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Chapter

Introduction to the Legal System

LEARNING OBJECTIVES

- 1 Define “law” and identify the types of law that exist in Canada
- 2 Distinguish between the civil law and common law legal systems found in Canada
- 3 Identify the sources of Canadian law
- 4 Isolate the three elements of Canada’s Constitution
- 5 Explain how legislative power is divided in Canada
- 6 Detail how legislation is created in the parliamentary system
- 7 Describe the rights and freedoms protected by the *Charter of Rights and Freedoms*
- 8 List the areas and grounds upon which human rights legislation prohibits discrimination

WHAT IS LAW?

Most of us recognize the rules and regulations that are considered law and understand that law plays an important role in ordering society, but knowing that does not make it easy to come up with a satisfactory, all-inclusive definition of “law.” Philosophers have been trying for centuries to determine just what **law** means, and their theories have profoundly affected the development of our legal system. Law has been defined in moral terms, where only good rules are considered law (natural law theorists). Others have defined law by looking at its source, stipulating that only the rules enacted by those with authority to do so qualify as law (*legal positivists*). And some have defined law in practical terms, suggesting that only those rules that the courts are willing to enforce qualify as law (*legal realists*). Legal positivism helped shape the concept of law in Canada, where **parliamentary supremacy** requires that we look to the enactments of the federal Parliament or provincial legislatures as the primary source of law. In the United States, however, a more pragmatic approach to law based on legal realism has been adopted. It allows judges to factor in current social and economic realities when they make their decisions.

For our purposes, the following simplified definition is helpful, if we remember that it is not universally applicable. **Law is the body of rules made by government that can be enforced by the courts or by other government agencies.** In our daily activities, we are exposed to many rules that do not qualify as law. Courtesy demands that we do not interrupt when someone is speaking. Social convention determines that it is inappropriate to enter a restaurant shirtless or shoeless. Universities and colleges often establish rules of conduct for their students and faculty. These rules do not fall into our definition of law because the courts do not enforce them. But when there is a disagreement over who is responsible for an accident, a question as to whether a crime has been committed, or a difference of opinion about the terms

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There is no wholly satisfactory definition of law

Definition

of a contract or a will, the participants may find themselves before a judge. Rules that can be enforced by the courts govern these situations; thus, they are laws within the definition presented here.

Government agencies also enforce the law

A person dealing with government agencies, such as labour relations boards, workers' compensation boards, or city and municipal councils, must recognize that these bodies are also able to render decisions in matters that come before them. The rules enforced by these bodies are also laws within this definition. The unique problems associated with government agencies and regulatory bodies will be discussed in Chapter 3 in the section entitled "Dealing with Regulatory Bodies."

Do not confuse law and morality

While the definition of law as enforceable rules has practical value, it does not suggest what is just or moral. We must not assume that so long as we obey the law we are acting morally. As discussed in Chapter 1, legal compliance and ethical behaviour are two different things, and people must decide for themselves what standard they will adhere to. Many choose to live by a personal code of conduct demanding adherence to more stringent rules than those set out in the law, while others disregard even these basic requirements. Some think that moral values have no place in the business world, but in fact the opposite is true. As was pointed out in Chapter 1, there is now an expectation of high ethical standards in business activities, and it is hoped that those who study the law as it relates to business will appreciate and adhere to those higher standards. We must at least understand that whether we are motivated by divine law, conscience, moral indifference, or avarice, serious consequences may follow from non-compliance with the body of rules we call law.

Categories of Law

Law consists of rules with different but intersecting functions. The primary categories are substantive and procedural laws. **Substantive law** establishes not only the rights an individual has in society, but also the limits on his or her conduct. The rights to travel, to vote, and to own property are guaranteed by substantive law. Prohibitions against theft and murder as well as other actions that harm our neighbours are also examples of substantive law. **Procedural law** determines how the substantive laws will be enforced. The rules governing arrest, investigation, and pre-trial and court processes in both criminal and civil cases are examples.

Substantive law includes public and private law

Law can also be distinguished by its public or private function. **Public law** includes constitutional law, which determines how the country is governed and the laws that affect individuals' relationships with government—such as criminal law and the regulations created by government agencies. **Private law** involves the rules that govern our personal, social, and business relations, which are enforced when one person sues another in a private or civil action. Knowing the law and how it functions allows us to structure our lives as productive and accepted members of the community and to predict the consequences of our conduct. Business students study law because it defines the environment of rules within which business functions. In order to play the game, we must know the rules.

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Quebec uses civil law; all other provinces use common law

LO 2

ORIGINS OF LAW

Nine of the ten Canadian provinces and the three territories have adopted the common law legal system developed over the past millennium in England. For private matters, Quebec has adopted a system based on the *French Civil Code*. Although this text focuses on common law, understanding it may be assisted by briefly examining the basic differences between the common law and civil law legal systems. It is important to note that the term "civil law" has two distinct meanings. The following discussion is about the **civil law legal system** developed in Europe and now used in many jurisdictions, including Quebec. The terms "civil court," "civil action," and "civil law" are also used within our **common law legal system** to describe private law matters and should not be confused with the *Civil Code* or civil law as used in Quebec.

Civil Law Legal System

Modern civil law traces its origins to the Emperor Justinian, who had Roman law codified for use throughout the Roman Empire. This codification became the foundation of the legal system in continental Europe. Its most significant modification occurred early in the nineteenth century when Napoleon revised it. The *Napoleonic Code* was adopted throughout Europe and most of the European colonies. Today, variations of the civil code are used in continental Europe, South America, most of Africa, and many other parts of the world including Quebec. The most important feature of French civil law is its central code—a list of rules stated as broad principles of law that judges apply to the cases that come before them. Under this system, people wanting to know their legal rights or obligations refer to the *Civil Code*.

Quebec courts rely on the rules set out in the *Civil Code* to resolve private disputes in that province. While civil law judges are influenced by decisions made in other cases, and lawyers will take great pains to point out what other judges have done in similar situations, the key to understanding the civil law legal system is to recognize that ultimately the *Civil Code* determines the principle to be applied. Prior decisions do not constitute binding precedents in a civil law jurisdiction. The most recent *Civil Code of Quebec* came into effect on January 1, 1994.¹ One-quarter of the 1994 *Civil Code* is new law, making its introduction a significant event in the evolution of the law in Quebec.

One of the effects of the updated *Civil Code of Quebec* was to make the doctrine of good faith (recently developed in common law and discussed in Chapter 7) part of Quebec's contract law. Prior to this the law was similar to the common law, where the obligation to act in good faith toward the person you are dealing with applied only when special relationships existed. Article 1375 of the new *Civil Code* states that contracting parties “shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.”² This means that the parties can no longer withhold important information or fail to correct erroneous assumptions that they know have been made by the other side without exposing themselves to an action for violating this obligation of good faith.

To illustrate how the law is applied in a civil law legal system as opposed to a common law legal system, consider the situation involving a person suffering injury because of the careless act of another. If a person was seriously burned in Quebec, as a result of being served overly hot coffee in a pliable paper cup at a fast-food restaurant drive-through, the victim would turn to the *Civil Code* to determine his or her rights. Articles 1457 and 1463 of the *Civil Code of Quebec* state the following:³

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature. He is also bound, in certain cases, to make reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

1463. The principal is bound to make reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his remedies against them.

Thus, applying article 1457 the server may be held liable to the customer. But if in a subsequent identical case the court applied both articles 1457 and 1463, the employer could be held liable in addition to the employee, increasing the

Variations of the civil code are used throughout much of the world

A civil code provides predictability

Quebec uses the *Civil Code* to resolve private disputes

The *Civil Code* recognizes doctrine of good faith

The *Civil Code* also applies to tort cases

Consistency is reduced where preceding court decisions can be ignored

¹ *Civil Code of Quebec*, SQ 1991, c. 64.

² *Civil Code of Quebec*, LRQ, c C-1991, art. 1375.

³ *Ibid.*, art. 1457, 1463.

likelihood that the customer would actually recover any damages awarded by the court. Since the courts in a civil law jurisdiction are not required to follow each other's decisions, two very similar cases may be decided differently. The end result is shaped by the specific "law" or article of the *Civil Code* that is applied to the facts of a case.

Following precedent increases consistency and predictability

In a common law jurisdiction, liability may also be imposed on both the employer and the employee who caused injury by the application of the principles of negligence and vicarious liability (see Chapter 5). But in a common law jurisdiction, the doctrine of following **precedent** would demand that the courts look to similar cases for the principles to be applied. Thus, if a litigant can point to a case similar to her own, where a superior court imposed liability on both the employee (server) and the employer (restaurant), it is likely that a similar decision will be delivered in her case.

There are many important differences between civil law and the principles of common law. In this text, we have limited the discussion to common law. While there are many similarities, care should be taken not to assume that the same principles apply to Quebec or other civil law jurisdictions.

Common Law Legal System

Common law grew from the struggle for power

As Roman civil law was taking hold in Europe, relations between the existing English and French kingdoms were frequently strained. It has been suggested that this strain is the reason England maintained its unique common law system of justice rather than adopting the more widely accepted Roman civil law. The early Norman kings established a strong feudal system in England that centralized power in their hands. As long as they remained strong they maintained their power; but when weak kings were on the throne, power was surrendered to the nobles. The growth of the common law legal system was affected by this ongoing struggle for power between kings and nobles and later between kings and Parliament.

Henry II established travelling courts

Common law principles came from the common people—their traditions and customs

During times when power was decentralized, the administration of justice fell to the local lords, barons, or sheriffs who would hold court as part of their feudal responsibility. Their courts commonly resorted to such practices as trial by battle or ordeal. Trial by battle involved armed combat between the litigants or their champions, and trial by ordeal involved some physical test. The assumption was made that God would intervene on behalf of the righteous party. Strong kings, especially Henry II, enhanced their power by establishing travelling courts, which provided a more attractive method of resolving disputes. As more people used the king's courts, their power base broadened and their strength increased. The fairer the royal judges, the more litigants they attracted. Eventually, the courts of the nobles fell into disuse. The function of the royal courts was not to impose any particular set of laws but to be as fair and impartial as possible. To this end, they did not make new rules but enforced the customs and traditions they found already in place in the towns and villages they visited. The judges also began to look to each other for rules to apply when faced with new situations.

STARE DECISIS

Judges follow decisions—if made within that court's hierarchy

Gradually, a system of justice developed in which the judges were required to follow each other's decisions. This process is called *stare decisis*, or "following precedent." Another factor that affected the development of *stare decisis* was the creation of appeal courts. Although the process of appeal at this time was rudimentary, trial judges would try to avoid the embarrassment of having their decisions overturned and declared in error. Eventually, the practice of following precedent became institutionalized.⁴

⁴ See Department of Justice, "Canada's System of Justice," accessed December 2014, www.justice.gc.ca/eng/csj-sjc/index.html.

CASE SUMMARY 2.1**Inconsistent Interpretations—The Significance of Having a Supreme Court: *R. v. Keegstra*⁵ and *R. v. Andrews*⁶**

Each province in Canada has its own hierarchy of courts. Thus a ruling from the highest court in one province may conflict with decisions from other courts. Consider the dilemma faced by the police in enforcing Canada's *Criminal Code* following the decisions in the *Keegstra* and *Andrews* cases. Both cases involved charges laid under section 319(2) of the *Criminal Code*, which prohibits wilful promotion of hatred against identifiable groups.

Keegstra had been teaching students in Eckville, Alberta, that the Holocaust was a hoax. Andrews was also spreading anti-Semitic, white supremacist hate literature. In the *Keegstra* case, the charges were set aside when the Alberta Court of Appeal declared section 319 to be unconstitutional because it violated the *Charter*. Keegstra successfully argued that the *Criminal Code* prohibition violated his freedom of expression as guaranteed by the *Charter of Rights and Freedoms*. But in the *Andrews* case, the Ontario Court of Appeal upheld the constitutionality of the same charges even though it had the benefit of the Alberta decision. It simply chose not to follow that decision.

Courts from different provinces are not bound to follow each other's decisions. Consequently, Canadians may face situations where charges cannot be laid in one province but similar conduct will result in criminal prosecution in others. The police could not pursue hate crimes in Alberta because the Alberta Court of Appeal had ruled the law unconstitutional; yet in Ontario similar conduct drew charges.

Fortunately, both cases were appealed to the Supreme Court of Canada, which ruled on the *Keegstra* and *Andrews* appeals simultaneously. It declared section 319 constitutional, finding that although it violates freedom of expression, this infringement is justifiable under section 1 of the *Charter*. Prohibiting hateful and harmful communications was found to be justifiable for the good of society as a whole. Keegstra was thus tried for inciting hatred and was eventually convicted.

SMALL BUSINESS PERSPECTIVE

These cases demonstrate that one law may be interpreted and enforced differently from province to province. You cannot assume that the law in one province is identical to that in another. Laws—and their interpretation—may differ across the country.

The most significant feature of the common law legal system today is that the decision of a judge at one level is binding on all judges in the court hierarchy who function in a court of lower rank, provided the facts in the two cases are similar. For example, in the *Toronto Star* case⁷ the Court referred to the necessity to follow precedent, even though the applicants argued that the Court could depart from an earlier 1984 decision of the Ontario Court of Appeal that upheld mandatory publication bans. The judge declared that

the question put to the Court of Appeal in *Global* is indistinguishable from the one I am asked to consider. I find I have no authority to reconsider *Global*. Until such time as the Court of Appeal or the Supreme Court of Canada finds that *Global* was wrongly decided, it remains the law in Ontario.

⁵ [1988] A.J. No. 501 (C.A.), rev'd [1990] 3 SCR 697.

⁶ [1988] O.J. No. 1222 (C.A.), [1990] 3 SCR 870.

⁷ *Toronto Star Newspapers Ltd. v. The Queen*, [2007] 84 O.R. (3d) 766 (Ont. H.C.J.). It is interesting to note that this case did make its way to the Supreme Court of Canada; see [2010] 1 SCR 721, 2010 SCC 21. Mandatory publication bans were again upheld as constitutional.

A judge today hearing a case in the Court of Queen's Bench for Alberta would be required to follow a similar decision laid down in the Court of Appeal for Alberta or the Supreme Court of Canada, but would not have to follow a decision involving an identical case from the Court of Appeal for Manitoba.⁸ Such a decision would be merely persuasive, since it came from a different jurisdiction. Because the Supreme Court of Canada is the highest court in the land, its decisions are binding on all Canadian courts.

CASE SUMMARY 2.2

Lower Court Must Follow Decision of Higher Court: *Canada v. Craig*⁹

This was a case where the minister of national revenue reassessed the taxpayer's income taxes, placing a limit (or cap) on the farm losses that were deductible. In doing so, the minister applied the interpretation of the *Income Tax Act* made by the Supreme Court of Canada in *Moldowan v. The Queen*.¹⁰ The taxpayer appealed to the Tax Court of Canada, which decided to follow a different interpretation of section 31 of the Act, as made in the *Gunn* case,¹¹ a decision of the Federal Court of Appeal. Based on this interpretation, the taxpayer was successful and the limit on deductions was removed. The minister appealed to the Federal Court of Appeal, which also chose to follow the *Gunn* precedent. The preliminary issue was thus whether the Federal Court of Appeal was entitled to disregard the Supreme Court's precedent in *Moldowan*.

The Supreme Court reiterated the importance of following precedent. One of the fallouts from *Gunn* was that it left lower courts in the difficult position of facing two inconsistent precedents and having to decide which one to follow. This led to uncertainty, which the application of precedent is intended to preclude. There may have been justification for arriving at a different interpretation, "But regardless of the explanation, what the Court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it."¹²

The Supreme Court then addressed whether it should overrule *Moldowan*. It stated that overturning its own precedent was a step not to be taken lightly, but only based on compelling reasons. Courts must balance two important values: correctness and certainty, assessing whether it is preferable to adhere to an incorrect precedent to maintain certainty or to correct the error. In this case, the Supreme Court was satisfied that relevant considerations justified overruling *Moldowan*, which it did, and the minister's appeal was dismissed.

SMALL BUSINESS PERSPECTIVE

A sophisticated businessperson will appreciate the predictability of the common law. If in doubt as to what the law may be, a lawyer will review precedents from similar cases and, with some degree of certainty, be able to predict a likely outcome.

Stare decisis provides predictability

The role *stare decisis* plays in the English common law legal system is similar to the role the *Civil Code* plays in the French system. It allows the parties to predict the outcome of the litigation and thus avoid going to court. However, a significant

⁸ Strictly speaking, a judge is not bound to follow decisions made by other judges in a court at the same level in that province. However, the practical effect is the same, since these judges must follow their colleagues' decisions "in the absence of strong reason to the contrary." *R. v. Morris*, [1942] O.W.N. 447 (Ont. H.C.J.).

⁹ 2012 SCC 43, [2012] 2 SCR 489, 2012 SCC 43 (CanLII).

¹⁰ [1978] 1 SCR 480, 1977 CanLII 5 (SCC).

¹¹ *Gunn v. Canada*, 2006 FCA 281 (CanLII), [2007] 3 F.C.R. 57.

¹² *Supra* 9, para. 21.

disadvantage of following precedent is that a judge must follow another judge's decision even though social attitudes may have changed. The system is anchored to the past, with only limited capacity to make corrections or to adapt and change to meet modern needs. Opposing legal representatives present a judge with several precedents that support their side of the argument. The judge's job is to analyze the facts of the precedent cases and compare them with the case at hand. Since no two cases are ever exactly alike, the judge has some flexibility in deciding whether or not to apply a particular precedent. Judges try to avoid applying precedent decisions by finding essential differences between the facts of the two cases if they feel that the prior decision will create an injustice in the present case. This process is referred to as **distinguishing the facts** of opposing precedents. Still, judges cannot stray very far from the established line of precedents.

One drawback is inflexibility

SOURCES OF LAW

Common Law

At an early stage in the development of common law, three great courts were created: the Court of Common Pleas, the Court of King's Bench, and the Exchequer Court, referred to collectively as the **common law courts**. The rules developed in the courts were called "common law" because the judges, at least in theory, did not create law but merely discovered it in the customs and traditions of the people to whom it was to be applied. However, the foundation for a complete legal system could not be supplied by local custom and tradition alone, so common law judges borrowed legal principles from many different sources. Common law borrows from **Roman civil law**, which gave us our concepts of property and possessions. **Canon or church law** contributed law in relation to families and estates. Another important European system that had an impact on common law was called the **law merchant**. Trading between nations was performed by merchants who were members of guilds (similar to modern trade unions or professional organizations), which developed their own rules to deal with disputes between members. As the strength of the guilds declined, common law judges found themselves dealing increasingly with disputes between merchants. The law merchant was then adopted as part of the English common law, and it included laws relating to negotiable instruments such as cheques and promissory notes.

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Customs and traditions are major sources of common law
Common law borrows from

- Roman civil law
- Canon law
- Law merchant

Equity

Common law courts had some serious limitations. Parties seeking justice before them found it difficult to obtain fair and proper redress for the grievances they had suffered. Because of the rigidity of the process, the inflexibility of the rules applied, and the limited scope of the remedies available, people often went directly to the king for satisfaction and relief. The burden of this process made it necessary for the king to delegate the responsibility to the chancellor, who in turn appointed several vice-chancellors. This body eventually became known as the **Court of Chancery**, sometimes referred to as the **Court of Equity**. It dealt with matters that, for various reasons, could not be handled adequately or fairly by the common law courts. The Court of Chancery did not hear appeals from the common law courts; rather, it provided an alternative forum. If people seeking relief knew that the common law courts could provide no remedy or that the remedy would be inadequate, they would go to the Court of Chancery instead.

Common law is rigid

Court of Chancery provided relief

Initially, the Court of Chancery was unhampered by the requirement to follow precedent and the rigidity that permeated the common law courts and could decide a case on its merits. The system of law developed by the Court of Chancery became known as the **law of equity**. This flexibility, which was the most significant asset of **equity**, was also its greatest drawback. Each decision of

Resulted in the law of equity

Conflict resulted in rigidity in chancery as well

Equity today does not simply mean fairness

Equity supplements the common law

the Court of Chancery appeared arbitrary—there was no uniformity within the system, and it was difficult to predict the outcome of a given case. This caused friction between the chancery and the common law judges, which was solved, to some extent, by the chancery’s adopting *stare decisis*. Finally, the two separate court systems were amalgamated by the *Judicature Acts of 1873–1875*.¹³ This merger happened in Canada as well, and today there is only one court system in each of the provinces.

Although the two court systems merged, the bodies of law they had created did not, and it is best still to think of common law and equity as two distinct bodies of rules. Originally, the rules of equity may have been based on fairness and justice, but when a person today asks a judge to apply equity they are not asking for fairness—they are asking that the rules developed by the courts of chancery be applied to the case. Equity should be viewed as a supplement to rather than a replacement of common law. Common law is complete—albeit somewhat unsatisfactory—without equity, but equity would be nothing without common law. The courts of chancery were instrumental in developing such principles in law as the **trust** (in which one party holds property for another) and also provided several alternative remedies, such as injunction and specific performance, which will be examined later in the text.

The common law provinces in Canada administer both common law and equity, and judges treat matters differently when proceeding under equity as opposed to common law rules. Of course, judges must always be alert to the fact that any applicable parliamentary statute will override both.

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Statutes and regulations override judge-made law

Statutes

In many situations, justice was not available in either the common law or chancery courts, and another method was needed to correct these inadequacies. The English Civil War of the seventeenth century firmly established the principle that Parliament, rather than the king, was supreme, and from that time on Parliament handled any major modification to the law. Parliamentary enactments are referred to as **statutes** or legislation and take precedence over judge-made law based on either common law or equity.

It is important to remember that government has several distinct functions: legislative, judicial, and administrative. The **legislative branch** consists of Parliament, which legislates or creates the law, as do each of the provincial legislatures. The **judicial branch** is the court system, and the judiciary interprets **legislation** and makes case law. The **executive branch** and its agencies administer and implement that law. Organizations such as the RCMP, the Employment Insurance Commission, and the military are part of the executive branch of government. Often legislation creating such bodies (the enabling statute) delegates power to them to create regulations (the subordinate legislation). Through those **regulations** government agencies implement and accomplish the goals of the enabling statute and enforce its terms. Similarly, municipal bylaws operate as subordinate legislation. A provincial statute, such as Ontario’s *Municipal Act, 2001*,¹⁴ may enable municipalities to pass bylaws, but only with regard to matters stipulated in the Act.

For the businessperson, these statutes and regulations have become all-important, setting out the specific rules governing business activities in all jurisdictions. Although judge-made law still forms the foundation of our legal system, it is statutes and regulations that control and restrict what we can do and determine what we must do to carry on business in Canada today. See Table 2.1 for a summary of the sources of law in Canada.

¹³ *Judicature Acts (1873–1875)*, 31 Geo. III.

¹⁴ S.O. 2001, c. 25.

Table 2.1 Sources of Law in Canada

Branch of Government	Legislative	Executive	Judicial
Who fills these positions?	Federally: Parliament Provincially: Legislative Assemblies	Prime minister and cabinet ministers together with each department's civil servants/bureaucrats Premier and the cabinet together with each department's civil servants/bureaucrats	Judges appointed by the various provinces and federally appointed justices
Type of law made	Statute law (legislation)	Subordinate legislation <ul style="list-style-type: none"> regulations made by order-in-council or as authorized by legislation bylaws made by municipal governments 	Case law
Examples	<p>(Federal)</p> <ul style="list-style-type: none"> <i>Income Tax Act</i> <i>Immigration and Refugee Protection Act</i> <i>Criminal Code</i> <p>(Provincial)</p> <ul style="list-style-type: none"> <i>Workers' Compensation Act</i> <i>Traffic Safety Act</i> <i>Business Corporations Act</i> 	<p>(Federal)</p> <ul style="list-style-type: none"> <i>Income Tax Regulations</i> <i>Immigration and Refugee Protection Regulations</i> <i>Criminal Appeal Rules</i> <p>(Provincial)</p> <ul style="list-style-type: none"> <i>Workers' Compensation Regulations</i> <i>Traffic Control Device Regulation</i> <i>Business Corporations Regulation</i> 	<p>(Federal)</p> <p>The decision of the Supreme Court of Canada in <i>R. v. Keegstra</i></p> <p>(Provincial)</p> <p>The decision of the Ontario Court of Appeal in <i>Halpern v. Canada (Attorney General)</i></p>

LAW IN CANADA

Confederation

Canada came into existence in 1867 with the federation of Upper and Lower Canada, Nova Scotia, and New Brunswick. Other provinces followed, with Newfoundland being the most recent to join **Confederation**. Every jurisdiction except Quebec adopted the English common law legal system. Quebec elected to retain the use of the French civil law legal system for private matters falling within provincial jurisdiction.

Confederation was accomplished when the British Parliament passed the *British North America Act (BNA Act)*, now renamed the *Constitution Act, 1867*.¹⁵ The *BNA Act*'s primary significance is that it created the Dominion of Canada; divided power between the executive, judicial, and legislative branches of government; and determined the functions and powers of the provincial and federal levels of government. The preamble to the *BNA Act* says that Canada has a constitution "similar in principle to that of the United Kingdom"; that is, we claim as part of our Constitution all the great constitutional institutions of the United Kingdom, such as the *Magna Carta* (1215) and the *English Bill of Rights* (1689). Also included are such unwritten conventions as the **rule of law**, which recognizes that although Parliament is supreme and can create any law considered appropriate, citizens are protected from the arbitrary actions of the government. All actions of government and government agencies must be authorized by valid legislation. In addition, our Constitution includes those acts passed by both the British and Canadian Parliaments subsequent to the *Constitution Act, 1867* that have status beyond mere statutes, such as the *Statute of Westminster* (1931) and the *Constitution Act, 1982*,¹⁶ which includes

¹⁵ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (formerly the *British North America Act, 1867*).

¹⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

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NOTE: Throughout the text, reference will be made to the MyBusLawLab, where statute details and provincial variations between them will be available. Also check out the "Provincial Content," which focuses on the law in specified jurisdictions.

The *BNA Act* created Canada and divided powers

There is more to the Canadian Constitution than the BNA Act and Charter

the *Charter of Rights and Freedoms*. Section 52(2) of the *Constitution Act, 1982*, clarifies that it and the *Canada Act 1982*, together with the 30 enactments listed in its schedule, collectively form the Constitution of Canada.¹⁷

Canada's Constitution is, in essence, the "rulebook" that government must follow. It comprises three elements: (1) statutes, such as the *Constitution Act, 1982*, and the statutes creating various provinces; (2) case law on constitutional issues, such as whether the federal or provincial government has jurisdiction to create certain statutes; and (3) conventions, which are unwritten rules dictating how the government is to operate and include the rule of law.

CASE SUMMARY 2.3

The Impact of Convention: Deciding Whether to Prorogue Parliament¹⁸

Since the King–Byng Affair in 1926,¹⁹ the convention (unwritten rule) has been that the governor general is expected to take the advice of the sitting prime minister. This convention arose on the heels of the then governor general's (Lord Byng's) decision to ignore the wishes of the prime minister (Mackenzie King) to dissolve Parliament. Instead, Lord Byng called upon the leader of the opposition to lead Parliament, which proved to be futile since the opposition did not have the support of the House of Commons. The minority government was soon defeated and an election had to be called anyway.

In December 2008, the leaders of the Liberal and New Democratic parties formed a coalition and, with the support of the Bloc Québécois, planned to defeat Stephen Harper's Conservatives during the first sitting of Parliament. Harper thus asked Governor General Michaëlle Jean to prorogue Parliament until a new budget could be presented. In deciding to heed the prime minister's request, the governor general followed convention. Her decision to prorogue Parliament, however, dealt a death blow to the coalition and provided the Conservatives with a chance to win back the confidence of the House.

DISCUSSION QUESTION

Since the King–Byng Affair the role of the governor general has been largely ceremonial, yet when political division impedes the function of government, the head of state may be called upon to make tough decisions. Under what circumstances might it be acceptable for the governor general not to follow the advice of a prime minister?

For the person in business, it must be remembered that the effect of Confederation was not simply to create one country with one set of rules. Each province was given the power to establish rules in those areas over which it had jurisdiction. As a consequence, businesses operating within and between provinces must comply with federal, provincial, and municipal regulations. In spite of the opportunity for great divergence among the provinces, it is encouraging to see how similar the controls and restrictions are in the different jurisdictions.

Constitution and Division of Powers

In Canada, as in Britain, Parliament is supreme and traditionally has had the power to make laws that cannot be overruled by any other body and are subject only to the realities of the political system in which they function. But in Canada, the *Constitution*

The Constitution Act and Charter limit power of federal and provincial governments

¹⁷ See the Schedule to the *Constitution Act, 1982*, listing the *Alberta Act*, *Saskatchewan Act*, *Newfoundland Act*, and numerous *Constitution Acts* as parts of Canada's Constitution.

¹⁸ For more information on this constitutional spectacle, see Robert Sheppard, "The Delicate Role of the Governor General," *CBC News*, December 2, 2008, accessed December 2014, www.cbc.ca/news/canada/the-delicate-role-of-the-governor-general-1.701974.

¹⁹ To view a video clip summarizing the King–Byng Affair, see "The King–Byng Affair," *CBC Digital Archives*, accessed December 2014, www.cbc.ca/archives/entry/political-scandals-the-king-byng-affair.

Act, 1867 and the *Charter of Rights and Freedoms* place some limitations on this supremacy. Unlike the United Kingdom, Canada has a federal form of government with 11 different legislative bodies, each claiming the supreme powers of Parliament.

Refer to the MyBusLawLab for links to the federal and various provincial government sites for current legislation.

The *Constitution Act, 1867* assigned different legislative powers to the federal and provincial governments. The powers of the federal government are set out primarily in section 91 of the *Constitution Act, 1867*, and those of the provincial governments are set out in section 92. The federal government has exclusive power over such matters as banking, currency, the postal service, criminal law (although not its enforcement), and the appointment of judges in the federal and higher-level provincial courts. The federal government passes considerable legislation affecting such matters as the regulation of all import and export activities, taxation, environmental concerns, money and banking, interprovincial and international transportation, as well as important areas of intellectual property, such as copyrights, patents, and trademarks. The provinces, on the other hand, have exclusive jurisdiction over such matters as hospitals, education, the administration of the courts, and commercial activities carried on at the provincial level.

Thus, most business activities that are carried on within the province are governed by provincial legislation or municipal bylaws, including statutes dealing with the sale of goods, consumer protection, employment, workers' compensation, collective bargaining, secured transactions, incorporation, real estate, and licensing. For industries that fall within federal jurisdiction, such as banking and the railways, there are corresponding federal statutes. Under the "Peace, Order, and good Government" (POGG) clause (found in the introduction to section 91), the federal government has residual power to make law with respect to things not listed in the *Constitution Act, 1867*, such as broadcasting and air travel. Under section 92(16), the provinces are given broad powers to make law with respect to all matters of a local or private nature. It is important to note that these assigned areas of jurisdiction are concerned with the nature of the legislation being passed rather than the individuals or things affected. Thus, the federal government's power to pass banking legislation allows it to control anything to do with banking, including interest rates, deposits, and how those deposits are invested. See Table 2.2 for a summary of the division of powers.

The *Constitution Act, 1867* divides powers between the federal and provincial governments

Federal powers set out in section 91

Provincial powers set out in section 92

Sections 91 and 92 deal with areas of jurisdiction

Table 2.2 Division of Powers

Federal—Section 91	Provincial—Section 92
Trade and commerce	Municipal institutions
Employment insurance	Hospitals (and health care)
Raising monies by any mode of taxation	Direct taxation within the province
Criminal law (although not its enforcement)	Administration of justice within the province
Banking, currency, postal service	Property and civil rights
Residual power under the "POGG" clause	Generally, matters of a local or private nature

The division of powers accomplished by sections 91 and 92 of the *Constitution Act, 1867* has been important in the development of Canada as a nation and, until the recent entrenchment of the *Charter*, was the main consideration of courts when faced with constitutional questions. In these jurisdictional disputes between governments, where competing governments claim to control a particular activity, the courts are called upon to act as a referee.

When determining the constitutional validity of legislation, the courts often resolve the issue by looking at the "pith and substance" of the challenged law. In other words, what is the main purpose of the law? Then the court examines whether the government that enacted the law has the constitutional jurisdiction to regulate that concern.

Courts examine the essence of laws in constitutional challenges

CASE SUMMARY 2.4

**National Securities Regulator Declared Unconstitutional:
*Reference Re Securities Act*²⁰**

Should Canada have a single national securities regulator? Proponents have argued that a national regulator would help discourage white-collar crime by making enforcement much tougher. Currently, each province and territory has its own securities regulator, making enforcement more costly and potentially less effective.

But the Supreme Court was not asked to make an economic decision. It was asked to determine the constitutional validity of a national *Securities Act*. The federal government claimed it had jurisdiction based on its power to regulate trade and commerce under section 91(2) of the *Constitution Act, 1867*. Several provinces countered that regulating securities falls under the provincial power over property and civil rights (under section 92(13) of the *Constitution Act, 1867*) and pertains to matters of a merely local or private nature (section 92(16)), namely the regulation of contracts and property.

The Supreme Court conducted a pith and substance analysis to ascertain the purpose and effects of the law. It determined that the purpose of the *Securities Act* is to implement a comprehensive Canadian regime to regulate securities with a view to protect investors; to promote fair, efficient, and competitive capital markets; and to ensure the integrity and stability of the financial system. However, its effects would be to duplicate and displace the existing provincial and territorial securities regimes.

The Court declared that while Parliament's power over the regulation of trade and commerce under section 91(2) is, at face value, broad, it cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries.

Accordingly, the Court ruled that "The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*."

QUESTION FOR DISCUSSION

Has the Supreme Court left the door open for another version of a national *Securities Act*? What options does the federal government have? How has the federal government introduced national standards over other areas falling under provincial control, such as health care?

A pith and substance analysis was also the approach taken in the *Reference re Firearms Act (Can.)* case.²¹ In 1995, Parliament amended the *Criminal Code* by enacting the *Firearms Act*.²² The amendments require all holders of firearms to obtain licences and register their guns. Alberta, backed by Ontario, Saskatchewan, Manitoba, and the territories, challenged the law, arguing it was a brazen intrusion on private property and civil rights, a provincial power according to section 92(13) of the *Constitution Act, 1867*. The opponents argued that the new law would do no more to control gun crimes than registering vehicles does to stop traffic offences.

The Supreme Court of Canada upheld the *Firearms Act* as *intra vires* Parliament, meaning that it was within its power. It found that the Act constitutes a valid exercise of Parliament's jurisdiction over criminal law because its "pith and substance" is directed at enhancing public safety by controlling access to firearms. Because guns are dangerous and pose a risk to public safety, their control and regulation as dangerous products were regarded as valid purposes for criminal law. In essence,

Laws are upheld if interference with another jurisdiction's power is incidental

²⁰ [2011] 3 SCR 837, 2011 SCC 66 (CanLII).

²¹ [2000] 1 SCR 783, 2000 SCC 31 (CanLII).

²² S.C. 1995, c. 39.

the law was determined to be criminal in focus. The Act impacted provincial jurisdiction over property and civil rights only incidentally. Accordingly, the *Firearms Act* was upheld as a valid exercise of federal power under section 91(27) of the *Constitution Act, 1867*.

Nonetheless, the *Firearms Act* and the gun registry it created were later denuded, not by a court decision but by a change of government. Prime Minister Harper's Conservative Party had opposed the legislation from the outset, and once in a majority position it introduced Bill C-19 to end the controversial long-gun registry. Further amendments to the *Firearms Act* continue to be brought forward, as evidenced by the introduction of the proposed *Common Sense Firearms Licensing Act* in October 2014.²³

It is interesting to note that constitutional challenges are not undertaken just by governments. Individuals affected by laws may choose to challenge their validity as well.

CASE SUMMARY 2.5

Individual Challenges Validity of Forfeiture Laws: *Chatterjee v. Ontario (Attorney General)*²⁴

Chatterjee, a university student, was being arrested for breach of probation when the police coincidentally found \$29 000 in cash and items associated with drug trafficking in his car, but no drugs. No charges were laid relating to the money, nor was Chatterjee charged with any drug-related activity. Nonetheless, the attorney general applied for and obtained an order allowing the Crown to keep the money and equipment as proceeds of unlawful activity under Ontario's *Remedies for Organized Crime and Other Unlawful Activities Act*, also known as the *Civil Remedies Act (CRA)*. Chatterjee challenged the constitutional validity of the *CRA*, arguing that the province did not have the right to seize proceeds of crime because criminal law is a matter of federal, not provincial, jurisdiction.

The Supreme Court of Canada unanimously upheld the provincial law, since the dominant feature related to "property and civil rights," a provincial matter. While its provisions may incidentally overlap with criminal law, "the fact that the *CRA* aims to deter federal offences as well as provincial offences, and indeed, offences outside of Canada, is not fatal to its validity." As stated by Justice Binnie for the Court,

The *CRA* was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community stability and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it.

SMALL BUSINESS PERSPECTIVE

Although this constitutional challenge was unsuccessful, the lesson is that if you find yourself confronted by a particular law you might solve the issue by challenging the constitutional validity of the enactment.

²³ You can track the progress of Bill C-42, the *Common Sense Firearms Licensing Act*, on Parliament's website, accessed October 2014, www.parl.gc.ca/LegisInfo/Home.aspx?language=E&ParliamentSession=41-2.

²⁴ [2009] 1 SCR 624, 2009 SCC 19 (CanLII).

Validity of a statute determined by its true nature

Conflicting Powers

On occasion, one level of government passes legislation that may infringe on the powers of another. For example, municipal governments have tried to control prostitution or pornography, using their zoning or licensing power, when in fact these matters are controlled by criminal law, a federal area.²⁵ Such bylaws have been struck down as *ultra vires* (beyond one's jurisdiction or power) by the courts as veiled attempts to control moral conduct, matters to be dealt with under criminal jurisdiction. Municipalities sometimes try to dramatically increase the licensing fee charged to a business to accomplish the same purpose, often with the same result.

One level of government cannot invade the area given to another by trying to make it look like the legislation is of a different kind. This is called “colourable legislation” and the court simply looks at the substance of what the governing body is trying to do, as opposed to what it claims to be doing, and asks whether or not it has that power.

CASE SUMMARY 2.6

Municipal Bylaw Addressing Morality: *Vaughan (City) v. Tsui*²⁶

A pith and substance analysis was used in the *Tsui* case, where a bylaw prohibited body rub parlours from being open after 10:00 p.m. on weekdays and after 5:00 or 6:00 p.m. on weekends. Faced with losing his licence for staying open after hours, the owner of a body rub parlour challenged the validity of the bylaw, arguing that its object was to curtail prostitution, an activity allegedly occurring at body rub parlours. Evidence established that the city did not want the criminal element associated with prostitution to be in residential neighbourhoods, so it enacted laws relocating body rub parlours to industrial neighbourhoods and set restrictive hours of operation. The Court concluded that the pith and substance of the impugned sections of the bylaw was criminal and therefore *ultra vires* the City of Vaughan.

The sections prescribing hours of operation were an attempt to legislate prostitution; the sections dealing with nudity also fell within the scope of the criminal law. Since these matters lay within the federal government's scope of power, the impugned sections of the bylaw were quashed.

DISCUSSION QUESTION

In light of the division of powers, can you think of other laws that may be characterized as colourable legislation? Who can challenge such legislation and how is this done?

Double aspect doctrine leads courts to uphold laws where the provincial and federal aspects are of equal importance

What if, after reviewing the pith and substance of the challenged legislation, it is not possible to determine which aspect is dominant? The provincial and federal aspects of the impugned legislation are occasionally of equal importance. In such cases, the courts may apply the double aspect doctrine of judicial restraint and conclude that the legislation is constitutionally valid. In *R. v. Keshane*,²⁷ for example, the constitutionality of Edmonton Bylaw 14614 was challenged. It made fighting in a public place punishable by a fine and applied both to consensual and non-consensual fights. The Court found the dominant purpose of the bylaw had both federal and provincial aspects of roughly equal importance. The provincial aspect was protection of public spaces and reducing nuisance; the federal aspect was preservation of public peace and order. The double aspect doctrine of judicial restraint was applied, and the validity of the bylaw was upheld.

²⁵ *R. v. Westendorp*, [1983] 1 SCR 43, 1983 CanLII 1 (SCC).

²⁶ 2013 O.N.C.J. 643 (CanLII); See also [2000] B.C.J. No. 1154 (B.C.S.C.), where a municipal bylaw prohibiting topless sunbathing was similarly struck down.

²⁷ 2012 A.B.C.A. 330 (CanLII).

Likewise, in *Smith v. St. Albert (City)*,²⁸ Chad Smoke Shop challenged the validity of a bylaw restricting the sale and display of items associated with illicit drug consumption. The pith and substance of the bylaw provisions fell under multiple heads of power: federal power over criminal law under section 91(27) and provincial power over licensing and regulating businesses in the community under sections 92(9) and 92(13). The double aspect doctrine was again applied and the bylaw was upheld.

The powers of the federal and provincial governments can overlap considerably. If the overlap between provincial and federal legislation is merely incidental, both are valid and both are operative. An individual must obey both by adhering to the higher standard, whether provincial or federal. But there are occasions where the laws truly conflict and it is not possible to obey both. In those situations, the principle of **paramountcy** may require that the federal legislation be operative and the provincial legislation go into abeyance and no longer apply.

When provincial and federal laws conflict, follow federal

CASE SUMMARY 2.7

Another Challenge Goes Up in Smoke: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*²⁹

The federal *Tobacco Act* permitted manufacturers and retailers to display tobacco products and to post signs setting out availability and prices. Saskatchewan passed the *Tobacco Control Act* prohibiting all advertising, display, and promotion of tobacco products in any location where they might be seen by someone under 18. Rothmans, Benson & Hedges Inc., preferring the provisions of the federal statute, challenged the provincial law, arguing that it was in conflict with the federal Act and that because of the principle of paramountcy it could not stand. The federal legislation was valid and within the competency of the federal government under its criminal law power described in section 91(27) of the *Constitution Act, 1867*. The provincial legislation was likewise valid under the provincial powers set out in section 92 of the *Constitution Act, 1867*. The problem was to determine whether the provincial Act could stand given the federal intrusion into the area.

The Supreme Court of Canada found that the two statutes were not in conflict; one simply went further than the other. It was possible for the retailers and manufacturers to obey them both by following the higher standard set out in the provincial Act. Thus if young people were prohibited from coming into a place, such as a bar or pub, the merchant could still display tobacco products and be in compliance with both the federal and the provincial Act. Thus, finding no conflict, the Court found the provincial Act valid and binding.

SMALL BUSINESS PERSPECTIVE

The above case demonstrates an interesting tactic—if a particular law restricts the profitability of a person's business, he may be able to challenge its constitutionality. If the challenge is successful, the courts can strike the law down, resolving the problem for the business owner. But note: Paramountcy only applies when there is a true conflict between valid federal and valid provincial legislation.

Delegation of Powers

Since neither the federal nor the provincial levels of government are considered inferior legislative bodies, both are supreme parliaments in their assigned areas. Over the years, for various reasons, these bodies have sometimes found it necessary

Direct delegation is prohibited

²⁸. 2014 A.B.C.A. 76 (CanLII).

²⁹. [2005] 1 SCR 188, 2005 SCC 13 (CanLII).

to transfer the powers given to them to other levels of government. However, direct delegation between the federal and provincial governments is prohibited. For example, during the Depression of the 1930s, it became clear that a national system of unemployment insurance was needed. The provinces, having jurisdiction in this area, may have preferred to delegate their power to the federal government. The Supreme Court held that they could not do so since it was an “abdication” of the “exclusive powers” given to the provinces under the *Constitution Act, 1867*. To make unemployment insurance an area of federal responsibility, the British Parliament needed to amend the Constitution. This amendment is now incorporated in section 91, subsection (2A) of the *Constitution Act, 1867*.

Indirect delegation is permitted

Although direct delegation is prohibited, it is possible for the federal and provincial governments to delegate their powers to inferior bodies, such as boards and individual civil servants; in fact, this is usually the only way that governmental bodies can conduct their business. It is thus possible for the federal government to delegate its power in a particular area to a provincial board or a provincial civil servant. Similarly, a province can give powers to federal boards, since these are also inferior bodies. In this way, governments overcome the prohibition against delegation.

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Federal government exerts influence by providing funding—with strings attached

Agreements to Share Powers

Another means used to circumvent the constitutional rigidity created by the 1867 division of powers is through federal and provincial agreements to share powers. These agreements may consist of *transfer-payment schemes*, or conditional grants under which the transfer of funds from the federal government is tied to conditions on how the money is to be spent. Through such schemes, the federal government can exercise some say as to how a provincial government operates programs that fall under the province’s constitutional area of control. The federal government may set certain national standards to which the funding is tied and in this fashion ensure that all Canadians have access to similar levels of service.

Transfer-payment schemes in the areas of health, social programs, and education are examples of provincial areas where the federal government provides considerable funding along with the imposition of national standards or other conditions on the provinces. At the time of Confederation, government spending on these services was minuscule. Now these areas may account for two-thirds of all government spending. The provinces, with their restricted taxing powers, would have difficulty providing these services without federal funding.

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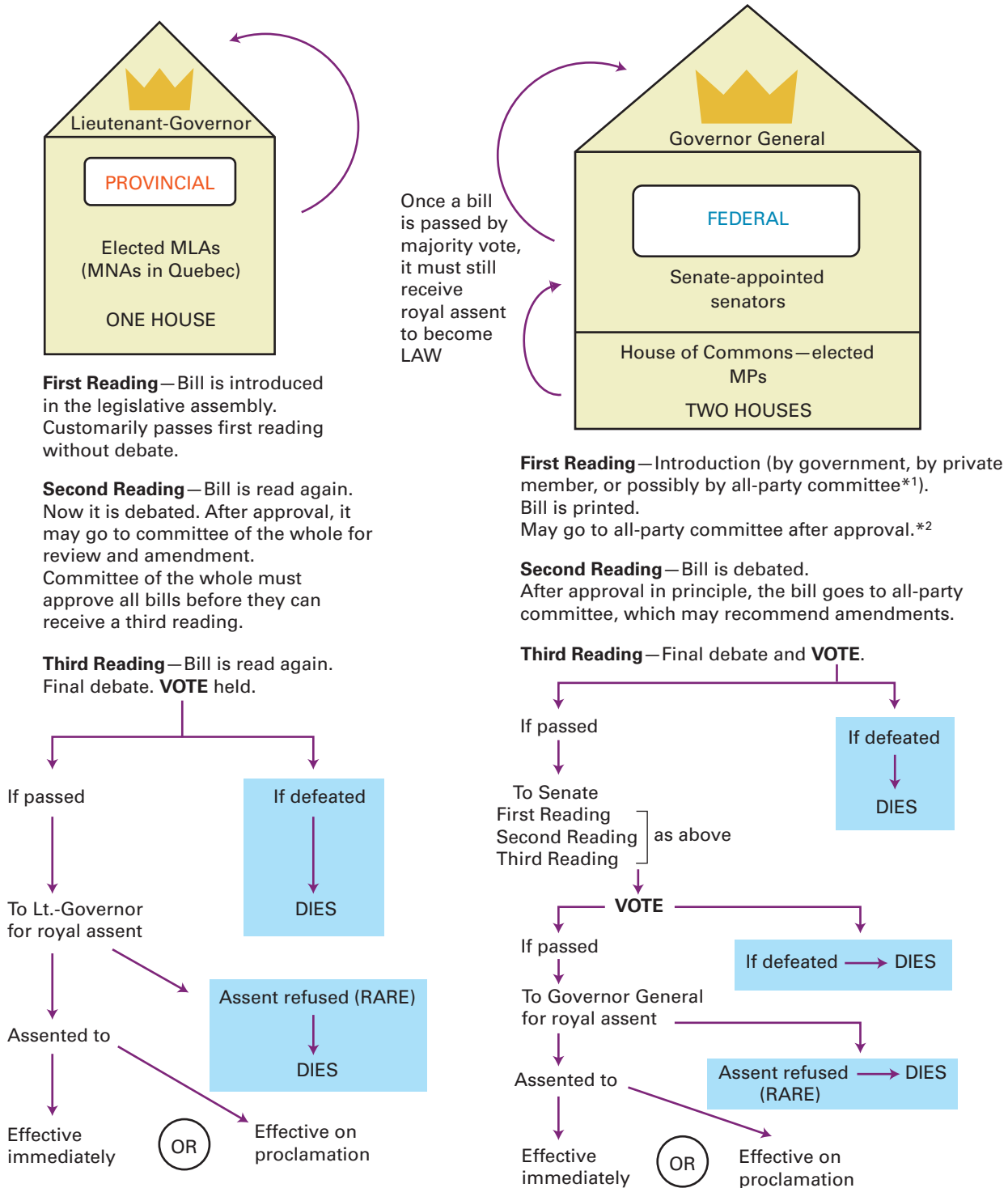
Statutes must receive royal assent

Legislative Power

Canada’s Constitution divides legislative power between the federal and provincial governments, but it also requires legislation to proceed through a sequence of introduction, debate, modification, and approval that is referred to as first, second, and third readings. When a **bill** is finally enacted, it has the status of a statute (although it may still be referred to as a bill or an act). Such a statute does not have the status of law until it receives the approval of the governor general at the federal level or the lieutenant-governor in a province, a process referred to as receiving **royal assent**. The governor general and the lieutenant-governors are the Queen’s representatives in Canada and can grant royal assent (sign) on behalf of the Crown. Current convention (practice) in Canada directs the Queen’s representatives to sign as the government in power directs them, and such approval is therefore usually a formality. The government may use this requirement to delay a piece of legislation from coming into effect, and care should therefore be taken when examining an Act to make sure that it has received royal assent. The statute itself may provide that different parts of it will come into force at different times. There are many examples where whole acts or portions of them have no legal effect for these reasons. See Figure 2.1 for a summary of the traditional process for passing bills.

The Government of Canada publishes a compilation of these statutes annually; the collection can be found in most libraries under *Statutes of Canada*. The federal

Figure 2.1 Traditional Passage of Bills



The federal government now allows for two variations from the “traditional” passage of bills.*¹ A motion may be tabled for a committee to prepare and introduce a bill.*² Bills may now be referred to committee *before* second reading. In any event, a bill goes to committee only *once*.

government has summarized and published all current statutes in the *Revised Statutes of Canada* of 1985, cited as R.S.C. (1985). It is not necessary to go back any earlier than this compilation to find current legislation. Federal legislation can be accessed online at <http://laws-lois.justice.gc.ca>. As of June 1, 2009, all consolidated acts and regulations on the Justice Laws Website are “official,” meaning that they can be used for evidentiary purposes.

Federal and provincial statutes are compiled and published

Similarly, each province annually publishes the statutes passed by its legislative assembly and provides a compilation in the form of revised statutes. Unfortunately, there is no uniformity in the timing of the revisions, and each province has revised and compiled its statutes in a different year. Most jurisdictions provide official or unofficial consolidated updates of their statutes online as an ongoing service. These statutes, along with useful commentary about new legislation, are currently available on the Internet at their respective government's website. LawCentral Alberta provides easy access to the laws across the country (see www.lawcentralalberta.ca) as does the Canadian Legal Information Institute (www.canlii.org). The MyBusLawLab will also provide important information with respect to relevant statutes and other material as they are discussed throughout the text.

Regulations are also published

Statutes often empower government agencies to create further rules to carry out their functions. As long as these regulations meet the terms of the statute, they have the effect of law. They are also published and are available to the public as *Regulations of Canada* or of the respective provinces. Cities and municipalities pass bylaws under their statutory authority in the same way, and these too are published and made available by those jurisdictions. Statutes (if passed within the power of the respective government's constitutional authority) override any previous law in place, whether judge-made law (common law or equity) or prior legislation.

Judges interpret and apply statutes

When judges are required to deal with a statute, they must first determine what it means. The judge must then determine whether, under the *Constitution Act, 1867* and other constitutional provisions, the legislative body that passed the statute in question had the power to do so. When a judge interprets and applies a statute, that decision becomes a precedent, and henceforth the statute must be interpreted in the same way by courts lower in the court hierarchy.

Decisions create precedents for future interpretations**LO 7****PROTECTION OF RIGHTS AND FREEDOMS****Rights and freedoms were historically protected by convention**

The preamble of the *Constitution Act, 1867* states that Canada will have “a Constitution similar in principle to that of the United Kingdom.” The courts have interpreted that phrase as importing into Canada the unwritten conventions and traditions of government developed in the United Kingdom over the centuries. Among those unwritten conventions are the practices of protecting and preserving fundamental rights and freedoms. Canada has thus inherited the British tradition of protecting human rights and individual freedoms through unwritten conventions (practices) as supported by common law.

In the aftermath of World War II, concern arose over the adequacy of entrusting the protection of personal rights and freedoms to common law. Two streams of legislation developed: one dealing with protecting human rights against abuses by the government and the second aimed at protecting individuals against discrimination and intolerance by society at large.

Canadian Bill of Rights

It is important to understand that basic human rights protections set out in ordinary statutes passed by the federal or provincial governments may not protect people from abuses by government. Because Canada adopted the British method of government, which is based on the supremacy of Parliament, the provincial and federal governments were free to interfere at will with civil rights through legislation. We need look no further than the way Japanese Canadians were treated during World War II to conclude that it could be dangerous for Canadians to leave the protection of their basic rights to the political process.³⁰

³⁰ During World War II, Japanese Canadians were forcibly relocated to internment camps across the country because they were deemed a “threat” to national security.

The first attempt at limiting the federal government's power to pass legislation that violates basic human rights was the passage (in 1960) of the *Canadian Bill of Rights*.³¹ Because it was not entrenched in the Constitution, the courts viewed the *Canadian Bill of Rights* as just another statute that could be repealed, amended, or simply overridden by any subsequent federal statute. Furthermore, when asked to apply the *Canadian Bill of Rights*, the courts approached its provisions in the same narrow, restrictive way that they did any other legislation, thus significantly limiting its scope and effect. For example, when subsequently passed federal legislation was found to be in conflict with the provisions of the *Canadian Bill of Rights*, instead of applying the *Canadian Bill of Rights* and limiting the operation of the new statute, the courts would treat the new legislation as overriding the old and would disregard the provisions that conflicted with the new legislation. This, of course, effectively defeated the purpose of the *Canadian Bill of Rights*, and while it is still considered law in Canada its effectiveness is extremely limited. Something more was needed.

The Canadian Bill of Rights was viewed as just another statute

Charter of Rights and Freedoms

A constitutional guarantee of basic rights and freedoms arose in 1982 following a series of constitutional conferences. The *Constitution Act, 1982*³² was simultaneously enacted in Canada and the United Kingdom. In the latter, it was contained in a statute called the *Canada Act 1982*.³³ One effect of these enactments was to make a significant addition to the Canadian Constitution in the form of the *Canadian Charter of Rights and Freedoms*.

The effect of including the *Charter* in our Constitution is twofold. First, neither the federal government nor the provinces have the power to modify or otherwise interfere with the basic rights set out in the *Charter* except through constitutional amendment. Ordinary legislation will not override the *Charter* simply because it is passed after the *Charter*. The provisions are said to be entrenched in the Constitution and are, as declared in section 52 of the *Constitution Act, 1982*, "the supreme law of Canada." Section 52 goes on to state "any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force or effect." In other words, the *Charter* and the rights protected by it come first.

Second, the burden of protecting those rights has shifted from politicians to judges. Now an individual who feels that her rights have been interfered with by legislation or other forms of government action can seek redress from the courts, relying on the provisions of the *Charter*. The courts can remedy a violation of rights by excluding evidence improperly secured and can grant any remedy deemed to be just in the circumstances.³⁴ The courts can even strike down statutes that infringe on those rights. Hence, the doctrine of parliamentary supremacy has been restricted, and the courts are able to check the power of both Parliament and the legislatures in those areas covered by the *Charter*.

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The Constitution includes the Charter; together they are the SUPREME law of Canada

Courts are empowered to strike down offending statutes

LIMITATIONS

There are three important limitations on the entrenchment of these basic rights. Section 1 of the *Charter of Rights and Freedoms* allows "reasonable limits" to be placed on those rights and freedoms when limiting them can be "demonstrably justified in a free and democratic society." This gives the courts the power to uphold a law even if it violates rights so as to avoid an unreasonable result.

The rights and freedoms set out in the *Charter* are, therefore, not absolute. For example, the *Charter* guarantees freedom of expression, but there would be

Government cannot interfere with basic rights and freedoms except if it is justifiable to do so

³¹ S.C. 1960, c. 44.

³² Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³³ *Canada Act 1982* (U.K.), 1982, c. 11.

³⁴ *Canadian Charter of Rights and Freedoms*, s. 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

little dispute that libel, slander, or hard-core pornography must be controlled. In *Hill v. Church of Scientology of Toronto*,³⁵ the Supreme Court was asked to give effect to the freedom of expression provision of the *Charter* by dismissing a defamation action against the church and its representative, especially where the remarks were directed at a government official or Crown prosecutor. The Court found that the laws of defamation were, under section 1, a reasonable limitation on the operation of the freedom of expression clause of the *Charter*. Similarly, in the *Sharpe* case³⁶ the accused argued that since freedom of expression was protected by the *Charter*, charges making it an offence to possess child pornography should be struck down since the material (in this case, photos in the possession of and stories written by the accused) may have artistic merit. The Supreme Court upheld most of the pornography law on the basis that it was needed to protect children from harm.

The interests of the public are considered when applying section 1. Nonetheless, a law that restricts *Charter* rights, though apparently justified, will be rejected if it goes too far. In the *Oakes* case,³⁷ the Supreme Court created a framework for assessing whether a law that violates rights should be upheld. First, it must be established that the impugned legislation relates to a pressing and substantial concern in a free and democratic society. Second, the means must be reasonable and demonstrably justified. This involves a proportionality test to be applied between the legislative objective and the disputed legislation. The more severe the deleterious effects of a measure, the more important the objective must be. Furthermore, the means should impair the right in question as little as possible.

CASE SUMMARY 2.8

Polygamy and Crime: Reference re Section 293 of the Criminal Code of Canada³⁸

Investigations into polygamous practices in Bountiful, British Columbia, including allegations of trafficking young girls between Canada and the United States, raised concerns regarding the constitutional validity of section 293 of the *Criminal Code*. It declares polygamy to be an indictable offence punishable by imprisonment. Before proceeding with prosecutions under section 293, the BC government decided to put this question to the Court: Is section 293 of the *Code* consistent with the *Charter*, and if not, in what particulars and to what extent?

Those challenging the law submitted that it was a product of anti-Mormon sentiment and constituted an unacceptable intrusion upon the freedoms of religion, expression, association, and equality as protected by the *Charter*. They argued that those infringements were not justified under section 1 of the *Charter*.

The Court conceded that the *Criminal Code* restriction against polygamy infringes on certain sections of the *Charter*, but the key issue was whether the prohibition was justifiable. In its 335-page decision, the Court ruled that section 293 is constitutionally sound because prevention of the collective harms associated with polygamy, including sexual exploitation of young women and expulsion of young men from polygamous communities, was a pressing and substantial concern in a free and democratic society. The impairment of religious freedom was minimal and, since the provision was proportional in its effect, the violation of religious freedoms was justified as reasonable. The benefits of banning polygamy far outweighed the detriments.

³⁵. [1995] 2 SCR 1130, 1995 CanLII 59 (SCC).

³⁶. *R. v. Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 (CanLII).

³⁷. *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).

³⁸. 2011 BCSC 1588 (CanLII).

DISCUSSION QUESTION

As is evident in this decision, the Court determined that the legislation banning polygamy related to a pressing and substantial concern. Second, the infringement of religious freedom was assessed as proportionate when compared with the greater harm caused by polygamous practices. What other laws that may violate *Charter* rights or freedoms would you evaluate as being reasonable and justifiable?

The second limitation is contained in section 33 and is referred to as the “notwithstanding clause.” It allows each of the provinces and the federal government to override the basic rights contained in section 2 and sections 7 through 15 of the *Charter* simply by stating that the new legislation operates “notwithstanding” (regardless of) the *Charter*. The sections that can be overridden in this way include **fundamental freedoms** (provisions such as freedom of conscience and religion, of thought and belief, of opinion and expression, and of assembly and association); **legal rights** (the right of life, liberty, and security of person; security against unreasonable search and seizure, arbitrary imprisonment, and detention); and **equality rights** (the right not to be discriminated against on the basis of gender, age, religion, race, or colour; and the guarantee of equality before the law).

It would appear that section 33 weakens the *Charter of Rights and Freedoms* considerably and restores the supremacy of Parliament, at least in relation to the designated sections. It was originally hoped that most politicians would find the political cost too great to override the *Charter* in this way and, as a result, would refrain from doing so. For the most part, this has been the case. Quebec, however, used the notwithstanding clause to support language legislation restricting the use of English on business signs in that province. This legislation clearly violates the *Charter*’s guarantee of freedom of expression, but the Quebec government gambled that the majority of the electorate would favour such protection of the French language. Refer to the MyBusLawLab for details.

There are few other examples of the notwithstanding clause being used, and Alberta’s experiments with invoking the clause have been controversial.³⁹ The notwithstanding clause does not apply to sections guaranteeing democratic rights (the right to vote and to elect members to Parliament and the legislative assemblies), mobility rights (the right to enter and leave Canada), or language rights (the right to use both official languages). In addition, the rights of Aboriginal people and the rights guaranteed to both genders cannot be overridden by the federal or provincial governments.

A “sunset clause” is applied to the operation of section 33. If the notwithstanding clause is invoked, the statute must be re-enacted by that legislative body every five years. This forces a re-examination of the decision to override the *Charter* after the intervening event of an election where the use of the notwithstanding clause can be made an issue. New legislators may not be as willing to pay the political cost of using the notwithstanding clause.

The third limitation is the restriction of the operation of the *Charter* to government and government-related activities. Section 32(1)(a) declares that the *Charter* applies only to matters falling within the authority of “the Parliament and Government of Canada” and the territories, and section 32(1)(b) makes the *Charter* apply “to the legislature and government of each province.” A serious problem facing the courts is determining just where government stops and government institutions acting in a private capacity begin. Are government

The use of the notwithstanding clause may be a political gamble

A sunset clause causes legislation to expire

The *Charter* applies only to the government—but where does government stop?

³⁹ Alberta used the notwithstanding clause to override equality rights when it passed the *Marriage Act* provisions restricting marriage to a man and a woman. The clause was used to deny same-sex couples the ability to marry. The sunset clause caused that override to expire in 2005. See *Marriage Act*, R.S.A. 2000, c. M-5, s. 2.

The *Charter* probably applies to private institutions acting as arms of government

institutions—universities, schools, hospitals, and Crown corporations like the Canadian Broadcasting Corporation—affected?

While there are still many questions, it does seem clear that when such institutions are acting as an arm of government, the *Charter* applies. Certainly the *Charter* applies to the legislation creating these institutions and to the services provided directly by government departments, including the police and military. When government agencies act in their private capacity (for example, in employee relations), the appropriate federal or provincial human rights legislation applies; such legislation must, in turn, comply with the provisions of the *Charter*. If a section of a statute is in conflict with the provisions of the *Charter*, the offending section may be declared void. Courts may strike down the void law or grant a remedy that is appropriate. In the *Vriend* case⁴⁰ (discussed in Case Summary 2.17), the Supreme Court of Canada showed its willingness to interpret into the Alberta statute a provision prohibiting discrimination on the basis of sexual orientation rather than overturning the statute. Occasionally, the courts have declared legislation invalid but have stayed (held in abeyance) their decision to give the legislators an opportunity to amend the statutes themselves.⁴¹

While the *Charter* directly affects an individual's relationship with government, it only indirectly affects the relationships between individuals and between individuals and private institutions. Human rights legislation impacts these latter relationships, but these federal and provincial human rights codes must comply with the *Charter*. It is also important to remember that the provisions of the *Charter* apply not only to the regulations and enactments of these government bodies and institutions but also to the conduct of government officials employed by them. These officials derive their authority from provincial or federal enactments. If they are acting in a way that violates the provisions of the *Charter*, either they are not acting within their authority or the statute authorizing their conduct is itself in violation of the *Charter*. In either case, such offending conduct can be challenged under the *Charter*.

Charter Provisions

A brief summary of the types of rights and freedoms Canadians now enjoy because of the *Charter of Rights and Freedoms* follows. The *Charter* sets out several rights that are available in some cases only to citizens of Canada and in other cases to everyone in the nation. The extent of these rights and freedoms, their meaning, and the limitations on those rights are still being defined by court decisions. Recourse is available through the courts if the declared rights are interfered with by laws or by the acts of government agents. The courts have been empowered under section 24 of the *Charter* to “provide such remedies as the court considers appropriate and just in the circumstances.” These powers are in addition to the inherent power of the court to declare that the offending legislation or conduct is of no effect. This provision allows the courts to award damages, injunctions, and other remedies when otherwise they would have had no power to do so. Section 24 also gives a judge the power in a criminal matter to exclude evidence that has been obtained in a way that violates the *Charter* rights of the accused if its admission “would bring the administration of justice into disrepute.”

FUNDAMENTAL FREEDOMS

Section 2 of the *Charter* declares certain underlying fundamental freedoms available to everyone in Canada. These are freedom of conscience and religion; freedom of belief, opinion, and expression; and freedom of assembly and association. The *Charter* protects the right to believe in whatever we wish, to express

Everyone in Canada has the right to freedom of conscience and religion; of thought, belief, and opinion; of the press; of peaceful assembly; of association.

⁴⁰ *Vriend v. Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC).

⁴¹ See *Haig v. Canada*, 1992 CanLII 2787 (ON CA).

that belief, and to carry on activities associated with it free from interference. When the expression of those freedoms or the activities associated with them interferes with the freedoms of others, the courts may restrict those freedoms by applying section 1 of the *Charter*.

CASE SUMMARY 2.9

Sunday Shopping: Does It Prevent Corporations from Going to Church? *R. v. Big M Drug Mart Ltd.*⁴²

Big M Drug Mart Ltd. was charged with violation of the *Lord's Day Act*, which required that commercial businesses be closed on Sunday. This statute was enacted by the federal government under its criminal law power long before the enactment of the *Charter*. It compelled the observance of a religious duty by means of prohibitions and penalties. The Supreme Court of Canada held that the *Lord's Day Act* was invalid and of no effect because it interfered with freedom of conscience and religion. It did not matter that the applicant was a corporation incapable of having a conscience or beliefs. Section 2 states that "everyone," be it a corporation or an individual, enjoys fundamental freedoms. And section 24 states "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied" may apply to a court to obtain a just remedy.

Communities seeking to maintain a day of rest can look to the decision in *London Drugs Ltd. v. Red Deer (City)*.⁴³ It involved a requirement that businesses close one day a week. In that case, however, the bylaw simply required businesses to be closed any day during a week. The bylaw specified Sunday as a default, but allowed the business to specify another day if it wished. That made the law secular rather than religious, its object being to give workers one day in the week free of work. This treated all businesses equally since they had a choice as to when to close.

SMALL BUSINESS PERSPECTIVE

Ironically, businesses have raised violation of religious freedoms to increase their profits. These cases illustrate that the *Charter* can be used to strike down laws even when the true motive has little to do with asserting rights.

Freedom of conscience and religion was likewise raised in the *Hutterian Brethren* case,⁴⁴ where a regulation requiring that all drivers' licences include a photo of the driver was challenged. The Hutterian Brethren took the position that requiring a photograph to be taken violated the respondents' religious freedoms and equality rights under the *Charter*. The courts refused to strike down the regulation. The objective of the impugned regulation, namely maintaining the integrity of the licensing system in a way that minimizes the risk of identity theft, was clearly a goal of pressing and substantial importance, justifying limits on rights. Thus, if Albertans wish to drive, they will need to submit to having their photos taken despite any religious reservations.

Freedom of expression, which includes freedom of the press, is an extremely important provision for preserving the democratic nature of Canada, and our courts are careful to uphold these freedoms. Still, there are many limitations on them, such as the laws of defamation and obscenity.

⁴². [1985] 1 SCR 295, 1985 CanLII 69 (SCC).

⁴³. [1987] A.J. No. 815 (Q.B.); appeal dismissed [1988] A.J. No. 701 (C.A.); leave to appeal to the Supreme Court refused [1988] S.C.C.A. No. 246.

⁴⁴. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37 (CanLII).

CASE SUMMARY 2.10**When Does Expressing One's Opinions Contravene the Law?
*Saskatchewan (Human Rights Commission) v. Whatcott*⁴⁵**

Whatcott distributed four anti-gay flyers to homes in Saskatoon and Regina in 2001 and 2002. Several recipients filed complaints with the Saskatchewan Human Rights Commission, alleging the material in the flyers “promotes hatred against individuals because of their sexual orientation” in violation of section 14(1)(b) of the *Saskatchewan Human Rights Code*. A tribunal hearing was convened and it concluded that the material did violate the *Code*. Whatcott appealed, claiming that the *Code* provisions violated his freedoms of expression and religion because they prevented him from expressing his religious beliefs about homosexual conduct. Ultimately, the case was heard by the Supreme Court of Canada.

Section 14(1)(b) of the *Code* prohibited the publication or display of any representation “that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.” The Supreme Court of Canada concluded that section 14(1)(b) infringed on section 2(a) (freedom of religion) and section 2(b) (freedom of expression) of the *Charter*, but the infringement was justified under section 1 of the *Charter*.

The Court held that a prohibition of any representation that “ridicules, belittles or otherwise affronts the dignity of” any person or class of persons on the basis of a prohibited ground was not a reasonable limit on freedom of expression or religion, thus these words were severed. But the remaining prohibition of any representation “that exposes or tends to expose to hatred” any person or class of persons on the basis of a prohibited ground was a reasonable limit and demonstrably justified in a free and democratic society.

DISCUSSION QUESTION

In protecting individuals from discrimination, human rights legislation causes a conflict between freedom of expression and the right to equal treatment free from discrimination. What factors should guide the courts in balancing these conflicting rights?

The *Charter* also protects freedom of association. The Supreme Court of Canada has stated that collective bargaining is the “most significant collective activity through which freedom of association is expressed in the labour context.”⁴⁶ Laws that restrict collective bargaining rights are thus subject to *Charter* scrutiny. But in *Fraser v. Ontario (Attorney General)*,⁴⁷ the Supreme Court was less expansive in its interpretation of freedom to associate. In 2002, the Ontario government introduced the *Agricultural Employees Protection Act (AEPA)*, thus excluding farm workers from the provisions of the *Labour Relations Act*. Farm workers claimed the new Act offered fewer protections and failed to adequately protect their *Charter* freedom of association rights. Specifically, the new legislation failed to provide for meaningful collective bargaining and provided no right to strike. In a divided decision, the Court stated that the *AEPA* did not violate section 2 because the freedom to associate does not guarantee access to any particular model of labour relations. The freedom protects the right to associate to achieve workplace goals through collective action, and since employers were obligated to listen to representations from an employee association implicitly in good faith, the *AEPA* satisfied this constitutional obligation. Essentially, the Court found that an individual’s freedom of association under section 2(d) simply imposes an obligation on employers to bargain in good faith on workplace issues.

⁴⁵. [2013] 1 SCR 467, 2013 SCC 11 (CanLII).

⁴⁶. *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 (CanLII), at p. 66.

⁴⁷. [2011] 2 SCR 3, 2011 SCC 20 (CanLII).

When employer rights are interfered with by inappropriate trade union activity, limits may be imposed on the right to peaceful assembly. The rights to peaceful assembly and freedom of association have likewise been limited when riots may occur.

Note that section 2 is one of the areas of the *Charter* that can be overridden by the use of the notwithstanding clause (section 33).

DEMOCRATIC RIGHTS

Sections 3, 4, and 5 protect our rights to vote and to qualify to be elected to the House of Commons or the provincial legislative assemblies. Reasonable limitations can be put on the right to vote, restricting those who are underage and, most likely, those deemed mentally incompetent. But the abuses of the past, where racial groups were denied the vote, are now prohibited. Before 1982, these rights were protected by constitutional convention, but now they are enshrined in the *Charter*. Section 4 ensures there will be an election at least every five years, except in times of war, and section 5 requires that the elected body be called into session at least once every 12 months. The government in power still has the right to decide when to call an election within that five-year period and also whether to call the session into sitting more often than the “once every 12 months” minimum. The government also has the power to determine what that session will consist of, which also provides some potential for abuse. These sections cannot be overridden by the notwithstanding clause (section 33), a distinction of which the courts have taken notice (see Case Summary 2.11).

Maximum duration before the next election is five years unless crises loom

Charter enshrines the right to vote, to be elected; requirement to have government sit annually

CASE SUMMARY 2.11

Ballot Boxes in Jails: *Sauvé v. Canada (Chief Electoral Officer)*⁴⁸

All prison inmates were prohibited from voting in federal elections by the former provisions of the *Canada Elections Act*. That Act was held unconstitutional as an unjustified denial of the right to vote, guaranteed by section 3 of the *Charter*, in *Sauvé v. Canada (Attorney General)*.⁴⁹ Parliament responded to this litigation by changing the Act, denying the right to vote to a smaller group—those inmates serving sentences of two years or more. The issue in this case was whether the new provisions were likewise unconstitutional. It was argued that they violated the right to vote (section 3) and equality rights as protected by section 15. The Crown conceded that the Act contravened section 3 of the *Charter*. The key issue was thus whether this restriction could be demonstrably justified under section 1.

The Court decided that the violation was not justified. As stated by Chief Justice McLachlin, “The right to vote, which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here the reasons do not suffice . . . Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot be lightly set aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.”⁵⁰

DISCUSSION QUESTIONS

The fact that the notwithstanding clause cannot be used to override democratic rights was emphasized in the above decision. But what about 17 year olds and other youths? Shouldn't the right to vote be extended to them as well?⁵¹ And what does this suggest about the inviolability of mobility rights and language rights?

⁴⁸. [2002] 2 F.C. 119 (C.A.), rev'd [2002] 3 SCR 519, 2002 SCC 68 (CanLII).

⁴⁹. [1993] 2 SCR 438, 1993 CanLII 92 (SCC).

⁵⁰. Inmates finally secured the right to vote in provincial elections in Alberta in 2010 with passage of the *Election Statutes Amendment Act, 2010*, S.A. 2010, c. 8.

⁵¹. See *Fitzgerald v. Alberta*, 2004 A.B.C.A. 184 (CanLII), where 17 year olds, denied the right to vote in provincial and municipal elections, challenged the *Elections Act* and the *Local Authorities Act* for violating their *Charter* rights under section 3 and section 15(1), respectively.

Citizens enjoy the right to enter and leave Canada

MOBILITY RIGHTS

Section 6 of the *Charter* ensures that Canadians can travel and live anywhere within the geographic limitations of Canada as well as enter and leave the country at will. It also ensures that all Canadians have the right to earn a livelihood in any part of Canada. But again, these assurances are qualified. Programs that are of general application in a province or region can be valid even though they appear to interfere with these rights. In the field of employment, for instance, provincial licensing and educational requirements may prevent people trained and licensed in other parts of the country from carrying on their chosen profession without requalifying in that province. Section 6(4) specifically allows for programs that are designed to better the condition of those “who are socially or economically disadvantaged,” even when those programs interfere with the mobility rights of other Canadians who might want to take advantage of the programs but are prohibited from doing so.

CASE SUMMARY 2.12

Non-Resident Asserts the Right to Earn a Living: *Basile v. Attorney General of Nova Scotia*⁵²

Under the *Direct Sellers' Licensing and Regulation Act*,⁵³ anyone involved in the activity of direct selling (door-to-door sales) in Nova Scotia had to be a resident of that province. Mr. Basile was a bookseller and a resident of Quebec. He applied for a licence to sell in Nova Scotia and was refused because he was not a permanent resident, as required by the statute. He challenged this decision as a violation of his mobility rights under the *Charter of Rights and Freedoms*. This was clearly an infringement of the mobility rights under the *Charter*, which gave any Canadian the right to travel to and earn a living in any part of the country. The main difficulty was to decide whether this fell into one of the exceptions set out in either section 6(3)(a) (laws of general application) or the reasonable limitation clause in section 1 of the *Charter*. The Court held that this did not qualify as a law of general application, since it was directed at one specific group—non-residents. Further, since no evidence had been presented that would support the argument that this was a reasonable limitation as required under section 1 of the *Charter*, Mr. Basile was successful, and the offending section was declared by the Court to be “of no force and effect.”

SMALL BUSINESS PERSPECTIVE

Mr. Basile was successful in asserting his mobility rights and in having the restricting legislation struck down. But would a business or corporation be able to raise a similar argument? Consider to whom mobility rights are extended.

LEGAL RIGHTS

The rights listed under this heading are intended to protect individuals from unreasonable interference from the government or its agents and to ensure that when there is interference it is done in a way that is both procedurally fair and consistent with basic principles of fundamental justice. It is important to note that the protections provided under this heading do not extend to interference with property rights. There is no specific reference to property rights in the *Charter*.

Section 7 states that we have the right to life, liberty, and the security of person and the right not to have these rights taken away except in accordance with the “principles of fundamental justice.” In the *Baker* case, where the Supreme Court examined the procedure followed at deportation hearings, Justice L’Heureux-Dubé

Everyone has a right to life, liberty, and security of person

⁵² [1984] N.S.J. No. 337 N.S.S.C. (App. Div.).

⁵³ S.N.S. 1975, c. 9.

summarized what is required by the principles of **procedural fairness**: “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”⁵⁴ The requirements of fundamental justice include procedural fairness but go further. Certain underlying principles considered basic to our legal system, such as the rule of law, would also be included.

Sections 8 and 9 prohibit such activities as unreasonable search and seizure and arbitrary imprisonment.⁵⁵ Subsequent sections provide for the right to be informed of the reason for an arrest, the right to retain counsel, the right to be tried within a reasonable time, the right to the presumption of innocence, the right not to be tried twice for the same offence, and the right not to be subjected to any cruel or unusual punishment. The common theme here is the protection of people from abusive, arbitrary, or unequal application of police and prosecutorial power. Not only is the individual protected in the event of such an abuse, but the provisions also serve to discourage the police and prosecutors from acting outside the law. The powers given to the courts further help to persuade the law-enforcement community to act properly by allowing the court to exclude evidence obtained in violation of these provisions, where not to do so “would bring the administration of justice into disrepute” (see section 24(2)). These basic legal rights can be overridden by the invocation of the notwithstanding clause.

Everyone is entitled to procedural fairness

Everyone is to be secure from unreasonable search, seizure, detention, or imprisonment

CASE SUMMARY 2.13

A Right to Die? *Rodriguez v. British Columbia (Attorney General)*,⁵⁶ *Carter v. Canada (Attorney General)*⁵⁷

Does the right to life as guaranteed by section 7 of the *Charter* also protect the right to die? Sue Rodriguez, a terminally ill patient, sought the assistance of a physician to commit suicide. The *Criminal Code of Canada*, however, prohibits aiding a person to commit suicide, so Rodriguez argued that this violated her rights under sections 7, 12, and 15(1) of the *Charter*. Rodriguez argued that the guarantee of “security of person” found in section 7 protected her right to decide what would happen to her body. Control over her body would be violated if she could not choose to die. Rodriguez claimed that forcing her to live in a degenerated body would be cruel and unusual treatment, in violation of section 12. Finally, she claimed that the *Code*, by barring a terminally ill person from a “physician assisted suicide,” in effect creates inequality. It prevents individuals who are physically unable to end their lives without assistance from choosing suicide; yet that option is, in principle, available to other members of the public without contravening the law. Commission of suicide is not a punishable offence or a crime.

In a split decision, the Supreme Court of Canada determined that the right to security of person also had to be viewed in light of the sanctity of life, the right to life also being specifically guaranteed under section 7. Section 12 was not violated by the *Code*, as a prohibition of assisted suicide is not a form of “treatment” by the state. Finally, the majority determined that if equality rights were violated by the *Code*, this violation would be justifiable under section 1. Criminalizing assisted suicide protects the sanctity of life and prevents abuses. Concern that decriminalization of assisted suicide might lead to abuses

⁵⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) at 841.

⁵⁵ See *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 B.C.S.C. 1639 (CanLII), where British Columbia’s drunk driving laws, providing for automatic roadside prohibition, were successfully challenged for violating section 8 of the *Charter*.

⁵⁶ [1993] 3 SCR 519, 1993 CanLII 75 (SCC).

⁵⁷ [2015] 1 SCR 331, 2015 SCC 5 (CanLII).

prevented the Court from taking the first step down the slippery path toward it. “Active euthanasia,” or doctor-assisted suicide, thus remained illegal in Canada.

Two decades later the same issue was before the Supreme Court in the *Carter and Taylor* appeals. Gloria Taylor set about ending her life following a diagnosis of Lou Gehrig’s disease. She launched a “right to die with dignity” lawsuit. In June 2012, the B.C. Supreme Court agreed that existing laws did deny Taylor the right to control her own life. She was given an exemption so she could get help ending her own life, but she died before that could happen.⁵⁸

Lee Carter also sought the right to die; the Supreme Court of Canada heard the appeal in October 2014.⁵⁹ The Court reversed its earlier position and declared that insofar as the law prohibits physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, sections 241(b) and 14 of the Criminal Code deprive these adults of their right to life, liberty, and security of the person under section 7 of the Charter. The declaration of invalidity, however, was suspended for 12 months.

DISCUSSION QUESTIONS

Should the issue of decriminalizing euthanasia be determined by the courts or by Parliament? As Sue Rodriguez asked, “Whose life is it anyway?” The courts have clearly put the issue back into Parliament’s hands, within a time frame. It remains to be seen whether politicians will seek public input on this complex ethical issue.

Every person is to be equal before and under the law

EQUALITY RIGHTS

The equality rights set out in section 15 of the *Charter* prohibit discrimination in the application of the law on the basis of gender, religion, race, age, or national origin and ensure that all people in Canada have the same claim to the protection and benefits of the law. This means that the various provisions of the federal and provincial laws must be applied equally to all. Any time a distinction is made in any provincial or federal law or by a government official on the basis of one of these categories, it can be challenged as unconstitutional.

CASE SUMMARY 2.14

Age Discrimination Justified: *Withler v. Canada (Attorney General)*⁶⁰

The plaintiffs, widows whose supplemental death benefits were reduced because of the age of their husbands at the time of death, complained of unequal treatment under the law. The *Public Service Superannuation Act (PSSA)* and the *Canadian Forces Superannuation Act (CFSA)* provide a supplementary death benefit of twice the salary of the participants upon their death, subject to a reduction for age. Under the *PSSA*, public servants’ benefits are reduced by 10 percent for each year of age in excess of 65; under the *CFSA*, Canadian Forces members’ benefits are reduced 10 percent for each year of age beyond 60. The plaintiffs claimed that those provisions constitute age discrimination and thus violate section 15 of the *Charter*. They sought a declaration that the provisions are inconsistent with the *Charter* and of no force and effect and claimed judgment for the amount by which benefit payments had been reduced (an amount exceeding \$2 billion for the class).

⁵⁸ See *Carter v. Canada (Attorney General)*, 2012 B.C.S.C. 886 (CanLII), where the laws prohibiting physician-assisted suicide were declared to unjustifiably infringe on sections 7 and 15 of the *Charter*.

⁵⁹ A webcast of the hearing (Case #35591), held on October 15, 2014, is available on the Supreme Court’s website, www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35591.

⁶⁰ [2011] 1 SCR 396, 2011 SCC 12 (CanLII).

The Supreme Court concluded that the approach to be taken when addressing equality rights is one that takes account of the full context of the claimant group's situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

Clearly, the reduction provisions at issue in this case were age related; they thus constituted an obvious distinction on an enumerated ground. Next, the Court addressed whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. To answer this question, the focus must be on the nature of the benefit. A contextual assessment revealed that the age-based benefit reduction did not breach section 15 because the benefit reductions reflected the reality that different groups of survivors have different needs. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, whose spouses' long-term income security is guaranteed by the survivors' pension coupled with the public service's health and dental plans, it is intended to assist with the costs of terminal illness and death. Rather than causing disadvantage, the reduction provisions actually furthered the goal of the scheme—to provide for surviving spouses according to their needs. Accordingly, the court challenge to these provisions failed.

DISCUSSION QUESTION

Distinctions as to who qualifies for government assistance are often based on age or some other ground that may be protected by the *Charter*. What factors may lead a court to conclude that a program violates the *Charter* because of unequal treatment?

Section 15 contains a general prohibition against discrimination, so even where the discrimination relates to a category not specifically listed, victims will generally be protected. The courts interpret the Constitution and its provisions broadly. Thus, even though section 15 makes no reference to sexual preference or orientation, the courts have had no difficulty in concluding that a denial of benefits to same-sex couples is prohibited because it discriminates against applicants on the basis of their sexual orientation. See the MyBusLawLab for further details.

CASE SUMMARY 2.15

Courts Prompt Significant Legislative Changes: *Halpern v. Canada (Attorney General)*⁶¹

The Ontario Court of Appeal was asked whether the exclusion of same-sex couples from the common law definition of marriage as “one man and one woman” breached sections 2(a) or 15(1) of the *Charter*. It declared the definition of marriage to be invalid as it offends equality rights. It reformulated the definition to the “voluntary union for life of two people to the exclusion of all others” and declared this definition to have immediate effect. Consequently, numerous same-sex couples rushed to secure marriage licences. The federal government responded by referring a proposed bill on same-sex marriage to the Supreme Court of Canada for review.⁶² After the Supreme Court affirmed the validity of the proposed legislation and the authority of the federal Parliament to define marriage, Parliament proceeded to redefine marriage to include same-sex couples.⁶³

⁶¹. 2003 CanLII 26403 (ON CA).

⁶². *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79 (CanLII).

⁶³. *Civil Marriage Act*, S.C. 2005, c. 33.

DISCUSSION QUESTION

Parliament remains supreme in Canada, so long as it does not violate the Constitution. Knowing what you do about the *Charter*, what steps could Parliament have taken if it wished to preserve the traditional definition of marriage?

It is important to note that section 15(2) provides for affirmative-action programs. When a provision is intentionally introduced that has the effect of discriminating against one group of people, it may still be allowed if its purpose is to correct an imbalance that has occurred through discrimination in the past. Thus, the government may intentionally set out to hire women or specific ethnic minorities to get a better balance in the civil service. This is permissible even though it will have the effect of preventing people of other groups, such as white men, from having an equal opportunity to obtain those same jobs. Universities often have similar programs to encourage minorities to enter faculties or professions to correct historical imbalances.

In addition to the provisions set out in section 15, there are other provisions in the *Charter* setting out equality rights. Section 28 guarantees that the provisions of the *Charter* apply equally to males and females. Equality rights (protected by section 15) can be overridden by the operation of the notwithstanding clause, but section 28 cannot be overridden.

Section 35 states that the *Charter* in no way affects the rights (including treaty rights) of the Aboriginal peoples of Canada. Although this last provision may have the effect of preserving inequality rather than eliminating it, the objective of this section is to ensure that during the process of treaty negotiations and land claim disputes between the provincial governments and Aboriginal groups, nothing in the *Charter* would interfere with the special-status rights associated with that group. Section 33 cannot be used to override the protection given to the position of the Aboriginal peoples of Canada.

Although these *Charter* provisions apply only in our dealings with government, it is important for businesspeople to remember that these equality provisions are the essence of most provincial and federal human rights legislation. Since those statutes must comply with the *Charter* provisions, the *Charter* indirectly controls business practices (see Case Summary 2.17, *Vriend v. Alberta*). In addition, there are many examples of provincial and federal legislation that require all those working on government-funded projects to comply with special federal and provincial programs aimed at correcting past injustices. These special requirements may range from fair-wage policies (where non-union businesses must pay wages comparable with union-negotiated wages) to programs requiring the hiring or promotion of disadvantaged minorities or the correction of gender imbalances in the workforce.⁶⁴

LANGUAGE RIGHTS

The part of the *Charter* headed “Official Languages of Canada” and outlined in sections 16 to 22 ensures that French and English have equal status and that rights of minorities to use those languages are protected.⁶⁵ Of the Canadian provinces, only New Brunswick is officially bilingual, so section 16 of the *Charter* declares that English and French are the official languages of Canada (federally) and of New Brunswick. All federal government activities, including court proceedings, publications, and other services where numbers warrant, must be available in both official languages. Similar rules are established for New Brunswick. Note that some language rights are set out in the *Constitution Act, 1867*. For example, section 3 requires that Quebec provide court services in English as well as French. The *Constitution Act, 1867* also requires that Manitoba provide many government services in both English and French.

French and English have equal status—Canada and New Brunswick are officially bilingual

⁶⁴ See, for example, the federal *Employment Equity Act*, S.C. 1995, c. 44.

⁶⁵ See *R. v. Beaulac*, [1999] 1 SCR 768, 1999 CanLII 684 (SCC), where the accused successfully appealed his conviction on murder charges and a new trial was ordered because the B.C. trial judge refused his request for a trial before a bilingual judge and jury. Although the accused could express himself in English, his own official language was French.

CASE SUMMARY 2.16**Traffic Ticket Challenge Could Necessitate Translation of Alberta's Laws: *R. v. Caron*⁶⁶**

It is amazing what fighting a traffic ticket might lead to. Gilles Caron, a francophone truck driver, challenged a \$54 traffic ticket, arguing that the law was invalid as it had not been published in French. Alberta's 1988 *Languages Act* revoked French language rights, but Caron argued this law was unconstitutional.

Expert testimony was introduced and revealed that a key piece of historical evidence was missing when the *Languages Act* was passed. Records established that Rupert's Land (from which Alberta was carved) agreed to join Canada only if French language rights were protected. Judge Leo Wenden ruled the *Languages Act* unconstitutional and stated that Alberta was constitutionally required to enact all of its legislation in English and French. Caron was found not guilty of the traffic violation.

The decision was appealed. The Court of Appeal was asked to consider two questions: (1) Must the statutes of the province of Alberta be printed and published in English and French; and (2) is the *Languages Act*, R.S.A. 2000, c. L-6, *ultra vires* to the extent that it abrogates Alberta's constitutional obligation to print and publish its statutes and regulations in English and French? The Court's answer to these questions was "no." Justice Rowbotham stated,

Even with the application of the constitutional principles of protection of minorities, and the need to interpret the relevant language in a large and liberal manner, I cannot ignore certain realities. Parliament clearly entrenched language rights in Manitoba about the same time as it enacted the 1870 Order. Parliament and the Imperial Parliament knew full well how to entrench language rights. Yet, neither elected to do so in any constitutional document relating to what is now Alberta. In the result, I conclude that this is an insurmountable obstacle to the appellants' claim.⁶⁷

Justice Slatter, who concurred with the result, did so on the basis that the decision of whether legislation needed to be published in French had already been decided in *R. v. Mercure*,⁶⁸ which addressed identical issues with respect to whether laws need be published in French in Saskatchewan.

A final appeal was heard by the Supreme Court of Canada on February 13, 2015. The judgment was reserved, so the province awaits word as to whether it will need to publish its laws in French.

DISCUSSION QUESTION

Who should bear the cost of *Charter* challenges? Caron obtained an order directing the Crown to provide approximately \$94 000 to him for legal costs incurred during the trial. While the traffic ticket charges were minor, the trial raised the issue of French language rights and proceeded over 80 days. The government appealed the funding order but lost.⁶⁹ The legal costs, however, will be trivial compared to the potential cost of translating and publishing Alberta's laws in French.

Minority-language educational rights, outlined in section 23, are guaranteed for the citizens of Canada, ensuring that those whose first language is English or French and who received their primary education in English or French, or have had one of their children educated in English or French, have the right to have their other

⁶⁶. 2014 A.B.C.A. 71 (CanLII); appeal heard by the Supreme Court of Canada on February 13, 2015; judgment reserved. See Case #35842.

⁶⁷. *Supra* note 65, at para. 20.

⁶⁸. [1988] 1 SCR 234, 1988 CanLII 107 (SCC).

⁶⁹. [2011] 1 SCR 78, 2011 SCC 5 (CanLII).

children educated in that language. People who are immigrants to Canada have no such rights, no matter what their native language may be. Note that the right to be educated in English or French applies only where community numbers warrant the expense of setting up such a program. Language rights and minority-language educational rights cannot be overridden by section 33 of the *Charter*.

SECTION 52

The *Constitution Act, 1982* made other important changes to Canada's Constitution. In addition to declaring that the Constitution is the "supreme law of Canada," section 52 also sets out all the statutes that have constitutional status in an attached schedule. Important amendments were also made to the *Constitution Act, 1867*, creating section 92A, which expands the power of the provinces to make law with respect to non-renewable natural resources, including the generation of electric power and forestry resources.

The Importance of the Changes to the Constitution

The significance of the 1982 additions to the Constitution cannot be overemphasized. The *Charter of Rights and Freedoms* will continue to affect the development of Canadian law over the next century. Traditionally, Canadian courts had adopted the position that their function was to apply the law as it existed. If the law needed to be changed, the judiciary left the job to Parliament and the legislative assemblies. It is clear that the courts have been forced to play a more active role and create new law through their interpretation and application of the provisions of the *Charter*. The broad, generalized nature of the *Charter* provisions contributes to this more expansive role of the courts. Statutes have traditionally been interpreted in a narrow way, and because of this they are always carefully and precisely worded. But the *Charter* provisions are generalizations, and the courts must therefore interpret these broad statements by filling in the gaps and thus making new law.

The *Constitution Act, 1982* also eliminated the requirement that any major change involving Canada's Constitution had to be made by an act of the Parliament of Great Britain. Because the original *BNA Act* was an Act of the British Parliament, any changes to it had to be made by that body. When the provinces and the federal government agreed on a formula for amending the Constitution at home in Canada (a process known as "repatriation"), the British Parliament passed the *Canada Act*,⁷⁰ making Canada completely independent of Britain. It should be emphasized that although Canada's ties to the British Parliament have been severed, our relationship with the monarch remains. The Queen remains the Queen of Canada, just as she is the Queen of the United Kingdom, Australia, New Zealand, and other independent nations.

Quebec, however, did not assent to this document. Subsequently, another important agreement that attempted to change this amending formula was drawn up—the Meech Lake Accord. However, the Accord did not receive the required unanimous approval by the provinces within the specified time limit. Its failure and the failure of the subsequent Charlottetown Accord (which went to a national referendum) have created a constitutional crisis in Canada, with Quebec seeking independence. The pro-separatist government in Quebec took the question of sovereignty to a provincial referendum in 1996, which failed by a margin of only 1 percent. Thereafter, the federal government submitted a Reference to the Supreme Court of Canada⁷¹ to determine whether Quebec could unilaterally secede from Canada. Discussions regarding granting Quebec distinct status in Canada have occasioned much debate and dissension within the federation. The question of whether Quebec will remain in Canada continues to be an important and troubling issue for Canada.

Quebec did not agree with patriating the Constitution

⁷⁰ *Canada Act 1982* (U.K.), 1982, c. 11.

⁷¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 798 (SCC).

HUMAN RIGHTS LEGISLATION

Whereas the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms* address protecting individuals' rights from abuses by government, various federal and provincial statutes have been enacted with the aim of protecting an individual's rights from abuse by other members of the public. Initially, human rights legislation was designed to stop discrimination against identifiable minority groups in specific areas, such as hotels and restaurants (see the *Racial Discrimination Act, 1944* of Ontario⁷²). Today's statutes are broader in scope, protecting individuals against human rights violations by the public at large in a variety of settings. The *Canadian Human Rights Act*⁷³ is one example. Refer to the MyBusLawLab for details and provincial variations.

The *Canadian Human Rights Act (CHRA)* applies to abuses in sectors regulated by federal legislation, such as the broadcast and telecommunication industries; similar provincial statutes apply only in areas controlled by provincial legislation.⁷⁴ For example, if you were employed by a bank, any human rights complaints concerning activities at work would be brought before the Canadian Human Rights Commission (CHRC) because banks are federally regulated; however, if you were employed by a provincially regulated retailer, those human rights complaints would be addressed by the provincial human rights commission. These statutes aim at ensuring that individuals have access to employment (including membership in professional organizations and unions) without facing barriers created through discrimination. Access to facilities and services customarily available to the public, as well as to accommodation (tenancies), is likewise addressed. In addition, the legislation targets discriminatory publications and signs that expose individuals to hatred or contempt.

Human rights acts prohibit discrimination based on various protected grounds, including gender, religion, ethnic origin, race, age, and disabilities. The *CHRA* now specifically protects against discrimination on the grounds of sexual orientation and pardoned criminal conviction, but not all provincial legislation goes so far. Where protection against discrimination on the basis of sexual orientation has been left out of human rights legislation, the courts have shown a willingness to imply the existence of this protection. The principle applied is that under the *Charter of Rights and Freedoms* every individual is entitled to the "equal protection and equal benefit of the law"; therefore, such rights ought to have been included. In the process, the courts are effectively rewriting statutes.

LO 8

MyBusLawLab



Human rights legislation prohibits discrimination in certain prescribed areas

Human rights legislation addresses discrimination on certain prohibited grounds

CASE SUMMARY 2.17

Equality Issues Resolved by the Courts: *Vriend v. Alberta*⁷⁵

In 1987, Delwin Vriend was employed at King's College, a private religious school. His job performance was not in question, but he was dismissed after he "disclosed his homosexuality." He tried to file a complaint under Alberta's *Individual's Rights Protection Act (IRPA)* but was advised that sexual orientation was not a ground upon which discrimination was prohibited by the Act.

⁷² S.O. 1944, c. 51.

⁷³ R.S.C. 1985, c. H-6.

⁷⁴ See *Human Rights Code*, R.S.O. 1990, c. H-19; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5; *Human Rights Code*, R.S.B.C. 1996, c. 210; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; *The Human Rights Code*, C.C.S.M. c. H175; *Human Rights Act*, R.S.N.B. 2011, c. 171; *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1; *Human Rights Act*, R.S.N.S. 1989, c. 214; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12; *Human Rights Act*, S.N.W.T. 2002, c. 18; *Human Rights Act*, S. Nu. 2003, c.12; *Human Rights Act*, R.S.Y. 2002, c. 116.

⁷⁵ [1998] 1 SCR 493, 1998 CanLII 816 (SCC).

The case went to the Supreme Court of Canada, which agreed with the trial court that the protections given by the Act were under-inclusive, protecting some but not all from discrimination. The Supreme Court essentially rewrote the provincial statute so that it complied with section 15 of the *Charter of Rights and Freedoms* by reading “sexual orientation” into the impugned provisions of the *IRPA*. It reasoned that this was the most appropriate way of remedying the under-inclusiveness. In light of the Act’s preamble and stated purpose, if the legislature had the choice of having no human rights statute or having one that extended protection to those historically facing discrimination—like homosexuals—the latter option would be chosen.

This case is interesting because it raises the issue of how far the courts can go in shaping the law. Here the Supreme Court effectively rewrote provincial legislation so as to make it consistent with the *Charter*.

DISCUSSION QUESTIONS

What do you think? Is “judicial legislating” proper under Canada’s Constitution? Or should the courts merely declare whether legislation is constitutional or not, and then allow the legislators time to amend any contravening legislation?

Human rights protections continue to evolve

It is interesting to reflect on the evolution of human rights protection. Three decades ago discrimination based on sexual orientation was not specifically prohibited. Passage of the *Charter* enabled individuals to challenge laws that denied equal treatment. Cases like the *Vriend* decision brought the issue of discrimination based on sexual orientation to the attention of the public. As public sensitivity increased, the protection given to same-sex relationships expanded. The denial of marriage licences was held to be unconstitutional; eventually, the federal government was pressured to redefine marriage and sought the Supreme Court’s input in the *Reference re Same-Sex Marriage* case.⁷⁶ Now the protections extended to same-sex marriages equal those extended to traditional marriages. See the MyBusLawLab for details.

Complaints are resolved through mediation—or tribunal hearings

Both the federal and the provincial governments have set up special human rights tribunals authorized to hear complaints of human rights violations, to investigate, and where appropriate to impose significant sanctions and remedies. There are time limits to consider: A complaint before the CHRC, for example, must be filed within 12 months of the alleged incident. The commission then proceeds to attempt settlement of the complaint through mediation and investigation. If all else fails, a tribunal hearing is convened.

For businesspeople, knowledge of the human rights codes applicable to their industry is essential. These codes not only govern how employees are to be treated but also apply to the treatment of customers and those with whom business is conducted. In fact, a significant number of cases before human rights commissions deal with complaints arising from business interactions, usually because of questionable customer relations practices.

CASE SUMMARY 2.18

Nightclub’s Racial Policies Exposed: *Randhawa v. Tequila Bar & Grill Ltd.*⁷⁷; *Simpson v. Oil City Hospitality Inc.*⁷⁸

In the *Randhawa* case, the complainant had already been refused entry by another establishment before joining the lineup to enter the Tequila Bar. He asked the doorman whether he too would be turning the complainant away because he was wearing a turban. The first

⁷⁶ [2004] 3 SCR 698, 2004 SCC 79 (CanLII).

⁷⁷ 2008 A.H.R.C. 3 (CanLII).

⁷⁸ 2012 A.H.R.C. 8 (CanLII).

doorman indicated that it was not going to be an issue. But then another doorman came over and told Randhawa to save his time as he would not be admitted that night. The club would require that Randhawa produce three pieces of government-issued ID, and if he did manage to produce that, the club would insist on five or ten pieces.

When Randhawa objected that such discrimination was wrong and asked why the doorman was doing this, the doorman replied that it being Calgary Stampede week the owners wanted to maintain a certain image. The lineup was being monitored by management via security camera; management had instructed the doormen to deny the complainant and his friends entry so as not to have too many “brown” people inside.

Similarly, in the *Simpson* case the complainant was denied entry to a nightclub because he was Asian.

In each case the Human Rights Tribunal found the evidence of the complainants and their witnesses credible, whereas the respondents failed to take the complaints seriously. Simpson was awarded general damages of \$15 000; Randhawa was awarded \$5000 for his pain, suffering, and loss of self-respect and dignity plus interest and travel costs. The respondents were each required to issue apologies, implement specific policies on racial discrimination in the workplace, and their management and staff were ordered to participate in an education seminar conducted by the commission. Oil City was also required to post signs stating “THIS ESTABLISHMENT WELCOMES PATRONS OF ALL RACES.”

SMALL BUSINESS PERSPECTIVE

These cases highlight the necessity of being familiar with human rights legislation as a provider of services or accommodation. Failure to treat customers equally may lead to a finding of unlawful discrimination. The consequences may be costly and the negative publicity embarrassing.

Discrimination may involve singling out individuals and treating them differently than others. Harassment is an action addressed by human rights legislation. The offending conduct usually involves the misuse of a position of power or authority to obtain a sexual or some other advantage. Protection against sexual harassment exists because sexual harassment is regarded as a form of discrimination on the basis of gender. Protection against other forms of harassment, even where not specifically addressed by legislation, is now being addressed by employers in their policy manuals and in collective agreements.

Human rights decisions recognize that when there is a duty not to discriminate there is a corresponding duty to take reasonable steps to accommodate any person who may be discriminated against. This may require anything from creating wider spaces between workstations to accommodate a wheelchair to providing a digital reader for a blind person. Failure to accommodate religious beliefs may result in the employer being required to take reasonable steps to rearrange work schedules so that employees are not obligated to work on their day of worship. The field of employment is impacted significantly by human rights legislation. This will be treated as a specific topic in Chapter 12.

Remedies are available for harassment upon a prohibited ground

Duty to accommodate—unless causing undue hardship

CASE SUMMARY 2.19

Duty to Accommodate Those Facing Discrimination: *Ontario Human Rights Commission et al. v. Simpsons-Sears Ltd.*⁷⁹

Salesclerks employed at a particular branch of Simpsons-Sears Ltd. were required to work some Friday nights and two out of every three Saturdays. Mrs. O’Malley, a member of the Seventh-day Adventist Church, informed her manager that she could no

⁷⁹. [1985] 2 SCR 536, 1985 CanLII 18 (SCC).

longer work on their Sabbath day (Friday night to Saturday night). Her employment was terminated, and she was hired back part time to accommodate these restrictions. She wanted to continue working full time and laid a complaint with the Ontario Human Rights Commission on the basis of discrimination against her because of her creed. The matter was eventually appealed to the Supreme Court of Canada, which held that discrimination had, in fact, taken place.

It was not necessary to show that there was an intention to discriminate, only that there was discrimination in fact. Even where the rule or practice was initiated for sound economic and business reasons, it could still amount to discrimination if it impacted individuals negatively based on one of the protected grounds. The employer was required to take reasonable steps to try to accommodate the religious practices of this employee, short of creating undue hardship on the business. Since the business had failed to show any evidence of accommodation or that to accommodate would have created undue hardship, the complaint was upheld. Simpsons-Sears was required to pay Mrs. O'Malley the difference in wages between what she had made as a part-time employee and what she would have made as a full-time employee.

SMALL BUSINESS PERSPECTIVE

Human rights legislation forces employers to be sensitive to the diverse needs of employees and accommodate their differences. Employers may complain about this added inconvenience or added obligation, but unless it imposes an undue hardship accommodation will be required.

Since the adoption of the *Charter of Rights and Freedoms*, an issue that often arises is whether these human rights acts go far enough. The protections extend only to certain areas as identified by the specific federal or provincial legislation—typically employment, tenancies, public facilities and services, and public signs and notices. Private clubs can still discriminate as to who they will admit as members because discrimination by private facilities is not prohibited by the legislation. This explains why some golf clubs, for example, do not have female members. Furthermore, the grounds upon which discrimination is prohibited vary from one jurisdiction to another; so even though pardoned criminals may be protected by the federal law, the same is not true under each province's legislation.

CASE SUMMARY 2.20

Accommodating Family Status Includes Considering Childcare Obligations: *Canada (Attorney General) v. Johnstone*⁸⁰

Ms. Johnstone was employed by the Canadian Border Services Agency (CBSA), as was her spouse. Both worked variable shift schedules. After their second child was born, Ms. Johnstone sought a fixed schedule at Pearson International Airport because finding childcare was difficult when both parents worked variable schedules.

In the past, the CBSA had accommodated some employees who had medical issues or constraints due to religious beliefs by providing them with a fixed work schedule on a full-time basis. However, the CBSA refused to accommodate employees' childcare obligations on the ground that it had no legal duty to do so. Instead, the CBSA had an unwritten policy allowing an employee with childcare obligations to work fixed schedules, but only if the employee agreed to work part time. Part-time employees, however,

⁸⁰. 2014 F.C.A. 110 (CanLII).

enjoyed fewer employment benefits, notably with regard to pension entitlements and promotion opportunities.

Ms. Johnstone was not satisfied with the requirement to accept part-time employment in return for obtaining static shifts. She filed a complaint with the Canadian Human Rights Commission alleging discrimination on the basis of family status contrary to sections 7 and 10 of the *Canadian Human Rights Act*.

Note that the CBSA did not refuse to provide static shifts to Ms. Johnstone on a full-time basis on the grounds that this would cause it undue hardship. Instead it took the position that accommodation of childcare obligations was not required of an employer.

The Federal Court of Appeal affirmed that family status incorporates parental obligations such as childcare obligations. Accommodation is required for parental obligations “which engage the parent’s legal responsibility for the child, such as childcare obligations, as opposed to personal choices,” such as choosing to enrol their children in extracurricular activities.

The Court set out the following tests to be applied:

[I]n order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The employer was thus required to accommodate Ms. Johnstone.

SMALL BUSINESS PERSPECTIVE

It will be interesting to see if provincial human rights legislation is enforced using these tests. If so, employers will face further demands to adjust workplace policies in light of employees’ childcare obligations.

Part of the mandate of human rights commissions is to promote knowledge of human rights and to encourage people to follow principles of equality. The prohibition of discriminatory signs and notices assists in that end. The federal *CHRA* goes even further and deems it a discriminatory practice to communicate hate messages “telephonically or by means of a telecommunication undertaking within the legislative authority of Parliament.”⁸¹ In 2002, Ernst Zündel’s Internet site was found to have contravened section 13 of the Act. This was Canada’s first-ever human rights complaint involving an Internet hate site. The Canadian Human Rights Tribunal concluded that the site created conditions that allow hatred to flourish.⁸²

Amendments to the *CHRA* impacting First Nations governments came into force in June 2008. Since 1977, the *CHRA* did not apply to the federal government and First Nations governments for decisions authorized by the *Indian Act*. Complaints arose largely from First Nations women who married non-status Indians and were thus exposed to discriminatory treatment; these women were not able to seek remedies under the *CHRA*. This exemption from the *CHRA* was removed and gender equality stipulations were expressly protected.⁸³

⁸¹ *Canadian Human Rights Act*, R.S. 1985, c. H-6, s. 13.

⁸² *Citron and Toronto Mayor’s Committee v. Zündel*, 2002 CanLII 23557 (CHRT).

⁸³ Section 67 of the *Canadian Human Rights Act* restricted the ability of First Nations people living on reserve to file a complaint against band councils or the federal government. It was repealed by Bill C-21 effective June 18, 2008.

**REDUCING RISK 2.1**

Sophisticated clients understand that it is wise to be familiar with the human rights legislation in place where they do business and to make sure that their activities comply with these laws. In addition to requiring offenders to pay compensation

and damages to those aggrieved, human rights commissions often require public apologies when discriminatory practices have been condoned. The resulting damage to the goodwill and reputation of a business is simply too great to ignore.

MyBusLawLab

Be sure to visit the MyBusLawLab that accompanies this book. You will find practice tests, a personalized study plan, province-specific material, and much more!

SUMMARY**A workable definition of “law”**

- Law is the body of rules made by government that can be enforced by courts or government agencies

Categories of law

- Substantive law governs behaviour
- Procedural law regulates enforcement processes
- Public law comprises constitutional, criminal, and administrative law
- Private law involves one person suing another

Origins of law

- Civil law jurisdictions rely on principles found within a civil code
- Common law jurisdictions rely on principles established by judge-made laws (precedents)

Sources of Canadian law

- Common law
- Equity from chancery courts
- Statutes—legislation of federal and provincial governments

Constitution of Canada

- Various statutes that have constitutional status
 - *Constitution Act, 1867 (BNA Act)*
 - *Constitution Act, 1982*, including the *Charter of Rights and Freedoms*
 - Statutes listed in the Schedule to the *Constitution Act, 1982*
- Conventions and traditions
- Case law on constitutional issues

Constitution Act, 1867

- Created the Dominion of Canada and established its structures
- Divides power between federal and provincial governments
- Legislative powers are set out largely in sections 91 and 92
- Courts interpret and rule on constitutional issues

Charter of Rights and Freedoms

- Entrenches the rights of individuals in Canada
- All legislation must be compliant with the *Charter*
- Applies to relationships with government
- Limited by sections 1, 32, and 33

Human rights legislation

- Federal—provides protection against discrimination by businesses that fall under federal jurisdiction
- Provincial—addresses discriminatory practices by parties under provincial regulation

QUESTIONS FOR REVIEW

1. Why is it difficult to come up with a satisfactory definition of law?
2. Where do we look to predict the outcome of a legal dispute:
 - a. in a common law system?
 - b. in a civil law system?
3. Explain how the use of previous decisions differs in civil law and common law jurisdictions.
4. Describe what is meant by the following statement: “Common law judges did not make the law, they found it.”
5. Describe the advantages and the disadvantages of the system of *stare decisis*.
6. Describe the problems with the common law system that led to the development of the law of equity.
7. Detail what was accomplished by the *Judicature Acts of 1873–1875*.
8. Explain what is meant by the phrase “the supremacy of Parliament.”
9. What effect will a properly passed statute have on inconsistent judge-made law (case law)?
10. Outline how a parliamentary bill becomes law.
11. Using the principle of *stare decisis*, explain how judges determine whether they are bound by another judge’s decision in a similar case.
12. What is included in Canada’s Constitution?
13. What is the effect of sections 91 and 92 of the *Constitution Act, 1867*, formerly the *British North America Act*?
14. How did the *Constitution Act, 1867* limit the power of the federal and provincial governments? How is it possible, given the division of powers, to have identical provisions in both federal and provincial legislations and have both be valid?
15. Explain what is meant by the doctrine of paramountcy. When does the doctrine apply?
16. Describe the limitations on the federal and provincial governments’ powers to delegate their authority to make laws.
17. Identify the limitations of human rights legislation. Does it address all discrimination?
18. Explain how the *Constitution Act, 1982*, including the *Charter of Rights and Freedoms*, affects the doctrine of supremacy of Parliament.
19. Explain any limitations that apply to the rights and freedoms listed in the *Charter*.
20. Give examples of democratic rights, mobility rights, legal rights, and equality rights as protected under the *Charter*. Give examples of three other types of rights protected under the *Charter*.
21. How do human rights codes differ in their application from the *Charter of Rights and Freedoms*?

CASES AND DISCUSSION QUESTIONS

1. *R. v. Clough*, 2001 BCCA 613 (CanLII)

Ms. Clough was convicted in a B.C. Provincial Court of possession of cocaine for the purposes of trafficking and possession of a small amount of marijuana. At the time of sentencing, the provincial court judge had to decide whether this was an appropriate case to impose a conditional sentence on Ms. Clough or whether a harsher sentence involving a jail term was warranted. He was asked to take into consideration the Supreme Court of Canada decision in *R. v. Proulx*, setting out certain guidelines for sentencing in these circumstances, and the British Columbia Court of Appeal decision in *R. v. Kozma*, which upheld the imposition of a conditional sentence in a similar matter. The trial judge decided that *Kozma* was wrongly decided and imposed a jail sentence instead.

If Clough was to appeal her sentence, what argument could she make?

2. *R. v. Spratt*, 2008 BCCA 340 (CanLII); application for leave to appeal to the Supreme Court dismissed June 18, 2009

Spratt and Watson were charged under sections 2(1)(a) and 2(1)(b) of the provincial *Access to Abortion Services Act* as a result of their activities outside of a Vancouver health clinic. Signs stating “You shall not murder” and “Unborn Persons Have the Right to Live” were waved within a “bubble” or access zone outside the abortion clinic. The law aims to protect women from interference in this zone. The accused argued that the law violates their freedom of expression.

Whose rights should be paramount in cases such as this?

3. *McKay-Panos v. Air Canada*, [2006] 4 FCR 3, 2006 FCA 8 (CanLII)

The appellant, a morbidly obese passenger, was subjected to offhand remarks and laughter when she expressed concern over whether an economy class seat would accommodate her. She was told she would not have to purchase two seats, but suffered bruising and indignation when she tried to fit into a standard seat. The issue brought before the Canadian Transportation Agency was whether obesity was a disability that airlines needed to accommodate.

Is obesity a disability that demands accommodation? To what extent should an airline have to accommodate large passengers?