

Foundations of Business Law in Canada

1

LEARNING OUTCOMES

Business and the Law	2
The Canadian Legal System: A Framework for an Orderly Society	6
The Canadian Constitution and Other Sources of Law in Canada	7
Categories of Law	15
Legal Aspects of Business Activity	23
The Answer to Every Legal Question	24
Business Law and Business Ethics	25
Chapter Summary	26

After reading this chapter, you should be able to:

- Describe how law relates to business and its significance to business decision-making.
- Describe the process for developing a legal risk management plan and explain its importance.
- Explain the concept of legal precedent in Canada's common law system.
- Explain the function of the three branches of government and identify the source of law that is derived from each.
- Explain the significance of Canada's Constitution for the government's law-making powers.
- Describe how the federal, provincial, and municipal governments regulate business activity.
- Explain the significance of the *Canadian Charter of Rights and Freedoms* to business activity.
- Classify law as either substantive or procedural.
- Differentiate public law from private law and identify legal terminology associated with each.
- Explain how administrative law affects businesses.
- Discuss the difference between business law and business ethics.
- Describe the benefits of studying business law.

Business and the Law

From a business perspective, the law can be a tool that, when used effectively, enhances business. However, law can also pose a risk that, when improperly managed, can significantly damage a business. An understanding of the legal aspects of doing business is crucial to business success. The law can facilitate business by setting reliable ground rules for everyone to follow, protect business assets and other interests, and provide a mechanism for resolving disputes in an efficient and predictable manner. However, the law can also impose liability on businesses—for both their actions and their inactions.

Becoming familiar with the number and scope of laws that are applicable to one's business may seem a daunting task. This textbook has been developed to provide those involved in business activity with sufficient knowledge of business law to achieve the following objectives:

- identify legal risks associated with business activity and business relationships
- apply knowledge of law in developing strategies to minimize legal risks
- recognize when the assistance of a legal professional is prudent
- utilize the services of a legal professional effectively.

Learning the basic principles that underlie business law will benefit anyone involved in business today. Whether you are a business owner, manager, employee, or consumer, knowledge of business law can help minimize legal risk by ensuring that legal implications are considered as part of the business decision-making process.

Managing Legal Risk

Good business decisions cannot be made without consideration of the legal risk associated with business choices. Legal risk management allows you to plan for and reduce, or even prevent, many business losses. There is no handy list of legal risks. Anticipating what can go wrong and developing strategies to prevent the risk from being realized is an ongoing process.

As you approach the study of business law, consider how the concepts we discuss apply to the business operations relevant to you. A proactive approach to minimizing risk is to implement a **legal risk management plan**. This means identifying the legal risks associated with every facet of your business activity and developing comprehensive measures to address them. Here is a basic overview of the steps involved in a legal risk management plan:

1. Identify the legal risks. This is a comprehensive process that requires assessing the entire operation of the business, including functional areas of the business as well as internal and external relationships. It requires a basic familiarity with the laws that will govern your business.
2. Evaluate the legal risks. For each risk identified, assess the probability of the risk occurring and the severity of potential losses, should the risk occur. (Refer to Table 1.1.) This requires an understanding of the consequences of legal breaches and the options for resolving disputes.
3. Manage the legal risk by devising and implementing a legal risk strategy. This will require you to devise proactive and reactive measures to address the risks that you have identified. Conscientious implementation of the plan should reduce or eliminate significant legal risk.

legal risk management plan

plan that allows businesses to take action to prevent or reduce loss

Table 1.1 Evaluating Severity and Probability of Legal Risk

Probability of Risk Occurring	Consequence of Risk Occurring				
	Very low	Low	Moderate	High	Critical
Very low					
Low					
Moderate					
High					
Very high					

4. Review and revise your legal risk strategy. Monitor its implementation to ensure it is effective—and if it is not, amend it. Track changes to your business strategy and goals and to the law to ensure your legal risk strategy keeps pace with those changes. Revise your legal risk strategy to reflect changes in your business and the legal environment.

There are four main strategies in managing legal risk (Step 3, above):

1. **Risk avoidance.** This involves the decision to stop a particular business activity because the risk is too great; this might be of particular importance where the probability and the severity of the risk are high.
2. **Risk transference.** This approach involves transferring the risk to another; the two most common ways to transfer risk are by contract (where another party agrees to assume the risk) or acquisition of insurance (where your risk is pooled with that of others).
3. **Risk reduction.** This is an extensively used strategy in legal risk management plans that involves putting practices in place to lower the probability and/or severity of the risks.
4. **Risk retention.** This is a decision to simply risk it; this approach may be appropriate where the impact of the risk on the business is lower than the cost of avoiding or transferring the risk.

Legal risk management requires a comprehensive approach to each legal issue that may arise for a particular business. We will explore the laws that commonly apply to Canadian businesses from the perspective of legal risk management. Throughout the text, you will find suggestions on how you can most effectively address the risks posed by various business activities in Minimizing Your Risk boxes. In addition to the overview provided here, legal advice can be of significant assistance in identifying legal risks, appreciating their potential severity, and developing and reviewing your legal risk management plan.

Preparing to Learn About Canadian Business Law

Before launching into an examination of the many laws that apply to Canadian businesses, it is helpful to ensure that all businesses start with the same base understanding of the Canadian legal system. This is important for businesses because:

- examining the different sources of law allows businesses to appreciate the wide range of laws that affect Canadian businesses;

- familiarity with government bodies and their respective roles allows businesses to identify which government bodies can assist them in interpreting law, changing ineffective law, or resolving legal disputes;
- identifying the legal limitations on government action allows businesses to properly protect their interests; and
- recognizing the different categories of law allows businesses to better understand the purpose and objectives of particular laws.

Because an examination of Canadian business law can be difficult to grasp in the abstract, you will find practical examples of the legal principles being discussed throughout the text. In addition, a running fact scenario will be used to allow for more in-depth and sustained discussion and analysis. This fact scenario is introduced in the Scenario box, below.



SCENARIO

Valery Garza has a PhD in chemical and biological engineering from the University of British Columbia. She studied how enzymes (naturally occurring chemicals) in the larvae of a certain type of moth are able to biodegrade plastics. She saw a great opportunity to create a potentially valuable, eco-friendly product, so she developed a synthetic version of the enzyme that is able to perform the same task. When this synthetic enzyme comes into contact with plastic, it creates a chemical reaction that degrades 96 percent of the plastic material into carbon dioxide and water. The degradation process releases a significant amount of heat, and the heat produced can be used to power turbines and generate electricity.¹

Valery envisions many applications for her invention. It could be used to reduce land-fill volume while generating power; plastics companies could use their scrap materials to power their buildings; environmental cleanup firms could use portable generators to eliminate plastic pollution on the spot and store the energy produced in batteries for later use; and even remote communities could benefit from consumer-sized generators powered by the plastic that wraps all of the products delivered to them.

Valery has enlisted the help of her best friend from university, Namid Blackburn. Namid is a chemical processing engineer and is working with Valery to improve the efficiency of the degradation process. With the help of Mitchell Wu, a mechanical engineer, they have developed a prototype for a small portable electricity generator that uses plastic (exposed to the synthetic enzyme) as the fuel rather than gasoline. Although it is a bit bulky, and they continue to work on its efficiency, their current prototype can produce a 2,000-watt charge that can run for one hour on a 50 percent load from the equivalent of 48 water bottles of plastic as the fuel.

Valery, Namid, and Mitchell are considering going into business together to further develop and market the portable generators and then to expand to larger-scale

1 The idea for this research project and the subsequent business venture arose from Ian Sample, "Plastic-Eating Worms Could Help Wage War on Waste," *Guardian* (25 April 2017), online: <<https://www.theguardian.com/science/2017/apr/24/plastic-munching-worms-could-help-wage-war-on-waste-galleria-mellonella>>; and Matthew Sedacca, "Plastic-Eating Worms Could Inspire Waste-Degrading Tools," *Scientific American* (8 June 2017), online: <<https://www.scientificamerican.com/article/plastic-eating-worms-could-inspire-waste-degrading-tools/>>. However, the inventions described do not currently exist, nor does the business venture.

generators, perhaps joining forces with environmental cleanup firms or municipal waste firms. They are excited about the potential of their business concept.

Valery views this venture as her “baby”; she developed the initial invention and business concept and she wants to be involved in all aspects of the evolving business. She is considering a number of names for the business but currently favours Val-Nam Generation (hereafter referred to as Val-Nam), which uses the first three letters of her name and Namid’s name. Namid is more interested in continuing to work on the research and development side of the business and, given the potential he sees for the business, would like to invest in it. Mitchell has some start-up experience: he has commercialized a few of his own inventions and is currently involved in two other business ventures. He is interested in using his experience to help the business develop and also in investing in the business.

As the three (individually and collectively, as the business Val-Nam) consider their next steps, they have a number of issues to address, including the following:

- Valery wonders how best to protect her invention so that she receives appropriate compensation for it and so that it doesn’t fall into the hands of a competitor.
- Val-Nam is concerned about product safety regulations that may restrict the sale and use of its generators. It believes it can convince concerned parties that the generators are safe, even though they do not technically comply with some of the current regulations.
- Val-Nam was recently turned down for a government grant aimed at green energy start-up ventures. It wants to investigate why it was turned down and perhaps challenge the decision.
- Val-Nam would like to arrange for WeSolve Manufacturing Solutions Incorporated (WeSolve) to produce an initial batch of the generators but doesn’t want to be locked into a long-term arrangement because Val-Nam would like to eventually do its own manufacturing.
- Namid has a young family and he has heard that business owners can sometimes lose their personal assets, like their house, if their products cause injury to customers and there is significant court-ordered compensation. He is concerned, given that this is a new, untested product, that he could lose everything if things go wrong. He wants to know how best to protect his family while still becoming involved in the business.
- Given his other business interests, Mitchell is wondering how best to set up his relationship with this new business. Should he invest? Become an employee? Simply provide contracted services? Or should he engage in some combination of the three?
- Together, the three have some capital to contribute to the new business but they will need more. They are wondering which financing options would be best, given the nature of the business and their respective tolerances for risk.
- Val-Nam is looking at location options for both a business head office and potential future manufacturing facilities. It is concerned about the debt burden of purchasing land but also does not want to be locked into long-term leasing arrangements. It wonders how best to proceed.

All of these questions, and many more that the business will face, require an understanding of the law to answer. For some questions, it will be important for Valery, Namid, and Mitchell to obtain legal advice before making a decision; for others, however, they may be able to find sufficient information on their own if they have an adequate base knowledge of Canadian business law.

In providing the base from which further discussion of Canadian business law can develop, we will look at the legal systems that exist in Canada, different sources of law, including the institutions that create law, key categories of law, and an overview of the main topics in Canadian business law.

The Canadian Legal System: A Framework for an Orderly Society

Law consists of the rules that are established and enforced by society to regulate the conduct of its members. By establishing rules of conduct, society (through government) seeks to create a stable environment in which its members can interact peaceably and productively. Law governs the relationships of individuals and organizations, including businesses and governments. At the same time, law functions to safeguard individuals and organizations, by providing protection not only from others, but also from government itself.

Not all rules that set expectations on the conduct of individuals and organizations are law. The feature that distinguishes law from other rules is enforceability; law is the body of rules enforceable using the authority of the state. Courts and other government agencies have the power to enforce law.

The authority of government and its institutions to create and enforce law, however, is not without limits. The **rule of law** is a fundamental legal principle that no one is above the law. The rule of law prevents the arbitrary use of government power. Judges, government officials, and the government itself cannot act outside their respective **jurisdictions**—the legal authority granted to them by law. In this chapter, we will examine the authority (and limits) of government action in Canada as we take a closer look at the Canadian Constitution. A **constitution** is the foundation upon which government is granted its authority to govern. Before proceeding to study the substantive areas of law that impact business, it is important to have a solid understanding of the basis upon which all law is founded and how it is applied. The material that will be examined in this chapter, therefore, establishes the context in which to consider the content in later chapters.

In Canada, the Constitution establishes a federal government structure that incorporates two different legal systems or traditions: the British common law system and the European civil law system.

Canada's Two Legal Systems

There are two main legal systems in the world, which have developed from differing historical origins: the civil law system and the common law system.

The **civil law system** is a system of codified law. This means that the source of law comes from the rules that are set, or codified, by statute. Judges in a civil law system do not have to consider how other judges may have decided similar cases. While they may be persuaded by how a decision was reached in other, similar cases, they are not required to follow them; they only have to apply the written law before them. France has a civil law system and thus the province of Quebec, having French roots, adopted the civil law system for matters within Quebec's provincial jurisdiction.

All other provinces and territories in Canada, as well as the federal government, follow the system of law derived from Britain, called the **common law system**. This system was developed by judges over time, using previously decided similar cases to

rule of law

legal principle that every person has equal rights before the law and that the law is supreme; it safeguards citizens from arbitrary actions of government

jurisdiction

authority to make or enforce the law

constitution

supreme law that establishes the basis upon which all other laws are created

civil law system

system of law where all rules are established in statute and courts lack authority to act without a statute; judges in civil law systems are not bound by the doctrine of precedent and have the freedom to interpret statutes independently of previous decisions

common law system

system of law that recognizes court decisions with the same force of law as statutes, where statutes mean what courts interpret them to mean and where courts have the authority to make law where no legislative statute exists and to establish precedent

determine how to apply the law to the case before them. Gradually, a system of rules emerged from these cases, thus creating “common law” or “judge-made” law. The principle that a rule established in a previous case is binding on subsequent cases is known by the Latin term **stare decisis**, which means to follow that which has already been decided. It is also known as the **doctrine of precedent**.

Having a common law system in Canada means that in all common law jurisdictions, judges are required to follow the interpretation given to the law by higher courts in the same jurisdiction. The Supreme Court of Canada is the highest court in the land and so its rulings must be followed by all lower court judges. We will take a closer look at the hierarchy of courts and how the doctrine of precedent applies in Chapter 2. Practically, however, what it means for businesses examining legal issues is that it is not enough to know what the legislation says. In order to have a firm grasp of the law, it is important to know the legal principles and application of the law established in previous court cases. The doctrine of precedent is an important part of Canadian legal tradition and helps provide a degree of certainty in how judges will decide similar cases. The drawback is that it often requires the assistance of a legal professional to research the relevant case law.

stare decisis

principle that requires judges to follow decisions of higher courts in similar cases

doctrine of precedent

principle requiring that a rule set out by a court in a decided case be applied to a new case

SCENARIO

If Val-Nam operates in both Quebec and other Canadian provinces, it will have to consider whether the different legal systems (civil law and common law) affect its legal relationships and arrangements differently.



In both the civil law system and the common law system, “law” is found in constitutional documents and in statutes created by legislatures, but only in the common law system will you find “law” in case law. The next section looks at these three sources of law and the institutions that create law.

The Canadian Constitution and Other Sources of Law in Canada

For businesses trying to determine how to comply with the law in their day-to-day dealings, it is important to know where to look for “law.” In Canada, law is found in the Constitution, in statutes, regulations, and by-laws, and in the common law. The Constitution also establishes which bodies have the jurisdiction to create these different types of law and protects citizens against improper government action. The two main documents of Canada’s Constitution are the *Constitution Act, 1867* and the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*. This section provides a brief overview of each act.

The Constitution Act, 1867 (formerly the British North America Act, 1867)

A constitution is the foundation upon which a government is organized and its powers are defined, thus establishing the extent (and limits) of government authority. The Canadian Constitution establishes the basic framework under which all other

laws are created and the basic principles to which all other laws must conform. The Constitution is the supreme law of Canada.

Canada was created by an act of the Parliament of the United Kingdom called the *British North America Act, 1867*. This act was transferred from the authority of the UK Parliament to the authority of the Canadian federal Parliament and provincial legislatures in 1982 (it was “patriated”) and was renamed the *Constitution Act, 1867*. However, the Canadian Constitution is not a single document; it includes many statutes, judicial decisions that interpret these documents, and unwritten rules called constitutional conventions.

Although we begin the study of Canada’s legal framework in 1867, when the Dominion of Canada was established, we do so with deference to the original inhabitants of these lands who were here for many thousands of years before explorers arrived from Europe. Indeed, Canada’s Constitution recognizes the rights of Aboriginal peoples to preserve customs and traditions as continuing cultural practices, and it reaffirms treaty rights set out in agreements between the government and particular Aboriginal communities.

The *Constitution Act, 1867* creates a **federal system of government** in Canada. This means that there are two levels of government: the federal level and the provincial level. Both levels of government have similar institutional structures.

federal system of government

system whereby law-making powers are divided between the federal and provincial governments according to subject matter

The Three Branches of Government

The Constitution establishes that Canada has three branches of government: the legislative branch, the executive branch, and the judicial branch. The three branches operate at both the federal and provincial levels. In other words, there is a legislative, executive, and judicial branch of government at the federal level and in each province.

A brief overview of these three branches, below, provides the basic framework of how government is structured. This is significant because each of the branches serves a different function and is a source of law. See Table 1.2.

Table 1.2 Branches of Government and Sources of Law

	Legislative Branch	Executive Branch	Judicial Branch
Function	Introduce, vote on, and pass legislation (statutes)	Administer day-to-day business of government	Adjudicate legal matters and disputes
Composition	Federal: Parliament (elected) Provincial: Legislative assemblies (elected)	Federal: Prime minister, Cabinet ministers, and each department’s civil servants Provincial: Premier, Cabinet ministers, and each department’s civil servants Federal and provincial administrative tribunals	Federally and provincially appointed judges
Sources of law	Statutes	Regulations	Case law

Figure 1.1

The House of Commons in Ottawa is where democratically elected officials debate and vote on statute law as part of the legislative branch of government.

LEGISLATIVE BRANCH

The **legislative branch** of government is the branch that is democratically elected and whose function it is to legislate—to introduce, vote on, and pass legislation, also known as statute law. The legislative body, or legislature, at the federal level is Parliament. Provincial legislative bodies are known as legislative assemblies. The term “statutory” refers to something that is required or permitted as a result of enacted legislation. For example, a statutory holiday or statutory minimum wage requirements are rights or obligations established by legislation. Refer to Table 1.3 for examples of statutes that affect business.

The legislative process refers to the manner in which a bill (proposed law) becomes a statute. The process involves several steps before a statute is enacted, including a vote by elected representatives. If passed, the bill will become law on the date that it is proclaimed to be in force. The power to create legislation is divided between Parliament and the provincial legislative assemblies. The powers of Parliament are set out in section 91 of the *Constitution Act, 1867*, and the powers of the provincial legislatures are set out in section 92. The two levels of government are assigned separate law-making authority, or jurisdiction, according to subject matter.

◇ Law-Making Authority of Parliament (Section 91)

Parliament is based in Ottawa, Canada’s capital. It has jurisdiction over matters of national interest, and federal legislation applies to all people in Canada, from coast to coast to coast. For example, the federal government regulates the importation and exportation of goods in and out of Canada because it was deemed important

legislative branch

branch of government at both the federal and provincial levels that has the power and responsibility to pass legislation

Table 1.3 A Sampling of Statutes That Affect Business

Area of Law	Name of Statute	Sample Rules
Business organizations	<i>Business Corporations Act</i>	Rules for incorporating companies that do business in Ontario
Intellectual property	<i>Copyright Act</i>	Rules protecting rights in property such as music, art, books, and theatre productions
Contracts	<i>Sale of Goods Act</i>	Rules that imply terms and conditions into commercial contracts, unless the contracting parties opt out
Employment	<i>Employment Standards Act, 2000</i>	Rules that provide minimum standards for wages, hours of work, and pregnancy leave
Bankruptcy	<i>Bankruptcy and Insolvency Act</i>	Rules determining when an act of bankruptcy has occurred
Property	<i>Mortgages Act</i>	Rules outlining the steps a creditor must take before foreclosing on a mortgage
Marketing and promotion	<i>Competition Act</i>	Rules forbidding unacceptable pricing schemes
Torts	<i>Occupiers' Liability Act</i>	Rules establishing a high duty of care owed to anyone who enters business premises with permission

to have the same legal standards apply across the country. Other matters that fall under federal jurisdiction, as set out in section 91 of the *Constitution Act, 1867*, include citizenship, criminal law, military and national defence, banking and printing of money, postal services, intellectual property, taxation of any kind, shipping, and interprovincial trade and commerce.

Section 91 also provides that the federal government shall make laws for the “peace, order and good government of Canada.” This represents the federal government’s residual powers to make law in respect of all matters that do not fall within provincial jurisdiction. In other words, matters that are not exclusively allocated to the provinces under section 92 are matters over which the federal government has jurisdiction, even if they are not specifically mentioned in section 91. Many matters requiring regulation today were not even imagined in 1867. Over time, the federal government has, by way of application of this residual clause, come to govern matters such as radio, television, nuclear energy, aeronautics, and control of drugs.

A government agency can often be identified as federal by the inclusion of “Canada” in its name: for example, Canadian Human Rights Commission, Canadian Environmental Assessment Agency, Canada Revenue Agency, Canada Employment Insurance Commission, and Canadian Radio-television and Telecommunications Commission.

The federal government also has law-making jurisdiction over Canada’s three territories, the Northwest Territories, Yukon, and Nunavut, but has delegated some law-making powers to the territorial governments.

◇ Law-Making Authority of Provincial Legislatures (Section 92)

The work of government is divided between, and assigned to, the two levels in a federal system. Whereas the *Constitution Act, 1867* assigned matters of national interest to the federal government, it assigned jurisdiction over all matters of local interest to the provincial level of government.

In many ways, the provincial governments have greater authority over matters of concern in the day-to-day life of people and businesses. As set out in section 92 of the *Constitution Act, 1867*, provincial governments are responsible for legislating in matters that affect the welfare of people, such as education, hospital administration, the administration of justice, social services, property rights, and natural resources such as minerals, gas, and oil; they also have the power of direct taxation. Provincial governments regulate commercial activities carried out at the provincial level, including incorporation, real estate, consumer protection, sale of goods, business and other licensing, and employment. The expression “Canadian business law” can be misleading. More often than not, when it comes to matters that directly impact most businesses, it is provincial law that will be applicable.

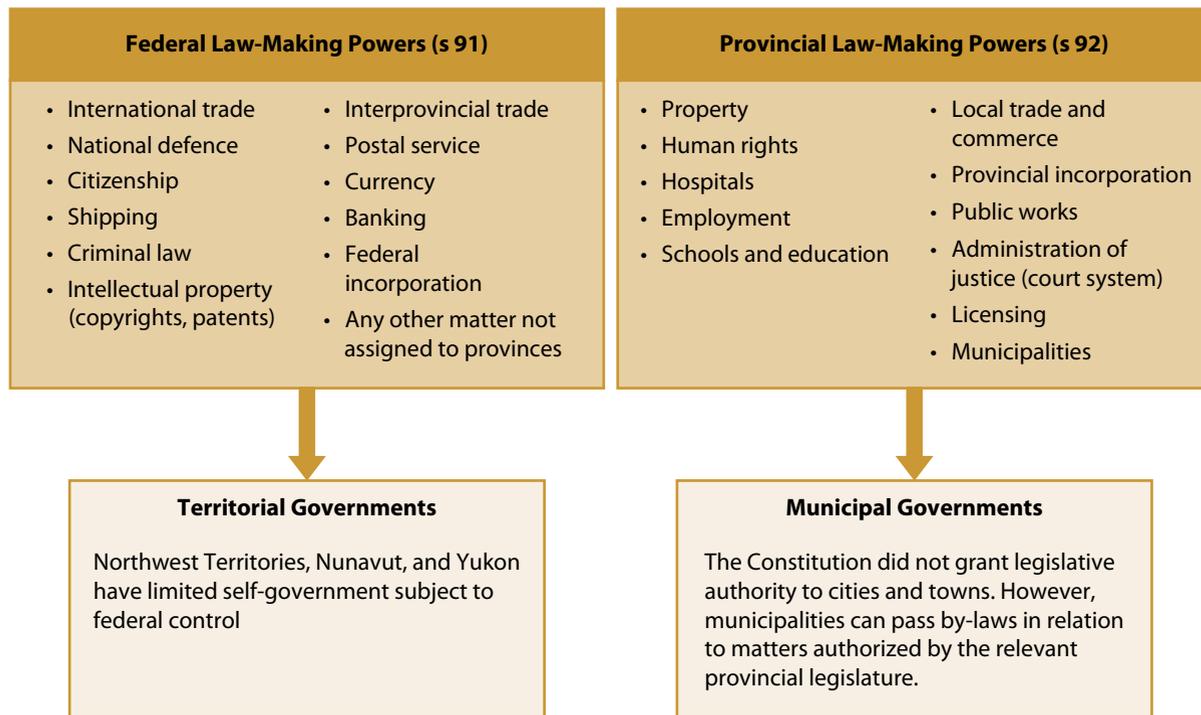
Each province in Canada has its own government, with law-making authority over the matters set out in section 92. This is why matters such as minimum wage, the percentage of sales tax applied to goods, and the age of majority for the service of alcohol are not uniform across the country.

Municipal governments get their power from the provincial level of government. Provinces create these smaller governing bodies of cities and towns for more localized delivery of government services by delegating responsibilities to them. For example, municipal governments are responsible for local infrastructure, including roads and sewers, fire and police services, water services, local transit, libraries, garbage collection, and parks. Unlike federal and provincial governments, which have the power to create legislation in their respective areas of jurisdiction, municipal governments are granted the power to make by-laws. Generally, municipal by-laws regulate those things that impact the safety or enjoyment of property in the community. For instance, by-laws may regulate parking, speed limits on local roads, noise limits, food inspection, animal control, zoning of commercial and residential areas, building codes, and construction permits. A municipality may require businesses to obtain permits, licences, or other manner of approvals. For example, a business may need a permit to erect a sign. Municipalities need revenue to operate; their main source of revenue comes from the collection of tax on property. By-laws are included in our definition of law as they are part of the body of rules that can be enforced by the courts and other government agencies, including municipal officials and by-law enforcement officers.

Refer to Figure 1.2 for a summary of the legislative jurisdiction of Parliament, the provincial and territorial governments, and municipalities.

◇ Shared Power: Concurrent Jurisdiction

The areas of law-making authority set out in sections 91 and 92 largely represent the exclusive jurisdiction of the federal and provincial levels of government. Where the Constitution sets out an exclusive jurisdiction, the other level of government is excluded from enacting legislation. For example, a provincial government cannot enact criminal law. Also, a government cannot directly delegate its exclusive law-making authority to the other level. Sometimes, however, the federal and provincial governments will share law-making authority. This is known as having

Figure 1.2 Law-Making Jurisdiction of Federal and Provincial Governments

concurrent jurisdiction. Agriculture and the environment are examples of areas where both levels share law-making authority. The risk in having concurrent jurisdiction is that enactment of different laws may conflict with one another. This is not common, but in the rare case that there is an express contradiction between the laws, the **doctrine of paramountcy** will apply. This means that the federal law will prevail.

doctrine of paramountcy

rule that establishes that where there is a conflict between federal and provincial law, the federal law will prevail and, where it conflicts, the provincial law will be inoperative

executive branch

branch of government at both the federal and provincial levels responsible for implementing and enforcing the laws made by the legislative branch

regulations

rules created by the executive branch of government that have the force of law

EXECUTIVE BRANCH

The **executive branch** of government is the one that carries out the day-to-day function of government; it formulates and executes government policy and administers all the departments of government. The chief executive is the prime minister at the federal level and the premier at the provincial level. The executive branch includes the Cabinet, made up of the ministers who head the departments of government; civil servants; and agencies, boards, commissions, and tribunals. Cabinet establishes government policy. The departments of government provide Cabinet members with policy recommendations. As the members of Cabinet are also members of the legislative branch, it is through them that most legislation is introduced into the legislature. Typically, because the executive branch carries out the operations of government, it is the branch with the greatest practical relevance to business and with which business people will most commonly interact.

Statutes enacted by the legislative branch of government often empower the executive branch to create the detailed rules to complement the legislation. These rules are called **regulations** and provide us with another source of law that can be enforced by the courts and other government agencies.

SCENARIO

If Val-Nam is concerned with the application of product safety regulations to its generators, it will want to:

- determine which level of government regulates product safety,
- review the relevant product safety legislation and regulations,
- consult with the executive branch—the ministry responsible for implementing the legislation in question, and
- consider lobbying for change. If a change to the legislation is required, Val-Nam should consider lobbying the executive branch (where policy is developed) and then members of the legislative branch in order to obtain the necessary support to pass an amending bill through the legislature. If a change to the regulation is required, Val-Nam need only lobby the executive branch, as both the policy- and regulation-making functions rest with that branch.



JUDICIAL BRANCH

The **judicial branch** of government is comprised of judges whose function it is to adjudicate; they do so by interpreting and applying the law to disputes that are brought before the courts. Judges are appointed by federal and provincial governments, but they function independently from both the legislative and executive branches. In our common law system, the interpretation and application of law by judges can lead to the creation of precedent. In essence, precedents create “rules” that must be followed by other judges. By this method of making law, the judicial branch of government provides another source of law known as common law (or case law).

judicial branch

courts at the federal and provincial levels responsible for interpreting and applying the law passed by the legislative branch; also responsible for determining that law is valid within the authority set out in the Constitution

Figure 1.3



The Supreme Court of Canada is the highest level of the judicial branch of government.

judiciary

term used to describe judges, collectively

ultra vires

beyond the level of power of a government or corporation

parliamentary supremacy

constitutional convention that holds the legislative branch of government supreme over the other branches, thus allowing new legislation to override judge-made law

The **judiciary** is also responsible for ensuring the constitutionality of the law. Judges have the power to declare law unconstitutional, thus having no force or effect, if created without proper jurisdiction. When government creates law that is outside its authorized jurisdiction, it is acting unconstitutionally. Judges will declare such law **ultra vires**—a Latin term meaning that the government acted “beyond the scope of its power”—and strike down the legislation.

PARLIAMENTARY SUPREMACY

The judicial branch of government has a significant amount of power, and it may appear perplexing that judges, who are appointed, can trump the work of the legislature, which is an elected body. Judges, for instance, may interpret legislation in a way that the legislature did not intend. Or, judges may strike down legislation because the legislature overstepped its authority. Although judges have the authority to act in this manner, it is important to recognize that the legislature has parliamentary supremacy. **Parliamentary supremacy** is a constitutional convention that allows the legislature to override judge-made law. This means that the legislative branch of government can respond to court rulings or interpretations of the law by creating new law to give effect to what they wish to do (provided they are acting constitutionally within their jurisdiction).

The three branches of government are distinct, but together they provide the framework that guides the democratic governance of Canada. Canadian businesses are well served by understanding the roles and responsibilities of each branch.

The Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms

When the Constitution was patriated in 1982, Canada took the opportunity to include the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*. By its inclusion in the Constitution, the Charter was made “supreme law of the land.” The Charter proclaims important rights and freedoms of people in Canada including equality rights, legal rights, democratic rights, and fundamental freedoms. The Charter has had a profound impact on law in Canada because it has broadened the judiciary’s ability to strike down legislation. Up until 1982, the examination of the constitutionality of legislation by judges was limited to issues of jurisdiction that pertained to sections 91 and 92 and that ensured each level of government had the lawful authority to enact the legislation at issue. Since 1982, the constitutionality of legislation can be challenged for violating fundamental rights and freedoms as set out in the Charter as well. Canadian courts, therefore, are empowered to strike down any law that violates the Charter. Keeping in mind the doctrine of parliamentary supremacy, this nonetheless represents a considerable expansion of the court’s powers.

It must be stressed that the Charter protects rights and freedoms from *government* interference. It places a limit on the power of government and applies to both levels and all branches of government, including the actions of government officials and law enforcement agents. It does not apply to discriminatory actions by individuals or businesses (for that we must look to human rights legislation, which we will examine in Chapter 9). Note that property rights (rights to own and enjoy property) and economic rights (rights to carry on business activity) are not protected in the Charter. Table 1.4 presents a sampling of ways in which the Charter has the potential to affect business activity in Canada.

Table 1.4 Charter Rights and Business Activities

Charter Right	Meaning of Right	Business Activity Affected
Equality (s 15)	Freedom from discrimination in the application and protection of the law based on specified grounds (such as age, gender, race, and religion)	Laws permitting mandatory retirement policies have been challenged
Freedom of expression (s 2(b))	Freedom to state opinions openly	Laws limiting advertising and marketing strategies have been challenged
Freedom of association (s 2(d))	Freedom to establish and belong to associations	Laws limiting the rights of workers to organize and join trade unions have been challenged
Freedom of religion (s 2(a))	Freedom to practise sincerely held beliefs of a religious or spiritual nature	Laws limiting Sunday shopping have been challenged
Mobility (s 6)	Freedom to pursue a job anywhere in Canada	Laws limiting the rights of provincially certified professionals to work in other provinces have been challenged

Canada is a representative democracy in which people vote for politicians who represent them. If people do not like the laws passed or the policies of the government, the election process provides the opportunity to choose differently in the next election. The democratic principle of “majority rule,” however, may at times come into conflict with other important principles, such as protecting minority rights or individual freedoms. The Charter protects rights that are seen as fundamental and that should not be infringed by the public opinion of the day.

Section 1 of the Charter provides that all rights and freedoms are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This means that although rights and freedoms are guaranteed by the Charter, they are not without limits. Each time a court hears a constitutional challenge about whether a law has violated the Charter, the court must consider whether the law imposes a *reasonable* limit on the right or freedom. Only when the court finds that the law violates a Charter right *and* cannot be justified as reasonable in the circumstances will the court strike down the legislation. For example, although the Charter protects freedom of expression, this freedom may be reasonably limited by laws regulating pornography, hate speech, advertising, copyright, defamation, and even noise by-laws.

Categories of Law

In addition to recognizing the different sources of business law in Canada, it is important to understand key categories into which the law is divided; this will enable you to better understand the function and purpose of the laws that affect your business. All laws can be identified as either substantive or procedural in nature and can also be divided into public law or private law. These categorizations are explored below.

Substantive Law Versus Procedural Law

substantive law

rules that establish rights and limits

procedural law

rules that establish the process of how substantive law will be enforced

Substantive law refers to the law that sets out the rights and obligations of individuals. As the name suggests, this is the “substance” of the rules that establish what we can and cannot do. For example, the law that sets the speed limits on roads is substantive law. Exceeding the speed limit is an offence that violates this substantive rule.

Procedural law refers to the rules that set out how substantive laws will be enforced. There are often numerous rules of procedure on how to enforce a single substantive rule. For example, in the case of exceeding the speed limit, there are many rules in place that must be followed, by law, before someone can be convicted of that offence: a ticket must be issued, the driver may dispute the ticket, there is a time limit within which to dispute the ticket, and if the driver wishes to dispute the ticket, a court hearing will be held to determine whether the driver is guilty of violating the substantive rule. The rules governing the court process are also procedural rules: who will preside at the hearing, how the hearing will be conducted, how witness testimony and other evidence will be admitted—these are just a few examples of the many procedural rules that must be followed in order to enforce the substantive rule that set out what the driver could and could not do. The main purpose of procedural law is to ensure a fair process and consistency in the enforcement of substantive law.

Most of the chapters in this book will present the substantive aspects of business law. These rules that establish rights and obligations relevant to business activity are of primary importance in managing legal risk. In most cases where the risk is realized, legal counsel—whose concern it is to follow the procedural rules—will be retained. The rules of evidence, for example, provide the procedure for the establishment of proof in legal proceedings. While reference to procedural law will be made to provide additional context in instances throughout this textbook, the focus on procedural law will take place largely in Chapter 2.

Public Law Versus Private Law

Law can also be categorized as either public or private. The distinction between public law and private law is foundational and will provide context for understanding how to categorize all the areas of business law addressed in later chapters. Public law governs the relationship between persons and the state. Private law governs the relationship between persons; the relationships between persons can be personal, social, or business relationships. Government is not a party to the relationship in private law.²

“Public” refers to something that concerns the people as a whole. In our society, the public are represented by government. **Public law** describes all the areas of law that concern the people as a whole, and thus, public law regulates the relationship between individuals and government at all levels. Tax law, criminal law, administrative law, environmental law, and constitutional law are examples of public law.

public law

rules that govern the relationship between individuals (including corporations) and government

² The exception to this statement is where government is acting as a person rather than in its capacity as a government. For example, when a government department hires an employee, which it does in the same manner and to the same effect as a business would hire an employee, the employment agreement is governed by contract law principles, which are private law.

From the perspective of business activity, any time a business is involved with a regulatory body or government official, it is a matter of public law. Examples include health and safety officials, food inspection agencies, municipal building departments, the federal competition bureau, labour relation boards, human rights tribunals, and privacy commissions. Public law disputes may end up in court or may be dealt with by an administrative tribunal (discussed later in this chapter).

Another term commonly used in relation to public law is **Crown**. Canada is a constitutional monarchy with the Queen as the symbolic head of state. Crown is another word used to refer to the state, or government. For example, Crown lands refer to lands belonging to the government.

Private law relates to the legal relationships between persons, including corporations. The focus of this text is on business interactions and, to the extent that these are person-to-person relationships, the legal aspects of business are most often private law matters. The law of torts, property, and contracts, for example, are categorized as private law. Although we will not be addressing it in our examination of business law, family law is another example of private law. See Table 1.5 for examples of public and private laws.

Another way to refer to private law is as **civil law**. The terms “private law” and “civil law” can be used interchangeably. Private law disputes may result in a lawsuit; the lawsuit process, which we will examine in Chapter 2, is also known as civil litigation. The term “civil” in these instances refers to the fact that the matter is one of private law. Note, however, that this reference to civil law should not be confused with the civil law system, which is explained above and refers to the type of *system* of law used by some countries (and the province of Quebec).

Public Law Offences Versus Lawsuits

Public law and private law differ in several ways, including the process by which cases move through the courts. They also differ in purpose. When the state creates rules to be followed by its members, it can make it an offence to break the rules. Criminal law is an example of law that establishes a set of offences. The purpose of criminal law is to punish offenders. Its purpose is different from that of civil law, whose purpose it is to compensate the victim for the harm done. Because criminal and civil law have different purposes, it is possible for one set of events to lead to both kinds of proceedings. This section will introduce you to the distinct terminology used in respect of criminal and civil matters.

Table 1.5 Examples of laws categorized as public or private

Public Law	Private Law
Administrative law	Contract law
Constitutional law	Tort law
Criminal law	Corporate and commercial law
Tax law	Property law

Crown

all aspects of the state in a commonwealth nation; the Monarch is the symbolic embodiment

private law

rules that govern the relationship between individuals (including corporations) where there is no government involvement

civil law

another way to refer to private law; concerned with the private relations of individuals

TERMINOLOGY OF PUBLIC LAW OFFENCES: CRIMINAL AND PROVINCIAL OFFENCES

Criminal law refers to the rules of the state that are designed to protect society as a whole. In Canada, criminal law is regulated by the federal government, which means that criminal offences are uniformly applicable across Canada. Criminal law is enforced by the state. Police and other law enforcement officials have the power to bring charges against offenders. When someone is charged with an offence, the proceeding will be one of public law. In these legal proceedings, society is represented by the Crown attorney, also known as the **prosecutor**. The prosecutor does not represent the victim. The prosecutor's role is to "see justice done." Proceedings in the criminal justice system are about determining whether the accused person, known as the **defendant**, is guilty of the charges. The victim's role is to be a witness in the case. A defendant who is found not guilty is acquitted of the charges. A defendant who is found guilty is convicted. Following a conviction, a judge will punish, or sentence, the defendant for the crime. The terminology used here is reserved for criminal (or provincial offence) cases.

Provincial governments do not have the authority to make criminal law. While only the federal government can make an offence a "crime," provincial governments do have powers to create **regulatory offences**. For example, provincial governments can develop health and safety, fishing, environmental, and traffic laws. Individuals charged under these provincial offences will go through a process similar to that of less serious criminal offences (known as summary conviction offences). Conviction for a provincial offence will not result in a criminal record or qualify as a criminal act. The individual who is convicted, however, can be punished with fines or even imprisonment. The terminology of criminal law is used for regulatory offences as well. Provincial offences are sometimes referred to as quasi-criminal matters because of their similarity to criminal law.

TERMINOLOGY OF PRIVATE LAW: LAWSUITS

The terminology of civil law cases, or lawsuits, is different from that of public law cases. We do not say that someone is "charged" with breach of contract or is "guilty" of a tort. It is not the purpose of a lawsuit to punish the person sued, so there will be no fines or imprisonment as a result. The civil litigation process will be explored in more detail in Chapter 2. The objective here is to introduce you to the terminology and how it differs from criminal law cases.

Categorized as private law, lawsuits involve disputes between persons. A person who has been wronged, in private law, can sue the person responsible for the harm. Rather than punishing the wrongdoer, the purpose of the lawsuit will be to compensate the person who has been wronged. There is no government involvement and thus no prosecutor. The person bringing the lawsuit and making the claim is called the **plaintiff**. The person being sued is called the defendant. A civil case is concerned with whether the defendant is **liable**, or legally responsible, in the matter before the court. If the defendant is found liable, the most common remedy imposed by the court is monetary compensation, also known as **damages**. The study of business law will most often use this terminology because the law that primarily concerns businesses falls under the category of private law.

BURDEN OF PROOF AND STANDARD OF PROOF

As noted above, one set of events can lead to both a public law trial and a lawsuit. For example, a person can be charged with fraud (a crime) in public law and be

criminal law

rules established by the federal government that govern the standard of acceptable behaviour in society, the breach of which results in fines and imprisonment

prosecutor

representative of the government who is responsible for presenting the government's case in public law matters against an accused person charged with an offence; also known as Crown attorney

defendant

person accused of an offence; may also refer to a person being sued

regulatory offence

breaking of a rule contained in a statute that can result in fines or other penalties but is not a criminal offence

plaintiff

party who commences a lawsuit (the party who is suing)

liable

legally responsible

damages

losses suffered as a result of the commission of a tort or a breach of contract, or monetary compensation awarded for these losses

Table 1.6 Civil Counterparts of Criminal Offences

Criminal Offences	Civil Counterparts
<i>Criminal negligence</i>	<i>Tort of negligence</i>
<i>Attempted murder</i>	<i>Tort of battery</i>
<i>Fraud</i>	<i>Tort of deceit or fraudulent misrepresentation</i>
<i>Theft</i>	<i>Tort of conversion</i>
<i>Assault</i>	<i>Tort of assault/battery</i>
<i>Impaired driving causing death</i>	<i>Tort of negligence</i>
<i>Arson</i>	<i>Tort of trespass and/or tort of conversion</i>

sued (a lawsuit) in private law. See Table 1.6 above for some examples of where the same set of events can lead to two different proceedings—one in criminal law and one in civil law.

Burden of proof refers to the responsibility to prove the case in court. In the criminal case, the burden of proof will be on the prosecutor. Consider that it is society who is accusing the defendant of the crime, so it will be society's representative who must prove the charges. In contrast, the burden of proof in the lawsuit will be on the plaintiff, because it is the plaintiff who is claiming that the defendant should be held liable for the harm done.

The outcome of one case is not dependent on the other, not only because the purpose of the proceedings is different, but because the standard of proof used to establish the facts is different. **Standard of proof** refers to the degree of proof that must be provided in order to satisfy the court that the allegations are proven. The serious nature of an accusation by the state against an individual results in a higher standard of proof in criminal cases. In a criminal case, the prosecutor will have to establish the defendant's guilt **beyond a reasonable doubt**. In the example above—of a person both charged with fraud in public law and sued in private law—the defendant in the fraud case will be convicted only if the court is satisfied, without any reasonable doubt, that the crime was committed by the defendant. In the lawsuit, the plaintiff has a lower standard of proof. In order to be successful in the lawsuit, the plaintiff must satisfy the court that the defendant is liable on a **balance of probabilities**. The court will be satisfied of a defendant's liability if it accepts the sufficient likelihood of the plaintiff's claims. A person who *probably* committed a crime (but there is reasonable doubt) will not be found guilty; but a person who *probably* wronged the plaintiff will be found liable for the harm.

See Table 1.7 for a summary of the key differences between criminal and civil court proceedings.

But what does it mean to “prove” something either beyond a reasonable doubt or on a balance of probabilities? Establishing proof depends upon evidence. The law of evidence involves a complex set of rules that determine what is admissible and therefore can be considered by a court or tribunal in its decision. An examination of the

burden of proof

requirement that a certain party prove a particular fact at trial

standard of proof

degree to which a party must convince a judge or jury that the allegations are true

beyond a reasonable doubt

standard of proof that the prosecutor must meet in a criminal trial in order for a defendant to be found guilty

balance of probabilities

standard of proof in civil law (as opposed to criminal law) indicating that one version of events is more probable than another

Table 1.7 Contrasting Criminal and Civil Proceedings

	Criminal Proceedings	Civil Proceedings
Category	Public law	Private law
Case name	R* v Defendant	Plaintiff v Defendant
Terminology	Accused is charged	Defendant is sued
Issue in the case	To determine whether the defendant is guilty	To determine whether the defendant is liable
Purpose	To punish the guilty party	To compensate the wronged party (plaintiff)
Burden of proof	Prosecutor	Plaintiff
Standard of proof	Beyond a reasonable doubt	Balance of probabilities
Judgment	If the defendant is convicted of the crime, the judge will pass sentence.	If the defendant is held to be liable for the harm caused, the judge will order a remedy.
Consequences	Examples of types of sentence include fines, imprisonment, and other requirements that are part of a probation order. The accused will have a criminal record.	Example of types of remedies include an order for damages, injunction, and specific performance, as well as an order to pay the other side for legal costs.

* "R" in the case title of a criminal proceeding stands for the Crown, in reference to the Latin term for King (Rex) or Queen (Regina).

law of evidence is outside the focus of the material in this textbook, as it is generally a matter to be addressed by the legal professionals representing the parties. However, a short answer to the question of what is proof is that evidence is required to establish or prove the facts. If a fact cannot be established by the admissible evidence, it is as if the fact did not exist. If a fact that is germane to the legal issue cannot be proven, it may not be treated as fact for the purposes of the legal proceeding and, consequently, it cannot alter the legal outcome.

Administrative Law

administrative law
body of rules applied to monitor decision-making powers of government agencies

One area of public law that warrants specific attention is **administrative law**. Administrative law refers to the body of law that is concerned with the regulation of business and other activities by government, including the rules created and applied to government agencies and their decision-making powers. It is an area of public law with growing importance to business, as government agencies, boards, and commissions expand regulation of economic and commercial activity. See Table 1.8 for examples of administrative agencies that affect business.

administrative agency
government body that administers and enforces a particular area of law

Administrative agencies are government bodies established by legislation to regulate or oversee a particular activity that requires specialized knowledge. Administrative agencies have three broad functions: advisory (providing information to help develop government policy), operational (running day-to-day operations), and regulatory. We will focus on the regulatory aspects of administrative agencies. Administrative agencies function as regulatory bodies when they oversee and regulate

Table 1.8 Administrative Agencies That Affect Business

Administrative Agency	Function
Provincial alcohol commissions	Grant licences to bars and restaurants, allowing them to serve alcohol to patrons
Canadian Radio-television and Telecommunications Commission (CRTC)	Grants operating licences to television and radio stations across the country
Provincial workplace safety and insurance boards	Grant compensation to injured workers
Federal and provincial human rights tribunals	Determine whether human rights legislation has been violated
Canadian Food Inspection Agency	Issues decisions regarding food inspection and safety
Provincial professional societies or governing bodies	Grant licences to particular professionals (for example, lawyers, accountants, architects, nurses, and pharmacists) to practise their profession
Federal Competition Tribunal	Issues decisions regarding anti-competitive and dishonest conduct in business
Municipal building departments	Conduct inspections of buildings and grant permits to alter premises

the operation of private activity. A business that is licensed, for instance, will have to be aware of its relationship to the regulatory body that is responsible to ensure that the requirements of the licence are met.

ADMINISTRATIVE TRIBUNALS

In some instances, government will use the court system to enforce its rules (see coverage of regulatory offences above). But in many other instances, government establishes other government bodies to help enforce its rules. Whether they are called tribunals, boards, or commissions, these government agencies work alongside government departments and ministries to enforce regulatory rules (you will recall that they fall under the executive branch, just like government departments and ministries). An **administrative tribunal** is any government body (even if it is called something else) that has a decision-making function. The rules that provide the authority, procedure, and limits to tribunal actions are all part of administrative law. There are countless examples of government bodies that function as tribunals. Look at Table 1.8 and consider the context in which those administrative agencies would act as tribunals in exercising decision-making discretion.

administrative tribunal

government body that has decision-making power regarding an administrative matter

PROCEDURAL FAIRNESS IN ADMINISTRATIVE TRIBUNALS

In order to exercise decision-making powers, an administrative body must be authorized to do so by legislation (or regulation). It must exercise that authority properly and fairly. Circumstances vary depending on the type of administrative

rules of natural justice

principle encompassing the right to be heard, the right to hear the case against you, and the right to reply to the case; also known as fundamental fairness



tribunal but, at a minimum, procedural fairness means that the administrative tribunal must respect the following **rules of natural justice**:

- The person affected by the decision must be notified that a decision is going to be made.
- All the information, or evidence, that will impact the decision must be disclosed to the person it will affect.
- The person affected by the decision must be provided with an opportunity to address or refute the evidence provided.
- The decision must be made by the body that hears the evidence.
- The decision-makers must be impartial (free from any bias or conflict of interest in the case).

SCENARIO

When Val-Nam reviews the decision of the government body that turned down its grant application, it will want to consider whether the body adhered to the principles of natural justice in coming to its decision.

If Val-Nam has reason to believe that the decision did not comply with these principles, it may decide to challenge the decision through judicial review, described below.

ADMINISTRATIVE TRIBUNAL VERSUS JUDICIAL PROCESS

Hearings before administrative tribunals differ depending on the type of tribunal and the authorizing statute that created it. Administrative tribunals are similar to courts in the sense that they make binding decisions that affect legal rights, but they differ from the judicial branch of government in some significant ways. The decision-makers of administrative tribunals are rarely judges; they are usually people with some relevant expertise in the subject matter of the dispute. Administrative tribunals also differ from courts in the following significant ways:

- Administrative tribunals are not bound by the strict rule of *stare decisis* that requires courts to follow previously decided cases.
- They can take public policy into account when applying the law.
- Their procedural rules are more informal and flexible.
- The rules of evidence are much more permissive, such that evidence that would not be admissible in court may be accepted at a hearing before an administrative tribunal.
- There is often no appeal process that would bring the substantive legal matter dealt with by an administrative tribunal into the court system; generally, the opportunity to involve the court system is limited to challenging whether the administrative body had legal authority to make the decision or whether it properly followed the rules of procedural fairness. The means of challenging a tribunal decision in this manner is a process known as **judicial review**.

It is advisable to seek legal advice before submitting to, or appearing before, an administrative tribunal. Although they are not courts, administrative tribunals have decision-making powers that can profoundly impact an individual or business.

With this background in the structure of the Canadian legal system and in key categories of law, you now have the foundation on which to build your

judicial review

process whereby a court reviews the decision of an administrative tribunal

understanding of the substantive areas of business law and, from there, to consider how you will manage the legal risks inherent in your business.

Legal Aspects of Business Activity

Law functions to create stable environments in which members of society can plan their affairs with some certainty and predictability. Applying this function to business activity, law enables people to go about their business with a measure of confidence in the enforceability of the established rules. Business is a very large arena. It should not come as a surprise that no academic course, or single textbook, can comprehensively address every possible instance of the law's reach when it comes to business matters. There are, however, key areas of law that are common to all types of businesses, regardless of industry. The following key areas will be addressed in the subsequent chapters.

First, while law functions to minimize conflict in society, where legal conflict does occur the law's role is to facilitate the resolution of disputes through the establishment of processes and procedures. Generally, the details involved in navigating the court system can be left to legal professionals. However, even where legal representation is needed, a basic understanding of these processes, the terminology used, and the relevant court structure provide for more effective communications between legal representative and client. We will explore the basic elements of the systems of dispute resolution, including alternatives to court action, in Chapter 2.

SCENARIO

Should Val-Nam's arrangements with WeSolve for the manufacture of Val-Nam's generators not meet Val-Nam's expectations, Val-Nam may want to negotiate some form of compensation or concession from WeSolve. An understanding of the options for dispute resolution will assist Val-Nam in this process.



The law of torts (Chapter 3) provides compensation to those harmed by the intentional or negligent acts (or omissions) of others. A business could be either the person harmed or the person who has caused the harm. Of legal significance for any business is the potential for injury to those who interact with the business, including injury to a person harmed on the property, harm caused by an employee's actions or by a product or service, losses suffered because of misrepresentations made during the negotiation of an agreement, and damage to the reputation of a person or business caused by false statements. We will examine the legal principles that are applied to these and other types of torts.

Agreements made in the course of business are governed by the law of contracts (Chapters 4 and 5), and understanding the basic underlying principles of contract law is important for every business person. Extensive government regulation addresses many business practices. Key areas of regulation include regulation related to contract formation, consumer protection, and the protection of a fair and open marketplace (Chapter 6). Laws also govern how business is formed and carried out. We will consider the legal advantages and disadvantages of the most common forms of carrying on business: sole proprietorships, partnerships, and corporations (Chapter 7).



SCENARIO

Product liability issues may be an area of significant legal risk for Val-Nam. An understanding of the elements of the tort of negligence, of contractual protections that are available to a business, and of consumer protection legislation will help Val-Nam properly evaluate and manage this risk.

Further, an understanding of the legal protections, costs, and risks associated with the different forms of carrying on business (sole proprietorships, partnerships, and corporations) will help Valery, Namid, and Mitchell decide whether the form of business chosen will sufficiently protect their personal assets from product liability claims.

It is advantageous to business people to have a basic understanding of law that governs banking, financing, and the law of debtor-creditor (Chapter 8). The legal responsibilities involved in the employment relationship, and awareness of the legal risks that arise from it, are essential in today's business environment (Chapter 9). Similarly vital is an understanding of the law surrounding property (Chapter 10). Property is not limited to tangible assets. We will examine law as it relates to intangible forms of property such as copyrights, trademarks, and patents. Intellectual property is exceedingly important in today's digital world, as is the expanding nature of a business's legal responsibility in protecting the personal information and privacy of others (Chapter 11).



SCENARIO

An understanding of the legal forms of business, of contract law, and of employment law will help Mitchell decide what the nature of his relationship to the business should be.

An appreciation for the different forms of financing available to the business and their relative legal risks will help Val-Nam determine the appropriate mix of financing options for the business.

An understanding of financing law, contract law, and property law will help Val-Nam determine how best to obtain a head office location and land for future manufacturing facilities.

Familiarity with intellectual property law, both common law and statutory law, will allow Valery to protect her invention and the business concept she has created.

The foundational knowledge that will be gained in the study of these areas of the law has applications to all types of business. Knowledge of business law forms the basis upon which to assess legal risk and, in turn, to develop important skills for avoiding legal risk. Before a legal risk can be managed, it must be recognized. The ability to identify and anticipate legal risk is a valuable and necessary skill for anyone whose goal it is to succeed in business.

The Answer to Every Legal Question

As you work your way through the materials in this text, be alert to the complexity that can be hidden in what may appear to be a simple legal question. One of the frustrating aspects of the study of law for some students is that it may appear that

there are no definitive answers to even what seem to be simple legal questions. There is a running joke that the answer to every legal question is “It depends.” While it is probably accurate that “It depends” is the first response to most questions, the inquiry must then continue. The issue is generally in the incompleteness of the facts available to answer the question. More information is usually needed for an answer that is relevant and applicable.

Consider this question: Can the staff at a restaurant lawfully serve an alcoholic beverage to a 19-year-old patron? Answer: It depends.

What other information is needed before we can reach the answer?

- Is the restaurant licensed to serve alcohol? (This is a threshold question, as without a liquor licence, no alcohol can be served.)
- In what province is the restaurant located? (Different provinces have different age restrictions for the service of alcoholic beverages.)

In practice, assessing a legal question requires applying the applicable law and relevant facts to the issue at hand. The fact that it is provincial law that regulates the service of alcohol is relevant but only partially helpful. The facts of the case are critical. *Change the facts and you change the answer.* In the scenario above, if the restaurant is licensed to serve alcohol, and if it is located in the province of Ontario, where the age of majority for the service of alcohol is 19, then it would appear that the answer to the original question is yes and that the patron can be lawfully served. Remember, however, that if the facts are changed, the answer can change. For instance, if we add an additional fact that it is 3:00 a.m., then it would not be permissible to serve the patron. What if the patron is impaired? What if the staff person is 17 years old? What other factors or issues might affect the answer?

The study of law requires the ability to identify the legal issue and apply the facts and the law to that issue. In order to concentrate on learning the law and identifying legal issues, the facts will be provided to you in case scenarios and examples used in this textbook. The facts presented throughout this textbook to illustrate each legal principle should be accepted as the facts that are to be applied to the legal concept under review; you need not concern yourself with “what if” questions about the existence of other facts. This guideline also applies to answering review questions (unless the question asks you to explore additional facts). Remember that taking into consideration facts that are not part of the discussion or scenario may lead to a different answer when applying the law. Although you will be provided with facts in the discussions of legal concepts for the purpose of applying the law, when faced with real legal questions, ensuring a thorough exploration of facts is critical.

Business Law and Business Ethics

Legal principles and ethical values often intersect, but they are not the same thing: complying with the law is not equivalent to being ethical; conversely, violating the law is not necessarily equivalent to being unethical. It may not be illegal to betray a friend, but many would condemn it as unethical. Likewise, it may be illegal to drive with expired license plates, but few people would categorize it as unethical.

Should a business outsource manufacturing of a product to a country where it is legal to use child labour? Should a business recycle even if it is not required to do so by law? Should a business advertise using images that are degrading to women? From the perspective of reputation and, indeed, risk to a business' profitability, it

may not be enough for a business to be legally compliant—the business may also need to reflect the moral standards of its community.

Business ethics are the values and moral principles that help to identify right and wrong in a business context. Legal standards may be the minimum requirements. People in business are well advised to have an understanding of both the legal and ethical environments in which their business operates and to consider the ethical as well as legal risks in business decision-making.

CHAPTER SUMMARY

The law can be a valuable tool to enhance your business but it can also impose costly liability on a business. A legal risk management plan can allow you to reduce or even prevent many business losses. The development of a legal risk management plan is an ongoing process that requires you to anticipate what can go wrong and to develop strategies to prevent legal risks from being realized.

A basic understanding of the Canadian legal system provides an important foundation for the examination of legal risk. Canadian law stems from a number of sources. The Constitution is the highest law: it provides the framework and principles to which all other laws must adhere. It contains the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*. The latter sets out the rights and freedoms of Canadians and prohibits government and legislation from interfering with those rights and freedoms. All Canadian provinces and territories use the British-based common law (except Quebec, which uses the French-based civil law). The name “common law” stems from the fact that the laws have been applied many times and, now, courts are required to make decisions according to these precedents. Statute law is created by the federal, provincial, and territorial governments. Many statutes formalize and clarify the common law. As well, municipalities pass by-laws on matters such as local taxes, land zoning, and licensing for the region and municipality for which they are responsible.

Substantive law is the “substance” of the rules that establish what we can and cannot do. Procedural law tells us how to enforce the substantive rules. Public law regulates the relationship between persons and government at all levels. Private law regulates individual-individual, individual-business, and business-business relationships. There are many differences between public and private law: in the terminology used, the process by which disputes proceed through the courts, and the standard and burden of proof in proceedings.

Given the increased prevalence of government regulation of business, an understanding of administrative law is important for business. Administrative law governs the fairness of decisions made by government agencies and protects the public and businesses from government action that overreaches its statutory jurisdiction.

Assessing a legal issue requires applying the applicable law and relevant facts. The facts of the case are critical. *Change the facts and you change the answer.*

Adherence to legal requirements may not be enough for a business to develop a positive reputation in the community. While legal standards tend to establish a base level of acceptable behaviour, community morals may demand a higher level of ethical behaviour from businesses.

KEY TERMS

administrative agency, 20

administrative law, 20

administrative tribunal, 21

balance of probabilities, 19

beyond a reasonable doubt, 19

burden of proof, 19

civil law, 17

civil law system, 6

common law system, 6

constitution, 6

criminal law, 18

Crown, 17

damages, 18

defendant, 18

doctrine of paramourty, 12

doctrine of precedent, 7

executive branch, 12

federal system of government, 8

judicial branch, 13

judicial review, 22

judiciary, 14

jurisdiction, 6	private law, 17	rule of law, 6
legal risk management plan, 2	procedural law, 16	rules of natural justice, 22
legislative branch, 9	prosecutor, 18	standard of proof, 19
liable, 18	public law, 16	<i>stare decisis</i> , 7
parliamentary supremacy, 14	regulations, 12	substantive law, 16
plaintiff, 18	regulatory offence, 18	<i>ultra vires</i> , 14

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Business Corporations Act, RSO 1990, c B.16.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Competition Act, RSC 1985, c C-34.

The Constitution Act, 1867, 30 & 31 Vict, c 3.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Copyright Act, RSC 1985, c C-42.

Employment Standards Act, 2000, SO 2000, c 41.

Mortgages Act, RSO 1990, c M.40.

Occupiers' Liability Act, RSO 1990, c O.2.

Sale of Goods Act, RSO 1990, c S.1.

EXERCISES

True or False?

- ___ 1. Laws promote certainty and predictability because they never change.
- ___ 2. One of the purposes of the criminal justice system is to ensure that the victim of the crime will be compensated for the harm done by the offender.
- ___ 3. A purpose of a legal risk management plan is to reduce the risk of being sued and to reduce the amount of liability in the event of a lawsuit.
- ___ 4. The *Canadian Charter of Rights and Freedoms* replaced human rights legislation in 1982, when Canada's Constitution was brought home from England.
- ___ 5. The courts are empowered to strike down any law that violates the Charter.
- ___ 6. The Charter does not prohibit businesses from discriminating against racial minorities if they so choose.
- ___ 7. Administrative tribunals have less expertise than courts.
- ___ 8. Public laws govern actions of individuals and businesses when those actions occur in public places such as parks, roads, waterways, and the air.
- ___ 9. Canada and all its provinces and territories operate under a common law legal system.
- ___ 10. Judicial review is a process whereby a court reviews a tribunal's decision for errors of law, errors involving fairness, or errors involving the tribunal's exercise of power.

Multiple Choice

1. Which definition or definitions best describe "the rule of law"?
 - a. Everyone has equal rights before the law, and nobody is above the law, including government.
 - b. The wealthy and educated are more likely to benefit from the law than are the poor and uneducated, and all societies are ruled by law.
 - c. Punishment for breaking the law is imposed according to rules of conduct.
 - d. All of the above.
2. Which of the following best describes the protections afforded by the *Canadian Charter of Rights and Freedoms*?
 - a. Freedom from discrimination and harassment in the workplace.
 - b. Freedom from unreasonable government interference with respect to rights and freedoms such as equality, religion, and expression.
 - c. The legal right to sue a person or company for discrimination.
 - d. The legal rights and freedoms of Canadians are guaranteed and cannot be limited by legislation in any way.

3. Which of the following best describes substantive law?
 - a. It defines international legal status.
 - b. It defines relationships between governments.
 - c. It defines the process by which to enforce legal protections set out in the Charter.
 - d. It defines rights and sets limits on conduct.
4. What does the division of powers found within Canada's Constitution dictate?
 - a. Which powers are statutory and which are derived from the common law.
 - b. Which powers are territorial, provincial, and municipal.
 - c. Which powers are provided to Quebec through the civil law and to the rest of Canada through the common law.
 - d. Which powers are federal and which powers are exclusively provincial.
5. In which of the following legal proceedings is Barney appearing in a matter categorized as private law?
 - a. Barney appears as a witness for the prosecution in Fred's fraud trial.
 - b. Barney appears as a witness at a hearing where Fred is appealing the decision of a worker's compensation tribunal.
 - c. Barney appears as a witness in a proceeding where Fred is suing a business associate for breach of contract.
 - d. Barney appears as a witness at Fred's trial on a municipal noise by-law infraction.
6. Which of the following is an example of procedural law?
 - a. The rule that prohibits a restaurant from serving alcohol to persons under the age of 19.
 - b. The rule that requires the operator of a vehicle to drive within the prescribed speed limit.
 - c. The rule that prevents songs protected by copyright from being uploaded onto the Internet without permission.
 - d. The rule that requires that a lawsuit must be personally served on the defendant in the case.
7. Which of the following is not a legal term normally associated with civil law proceedings?
 - a. liability
 - b. prosecutor
 - c. plaintiff
 - d. damages
8. Which of the following is *not* an example of how tribunals are different from courts?
 - a. Tribunal decisions are not binding on the parties in the same way as are court decisions.
 - b. Tribunals usually have more informal and flexible procedures than do courts.
 - c. Tribunals may consider public policy to a degree that courts usually do not.
 - d. Tribunals may admit evidence that would never be admitted in a court.
9. The judicial branch of government creates case law when it interprets the law. However, Canada has a constitutional principle that allows the legislative branch of government to override judge-made law. What is this constitutional principle known as?
 - a. *ultra vires*
 - b. *stare decisis*
 - c. rule of law
 - d. parliamentary supremacy

Short Answer

1. Define "law" and describe its purpose.
2. Describe the steps to take in devising a legal risk management plan.
3. Explain why the most common answer to many legal questions is "It depends." What factors affect the analysis of a legal issue?
4. What is meant by "jurisdiction"? Provide examples to explain your answer.
5. Describe the advantages and disadvantages of Canada's common law legal system.
6. Explain how the protections of equality rights under the Charter differ in application from provincial human rights codes.
7. Explain how business law differs from business ethics.
8. Describe two reasons for which a court may determine legislation to be unconstitutional.

Apply Your Knowledge

1. Review the following scenarios and identify whether the legal matter at issue will be categorized as public law or private law. Discuss the terminology used in the scenario and how that helps determine how the matter is categorized.
 - a. Jessica must attend a hearing before an immigration tribunal regarding her status to live and work in Canada.
 - b. George has been fired from his job and plans to sue his employer for wrongful dismissal.
 - c. Anastasia got a ticket for talking on her cellphone while driving and intends to fight the ticket in court.
 - d. Maria is bringing a legal proceeding against her competitor for patent violation.
 - e. Sarah has been fined for fishing without a licence.
 - f. Kosta is commencing legal proceedings against his business associate for breach of contract.
 - g. Sami has filed a complaint with the Canadian Human Rights Commission alleging discrimination by his employer.
 - h. Rino's company has been fined by the provincial Ministry of Labour following a workplace accident.
 - i. Sonya has received several notices from the Canada Revenue Agency about failing to report income.
 - j. Olga has applied for a liquor licence for a new nightclub, but the neighbours are opposing it.
 - k. Kira has made a complaint to the Privacy Commissioner about the disclosure of her personal financial information by a bank manager without authorization.
2. Refer to sections 91 and 92 of the Constitution and identify which level of government, federal or provincial, has the power to make law in relation to the following topics:
 - a. Protection of an invention.
 - b. Disposal of waste products by hospitals.
 - c. Fees payable to register a real estate transaction.
 - d. Conspiring to commit fraud.
 - e. Minimum wage for liquor servers.
 - f. Safety standards for trucking companies that carry goods between provinces.
3. Review the following matters and comment on whether the Charter applies:
 - a. A taxi company refuses to hire a Sikh because he wears a turban.
 - b. A city by-law prohibits the rental of community spaces to religious organizations.
 - c. The federal government enacts legislation authorizing police to seize computer data of anyone suspected of a computer crime without needing to apply for a warrant.
 - d. A software development company fires an employee for expressing political views on social media.

