CHAPTER 1
RISK MANAGEMENT AND SOURCES OF LAW

CONTENTS

TEACHING APPROACH

An Interactive Approach

The teaching philosophy adopted for this introductory chapter is critically important because it will set the tone for the entire course. While it is perhaps inevitable that students may not be fully prepared during the initial session, they nevertheless must be drawn into the material. This chapter was designed with that need in mind.

Some topics almost inevitably must be approached in a lecture format. It is, for instance, rather difficult to generate animated discussion regarding the legislative process through

which a bill is transformed into a statute. Those materials should be treated accordingly. Students should appreciate the means by which laws come into existence, as well as the opportunities that business people have to influence that process. Little would be gained, however, from excessive detail or extended debate.

The great bulk of the chapter, in contrast, has been structured to foster discussion and to allow students to develop skills that they will require throughout the course (and into their professions). That is true from the opening pages of the text. Rather than tell students why, as business students, they should study law, let them discover the reasons for themselves. Ask them to imagine themselves in business. Take suggestions until a simple model emerges. Then continue on with the exercise using that simple model. Ask why some businesses succeed, while others fail. Push the students toward the realization that the answer depends a great deal on risk management, both negatively and positively. A successful business person is able to make decisions that avoid harmful events and that exploit profitable opportunities. That proposition will logically lead to the next series of questions. *How* do business people effectively manage risks? What do they need to *know*? For present purposes, the important answer is "law." Allow the students to explore some of the various ways in which a knowledge of the law can help a business. Once again, make sure that they consider negative *and* positive possibilities. It is important to highlight both sides of that coin. Risk management most obviously includes the avoidance of liability, but it also includes, for instance, the ability to use a contract to hold another party to a promise. Students must realize early on that, from a business perspective, the law is not simply a series of prohibitions, but rather a rich and varied collection of resources that can be used for the effective management of risk. That is why they must be familiar with it.

Although the chapter goes on to examine a number of other introductory topics, it is important to maintain the momentum generated by the opening exercise. The natural temptation to rely exclusively on straight lectures must be resisted. There is, understandably, an inclination among most students to remain passive during the initial sessions. There is also a tendency among students to regard opening lectures as somehow relatively unimportant. Both of those factors must be overcome. With that in mind, Chapter 1 includes a number of Discussion Boxes that are inherently interesting and immediately accessible.

- Business Decision 1.1 centres upon the issue of reference letters, a subject of great significance for every young professional.
- Ethical Perspective 1.1 deals with a failure to rescue a drowning person. If desired, it can be made more poignant by changing the facts to include a drowning child. Absent a special relationship (*eg* parent or teacher), I am legally free to watch an infant drown, just as I am legally free to watch an adult die.

Law as a Process

The various discussion boxes are valuable from a purely pedagogic perspective: they help to keep students engaged and interested. At least implicitly, however, they also serve two other useful functions. First, by working through the exercises, students will begin to develop essential skills. Risk management requires action. Students therefore should

become accustomed to actively discovering information and formulating solutions, rather than merely passively receiving lecture notes. Second, the process of working through business law issues should make students realize that law is a malleable process, rather than a static list of *dos* and *don'ts*.

Although that proposition may initially seem trite, it underlies a significant challenge in teaching business law. Students very often arrive in class with an assumption that the law consists of a long list of rules, and that legal education consists of memorizing as many of them as possible. Somewhere out there, it is thought, there is a really big book with all of the answers. That, of course, is not true. Law is constantly evolving to reflect changes in society. (In the business context, for example, a rule of contract that was developed in the nineteenth century may no longer be appropriate. Chapter 18, which deals with Electronic Commerce, contains a number of illustrations.) Furthermore, those changes are introduced by human agents, typically judges and legislators, who struggle to strike a delicate balance between competing interests. (The text's discussion of the *Charter* clearly points in that direction. A statute that prohibits the sale of violent pornography violates freedom of choice, but it is nevertheless justifiable given the current state of Canadian society.) The material should be presented in a way that highlights the malleability of rules and that stresses the human face of the law. Students should realize that a rule that they learn today may be discarded tomorrow if judges or legislators adopt a new position on a particular issue. Consequently, quite often, what is important is not the memorization of rules, but rather an understanding of the process.

The Discussion Boxes can also be used to debunk another common misperception. Many students tend to equate law and "justice" (usually with the assumption that "justice" coincides with their intuitive notions of right and wrong). The discussion engendered by Ethical Perspective 1.1 can be used to dispel that myth. Students should realize that while there is considerable overlap between law and morality, those two categories are not always consistent. Indeed, in an increasingly multicultural society, moral consensus is becoming even more difficult to obtain. Consequently, the law very often must be content to strike a balance between competing interests in a way that will inevitably offend some moral perspectives.

The *Canadian Charter of Rights and Freedoms*

A substantial portion of the chapter is devoted to the *Charter*. As many of the examples illustrate, business people are often directly affected by *Charter* decisions. Beyond that, however, students must be made to appreciate that Canadian law — indeed Canadian society — simply cannot be understood apart from the *Charter*. Every Canadian, including every business person, is deeply affected by its provisions. The *Charter* provides the backdrop against which everything else plays out.

ADDITIONAL TEACHING SUGGESTIONS

Natural Law and Positivism

While it would be inappropriate to embark on an extended philosophical debate, the issues surrounding Ethical Perspective 1.1 inevitably will lead students to question that nature of law. Historically, the issue tended to divide thinkers into two camps: those who

subscribed to natural law theory and those who subscribed to positivism. To some extent, that remains true today, notwithstanding the growth of more modern perspectives (*eg* law and economics, feminism, critical legal studies).

Classical natural law theory was based on the belief that there exists a natural order within the universe, and that humans have a natural role within that universe. Morality and immorality consequently were defined in terms of activities that tended either toward or against the fulfillment of that role. To take a common example, it was thought that humans exist to fulfill certain ends: survival, perpetuation of the family, and so on. Sexual intercourse intended for the purpose of procreation was considered moral because it tended toward the fulfillment of those ends. In contrast, sexual activity that was not intended for procreative purposes (*eg* sodomy) was considered immoral. Laws were formulated accordingly. Vaginal intercourse between man and wife was permitted, while homosexuality was prohibited.

Because of the need to identify a set of purposes, natural law theory tends to be closely tied to religious beliefs. There is, however, no necessary connection between the two. So long as there is some touchstone that sets the standard for assessment, it is possible to have a secular conception of natural law. An atheistic environmentalist, for instance, might believe that the validity of human laws can be adjudged by their tendency to either promote or frustrate conservation of the planet in its natural state.

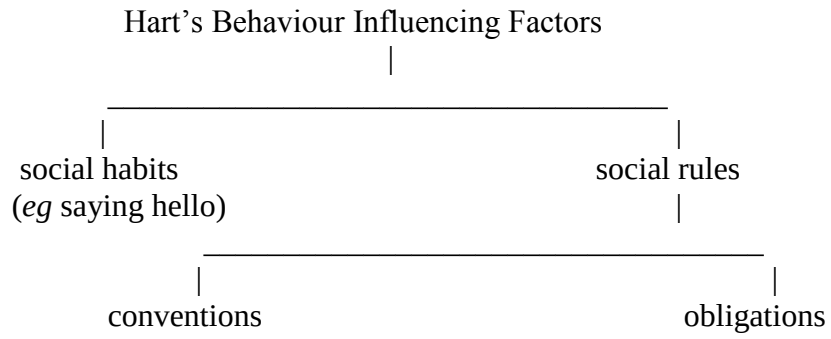
Students could be asked to critique natural law theory. They might be expected to suggest arguments along the following lines.

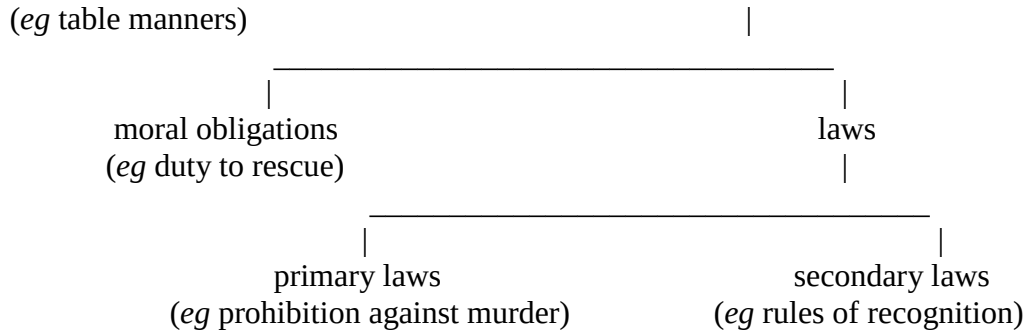
- Natural law cannot account for the whole of the legal system. There are many laws that, in themselves, are morally neutral. It is, for instance, hard to see how a legal requirement to fill out a form in triplicate either advances or inhibits any particular view of the universe. In response, it might be suggested that natural law merely requires a law to be morally permissible, not morally mandated.
- Natural law also cannot account for the undeniable existence of morally repugnant laws. That is inevitable given the extent to which Canadian law must mediate between the increasingly divergent views of a multicultural society. No perspective can command the invariable support of the courts and legislatures. Classroom examples, however, should be chosen with great care. A suggestion that abortion is immoral, for instance, should be clearly ascribed to a particular point of view, rather than presented as a "correct" position. Likewise the suggestion that the government's failure to implement effective pay equity provisions is morally offensive.
- Perhaps the most damning criticism of natural law lies in the great difficulty of identifying and articulating natural ends, and in the even greater difficulty of applying those standards in specific ways. The standards may tend to be so abstract as to be practically useless. What does it really mean, for example, to say "do good and avoid evil"? Furthermore, in a pluralistic society, the mere act of identifying the relevant ends will tend to smack of subjectivity. Given the *Constitution*'s entrenchment of multiculturalism, why should one group, however large in number, be entitled to force its views upon others?

Natural law theory is typically contrasted with positivism. That term is not based on the belief that law must be "positive," in the sense of being affirmative or good. "Positivism," rather, refers to a law that has been "posited," in the sense of being articulated or laid down. Positivism is based on a theory of pedigree. So long as a rule was established by a person with the authority to do so, it is valid, regardless of other characteristics (*eg* its apparent morality). John Austin (1790-1859) therefore defined "law" as a command issued by a sovereign. A sovereign, in turn, was defined as a person who is habitually obeyed by the bulk of the community, and who does not habitually obey anyone else. A command issued by Parliament is law, but one issued by a gun-wielding thief is not. Both commands are apt to be met, but only Parliament can satisfy the definition of a sovereign.

Herbert Hart's theory of positivism may appeal to students who are curious as to the differences between different types of rules. Hart (1907-1992) tried to identify laws by distinguishing the various factors that influence human behaviour.

- Within all the factors that influence human behaviour, it is possible to distinguish between *social habits* and *social rules*. Saying "good morning" is a social habit. There is no sanction if it is not met.
- Within the broad class of social rules, it is possible to distinguish between *conventions* and *obligations*. Table manners are a convention. There is a sanction if they are not performed, but the sanction is informal and not particularly rigorous. Obligations are more regularly and rigorously sanctioned.
- Within the broad class of obligations, it is possible to distinguish between *moral obligations* and *laws*. The duty to effect an easy rescue is generally a moral obligation. Moral obligations may receive severe sanctions, such as shame and guilt, if they are not met. Those sanctions, however, are informal in the sense that they are not mediated through a central body. Laws involve sanctions that are usually more severe and that are centrally mediated.
- Within the broad class of laws, it is possible to distinguish between *primary laws* and *secondary laws*. Primary laws affect physical matters, they impose legal rights and obligations, and they may receive severe sanctions mediated through a central agency (*ie* the government). An example would be the prohibition against murder. Secondary laws explain and affect primary laws. They include rules of recognition (who has the authority to make laws?), change (how are laws changed?), adjudication (who is entitled to resolve legal disputes?), and sanctions (what penalties are imposed if the requirements of a law is not satisfied?).





Students could be asked to critique positivism. They might be expected to suggest arguments along the following lines.

- Many people find positivism amoral because it validates laws solely on the basis of pedigree. As long as a rule was made by a person with authority, it is a law, however morally repugnant it may seem. Arguably, then, Nazi law was valid law, notwithstanding the atrocities committed in its name.
- Students might also recognize that the theory underlying positivism eventually runs out and requires a leap of faith. The problem lies with Hart's conception of rules of recognition. In Canada, for instance, we generally accept that an act is illegal if it is prohibited by the *Criminal Code*. But why are the provisions of the *Criminal Code* considered valid? Because they are contained in a statute that was created by Parliament. But why does Parliament have the authority to enact a statute? Because section 91 of the *Constitution* says so. But why does the *Constitution* have the ability to determine who gets to make rules? At that point, the answer must simply fall back on the observable social fact that Canadians accept the validity of the *Constitution*.

Although positivists, on the whole, have the upper hand today, there remain important strands of natural law thinking in the Canadian legal system. An important illustration concerns jury nullification. A jury represents democracy writ small. Every few years, Canadians go to the ballot box, and once there, exercise judgment as they see fit. They are not required to arrive at a "correct" conclusion, but rather decide independently, in the particular circumstances, how the country shall be governed. Likewise, within certain parameters, jurors are entitled to exercise a discretion and to arrive at conclusions that are irreconcilable with posited rules. Interestingly, however, they cannot be told, by either the judge or the lawyers, that they enjoy that inherent power. Examples of jury nullification tend to be quite interesting.

- The events surrounding Dr Henry Morgentaler in the 1970s and 1980s are illustrative. Although his conduct appeared to many to contravene the *Criminal Code*'s provisions prohibiting abortions, jurors in several provinces consistently exercised their independent judgment and refused to convict.
- The issue of jury nullification arose again in the case of Robert Latimer, who was convicted by a jury of "mercy killing" in the death of his profoundly disabled daughter. His lawyer appealed the conviction to the Supreme Court of Canada on the ground that the trial judge refused to answer the jury's question as to the sentence that would be applied in the event of conviction. The theory was that the

jury would exercise its inherent right to ignore the law and acquit Latimer if it had known that a conviction for second degree murder carries a mandatory ten year sentence. The Court did not accept that argument.

- Jury nullification has played an important role in race relations in the United States. White juries in the north habitually refused to enforce fugitive slave laws that carried a death sentence. In a later era, white juries in the south habitually acquitted those accused of lynching, even in the face of clear evidence. More recently, many observers point to OJ Simpson's acquittal for murder. The jurors, perhaps offended by police tactics, perhaps motivated by racial considerations, refused to convict. His lawyer, Alan Dershowitz, has entertained the possibility that the verdict was an instance of jury nullification: *Reasonable Doubts: The OJ Simpson Case and Criminal Justice* (1996).

As part of their exploration of the nature of law, students could be asked to reflect on the concept of jury nullification. Is it appropriate for a small group of randomly selected individuals to exercise the power to effectively re-write the law, at least in the circumstances of a particular case? Will such power always be exercised "properly"? Is it even possible, in the absence of an accepted standard for assessment, to determine what is proper and what is improper?

Corporate Crime: Section 217.1 of the *Criminal Code*

In 1992, 26 miners were killed by an underground explosion at a Westray Mine in Nova Scotia. The accident occurred despite repeated complaints by miners, union officials, and government inspectors regarding the hazardous working conditions. It subsequently appeared clear that the company had failed to exercise sufficient care in providing for workplace safety. Nevertheless, given the state of criminal law at the time of the accident, as well as the vagaries of the evidentiary process, attempts to prosecute the company and various managers failed.[1]

In the aftermath of the incident, Parliament amended the *Criminal Code* in 2004 to include a new section 217.1.

> Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Section (1) creates a new legal duty for workplace health and safety, (2) requires any person who directs work to take "reasonable steps" to ensure the safety of workers and the public, (3) creates a new regime of corporate criminal liability by holding a corporation responsible for the conduct of anyone within the organization that directs work, and (4) allows for the imposition of serious penalties in the event of injury or death.[2]

Although there is little caselaw on the new provision, section 217.1 was successfully used to prosecute a company responsible for an employee's death in *R v*

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[1] A useful summary of the Westray disaster, including references to additional sources, is available from Wikipedia <http://en.wikipedia.org/wiki/Westray_Mine>.

[2] The Canadian Centre for Occupational Health and Safety provides a website discussing various features of the new law <http://www.ccohs.ca/oshanswers/legisl/billc45.html>.

Transpavé Inc.[3] The court imposed a fine of $110 000. That case is discussed in Case Brief 1.1.

Division of Powers

As suggested in the text, the division of powers not only is an essential element of Canadian federalism, it is also occasionally an important source of risk management. Sections 91 and 92 of the *Constitution* stipulate the areas in which the federal and provincial (or territorial) governments respectively can legislate. If a business finds that it is treated unfavourably by a particular statute, it may be able to have that law struck out if it is *ultra vires*, in the sense that it was outside the scope of authority of the enacting body. A sampling of provisions from sections 91 and 92 is presented in the text. Students might also be directed to the full list, which appears below. (The residual power, which gives Parliament authority over everything not specifically allocated to the provinces, appears in the opening words of section 91.)

> 91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> - The Public Debt and Property.
> - The Regulation of Trade and Commerce.
> - Unemployment insurance.
> - The raising of Money by any Mode or System of Taxation.
> - The borrowing of Money on the Public Credit.
> - Postal Service.
> - The Census and Statistics.
> - Militia, Military and Naval Service, and Defence.
> - The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
> - Beacons, Buoys, Lighthouses, and Sable Island.
> - Navigation and Shipping.
> - Quarantine and the Establishment and Maintenance of Marine Hospitals.
> - Sea Coast and Inland Fisheries.
> - Ferries between a Province and any British or Foreign Country or between Two Provinces.
> - Currency and Coinage.

[3] 2008 QCCQ 1598.

- Banking, Incorporation of Banks, and the Issue of Paper Money.
- Savings Banks.
- Weights and Measures.
- Bills of Exchange and Promissory Notes.
- Interest.
- Legal Tender.
- Bankruptcy and Insolvency.
- Patents of Invention and Discovery.
- Copyrights.
- Indians, and Lands reserved for the Indians.
- Naturalization and Aliens.
- Marriage and Divorce.
- The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
- The Establishment, Maintenance, and Management of Penitentiaries.
- Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

- Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
- The borrowing of Money on the sole Credit of the Province.
- The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
- The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
- The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- Municipal Institutions in the Province.

- Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
- Local Works and Undertakings other than such as are of the following Classes:
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (b) Lines of Steam Ships between the Province and any British or Foreign Country:
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
- The Incorporation of Companies with Provincial Objects.
- The Solemnization of Marriage in the Province.
- Property and Civil Rights in the Province.
- The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
- Generally all Matters of a merely local or private Nature in the Province.

<http://laws.justice.gc.ca/eng/Const/page-4.html#h-17>

Concurrent Jurisdiction

As explained in Chapter 25, it is also possible, in some situations, for the two levels of government to enjoy *concurrent jurisdiction*. For instance, section 95 of the Constitution gives jurisdiction over agricultural matters to both the federal government and the provincial governments.

Patriation of the Constitution

The text refers to the difficulty of amending the Constitution and to the creation of the *Canadian Charter of Rights and Freedoms*. As background to both of those topics, it may be useful to raise the issue of *patriation*.

Between 1867 and 1982, Canada was in an unusual position. It became an independent country in 1867 when the *British North America Act* was proclaimed by the British

government at Westminster. It did not, however, have the power to amend or alter its Constitution. That power was formally retained by Westminster. The situation was later summarized by the Supreme Court of Canada, which referred to the "anomaly that although Canada has international recognition as an independent, autonomous and self-governing state ... yet it suffers from an internal deficiency in the absence of legal power to alter or amend the essential distributive arrangements under which legal authority is exercised in the country, whether at the federal or provincial level."[4]

Much of Canadian history has been concerned with the attempt to eliminate that anomaly. Interestingly, the main sticking point was the inability of the provinces and the federal government to agree on an amending formula. Westminster was unwilling to relinquish control until Canadians found some way, amongst themselves, to facilitate future constitutional developments.

In 1931, the *Statute of Westminster* gave Canada full legal independence. The British Parliament no longer could vote on laws that applied in Canada. Still, the main problem remained.

In 1949, the British amended the Canadian Constitution to allow the federal government in Canada to regulate some parts of the Constitution. And in the same year, the federal Parliament abolished appeals to the Privy Council. The Supreme Court of Canada then became the court of last resort in this country. (Students might be told that the Privy Council continues to hear appeals from many of its former colonies. Indeed, appeals from New Zealand continued until 2003!)

The situation finally came to a head in 1980, after the Parti Quebecois suffered a clear defeat in a referendum on Quebec sovereignty (about 60 percent of Quebecers voted "no"). Prime Minister Trudeau used the occasion to spark a new round of Constitutional discussions. In 1981, the Supreme Court of Canada held that the federal government had the power to act unilaterally, but indicated that it would be clearly preferable for the provinces to be on-side.[5] While the Prime Minister announced that he was prepared to proceed alone, he eventually secured the consent of the provinces (excluding Quebec) to the general amending formula that is discussed in the text. On April 17, 1982, the Queen proclaimed the Constitution Act 1982. The document also included the *Charter*, which was another part of the Prime Minister's vision for Canada.

Constitutional Amendments — *Regional Veto Act*

As explained in the text, the Constitution is difficult to amend. The general amending formula requires the consent of Parliament plus the legislatures of at least two-thirds of the provinces that represent at least 50 percent of the country's population. However, the standard has now been set even higher by the *Regional Veto Act*.[6] The Act says (in its entirety):

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4 *Reference Re Amendment of Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC).

5 *Reference Re Amendment of Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC).

6 *An Act Respecting Constitutional Amendments*, S.C. 1996, c. 1.

> **1.** (1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes:
>
> (*a*) Ontario;
>
> (*b*) Quebec;
>
> (*c*) British Columbia;
>
> (*d*) two or more of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces; and
>
> (*e*) two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Prairie provinces.
>
> (2) In this section,
>
> "Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
>
> "Prairie provinces" means the provinces of Manitoba, Saskatchewan and Alberta.

The Act was introduced by the federal government following the Quebec referendum as part of Prime Minister Chretien's promise to Quebec that future constitutional amendments would not occur without that province's consent. In effect, it gives a veto to Ontario, Quebec, British Columbia and Alberta (because among the prairie provinces, Alberta has more than fifty percent of the population). The Act is, however, simply a federal statute. Consequently, unlike the Constitution's amending provisions, it could be easily repealed.

Charter of Rights and Freedoms

Knowledge of the *Charter* is an essential part of risk management. The text discusses a number of examples. For instance, Sunday closing laws were successfully challenged on the ground that they violate the right to freedom of religion that is guaranteed by section 2(a). The text also quotes several key provisions. Students could be directed to the full document: <http://laws.justice.gc.ca/eng/Const/page-15.html>.

Before the *Charter* — The *Bill of Rights*

As an introduction to the *Charter*, students might be directed to the *Bill of Rights* that was introduced in 1960. Although the *Bill of Rights* covered much the same ground as the *Charter*, it suffered from three significant drawbacks.

- Since the *Charter* is part of the Constitution, it is the highest law in the land. As the text explains, any law that is inconsistent with it is of "no force or effect." The *Bill of Rights*, in contrast, was simply a statute.
- Furthermore, since the *Bill of Rights* was a federal statute, it did not apply to the actions of the provincial legislatures or provincial authorities.
- For both of those reasons, the courts tended to give the *Bill of Rights* a rather cramped interpretation. They certainly did not adopt the same broad purposive approach that they apply to the *Charter*. Most judges were reluctant to exercise the power under the *Bill of Rights* to invalidate otherwise validly enacted laws. Consequently, while it held great promise when introduce din 1960, it has had surprisingly little effect on Canadian life.

Despite those defects, however, the *Bill of Rights* remains important in some respects. Notwithstanding the introduction of the *Charter*, the *Bill of Rights* remains in force. Moreover, while both documents cover much the same ground, the *Bill of Rights* contains some rights that are not founding the *Charter*. Perhaps most significantly, section 1(a) of the *Bill of Rights* declared "the right of the individual to life, liberty, security of the person and *enjoyment of property*, and the right not to be deprived thereof except by due process of law." As explained in the text, the drafters of the *Charter* refused to include property rights in that document.

The Scope of the *Charter*

Section 32(1) of the *Charter* states:

> This *Charter* applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

When the *Charter* was introduced in 1982, there was considerable debate as to its scope of applicability. Some commentators argued that the document applied to *all* laws, such that both statutory and common law (in the sense of being judge-made) rules were caught, whether they arose in public or private matters. On that view, section 32 merely confirmed, somewhat superfluously, that the *Charter* applied to government action. A contrary view, however, more closely followed the text of section 32 by arguing that the *Charter* applied only to government action and not to private matters. On that view, the purpose of the document was to regulate the relationships between citizens and state, and was not to apply in purely private matters. As explained below in the Case Brief of *RWDSU Local 580 v Dolphin Delivery Ltd*, the Supreme Court of Canada generally

adopted the latter interpretation. However, it also ambiguously indicated, with respect to private law rules, that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Constitution*."

It therefore is critically important to define the concept of "government action."

- The *Charter* obviously applies to Parliament, provincial and territorial legislatures, and municipalities. It therefore governs statutes, regulations, by-laws, and the like.
- It also applies to the actions of government officials, including the police and Crown corporations. However, while the judiciary is sometimes classified as a branch of "government" (very broadly speaking), the Supreme Court of Canada in *Dolphin Delivery* rejected the suggestion that all judicial action is caught by the *Charter*. Since all laws must, in the final analysis, be interpreted and applied by judges, that view would intolerably subject *all* law to *Charter* scrutiny.
- The *Charter* often applies to people, such as government-appointed adjudicators, who derive their power from legislation. In addition, it applies to bodies, such as law societies and colleges of surgeons, that exercise a regulatory power that has been delegated by government.
- A more difficult issue arises with respect to institutions that are "public" in a broad sense. The courts have said that the critical factor is the extent to which an institution is controlled by the government. Consequently, the *Charter* applies to community colleges, but not to universities. While both types of institution receive government funding, the government has relatively greater say in the day-to-day operations of the former. Universities, in contrast, generally are marked by a greater degree of independence.
- The *Charter* does not apply to private corporations, despite their statutory foundations. Like universities, private corporations are dependent upon government legislation for their existence. Once in existence, however, they then take on an independent life of their own, substantially separate from government control.

The *Charter* therefore, does not apply *against* private corporations. As explained in the text, it may apply in *favour* of such bodies, depending upon the circumstances. Some *Charter* provisions are necessarily limited to individuals, either because of the manner in which they are phrased (*eg* some provisions, such as section 2, apply to "everyone," which is broad enough to encompass artificial entities, while others, such as section 15(1), apply only to "individuals," which is limited to natural persons), or because of their content (*eg* a private corporation has need for freedom of expression under section 2(b), but cannot have religious belief for the purposes of section 2(a)). Nevertheless, as explained below in the Case Brief of *R v Big M Drug Mart Ltd*, even if a corporation cannot directly claim the benefit of a provision, it may be able to rely upon such a provision in order to challenge a law under which it has been criminally charged. While a corporation has no religious beliefs to protect, it cannot be convicted under a statute that is invalid because it is contrary to section 2(a) of the *Charter*. A law that is invalid is invalid for all purposes.

The *Charter* and Its Critics

For many students, the *Charter* will fall into a category with motherhood and apple pie as things that are undeniably good. On first impression, at least, it may seem difficult to find fault with concepts like freedom of expression and religion (section 2), life, liberty and the security of the person (section 7), and equality (section 15). The *Charter* nevertheless has been the subject of criticism from diverse perspectives. Students could be led through a discussion of some of the more significant arguments.

Some students will appreciate, perhaps from frequent comments in the media, that many Canadians are concerned about the seemingly undemocratic nature of the *Charter*. As explained in the text, courts traditionally had little authority to strike down laws. For the most part, a statute could be invalidated only if it was *ultra vires*. Returning to the language used above in connection with positivism, validity was simply a function of pedigree. The *Charter*, however, allows judges to strike down laws on substantive grounds as well. That fact raises many of the same concerns that were previously expressed in connection with natural law theory. While judges are, of course, required to follow the wording of the *Charter*, many provisions are loosely worded and open-ended. They create generous scope for judicial interpretation. And in performing that interpretive exercise, judges will often be required to draw upon personal notions of justice that will not be shared by all Canadians. Moreover, it has been argued that Canada has moved away from a system of parliamentary supremacy, in which democratically elected officials have the final say, on behalf of their constituents, in determining how the country will be governed. In some respects, at least, the *Charter* places unelected, and hence ultimately unaccountable, judges at the top of the legal hierarchy. And since Canadian citizens have no (direct) role to play in the appointment and removal of judges, they have lost control of the system. See FL Morton & R Knopff *The Charter Revolution and the Court Party* (2000).

A counter-argument, which has received support in the Supreme Court of Canada (*eg R v Mills* (1999) 180 DLR (4th) 1), insists that the legislatures, and hence the people, do remain ultimately in charge. *Charter* litigation merely creates a "dialogue" between the courts and the legislatures. Even if a statute is struck down, Parliament usually enjoys several options. Although politically infeasible in most circumstances, it may be entitled to invoke the "notwithstanding clause" found in section 33. More significantly, judges often indicate precisely why a law was struck, along with at implicit guidance as to how the defect may be cured. A legislator therefore may respond to the invalidation of a law by adopting less intrusive means of achieving the same objectives. The *Charter* itself facilitates such responses.

- Section 1 expressly states that the rights and freedoms are guaranteed subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In other words, the legislature can violate *Charter* rights, as long as it does so in a reasonable manner.
- Many rights and freedoms are couched in language that similarly allows for some legislative latitude. Section 8 provides protection against "unreasonable" search

and seizure. Section 9 guarantees the right to not be "arbitrarily" detained or imprisoned. Section 12 prohibits "cruel and unusual" punishment.

See P Hogg & A Bushell. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

The most common criticisms of the *Charter* come from the "right" of the political spectrum, by those who are concerned about judicial activism and the purportedly undemocratic nature of the document. There are, however, critics on the left as well. Karl Marx once said that "religion is the opiate of the masses." The same might be said of the *Charter*. It allegedly creates the appearance of justice, while doing very little to effectively address the fundamental problems that underlie Canadian society. Dissent is silenced by the hollow promise of change, and the masses are placated by a placebo. The *Charter*, however, is incapable of effecting real change so long as it continues to be applied by a judicial class that is drawn very largely from the ranks of commercial lawyers. Bay Street, the argument goes, will never be able to understand the view from the bottom. Furthermore, the practical role of the *Charter* is to foster isolation and conflict. Because it must, as a last resort, be applied through an adversarial process, it inhibits the emergence of consensual decision-making. And finally, notwithstanding the availability of government funded counsel in some situations, the reality of *Charter* litigation is hugely expensive, and hence inaccessible to many disadvantaged people.

Statutory Interpretation

There is a tendency to assume that if there is legislation on point, the law must be clear. It is simply a matter of reading the statute[7] and applying its rules. In fact, however, the situation tends to be more complicated. As suggested in the discussion of constitutional interpretation, words have to be interpreted before they can be applied.

Although the basic ideas are the same, there are some important differences between constitutional interpretation and statutory interpretation. First, while the Constitution provides the foundations for society, statutes deal with more specific issues. Second, while the Constitution is very difficult to change, statutes are relatively easy to enact, amend or repeal. Consequently, while the Supreme Court of Canada has said that the Constitution must be interpreted in a purposive manner, statutes may be treated differently.

A large number of "rules" exist to help judges interpret statutes. In reality, however, those "rules" are really more like guidelines. And furthermore, those guidelines are not always entirely helpful.[8] Many are vague, and some tend to contradict each other. As a result, statutory interpretation is more of an art than a science. The "proper" interpretation of a

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[7] For the sake of convenience, we will talk in this section about statutes. Of course, the issue of interpretation applies to subordinate legislation and by-laws as well.

[8] In *Bell ExpressVu Ltd Partnership v Rex* (2002) 212 DLR (4th) 1 at 19 (SCC), Iacobucci J said that the "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." That very broad approach allows the courts considerable flexibility.

statute often depends upon whether, on a personal level, you favour a purposive approach or a textual approach. (Few people go to either extreme, but most of us do tend to lean one way or the other.) We can describe those two possibilities in general terms.

- *Purposive Approach*: As we saw in our discussion of constitutional interpretation, the purposive approach focuses on the legislature's intention. The goal is to determine the statute's purpose and to then read the Act in the way that best achieves that purpose. It is therefore necessary to look outside of the document by considering the social and historical context.
- *Textual Approach*: The textual approach, in contrast, focuses on the words themselves. Each word is given its plain meaning and the statute is simply the sum of its parts. There is little need to look outside of the document

The following exercise explores the differences between the purposive approach and the textual approach.

Business Law in Action
Statutory Interpretation

You employ twenty people as part of your mushroom-growing business. The provincial government recently enacted a statute that establishes a minimum wage for "any person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, tobacco or vegetables." That minimum wage is well above what you currently pay. Your employees say that mushrooms are a type of vegetable (at least for the purposes of the legislation) and that they are consequently entitled to a raise.

Questions

1. Are you required to pay the minimum wage? Are mushrooms a type of vegetable?

2. What conclusion will the court reach under a textual approach? How will the judge determine the meaning of the word "vegetable"? Would a botanist define a mushroom as a vegetable? Would a general dictionary do so? Does it matter that most people expect to find mushrooms in the vegetable section of a grocery store? If the judge decides that mushrooms are not vegetables, is there any reason why a person who picks mushrooms is less in need of a minimum wage than a person who picks carrots?

3. What answer will the court reach under a purposive approach? How will the judge determine the purpose of the statute? Is it appropriate to look at what the legislators said? Or should the judge focus on what a reasonable person would regard as the statute's purpose? Should the judge be influenced by issues of fairness?

4. Leaving aside your desire to avoid the minimum wage, what are the advantages and disadvantages of the textual approach and the purposive

approach? Is one approach more just, or more predictable, or more democratic than the other?

Answer

The case is based on *Ontario Mushroom Co v Learie*.[9] The facts have, however, been slightly changed. In that case, the legislation established a minimum wage, but *exempted* "any person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, tobacco or vegetables." As presented in the text, the question is more positively phrased in terms of whether mushroom workers, like other farm workers, are *entitled* to the minimum wage.

1. Technically speaking, mushrooms are not vegetables — they are fungi. The court nevertheless held, by a majority of two to one, that mushrooms are a type of vegetable *for the purposes of the Act*. Students will, however, reach their own conclusions based on their approach to statutory interpretation.

2. The dissenting judge, Southey J, adopted a textual approach. He based his decision largely on dictionary interpretations. Even on that approach, however, there is room for debate.

- The dictionary that he consulted provided several meanings of "vegetable." One definition said that a vegetable is something that is "of, or having the nature of, plants in general (the vegetable kingdom)." Accordingly, as in the children's game "animal — vegetable — mineral," everything that is not an animal or a mineral must be a vegetable. Southey J rejected that approach, however, as being too broad.
- Southey J instead adopted a definition that classified a vegetable as "(a) Any herbaceous plant that is eaten whole or in part, raw or cooked, generally with an entree or in a salad but not as a dessert, (b) the edible part of such a plant, as the root (*eg* a carrot), tuber, (a potato), seed (a pea), fruit (a tomato), stem (celery), leaf (lettuce), etc." He then relied upon a similarly technical dictionary definition of "herbaceous." And since a mushroom does not, in contrast to his definition of "herbaceous," have leaves or chlorophyll, and since it does not utilize food from the soil with sunlight to manufacture tissue, he concluded that it cannot be a vegetable.

Significantly, by accepting dictionary definitions, Southey J rejected uncontradicted evidence to the effect that government officials, as well as organizations working in the field, routinely categorize mushrooms as "vegetables." The first problem with the textual approach consequently is that, while it purports to operate objectively on the basis of plain meanings, it actually requires the judge to select from amongst a range of meanings.

[9] (1977) 15 OR (2d) 639 (Ont Div Ct).

The second problem is that the textual approach operates without regard to the social and legal context. One the basis of a technical definition of "vegetable," Southey J drew a distinction between people who pick mushrooms and people who pick, say, carrots. In the absence of evidence to the contrary, however, it would seem that the social concern in the same in either event. Certain groups of workers are vulnerable to exploitation and therefore in need of protective legislation.

3. The majority, led by Reid J, adopted a more purposive approach. It did rely upon the fact that people working in the area, like the public generally, habitually regard mushrooms as vegetables. More importantly, however, Reid J took the social context into consideration. His definition of "vegetable" reflected his belief that there was no apparent reason for favouring some types of farm workers over others.

There are, however, problems with the purposive approach as well. While the issue may seem fairly simple in this case, it is often difficult to determine a statute's purpose. In terms of the proper approach, there is a debate as to whether the relevant intention is the one that the legislators had in mind at the time of enactment *or* the one that reasonable people would hold after reading the statute and considering the context. Within that same debate, there is a question as to how the relevant purpose should be identified if different legislators (or different reasonable people) held different views.

There is also a debate as to whether the interpreter should even try to ascertain the intention of any particular group of people *or* whether it is more appropriate to ask, objectively, about the actual function of the statute. And if the latter approach is adopted, there is a question as to how that objective purpose or function can be ascertained.

Problems may also arise from the fact that the social and legal context within which a statute operates may change over time. For example, while Sunday closing laws were originally introduced for religious reasons, they arguably came to serve an important secular purpose by increasing the likelihood of families spending time together.

4. As we have already seen, the textual and purposive approaches both have merits and demerits. Both work well in some circumstances, but both are also open to abuse. It is hard to say that one is generally "more just" than the other. Narrowly applied, the textual approach certainly can lead to injustice if words are given an artificially cramped meaning. But by the same token, the purposive approach can also lead to injustice. Justice is usually a zero-sum game. One person's gain is another person's loss. On the facts of this case, for instance, the majority opinion would benefit the workers, but impose a substantial burden on the employer.

> The textual approach is often thought to be more predictable, and on the whole, that may be true to some extent. The text is tied to the words, and the words are tied to their "plain meanings." As this case illustrates, however, even the textual approach requires the judge to exercise a discretion. There are many definitions of "vegetable." The one that is chosen will (perhaps inevitably) reflect underlying values.
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> The extent to which one approach is more democratic than the other depends upon the circumstances. This case is again illustrative. An interpretation is "democratic" if it reflects the will of the people, as expressed through their elected officials. Often, however, it may be debatable as to whether the legislative intention is better served by a textual approach or by a purposive approach. Legislators sometimes use words very precisely; others times they couch their thoughts in ambiguous language. Democratic values would be best served if (as seems difficult) judges were capable of consistently determining which model applied on the facts before them.

Law and Equity

The relationship between law and equity is not well understood, not even by lawyers and judges. It is common among in this country to view equity as a parallel system of justice in which individual disputes are resolved on the basis of a broad judicial discretion. That statement contains two propositions: one suggesting the existence of parallel systems of dispute resolution and the other suggesting the existence of a broad judicial discretion. Neither is correct.

Not Parallel Systems

The idea of a parallel system, in which law and equity equally cover the legal landscape, albeit in different terms, is incorrect. The Chancellor initially became involved in legal disputes only where the law was inadequate, and it remains true today that equity intervenes only when needed. That explains why, for instance, you almost certainly have legal title, but not equitable title, to your watch. You do not hold equitable title simply because none is needed. Professor Maitland famously described the relationship between law and equity in the following way.

> We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying "Equity is hereby abolished," we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been enforced. On the other hand had the legislature said, "Common law is hereby abolished," this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of the common law.[10]

Not Broad Discretion

[10] FW Maitland *Equity: A Course of Lectures* (Cambridge, CUP, 1939) at 19.

Canadian courts routinely administer equity in the belief that that jurisdiction confers a broad, generalized judicial discretion to achieve "justice." Courts in other jurisdictions, most notably New South Wales in Australia (which retained a separate Chancery Bar until the 1970s), take a dim view of that approach. Commenting on the Canadian adventures in fiduciary law, for instance, an Australian judge once accused his Canadian colleagues of

> a tendency to widen the equitable concept ... to a point where it is devoid of all reasoning. [O]ne has the uneasy feeling that the courts of that country ... simply assert that [an actor] has committed a breach of fiduciary duty.[11]

On appeal in the same case, the High Court of Australia agreed, in terms that disregard the courtesy normally respected between fellow judges. The Canadian approach to fiduciary obligations was said to be

> marked by assertion rather than analysis [which while capable of] effectuating a preference for a particular result ... does not involve the development or elucidation of any particular doctrine.[12]

The leading Australian text is even less kind in asking, with respect to the precedential value of Canadian judgments, "why should Australian courts bring third rate foreign cases into account when they have plenty of second rate cases of their own to consider?"[13]

As in Australia, judges in this country would do well to occasionally revisit the history of the subject. True enough, the Chancellor initially began by resolving disputes according to his own conscience. The flaw in that approach is obvious, however, and as early as 1689, John Selden decried the vagaries of discretionary justice by invoking the famous image of the Chancellor's foot.

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. T'is as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot.[14]

In reaction to that criticism, the pendulum then swung far—too far—in the opposite direction. Even before the *Judicature Acts* effected a "fusion" of the administration of the two jurisdictions, equity had become at least as rigid and hidebound as law. In describing the unfortunate litigants in the fictional case of *Jarndyce v Jarndyce*, Charles Dickens mocked equity's image as a source of sensitive justice.

> This is the Court of Chancery ... which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often

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11 *Breen v Williams* (1994) 35 NSWLR 522 at 570 (NSW CA).

12 *Breen v Williams* (1996) 186 CLR 71 at 95 (HCA).

13 RP Meagher, JD Heydon & MJ Leeming (eds), *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* 4th ed (Sydney, Butterworths, 2002) at 217-218.

14 J Selden *Table Talk* (1689).

give—the warning, "Suffer any wrong that can be done you rather than come here!"[15]

In much of the common law world today, law and equity are largely undistinguishable in everything other than pedigree. Contrary to popular stereotype, some concepts in law are notoriously vague and open-ended (*eg* the tort of negligence), while some equitable doctrines are remarkably rigid and unforgiving (*eg* fiduciary law). For the most part, however, rules and principles—in both law and equity—are as narrow or broad as need be, without regard to history. The movement increasingly is toward eradicating differences between the two jurisdictions.[16]

Though often adopting much the same view, Canadian courts unfortunately continue occasionally to view equitable doctrines as somehow specially loose and malleable.

Trusts

The trust is often said to be equity's greatest creation. As explained in the text, a trust exists anytime that one person—called the *trustee*—holds property[17] for the benefit of another person—called the *beneficiary*. There are three types of trusts.

Express Trusts

As discussed in the text, the most common type of trust is the *express trust*. It may be created anytime that a person—called the settlor—wants to place property into trust. A court will ask if the *three certainties* have been satisfied. The *certainty of intention* requires proof that the settlor actually intended for property to be held on trust as opposed to, say, a simple gift or a bailment.[18] The *certainty of subject matter* requires the relevant property to be identified. A trust may be imposed on any type of property: real property or personal property, tangible property or intangible property. If there is more than one beneficiary, it must also be clear which part of the property goes to each beneficiary. And finally, a trust requires *certainty of objects*, which means that it must be possible to ascertain the beneficiaries.

As a matter of convenience and safety, it is very common for a settlor to name more than one trustee. It also is possible for the settlor and the trustee to be the same person. Instead of transferring property to someone else to hold as trustee, I may simply declare that I am trustee of property that I already own. It also is very common for the trust property to be divided amongst several beneficiaries.

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15 *Bleak House* (1853).

16 A Burrows "We Do This At Common Law But That In Equity" (2002) 22 OJLS 1.

17 In most instances, the trustee holds *legal* title and the beneficiary has *equitable* title. It is possible, however, for both parties to hold equitable title. That is true, for instance of a sub-trust. Assume that an express trust is up and running. As the equitable owner of the property, the beneficiary (B1) may wish to place his or her interest into another trust for some other beneficiary (B2). Under that second trust, the new trustee (T2) receives what the original beneficiary (B1) has to give—*ie* equitable title. That equitable title is then held on trust for the beneficiary under the new trust (B2). In such circumstances, it is convenient to say that while the trustee (T2) has the equitable or *administrative* title, the new beneficiary (B2) has the equitable or *beneficial* title.

18 As discussed in Chapter 17, a *bailment* occurs when one person—called the bailee—possesses property that is owned by another person—called the bailor. In contrast to a trust, which exists in equity, a bailment is a purely legal relationship.

An express trust may be *fixed* or *discretionary*. Under a fixed trust, the settlor provides precise details as to when and how the trustee shall distribute the property. A trustee, for example, may be told to pay half of a trust fund to the beneficiary immediately and the other half when the beneficiary becomes an adult. Under a discretionary trust, the trustee is required to make a decision as to when and how the property will be distributed. For example, the settlor may direct the trustee to decide how a trust fund will be divided amongst four beneficiaries.

Resulting Trust

A *resulting trust* arises by operation of law, rather than in response to the settlor's intention. The label often seems a bit confusing, but the essence of the trust is easily grasped once it is understood that the word "resulting" comes from the Latin "resalire," which means to "jump back." A resulting trust therefore is a trust that always causes property to jump back from whence it came.

Property is transferred from the plaintiff to the defendant. In certain circumstances, equity imposes a resulting trust that causes the benefit to jump back. Although the defendant received legal title to the property, the equitable or beneficial title jumps back to the plaintiff. The defendant therefore holds the property on trust for the plaintiff. In the normal course of events, that trust is then executed when the defendant transfers the thing back to the plaintiff. Once that happens, the plaintiff again has the legal title, and the trust, which no longer has any work to do, simply dies away.

A resulting trust traditionally arose in two situations.

- *Failed Express Trust* A resulting trust almost always[19] arises if an express trust has failed to take effect. A settlor transfers property to a trustee to hold for a beneficiary under an express trust. That trust then fails because, for example, the objects are not sufficiently certain (*ie* the settlor did not clearly describe who was to be the beneficiary). The property cannot go forward to the beneficiary and it cannot simply stay with the trustee because the settlor never intended for the trustee to personally benefit. Equity therefore recognizes a resulting trust that causes the property to jump back. The trustee has legal title, but the equitable or beneficial title is awarded to the settlor.
- *Gratuitous Transfer* Equity is suspicious of gratuitous transfers. If the plaintiff transfers property to the defendant without receiving back anything in exchange, the law may conclude that there has been a gift, but equity usually presumes[20] that the plaintiff did not truly intend to confer a benefit upon the

[19] A resulting trust will not arise if, for example, the settlor intended for the trustee to personally benefit if the intended express trust failed to take effect.

[20] Most gratuitous transfers raise a *presumption of resulting trust*. In contrast, equity sometimes assumes, under a *presumption of advancement*, that a transfer truly was intended to be a gift. Traditionally, that occurred if a man (but not a woman) gratuitously transferred property to a child or to a spouse. Today, however, a presumption of advancement clearly applies only if a parent (a father *or* a mother) gratuitously transfers property to an *infant* child: *Pecore v Pecore* (2007) 279 DLR (4th) 513 (SCC). The same rule almost certainly now applies whether a husband transfers property to a wife or a wife transfers property to a

defendant. And since a transfer of property requires both physical delivery and an intention to pass title, equity imposes a resulting trust. Consequently, although the defendant has received legal title, the property equitably or beneficially belongs to the plaintiff. That presumption will be rebutted only if the court is convinced that the plaintiff really did intend to give something for nothing.

- *Purchase Money Resulting Trust* A resulting trust presumably arises if the plaintiff gratuitously transfers property to the defendant. The same is true if, instead of undertaking a direct transfer, the plaintiff pays a third party to transfer property to the defendant. For example, instead of buying a ring and giving it to you, I may pay a jewelry store to deliver a ring to you. The outcome is the same. In the second situation, a purchase money resulting trust presumably arises, with the result that you hold the ring on trust for me.

Constructive Trust

A *constructive trust* is a trust—other than a resulting trust—that is constructed or created by operation of law. In various circumstances, equity believes that the person who owns the property ought to hold the thing for the benefit of someone else.

- *Wrongs* A constructive trust may be imposed upon property that the defendant acquires as a result of committing a wrong against the plaintiff. Assume, for example, that a small mining company (the plaintiff) hopes to create a joint venture with a large mining company (the defendant). As part of their pre-contractual negotiations, the plaintiff discloses secret information regarding the location of an enormous gold mine. Instead of entering into a joint venture, however, the defendant simply buys the relevant land for itself. If the plaintiff successfully sues for breach of confidence, it has the option of claiming either compensation for its loss or disgorgement of the defendant's gain. And if it elects the latter, it may persuade the court to award proprietary, rather than personal, disgorgement—*ie* it may convince the court to order the defendant to hand over the property, rather than merely impose a debt upon the defendant.[21] Proprietary disgorgement in that instance takes the form of a constructive trust. The defendant has legal title, but because it acquired that property wrongfully, it must hold the property for the plaintiff's benefit.[22]

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husband. The Supreme Court of Canada, however, have not yet decided whether that rule involves a presumption of advancement or a presumption of resulting trust.

[21] In deciding whether proprietary disgorgement is available, a court will be guided by the test that was formulated in *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214 at 230 (SCC):

> "(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected."

[22] *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SCC).

- *Unjust Enrichment* The action for *unjust enrichment* consists of three elements: (1) the defendant is *enriched*, (2) the plaintiff suffers the *corresponding deprivation*, and (3) there is an *absence of juristic reason* for the defendant's enrichment.[23] The remedy is always *restitution—ie* the defendant must give back the benefit to the plaintiff. Restitution usually is awarded personally, so that the defendant is required to restore the value of the benefit rather than the benefit itself. Occasionally, however, restitution may be awarded proprietarily, in the form of a constructive trust, if the court believes that the plaintiff should be entitled to recover the benefit itself. Assume that the plaintiff bank is indebted to the defendant bank for $2 000 000. It pays the debt. By mistake, it pays a second time. A short time later, the defendant becomes insolvent. The defendant is liable for restitution, but if the remedy is simply personal, the plaintiff will line up with the other creditors and will take perhaps cents on the dollar. A court, however, may decide to award proprietary restitution by subjecting the second payment to a constructive trust. And since the defendant's debts cannot be paid with property that beneficially belongs to the plaintiff, the plaintiff can take all of the second payment of $2 000 000, even if that leaves nothing for the defendant's other general creditors.[24] Unfortunately, the Supreme Court of Canada has not yet explained when and why such relief shall be available.
- *Perfected Intentions and Protected Reliance* In a variety of situations, equity will impose a constructive trust even though the facts do not reveal a wrong or an unjust enrichment. In such circumstances, it imposes the trust in order to perfect the parties' intentions and to protect their reliance interests. That is true, for example, under a *secret trust*.[25] Assume that a man is drafting up his will. He wants to leave some property to his long-time mistress or to a child born outside of his marriage or to a controversial organization, but he does not want his family and friends to know about it. He therefore drafts his will to leave property to his close friend, but only after he has secured the friend's promise to hold the property on trust for the real beneficiary. When the man dies, his friend inherits the property. Because the trust is not written into the will, it is not enforceable as an express trust. Nevertheless, equity will require the friend to hold the property on constructive trust as promised. Both the testator and his friend intended to create that trust. Furthermore, the testator detrimentally relied upon the friend's promise. The constructive trust therefore perfects the testator's wish.

DISCUSSION BOXES

Business Decision 1.1

Risk Management

1. This question introduces students to the concept of risk management. Because it appears so early in the text, it requires relatively little by way of a substantive response. Moreover, on the facts, there is no single right answer. An individual student's

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23 *Garland v Consumers' Gas Co* (2004) 237 DLR (4th) 385 (SCC).

24 *Chase Manhattan v Israel British Bank (London) Ltd* [1981] 1 Ch 105 (QB).

25 The trust is *fully secret* if the will simply leaves property to the trustee and says nothing at all about the trust. A *semi-secret trust*, in contrast, occurs if the will says that the property is being given on trust, but does not provide the details (*eg* the identity of the beneficiary).

conclusion will reflect, to some degree, his or her personality traits. Students nevertheless should appreciate that effective risk management requires a process of: (i) identification, (ii) evaluation, and (iii) response. Depending upon how it is worded, a reference letter may create a risk of liability and litigation. Students should be expected to notionally evaluate the likelihood and severity of those risks. Having done so, students might then decide to: (i) not write any letter at all, (ii) write an innocuous letter that does not refer, explicitly or implicitly, to the allegations of theft, or (iii) write a letter that accuses the former employee of theft or at least strongly hints at dishonesty. In any event, students must realize that there are potential costs. Even the first option raises the risk that the ex-employee will steal from her new employer, thereby potentially creating a rift between the two companies. The new employer may feel aggrieved that it was not warned of the woman's criminal history.

Students might understandably doubt their own ability to perform that exercise, even after they have completed the course. Looking forward in the text, such doubts might be tied to the need to occasionally seek legal advice. As a matter of risk management, a business sometimes should consult a lawyer as a way of preventing, rather than resolving, a legal problem.

Ethical Perspective 1.1
Rules and Laws

1. Most students will presumably say that they would have rescued the canoeist, even if they were under a moral, but not a legal, obligation to do so. There is, however, no single right answer. An individual student's response will reflect his or her personality. It will also reflect the considerations that are raised in the second question.

2. Most students presumably will say that they would be sufficiently motivated by morality alone. But if so, they might be asked to define "morality." Does that term refer to acts and omissions that are inherently good or bad, or does it merely describe the sense of satisfaction or guilt that would attend upon certain courses of conduct? If it is the former, by what standard are acts and omissions judged? Who is entitled to make up the rules? How are those rules expressed? Do they depend upon the presumed wishes of a God or are they sufficiently articulated through society? Can a company, which does not have a mind of its own, act immorally? When should the acts or omissions of a company's representative be attributed to the company itself? (Those last two questions foreshadow the discussion of corporate responsibility that appears in Chapter 21.)

Leaving aside morality, some students might be motivated to rescue the canoeist by the fear of informal social sanctions. A failure to rescue may result in adverse publicity and therefore may hurt the bystander's business. Students might be asked to consider the extent to which bad publicity actually does hurt business. Is the public sufficiently aware of isolated immoral acts? If so, are spending habits affected by such knowledge? How quickly do the effects of bad publicity fade in time? Are there steps that a business can take to minimize even the immediate effects of bad publicity (*eg* by hiring a "spin doctor")?

Students might also be encouraged to discuss the extent to which legal obligations *should* reflect moral obligations. They might be asked if some obligations should be sanctioned only by informal social pressures (*eg* loss of business or bad publicity). They might also be asked if such sanctions are too uncertain and ineffective to express societal disapproval and deter undesirable behaviour.

You Be the Judge 1.1
***Charter* Remedies**

1. The "correct" answer, or at least the one that was given by the courts in *Phillips v Nova Scotia (Social Assistance Appeal Board)*, was that the offending provisions should be struck down altogether. Consequently, not only was Charles Phillips denied benefits, but so too mothers who cared for children born out of wedlock. The court based that conclusion on the (narrow and probably erroneous) belief that it would be inappropriate to order the legislature to expend money in a certain way.

2. The prevailing view among academics, and probably the answer that will receive the most support from students, is that the constitutional defect should be cured by *reading in*. Eligible recipients should be defined in terms of single *parents* who care for children born out of wedlock. In other words, "mother" should be interpreted as "parent" and "parent" should be defined as "mother or father." In support of that view, it might be said that the extension of benefits to male parents would have little effect on public resources. Statistically speaking, most single parents are women. Men do not usually have individual care of children — still fewer have individual care for children born out of wedlock.

The decision in *Phillips* came relatively early in the history of *Charter* litigation and the same facts would likely be decided differently today. Over time, the courts have become somewhat less reluctant to impose positive obligations upon the legislatures.

The remedy of *severance* will not work because there is nothing to sever. And *reading down* is inappropriate because the problem lies in the fact that the statute is under-inclusive, rather than over-inclusive.

Some students might suggest a remedy of *damages*, but that approach is better suited to situations in which a particular person suffers a loss as a result of a *Charter* "tort" (as in *Jane Doe*'s case). Furthermore, while damages would help Charles Phillips, it would not provide any relief to other single fathers who care for children born out of wedlock. Each father would have to commence a separate action.

Business Decision 1.2
Law, Equity, and The Trust

1. This is a very difficult question. It requires students to extrapolate the nature of the trust from the information that has been given. There are two general disadvantages to using a trust.

- The first disadvantage turns on the difference between *owning* something and being *owed* something. Suppose that the agent had paid the money received from the customers into a certain account.
    - If the agent is in good financial condition, it may be better for the airline to have a simple agency relationship (without a trust). In that situation, the agent is merely required to pay a certain amount of money to the airline.

The airline is not tied to the bank account. It is entitled to say to the agent, "Come up with the money — somehow."

- Consequently, if the money in the account was to disappear, the airline could still insist upon payment if there was not a trust. It would look at the lost bank account and say to the agent, "That's your problem. I still want to be paid the proper amount. Find the right amount of money somewhere else."
- If, in contrast, the money in the bank account had been held on trust, and the loss occurred without the agent's fault (*eg* because the bank unexpectedly collapsed), then the airline would suffer the loss. The agent would point to the lost bank account and say, "I'm sorry, but that was *your* money. And now it's gone. I don't have to give you *my* money just because you suffered a loss."

- A trust is, however, useful if there is a chance that the agent will fall into financial difficulties. If there is a trust, the agent does not owe a general debt to the airline. Instead, it holds a particular fund on behalf of the airline.
  - Consequently, if the agent was to become bankrupt, the airline could look at the trust fund in the account and say to the agent's other creditors, "That is *my* money and I'm taking it all. You'll just have to hope that the agent has some other pot of money that you can share."

- The second disadvantage arises from the operation of the trust. The airline must be able to point to *its* money in the agent's hands. That means that the agent must keep the airline's money sufficiently separated from its own. If there is a mixing of funds, then (depending upon some rather complicated tracing rules) the trust may be lost because the trust assets can no longer be identified. It is, of course, administratively cumbersome, and occasionally expensive, to establish and operate a system that holds trust assets in a special account. It is easier for the agent to simply deposit all of the money that it receives (from various sources) into a single account.

REVIEW QUESTIONS

1. Risk management is the process of identifying, evaluating, and responding to the possibility of harmful events. It is important in the business world because the success or failure of a business generally depends upon the ability to minimize losses and maximize gains. Profitable opportunities need to be exploited and potentially harmful events need to be avoided or contained. Those exercises in turn presume some degree of legal education. The law impacts on virtually every decision, act, and omission that may occur within a business context. The ability to exploit opportunities and avoid costs therefore depends upon an ability to respond appropriately to the legal implications of a particular course of conduct.

2. The three steps of risk management are identification, evaluation, and response. They can be illustrated on the basis of an example in which a business person is presented with an opportunity to place a new product on the market.

- The business must first *identify* the associated risks of legal liability. For instance, as discussed in Chapter 6, the sale of the product may generate a claim in negligence if it injures someone. Alternatively, as discussed in Chapter 18, it may generate a claim in intellectual property if it was manufactured in violation of someone's patent rights.
- Having identified the risks, the business must then *evaluate* them. It must estimate the likelihood that a risk will become manifest, as well as the likely costs that will be incurred in that event. For instance, even if the product does injure several consumers, some may not be inclined to sue. And even if some do sue, it might be possible to settle claims out of court or successfully defend them in court. It might also be protected by liability insurance, as discussed in Chapter 3.
- Having identified and evaluated the risks, the business must then formulate a *response*. It must decide, among other things, whether or not it will place the new product on the market. It may, for instance, choose to release the product, but protect itself with liability insurance.

3. A person may carry on business in a variety of ways (as further discussed in Chapter 20). If one simply buys and sells goods or services in a personal capacity, then that person enjoys all of the profits, but he or she also is personally liable for all of the losses and liabilities that arise. It may not be long before the debts are large enough to be personally ruinous. As a result, it often is prudent to conduct business through a corporation. In that event, most debts and liabilities are incurred by the corporation, rather than by the people involved in it—*eg* directors, officers, shareholders. Creditors can compel the company to pay up, but the person behind the company usually cannot be touched. (There are some exceptions to that rule. Directors, for instance, may be personally liable for torts that they commit.)

4. Legal expertise is an essential component of risk management. Businesses often need the help of lawyers. In most cases, lawyers are hired from time to time as the need arises. Some larger organizations, however, have in-house counsel. As the name suggests, in-house counsel consists of a lawyer who works full-time within the organization. A disadvantage of that arrangement is expense. It is usually costlier (at least in an immediate sense) to have a lawyer on the permanent payroll, than to merely hire one as the need arises. There are, however, substantial advantages. Most significantly, since the in-house counsel is a member of the organization, it is often better able to recognize solutions and, in some cases, to prevent problems from occurring in the first place.

5. The statement is not true. Though related, the two phrases mean different things. A "white collar crime" is a criminal offence that is committed by a business person. For example, a white collar crime occurs if the manager of a business steals from the company's petty cash box. A "corporate crime" occurs when a corporation itself is convicted of committing a crime. Of course, a corporation cannot act by itself—it is a legal fiction that depends upon the actions of its human agents. Nevertheless, a corporation may be convicted of a corporate crime if, for instance, a company that

operates a used car dealership has a policy of rolling back odometers. As the examples suggest, a white collar crime usually is committed by a person within a corporation who intends to thereby benefit himself or herself. In contrast, a corporate crime usually is committed with the intention of benefitting the company itself.

6. Public law is concerned with governments and the ways in which they deal with their citizens. It includes the topics of constitutional law, administrative law, criminal law, and tax law. Private law is concerned with the rules that apply in private matters. It includes the topics of contract law, tort law, and property law.

Although there is a tendency to assume that the government is only ever involved in public law, it may also be a party in a private law matter. First, it is also possible for a private person to sue a public body. That may occur, for instance, if a person's house is damaged as a result of a municipality's failure to honour its duty of care in negligence by properly inspecting the construction of the building. The government is also subject to the private law when it enters into private transactions. That is true, for instance, when a government contractually agrees to purchase paper from a store.

7. Because Canadians expect a great deal from their elected officials, governments must, in order to manage that workload, *delegate* or *assign* responsibility to a wide variety of agencies, boards, commissions, and tribunals. Administrative law is concerned with the creation and operation of those bodies. It has a profound impact on business. For instance, a human rights tribunal may decide that a corporation discriminated against women by paying them less than it paid men for work of similar value. If so, the company may be ordered to pay millions of dollars in compensation. And even if a particular business never becomes involved in that sort of landmark case, it probably has to deal, in the normal course of operations, with a number of administrative bodies. There are literally hundreds.

8. A company traditionally could be convicted of a crime only if the acts in question were performed by the company's "directing mind." In 2004, Parliament amended the *Criminal Code* in an effort to improve workplace safety. Under section 217.1, the new provision, a company can now be convicted on the basis of acts performed by a long list of individuals, including directors, officers, managers, partners, employees, and agents. The new law states:

> Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

As explained previously in this chapter of the *Instructor's Resource Manual*, the new section therefore (1) creates a new legal duty for workplace health and safety, (2) requires any person who directs work to take "reasonable steps" to ensure the safety of workers and the public, (3) creates a new regime of corporate criminal liability by holding a corporation responsible for the conduct of anyone within the organization that directs work, and (4) allows for the imposition of serious penalties in the event of injury or death.

Case Brief 1.1, dealing with *R v Transpavé Inc*, illustrated section 217.1 in action.

9. Private law is often divided into three units: tort, contract, and property. Each is critically important to business.

- A tort is a private wrong. It is an offence against a particular person. Like the law of contracts, the law of torts covers a great deal of territory. It can be split into three categories: (i) intentional torts, such as assault and false imprisonment, (ii) business torts, such as deceit and conspiracy, and (iii) negligence, which covers most situations in which one person carelessly hurts another.
- The law of contracts is concerned with the creation and enforcement of agreements. From a business perspective, this is a tremendously important area of law. Business is based on transactions and the law of contracts governs virtually every one of them. For instance, contracts are involved in: (i) the sale of goods, such as cows and computers, (ii) the use of negotiable instruments, such as cheques, (iii) real estate transactions, such as the purchase of land, (iv) the operation of corporations, and (v) the employment relationship that exists between a business and its workers.
- The law of property governs the acquisition, use, and disposition of property. That topic can also be divided into three main parts: (i) real property, which consists of land and things that are attached to land, (ii) personal property, which consists of things that can be moved from one place to another, and (iii) intellectual property, which consists of things that consist of original ideas (such as patents and copyrights). All three forms of property are important in business. Every company owns personal property, the vast majority have interests in real property, and a growing number rely heavily on intellectual property. There are, in addition, several areas of law that deal with all forms of property.

10. The *Constitution* recognizes two levels of government: federal and provincial (or territorial). Sections 91 and 92 of the *Constitution* lists the topic areas in which each level of government can legislate or make laws. If a government attempts to make a law outside of the scope of its authority, it acts *ultra vires* (which means "beyond the power). Section 52 of the *Constitution* states: "The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect." Consequently, since an *ultra vires* law is inconsistent with the *Constitution*, it is not really a law at all.

11. The statement is largely incorrect. While the Constitution does provide the basic rules for Canadian society, it is very difficult to change. A Constitutional amendment requires consent of Parliament *plus* two-thirds of the provinces, where those consenting provinces represent at least 50 per cent of the country's population. The explanation for that high standard consists of the fact that a society cannot be stable if its basic rules are constantly in a state of flux. Citizens, businesses and governments cannot confidently plan for the future if they are worried that their basic assumptions may be incorrect. And, of course, a country that is in a constant state of flux cannot possibly be peaceful or productive.

12. The statement is partly true and partly false. (1) The initial premise is a matter of opinion and therefore is neither right nor wrong. Many Canadians undoubtedly do feel more closely connected to their province than to their country. At the same time, the federal government undoubtedly has authority over some subjects—such as criminal law—that directly affect everyday lives. (2) It is true to say that the federal government is favoured by the doctrine of paramountcy. That doctrine states that if a federal law conflicts with a provincial law, the federal law prevails. (3) It is not true to say, however, that the residual clause favours the provinces. On the contrary, the residual power means that the federal government has authority over any topic that the Constitution does not otherwise assign to the federal government or the provinces.

13. Traditionally, as long as a government acted within the scope of its power (or *intra vires*), its laws were generally valid. Since 1982, however, the situation has been much different. In that year, the *Canadian Charter of Rights and Freedoms* was written into the *Constitution*. As its name indicates, the *Charter* (as it is usually called), was introduced to protect basic rights and freedoms, such as freedom of religion, freedom of expression, and the right to equality. Consequently, even if a law was *intra vires* the government that enacted it, it may be struck down or modified by a court if it is found to violate a provision of the *Charter*. The courts are empowered to act in that way because the *Charter* is part of the *Constitution*, and section 52 of the *Constitution* states that "any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect."

14. Although the *Charter* may affect business people, it is important to realize that it does not contain general *property rights* (to enjoy property) or *economic rights* (to carry on economic activities). The people who drafted the *Charter* expressly rejected a right to "the enjoyment of property." They were concerned that such a right would, for instance, hamper the government's ability to protect the environment, regulate the use of land, control resource-based industries, or restrict foreign ownership of Canadian land. They were also concerned that economic rights would allow wealthy individuals to frustrate government plans to act in the public's best interests. The Supreme Court of Canada has consequently said that there is no right under the *Charter* to "unconstrained freedom" in economic activities, nor is there an "unconstrained right to transact business whenever one wishes." The denial of economic rights has also made it difficult for disadvantaged Canadians to force governments to provide social assistance

15. Although many of its rights and freedoms are quite broad, the *Charter* is also subject to several restrictions.

- *Government Action* Section 32(1) of the *Charter* states that the document applies to "Parliament" and "the legislature ... of each province." Consequently, its rights and freedoms have full effect only if a person is complaining about the government's behaviour. In contrast, the *Charter* does not directly apply to disputes involving private parties. For instance, the right to freedom of expression that is found in section 2(b) does not entitle a union to picket a private corporation. Interestingly, however, the Supreme Court of Canada has also said

that private law should be developed in a way that is consistent with *Charter* values. It is not yet clear exactly what that means.

- *Corporations* The *Charter* generally does not apply *against* private corporations. It may not apply in *favour* of them either. It depends upon the circumstances. For example, notice that section 2(b) refers to "everyone," while section 15(1) refers to "every individual." A company is a kind of "person," but it is not an "individual." As a result, it enjoys freedom of expression, but not the right to equality.
- *Reasonable Limits* Section 1 of the *Charter* states that the rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The *Constitution* therefore recognizes that it is occasionally acceptable to violate a person's rights. In one famous case, the Supreme Court of Canada held that a shop owner's freedom of expression was infringed by a law that prevented him from selling violent pornography. However, the judges also held that society was justified in banning that sort material because it is degrading, dehumanizing, and harmful to women. The law was therefore enforceable and the shop owner was prohibited from selling the offending material.
- *Notwithstanding Clause* Finally, section 33 may allow Parliament or a legislature to create and enforce a law "notwithstanding" the fact that it violates the *Charter*. In practice, however, the notwithstanding clause is almost never used. The section requires the government to expressly declare that it is overriding fundamental rights and freedoms. Of course, that sort of declaration is usually bad politics. It tends to upset voters.

16. The statement is true only insofar as it says that damages are usually awarded for the purpose of requiring one person to monetarily repair another's loss. (To be more precise, damages sometimes are calculated by reference to goals other than compensation. Punitive damages, for example, are intended to punish and deter. At this point in the course, however, students are unlikely to move beyond the simpler proposition.) That does not mean, however, that damages are unavailable with respect to *Charter* violations. The *Charter* sets out various rights and obligations. Section 52 says that any law that is inconsistent with a *Charter* provision is of "no force or effect." In addition, if a person has suffered a *Charter* violation, then a court is allowed, under section 24 of the *Charter*, to award "such remedy as [it] considers appropriate and just in the circumstances." One such remedy is an award of damages. As the Supreme Court of Canada recently explained in *Ward v Vancouver (City)*,[26] that remedy is intended to compensate the plaintiff's loss, vindicate the plaintiff's rights, and deter or discourage future wrongdoing.

17. The statement is not correct. *Subordinate legislation* is not a type of legislation that only a municipality can create. Subordinate legislation instead can exist at either the federal or the provincial (or territorial) level. It consists of rules that are created, outside the usual cumbersome legislative process, by a designated official (such as a government

[26] (2010) 321 DLR (4th) 1 (SCC).

minister, a commission, or a tribunal). It is required because it is impossible for Parliament, or a provincial legislature, as a whole to respond quickly by amending legislation to meet the changing needs of society.

One of the most important types of subordinate legislation involves *municipalities*. The Constitution is concerned with only two levels of government: federal and provincial (or territorial). However, a third level is needed. For instance, neither Parliament nor the legislature will decide whether cats can roam free in a particular town. That decision must be made locally. The Constitution gives the provinces the power to create municipalities, which are towns and cities.

18. The Constitution contemplates two levels of government: federal and provincial. Many issues, however, require decisions to be formulated and implemented at a more local level. Provinces therefore create subordinate legislation that create municipalities and, in turn, that allow the municipalities to create local rules. Those local rules are known as by-laws. Although municipalities are the lowest level of government, their impact on business can be significant. Among other things, by-laws are used to license businesses, impose some sorts of taxes, plan commercial developments, and regulate parking. City hall is a powerful place.

19. A trust is a function of both law and equity, depending upon how the question is asked. The ambiguity stems from the fact that the phrase "common law" refers to three distinct ideas. (1) At the broadest level, the "common law" refers to a system of law that historically was derived from England. Since the idea of a trust is part of the legal system that Canadian jurisdictions inherited from England, a trust certainly is a "common law" subject in that sense. (2) Within a system of law derived from England, the "common law" refers to rules that were developed by judges, rather than legislators or constitutional drafters. Since the trust was developed by judges, it certainly is a "common aw" subject in that sense as well. (3) Within a legal system derived from England and within all of the rules that were developed by judge, the "common law" refers to the ancient courts of law (*ie* King's Bench, Exchequer, Common Pleas). It can be contrasted with "equity," which refers to rules developed by judges who sat in the courts of equity or chancery. Since the trust was developed by the second set of courts, it is, in that sense, a product of "equity" rather than the "common law."

20. Canada (with the exception of Quebec) is a common law country. That means that it inherited its legal system from England. The legal system that developed in England originally had only one type of court. And the rules and procedures that were used in those courts of law were often rigid and harsh. At the same time, however, the king (or, rarely, the queen) was seen as the ultimate source of law. Consequently, when people were unhappy with decisions that they received in court, they could ask the king for relief. Not surprisingly, the king was too busy to deal with all of those petitions personally. He therefore asked the chancellor (his legal and religious adviser) to act on his behalf. And as the number of petitions continued to increase, the chancellor asked other people to act on his behalf. The chancellor and the people under him eventually became recognized as a separate court that was known as the court of equity (or the court

of chancery). That name reflects the way in which the new court originally decided cases. The king, the chancellor, and the chancellor's men simply did what they believed was right. In contrast to the courts of law, they were much less concerned with rigid rules and much more concerned with justice. In other words, their decisions were based on equity, which in a general sense means fairness.

Equity continues to play an important role in our legal system. However, it is much different than when it was first created. Two changes are especially significant.

- *The Nature of Equity* The concept of equity no longer allows judges to simply decide cases on the basis of fairness. Like the courts of law, the courts of equity eventually developed and applied a consistent set of rules. Equity may still be slightly more flexible than law. But for the most part, those two systems are different only because they occasionally apply different rules.
- *One Set of Courts* Initially, the courts of law and the courts of equity were completely separate. They occupied different buildings, they used different judges, they heard from different lawyers, and so on. At the end of the nineteenth century, however, the two court systems were joined into one. Consequently, every Canadian court is now a court of law *and* a court of equity. The same judges apply both sets of rules.

CASES & PROBLEMS

1. This question requires students to appreciate that there sometimes is a difference between: (i) legal obligations, (ii) moral obligations, and (iii) good business practices. It also requires them to devise a risk management strategy that best serves the company's needs.

Nagatomi is not under any legal obligation to deliver the machine to Inga before payment. Furthermore, it is legally entitled to re-sell the machine to the buyer in Colorado and to charge any resulting expenses to Inga. Sometimes, however, it does not make good sense to strictly enforce legal rights. This appears to be one such situation.

Although not every business person would agree, Nagatomi arguably has a moral obligation to agree to Inga's proposal. It knows that she has recently suffered a string of bad luck and that she may be financially ruined if she is not allowed to use the harvester before making payment. Furthermore, the facts suggest that her proposal entails little risk for the company. While more information is needed, it appears that Inga's crop is very good and that she would be able to pay the full price, with interest, within a relatively short time.

Finally, it would appear to be commercially advantageous for Nagatomi to agree to Inga's proposal. If it strictly enforces its legal rights, it will make only one sale: the Colorado buyer will purchase the machine that was initially built for Inga. However, if the company agrees to Inga's proposal, it will make two sales. First, Inga will eventually pay for her harvester. And second, the Colorado buyer will pay for the second harvester that the company will be able to manufacturer during the next year. (The Colorado buyer does not require delivery until next autumn.)

2. This question is intended to review the basic principles of risk management in a general way. Since the facts are incomplete, students should not be expected to provide specific solutions.

The risk management process involves three steps: identification, evaluation, and response.

- Rabby has already identified the problem, at least in general terms. Its software program will erase information from its customers' computers.
- Rabby also needs to evaluate the problem as accurately as possible. That is especially true with respect to legal liability. Before it can formulate a sensible response, it needs to know the approximate number and value of the claims that it may face. It also needs to determine the potential consequences of adverse publicity.
- Finally, on the basis of as much information as possible, Rabby needs to formulate the response that best suits its needs. At this point, there is no ideal solution. The company therefore must find a way to minimize its prospective losses, both in terms of legal liability and in terms of damage to its reputation.

Generally speaking, there are four forms of risk management: risk avoidance, risk reduction, risk shifting, and risk acceptance.

- At this point, risk avoidance is not entirely possible. Rabby might be able to prevent any actual damage to its customers' computers by recalling all of the units that it shipped to the stores. That tactic, however, carries obvious costs in terms of refunds, replacements, and loss of reputation.
- Likewise, there is relatively little that can be done at this stage with respect to risk reduction. The company should, however, consider whether it would be better in the long run to recall the products or to hope for the best and simply deal with claims as they arise.
- Since the problem already exists, Rabby would presumably find it most difficult to arrange insurance coverage. Even if such coverage was available, the premiums might be prohibitively expensive. As another form of risk shifting, Rabby could consider raising the prices of its other products. By doing so, it might hope to shift the costs associated with the problem onto its future customers. Given the highly competitive nature of industry, however, even a small price increase might significantly hurt sales.
- Finally, Rabby might simply accept the risk. It could do nothing at this point and hope for the best. And when it does receive claims, it might settle those cases as quietly as possible in order to avoid adverse publicity.

3. This question raises the issue of *paramountcy*. When there is a conflict or tension between a federal law and a provincial law, the doctrine of federal paramountcy resolves the dispute on the basis of the Constitution's division of powers by stating that the federal law prevails.

Before discussing the issue of federal paramountcy, however, it is first necessary to recognize that there is a conflict. The federal *Canada Marine Act* established the Vancouver Port Authority (the VPA) to ensure that shipping operates effectively in the

Vancouver harbour. By granting approval to the development proposal created by Lafarge Canada Inc, the VPA has indicated its belief that the project is essential to the goals of the *Canada Marine Act*.

The tension arises in this case because a citizens' group insists that the project also requires approval from the city. Planning approval of that sort is a municipal matter. As explained in the text, however, municipalities operate on the basis of *subordinate legislation* as a result of provincial legislation. Consequently, although the point may not be immediately obvious to some students, municipal planning approval does entail provincial authority.

A question therefore arises as to whether land under control of the federally constituted VPA must comply with the requirements of a municipal bylaw enacted under the authority of provincial legislation. In *British Columbia (Attorney General) v Lafarge Canada Inc*,[27] the Supreme Court of Canada invoked the doctrine of federal paramountcy and held that the municipal/provincial laws could not impede the federally approved project. To hold otherwise would deprive the VPA of its final decision-making power.

4. This question is based on *Ward v Vancouver*.[28] The facts state that the police violated the plaintiff's rights under s 8 of the *Charter*. At a minimum, the plaintiff would be entitled to a *declaration*. That remedy, however, would merely provide a judicial declaration that the plaintiff's rights had been violated. Most of the other potential remedies are inapplicable. Since the wrong has already been committed and is not continuing, there would be no point in awarding an *injunction*, which would require the government to act in a certain way. Since the violation did not arise from the existence of a particular law, it would not make sense for the court to provide a remedy of *striking down*. Likewise, since the violation did not arise from the language of any legislation, the case does not call out for a remedy of *severance*, *reading down*, or *reading in*. The final possibility, however, is well-suited to the case. A court would likely award *damages*, under s 24 of the *Charter*, for the purpose of compensating the plaintiff for his loss, as well as vindicating his rights, and deterring future misconduct. In the actual case of *Ward v Vancouver*, the Supreme Court of Canada upheld the trial judge's decision to award $5000.

5. This case is based on *Ramsden v City of Peterborough*.[29] It is designed to help students gain a better appreciation of the *Charter*. A proper answer would be expected to cover the following points.

The facts generally fall within the scope of the *Charter* because the applicant is complaining about government action in the form of a by-law (legislation).

The by-law would be challenged under section 2(b) of the *Charter*, which guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The by-law violates that guarantee because it creates an absolute ban on the applicant's freedom to communicate to the public about upcoming events.

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27 (2007) 281 DLR (4th) 54 (SCC).

28 (2010) 321 DLR (4th) 1 (SCC).

29 (1993) 106 DLR (4th) 233 (SCC).

Some students might suggest that the *Charter* is inapplicable because, as the text states, it does not contain general guarantees of "economic activity." That proposition must, however, be read in context. While there is no general right to carry on business as the individual sees fit, some activities (such as freedom of expression) may be protected even though they are used in furtherance of a business enterprise. Many of the illustrations contained in the text prove that point (*eg Irwin Toy v Quebec* — television advertising; *Bill 101* — outdoor signs in Quebec).

Even though a law violates the *Charter* right, it may be saved under section 1 of the *Charter*, if it is a "reasonable" limit "prescribed by law as can be demonstrably justified in a free and democratic society." Students would be expected to note that point and to offer some discussion. In *Ramsden* itself, the Supreme Court of Canada held that the by-law could not be saved under section 1. The by-law was drafted too broadly. The city was properly concerned, for instance, that posted advertisements might create litter or "aesthetic blight." There was, however, no justification for a *complete* ban on advertising on *any* public property. The court suggested that the by-law might have properly served its purpose if it had prohibited certain types of advertisements, or limited them to certain types of public property.

Assuming that there has been a violation that cannot be saved under section 1, the court would impose a remedy. It might be possible to "read down" the by-law by limiting its scope of application. That remedy would, however, require the court to exercise an essentially legislative discretion in deciding which types of advertising were and were not permissible. The better approach (and the one adopted by the Supreme Court of Canada in *Ramsden*) would be to simply strike down By-law 2720.

The city would presumably then enact a new by-law that more narrowly serves its goals and that does not violate the *Charter*.

6. If Macca merely hires Ramon to collect customers' payments on its behalf, then it runs the risk of Ramon's bankruptcy. In that situation, a simple debt arises between the parties. After collecting money from Macca's customers, Ramon is required to pay over the same amount to Macca (perhaps with a reduction for its own fee). If Ramon becomes bankrupt, then Macca can still sue for the debt, but since Ramon will have more debts than resources, Macca could not possibly collect everything to which it is entitled.

Macca can avoid that risk by stipulating that any money collected by Ramon be held on *express trust*. Under an express trust, Ramon would receive legal title to money that it collected from Macca's customers, but the equitable title would be owned by Macca. Ramon therefore would hold the money for Macca's benefit. And since the money would really belong to Macca, it would not be available to pay Ramon's other debts. Macca could take the entire collected fund, leaving perhaps nothing behind for Ramon's other creditors.

Under an express trust, Ramon would hold the collected fund as a *trustee*. Macca would equitably own the same fund as the *beneficiary*. Although the text does not explain the point, the role of the *settlor* probably would be played by Ramon. The settlor is the person who puts property into trust. On these facts, the money actually comes from Macca's customers. They cannot be the settlors, however, since they do not hand over the money with the intention to pay into a trust. The better view is that Ramon receives legal

title to the money from the customers. Once it does so, it is required to declare itself to be trustee and to hold the fund for Macca's benefit.

CASE BRIEFS

Grimshaw v Ford Motor Co (1981) 119 Cal App (3d) 757—note 2

Ford Motor Co manufactured the Pinto. Its engineers realized that, because of a design flaw, the gas tank was prone to explosion if the vehicle was struck from behind. The engineers also realized that the problem could be eliminated by slight modification, which would cost as little as $4 per vehicle. The company chose to not publicize the danger, however, because it was concerned about the cost of a recall. It also conducted a statistical and economic analysis that suggested that it would be less expensive to simply pay damages for accidents that did occur (even though such accidents carried a high risk of serious injury and death) than to effect a recall of all of the affected vehicles.

The company was held liable. In addition to compensatory damages, the jury awarded $125 000 000 in punitive damages in an attempt to ensure that the company did not actually profit by rejecting the opportunity to implement the life-saving modifications. (That award was reduced by the court to $3.5 million.)

Crocker v Sundance Northwest Resorts Ltd (1988) 51 DLR (4th) 321 (SCC)—note 5

The defendant organized an event in which contestants raced down a snow-covered mountain on inner tubes. Before being allowed to compete, the plaintiff was presented with a form that released the defendant from liability for negligence. Although the plaintiff signed that document, he had not read it and it had not been explained to him. He was later injured after being thrown from his tube during the race. He sued the defendant in the tort of negligence on the basis that it carelessly allowed him to compete even though he was obviously very drunk. The defendant responded by arguing that the plaintiff had voluntarily assumed the risk of injury.

The Supreme Court of Canada held that the defendant owed a duty of care to protect the plaintiff because of the commercial relationship that existed between the parties. It failed in that duty of care because it allowed the plaintiff to participate in the tubing race while obviously drunk. The court also held that the plaintiff had not voluntarily assumed the risk of injury.

> [T]he waiver provision in the entry form was not drawn to the plaintiff's attention ... he had not read it, and, indeed, did not know of its existence. He thought he was simply signing an entry form. In these circumstances [the defendant] cannot rely upon the waiver clause in the entry form.

The Court did, however reduce the plaintiff's damages by 25 percent to reflect his own contributory negligence.

Osterlind v Hill (1928) 160 NE 301 (Mass)—note 6

The defendant rented a dilapidated canoe to the deceased, who he knew to be drunk. The deceased paddled some way out into the water, capsized, and shouted for help for 30 minutes. The defendant heard the cries for help, and could have easily come to the rescue,

but chose to stay on shore. He was sued in negligence for his failure to act. The claim was rejected on the basis that there is no general duty to rescue.

Bell Canada v Canadian Telephone Employees Association (2001) 199 DLR (4th) 664 (FC CA), affd (2003) 227 DLR (4th) 193 (SCC)—note 11
Beginning in the 1980s, a series of proceedings were commenced against Bell Canada on the basis of an allegation that it had discriminated against women by failing to provide them with equal pay for work of equal value. At one point, Bell Canada offered a settlement of $29 000 000, which was rejected by the complainants.

R v Waterloo Mercury Sales Ltd (1974) 49 DLR (3d) 131 (Alta Dist Ct)—note 13
A car dealership sold used cars. Its used car sales manager fraudulently caused odometers on used cars to be turned back. The dealership itself was charged under the *Criminal Code*. The court convicted. It held that the sales manager was the directing mind of the corporation for the purposes of the criminal activity. It reached that conclusion on the ground that the sales manager had been given authority to design and supervise the performance of fraudulent corporate policy. It would have been different if he had merely been given authority to carry out policies that someone else in the organization created.

Neilsen v City of Kamloops (1984) 10 DLR (4th) 641 (SCC)—note 15
A construction company was building a house in Kamloops. Acting under municipal regulations, a city official inspected the project in its earlier stages and noted that it was not, contrary to the regulations, built on solid foundations. The inspector ordered the builder to remedy that defect. The builder ignored that order. Furthermore, the city did not take effective steps for the enforcement of its order. As a result, the house was completed with weak foundations. The house then passed through several hands before being purchased by the plaintiff. The plaintiff suffered a loss when the house subsided as a result of its weak foundations. The plaintiff sued the city in the tort of negligence for failing to properly enforce its own building regulations.

The Supreme Court of Canada imposed liability. It held that a defendant owes a duty of care to the plaintiff if: (i) it was reasonably foreseeable that carelessness by the defendant would result in a loss or injury to the plaintiff, and (ii) there are no policy factors for refusing to recognize a duty of care. That test was satisfied on the facts. It was clearly foreseeable that a subsequent purchaser like the plaintiff might suffer a loss if the defendant carelessly failed to enforce its own building regulations by taking reasonable steps to ensure that houses are built on solid foundations. Furthermore, there were no policy reason to deny the existence of a duty of care. More significantly, a majority of the Court rejected the argument that the recognition of a duty of care would open the floodgates to litigation by allowing people to sue municipalities too often.

Neilsen also established the general rules that determine when an action in negligence can be brought against a government. The Court distinguished between two types of cases.

- In the first, the plaintiff complains about a *policy or planning* decision that was made by a government. For instance, the plaintiff may complain that she was injured because the government carelessly chose not to plow snow from

secondary roads (and because she subsequently slid off such a road and into a ditch). Unless that decision was made in bad faith or arose by default because the government simply failed to make any decision at all, the plaintiff's claim in negligence will fail. The courts are not prepared to second guess the manner in which a government determines its priorities or allocates its resources.

- In the second type of case, the plaintiff complains about the government's *operational* behaviour. The plaintiff says that the government chose to do something, but then did it in a careless manner. That was the situation in *Neilsen*. The City of Kamloops decided to regulate construction projects, but then carelessly failed to enforce an order issued by one of its inspectors. As *Neilsen* illustrates, a government generally can be held liable with respect to operational matters.

Central Trust Co v Rafuse (1986) 31 DLR (4th) 481 (SCC)—note 16
The plaintiff hired the defendant lawyer to act in the purchase of shares. As part of that task, the defendant was required to arrange a mortgage. Because of its carelessness, the mortgage that the defendant arranged for the plaintiff was void. The plaintiff therefore suffered an economic loss on the deal. The plaintiff wanted to sue the defendant in the tort of negligence. The defendant, however, argued that the claim properly arose in contract and that the tort action was barred by the statutory limitation period in any event.

The Supreme Court of Canada held that the same set of facts can support concurrent actions in tort and contract, and that the plaintiff has a generally unfettered discretion to sue for one or the other or both (subject, of course, to the rule against double recovery). On the facts, the defendant had breached its contractual promise to act with appropriate skill and care. It also committed the tort of negligence by carelessly failing to secure a valid mortgage for the plaintiff.

The concurrency of actions is, however, subject to an important qualification. The plaintiff cannot use an action in tort to circumvent an exclusion or limitation contained in a contract. For instance, if a contract allowed liability only if the defendant acted with "gross negligence," the plaintiff could not succeed in tort on the basis of a claim for simple negligence.

Reference Re Validity of s 5(a) of the Dairy Industry Act (Canada) [1949] 1 DLR 433 (SCC)—note 24
The essential facts and reasons appear in the text.

R v Mersey Seafoods Ltd (2008) 295 DLR (4th) 244 (NS CA)—note 25
Mersey Seafoods Ltd, a Nova Scotia based fishing business, was charged with eight counts under the provincial *Occupational Health and Safety Act*. It fought the charges on the basis that since shipping and navigation are federal powers under the *Constitution*, the provincial legislation was of no effect under the doctrine of federal paramountcy. That argument succeeded at trial, but the Nova Scotia Court of Appeal held otherwise. It held that the pith and substance of the matter pertained to labour relations and working conditions, which are matters of provincial authority. The mere fact that vessel in

question was involved in shipping did not transform the company into a federal undertaking.

Reference Re Same Sex Marriage (2004) 246 DLR (4th) 193 (SCC)—note 27
Leading up to the decision in this case, various appellate courts had held that a definition of marriage that excluded same-sex couples violated the equality provisions of the *Charter*. Rather than appeal those decisions to the Supreme Court of Canada, the federal government of Jean Chretien proposed a new law that would allow same-sex marriages. It then submitted to the Court a reference that posed three questions.

1. Was the definition of marriage within the exclusive legislative authority of the federal Parliament of Canada? In other words, did the federal government have the authority to change the definition without the permission of the provinces?

2. Was the inclusion of same-sex couples within the definition of marriage consistent with the *Charter of Rights and Freedoms*?

3. Did the freedom of religion guaranteed by the *Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between same-sex couples that was contrary to the religious beliefs of those officials?

After becoming Prime Minister, Paul Martin added a fourth question:

> 4. Is the traditional definition of marriage (between one man and one woman) consistent with the *Charter of Rights and Freedoms*?

The Supreme Court held as follows:

> Question #1 The federal government has exclusive authority to define the concept of marriage.
>
> Question #2 The new definition of marriage, which included same-sex couples, did not violate the *Charter*. That did not mean, however, that a definition of marriage that did not include same-sex couples violated the *Charter*.
>
> Question #3 Religious institutions could not be forced to perform ceremonies against their beliefs.
>
> Question #4 The Court refused to answer this question on the ground that it previously had been answered by the lower courts and not challenged by the federal government,

Chaoulli v Quebec (Attorney General) (2005) 254 DLR (4th) 577 (SCC)—note 28

Jacques Chaoulli and George Zeliotis brought an action against Quebec's *Health Insurance Act* and *Hospital Insurance Act*. Those statutes prohibit private payment for the cost of health care services which are insured by the public system. The applicants claimed that they were constitutionally entitled to spend their own money on health care, even if the services were also offered under the publicly-funded system. On a larger scale, the case was seen by many commentators as a tipping point in the political debate regarding the legitimacy and desirability of private or "two-tier" health care.

The Supreme Court of Canada held that preservation of the publicly-funded health care system was a pressing and substantial objective. By a majority, however, the court also held that it was unconstitutional, in the circumstances, for the province to prohibit people from privately purchasing health care. It further held that the province had not shown that a total prohibition was necessary to achieve social goals.

Four of the majority judges held that the prohibition on private health violated Quebec's *Charter of Rights*. Three of those judges further held that the prohibition also violated the Canadian *Charter of Rights and Freedoms.*

Three dissenting judges held that decisions regarding the delivery of health care should be made by the legislature, rather than by the courts. They further held that the *Charter* did not contain any "principle of fundamental justice" that could be breached in the circumstances.

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (SCC)—note 29 and note 46
Parliament enacted the *Lord's Day Act*, which prohibited most stores from being open for business on Sundays. Big M Drug Mart was charged for violating that statute. Since the accused was a corporation, it could not hold religious beliefs itself and therefore could not directly argue that the statute violated section 2(a) of the *Charter*, which protects freedom of religion. Nevertheless, the corporation was entitled to challenge the validity of the law on the basis that, if the statute was constitutionally invalid, it could not support a prosecution.

As a preliminary point, the case has an interestingly jurisdictional issue. The statute initially had a religious purpose, insofar as it was aimed at maintaining the Christian sanctity of Sundays. Over time, however, the purpose of the statute quite clearly appeared to be secularized so as to simply allow a common day of rest. Nevertheless, for the purposes of this action, the Crown was required to defend the legislation on religious grounds. Considered in that light, it fell within the scope of the federal government's scope of authority under section 91(27) of the *Constitution* (criminal law). If, in contrast, the legislation was approached on purely secular grounds, it was *ultra vires* because it involved federal intrusion into an area under provincial jurisdiction according to section 92(13) of the *Constitution* (property and civil rights).

The Supreme Court of Canada held that the statute violated section 2(a) of the *Charter*. Dickson J said:

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.
>
> Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.

The court also held that the violation could not be saved under section 1 of the *Charter* as a "reasonable limit." Since the statute had to be approached as serving a religious purpose, there was no way in which it could be squared with the need to protect freedom of religion.

In the subsequent case of *Edwards Books and Art Ltd v R* (1986) 35 DLR (4th) 1, the Supreme Court of Canada dealt with another Sunday closing law. In that case, the statute was enacted by the province of Ontario for the secular purpose of providing a common day of rest. Nevertheless, it too was held to violate the *Charter* because, while secular in stated purpose, it was discriminatory in effect. It disadvantaged some groups (*eg* Jews, Seventh Day Adventists) who would be required to close on Sundays, even though their religious faith also required them to close on another day of the week. A majority of the Court, however, also held that statute was a "reasonable limitation" on the *Charter* rights and therefore was saved under section 1. Although various reasons were given for that conclusion, most focused on the need to protect vulnerable employees from unfair working conditions. Everyone needs a day of rest.

Black v Law Society of Alberta (1989) 58 DLR (4th) 317 (SCC)—note 30
The Law Society of Alberta wanted to prevent the development of inter-provincial law firms. In particular, it wanted to prevent the creation of partnerships between law firms in Alberta and Ontario. It therefore created rules that: (i) prohibited partnerships between residents and non-residents of Alberta, and (ii) prohibited a person from being a partner in more than one firm at the same time. Those rules were challenged on the basis that they violated section 6(2) of the *Charter*, which guarantees mobility rights.

The Supreme Court of Canada struck down the rules, on the ground that they seriously impaired the ability of a non-Albertan to enter into a legitimate business arrangement within the province. The violation was not saved as a "reasonable limitation" under section 1. Although the Law Society of Alberta had legitimate concerns regarding the

regulation of the legal profession, it could secure its goals through other, less intrusive means.

Andrews v Law Society (British Columbia) (1989) 56 DLR (4th) 1 (SCC)—note 31
The *Barristers and Solicitors Act* of British Columbia stated that only Canadian citizens could practice law in the province. Mark Andrews was a British citizen who was permanently resident in British Columbia. He had satisfied all of the requirements for admission to the British Columbia bar, except that he was not a Canadian citizen. He challenged that requirement on the basis that it violated the guarantee of equality that is found in section 15 of the *Charter*.

The Supreme Court of Canada struck down the law on the basis that it violated the *Charter*. The case is especially important because it formulated the proper approach to section 15. The Court emphatically rejected a "similarly situated" test that would simply would require that people in similar situations be treated in a similar way. That approach is deficient because, to take a simple example, it would preclude a one-armed swimmer from ever winning a race if the rules defined the winner as "the person who first touches both hands to the end of the pool." Instead, the Court held that the purpose of section 15 was to protect vulnerable groups from discrimination. Such groups are defined by the grounds enumerated in section 15 (*ie* race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), and by analogous extensions (*eg* sexual orientation). A law violates section 15 if its purpose or effect is discriminatory in the relevant way.

On the facts, the Court held that the impugned statute violated section 15. Citizenship fell within the *Charter* provision by analogy, because non-citizens are a "discrete and insular minority," because non-citizens tend to lack political power, and because citizenship is an immutable characteristic. The statute discriminated against Andrews because of his citizenship. And finally, while the province was legitimately concerned to ensure high standards in the legal profession, there were other, more reasonable means of securing that goal.

Gosselin v Quebec (Attorney General) (2002) 221 DLR (4th) 257 (SCC)—note 33
During the time between1984 and 1989, the social assistance program in Quebec provided lower levels of assistance for individuals under the age of 30 compared to recipients who were 30 or older. The program operated pursuant to the *Regulation Respecting Social Aid*, enacted under the *Social Aid Act*. Individuals receiving lower levels of assistance could increase their entitlement by participating in one of the work activities or educational programs offered by the government. This system was designed to encourage young people to join the workforce.

Louise Gosselin was a social assistance recipient during the relevant time. She attacked the scheme by alleging that it violated the *Charter*. One basis for the attack was Gosselin's contention that the scheme violated section 7 of the *Charter*. She argued that the right to security of the person included the right to receive a level of social assistance that is sufficient to meet basic needs.

The majority of the Supreme Court of Canada indicated that rights protected by section 7 had not yet been extended to include economic rights. Furthermore, the Court indicated that even if section 7 could be interpreted to include economic rights it does not place positive obligations on the government, but rather only creates the obligation not to deprive a person of life, liberty, or security of the person. Accordingly, Gosselin's claim was denied.

See also *Wilson v. British Columbia (Medical Services Commission)* (1988) 53 DLR (4th) 171 (BC CA) (holding that section 7 does not extend to pure economic rights).

Boulter v Nova Scotia Power Inc (2009) 307 DLR (4th) 293 (NS CA)—note 34
The defendant sold power to consumers in Nova Scotia. Its pricing scheme charged the same rate to all customers, regardless of income. An action was commenced under s 15 of the *Charter*. The applicant complained that a single rate discriminated, in effect, against low-income individuals, who find it more difficult to afford a price that is easily satisfied by a wealthier person. Although previous courts had been split on the issue, the Nova Scotia held that poverty is not an analogous ground under s 15 and that the impugned pricing scheme consequently was valid.

Pridgen v University of Calgary (2010) 325 DLR (4th) 441 (Alta QB), affd (2012) 350 DLR (4th) 1 (Alta CA)—note 35
It often is said that because universities operate with sufficient independence from the government, they are not governed by the *Charter*. That proposition, however, may need to be qualified.

Twin brothers, Kevin and Steven Pridgen, attended the University of Calgary and were enrolled in a course taught by Professor Aruna Mitra. As sometimes occurs, the brothers were less than impressed with the quality of instruction. In contrast to the past, however, comments that might have been confined to a campus tavern are now more likely to appear online. A classmate posted a message on his Facebook "wall" that said, "I NO Longer Fear Hell. I took a course with Aruna Mitra." Since they shared similar views, the Pridgen twins added their own thoughts. Steve wrote, "Some how I think she just got lazy and gave everybody a 65....that's what I got. Does anybody know how to apply to have it remarked?" Keith's added his own thoughts:

> Hey fellow LWSO. homes … So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C !!!!! Remember when she told us she was a long-term professor? Well actually she was only sessional and picked up our class at the last moment because another prof wasn't able to do it ... lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future L.S.W.O. students!

After the professor complained about the matter, the faculty's dean found the students' comments constituted non-academic misconduct. The sanctions included 24 months of probation and an order to provide the aggrieved professor with an unreserved apology. Failure to comply with the dean's order exposed the students to further sanctions, including suspension and expulsion. The brothers appealed, but the Review Committee

upheld the finding of misconduct (albeit while reducing the sanctions). The Board of Governors rejected a further appeal.

The twins then brought the matter before the courts. Against their claim that their right to freedom of expression under s 2(d) of the *Charter* had been violated, the University of Calgary argued that it was not part of the government and that it consequently was not subject to the *Charter*.

Strekaf J upheld the twins' claim. She agreed that the day-to-day operations of a university generally are not subject to the *Charter*. She drew a distinction, however, between events occurring within the usual course of university operations and events pertaining to a university's implementation of a specific government policy." In this instance, the University was acting as the government's agent in facilitating access to a post-secondary educational institution under the *Post-Secondary Learning Act* SA 2003, c P-19.5 (Alta). The Court further held that while the Review Committee had otherwise acted in a procedurally fair manner, it failed to provide adequate reasons for upholding the Dean's finding of misconduct. She also found that the evidence provided no reasonable basis upon which the twins could have been found guilty of non-academic misconduct.

RWDSU Local 580 v Dolphin Delivery Ltd (1986) 33 DLR (4th) 174 (SCC)—note 36
A union was involved in secondary picketing against an employer. The employer sought an injunction to restrain the picketing, on the ground that is constituted the tort of inducing breach of contract. The union argued that an injunction was unavailable because it would violate the *Charter*'s guarantee of freedom of expression. An important preliminary issue arose, however, as to whether or not the *Charter* applied in such circumstances.

The Supreme Court of Canada held that the *Charter* applies only to government. "Government" includes the legislative, executive, and administrative branches. It includes statutes and regulations. It also includes the common law (*ie* judge made law), but only to the extent that the government relies upon it. The *Charter*, in contrast, does not apply directly to the judicial branch.

> The *Charter* does not apply to private litigation completely divorced from any connection with government. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: their actions are subject to the *Charter* whether invoked in public or private litigation. An order of the Court, however, cannot be equated with government action for the purposes of *Charter* application notwithstanding political theory. The Courts, while bound by the *Charter*, act as neutral arbiters and to regard a court order as an element of government action necessary to invoke the *Charter* would unduly widen the scope of the *Charter*'s application to virtually all litigation.

Nor does the *Charter* directly apply to private disputes between private parties. That was true on the facts. However, the Court also said, without extensive explanation:

> Where … private party A sues private party B relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Constitution*. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.

The same view has been repeated in subsequent cases, again without extensive analysis. In *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC), Cory J said:

> Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

Similarly, in *Dobson v Dobson* (1999) 174 DLR (4th) 1 (SCC) (which is the subject of the next Case Brief), McLachlin J said:

> In my view, to apply common law liability for negligence generally to pregnant women in relation to the unborn is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the *Canadian Charter of Rights and Freedoms*. Liability for foetal injury by pregnant women would run contrary to two of the most fundamental of these values – liberty and equality.

Dobson v Dobson (1999) 174 DLR (4th) 1 (SCC)—note 37

An action in the tort of negligence was brought on behalf of a boy against his mother. During pregnancy, the mother carelessly became involved in a car accident. That accident damaged the fetus and the boy was subsequently born with disabilities. The mother supported the action, which was really against her insurance company, because she too wanted her son to receive compensation for his injuries.

The Supreme Court of Canada denied the possibility of imposing liability. While accepting that injury to the son was a reasonably foreseeable result of the mother's carelessness, the court held that policy factors negated a duty of care. The majority was concerned that a duty of care would intolerably infringe upon a pregnant woman's freedom of choice for a nine-month period. It was also dissuaded by the task of formulating a standard of care. In contrast to the dissenting judge, it did not believe that the obligation to act carefully, if recognized, could be confined to activities like driving.

R v Rockwood (2007) 287 DLR (4th) 471 (Nfld CA) — note 39
Brent Rockwood was the sole shareholder, director, and officer of Leyson Holdings Inc. Rule of 5.07(2) of the *Rules of the Supreme Court of Newfoundland* allowed individuals to appear in court unrepresented, but required corporations to be represented by lawyers. Rockwood challenged that rule on the basis that it violated his company's right to equality under section 15(1) of the *Charter*. The Newfoundland Court of Appeal rejected that argument. It held that the interests of human dignity and self-worth, which underlie the guarantee of equality that appears in section 15(1), are not engaged by a corporation.

R v Butler (1992) 89 DLR (4th) 449 (SCC)—note 40
Donald Butler operated a store in Winnipeg that sold hard core pornography. He was charged under a *Criminal Code* provision that makes it an offence to disseminate "obscene" materials, which have the dominant characteristic of "the undue exploitation of sex, or of sex and any one or more of … crime, horror, cruelty, and violence." He claimed that the law violated his freedom of expression under section 2(b) of the *Charter*.

The Supreme Court of Canada held that the law violated section 2(b) of the *Charter* because it limited the freedom of expression. However, the Court also held that the law was saved under section 1 as a "reasonable limitation" on the freedom of expression. It did so by approaching the law not as a matter of decency or obscenity, but rather as a matter of pornography. While sexually explicit materials were acceptable in some situations, society had a legitimate reason for controlling materials that involve depictions of violence, degradation, dehumanization, or children.

RWDSU v Saskatchewan (1987) 38 DLR (4th) 277 (SCC)—note 42
As a result of stalled contract negotiations, the unions representing Saskatchewan dairy workers started making plans for a strike. In response, the dairies implemented a lock-out. The Legislature of Saskatchewan immediately enacted the *Dairy Workers (Maintenance of Operations) Act*. The legislation temporarily prevented the dairy workers from striking and the dairies from engaging in a lock-out. The unions and dairy workers applied for a declaration that the law infringed on the freedom of association as guaranteed by section 2(d) of the *Charter*.

The first issue for consideration before the Supreme Court of Canada was whether or not the freedom of association, as it is protected by the *Charter*, includes the right to strike. Citing a recent reference in which the Court determined just that issue, the majority held that freedom of association, as it is protected by the *Charter*, does not extend to include the right to strike. As a result, the *Dairy Workers (Maintenance of Operations) Act* was not in violation of the *Charter*. The application was dismissed.

Ford v Quebec (Attorney General) (1988) 54 DLR (4th) 577 (SCC)—note 43
The Quebec *Charter of the French Language* (commonly known as "Bill 101") required that all outdoor signs appear only in French. Several businesses affected by the law challenged the legislation. One basis of their challenge was that the language requirement in the statute contravened section 2(b) of the *Charter*, which guarantees the freedom of expression.

The Supreme Court of Canada determined that the language requirement under the *Charter of the French Language* infringed the *Charter* guarantee of freedom of expression. However, the act contained a valid notwithstanding clause, protecting the impugned provision.

Note: the clause was found to be inoperative anyway, because it infringed the Quebec *Charter of Human Rights and Freedoms*.

Alliance des professeurs de Montréal v Quebec (Attorney General) (1985) 21 DLR (4th) 354 (Que CA)—note 43
The Quebec Government attempted to insert a notwithstanding clause into all of the province's legislation using the *Act respecting the Constitution Act, 1982*. The clause indicated that each particular act is operative notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982. The constitutionality of the Act was attacked.

Section 33 of the Constitution Act provides for the procedure that must be followed in order to implement the notwithstanding clause.

- the override declaration must be expressly stated
- the override declaration must be a part of the statute which is exempt from or of which a provision is exempt from the application of the *Charter*
- the override declaration must indicate which provision of the *Charter* is to be disregarded

The Quebec Court of Appeal determined that the *Act respecting the Constitution Act, 1982* did not meet these requirements and was therefore unconstitutional.

Eldridge v British Columbia (Attorney General) (1997) 151 DLR (4th) 577 (SCC)—note 44
Two statutes address health care financing in British Columbia: the *Hospital Insurance Act* and the *Medical and Health Care Services Act*. Neither statute specifically provided for sign language interpretation for the deaf while they are receiving medical services. Sign language interpretation was initially provided by a non-profit agency, but the services were stopped when the agency could no longer secure adequate financial assistance to maintain the program. Following the cessation of the program, three individuals brought forward an application for a declaration that both the *Hospital Insurance Act* and the *Medical and Health Care Services Act* contravened the *Charter* guarantee of equality. The individuals, who were deaf and preferred to communicate using sign language, argued that they were not receiving equal benefit under the law, guaranteed under section 15 of the *Charter*, because they were receiving a lower quality health care due to their physical disabilities.

The Supreme Court of Canada decided that the relevant legislation did not directly contravene the *Charter* because sign language interpretation was not specifically excluded from coverage. The Court determined that the medical services commission and the individual hospitals enjoyed a broad discretion under the *Hospital Insurance Act* and the *Medical and Helath Care Services Act*. It was through the exercise of this discretion

that the *Charter* was infringed. The court granted the declaration, but opted to leave it up to the government of British Columbia to determine the best way to administer the relevant legislation that would be consistent with the *Charter*. The declaration was suspended for six months to provide the government with the time necessary to make changes.

Marchand v Simcoe County Board of Education (1986) 29 DLR (4th) 596 (Ont HCJ)—note 45

Jacques Marchand was a resident of Ontario near the Town of Penetanguishene in the County of Simcoe. Marchand's first language was French, which is the minority language in the Province of Ontario. He wanted his children to be educated in French. While there were four French language primary schools in and around the Town of Penetanguishene, there was no French language high school as of the late 1970s. In 1980, in response to requests by several members of the French language community which were supported by the French Language Advisory Committee and the Minister of Education for the Province of Ontario, a French language high school was opened. The school lacked a cafeteria and the necessary facilities for both industrial shops and home economics classes. The poor quality of facilities resulted in significantly lower enrolment than expected. On behalf of himself and others residing in or near Penetanguishene, Marchand brought forward an action against the Simcoe County Board of Education requesting a declaration of their minority language education rights as protected by section 23 of the Charter.

The Ontario High Court of Justice decided that pursuant to section 23 of the Charter, Marchand had the right to have his children educated in French and that the necessary facilities should be paid for with public funds. The Court also indicated that the quality of the education offered at French language institutions must be comparable to that offered at English language institutions.

Reference Re Manitoba Language Rights (1985) 19 DLR (4th) 1 (SCC)—note 47

According to section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*, all legislative enactments by the Manitoba legislature must be in both English and French. In 1890, Manitoba enacted the *Official Language Act*, which contradicted the bilingual requirement, indicating that all legislative enactments only need to be published in English. Despite several challenges regarding the validity of the *Official Language Act*, all legislative enactments in Manitoba were published only in English for over 90 years.

A reference was sent to the Supreme Court of Canada regarding the language issue. The reference consisted of four questions including whether or not the language requirements in the *Constitution Act, 1867* and the *Manitoba Act, 1870* were mandatory, whether legislation that was enacted in English only was invalid, and if so, whether those laws had any legal force and effect.

The language requirements were determined to be mandatory, and, as a consequence, the laws published in English only were invalid. However, the laws were deemed to be valid

and of force and effect for a period of time, allowing the legislature the time necessary to translate all of the laws.

Canada (Employment and Immigration Commission) v Tetreault-Gadoury (1991) 81 DLR (4th) 358 (SCC)—note 48
Marcelle Tetreault-Gadoury lost her job less than two weeks after her 65th birthday. She immediately applied to the Employment and Immigration Commission for benefits under the *Unemployment Insurance Act, 1971*. She met most of the criteria for entitlement to benefits, but her application was denied because of her age. According to the Commission she was no longer entitled to ordinary weekly benefits. All she could receive was a lump sum retirement benefit which equalled three weeks of regular entitlement. She appealed the decision, contending that the relevant section of the *Unemployment Insurance Act* violated the guarantee of equality under section 15 of the *Charter*.

The Supreme Court of Canada found that the relevant section of the *Unemployment Insurance Act* violated the guarantee of equality as provided for by the *Charter*. The Federal government repealed the relevant section of the *Unemployment Insurance Act, 1971* before the case was heard by the Supreme Court of Canada. Removal of the impugned section was a satisfactory way of addressing the *Charter* infringement.

R v Sharpe (2001) 194 DLR (4th) 1 (SCC)—note 49
John Sharpe was charged under a *Criminal Code* provision that makes if an offence to possess child pornography. He contended that the law, as it appeared in the *Criminal Code*, violated his freedom of expression, guaranteed under section 2(b) of the *Charter*.

The Crown conceded that the relevant section did infringe the freedom of expression, but argued that the infringement was justified under section 1 of the *Charter*. The Supreme Court of Canada decided that while the law prohibiting possession of child pornography was for the most part justifiable, given the importance of its objective to protect children from exploitation, it improperly applied to two classes of material.

> The first class consists of self-created, privately held expressive materials. Private journals, diaries, writings, drawings and other works of the imagination, created by oneself exclusively for oneself … The second class of material concerns privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use. Sexually explicit photographs taken by a teenager of him- or herself, and kept entirely in private, would fall within this class of materials.

After determining that the law infringed the freedom of expression and was not justifiable under section 1, the Court turned to remedies. Since the law was largely in accordance with the *Charter* the Court indicated that it would be inappropriate to strike down the law entirely. Rather, in light of the fact that the law was determined to be overly broad in only two small respects, the Court elected to read into the law exceptions for the problematic areas.

Miron v Trudel (1995) 124 DLR (4th) 693 (SCC)—note 50

John Miron was a passenger in a vehicle that was involved in a motor vehicle accident. He sustained injuries as a result of the accident that affected his ability to work. The owner of the car was uninsured, as was the individual operating it at the time of the accident. Consequently, Miron, who was involved in a common law relationship at the time of the accident, applied for accident benefits through his common law partner's insurance. The application was pursuant to a provision in the policy allowing claims by spouses or dependants. Miron was denied benefits because he was not a "spouse," as defined by the *Insurance Act*. Miron and his partner sued the insurance company, alleging that the denial of benefits for common law spouses infringed the *Charter* guarantee of equality.

The Supreme Court of Canada held that the statute violated section 15 of the *Charter* by denying benefits to common law partners. The *Insurance Act* had been amended in 1990, after this case was started, to include common law partners in the definition of "spouse." The change did not alter the claim in this case because it did not take effect retroactively. However, when addressing the question of remedies, the Court determined "that this is one of those exceptional cases where retroactively 'reading up' a statute is justified." The relevant statute was read as including common law partners as spouses, and the case was remitted for trial.

Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police (1998) 160 DLR (4th) 697 (Ont Gen Div)—note 51
The plaintiff was sexually assaulted in her Toronto apartment by a stranger. The assailant entered her apartment by the balcony. This was the fifth sexual assault reported to the police in the same geographical area, occurring under very similar circumstances, within months. All of the assaults were eventually linked to the same perpetrator. All of the victims had certain common traits in that they all lived alone in second or third floor apartments with balconies in a certain neighbourhood in Toronto.

Jane Doe filed a suit against the police. She claimed that by failing to warn women they knew to be at risk of becoming victims the police both acted negligently and violated her rights under sections 7 and 15 of the *Charter*.

The Supreme Court of Canada decided that the police did violate the rights under sections 7 and 15 of the Charter by failing to warn women known to be at risk. The Court indicated that the decision by police not to warn women in the area was largely because they believed that the women would have panicked, possibly hampering the investigation. These reasons were found to be discriminatory, violating the section 15 guarantee of equality. Furthermore, the failure to warn jeopardized Jane Doe's security of the person, guaranteed under section 7 of the Charter.

Ward v Vancouver (2010) 321 DLR (4th) 1 (SCC)—note 52
Prime Minister Chretien visited Vancouver in August of 2002 to commemorate the opening of a new gate to the city's Chinatown. City police received a tip that an unidentified man intended to throw a pie at the Prime Minister. The plaintiff, a lawyer in his mid-40s, attended the event, acted in a suspicious manner, and loosely fit a broad

description given to the police. The police, mistakenly believing that the plaintiff was the would-be assailant, handcuffed him and took him to a police station. He was subjected to a strip search and held for approximately four and a half hours. When the error eventually was discovered, the plaintiff was released.

The plaintiff commenced a number of actions. The trial judge found that the province and the city had acted in good faith and were not liable for any common law tort. He also found, however, that the city, by conducting the strip search, and the province, by detaining the vehicle, violated the plaintiff's right under s 8 of the *Charter* to be free from unreasonable search and seizure. The Court accordingly assessed damages under s. 24(1) of the *Charter*: $5000 for the strip search. The British Columbia Court of Appeal agreed.

The case then appeared before the Supreme Court of Canada. Writing for a unanimous panel, McLachlin CJC formulated a four-part test governing damages for *Charter* violations:

> "The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages."

McLachlin CJC then applied that test. (1) Section 8 of the *Charter* (freedom from unreasonable search and seizure) was breached when the police subjected the claimant to a strip search and detention. (2) The infringement of the claimant's constitutional rights required compensation. Damages also served the function of vindication of the claimant's rights and deterrence of further police misconduct. (3) There were no "alternative remedies … available to achieve the objects of compensation, vindication or deterrence with respect to the strip search." (4) Finally, "[c]onsidering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion," the $5,000 damage award was considered appropriate.

Phillips v Nova Scotia (Social Assistance Appeal Board) (1986) 27 DLR (4th) 156 (NS SC TD), aff'd (1986) 34 DLR (4th) 633 (CA)—note 53
The fact and decision appear in You Be the Judge 1.1.

Adult Entertainment Association of Canada v Ottawa (2007) 283 DLR (4th) 704 (Ont CA)—note 60
The City of Ottawa passed a bylaw that prohibited physical contact between exotic dancers and customers. Other municipalities had similar rules in place. Ottawa, however, went one step further by also requiring that all entertainment and services be performed in open areas. It did so to preempt any attempt by strip club owners to argue that they

could not be held responsible for activities that took place in closed booths or private rooms.

Because it effectively ended the lucrative trade in "lap dancing," Ottawa's by-law caused considerable economic harm to members of the applicant association. The association therefore challenged the bylaw. The Ontario Court of Appeal, however, found in favour of the municipality. In doing so, it stressed that (1) the city had first consulted with interested stakeholders, and (2) the bylaw was motivated not by an attempt to regulate morality or drive strip clubs out of town, but rather by a desire to protect public health and safety.

1254582 Alberta Ltd v Edmonton (City) (2009) 306 DLR (4th) 310 (Alta CA)—note 61
Edmonton International Airport is located several outside of Edmonton city limits. Airport passengers are a potentially lucrative part of the taxi-cab trade, but far less so if a tax driver is entitled to conduct business in only one direction (*ie* either from the airport to the city, or from the city to the airport, but not both). Edmonton City Council passed a bylaw that prohibited members of the Airport Taxi Service (ATS) from collecting passengers within the city unless those members held a municipal licence. The number of licenses, however, was severely capped and there was virtually no chance that a member of ATS would be granted one. A member of ATS challenged the city bylaw.

A majority of the Alberta Court of Appeal upheld a lower court decision in favour of the city's bylaw. Watson JA found that the rule was within the municipality's jurisdiction and that it did not conflict with any other law. The city therefore was entitled to substantially reduce the profitability of belonging to the ATS.

LAC Minerals Ltd v International Corona Resources (1989) 61 DLR (4th) 14 (SCC)—note 64
International Corona Resources, a mining company, was engaged in an exploration program on a piece of property owned by the company in Ontario. As a result of this exploration the company gained information about the mineral deposits contained in the adjoining property.

Also during this time, Corona was approached by LAC Minerals, another mining company. LAC Minerals had become aware of Corona's exploratory activities and approached them indicating an interest in setting up a joint venture or a partnership. At one point during their correspondence, Corona revealed the results of their exploration, including their speculation about the adjoining property. LAC subsequently contacted the owner of the adjoining property and purchased the mining rights for itself. Corona then sued LAC Minerals for breach of confidence and breach of fiduciary obligation.

The Supreme Court of Canada rejected the claim for breach of fiduciary duty, but held that LAC was liable for breach of confidence. The court imposed a constructive trust, with the effect that LAC held the property for the benefit of Corona.