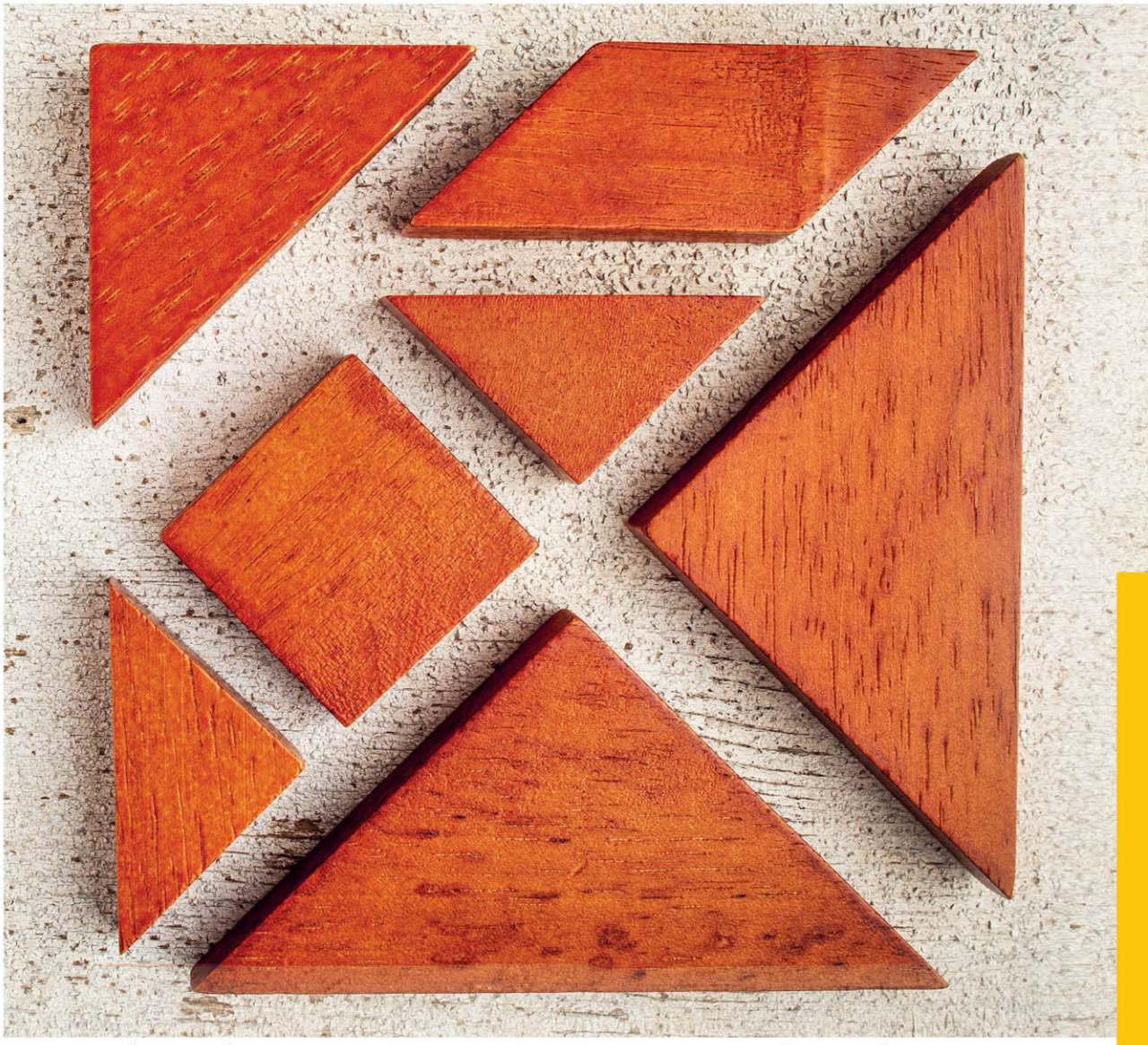
Legal Fundamentals

for Canadian Business



Fourth Edition

Richard A. Yates

FOURTH EDITION

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for Canadian Business

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RICHARD A. YATES Simon Fraser University

PEARSON

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PREFACE

I am very pleased to have the opportunity to write a fourth edition of *Legal Fundamentals for Canadian Business* but also feel some trepidation. It is difficult to resist adding a lot more information because certainly the law is constantly changing; there are new case decisions, new legislative enactments, and new challenges facing business people that are not clearly elucidated in the current law. The difficulty is that adding more threatens the primary purpose of the text—to make the information manageable in a one-semester undergraduate course and to cover the information essential for students to enter into the business environment with confidence. So in the process of revising, I have kept the original focus clearly in mind. I have implemented a number of recommendations from reviewers, modifying, increasing, and reducing content as appropriate. I have maintained a focus on intellectual property and information technology, as they are areas where there have been dramatic legislative changes and technological advancements in recent years. I always keep in mind that a risk-averse businessperson is perhaps the most astute, and so we have increased the suggestions and ideas on how legal complications can develop and have proposed ways and means to avoid them. As usual we have replaced many of the cases with newer decisions and commented on their impact on the laws that affect business decision making. Recognizing that judicial decisions are the essential guideposts to business activity, I give full recognition to their importance in this endeavour. I am grateful to students and instructors whose use of the text suggests that I am still on the right track.

APPROACH

Although some may raise their eyebrows at yet another business law text in an already crowded field, I have observed that most of the texts currently used are too extensive or too detailed for some courses. In this text I have attempted to create a shorter book (only 10 chapters) without sacrificing essential content. I have also found that the text usually drives the course; and many instructors complain that they don't have enough time in a 14-week term to deal with all of the subjects they would like to cover. Sometimes instructors teach a course that must be delivered in an even more condensed time frame. Some teach specialized courses in marketing, computers, finance, and the like, and find that they have to spend so much time on a general introduction to business law that they don't have time to focus on the law that affects the specialized topic that is the primary objective of the course. This text gives business law instructors the flexibility to deal with all of the topics, to customize their course by supplementing it with additional material, and/or to concentrate on an area of specialization.

Many instructors feel a pressing need to deliver the introductory and foundation material efficiently so that there is enough time left to cover more advanced material. Hence, in this text there is only one introductory chapter setting out the history, institutions, and litigation processes used in Canada, only one chapter on torts, and three chapters on basic contract law. A great deal of effort has gone into making these chapters as efficient as possible, while still covering the essential concepts and rules. The remaining five chapters deal with more advanced and technical information—

everything from the legal issues regarding agency and employment to the timely issues of intellectual property—and have not been simplified to the same extent as the first five. Although somewhat condensed here, these topics don't really lend themselves to abbreviation.

FEATURES

I've incorporated several features into the text to engage students. Throughout the text there are **Case Summaries** designed to illustrate the legal concepts under discussion. Such case studies are the heart of any business law course and create a dynamic, practical environment for a subject that, without them, would be dry and uninspiring at best.

For some topics I have also included **diagrams** that illustrate the legal relationships in the case. There are also a number of **figures** and **tables** included throughout the text; these are designed to clarify and summarize information so that it's easily accessible to students.

The **Questions for Student Review** are designed to help students review the chapter material. As they respond to the questions, referring back to the content of the chapter, students should develop a good grasp of the concepts and principles contained in the chapter.

Also at the end of each chapter, **Questions for Further Discussion** can be used in class or group discussions. They raise issues with respect to the topics discussed. There are no solutions provided, as they are intended to point out the dilemmas often faced by those who make or enforce these legal principles.

Questions for Student Review

1. Why is it important for a business student to understand the law?
2. Define law and distinguish between substantive and procedural law.
3. Explain the origin and function of the *Constitution Act (1867)*, formerly the *British North America Act*, and its importance with respect to how Canada is governed.
4. Explain parliamentary supremacy and its place in our legal system.
5. Indicate the importance of the *Constitution Act (1982)*, and explain why it was important to the development of Canada.
6. How are individual human rights protected in Canada?
7. Explain the significance of the *Charter of Rights and Freedoms*, and identify three limitations on its application.
8. Describe the basic rights and freedoms protected in the *Charter*.
9. Describe the court structure in place in your province.
10. Contrast the nature and function of the provincial court and superior trial court in your province, and distinguish between the roles of trial courts and courts of appeal, including the Supreme Court of Canada.

Questions for Further Discussion

1. Discuss the relationship between law, morality, and ethics. How does an individual determine what is ethical behaviour and what is not if one cannot use the law as the test? What would be the outcome if the courts tried to set a social or personal moral standard? What role should morality and ethics play in business decisions?
2. Canada has a tradition of parliamentary supremacy inherited from Great Britain. However, that tradition has been modified somewhat by the passage of the *Charter of Rights and Freedoms*. Explain how the *Charter* has limited parliamentary supremacy, how that affects the role of the courts, and whether these changes are advantageous or detrimental to Canada as a democracy.
3. The process leading to trial is long, involved, and costly. Most jurisdictions are trying to change the procedures to alleviate delays and costs. How successful are they, and what other changes would be appropriate? Keep in mind the benefits of the current system; do they outweigh the disadvantages? In your discussion consider the advantages and disadvantages of alternate dispute-resolution methods.

Cases for Discussion

1. *Isen v. Simms*, S.C.C., 2006 SCC 41; [2006] 2 S.C.R. 349

   Isen was the owner of a 17-foot pleasure boat. After a day of boating on the lake and loading the boat on its trailer in preparation for transporting it on the highway, Isen was securing the boat with the help of Dr. Simms. Isen was stretching a bungee cord over the engine when it slipped and hit Dr. Simms, causing an eye injury. He and his wife sued in the Ontario Superior Court for $2.2 million. Mr. Isen brought an application before the federal court for a declaration that the federal maritime law applied and the *Canada Shipping Act* imposed a $1 million limitation on damages in this situation. Explain whether the limitation imposed in the federal statute should apply in this situation and why.

2. *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1094, 106 D.L.R. (4th) 233 (SCC)

   This is a classic case dealing with freedom of expression. The City of Peterborough had passed a by-law prohibiting the posting of any material on city property. The by-law prohibited the posting of "any bill, poster, or other advertisement of any nature," on any

Finally, the **Cases for Discussion** at the end of each chapter are based on actual court reports. I have not included the decisions so that the cases can be used in assignments or for classroom discussions. Instructors have access to the actual outcomes in the Instructor's Manual, or students can follow the reference to discover the outcome for themselves.

SUPPLEMENTS

Legal Fundamentals for Canadian Business, Fourth Edition, is accompanied by a new comprehensive and exciting supplements package.

Companion Website The Companion Website is an online study tool for students. The Companion Website provides students with an assortment of tools to help enrich the learning experience, including, glossary flashcards, student PowerPoints, self-quiz, internet exercises, short essay exercises, cases with assessments, and hyperlinked URLs. This comprehensive resource includes provincial supplements for British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and the Atlantic provinces, covering special topics for each of these areas. These topics include a brief overview of business legislation specific to the province, along with links to relevant cases, legislation, and additional resources.

Instructor's Manual This manual includes a number of aids, including outlines of how lectures might be developed, chapter summaries, answers to review questions, and suggestions for conducting classroom discussions. The court decisions for the end-of-chapter cases are also provided, and sample examination questions are included for each chapter.

MyTest MyTest from Pearson Canada is a powerful assessment generation program that helps instructors easily create and print quizzes, tests, and exams, as well as homework or practice handouts. Questions and tests can be authored online, allowing instructors ultimate flexibility and the ability to efficiently manage assessments at any time, from anywhere. MyTest for *Legal Fundamentals for Canadian Business*, Fourth Edition, contains a comprehensive selection of multiple-choice, true/false, and short essay questions with answers. A link to the MyTest is available on the Pearson online catalogue. These questions are also available in Microsoft Word format as a download from the online catalogue.

PowerPoint® Presentations This supplement provides a comprehensive selection of slides highlighting key concepts featured in the text to assist instructors and students. The complete PowerPoint slides can be downloaded from the Pearson online catalogue.

Image Library Every image from the book is available to instructors in electronic format to use in lectures and presentations. The Image Library can be downloaded from the Pearson online catalogue.

Technology Specialists Pearson's Technology Specialists work with faculty and campus course designers to ensure that Pearson technology products, assessment tools, and online course materials are tailored to meet your specific needs. This highly qualified team is dedicated to helping schools and instructors take full advantage of a wide range of educational resources, by assisting in the integration of a variety of instructional materials and media formats. Your local Pearson Education sales representative can provide you with more details about this service program.

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Navigate to the book's catalogue page to view a list of available supplements. See your local sales representative for details and access.

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Chapter 1

The Canadian Legal System

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Learning Objectives

LO 1 Define what law is

LO 2 Identify the sources of Canadian laws and distinguish their components

LO 3 Describe the structure of the courts in Canada and illustrate the litigation process

LO 4 Outline the processes of trial and judgment

LO 5 Explain the function and use of alternative methods for resolving disputes

LO 6 Define administrative law and explain when and how it is used

LO 7 Describe the aspects of criminal law that should be of concern to a business person

Knowledge of law is vital for business

An understanding of law and the legal system in Canada is essential for the business person. Business activities, like other forms of human endeavour, involve significant human interaction. Whether you are a manager, a consultant, a professional, or a consumer, you must deal with suppliers, employees, creditors, lawyers, insurance agents, landlords, accountants, shareholders, and senior managers, as well as government agencies. All of these relationships carry with them important rights, responsibilities, and obligations. These rights and obligations take the form of legal rules, and to participate in business it is important to understand them. The objective of this text is to provide the business person with enough information about the law so that legal problems can be avoided; to know when he or she is involved in a situation where legal advice is needed; and to be a more informed and effective client when those services are required. The client must give the lawyer instruction and direction as to what to do, not the other way around. With a basic understanding of the law, the client is better able to give those instructions. Business people without such an understanding will often ignore the law or make the wrong decision in situations that have important legal consequences and thus make the situation much worse.

Perhaps the most important benefit to the student from the study of business law is the knowledge of how to reduce the legal risk of doing business. Risk avoidance with respect to physical facilities such as stores, restaurants, plants, showrooms, warehouses, and factories is easy to understand but often difficult to implement. We often see accidents waiting to happen. A plate-glass door polished to invisibility is an invitation for someone in a hurry to crash through it. A step down in a restaurant that is obscured by lighting set low for effect will likely result in a fall. Unlit stairwells, frayed carpets, improperly secured grab handles or railings, and balconies with low railings are just a few examples of physical dangers that should be removed or repaired. It is equally important to do everything possible to reduce legal risk with respect to business practices. A simple example is a restaurant server using a glass to scoop ice cubes instead of a metal or plastic scoop. The glass can chip or break and cause a serious injury. But the same principle applies to the more complicated aspects of doing business. Contracts must be carefully drawn to anticipate all eventualities. Intellectual property, including electronically stored data and electronic communications, should be protected. Checking references is important with respect not only to potential employees, but also to suppliers, service providers, and important customers. Even the lawyers providing legal advice should be carefully chosen. Risk avoidance is not simply a long list of things to avoid. Rather, it is a state of mind, where we try to anticipate what can go wrong and take steps to avoid that eventuality. Of course, to manage risk it is necessary to recognize the risks and to understand them. Employment, personal injury and contract disputes are most common in business. This text covers these and several other related topics and, encourages the development of a risk-avoidance attitude throughout. The first chapter examines the foundation of the legal system and some basic Canadian institutions upon which the commercial legal environment has been built.

LO 1 WHAT IS LAW?

Law consists of rules enforceable in court or by other government agencies

Most people think they understand what law is, but in fact, an accurate definition is difficult to come by. There are serious problems with most definitions of law, including the following, but from a practical standpoint and for the purposes of this book, which is primarily about business law, **law** consists of rules with penalties that are likely to be enforced either by the courts or by other agents of government. While business people should avoid

litigation as much as possible, it is hoped that understanding the rules discussed in this text will help you to avoid and resolve legal problems.

Law and morality should not be confused

It is especially important for business people not to confuse law and morality. The impetus for any given legal rule can vary from economic efficiency to political expediency. It may well be that the only justification for a law is historical, as in "it has always been that way." Legal rules may express some moral content, but no one should assume that because they are obeying the law, they are acting morally. Ethics has become an important aspect of any business education. Recent high-profile incidents of corporate abuses have made the topic of ethics a major area of discussion at both the academic and practical levels. The law is an important consideration in this discussion, if only to stress that law does not define ethical behaviour, and that business people should rise above the minimal requirements of the law. For example, the huge bonuses executives of U.S. financial institutions took for themselves after the government bailout in 2008 may well be morally reprehensible, but it is doubtful that any law was broken. This text will not deal directly with such moral issues, but they will be raised in the Questions for Further Discussion at the end of each chapter.

While this text is most concerned with **substantive law** (the rules determining behaviour, including our rights and obligations), we must also be aware of the other great body of law, **procedural law,** which is concerned with how legal institutions work and the processes involved in enforcing the law. Although there will be some examination of **public law**, where the dispute involves the government (including criminal law and government regulation), the main objective of this text is to examine the rules governing business interactions. **Private law**, or **civil law,** is composed of the rules that enable an individual to sue a person who has injured him or her. From a business point of view, any time a business person is dealing with a government official or regulatory body, such as a labour relations board or human rights commission, it is a matter of public law. It is a matter of private law when a business person is involved in a contract dispute with a supplier or customer. We also distinguish between domestic and international law, where **domestic law** refers to the rules governing interactions between persons in Canada, while **international law** applies to activities between individuals in different countries or the relations between those nations. A limited discussion of criminal law (an aspect of public law) is included, at least as it affects business. A criminal matter is usually offensive conduct considered serious enough for the government to get involved and punish the wrongdoer.

While only a small proportion of business disputes ever get to court, the cases that do establish the legal rules. Knowing that the principles established in court decisions will be enforced in subsequent judicial cases helps parties to resolve their disputes without actually going to trial. When a dispute is taken to court, the person suing is called the **plaintiff** and the person being sued the **defendant**. Note that in some special cases the person bringing the matter before a judge is referred to as the **applicant** and the opposing party the **respondent**. When one party is dissatisfied with the decision and appeals it to a higher court, the parties are then referred to as the **appellant** and the **respondent**. Be careful not to make a mistake about these parties. The appellant may be either the plaintiff or the defendant, depending on who lost at the trial level and is now appealing the decision, and the respondent is the party (usually the winner at the trial level) who is responding to that appeal. In a criminal action the prosecution is referred to as the Crown (indicated as Rex or Regina, but usually simply by the capital letter *R*) and the person defending is referred to as the accused.

Choose a lawyer carefully

An important relationship for any business to establish is the one with a lawyer. Whether it is to help construct corporation documents or to assist in the creation of contracts, discussions with a lawyer can prevent costly legal entanglements. But when there is a dispute, a lawyer who is already familiar with the business, its managers, and goals, can be a valuable asset. Lawyers, trained in universities are "called to the bar" in each province. This means they are certified to function in legal matters and represent their clients in court. Their role is to give their clients advice rather than make decisions for them. Lawyers often specialize in one area of the profession, and so it is important to choose one that is skilled in business transactions and dispute resolution. Notary publics or paralegals can also provide legal services but are much more restricted in what they can do.

LO 2 SOURCES OF LAW

Quebec uses the *Civil Code*

Each province was given the right to determine its own law with respect to matters falling under its jurisdiction. Jurisdiction in this sense has two meanings. A province has a limited physical jurisdiction in that it can only make laws that have effect within its provincial boundaries, but it also has a limitation in what kinds of laws it can pass as determined by the *Constitution Act (1982)* and the *Charter of Rights and Freedoms* discussed later in this chapter. Since private law is primarily a provincial matter, it is not surprising that the English-speaking provinces adopted the law used in England— or the **common law**— while Quebec adopted the French legal system based on the Napoleonic Code. The French ***Civil Code*** is a body of rules setting out general principles that are applied by the courts to the problem before them. In this system the judge is not bound by precedent (following prior decided cases), but must apply the provisions of the *Code*. For example, when faced with the problem of determining liability in a personal injury case, the judge would apply section 1457 of the Quebec *Civil Code*, which states:

> Every person has a duty to abide by the rules of conduct which lie upon 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 responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

When a runner carelessly bumps into another and causes injury, a Quebec judge would apply this provision and order that the runner pay compensation. The decisions of other judges may be persuasive, but the duty of a judge in Quebec is primarily to apply the *Code*. Most other countries in the world use a variant of this codified approach to law, and it is this codification that makes the law predictable in those countries.

Common Law The other Canadian provinces and the territories adopted a system of law derived from England, referred to as the common law (mentioned above). As a result, Canada is one of the few "bijural" countries in the world where the civil law and common law work side by side. The unique aspect of the common law system is that instead of following a written code, the judge looks to prior case law. When faced with a particular problem, such as the personal injury situation described above, a common law judge would look at prior cases (normally brought to the judge's attention by the lawyers arguing the case) and choose the particular case that most closely resembles the one at hand. The

judge will determine the obligations of the parties based on that **precedent**. Of course, there is a complex body of rules to determine which precedent the judge must follow. Essentially, a case involving the same issue decided in a court higher in the judicial hierarchy is a binding precedent and must be followed. Thus, a judge in the Provincial Court of Saskatchewan is bound to follow the decision of the Court of Appeal of that province, but not the decision of the Court of Appeal in New Brunswick, which is in a different judicial hierarchy. That decision may be persuasive, but is not binding. Our judges will often look to decisions from other, similar judicial systems, including Great Britain, the United States, Australia, and New Zealand, but it must be emphasized that these decisions are not binding, only persuasive, on Canadian courts.

Other provinces use common law, which is based on cases

When the judge prepares a report of the case, a considerable portion of the decision is usually an explanation of why the judge chose to follow one precedent rather than another. This process is referred to as **distinguishing cases**. The system of determining law through following precedent in our legal system is referred to as ***stare decisis***. Following prior decisions requires that judges and lawyers know and understand the implications of many cases that have been heard in the courts and have ready access to reports of those cases. Case reports are normally long and complex documents. To recall the significant aspects of the case quickly, students of the law use case briefs to summarize these reports. Table 1.1 describes the important elements of a case brief. Most of the cases summarized in this text will include these components, although because the cases are used primarily

Judges are bound to follow prior cases

Table 1.1 Elements of a Case Brief

Parties This identifies the parties to the action and distinguishes the plaintiff from the defendant (appellant or respondent at the appeal level). When the letter *R* is used to signify one of the parties it refers to Rex or Regina, the king or queen, who symbolizes the state or government, meaning this is a public law case in which the Crown or state is prosecuting the defendant. When both parties are named as individuals or companies, it is a private law case where the plaintiff is suing the defendant.

Facts This is a brief description of what happened to give rise to the dispute between the parties. Only the facts necessary to support the decision are usually included in a brief.

History of the Action This lists the various courts that have dealt with the matter and the decisions at each hearing, that is, at the trial level, appeal level, and Supreme Court of Canada level.

Issues These are the legal questions that the court must consider to decide the case. (It is at this point that the student should consider the arguments that support both sides of the issue. This will do more than anything else to assist in the analysis of cases and foster appreciation of the unique way that students of the law approach such problems.)

Decision This is the court's decision, either in favour of or against the plaintiff or defendant, or in the case of an appeal, in favour of the appellant or respondent.

Reasons This is a summary of the reasons for the decision and is usually a response to the issues raised. In this text, this is the most important part of the judgment because the case will normally be used as an example illustrating the principle of law.

Ratio This is the legal principle established by the case and is usually only included when it will be binding on other courts. For our purposes, students could use this heading to summarize the legal principle the case was used to illustrate.

to explain a single legal principle and for interest's sake focus on the narrative of the case, we may not specify each of them. When you read the case summaries try to extract the information using the elements outlined below.

Common law developed by common law courts

Law of Equity The common law evolved from case decisions made in three common law courts set up under the king's authority during the Middle Ages in England. These courts were the Court of Kings Bench, the Court of the Exchequer, and the Court of Common Pleas—together referred to as the common law courts. This body of judges' decisions continued to develop in England, but eventually because of restrictions on the power of the king imposed by the nobles and because of what was essentially institutional inertia, the common law courts of England became harsh and inflexible. People seeking unique remedies such as an injunction (an order that an offender stop the offending conduct) or relief from some restrictive common law rule had only one recourse—to petition the king. Since, in theory, the king was the source of power for all courts, he also had the power to make orders overcoming individual injustices caused by their shortcomings. This task was soon assigned to others and eventually developed into a separate body known as the **Courts of Chancery**. The common law courts and the Courts of Chancery were often in conflict and were eventually merged in the 19th century, but the body of rules developed by the Courts of Chancery (known as the **Law of Equity**) remained separate. Today, when we talk about judge-made law in the legal systems of the English-speaking provinces, we must differentiate between common law and equity. The name we give the system of laws used in the English speaking provinces is the Common Law, which is named after this most significant component. This terminology sometimes causes confusion since it is not always obvious whether the speaker is referring to the common law system or this important component as distinguished from equity.

Equity developed by Court of Chancery

Case Summary 1.1 *R. v. Butchko*[1]

Provincial Supreme Court Judge Must Follow Court of Queen's Bench Decision

R. (The Crown) v. Butchko (the Accused and also the Appellant) in an appeal before the Saskatchewan Court of Queen's Bench.

Facts: Mr. Butchko was stopped by the police in Saskatchewan after making an illegal U turn, and the officer smelled liquor on his breath. Butchko was asked several times to submit to a breathalyzer test and refused. He was then charged and later convicted in the provincial court with refusing to submit to a breathalyzer test under section 254(2) of the *Criminal Code*.

History of the Action: This is a Saskatchewan Court of Queen's Bench decision reversing the conviction of the accused at trial in the provincial court. Note that the matter was further appealed to the Court of Appeal which reinstated the conviction.

Issue: Was the mere smell of alcohol on the breath of the accused sufficient to constitute reasonable grounds to demand a breathalyzer test resulting in the section 254(2) refusal charge? Was the judge right in choosing to follow an Ontario decision rather than the decision of the Saskatchewan Court of Queen's Bench?

Reasons: There was a Saskatchewan Court of Queen's Bench decision (*R. v. Arcand* unreported) stating that the mere smell of alcohol on a person's breath was not enough reason

[1] 2004 SKQB 140 (CanLII), appealed 2004 SKCA 159 (CanLII).

to demand a breathalyzer test. But there was also a Court of Appeal for Ontario case (*R.v.Lindsay*) holding that the smell of alcohol by itself did constitute reasonable grounds to demand the breathalyzer test. The provincial court judge chose to follow the Ontario case on the basis that it better stated the law, resulting in Mr. Butchko's conviction.

That decision was appealed to the Court of Queen's Bench, where the judge held that even though the Ontario decision may be better law, under the rules of *stare decisis* the inferior provincial court was required to follow the *R. v. Arcand* decision made by a Saskatchewan Court of Queen's Bench judge. Only the Court of Appeal for Saskatchewan could overturn the *Arcand* case. In fact the prosecutor then appealed the matter to that court, and the Court of Appeal reinstated the conviction of Mr. Butchko, choosing to adopt the law as stated in the Ontario *R. v. Lindsay* case, overturning the *Arcand* decision.

Ratio: The operation of *stare decisis* requires that an inferior court must follow the decision of a superior court even where the judge thinks that decision is incorrect. The idea is that the matter can then be appealed until it gets to a level that can overturn the questionable decision (as happened here) and establish a new precedent case for the province.

To illustrate the difference between common law and equity, if someone erected a sign that encroached on your property, you could claim trespass and ask a court to have it removed. Monetary compensation is the normal common law remedy for trespass, but that would not solve this problem. An order to remove the sign would require an injunction, which is an equitable remedy developed by the Courts of Chancery. The common law then is a body of rules based on cases developed in the common law courts, whereas equity is a list of rules or principles developed by the Court of Chancery from which a judge can draw to supplement the more restrictive provisions of the common law. Note that while it looks like the common law developed independently, in fact those judges borrowed from several different sources as they developed the law. Thus, canon law (church law) influenced our law of wills and estates, Roman law influenced property law, and the law merchant (the body of rules developed by the merchant guilds that traded throughout Europe) that was adopted as a body into the common law gave us our law with respect to negotiable instruments (cheques, bills of exchange, and promissory notes).

The English-speaking provinces adopted the English legal system at different times in their history. British Columbia declared that the law of England would become the law of that province as of 1857, and Manitoba did the same in 1870. Ontario and the eastern provinces adopted English law prior to Confederation. Since adopting the common law of England, the courts of each province have added their own decisions, creating a unique body of case law particular to each province (see Figure 1.1).

Statutes The third body of law used in our courts is derived from government **statutes**. As a result of the English Civil War, the principle of **parliamentary supremacy** was firmly established with the consequence that any legislation passed by Parliament overrides judge-made law, whether in the form of common law or equity. Today in Canada, most new law takes the form of statutes enacted by either the federal Parliament or the provincial legislatures. Since statutes override prior judge-made law, the judges will only follow them when the wording is very clear and specific, which goes some way toward explaining their complicated legalistic form. In any given case today, a judge will look to case law taken from the common law or equity for direction, but if there is a valid statute applicable to the dispute, that statute must be followed. It should be noted that Quebec also has enacted statutes to supplement the provisions of the *Civil Code* and so a judge in that province faced with a case could turn to both the *Civil Code* and statutes as the circumstances warrant.

Statutes are passed by Parliament or legislatures

Our law is based on statutes, common law, and equity

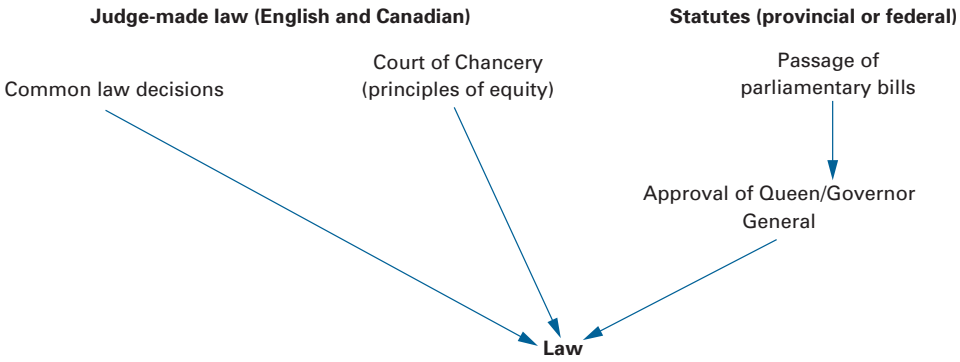

Figure 1.1 Sources of Law

Law applied in courts today is derived from judge-made law (common law and equity) and from statutes, including regulations at both federal and provincial levels.

LO 2 THE LAW IN CANADA

BNA Act creates Canada with constitution like Britain's

Canada was created with the passage of the *British North America Act* (*BNA Act*), which in 1867 united several English colonies into one confederation. The *BNA Act* declared that Canada would have a constitution "similar in principle to that of the United Kingdom." In contrast to the United States, which has one constitutional instrument, England has an unwritten constitution in the sense that it is found in various proclamations, statutes, traditions, and judicially proclaimed principles. Thus, the **rule of law** (the principle that all are subject to the law and legal process), the *Magna Carta* (the first royal proclamation of basic human rights), and parliamentary supremacy (the principle that everyone, even monarchs and judges, is subject to laws made by Parliament) are all part of the constitutional tradition inherited by Canada. The *BNA Act* itself—now called the *Constitution Act (1867)* —has constitutional status in Canada. This means its provisions cannot be changed through a simple parliamentary enactment; they can only be altered through the more involved and onerous process of constitutional amendment.

Constitution Act (1867) (BNA Act) divides powers between federal and provincial governments

Today the main function of the *Constitution Act (1867)* is to divide powers between the federal and provincial governments. Parliament is the supreme law-making body in Canada (parliamentary supremacy). But this constitutional principle, inherited from England, presented our founding fathers with a problem. In Canada there are now 11 sovereign governing bodies (10 provincial legislative assemblies and one federal Parliament). Which of these bodies is supreme? The answer is that each governs in its assigned area. Thus, the *Constitution Act (1867)*, primarily in sections 91 and 92, assigns powers to the federal and the provincial governments. Section 91 gives the federal government the power to make laws with respect to such areas as money and banking, the military, criminal law, and weights and measures, whereas other areas such as health, education, and matters of local commerce are assigned to the provinces under section 92. Because most of the business law we deal with is concerned with local trade and commerce, we will concentrate on provincial legislation and judge-made law. Still, there are many business situations where federal statutes will govern. The various categories listed in sections 91 and 92 are sources of power rather than watertight compartments, and as a result there can be occasional overlap. The business person may face both federal and provincial statutes that apply. When that happens and there is a true conflict (where it is not possible to obey

both), the federal legislation takes precedence over the provincial. This is called the principle of paramountcy. The *Lafarge* case that follows illustrates what happens when valid provincial legislation conflicts with valid federal legislation. Sections 91 and 92 of the *Constitution Act (1867)* may be viewed online at www.canlii.org. Note that this website is extremely valuable to the law student as it provides access not only to provincial and federal legislation and regulations, but also to all important recent cases in the various provinces and in the federal courts. There are a number of other provincial websites that are helpful, but the author has found this to be the most complete and accessible free site.

Federal law followed where provincial and federal laws conflict

Case Summary 1.2 *British Columbia (Attorney General) v. Lafarge Canada Inc.*[2]

Federal Law Supersedes City By-laws

A Vancouver ratepayer's group, later joined by the Attorney General of British Columbia brought this application opposed by the respondent Lafarge. Lafarge is the appellant at the Supreme Court of Canada level.

A group of Vancouver ratepayers filed an application to require Lafarge to get a development permit from the city to build a cement plant on the Vancouver waterfront. This was opposed by Lafarge and the Vancouver Port Authority (a federally controlled organization). Lafarge lost at that level and appealed to the Court of Appeal for British Columbia. The Appeal Court decided in favour of Lafarge, and the ratepayers appealed to the Supreme Court of Canada. Note that the Attorney General of British Columbia joined the ratepayers as appellant, and several other provinces joined the action as interveners.

Lafarge felt that it was under the jurisdiction of the Vancouver Port Authority (a federal entity created under the *Canada Marine Act*) and didn't have to comply with provincial or municipal regulations. The court had to decide whether city zoning rules applied to this project and how the federal and provincial laws interrelate.

The Supreme Court first looked at the power granted to the province and thus to the city under the *Constitution Act (1867)* and decided that the municipal by-laws and zoning rules did apply to the Lafarge project. It is clear that under sections 92(8), 92(13), and 92(26) of the *Act,* the City of Vancouver's by-laws were constitutionally valid.

The court also found that the project was necessarily incidental to the exercise of federal power with respect to "debt and property" and "navigation and shipping" under section 91(1a) and section 91(10) of the *Act*. The Vancouver Port Authority was properly created under the *Canada Marine Act* and the Lafarge project fell within its mandate, so only its approval was required. There was a clear conflict between valid federal law and valid provincial law, and under the principle of paramountcy only the federal law applied.

This case illustrates not only how the powers of government are divided between the federal and provincial governments under sections 91 and 92 of the *Constitution Act (1867)*, but also what happens when the provincial law and the federal law are in conflict. When both cannot be obeyed the principle of paramountcy requires that the federal laws prevail and be followed.

Both the federal and provincial governments make law by enacting **legislation** (see Figure 1.2). Elected representatives form the House of Commons, while appointed members make up the Senate. Together those bodies constitute the Parliament of Canada. The provinces have only one level, consisting of elected members, which is referred to as the Legislative Assembly of the Province. The prime minister or premier and the cabinet are chosen from these members and form the federal or provincial government. The governments of the territories don't have the status of provinces, but remain under federal control, much as a city or municipality is subject to provincial control. Still, the Yukon, the

[2][2007] 2 S.C.R. 86; (2007), 281 D.L.R. (4th) 54 (S.C.C.).