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Chapter 2

The Canadian Legal System

Instructor's Manual—Answers

by Shannon O'Byrne

I. TEACHING OBJECTIVES

After studying this chapter, students should have an understanding of

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

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Whereas Chapter 1 dealt with the question "Why study the law in a business program?" Chapter 2 explains what the law is and where the law comes from. In sum, the chapter provides students with grounding in the basics of governmental operations—legislative, executive, and judicial. Though this makes for a reasonably technical chapter, it is an important one because it introduces students to the regulatory or administrative context of doing business.

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

- The legislative branch of government, which passes statute law, such as Nova Scotia's *Tobacco Access Act.*
- The political executive, which decides on the policy leading to Nova Scotia's legislation. As another example of involvement by the political executive, federal regulations determine what the industry must show on the face of its cigarette packages.
- The judicial branch of government, which determines, for example, whether or not the impeached legislation is constitutional.

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

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II. TEACHING STRATEGIES

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

One approach that has proven successful in explaining the sources and classification of the law is to incrementally explain Figure 2.8 in the textbook (page 39), which is reproduced on the next page. Figure 2.8 summarizes the following basic propositions introduced in the chapter:

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

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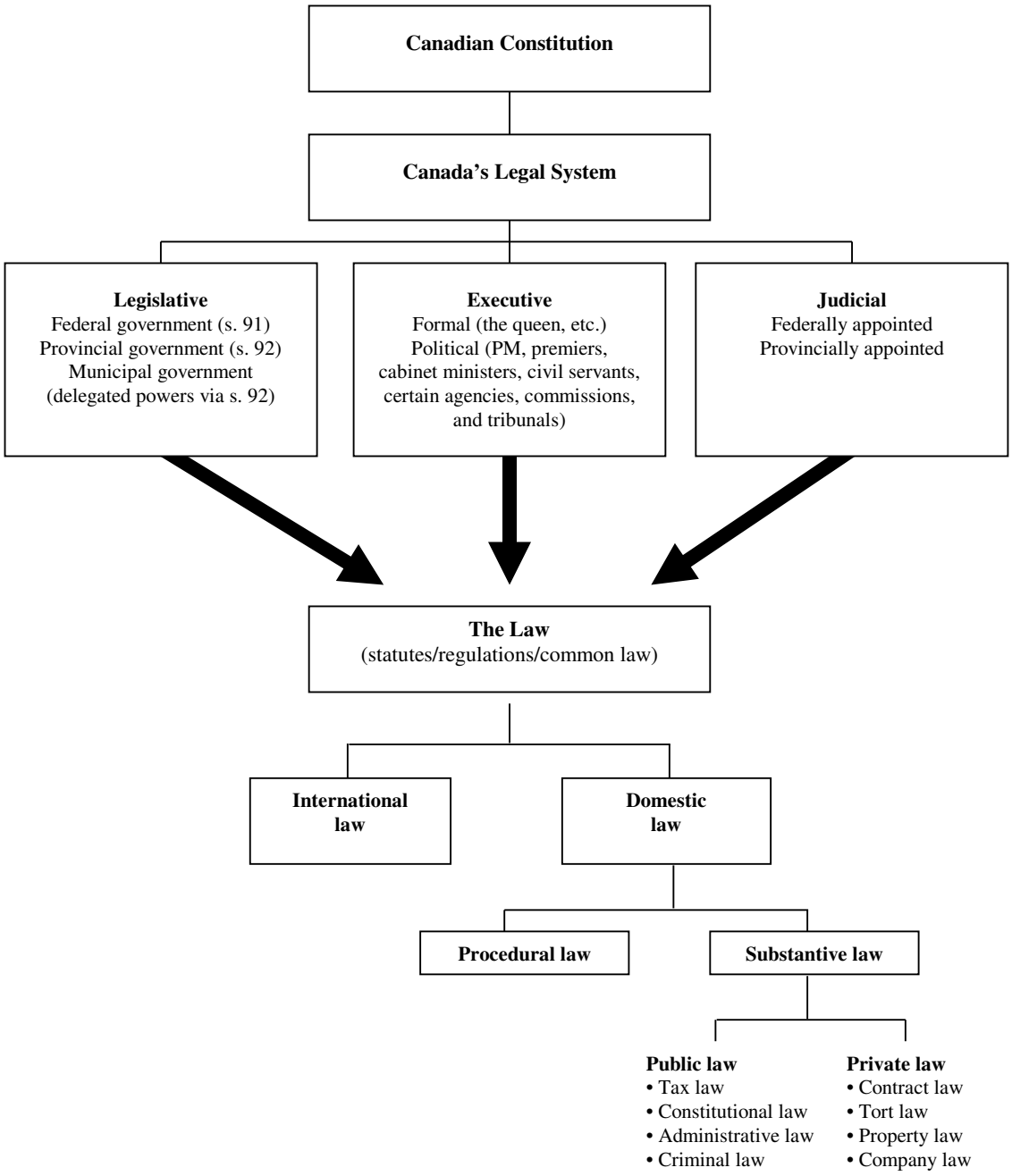
and criminal law. Private law includes contracts law, tort law, property law, and company law.

Figure 2.8 [from textbook]



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

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

III. STUDENT ACTIVITIES

Task 1: To help students gain familiarity with how government works, ask them to research a discrete topic—such as the history of Parliament or the division of powers.

Task 2: Situation for Discussion 2 describes a brawl at a bar in Halifax and the potential legislative aftermath. Ask the students to find other examples in which possible problems arising from business management/business activity might lead to new laws being enacted. (Examples from the textbook include a lack of safety in drinking establishments leading to minimum drink prices being enacted in Alberta (see "Alberta mandates minimum booze prices," *Calgary Herald* (3 July 2008) at <http://www.canada.com/topics/news/national/story.html?id=b05c84ea-76a5-

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41a6-beeb-7e7ef41006e8>) and in Nova Scotia (see CBC News, "N.S. sets minimum price for alcoholic drinks. Rule ends dollar-a-drink nights at Halifax bars" (19 December 2008) online: CBC <http://www.cbc.ca/news/canada/nova-scotia/n-s-sets-minimum-price-for-alcoholic-drinks-1.755597>; fly-by-night home inspectors leading to legislation governing the home inspection industry (Situation for Discussion 1); and gender-based pricing leading an Ontario backbencher to introduce a bill banning the practice (see Questions for Critical Thinking 1. Examples from Chapter 1 include the inhumane treatment of chickens being transported for slaughter (see Ethical Considerations: Maple Lodge Farms conviction) and underage tanning (see Business and Legislation: Regulating the Tanning Industry, page 9).

IV. EXPLANATION OF SELECTED FEATURES

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Photo caption: Some customers are unhappy with display bans, including Rene LaPointe. "It's just another law for the government to throw at us," says LaPointe. "They're treating the adults like children." Do you agree with his analysis? [footnote deleted]

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

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Environmental Perspective: Concurrent Jurisdiction over the Environment

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

Concurrent jurisdiction over the environment is inevitable because it follows from the distinct powers that each level of government is given under the Constitution. For example, a source of the federal government's power over the environment comes from its s. 91 power over navigation and shipping. One source of the provincial government's power over the environment derives from its jurisdiction over such matters as property and civil rights. Therefore, concurrent jurisdiction has at least logic to recommend it and leaves environmental matters in the hands of the level of government that might be best equipped be able to assess and handle it. However, this division can also lead to a regrettable lack of coordination on a variety of fronts, including the cleanup of contaminated soil, as well as regulatory complexity and inefficiencies.

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

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International Perspective: Antismoking Treaty

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

Countries working together from an agreed-on template—such as is contained in a treaty—are likely to benefit from the increased efficiencies associated with this kind of cooperation. Instead of each country working in isolation, countries combine forces, share their knowledge base, and formulate a generalized solution. Such an efficiency counts as an advantage of global cooperation, as do the opportunities that emerge for cooperation on other related issues. Cooperation also makes it easier for each country to resist the efforts of smoking lobbies and the tobacco industry. The disadvantages relate largely to a compromised ability to change course in how smoking is to be combated within a country.

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Photo caption: Hookah tobacco is at least as dangerous as cigarette tobacco. Should it be exempt from appropriate health warnings in Canada?

The Mayo Clinic Patient Care and Health Info website contains an article from J. Taylor Hays entitled "Is hookah smoking safer than smoking cigarettes?" (undated document), online: Mayo Clinic, <http://www.mayoclinic.org/healthy-lifestyle/quit-smoking/expert-answers/hookah/faq-20057920>. Here, the author states:

> The tobacco is no less toxic in a hookah pipe than in a cigarette, and the water in the hookah does not filter out the toxic ingredients in the tobacco smoke. Hookah smokers may actually inhale more tobacco smoke than cigarette smokers do because of the large

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volume of smoke they inhale in one smoking session, which can last as long as 60 minutes

See too Shereen Lehman, "Hookah smokers are inhaling benzene, a leukemia risk, study says" *Globe & Mail* (27 November 2014) at L7.

Given these risks, it is difficult to see why hookah tobacco is not subject to health warnings and other forms of government regulation. In fact, the Centers for Disease Control and Prevention notes that hookah smoking is rising among youth and college students. It also references WHO's Study Group on Tobacco Product Regulation that urges consideration of the following to reduce hookah smoking. Note that five of the six points would involve government regulation of the product:

- "Education of health professionals, regulators, and the public at large is urgently needed about the risks of hookah smoking, including high potential levels of second-hand exposure among children, pregnant women, and others.
- Hookahs and hookah tobacco should be subjected to the same regulations as cigarettes and other tobacco products.
- Hookahs and hookah tobacco should include strong health warnings.
- Claims of harm reduction and safety should be prohibited.
- Misleading labelling, such as "contains 0 MG tar," which may imply safety, should be prohibited.
- Waterpipes should be included in comprehensive tobacco control efforts, including prevention strategies and cessation interventions.

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- Hookahs should be prohibited in places consistent with bans on cigarette and other forms of tobacco smoking."

See online CDC <http://www.cdc.gov/features/hookahsmoking/>.

For further analysis from a specifically Canadian legal perspective, see Non-Smokers' Rights Association, "Water Pipe Smoking in Canada: New Trend, Old Tradition" (February 2012), online: Non-smokers' rights association <https://www.nsra-adnf.ca/cms/page2289.cfm>.

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Business and Legislation: Tobacco Regulation by the Federal Government

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

For the moving back story about Barb Tarbox's image on cigarette packages, see the DVD supplement supporting this Instructor's Manual that contains the clip entitled "Barb Tarbox legacy."

Statistics Canada reports that smoking has declined dramatically over the last 10 years and particularly so among teens. As reported by the *Red Deer Advocate* (22 June 2012), Ottawa credits some of this success to its "its mandatory, graphic anti-smoking packaging for tobacco products." The article goes on to note that "one in five Canadians aged 12 and over—5.8 million people—smoke on an occasional or a daily basis, down from 25.9 per cent in 2001. For teens aged 15 to 17, the rate fell over the same period to 9.4 per cent from 20.8 per cent. For those aged

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18 to 19, the rate dropped to one in five from one in three." Other factors that have presumably contributed to the decline in smoking rates include increased education programs, reports the *Red Deer Advocate*. Another contributing factor in the decline is the escalating cost of cigarettes because of increased levels of taxation. See *Red Deer Advocate*, "Gruesome images on cigarette packs seem to be working," *Winnipeg Free Press* (22 June 2012), online: Winnipeg Free Press < http://www.winnipegfreepress.com/opinion/westview/gruesome-images-on-cigarette-packs-seem-to-be-working-159983365.html>.

An analysis of studies conducted at the University of North Carolina at Chapter Hill concludes that pictorial warnings are more effective than text warnings alone:

> Pictorial warnings had a bigger impact on 20 outcome measures—including increasing intentions not to start smoking, intentions to quit smoking, getting and keeping people's attention, triggering people to think about the negative impacts of smoking, and for credibility.
> ….
> Pictorial warnings made people look at smoking in a more negative way and increased their intentions to quit smoking. This is very important, as these variables are associated with later attempts to quit smoking …..

See UNC Health Care and School of Medicine Newsroom, "UNC Analysis Shows Advantage for Picture-Based Cigarette Pack Warnings over Text Warnings" (6 May 2015), online: UNC <http://news.unchealthcare.org/news/2015/may/unc-analysis-shows-advantage-for-picture-based-cigarette-pack-warnings-over-text-warnings>.

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

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

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

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

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

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

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

V. CHAPTER STUDY

Questions for Review, page 42

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

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

2. **What does "jurisdiction" mean?**

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

3. **What is an example of a constitutional convention?**

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

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

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

5. What is the doctrine of paramountcy?

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?

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

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

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

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

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

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9. What is the executive branch of government?

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

10. How is the executive branch different from the legislative branch?

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

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

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

12. What are the two types of trial courts?

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

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

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

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

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 determines that a piece of legislation is unconstitutional?

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

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

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

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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?

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

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

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

19. What is the role of equity?

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?

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 43

1. **Women pay higher prices for certain products and services compared to what men are charged—from dry-cleaning to haircuts. This is known as gender-**

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based pricing. Is gender-based pricing objectionable? Should government regulate price when it is discriminatory or should that be left to the free market?

Although government regulation is often mandated to fight discrimination, gender based pricing is not necessarily one of those cases. A good argument is 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. For example, the *Globe and Mail* reports on a 2009 study that assessed 50 randomly selected American drycleaners. The study determined that, on average, women paid 73 percent more to have their shirts laundered than men. A separate study from the previous year reports that 75 percent of women who shopped in the past year said they avoided buying clothes that would require dry cleaning. See Michael Kesterton, "Social Studies: Women and dry cleaning" *Globe & Mail* (29 July 2011) L7.

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 anti-gender pricing legislation to be passed.

Women's haircuts are typically more costly than men's haircuts, doubtless because they are more time consuming for the stylist to produce. This seems to be a reasonable justification for an increased price. It is considerably less convincing to suggest, as some in the dry cleaning industry have done, that automated technology is geared to larger items of clothing and therefore women's blouses need to be touched by hand, driving up the service cost in that circumstance. (See Jack Kohane, "'Gender Tax' in Ontario's Crosshairs: Backbencher's Bill Would Eliminate Unequal Pricing" *Business*

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Edge 1 (26 May 2005), online: Business Edge News Magazine <http://www.businessedge.ca/archives/article.cfm/gender-tax-in-ontarios-crosshairs-9591>.

Some critics have argued that automated technology could be geared to smaller items of clothing, however. Put another way, are smaller people (more likely to be women) being forced to subsidize larger people (more likely to be men) because of a technology "bias"? As author Joanne Thomas Yaccato notes in *The 80% Minority: Reaching the Real World of Women Consumers*: "…If the technology is there for men's apparel, it must be there for cleaning women's garments."

2. The Supreme Court of Canada in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, ruled that public sector employees (that is, employees who work for government) have a constitutionally protected right to strike. More specifically, it ruled that labour reform legislation from Saskatchewan was unconstitutional because it interfered with the right to strike in a way that went beyond what was reasonably required. For example, the legislation prohibited government employees who performed essential services from participating in a strike but provided that the public sector employer *alone* had the right to determine who those employees would be. Do you think the employer should have the absolute right to decide who provides essential service? What would such absolute power do to the right to strike?]

Under legislation passed by the government of Saskatchewan (*The Public Service Essential Services Act* ss. 2008 c. P42.2), any category of worker identified by the government as

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providing an essential service would be denied the right to strike. The first question the court had to establish was whether the right to strike was constitutionally protected. The majority said that is was. As Justice Abella notes at para 54,

> Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

The majority concluded that the right to strike was protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (freedom of association) because of the significant role it plays in the collective bargaining process. Therefore, the government's legislation limiting that right would have to meet the strictures of s. 1.

There were several problems with the legislation causing it to fail s. 1 scrutiny. At para 90, the court observed that Saskatchewan had offered no evidence supporting its position that "ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority." At para 92, the court noted with concern the absence of "an impartial and effective dispute resolution process to challenge public employer designations under…the legislation." Also problematic was the legislative absence of a "meaningful alternative mechanism for resolving bargaining impasses, such as arbitration," at para 93. In short, at para 96:

> Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective 2015 SCC 4 (CanLII) bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing. Quite simply, it impairs the s. 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

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On the other hand, the government employer has to ensure that the public is properly served and not placed in danger, for example. According to the dissenting Justices Rothstein and Wagner, the majority of the court fell into error by relying on a "19th century conception of the relationship between employers and workers," enshrining "a political understanding of this concept that favours the interests of employees over those of employers and even over the public" at para 125.

Note, however, that the majority was not opposed to legislation limiting the right to strike per se. Its concern was that this particular piece of legislation failed the minimal impairment and proportionality tests.

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

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

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

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required them to have a longer qualifying period for benefits than anyone else under the Act. According to Mr. Justice Ritchie, if the impugned provision in the Act

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

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

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

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

4. Review Figure 2.3 on page 34. 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.

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

Section 1 allows the courts to strike the balance between protecting the rights of the individual and allowing governments to legislate for the benefit of larger groups or even all members of society. Section 1 of the *Charter* is necessary. Otherwise, if rights were absolute, a person could slander and hide behind the concept of freedom of speech, to name just one example.

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

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

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

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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 43–44

1. **The government of Alberta has passed regulations that include requirements that home inspection businesses be provincially licensed and carry $1 million in errors and omissions insurance. Beyond this, the province has mandated educational standards for home inspectors with the goal of improving the quality of work done by the home inspection industry. Then Opposition Liberal MLA Hugh MacDonald endorsed the regulations as a means of clamping down on fly-by-night home inspectors, observing:**

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

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

A housing purchase is one of the most expensive purchases most individuals make in their lifetime. An unregulated housing inspection industry means that consumers are more likely to run up against an incompetent or a dishonest home inspector and buy the wrong house. This can have utterly devastating financial consequences. As reported by Karen Kleiss ("Home buyers get more protection," *Edmonton Journal* (14 May 2011), online: Edmonton Journal <http://www2.canada.com/edmontonjournal/news/story.html?id=b33dcbc8-b96a-4f5c-bd78-

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f9f1a8862aa3)>, Terry Fikowski (of HouseMaster Home Inspections) welcomes home inspector regulation, because "a lot of the requirements in the regulation are things that home inspectors already do. Those that don't probably shouldn't be in the industry." He adds: "A lot of operators do not have any formal training of any sort, so training is a big thing. It's going to make sure those people get the proper training and have the proper insurance."

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

2. **A brawl at a popular Halifax nightclub called the Dome resulted in 38 arrests and the suspension of the Dome's liquor licence. Government 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, then Nova Scotia's Minister of Health Promotion and Protection. The Nova Scotia government expressed its hopes to develop recommendations to address problems associated with excess alcohol consumption. From a risk management perspective, how should local bar owners approach governmental concern over bar violence? [footnotes deleted]**

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

- The industry might consider voluntarily ending discount drinks pre-emptively. This may help to reduce violence as it will help to reduce the number of people who are

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intoxicated. An industry-wide change deals with the problem of only some bars eliminating discount drinks.

- Bar owners should consider better control and security within bars and nightclubs.
- Bar owners should consider better training of their security personnel to prevent violence from occurring or escalating.
- Bar owners should consider lifetime bans for troublemakers.
- Bar owners should increase the number of video surveillance cameras.
- Bar owners should ensure that service is cut off to those who are impaired (which is already required by law).

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

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

- Limiting the number of patrons to 80 per cent of bar capacity.
- Hiring at least four off-duty police on a busy night, up from two.
- Doubling security staff inside the bar.
- Hiring a consultant for security training.
- Doubling the number of video cameras to 64 and giving police access to them.

When it comes to the lifetime ban for known troublemakers, the bar hopes to set a precedent.

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See CBC News, "Bar to stop selling $1 drinks after brawl" (28 December 2007), online: CBC News <http://www.cbc.ca/news/canada/nova-scotia/bar-to-stop-selling-1-drinks-after-brawl-1.667475>.

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

For analysis of Alberta law and related commentary, see CBC News, "New rules for Alberta bar patrons kick in" (1 August 2008), online: CBC News <http://www.cbc.ca/news/canada/calgary/new-rules-for-alberta-bar-patrons-kick-in-1.749699>.

3. **With the goal of reducing childhood obesity, the Ontario government in 2014 introduced a bill to require restaurants to post calorie counts beside menu items so consumers would know, for example, that a "raisin bran muffin from Tim Hortons has more calories than a cheeseburger" in the words of then Health Minister Deb Matthews. The Canadian Restaurant and Foodservices Association (CRFA) has dismissed the initiative as too simplistic as well as confusing. "There could be 10,000 ways to make a pizza. How do you put that out there?" said James Rilett, the CRFA's vice-president for Ontario. "It's not simply just stick a number up there and people will understand it." Do you agree with the proposed legislation? Why or why not? [footnotes deleted]**

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Ontario's Bill 45, the *Making Healthier Choices Act*, passed third reading on May 26, 2015 with all three parties voting "overwhelmingly" in favour. See Robert Benzie, "Ontario bans flavoured tobacco, forces calorie count on fast-food menus," *The Toronto Star* (26 May 2015) online: Toronto Star <http://www.thestar.com/news/queenspark/2015/05/26/ontario-mpps-ban-flavoured-tobacco-force-calorie-count-on-fast-food-menus.html>. It comes into force on January 1, 2017.

As summarized by Wendy Glauser, Jill Konkin, and Sachin Pendharkar, "Do calories on restaurant menus make a difference?" Healthy Debate (9 April 2015), online: Healthy Debate <http://healthydebate.ca/2015/04/topic/calories-restaurant-menus>, the legislation

> requires restaurants, supermarkets and other vendors that sell ready-to-eat food to display the total calories alongside menu options. The law will only apply to vendors with 20 locations or more, due to the expense of measuring calories and the requirement of a very standardized menu. Though the current bill doesn't describe the method that restaurants use to measure calories, inspectors will be able to investigate to ensure accuracy. Companies in violation of the Act would face hefty fines.

The entire bill can be found at: <http://www.ontla.on.ca/web/bills/bills_detail.do?BillID=3080>.

One the one hand, the legislation is designed to assist consumers in a landscape where a food item that is seemingly low in calories is, in fact, tremendously and unexpected caloric. In this sense, the education is a good thing. According to a government press release, an important object of the bill is to help consumers chose more wisely by "giving them caloric information when eating out or purchasing take-away meals." See Government of Ontario, "New Legislation Passes to Help Reduce Smoking and Obesity Rates" (26 May 2015) online Government of Ontario: <http://news.ontario.ca/mohltc/en/2015/05/new-legislation-passes-to-help-reduce-smoking-and-obesity-rates.html>. In this same press release, the government notes that

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"According to a 2011 Ipsos Reid study, approximately 95 per cent of Ontarians support requiring fast food restaurants to list nutrition information on their menus."

On the other hand, the legislation might be considered draconian and unnecessary. As reported by Glauser et al., James Rilett, vice president for Canadian Restaurant and Foodservices Association, Ontario, "states that his members prefer voluntary programs but also said restaurant owners go out of their way to respond to nutritional transparency requests from the public. They want customers to be happy," he explained.

While it is possible that customers may be confused by calorie count postings, this remains to be seen. Once the legislation is proclaimed in force, more will be known about its effectiveness. A 2011 study done in the United States and reported on by Stanford Business GSB, concluded that

> when restaurants post calories on menu boards, there is a reduction in calories per transaction. Based on transaction data provided by Starbucks, researchers from Stanford GSB found that calorie-posting in New York City in 2008 led to a 6% reduction in calories per transaction. According to the study, beverage choices at Starbucks are unaffected by calorie posting. However, calorie posting leads consumers to buy fewer food items, and to switch to lower calorie food items.

See Stanford Business GSB, "Researchers: How Does Posting Calories Affect Behavior?" (1 February 2011) online Standard Business GSB <http://www.gsb.stanford.edu/insights/researchers-how-does-posting-calories-affect-behavior>.

In sum, the legislation may help to fight obesity by providing education and is tremendously popular with Ontarians. However, it undoubtedly interferes with how chain restaurants may want to run their business. It is worth noting that now that the legislation has passed, however, business criticisms of the concept have become more muted.

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4. **Liberal leader Justin Trudeau is in favour of ending the prohibition on marijuana, noting that it costs $500 million a year in law enforcement, has caused 475,000 Canadians to have criminal records since 2006, and pumps money into organized crime and crime gangs. The Conservative government is on the record as being opposed to decriminalization but is considering a softening in the current laws so that police could simply ticket those found with small amounts of marijuana instead of laying charges. Should marijuana be decriminalized? Why or why not? If a province wanted to legalize marijuana, would it have the power to do so? [footnotes deleted]**

The content of this Situation for Discussion provides some analysis to get students started. The biggest point in favour of decriminalization is simply this: it is unduly harsh and punitive to give someone a criminal record for a relatively minor infraction. Other possible reasons for decriminalization include providing government with another product to tax; providing government with the opportunity to regulate the sale and production of the drug, thereby increasing safety; and freeing the police to investigate more serious crimes.

Reasons against legalization include the view that legalization is contrary to a law and order agenda; marijuana is a gateway drug, leading the user to more serious and dangerous drugs; the drug is carcinogenic and linked to a host of illnesses, including lung cancer, and that the state should not be seen to condone drug use of this kind.

One purpose of the debate this question is intended to spark is to illustrate the policy analysis that goes into legislative decision-making as well as ideological underpinnings informing both sides of the divide.

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Of course, a province cannot legalize marijuana since jurisdiction over such a matter falls to the federal government under its criminal law power.

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

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

6. **Several provinces have passed legislation that restricts the sale of violent video games to children. How could this legislation be challenged under the *Charter*? Explain. Are there any ethical considerations when contemplating such a challenge?**

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.

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> 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).

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Chapter 2

The Canadian Legal System

Enriched Instructor's Manual

by Shannon O'Byrne

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I. TEACHING OBJECTIVES

After studying this chapter, students should have an understanding of

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

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Whereas Chapter 1 dealt with the question "Why study the law in a business program?" Chapter 2 explains what the law is and where the law comes from. In sum, the chapter provides students with grounding in the basics of governmental operations—legislative, executive, and judicial. Though this makes for a reasonably technical chapter, it is an important one because it introduces students to the regulatory or administrative context of doing business.

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

- The legislative branch of government, which passes statute law, such as Nova Scotia's *Tobacco Access Act.*
- The political executive, which decides on the policy leading to Nova Scotia's legislation. As another example of involvement by the political executive, federal regulations determine what the industry must show on the face of its cigarette packages.
- The judicial branch of government, which determines, for example, whether or not the impeached legislation is constitutional.

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

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II. TEACHING STRATEGIES

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

One approach that has proven successful in explaining the sources and classification of the law is to incrementally explain Figure 2.8 in the textbook (page 39), which is reproduced on the next page. Figure 2.8 summarizes the following basic propositions introduced in the chapter:

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

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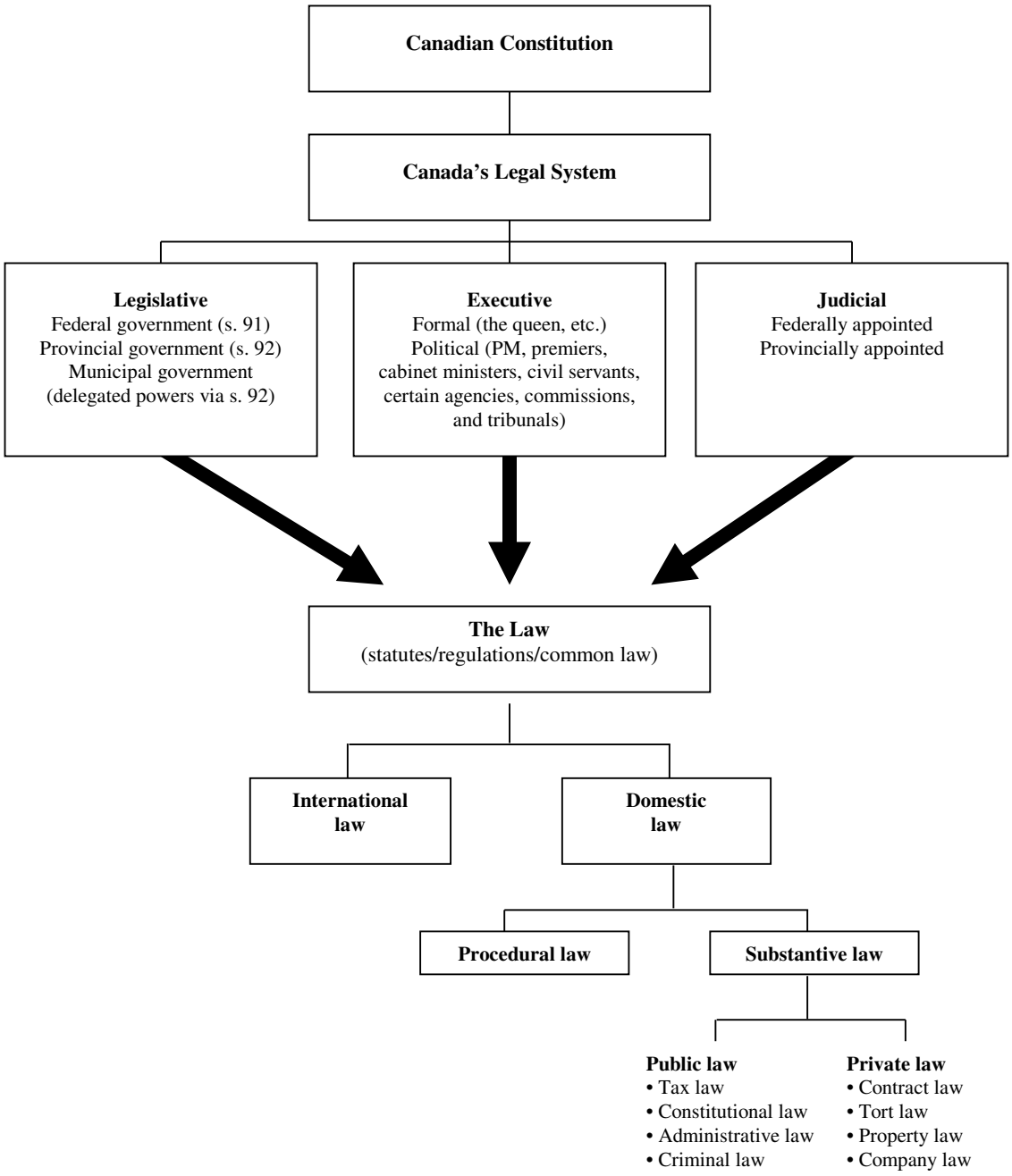
and criminal law. Private law includes contracts law, tort law, property law, and company law.

Figure 2.8 [from textbook]



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

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

III. STUDENT ACTIVITIES

Task 1: To help students gain familiarity with how government works, ask them to research a discrete topic—such as the history of Parliament or the division of powers.

Task 2: Situation for Discussion 2 describes a brawl at a bar in Halifax and the potential legislative aftermath. Ask the students to find other examples in which possible problems arising from business management/business activity might lead to new laws being enacted. (Examples from the textbook include a lack of safety in drinking establishments leading to minimum drink prices being enacted in Alberta (see "Alberta mandates minimum booze prices," *Calgary Herald* (3 July 2008) at <http://www.canada.com/topics/news/national/story.html?id=b05c84ea-76a5-

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41a6-beeb-7e7ef41006e8>) and in Nova Scotia (see CBC News, "N.S. sets minimum price for alcoholic drinks. Rule ends dollar-a-drink nights at Halifax bars" (19 December 2008) online: CBC <http://www.cbc.ca/news/canada/nova-scotia/n-s-sets-minimum-price-for-alcoholic-drinks-1.755597>); fly-by-night home inspectors leading to legislation governing the home inspection industry (Situation for Discussion 1); and gender-based pricing leading an Ontario backbencher to introduce a bill banning the practice (see Questions for Critical Thinking 1). Examples from Chapter 1 include the inhumane treatment of chickens being transported for slaughter (see Ethical Considerations: Maple Lodge Farms conviction) and underage tanning (see Business and Legislation: Regulating the Tanning Industry, page 9).

IV. EXPLANATION OF SELECTED FEATURES

Page 21

Photo caption: Some customers are unhappy with display bans, including Rene LaPointe. "It's just another law for the government to throw at us," says LaPointe. "They're treating the adults like children." Do you agree with his analysis? [footnote deleted]

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

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Page 24

Environmental Perspective: Concurrent Jurisdiction over the Environment

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

Concurrent jurisdiction over the environment is inevitable because it follows from the distinct powers that each level of government is given under the Constitution. For example, a source of the federal government's power over the environment comes from its s. 91 power over navigation and shipping. One source of the provincial government's power over the environment derives from its jurisdiction over such matters as property and civil rights. Therefore, concurrent jurisdiction has at least logic to recommend it and leaves environmental matters in the hands of the level of government that might be best equipped be able to assess and handle it. However, this division can also lead to a regrettable lack of coordination on a variety of fronts, including the cleanup of contaminated soil, as well as regulatory complexity and inefficiencies.

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

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Page 26

International Perspective: Antismoking Treaty

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

Countries working together from an agreed-on template—such as is contained in a treaty—are likely to benefit from the increased efficiencies associated with this kind of cooperation. Instead of each country working in isolation, countries combine forces, share their knowledge base, and formulate a generalized solution. Such an efficiency counts as an advantage of global cooperation, as do the opportunities that emerge for cooperation on other related issues. Cooperation also makes it easier for each country to resist the efforts of smoking lobbies and the tobacco industry. The disadvantages relate largely to a compromised ability to change course in how smoking is to be combated within a country.

Page 26

Photo caption: Hookah tobacco is at least as dangerous as cigarette tobacco. Should it be exempt from appropriate health warnings in Canada?

The Mayo Clinic Patient Care and Health Info website contains an article from J. Taylor Hays entitled "Is hookah smoking safer than smoking cigarettes?" (undated document), online: Mayo Clinic <http://www.mayoclinic.org/healthy-lifestyle/quit-smoking/expert-answers/hookah/faq-20057920>. Here, the author states:

> The tobacco is no less toxic in a hookah pipe than in a cigarette, and the water in the hookah does not filter out the toxic ingredients in the tobacco smoke. Hookah smokers may actually inhale more tobacco smoke than cigarette smokers do because of the large

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volume of smoke they inhale in one smoking session, which can last as long as 60 minutes.

See too Shereen Lehman, "Hookah smokers are inhaling benzene, a leukemia risk, study says" *Globe & Mail* (27 November 2014) at L7.

Given these risks, it is difficult to see why hookah tobacco is not subject to health warnings and other forms of government regulation. In fact, the Centers for Disease Control and Prevention notes that hookah smoking is rising among youth and college students. It also references WHO's Study Group on Tobacco Product Regulation which urges consideration of the following to reduce hookah smoking. Note that five of the six points would involve government regulation of the product:

- "Education of health professionals, regulators, and the public at large is urgently needed about the risks of hookah smoking, including high potential levels of second-hand exposure among children, pregnant women, and others.
- Hookahs and hookah tobacco should be subjected to the same regulations as cigarettes and other tobacco products.
- Hookahs and hookah tobacco should include strong health warnings.
- Claims of harm reduction and safety should be prohibited.
- Misleading labelling, such as "contains 0 MG tar," which may imply safety, should be prohibited.
- Waterpipes should be included in comprehensive tobacco control efforts, including prevention strategies and cessation interventions.

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- Hookahs should be prohibited in places consistent with bans on cigarette and other forms of tobacco smoking."

See online CDC <http://www.cdc.gov/features/hookahsmoking/>.

For further analysis from a specifically Canadian legal perspective, see Non-Smokers' Rights Association, "Water Pipe Smoking in Canada: New Trend, Old Tradition" (February 2012), online: Non-smokers' rights association <https://www.nsra-adnf.ca/cms/page2289.cfm>.

Page 27

Business and Legislation: Tobacco Regulation by the Federal Government

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

For the moving back story about Barb Tarbox's image on cigarette packages, see the DVD supplement supporting this Instructor's Manual that contains the clip entitled "Barb Tarbox legacy."

Statistics Canada reports that smoking has declined dramatically over the last 10 years and particularly so among teens. As reported by the *Red Deer Advocate* (22 June 2012), Ottawa credits some of this success to its "its mandatory, graphic anti-smoking packaging for tobacco products." The article goes on to note that "one in five Canadians aged 12 and over—5.8 million people—smoke on an occasional or a daily basis, down from 25.9 per cent in 2001. For teens aged 15 to 17, the rate fell over the same period to 9.4 per cent from 20.8 per cent. For those aged

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18 to 19, the rate dropped to one in five from one in three." Other factors that have presumably contributed to the decline in smoking rates include increased education programs, reports the *Red Deer Advocate*. Another contributing factor in the decline is the escalating cost of cigarettes because of increased levels of taxation. See *Red Deer Advocate*, "Gruesome images on cigarette packs seem to be working," *Winnipeg Free Press* (22 June 2012), online: Winnipeg Free Press <http://www.winnipegfreepress.com/opinion/westview/gruesome-images-on-cigarette-packs-seem-to-be-working-159983365.html>.

An analysis of studies conducted at the University of North Carolina at Chapter Hill concludes that pictorial warnings are more effective than text warnings alone:

> Pictorial warnings had a bigger impact on 20 outcome measures—including increasing intentions not to start smoking, intentions to quit smoking, getting and keeping people's attention, triggering people to think about the negative impacts of smoking, and for credibility.
> ….
> Pictorial warnings made people look at smoking in a more negative way and increased their intentions to quit smoking. This is very important, as these variables are associated with later attempts to quit smoking …..

See UNC Health Care and School of Medicine Newsroom, "UNC Analysis Shows Advantage for Picture-Based Cigarette Pack Warnings over Text Warnings" (6 May 2015), online: UNC <http://news.unchealthcare.org/news/2015/may/unc-analysis-shows-advantage-for-picture-based-cigarette-pack-warnings-over-text-warnings>.

Page 31

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

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

Students may be divided on this point. On the one hand, it seems reasonable for government to seek to reduce smoking, particularly in young people. Since power walls normalize smoking—at

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least to some extent—banning such walls is an important and relatively unobtrusive way of helping to ensure that young people never take up a habit that could kill them. As noted in the Business Law in Practice opening scenario, in countries that have banned tobacco displays, there has been an encouraging reduction in smoking by young people.

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

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

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

This response by the *Chronicle Herald* creates its own set of problems because now, to apply the new distinction it advances, we have to ask if the vendor's raison d'être is tobacco sales or not. This is a slippery standard whereas the existing legislation at least has clarity to recommend it. A person is a tobacconist or that person is not. Full stop. As well, it may be problematic to conclude, as the editorial does, that Gee obeys the law "in every way that matters." Part of the

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legislative frameworks requires tobacco products not to be displayed unless the seller is a tobacconist. One could argue that this provision matters too.

V. CHAPTER STUDY

Questions for Review, page 42

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

2. **What does "jurisdiction" mean?**

3. **What is an example of a constitutional convention?**

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

5. **What is the doctrine of paramountcy?**

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

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

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

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9. What is the executive branch of government?

10. How is the executive branch different from the legislative branch?

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

12. What are the two types of trial courts?

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

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

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

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

17. What is the difference between public law and private law?

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

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19. What is the role of equity?

20. What is one important function of administrative law?

Questions for Critical Thinking, page 43

1. Women pay higher prices for certain products and services compared to what men are charged—from dry-cleaning to haircuts. This is known as gender-based pricing. Is gender-based pricing objectionable? Should government regulate price when it is discriminatory or should that be left to the free market?

2. The Supreme Court of Canada in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, ruled that public sector employees (that is, employees who work for government) have a constitutionally protected right to strike. More specifically, it ruled that labour reform legislation from Saskatchewan was unconstitutional because it interfered with the right to strike in a way that went beyond what was reasonably required. For example, the legislation prohibited government employees who performed essential services from participating in a strike but provided that the public sector employer *alone* had the right to determine who those employees would be. Do you think the employer should have the absolute right to decide who provides essential service? What would such absolute power do to the right to strike?]

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

4. **Review Figure 2.3 on page 34. In your opinion, how has the *Charter* affected business activity?**

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

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

Situations for Discussion, pages 43–44

1. **The government of Alberta has passed regulations that include requirements that home inspection businesses be provincially licensed and carry $1 million in errors and omissions insurance. Beyond this, the province has mandated educational**

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standards for home inspectors with the goal of improving the quality of work done by the home inspection industry. Then Opposition Liberal MLA Hugh MacDonald endorsed the regulations as a means of clamping down on fly-by-night home inspectors, observing:

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

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

2. **A brawl at a popular Halifax nightclub called the Dome resulted in 38 arrests and the suspension of the Dome's liquor licence. Government 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, then Nova Scotia's Minister of Health Promotion and Protection. The Nova Scotia government expressed its hopes to develop recommendations to address problems associated with excess alcohol consumption. From a risk management perspective, how should local bar owners approach governmental concern over bar violence? [footnotes deleted]**

3. **With the goal of reducing childhood obesity, the Ontario government in 2014 introduced a bill to require restaurants to post calorie counts beside menu items so consumers would know, for example, that a "raisin bran muffin from Tim Hortons**

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has more calories than a cheeseburger" in the words of then Health Minister Deb Matthews. The Canadian Restaurant and Foodservices Association (CRFA) has dismissed the initiative as too simplistic as well as confusing. "There could be 10,000 ways to make a pizza. How do you put that out there?" said James Rilett, the CRFA's vice-president for Ontario. "It's not simply just stick a number up there and people will understand it." Do you agree with the proposed legislation? Why or why not? [footnotes deleted]

4. **Liberal leader Justin Trudeau is in favour of ending the prohibition on marijuana, noting that it costs $500 million a year in law enforcement, has caused 475,000 Canadians to have criminal records since 2006, and pumps money into organized crime and crime gangs. The Conservative government is on the record as being opposed to decriminalization but is considering a softening in the current laws so that police could simply ticket those found with small amounts of marijuana instead of laying charges. Should marijuana be decriminalized? Why or why not? If a province wanted to legalize marijuana, would it have the power to do so? [footnotes deleted]**

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?**

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6. Several provinces have passed legislation that restricts the sale of violent video games to children. How could this legislation be challenged under the *Charter*? Explain. Are there any ethical considerations when contemplating such a challenge?

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Answers to Chapter 2 Homework Questions in MindTap

1. What areas of jurisdiction does s. 91 of the Constitution Act 1867 assign and what level of government is this jurisdiction assigned to?

ANS: Section 91 of the *Constitution Act, 1867* assigns jurisdiction to the federal government to make laws in the following areas: interprovincial/international trade and commerce, trade as a whole, postal service, navigation and shipping, seacoast and inland fisheries, currency, national defence, criminal law, banking, and all other legislative areas not expressly given to the provinces.

2. Describe the composition of the formal executive branch of government and explain the nature of its role in the legislative process.

ANS: The executive branch of government is made up of the Canadian head of state, the ruling monarch in England, who is currently Queen Elizabeth II; the governor general, who is the head of state's representative in the federal parliament; and the lieutenant governors, who are the head of state's representatives in the provincial parliaments. The formal executive branch of the government has a significant role in the legislative process in that every piece of federal or provincial legislation must receive royal assent in order to become valid and enforceable statute law.

3. Describe the important responsibility of the judicial branch with respect to legislation and explain how the judiciary approaches protecting individual Charter rights.

ANS: The important responsibility of the judicial branch of the government is to determine whether legislation passed by parliament or the provincial legislatures meets the requirements of the Canadian Constitution and the Canadian Charter of Rights and Freedoms. The Charter is a judicially enforceable guarantee that the government will act consistently with the values associated with a liberal democratic state. Madam Justice Wilson stated that "the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."

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4. Identify the various categories of law and describe the nature of the law that pertains to each category.

ANS: The various categories of law and the nature of law that pertains to each category are as follows:

- *Domestic law*: internal law of a country, including statute and common law
- *International law*: law that governs relations between states and international organizations
- *Substantive law*: law that defines rights, duties, and liabilities
- *Procedural law*: law governing the procedure to enforce rights, duties, and liabilities
- *Public law*: law that regulates the relationship between persons and government
- *Private law*: law that regulates the relationship between persons
- *Common law*: private law based on precedent
- *Civil law*: private law based on a civil code.

5. Explain the significance of administrative law with respect to commercial activity.

ANS: Administrative law is one of the primary legal areas in which government and business interact. Administrative law is comprised of rules created and applied by the various boards, agencies, commissions, tribunals, and individuals who exercise a governmental function as a result of legislation giving them that power. Administrative law also refers to the rules of fairness that constrain how administrative bodies exercise their authority. Administrative law has significant impact on business because so much commercial activity is regulated by these bodies, from licensing requests to zoning and subdivision applications and human rights complaints. Administrative law provides protections by ensuring that a fair process accompanies any regulatory decisions that affect a business or any other activity.

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Answers to Chapter 2 Study Guide Questions in MindTap

1. Describe how each of the branches of government affect business and explain why it is essential for business owners and managers to have some basic knowledge of the Canadian legal system and the constitutional law that governs it.

ANS: The legislative branch of government passes laws that impact on business operations. The executive branch implements and generates policy that may be directed at business. The judicial branch provides rulings that not only resolve existing legal conflicts, but also impact on future disputes. Failure to comply with laws enacted by governments can result in fines or other penalties, including closure of a business. Ignorance of the law means that business misses opportunities to influence government policy and take advantage of favourable laws. Failure to challenge laws that are unconstitutional means businesses may be needlessly constrained.

2. What areas of jurisdiction does s. 92 of the Constitution Act 1867 assign and what level of government is this jurisdiction assigned to?

ANS: Section 92 of the *Constitutional Act, 1867*, assigns jurisdiction to the provincial governments to make laws in the following areas: hospitals, property and civil rights within the province, administration of justice, local matters, incorporation of provincial companies, and power to delegate law-making authority to municipal governments.

3. Describe the composition of the political executive and the cabinet. Explain the significant law-making function of cabinet, the nature of regulations, and the relevance of the political executive to businesses.

ANS: The political executive consists of the chief executive (prime minister or premier), as well as cabinet ministers, civil servants, and the agencies, commissions, and tribunals that perform governmental functions. The cabinet is comprised of the all the ministers of the various government departments, as well as the prime minister or premier. Cabinet holds the significant law-making function of passing regulations that provide the detail pertaining to enacted statutes. Regulations are a form of subordinate legislation that can only have the force of law if that power is contained in the statute passed by parliament or the provincial legislature. The political executive is of great relevance to businesses because it formulates and executes government policy and administers to all departments of the government. Businesses typically lobby the political executive in an attempt to secure favourable or improved treatment under legislation or with respect to policy formation.

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4. Identify the source of the Supreme Court's power to strike down legislation, as well as the sections of the *Charter* that: (1) prohibit violation of *Charter* rights or freedoms, (2) enables the government to violate *Charter* rights or freedoms, and (3) gives the legislative branch the final word on infringement of *Charter* rights and freedoms.

ANS: The Supreme Court of Canada's authority to strike down legislation is set out in sections 24 and 52 of the *Charter*. Section 32 of the *Charte*r prohibits governments from violating any of the *Charter* rights or freedoms through the imposition of unconstitutional legislation or regulations. Section 1 of the *Charte*r states; "The *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," meaning, a government can restrict any right included in the *Charter*, provided it has balanced all relevant interests carefully, as required by section 1. Section 33 of the *Charter* allows government to enact legislation "notwithstanding" its unconstitutionality. Although this option does not exist for all rights and freedoms guaranteed by the *Charter*, it does exist for a great many of them.

5. Identify the types of law that are classified as private law and the types of law that are classified as public law.

ANS: The types of law that are classified as private law are contract law, tort law, property law, and company law. The types of law that are classified as public law are criminal law, tax law, constitutional law, and administrative law.

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Chapter 2

Video Quiz

1. What subordinate legislation would the federal government have used to implement the advertising campaign discussed in the video?
   a. Tobacco Act
   b. Tobacco Access Act
   c. Tobacco Products and Information Act
   d. Canada Health Act

   ANS: C

   REJ: The Executive Branch of the Government

2. What is the legislation that limits a retailer's ability to display cigarettes within a store called?
   a. Tobacco Act
   b. Tobacco Products and Information Regulations
   c. Tobacco Access Act
   d. Environmental Protection Act

   ANS: C

   REJ: The System of Courts

Short Answer Question

1. What were the four main points of reasoning offered by the court in finding that restricting the display of tobacco products in the Robert Gee case was not unconstitutional pursuant to S.1 of the Charter of Rights and Freedoms?

   ANS:
   Section 1 of the Charter sets out the following: 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.

   1. The purpose of the The Tobacco Act was to protect the health of Nova Scotians, particularly that of youth.
   2. The purpose of the legislation was important given the danger of tobacco products.
   3. The ban on display was a rational means of achieving the legislative goal of protecting health.
   4. Gee could still offer information about the products he sold and show the product at time of purchase

   REJ: The System of Courts

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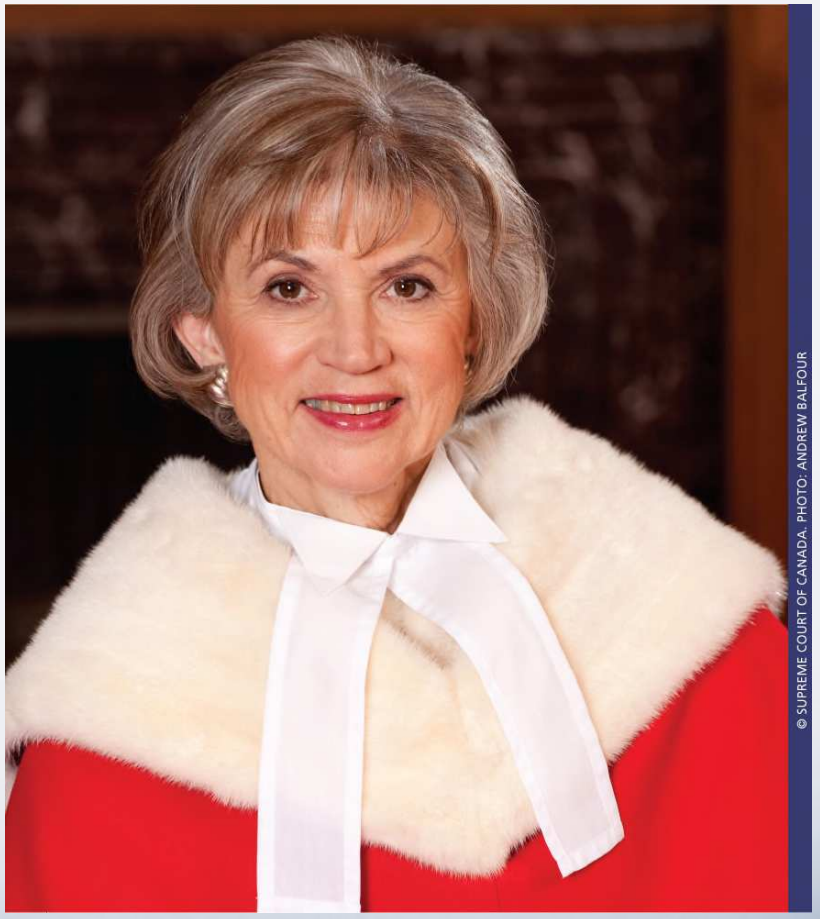
The Canadian Legal System

Chapter 2



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The Canadian Legal System

LEARNING OBJECTIVES

- Understand the impact of the Canadian legal system on business
- Understand the role of constitutional law in protecting commercial rights and freedoms
- Understand the government's law-making powers under sections 91 and 92 of the *Constitution Act, 1867*
- Understand the executive's formal and political functions in regulating business

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The Canadian Legal System

LEARNING OBJECTIVES continued

- Understand the judiciary's role in assessing the constitutionality of legislation
- Understand the classifications of law
- Understand how administrative law affects business

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The Canadian Legal System

- The machinery that comprises and governs the legislative, executive, and judicial branches of government

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The Canadian Legal System

LEGISLATIVE BRANCH – The branch of government that creates statute law

STATUTE LAW – Formal, written laws created or enacted by the legislative branch of government

JURISDICTION – The power that a given level of government has to enact laws

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The Canadian Constitution

- Contained in several different documents
- All Canadian laws must comply with the Canadian Constitution.
- Is difficult to change – a special amending formula must be met

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Constitutional Conventions

- Important rules that are not enforceable by a court of law but that practically determine how a given power is exercised by government
- *Example:* The office of prime minister does not formally exist in our constitutional documents.

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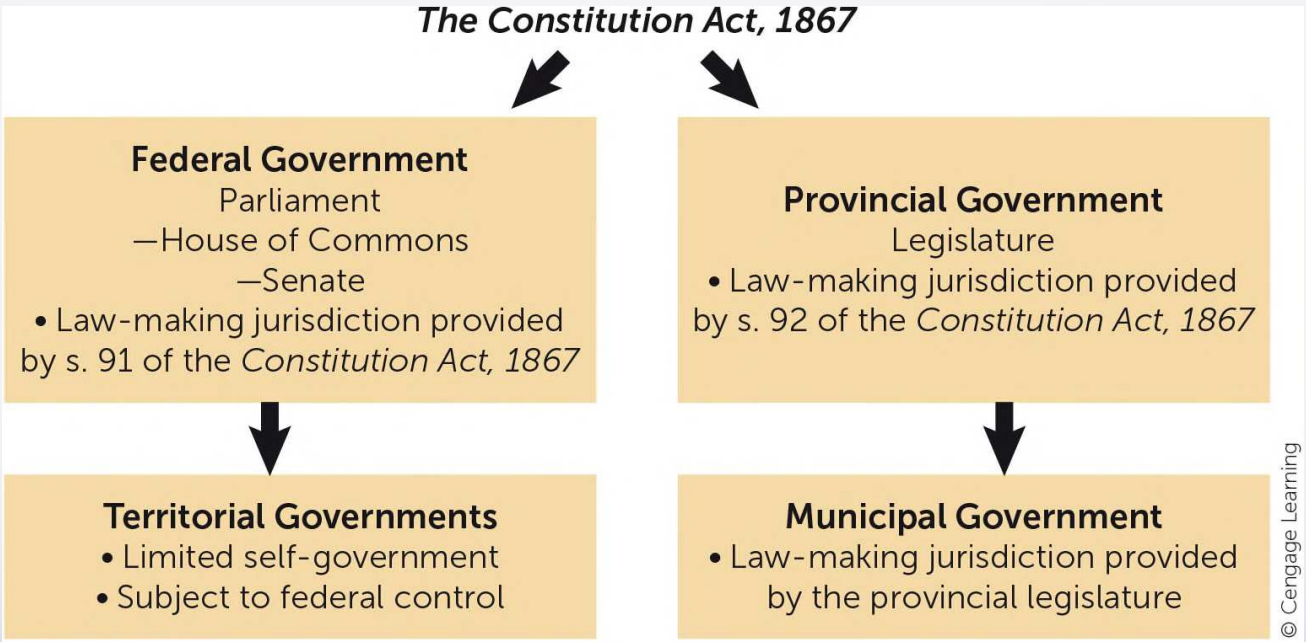
The Constitution Act, 1967



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Constitution Act, 1867

- Formerly the *BNA Act*
- Sets up our courts
- Contains the "**DIVISION OF POWERS**" **Exclusive Federal Jurisdiction (s. 91)**, such as:
  - currency
  - national defence
  - criminal law
  - banking
  - postal service

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Constitution Act, 1867

- **Exclusive Provincial Jurisdiction (s. 92)** includes:
  - hospitals
  - property and civil rights with the province
  - administration of justice
  - local matters
  - incorporation of provincial corporations
  - municipalities

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Constitution Act, 1867

- **Municipalities**
  - Have no constitutionally recognized powers
  - Are usually delegated powers by the provinces in some areas, such as
    - zoning
    - property tax
    - licensing

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Canadian Charter of Rights and Freedoms (Charter)

- Created in 1982, part of the *Constitution Act, 1982*
- Guarantees specific rights and freedoms enshrined in the Constitution and is enforceable by the judiciary

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Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

a. freedom of conscience and religion;

b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

c. freedom of peaceful assembly; and

d. freedom of association.

(*Charter*, s. 2)

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Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(*Charter*, s. 15)

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Environmental Perspective

Concurrent Jurisdiction over the Environment

- Is concurrent jurisdiction over the environment inevitable?
- What are the advantages and disadvantages of concurrent jurisdiction?

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International Perspective

Anti-Smoking Treaty

- What are some of the efficiencies of inter-country cooperation?

- Should Hookahs tobacco be subject to the same government regulation?

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Are There Limits to Our *Charter* Rights?

Section 1 – Provides that all rights in the *Charter* are subject to *reasonable limits*

Do you support Gee's decision to fight the legislation?

Store Owner Challenges Nova Scotia's *Tobacco Access Act* (p. 32 of textbook)

KIRK STARRATT, KINGS COUNTY ADVERTISER, TC MEDIA

Robert Gee

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Are There Limits to Our *Charter* Rights?

SECTION 33 (THE "NOTWITHSTANDING CLAUSE") – Allows governments to "opt out" of some *Charter* rights by enacting legislation "notwithstanding" that it violates the *Charter*

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Concurrent Jurisdiction

- Jurisdiction that is shared between levels of government, such as
  - public health
  - the environment

DOCTRINE OF PARAMOUNTCY – Provides that federal laws prevail when there are conflicting or inconsistent federal and provincial laws

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Executive Branch of Government

FORMAL EXECUTIVE – The branch of government responsible for the ceremonial features of government

POLITICAL EXECUTIVE – The branch of government responsible for day-to-day operations, including formulating and executing government policy, as well as administering all departments of government

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Executive Branch of Government

RATIFY – To authorize or approve

TREATY – An agreement between two or more states that is governed by international law

BYLAWS – Laws made by the municipal level of government

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Executive Branch of Government

CABINET – A body composed of all ministers heading government departments, as well as the prime minister or premier

REGULATIONS – Rules created by the political executive that have the force of law

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Judicial Branch of Government

JUDICIARY – A collective reference to judges

JUDGES – Those appointed by federal and provincial governments to adjudicate on a variety of disputes, as well as to preside over criminal proceedings

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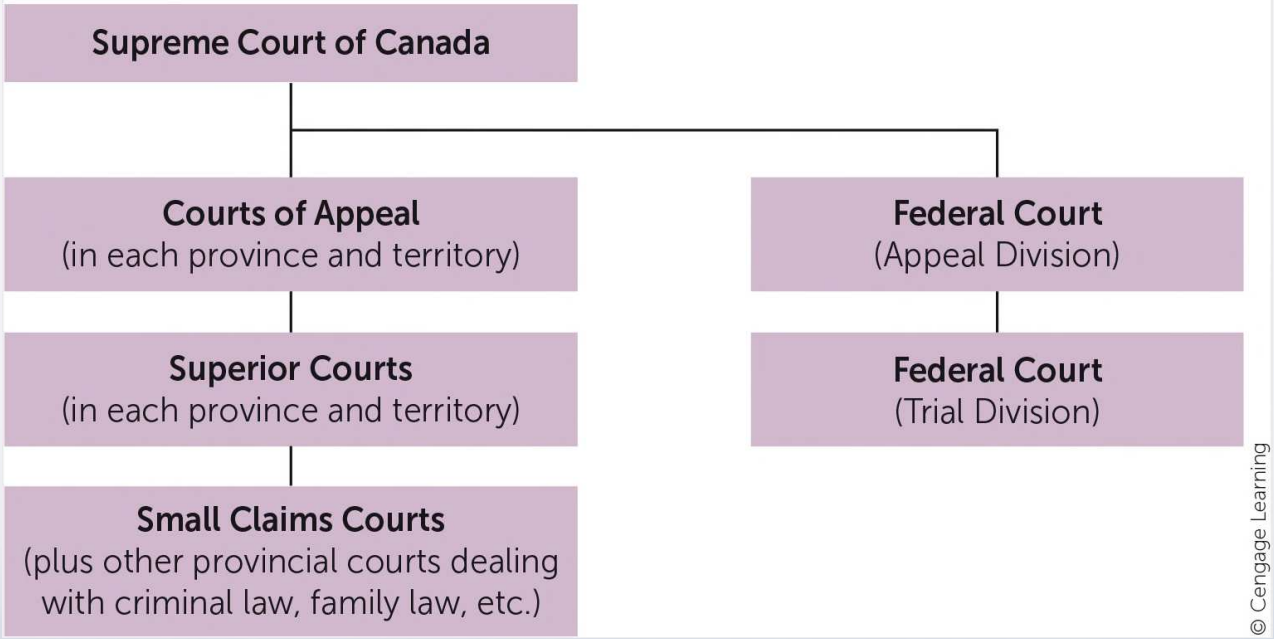
Courts Dealing with Commercial Disputes

FIGURE 2.2 Courts Dealing with Commercial Disputes



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The System of Courts

INFERIOR COURT – A court with limited financial jurisdiction whose judges are appointed by the provincial government

SMALL CLAIMS COURT – A court that deals with claims up to a specified amount

SUPERIOR COURT – A court with unlimited financial jurisdiction whose judges are appointed by the federal government

SUPREME COURT OF CANADA – The final court for appeals in the country

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The System of Courts

SUPREME COURT OF CANADA (SCC) – The final court for appeals in the country

FEDERAL COURT OF CANADA – The court that deals with some types of litigation involving the federal government

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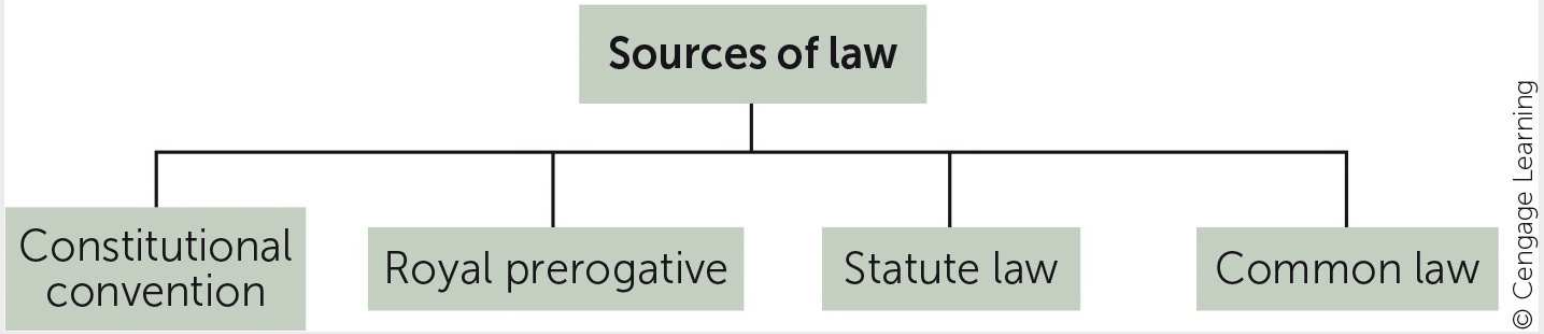
Sources of Law

FIGURE 2.4 The Sources of Law



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Sources of Law

ROYAL PREROGATIVE – Refers to the historical rights and privileges of the Crown, including the right to conduct foreign affairs and to declare war

COMMON LAW – Judge-made law. Common law is created when judges make decisions. The decisions become precedents, and they are cumulatively referred to as the common law.

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How the Common Law System Works

- A lower court must follow a relevant precedent created by a higher court within the same jurisdiction.
- Not all precedents are of equal value – the higher the court that created the precedent, the more valued the decision is.
- The Supreme Court of Canada – the highest court in Canada – is entitled to decide a case in any way it sees fit.

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Sources of Law

LAW OF EQUITY – Another set of rules, known as rules of equity. Like common law, equity originated in England. Equity focuses on what would be fair given the specific circumstances of the case, as opposed to what the strict rules of common law might dictate. An example is the remedy of an injunction.

- Equity assists only those with **"clean hands."**

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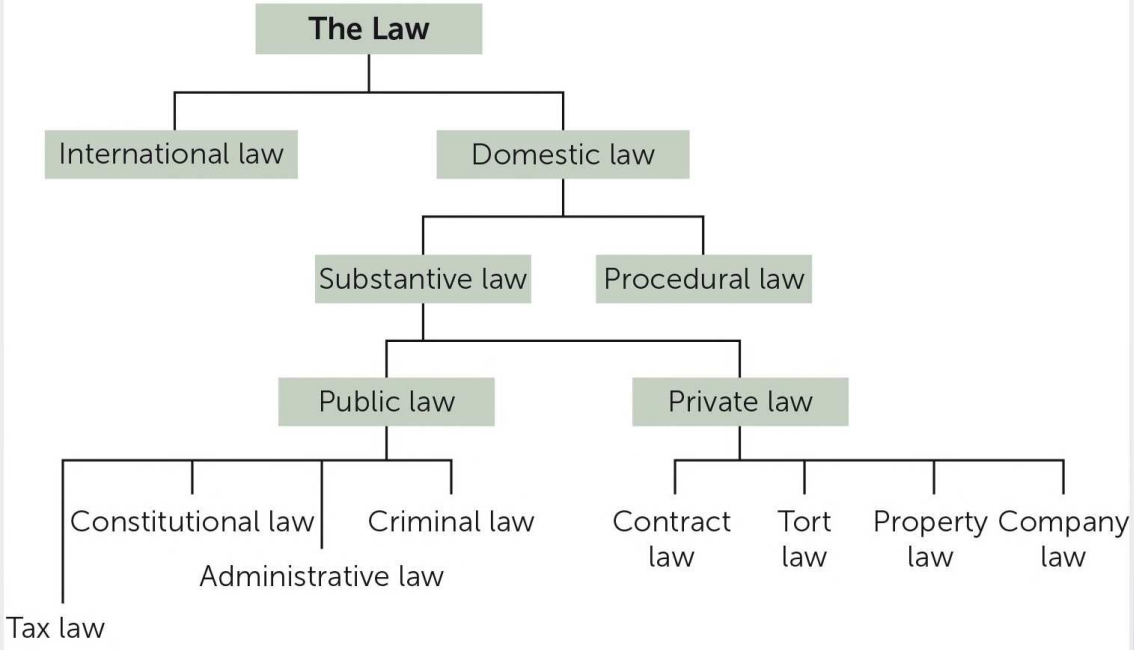
Classifications of Law

FIGURE 2.7 Divisions/Classifications of the Law



Source: From Gerald G. Gall, *The Canadian Legal System, 5th edition* (Toronto: Carswell, 2004). Figure 2.7, p. 29. Adapted by permission of Carswell, a division of Thomson Reuters Canada Limited.

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Classifications of Law

- **DOMESTIC versus INTERNATIONAL LAW**
- **SUBSTANTIVE versus PROCEDURAL LAW**

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Classifications of Law

- **PUBLIC versus PRIVATE LAW**

PUBLIC LAW – Areas of law that relate to or regulate the relationship between persons and government at all levels, such as Criminal Law

PRIVATE LAW – Areas of law that concern dealings between persons, such as Law of Contracts

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Classifications of Law

- **COMMON LAW versus CIVIL LAW**

COMMON LAW – A system of law that includes judge-made law. Used in all provinces except Quebec.

CIVIL LAW – A system of law in which judges look to the *Civil Code* for general principles to be applied to the case at hand. They are not bound by how other judges have interpreted the *Code*.

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Administrative Law and Business

ADMINISTRATIVE LAW

- Refers to rules created and applied by the various boards, agencies, commissions, and tribunals
- Functions of administrative bodies and officials often varies.
- *Example:* Canadian Radio-television and Telecommunications Commission (CRTC)

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Examples of Administrative Bodies and Officials Affecting Business?

- If you plan to sell alcohol, you may interact with the **liquor control board** or **commission.**
- If you plan to hire employees, you may interact with the **workers' compensation board.**

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The Canadian Legal System

- The Constitution protects certain commercial rights and freedoms and establishes limits on governmental authority.
- The government's law-making powers under the *Constitution Act, 1867,* are divided between the federal and provincial levels of government.
- There are numerous courts that may be involved in business-related law matters.

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The Canadian Legal System

- The judiciary has a role in assessing the constitutionality of legislation and can also create “common law.”
- There are numerous classifications of law.
- Administrative law can affect business.

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