Chapter 1

Knowledge of Law as a Business Asset

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I. TEACHING OBJECTIVES

After studying this chapter, students should have an understanding of

- the role of law in guiding conduct
- the importance of legal knowledge in the business environment
- the challenges posed by business ethics and their relationship to legal requirements

This chapter provides an introduction to the role and purpose of the Canadian legal system *within a business context.* It endeavours to put forth a corrective or alternative to the view that the legal system is obstructionist in the sense of "getting in the way" of commercial activity. Instead, the chapter advances the perspective that the law facilitates business planning, offers protection mechanisms, provides general rules of commerce, and allows businesspeople to manage their exposure to risk. In this way, the chapter defends the central proposition that informs the whole text: knowledge of the law is a business asset.

The teaching objective of this chapter is to establish why it is important to study law in a business program. It is helpful to convey to students that the whole course is centred on the *practical* application of legal ideas and principles, and will therefore likely resonate throughout their careers.

To provide a foundation for the subsequent discussion of specific legal subject areas, Chapter 1 is an account of the basic ideas that inform the Canadian legal system. By relying on the exaggerated persona of the incompetent and oblivious Louella (whose business suffers from a series of tribulations), the chapter also illustrates the pitfalls of legal ignorance. Beyond this, it demonstrates the wide range of laws that affect Louella's operations and how Louella should proactively endeavour to understand and use the law to her advantage.

Through class discussion, the instructor can try to tap into whatever legal knowledge students may have and then gently advance it. For example, a student may think that the law is simply a set of rules—which it is, from a certain perspective—but it is also a process by which disputes are resolved. Furthermore, the law does not concern a process that resolves disputes in any old way; it embodies important principles, such as the idea that the laws and how they are applied should be fair and free from bias. Though no justice system can achieve such a standard of perfection, the Canadian legal system is dedicated to trying to reach it.

II. TEACHING STRATEGIES

Although some students may have a general sense of the legal system, it can be difficult to elicit class discussion on such a broad topic. In short, students may be too intimidated to share their thoughts on the subject. Since the tone of the class is established early in the term, it is important to find ways of securing student participation at the outset.

Students (at least some) will have read Chapter 1 and already be familiar with the Business Law in Practice scenario involving Louella and her disastrous business venture. During class, it may therefore be preferable to present a new, but parallel, example to facilitate discussion.

The following example has been classroom tested, with success. A businessperson has come up with a new product—say, a computer that translates English into other languages. This entrepreneur believes that her product has numerous applications, in both the public and private sectors. She needs to work up a business plan. What business decisions must she make to bring the product to market?

This example encourages discussion because it is straightforward. Students will quickly identify a number of areas requiring attention—the entrepreneur needs to choose a business name, hire employees, get financing in place, and so on. After general discussion subsides, the instructor can then zero in on two or three of the business decisions identified and illustrate how the law affects those decisions and provides mandatory parameters. For example, when choosing a name, the entrepreneur must be sure not to commit the tort of passing off, nor violate someone else's trademark. In hiring employees, the entrepreneur must abide by the dictates of human rights legislation prohibiting discrimination, as well as comply with occupational health and safety legislation during operations. Before beginning production, the entrepreneur must be sure that his idea does not involve someone else's patent, and so on.

From there, the instructor can ask the class to consider

- what the purpose of these laws might be
- whether they are positive or negative forces for this entrepreneur specifically
- whether they are positive or negative forces for business generally

After discussing these points, the instructor can then steer debate to the text's account of the general purposes of law.

An alternative approach—which has also proven successful in the classroom—is to follow through with the Business Law in Practice scenario. By highlighting the legal difficulties experienced by Louella, an instructor can focus on this chapter's themes, namely:

- the three purposes of the law (i.e., protecting persons and their property, facilitating interactions, providing mechanisms for dispute resolution)
- how and why the law works
- how knowledge of the law is a business asset, including the importance of legal risk management
- the relationship between law and business ethics

III. STUDENT ACTIVITIES

Task 1: One way to help students prepare for class discussion about the role of the law in the business world is to ask them to find a news story, in a local or national paper, involving business and the law. Ask students to come to class having summarized the story and identified the main legal question or legal issue to be resolved.

Task 2: Chapter 1 of the DVD supplement (supporting the Instructor's Manual) includes a CBC *Marketplace* update (called "Faking It") about San Francisco Gifts Ltd. and its owner, Barry Slawsky. This video builds on the Business Application of the Law: Fraud on the Public (page 4 of the text), which kicks off the story of San Francisco Gifts placing fake UL (Underwriters Laboratories) labels on table lamps being sold in its retail outlets. The lamps had not been UL inspected and, in fact, were a potential fire hazard. The video discusses the fire hazard created by another San Francisco Gifts product—specifically, a dolphin lamp—which also bore a fake UL label. In this latter case, the product in question began to catch on fire but the family was home and the appliance was quickly unplugged, thereby averting a potential tragedy. See too: CBC News, "Fake labels give consumers false sense of safety: CBC report" (7 April 2007) at http://www.cbc.ca/canada/story/2006/04/07/labels060407.html.

After showing the CBC *Marketplace* video to the class, the instructor might pose the question in Task 1 above ("What is the main legal question or legal issue to be resolved?") and the following questions as well:

- What is the purpose of the law that requires UL inspection and prohibits counterfeit UL labels?
- How does such a law fit within the definition of law set out on page 5 of the text?

- Is the law failing in the San Francisco Gifts case?
- Is enforcement failing in the San Francisco Gifts case?
- What do you think should happen next?

On a related front, students could be asked to consider the video in light of Questions for Review 1, 2, 3, 10, and 12.

Task 3: The DVD (supporting the Instructor's Manual) also includes several short news clips reporting on an emerging legal issue or problem. "Sled Dog Repo" concerns the killing of sled dogs in British Columbia (which is also the focus of Ethical Considerations: Inhumane Killing of Sled Dogs in British Columbia, page 7). "Facebook Privacy" concerns privacy issues on Facebook (which is also the focus of Technology and the Law: University of Ottawa Law Students Help Challenge Facebook, page 6). "Victoria Tanning" concerns underage tanning (which is also the focus of Business and Legislation: Regulating the Tanning Industry, page 10). The instructor could show these clips in succession and ask the class to discuss the role of law in modern Canadian society. To what extent should the law mandate protection (for animals, for underage tanners, for those who use Facebook) and to what extent should people (including those in the sled dog industry, corporations like Facebook, and those who choose to tan) be left free from government constraint or control. One common theme that unites the clips is that those whom the law seeks to protect are vulnerable in that they cannot choose their own course (such as sled dogs) or might be too immature to do so rationally (underage tanners) or do not know that their rights may be being violated to begin with (such as when social media share information with third party vendors).

IV. EXPLANATION OF SELECTED FEATURES

Page 4

Business Application of the Law: Fraud on the Public

Critical Analysis: What are the alternatives to market regulation by government?

Absent market regulation by government in relation to product safety standards, for example, consumers would presumably be left to discover for themselves what products are safe. Businesses that supply shoddy products would develop poor reputations and end up out of business. Relying on the market to drive such individuals out of business, however, is a slow process and needless injury and loss could arise in the interim. Market regulation by government is therefore generally seen as preferable.

Page 5

International Perspective: US Spam Laws

Critical Analysis: Should American judgments be enforceable in Canada? Why or why not? What is objectionable about spamming? How is it different from marketing?

(Note: Though the question above raises the more complicated matter of when foreign judgments should be domestically recognized, there is no need to take a technical approach to the matter—especially so early in the course. It is preferable to approach the question conceptually but within the context offered by the Guerbuez narrative.)

If Facebook were unable to enforce its judgment in Canada, Guerbuez would essentially be able to break US laws with impunity. That is, assuming that Guerbuez has no assets in the United States, the only way that Facebook will see a dime of its award is to seize Guerbuez's property in Quebec. This it can do only by getting its US judgment recognized in Quebec. So long as the US

court's decision has been reached on a fair and legitimate basis, there is no reason for Canadian courts not to assist Facebook. Beyond this, and as the Quebec Superior Court points out, Guerbuez would have faced similar sanctions under Canada's then-proposed spam legislation. It advances justice to permit Facebook to satisfy its judgment in Quebec. As Daniel Bourque notes, these Quebec decisions demonstrate that "as a matter of international courtesy," Canadian courts will enforce, not lightly set aside, foreign judgements absent important reasons mandating them to. See Daniel Bourque, "Quebec court enforces U.S. court's $873 million judgement against Facebook spammer" (2011-201) 11 I.E.C.L.C. at http://www.mcmillan.ca/Files/129163_article.pdf.

Spamming is objectionable for a multitude of reasons. For example, it wastes employee time, hurts the reputation of legitimate Internet marketers, and puts a strain on Internet services providers. According to the 2005 National Task Force on Spam:

> [t]he new mutations of spam undermine consumer confidence in the Internet as a platform for commerce and communications. Because of this, the potential of information and communications technology to buttress productivity, and the ability of e-commerce to attract investment, create jobs and enrich our lives, is constrained not only by the torrents of spam, but by the deception, fraudulent and malicious activities that sometimes accompany it.

For more analysis from this Canadian task force, see "Stopping spam: Creating a stronger, safer Internet: Report of the task force on spam" (May 2005) at http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h_gv00317.html.

Spamming is a form of marketing but of an inherently objectionable variety. Spammers typically purchase email lists of potential customers and then inundate those email addresses with advertisements for products and services. There has been no consent by the recipients to receiving such communication—the ads are unsolicited and therefore particularly intrusive.

The question concerning the difference between spam and marketing can usefully be revisited in Chapter 6, where the textbook provides a basic introduction to Canada's new anti-spamming legislation (which is anticipated to be proclaimed in force in 2013). When this legislation is in place, the difference between spam and simple e-marketing will be straightforward. E-marketing communications will be legislatively compliant. Spam will not be. For more discussion, see too Chapter 6 of this Instructor's Manual.

Page 6

Technology and the Law: University of Ottawa Law Students Help Challenge Facebook

Critical Analysis: In what way does *PIPEDA* protect people and their property? Do you think that the legislation puts too much responsibility on business?

PIPEDA requires businesses to be accountable in how they gather, secure, disclose, and discard the personal information of customers, including credit card numbers, photographs, business email addresses, and computer internet protocol (IP) addresses. (For analysis, see Office of the Privacy Commissioner of Canada, "Leading by example: Key developments in the first seven years of the *Personal Information Protection and Electronic Documents Act* (PIPEDA)" (2008) at http://www.priv.gc.ca/information/pub/lbe_080523_e.asp.) *PIPEDA*'s legislative requirements seek to protect persons and their property by acknowledging the importance of privacy, regulating how business is to manage the personal information of customers, and endeavouring to prevent such crimes as identity theft.

In its report entitled "Leading by example: Key developments in the first seven years of PIPEDA" (2008) at http://www.priv.gc.ca/information/pub/lbe_080523_e.asp, the Office of the Privacy Commissioner of Canada provides many illuminating examples of privacy breaches that

could be used by an instructor in the classroom. For example, the report recounts the inappropriate disposal of personal information by a bank, in the following terms:

> The Assistant Commissioner has found that disposing of sensitive personal banking information in a recycling bin is a violation of PIPEDA. In this case, the complainant learned that his personal banking information—including the complainant's and his wife's names, address, social insurance numbers, account number and transaction history—was found by a third party in an unattended recycling bin in a parking garage. The bank determined that two of its employees had inadvertently put the information in a recycling bin rather than in a shredding bin when cleaning out the desk of a former employee. In addition to finding that the organization had violated PIPEDA's safeguards provision, the Assistant Commissioner was troubled by the fact that the information had been left in the desk of the former employee for a year. The Assistant Commissioner stated that such information should be shredded as part of a systematic approach to dealing with any confidential information in the custody of a departing employee. [footnotes deleted]

Although privacy legislation inevitably does place burdens on business, it has a strong justification for doing so. Customers are entitled to expect that their personal data will be properly stored and protected. As then–industry minister John Manley stated in 2000, "The protection of our personal privacy is a basic right which Canadians cherish" (quoted in "Leading by example" at http://www.priv.gc.ca/information/pub/lbe_080523_e.asp).

For a news clip concerning Facebook's privacy issues, see the DVD supplement entitled *The National*: "Facebook Privacy."

Page 7

Ethical Considerations: Inhumane Killing of Sled Dogs in British Columbia.

Critical Analysis: What is the role of business to ensure the ethical treatment of animals? Is it acceptable to kill sled dogs with a shotgun? What is the role of government to ensure the ethical treatment of animals?

Working animals must rely on the business responsible for their care to provide adequate food, water, shelter, and other forms of protection. Common humanity requires no less. Beyond this, provincial animal protection laws, as well as the *Criminal Code of Canada*, mandate minimum standards of treatment. More specifically for the purposes to this question, causing unnecessary distress to an animal is contrary to law; therefore, when an animal has to be "put down," it must be done humanely. On this point, Tracy Sherlock, "Sled dog bodies exhumed," *Vancouver Sun* (9 May 2011) at http://www2.canada.com/edmontonjournal/news/story.html?id=e25c4365-57a4-419a-a71a-621fd777ea6e relies on the analysis of Marcie Moriarty of the BC SPCA when she writes, "A single, fatal gun shot does not constitute animal cruelty, but throat slashing, bludgeoning or multiple gun shot wounds when the first is not fatal do." Since this news report, the British Columbia government approved (in January 2012) the *Sled Dog Code of Practices*, which, at page 40, offers the follow recommended best practices in the context of sled dog euthanasia:

- Work with a practicing veterinarian to develop a euthanasia plan.
- Ensure sled dogs are euthanized by a practicing veterinarian using a barbiturate overdose with prior sedation.
- In an emergency situation (i.e. critical distress) AND when a practicing veterinarian is not available, euthanasia should be performed by a competent person (see glossary), and undertaken by a single bullet of an appropriate calibre to the brain (see Appendix "G", *Guidelines for euthanasia of domestic animals by firearms*, Longair et al.).
- Use appropriate restraint if required.
- Do not use euthanasia for population control.
- Undertake euthanasia out of the sight of other sled dogs to minimize distress.

To read the Code, go to http://www.gov.bc.ca/agri/down/sled_dog_code_of_practice.pdf. For a news clip concerning this story, see the DVD supplement entitled "Sled Dog Repo."

Page 9

Ethical Considerations: The Subprime Mortgage Crisis

Critical Analysis: Even though the lenders may not have acted illegally at the time, do you think that they had any ethical responsibility to ensure that mortgage applicants were financially able to afford the loan in question? Do you think it is better for borrowers who overextend themselves to simply bear the consequences of their own actions? Is government to blame for not doing more to protect naïve borrowers?

As this chapter notes, no set of regulations can prevent fraud; however, there seems to be reasonably wide acknowledgment that government needs a stronger presence in the subprime mortgage market to reduce the likelihood of future abuses. Though borrowers and investors are responsible, to an important degree, for their own decisions, subprime borrower looked to the lender and broker as experts. According to the Federal Reserve Board, with implicit concern about the practice,

> [loan] originators may sometimes encourage borrowers to be excessively optimistic about their ability to refinance should they be unable to sustain repayment. For example, they sometimes offer reassurances that interest rates will remain low and house prices will increase; borrowers may be swayed by such reassurances because they believe the sources are experts.

From 44522 Federal Register/Vol. 73, No. 147/Wednesday, July 30, 2008/Rules and Regulations at

http://www.federalreserve.gov/reportforms/formsreview/RegZ_20080730_ffr.pdf.

As well, academics, such as Oren Bar-Gill ("The law, economics and psychology of subprime mortgage contracts" (2009), NYU Law and Economics Research Paper No. 08-59 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304744), have shown how the subprime mortgage industry designed their mortgage products to be unduly complex. This prevented unsophisticated mortgagors from understanding what they were getting into.

Though investors who purchased products backed by subprime mortgages are sophisticated, they certainly did not expect such egregious conduct from the mortgage industry and were taken by surprise.

Concern about deception in the mortgage practices and the moral risk resulting from securitization are at the core of analysis offered by Elizabeth Warren, chair of the Congressional Oversight Panel:

> [f]or years, Wall Street CEOs have thrown away customer trust like so much worthless trash. Banks and brokers have sold deceptive mortgages for more than a decade. Financial wizards made billions by packaging and repackaging those loans into securities. And federal regulators played the role of lookout at a bank robbery, holding back anyone who tried to stop the massive looting from middle-class families. When they weren't selling deceptive mortgages, Wall Street invented new credit card tricks and clever overdraft fees.

See Warren, "Wall Street's race to the bottom," *Wall Street Journal* (8 February 2010) at http://online.wsj.com/article/SB10001424052748703630404575053514188773400.html?mod=WSJ_Opinion_LEFTTopOpinion (last accessed Feb. 2010).

In response to the egregious practices identified by Warren and others, the US House of Representatives passed a 2009 financial reform bill that created the Consumer Financial Protection Agency (CFPA). Under the bill, the CFPA is given oversight powers over a variety of financial products, including mortgages, and, on a related front, requires lenders to retain a portion of their loans in a securitization context. For discussion, see Paul Krugman, "Good and Boring," *New York Times* (31 January 2010) at http://www.nytimes.com/2010/02/01/opinion/01krugman.html (last accessed Feb. 2010). The bill's fate in the Senate remains uncertain at date of writing.

Note too that the Canadian federal minister of finance has continued the process of mortgage reform in this country, which is described in the press release at http://www.fin.gc.ca/n10/10-

011-eng.asp. For example, even if a borrower intends to take a variable rate mortgage, the borrower must qualify for a fixed five-year mortgage. Most recently, the federal government has dropped the maximum amortization period from 30 years to 25 years and the maximum refinancing amount from 85% to 80%. According the minister of finance, the goal is to "ensure that households do not become overextended." See RBC "Canada's Mortgage Rules to Tighten Again" (21 June 2012) at http://www.rbc.com/economics/market/pdf/mortgagerules.pdf.

Page 9

Photo caption: What are the costs of foreclosure to the homeowner?

As Chairman Ben Bernanke noted before the Committee on Financial Services, U.S. House of Representatives (September 20, 2007) at http://www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm:

> The consequences of default may be severe for homeowners, who face the possibility of foreclosure, the loss of accumulated home equity, and reduced access to credit. In addition, clusters of foreclosures can lead to declines in the values of nearby properties and do great damage to neighbourhoods.

See too Elizabeth Warren's comment in "Unsafe at any rate," *Democracy: a Journal of Ideas* (Summer 2007) at http://www.democracyjournal.org/article.php?ID=6528:

> for a growing number of families who are steered into over-priced credit products, risky subprime mortgages, and misleading insurance plans, trust in a creditor turns out to be costly. And for families who get tangled up with truly dangerous financial products, the result can be wiped-out savings, lost homes, higher costs for car insurance, denial of jobs, troubled marriages, bleak retirements, and broken lives.

Page 10

Business and Legislation: Regulating the Tanning Industry

Critical Analysis: Should the government try to protect young people from the dangers of tanning beds, or should that should the matter be left up to the individual consumer? What is the role of government in such a context?

Given the inherent dangers of tanning beds—including disease, disfigurement, and death—there is a strong argument that regulating their use is an appropriate use of government power. As Dr. Jeffrey C. Salomon (assistant clinical professor of plastic surgery at Yale University School of Medicine), states: "UV radiation [from tanning beds] damages the DNA in the skin and while it may take years for that DNA damage to manifest itself as a skin cancer, it is still a preventable risk, similar to smoking." Salomon also stated that "[as with] smoking, we have an obligation as a society to protect our youngest citizens from a known cancer risk by any legal means." See Skin Cancer Foundation, "FDA panel weighs new restrictions on tanning beds" (25 March 2010) at http://www.skincancer.org/news/tanning/FDA-Panel-Weighs-New-Restrictions-on-Tanning-Beds.

Even the Joint Canadian Tanning Association acknowledges the need for some regulation and has been requesting provincial standards requiring:

- parental consent for tanners under 18
- mandatory protective eyewear
- correct skin typing for every client
- salon operator training and certification
- control of equipment by certified operators
- barring of customers that are skin type 1 (always burn, never tan)
- banning of self-serve tanning equipment

Note that the Association seeks parental consent for everyone under 18, as opposed to a ban, and some students may agree that such a limitation is more than adequate. See statement from Steve Gilroy, "Regulating the Indoor Tanning Industry" (26 April 2012) at http://www.newswire.ca/en/story/962371/regulating-the-indoor-tanning-industry.

For a news clip concerning the tanning industry and regulation, see the DVD supplement entitled "Victoria Tanning."

Page 13

Photo caption: How can parties resolve a business dispute without going to court?

Of course, parties can simply try to talk out an issue and come to an acceptable solution. If this proves impossible, involving a neutral third party—such as a mediator or an arbitrator—can help keep a business dispute out of court.

Page 14

Photo caption: This man claimed to have been locked in a car trunk over a debt owed to his attackers. He was freed from the trunk by firefighters. How is this method of dispute resolution inconsistent with the values informing the Canadian justice system?

The man in the trunk has presumably been locked in there by people to whom he owes money. They want him to pay. This method of dispute resolution bears none of the hallmarks of the Canadian justice system because the process for determining liability and the rules applied to the dispute are not fair and are not free from bias. There is no third-party judge bringing any objectivity to the process. The creditors are judge, jury, and executioner. That is, they decide what the "facts" are, they decide what the "law" is, and they visit a punishment on the debtor.

V. CHAPTER STUDY

Questions for Review, page 19

1. **What is the function of law? Page 5**

The function of the law is to protect persons and their property, facilitate interactions, and provide mechanisms for dispute resolution.

2. **How does the law protect members of society? Page 8**

The law protects members of society in two ways: first, it sets rules with penalties to encourage compliance, and second, it seeks to make those who break the law accountable for their misconduct.

3. **How does the law facilitate business activity? Page 10**

The law facilitates business activity by establishing rules that govern the marketplace. For example, the law of contract provides a way for parties to enter into binding agreements, thereby creating a measure of security and certainty in their business operations.

4. **In what ways does law facilitate certainty in the marketplace? Page 10**

The law facilitates certainty by providing rules, particularly in the area of contracts, that allow business enterprises to plan for the future and to enforce their expectations. In short, legal rules provide definition and context to doing business.

5. Does the nature of the business relationship affect the enforcement of legal rights? Page 11

Yes. Parties to a contract do not always observe their agreement to the letter, preferring to maintain their relationship rather than resort to litigation for breach of contract

6. How does the law resolve disputes? Page 12

To avoid litigation, the legal system offers mediation and arbitration. Sometimes those prove unsuccessful and the matter is taken to court.

7. Does dispute resolution always involve going to court? Page 12

Going to court is an option, though ordinarily one of last resort, given the time it takes and the uncertainty and expense associated with it. Other methods of dispute resolution include mediation and arbitration.

8. In what way is knowledge of the law a business asset? Pages 3–12, 14–15

Informed owners and managers can protect their businesses by ensuring compliance with legal requirements. They can capitalize on the planning function of law to ensure the future of their businesses by entering into contracts. They can also seek enforcement of legal rules against those who do business or have other interactions with the enterprise. In this way, the property, contractual expectations, and profitability of a business are made more secure.

9. How might a lack of knowledge of the law negatively impact a business? Pages 4, 13

Business owners can suffer much anxiety, grief, and financial loss through a lack of knowledge of the law. In Louella's case, for example, the law holds her responsible for the head injuries suffered by her customer because she was negligent in how she assembled the display case.

A lack of legal knowledge may result in a business's failure to maximize opportunities or to lose out on them altogether. More seriously, however, businesses or business owners who are unaware of (or ignore) pertinent legal standards may find themselves subject to regulatory and judicial sanctions, which could range from being fined to being forced to close down.

10. Why should a business put in place a legal risk management plan? Page 15

A legal risk management plan identifies the legal risks associated with a business and seeks to implement concrete measures for managing those risks. Such a plan therefore helps avoid the negative business experience that Louella created for herself.

11. What is the role of business ethics? Pages 15–16

The role of business ethics is to require entrepreneurs to conform to principles of commercial morality, fairness, and honesty. Ethics seek to identify moral principles and values that determine right and wrong in the business world.

12. Why are business ethics important? Page 15

Business ethics concern moral principles and values that seek to determine right and wrong in the business world. On this basis, although it is ethical for a business to comply with the law,

ethics may demand even more. Business ethics require entrepreneurs to conform to principles of commercial morality, fairness, and honesty.

13. What is spam? Page 3

Spam is unsolicited commercial email

14. What is the purpose of regulating spam? Page 5

The purpose of regulating spam is to protect the public from unwarranted intrusions in their private affairs, as well as to address the fact that spam costs business lost productivity, poses a continual threat of harmful viruses, and hurts the reputation of legitimate marketers.

Questions for Critical Thinking, page 19

1. What is the relationship between ethics and law? Are ethical responsibilities the same as legal responsibilities?

Although an obvious overlay exists between ethics and law (particularly in the area of criminal law), ethics may dictate that a business do more than simply comply with legal dictates This is because business ethics require entrepreneurs to conform to principles of morality, fairness, and honesty. For example, although it may be legal for Louella to sell violent comic books to children, it may not necessarily be ethical to do so.

2. When is a lawsuit the best response to a legal dispute? What is at risk?

When timely and informal efforts to settle a legal disagreement fail because, for example, the other side is being tremendously unreasonable, a lawsuit is an important recourse. Bringing a lawsuit risks the business relationship between the parties, but at this point, there is likely little to

salvage in any event. The other risks relate to the fact that the legal system is expensive to use, time consuming, complex, and relatively inaccessible. Furthermore, it can be difficult to predict the outcome of a legal dispute. From a business perspective, being involved in the legal system can be particularly disadvantageous, since fighting a lawsuit is an obvious drain on financial and human resources, with no assurance of a positive outcome in return.

Note that even when a lawsuit is brought, the parties might still be able to settle out of court and should try to do so.

3. Knowledge of the law is a business asset. How can you acquire this asset short of becoming a lawyer? How is ignorance of the law a liability?

One purpose of this question is to encourage students to become familiar with the text's website. It provides links to websites containing legal information of relevance to the business student.

Other sources of legal knowledge include

- the CanLII (Canadian Legal Information Institute) website, which provides free access to the texts of judicial decisions and legislation (see http://www.canlii.org/en/);
- the government (federal, provincial, and municipal)
- public legal education institutions
- courses and workshops
- legal publications geared to certain professions, such as accountancy
- legal columns in newspapers and magazines
- the legal profession

4. **There has been considerable concern about the safety of Tasers (electroshock weapons) and their possible role in the death of approximately 300 people in North America. The danger associated with Tasers was most recently brought to light because of the death of Robert Dziekanski, a Polish immigrant who died at the Vancouver International Airport immediately after being tased by RCMP officers. According to the CEO of Taser International, however, there is "no other device with as much accountability" as a Taser and he maintains that Tasers actually save lives. What is the role of the law in regulating the products sold in the marketplace and ensuring their safety or relative safety? [footnotes deleted]**

An important role of the law is to protect persons not just from criminal activity but from dangerous products. Although corporations that produce electroshock weapons may insist on the safety of their products, it is important that government assess this matter independently and regulate or even ban such products as appropriate.

In 2007, Taser International lost its first liability suit. It was found liable for the death of a California man and ordered by a jury to pay $6.2 million in damages. See Margaret Cronin Fisk, "Taser loses 1st product-liability suit; jury awards $6 Million," *Bloomberg.com* (7 July 2008) at http://www.bloomberg.com/apps/news?pid=20601103&refer=us&sid=aYJitFRQLpZk. Liability was based, in part, on Taser's failure to warn police that prolonged exposure to the weapon could increase the risk of heart attack. Beyond this, press accounts in September 2008 detail a report commissioned by the RCMP that criticizes the RCMP for not doing sufficient independent research on the safety of Tasers. See, for example, Tim Lai, "Taser report criticizes RCMP research," *Vancouver Sun* (12 September 2008) at http://www.canada.com/vancouversun/news/story.html?id=6576c6c5-2d52-4856-b7e8-

240a33ca5950. It also is reported that a significant number of tested Tasers fired at a higher electrical charge than acknowledged by its manufacturer. (For a summary of the results of the Taser test, see "Some tested Tasers fire stronger current than company says: CBC/Radio-Canada probe" (4 December 2008) at http://www.cbc.ca/canada/story/2008/12/04/taser-tests.html. For more recent analysis of the link between industry and conclusions regarding Taser safety, see Samantha Murphy "Questions raised about studies of Taser safety," *NBC News.com* (5 October 2011) at http://www.msnbc.msn.com/id/42976740/ns/technology_and_science-tech_and_gadgets/t/questions-raised-about-studies-taser-safety/.)

Taser International Inc. was also recently found liable in the death of 17-year-old American Daryl Turner, though the Federal District Court for the Western District of North Carolina reduced the jury award from $10 million to $4.3 million. As reported by CTV News, the American court "ruled that the manufacturer created an unreasonable danger by not telling its customers what the weapon was capable of, a decision that raises questions about stun gun accountability for all who use them." See CTV News.ca staff, "U.S. court's Taser liability verdict stuns distributor" (24 July 2011) at http://www.ctvnews.ca/u-s-court-s-taser-liability-verdict-stuns-distributor-1.674521#ixzz2BTtc2hhW. And for further detail and analysis from the manufacturer, see Taser International Inc.'s press release "Court grants Taser's motion to reduce turner jury verdict from $10M to 4.3 M" (28 March 2012) at http://ca.finance.yahoo.com/news/court-grants-tasers-motion-reduce-154200679.html.

5. Adam Guerbuez, the spammer described in this chapter, was made subject to a judgment of almost $1 billion dollars by an American court. Do you think this

judgment is unreasonably large? Should the defendant's ability to pay be taken into consideration by the court? Why or why not?

There is no doubt that $1 billion is a large amount of money and that Guerbuez would never have the resources to pay it. However, the size of the award makes an important public statement and serves to discourage brazen spammers like Guerbuez. Although Guerbuez's ability to pay is an important practical consideration, Facebook is entitled to a judgment that reflects the seriousness of the violation. It is the egregiousness of Guerbuez disregard of the law that caused the award to be so high. In this sense, Guerbuez's wound is entirely self-inflicted and it is hard to find much sympathy for the defendant.

6. **In 2010, the New Brunswick government implemented new voluntary guidelines governing the indoor tanning industry, including that people under 18 should not be permitted to indoor tan. These guidelines would be voluntary to start with but that would change if indoor tanning operators ignored the guidelines, at which point legislation would be brought in. Is this a good approach to regulating business? Why or why not?**

The predictable difficulty with voluntary measures is that they may not see compliance. This apparently is the experience in New Brunswick. Press accounts report that more than half of the tanning salons are not following the specific guidelines, which does not permit those under 18 years old to tan in tanning salons. In face of these statistics, the Canadian Cancer Society is calling on the government to enact legislation instead. According to Canadian Cancer Society representative Rosemary Boyle, "This is a protection issue.... You know, we protect youth from driving too young, we have an age restriction on driving. We have an age restriction on alcohol

purchase. We have an age restriction in purchase of cigarettes.... So it only makes sense that there needs to be an age restriction on this as well." See CBC News, "Tanning salon laws needed, says Cancer Society" (6 March 2012) at http://www.cbc.ca/news/canada/new-brunswick/story/2012/03/06/nb-tanning-salon-legislation-cancer.html.

Situations for Discussion, pages 20–21

1. **Joe has recently opened a bar and adjoining restaurant, specializing in seafood. It is named "The Finny Friends" after a restaurant that Joe had visited in Toronto several years ago. In accordance with the law, Joe has a liquor licence from the provincial liquor-licensing authority that limits the seating capacity in the bar to 30. As Joe's bar becomes increasing popular, he begins to regularly allow more than 60 patrons in at one time. Eventually he is caught, and—having already received two warnings—his operation is closed down for 30 days. Joe is flabbergasted at the severity of the penalty. Soon thereafter, Joe is contacted by a lawyer for The Finny Friends restaurant in Toronto. The lawyer says that Joe has 48 hours to take down his restaurant awning and destroy anything else with the name The Finny Friends on it (including menus, invoices, place mats, napkins, and even match covers) or he will bring an application for a court order to that effect. To make matters worse, a health inspector is on Joe's doorstep saying that there have been several recent reports of food poisoning originating from Joe's restaurant. What has gone wrong in Joe's business and why?**

Joe has neglected to inform himself as to how the law affects his business and the penalties for non-compliance. For example, he must respect the seating capacity that accompanies his liquor licence; he must not confuse the public into thinking that there is an association between his

restaurant and the identically named Toronto restaurant because there is not; and he must respect health and sanitation requirements—both for the safety of his customers and for his business's reputation. Joe's failure to respect the law can lead to penalties severe enough to cause the demise of his business.

Just as Joe must devote resources to monitoring his staff, attending to proper bookkeeping, and keeping his loans in good standing, he must also spend time managing the legal elements of his business environment. Since the law affects Joe's business from a variety of perspectives, he is much better off accepting this responsibility from the outset, rather than fighting a rearguard action. Once he understands the law, Joe can take simple, proactive steps to ensure that he complies with it; just as importantly, he can plan for the future.

2. **The Privacy Commissioner's Annual Report (2011) criticized Staples Business Depot for not taking better steps to protect the privacy of customers who returned computers and USB hard drives. These returned items had undergone a "wipe and restore" process before resale, but the Privacy Commission's audit found that sensitive data, such as social insurance numbers and tax records, had not been erased in all cases. What should Staples Business Depot do to ensure better compliance with privacy legislation? Would it be sufficient, for example, to ask customers to sign a form saying that they have wiped the returned electronic clean?**

For the news article on which this Situation for Discussion is based, see Emily Jackson, "Staples cited for failing to delete data," *The Globe and Mail* (21 June 2011) at http://www.theglobeandmail.com/news/national/staples-cited-for-failing-to-delete-

data/article1360486/. For the audit report on Staples by the Privacy Commission, see http://www.priv.gc.ca/information/pub/ar-vr/ar-vr_staples_2011_e.asp.

As reported in *The Globe and Mail* story cited above, the Privacy Office did a one-year assessment, inter alia, of Staples procedures in cleaning returned devices and found a one-third failure rate. This result is clearly unacceptable given the risk to privacy this poses to customers and because it increases the chance of identity theft. It is crucial that Staples improves its process, which can be accomplished by seeking expert help. Compliance monitoring going forward will be absolutely critical. Though wiping returned product can prove costly—*The Globe and Mail* reports that wiping a hard drive can cost up to $100 a computer—this is simply the cost of doing business. Staples has no choice.

The Situation for Discussion asks if it would be sufficient to ask customers to sign a form saying that they had wiped the returned electronic clean. Clearly, this would not be sufficient because Staples has the legal obligations under privacy law and such a form would not exonerate it. Put another way, even if the customer signed the form, this would not provide a defence to Staples should the customer have been in error and not wiped clean the electronic in question. The buck stops with Staples.

3. **Assume that you have a major dispute with a business on the property next to yours over acceptable use of its land. You find that although zoning allows for a small tool shop to operate on the property, the noise is too much for you. Your lawyer tells you that there may be a legal case for you to pursue, but it will be costly and the results are not guaranteed. What alternative approaches might address your problems more effectively?**

This problem sets the stage for students to consider alternatives to a full-blown legal conflict and look to alternative dispute resolution (ADR) techniques instead. ADR is developed more thoroughly in Chapters 3 and 4 of the text.

At this point in their studies, students will be able to suggest some general approaches to resolving the problem. Options include having the disgruntled neighbour

- speak directly to the tool shop business for its input on the noise problem
- ask the tool shop business to restrict its use of loud power tools to certain hours
- offer to share the cost of improving the sound insulation on the shop
- suggest that a third party be consulted to find a compromise to the problem

If the problem cannot be solved, it may well be that the disgruntled neighbour will have to litigate if the noise is simply too overwhelming. The only other alternative would be to move.

4. **Several provinces across Canada, including Ontario, Manitoba, and Saskatchewan, have proposed or passed legislation that prevents children from buying or renting video games that are expressly violent or sexual, as determined by a ratings board. Businesses found selling these games to minors face penalties that range from fines to having their licence revoked. How effective do you think government regulation is in limiting children's access to violent video games? Are there better ways of achieving these types of goals? Is it the role of governments to provide legal consequences for the underage renting or purchase of violent video games? [footnotes deleted]**

Similar to other areas in which the government has used regulation to limit minors' access to certain products, the proposed legislation will be effective but not to the extent the government

would like. Minors are still able to get video games, just as they have been able to get alcohol. However, the obligations placed on the businesses, and the potential licence revocation and fines, will go a long way to preventing minors from having easy access to such video games. The government has tried other methods to achieve these goals, but experience shows that the most effective method is to regulate the businesses that distribute the material.

Whether or not it is the government's role to provide legal consequences for the underage renting or purchase of violent video games is debatable. Obviously, parents can regulate what goes on in their homes but only government can regulate the activities of businesses.

5. **Olivia owns a convenience store and has invested a lot of money in gambling machines for the store. Recently, the government passed a law banning the machines from the store immediately, although pubs are allowed to continue operating these machines. Is this law fair? Does it violate any of the common values associated with the law? Would it make a difference if the law applied only to new businesses? Would it make a difference if the government provided compensation to the convenience stores affected or phased in the law to allow for a period of adjustment?**

This problem is intended to stimulate discussion as to what the characteristics of a "good" law would be, versus an unfair one. There were a number of unfortunate—even unjust—factors in the new law:

- It is retroactive and applies to businesses that have already set up on the basis of such machines being permissible.

- It appears to be arbitrary in that gambling is still permitted in bars—why, therefore, ban them from convenience stores?
- It has features of expropriation surrounding it. Will the storeowner be compensated? On what basis?

When the government makes laws that regulate business, some party will likely be hurt financially. The law generally does its best to regulate the marketplace by allowing businesses to make money while ensuring that the public is protected.

The law must change and adapt to the evolving requirements of society. In some situations, when the law is undergoing a change, legislators will grandfather-in certain groups as this prevents drastic financial losses and gives established businesses time to adjust changes in the law. Compensation and phased-in periods allow businesses to find alternative methods of income. However, those that cannot do so will eventually go out of business.

6. When her husband died of a heart attack in 2001 after taking the painkiller Vioxx, Carol Ernst sued the pharmaceutical manufacturer, Merck & Company. In 2005, a Texas jury awarded her $253.5 million after concluding that Vioxx had caused Mr. Ernst's death. In 2008, a Texas appeals court reversed Mrs. Ernst's victory. The court concluded that there was no evidence that Vioxx had, in fact, caused the death of Mr. Ernst and, as a result, Mrs. Ernst has been left with no compensation whatsoever for her husband's death.

According to news reports, Merck has taken an aggressive stance on lawsuits against it and spent more than $1 billion on legal fees. Merck has observed that the plaintiffs are required to prove that Vioxx caused the heart attack in question.

Given that heart attacks are the most common cause of death in the United States, Merck would have faced "an essentially unlimited pool of plaintiffs" without taking such a hard line, according to an American law professor.

In 2007, a lawyer representing Mrs. Ernst stated to *The New York Times* that Merck should be amenable to settling at least some of the cases brought against it. He claimed that "Merck's goal is to manipulate the legal system to deprive justice to tens of thousands of people.... Justice delayed is justice denied."

Merck has taken steps to resolve some of the cases brought against it, however. In 2007, it entered into a $4.85 billion agreement, the goal of which is to bring to a conclusion a majority of the remaining Vioxx lawsuits. According to press accounts, more than 44 000 plaintiffs involved in the most serious claims have enrolled in the proposed settlement.

Do you agree with Merck's approach to the lawsuits that have been brought against it? What happens to people who want to sue Merck but cannot afford a lawyer? [footnotes deleted]

Merck cannot simply pay out the claims of everyone who has sued it. It is reasonable for Merck to insist that the plaintiffs prove their case, including that those who allegedly died from taking Vioxx actually took Vioxx before having the heart attack and that the heart attack was not caused by high cholesterol or other medical conditions, for example. Mediation and arbitration might be an effective way of settling some of the claims, particularly as Merck itself has acknowledged, according to *The New York Times,* that Vioxx can cause heart attacks in those who take it for longer than 18 months. Since settlement discussions are generally not public, it is hard to know whether Merck is actually trying to settle claims outside those included in the $4.85 billion pool,

but Merck has settled many claims out of court already. Plaintiffs who cannot afford to pay lawyers by the hour can try to find a lawyer to take their claim on a contingency basis whereby the lawyer is only paid if the claim is successful. Contingency fees are discussed in more detail in Chapter 4.

A national class action in Canada against Merck has recently been settled. For the September 4, 2012, decision by Justice Leitch approving the settlement, go to http://vioxxnationalclassaction.ca/pdfs/Vioxx%20Reasons%20for%20Settlement%20Approval%20Ontario.pdf.

