Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

SKU: 9780176795085-SOLUTIONS

Chapter 2

The Canadian Legal System

Solutions Manual for In-text Questions, Exercises, and Situations for Discussion

by Shannon O'Byrne*

QUESTIONS FOR REVIEW, PAGE 53

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

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

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

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

*with assistance by Daniel Howitt.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

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

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

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

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

8. What is the difference between a regulation and a bylaw?

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

9. What is the executive branch of government?

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

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

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

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

reasonably measured, controlled, and appropriate way. If the government is unable to do so, only then will the law in question be struck down.

16. Describe aboriginal rights and treaty rights. How are these rights protected?

Aboriginal rights, which are protected under section 35 of the *Constitution Act, 1982*, concern rights that exist where treaties have not been negotiated and include rights relating to occupation of land as well as rights that may or may not be connected to a specific location or land. The Supreme Court of Canada in *Van der Peet* (as quoted in the textbook **on page** 48) describes the doctrine of aboriginal rights as being recognized and affirmed "because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

Treaty rights are rights that have arisen in relation to official agreements between the Crown and Indigenous peoples, including dating back to the early **18th** century**,** as well as eleven number Treaties following Canadian Confederation. Modern day treaties have also been negotiated. Treaty rights are also protected under section 35 of the *Constitution Act, 1982*.

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

19. What is the role of equity?

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

20. What is one important function of administrative law?

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

QUESTIONS FOR CRITICAL THINKING, PAGES 53–54

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

Although government regulation is often mandated to fight discrimination, gender based pricing is not necessarily one of those cases. A good argument is that pricing should be left to the marketplace and companies who overcharge their customers will see the market consequences in the form of reduced patronage. For example, the *Globe and Mail* reports on a 2009 study that assessed 50 randomly selected American drycleaners. The study determined that, on average, women paid 73 percent more to have their shirts laundered than men. A separate study from the previous year reports that 75 percent of women who shopped in the past year said they avoided

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

buying clothes that would require dry cleaning. See Michael Kesterton, "Social Studies: Women and dry cleaning" *Globe & Mail* (29 July 2011) L7.

The other view is that gender-based pricing is so entrenched that businesses are unlikely to ever change unless forced to do so by law. If this is the case, the only way women will be treated equally as consumers is for anti-gender pricing legislation to be passed.

Women's haircuts are typically more costly than men's haircuts, doubtless because they are more time consuming for the stylist to produce. This seems to be a reasonable justification for an increased price. It is considerably less convincing to suggest, as some in the dry cleaning industry have done, that automated technology is geared to larger items of clothing and therefore women's blouses need to be touched by hand, driving up the service cost in that circumstance. (See Jack Kohane, "'Gender Tax' in Ontario's Crosshairs: Backbencher's Bill Would Eliminate Unequal Pricing" *Business Edge* 1 (26 May 2005), online: Business Edge News Magazine <http://www.businessedge.ca/archives/article.cfm/gender-tax-in-ontarios-crosshairs-9591>.

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

3. **Why is the constitutional recognition of aboriginal rights so important? For example, in what ways can this recognition advance reconciliation of Indigenous and non-Indigenous peoples in Canada?**

Scholars have described how Indigenous peoples established long-standing legal traditions prior to the arrival of Europeans in what is now Canada. These rights have survived assertions of British and French sovereignty. For example, in *R v Sparrow*, [1990] 1SCR 1075 (discussed in the textbook on page 49), the court held that the Musqueam of British Columbia possessed an aboriginal right to fish for food, social, and ceremonial purposes along an area of the Fraser River" at para 30. The recognition of Aboriginal rights is part of s. 35 of the *Constitution Act, 1982*. This provision, in turn, is described by Justice Binnie in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (quoted in the text **on** page 48), as advancing "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" at para 10.

4. **Review Figure 2.4 on pages 41–42. In your opinion, how has the *Charter* affected business activity?**

The *Charter* has

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

Section 1 allows the courts to strike the balance between protecting the rights of the individual and allowing governments to legislate for the benefit of larger groups or even all members of Canadian society. Section 1 of the *Charter* is necessary. If rights were absolute, for example, government would not be able to provide a common day off for retail workers (see *Edwards Books and Art*, [1986] 2 SCR 713 referenced on page 41 of the textbook) or protect children from manipulative advertising (see *Irwin Toy v Quebec,* [1989] 1 SCR 927 referenced on page 41 of the textbook).

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

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

- the need for expertise in a particular area like atomic energy
- the need to take pressure off the judicial system
- the need for ADR in general

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

- the need to take care of a certain group in society, like workers injured on the job, regardless of fault

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

SITUATIONS FOR DISCUSSION, PAGES 54–55

1. Through the *Healthy Menus Choices Act*, 2015 SO c 7, Ontario has recently enacted legislation to fight childhood obesity, among other goals. This Act requires all food-service chains with 20 or more Ontario locations to post on the premises the calorie counts of the food and drinks. According to the Minister of Health and Long-Term Care, Dr. Eric Hoskins, the goal is to help people in Ontario to "make informed, healthy decisions for themselves and their families." In 2017, the Toronto Star reported that the Freshii restaurant chain in Ontario (which serves salads, quinoa bowls, and wraps, for example) was not complying with this new law because, while it posts calorie counts online, it does not do so in its restaurants. Freshii, whose motto is "count nutrients, not calories," regards the Ontario law as "overly-simplistic." Dr. David Jenkins with the University of Toronto agrees with this kind of assessment, observing that calorie count is likely less important than the nature of the food itself, adding: "I'm more interested in what McDonald's are doing." Meanwhile, Freshii has recently agreed to "meet the minimum compliance as required [by the legislation]." Do you agree with the calorie counting legislation? Why or why not?

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

On the one hand, the legislation is designed to assist consumers in a landscape where a food item that is seemingly low in calories is, in fact, tremendously and unexpectedly caloric. In this sense, the education is a good thing. According to a government press release, an important object of the bill is to help consumers choose more wisely by "giving them caloric information when eating out or purchasing take-away meals." See Government of Ontario, "New Legislation Passes to Help Reduce Smoking and Obesity Rates" (26 May 2015) online: Government of Ontario <http://news.ontario.ca/mohltc/en/2015/05/new-legislation-passes-to-help-reduce-smoking-and-obesity-rates.html>. In this same press release, the government notes that "According to a 2011 Ipsos Reid study, approximately 95 per cent of Ontarians support requiring fast food restaurants to list nutrition information on their menus."

On the other hand, the legislation might be considered draconian and unnecessary. As reported by Glauser et al., James Rilett, vice president for Canadian Restaurant and Foodservices Association, Ontario, "states that his members prefer voluntary programs but also said restaurant owners go out of their way to respond to nutritional transparency requests from the public. They want customers to be happy," he explained. Further, as pointed out by Freshii's objection to the law, customers may be confused by calorie count postings. In some situations, the calorie amount may be misleading or obscure more important nutritional information. It undoubtedly interferes with how chain restaurants, such as Freshii, may want to run their business or market themselves to consumers.

It is worth noting however, that despite some strong objections like the one from Freshii, business criticisms of the concept have become more muted since the legislation passed.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

2. **A brawl at a popular Halifax nightclub called the Dome resulted in 38 arrests and the suspension of the Dome's liquor licence. Government officials believe that one-dollar drinks offered by the Dome are one factor contributing to such violence. "This has blown into a cultural problem, and one of the issues we have identified is low-price, deep-discount drinks," said Barry Barnet, then Nova Scotia's Minister of Health Promotion and Protection. The Nova Scotia government expressed its hopes to develop recommendations to address problems associated with excess alcohol consumption. From a risk management perspective, how should local bar owners approach governmental concern over bar violence? [footnotes deleted]**

Though a full risk management model is not presented until Chapter 3, students should still be able to suggest ways in which bar violence can be reduced or eliminated. To get its liquor licence back, the Dome came up with several risk management strategies that might be more broadly instructive. According to the CBC, these measures included:

- ending the practice of one-dollar drinks
- stopping advertising drink prices
- installing more video cameras and give police access to them
- handing out lifetime bans to troublemakers
- limiting the number of patrons to 80 per cent of bar capacity
- hiring at least four off-duty police on a busy night, up from two
- doubling security staff inside the bar
- hiring a consultant for security training

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Additionally, the Dome should be careful to cut off alcohol service to those who are impaired (which is already legally required). The idea is to proactively address the problem identified by government and work to eliminate or reduce it. See CBC News, "Bar to stop selling $1 drinks after brawl" (28 December 2007), online: CBC News <http://www.cbc.ca/news/canada/nova-scotia/bar-to-stop-selling-1-drinks-after-brawl-1.667475>.

Note that several jurisdictions, now including Nova Scotia and Alberta, have enacted legislation on the same point. For analysis of Nova Scotia law and related commentary, see Rachel Boomer, "Nova Scotia introduces minimum drink prices," *Metro* (19 December 2008), online: Metro <http://metronews.ca>. For analysis of Alberta law and related commentary, see CBC News, "New rules for Alberta bar patrons kick in" (1 August 2008), online: CBC News <http://www.cbc.ca/news/canada/calgary/new-rules-for-alberta-bar-patrons-kick-in-1.749699>.

3. **The federal government legalized recreational cannabis as of October 17, 2018, but only in limited situations. For example, a Department of Justice website states (among other things) that, subject to provincial or territorial restrictions, those who are 18 years of age or older are now legally able to:**
   - **possess up to 30 grams of legal cannabis, dried or equivalent in non-dried form in public**
   - **share up to 30 grams of legal cannabis with other adults**
   - **buy dried or fresh cannabis and cannabis oil from a provincially licensed retailer**

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

- **in provinces and territories without a regulated retail framework, individuals are able to purchase cannabis online from federally licensed producers**
- **grow, from licensed see or seedlings, up to 4 cannabis plants per residence for personal use**
- **make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products[1]….**

The current regime for medical cannabis remains unchanged[2]. Do you agree with the federal government's decision on legalization? What are the pros and cons of this decision?

The biggest benefit of decriminalization is simply this: it is unduly harsh and punitive to give someone a criminal record for a relatively minor infraction of the law. Other benefits of the government's policy of decriminalization include providing government with another product to tax; providing government with the opportunity to regulate the sale and production of the drug, thereby increasing safety; and freeing the police to investigate more serious crimes.

Cons of the decriminalization legislation include the view that legalization is contrary to a law and order agenda; marijuana has been called a gateway drug, leading the user to more serious and dangerous drugs; the drug is carcinogenic and linked to a host of illnesses, including lung cancer, and that the state should not be seen to condone drug use of this kind. Beyond this, legalization may lead to more impaired driving charges as access to marijuana is more widespread.

---

[1] Department of Justice, "Cannabis Legalization and Regulation", (17 October 2018), online: https://www.justice.gc.ca/eng/cj-jp/cannabis/. Emphasis and formatting in the original.
[2] Department of Justice, "Cannabis Legalization and Regulation", (17 October 2018), online: https://www.justice.gc.ca/eng/cj-jp/cannabis/. Emphasis and formatting in the original.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

The foregoing illustrates the policy analysis that goes into legislative decision making as well as the ideological underpinnings informing both sides of legislative debates.

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

6. **The government of Alberta has passed regulations that include requirements that home inspection businesses be provincially licensed and carry $1 million in errors and omissions insurance. Beyond this, the province has mandated educational standards for home inspectors with the goal of improving the quality of work done by the home inspection industry. Then-Opposition Liberal MLA Hugh MacDonald endorsed the regulations as a means of clamping down on fly-by-night home inspectors, observing: "If I'm making an important decision to purchase a home based on information I'm getting from a home inspector, that person should be licensed and have minimum credentials." Do you agree that government should regulate such an industry? What are the costs and benefits of such regulation to the consumer?**

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

more protection," *Edmonton Journal* (14 May 2011), online: Edmonton Journal <http://www2.canada.com/edmontonjournal/news/story.html?id=b33dcbc8-b96a-4f5c-bd78-f9f1a8862aa3)>, Terry Fikowski (of HouseMaster Home Inspections) welcomes home inspector regulation, because "a lot of the requirements in the regulation are things that home inspectors already do. Those that don't probably shouldn't be in the industry." He adds: "A lot of operators do not have any formal training of any sort, so training is a big thing. It's going to make sure those people get the proper training and have the proper insurance."

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

PHOTO CAPTIONS

Photo caption, page 25: Some customers are unhappy with display bans, including Rene LaPointe. "It's just another law for the government to throw at us," says LaPointe. "They're treating the adults like children." Do you agree with his analysis? [footnote deleted]

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

Photo Caption, page 31: Is vaping harmful?

Vaping is harmful, at least to some extent. Like cigarettes, vaping products can contain nicotine, which is addictive and toxic. Vaping can also lead young people to take up cigarette smoking. For more information, see Health Canada, News Release, "Government of Canada Introduces New Tobacco and Vaping Products Legislation" (22 November 2016), online: <https://www.canada.ca/en/health-canada/news/2016/11/government-canada-introduces-new-tobacco-vaping-products-legislation.html>.

Photo caption, page 33: This image depicts Barb Tarbox who died of lung cancer caused by smoking. She was so addicted to cigarettes that she continued smoking until her death. One of her final wishes was that her dying image appear on cigarette packages as a warning to others. Are such images effective? [footnote deleted]

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Statistics Canada reports that smoking has declined dramatically and particularly so among teens. As reported by the *Red Deer Advocate* (22 June 2012), Ottawa credits some of this success to its "its mandatory, graphic anti-smoking packaging for tobacco products." Other factors that have presumably contributed to the decline in smoking rates include increased education programs, reports the *Red Deer Advocate*. Another contributing factor in the decline is the escalating cost of cigarettes because of increased levels of taxation. See *Red Deer Advocate*, "Gruesome images on cigarette packs seem to be working," *Winnipeg Free Press* (22 June 2012), online: Winnipeg Free Press <http://www.winnipegfreepress.com/opinion/westview/gruesome-images-on-cigarette-packs-seem-to-be-working-159983365.html>.

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Chapter 2

The Canadian Legal System

Enriched Instructor's Manual with Solutions

by Shannon O'Byrne*

I. TEACHING OBJECTIVES

After studying this chapter, students should have an understanding of

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

*with assistance by Daniel Howitt.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Whereas Chapter 1 dealt with the question "Why study the law in a business program?", Chapter 2 explains what the law is and where the law comes from. In sum, the chapter provides students with grounding in the basics of governmental operations—legislative, executive, and judicial. The chapter also includes an account of Indigenous laws, aboriginal rights, and treaty rights both for their own sake and as significant elements in Constitutional law. This chapter is important for introducing students to the regulatory or administrative context of doing business.

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

II. TEACHING STRATEGIES

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

One approach that has proven successful in explaining the sources and classification of the law is to incrementally explain Figure 2.8 in the textbook (page 45), which is reproduced on the next page. Figure 2.8 summarizes the following basic propositions introduced in the chapter:

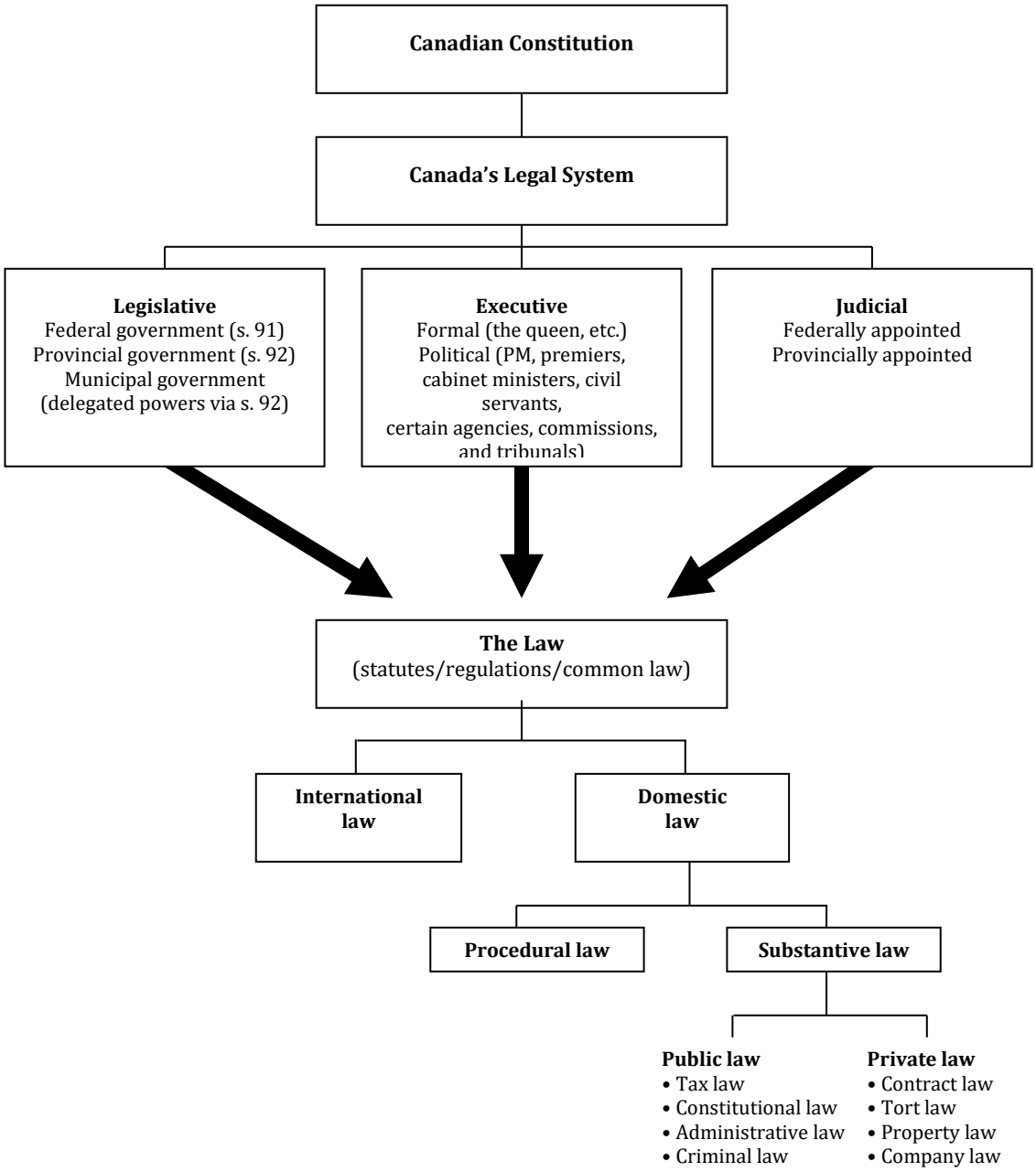
- The Canadian legal system takes its current form because of the Constitution.
- The Constitution mandates Canada's legal system and therefore the three branches of government (legislative, executive, and judicial).
- The Constitution creates two levels of government: federal and provincial. Municipal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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

Figure 2.8 [from textbook]



Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

Beyond constitutional law as traditionally depicted above, section 35 of the *Constitution Act, 1982* expressly protects the rights of Indigenous peoples in relation to existing aboriginal and treaty rights. And as another example, the *Indian Act* recognizes First Nations band councils as having the power to pass certain bylaws governing the reserve community.

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

III. STUDENT ACTIVITIES

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

Task 2: To help students understand some of the work of and background to the Truth and Reconciliation Commission, refer students to **Question for Critical Thinking #3**, which asks how recognition of aboriginal rights can advance reconciliation [see infra for a possible answer to this question]. The instructor can use the question as a way to introduce the Truth and

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Reconciliation Report, prepared in response to tragedies associated with Canada's residential school system. For an explanation of truth and reconciliation, show the class the video entitled "Murray Sinclair: What Is Reconciliation? TRC" at this link: <https://www.youtube.com/watch?v=swo9flbACho>. The individual presenting is Murray Sinclair, a senator and First Nations lawyer who chaired the Truth and Reconciliation Commission. For further background, see the clip entitled "Truth and Reconciliation Commission final report at this link: <https://www.youtube.com/watch?v=lKKLgwlosaw>. This is an older video (from 2015), but it does explain the genesis and import of the Commission Report.

Task 3: To help students understand the role of law in society, consider The Business and Legislation box, "Tobacco Regulation by the Federal Government." It discusses proposed regulations on standardized packaging for tobacco. Show the class the following news clip at this link: < https://toronto.ctvnews.ca/video?clipId=881615>. This clip will assist students in answering the Critical Analysis questions following the Business and Legislation box: Do you agree with the government's initiative to impose PSP regulations on the tobacco industry? Why or why not? (See infra for answers to these questions.) [Note to the instructor: This video was chosen as of date of writing when the standardized packaging for tobacco regulations had not yet been passed.]

Another way in to a similar question (re: the role of legislation), see Situation for Discussion #1. It describes calorie counting legislation in Ontario, which is meant to fight childhood obesity as well as to help people make healthy food choices. The *Healthy Menu Choices Act* requires food chains covered by the legislation to post the calorie count of their products. Show students the video entitled "Healthy Menu Choices Act | Fanshawe Learns" at this link:

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

<https://www.youtube.com/watch?v=NPSd0_LpXos>. It concerns the legislation when it was at the proposal stage and sets out a range of views on the subject, with a focus on the student perspective. In light of the video and their own views, ask students to consider the following question at the end of the Situation for Discussion #1: Do you agree with calorie counting legislation? Why or why not? The Situation for Discussion also refers to Freshii's initial refusal to comply with the legislation. For a news clip regarding Freshii's resistance to the calorie counting legislation, see the video "Freshii defies Ontario's calorie label law" at this link: <https://www.youtube.com/watch?v=pLAUfQSVxtY>. As noted in the Situation for Discussion, Freshii subsequently relented and complied with the legislation. For answers to the Situation for Discussion questions, see *infra*.

A similar exercise can be done in relation to the decriminalization of recreational marijuana, which forms the basis for Situation for Discussion #3. The CBC video "Marijuana legalization: What are Canadians' concerns about cannabis?" features Canadians commenting on legalization at this link: <http://www.cbc.ca/player/play/1260491843798>.

As marijuana legalization is a rapidly developing area, the instructor will likely be able to locate more current videos in the time leading up to class.

IV. EXPLANATION OF SELECTED FEATURES

Page 25

Photo caption: Some customers are unhappy with display bans, including Rene LaPointe. "It's just another law for the government to throw at us," says LaPointe.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

"They're treating the adults like children." Do you agree with his analysis? [footnote deleted]

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

Pages 27–28

Business and Legislation: *Constitution Act, 1867*

Critical Analysis: What are the advantages of dividing law-making powers between the federal and provincial governments? What are the disadvantages?

In *Constitutional Law of Canada*, 5th ed. (2007 and continuously updated), leading scholar Peter Hogg summarizes several of the benefits of federalism, at 5.1 and following. First, given the size and diversity of Canada, "there may be advantages of efficiency and accountability in dividing the powers of government so that a national government is responsible for matters of national importance and provincial or state governments are responsible for matters of local importance. There would inevitably be diseconomies of scale if all governmental decision-making was centralized in one unwieldy bureaucracy. [Second], …a more decentralized form of government can be expected to be able to identify and give effect to different preferences and interests in different parts of the country." For example, in areas such as criminal law, banking or interprovincial trade, it is beneficial to have one consistent law that applies across the country. Third, federalism precludes the accumulation of too much power at the central level and is thus

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

"a check against tyranny." When power is diffuse, it is more difficult for it to be abused by one individual or smaller group.

The disadvantages of federalism include that it leads to a weak government centrally. As Hogg notes, "the dispersal of power makes it hard to enact and implement new public policies." Other difficulties relate to coordination. For instance, differences in laws can make it more complex to do business across multiple provinces. Additionally, legal disputes that involve assets or parties in multiple provinces can be more difficult to resolve.

Overall, Canada's system of government has advantages and disadvantages, as illustrated above. It is a system built on historical compromises between, as Hogg puts it, "proponents of unity (who would have preferred a legislative union) and proponents of diversity (who were unwilling to submerge the separate identities of their provinces)."

Pages 28–30

Environmental Perspective: Concurrent Jurisdiction over the Environment

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

A partial solution to this problem is for the political executive at all levels of government to cooperate. For example, through the Canadian Council of Ministers of the Environment (CCME), environment ministers from territorial, provincial, and federal levels collaborate to achieve, in CCME's words, "positive environmental results, focusing on issues that are Canada-wide in scope and that require collective attention by a number of governments. Since environment is constitutionally an area of shared jurisdiction, it makes sense to work together to promote effective results." See Canadian Council of Ministers of the Environment (CCME), online: <https://www.ccme.ca/en/about/index.html>.

Pages 30–31

Business and Legislation: Vaping and the Law

Critical Analysis: Vaping is generally regarded as less harmful than smoking tobacco. Should government nonetheless restrict the access of young people to vaping products? Why or why not?

The *New York Times* reports that a recent study (by the National Academies of Sciences, Engineering, and Medicine) finds that vaping devices "are safer than traditional smoking products and may help smokers quit, citing conclusive proof that switching can reduce smokers' exposure to deadly tar, dangerous chemicals and other carcinogens." See Sheila Kaplan, "Vaping Can Be Addictive and Lure Teenagers to Smoking, Science Panel Concludes," *New York Times* (23 January 2018), online: <https://www.nytimes.com/2018/01/23/health/e-cigarettes-smoking-fda-tobacco.html?smid=fb-nytimes&smtyp=cur>. However, vaping nonetheless poses a particular risk to young people. Indeed, this same study concluded "that vaping with e-cigarettes

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

that contain nicotine can be addictive and that teenagers who use the devices may be at higher risk of smoking." Beyond this, vaping may even renormalize smoking, at least in the eyes of younger people.

The study offered no conclusions as to whether vaping is safe, noting that there have been no long-term studies on its health effects.

According to Health Canada, the number of young people (aged 15–19) who have tried e-cigarettes is on the rise (going from 20 percent of youth in 2013 to 26 percent of youth in 2015). See: Health Canada, News Release, "Government of Canada Introduces New Tobacco and Vaping Products Legislation" (22 November 2016), online: <https://www.canada.ca/en/health-canada/news/2016/11/government-canada-introduces-new-tobacco-vaping-products-legislation.html>.

Taken together, it would seem that the government has ample justification to limit youth access to vaping due to the potential for harm. Furthermore, it could be argued that restricting access to vaping by youths would not differ dramatically from the current restrictions on access to alcohol or traditional cigarettes.

Page 31

Photo Caption: Is vaping harmful?

Vaping is harmful, at least to some extent. Like cigarettes, vaping products can contain nicotine, which is addictive and toxic. Vaping can also lead young people to take up cigarette smoking. For more information, see Health Canada, News Release, "Government of Canada Introduces New Tobacco and Vaping Products Legislation" (22 November 2016), online: <https://www.canada.ca/en/health-canada/news/2016/11/government-canada-introduces-new-tobacco-vaping-products-legislation.html>.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Pages 32–34

Business and Legislation: Tobacco Regulation by the Federal Government

Critical Analysis: Do you agree with the government's initiative to impose PSP regulations on the tobacco industry? Why or why not?

Because cigarette consumption is deadly, government has a strong obligation to take all reasonable steps to reduce its use. The Canadian Cancer Society reports that smoking causes one in five of all deaths; on a related front, smoking costs the healthcare system $6.5 billion every year. See Canadian Cancer Society, "Smoking causes 1 in 5 of all deaths; costs $6.5 billion in healthcare in Canada each year: study" (16 October 2017), online: <http://www.cancer.ca/en/about-us/for-media/media-releases/national/2017/cost-of-tobacco/?region=on>.

However, critics regard plain and standard packaging (PSP) to have been ineffective and a "flop" in Australia—which was one of the first jurisdictions to initiate a PSP regulatory framework. Eric Gagnon of Imperial Tobacco holds this view and has written a highly negative op-ed piece in the *Financial Post* on point. See Eric Gagnon, "Plain-packaging tobacco is a flop and our health depends on Ottawa admitting it," *Financial Post* (14 December 2017), online: <https://business.financialpost.com/opinion/plain-packaged-tobacco-is-a-flop-and-our-health-relies-on-ottawa-admitting-it>. Others take a contrary position, including the government of Australia, which made submissions to Canada's federal government showing that PSP measures "have begun to achieve their objectives and are expected to continue to do so," and that "the implementation of plain packaging measures has resulted in 108,228 fewer people who smoke in Australia." See Government of Canada, "Consultation Summary: 'Plain and standardized packaging' for Tobacco Products" (last modified 17 January 2017), online:

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

<https://www.canada.ca/en/health-canada/services/publications/healthy-living/plain-standardized-packaging-tobacco-products-consultation-summary.html>. This Consultation Summary goes on to state that "[i]ndependent research, spanning at least two decades and multiple countries, has consistently demonstrated that PSP reduces the appeal of tobacco products, particularly among youth and young adults. Eighty-two percent (82%) of current adult daily smokers had their first cigarette by age 18. Preventing initiation of tobacco use by young people is one of the most effective means of achieving a long-term decrease in tobacco use prevalence."

The tobacco industry has powerful incentives to resist PSP since product package logo and colour are among the few ways left to promote sales. If the industry does launch a court challenge regarding PSP, expert evidence from both sides regarding its effectiveness will be held up for judicial scrutiny as an important part of the litigation.

Page 33

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

Statistics Canada reports that smoking has declined dramatically and particularly so among teens. As reported by the *Red Deer Advocate* (22 June 2012), Ottawa credits some of this success to its "its mandatory, graphic anti-smoking packaging for tobacco products." Other factors that have presumably contributed to the decline in smoking rates include increased education programs, reports the *Red Deer Advocate*. Another contributing factor in the decline is the escalating cost of cigarettes because of increased levels of taxation. See *Red Deer Advocate*,

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

"Gruesome images on cigarette packs seem to be working," *Winnipeg Free Press* (22 June 2012), online: Winnipeg Free Press <http://www.winnipegfreepress.com/opinion/westview/gruesome-images-on-cigarette-packs-seem-to-be-working-159983365.html>.

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

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

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

Pages 37–38

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

Critical Analysis: With whom do you side in this conflict: Mr. Gee or the Nova Scotia legislature in passing the law it did? Why?

On the one hand, it seems reasonable for government to seek to reduce smoking, particularly in young people. Since power walls normalize smoking—at least to some extent—banning such walls is an important and relatively unobtrusive way of helping to ensure that young people

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

never take up a habit that could kill them. As noted in the Business Law in Practice opening scenario, in countries that have banned tobacco displays, there has been an encouraging reduction in smoking by young people.

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

V. CHAPTER STUDY

Questions for Review, page 53

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

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

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

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

5. What is the doctrine of paramountcy?

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

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

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

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

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

8. What is the difference between a regulation and a bylaw?

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

9. What is the executive branch of government?

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

often empowered by legislation to pass regulations that provide detail to what the statute has enacted.

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

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

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

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

16. Describe aboriginal rights and treaty rights. How are these rights protected?

Aboriginal rights, which are protected under section 35 of the *Constitution Act, 1982*, concern rights that exist where treaties have not been negotiated and include rights relating to occupation of land as well as rights that may or may not be connected to a specific location or land. The Supreme Court of Canada in *Van der Peet* (as quoted in the textbook **on page** 48) describes the doctrine of aboriginal rights as being recognized and affirmed "because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

Treaty rights are rights that have arisen in relation to official agreements between the Crown and Indigenous peoples, including dating back to the early **18th** century**,** as well as eleven number Treaties following Canadian Confederation. Modern day treaties have also been negotiated. Treaty rights are also protected under section 35 of the *Constitution Act, 1982*.

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

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

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

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

19. What is the role of equity?

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

20. **What is one important function of administrative law?**

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

Questions for Critical Thinking, pages 53–54

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

The other view is that gender-based pricing is so entrenched that businesses are unlikely to ever change unless forced to do so by law. If this is the case, the only way women will be treated equally as consumers is for anti-gender pricing legislation to be passed.

Women's haircuts are typically more costly than men's haircuts, doubtless because they are more time consuming for the stylist to produce. This seems to be a reasonable justification for an increased price. It is considerably less convincing to suggest, as some in the dry cleaning industry have done, that automated technology is geared to larger items of clothing and therefore women's blouses need to be touched by hand, driving up the service cost in that circumstance. (See Jack Kohane, "'Gender Tax' in Ontario's Crosshairs: Backbencher's Bill Would Eliminate Unequal Pricing" *Business Edge* 1 (26 May 2005), online: Business Edge News Magazine <http://www.businessedge.ca/archives/article.cfm/gender-tax-in-ontarios-crosshairs-9591>.

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

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

A system of precedent (*stare decisis*) is intended to promote certainty, predictability, consistency, and uniformity in the law—its informing principle being that "like" cases are to be

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

treated alike. One disadvantage is that the application of precedent in a given case may create an injustice. A related problem is that, given the slowness with which the common law evolves, the legal system fails to keep pace with social, political, and economic change.

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

3. **Why is the constitutional recognition of aboriginal rights so important? For example, in what ways can this recognition advance reconciliation of Indigenous and non-Indigenous peoples in Canada?**

Scholars have described how Indigenous peoples established long-standing legal traditions prior to the arrival of Europeans in what is now Canada. These rights have survived assertions of British and French sovereignty. For example, in *R v Sparrow*, [1990] 1SCR 1075 (discussed in the textbook on page 49), the court held that the Musqueam of British Columbia possessed an aboriginal right to fish for food, social, and ceremonial purposes along an area of the Fraser River" at para 30. The recognition of Aboriginal rights is part of s. 35 of the *Constitution Act, 1982*. This provision, in turn, is described by Justice Binnie in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (quoted in the text **on** page 48), as advancing "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" at para 10.

4. **Review Figure 2.4 on pages 41–42. In your opinion, how has the *Charter* affected business activity?**

The *Charter* has

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

Section 1 allows the courts to strike the balance between protecting the rights of the individual and allowing governments to legislate for the benefit of larger groups or even all members of Canadian society. Section 1 of the *Charter* is necessary. If rights were absolute, for example, government would not be able to provide a common day off for retail workers (see *Edwards Books and Art*, [1986] 2 SCR 713 referenced on page 41 of the textbook) or protect children from manipulative advertising (see *Irwin Toy v Quebec,* [1989] 1 SCR 927 referenced on page 41 of the textbook).

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

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

- the need for expertise in a particular area like atomic energy
- the need to take pressure off the judicial system
- the need for ADR in general

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

- the need to take care of a certain group in society, like workers injured on the job, regardless of fault

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

Situations for Discussion, pages 54–55

1. **Through the *Healthy Menus Choices Act*, 2015 SO c 7, Ontario has recently enacted legislation to fight childhood obesity, among other goals. This Act requires all food-service chains with 20 or more Ontario locations to post on the premises the calorie counts of the food and drinks. According to the Minister of Health and Long-Term Care, Dr. Eric Hoskins, the goal is to help people in Ontario to "make informed, healthy decisions for themselves and their families." In 2017, the Toronto Star reported that the Freshii restaurant chain in Ontario (which serves salads, quinoa bowls, and wraps, for example) was not complying with this new law because, while it posts calorie counts online, it does not do so in its restaurants. Freshii, whose motto is "count nutrients, not calories," regards the Ontario law as "overly-simplistic." Dr. David Jenkins with the University of Toronto agrees with this kind of assessment, observing that calorie count is likely less important than the nature of the food itself, adding: "I'm more interested in what McDonald's are doing." Meanwhile, Freshii has recently agreed to "meet the minimum compliance as required [by the legislation]." Do you agree with the calorie counting legislation? Why or why not?**

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

On the one hand, the legislation is designed to assist consumers in a landscape where a food item that is seemingly low in calories is, in fact, tremendously and unexpectedly caloric. In this sense, the education is a good thing. According to a government press release, an important object of the bill is to help consumers choose more wisely by "giving them caloric information when eating out or purchasing take-away meals." See Government of Ontario, "New Legislation Passes to Help Reduce Smoking and Obesity Rates" (26 May 2015) online: Government of Ontario <http://news.ontario.ca/mohltc/en/2015/05/new-legislation-passes-to-help-reduce-smoking-and-obesity-rates.html>. In this same press release, the government notes that "According to a 2011 Ipsos Reid study, approximately 95 per cent of Ontarians support requiring fast food restaurants to list nutrition information on their menus."

On the other hand, the legislation might be considered draconian and unnecessary. As reported by Glauser et al., James Rilett, vice president for Canadian Restaurant and Foodservices Association, Ontario, "states that his members prefer voluntary programs but also said restaurant owners go out of their way to respond to nutritional transparency requests from the public. They want customers to be happy," he explained. Further, as pointed out by Freshii's objection to the law, customers may be confused by calorie count postings. In some situations, the calorie amount may be misleading or obscure more important nutritional information. It undoubtedly interferes with how chain restaurants, such as Freshii, may want to run their business or market themselves to consumers.

It is worth noting however, that despite some strong objections like the one from Freshii, business criticisms of the concept have become more muted since the legislation passed.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

2. **A brawl at a popular Halifax nightclub called the Dome resulted in 38 arrests and the suspension of the Dome's liquor licence. Government officials believe that one-dollar drinks offered by the Dome are one factor contributing to such violence. "This has blown into a cultural problem, and one of the issues we have identified is low-price, deep-discount drinks," said Barry Barnet, then Nova Scotia's Minister of Health Promotion and Protection. The Nova Scotia government expressed its hopes to develop recommendations to address problems associated with excess alcohol consumption. From a risk management perspective, how should local bar owners approach governmental concern over bar violence? [footnotes deleted]**

Though a full risk management model is not presented until Chapter 3, students should still be able to suggest ways in which bar violence can be reduced or eliminated. To get its liquor licence back, the Dome came up with several risk management strategies that might be more broadly instructive. According to the CBC, these measures included:

- ending the practice of one-dollar drinks
- stopping advertising drink prices
- installing more video cameras and give police access to them
- handing out lifetime bans to troublemakers
- limiting the number of patrons to 80 per cent of bar capacity
- hiring at least four off-duty police on a busy night, up from two
- doubling security staff inside the bar
- hiring a consultant for security training

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

Additionally, the Dome should be careful to cut off alcohol service to those who are impaired (which is already legally required). The idea is to proactively address the problem identified by government and work to eliminate or reduce it. See CBC News, "Bar to stop selling $1 drinks after brawl" (28 December 2007), online: CBC News <http://www.cbc.ca/news/canada/nova-scotia/bar-to-stop-selling-1-drinks-after-brawl-1.667475>.

Note that several jurisdictions, now including Nova Scotia and Alberta, have enacted legislation on the same point. For analysis of Nova Scotia law and related commentary, see Rachel Boomer, "Nova Scotia introduces minimum drink prices," *Metro* (19 December 2008), online: Metro <http://metronews.ca>. For analysis of Alberta law and related commentary, see CBC News, "New rules for Alberta bar patrons kick in" (1 August 2008), online: CBC News <http://www.cbc.ca/news/canada/calgary/new-rules-for-alberta-bar-patrons-kick-in-1.749699>.

3. **The federal government legalized recreational cannabis as of October 17, 2018, but only in limited situations. For example, a Department of Justice website states (among other things) that, subject to provincial or territorial restrictions, those who are 18 years of age or older are now legally able to:**
   - **possess up to 30 grams of legal cannabis, dried or equivalent in non-dried form in public**
   - **share up to 30 grams of legal cannabis with other adults**
   - **buy dried or fresh cannabis and cannabis oil from a provincially licensed retailer**

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

- **in provinces and territories without a regulated retail framework, individuals are able to purchase cannabis online from federally licensed producers**
- **grow, from licensed see or seedlings, up to 4 cannabis plants per residence for personal use**
- **make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products[1]….**

The current regime for medical cannabis remains unchanged[2]. Do you agree with the federal government's decision on legalization? What are the pros and cons of this decision?

The biggest benefit of decriminalization is simply this: it is unduly harsh and punitive to give someone a criminal record for a relatively minor infraction of the law. Other benefits of the government's policy of decriminalization include providing government with another product to tax; providing government with the opportunity to regulate the sale and production of the drug, thereby increasing safety; and freeing the police to investigate more serious crimes.

Cons of the decriminalization legislation include the view that legalization is contrary to a law and order agenda; marijuana has been called a gateway drug, leading the user to more serious and dangerous drugs; the drug is carcinogenic and linked to a host of illnesses, including lung cancer, and that the state should not be seen to condone drug use of this kind. Beyond this, legalization may lead to more impaired driving charges as access to marijuana is more widespread.

---

[1] Department of Justice, "Cannabis Legalization and Regulation", (17 October 2018), online: https://www.justice.gc.ca/eng/cj-jp/cannabis/. Emphasis and formatting in the original.
[2] Department of Justice, "Cannabis Legalization and Regulation", (17 October 2018), online: https://www.justice.gc.ca/eng/cj-jp/cannabis/. Emphasis and formatting in the original.

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

The foregoing illustrates the policy analysis that goes into legislative decision making as well as the ideological underpinnings informing both sides of legislative debates.

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

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

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

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

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

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

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

6. **The government of Alberta has passed regulations that include requirements that home inspection businesses be provincially licensed and carry $1 million in errors and omissions insurance. Beyond this, the province has mandated educational standards for home inspectors with the goal of improving the quality of work done by the home inspection industry. Then-Opposition Liberal MLA Hugh MacDonald endorsed the regulations as a means of clamping down on fly-by-night home inspectors, observing: "If I'm making an important decision to purchase a home based on information I'm getting from a home inspector, that person should be licensed and have minimum credentials." Do you agree that government should regulate such an industry? What are the costs and benefits of such regulation to the consumer?**

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual

more protection," *Edmonton Journal* (14 May 2011), online: Edmonton Journal <http://www2.canada.com/edmontonjournal/news/story.html?id=b33dcbc8-b96a-4f5c-bd78-f9f1a8862aa3)>, Terry Fikowski (of HouseMaster Home Inspections) welcomes home inspector regulation, because "a lot of the requirements in the regulation are things that home inspectors already do. Those that don't probably shouldn't be in the industry." He adds: "A lot of operators do not have any formal training of any sort, so training is a big thing. It's going to make sure those people get the proper training and have the proper insurance."

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

Copyright © 2020 by Nelson Education Ltd.

Canadian Business and the Law (Canadian) 7th edition Duplessis Solutions Manual