



McInnes  
Kerr  
VanDuzer  
Lavoie

6th Edition

# MANAGING THE LAW

The Legal Aspects of  
Doing Business



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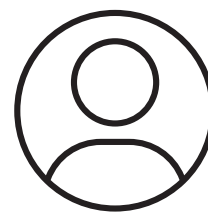
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# Preface

## About *Managing the Law*, Sixth Edition

### Our Approach

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

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

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

This book was written with these considerations firmly in mind. As a result, *Managing the Law* differs from other books on the market in two important ways. First, it is a book for business students, not law students. *Managing the Law* provides a thorough and current picture of the legal rules that are relevant in the business world. It does not sacrifice important information for the

sake of simplicity. At the same time, however, it does not overwhelm the business student with unnecessary detail or impenetrable jargon. The tone is intelligent and student-friendly. The text is accessible and comprehensible, regardless of the reader’s background.

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

Canadian business students, like Canadians in general, are an increasingly diverse group. They come from a variety of backgrounds in terms of personal characteristics, past qualifications, and professional aspirations. Some are new Canadians; others have long-established roots. Some are embarking on post-secondary education for the first time; others are engaged in advanced degrees. Some have little experience in the business world; others are retraining after successful careers. Some are seeking a generalized education; others are more focused on a particular career. This book is appropriate for them all.

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

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

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

## Content Features

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

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

**Key Terms** Key terms are boldfaced where they are defined in the body of the text. They are also restated with their definitions in the margins or as pop-ups in Revel.

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

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

- **Concept Summaries** Every chapter contains at least one Concept Summary; most chapters contain many more. Presented in tabular form, the Concept Summaries provide succinct and easily understood reviews of difficult concepts and rules. They are often used to compare and contrast related areas of law.
- **Figures** Every chapter contains at least one figure. Various diagrams and drawings are used to illustrate and clarify important concepts. Aside from their inherent pedagogic value, they contribute to the visual appeal of the book and therefore draw students into the material.
- **Chapter Summaries** Each chapter ends with a summary that briefly reviews the important concepts of the chapter. These summaries help prepare students for the end-of-chapter exercises.
- **Review Questions** Twenty review questions appear at the end of each chapter. In some instances, students are required to define and explain key concepts and terms. In others, they are asked to respond to short problems. The review questions can be discussed in class or assigned to students for independent study. (Model answers are provided in the *Instructor's Resource Manual*.)
- **Cases and Problems** Each chapter concludes with 6 to 12 Cases and Problems. These exercises vary in both length and difficulty. They are ideally suited to classroom discussion, but they too can be assigned to students for independent study. In Revel, each chapter also features two interactive case studies for students to work through. (Model answers for all cases are provided in the *Instructor's Resource Manual*.)

## What's New

- **Learning Objectives** For this edition, each chapter's learning objectives have been revised and refocused to align with each module and its accompanying assessment more closely. We have narrowed the scope of the learning objectives, ensuring each objective is relevant, measurable, and achievable.
- **Quizzes** A large number of the quiz questions are new to this edition and were created to align with a specific learning objective.
- **Indigenous Business Issues** For this edition, inclusion of content related to Indigenous business issues was a priority, with the goal of improving coverage of these issues even more in future editions.
- **Chapter-Specific Key Updates**
  - Chapter 1 contains a new section on Indigenous rights and the duty to consult.
  - Chapters 15 and 16 contain a significant amount of new material on property interests in land in Indigenous communities, with a particular emphasis on issues that arise in doing business within these communities.

- Chapter 20 contains a new ethical issue on real estate agents with a conflict of interest.
- Chapter 21 includes a new discussion of co-operatives.
- Chapter 23 includes a new Ethical Perspective on board and management diversity.
- Chapter 25 contains a new module on environmental protection.

## Digital Learning with Revel

The sixth edition of *Managing the Law* is delivered through Pearson's Revel platform.

Revel® improves results by empowering students to actively participate in learning. More than a digital textbook, Revel delivers an engaging blend of author content, media, and assessment opportunities. With Revel, students read and practise in one continuous experience. Interactive content and assessments integrated throughout the narrative provide opportunities for students to explore and apply concepts. And Revel is mobile and user-friendly, so students can learn on the go—anytime, anywhere, on any device.

Dynamic content brings concepts to life

- **Videos and interactives** integrated directly into the narrative get students learning actively, making it more likely that they'll retain what they've read.
- Embedded **assessments** afford students regular opportunities to check their understanding. The results enable instructors to gauge student comprehension and provide timely feedback to address learning gaps along the way.
- **Writing assignments**—such as journalling prompts, shared writing activities, and essays—enable educators to foster and assess critical thinking without significantly impacting their grading burden.
- **Video quizzes** offer students opportunities to further their knowledge by applying concepts and testing their understanding. Instructors can share videos accompanied by time-stamped multiple-choice questions.
- **Shared multimedia assignments** make it easy for instructors and students to post and respond to videos and other media. Students can also record and upload their own presentations for grading, comments, or peer review.
- The Revel® **mobile app** lets students read and practise anywhere, anytime, on any device—online and off. It syncs work across all registered devices automatically, allowing learners to toggle between phone, tablet, and laptop as they move through their day.
- The **audio playlist** lets students listen and learn as they go.

Actionable insights help improve results

- The **educator dashboard** offers an at-a-glance look at overall class performance. It helps instructors

identify and contact struggling and low-activity students, ensuring that the class stays on pace.

- The **enhanced grades view** provides detailed insights on student performance, from specific assignments to individual student scores.
- **LMS integration** provides institutions, instructors, and students easy access to their Revel courses via Blackboard Learn™, Canvas™, Brightspace by D2L™, and Moodle™. Single sign-on lets students access Revel on their first day.

## Important Digital Assets

- **Interactive Cases** Each chapter contains two interactive case exercises. Presented with a fictional legal scenario, the student is prompted to make a series of decisions and are given feedback on each choice.
- **Videos** This new animated business law video series covers the text's big topics in fun, digestible packages. Located at the beginning of each Part, the videos show a suite of characters facing various legal situations and discussing their options. A series of multiple-choice questions accompanies each video.
- **Provincial Content.** The Revel edition includes provincially specific material for British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and the Atlantic provinces.
- **Quizzes** In Revel, each module concludes with a multiple-choice quiz of 3–5 questions and each chapter concludes with a multiple-choice quiz of 19–22 questions.

## Supplements

Supplements are available for download from the Revel Instructor Resources page. Contact your Pearson rep for access information and instructions if you do not have a Revel account.

- Test Bank
- MyTest
- Image Library
- PowerPoint Presentations
- Instructor's Resource Manual

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 David Simmonds (Assiniboine Community College)

## Dedication

The authors were greatly saddened by the death of their friend, colleague, and co-author, Professor Ian Kerr, on 27 August 2019. Ian was a remarkably gifted teacher, a globally leading researcher in law and technology, and committed faculty member of the Common Law Section at the University of Ottawa's Faculty of Law where he held the Canada Research Chair in Ethics, Law and Technology. Along with Mitchell McInnes, he developed the idea for *Managing the Law* and brought it to life. We will miss his vision and his passion.

We dedicate this sixth edition of *Managing the Law* to Ian's memory.

## Author Biographies

**Mitchell McInnes, PhD (Cambridge), LLM (Cambridge), LLB (Alberta), BA (Alberta), of the Alberta Bar, Professor** Professor McInnes is a member of the University of Alberta's Faculty of Law. He previously taught at the University of Western Ontario, the University of Melbourne, and Deakin University in Australia. He clerked at the Supreme Court of Canada and served as a Legal Research Officer with the Alberta Court of Appeal.

Professor McInnes's research focuses on unjust enrichment, restitution, trusts, torts, contracts, remedies, and wills. He is the author of *The Canadian Law of Unjust Enrichment and Restitution* (2014), and a co-author of *Managing the Law: The Legal Aspects of Doing Business* (2002, 2006, 2010, 2013, 2017, 2021), *Oosterhoff on Trusts* (2004, 2009, 2014, 2019), *Oosterhoff on Wills and Succession* (2016, 2021), *Fridman's Law of Torts in Canada* (2020), *Introduction to the Law of Torts* (2020), *Cases and Materials on the Law of Torts* (2000, 2003, 2007, 2011, 2015, 2019), and *Cases and Materials on the Law of Restitution* (2004). He served as editor for *Understanding Unjust Enrichment* (2006) and *Restitution: Developments in Unjust Enrichment* (1996).

In addition, Professor McInnes has published more than 150 articles, comments, and reviews in leading journals, including the *Law Quarterly Review*, the *Cambridge Law Journal*, the *Canadian Bar Review*, and the *University of Toronto Law Journal*. His work has been relied upon by a number of courts, including the Supreme Court of Canada, the Supreme Court of the United Kingdom, the High Court of Australia, and the Supreme Court of New Zealand.

In 2016, Professor McInnes received the Law Society of Alberta's *Distinguished Service Award for Legal Scholarship*. His efforts in the classroom have been recognized by the *Rutherford Award for Excellence in Undergraduate Teaching*, which is the University of Alberta's highest teaching award (2011), and the *Tevie H Miller Teaching Excellence Award*, the Faculty of Law's highest teaching award (2008, 2015). While teaching at the University of Western Ontario, he received the University of Western Ontario's *Award of Excellence in Undergraduate Teaching*, the Legal Society's *Professor of the Year*, and the *Edward G Pleva Award for Excellence in Teaching*. On several occasions, *Maclean's* magazine named him as one of Canada's leading university teachers.

**J. Anthony VanDuzer, LLM (Columbia), LLB (Ottawa), BA (Queen's), of the Bar of Ontario, Professor and Hyman Soloway Chair in Business and Trade Law** Professor VanDuzer has taught and practised extensively in the area of corporate and commercial law for more than 30 years. Following five years in private practice, he joined the Faculty of Law at the University of Ottawa. He teaches a variety of advanced business and international economic law subjects, for which he has received several teaching awards. He has taught in the University of Ottawa's Executive MBA program as well as at universities in the UK, Germany, and New Zealand. Since 2003, he has been an Adjunct Research Professor at the Norman Paterson School of International Affairs at Carleton University.

Tony has written more than 90 published articles and papers on subjects ranging from pharmaceutical patents and health care to corporate law. He has also written several significant books on business law, including *The Law of Partnerships and Corporations*, 4th ed. (Concord: Irwin, 2018); and *Merger Notification in Canada* (with Albert Gourley), (Toronto: CCH Canadian, 1994). His work has been cited by the Supreme Court of Canada as well as provincial superior courts and courts of appeal.

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

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

**Malcolm Lavoie, BA (Hons) (UBC), MSc (LSE), BCL, LLB (McGill), LLM, SJD (Harvard), of the Alberta Bar, Associate Professor** Malcolm Lavoie is an Associate Professor at the University of Alberta Faculty of Law. His research deals with property law, judicial remedies, federalism, and issues of Indigenous land tenure and jurisdiction. His work has appeared in numerous publications, including the *McGill Law Journal*, the *University of Toronto Law Journal*, *Osgoode Hall Law Journal*, the *UBC Law Review*, and the *Oxford University Commonwealth Law Journal*. Prior to joining the Faculty of Law, he was a graduate student at Harvard Law School, where his work was supported by a Frank Knox Memorial Fellowship, Weatherhead Center Graduate Research Fellowship, Fulbright Student Award, and a Project on the Foundations of Private Law Student Fellowship. He clerked for the Hon. Justice Frans Slatter of the Alberta Court of Appeal (2012–2013) and for the Hon. Justice Rosalie Abella of the Supreme Court of Canada (2013–2014). He is a past recipient of the *Canadian Association of Law Teachers (CALT) Scholarly Paper Award* and the *Harvard Project on the Foundations of Private Law Writing Prize*. His scholarship has also been cited by the Supreme Court of Canada.

In addition to his research and teaching, Professor Lavoie is an active member of the Alberta Bar. He is Associate Counsel with Miller Thomson, LLP, a national business law firm. In his practice, he advises First Nations governments on a range of legal issues. He also consults on commercial litigation and regulatory matters. He has previously argued before the Supreme Court of Canada. Professor Lavoie currently serves on the Alberta Judicial Council and the board of the Edmonton Bar Association.

# Understanding Legal Citations

## How to Read a Citation

### Civil Case Citations

<b>Dobson</b>	<b>v</b>	<b>Dobson</b>	<b>(1999)</b>	<b>174</b>	<b>DLR</b>	<b>(4th)</b>	<b>1</b>	<b>(SCC)</b>
plaintiff	<i>versus</i> (Latin for "against")	defendant	year of decision	volume number	case reporter	series	page number	court
<b>Smith</b>	<b>v</b>	<b>Inco Inc</b>	<b>2010</b>		<b>ONSC</b>		<b>3790</b>	
(plaintiff)	(versus)	(defendant)	(year of decision)		(court, i.e. Ontario Superior Court)		(number of decision in that year)	

### Criminal Case Citation

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

## EXPLANATION OF ABBREVIATIONS

### JURISDICTIONS

#### Canada

Alta; AB  
BC  
Can  
Man; MB  
NB  
Nfld; NL; Nfld & Lab  
NWT  
NS  
Nun  
Ont; ON  
PEI  
Que; QB  
Sask  
Yuk; YK

#### United Kingdom

Eng  
UK

#### United States

Ala  
Cal  
Conn  
Ill  
Mass  
NJ  
NY  
Pa

#### Australia and New Zealand

Aust  
NZ

Alberta  
British Columbia  
Canada  
Manitoba  
New Brunswick  
Newfoundland  
Northwest Territories  
Nova Scotia  
Nunavut  
Ontario  
Prince Edward Island  
Quebec  
Saskatchewan  
Yukon

England  
United Kingdom

Alabama  
California  
Connecticut  
Illinois  
Massachusetts  
New Jersey  
New York  
Pennsylvania

Australia  
New Zealand

### COURTS

#### Canada

CA  
Co Ct  
Dist Ct  
Div Ct  
FC CA  
FC TD  
Gen Div  
HCJ  
QB  
SC  
SC AD  
SC TD  
SCC  
SCJ  
TCC

#### United Kingdom

CA  
Ch  
Ch D  
CP  
Ex  
Ex Ch  
HL  
KB  
PC

Court of Appeal  
County Court  
District Court  
Divisional Court  
Federal Court, Court of Appeal  
Federal Court, Trial Division  
General Division  
High Court of Justice  
Court of Queen's Bench  
Supreme Court  
Supreme Court, Appeal Division  
Supreme Court, Trial Division  
Supreme Court of Canada  
Superior Court of Justice  
Tax Court of Canada

Court of Appeal  
Chancery Court  
High Court: Chancery Division  
Common Pleas  
Exchequer Court  
Exchequer Chamber  
House of Lords  
Court of King's Bench  
Judicial Committee of the Privy Council

QB Court of Queen's Bench

**United States**

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

**Australia and New Zealand**

HC High Court

**JUDGES**

**Canada**

J Justice  
 JA Justice of Appeal  
 JJ Justices  
 CJ Chief Justice

**United Kingdom**

LJ Lord Justice  
 MR Master of the Rolls

**CASELAW REPORTERS**

**Canada**

AR Alberta Reports  
 Admin LR Administrative Law Reports  
 Alta LR Alberta Law Reports  
 BCLR British Columbia Law Reports  
 BLR Business Law Reports  
 CBR Canadian Bankruptcy Reports  
 CCEL Canadian Cases on Employment Law  
 CCLT Canadian Cases on the Law of Torts  
 CPR Canadian Patent Reporter  
 CR Criminal Reports  
 DLR Dominion Law Reports  
 DTC Dominion Tax Cases  
 ETR Estates and Trusts Reports  
 Ex CR Canada Law Reports: Exchequer Court of Canada  
 FC Federal Court Reports  
 LAC Labour Arbitration Cases  
 Man R Manitoba Reports  
 NBR New Brunswick Reports  
 NSR Nova Scotia Reports  
 OLR Ontario Law Reports  
 OLRB Rep Ontario Labour Relations Board Reports  
 OR Ontario Reports  
 OTC Ontario Trial Cases  
 OWN Ontario Weekly Notes  
 PPSAC Personal Property Security Act Cases  
 RPR Real Property Reports  
 SCR Supreme Court Reports  
 WWR Western Weekly Reports

**United Kingdom**

AC Appeal Cases  
 All ER All England Reports

App Cas Appeal Cases  
 Ch D Chancery Division  
 ER English Reports  
 HL Cas House of Lords Cases  
 KB King's Bench  
 LR Law Reports  
 Lloyds Rep Lloyd's Law Reports  
 QB Queen's Bench  
 WLR Weekly Law Reports

**United States**

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

**Quicklaw Databases**

AJ Alberta Judgments  
 BCJ British Columbia Judgments  
 OJ Ontario Judgments  
 SCJ Supreme Court Judgments  
 YJ Yukon Judgments

**Australia and New Zealand**

CLR Commonwealth Law Reports  
 NZLR New Zealand Law Reports  
 SR (NSW) State Reports (New South Wales)

**STATUTES**

**Canada**

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

**United Kingdom**

Vict Victoria  
 Cha Charles

**United States**

USC United States Code

**PERIODICALS**

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

## Part 1 Introduction to Law

### Chapter 1

# Risk Management and Sources of Law



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## Learning Objectives

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

- 1.1** Explain how a business can analyze risks, assess risk management strategies, and use legal techniques to deal with those risks.
- 1.2** Create a map of the law that includes four areas of public law and three areas of private law that are important to business people.
- 1.3** Identify three sources of law and provide examples of how each can affect business people.

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

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

## 1.1 Why Study Law?

### 1.1 Explain how a business can analyze risks, assess risk management strategies, and use legal techniques to deal with those risks.

We therefore begin with the obvious question: Why study law? The answer depends upon who you are. As consumers, we all need to be aware of the rules that govern commercial transactions. In terms of employment, you may intend to work in the public sector. If so, you need to understand not only the nature of government organizations, but also the different types of laws that may affect you. Chances are, however, that you are a business student. And as you know, businesses exist primarily to make money. The goal is to maximize gains and minimize losses.

Of course, there are many factors in that equation: hard work, natural talent, good luck, and so on. But for the most part, success and failure are the results of choices. A business must choose, for example, a product, a price, a location, and a marketing strategy. And every one of those *business* choices has *legal* consequences. Some consequences are profitable; others are financially disastrous. The difference between winning and losing in the business world often depends upon the ability to make good choices from a legal perspective. That fact suggests, in general terms, both *why* you should study law and *which* parts of the law you should study.

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

### Risk Management: Analysis

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

#### risk management

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

## Business Decision 1.1

### Risk Management

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

is one of your best customers, you are tempted to write a candid letter.

### Questions for Discussion

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

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

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

Business Decision 1.1 demonstrates risks that are largely legal and private in nature. While court cases are public events, very few cases ever go before a judge. Most are settled by the parties themselves. As a result, you are mainly concerned about being held liable to your ex-employee.

Quite often, however, extra-legal concerns may prove even more important. In addition to potentially leading to liability, an incident may generate bad publicity and damage consumer confidence. Canadians have seen many examples in recent years.

"Dieselgate," a scandal involving Volkswagen's diesel-powered vehicles, provides a sobering example. Because of concerns regarding pollution, governments around the world imposed standards for nitrous oxide emissions. Volkswagen responded by programming its vehicles to cut emissions, but only while being tested. The vehicles

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

otherwise emitted pollutants well above permitted levels. When the facts became public, the consequences were enormous. In addition to criminal prosecutions, Volkswagen had to recall 11 million vehicles and bring them into compliance with the law. The company set aside almost \$20 billion to cover the associated expenses. At the same time, the value of its shares plummeted.

## Risk Management: Strategies

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

- *Risk Avoidance* Some risks are so serious that they should be avoided altogether. An automobile that regularly explodes upon impact should be removed from the market. Aside from issues of morality, the financial costs of being held liable will probably outweigh any sales profits.<sup>2</sup>
- *Risk Reduction* Some risks can be reduced to an acceptable level through precautions. For example, a bank that lends \$500,000 to a manufacturer realizes that the loan may not be repaid if the economy goes into recession. The bank can, however, protect itself by requiring the business to grant a *mortgage* over its factory. In that case, if the bank does not get its money, it may at least get the property.
- *Risk Shifting* Even if a risk cannot be avoided or reduced, it may be shifted onto another party. We will very shortly introduce two exceptionally important strategies for shifting risks: *insurance* and *exclusion clauses*. There are others.

Suppose, for example, that a construction company requires the temporary use of a crane. It has two options. First, it may rent a crane and have it operated by one of its own employees. Second, it may rent a crane and hire an *independent contractor* to operate it.<sup>3</sup> An independent contractor is a person who performs services on behalf of a company, but who is not a regular employee of that company. Although it is often difficult to distinguish between an employee and an independent contractor, there is a crucial difference in terms of risk management.

Suppose the worker operates the crane carelessly and injures a bystander. The bystander will certainly be able to sue the person who was actually in control of the equipment. Furthermore, if that person was an employee, then the bystander will also be entitled to sue the company. Even if it did not do anything wrong, a company is *vicariously liable* for the actions of its employees. (We will examine the doctrine of vicarious liability in Chapter 3.) A company is not, however, vicariously liable for an independent contractor. In some situations, it is therefore prudent to have work done by an independent contractor, rather than an employee.

- *Risk Acceptance* It is sometimes appropriate to simply accept a risk. Imagine a golf course that operates behind a factory. It is possible that a wild shot might hit a factory window, and that the golf course might be held responsible for the resulting damage. Nevertheless, if the likelihood of such an accident is small, the club might decide to do nothing at all. It certainly would not close the course to avoid

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

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



the risk altogether. It might also find that the costs of reducing the risk by erecting a large safety net or shifting the risk by buying an insurance policy are too high. The most sensible approach might be to hope for the best and pay for any windows that are broken.

## Risk Management: Techniques

- *Insurance* An insurance policy is a type of contract. One party, called the *insured*, promises to pay a price, called the *premium*. The other party, called the *insurer*, promises to pay a certain amount of money if the insured suffers a certain type of loss. There are many types of insurance. For now, we will mention two.

*Liability insurance* provides a benefit if the purchaser is held liable for doing something wrong.<sup>4</sup> *Property insurance* provides a benefit if the purchaser's property is damaged, lost, or destroyed. (We will examine property insurance in Chapter 17.) In either situation, insurance shifts the risk. For instance, while millions of Canadians buy liability insurance every year, only a fraction of those people are actually sued. Insurance works by spreading the cost of that liability over the entire group.

- *Exclusion Clauses* Many businesses make money by selling goods or services. Those sales are created by contracts. And those contracts very often contain exclusion or limitation clauses. (We will examine exclusion and limitation clauses in Chapters 9 and 12.) Such a clause is a contractual term that changes the usual consequences of the rules of liability. The clause may attempt to exclude all risk of liability, or it may exclude liability for certain types of acts or certain types of losses, or it may limit the amount of compensation that is available.

There are countless examples. A courier company's contract may say that it cannot be held liable at all, or for more than \$100, if it loses, damages, or destroys a package. In another example, if parties conducting business do not create a written contract, a company may attempt to exclude or limit liability by posting a notice somewhere on its premises. The entrance to a car park, for instance, may contain a large sign telling customers that they park at their own risk. While exclusion and limitation clauses are subject to certain rules and restrictions, the law generally allows people to sign away their right to sue.

- *Incorporation* There are many ways to conduct business. An individual who chooses to act in a personal capacity may be held personally liable for any debts or liabilities incurred by the business. To manage those risks, many businesses are set up as corporations or companies. (We will examine corporations, and others ways of carrying on business, in Chapter 21.)

The most significant benefit of incorporation is limited liability. That means that it is usually only the company itself, and not the directors or shareholders, that may be held liable for debts. The company may be lost, but the people behind it will be safe. It is important to realize, however, that the concept of limited liability does not protect individuals from *all* risks. For example, employees, directors, and officers may be held personally liable for the torts that they commit.

Concept Summary 1.1 summarizes the analysis and strategies involved in the management of business risks. It also reveals that certain basic techniques are commonly

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

used to manage risks. Some of those techniques are fairly obvious. Businesses should, of course, carefully select and properly train employees. Other techniques are more legal in nature. We will discuss those in greater detail in later chapters. At this point, it is enough simply to introduce three important techniques.

### Concept Summary 1.1 Risk Management

Risk Management Analysis	
Identification	What risks exist in a particular situation?
Evaluation	How <i>serious</i> are those risks?
Response	How will you react?
Risk Management Strategies	
Avoidance	A risk should be <i>eliminated</i> altogether.
Reduction	A risk should be <i>decreased</i> to an acceptable level.
Shifting	A risk should be <i>transferred</i> to another party.
Acceptance	A risk should be <i>tolerated</i> as a cost of doing business.
Risk Management Techniques	
Insurance	A risk may be reduced and shifted by contracting for an <i>insurer's promise to pay</i> if a loss occurs.
Exclusion and limitation clause	A risk may be reduced or eliminated by contracting for a right to <i>limit or exclude liability</i> .
Incorporation	A risk may be reduced by <i>conducting business through a company</i> .

Risk management does not require you to become a lawyer. It may, however, require you to hire a lawyer. As a business person, you need to know enough about the law to recognize potential problems. In some situations, you will be able to resolve those problems yourself, preferably by taking steps to avoid them in the first place. But in other situations, it makes sense to call in an expert. Although lawyers' fees can be quite high, you may end up paying much more in the long run if you do not seek professional advice at the outset. Compared with the cost of losing a lawsuit or watching a deal collapse, a lawyer's bill is often a bargain.

In fact, some businesses have *in-house counsel*. Instead of hiring lawyers from time to time as the need arises, a company may create its own permanent legal department. While that option creates an additional expense that small businesses cannot afford, it does provide more efficient risk protection. Since in-house counsel have inside knowledge of their company, they are able to both prevent problems from arising and resolve disputes that do occur.

## 1.2 The Nature of Law

### 1.2 Create a map of the law that includes four areas of public law and three areas of private law that are important to business people.

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

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

# Ethical Perspective 1.1

## Rules and Laws

During the summer months, you operate a canoe rental business at a popular vacation spot. One of your customers has paddled to the middle of the lake, has fallen into the water, and is frantically calling for help. He is in great danger of drowning. You hear his cries and you could easily paddle to his rescue. You would rather not get involved, however, partly because you are annoyed that he ignored your advice to wear a life jacket.

I have come to the lake to fish for the morning. I also hear the man's call for help and I know that I could easily bring him to shore in my motorboat. I would much prefer, however, to head in the other direction and start fishing.

Does either one of us have an obligation to rescue the man? If neither of us helps and he drowns, can either of us be held responsible? What sort of responsibility would we incur?

Most people would say that you and I should help the man, especially since we could do so easily and safely. An important distinction nevertheless needs to be drawn between *legal* obligations and *moral* obligations. According to an old American case, you could not be held legally responsible even if you knew that the man was drunk

when he rented the canoe.<sup>5</sup> That no longer is true in Canada.<sup>6</sup> Because you entered into a contract with the man, the law now says that you have a legal duty to rescue him.<sup>7</sup>

Since I do not have any relationship with the man, my situation is less clear. Judges traditionally drew a distinction between moral obligations and legal obligations, and have said that there is no general duty to rescue in law. The attitude of Canadian courts, however, is slowly changing. Consequently, although the current cases say that I am entitled to simply ignore the call for help, a court might decide differently some day soon. The law is always evolving. A moral obligation today may become a legal obligation tomorrow.

## Questions for Discussion

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

Ethical Perspective 1.1 demonstrates that it is occasionally difficult to distinguish between moral obligations and legal obligations. However, it also helps us define the word “law.” Although philosophers have debated the issue for thousands of years, it is enough for us to say that a **law** is a rule that can be enforced by the courts.<sup>8</sup> If I merely broke a moral obligation by refusing to rescue the canoeist, then I might be punished, but only through public opinion. Colleagues might stop talking to me, and newspapers might print unflattering articles. In contrast, if you broke a legal obligation by refusing to help, then you would have more serious things to worry about. Depending on the precise nature of the legal obligation, a court might put you in jail or require you to compensate the victim's family for his death.

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

## A Map of the Law: Introduction

Even when distinguished from other types of rules, the law remains an enormous topic. To make sense of it all, we need to organize it into different parts. There are many ways of doing so. In Canada, for example, it is necessary to distinguish between *civil law* and *common law*.<sup>9</sup>

**a law**

is a rule that can be enforced by the courts

<sup>5</sup>*Osterlind v Hill* (1928) 160 NE 301 (Mass).

<sup>6</sup>Rescue sometimes is required by a statute. The *Canada Shipping Act 2001* states that the “master of a vessel in Canadian waters shall render assistance to every person who is found at sea and in danger of being lost”: SC 2001, c C-26, s 132.

<sup>7</sup>*Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321 (SCC). This case is discussed in Chapter 6 (Case Brief 6.5).

<sup>8</sup>If a rule is *not* a law, it will not be enforced by the law. That issue arose in *Kosoian v Société de transport de Montréal* 2019 SCC 59. A young woman on an escalator ignored a police officer's order to hold onto a handrail. He arrested her. When she challenged his actions, he pointed to a nearby pictogram indicating that handrails should be used and he explained that he believed that there was a law to that effect. In fact, there was no such law. The young woman received \$20,000 in damages for the unlawful arrest.

<sup>9</sup>There are other systems of law as well, such as Aboriginal law and Islamic law.

**civil law**

systems trace their history to ancient Rome

**a jurisdiction**

is a geographical area that uses the same set of laws

**common law**

systems trace their history to England

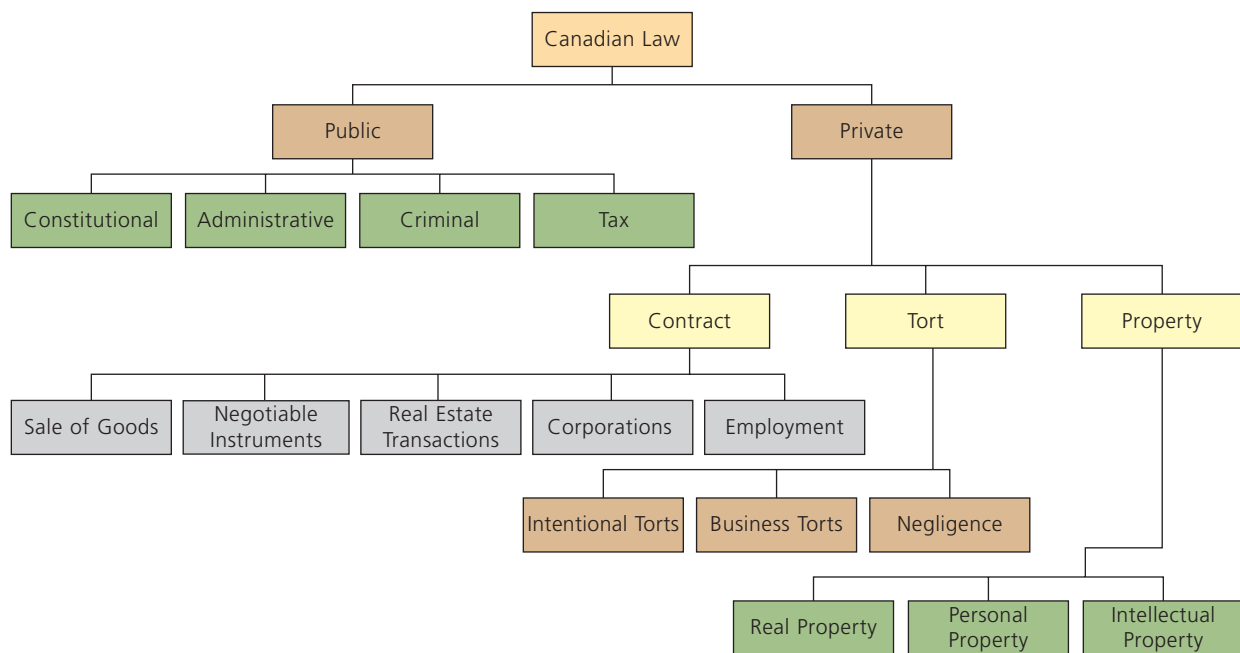
**Civil law** systems trace their history to ancient Rome. Since the Roman Empire covered most of Europe, most countries on that continent are still *civilian*. The only civil law *jurisdiction* in Canada, however, is Quebec, which initially borrowed its law from France. (Although it has many different meanings, **jurisdiction** in this situation refers to a geographical area that uses the same set of laws.)

**Common law** systems trace their history to England.<sup>10</sup> Consequently, most jurisdictions that were settled by English colonists continue to use the common law. That is true of the rest of Canada, as well as jurisdictions such as Australia, New Zealand, and most of the United States.<sup>11</sup>

Since there are significant differences between civil law systems and common law systems, there are also significant differences between the laws that apply in Quebec and the laws that apply in the rest of this country.<sup>12</sup> It is for that reason that we will focus on Canadian laws that apply outside of Quebec. At the same time, however, it is important to recognize that some types of laws are the same across the entire country. That is true, for example, of criminal laws and constitutional laws. We will therefore occasionally consider cases from Quebec.

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

**Figure 1.1** A Map of the Law



<sup>10</sup>The phrase “common law” refers to the fact that the rules in question were used throughout ancient England, in contrast to the various systems of localized rules that had developed over time.

<sup>11</sup>The exception in the United States is Louisiana. Like Quebec, it was settled by France and therefore uses a civil law system.

<sup>12</sup>“Civil law” is a confusing phrase. While it often refers to a legal system that can be traced to ancient Rome, later in this chapter we will encounter another definition of that phrase. Within a common law system, “civil law” may refer to private law rather than public law. For example, when Canadian lawyers talk about “civil litigation,” they are usually referring to cases involving contracts or torts. “Common law” is also a confusing phrase. While it often refers to a legal system that can be traced to England, later in this chapter we will see that it may also refer to rules that are made by judges, rather than by legislators. And within the context of rules made by judges, “common law” may refer to those made by judges who sat in the courts of law, as opposed to the courts of equity. (The concepts of “law” and “equity” are explained at the end of this chapter.)

## A Map of the Law: Public Law

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

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

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

Since the second half of the 20th century, Canadians have grown to expect more and more from their elected officials. To manage the workload, governments regularly *delegate* or *assign* responsibility to a variety of agencies, boards, commissions, and tribunals. **Administrative law** is concerned with the creation and operation of those bodies.

Administrative law has a profound impact on business. For instance, a human rights tribunal may decide that a corporation discriminated against women by paying them less than it paid men for work of similar value. If so, the company may be ordered to pay millions of dollars in compensation.<sup>13</sup> Even if a particular business never becomes involved in that sort of landmark case, it probably has to deal, in the normal course of operations, with a number of administrative bodies. There are literally hundreds. Figure 1.2 lists a sampling of federal, provincial (or territorial), and municipal bodies that regularly affect business.<sup>14</sup>

### public law

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

### constitutional law

provides the basic rules of our political and legal systems

### administrative law

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

**Figure 1.2** Administrative Bodies Affecting Business

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

<sup>13</sup>*Bell Canada v Canadian Telephone Employees Association* (2001) 199 DLR (4th) 664 (FC CA).

<sup>14</sup>This list is not exhaustive. Some bodies serve more than one function. Note that, below the federal level, the name of a particular body may vary from place to place.

**criminal law**

deals with offences against the state

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

- *White-Collar Crimes* As the name suggests, white-collar crimes are committed by people in suits. A manager who steals money from the petty-cash drawer is a white-collar criminal.
- *Corporate Crime* A crime can even be committed by a company itself. A corporate crime occurs, for instance, when a used-car dealership adopts a policy of rolling back the odometers on its vehicles. That company is guilty of fraud.<sup>15</sup> Case Brief 1.1 discusses another exceptionally important example.

## Case Brief 1.1

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

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

Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent

bodily harm to that person, or any other person, arising from that work or task.

Although that amendment did not save Steve L'Écuyer's life, it did allow his employer to be punished. Transpavé Inc manufactures concrete products. Steve was killed after being crushed beneath a pallet loader. The evidence indicated that he had not been properly trained and that a safety device on the machine, a motion detector, had been turned off. The court imposed a fine of \$110,000. The amount would have been much higher if the company had not spent more than \$750,000, after the accident, to upgrade worker safety.

**tax law**

is concerned with the rules that are used to collect money for public spending

The various branches of government, such as Parliament, administrative bodies, and courts, require a great deal of money to operate. **Tax law** is concerned with the rules that are used to collect money for public spending. This is an area of great interest to the business community.

## A Map of the Law: Private Law

**private law**

is concerned with the rules that apply in private matters

Although we will occasionally discuss public law, our focus is on *private law*. **Private law** is concerned with the rules that apply in private matters. Both parties in a private dispute are usually private *persons*, either individuals or organizations such as corporations. For instance, your theatre company might sue me if I failed to perform a play as promised.

Private law can also apply to the government. First, it is possible for a private person to sue a public body.<sup>16</sup> Assume that the municipal government carelessly

<sup>15</sup>*R v Waterloo Mercury Sales Ltd* (1974) 49 DLR (3d) 131 (Alta Dist Ct). Corporate crime is discussed in Chapter 22.

<sup>16</sup>And vice versa. If you accidentally burned down City Hall, the municipal government could sue you.