

# MANAGING THE LAW

THE LEGAL ASPECTS OF DOING BUSINESS



McINNES

KERR

VANDUZER

FOURTH EDITION

## How to Read a Citation

<i>Dobson</i> plaintiff	<i>v</i> <i>versus</i> (Latin for “against”)	<i>Dobson</i> defendant	(1999) year of decision	174 volume number	DLR case reporter	(4th) series	1 page number	(SCC) court
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### *Civil Case Citation*

### *Criminal Case Citation*

<i>R</i> <i>Rex</i> or <i>Regina</i> (Latin for “King” or “Queen”)	<i>v</i> <i>versus</i> (Latin for “against”)	<i>Waterloo</i> <i>Mercury</i> <i>Sales Ltd</i> defendant or accused	(1974) year of decision	49 volume number	DLR case reporter	(3d) series	131 page number	(Alta Dist Ct) court
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## EXPLANATION OF ABBREVIATIONS

### JURISDICTIONS

#### *Canada*

Alta	Alberta
BC	British Columbia
Can	Canada
Man	Manitoba
NB	New Brunswick
Nfld	Newfoundland
NWT	Northwest Territories
NS	Nova Scotia
Nun	Nunavut
Ont	Ontario
PEI	Prince Edward Island
Que	Quebec
Sask	Saskatchewan
Yuk	Yukon

#### *United Kingdom*

Eng	England
UK	United Kingdom

#### *United States*

Ala	Alabama
Cal	California
Conn	Connecticut
Ill	Illinois
Mass	Massachusetts
NJ	New Jersey
NY	New York
Pa	Pennsylvania

#### *Australia and New Zealand*

Aust	Australia
NZ	New Zealand

### COURTS

#### *Canada*

CA	Court of Appeal
Co Ct	County Court
Dist Ct	District Court
Div Ct	Divisional Court
FC CA	Federal Court, Court of Appeal
FC TD	Federal Court, Trial Division
Gen Div	General Division
H CJ	High Court of Justice
QB	Court of Queen’s Bench
SC	Supreme Court
SC AD	Supreme Court, Appeal Division
SC TD	Supreme Court, Trial Division
SCC	Supreme Court of Canada
SCJ	Superior Court of Justice
TCC	Tax Court of Canada

#### *United Kingdom*

CA	Court of Appeal
Ch	Chancery Court
Ch D	High Court: Chancery Division
CP	Common Pleas
Ex	Exchequer Court
Ex Ch	Exchequer Chamber
HL	House of Lords
KB	Court of King’s Bench
PC	Judicial Committee of the Privy Council
QB	Court of Queen’s Bench

#### *United States*

CA	Court of Appeal
Cir	Circuit Court
Sup Ct	Supreme Court
SD	Southern District
WD	Western District

#### *Australia and New Zealand*

HC	High Court
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## JUDGES

### Canada

J	Justice
JA	Justice of Appeal
JJ	Justices
CJ	Chief Justice

### United Kingdom

LJ	Lord Justice
MR	Master of the Rolls

## CASELAW REPORTERS

### Canada

AR	Alberta Reports
BCDLA	British Columbia Decisions, Labour Arbitration
BCLR	British Columbia Law Reports
BLR	Business Law Reports
CBR	Canadian Bankruptcy Reports
CCC	Canadian Criminal Cases
CCEL	Canadian Cases on Employment Law
CCLT	Canadian Cases on the Law of Torts
CELR	Canadian Environmental Law Reports
CPR	Canadian Patent Reporter
CTC	Canada Tax Cases
DLR	Dominion Law Reports
DTC	Dominion Tax Cases
Ex CR	Canada Law Reports: Exchequer Court of Canada
FC	Federal Court Reports
FTR	Federal Trial Reports
LAC	Labour Arbitration Cases
NBR	New Brunswick Reports
Nfld & PEIR	Newfoundland and Prince Edward Island Reports
NSR	Nova Scotia Reports
OLR	Ontario Law Reports
OLRB Rep	Ontario Labour Relations Board Reports
OR	Ontario Reports
OTC	Ontario Trial Cases
OWN	Ontario Weekly Notes
PPSAC	Personal Property Security Act Cases
Sask R	Saskatchewan Reports
SCR	Supreme Court Reports
WWR	Western Weekly Reports

### United Kingdom

AC	Appeal Cases
All ER	All England Reports
App Cas	Appeal Cases
Ch D	Chancery Division
ER	English Reports
HL Cas	House of Lords Cases

KB	King's Bench
LR	Law Reports
Lloyds Rep	Lloyd's Law Reports
QB	Queen's Bench
WLR	Weekly Law Reports

### United States

F	Federal Reporter
F Supp	Federal Supplement
NE	Northeastern Reporter
NY	New York Reports
P	Pacific Reporter
So	Southern Reporter
WL	Westlaw

### Quicklaw Databases

BCJ	British Columbia Judgments
OJ	Ontario Judgments
YJ	Yukon Judgments

### Australia and New Zealand

CLR	Commonwealth Law Reports
SR (NSW)	State Reports (New South Wales)
Qd R	Queensland Reports

## STATUTES

### Canada

RRO	Revised Regulations of Ontario
RSC	Revised Statutes of Canada
RSA	Revised Statutes of Alberta
RSBC	Revised Statutes of British Columbia
RSM	Revised Statutes of Manitoba
RSN	Revised Statutes of Newfoundland
RSNB	Revised Statutes of New Brunswick
RSNWT	Revised Statutes Northwest Territories
RSNS	Revised Statutes of Nova Scotia
RSO	Revised Statutes of Ontario
RSPEI	Revised Statutes of Prince Edward Island
RSQ	Revised Statutes of Quebec
RSS	Revised Statutes of Saskatchewan
RSY	Revised Statutes of Yukon
SOR	Statutory Orders and Regulations

### United Kingdom

Vict	Victoria
Cha	Charles

### United States

USC	United States Code
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## PERIODICALS

Berkeley Tech LJ	Berkeley Technology Law Journal
Can Bar Rev	Canadian Bar Review
Cornell LQ	Cornell Law Quarterly
Osgoode Hall LJ	Osgoode Hall Law Journal

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MITCHELL MCINNES

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Professor McInnes' research focuses on Unjust Enrichment, Restitution, Remedies, Trusts, Contract, and Tort. He has published more than one hundred papers in leading journals, including the *Canadian Bar Review*, the *University of Toronto Law Journal*, the *Cambridge Law Journal*, and the *Law Quarterly Review*. He is a co-author of three casebooks: *Cases and Materials on the Law of Torts* (Carswell), *Oosterhoff on Trusts: Text, Commentary and Cases on Trusts* (Carswell), and *Cases and Materials on the Law of Restitution* (Emond Montgomery). He has also published two collections of essays on the law of unjust enrichment: *Restitution: Developments in Unjust Enrichment* (Law Book Company) and *Understanding Unjust Enrichment* (Hart). His work has been relied upon by a number of courts, including the Supreme Court of Canada and the High Court of Australia.

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Over the past decade, he has often been called on to advise Canadian government agencies and organizations on business and trade law issues. He completed a study for the Canadian Competition Bureau in 1999 on anti-competitive pricing practices. Many of his recommendations for reform of the *Competition Act* were included in amendments to the *Act* in 2009. His study for the Department of Foreign Affairs and International Trade of the impact of the WTO General Agreement on Trade in Services on the delivery of health, education, and social services in Canada was presented to the Standing Committee on Foreign Affairs and International Trade in 2005.

Tony has worked with international development agencies around the world, such as the Canadian International Development Agency and the World Bank, delivering workshops, drafting new laws, and providing other forms of technical assistance to foreign governments on issues related to business and trade. He played a key role in the drafting of Russia's foreign trade law and business registration law.

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# Preface

*Managing the Law: The Legal Aspects of Doing Business* aims to equip students with the conceptual tools and intellectual skills needed to identify, assess, and manage the legal risks that arise in the course of doing business. Students who study this text will achieve the following:

- A basic understanding of the function of law.
- A basic understanding of the structure of the Canadian legal system.
- A basic understanding of legal sources, concepts, and principles.
- A sound understanding of the specific areas of the law that are especially important to business.
- The ability to identify legal problems that arise in business contexts.
- The ability to formulate opinions on important socio-legal issues that affect business.
- The ability to apply basic legal principles to problems that arise in business contexts.
- The ability to critically evaluate legal arguments put forth by others.
- The ability to devise arguments and present them persuasively.

Training students “to think like lawyers” (to use a favourite phrase of law professors) has long been the main purpose of law courses, even those designed for business students. But although this book provides valuable insight into legal thought processes, we have written this text to address a different primary goal. With *Managing the Law*, we aim to help students learn how “to think like successful business people.” The key concept here is **risk management**. Business people should know enough about the law to identify legal issues and arrange their affairs so as to avoid difficulties. Moreover, they should know enough about the law to recognize when it is appropriate to obtain expert advice from a legal professional. Success in the business world often depends on thoughtful delegation.

This book was written with these considerations firmly in mind. As a result, *Managing the Law* differs from other books on the market in two important ways. First, it is a book for business students, not law students. *Managing the Law* provides a thorough and current picture of the legal rules that are relevant in the business world. It does not sacrifice important information for the sake of simplicity. At the same time, however, it does not overwhelm the business student with unnecessary detail or impenetrable jargon. The tone is intelligent and student-friendly. The text is accessible and comprehensible, regardless of the reader’s background.

Second, the text’s recurring theme is *risk management*. That focus is reflected in both the choice and the presentation of material. Legal topics are chosen for their relevance to the commercial context. Furthermore, they are presented in a manner that fosters the development of effective risk-management skills. Through the extensive use of discussion boxes, review exercises, cases and problems, and the like, the text draws students into the business law world and requires them to actively resolve practical problems. Sometimes, of course, the proper resolution of a problem involves recognition of the need for a lawyer’s assistance.

Canadian business students, like Canadians in general, are an increasingly diverse group. They come from a variety of backgrounds in terms of



personal characteristics, past qualifications, and professional aspirations. Some are new Canadians; others have long-established roots. Some are embarking on post-secondary education for the first time; others are engaged in advanced degrees. Some have little experience in the business world; others are retraining after successful careers. Some are seeking a generalized education; others are more focused on a particular career. This book is appropriate for them all.

Law texts are invariably dense and uninviting, not only in substance and language but also in appearance. By extension, business law texts often suffer the same flaw. In contrast, *Managing the Law* has been specifically designed with the full breadth of its target audience in mind. It is visually engaging. Its use of colour, boxes, icons, figures, and layout draws readers in and provides them with room to breathe intellectually.

*Managing the Law* has also been designed for use in any course that deals with legal issues in a “business context” (using that phrase broadly). Consequently, without limiting its scope, it is appropriate for students who are studying the legal aspects of any of the following areas:

- Accounting
- Business administration
- Commerce
- Finance
- Management
- Marketing
- Office administration

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## Organization

This text is divided into nine parts.

- **Part 1 (Introduction to Law)** consists of two chapters. The first chapter, dealing with risk management and sources of law, opens with an explanation of why business people should study law explaining the core concept of risk management. The chapter then sketches the essential features of the Canadian legal system, including:
  - The nature of law
  - Branches of law
  - Sources of lawThe second chapter, dealing with litigation and alternative dispute resolution, explains various mechanisms for the resolution of legal disputes:
  - The litigation process
  - The court system
  - Alternative dispute resolution
- **Part 2 (Torts)** is divided into four chapters. The focus throughout is on risk management in the business context. Here we introduce such key concepts as vicarious liability and liability insurance. And we examine business torts such as nuisance and defamation. The final chapter, which deals with the tort of negligence, places special emphasis on professional negligence as it arises in commercial matters.
- **Part 3 (Contracts)** consists of eight chapters dealing at length with the central concept of contracts. Because of the significance of enforceable

agreements in the commercial context, separate chapters are devoted to each of the following:

- Formation of contracts
- Consideration and privity
- Terms and representations
- Contractual defects
- Discharge and breach
- Remedies

The final chapters focus on two particularly important types of contracts:

- Sales of goods
- Negotiable instruments
- **Part 4 (Property)** consists of three chapters on the law of property. The discussion, as always, places the reader at the heart of practical business-law problems. The examination of personal property, for instance, centres on the institution of bailment and the means by which various forms of insurance can be used to manage legal risks
- **Part 5 (Business Law in the Digital Age)**, consisting of two chapters, provides an unprecedented introduction to business law in the digital age. It deals with:
  - Intellectual property rights
  - Electronic commerce
- **Part 6 (Business Organizations)** deals with various types of business organizations. Its three chapters examine sole proprietorships, partnerships, corporations, agency relationships, joint ventures, and franchises. The principles of risk management are highlighted throughout.
- **Part 7 (Practical Business Decisions)** addresses specific decisions that affect business. Its two chapters focus on issues arising from:
  - Secured transactions
  - Bankruptcy and insolvency
- **Part 8 (Sources and Forms of Public Law Regulation)** moves the discussion out of the purely private realm and into the world of public regulation and international relations. Its one chapter examines the various means by which Canadian governments regulate commercial conduct. It considers, for example, competition law, consumer protections laws, and environmental protection laws.
- **Part 9 (Employment and Labour Law)** is divided into two chapters. The first focuses on individual employment. Risk management issues are highlighted at all stages of the employee/employer relationship, ranging from pre-employment matters (such as advertising and hiring) to post-employment matters (such as dismissal and severance packages). The second chapter focuses on organized labour. It includes a discussion of collective agreements, grievances, and industrial conflicts.

Taken together, those nine parts provide a thorough examination of the legal issues that generally affect Canadian businesses. At the same time, we have organized the material to offer instructors the utmost flexibility in matching the book to their course designs. We recognize that time is usually tight in business law courses. Therefore, we have adopted a modular approach in organizing the chapters and units. After covering the introductory Chapters 1 and 2 and the core material on contracts in Chapters 7–12, instructors can feel free to cover the remaining chapters in the order that best suits their needs.

# Features

Students learn effectively when they are interested, enthusiastic, and engaged. As a result, we have designed this text to encourage students to participate actively, rather than merely read passively. A large number of features ensure that the materials are both accessible and stimulating.

**Objectives.** Each chapter opens with a list of 10 objectives that stress key issues and highlight risk-management skills that students should aim to develop. By providing a roadmap at the beginning of each chapter, the objectives help students to read and understand the material more efficiently and more effectively.

**Key Terms.** Key terms are boldfaced where they are defined in the body of the text. They are also restated with their definitions in the margins.

**Discussion Boxes.** Each chapter contains at least one instance of each of five distinct types of discussion boxes. These boxes provide instructors with additional opportunities to stimulate critical thinking and engage students in classroom debate. With the exception of the Case Briefs, each discussion box ends with Questions for Discussion. (Model answers appear in the *Instructor's Resource Manual*.) Each type of box fulfils a particular pedagogical goal.

- **Case Briefs** illustrate how the courts have formulated and applied legal rules in specific business contexts. They also introduce students to many of the leading cases in the common law system.
- **Business Decision** boxes ask students to respond as business people to common legal problems. They are designed to foster the development of sound commercial judgment. Accordingly, they focus less on purely legal concepts and more on practical matters that influence decisions in the commercial world.
- **You Be the Judge** boxes ask students to respond as judges to legal problems that commonly arise in the business world. They are designed to give students insight into legal thought processes.
- **Ethical Perspective** boxes ask students to assess morally contentious business-law scenarios. They compel students to place both business considerations and legal concerns into a larger social context, and to develop an appreciation of the fact that alternative solutions often pull in different directions. These boxes are particularly effective in generating classroom discussions.

**Concept Summaries.** Every chapter contains at least one Concept Summary; most chapters contain many more. Presented in tabular form, the Concept Summaries provide succinct and easily understood reviews of difficult concepts and rules. They are often used to compare and contrast related areas of law.

**Figures.** Every chapter contains at least one figure. Various diagrams and drawings are used to illustrate and clarify important concepts. Aside from their inherent pedagogic value, they contribute to the visual appeal of the book and therefore draw students into the material.

**Chapter Summaries.** Each chapter ends with a chapter summary that briefly reviews the important concepts of the chapter. These summaries help prepare students for the end-of-chapter exercises.

**Review Questions.** Twenty review questions appear at the end of each chapter. In some instances, students are required to define and explain key concepts and terms. In others, they are asked to respond to short problems. The

**LEARNING OBJECTIVES** After completing this chapter, you should be able to:

- Explain why it is important for business people to study law.
- List five legal strategies for managing risks.
- Provide a general definition of the word "law."
- List four areas of public law and three areas of private law.
- Explain how behaviors in the workplace can be described by the Criminal Code and provide several areas of business.
- Explain two meanings of meanings of the term "law."

public law is concerned with governments and the ways in which they deal with their citizens

**Public law** with their citizens

consti

**Case Brief 1.1**

*R v Transpavé Inc* 2008 QCCQ 1598 (Ct of Que)

Traditionally, a company could be convicted of a crime only if the criminal acts were performed by the company's "directing mind." In 2004, Parliament amended the Criminal Code in an effort to improve work-

**Business Decision 1.2**

**Law, Equity, and the Trust**

You own a small airline. Like other airlines, your airline does most of its business through travel agents. These agents attract passengers, issue tickets, and receive payment on your behalf. Unfortunately, a travel agent

**You Be the Judge 1.1**

**Charter Remedies<sup>53</sup>**

The Family Benefits Act provides social assistance in any "mother whose dependent child was born out of wedlock." Charles Phillips, a single father, cares for his daughter, who was born out of wedlock.

**Ethical Perspective 1.1**

**Rules and Laws**

While fishing from a lakeshore, I saw a canoeist tip his boat and fall into the water. Although he screamed for help for more than 20 minutes, I did nothing at all. My motorboat was nearby, and I could have easily

**Concept Summary 1.1**

**Division of Powers**

Federal	criminal law
provincial/territorial	taxation

**FIGURE 1.4 The Common Law**

```

    graph TD
      S[Statutes] --- CL1[Common Law  
(Derived from English Law)]
      CL1 --- S
      CL1 --- CL2[Common Law  
(Judge-made law)]
      CL2 --- S
  
```

review questions can be discussed in class or assigned to students for independent study. (Model answers are provided in the *Instructor's Resource Manual*.)

**Cases and Problems.** Each chapter concludes with 12 Cases and Problems (with the exception of the first and second chapters, which each contain six), at least two of which are new to this edition. These exercises vary in both length and difficulty. They are ideally suited to classroom discussion, but they too can be assigned to students for independent study. (Model answers are provided in the *Instructor's Resource Manual*.)

**Canadian Case Studies.** A special Canadian Case Study is provided at the end of each of Parts 2, 5, 8, and 9. Each of these cases provides an in-depth opportunity to apply the lessons learned from the text. Students are able to identify issues within practical business contexts and then propose possible solutions. The Canadian Case Studies readily lend themselves to both classroom discussion and independent study. (Model answers are provided in the *Instructor's Resource Manual*.)

## MyBusLawLab

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### MyBusLawLab—the moment you know

MyBusLawLab is our online component for the 4th edition of *Managing the Law: The Legal Aspects of Doing Business*. This valuable tool provides **students** and **instructors** with personalized Study Plans and the opportunity for unlimited practice. MyBusLawLab also includes Pearson eText, a robust eBook version of the textbook that enables both students and instructors to highlight specific sections, add notes, share notes, and magnify any of the images or pages without distortion. MyBusLawLab also makes additional materials available to students. These materials include: topics of interest as they relate to business law practices in British Columbia, Alberta, Saskatchewan, Manitoba, the Atlantic Provinces, and Ontario; the *Charter of Rights and Freedoms*; and sample mortgage documents.

- MyBusLawLab features:
  - **Self-study questions** for extra practice and review (the questions do not duplicate any of those in the *Test Item File*).
  - **Provincially specific material**, aimed at British Columbia, Alberta, Saskatchewan, Manitoba, the Atlantic Provinces, and Ontario.
  - **Additional materials** that could not be incorporated into the book, such as the text of the *Charter of Rights and Freedoms*, and sample mortgage documents.

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## New to This Edition

While retaining the strengths of the previous editions of *Managing the Law*, this fourth edition introduces several important changes.

- **Risk Management.** The focus on the management of legal risks is strengthened throughout the book.
- **Paralegals.** The coverage of paralegals in Chapter 2 is expanded and includes discussion of paralegals outside Ontario.
- **Judicial Review.** Chapter 2's discussion of Administrative Law is updated and now includes a discussion of judicial review.
- **Invasion of Privacy.** The emerging tort of invasion of privacy is now discussed in greater detail, including a look at *Jones v Tige*.
- **Land Owners' Rights.** Chapter 4 features a new discussion of the extent of land owners' rights, and an expanded discussion of right of defence of property.
- **Defamation.** Chapter 5 features a new Case Brief discussing online defamation.
- **Negligence.** Chapter 6 features a new discussion of the application of negligence in the workplace.
- **Contract Law.** Chapter 9 now features a new section dealing with boilerplate clauses, and includes an example of a boilerplate contract.
- **Electronic Payments.** Chapter 11 includes a new discussion of electronic payment systems, including PayPal.
- **Damages.** Chapter 12 contains a new section on calculation of expectation damages.
- **Intellectual Property.** Chapter 18 is expanded to include a discussion of new forms of expression (literary, artistic, and dramatic works).
- **Copyright Infringement.** Chapter 18 includes a discussion of the new *Copyright Modernization Act*. Figure 18.4 lists all the major new provisions in The *Copyright Modernization Act* and explains the effect of such changes. One of the significant changes in the Act deals with new "technological protection measures" or "digital locks". This change is explained in order to have students consider whether the new law will help maintain copyright's balance or whether it will impair citizens' ability to access information.
- **Electronic Commerce.** The discussion of jurisdiction in electronic tort cases is updated to include new Supreme Court rulings in Chapter 19. "You be the Judge 19.2" features the Heartleand Payment processing case—a case many consider to be the largest security breach in history.
- **Identity Theft.** The discussion in Chapter 19 of identity theft is extended with a discussion of new legislation that focuses on the preparatory stages of identity theft.
- **Internet Spam.** Chapter 19 now includes a discussion of Bill C-28, *Fighting Internet and Wireless Spam Act (FISA)*. The text provides an explanation of the Act and the penalties that it imposes on violators.
- **Corporate Social Responsibility.** Chapter 22 is heavily revised to include an expanded discussion of corporate social responsibility, featuring real-world examples of companies that have failed or excelled.
- **Securities Law.** The discussion of securities law in Chapter 22 is expanded with a longer introduction and new material concerning environmental disclosure rules.

- **Taxation.** The taxation coverage in Chapter 25 is revised to include a new section on the taxation of corporations and shareholders, to discuss taxation of small businesses, and to provide a discussion of the legal basis for federal and provincial taxation
- **Contractors.** The section on contractors in Chapter 26 is expanded to include information on a new category of worker, the dependent contractor.
- **Discrimination.** The coverage of human rights and discrimination, in Chapter 26, is changes to include updates to the Human Rights Code of several provinces.
- **Boilerplate Contractual Clauses** is a new appendix that contains a variety of examples of clauses that are discussed in Chapter 9.

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## Supplements

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### *Dedication*

For Alison: *durate et vosmet rebus servate secundis.*

#### **M.M.**

To my sweet little Ruby Tuesday, who turned two in June—*yum, yum bubba yum, bubba yubba bubba gum*”

#### **I.R.K.**

Jodie—for her continuing indulgence and support; Taylor and Eli—for their patience with their too often absent father; and Shirley—for being my biggest fan.

#### **J.A.V.**



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# Risk Management and Sources of Law

## CHAPTER OVERVIEW

### Why Study Law?

Risk Management

### An Introduction to the Legal System

The Nature of Law

A Map of the Law

Sources of Law



## LEARNING OBJECTIVES

After completing this chapter, you should be able to:

- ❶ Explain why it is important for business people to study law.
- ❷ List four basic strategies for managing risks.
- ❸ List three strategies for risk management that businesses often use in different situations.
- ❹ Provide a general definition of the word “law.”
- ❺ List four areas of public law and three areas of private law. Provide examples that demonstrate how each one of those areas is relevant to business people.
- ❻ Outline one way in which tort and contract law are similar and two ways in which they are different.
- ❼ Explain how federalism is related to the division of powers.
- ❽ Describe the *Canadian Charter of Rights and Freedoms* and provide several examples of how it can help or hurt a business.
- ❾ Explain two meanings of the term “civil law” and three meanings of the term “common law.”
- ❿ Explain the historical development of equity. Briefly explain the relationship between law and equity today.

Law is essential to any society. It both shapes and reflects how people interact. As we will see in this textbook, it can affect a person even before birth (can you sue someone for injuries that you suffered as a fetus?) and even after death (what happens to your property after you are gone?). It also governs the most important issues that arise in between: the freedom to choose a lifestyle, the right to marry, the ability to create and raise children, the obligation to pay taxes, and so on.

Not surprisingly, the law is an enormous subject. As a whole, it cannot be studied in a single course. Indeed, as a whole, it cannot be mastered in an entire lifetime. Therefore, we have to make choices. We must examine some topics and leave others to the side. To a large extent, those choices depend upon our reason for studying law in the first place.

L.O. ① ② ③

## Why Study Law?

We therefore begin with the obvious question: Why study law? The answer depends upon who you are. As consumers, we all need to be aware of the rules that govern commercial transactions. In terms of employment, you may intend to work in the public sector. If so, you need to understand not only the nature of government organizations, but also the different types of laws that may affect you. Chances are, however, that you are a business student. And as you know, businesses exist primarily to make money. The goal is to maximize gains and minimize losses. Of course, there are many factors in that equation: hard work, natural talent, good luck, and so on. But for the most part, success and failure are the results of choices. A business must choose, for example, a product, a price, a location, and a marketing strategy. And every one of those *business* choices has *legal* consequences. Some consequences are profitable; others are financially disastrous. The difference between winning and losing in the business world often depends upon the ability to make good choices from a legal perspective. That fact suggests, in general terms, both *why* you should study law and *which* parts of the law you should study.

It is important to realize that the law can both hurt *and* help. Many people think of laws only in terms of prohibitions and punishments. For example, if you break the rule against murder, you may be sent to jail. But the law can also allow you to do things that you could not otherwise do. Generally speaking, for instance, I am entitled to ignore my promises. I can stay home and read even if I agreed to meet you at the movies. Beyond the fear of making you angry, there is nothing that compels me to keep my word. In the business world, however, that sort of behaviour simply cannot be tolerated. If I promise to provide materials to your factory, you may act on the assumption that I will deliver. For instance, you may hire extra staff or promise to re-sell the materials to someone else. You therefore need some way of holding me to my word. Your best bet is to persuade me to enter into a *contract*. As we will see in a later chapter, a contract is a legal concept that allows people to create *enforceable* promises. In that situation, you would not have to worry (as much) that I might ignore my promise.

## RISK MANAGEMENT

Throughout this book, we will see a number of other ways in which businesses can positively benefit from the law. Much more often, however, we will be concerned about avoiding losses. The main theme of our discussion is that legal education plays a critical role in *risk management*. **Risk management** is the process of identifying, evaluating, and responding to the possibility of harmful events. Business Decision 1.1 provides a simple example.

**risk management** is the process of identifying, evaluating, and responding to the possibility of harmful events

## Business Decision 1.1

### Risk Management

One of your ex-employees is hoping to join another company. She has asked you to write a reference letter on her behalf. She obviously does not know that you have a very low opinion of her, largely because you believe that she stole money from your business. Furthermore, since the company that she wants to join is one of your best customers, you are tempted to write a candid letter.

### Questions for Discussion

1. Will you write a reference for your ex-employee? If so, what will it say?

Unless you know something about the law of torts, you are not in a position to answer those questions properly. You need to identify, evaluate, and respond to the legal risks involved.

- **Identification:** If you accuse your ex-employee of theft, she may sue you for defamation because your statement would cause a reasonable person to think less of her.<sup>1</sup> More surprisingly, if you unreasonably refuse to write a letter, or if you write an unreasonably brief letter, you may be held liable for reducing the ex-employee's job prospects. In any event, you need to be concerned about *liability*, about actually being held legally responsible. But you also need to be concerned about the possibility of being sued. As we will see in the next chapter, litigation is time-consuming and expensive, even when you win.
- **Evaluation:** Having identified the risk of being sued for defamation, you may decide that a candid letter would nevertheless be legally acceptable. Your allegations may be true. Even if they are not, you may be justified in sharing your suspicions with the other company. Furthermore, you may believe that the arguments in your favour are strong enough to discourage your former employee from suing you.
- **Response:** Finally, having identified and evaluated the risks, you need to formulate a response. You have several options. You can refuse to write a letter. You can write a letter that does not mention your suspicions. Or you can write a letter that accuses your former employee of theft. The choice is still yours. Significantly, however, you are now in a position to make an informed decision. A basic understanding of the law makes you a better business person.

Business Decision 1.1 demonstrates risks that are largely legal and private in nature. While court cases are public events, very few cases ever go before a judge. Most are settled by the parties themselves. As a result, you were mainly concerned about being held liable to your ex-employee. Quite often, however, extra-legal concerns may prove even more important. In addition to potentially leading to liability, an accident may generate bad publicity and damage consumer confidence. Canadians have seen many examples in recent years. In 2008, for example, contamination at a Maple Leaf meat packing plant in Ontario resulted in at least six deaths and dozens of injuries from listeriosis.

<sup>1</sup> The tort of defamation is discussed in Chapter 5. As we will see, a reference letter is protected by the defence of qualified privilege, meaning that an inaccurate and harmful statement will not trigger liability if the writer acted in good faith.



Although the company's response to the tragedy was considered by many to have been a textbook example of corporate responsibility, millions of dollars were lost to suspended operations, recalled products, and loss of consumer confidence. Those risks also need to be managed.

Notice that we have been talking about risk *management*. There are potential costs associated with nearly every form of behaviour, and that includes doing nothing at all. A business probably cannot exist, and certainly cannot profit, unless it is willing to take some chances. The goal therefore is not necessarily to eliminate risks; it is to *manage* them. The appropriate strategy depends upon the circumstances.

- **Risk avoidance:** Some risks are so serious that they should be avoided altogether. An automobile that regularly explodes upon impact should be removed from the market. Aside from issues of morality, the financial costs of being held liable will probably outweigh any sales profits.<sup>2</sup>
- **Risk reduction:** Some risks can be reduced to an acceptable level through precautions. For example, a bank that lends \$500 000 to a manufacturer realizes that the loan may not be repaid if the economy goes into recession. The bank can, however, protect itself by requiring the business to grant a *mortgage* over its factory. In that case, if the bank does not get its money, it may at least get the property.
- **Risk shifting:** Even if a risk cannot be avoided or reduced, it may be shifted onto another party. We will very shortly introduce two exceptionally important strategies for shifting risks: *insurance* and *exclusion clauses*. There are others. Suppose, for example, that a construction company requires the temporary use of a crane. It has two options. First, it may rent a crane and have it operated by one of its own employees. Second, it may rent a crane and hire an *independent contractor* to operate it.<sup>3</sup> An independent contractor is a person who performs services on behalf of a company, but who is not a regular employee of that company. Although it is often difficult to distinguish between an employee and an independent contractor, there is a crucial difference in terms of risk management. Suppose the worker operates the crane carelessly and injures a bystander. The bystander will certainly be able to sue the person who was actually in control of the equipment. Furthermore, if that person was an employee, then the bystander will also be entitled to sue the company. Even if it did not do anything wrong, a company is *vicariously liable* for the actions of its employees. (We will examine the doctrine of vicarious liability in Chapter 3.) A company is not, however, vicariously liable for an independent contractor. In some situations, it is therefore prudent to have work done by an independent contractor, rather than an employee.
- **Risk acceptance:** It is sometimes appropriate to simply accept a risk. Imagine a golf course that operates behind a factory. It is possible that a wild shot might hit a factory window, and that the golf course might be held responsible for the resulting damage. Nevertheless, if the likelihood of such an accident is small, the club might decide to do nothing at all. It certainly would not close the course to avoid the risk altogether. It might also find that the costs of reducing the risk by erecting a large safety net,

<sup>2</sup> *Grimshaw v Ford Motor Co* (1981) 119 Cal App (3d) 757.

<sup>3</sup> We will examine the difference between employees and independent contractors in Chapters 3 and 26.

or shifting the risk by buying an insurance policy, are too high. The most sensible approach might be to hope for the best and pay for any windows that are broken.

As we have seen, it sometimes is possible to deal with individual problems as they arise. Many of the most effective forms of risk management, however, apply more broadly. Some are fairly obvious. Businesses should, of course, ensure that employees are carefully selected and properly trained. Other strategies are more legal in nature. We will discuss those strategies in greater detail in later chapters. At this point, it is enough simply to introduce three important concepts.

- **Insurance:** Insurance is a contract in which one party agrees, in exchange for a price, to pay a certain amount of money if another party suffers a loss. There are many types of insurance. For now, we will mention two. Liability insurance provides a benefit if the purchaser is held liable for doing something wrong.<sup>4</sup> Property insurance provides a benefit if the purchaser's property is damaged, lost, or destroyed. (We will examine property insurance in Chapter 17.) In either situation, insurance shifts the risk. For instance, while millions of Canadians buy liability insurance every year, only a fraction of those people are actually sued. Insurance works by spreading the cost of that liability over the entire group.
- **Exclusion and limitation clauses:** Many businesses make money by selling goods or services. Those sales are created by contracts. And those contracts very often contain exclusion or limitation clauses. (We will examine exclusion and limitation clauses in Chapters 9 and 12.) Such a clause is a contractual term that changes the usual rules of liability. The clause may attempt to exclude all risk of liability, or it may exclude liability for certain types of acts or certain types of losses, or it may limit the amount of compensation that is available. For instance, a courier company's contract may say that it cannot be held liable at all, or for more than \$100, if it loses, damages, or destroys a package. In another example, if parties conducting business do not create a written contract, a company may attempt to exclude or limit liability by posting a notice somewhere on its premises. The entrance to a car park, for instance, may contain a large sign telling customers that they park at their own risk. While exclusion and limitation clauses are subject to certain rules and restrictions, the law generally allows people to sign away their right to sue.
- **Incorporation:** There are many ways to conduct business. An individual who chooses to act in a personal capacity may be held personally liable for any debts or liabilities incurred by the business. To avoid some of those risks, many businesses are set up as corporations or companies. (We will examine corporations, and others ways of carrying on business, in Chapter 21.) The most significant benefit of incorporation is limited liability. That means that it is usually only the company itself, and not the directors or shareholders, that may be held liable for debts. The company may be lost, but the people behind it will be safe. It is important to realize, however, that the concept of limited liability does not protect individuals from *all* risks. For example, employees, directors, and officers may be held personally liable for the torts that they commit.

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<sup>4</sup> Liability insurance also creates a *duty to defend*. That means that the insurance company is responsible for the litigation, including the costs of hiring lawyers, if its customer is sued by a third party. We will examine liability insurance in Chapter 3.

Risk management does not require you to become a lawyer. It may, however, require you to hire a lawyer. As a business person, you need to know enough about the law to recognize potential problems. In some situations, you will be able to resolve those problems yourself, preferably by taking steps to avoid them in the first place. But in other situations, it makes sense to call in an expert. Although lawyers' fees can be quite high, you may end up paying much more in the long run if you do not seek professional advice at the outset. Compared with the cost of losing a lawsuit or watching a deal collapse, a lawyer's bill is often a bargain. In fact, many businesses have *in-house counsel*. Instead of hiring lawyers from time to time as the need arises, a company may create its own permanent legal department. While that option creates an additional expense, it also provides more efficient risk protection. Lawyers will be on hand not only to resolve legal problems, but also to help identify and prevent them.

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## An Introduction to the Legal System

In the chapters that follow, we will examine various areas of law, including tort, contract, and property. But first, we must discuss the Canadian legal system as a whole. We can do so quite quickly. While it is important for business people to understand the basic structure of the courts, for instance, most of the details can be left to the lawyers.

### THE NATURE OF LAW

What are laws? Most people would say that they are rules. That may be true, but it is also clear that not every rule is a law. Sometimes that point is obvious. For example, there is a rule against moving a bishop horizontally across a chessboard, but there certainly is not any law to that effect. Sometimes, however, it is much more difficult to determine whether a rule is also a law. Consider Ethical Perspective 1.1.

### Ethical Perspective 1.1

#### Rules and Laws

While fishing from a lakeshore, I saw a canoeist tip his boat and fall into the water. Although he screamed for help for more than 20 minutes, I did nothing at all. My motorboat was nearby, and I could have easily rescued him, but I preferred to continue fishing. Was there any rule that required me to get involved? Assuming that the canoeist drowned, can I be held legally responsible?

Most people would agree that I had an obligation to rescue the canoeist, especially since I could have done so safely and easily. However, that rule may exist only in *morality*, and not in *law*. According to an old American case, I could not be held legally responsible even if I had rented the boat to the deceased when I knew that he was drunk.<sup>5</sup> In the same situation today, a Canadian court would undoubtedly impose liability.<sup>6</sup> But if I did not have a business relationship with the canoeist,

the answer would be less clear. The courts traditionally drew a distinction between moral obligations and legal obligations, and generally said that there was no duty to rescue in law. Recently, however, Canadian judges have begun to adopt a different attitude. Consequently, while we now know that there is sometimes both a moral duty *and* a legal duty to rescue, we do not know exactly when that is true.

#### Questions for Discussion

1. How would you, as a business person, decide when to follow a moral rule, even if you were not obligated to do so by a legal rule?
2. Does your answer depend entirely upon morality? Are there also important business consequences to acting morally or immorally?

<sup>5</sup> *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321 (SCC). This case is discussed in Chapter 6 (Case Brief 6.5 on page 155).

<sup>6</sup> *Osterlind v Hill* (1928) 160 NE 301 (Mass).

Ethical Perspective 1.1 demonstrates that it is occasionally difficult to distinguish between moral obligations and legal obligations. However, it also helps us define the word “law.” Although philosophers have debated the issue for thousands of years, it is enough for us to say that a **law** is a rule that can be enforced by the courts. If I had merely broken a moral obligation by refusing to rescue the canoeist, then I might be punished, but only through public opinion. Colleagues might stop talking to me, and newspapers might print unflattering articles. However, if I had also broken a legal obligation, then I would have more serious things to worry about. Depending on the precise nature of the legal obligation, a court might put me in jail or require me to compensate the victim’s family for his death.

Of course, moral issues may arise even if a rule is identified as a law. For instance, as a clothing manufacturer, you may be legally entitled to reduce production costs by using child labour in developing nations. If so, you may be faced with a difficult choice between your heart and your wallet. The Ethical Perspective boxes throughout this book provide many more examples.

a **law** is a rule that can be enforced by the courts

## A MAP OF THE LAW

Even after it has been distinguished from other types of rules, the law remains an enormous topic. To make sense of it all, we need to organize it into different parts. There are many ways of doing so. In Canada, for example, it is necessary to distinguish between *civil law* and *common law*.<sup>7</sup> **Civil law** systems trace their history to ancient Rome. Since the Roman Empire covered most of Europe, most countries on that continent are still *civilian*. The only civil law *jurisdiction* in Canada, however, is Quebec, which initially borrowed its law from France. (Although it has many different meanings, **jurisdiction** in this situation refers to a geographical area that uses the same set of laws.) **Common law** systems trace their history to England.<sup>8</sup> Consequently, most jurisdictions that were settled by English colonists continue to use the common law. That is true of the rest of Canada, as well as jurisdictions such as Australia, New Zealand, and most of the United States.<sup>9</sup> Since there are significant differences between civil law systems and common law systems, there are also significant differences between the laws that apply in Quebec and the laws that apply in the rest of this country.<sup>10</sup> It is for that reason that we will focus on Canadian laws that apply outside of Quebec. At the same time, however, it is important to recognize that some types of laws are the same across the entire country. That is true, for example, of criminal laws and constitutional laws. We will therefore occasionally consider cases from Quebec.

**civil law** systems trace their history to ancient Rome

a **jurisdiction** is a geographical area that uses the same set of laws

**common law** systems trace their history to England

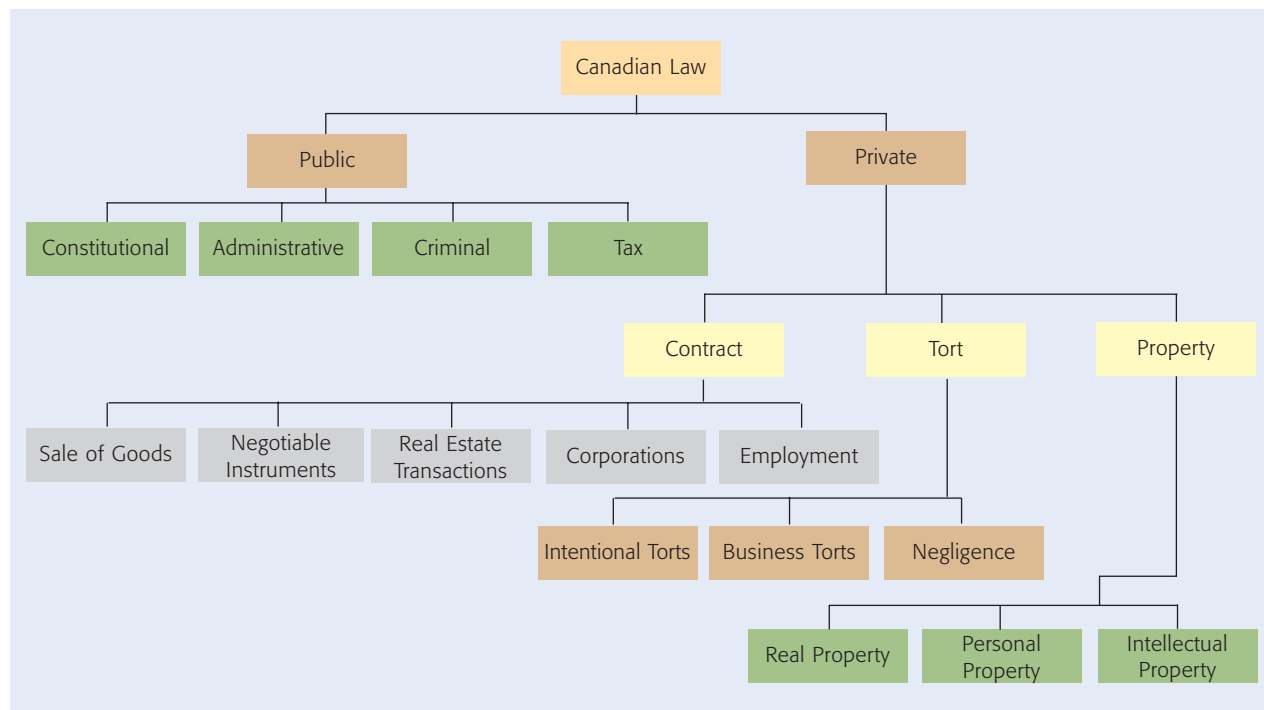
<sup>7</sup> There are other systems of law as well, such as Aboriginal law and Islamic law.

<sup>8</sup> The phrase “common law” refers to the fact that the rules in question were used throughout ancient England, in contrast to the various systems of localized rules that had developed over time.

<sup>9</sup> The exception in the United States is Louisiana. Like Quebec, it was settled by France and therefore uses a civil law system.

<sup>10</sup> “Civil law” is a confusing phrase. While it often refers to a legal system that can be traced to ancient Rome, later in this chapter we will encounter another definition of that phrase. Within a common law system, “civil law” may refer to private law rather than public law. For example, when Canadian lawyers talk about “civil litigation,” they are usually referring to cases involving contracts or torts. “Common law” is also a confusing phrase. While it often refers to a legal system that can be traced to England, later in this chapter we will see that it may also refer to rules that are made by judges, rather than by legislators. And within the context of rules made by judges, “common law” may refer to those made by judges who sat in the courts of law, as opposed to the courts of equity. (The concepts of “law” and “equity” are explained at the end of this chapter.)

FIGURE 1.1 A Map of the Law



Within Canada's common law system, we can further organize legal rules on the basis of the topics they address. Although it does not cover every possibility, Figure 1.1 represents some of the most important areas that we will discuss in this book.

## Public Law

Figure 1.1 shows that the major division is between *public law* and *private law*. **Public law** is concerned with governments and the ways in which they deal with their citizens. It includes

- constitutional law
- administrative law
- criminal law
- tax law

**Constitutional law** provides the basic rules of our political and legal systems. It determines who is entitled to create and enforce laws, and it establishes the fundamental rights and freedoms that Canadians enjoy. We will discuss the Constitution in more detail in a later part of this chapter.

In the past 50 years, Canadians have grown to expect more and more from their elected officials. To manage the workload, governments regularly *delegate* or *assign* responsibility to a 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

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**constitutional law** provides the basic rules of our political and legal systems

**administrative law** is concerned with the creation and operation of administrative agencies, boards, commissions, and tribunals

**FIGURE 1.2** Administrative Bodies Affecting Business

Federal	
Canadian Radio-television and Telecommunications Commission	regulates broadcasting and telecommunications systems
National Energy Board	regulates pipelines, energy development, and trade in the energy industry
Canadian International Trade Tribunal	investigates possible violations of international trade regulations
Competition Tribunal	resolves disputes under the <i>Competition Act</i> (discussed in Chapter 25)
Provincial or Territorial	
Workers' Compensation Board	promotes workplace safety and rehabilitates and compensates injured workers
Labour Relations Board	assists in the resolution of labour disputes
Environmental Appeal Board	assists in the resolution of environmental disputes
Professional Society (eg Law Society of Alberta)	regulates and licenses the practice of a particular profession (eg law)
Municipal	
Zoning and Planning Board	regulates the use of land
Building and Inspections Department	regulates and licenses building projects
Licence Division	regulates and licenses business operations

may be ordered to pay millions of dollars in compensation.<sup>11</sup> 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. Figure 1.2 lists a sampling of federal, provincial (or territorial), and municipal bodies that regularly affect business.<sup>12</sup>

**Criminal law** deals with offences against the state. In other words, it is concerned with people who break rules that are designed to protect society as a whole. For instance, if you punch me, you have committed a *tort* because (as discussed below) you have done something wrong to me personally. However, you have also committed a *crime* because you have done something wrong to the entire community. Even if I am not particularly upset about being hit, society may want to discourage and punish your behaviour. Consequently, the police and the prosecutor may bring you to court even if I would prefer to drop the matter. Although we tend to think of criminals as violent individuals, it is important to know that crime can happen in the business world as well.

**criminal law** deals with offences against the state

- *White-collar crimes*, as the name suggests, are committed by people in suits. A manager who steals money from the petty-cash drawer is a white-collar criminal.
- A crime can even be committed by a company itself. A *corporate crime* occurs, for instance, when a used-car dealership adopts a policy of rolling

<sup>11</sup>. *Bell Canada v Canadian Telephone Employees Association* (2001) 199 DLR (4th) 664 (FC CA).

<sup>12</sup>. This list is not exhaustive. Some bodies serve more than one function. Note that, below the federal level, the name of a particular body may vary from place to place.