CHAPTER 1

LAW, SOCIETY, AND BUSINESS

Chapter 1 emphasizes the important and integrated relationship among law, business and ethics. This chapter justifies the placement of a law course in the business program. Often students do not understand why they must take this course. It is helpful to open the course with a series of questions:

- Why should business students study law?
- If law represents society's standard of desirable behaviour, why are laws hotly debated, changed or disobeyed?
- Which laws do students frequently disobey and which laws would they never consider breaking?
- Why do they comply with a law: because they agree with it, because they fear the consequences of non-compliance, or for some other reason?

When teaching this material, it is worth keeping in mind that many students have preconceived ideas about the nature of "law." It is a theme of this and subsequent chapters that most laws do not originate simply as rules in the minds of those in power; they represent the values of the public at large. The categories of legal liability (criminal, regulatory, and civil) may be presented as tools to encourage compliance with the law and indicators of society's opinion of the behaviours.

The main purpose of the chapter is to generate class discussion of some of the concepts introduced. It may be useful to take one of the illustrations—such as 1.2 (Source p. 4)—and trace the history of the law. The legal treatment of possession of marijuana demonstrates the struggle to balance issues of generational attitudes, enforceability, and fairness. Comparisons to alcohol and prohibition are relevant.

Key dates in the Development of the Law of Possession

1923 – possession introduced as criminal hybrid offence

1961 – possession changes to strictly indictable criminal offence

1968 – possession returned to a hybrid criminal offence

1974 – attempt to make possession exclusively summary offence fails

1996 – possession is changed to a summary offence only

2000 – *R* v. *Parker* (2000) 49 O, R. (3d) 481 Ontario Court of Appeal declares prohibition on possession for medical use unconstitutional (s. 7 of *Charter*). The result is the Marijuana Medical Access Regulations.

2003 – Supreme Court upholds prohibition against personal use. It does not violate the Charter (s. 7, 12): *R.* v. *Malmo-Levine*, 2003 SCC 74 *R.* v. *Caine* and *R.* v. *Clay*, 2003 75

2004 – Bill C-17 (proposing removal of possession of small amounts from criminal process in favor of a regulatory offence ($150/100 fine)) not implemented

2008 – Bill C-26 (proposing mandatory minimum sentences for trafficking and production) not implemented

Available resources include the Senate Special Committee on Illegal Drugs Cannabis: Summary Report, September 2002 <http://www.parl.gc.ca/37/1/parlbus/senate/com-e/ille-e/summary-e.pdf>, this includes a discussion on public opinion), Bill C-17 38th Parliament, 1st Session (backgrounder discusses decriminalization vs. legalization)

Illustration 1.2 also demonstrates the combined roles of courts and legislatures in the formation and development of law. Some students may argue 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 logical, it is unrealistic as a description of what actually happens in formulating judicial opinions. Some of the most eminent judges have acknowledged that courts frequently make law when, in the course of choosing from available principles they select those that may reflect their own values. When judges are asked to determine what is "justified in a free and democratic society" (s.1 of the *Charter of Rights and Freedom*) it is inevitable that their values and the values of society as a whole shape the development of the law.

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

- **Generality**: The law should provide guidance for all kinds of human conduct without directing our every action.
- **Promulgation**: Individuals are presumed to know the law. Therefore people must have access to the laws' contents. The type of law and the nature of the group to which it applies determine the way the law should be publicized. Discussion can focus on the *Statutory Instruments Act*, Canada Gazette and case databases (free and fee based).
- **Lack of Retroactivity**: To punish someone today for doing yesterday what was then lawful conduct would be a pernicious form of law. Given a legal system of prospective laws, is there ever any justification for a retroactive law?
- **Clarity**: If laws are obscure, confusing or incoherent, then people cannot be expected to conform to them.
- **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.
- **Impossibility**: Laws should not require the impossible.

- **Constancy:** When laws change frequently, confusion results and the effectiveness of the legal system is impaired.
- **Congruence between Official Action and Existing Law:** Failure to enforce laws, 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.

LEGAL RISK MANAGEMENT (Source p. 5)

This section identifies how legal compliance is incorporated into every day business decision making. Instructors should ensure students recognize the need to comprehend legal principles in order to complete particular components of a legal risk management plan. Even when legal advice is being sought, it will be much more valuable (less expensive and more easily understood) if the business person understands basic legal principles.

THE LEGAL PROFESSION (Source p. 7)

This section outlines the various titles given to those who practice law in England, the United States and Canada. It also briefly discusses the standards expected of members of the profession, breaches of which could, if very serious, result in a lawyer in Canada being disbarred, meaning that the lawyer is expelled from the applicable provincial law society so is no longer able to practice law. The use of paralegals, now regulated and licensed in certain provinces, is set out and relates that paralegals provide many useful services, including cost-saving measures for the public and businesses in such areas as incorporations, uncontested divorces, and simple wills.

An interesting discussion would be the law relating to solicitor-privilege, as set out in this section.

BUSINESS AND THE LEGAL PROFESSION (Sourse p. 7)

In organizing a risk management plan, the use of in-house counsel versus designated lawyers within an outside law firm should be discussed. Key factors include the size of the business and risks which are present, as well as the need for legal advisors who are aware of all aspects of the business which may be affected. Often, companies that have inhouse counsel find these lawyers to be a valuable asset within the management team, as well as a cost-efficient and expedient way to manage legal issues as they arise or through prevention before they arise.

LAW AND BUSINESS ETHICS (Source p. 9)

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 emergence of "Corporate Social Responsibility" as a societal expectation should be identified as a demonstration of the increased importance of ethical business decision making. The inter-related nature of business decision making may be expanded upon using Figure 1.1 and the "Three Domain Approach" described by Professors Schwartz and Carroll (Source p. 9). Ethics are no longer an after thought considered once legal compliance and profit have been achieved (as early pyramid style models suggested). Students should be asked to describe the fundamental values they include in the concept of "ethics".

Professor Schwartz identifies the following six values:*

Trustworthiness:

(honesty, integrity, reliability, and loyalty)

Respect

(consideration for the rights of others)

Fairness

(balancing the interests of all other stakeholders)

Responsibility

(accountability for ones actions and the actions of others)

Caring

(avoid unnecessary harm)

Citizenship

(honourable member of society, obeying the law)

*As discussed in three articles:

Schwartz, M. S.: 2001, "The Nature and Relationship between Corporate Codes of Ethics and Behavior", *Journal of Business Ethics* 32: 247 – 262

Schwartz, M. S.: 2002, "A Code of Ethics for Corporate Codes of Ethics", *Journal of Business Ethics* 41: 27-43

Schwartz, M. S.: 2004, "Effective Corporate Codes of Ethics: Perceptions of Code Users", *Journal of Business Ethics* 55: 323 – 343

It should be noted that *obeying the law* is an ethical value and may have been the response given by some students to the earlier question about reasons for compliance. These six values may be used in each of the following chapters as criteria for assessment of the issues presented in the "Ethical Issues" theme boxes. Most often the issue of fairness (balancing the rights of others) will be involved because the theme boxes try to present a dilemma where two or more values conflict.

Finally, some comment should be made about how best to achieve ethical decision making. Can ethics be legislated? Consider recent initiatives in corporate governance. The role of the voluntary code of conduct is discussed in the text and the above described Schwartz articles.

THE COURTS AND LEGISLATION (Source p. 11)

Federalism and 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. This is the time to show students that businesses use these arguments strategically, in order to defeat unwanted business regulation.

Case 1.1 (Source p. 12) 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.

As set out in the text, the courts try to use a two-step process in determining whether an area of law is within federal or provincial powers. The Supreme Court of Canada is the final arbiter of conflicts over the substance of a law. The two-step process first looks at what the law actually does and why and then what delegated power, federal or provincial, would be responsible for this law? Of course the courts must also determine if there are concurrent powers, allowing botht the federal and provincial government to legislate in the area, or whether the principle of federal paramountcy should apply.

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?

If the instructor wishes to use the same-sex marriage issue as an example, a very useful summary of the history of same-sex marriage has been prepared by Steve Beattie (*Tracing the steps towards same-sex union and marriage in Canada,* April 2004) and is available at samesexmarriage.ca, in the documents section.

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), who 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 which prove to be ambiguous or contradictory.

THE *CHARTER OF RIGHTS AND FREEDOMS* (Source p. 13)

The Charter is a very important topic in Chapter 1, its significance for business seen in both regulations and legislation affecting business and in its' effect on the retail environment. An intereting discussion might revolve around the ways in which the Charter has affected business—i.e., hiring practices, employees' rights to certain days off, Sunday openings, mandatory retirement. As part of the discussion, it is necessary to articulate that the Charter only applies to government, excluding hospitals and universities. The *McKinney v. University of Guelph* case (page 14 n.13) is an interesting review of this aspect of the law. As well, Case 1.2, (page 16) reviews the Lord's Day Act and the Charter.

Another topic necessary to discuss is that the Charter is not absolute—s. 33 allows for legislation which overrides the Charter as long as the legislation states that it violates specific Charter sections. However, any such legislation will expire within five years, and referred to as a sunset clause. S. 1 also allows for legislation that violates the Charter, based on the preamble that states that all laws are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." S. 1 allows for rights of search and seizure and extradition treaties, which would otherwise offend the Charter.

Another important discussion topic is the process used to review a statute that may offend the Charter and the method the courts use when determining if a statute violates the Charter. Some questions for consideration:

- Does the Charter apply to the situation; that is, is it a government or governmental activity?
- In this situation, were rights under the Charter infringed upon?
- Can the infringement be justified under s. 1 of the Charter; that is, is the legislation necessary in a free and democratic society?

In examining how the Charter is reviewed, key provisions of the Charter can be discussed, including fundamental freedoms, legal rights, and equality rights, as set out in the text. Of interest are the two aspects of s. 15, under equality rights, which allow for "affirmative actions" and for the requirement that the Charter apply equally to male and female persons.

CHALLENGING THE VALIDITY OF A STATUTE (Source p. 16)

The courts will examine the substance of a statue; that is, what it does rather than what it purports to do, when considering if a statute is valid. What is its purpose and effect? The courts will determine if the subject matter is outside the constitutional jurisdiction of the government, also whether or not the statute itself violates the Charter—illustration 1.6 (p.16) is an example of this. Furthermore, as set out in the text, the interpretation of the statute may affect its applicability. A narrow interpretation may limit the functionality of a statute, until Parliament is able to introduce an amendment to the statute to enable its application.

CONTEMPORARY ISSUE (Source p. 18)

The Role of Judges

The essence of jurisdictional and *Charter* challenges involve value judgments that can be viewed as highly subjective and biased by those who disagree with a decision reached by a court.

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?

Question 2 - Students should note 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?

Question 3 – The purpose of this question 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, and whether such an amendment could be free of political bias.

Question 4 - This question focuses on the practice of public confirmation hearings for United States Supreme Court justices which often involve disclosure of personal positions on controversial issues such as abortion, affirmative action and gay rights. In 2004 the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness tabled a report proposing reform to the Canadian appointment process which involved the creation of an advisory committee. (See Report 1- Improving the Supreme Court of Canada Appointments Process, 37th Parliament, 3rd Session, available online in the publications section at parl.gc.ca.

The Federal Government favoured an alternative process that preserved the wide discretion of the Prime Minister and the Minister of Justice. Neither proposal included public hearings prior to appointment. This question can be considered with the International Issue in Chapter 2 which discusses the American practice of electing judges.

Question 5 – The suspension of a ruling, allowing the government to strategize, may allow for fewer laws to be struck down, and for less dire consequences if the courts must interpret existing laws in a way that could affect components of our society in an adverse way – a good question as it speaks to compromise between the courts and the legislature.

QUESTIONS FOR REVIEW

1. Law: (a) influences and controls the behaviour of individuals in society (public law); (b) empowers, influences, and controls the actions of government; and (c) provides a framework for interaction between individuals (private law). (Source p. 4)
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 and globalization. (Source pp. 4-5)
3. Legal liability assigns responsibility for the consequences of breaking the law. The consequences that follow may take a number of forms depending upon the type of legal liability: criminal liability, quasi-criminal liability, or civil liability. (Source p. 4)
4. Criminal liability arises from the most serious breaches of public law. The government enforces penalties for these breaches on behalf of society as a whole. Civil liability arises from disputes of a private nature between individuals and the aggrieved party (not the government); it is responsible for enforcing the law and and for enabling injured persons to seek compensation. (Source p. 4)
5. Law and ethics are distinct but related concepts. Law sets the minimum acceptable standard for behaviour that individuals must comply with in an organized society while ethics often reflect a “higher” standard of desirable conduct that is not compulsory. Still most law is based on a moral principle and in this way ethics often inform and shape the development of law. (Source pp. 2-3)

6. A legal risk management plan has the following components:
    - Identify potential legal risks
    - Assess and prioritize each legal risk according to degree of likeliness and magnitude of damage
    - Develop strategies to address each risk from both proactive and reactive perspectives
    - Implement the plan
    - Regularly review and update the plan. (Source p. 6)
7. Businesses adopt codes often to reflect the moral values of their managers and in response to public criticism. Codes of conduct may also improve relations with their employees, with consumers and the public generally. Sometimes, government regulations require businesses to adopt codes of conduct, for example privacy policies. Professional and industry associations also require their members to adopt or comply with common codes of conduct. (Source p. 6)
8. In a federal country, the court plays the role of constitutional umpire. When the two levels of government disagree about the extent of their powers and pass legislation that may be in conflict, it falls to the courts to determine which level is correct; it finds the legislation of the other level beyond its powers—*ultra vires*. (Source p. 11)
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. (Source p. 12)
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. (Source pp.16-17)
11. Business use four different strategies (often in combination) in order to manage legal risk. The strategies are to avoid risk (discontinue the activity), reduce risk (tight quality control on the activity), transfer risk (distribute the risk to others), and absorb the risk (budget for the cost of the risk). (Source pp. 6-7) This discussion may also include the hiring of in-house counsel as a "watchdog" of the risks. (Source p.8)
12. Public law regulates the conduct of government and the relationship between government and private persons. Private law regulates the relations between private persons and entities. (Source p. 2)
13. Sections 91 and 92 set out the powers, respectively, of the federal Parliament and the provincial legislatures. As previously noted in Question 9, if power over an activity cannot be found in either section, it falls into the residual powers of the federal government. 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. (Source p. 12)

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 the Charter applies to the situation and 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. (Source p. 14)
15. The *Charter* applies to governments and their activities but not to private sector activities by private entities. (Source p. 15) See also *McKinney v Guelph University* (Source p. 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. (Source p. 3)

CASE SUMMARIES

***Bank of Montreal v. Hall,* [1990] 1 S.C.R. 121.**

The doctrine of paramountcy comes into effect when it is impossible for dual compliance with both a provincial and federal statute.

***Canada (Attorney General) v. Bedford,* 2013 S.C.C 72.**

This case is important because the court found that the bawdy house law violates sex workers' constitutionally protected right to security, under s. 7 of the *Charter*, so it struck down the law, but more importantly, the court allowed the government one year to amend the unconstitutional laws.

***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence,* 2012 S.C.C 46.**

This case involved the issue of public interest standing, which arose from a case involving a constitutional challenge to adult prostitution, with the court originally ruling that the plaintiffs did not have standing to bring a lawsuit. The issue went to the Supreme Court of Canada, who held that when looking at granting public standing, a factor to be considered is "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."

***Greater Toronto Airports Authority v. City of Mississauga* (2000), 192 D.L.R. (4th) 443.**

The issue here involved an ongoing dispute involving jurisdiction over the redevelopment of the Pearson Airport. The Court ruled that the federal Parliament's exclusive jurisdiction over aeronautics, federal undertakings and property belonging to the federal

Crown prevented the city of Mississauga from regulating construction at the airport, including the application for building permits and payment of both provincial and municipal fees.

***Halpern v. Attorney General of Ontario et. al.*, (2003), 65 O.R. (3d) 161 (Ontario Court of Appeal).**

Several same-sex couples unsuccessfully sought marriage licences from the City of Toronto. They initiated a court application which was joined with an application by the Metropolitan Community Church of Toronto seeking registration of religious marriage ceremonies performed for same-sex couples. The Divisional Court found that the historic common law definition of marriage as a marriage between a man and a woman (found in *Hyde v. Hyde and Woodman see* {L.R.] 1 P.& D. 130 (U. K.)) violated the *Charter of Rights and* Freedoms, in particular the equality rights of 15(1). The Court held that discrimination based on sexual orientation was not justified under s. 1. The Court of Appeal unanimously held that the common law definition of marriage violated the equality provisions of the *Charter*. It held that the cases addressed the legal not religious definition of marriage and the Attorney General had failed to show a pressing and substantial objective to be achieved by denying same-sex couples the right to marry (*R. v. Oakes* [1986] 1 S.C.R. 950). It specifically rejected "encouragement of procreation" as such an objective. It declared the "man and a woman" portion of the definition of marriage invalid. Importantly, (for the purpose of the above described Reference), the Attorney General did not appeal.

***Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at 964 (Supreme Court of Canada).**

The *Quebec Consumer Protection Act* prohibited advertising aimed at persons under the age of thirteen years. Irwin Toy Ltd. challenged the validity of the statute as being *ultra vires* the powers of the province as the power to legislate for radio and television lay within the power of the federal government. The court held that the statute was not void as it the purpose of the legislation was to protect children and that the effect on television advertising was incidental.

***McKinney v. University of Guelph* [1990] 3 S.C.R. 229 (Supreme Court of Canada).**

The Ontario Council of University Faculty Associations brought an action on behalf of eight professors who claimed that their universities' mandatory retirement provisions amounted to age discrimination. At the time the Ontario Human Rights Code defined age as eighteen to sixty-four, thereby allowing age discrimination in the form of mandatory retirement at age sixty-five. The applicants claimed that this definition of age offended the *Charter*. First, the Supreme Court upheld the lower court's finding that the *Charter* did not apply to universities directly. The *Charter* applies to government actions only and universities were held to be non-government bodies despite their large degree of public

funding, public purpose and statutory creation. They are not subject to government or exercise government authority. The Court upheld the definition of age in the Ontario Human Rights Code. Mandatory retirement was justifiable age discrimination in the context of s. 1 of the *Charter*. It was the least offensive way of promoting youth employment, faculty renewal and facilitating pension management.

***Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161.**

The issue here was whether both the provincial *Ontario Securities Act* and the federal legislation, which almost duplicated the provincial legislation, could both operate; that is, did the Double Aspect doctrine apply? The court ruled that both statutes were operative as validity turns on classification and that paramountcy did not apply.

***Newfoundland (Treasury Board) v. N.A.P.E.*, (2004) D.L.R. (4th) 294 (Supreme Court of Canada).**

In 1991 the Newfoundland government enacted legislation that wiped out arrears owing to its female public service employees for pay equity compensation. The union grieved and an arbitrator held that the legislation violated s. 15 of the *Charter*. On appeal the motions judge, the Court of Appeal and the Supreme Court of Canada all held that the legislation was justified under s. 1 of the *Charter* because its objective was to respond to a severe provincial financial crisis. This was a pressing and substantial legislative objective although the courts will remain skeptical of general budgetary constraints as a rational for violating the *Charter*.

Reference Re. *Assisted Human Reproduction Act*, [2010] S.C.J. No. 61 at para. 19 (S.C.C.).

The issue here was that certain prohibitions were fine while others were considered an attempt to regulate medical malpractice and research related to reproduction, with the court holding that the provisions were valid under the federal government's criminal law power.

***Reference re: Same Sex Marriage*, (2004) 246 D.L.R. (4th) 193 (Supreme Court of Canada).**

Following the Halpern decision (below n. 19) the federal government referred proposed legislation defining marriage as a "lawful union of two persons" (without reference to gender) or its opinion of four questions. In accordance with s. 53 of the *Supreme Court of Canada Act*, the Court offered an opinion on three of the four questions. It said:

(1) The proposed legislation was within the legislative power of the federal government; (2) The proposed definition was consistent with the Charter; and (3) The *Charter* would protect religious official from having to marry same-sex couples. The fourth question

asked whether the previous "man and woman" definition was consistent with the *Charter* and the Supreme Court refused to answer this question saying that since the government had not appealed the Halpern (and other) decisions, commenting on this issue now had the potential to put the law into a state of confusion.

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

See Case 1.2 at p. 16 in the text. 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 it 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.

Source p. 14, n. 12

***R. v. Van Kessel Estate*, 2013 BCCA 221.**

The appellant contested the forfeiture provisions of the *Controlled Drugs and Substances Act*, stating that the provisions of the *Act* were *ultra vires* the federal government as they concerned provincial powers being property and civil rights, even where enforced due to a conviction for the production of marijuana. The British Columbia Court of Appeal ruled that while provincial powers were encroached, this was incidental to the dominant purpose of the objectives of the *Act* in relation to combating illicit drug trade.

***Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188.**

This is another case dealing with both federal and provincial legislation, here being the federal *Tobacco Act* and the *Saskatchewan Tobacco Control Act*. The court held that the provincial legislation was not sufficiently inconsistent with the federal legislation so that dual compliance was possible and both the federal and provincial legislation were valid.

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

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.