INSTRUCTOR'S RESOURCE MANUAL

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The Law and Business Administration in Canada

Eleventh Edition

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Introduction

The Eleventh Edition of *The Law and Business Administration in Canada*

It is now over 40 years since the first edition of *The Law and Business Administration in Canada* was published, though each subsequent edition has contained substantial revisions—not only to keep it up to date by the inclusion of new cases and statutes, but also in the subject matter covered and in the organization of its presentation.

Course Content

We have on occasions been asked to suggest which particular chapters, or subjects, should form the principal focus of courses, where time does not permit coverage of the entire book. This is very difficult to do, since our book is used in a wide variety of courses—some of them whole-year courses and others one-term courses. Some students may take only one course in Business Law, while others may take two or more courses. These courses may be part of a curriculum in Accounting, Business Management, Commerce, Engineering, or Medicine—to name only a few. The content and emphasis will consequently vary considerably from one course to another.

The first part, The Law in its Social Context, provides a general introduction to the study of law. The amount of time devoted to this part will probably depend upon the general educational background of the class and the relationship of the material to other courses that students may be taking. The core of the book lies in Parts 2 and 3—Torts and, especially, Contracts. Without an understanding of the law of contract, study of the remaining subjects covered in this book will be difficult or impossible. As to the later parts of the book, we expect instructors to select those subjects that best relate to the needs of the particular class. We would, however, suggest that students receive some exposure to Part 6, on Business Organizations.

The Manual

These notes are not intended to provide in any sense final definitive "answers" to any of the Review Questions, and Problems and Cases. Similarly, any recommendations for effective classroom presentation are merely those of the authors. They are offered in the hope that, even if another instructor may disagree in places with them, they will nevertheless offer ideas that will help in the planning of classes.

The *Instructor's Resource Manual* for this edition has followed the approach of the *Manual* for previous editions, with additional material to take account of the innovations that have been introduced. It includes:

Introductory Section

To assist those instructors who have used earlier editions, we have indicated those places where major changes from the tenth edition have been made. The introductory sections contain suggestions for teachers as to approaches that might be taken and material that requires special emphasis.

Contemporary Issues
Contemporary Issue "boxes" are intended to promote class discussion. Such discussions might last for as much as an hour—or longer. It is unlikely that there will be sufficient time available to discuss every chapter in this way and instructors will probably wish to select a few only of the issues for extended discussion. We have attempted to suggest the types of questions that students might be expected to raise, or that instructors might pose in order to stimulate discussion.

Questions for Review
These are short questions, the answers to which can all be found in the text. The primary intention is that students should be able to test themselves on their understanding of the material in each chapter.

Cases and Problems
As before, we have provided suggested answers to all Cases and Problems. The distinction that was made in earlier editions between "Problems" and "Cases" has been abandoned, since it no longer seemed to serve any useful purpose. Some of our Cases and Problems are based on decided cases; others are purely hypothetical. But even in those that are actual cases, it is important for students to understand that the law is constantly changing. A case that may have been decided one way 20 or 100 years ago, would not necessarily be decided in the same way today. And a case decided in British Columbia would not necessarily be decided the same way in Ontario, since the applicable legislation may be different. Consequently, it is not sufficient to identify the actual case and then to look up the "answer". For that reason, even where a Case or Problem is based on the facts of a decided case, we have not named that case in the text (although we have done so in this *Manual*, since the instructor may find this helpful).

Case Summaries
As with the previous edition, we include summaries of virtually all cases referred to in the text and footnotes, save those cases that are described sufficiently in the text (for example, those described in the "Case" boxes), or a few that, apart from the authority they give to a particular interpretation of the law, do not present useful facts.

Chapter 1

LAW AND SOCIETY

The purpose of the first two chapters in the text is to provide a useful background for subsequent chapters on particular aspects of the law that relates to business administration.

The subject matter of Chapter 1 explains the competing theories behind the law. Many students have a natural interest in it and the challenge for the instructor is to organize the material in advance so that class discussion can be focussed on a few particular ideas. These notes will offer some suggestions for organizing class discussion.

When teaching this material, it is worth keeping in mind the kinds of preconceived ideas that many students will have about the nature of "law." They may be surprised to learn that there is no agreement on the meaning of "law", that significantly different perceptions of the function of law in society exist, and that in fact each of us operates within a framework of thinking about law that is by no means universal. Moreover, they may come to see that conclusions about what amounts to "justice" are likely to arise from our perception of the role of law in society, and this perception is derived from our own set of political, social and philosophical values. It will be a theme of this and subsequent chapters that most laws do not originate simply as rules in the minds of those in a position to impose them on others. For example, laws that do not work well in regulating business relationships are unlikely to survive without modification: laws change to satisfy the reasonable expectations of those who are subject to them.

Business students, who may not have previously encountered law as a formal subject of study, can frequently benefit from learning to distinguish between a "natural law" (or idealist) approach and a “positivist” approach. The law with which we live and on which we base our predictions of the outcomes of court actions is, by and large, positive law—the product of what the legislatures have declared law to be and of what the courts are likely to say it is in relation to previous decisions. If we do not agree with and wish to reform positive law, we may agitate for parliamentary amendment of existing legislation or write an article criticizing past judicial decisions (and perhaps thereby influence future ones). But we cannot change the law simply by applying our own version of what we think it should be in our personal and business relations.

The main purpose of the chapter is to generate class discussion of some of the concepts introduced. For example, it may be useful to take one of the illustrations—such as Case 1.1 (at p. 6)—and adopt a provocative position by arguing for conviction of the accused sailors. (At the time of Dudley and Stephens, from which the facts are drawn, the penalty for a verdict of murder was capital punishment.) There are several lines of reasoning that can be used to support the sailors' conviction. The judge in the actual case found them guilty of murder and refused to accept a defence of necessity.

One argument in favour of conviction is the possibility of the use of executive clemency. A court might find them guilty of murder and sentence them to death, while expecting that the government would, given the extenuating circumstances, intervene and order the sentence to be mitigated. In the actual case, Queen Victoria commuted the sentences to

six months' imprisonment.

Another argument in support of conviction is that, however harsh the penalty, it is not for the courts in a system of parliamentary democracy to alter the will of Parliament as expressed in its criminal legislation. A court usurps that prerogative when it undertakes, on its own, to modify the directives of the legislature as set out in the penalty provisions of a statute such as the Criminal Code.

Some students may question the argument that in a system of parliamentary democracy, it is not for the courts to make the law, but only to apply it. Although this argument seems logically impeccable, it is unreliable as a description of what actually happens in formulating judicial opinions. Some of the most eminent judges have been realistic enough to acknowledge that courts frequently make law when, in the course of choosing from available principles they select those that may reflect their own values.

The chapter also provides background for class discussion about what qualities that "law" should have to make it a respected and accepted institution in any society. Professor Fuller suggested eight principles for making laws that satisfy the expectations of citizens subject to them (see *The Morality of Law* (rev. ed.), Yale Univ. Press, 1969):

1. Generality

The law should provide guidance for all kinds of human conduct. It should not leave us in a dilemma about whether or not what we are doing is illegal. At the same time, it should not put the lawgiver in the impossible position of standing over people and directing their every action.

Do we want to live in a country in which "Everything not expressly approved is forbidden" or one in which "Everything not expressly forbidden is legally permissible"? The former envisages a completely codified, programmed, oppressive society—the Orwellian world of Big Brother!

2. Promulgation

This principle requires that people subject to laws be educated about the laws' contents. A lawgiver who expects individuals to obey certain rules must take reasonable steps to ensure that they know what they are. The type of law and the nature of the group to which it applies determines the way the law should be publicized. For example, suppose that government printers were on strike and copies of new statutes passed at the current session of Parliament were unavailable. (This occurred once in Britain.) It would not be possible for most citizens to learn their obligations under the new laws. Should the new laws be enforced by the government before publication? Any punishment imposed would seem unfair.

3. Lack of Retroactivity

To punish someone today for doing yesterday what was then lawful conduct would be a pernicious form of law. Since law governs human conduct, it should operate prospectively only. Given a legal system of prospective laws, is there ever any justification for a retroactive law?

4. Clarity

If laws are obscure, confusing or incoherent, then people cannot be expected to conform to them. If various interpretations appear equally valid, then one cannot expect all people to conform to any one interpretation. Moreover, this obscurity will impede business transactions. Unfortunately, laws too often are confusing and do interfere with legitimate business arrangements.

5. Non-Contradiction

It is absurd to sanction or even compel certain conduct under one rule and then to punish a person for it under another rule.

6. Impossibility

Laws should not require the impossible.

7. Constancy

Frequent changes in the law render it difficult, if not impossible, for those subject to the rules to learn and abide by them. When laws change frequently, confusion results and the effectiveness of the legal system is impaired.

8. Congruence between Official Action and Existing Law

In order to have an effective legal system, officials responsible for enforcing the rules must ensure that their enforcement corresponds to the rules. Failure to enforce them, or their sporadic enforcement, will call into serious question the validity of the rules themselves as well as of the enforcement procedure. Moreover, lawgivers must abide by the same laws that they make for others. In summary, the legal system is a two-way process that involves a set of mutual expectations. The lawgiver expects that the rules will be observed by those individuals subject to the rules. Individuals, on the other hand, have expectations of the lawgiver—a set of principles that Fuller has called the "Internal morality" of law. The more closely the rules conform to these requirements, the more effective will be the legal system.

LAW AND BUSINESS ETHICS

The subject of ethics raises the question of whether merely abiding by the law is an adequate standard of conduct for businesses: should businesses be expected to do more? We discuss two aspects of this question—the personal moral or ethical code of those who manage the affairs of the enterprise, and the more pragmatic view that ethical behaviour will result in a more successful business.

THE COURTS AS ARBITER OF THE CONSTITUTION

The main significance of the Constitution Act, 1867 for business law lies in the division of powers it prescribes for the federal and provincial governments. For example, s. 91 of the Act assigns legislation over "trade and commerce" to federal jurisdiction while s. 92 gives the provinces legislative prerogative over "property and civil rights." Since each level of government is jealous of its prerogative, the Supreme Court of Canada has frequently had to interpret the meaning of these terms in relation to proposed legislation and to determine which level of government has the relevant authority..

CASE 1.2 illustrates the delicate role of the courts in maintaining a fair and workable balance between the two levels of government: if the courts were to insist that every federal statute precluded the provinces from legislating in an area that otherwise would fall concurrently within their jurisdiction, the provinces would be severely limited in exercising powers in their legitimate interests. On the other hand, the courts must not ignore the need for uniformity across Canada in areas where federal responsibility is considered more important. Here are some interesting examples for discussion:

(a) who should regulate the stock markets—the federal government under the “trade and commerce” power, or the provinces under “property and civil rights”?

(b) who should regulate highways—the provinces that build and maintain highways as “local works and undertakings” under s. 92 (10), or the federal government under s. 92 (10) (c), since highways almost invariably are part of a network that crosses provincial borders?

AS PROTECTOR OF CIVIL LIBERTIES

The Canadian Charter of Rights and Freedoms, part of the Constitution Act, 1982, is important, not only for each Canadian citizen, but also for business practices and especially employment. The impact of the Charter on business activitiesw is discussed further in chapter 32.

AS INTERPRETER OF LEGISLATION

Disagreement about the meaning of words is one of the most common bases for legal disputes. One whole chapter in the text is devoted to the task of the courts in interpreting the words that parties themselves choose in forming their contracts. Our concern here is with the problems created by the choice of words used in statutes.

Those who draft our statutes do not do so by sitting in the legislature, listening to the debate on a given subject and then retiring to express their recollection of the will of the legislature in the form of a statute. Instead, the drafters—civil servants who specialize in the task drafting and often seek expert legal assistance—present the legislature with a draft of proposed legislation in the form of a "bill". It is debated, amended, presented again for a further "reading" by the elected members of the legislature, redrafted to incorporate required amendments and then presented for a final revision or "third reading": the legislature's approval of it, followed by the signature of the head of state, the Governor General or Lieutenant Governor, turns the bill into a statute. Sometimes, as an integral part of this method of law-making, a "select committee" is appointed from members of the legislature, to invite briefs on a draft bill from interested members of the public and to hold public hearings; this function may also be performed by a standing committee. The process, while conscientious and democratic, is far from perfect and words sometimes appear in the final draft that prove to be ambiguous or contradictory.

As the text explains, any distinction between a "literal" and a "liberal" approach to the interpretation of statutes by courts is easier to envisage conceptually than to apply in specific circumstances. Some degree of interpretation is always required; even finding the "plain meaning" of words requires an interpretation of those words as they apply to the facts of each case.

CONTEMPORARY ISSUE (p. 17)

The issues raised in this chapter are further complicated by the introduction of the Charter of Rights and Freedoms: the use of “Brandeis Brief” evidence in questions about equality of treatment inevitably includes important value judgments that can be viewed as highly subjective and biased by those who disagree with a decision reached by a court.

Regarding question 1, we have seen that a court may narrow or restrict the application of a particular provision to make it comply with the constitutional limits. Is this really different from striking the provision down?

In discussing question 2, students should not that some – but not all – provisions in the Charter may be over-ridden if a statute expressly states that it is to operate “notwithstanding” those provisions. Why is it that the “notwithstanding” clause is so rarely used? What inhibits governments from employing it?

The purpose of question 3 is to illustrate to students just how difficult it is even to formulate an amendment on this subject, even if one or more of them might agree that a change should be made.

QUESTIONS FOR REVIEW

1. Law: (a) sets rules of conduct that protect us from being harmed by, and from harming others and provides compensation when we suffer harm; (b) empowers government to provide services for the benefit of society; and (c) provides a broader framework for organizing our affairs, such as entering into binding business arrangements. Page 3
2. A reliable and predictable legal framework permits businesses to enter into longer-term arrangements, to take calculated investment risks based on the prospective value of a project without fear of unlawful interference. This security is a significant incentive for business development. Page 3
3. Natural law is based on fundamental, moral principles, based on either religious beliefs or on reason and logic and is a higher law than “human” laws whether enacted by despots or by democratic legislatures. In contrast, positive law is defined as those rules enacted by government complete with sanctions to enforce them, whether or not they are seen to comply with principles of natural law. Page 5
4. Normative laws are rules governing human interaction and prescribing standards of conduct. Physical laws relate to the natural sciences; they describe natural phenomena and do not prescribe standards of behaviour. Page 5
5. The "is" involves laws that are binding and are accompanied by sanctions. The "ought" involves morals or rules that should be obeyed but are not binding. Pages 5-6
6. Austin's description of law as "the command of a sovereign" is difficult to apply to a federation such as Canada where legislative authority (sovereignty) is divided between several levels of government. Page 6

7. Businesses adopt codes often to reflect the moral values of their managers, and also because they believe it will improve relations with their employees, with consumers and the public generally. Page 7
8. In a federal country when the two levels of government disagree about the extent of their powers and pass legislation that may be in conflict, the courts have the task of determining which level is correct; it finds the legislation of the other level beyond its powers—*ultra vires*. Page 9
9. Residual powers are those that fall within federal jurisdiction in Canada because they are *not* expressly allocated to the provinces. Concurrent powers are overlapping powers of both levels to regulate the same activities. Page 9
10. When the Supreme Court finds a statute to be beyond the powers of a legislature, the legislature cannot override the Court. Only by obtaining an amendment to the Constitution through the amending process set out in the Constitution itself can such a statute be made valid. Page 11
11. The liberal approach is to view legislation in its larger context, especially by examining its purpose and the nature of the problem that it is intended to remedy. Page 16
12. In the Canadian Constitution, "civil rights" is part of the phrase "property and civil rights" in s. 92, and means private rights relating to ownership of property, to making contracts, to family relations and to civil liability in areas such as tort law. Page 11
13. Sections 91 and 92 set out the powers, respectively, of the federal Parliament and the provincial legislatures. The problems these sections raise are partly described in Question 8, above—when there is uncertainty about which level of government has the power to regulate particular activities. Page 9
14. A statute is presumed to be valid and initially it is not the task of the government to defend it; instead the onus is on the citizen to show that one of his constitutionally guaranteed rights has been infringed by a provision in the statute. Only if the court agrees that there is an infringement must the government then defend it by showing it to be "demonstrably justified" under section 1. Page 13
15. The Charter applies to governments and their activities but not to private sector activities. Page 13
16. Human interaction involves conflicts and disputes. Legal institutions are required to minimize conflicts and to resolve disputes when they arise. It is a paradox that the realization of liberty for everyone requires that individuals be subject to constraints requiring respect for the rights of others. Page 3

CASE SUMMARIES

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (United States Supreme Court, 1803).

(p. 10, n. 5)

John Adams, then President of the United States, signed a commission appointing William Marbury as a justice of the peace. The seal of the United States was affixed to

the commission but it never reached Marbury, having been held back by James Madison, Secretary of State of the United States. Marbury applied for a writ of mandamus to force Madision to deliver up the commission. The United States Supreme Court held that, since Marbury had been appointed and since his appointment was not revocable by the executive, withholding the commission was a breach of his legal right to exercise his office. Marbury was entitled to receive his commission. In the course of the decision, the Court held that it was the final arbiter of the Constitution.

***R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (Supreme Court of Canada).**

(p. 12, n. 8)

The Lord's Day Act, a federal statute prohibited anyone from selling any goods, or carrying on any "ordinary" business for gain on Sundays. Big M had been convicted of being open to the public for business and selling goods on Sunday. Big M challenged the validity of the Act on the basis that infringed the freedom of conscience and religion guaranteed in s. 2(a) of the Charter of Rights and Freedoms. The court agreed that the "primary purpose" of the Act was "compulsion of sabbatical [Sunday] observance", and struck down the legislation.

***Vriend et al. v. The Queen in the Right of Alberta et al.* (1998), 156 D.L.R. (4th) 385 (Supreme Court of Canada).**

(p. 12, n. 9)

Vriend was employed as a laboratory coordinator by King's College in Edmonton, and was given a permanent, full-time position in 1988. He received positive evaluations, salary increases and promotions for his work performance. In 1990, in response to an inquiry by the president of the college, Vriend disclosed that he was homosexual. In early 1991, the college's board of governors adopted a position statement on homosexuality, and soon after, the president requested Vriend's resignation. When he declined to resign he was dismissed. The sole reason given was his non-compliance with the college's policy on homosexual practice. Vriend was refused reinstatement and then tried to file a complaint with the Alberta Human Rights Commission on the grounds of discrimination based on his sexual orientation. The Commission rejected his complaint under the Individual's Rights Protection Act (Alberta's human rights act), because it did not include sexual orientation as a protected ground. Vriend then appealed to the courts. The trial judge found that the omission in the Act of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the Canadian Charter. She ordered that the words "sexual orientation" be read into the Act as a prohibited ground of discrimination. The majority of the Court of Appeal allowed the Alberta government's appeal, but the Supreme Court disagreed and upheld the trial judge's position. Accordingly, sexual orientation was read into the Alberta Act and gave Vriend the right to make his case before the Alberta Human Rights Commission.

1. The law in its social context -- 1. Law and society -- 2. The machinery of justice -- -- pt. 2. Torts -- 3. The law of torts -- 4. Professional liability -- -- pt. 3. Contracts -- 5. Formation of a contract : offer and acceptance -- 6. Formation of a contract : consideration, and intention to create legal relations -- 7. Formation of a contract : capacity to contract and legality of object -- 8. Grounds on which a contract may be impeached : mistake -- 9. Grounds on which a contract may be impeachedÂ Mortgages of land and real estate transactions -- -- pt. 6. Business organizations : their forms, operation, and management -- 26. Sole proprietorships and partnerships -- 27. The nature of a corporation and its formation -- 28. The internal affairs of corporations -- 29. Study in Canada: find full information about English-language programs, scholarships and internships in business-administration.Â B.A. Business Administration. Description The rapidly changing competitive world requires indivuals who are able to generate creative knowledge B.A. Business Studies with Law. Description It is necessary for non-lawyers to appreciate the extent to which they can deal with a legal problem. B.Sc. BBA. Description The BSLs Bachelor of Business Administration program is comprised of 200 ECTS credits and it is avail BSBA - Bachelors of Science in Business Administration. The AGSB undergraduate program is designed for the high school graduate with minimal work experience so that the partici