and judicial. Though this makes for a reasonably technical chapter, it has an important role in the text because it gives students an introduction to the regulatory/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 Jane, the vice president of marketing) provides a straightforward example of how government regulates business. The scenario illustrates, for example, that the tobacco industry is impacted by:

- the legislative branch of government which passes statute law like Saskatchewan's *Tobacco Control Act*
- the political executive who creates decides on the policy leading up to Saskatchewan'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 the impeached legislation is constitutional or not
- 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 which will be new to many students, particularly given their diversity of educational backgrounds and the internationalization of the student body. While the Business Law in Practice scenario provides a certain amount of context for discussion, a large part of this chapter is simply devoted to setting out 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 the chart on the following page:

Figure 2a

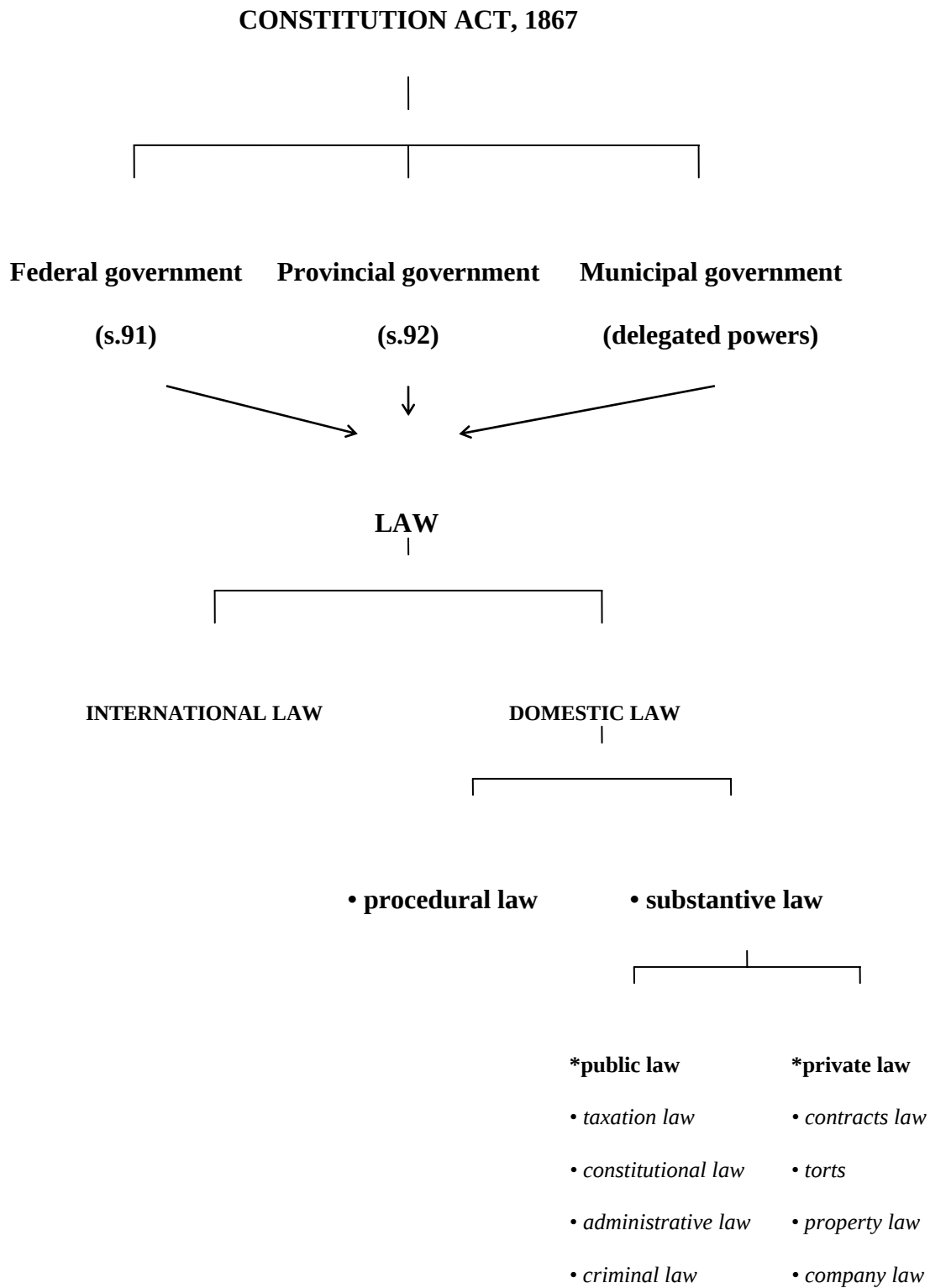


Figure 2a reflects the following basic propositions introduced in the Chapter:

- The Canadian legal system takes its current form due to the Constitution
- The Constitution mandates the 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 according to whether it is international or domestic. (Note: Since the text focuses on domestic law, international law is only briefly mentioned in the text. 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 being 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; criminal law. Private law includes: contracts law, tort law, property law, and company law.

It is very helpful to point out to students, when reviewing the categories of law in Figure 2.8 of the text, that there is no discrete category known as “business law.” This is because business is concerned with *all* aspects of the law—and is not a self-contained area by any means. 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 end in mind. For example, Question 1 in the Questions for Critical Thinking (Is Canada an over-governed state?) arises naturally in the context of the above figure as well as from Text Figure 2.9 *Administrative Bodies and Officials Affecting Business*. This latter figure sets out examples of the variety of licenses 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 of the textbook 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: In order 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 in text’s website, which provides links to a number of web sites 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 where possible problems arising from business management/business activity might lead to new laws being enacted. (Examples include, lack of safety in drinking establishments leading to minimum drink prices being enacted in Alberta (see <http://www.ahla.ca/resource/article/government-relations/legislation-regulations/minimum-drink-prices/>); high emissions from cars leading to commitments by the federal government to enact standards to reduce greenhouse gases from cars (see Situation for Discussion 3); squeegee kids walking into traffic and bothering drivers leading to provincial legislation in Ontario making it illegal for someone to offer to wash windshields for money (see Situation for Discussion 4); gender based pricing leading an Ontario backbencher to introduce a bill banning the practice (see Business and Legislation: Gender-Based Pricing, page 37) and, from Chapter One, fatalities in the sky-diving industry leading to calls for regulatory oversight.

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. They're treating the adults like children" according to LaPointe. Do you agree with his analysis?*

With respect, Rene LaPointe is missing the point entirely. The idea of a power 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 ever taking up the smoking habit, whether now or as they grow older.

Page 29

Business Application of the Law: Violating Municipal Bylaws

Critical Analysis: Do "butt buses" violate the spirit of the smoking bylaw? Does it matter whether the bus is used only for patrons smoking or, in addition, for the purpose of transporting customers? Should personal habits such as smoking be subject to government regulation? What is the difference among smoking in a bar, smoking on a "butt bus," and smoking in your own home or vehicle? Should it matter whether a child is in the vehicle or not?

There is an argument that "butt buses" violate the spirit of the smoking bylaw because the owner has essentially set up a smoking section albeit off-site. From the perspective of the bylaw, it does matter whether the bus is also used for transporting customers. If it is so used, the bus

cannot be considered a structure and is therefore not governed by the bylaw. While people are free to smoke if they chose, the dangers of second-hand smoke require the government to regulate it in order to protect the public at large. Some governments have already prohibited smoking in a private car which is transporting children, for example, so the statement quoted above is actually not an exaggeration. However, it is unlikely that government would prohibit an adult from smoking in his or her own car provided they are alone in the car or only transporting other adults who can presumably speak for themselves. Smoking in a bar puts employees and other patrons--including the non-smoking ones--at risk. Smoking in a butt bus which is not serviced by employees may well be acceptable, provided the bus really is a bus as opposed to a structure. Most would agree that smoking in your own home should be a matter of unfettered personal choice even though, regrettably, some people do not take the health of their children very seriously.

There is good justification for prohibiting smoking in a car when a child is present (though this leads to a difficult distinction since the same rationales would seem to apply to smoking in one's own home.) Since children have no real choice whether to be in a car where smoking occurs, there is every argument that government should protect them. A 2004 report by the Ontario Medical Association found that second hand smoke in a car is 23 times more toxic than it would be in a house. Opening a car window makes no appreciable difference. Note that Ontario's decision to legislate is a reversal of what Ontario's Health Minister concluded in 2007. As reported by *The National*, Minister of Health Promotion Jim Watson stated in June 2007 that said parents "should know the dangers of second-hand smoke trapped in cars. We're not about to legislate [a ban], but we don't rule out further measures in the future." Instead, "We've got to better educate parents. Maybe they don't realize they're endangering their children."

The tobacco industry is predictably opposed to any bans. As reported by Canadian Press, Nancy Daigneault, president of tobacco industry-funded lobby group Mychoice.ca, argues against a ban because, in her words: “If we’re going to be going down this route and handing police the power to pull people over who are smoking in cars, I think we’d have to get to a point in society where we say, is this product something that we should be still being permitted to be sold?...Why is it still a legal product? It doesn’t make sense to me.”

James Christie, “Ontario rejects car-smoking ban; Can't impose common sense, minister says” *The National* 2 February 2007 at <http://www.theglobeandmail.com/servlet/story/LAC.20070202.WATSON02/TPStory/National> (accessed 07 June 08).

See “CP “Ontario ready to crack down on smoking while kids in vehicle” *Edmonton Journal* (1 February 2007) page B8.

Page 30

International Perspective: Anti-smoking Treaty

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

Countries working together from an agreed-upon template – such as 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. It 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.

Page 31

Business and Legislation: Tobacco Regulation by the Federal Government

Photo caption: *What determines the images and wording stipulated on cigarette packages?*

Under the federal government's legislative plan, regulations stipulate these requirements.

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?

While government regulation is often mandated to fight discrimination, this is not necessarily one of those cases. There is a good argument 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 this kind of Bill to be enacted.

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

V. CHAPTER STUDY

Questions for Review, page 47

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 and autonomy, which is associated with the political philosophy known as liberalism.

2. What does “jurisdiction” mean? Page 25

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 to be 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 27

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 25

Paramountcy seems to favour the federal government to the extent that whenever 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.

8. What is the difference between a regulation and a bylaw (or ordinance)? Pages 28, 31

The term “bylaw” is often used to refer to municipal law. Regulations, by way of contrast, come from the political executive of the federal or provincial level of government (as the case may be) and are created pursuant to legislation.

9. What is the executive branch of government? Pages 30-31

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 which provide detail to what the statute has enacted.

10. How is the executive branch different from the legislative branch? pages 30, 25

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

11. What is precedent? Why is a system of courts essential to its creation? Page 39

Precedent refers to an earlier case which 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 its creation.

12. What are the two types of trial courts? Pages 31-32

The two types of trial courts are “inferior courts” (where the judges are appointed by the provincial government) and the “superior courts” (where judges are appointed by the federal government).

13. What is the common law? Who creates it? Page 39

The common law is comprised of rules that are formulated or created by the judiciary.

14. What is the *Canadian Charter of Rights and Freedoms*? Pages 32-33

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 40

The judiciary has considerable discretion in fashioning a remedy in the face of unconstitutional legislation. The remedy focussed 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 your 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 your freedom of expression? Pages 33- 35

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. What Canadian province operates under a civil law system? Page 42

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

19. What is the role of equity? Pages 39-40

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 43-44

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 45

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?

There are several features of Canada's system of government which 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 there are several areas of 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 text Figure 2.9 *Administrative Bodies and Officials Affecting Business*, page 41—business must acquire a variety of licenses, permits, and other permissions related to the activity in question.

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. The Supreme Court of Canada in *JTI-Macdonald Corp.* confirmed that under the federal *Tobacco Act*, some forms of advertising were still permissible, such as on premises where minors are prohibited, in publications with at least an 85 percent adult readership and on the Internet. In addition, such ads could not endorse smoking and could only focus on

brand differences. Do you think the federal government should amend the federal *Tobacco Act* to close these loopholes and prohibit tobacco advertising altogether?

Given the tremendous dangers of smoking and the importance of preventing people from beginning to smoke in the first place, there is every justification for closing these loopholes. On the other hand, it could be argued that these permissible forms of advertising do not create new smokers so much as permit those who already smoke to learn about the difference between various tobacco products. A *Globe and Mail* editorial from 29 June 2007 disagrees with a total ban, saying that: “Canadians have a right to communicate with one another, to advertise and to receive advertising messages, even when the subject of those messages is a noxious (and obnoxious substance.) The question is to what extent those messages should be curbed.” In a subsequent editorial, however, it suggests that further controls are required to restrict advertising on the internet since it is “so frequented by the younger, more vulnerable generation.” See “Big Tobacco cheers new ad loophole” *Globe and Mail* (30 June 2007) page A18.

3. Under a common law system, judges follow precedent when making decisions or resolving disputes. What are the advantages of following precedent? Can you think of any situations where it would 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 work 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 S.C.R 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 S.C.C. in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 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* (Toronto: Emond Montgomery, 1992).

4. Review the Chart "Constitutional Challenges Brought by Business" in Figure 2.3. 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 *Canadian Charter of Rights and Freedoms* 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 one of the *Charter* necessary, or should an individual's fundamental rights and freedoms be absolute?

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

6. Dozens of administrative tribunals, such as the Atomic Energy Commission of Canada, the Labour Relations Board, the Canadian Radio-television and Telecommunications Commission, the Occupational Health and Safety Commission, and Human Rights Tribunals, have been established by both the federal and provincial governments. Why do you think administrative tribunals are such a predominant feature in Canada? In other words, why have they been established?

There are a number of reasons why there is a proliferation of administrative tribunals in Canada, including:

- 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 48-49

Because these Situations for Discussion are posed at a very early point in the course, students will have difficulty coming up with quality answers—they simply do not have the resources to do so at this point. Situations for Discussion 1 can be usefully addressed if the instructor provides most of the content, while seeking student input in relation to public policy debates, or some other general area where students may have an opinion. Areas for discussion could include questions like:

- Should the private sector be considered to be “government” for the purposes of the *Charter* when delivering public sector services?
 - How does the workforce both benefit and suffer when employees are forced to retire at a specific age?
1. R&D, a Crown corporation, has recently completed a human resource audit and inventory. One of the distressing results of the exercise was the revelation that its workforce is aging and that young recruits are leaving for better opportunities elsewhere. One of the recommendations of the consultants carrying out the review is to institute a mandatory

retirement age of 55. Such a course of action would open up opportunities in the higher ranks of the corporation and would help retain younger workers by providing opportunities for promotion. Would such a policy violate the *Canadian Charter of Rights and Freedoms*? What additional information would be useful?

This scenario is based, in part, on *University of Alberta v. Alberta (Human Rights Commission)* (sub nom. *Dickason v. University of Alberta*), [1992] 2 S.C.R. 1003.

Summary

University of Alberta v. Alberta (Human Rights Commission) (sub nom. *Dickason v. University of Alberta*), [1992] 2 S.C.R. 1003.

A university professor was forced to retire at age 65, pursuant to a mandatory retirement clause in the collective agreement. She complained of discrimination on the basis of age to the Human Rights Commission, which, in turn, ordered her reinstatement. An appeal by university was dismissed. Upon further appeal, the Commission's decision was reversed. The Supreme Court of Canada dismissed the professor's appeal and upheld the policy.

The Supreme Court of Canada held that, though the mandatory retirement policy amounted to discrimination on the basis of age, the University had demonstrated that it was reasonable and justifiable within s.11.1 of the relevant human rights legislation and s.1 of the *Charter*. The objectives of mandatory retirement—such as the preservation of tenure, the promotion of academic renewal, the facilitation of planning, and the provision of “retirement with dignity” for professors—were sufficiently important to justify a limitation on the constitutional right to equality. The retirement policy was rationally connected to these objectives and met the minimal impairment test. There was no alternative to achieve the stated objectives except by violating the individual rights of faculty members. The court also

held that the effects of the discrimination were proportional to the legitimate objectives served.

Applying *Dickason*¹ to this situation the analysis would be as follows:

Issue 1: Does the *Charter* apply to Crown corporations? i.e., is a Crown corporation considered to be government?

If the Crown corporation is controlled by government—as opposed to simply financed by government—then it is subject to the *Charter*. For example, if the government is actively involved in the daily operations, and decision making is based on government policy, the *Charter* would apply.

This hypothetical does not contain enough information to assess the degree of government control. Even if the *Charter* does not apply, however, human rights legislation (such as Alberta’s *Individual’s Rights Protection Act*,² which applied in the *Dickason* case) prohibits discrimination on the basis of age in the private sector unless the discrimination is, in the words of s.11.1 of the *Individual’s Rights Protection Act*, “reasonable and justifiable.” The majority in *Dickason* ruled that the *Oakes* test—used in assessing *Charter* violations—also applies to assessing whether private sector discrimination is “reasonable and justifiable.” However, the majority also stated that the test must be applied with “a large measure of flexibility” and with “due regard to the context...of] the regulation of private relationships.”

Issue 2: Is a mandatory retirement policy discriminatory?

¹ For a brief and helpful analysis of *Dickason*, see Shirish Chotalia, “The Supreme Court and Mandatory Retirement: Sanctioning the Status Quo” in Vol. 4, Number 3, *Constitutional Forum* at 67.

² Alberta’s human rights legislation has since been renamed, to the *Human Rights, Citizenship, and Multiculturalism Act*, S.A. H-11.7.

Such a policy would amount to a *prima facie* violation of either the *Charter* or the relevant human rights code, since it discriminates on the basis of age.

Issue 3: Can this violation be saved by s.1 or alternatively, is it “fair and reasonable” under human rights legislation?

In *Dickason*, the majority found that a mandatory retirement provision in a collective agreement was enforceable. An important part of the reasoning was that, in the collective bargaining situation, a power imbalance between employer and employee is less likely to occur. On a related front, a collective agreement can also provide evidence of the reasonableness of a practice which appears to be discriminatory. The test for determining whether the discrimination in a collective bargaining agreement is reasonable and justified is found in *McKinney v.*

University of Guelph, [1990] 3 S.C.R. 229 at 447-448:

in the course of negotiating a collective bargaining agreement, it may become apparent that the union membership is overwhelmingly in favour of an agreement that embraces compulsory retirement as part of the consideration for obtaining higher wages at an earlier age—an age when houses must be bought and children raised and educated. That is to say, at a time when the need for family funds is at the highest.

It is often the case that, before a collective bargaining agreement is ratified, the union members will have received very careful advice concerning its terms and their significance not only from union officials, but also from skilled economists and lawyers. The collective agreement represents a total package balancing many factors and interests. It represents the considered opinion of its members that it would be in their best interests to accept the proposed contract. Bargains struck, whereby higher wages are paid at an earlier age in exchange for mandatory retirement at a fixed and certain age, may well confer a very real benefit upon the worker and not in any way affect his or her basic dignity or sense of worth. If such contracts should be found to be invalid, it would attack the very foundations of collective bargaining and might well put in jeopardy some of the hard-won rights of labour.

The collective agreement reflects the decision of intelligent adults, based upon sound advice, that it is in the best interest of themselves and their families to accept a higher wage settlement for the present and near future in exchange for agreeing to a fixed and certain date for retirement. In those circumstances, it would be unseemly and unfortunate for a court to say to a union worker that, although this carefully made decision is in the best interest of you and your family, you are not going to be permitted to enter into this contract. It is a position that I would find unacceptable.

There is no indication in the hypothetical that the retirement policy would become operational through a collective agreement. Absent such an avenue, the employer would have to show that the employee received higher wages, or some other benefit, in exchange for mandatory retirement, and that the agreement did not in any way affect the employee's basic dignity or sense of worth.

Even then, the policy is vulnerable. Though it provides opportunities for promotion and facilitates planning, for example, it probably cannot meet the minimal impairment test. In short, can the employer show that to fulfil its objectives of renewal, retirement must occur at age 55 instead of some later age?

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 one-dollar 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 Barnet, Nova Scotia's Minister of Health Promotion and Protection.³⁰ The Nova Scotia government says it hopes to develop recommendations to address problems associated with excess alcohol consumption.³¹ 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 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. Otherwise, legislation may well ensue as it did in Alberta. See

<http://www.cbc.ca/canada/calgary/story/2008/08/01/liquor-laws.html>

The CBC reports that as part of getting its liquor license back, the Dome committed to ending the practice of \$1.00 drinks, installing more video cameras, handing out life-time bans to trouble makers as well as:

- “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 “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>

3. Following legislative initiatives from California, Canada's Minister of Transport, Infrastructure and Communities has committed the federal government to regulate the fuel consumption of new cars and light trucks, beginning with the 2011 model year.
- According to a news release on Transport Canada's website, the government wants to make good on its commitment to implement, by this deadline, regulations whose standards are, in the Minister's words, "benchmarked against a stringent, dominant North American standard. . . . Our government recognizes that the transportation sector is one of the largest sources of greenhouse gas and air pollutant emissions in Canada, accounting for 25 percent of all Canada's GHG emissions. . . ." 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 to protect the environment and in compelling industry to improve its performance – through voluntary codes and by 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.

Such enhanced environmental protections would also appear to be consistent with the will of the Canadian electorate. An IBM survey taken 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.”

Source: *IBM Survey: Canadians' Concern About Environment Rising* 15 May 2007 at http://www.ibm.com/news/ca/en/2007/06/2007_05_15.html

4. The Ontario Court of Appeal in *R. v. Banks* (2007 ONCA 19) has upheld provincial legislation making it illegal for someone to offer to wash windshields for money. This means, among other things, that “squeegee kids” can no longer ply their trade. What effect does this ruling have on other jurisdictions within Canada? Is a British Columbia trial court bound to follow the new ruling? What effect will it have on a decision of the Court of Appeal of Alberta?

Because it is in the same jurisdiction, any lower court in Ontario would have to follow the decision of the Ontario Court of Appeal if the case were similar and could not be distinguished on its facts. Other jurisdictions could use the decision as a persuasive argument but it would not serve as a binding precedent. In other words, they would not be bound to follow the decision. Hence, a trial court in B.C. would not be bound to follow the new ruling. The Court of Appeal of Alberta could use the decision as persuasive but would not be bound by it.

Note that the SCC refused leave to appeal the Ontario Court in *R. v. Banks* [2007] S.C.C.A. No. 139.

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?

The accounting student must first work out a chronology: which is most recent in time, 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 which 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

According to Metcalf and Bennett, Manitoba, Ontario, Nova Scotia and New Brunswick have legislation in place directly regulating violent video games while British Columbia achieves this end via its motion picture legislation.