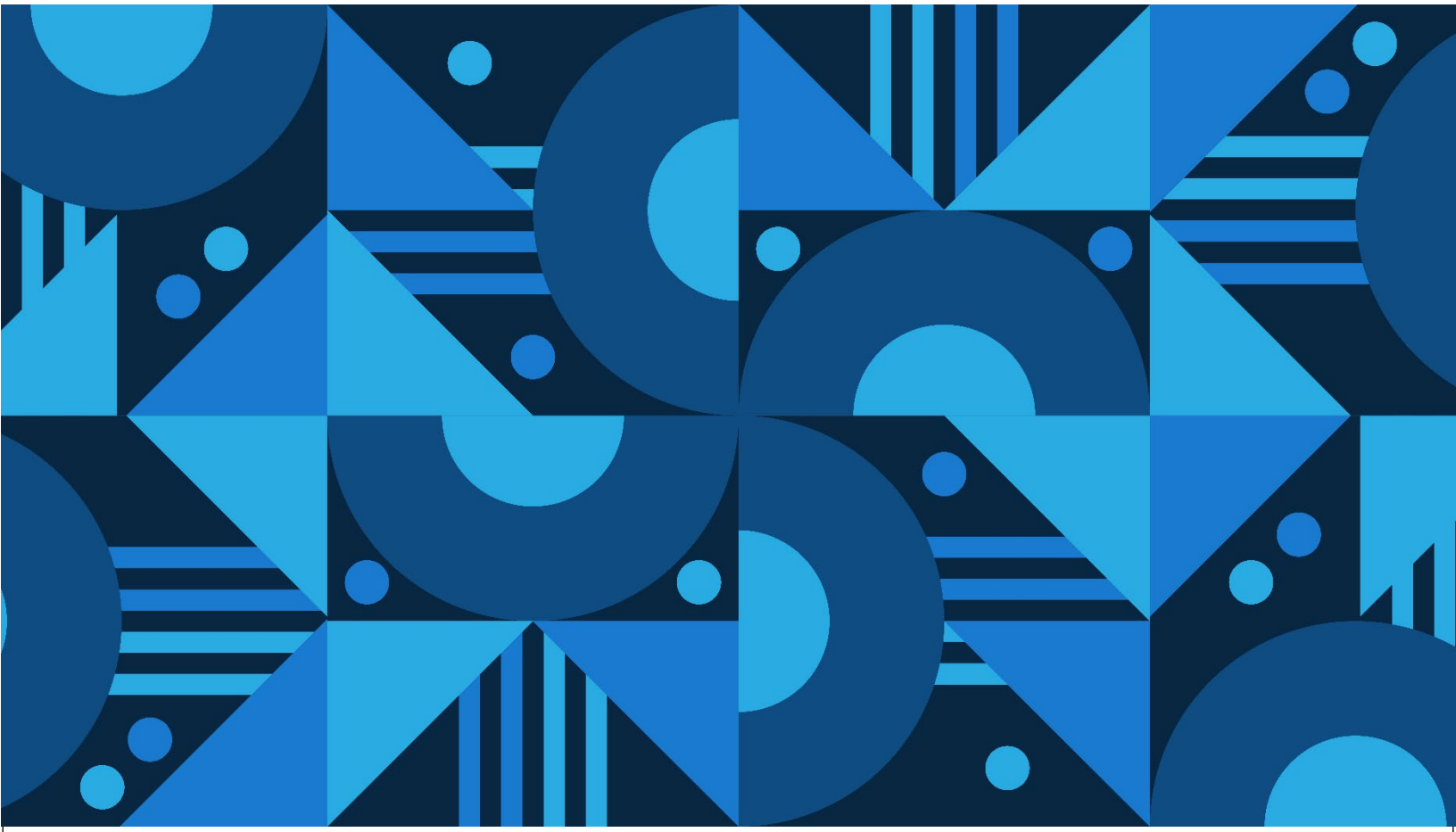
Foundations of Canadian Business Law

With a Focus on British Columbia



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Acknowledgments

With Gratitude and Respect

The author respectfully acknowledges that he researched and wrote this textbook on the traditional and unceded territories of the Tsleil-Waututh Nation and Squamish Nation.

Tsleil-Waututh Nation

PEOPLE OF THE INLET

Səl̓ílwətaɬ

Sḵwx̱wú7mesh Úxwumixw

Squamish Nation 1923 – 2023

The history and communities of the Nations is deeply rich and diverse and deserves further exploration. To view more information about the Nations, please visit the following links:

https://twnation.ca/

https://www.musqueam.bc.ca/

https://www.squamish.net/

Personal Acknowledgements

I am nothing without the love and strength of my family. Thank you both for lighting up my entire life.

Disclaimers and Disclosures

The content in this textbook is provided for general information purposes only. Nothing in this textbook constitutes legal or other professional advice. Discussions of legal rules, events, regulations, debates, and legal information are from only an academic perspective and, if you have questions about a specific legal issue you should speak to a lawyer for legal advice.

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In creating this text, generative artificial intelligence ("AI") (specifically, ChatGPT) was used as a resource for inspiration and, in some cases, elements of initial content drafting. In cases where AI was used, AI's role was limited and used only to supplement or support the author's own work. Each element of any AI-generated content was thoroughly reviewed, confirmed, and revised by the author. In total, the use of generative-AI is best described as minimal or modest.

This AI acknowledgement is provided to ensure full transparency about the tools used in the writing process while also confirming that the primary researcher, drafter, and editor was the author.

All matters arising from the use of this textbook shall be governed by British Columbia law and shall be within the exclusive jurisdiction of the courts of British Columbia.

Preface

This textbook has been a labour of love and one with a clear purpose. It was undertaken to provide readers with a free, accessible, and sound foundation for the major aspects of Canadian business law. While admittedly biased, I firmly believe that all people should have an understanding of some basic legal fundamentals.

For all readers, knowledge of the law can be tremendously valuable:

1. it is vital for you to properly protect your rights and advocating for yourself or others;
2. it helps mitigate personal and professional risks;
3. it helps to better prepare you for the legal disputes that will inevitably emerge in your life whether it be about entering into a contract, starting a business, buying a home, or all the myriad of other circumstances touching on law.
4. Ultimately, there is no relationship which is not affected by the law -- its presence is everywhere. As such, one of my great hopes is that this text can serve as a tool to get individuals to think about legal responsibilities and even, advocating for themselves.

While this textbook could never give you the answers to all the legal issues you may face hopefully, what it can do, is start you thinking about the right questions:

> "Understanding a question is half an answer."
>
> - Socrates

Take care and stay ever learning.

Brian Fixter

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Chapter 1: Introduction to the Canadian Legal System

Learning Outcomes:

1. Examine the underlying value of laws and their role in upholding fairness, justice, and equality in Canadian society.
2. Explore the historical traditions that have shaped the Canadian legal system, including the influence of British common law and French civil law traditions.
3. Recognize the roles of different parties involved in legal disputes, such as plaintiffs, defendants, and legal professionals.
4. Learn the steps involved in the litigation process, from the initiation of a lawsuit to the final judgment.
5. Understand alternative dispute resolution methods, such as mediation and arbitration, and their utility relative to litigation.

Introduction

In this chapter, we will be discussing the foundational building blocks of the Canadian legal system. In some ways, this is the most important starting part because, to truly understand some of the law we will learn later in the text, we also need to explore the underlying value of laws and their role in regulating conduct. This discussion will engage concepts such as the rule of law and its significance in upholding fairness, justice, and equality.

Additionally, we will look at some of the historical traditions that shaped (and continue to shape) our legal system. We will examine the influence of British common law and French civil law which forms the basis of Canadian jurisprudence.

Finally, we will delve into the steps of the litigation process, exploring the various stages involved including the initiation of the lawsuit, all way to the final judgment.

While some of this backdrop will feel historical, as we will soon see, so much of Canadian law is influenced by the very structure of the legal system.

Rules versus Laws

Our lives are heavily guided by both "rules" and "laws". It's obvious that without such structures, it would be difficult to organize and maintain society. However, what is the difference between the two?

> "The law is the foundation of a civilized society."
>
> - Alexis de Tocqueville

"Rules" refer to guidelines established by specific institutions or organizations, such as schools or workplaces, to regulate conduct and ensure smooth functioning within their respective environments. Rules are often more flexible and can be subject to change or adaptation based on the situation. Think about all the rules we might say influence our conduct. For example, an informal rule might say we should not cut in front of someone in a line-up at a sporting event or concert. What regulates this behaviour is not a "law"; there would be no prosecution or legal claim that could arise from cutting in the line. But, despite the lack of legal mechanism to enforce compliance, it does still shape our conduct, it is still a rule.

On the other hand, "laws" are official regulations and rules established by a governing body, usually a legislative authority, to govern the behaviour of individuals and maintain social order within a larger society. Laws are generally more rigid and binding, enforced by the legal system with prescribed penalties for non-compliance. They are designed to apply universally and govern actions that have broader implications for society as a whole.

Bedrock of the Common Law

As will be discussed, the bedrock of the Canadian legal system is the "common law". The essence of how the common law provides answers to legal answers is found in an old Latin concept called, stare decisis:

Stare Decisis = "To Stand By Things Decided"

As a legal doctrine, stare decisis emphasizes the importance of respecting prior court decisions — what we call following precedent. The idea is that by consistently reinforcing the court's prior decisions, this will ensure consistency, predictability, and stability in the legal system. All individuals can be confident of what the law says because judges are bound to follow the previously determined cases. Placing deference on prior cases also allows law to evolve gradually over time, rather than changing abruptly with each new case.

For example, imagine an employee, Leeza, believes that she has been subjected to discriminatory treatment by her employer based on her gender. Leeza decides to take legal action and files a lawsuit alleging employment discrimination. When the court examines Leeza's case, it will refer to previous judgments in similar cases involving gender discrimination. It will assess whether the facts and circumstances of Leeza's case are comparable to those of previous cases where discrimination claims were upheld or dismissed. The court will analyze the legal principles and reasoning applied in those earlier decisions to guide the determination in Leeza's case.

Ultimately, stare decisis ensures that Leeza's case is not treated in isolation. By relying on past decisions, the court can maintain consistency and fairness in its rulings.

The application of stare decisis can vary from one jurisdiction to another, and courts may choose to depart from precedent in certain circumstances. Perhaps, a court will choose to depart from precedent if the previous decision was wrongly decided, if the legal landscape has changed significantly since the previous decision was made, or if the previous decision is no longer in line with current societal values. However, these situations are generally the exception rather than the rule, and courts generally follow precedent unless there is a compelling reason not to do so.

Foundational Law — Overriding Stare Decisis

There have been a few notable instances where Canadian court's have veered away from the pure application of stare decisis. One major pivot was in "Medical Assistance in Dying (MAiD)" – can an individual choose to have medical assistance in their death? The legality of MAiD was considered in two judgments of the Supreme Court of Canada: Rodriguez v. British Columbia (Attorney General), 3 SCR 519 in 1993 and then later Carter v Canada (Attorney General), 2015 SCC 5 from 2015.

In the first case, Sue Rodriguez, a woman suffering from amyotrophic lateral sclerosis (ALS), sought the right to access assisted suicide to end her life. However, at the time, there was a

Criminal Code prohibition on assisted suicide. In 1993, the Supreme Court of Canada heard her challenge and ruled against her, stating that the prohibition on assisted suicide was constitutional. The Court concluded that the Canadian Charter of Rights and Freedoms (discussed later) did not encompass a right to assisted suicide.

However, in 2015, another terminally ill patient named Gloria Taylor, who was also diagnosed with ALS, challenged the constitutionality of the prohibition on assisted suicide in Carter v. Canada (Attorney General). In Taylor's case, the Supreme Court of Canada revisited the same issue of assisted suicide, but this time the court held that the prohibition on assisted suicide was unlawful. The court recognized that the ban on assisted suicide imposed unnecessary suffering on individuals who were grievously and irremediably ill, and it declared that certain exemptions should be made to allow physician-assisted dying.

The court's decision in the *Carter* effectively overruled *Rodriguez* decision from 1993. How the could the law so fundamentally reverse itself in just 22 years? The answer is that the Supreme Court of Canada found that there were significant changes in societal attitudes, legal developments, and the availability of evidence and arguments that were not present in the earlier case. The court acknowledged the evolving understanding of individual autonomy and the right to make decisions about one's own life, especially in the context of terminal illnesses. The Carter decision has had a profound impact on Canadian law and resulted in the federal government passing legislation in 2016 to regulate MAiD.

Origins of the Canadian Legal System

An interesting facet of the Canadian legal system is that it operates as a duality meaning, there are actually two legal systems operating at the exact same time. The two systems are the civil law system operating in the province of Quebec and the common law system operating in the rest of the provinces and territories. This duality emerged historically because of the influence of both the French and British in shaping the country.

The Civil Law System

Canada's Civil Law tradition is derived from the legal systems of France and other European countries influenced by Roman law. It places emphasis on comprehensive "codes" that provide the basis for legal principles and regulations. Civil law relies less on case law and more on the interpretation and application of central legal codes.

Quebec is the only Canadian province or territory utilizing a civil law model. The development of the civil law system is largely a reflection of the French colonial experience in what is now Quebec. In the 16th century, French explorers, such as Jacques Cartier, began exploring and establishing settlements. The first permanent French settlement was established in 1608 in Quebec City by Samuel de Champlain. These French settlers brought with them the legal traditions and practices of France, including the civil law system based on Roman law. When France ultimately ceded its territories in North America to Britain in the 18th century, the French civil law system remained in

place in Quebec; this decision was made, in part, to maintain the distinctiveness of Quebec's legal system.

In 1866, the Civil Code of Quebec was officially adopted as a comprehensive legal code governing private law matters, such as property, contracts, and civil liability, within the province. The civil law system continues to thrive in Quebec and, through its code-based system, provides a mechanism for solving legal disputes.

The Common Law System

Canadian common law finds its origins in medieval England. During the Middle Ages, legal cases and questions were determined by local courts. There was no centralized decision-maker nor a central code in which to find legal answers. Instead, over time the doctrine of precedent emerged requiring that decision-makers respect the decisions that had been previously decided.

In the 16th and 17th centuries, courts such as the Court of Chancery and the King's Bench were responsible for issuing decisions that would serve as precedent for future cases. After the British colonies were established in North America, English common law principles were then imported.

However, a question emerged about whether the common law or civil law would be the foundational legal system for the country at large. In part, this was settled by the Battle of Quebec which took place in 1759 during the Seven Years' War and was fought between British and French forces. Ultimately, the British were victorious, led by General James Wolfe and, as a result of the victory, Canada came under British control. Thus, the common law system was adopted and reigned supreme — that is except for what is now Quebec.

Role of Equity

"Equity" is another branch of law which also emerged from England. Equity is a system of justice that developed as a way to provide a more flexible and individualized approach to resolving disputes. It involves the application of fairness and justice in cases where the strict application of the law would lead to an unfair or unjust result. Where equity is used, the decision-maker has the power to fashion a remedy that is appropriate to the specific circumstances of the case and not be strictly beholden to the precedent.

In the modern Canadian legal system, law and equity are often treated as distinct bodies of law, but they may also be blended together in various ways. For example, in many Canadian courts a judge has the power to award both legal and "equitable" remedies in a single case. Such "equitable remedies" including injunctions (a court order requiring someone to do or refrain from doing something), specific performance (an order requiring someone to carry out a contract as agreed), or others that we will be canvassed in later chapters.

Indigenous Law and Recognition

Understanding the roots of the modern Canadian legal system requires a recognition of what occurred prior to the arrival of French and British colonists. Indigenous legal systems existed for thousands of years on today's unceded land. Speaking very generally, Indigenous rules and legal

principles include a holistic approach to law, incorporating social, economic, spiritual, and environmental aspects of life.

The notions of "Indigenous law" and "Aboriginal law" are separate and distinct and one should be careful in how those terms are used. Below is a fantastic overview of the distinction by Estella White (Charleson) – Hee Naih Cha Chist:

> "Indigenous law exists as a source of law apart from the common and civil legal traditions in Canada. Importantly, Indigenous laws also exist apart from Aboriginal law, though these sources of law are interconnected. Aboriginal law is a body of law, made by the courts and legislatures, that largely deals with the unique constitutional rights of Aboriginal peoples and the relationship between Aboriginal peoples and the Crown. Aboriginal law is largely found in colonial instruments (such as the Royal Proclamation of 1763, the Constitution Acts of 1867 and 1982 and the Indian Act) and court decisions, but also includes sources of Indigenous law."
>
> Estella White (Charleson) – Hee Naih Cha Chist,
> "Making Space for Indigenous Law,"
> http://jfklaw.ca/making-space-for-indigenous-law/

In recent years, there has been a growing recognition of the importance of Indigenous law within the Canadian legal framework both in its historical context, but also in modern application. Efforts are underway to incorporate Indigenous legal principles into various aspects of Canadian legal system such as restorative justice and treaty-building, in the hopes of better recognizing the rights and jurisdiction of Indigenous peoples and promoting equality, reconciliation, and decolonization.

Types of Legal Disputes in Canada

Another duality that exists in the Canadian legal system is that it is divided into two main branches: public law and private law. These branches encompass different areas of law and govern distinct types of legal disputes. Therefore, not every dispute is going to be handled the same or engage the same legal processes.

Public law deals with the relationships between individuals and the government or government entities. Public law sets out the rules and regulations that govern the exercise of power by the government and ensures the protection of public rights and interests. Some key areas of public law include:

- **Constitutional Law** – Involves the interpretation and application of the Canadian Constitution which outlines the fundamental principles and structures of the country's government. Constitutional law disputes involve issues related to the distribution of powers

between the federal and provincial governments, the protection of individual rights and freedoms, and the validity of governmental laws and actions.

- **Administrative Law** – Focuses on the actions and decisions of government agencies, boards, and tribunals. It regulates the exercise of administrative power, including the procedures followed by government entities and the legality of their decisions. Disputes in administrative law may arise when a person challenges a government decision or seeks remedies for actions taken by administrative bodies.
- **Criminal Law** – Focuses on offenses against society as a whole rather than individual disputes. It involves actions or omissions that are considered crimes and is enforced by the state through prosecution. Criminal law addresses "offenses" such as theft, assault, murder, and drug trafficking. The burden of proof lies with the prosecution, and if found guilty, the defendant may face penalties such as fines, imprisonment, or probation.

Private law governs the legal relationships between individuals, organizations, or private entities. It deals with the rights and obligations of individuals in their interactions with one another and provides the framework for resolving disputes between private parties. Some key areas of private law include the following:

- **Contract Law** – Deals with agreements between parties that create legally enforceable obligations. It governs issues such as the formation, interpretation, and performance of contracts.
- **Tort Law** – Covers civil wrongs or injuries caused by one party to another. It includes claims for personal injury, negligence, defamation, and other wrongful acts. Tort law allows injured parties to seek compensation for the harm suffered due to the actions or omissions of others.
- **Property Law** – Addresses the rights and obligations related to real and personal property. It includes ownership, transfer, and use of land, buildings, and other assets. If there is an interference with a form of property, the victim may seek compensation.

Much of this textbook's focus will be private law however, some attention will be paid to public law issues.

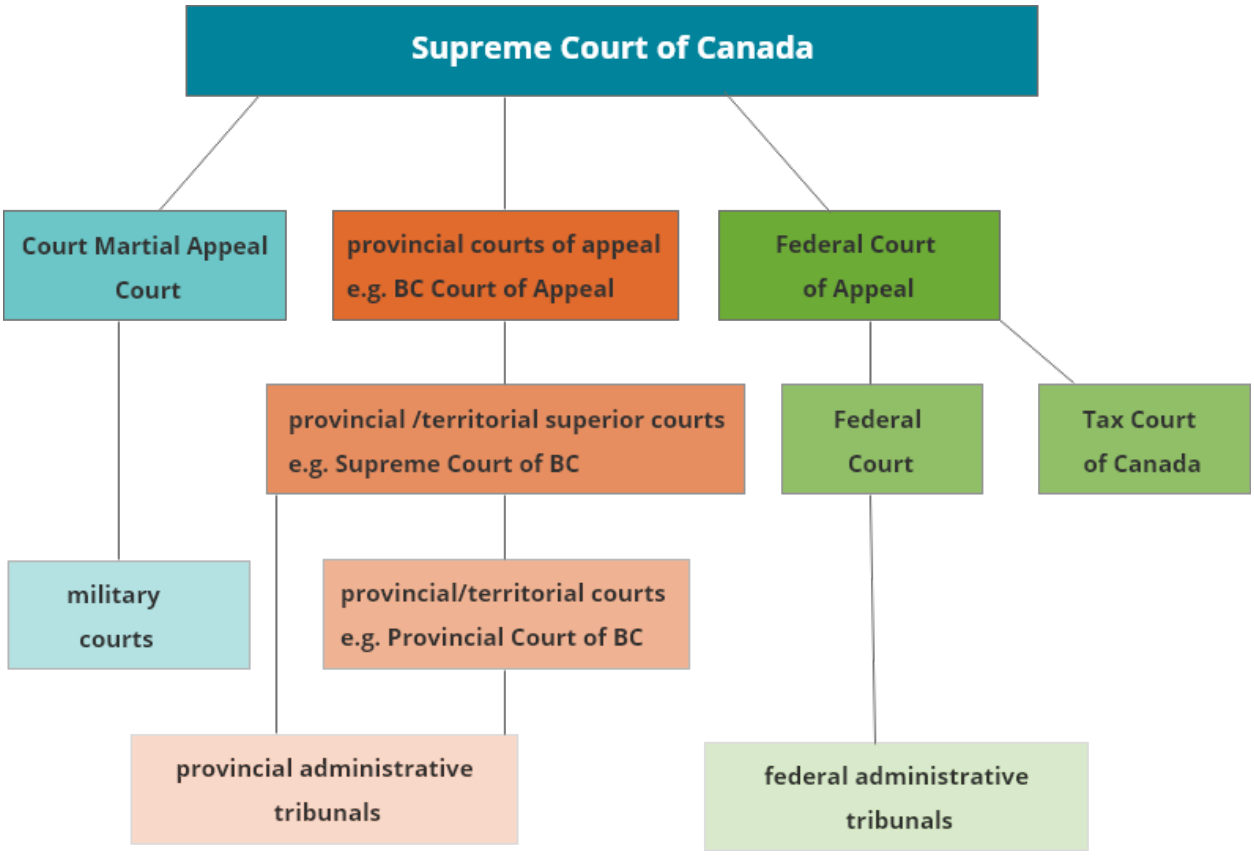
The Court Levels

In order to understand the process of resolving legal disputes, we must also understand where such disputes are heard.

Courts are independent bodies that have the authority to interpret and apply the law, resolve disputes, and ensure the protection of individual rights and freedoms. The primary function of courts is to resolve legal disputes through a fair and impartial process. They listen to the arguments presented by parties involved in a case, assess the evidence, and make decisions based on the law. Courts have the power to determine guilt or innocence in criminal matters and liability or damages in civil cases.

Not all courts are created equally. While they all have powers to resolve disputes, some courts have the ability to create more binding precedent, and some have jurisdiction to hear a wider array of disputes or issues.

As you can see from the following image*, the Canadian court system is hierarchical with a series of higher and lower-level courts:



The hierarchy of Canadian courts. Reproduced from the Justice Education Society. Website: https://courtsofbc.ca/justice-system/intro

In the upcoming section, we examine most of these court levels including their structure and jurisdiction.

The Supreme Court of Canada

At the top of the court hierarchy is the Supreme Court of Canada (SCC) and, as such, the decisions of the SCC are binding on all other courts in the country.

The SCC is Canada's highest court and the final court of appeal for all legal matters in the country. The court hears appeals from the federal courts of appeal and the provincial and territorial courts of appeal. The SCC also has the power to hear reference cases which are questions referred to the court by the federal or a provincial government for an opinion on a point of law.

The court itself is composed of nine justices appointed by the Governor-General of Canada on the advice of the Prime Minister.

The composition of the Supreme Court of Canada. Photograph attribution - Supreme Court of Canada: https://www.scc-csc.ca/about-apropos/gal/index-eng.aspx

Cases to the SCC are on permitted on leave from the court. In order for a case to be heard by the SCC, the party seeking to appeal must submit an application for leave to appeal. This application includes written arguments explaining why the Court should hear the case and typically requires a justification for why the underlying issues are of national importance. The leave to appeal process allows the Court to exercise its discretion in determining which cases it will hear.

The Supreme Court of Canada. Photograph attribution Supreme Court of Canada: https://www.scc-csc.ca/about-apropos/gal/index-eng.aspx

If leave to appeal is denied, it means the Court has decided not to hear the case and the decision of the lower court stands. If leave to appeal is granted, the case proceeds to a hearing.

The parties then present their arguments before the justices, who then deliberate and render a judgment. The SCC's decision in the appeal becomes the final ruling on the matter.

The Court has a limited capacity to hear cases due to the fact it sits only nine judges. As such, the Court typically hears only around 70 to 80 cases annually.

External Resource

Click the following link to watch archived webcasts of SCC hearings: https://www.scc-csc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx

The Courts of Appeal

The courts of appeal are the highest court in each individual province and territory. They are the intermediate appellate courts situated between the trial courts (such as provincial supreme courts and federal courts) and the SCC.

The primary function of the courts of appeal is to review decisions made by lower courts or administrative bodies to ensure the correct application of the facts and law. The courts of appeal do not re-try cases; instead, they focus on legal issues, such as errors in law, errors in fact, or procedural irregularities. Appellate courts do not consider new evidence or reassess witness credibility.

When a party is dissatisfied with a decision from a lower court or tribunal, they may file an appeal to the relevant court of appeal. The appellant (the party appealing) presents arguments explaining why the lower court's decision was incorrect or unjust, while the respondent (the opposing party) defends the lower court's decision. The appellate judges review the written submissions, the record of the lower court, and often hear oral arguments from the parties' legal representatives.

In most cases, appellate panels in Canada consist of three judges. This three-judge panel is commonly referred to as a "division" or a "panel" of the court of appeal. The three judges hear and decide the appeal collectively. However, there are instances where a court of appeal may sit with a larger number of judges. For particularly complex or significant cases, an appeal may be heard by a larger panel, such as five judges. This larger panel is often referred to as an "en banc" hearing; these are less common and usually reserved for cases of significant public interest or those involving novel legal questions.

The Supreme/Superior Courts

Generally, the superior or supreme level of court serves as the general trial court for most civil and criminal matters. This court level is principally responsible for handling more serious and complex trials, including major criminal offenses, high-value civil disputes, and family law matters.

While the superior/supreme courts have the authority to hear original cases, they also have the power to hear appeals from lower-level courts — for example, from the provincial small claims court. Accordingly, judges can sit in an appeal capacity and determine whether the lower court's decision was correct.

In cases at the superior/supreme court level, a single judge presides over the case and is responsible for making decisions; this is known as a judge-alone trial. However, in certain circumstances, particularly in criminal cases involving serious offenses, the accused person may have the right to a trial by jury. In these cases, a judge and a jury work together to decide the outcome of the trial. The judge provides guidance on legal matters, instructs the jury on the law, and ensures the trial proceeds fairly. The jury, consisting of a group of citizens selected from the community, hears the evidence presented in court, deliberates on the facts, and ultimately reaches a verdict.

The name of the superior/supreme court will vary from province to province; so too will the jurisdiction of the court. Below is a brief snapshot of the superior/supreme courts in Canada and the monetary jurisdiction for civil disputes.

Province	Supreme/Superior Court Name	Monetary Threshold for Court	Court Acronym in Case Citation
Alberta	Court of King's Bench of Alberta	Over $100,000	ABKB
British Columbia	Supreme Court of British Columbia	Over $35,000	BCSC
Manitoba	Court of King's Bench of Manitoba	Over $10,000	MBKB
New Brunswick	Court of King's Bench of New Brunswick	Over $20,000	NBQK
Newfoundland and Labrador	Supreme Court of Newfoundland and Labrador	Over $25,000	NLSC
Nova Scotia	Supreme Court of Nova Scotia	Over $25,000	NSSC
Ontario	Superior Court of Justice (Ontario)	Over $35,000	ONSC
Prince Edward Island	Supreme Court of Prince Edward Island	Over $25,000	PESC
Quebec	Superior Court of Quebec	Varies	QCCS
Saskatchewan	Court of King's Bench for Saskatchewan	Over $30,000	SKKB
Northwest Territories	Supreme Court of the Northwest Territories	Over $35,000	NWTSC
Nunavut	Nunavut Court of Justice	All monetary amounts.	NUCJ
Yukon	Supreme Court of Yukon	Over $25,000	YKSC

The Provincial Courts

The provincial courts are the main trial court in the province and is typically, the first level of court for most legal proceedings. As noted above, decisions of the provincial courts can also be appealed to the Supreme/Superior Courts.

The provincial courts have both criminal and civil jurisdiction and hear a wide range of cases including criminal offenses, family disputes, small claims, and traffic offenses. One of the most common areas of provincial court is the small claims division which hears disputes below the monetary threshold of the Supreme/Superior court. For example, the British Columbia Provincial

Court hears disputes below $35,000 — anything above that amount should be heard in BC Supreme Court.

British Columbia's Civil Resolution Tribunal

While laws and courts can be slow to adapt to new technology, the province of British Columbia has been at the forefront of embracing technology to resolve legal disputes. In 2017, the province launched an ingenious new online tribunal (the first in Canada) to handle low value legal disputes.

The Civil Resolution Tribunal (CRT) is a specialized online tribunal that deals with disputes under $5,000, and certain strata property and motor vehicle matters. The tribunal is similar to a court as it resolves legal disputes between parties however, the proceedings are conducted online, and the parties are almost always self-represented. As a result, the tribunal allows a flexible, low-cost, and accessible form of dispute resolution.

One of the major goals of the CRT is to enhance access to justice and reduce the financial barriers which may prevent individuals from seeking legal redress. As such, the fees associated with bringing a complaint are relatively low. The following represents the CRT filing fees as of 2023:

ITEM	FEE
Make a claim - Small Claims of $3,000 or less	$75 online / $100 by email or mail
Make a counterclaim or third-party claim - Small Claims of $3,000 or less	$75 online / $100 by email or mail
Make a claim - Small Claims of $3,001 or more	$125 online / $150 by email or mail
Make a counterclaim or third-party claim - Small Claims of $3,001 or more	$125 online / $150 by email or mail
Make a claim - Strata	$125 online / $150 by email or mail
Make a counterclaim or third-party claim - Strata	$125 online / $150 by email or mail
Make a claim - Societies and Cooperative Associations	$125 online / $150 by email or mail
Make a counterclaim or third-party claim - Societies and Cooperative Associations	$125 online / $150 by email or mail
Make a claim - Vehicle Accidents (accident benefits only)	$75 online / $100 by email or mail
Make a claim - Vehicle Accidents (damages and liability only)	$125 online / $150 by email or mail
Make a claim - Vehicle Accidents (damages and liability + accident benefits or minor injury determination)	$125 online / $150 by email or mail
Make a claim - Vehicle Accidents (minor injury determination only)	$75 online / $100 by email or mail
Make a claim - Vehicle Accidents (assessment of responsibility for an accident only)	$75 online / $100 by email or mail

External Resource

Click the following link to explore the BC Civil Resolution Tribunal website and learn about the process to file a complaint:
https://civilresolutionbc.ca/

Bringing a Legal Claim

Assuming parties are not able to informally resolve their legal dispute, it is likely that one or potentially, both, will commence litigation. Litigation is the process of resolving disputes using the court system. Accordingly, parties bring their dispute through the litigation process for a judge to resolve it.

The following discussion canvasses issues in commencing an action and describes the steps in the litigation process.

Is there Jurisdiction?

The first step in contemplating a legal action is to determine which court has jurisdiction over your case. Jurisdiction refers to the legal authority of a court to hear and decide cases. A person bringing a claim, would want to ensure that the court they are selecting has both "subject-matter jurisdiction" and "personal" jurisdiction.

Subject-matter jurisdiction refers to the authority of a court to hear cases involving certain types of disputes, such as criminal cases or civil cases. Some Canadian courts are more specialized or only hear issues of a certain type. For example, if you are suing because someone has breached a contract for $10,000, the various provincial courts would have subject-matter jurisdiction. However, if you have a maritime law issue, the Federal Courts will have jurisdiction.

Personal jurisdiction refers to the authority of a court over a particular individual or entity. A court can only exercise personal jurisdiction over a person or entity if they have sufficient contacts with the jurisdiction. It makes sense that an Ontario resident who is injured in Ontario by another Ontario resident should not be bringing a claim in a British Columbia court. If all of the material facts indicate Ontario, then the Ontario courts should have jurisdiction.

If a court lacks either subject-matter jurisdiction or personal jurisdiction, it will decline to hear the case.

Understanding the Burden of Proof

Regardless of the form of legal dispute, there will be a burden of proof which needs to be satisfied. The burden of proof refers to the obligation of a litigant to prove their case to a certain threshold. The concept is important because it helps to ensure that judicial decisions are based on sufficient evidence rather than unsubstantiated claims or subjective desires. It is fundamentally important for litigants to determine which side has the burden of proof and what degree of evidence is required to satisfy it.

In criminal cases, the burden of proof is on the prosecution and the standard is one of "beyond a reasonable doubt". The burden of proof requires prosecutors to present evidence that proves the accused is guilty beyond a reasonable doubt. This is a high standard of proof and is often referred to as it being a near certainty (or 99% likely) that the accused committed the crime. The burden of proof is high in criminal cases because the consequences of a guilty verdict are serious; an accused may go to jail or otherwise be burdened with a criminal record.

In civil cases, the burden of proof is lower than in criminal cases. In a civil case, the plaintiff (the party bringing the action) has the burden of proving their case on a balance of probabilities.

> "In a civil claim such as this the applicant bears the burden of proof, on a balance of probabilities. That means he must provide evidence that persuades me that his version of events is more likely than not. Otherwise, I must dismiss his claim."
>
> *Maxwell v. Clisby et al.*, 2018 BCCRT 10 at para. 11

The balance of probabilities means that the plaintiff must present evidence that makes it more likely than not that their claims are true; this is sometimes referred to as providing evidence which proves your case above 50%. If the plaintiff or applicant fails to meet that threshold then the case will be dismissed.

Accordingly, a party bringing a dispute should ensure that they have enough evidence to pass this legal threshold.

Foundational Law — The Burden of Proof

Maxwell v. Clisby et al., 2018 BCCRT 10 is a Civil Resolution Tribunal decision dealing with a dispute between two neighbours.

Maxwell (the applicant) claimed that he had discussions with Clisby (the respondent) about replacing an old fence, and in those discussions, they agreed to split the cost of removing the old fence and installing a new one. Clisby denied agreeing to share the cost and stated that the discussions were only about the height and style of the fence.

The central issue was whether Clisby agreed to pay part of the cost of the fence. The burden of proof fell on Maxwell to establish, on a balance of probabilities, that an agreement existed between the parties. Maxwell presented evidence including pictures of the old and new fencing, a topography survey, and photographs. He also testified about his version of events.

The Tribunal member held that Maxwell had failed to provide any evidence beyond his own submissions that Clisby agreed to share the costs of the new fence. With conflicting statements from both parties and no additional evidence supporting either side's version of events, Maxwell could not prove that Clisby agreed to pay. The tribunal member concluded that Maxwell's belief in the existence of an agreement was not sufficient evidence. As a result, Maxwell's claim was unsuccessful.

This relatively minor case demonstrates that when bringing a legal action, you need to be aware of the legal burden. The evidence always needs to pass the balance of probabilities or, as in the Maxwell case, the claim will be dismissed.

Initiating the Litigation Process

I. File the Pleadings

Once the proper court is identified, the parties then draft and file the pleadings are the written statements of the parties that outline the material facts and the legal issues in the case. The pleadings go by many names throughout the Canadian courts however, what unifies them is that they are each filed with the court and served (given) on the opposing parties.

There are a few main types of pleadings which are described below:

- Statement of Claim/Notice of Claim – The statement of claim or notice of claim is a document filed by the party bringing the action (the plaintiff or applicant) outlining the facts of the case and the relief they are seeking from the court.
- Statement of Defence/Response to Claim – The statement of defense or response to claim is a document filed by the party being sued (defendant or respondent) in response to the claim. It sets out the defendants'/their position on the issues raised in the lawsuit and the relief it is seeking — often a dismissal of the lawsuit.
- Counterclaim – The counterclaim is the legal pleading that is used by the defendant/respondent to make a claim back against the plaintiff/applicant. Counterclaims allow the defendant/respondent to pursue relief against the plaintiff in the existing litigation.
- Cross-Claim – If a plaintiff/applicant has also sued another party (there are multiple defendants/respondents), a cross-claim may be issued. A cross-claim is a pleading filed by one defendant/respondent against another defendant/respondent in the same litigation. Cross-claims can be valuable as they allow a defendant/respondent to assert a claim for liability against another defendant/respondent in the same over-arching litigation.
- Third Party Claim – A third party claim is a legal pleading in which a defendant/respondent in a lawsuit (the "third party") is brought into the case by the original defendant (the "primary defendant"). Under a third-party claim, the primary defendant claims that the third party is also responsible for the plaintiff's injuries or damages and therefore, should have to share in or contribute to any potential liability.

In hearing a case, the court must stay within the boundaries set by the pleadings. If a party does not raise an issue, claim, or defense in their pleadings, they cannot later assert it, and the court cannot make a ruling based on it. Therefore, the parties should be very thoughtful about what they want to argue in litigation and include such arguments in their pleadings.

Example – Multiple Pleadings

Let's use an example to highlight how a single dispute could lead to the filing of multiple different types of pleadings. Imagine a homeowner has recently inherited some money and decided to build a brand-new home on their existing lot. After hiring a construction company for the build, numerous issues emerged that led to litigation. Here are a few types of pleadings which could theoretically be involved in the dispute:

- **Statement of Claim/Notice of Civil Claim** – The homeowner's statement of claim may allege that the construction company failed to complete the construction of their new home in a timely and satisfactory manner, and as a result, caused the homeowner financial losses and inconvenience.
- **Statement of Defence/Response to Civil Claim** – The construction company may file a statement of defence/response denying the allegations made by the homeowner and asserting that they fulfilled their contractual obligations and that any delays or issues were caused by the homeowner.
- **Counterclaim** – The construction company may file a counterclaim against the homeowner, alleging that the homeowner failed to make timely payments or interfered with the construction process, and as a result, caused the construction company financial losses.
- **Cross-Claim** – If a subcontractor (like an electrician or plumber) is already a party in the litigation after being sued by the homeowner, the construction company may bring a cross-claim against the subcontractor.
- **Third-Party Claim** – The construction company may also bring a third-party claim against a subcontractor (who is not already in the litigation), alleging that the subcontractor's faulty work caused delays and defects in the construction of the homeowner's new home.

II. Discovery

Following the close of the pleadings process, the next step is for the parties to undertake "discovery". The discovery process unfolds in two ways: "document discovery" and "examinations for discovery".

Document discovery refers to the process of gathering and exchanging relevant documents that may be used in the litigation. Common examples of documents that are relevant in litigation are emails, text messages, financial records, company reports, police reports, or other witness statements. The parties to the litigation are expected to act with good faith in disclosing all material documents though there are a series of procedural steps a party can undertake if they believe that documents have been omitted or withheld by the other side.

Examinations for discovery are a process in which each litigant has the opportunity to question the other parties and any material witnesses to obtain statements. The individuals subject to examination must answer questions under oath and the statements gathered can be used as evidence in the trial. Examinations are often a formal process and typically conducted by the lawyers on each side.

III. The Trial

After the discovery stage closes, the next step in the litigation process would be the conduct of the trial. The trial will be heard in front of the trier-of-fact. In most civil cases in Canada, the trier-of-fact is a single judge (often called judge-alone trials) though in some cases the trial may be heard by a judge and jury.

The trial begins with the plaintiff presenting their case. This process includes the opening statement, the calling of witnesses, and introducing all the plaintiff's evidence. At the close of the plaintiff's case, the defendant then presents their case including their opening statement, their calling of witnesses, and evidence. During their respective presentations, the plaintiff and defendant have an opportunity to cross-examine each others' witnesses. Once the presentation of both sides is complete, the trial moves to closing arguments in which they summarize their evidence and the legal issues in the case and ask the jury or judge to find in their favour.

IV. The Decision and Costs

The judge or jury will then deliberate and reach a verdict — the formal decision in the case. If the defendant is found liable, the court will then determine the appropriate remedy, such as an award of damages. If the defendant is found not liable, then the plaintiff's action is dismissed.

The party that loses at trial (or loses an application to the court) is typically responsible for paying the legal costs of the winning party. This is known as a "costs award." The purpose of the award is to reimburse the winning party for expenses incurred during the litigation, including court fees, lawyer fees, and other expenses (photocopying, witness fees, etc.). However, it is uncommon for a costs award to cover the full amount of a plaintiff's or defendant's legal expenses. Typically, the winner will only get around 40% of their actual legal expenses covered by a costs award.

V. Will there be an Appeal?

If litigation proceeds to trial, it is possible that one or maybe both parties will be dissatisfied with the decision. A litigant can seek to appeal certain decisions made by a court, tribunal, or administrative agency to a higher court or tribunal. In essence, the party bringing the appeal, known as the appellant, is requesting a higher court to review the decision of a lower court.

To be successful in an appeal, the appellant must demonstrate that the lower court made an error in either interpreting the facts of the case or applying the law, and that this error resulted in an incorrect decision. Simply making a mistake is not sufficient; the mistake must be significant enough to have affected the outcome of the case.

One of the important procedural steps is to determine the deadline for filing an appeal of the initial decision. In many cases, a litigant will typically have 30 days from the date of the decision to file an

appeal. However, this deadline can be shorter or longer depending on the specific court or tribunal level.

Assuming the appeal is brought within the relevant filing deadline, the appeal process will then unfold, and the appellate court will render its decision. A court of appeal can make several types of decisions in civil cases, including upholding the decision of the lower court, reversing the decision of the lower court, or ordering a new trial.

Alternative Dispute Resolution

Litigation should not be taken lightly. It can be a time-consuming and costly process as well as emotionally taxing for the parties involved. Litigation also adds a layer of unpredictability into the dispute as the parties turn the decision-making over to a judge or jury. An often-under-appreciated downside to litigation is that it is also a matter of "public record", meaning easy public access to the pleadings and material evidence in the case. Because of these downsides, the parties often consider alternative ways to resolve their disputes.

Alternative dispute resolution (ADR) refers to methods of resolving disputes outside of litigation, such as through arbitration, mediation, or negotiation. These methods can be less costly and time-consuming than going to court though they differ in substantial ways.

Negotiation is a process in which the disputing parties communicate directly with each other in an effort to reach a mutually satisfactory resolution. This is typically done without the assistance of a third party.

Mediation is a process in which a neutral third party (the mediator) helps facilitate communication between the disputing parties; the ultimate goal of reaching a mutually satisfactory resolution. The mediator does not have the authority to make a binding decision but can help the parties come to an agreement on their own.

In arbitration, the parties select a neutral third party (the arbitrator) who acts as a private judge in the dispute. The arbitrator reviews the evidence, listens to the arguments presented by both parties, and renders a binding decision, known as an arbitral award. The arbitral award is enforceable by law, and it is typically final and not subject to appeal (except in limited circumstances). Arbitration offers several advantages over traditional litigation. It is often faster, more flexible, and less formal than going to court. The parties have more control over the process and can choose an arbitrator based on their expertise in the subject matter. Arbitration also provides greater privacy, as the proceedings and the award are not typically made public.

Example – Using Alternative Dispute Resolution

In the previous example above, we discussed a dispute between a homeowner, a construction company and some sub-trades. How could the parties use alternative dispute resolution to avoid the time, cost, and public nature of litigation? Here are a few potential avenues:

- **Negotiation** – The homeowner and the construction company could engage in negotiations to address the underlying dispute. They can discuss the construction delays, sub-par workmanship, or cost overruns, and work together to find a solution. The hope is that the parties can find consensus without resort to litigation or, if its already started, continuing the litigation.

- **Mediation** – The parties can use a mediator to facilitate discussions between them. The mediator can assist in exploring possible compromises, suggesting alternative solutions, and helping the parties consider the long-term implications of the litigation. The mediator's suggestions would not be binding and there is no guarantee of a resolution emerging from mediation.

- **Arbitration** – The homeowner and the construction company could opt for binding arbitration. An arbitrator would be selected, likely one with expertise in construction disputes, who would review the evidence, listen to the arguments from both parties, and then render a decision that is binding on both sides. The decision reached in arbitration can be enforced in the court (if necessary).

Deadlines on a Claim

All individuals should understand limitation periods — it is some of the most important law to know. Generally, a limitation period is a time limit within which legal proceedings must be brought on a particular cause of action. One of the keys purposes of limitation periods is to ensure that legal claims are dealt with promptly and that evidence is still fresh and available to support the claims.

"Limitation periods play an important role in the administration of justice by achieving a balance between every individual's right to justice on one hand and the systemic need for finality on the other. In their operation, limitation periods encourage the timely resolution of legal controversies and reconcile the competing interests of potential claimants, potential defendants and society at large."

Haldenby v. Dominion of Canada General Insurance Co., 55 O.R (3d) 470

Limitation periods for private claims are codified by statute and established provincially. In most cases, the limitation period for private claims is two years from the date that the litigant discovered or should have reasonably discovered they had a claim. A legal claim must be commenced within the two-year limitation period, or it will be statute-barred — the litigant will no longer be able to pursue their claim.

The limitation period in British Columbia is found in section 6(1) of the Limitation Act, S.B.C., 2012, c. 13:

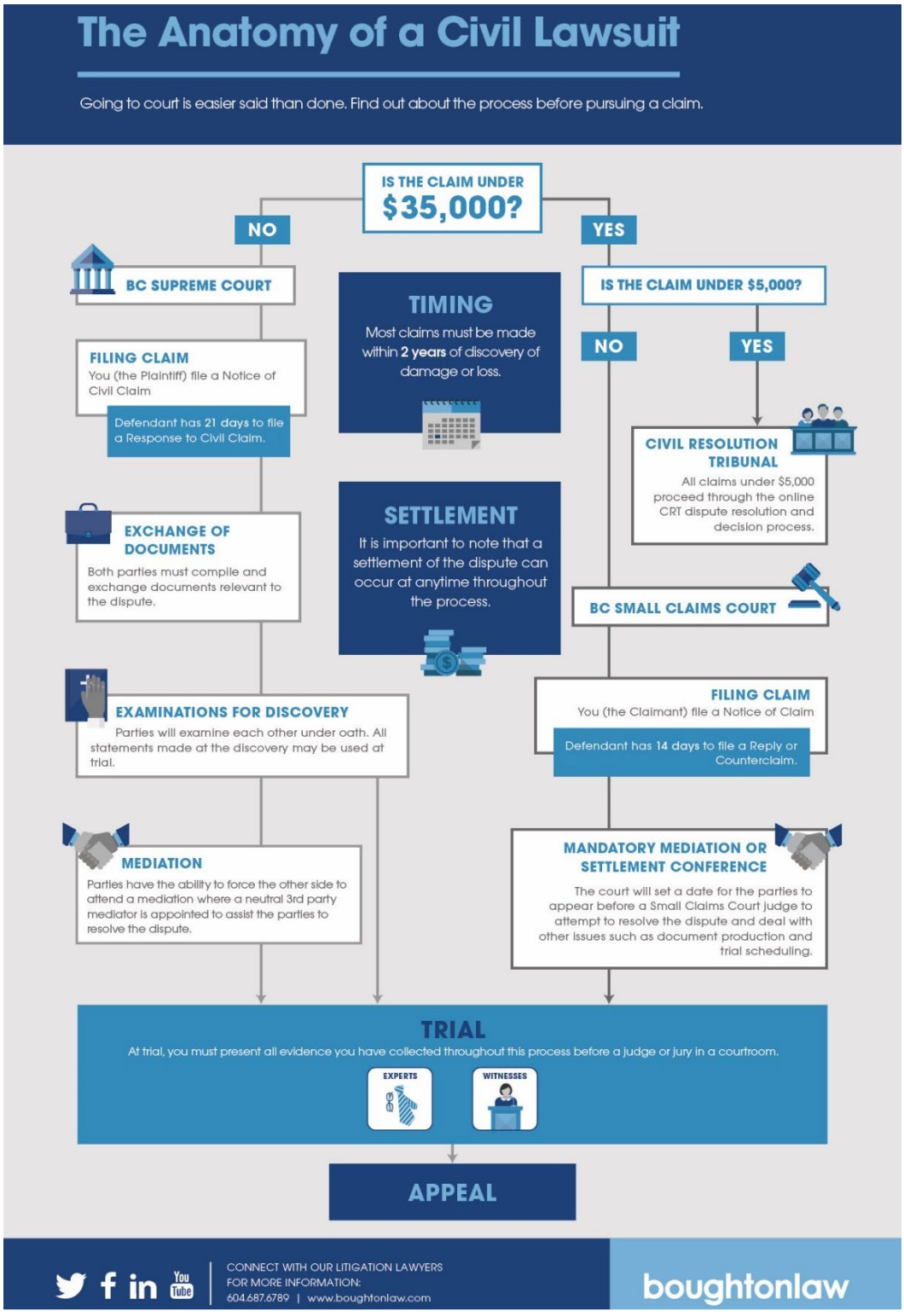
> Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

The clock starts to run from the date of "discoverability" which, in some cases, may be open to argument. Discoverability is said to occur when a person has knowledge of the material facts that would lead a reasonable person, exercising due diligence, to investigate a potential claim. In other words, it is the point at which a person knows or should have known that they have suffered a legal injury, and that the injury has a reasonable connection to the actions or omissions of the other party.

For example, imagine a store carelessly fails to clean-up a puddle of laundry detergent which has been spilled on the floor. While shopping, a customer slips in the spill and fractures her ankle. The customer would have two years from when she reasonably should have "discovered" the claim; in this example, the date of the slip and fall. If the customer fails to bring her claim within the two-year window, her claim will be statute-barred.

Summary of Litigation Steps in British Columbia

The following is a very useful summary of the litigation steps in British Columbia. It was prepared by a Vancouver law firm called Boughton Law.



*Flowchart attribution: Boughton Law website: https://www.boughtonlaw.com/2015/10/anatomy-of-a-civil-lawsuit/

Chapter 1 - Review Questions

1. What are the key differences between rules and laws?
2. What is stare decisis and how does it impact the Canadian legal system?
3. What are the distinctive features of the two legal systems operating in Canada?
4. How does the Canadian court system work? How is it structured?
5. What is the burden of proof in civil and criminal cases?
6. What are the main steps involved in a civil lawsuit in Canada?
7. What are the alternatives to litigation for resolving disputes?
8. What is a limitation period and why is it important?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 1? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

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Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 1:

https://youtu.be/bMiAUBFR7DU

Chapter 2:
Canada's Constitution: The Supreme Law

Learning Outcomes:

1. Examine the key principles and concepts outlined in the Constitution Act and the Charter of Rights and Freedoms.
2. Analyze the structure and organization of Canada's Constitution Act, including the division of powers between the federal and provincial governments.
3. Examine the fundamental rights and freedoms guaranteed by the Charter of Rights and Freedoms, such as freedom of expression, equality rights, and legal rights.
4. Examine section 1 of the Charter and its impact on balancing individual rights in a free and democratic society.

Introduction

In this chapter, we will be discussing the highest of all Canadian law: the Constitution.

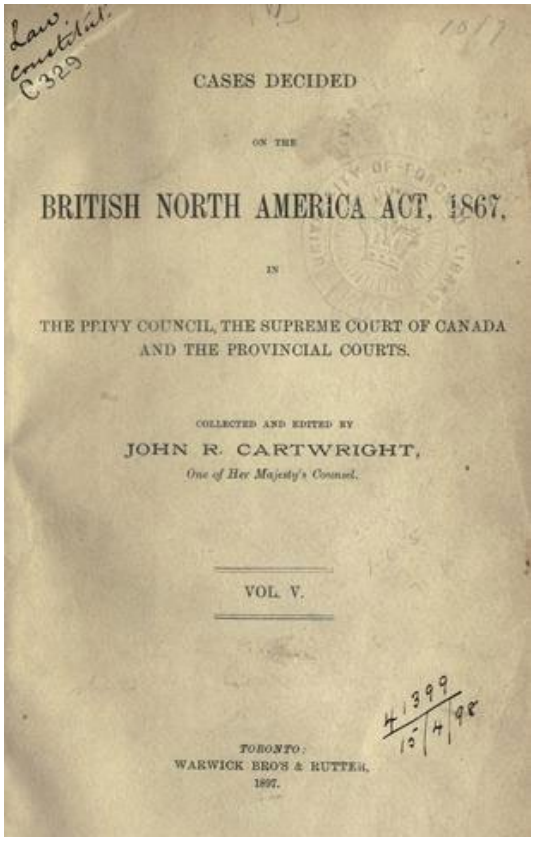
Canada is a constitutional monarchy which means that it has a monarch (currently King Charles III) as its head of state, but that the powers of the monarch are limited by the "constitution". Given such constitutional limitations, the monarch's role in Canada is largely ceremonial and now mostly serves as a symbol of Commonwealth unity and heritage. In its ceremonial role, the monarch or its delegates are tasked with the opening of Parliament and the granting of royal assent to new laws.

On the other hand, the Constitution of Canada stands as the supreme law. The Constitution ensures the rule of law, sets guardrails on the powers of the different branches of government (executive, legislative, and judicial), and determines how the multiple levels of government remain separated and balanced.

One of the more unique features of Canada's Constitution is that it is composed of two separate constitutional documents, both of which will be discussed: 1) the Constitution Act, and 2) the Charter of Rights and Freedoms.

Canada's Constitutional Origins

The history of the Canadian Constitution is a complex and evolving story that spans several centuries and involve grants of status from England in 1867 to the repatriation of the Constitution in 1982.



Canada's first brush with independence was through the passage of the British North America Act (BNA Act); now referred to as the Constitution Act, 1867. The BNA Act was passed by the British Parliament in 1867 and established the Dominion of Canada, bringing together the previously separate colonies Ontario, Quebec, New Brunswick, and Nova Scotia into a federal union.

The drive to a federal union was, in part, borne of concerns around facilitating economic development and improving defense against potential American expansionism. The hope was that by having a unified federal regime it could help reduce political and economic instabilities in the former British colonies.

Interestingly, the BNA Act was a statute passed by the British legislature and therefore, did not grant Canada complete independence from Britain. Instead, the statute established a constitutional framework that allowed for further development.

For much of Canada's history then, independence was simply because the British passed a statute granting it.

In 1982, the Government of Canada, in cooperation with the provinces, determined that it was time to "patriate" the Canadian constitution from the United Kingdom. This process of patriation resulted in the BNA Act being replaced by a new "Constitution Act" which became the supreme law of the country. The Constitution Act, 1982 transferred the power to amend certain parts of the constitution from the British Parliament to the Canadian government; this transfer marked an important step in Canada's path towards full sovereignty.

Provisions of the *Constitution Act*

As the original constitutional document, the Constitution Act is required to do quite a lot of legislative lifting. It establishes the declaration of Canada as a union, the role of the Executive and Legislative branches of government, and the selection of judges for the judiciary.

Our focus on the Constitution Act will be around three broad responsibilities: codifying the supremacy of the Constitution (section 52), allocating responsibility between the Federal and Provincial levels of government (section 91 and 92), and providing a Constitutional amendment process (section 38).

Section 52

Section 52 of the Constitution Act states the following:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section establishes the constitution's supremacy over all other laws. In effect, it ensures that the various levels of government cannot pass laws or conduct other actions which would violate the protections under the Constitution. Section 52 gives courts the power to strike down laws as ultra vires (Latin for "beyond the scope") meaning they are unconstitutional. This "striking" ability serves an important check on the power of the executive and legislative branches of government.

Sections 91 and 92 of the *Constitution Act*

As a federalist system, Canada has more than one level of government with law-making powers: 1) the federal level of government and 2) the provincial level of government. While this federalist structure enhances representation, it also has the problem of potentially leading to confusion and conflict if the varying levels of government pass laws on the same topic. Accordingly, how does a country maintain clarity on who can pass laws in which areas? The answer is in section 91 and 92 of the Constitution Act.

Sections 91 and 92 of the Constitution Act address the practicalities of having two levels of law-making powers by establishing a clear "division of powers" between the federal government and the provincial legislatures. Sections 91 and 92 allot each level of government with its own specific jurisdictions; neither level of government is meant to encroach on the jurisdiction of the other.

According to section 91, the Federal government has constitutional jurisdiction over matters with a more national focus — this makes sense as it is the national level of government. Under section 91, the Federal government has jurisdiction over things like the following:

- Criminal Law
- Navigation and Shipping
- Regulation of Trade and Commerce
- Currency and Coinage
- Taxation
- Banking
- Postal Service
- Military and Defence

In terms of provincial jurisdiction, section 92 states a number of key areas that the provinces have law-making authority in including, but not limited to, the following:

- Hospitals
- Property and Civil Rights
- Municipal Institutions
- Natural Resources
- Local Works and Undertakings
- Incorporation of Provincial Companies
- Provincial Courts
- Direct Taxation within the Province

If either the Federal or provincial governments attempted to legislate within any of the other's jurisdictional areas, it would be ultra vires and held to be of no force and effect. Therefore, both levels of government are required to stick to their constitutional jurisdictions.

Many things that exist in modern society could not have been predicted during the drafting of the Constitution Act (things like the internet, artificial intelligence, etc.). Accordingly, the Constitution Act created a "residuary power" to determine whether the Federal or Provincial governments would get authority in that new area. The residuary power is found in the preamble to section 91 which states the Federal Parliament has the power:

> "to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

This means that, if there are jurisdictional areas which have not been specifically assignment to the provinces, then the Federal level government has the constitutional authority over it.

Sections 38 of the Constitution Act

It was predicted that the Constitution may, at certain points, need to evolve or be amended. To provide clarity on that the amending process, the Constitution Act codified a "general" amending formula in section 38(1):

> 38 (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
> (a) resolutions of the Senate and House of Commons; and
> (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

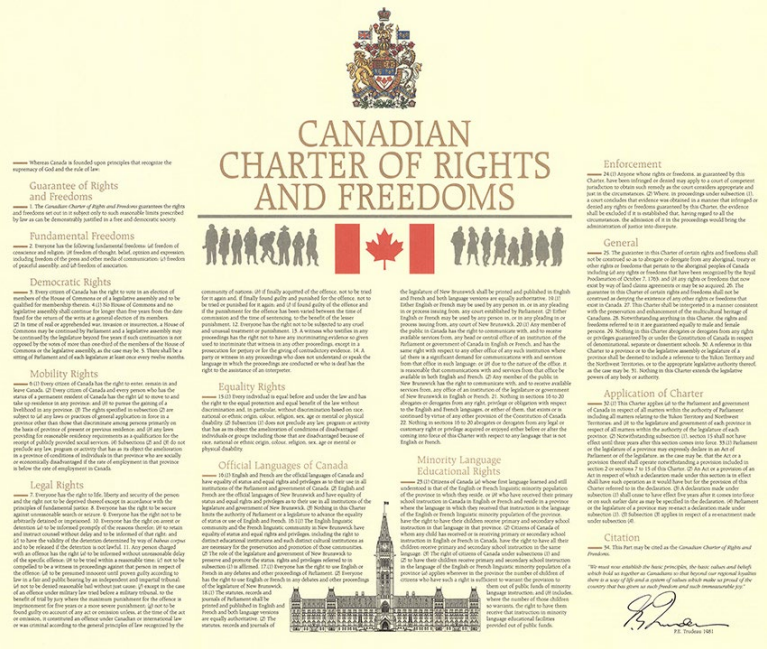
For constitutional amendments to occur, the general amending formula requires the agreement of the Federal government and at least two-thirds of the provinces representing at least 50% of the population. This high threshold is designed to ensure that any constitutional changes have broad regional support and take into account the interests of all parts of the country. The strict threshold also restricts any one level of country from trying to impose changes which are not widely supported.

*Former Canadian Prime Minister Pierre Elliott Trudeau and Britain's Queen Elizabeth II signing the Constitution Act on April 17, 1982. *Photograph attribution: the Department of Justice website: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/learn-apprend.html*

Charter of Rights and Freedoms

Perhaps the largest change to Canada's Constitution also occurred during the 1982 repatriation process. At that time, discussions were had between the Federal and Provincial governments about whether any other aspects of Canadian law should be constitutionalized. It made sense that, if there was going to a formal repatriation, that it would be an appropriate time to amend or add to the Constitution Act.

The discussions between the Federal and provincial governments led to one of the single most impactful documents in Canadian law:


CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

Fundamental Freedoms

Democratic Rights

Mobility Rights

Legal Rights

Equality Rights

Official Languages of Canada

Minority Language Educational Rights

Enforcement

General

Application of Charter

Citation

*Photo attribution. Department of Justice website:
https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/resources-ressources.html

At its core, the Charter protects certain rights and freedoms (to be discussed below). While many of these rights were already protected by Canadian law, that protection was through statutes. For example, the Canadian Bill of Rights was a federal statute passed in 1960 that aimed to protect certain basic rights and freedoms such as freedom of religion, expression, and equality. However, because it was simply a federal statute, it did not have the same legal weight as the Constitution and could be overridden by the federal or provincial governments.

After much negotiation between the Federal and provincial governments, the Charter of Rights and Freedoms was passed by Parliament and officially came into effect on April 17, 1982. The Charter builds on the protections provided by the Canadian Bill of Rights, but because of the fact that it is part of the Constitution, these rights are now the supreme law of the land. Therefore, a government cannot pass a law or conduct an action which violates an individual's Charter rights. This was a seismic development which greatly enhanced individual freedoms and the power of the court, while simultaneously curtailing some of the law-making powers of government.

When Does the Charter Apply?

Crucially, the Charter does not always apply to protect an individual's rights or freedoms.

Section 32 of the Charter places clear limits on when the Charter can be relied on to assert a right or freedom:

> 32.(1) This Charter applies:
>
> a. to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

What this means is that the rights and freedoms protected by the Charter, such as freedom of expression, equality, and the right to a fair trial, must be respected by all levels of government in Canada. However, this also means that the Charter can only be relied on when the government or a government actor is involved.

An important restriction on the Charter is that it does not apply to private individuals, businesses, or organizations. Given that, a private business is not bound to comply with the Charter and can freely violate its rights. For example, a private employer may be able to restrict an employee's freedom of expression in certain circumstances, but the government cannot do such as action without a valid and pressing reason.

So how then does the law protect an individual's right to be treated equally or fairly by private organizations? By statute. Governments pass statutory laws which regulate the conduct of private businesses. Most notably, each province and territory have passed provincial human rights legislation to bar discrimination by private individuals and organizations.

Myth-Busting

Myth: "My Constitutional/Charter Rights are Always Protected".

Incorrect. There are a variety of ways in which you may not be entitled to Charter protections. So, while the Charter is part of the supreme law, you may not even be entitled to assert those rights.

1. Your individual complaint does not involve the "government". According to section 32 of the Charter, in order to assert a Charter right, the government needs to somehow be engaged.
2. The government may pass a law "notwithstanding" your individual rights and freedoms. Section 33 (the "notwithstanding clause") allows the government to pass a law which directly overrides your individual freedoms.
3. The rights in a reasonable society will trump your individual rights. Section 1 of the Charter states that all individual rights are subject to "reasonable limits" determined by

what is fair in a free in a democratic society. So long as it's reasonable in a free and democratic society, the government can constitutionally limit your rights.

Summary of the Charter Rights

The Charter guarantees certain political/democratic rights of Canadian citizens and civil/legal rights to everyone in Canada. Foundationally, the Charter is designed to protect individuals and groups from government actions that might discriminate against them or limit their freedoms in some important way.

The Charter has a number of provisions that outline the rights and freedoms that are protected including section 2 (fundamental freedoms), section 7 (life, liberty and security of the person), section 8 (unreasonable search and seizure), section 15 (equality). Some of those broad overviews are highlighted in an information circular* created by the Government of Canada:

*Infographic Reproduced from Department of Justice website https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/seven-sept.html

While this circular provides a useful snapshot of the Charter rights, we will expand on the major Charter sections along with relevant cases below.

Major Sections of the Charter

Section 1

There is no more important section of the Charter than section 1.

Section 1 states as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Accordingly, section 1 codifies that all the rights protected by the Charter are not unlimited and can be overruled or denied, if doing so is a reasonable limit in a free and democratic society.

Ultimately, section 1 of the Charter acknowledges that there may be situations where the government needs to limit certain rights in order to protect other important societal values. An example of this can be seen in the case of hate speech. The Charter guarantees freedom of expression, but the government can pass laws that prohibit hate speech because it can be argued that such speech harms marginalized groups and actually undermines the values of a free and democratic society. Therefore, section 1 attempts to balance individual rights against the greater good of Canadian society.

Section 1 can "save" a law from being struck down even when that law infringes a Charter right.

The determination of "reasonable limits" can often be challenging. One of the seminal cases dealing with section, R. v. Oakes, attempts to craft a legal test to analyze whether limits on individual rights would be considered reasonable. The "Oakes test", developed in the case, is now used to determine whether a limit on a Charter right is reasonable and justifiable under section 1.

The Oakes Test

The Oakes test requires that the government demonstrate:

1. that the limit is a pressing and substantial objective,
2. that the limit is rationally connected to the objective,
3. that the limit minimally impairs the right in question, and
4. that the benefits of the limit outweigh the deleterious effects on the right.

Let's go back to our example of hate speech. Various levels of government have passed laws prohibiting "hate speech". Such laws would seemingly violate an individual's freedom of expression; however, can section 1 work to save those infringing laws? The government must demonstrate that the law in question has a pressing and substantial objective which is to protect individuals and groups from harm caused by hate speech. The means used to achieve that objective is proportional to the ends, meaning the law must be tailored to achieve its objective in a way that is not overly restrictive of Charter rights.

Foundational Law — *R. v. Oakes*, [1986] 1 SCR 103

David Edwin Oakes was charged with possession of vials of cannabis resin in the form of hashish oil. He was arrested for possession. However, according to a provision of the Narcotic Control Act, section 4(2), it was also possible to convict him of trafficking if that possession was proven. Specifically, section 4(2) of the Narcotic Control Act permitted the trial judge to make a finding that the possession was for purposes of trafficking if the possession was made out. The concern with section 4(2) was that it was a "reverse onus" provision requiring Oakes (the accused) to prove that the possession was not for the trafficking rather than the usual burden of offences being placed on the Crown.

Oakes challenged the constitutionality of section 4(2) arguing that this provision violated his rights under section 11(d) under the Canadian Charter of Rights and Freedoms — this section presumes an accused is innocent until proven guilty. Both the Ontario Provincial Court and the Ontario Court of Appeal found the reverse onus nature of the Narcotic Control Act violated section 11(d) of the Charter. The case was subsequently appealed to the Supreme Court of Canada.

The SCC analyzed whether the limit on Oakes' Charter rights through section 11(d) could be justified under section 1 of the Charter. The court acknowledged that the objective of combating drug abuse and maintaining public health and safety was pressing and substantial. However, it emphasized the importance of proportionality and determined that the provision's reverse onus nature was not a proportionate response relative to the constitutional presumption of innocence.

As a result, the provision was found to be unconstitutional and violated Oakes' rights under the Charter. The provision of the Narcotic Control Act was not saved by section 1.
The Oakes test stands as one of the most important Charter cases. It sets out the framework under which the court will determine if an alleged infringement of the Charter can be saved by section 1.

In any future Charter cases, it is virtually guaranteed that section 1 will be raised. Section 1 provides the ability to defend a Charter-violating law as being a reasonable limit. However, the court will be tasked with applying the Oakes test to determine if, in fact, the law is a reasonable limit in a free and democratic society.

Section 2

Section 2 of the Charter states:

> 2. Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c) freedom of peaceful assembly; and
> d) freedom of association.

It is clear that these "fundamental freedoms" are essential to the functioning of a democratic society. The bundle of rights provides individuals with the ability to express themselves, engage in peaceful assembly, and associate with others to pursue common goals or interests. However, recall from our discussion of section 1, that these rights are not absolute and can be subject to reasonable limits. Below is an examination of each of the section 2 rights.

I. Section 2(a)

Section 2(a) of the Charter guarantees freedom of conscience and religion. This means that individuals have the right to hold and practice their own religious beliefs without interference from the government.

One of the first and most consequential section 2(a) decisions was R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295. The case established that a federal statute, the Lord's Day Act which prohibited commercial activities on Sundays, violated the freedom of religion protections under section 2(a).

In *Big M*, the court held that the purpose of the Lord's Day Act was to compel the observance of the Christian sabbath and therefore, infringed upon freedom conscience and religion. Accordingly, the SCC struck down the law as being unconstitutional.

II. Section 2(b)

Section 2(b) of the Charter guarantees freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication. 2(b) ensures that the government cannot restrict an individual's freedom to express themselves.

This section has been the subject of several major cases which have helped to define the scope and limits of expression, including R. v. Keegstra, [1990] 3 SCR 697. In Keegstra, the SCC upheld the conviction of a schoolteacher for wilfully promoting hatred against an identifiable group. The Court found that this type of expression was not protected by the Charter as it poses a threat to the values of a free and democratic society.

III. Section 2(c)

Section 2(c) of the Charter guarantees freedom of peaceful assembly. This means that individuals have the right to gather together in a peaceful manner for a common purpose, without interference from the government. In many cases, claims under 2(c) are dove-tailed with those of 2(b); the

reason is that, for many, the purpose of assembly is to communicate expressive messages or content.

IV. Section 2(d)

Section 2(d) of the Charter guarantees freedom of association. This means that individuals have the right to join and participate in organizations of their choosing without interference from the government. This association includes the right to form and join trade unions, political parties, and other organizations.

One major case that dealt with freedom of association under section 2(d) is the SCC decision in Lavigne v. Ontario Public Service Employees Union, [1991] 2 SCR 211. In this case, the court considered whether public sector employees have the constitutional right to form a union under the Charter. The court held that public sector employees have the right to form a union and engage in collective bargaining under section 2(d) of the Charter.

Example – Violating Fundamental Freedoms

Imagine citizens in a Canadian city gather in the town square for a peaceful protest to signal their dissatisfaction with the government's climate change response. They hold up signs calling for urgent action to mitigate the effects of climate change. Shortly after, the local police force arrives and, without any warning or attempt at dialogue, they forcefully disperse the protesters using batons and tear gas.

The government's actions in this scenario would likely violate several of the fundamental freedoms:

- **Section 2(b)** – By forcefully breaking up the peaceful climate change protest, the government is suppressing the expression of the protesters' beliefs, opinions, and concerns about climate change. The use of force prevents them from expressing their thoughts on a matter of public importance.
- **Section 2(c)** – The government's decision to disperse the protesters with force violates their right to assemble peacefully. The protesters were not engaging in any violent or unlawful activities, and their gathering was intended to express their views and bring attention to an urgent issue. The use of batons and tear gas prevents them from exercising their right to peaceful assembly.
- **Section 2(d)** – By breaking up the protest, the government undermines the protesters' ability to associate with like-minded individuals and collectively express their concerns about climate change. The government's actions limit the protesters' freedom to join together to advocate for common goals and ideals.

Section 7

Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

While perhaps not completely understood back in 1982, section 7 has become one of the most important sections in the Charter for making creative and purposeful arguments. Ultimately, the section protects individuals from arbitrary state actions that infringe on their life, liberty, or security of the person – all of which are broad categories and can encapsulate multiple rights.

Over time, section 7 has had significant impacts. Its language deemed many government activities as unconstitutional such as:

- **Capital punishment** – Because everyone has the constitutional "right to life", capital punishment or the death penalty is unconstitutional. Therefore, a government could not impose the death penalty without violating section 7.
- **Medical Assistance in Dying** – As mentioned in Chapter 1, section 7 has been invoked in cases related to medical assistance in dying through the Carter v. Canada (Attorney General) case. You'll recall that the SCC struck down the prohibition on medical assistance in dying, ruling that it infringed upon an individual's right to life, liberty, and security of the person.

1. **Abortion** – Section 7 has been used to challenge various criminal laws that impact personal autonomy such as abortion. In the SCC case of R. v. Morgentaler, [1988] 1 SCR 30, the court struck down laws that restricted access to abortion, finding that they violated a woman's right to security of the person.

- **Arbitrary Detention** – Section 7 requires that individuals cannot be deprived of their liberty except in accordance with the principles of fundamental justice. This provision has been invoked in cases challenging the legality of prolonged detention without trial and certain immigration detention practices.

As you can see, section 7 affords a high degree of flexibility in its meaning and has resulted in varying and wide-reaching constitutional challenges.

Section 8

Section 8 of the Charter states:

> everyone has the right to be secure against unreasonable search or seizure.

This means that the government must have a valid reason for searching or seizing an individual's property or personal belongings and must follow proper legal procedures when doing so.

Section 8 has had an enduring legacy on the limits of police search powers. The section has ensured that the government cannot randomly search or seize an individual's property without a

clear and compelling justification. Since the passage of section 8, a few guiding principles have emerged about police search powers:

Police officers must have a warrant or reasonable grounds to believe that a crime has been committed before they can search a person's home or car.
Evidence obtained through an illegal search or seizure may not be used in court against the individual.

It's important to note that section 8 does not mean that individuals are immune to search or seizures. It means that there must be reasonable grounds for the search or seizure.

> "The state's authority to search is at odds with an individual's right to be left alone, especially when it involves one's residence. Courts have decided that the balance is struck when the authorization to search is based on "reasonable grounds" and not a hunch or suspicion."
>
> *R. v. Knott*, 2021 NSSC 255 at para. 9

Section 10

Section 10 of the Charter guarantees certain rights when individuals are arrested or detained by the police. Section 10 states:

> Everyone has the right on arrest or detention:
> a) to be informed promptly of the reasons therefor;
> b) to retain and instruct counsel without delay and to be informed of that right; and
> c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

These rights include the right to be informed of the reasons for the arrest, the right to retain and instruct counsel without delay, and the right to be informed of those rights. One of the aims of the section is to ensure that individuals who are arrested or detained by the police are aware of their rights and are able to exercise them; this includes the right to access legal representation in a timely manner.

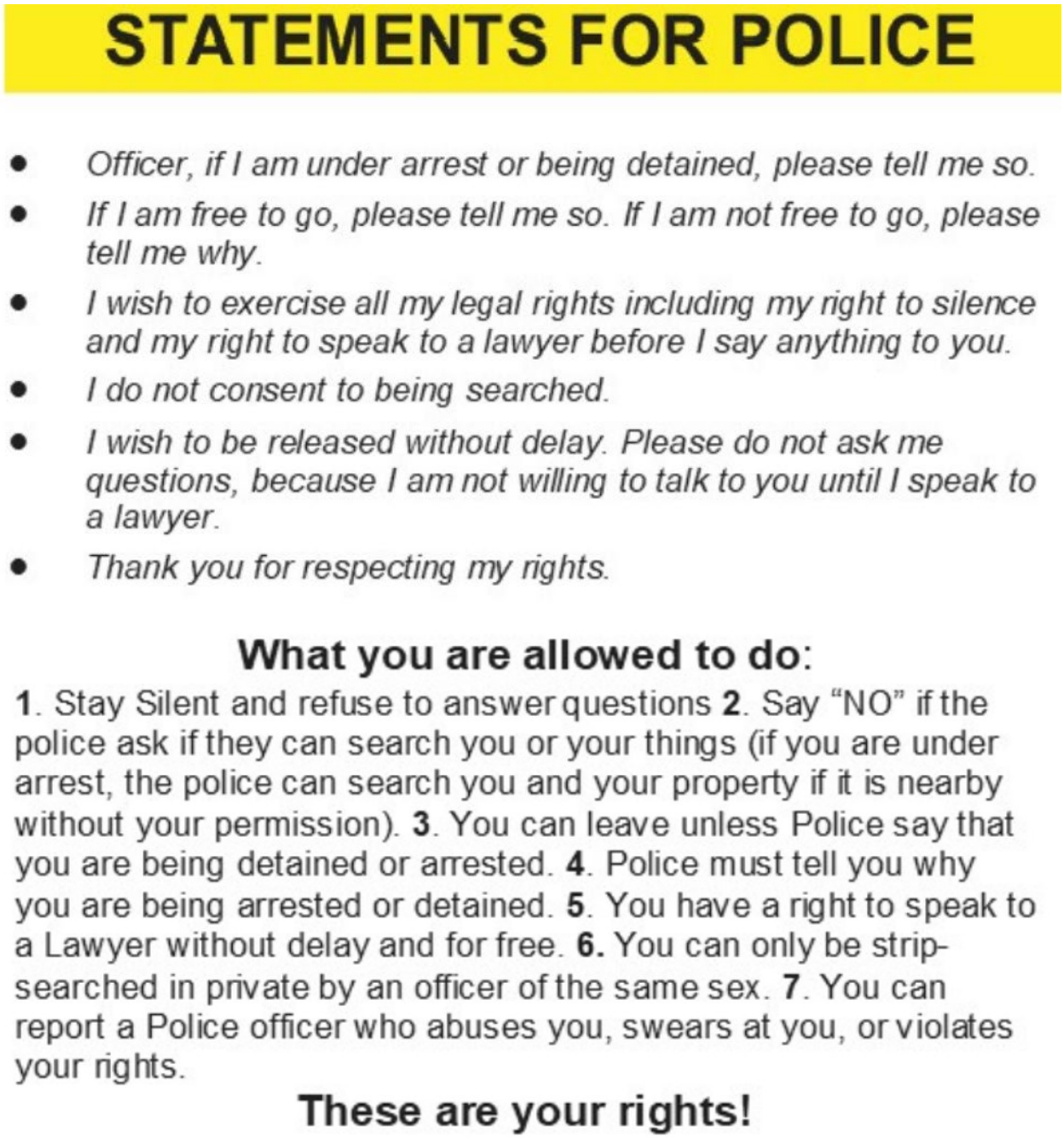
A few of the main legal protections under section 10 are that:

- a person who is arrested must be informed of the reasons for their arrest and the charges against them;
- a person who is arrested has the right to contact a lawyer and to have a lawyer present during questioning;
- a person who is arrested and detained must be brought before a judge without unreasonable delay to determine whether their detention is lawful; and

- a person who is arrested has the right to be informed of their rights, including the right to counsel, and to have those rights explained to them in a language they understand.

If the police fail to respect these rights during the arrest and detention process, the accused's case may be thrown out on the grounds that their Charter rights have been violated.

Some legal advocacy organizations throughout Canada have created sample scripts of how to respectfully assert your Charter rights when police are involved. Here is an example that has been created by Nishnawbe-Aski Legal Services in Thunder Bay:



STATEMENTS FOR POLICE

- *Officer, if I am under arrest or being detained, please tell me so.*
- *If I am free to go, please tell me so. If I am not free to go, please tell me why.*
- *I wish to exercise all my legal rights including my right to silence and my right to speak to a lawyer before I say anything to you.*
- *I do not consent to being searched.*
- *I wish to be released without delay. Please do not ask me questions, because I am not willing to talk to you until I speak to a lawyer.*
- *Thank you for respecting my rights.*

What you are allowed to do:

1. Stay Silent and refuse to answer questions **2**. Say "NO" if the police ask if they can search you or your things (if you are under arrest, the police can search you and your property if it is nearby without your permission). **3**. You can leave unless Police say that you are being detained or arrested. **4**. Police must tell you why you are being arrested or detained. **5**. You have a right to speak to a Lawyer without delay and for free. **6.** You can only be strip-searched in private by an officer of the same sex. **7**. You can report a Police officer who abuses you, swears at you, or violates your rights.

These are your rights!

Section 11

Section 11 deals with the rights of an accused in a criminal proceeding. While section 11 contains numerous subsections which will not be discussed, there are a few sections which are foundational, including:

> Any person charged with an offence has the right:
>
> a) to be informed without unreasonable delay of the specific offence;
>
> b) to be tried within a reasonable time;
>
> c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The aims of the section are to ensure that individuals accused of crimes are treated fairly and have certain rights safeguarded during the legal process.

One of the critical components of section 11 is its presumption of innocence for the accused. This means that the burden of proof for an offence always rests on the prosecution, and the accused is not required to prove their innocence.

Foundational Law – Charter Section 11 and Miranda Rights in the United States

If you have watched any American television show or movie involving a police scene, it's likely that you have heard the officers read the accused their "Miranda Rights". The Miranda Rights, also known as Miranda warnings, accomplish some similar aspects as Section 11 from the Charter.

The Miranda Rights include:

1. The right to remain silent.
2. The right to have an attorney present during questioning.
3. The warning that anything they say can and will be used against them in a court of law.
4. The right to have an attorney appointed if they cannot afford one.

These rights originated from the 1966 U.S. Supreme Court case Miranda v. Arizona, 384 U.S. 436 and are now used as a set of warnings given by law enforcement to individuals who are taken into custody or subject to interrogation. These rights assist in helping prevent coerced confessions and ensuring a fair trial.

Section 15

The Charter would not have been complete without a provision upholding the fundamental tenet of equality. Section 15(1) states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This section guarantees that all individuals in Canada are treated equally under the law, regardless of their personal characteristics.

The goal of section 15 is to ensure that everyone has an equal chance to participate in society, regardless of their background; it protects individuals from discrimination and helps to promote a fair and just society.

There have been numerous cases brought on grounds that the government or a government actor acted in a discriminatory manner. The first decision which went to the SCC on section 15 grounds was Andrews v. Law Society of British Columbia, [1989] 1 SCR 143. In the case, Mark Andrews, a lawyer from Britain sought to constitutionally challenge a rule which stated only Canadian citizens were permitted to join the Bar (allowing them to practice law). Andrews held that this governmental law (through a statute called the Barristers and Solicitors Act) violated his section 15 equality rights. The SCC ultimately held that restricting Andrews' admission to the Bar (and the legal requirement for citizenship generally) was a violation of the Charter's section 15 equality protections.

Section 33

One last section of the Charter to mention is Section 33(1) which is typically referred to as the "notwithstanding clause". Section 33 states:

> 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under section (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under section (1).
>
> (5) Section (3) applies in respect of a re-enactment made under section (4).

The notwithstanding clause provides a very unique power to governments to temporarily exempt certain laws from Charter scrutiny. This clause allows governments, both at the federal and

provincial levels, to enact legislation that will operate notwithstanding the rights and freedoms protected by the Charter.

In simpler terms, the notwithstanding clause enables governments to pass laws that may infringe upon the rights and freedoms guaranteed by the Charter for a specific period of time (up to five years) without the need to justify the infringement as reasonable or justifiable in a free and democratic society. This clause was introduced as a political compromise during the drafting of the Charter in order to address concerns about judicial activism and to accommodate regional differences within Canada.

The notwithstanding clause has been the subject of ongoing debate and controversy since its inception. Critics argue that it undermines the purpose of the Charter by allowing governments to bypass constitutional rights, while proponents argue that it is a necessary tool as it allows for flexibility in policy-making, particularly in cases where regional or societal concerns conflict with Charter rights.

Two ways of navigating this tension is that any law passed using the notwithstanding clause can only survive for up to 5 years before needing to be re-passed. The idea is that, during this 5-year period, the government may face criticism or opposition for exercising the notwithstanding clause and may not have the political support to pass such a law again. It's also possible that the government using the notwithstanding clause will lose the next election and the new government would overturn the law or not pass it again.

Chapter 2 - Review Questions

1. What makes up Canada's Constitution and why is it important?
2. How does Canada's federal system work in terms of law-making?
3. What is the Charter of Rights and Freedoms and who does it protect?
4. Can the rights and freedoms guaranteed by the Charter ever be limited?
5. What are some examples of fundamental freedoms protected by Section 2 of the Charter?
6. How does Section 7 of the Charter protect the "Life, liberty and security of the person"?
7. What are some key rights protected by the Charter for individuals accused of crimes?
8. Does the Charter include a provision that allows governments to override some Charter rights?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 2? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 2 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 2:

https://youtu.be/CmNsx1c1L2E

Chapter 3: Tort Law in Canada
Part I - The Intentional Torts

Learning Outcomes:

1. Define the different types of intentional torts, including assault, battery, false imprisonment, trespass to land, and the chattels torts.
2. Explain the essential elements required to establish liability for each intentional tort.
3. Evaluate the defences relevant to intentional torts, including complete and partial defences.
4. Consider significant court decisions dealing with intentional tort cases.
5. Apply the legal principles and elements of intentional torts to hypothetical scenarios to reinforce the application of the law.

Introduction

Tort law is our first stop on the journey examining private, civil law issues. Tort law helps to answer questions involving a host of practical wrongdoings. For example, how do we get compensation for an assault? What if someone steals our bicycle? Who can we sue for our injuries and what exactly are we suing for?

Ultimately, torts deal with injuries or harms suffered by one person (the plaintiff/victim) as a result of the actions or omissions of another person (the tortfeasor/defendant). It is meant to provide a means of compensation for the injured party, and to hold the person who caused the injury responsible for their actions or inaction. The classification of torts can be further subdivided into two camps: intentional torts versus unintentional torts.

Intentional torts are those in which the person who caused the injury or harm intended to do so; these torts include claims such as assault, battery, defamation, and false imprisonment. On the other hand, unintentional torts are those in which the person who caused the injury or harm did not intend to do so but was still careless in their actions; the unintentional torts include claims such as negligence and strict liability.

In this chapter, we will just be examining liability for intentional torts, and the unintentional torts will be left for the next chapter.

Liability

Unlike crimes which relate to guilt and innocence, the world of tort is focused on liability. Liability is when someone is legally responsible for the losses suffered. Liability is not a single note concept, it too can be understood in different ways namely, direct liability and vicarious liability.

Direct liability refers to a situation where an individual or organization is held liable for their own actions. For example, imagine if a driver causes a car accident due to their own negligence. The driver is the one who directly caused the accident and therefore, they would be personally liable for any injuries or damages suffered by the other parties.

Vicarious liability, on the other hand, refers to a situation where an individual or organization is held liable for the actions of another person. A classic situation of various liability is in employment, where an employer may be held liable for the torts of their employees. For example, if a delivery driver for a company causes an accident while on the job, the employer may be held vicariously liable for any injuries or damages suffered by the other parties involved in the accident. This liability attaches to the employer even though the employer may not have done anything to cause the harm; they are responsible because of the relationship.

Legal Test for Vicarious Liability

There are two key requirements for establishing vicarious liability:

1. there must be a relationship of employment between the employer and the employee, and
2. the employee must have committed the tortious act within the scope of their employment. This means that the act must have been committed in the course of the employee's work duties, be otherwise closely related to acting on behalf of the employer.

If these elements are present, an employer may be held vicariously liable for the employee's actions, even if the employer was not careless itself or otherwise involved in the misconduct.

What is challenging about vicarious liability is not just that the employer is liable for the torts committed by the employee, but also the fact that it can have wide-ranging financial consequences.

For example, imagine a local restaurant employs several servers to serve food and drinks to its customers. One day, a server accidentally spills hot coffee on a customer, causing severe burns and injuries. Since the server was serving the customer as part of their employment duties when the accident occurred, the actions can be attributed to the restaurant. Therefore, if the injured customer decides to file a lawsuit, they may hold both the server directly liable and the restaurant vicariously liable for their injuries.

Foundational Law – *Bazley v Curry*, [1999] 2 SCR 534

The plaintiff, Bazley, was a former resident of a group home for emotionally troubled children operated by the defendant, the Board of Governors of the Durham Board of Education. One of the employees, Curry, sexually abused Bazley during his stay at the group home.

The central question before the court was whether the Board of Governors could be held vicariously liable for the actions of Curry because he was an employee. The court focused its attention on whether Curry's wrongful act was committed within the "scope of employment". The Board of Governors argued the sexual assault was clearly not within the scope of employment as it was something that would never have been permitted nor was it within the scope of Curry's job duties.

The Supreme Court of Canada held that the Board of Governors was indeed vicariously liable for Curry's actions. The court recognized that in certain circumstances, such as when an employee is in a position of power and authority over vulnerable individuals, there may be a broader scope of what is "employment"; accordingly, the scope of employment not only includes authorized activities but also unauthorized and wrongful actions. In this case, Curry's position at the group home allowed him to gain access to and exploit vulnerable residents, making his wrongful actions closely connected to his employment.

The ruling set an important precedent for holding institutions accountable for the actions of their employees even when the misconduct would not have been authorized by the employer.

The Intentional Torts

Intentional torts are those where intentional actions of the defendant/tortfeasor result in harm or injury to the plaintiff/victim. The key distinctive factor with intentional torts is that the person committing the tort must have intended to act in a certain way.

> "… an intentional act occurs when the Defendant desired the consequences or ought to have been substantially certain that they would flow from the act."
>
> Lewis Klar, Tort Law, 4th ed. Page 46

Given the myriads of ways in which a party can intend harm to another, it is no surprise that there are a variety of different intentional torts that can be pursued. Importantly, for every intentional tort, there are specific legal elements which the plaintiff must satisfy on the balance of probabilities in order to establish liability and obtain damages or other relief.

What follows is a discussion of broad categories of the major intentional torts, including:

1. Protecting Your Person – Battery, Assault, Infliction of Mental Suffering, False Imprisonment, and Malicious Prosecution.
2. Protecting your Privacy – Invasion of Privacy
3. Protecting your Land – Trespass to Land and Nuisance
4. Protecting your Personal Property – Chattel Torts
5. Protecting your Reputation – Defamation
6. Protecting your Economic Interests – Deceit, Conspiracy, Intimidation, Inducing Breach

Protecting Your Person

It is hard to imagine a concept more worthy of legal protection than an individual's bodily integrity. The right to be free from unwanted bodily contact and deprivations of liberty are paramount or, as the court has said, "inviolate".

> "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate"
>
> *Collins v. Wilcock*,
> [1984] 3 All E.R. 374 (Q.B.), at p. 378

As such, there are numerous intentional torts which seek to protect bodily integrity and allow for compensation to be awarded if violated by the tortfeasor. The discussion below canvasses five torts which, in some capacity, focus on ensuring a person's bodily integrity.

Battery

Battery occurs when the plaintiff experiences actual physical contact as a result of the actions of the defendant. Battery typically arises in situations where there is unwanted physical contact against the victim by the tortfeasor.

Legal Test for Battery

In order to constitute a legal battery, the victim must prove the following:

1. there was intentional physical contact;
2. the contact was non-trivial; and
3. the contact was offensive (meaning that the victim did not consent).

Bahmutsky v. Griffiths, 2022 BCCRT 184 at para. 31

In battery cases, there is a strict requirement that the contact be offensive; this can be proven even if the contact is helpful as in the *Malette v. Shulman* case below.

Foundational Law – *Malette v. Shulman et al.*, 72 OR (2d) 417

The plaintiff, Malette, was severely injured in a car accident and was taken unconscious to the hospital. Malette was examined by Shulman, the defendant physician, in the emergency department. After examination, Shulman determined that a blood transfusion was necessary to save Malette's life. Complicating the transfusion order was the fact that an emergency room nurse had discovered a card in Malette's purse identifying her as a Jehovah's Witness and requesting that no blood transfusions be given on the basis of her religious beliefs.

Even after being advised of the "No Blood" card, Shulman believed that it was his professional responsibility to give Malette a transfusion and he was not satisfied that the card expressed her current position on treatment. Shulman then personally administered blood transfusions to Malette. Malette recovered from her injuries and filed a lawsuit against Shulman, the hospital, and others alleging that the blood transfusions constituted an assault and battery.
The trial judge awarded Malette $20,000 in damages for battery. The Ontario Court of Appeal, who reviewed the trial judge's decision, noted the following about the competing issues of Malette's bodily integrity and the goal of the medical system in administering care:

> At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults, as I

> have sought to demonstrate, are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self- determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority. I view the issues in this case from that perspective.
>
> Ultimately, the Ontario Court of Appeal upheld the finding that Malette was battered (and the $20,000 award) even though the unwanted bodily contact was not meant to cause harm and indeed, was designed to help.

Assault

Assault is a tort which often has overlap with battery however, it can be relied on by a plaintiff even where contact has not occurred. The tort is designed to protect individuals from gestures or words that cause fear of physical harm, even if no physical contact is made.

Legal Test for Assault

To be successful in a claim for assault, the victim must prove:

1. the tortfeasor created an intentional apprehension in the victim;
2. the tortfeasor threatened imminent contact; and
3. the contact threatened was offensive (meaning that the victim did not consent).

Provencher v. St. Paul's Hospital, 2015 BCSC 916 at para. 41

For example, if someone raises their fist as if to punch you, but does not actually make contact, that could be considered an assault. Traditionally, the damages for assault are low unless accompanied by a battery.

Intentional Infliction of Mental Suffering

The tort of intentional infliction of mental suffering, also known as the tort of intentional infliction of emotional distress, allows a plaintiff to seek damages for severe emotional distress caused by the defendant's intentional or reckless conduct.

Legal Test for Intentional Infliction of Mental Suffering

To be successful in a claim for intention infliction, the victim must prove:

1. the tortfeasor's conduct was flagrant and outrageous;
2. the tortfeasor's conduct was calculated to cause harm; and
3. the tortfeasor's conduct resulted in a visible and provable illness or injury.

Persaud v. Telus Corporation, 2017 ONCA 479 at para. 20

The tort is not always easy to prove as it requires the conduct to be so extreme as to go beyond all bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society. Despite this high burden, the tort has been successfully applied including, in the Boucher v. Wal-Mart case below.

Foundational Law – *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419

Boucher was employed as an assistant manager at a Wal-Mart store. After she refused a request by her supervisor to falsify a temperature log, the supervisor became abusive towards her, humiliating, demeaning and belittling her in front of other employees. Boucher filed an internal complaint, however Wal-Mart ultimately told her that her complaints were unsubstantiated, and she would be held accountable for making them.

Boucher, who by that point was suffering from serious stress-related physical symptoms, resigned and then sued Wal-Mart and the supervisor. Following the trial, the jury awarded Boucher damages of $1,200,000 against Wal-Mart, made up of $200,000 in aggravated damages for the manner in which she was dismissed and $1,000,000 in punitive damages. The jury also awarded Boucher damages of $250,000 against the supervisor, made up of $100,000 for intentional infliction of mental suffering and $150,000 in punitive damages (for which Wal-Mart was vicariously liable as the employer).

False Imprisonment

False imprisonment occurs when the defendant intentionally restricts the plaintiff's freedom of movement. Commonly, the restriction of movement is from physical restraint however, an individual can also be confined or restrained because of threat or psychological pressure. The tort can occur in situations like when a person is wrongfully detained by the police, when a store

employee wrongly accuses a shopper of shoplifting and detains them, or when someone is wrongly confined in a nursing home or other care facility.

Legal Test for False Imprisonment

To be successful in a claim for false imprisonment, the victim must prove:

1. the plaintiff was totally deprived of his or her liberty;
2. the deprivation was against the plaintiff's will; and
3. the deprivation was directly caused by the defendant.

S.(C.H.) v. Alberta (Director of Child Welfare), 2008 ABQB 513 at para 53

One question which emerges from the false imprisonment legal test is when there would be legal justification to detain another individual; that answer is principally found in the law relating to "citizen's arrest." The Citizen's Arrest and Self-Defence Act is a statute which amended section 494 of the Criminal Code of Canada to permit various forms of citizen's arrests in certain cases.

The following is the full text of section 494(1) and 494(2):

> ***Arrest without warrant by any person***
>
> 494 (1) Any one may arrest without warrant
> (a) a person whom he finds committing an indictable offence; or
> (b) a person who, on reasonable grounds, he believes
> (i) has committed a criminal offence, and
> (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
>
> ***Arrest by owner, etc., of property***
>
> 494 (2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and
> (a) they make the arrest at that time; or
> (b) they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

Very broadly, the Citizen's Arrest and Self-Defence Act empowers any person to arrest another person who they reasonably believe has committed a criminal offense. Accordingly, if an individual witnessed a crime being committed or reasonably believed one was just committed, they could detain and "arrest". If the arrest was valid then the plaintiff would fail in a claim for false imprisonment as the detention would be considered justified.

It is also worth noting that the law of citizen's arrest is not applicable in all circumstances. For example, a citizen's arrest is not available for minor offenses. Additionally, the police always recommend you contact them rather than attempting to conduct a citizen's arrest.

Important Considerations Before Making a Citizen's Arrest

The following factors should be considered before undertaking a citizen's arrest. The factors were compiled by the Government of Canada and are available on the Justice Canada website (https://www.justice.gc.ca/):

- Is it feasible for a peace officer to intervene? If so, report the crime to the police instead of taking action on your own.
- Your personal safety and that of others could be compromised by attempting an arrest. Relevant considerations would include whether the suspect is alone and whether they possess a weapon.
- Will you be able to turn the suspect over to the police without delay once an arrest is made?
- Do you have a reasonable belief regarding the suspect's criminal conduct?

Malicious Prosecution

Malicious prosecution applies when a person initiates a criminal legal proceeding against another person on malicious grounds. Part of the tort's purpose is to compensate individuals who have been improperly dragged into a criminal defence.

Legal Test for Malicious Prosecution

To be successful in a claim for malicious prosecution, the plaintiff must establish that the prosecution was:

1. initiated by the defendant;
2. terminated in favour of the plaintiff;
3. undertaken without reasonable and probable cause; and
4. motivated by malice or a primary purpose other than that of carrying the law into effect.

Miazga v. Kvello Estate, 2009 SCC 51 at para. 3

If these elements are present, the plaintiff may be entitled to damages for any harm suffered as a result of the malicious prosecution, including damages for emotional distress and damages for any financial losses incurred.

Foundational Law – *Drainville v. Vilchez*, 2014 ONSC 4060

This case arose from an incident in which Drainville drove into a gas station to inflate a tire. The area around the fuel pumps was blocked off by cones due to refueling. Drainville drove into an area that appeared clear of cones, heading towards the air pump, but was waved to a stop by the fuel truck driver, who then placed his legs against Drainville's front bumper. The driver, Vilchez, reported Drainville to the police and falsely accused him of intentionally hitting him. The police subsequently charged Drainville with two offenses.

Dranville was ultimately acquitted of all charges and then brought a civil lawsuit for malicious prosecution. Following a hearing, the trial judge awarded Drainville $23,866.37 as damages.

Protecting Your Privacy

While the preceding torts dealt primarily with protecting one's bodily integrity or liberty, questions often emerge as to the more abstract concept of "privacy".

Historically, there were very limited protections for privacy interests. However, as modern society has developed easier ways to invade personal information, the law has attempted to step in and provide a means of redress.

Common Law Privacy Protection

Canadian common law has been very reluctant to craft a generalized test for "invasion of privacy". As such, the tort of "intrusion upon seclusion" has stepped in to address the protection of privacy interests. Intrusion upon seclusion occurs when one person intentionally intrudes, physically or otherwise, upon the solitude or private affairs of another person.

Legal Test for Intrusion Upon Seclusion

To be successful in a claim for intrusion upon seclusion, the plaintiff must establish:

1. the defendant's conduct must be intentional or reckless;
2. the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
3. a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

Jones v. Tsige, 2012 ONCA 32 at para. 71

Statutory Tort of Invasion of Privacy

While the common law has so far not created an independent tort of "invasion of privacy", some provinces, notably British Columbia, have created the tort by statute.

According to section 1 of the British Columbia Privacy Act, R.S.B.C. 1996, c. 373, it is a tort to invade the reasonable expectation of privacy of another. Section 1 states as follows:

> 1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

Legal Test for Invasion of Privacy in British Columbia

To be successful in a claim for invasion of privacy under the *Privacy Act*, the plaintiff must establish:

1. the defendant wilfully invaded the privacy of the plaintiff; and
2. the plaintiff had a reasonable expectation of privacy in the circumstances.

While we often may subjectively desire privacy, that is a very different question than whether a reasonable person would objectively expect privacy in the circumstances. For example, a reasonable person would not typically expect privacy in public spaces such as streets, parks, or other areas accessible to the general public. When individuals are out in public, they can generally be observed by others, and their actions may be witnessed or recorded by surveillance cameras or bystanders. Accordingly, it would be very difficult to successfully develop an invasion of privacy claim.

However, some forms of conduct which would constitute an invasion of privacy would be invading an individual's private email account or the publication of private medical information about an individual without their consent.

To date, there have been very few cases successfully brought under the Privacy Act. However, as more cases emerge, we will get a greater sense of the expectations of privacy from the perspective of a reasonable person.

Protecting Your Land

Another legal interest worthy of protecting is one's land. While not as sensitive as scenarios involving interference to a person's bodily integrity, land is highly valuable, scarce, and subject to protections. The following discussion canvasses the torts of trespass to land and nuisance which allow for compensation for interferences involving land.

Trespass to Land

Trespass to land arises when an individual enters onto or remains on someone else's land without consent or lawful authority.

Legal Test for Trespass to Land

To be successful in a claim for trespass to land, the plaintiff must establish:

1. the defendant entered onto the plaintiff's land; and
2. there was no lawful justification for the entering of the land.

Glashutter v. Bell, 2001 BCSC 1581 at para. 26

Common examples of trespassing include:

- entering someone's property without permission, such as sneaking onto private land or breaking into a building;
- remaining on someone's property after being asked to leave, such as refusing to leave a store after being asked to by the store manager; and

- interfering with someone's use of their property, such as blocking a driveway or blocking access to a building.

In most cases, the remedy for trespass is an award of damages to the person whose property was trespassed upon. In some cases, the court may also grant an injunction ordering the trespasser to stop the trespassing.

Foundational Law – *Austin v. Rescon Const. (1984) Ltd., 36 BCLR (2d) 21*

An interesting case involving trespass is the British Columbia Court of Appeal decision of *Austin v. Rescon Construction*.

In 1985, the Rescon Construction was constructing a building complex next door to Austin's property in White Rock, British Columbia. Without obtaining permission, the Rescon installed between 35 and 39 steel rods, known as anchor rods, on Austin's property as part of the excavation's shoring system. According to Rescon, Mr. Wightman, an officer of the company attempted to contact Austin about the rods by visiting his home and leaving business cards with notes requesting a phone call, but Austin did not respond. After not receiving a response, Rescon went ahead and installed the rods anyway.

The trial judge in the case noted that there was a clear trespass as there was intentional entering of the land without Austin's consent. The trial judge awarded $500 as general damages and $7,500 as exemplary damages though the exemplary damages were increase to $30,000 on appeal.

Nuisance

Nuisance refers to any unreasonable interference with the use and enjoyment of someone's property.

Myth-Busting

Myth: "I Can Do Whatever I Want on My Own Land".

Incorrect. Nuisance serves as a tort check on your uses of property. A homeowner or tenant cannot act in a way that would be a nuisance — unreasonably disturbs the use and enjoyment of property.

Accordingly, your own use and enjoyment of property must be reasonable. While your neighbours cannot legally complain if they are particularly sensitive or subjectively disturbed, they can complain if a reasonable person's use of land would be disturbed. For example, homeowners who frequently host loud parties, play loud music, or engage in noisy activities are likely disturbing the enjoyment of a reasonable person and therefore, constitute a nuisance.

The purpose of this tort is to protect an individual's right to exclusive possession and control over their land. Within that broad definition, a nuisance can take many forms, including physical, chemical, noise pollution, or any other activity that interferes with someone's ability to use and enjoy their property.

Legal Test for Nuisance

To be successful in a claim for private nuisance, the plaintiff must establish:

1. the defendant interfered with the plaintiff's use and enjoyment of land; and
2. the interference was unreasonable.

Sutherland v. Vancouver International Airport Authority, 2002 BCCA 416 at para. 34

It is the later part of the test which is often most controversial; how does one demonstrate that the interference is unreasonable? In law, there are four factors which help an interference is unreasonable.

1. character of the neighbourhood in question;
2. the severity of the interference;
3. the utility of the defendant's conduct; and
4. the sensitivity of the plaintiff.

Each of these factors is balanced by the court to determine whether the interference was something reasonably to be expected or unreasonable thereby, constituting a nuisance.

Examples where a nuisance claim may be sought include:

- excessive or loud noise;
- smoke drifting onto the neighbour's property (cigarettes, vaping, burning leaves, etc);
- pets coming onto neighbour's property;
- trees, bushes, roots, growing onto neighbour's property; or
- neglected or unkept property drawing animals.

A good example where unreasonableness has been considered by the court is the case of *Northern Light Arabians v. Sapergia*, 2011 SKPC 151 out of Saskatchewan.

Foundational Law – *Northern Light Arabians v Sapergia*, 2011 SKPC 151

In this case, the plaintiffs, owners of Northern Light Arabians, and the defendant, Robert Sapergia, were neighbours who shared a road allowance and both owned horses. Northern Lights had erected and maintained a perimeter fence on their land bordering the road allowance, but Sapergia did not have a fence on his bordered portion of land. As a result, Sapergia's horses would leave his property and enter the Northern Lights' property. Northern Lights had asked Sapergia to put up a fence, but he refused, and, in response, Northern Lights brought a legal action for nuisance.

The Saskatchewan Provincial Court found that Mr. Sapergia did not exercise enough supervision and control over his horses to prevent them from causing problems for Northern Lights as his neighbour. The court held that Sapergia's use of his land amounted to a substantial and unreasonable interference with Northern Lights' use and enjoyment of their property. Northern Lights were awarded damages of $2,500 for the nuisance.

Protecting Your Personal Property

In addition to protecting oneself and one's enjoyment of land, the law also has a series of torts which compensate for interferences with personal or movable property.

Chattels refer to movable property that can be owned, possessed, and transferred by individuals. They are legally distinct from real property which includes land and buildings. Chattels encompass a wide range of tangible objects, such as furniture, vehicles, electronic devices, clothing, and other personal objects.

The chattel torts are a group of torts that deal with the unauthorized or wrongful use of another's personal property. The main chattel torts in common law are as follows:

- **Conversion** – occurs when someone intentionally or negligently interferes with another person's right to possession of their chattel. For example, if someone takes another person's car without their permission and uses it for their own purposes, they would be committing conversion.
- **Trespass to Chattels** – occurs when someone intentionally interferes with another person's right to possession of their chattel, but without actually taking possession of it. For example, if someone intentionally damages another person's computer without taking it, they would be committing trespass to chattels.
- **Detinue** – occurs when someone is in lawful possession of another person's chattel but refuses to return it when the rightful owner demands it. For example, if a person borrows another person's lawn mower and refuses to return it, they would be committing detinue.
- **Replevin** – this tort is related to detinue, and it is a legal action to recover personal property that is wrongfully taken or detained.

Each of the torts are related in that they deal with movable property however; the type and extent of interference is different.

From the Court:

"Trespass to chattels is intentionally interfering with rightful possession of goods without consent. It includes intentional and unlawful seizure ...

Detinue is refusing to return an item to a person who is entitled to it.

Conversion is when a person wrongfully possesses another's personal property in a way that interferes with the owner's rights to it. To prove conversion, the applicants must show a wrongful act by SH involving handling, disposing, or destroying an item, and that the act was intended to or actually interfered with the applicants' right or title to the item."

RH v. SH, 2022 BCCRT 428 at para. 13

Protecting Your Reputation

As we saw earlier, the Charter constitutionalizes freedom of expression. However, one's ability to express themselves is not unfettered — indeed, it could lead to tort liability if the content is found to be defamatory.

At the heart of defamation is the law's desire to protect one's reputation. A person's reputation is a valuable asset and can have significant personal and professional consequences if defamed. In a world where information spreads rapidly through social media and online platforms, a negative reputation can quickly tarnish an individual's or company's image.

The tort of defamation provides a legal remedy to individuals who have suffered harm to their reputation. By allowing individuals to bring defamation claims, the law recognizes the importance of protecting one's reputation from false and damaging statements. It ensures that individuals can seek compensation for the harm caused and helps deter others from spreading false information or making defamatory statements.

> "It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society ... has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited."
>
> *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para. 108

There are two main types of defamation in Canada: libel and slander. Libel is defamation that is in written form, while slander is defamation that is spoken.

Legal Test for Defamation

Regardless of the form, to be successful in a claim for defamation, the plaintiff must establish:

1. the statement was defamatory;
2. the statement referred to the plaintiff; and
3. the statement was published by the defendant to at least one other person.

Weaver v. Corcoran, 2017 BCCA 160 at para. 70

With respect to the first element of the test, a defamatory statement is one that tends to lower the reputation of the person in the estimation of right-thinking members of society. For example, if a newspaper article falsely accuses a lawyer of insurance fraud, it would be considered defamatory because it harms the lawyer's reputation in the community.

Secondly, the statement must specifically identify the person being defamed. For example, if a radio host makes a defamatory statement about "all politicians," it would not be defamatory because it does not refer to a specific individual.

Lastly, the statement must be communicated to at least one person other than the person being defamed. This can include speaking, writing, or printing the statement. For example, if a person makes a defamatory statement about their neighbour, but only says it to themselves and not to anyone else, it would not be considered defamation because it has not been published (i.e. communicated to a third party).

***Foundational Law — Hee Creations Group Ltd. v Chow,* 2018 BCSC 260**

Hee Creations claimed that it had been defamed in over a dozen social media posts published by Chow. The dispute started when Chow expressed dissatisfaction over pre-wedding photographs that she received from Hee Creations. As a result, Chow stopped payment on the balance of the wedding services contract. Hee Creations offered to terminate the contract and refund a portion of the funds already paid, but Chow rejected the offer. Chow then filed a small claims action for breach of contract and the plaintiff counterclaimed for the unpaid balance.

At the same time, Chow published a number of posts on English and Chinese social media. The posts were lengthy, inaccurate, disparaging, and made serious allegations against the plaintiff, including that the company took substandard photos, were unethical, were scammers, and engaged in extortion and unfair practices.

The court ruled that the social media posts were defamatory towards the plaintiff and were made with the intent to harm. It also noted that the posts had been widely shared and generated many responses. The court awarded a total of $115,000 in damages which included $75,000 for the losses to goodwill and an additional $15,000 for aggravated damages. Additionally, the court awarded $25,000 in punitive damages due to the malicious nature of the publications.

Protecting Your Economic Interests

In addition to many of the other torts we have seen, there are also options to seek compensation for economic damages caused by the tortfeasor. This not only serves the goal of providing individual compensation for injury, but also assists in promoting commercial fair play.

By allowing claims against those who act in an anti-competitive manner, it maintains a competitive environment and protects the interests of both businesses and consumers.

> "Competitors often dislike each other. And competitors almost always want to hurt each other's business ... Some competitor somewhere drives another out of a market, or even out of business entirely, every week of the year. So long as it commits no crime, tort, or other actionable wrong, that is perfectly legal. The permissible limits of competition are precisely the limits of criminal, torts, contract, and equity prosecutions or suits. What if hating a competitor and wishing that it were out of business were [actionable]? ... Then many businesses carrying on perfectly fair competition would be guilty of economic torts to their competitors all the time."
>
> *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, 1996 ABCA 275 at para. 56

Civil Conspiracy

Civil conspiracy is a legal cause of action that allows individuals to seek damages when two or more parties conspire to commit an unlawful act resulting in harm. The essence of the tort is that there are multiple parties which are attempting to cause a financial loss to another.

Legal Test for Conspiracy

The tort of civil conspiracy requires proof of a number of key elements:

1. the defendants must act in combination, that is, in concert, by agreement or with a common design;
2. each of the defendant's conduct must be unlawful and in furtherance of the conspiracy;
3. the defendants' acts must be directed towards the plaintiff;
   the defendants should have known that in the circumstances injury to the plaintiff would likely result; and
4. each defendant's conduct causes injury to the plaintiff.

Ontario Consumers Home Services v. Enercare Inc., 2014 ONSC 4154 at para. 21

If successful, the plaintiff may be entitled to various remedies, including damages to compensate for the harm suffered as a result of the conspiracy.

Example of Civil Conspiracy

The following is a fictitious scenario which would meet all the elements of the tort of civil conspiracy.

Alicia and Bao work for competing financial advisory firms and they conspired to defraud Wealth Management Inc., a rival company in the same industry. Their goal was to obtain confidential client information and use it to gain an unfair advantage.

Firstly, Alicia and Bao agreed to deceive Wealth Management Inc. by misrepresenting themselves as potential clients seeking financial advice. They intended to exploit this false representation to gain access to Wealth Management Inc.'s client database and steal valuable client information, including investment strategies, account details, and personal data.

Secondly, Alicia and Bao acted in concert through a course of conduct that is unlawful and involves the carrying out of an underlying tort, namely misrepresentation and fraud.

Thirdly, the conduct of Alicia and Bao was specifically directed towards Wealth Management Inc. They intentionally deceived the company to gain unauthorized access to its client database.

Fourthly, Alicia and Bao should have known that injury was likely to result from their conduct. They were aware that the misappropriation of confidential client information could lead to financial losses, damage to Wealth Management Inc.'s reputation, and potential harm to the affected clients.

Lastly, as a result of the conspiracy, Wealth Management Inc. suffered significant injury. It experienced financial losses due to potential client attrition, damage to its reputation and credibility in the market, and potential legal consequences arising from the breach of client confidentiality.

Intimidation

The tort of intimidation occurs when one person threatens to cause injury or loss to another person in order to influence their actions or decisions. This can take the form of physical threats, as well as threats to a person's reputation or economic well-being.

Legal Test for Intimidation

The tort of intimidation requires proof of six key factors:

1. coercion of another to do or refrain from doing an act;
2. the use of a threat as a means of compulsion;
3. the threat must be to use unlawful means;
4. the person threatened must comply with the demand;
5. intention to injure the person threatened; and
6. the person threatened must suffer damage.

Daishowa Inc. v. Friends of the Lubicon, 1996 CanLII 11767 at para. 55.

For example, imagine a workplace supervisor repeatedly threatened to fire an employee if they did not participate in illegal activities, such as manipulating financial records. The employee, fearing the loss of their job, eventually gave in to the threats and engaged in the illegal activities and ultimately was fired for that misconduct. Here the supervisor could be sued for intimidating the employee which resulted in a loss.

Inducing Breach of Contract

Inducing breach of contract applies when one person intentionally persuades another to breach a contract with a third party. This tort is based on the idea that there should be respect for the contractual relations entered into by two parties; a party that tries to disrupt that relationship should be subject to liability.

Legal Test for Inducing Breach of Contract

To succeed in a case for inducing breach of contract, the plaintiff must prove:

1. the existence of a contract;
2. the defendant was or can be assumed to have been aware of the existence of the contract;
3. the defendant intended to cause the breach;
4. the defendant caused or induced a breach; and
5. the plaintiff suffered damage as a result.

Super-Save Enterprises Ltd. v. Del's Propane Ltd., 2004 BCCA 183 at para. 2.

Foundational Law – *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 485

Drouillard was a cable and fibre optic installer who worked for the defendant, Cogeco, in Windsor until 1999, when he resigned to take employment in the United States. In 2001, he returned to Windsor and accepted an employment offer from Mastec, a cable industry contractor working on a large upgrade project for Cogeco. When Cogeco found out that Drouillard was with Mastec, Cogeco informed Mastec that it would not allow Drouillard to work on its projects. Mastec told Drouillard that unless he agreed to commute and work on projects in London or Kitchener, he would lose his job. Due to substantial family commitments, Drouillard was unable to agree to those terms and his employment offer was revoked.

Several months later, Mastec rehired Drouillard and assigned him to a project with Cogeco, but almost immediately his employment was terminated when Cogeco again told Mastec that it would not allow him to work on any of its equipment. Drouillard was unable to obtain employment with another Windsor cable industry contractor due to rumors about him. Drouillard sued Cogeco for inducing breach of contract.

Applying the legal test, the trial judge found Cogeco liable for inducing a breach of contract:

1. Drouillard had a valid employment contract with Mastec;
2. Cogeco was aware of the contract;
3. Cogeco intentionally caused the contract to be breached by causing Drouillard to be terminated without proper notice;
4. Cogenco's statements to Mastec resulted in Drouillard being terminated;
5. Drouillard suffered economic loss as a result of losing his job and being "blackballed" by Cogeco, making it difficult for him to find employment with other cable installation companies that work with Cogeco.

Ultimately, Drouillard was awarded $135,535 for lost income and an additional $62,465 for damages for humiliation, embarrassment, loss of reputation and loss of his chosen career.

Chapter 3 - Review Questions

1. What is the difference between battery and assault in tort law?
2. Can an employer be held responsible for an employee's wrongful actions?
3. What constitutes 'unreasonable' interference in a nuisance claim?
4. How does the tort of 'intrusion upon seclusion' protect privacy?
5. Can someone be held liable for persuading another to break a contract?
6. What is the difference between libel and slander?
7. What are the key elements required to establish a claim for malicious prosecution?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 3? Click here to be taken to be a roster of Chapter Quizzes:

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https://youtu.be/pCVosuXYp2Q

Chapter 4: Tort Law in Canada
Part II - The Unintentional Torts

Learning Outcomes:

1. Introduce the concept of unintentional torts.
2. Explain the concept of negligence, including the elements of duty of care, breach of the standard of care, and causation.
3. Understand the concept of occupiers' liability and its application to property owners and occupiers.
4. Explain the concept of strict liability and its application to certain activities or products that impose liability regardless of fault or negligence.
5. Evaluate the defenses available in unintentional tort cases, including contributory negligence and assumption of risk.

The Unintentional Torts

Should we attach liability when someone unintentionally causes harm? Should we hold those who fail to act with care responsible for losses? If so, how do we determine the boundaries of what is fair when someone commits a careless act?

Imagine the following scenario. A driver, distracted by checking a text message on their phone, hits a pedestrian crossing the street. The pedestrian suffers severe injuries and decides to sue the driver for negligence. In this case, it is evident that the pedestrian has a strong case for holding the driver liable. The driver's carelessness in checking the text message while driving directly caused the accident and resulted in harm to the pedestrian.

However, what about this scenario. After being injured in the accident, the pedestrian decides to sue not only the driver but also the person who sent the text message that distracted the driver. The pedestrian argues that the sender of the text should share the responsibility for the accident because their message caused the distraction. Is this fair? To what extent did the sender act carelessly and should they be responsible for the pedestrian's injuries?

While it is understandable that the pedestrian may feel aggrieved and want to hold all involved parties accountable, it may be challenging to establish the sender's legal liability. The sender likely did not have direct control over the driver's actions and did not force them to check the text message while driving.
These types of considerations (and interesting debates) are the heart of what is called: the unintentional torts.

While intentional torts are those in which the person committing the tort had the intention to cause harm or injury, unintentional torts impose liability even where the tortfeasor did not intend to cause harm or injury. The major distinction is that intent is not required for unintentional torts.

In this chapter we will examine three unintentional torts: negligence, occupier's liability, and strict liability.

The Law of Negligence

The law of negligence is based on the principle that people have a legal duty to take reasonable care to avoid causing foreseeable harm to others. If someone fails to meet this standard of care and someone else is injured or suffers a loss, the failure to take reasonable care may lead to liability.

Given that negligence is about careless acts or omissions, it is far and away the most commonly sued for tort. We can almost always see examples of negligence claims throughout the news:

In each of these examples, there is an allegation of carelessness. It's easy to see how there would be tensions in ensuring that negligence is not too easy nor too difficult of a standard to prove liability.

Legal Test for Negligence

In order to establish liability for negligence, the following four elements must be proven:

1. Duty of Care – the defendant owed the plaintiff a duty to take reasonable care to avoid causing foreseeable harm.
2. Breach of duty – the defendant breached their duty of care by acting or failing to act in a way that fell below the standard of care required in the circumstances.
3. Causation – the defendant's breach of duty caused the plaintiff's injury or loss.
4. Damages – the plaintiff's suffered damage or loss

Dadswell v. Enterprise Auto & R.V. Ltd., 2020 BCCRT 428 at para. 20.

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Another consideration will be whether the defendant can rely on any defences to completely remove or otherwise reduce its liability.

Each of the components in the negligence test are complex and merit a more fulsome explanation for when they will be established.

Step 1 – The Duty of Care

The ultimate question with the duty of care step is whether the defendant was under a legal obligation to act with care towards the plaintiff.

Where there is a duty of care imposed, it requires the defendant to take reasonable care to avoid causing harm to others. This means that individuals must act in a way that a reasonable person would in the same or similar circumstances. For example, a doctor owes a duty of care to their patient, and a driver owes a duty of care to other drivers and pedestrians on the road.

If there is not a duty of care established then, even if a plaintiff was injured, the defendant did not owe a legal duty to protect them in the first place. Even negligence states that individuals do not have to act with care towards every single other individual – to require that would be extremely broad. As such, the law recognizes that we cannot prevent all possible harms to everyone, so we must focus our responsibility on those who are most likely to be harmed.

How then does one determine whether you owe a legal duty of care to another? The original common law answer was found in the the seminal case of Donoghue v Stevenson [1932] AC 562 which established that the duty of care was found using the "neighbour principle".

> "Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."
>
> *Donoghue v Stevenson,* [1932] AC 562 at 580

The neighbour principle established a broad test for establishing a duty of care. It required individuals to consider the reasonably foreseeable consequences of their actions or omissions on others. It shifted the focus from specific categories of relationships to a more general principle of reasonable foreseeability and proximity.

Foundational Law – *Donoghue v Stevenson*, [1932] AC 562

Mrs. Donoghue consumed a bottle of ginger beer which was manufactured by Stevenson. Unfortunately, the bottle contained a decomposed snail, and as a result, Mrs. Donoghue fell ill. She sued Stevenson for negligence, arguing that the company had a duty of care towards her as a consumer.

Lord Atkin, one of the judges in the House of Lords, introduced the concept of the "neighbour principle" in his judgment. He stated that a person should take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to cause harm to their "neighbours." Lord Atkin further explained that "neighbour" should not be confined to individuals in close physical proximity. Instead, it should encompass anyone who could be reasonably foreseen as being affected by one's actions or omissions. This principle emphasized the idea of proximity, both physical and relational, in determining whether a duty of care existed in a particular situation.

The court held that Stevenson, as the manufacturer of the ginger beer, owed a duty of care to Mrs. Donoghue. They concluded that the manufacturer had a responsibility to ensure that the product they sold was safe for consumption and free from any potential hazards that could cause harm to consumers.
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In modern law, the discussion of the neighbour principle has largely been done away with and what remains is a discussion of proximity and reasonable foreseeability.

Proximity refers to the relationship between the parties involved which can include physical, social, or commercial proximity. This relationship must be such that it creates a reasonable expectation that care will be taken to avoid harm. For example, a doctor owes a duty of care to their patient due to the professional relationship between them.

Reasonable foreseeability, on the other hand, refers to whether harm was a foreseeable consequence of the defendant's actions. It involves asking whether a reasonable person in the position of the defendant would have foreseen that their actions could cause harm to another person. For example, a driver who is texting while driving should be able to foresee that their actions could lead to an accident and cause harm to other drivers on the road. However, it may not have been reasonable for someone who sends a text message to a friend to foresee that the friend would read it and, while doing so, would crash through an intersection and injure a pedestrian. But what about if the sender of the text knows that their driving friend habitually drives while trying to look at their phone and read text messages? Is there not an argument that the sender could reasonably foresee a loss from their text message?

The difference between proximity and reasonable foreseeability lies in the level of connection required to establish a duty of care. Proximity focuses on the relationship between the parties, while reasonable foreseeability focuses on the potential for harm to occur. Proximity is often easier to establish when the relationship between the parties is clear, while reasonable foreseeability may require more analysis of the specific circumstances of the case.

Ultimately, the duty of care can be challenging as there are few clear answers in the application of reasonable foreseeability. However, the court always strives to navigate these ambiguous questions by reference back to the reasonable person in the hopes of finding objective answers.

Step 2 – Breach of the Standard of Care

The second element for negligence is that the defendant breached the standard of care. In order to prove a breach of the standard of care has occurred, it must be shown that there is a reasonable level of care (the standard), and that the defendant failed to meet that standard (the breach).

The standard of care refers to the level of care that a reasonable person is expected to provide in a given situation. It is a vital part of a negligence because it establishes a benchmark against which the defendant's conduct is evaluated. If the defendant's actions fell below the standard of care, then they may be held liable for damages resulting from their negligence. On the other hand, if their conduct met or exceeded the standard of care, they would not be held liable even if the plaintiff was injured.

Ultimately, the standard of care only gives us our comparison, the breach of the standard of care is what establishes liability. The breach arises when the defendant has fallen below the reasonable care threshold of their comparative reasonable person. For example, consider a case in which a driver hits a pedestrian while texting on their phone. If a reasonable person would have concluded that it was unsafe to text while driving (very likely), then the driver would be found to have breached the standard of care.

Foundational Law – *Jacobsen v. Nike Canada Ltd.*, 1996 CanLII 3429

In September 1991, Michael Jacobsen, a 19-year-old warehouseman at Nike Canada Ltd., worked a 16-hour shift during which he and his co-workers consumed substantial amounts of beer provided by his employer, Nike. After work, he went to two clubs and continued drinking beer with a co-worker. The following morning, while driving home from his shift, Jacobsen veered off the highway, resulting in a car accident that left him quadriplegic.

Jacobsen sought damages from Nike, claiming that the company had a duty of care towards him and that this duty was breached when they supplied him with alcohol during working hours and failed to prevent him from driving.

Nike acknowledged that it owed a duty of care to Jacobsen but denied breaching that duty by not taking action to prevent him from driving. They argued that, based on the circumstances, they neither knew nor had reason to believe that Jacobsen was impaired when he left work.

The court determined that Nike failed to live up to the standard of a reasonable employer. Nike provided alcohol in the workplace and did not monitor the plaintiff's alcohol consumption and took no measures to ensure that he did not drive while impaired. This was a breach of the standard of care. Further, Nike required its employees to bring their cars to work, being fully aware that they would be driving home. Essentially, Nike made drinking and driving a part of the working conditions on that particular day. The company effectively encouraged the crew to consume alcohol without any limitations by freely providing large quantities of beer at the worksite.

Nike's duty for his Jacobsen's safety demanded that they avoid introducing conditions in the workplace that could reasonably put him at risk. Accordingly, Nike breached its standard of care and Jacobsen was awarded damages in the amount of $2,719,213.48.
.

Step 3 – Causation

The third element of negligence, causation, refers to the relationship between the defendant's actions or inactions and the plaintiff's loss.

To establish causation, the plaintiff must prove that the defendant's conduct was a cause in fact of their injuries, and that the harm suffered was a foreseeable consequence of the defendant's conduct.

There are two types of causation in negligence law: actual cause and proximate cause.

For example, if a person is injured in a car accident and sues the driver of the other car for damages, the plaintiff must prove that the driver's actions were the cause of the plaintiff's injuries. The plaintiff must show that "but for" the driver's actions, the accident and the plaintiff's injuries would not have occurred. If it can be shown that the accident would have happened even if the driver had

not been involved, then the driver's actions are not considered to be the cause of the plaintiff's injuries.

On the other hand, proximate cause, focuses on the foreseeability of harm caused by the defendant's conduct. Proximate cause asks whether the defendant's conduct was a foreseeable cause of the plaintiff's harm, or whether there were intervening factors that broke the causal chain between the defendant's conduct and the plaintiff's injuries.

For example, suppose that a driver negligently runs a red light and collides with another vehicle, causing the driver to sustain a broken arm. In this scenario, the driver's negligent conduct is the actual cause of the plaintiff's injuries because the accident would not have occurred but for the driver's failure to stop at the red light. Proximate cause is also established because it was foreseeable that running a red light could cause an accident resulting in bodily harm. On other hand, what if a driver runs a red light and collides with another car, injuring the driver, but that driver is then struck by lightning. The driver who ran the red light may not be held liable for the damages as the lightning strike was not a reasonably foreseeable event; the driver was not the proximate cause of the plaintiff's injuries.

Without causation, the plaintiff cannot establish liability, and the defendant cannot be held responsible for the plaintiff's harm. Therefore, causation plays an essential role in determining fault and awarding damages in negligence cases.

Foundational Law – *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27

Mustapha sued Culligan, a water supplier, for psychiatric injury he claimed to have suffered after discovering dead flies in a bottle of water he received from the company. Mustapha became obsessed with the incident and developed a major depressive disorder, along with phobia and anxiety. The trial judge ruled in favor of Mustapha, awarding him damages totaling $341,774.58. However, the case was appealed and the issue before the SCC was whether Mustapha had established causation.

According to the SCC, the law distinguishes between psychological disturbance that qualifies as personal injury and mere psychological upset. Personal injury must be serious, prolonged, and surpass ordinary annoyances, anxieties, and fears. In Mustapha's case, the medical evidence actually supported that he suffered psychiatric illness which constituted personal injury.

The next issue though was whether the defendant's breach of duty caused the Mustapha's damage or if it was too remote to warrant recovery. The principle of remoteness examines whether the harm is too unrelated to the wrongful conduct to hold the defendant liable. In order to establish that the damage suffered was not too remote, Mustapha needed to show that it was foreseeable for a person of ordinary fortitude to suffer serious injury from seeing the flies in the water bottle. However, the evidence presented only described Mustapha's individual and highly unusual reactions. There was no evidence that a person of ordinary fortitude would have suffered injury from the same situation.

Based on these considerations, the SCC concluded that Mustapha's loss was too remote to be reasonably foreseen, and therefore he could not recover damages from Culligan.

Step 4 – Damages

The final element in negligence is damages. Damages refer to the actual harm or loss suffered by the plaintiff as a result of the defendant's breach of duty. It can include physical injuries, emotional distress, financial losses, and any other negative consequences caused by the defendant's actions.

To succeed in a negligence claim, the plaintiff must demonstrate that they have suffered compensable damages.

Specific Forms of Negligence

Professional Negligence

What happens when the negligent act is committed by someone with some form of professional experience or expertise? For example, plumbers, accountants, carpenters, lawyers, doctors, etc? How does the law adjust to this circumstance?

Professional negligence cases involve a careless act committed by an individual with specialized skill or expertise. Professional negligence can occur in a wide range of professions, including the legal, medical, accounting, architectural, or engineering professions.

In order for a claim of professional negligence to be successful, the plaintiff must still show that the professional owed them a duty of care, that the standard of care was breached, and that the breach caused them to suffer some form of loss or damage. In many cases, it is not difficult to prove a duty of care is owed and the true debate falls to whether or not the professional breached the standard of care.

Notably, for professional negligence cases, the defendant professional is compared to that of a reasonably competent professional in the same field. The comparison drawn is between the conduct of the alleged negligent party and what a reasonable professional in the same field would have done in similar circumstances.

For example, imagine a case of medical malpractice. A doctor may be accused of breaching the standard of care by failing to diagnose or treat a patient's condition appropriately. In such a case, the standard of care is determined by looking at what a reasonable doctor (not person) with similar training and experience would have done under the same circumstances.

Product's Liability

Products liability is a body of law that imposes liability on manufacturers, distributors, and sellers of products for injuries or damages caused by defects in the products that they sell/make. This law

allows an individual who is injured by a defective product to bring a legal claim for damages against the party responsible for the defect.

Products liability in Canada differs dramatically from that in the United States. The main difference lies in the legal standards used to establish a product defect and the level of liability required to hold manufacturers and sellers responsible for injuries resulting from the use of their products.

In the United States, products liability law is based on the doctrine of strict liability which means that manufacturers are held strictly liable for any injuries caused by their products, regardless of whether they were negligent or not. This means that the plaintiff does not have to prove that the manufacturer was negligent or intended to harm them, but only that the product was defective and caused the injury. This legal standard place a heavy burden on manufacturers to ensure that their products are safe and free from defects.

On the other hand, in Canada, products liability law is based on the doctrine of negligence. Manufacturers and sellers are liable for injuries caused by their products only if they were negligent in designing, manufacturing, or selling the product. This means that the plaintiff must prove that the manufacturer or seller was negligent in some way and that their negligence caused the injury.

On the Canadian front, there are several different types of defects that can give rise to a products liability claim, including design defects, manufacturing defects, and warning defects. Design defects occur when the product is inherently dangerous or unsafe because of the way it was designed. Manufacturing defects occur when the product is safe when it is designed, but something goes wrong during the manufacturing process that makes it unsafe. Warning defects occur when the product is safe when used as intended, but the manufacturer fails to warn the user of potential dangers associated with the product.

Thin Skull Rule

What happens if the person you injure has an unexpected reaction? For example, I injure the arm of a pedestrian, and they then contract an infection while being treated at the hospital. Should I be responsible for the losses arising from the infection?

The thin skull rule is a legal principle that imposes liability on a defendant for any unusual or abnormal vulnerabilities that the plaintiff had at the time of the injury, even if that unusual condition or reaction was not foreseeable.

A defendant must take their victim as they find them, meaning that the defendant is responsible for any additional harm caused to the plaintiff due to the plaintiff's pre-existing vulnerabilities. If a person with a thin skull is struck on the head and suffers a brain injury, the defendant may be held liable for any additional harm that was caused by the plaintiff's thin skull, even if the defendant did not know about the plaintiff's condition at the time of the injury. The rule is intended to protect plaintiffs who are more vulnerable or susceptible to harm due to factors beyond their control.

Foundational Law – *Smith v Leech Brain & Co* [1962] 2 QB 405

The case involved Smith, a worker employed by Leech Brain & Co., who suffered a burn on his lip while working with molten metal. Smith had a pre-existing condition known as "keratoacanthoma," which is a benign skin condition. As a result of the burn, the condition worsened and developed into a malignant carcinoma, a form of skin cancer. Smith argued that his employer was responsible for the development of the cancer because the burn triggered its progression.

The central issue in the case was whether Leech Brain & Co. should be held liable for the full extent of Smith's injury, including the unforeseeable consequences resulting from his pre-existing condition.

The court upheld the application of the "thin skull" rule in this case. It found that Leech Brain & Co. was liable for the entire extent of Smith's injury, including the development of cancer. The court reasoned that the burn was a direct consequence of the defendant's negligence, and the unforeseeable progression of the condition did not absolve them of liability.

The case stands as a clear example of the "thin skull" rules and that defendant's will be held to take their victims as they are, including their pre-existing conditions.

Defences to Negligence

As with the intentional torts, a defendant to a negligence action has a variety of defences which they can use to eliminate or reduce their liability.

Some of the specific defenses to a negligence claim are:

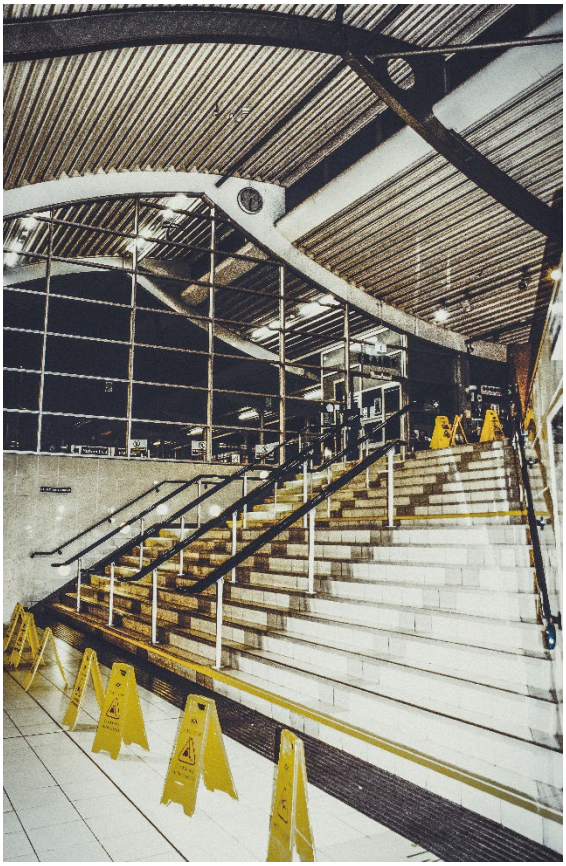
- **Contributory Negligence** – means the plaintiff's own negligence contributed to the harm that they suffered. If the plaintiff was also negligent, the defendant may be able to reduce or eliminate their liability. For example, if a plaintiff pedestrian was distracted by her phone and not paying attention to her surroundings, the defendant cyclist could argue that her actions contributed to the accident. In this case, the plaintiff's damages would be reduced by the percentage of her fault.
- **Assumption of Risk** – this defense is available when the plaintiff willingly and voluntarily assumed the risk of harm by engaging in a dangerous activity. For example, what if the plaintiff pedestrian was volunteering in a cycling event and had signed a waiver form indicating that they were not permitted to walk through the course and assumed all risks that they might be injured if they did so. The voluntary assumption of such risks could mean that the cyclist who strikes the pedestrian is completely absolved of liability.
- **Statutory Immunity** – certain defendants may be immune from liability because of a statutory provision that grants such immunity. For example, if the cyclist was a police officer

who was responding to an emergency and struck the pedestrian, the defendant may be immune from liability.

- **Illegality** – "ex turpi causa non oritur actio" is a Latin legal maxim that translates to "from a dishonorable cause an action does not arise." It is a principle that states a person cannot bring a legal action to claim a remedy or compensation if their claim arises from an illegal or immoral act that they themselves were involved in. The principle is rooted in the idea that the law should not aid someone who seeks to benefit from their own wrongdoing. For example, if a person gets injured while attempting to rob someone's house, they would not be able to sue the homeowner for negligence. The principle would apply because the person's injury resulted from their own illegal act. Similarly, if a person is injured while participating in an illegal street race, they would not be able to hold other participants or organizers liable for any resulting harm.
- **Good Samaritan Laws** – if the defendant was acting as a Good Samaritan, providing medical assistance or help in an emergency, they may be protected from liability by Good Samaritan laws. For example, if the cyclist was attempting to perform first aid on the pedestrian, but accidentally caused an additional cut. As a Good Samaritan, the cyclist should be immune from liability.

Occupiers' Liability

One of the long-standing traditions in law is respect for landowners and their blanket discretion to do as they please on their land. This respect has often translated into a restricted immunity against claims brought by the visitors to that land. Over time however, this immunity has been chipped away at such that visitors to a property can seek compensation for injuries they suffer.

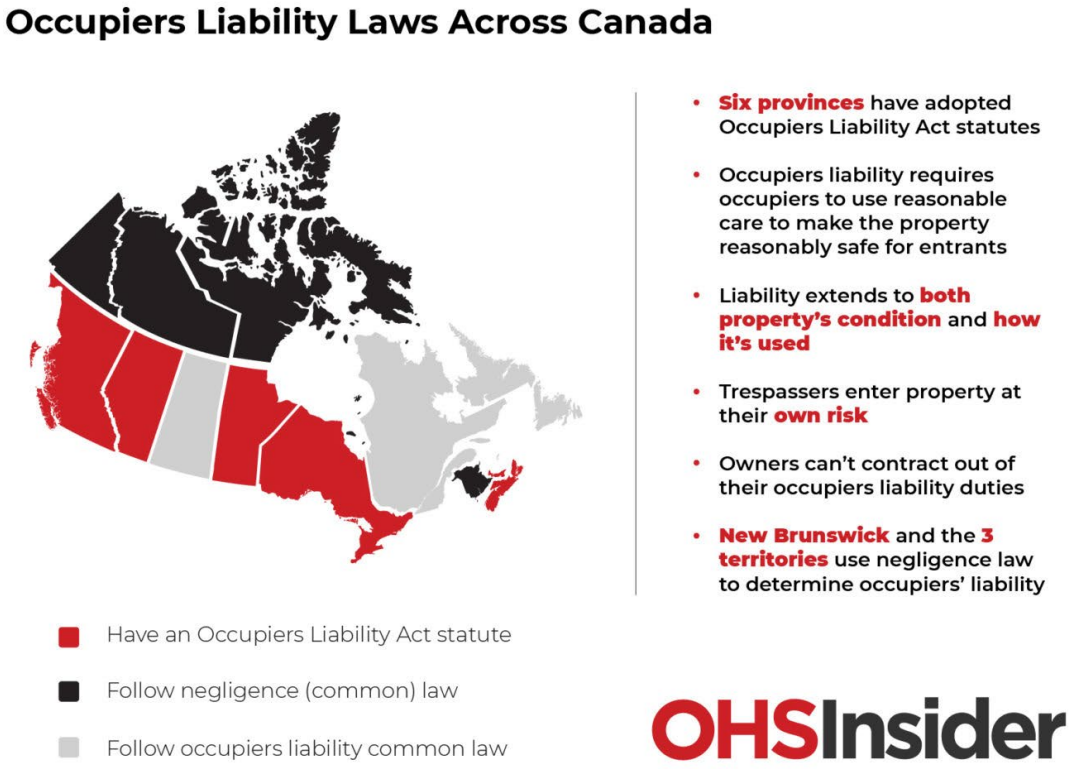


Occupiers' liability refers to the legal responsibility that an occupier of a property (such as a business owner, homeowner, or landlord) has to ensure that their property is safe for visitors and other lawful occupants. Occupiers' liability is based on the premise that the occupier of a property has a duty of care towards anyone who is on the property, whether they are invited guests, paying customers, or members of the public.

What can often be challenging is discerning the precise scope of the legal duty that is owed to visitors. This question can be examined through two evolutions in law: the traditional common law rules versus the statutory rules.

Whether you are bound by the traditional common rules, negligence, or statute depends on where the incident occurred. Some provinces/territories have passed occupiers liability statutes which would apply to the injury, while other provinces/territories have retained the traditional common law principles.

Therefore, there are numerous types of duties of care which may owed by an occupier and that duty depends on where the occupier is. An organization called OHS Insider* has created a handy reference chart to understand which type of law applies in which province and territory:



Reproduced from OHS Insider:
https://ohsinsider.com/occupiers-liability-know-the-laws-of-your-province/

Traditional Common Law of Occupiers' Liability

"The Canadian common law of occupiers' liability, which is concerned with tort responsibility of those who control land to those who enter onto their land, is a mess. In this area, perhaps more than in any other part of tort law, rigid rules and formal categories have spawned confusion and injustice."

Justice Linden, Canadian Tort Law (4th ed., 1988) at page 599

The traditional common law determined the duty of care depending on the particular reason for the visitor's visit. Once the precise reason for the visit was determined, the traditional common law would then assign a particular duty that was required to be met by the occupier. If the occupier failed to live up to that duty, then they would be responsible for any damages which flowed from that failure.

While the traditional common law still required that an occupier act with a certain duty of care to their visitors, the law varied on what that duty should look like. By examining a visitor's purpose of visit to determine the duty owed, there emerged numerous different duties of care that could be applied to an occupier.

Under the traditional common law, there were three main classifications of visitor and three different corresponding duties of care:

- **Invitee** – An invitee is a person who is invited onto the property for the occupier's financial benefit (e.g. a customer at a retail store). The occupier has a duty to warn of any unusual dangers of which the occupier knew, or ought to have known about.
- **Licensee** – A person who is allowed to enter the property with the occupier's permission for their own benefit (e.g. a social guest). The duty owed by an occupier to a licensee is only to protect the licensee against hidden dangers of which the occupier is aware.
- **Trespasser** – A person who enters the property without the occupier's permission (i.e. a burglar). The occupier owes a duty to not cause injury to the trespasser intentionally or recklessly.

Over time, a fourth classification of visitor was developed: the contractual entrant. Contractual entrants enter the land through a contract and therefore, are distinct from invitees. The duty owed to contractual entrants was to take due care that the premises are reasonably safe and act with reasonable care. One of the unique features of this category was that the occupier was required to supervise the activities conducted on the premises to ensure safety of the visitors.

As you can see, applying four separate standards of care are complex and cumbersome. Accordingly, many provinces have seen fit to statutorily override the traditional common law classifications.

Statutory Rules of Occupiers' Liability

As mentioned above, many provinces have chosen to do away with the confusion and rigidity arises from the traditional common law categories. In so doing, they have brought well-needed clarity to occupiers and visitors about when liability will be established.

> "At common law, persons entering an occupier's premises were traditionally defined as invitees, licensees or trespassers, and the duty of care owed by the occupier to such persons was determined on this basis. [However] the legislature enacted the Occupiers' Liability Act ... with the intention of replacing, refining and harmonizing the duty of care owed by occupiers to visitors on their premises."
>
> *Schneider v. St. Clair Region Conservation Authority*, 2009 ONCA 640 at para. 22.

While this text cannot canvass all of the provincial occupiers' liability statutes, attention is paid to the British Columbia version. It should be noted that certain provisions of the BC statute (including, the duty of care) are similar as to provisions in other provincial occupiers' legislation.

British Columbia Occupiers Liability Act, R.S.B.C. 1996, c. 337

Broadly speaking, the BC Occupiers Liability Act (OLA) codifies the legal duties and responsibilities of "occupiers" with respect to the safety of people who are on their "premises".

The OLA begins by defining an "occupier" and "premises" in a broad and liberal sense:

> "occupier" means a person who
> (a) is in physical possession of premises, or
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
> and, for this Act, there may be more than one occupier of the same premises;
>
> "premises" includes
> (a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),
> (b) ships and vessels,
> (c) trailers and portable structures designed or used for a residence, business or shelter, and
> (d) railway locomotives, railway cars, vehicles and aircraft while not in operation.

Based on this definition, liability can extend to individuals owning homes, renting units, controlling property or undertaking construction and substantial renovations.

Just because someone constitutes an occupier of premises does not mean they will be liable for injuries suffered by visitors; that answer is based on whether the occupier failed to meet the statutory duty owed.

The major thrust of the legal duty owed by occupiers is found in section 3(1) of the OLA which states:

> An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

Under section 3(1), an occupier of a property has a duty to take "reasonable care" to ensure the safety of people who are on the property. This duty of reasonable care applies to all individuals who are on the premises, whether they are invited guests, customers, or trespassers (again, the common law categories were expressly done away with). The duty of care also applies to all aspects of the premises, including the condition of the property itself, as well as any activities or hazards on the property that could potentially cause harm.

Given that the threshold is one of "reasonable care", whether or not a breach has occurred can be very case-by-case specific. Generally, though, in order to fulfill this duty of care, an occupier must take reasonable steps to prevent or correct any hazards on the premises. This may include regular inspections of the property, providing appropriate warnings or safety measures, and ensuring that any dangerous conditions are promptly addressed.

The OLA also sets out a number of defenses that an occupier may raise if they are sued for failing to meet their duty of care. These defenses include the defense of voluntary assumption of risk, where the injured person knew of the danger and chose to assume the risk of injury anyway. This specific defense is found in section 3(3) and section 3(3.1) of the statute which states:

> 3(3) … an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
> (a) create a danger with intent to do harm to the person or damage to the person's property, or
> (b) act with reckless disregard to the safety of the person or the integrity of the person's property."
>
> 3(3.1) A person who is trespassing on premises while committing, or with the intention of committing, a criminal act is deemed to have willingly assumed all risks …

Under 3(3) no duty of care would be owed where the injured visitor voluntarily assumed the risks of injury. For example, if a person visits a resort in British Columbia and decides to participate in out of bounds skiing or snowboarding, they may be found to have voluntarily assumed the risks associated with these activities. Skiing and snowboarding are known to be inherently risky activities that can result in injuries.

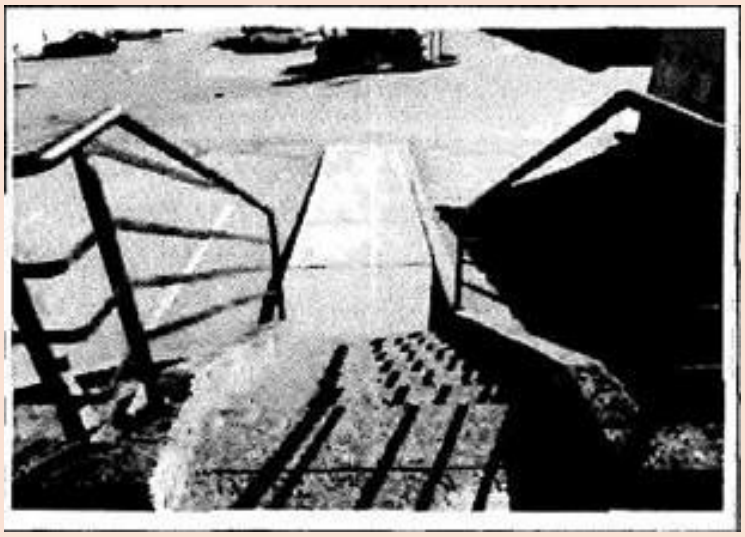
As to section 3(3.1), it operates to alleviate concerns that an occupier could somehow owe damages to an individual committing a criminal on the occupiers' premises. According to the provision, a person who unlawfully enters a property with the intention of committing a crime is considered to have voluntarily accepted all associated risks. For instance, if someone breaks into a building to steal equipment and falls from a height while trying to escape, they assume liability for any injuries sustained from the fall due to their illegal actions.

Ultimately, even though an individual may be injured, it does not always mean the occupier breached its standard of care. One such example, is *Slater v. Courtenay (City)*, 2021 BCSC 1678 discussed below.

Foundational Law – *Slater v. Courtenay (City)*, 2021 BCSC 1678

The plaintiff, Slater, was involved in an accident which resulted in serious injury to his finger.

One evening, Slater consumed several drinks at a bar. After leaving the bar, he walked towards a set of stairs leading to a parking lot; the stairs had a metal railing on both sides which Slater decided he wanted to try to slide down:



As Slater slid down the railing, he felt a sudden tug and experienced instant pain. Upon reaching the bottom, he discovered that his finger was missing. He was promptly taken to the hospital, where it was determined that his index finger had been amputated just above the first knuckle and it could not be re-attached.

In determining if the City of Courtenay (as the occupier) was liable, the court affirmed the duty owed under the OLA: "to take that care that is reasonable in all of the circumstances of the case to see that a person on the premises will be reasonably safe in using the premises".

The court ruled that the handrail was safe if used as intended, as a support for people walking up and down the stairs. It was unreasonable to expect the city to have foreseen abnormal use of the railing, such as someone sliding down the railing and gripping the handrail in a manner that would lead to injury. Holding the defendant accountable for such unforeseen actions would require a standard of perfection which is not legally required. Ultimately, the city did not breach its duty under the OLA and Slater's claim was dismissed.

The Rule in Rylands v. Fletcher

While the law of negligence and occupiers' liability rely on an assertion of carelessness, strict liability can be imposed even where a loss does not carelessly arise or is intentional. Instead, strict liability applies when an activity simply causes a loss.

Typical strict liability situations involve ultra-hazardous activities, where the risk of harm is high, and the activity is considered particularly dangerous. For example, activities such as handling explosives, operating a nuclear power plant, or owning a wild animal could all be instances where strict liability may apply. The idea is that if an individual wants to use their property in a dangerous way, they accept it may cause harm.

The origins of strict liability in tort are found in the case of Rylands v. Fletcher, (1868) LR 3 HL 330. The case involved a mill owner, Rylands, who built a reservoir on his property to store water for his mill. The reservoir was built in such a way that it was not watertight, and water leaked out and flooded a coal mine owned by Fletcher, causing damage. Fletcher sued Rylands for the damages.

In the case, the English court held that Rylands was strictly liable for the damages caused by the leak, even though he had not intended for the leak to occur and had taken precautions to prevent it. The court reasoned that Rylands had brought something onto his property that was likely to be dangerous if not properly contained, and that he was therefore responsible for any damages that resulted from the escape of that dangerous thing.

Legal Test for Rylands v. Fletcher

To be successful in suing in Rylands v. Fletcher, the plaintiff must establish the following:

1. the non-natural use of the land by the defendant, and
2. an escape from the land of something likely to do mischief
3. the plaintiff suffered damage as a direct result of the escape.

Smith v. Inco, 2010 ONSC 3790 at para. 45.

The rule in "Rylands v Fletcher" has since been adopted by Canadian courts and allows for damages to be awarded even absent intent or negligence because of a dangerous thing that the tortfeasor brought onto their property.

Chapter 4 - Review Questions

1. What is negligence and what are its key elements?
2. What is the difference between professional negligence and product liability?
3. Does the 'thin skull' rule apply in Canadian negligence cases?
4. What defenses can be raised against a negligence claim?
5. What is occupiers' liability and how does it differ from general negligence?
6. Are there different standards of care owed to different types of visitors on a property?
7. What is the 'Rule in Rylands v. Fletcher' and does it apply in Canada?
8. Does an occupier always owe a duty of care to someone injured on their property?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 4? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 4 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 4:

https://youtu.be/Lk2dcGXxS0U

Chapter 5: Contract Law in Canada
Part I - Creating a Contract

Learning Outcomes:

1. Understand the fundamental elements of a contract, including offer, acceptance, and consideration.
2. Differentiate between unilateral and bilateral offers and understand the acceptance requirements associated with each type.
3. Consider the requirement for legal capacity to enter into a contract, including the rules regarding minors, mental incapacity, and intoxication.
4. Examine the concepts of duress and undue influence and evaluate their impact on the enforceability of contracts.
5. Analyze the concept of illegality.

Introduction

Understanding contract law is really about starting with an understanding of basic agreements. An agreement is a mutual understanding or arrangement between two or more parties regarding a specific matter. It could be a verbal or written agreement. It could be informal or formal, and it does not necessarily need to be enforceable in a court of law.

On the other hand, a contract is a legally binding agreement between two or more parties that creates an obligation to fulfill certain terms and conditions. Contracts are typically written documents (though not always) and specify the details of the agreement, including the parties involved, the terms and conditions, the rights and obligations of each party, and the consequences for non-compliance.

The major difference between an agreement and a contract is enforceability. Key is the idea that an agreement may not necessarily be legally binding or enforceable, while a contract creates a legal obligation that can be enforced in court. The question that then emerges is: what makes a contract valid and enforceable?

Myth-Busting

Myth: "A Contract has to be in Writing to Be Enforceable".

Contrary to popular belief, a contract does not necessarily have to be in writing to be enforceable. While written contracts are commonly used and highly recommended, they are not the only means to create a legally binding agreement. Verbal agreements, also known as oral contracts, can be enforceable.

The enforceability of a contract, whether written or oral, primarily depends on the existence of the essential elements required for a valid contract (see below). As long as these elements are present, a contract can be formed and enforced, regardless of its form.

However, it is important to note that proving the terms and conditions of an oral contract can be more challenging compared to a written one. In the absence of written evidence, disputes may arise concerning the exact terms agreed upon or the existence of a contract altogether. This is where written contracts have an advantage, as they provide a clear record of the agreement, minimizing ambiguity and potential disagreements.

Elements of a Valid Contract

Contractual enforceability is critical; this is because enforceability means a court can hold both parties to their agreement. If a contract is not valid and enforceable, then a party is free to disregard its terms and there will be no legal consequences.

Legal Test for Contractual Enforceability

To be valid and enforceable, contracts generally require seven main elements:

- **Offer** – One party must make a clear and unequivocal offer to enter into a contract.
- **Acceptance** – The other party must accept the offer, either by agreeing to its terms or by performing the actions required in the contract.
- **Consideration** – Both parties must exchange something of value, such as money, goods, or services.
- **Intention to Create Legal Relations** – Both parties must have an intention to create a legally binding agreement.
- **Capacity** – Both parties must have legal capacity to enter into a contract. For example, minors and mentally incompetent persons may not have the capacity to enter into contracts.
- **Consent** – Both parties must give their free and informed consent to enter into the contract, without being coerced or deceived.
- **Legality** – The contract must be for a legal purpose and not violate any laws or public policy.

Without each of these core elements, an agreement would not be enforceable by a court. Given the stakes, a more fulsome explanation of each of the elements is detailed in the remainder of this chapter.

> "It is trite law that creation of a contract requires that there be an offer, acceptance and consideration..."
>
> *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 at para. 64

Offers

An offer is a proposal by one party to enter into a contract with another party. When a party makes an offer, they are referred to as the offeror and the party receiving the offer is referred to as the offeree. For an offer to be valid, it must be clear and definite, and communicated to the offeree.

While an offer is the initial proposal of the contractual terms, it does not, in and of itself, creates a contract. A contract is only formed if the offeree accepts the offer.

Because the offer must be a clear and unambiguous promise to do something, such as sell a good or provide a service, on specific terms, certain statements by a party will not constitute an offer:

- **Requests for Information** – These are statements that seek information, rather than make an offer. For example, if a potential buyer asks a seller for information about a product, such as its price or availability, it is not an offer to purchase the product.
- **Invitations to Treat** – These are statements that are not offers, but rather an invitation to negotiate. Examples include advertisements, catalogs, and price lists. For example, if a store advertises a sale on televisions, it is not an offer to sell a television to anyone at the advertised price. Rather, it is an invitation for customers to come and make an offer.
- **Puffery** – refers to exaggerated or vague statements made by a seller or advertiser that are not meant to be taken as factual claims. Puffs are sales language and are not considered offers. For example, if a restaurant advertises that it has the "best pizza in town," this statement is considered puffery because it is subjective and cannot be objectively proven. Similarly, if a car dealership claims that its cars are "the most reliable on the market," this statement is also considered puffery.

Foundational Law – *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 All ER 482

Boots Cash Chemists was a well-known pharmacy chain in the UK, and the Pharmaceutical Society of Great Britain was the regulatory body responsible for overseeing the practice of pharmacy.

Boots had a self-service system in their stores where customers would select items from shelves and bring them to the register for payment. The Pharmaceutical Society argued that by placing the items on the shelves, Boots was making an offer to sell, and the customer's act of taking the items to the cash register constituted an acceptance of that offer, forming a binding contract.

The court disagreed with the Pharmaceutical Society's argument and held that Boots' display of goods on the shelves was not an offer but rather an invitation to treat. The court reasoned that the customer makes an offer to purchase the items when they present them at the cash register, and the cashier accepts the customer's offer by ringing up the sale. Therefore, the contract is formed at the cash register which is the point of acceptance.

The Boots decision established that a display of goods on shelves, whether in a self-service store or otherwise, is generally considered an invitation to treat rather than an offer.

Types of Offers

Assuming that a statement is definite enough to be an offer, there is still the added consideration of exactly what type of offer has been extended: a bilateral or a unilateral offer.

In a bilateral situation, both parties must make a promise to form a contract. Accordingly, both the offeror and offeree will be promising something to each other. An example of a bilateral offer is a job offer. An employer may offer a candidate a job and in exchange the employee would be offering back their work. Because both the employer and employee are promises something to each other, it is a bilateral offer which turns into a bilateral contract on acceptance.

A unilateral offer, on the other hand, is an offer that can be accepted by performing a specified act or by refraining from doing something. The offeree does not need to make a promise, but rather, must perform the specified act to accept the offer and form the contract. Typically, these types of offers are seen as rewards where the offeror makes a promise to pay if a specified act is performed.

For instance, a company may offer a reward to anyone who provides information that leads to the capture of a criminal. If someone provides the information and the criminal is captured, the offeror is bound to pay the reward.

While bilateral offers and unilateral offers are both the initial proposal of terms, the distinction carries significance because it changes the form of acceptance required.

Termination of Offers

An offer can be terminated or ended in various ways. If an offer is terminated, it means that it is no longer open for acceptance.

The most common ways to terminate an offer are described below:

- **Revocation** – an offer can be revoked or withdrawn by the offeror any time before it is accepted by the offeree. For example, if a company offers a job to a candidate but later

decides to withdraw the offer, the offer is terminated. In order for an offer to be revoked, the offeror must clearly communicate their revocation the other party. One restriction on revocation is that, once an offer has been accepted, it becomes a binding contract and cannot be revoked.

- **Rejection** – an offer will be terminated if the offeree rejects the offer. For example, if a person offers to sell their car to another person, but the other person declines the offer, the offer is terminated. The offer is no longer open for acceptance.
- **Lapse of Time** – an offer can be terminated if the offeree does not accept the offer within a reasonable time. For example, if a company offers a discount to its customers for a limited period, and the customers do not accept the offer before the deadline, the offer is terminated. Sometimes the time period is described in the offer itself however, if an offer does not have a deadline, then a reasonable time period is used. The key question for the court is would a reasonable person still view the offer as being available for acceptance?
- **Counteroffer** – an offer can be terminated if the offeree makes a counteroffer. A counteroffer is a new proposal made by the offeree which terminates the original offer. For example, if a person offers to sell their car for $10,000, and the other person offers to buy it for $8,000, the original offer of $10,000 is terminated by the counteroffer.
- **Death or Incapacity** – an offer can be terminated if the offeror dies or becomes incapacitated before the offer is accepted. For example, if a person offers to sell their house to another person, but dies before the offer is accepted, the offer is terminated.

> "…the question is whether the offer is still alive. It is not alive unless the offeror wishes it to be so, for otherwise there is no agreement. When no indication is given by the offeror of the proper duration of the offer, then the court by applying the test of reasonable time is making a plausible guess as to the offeror's probable intention."
>
> Cote, An Introduction to the Law of Contract, states at p. 23

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Acceptance

A contract is formed when the acceptance of an offer occurs; at that point, both parties are legally bound to fulfill their obligations under the contract.

In general, for an offer to be considered accepted, the offeror must clearly communicate their offer to the other party, and that offeree must show their acceptance through some affirmative action (such as signing a document or saying "yes" to the offer). The acceptance of an offer must also be

unconditional meaning there can be no changes to the terms of the offer (that would be a counteroffer) and the offeror must receive the acceptance.

One possible exception to the clear communication of acceptance is in unilateral offers. With unilateral offers, the acceptance is the full performance of the offer terms. A seminal case dealing with unilateral offers and their acceptance is the English case of Carlill v. Carbolic Smoke Ball.

Foundational Law – *Carlill v Carbolic Smoke Ball Company*, [1893] 1 QB 256

Carlill v. Carbolic Smoke Ball Co dealt with the issue of whether an advertisement could be considered a legally binding contract. The case involved a company called the Carbolic Smoke Ball Co. which produced a product called the "Carbolic Smoke Ball" that was advertised as a cure for the flu. The company placed an advertisement in the Pall Mall Gazette in which they offered a reward of £100 to anyone who used the smoke ball and still contracted the flu.

Carlill saw the advertisement and decided to purchase and use the smoke ball as directed. Despite using the smoke ball, she still contracted the flu and subsequently brought a claim against the company for the £100 reward. The company argued that the advertisement was not a serious offer and was merely a "puff," or promotional statement, and therefore not a binding contract.

The court, however, ruled in favor of Carlill, stating that the advertisement was a clear and definite offer (unilateral) that had been made to the public at large, and that Carlill had accepted the offer by acting on it and fulfilling all the necessary conditions. As a result, the court held that the company was legally bound to pay the £100 reward to Carlill.

Consideration

What is consideration?

The concept of consideration refers to something of value that is exchanged between the parties to a contract. It can be referenced through the old Latin maxim of quid pro quo:

> "Quid Pro Quo" = "Something for Something"

Consideration is necessary for a contract to be legally binding, and requires that both parties must receive some benefit or suffer some detriment under the contract. For example, if one party promises to paint a house in exchange for money, the money is the consideration given by the other party in exchange for the promise to paint the house. If one party promises not to sue the other party in exchange for payment, the payment is the consideration given in exchange for the promise not to sue. Something for something.

Consideration can be anything of value, including money, goods, services, or a promise to do or not do something. However, some form of valid consideration must be exchanged between the parties to ensure enforceability of the contract.

Sufficiency of Consideration

An often-challenging question is what can constitute valid consideration for an exchange. The general rule is that consideration must be "sufficient". "Sufficient" consideration means that the value of the consideration exchanged by each party to the contract is deemed sufficient by the law to create a legally binding agreement. Almost all things that have economic value, regardless of the amount, constitute sufficient consideration; for example, $1, a chocolate bar, painting a fence, driving someone to the airport, etc. Ultimately, the court does not need the consideration exchanged to be equal but, the parties need to ensure that something of value is both given and received..

An interesting case where the sufficiency of consideration was challenged was the case of *Hamer v. Sid-way* 124 N.Y. 538 (1891).

Foundational Law – *Hamer v. Sidway,* 124 N.Y. 538 (1891)

William E. Story promised his nephew, William E. Story II, that if he refrained from drinking alcohol, using tobacco, swearing, or playing cards or billiards for money until he turned 21, he would pay him $5,000. The nephew complied with the terms of the agreement and reached the age of 21, but his uncle refused to pay him the money.

The New York Court of Appeals held that the nephew had provided sufficient legal consideration for his uncle's promise to pay him $5,000. In this case, the nephew had promised to refrain from certain activities until he turned 21 which was a legally binding promise. The uncle had also received a benefit from the nephew's promise which was the nephew refraining from certain prohibited activities. Ultimately, the court concluded that there was a valid contract between the two parties and that the uncle was required to pay the promised sum of $5,000.

Hamer v. Sidway also illustrates another point about consideration: that parties do not always have to promise benefits to each other. Rather, consideration can also be a detriment – the loss of something of value. In the Hamer case, the nephew's loss was the loss of smoking, drinking, and other activities.

Forbearance as Consideration

A loss as consideration can also come in the form of forbearance to sue. Forbearance to sue refers to a person's decision to refrain from pursuing legal action against someone else as consideration for a contract. The act of refraining from legal action is considered valuable consideration as it is a detriment to the party; the party is losing something, the legal claim, in exchange for a contractual promise.

As an example, let's say that Julian owes Jasdeep $10,000 under a loan agreement, but Julian has failed to make any payments on the loan. The typical remedy is for Jasdeep to sue Julian for the unpaid amount. However, instead of suing Julian, Jasdeep agrees to forbear from suing in exchange for a car provided by Julian. As such, Jasdeep's forbearance to sue is the valuable consideration in exchange for the car. The agreement for the car in exchange for the forbearance would, therefore, involve sufficient consideration between the two sides.

Forbearance is actually a very common form of consideration and is used in litigation settlements. To avoid the cost and time of legal proceedings, parties may agree to settle a case without going to court; one party agrees to withdraw the lawsuit in exchange for some other consideration.

Past Consideration

Past consideration is a type of consideration that is not sufficient to form a valid contract. The concept refers to a promise or act that was completed in the past, and which is being offered as the basis for a present or future promise. Promising something that was done in the past can be problematic because the courts generally view such past consideration as being invalid.

The reason why past consideration is not valid is because it is not being given in exchange for the promise, but rather appears to be a response to it. In effect, the exchange is "something for something already done".

One notable exception to the rule that past consideration is not valid is when the past act had been initially requested. The request exception states that if a promise is made to pay for a past act that was done at the request of the promisor, then the past act can be considered valid consideration. This is demonstrated by the English case of Lampleigh v. Brathwait, (1615), 80 ER 255 from 1615.

Foundational Law – *Lampleigh v. Braithwaite, (1615), 80 ER 255*

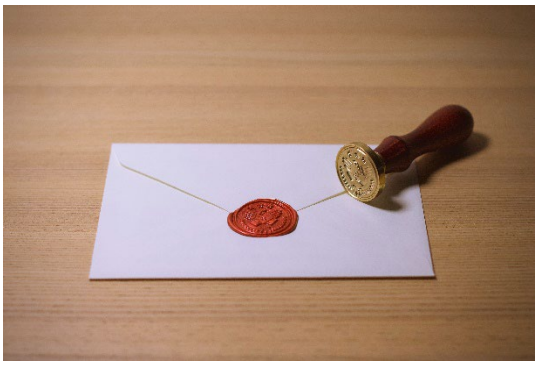
Braithwaite had killed a man and was now about to executed. He was clearly in need of assistance and reached out to Lampleigh, asking him to seek a pardon from the King on Braithwaite's behalf. Lampleigh did as requested and impressively, obtained a King's pardon for Braithwaite's crime. Upon Lampleigh's return, Braithwaite promised to pay Lampleigh £100 for his services, but he later refused to pay. Lampleigh sued Braithwaite for breach of contract.

The Court of King's Bench held that the promise made by Braithwaite was enforceable, even though the consideration for the promise was a past act (obtaining the pardon). This was because Lampleigh had done the act at Braithwaite's request, and the promise to pay was made in recognition of Lampleigh's services. Therefore, Braithwaite was required to honour the contractual promise of the £100.

When Consideration is Not Required

Throughout this section, it has been made clear that consideration must be given and received in order for the contractual promises to be valid. There are two exceptions to this general position: seals and promissory estoppel.

A physical seal, such as a wax seal or a stamp, was historically used as a way to indicate the parties' agreement to the terms of a contract. Additionally, the use of a physical seal was considered to be a substitute for the receipt of consideration — this means that a promise made by a party under seal could be enforceable even it was not supported by valid consideration. Even in modern business, the use of a physical seal may still serve as a substitute for consideration and render a promise valid.



For example, imagine Alice is a wealthy philanthropist who wants to donate a large sum of money to a charity. Alice drafts a document that promises to donate $100,000 to the charity, and she seals the document with her official wax seal. The document states that the donation is a one-way promise, and that the charity is not required to provide anything in return for the donation.

Legally, the use of the seal on the document would be enough to make Alice's promise legally binding, even though the charity is not offering any consideration in return. If Alice fails to make the promised donation, the charity may be able to sue her to enforce the promise.

The second exception to the consideration rule is promissory estoppel. Promissory estoppel is a legal argument that is made when a party has relied on a promise made by another party and has suffered a detriment as a result of relying on that promise.

Legal Test for Promissory Estoppel

In order for promissory estoppel to apply, the following elements must be present:

1. A promise must be made by one party to another;
2. The promisor must have intended for the promise to be relied upon by the promisee;
3. The promisee must have relied on the promise to their detriment; and
4. It would be unjust to allow the promisor to go back on their promise.

If these elements are present, the court may enforce the promise made by the promisor and require them to follow through on their commitment, even if the promise is not enforceable under contract law.

Promissory estoppel has evolved into a very powerful legal doctrine and one case that demonstrates it is Central London Property Trust Ltd v High Trees House Ltd, [1947] KB 130.

Foundational Law – *Central London Property Trust Ltd v High Trees House Ltd, [1947] KB 130*

This case concerned a 99-year lease of a block of flats in London which was agreed to by the parties in 1937.

In 1940, due to the outbreak of World War II, occupancy of the flats was severely impacted, and many of the flats became vacant. To alleviate the financial burden on the tenant, High Trees House Ltd, the landlord, Central London Property Trust Ltd, agreed to reduce the rent by half for the remainder of the war period. The parties agreed to this reduction in a letter which was later confirmed by a deed in 1945. After the war ended, the flats began to fill up again and the landlord sought to claim the full rent. The tenant argued that the landlord was estopped (prevented) from claiming the full rent because of the earlier agreement to reduce the rent.

The English High Court held that the landlord was estopped from claiming the full rent due to the tenant's reliance on the promise of reduced rent.

This case established that where one party has made a clear and unequivocal promise to another party, and that promise has been relied on by the other party, the promisor may be prevented from reneging on the promise, even if there is no consideration for the promise.

Intention to Create Legal Relations

In order for a contract to be legally enforceable, the parties must have intended to enter into a binding agreement. This means the parties understood and indeed, wanted, the contract to create a legal relationship between them. This intention can be express or implied, depending on the circumstances surrounding the formation of the contract.

Express intention to create legal relations occurs when the parties specifically state that they are entering into a legally binding agreement. This can be done through the use of explicit language in the contract, such as "this is a legally binding contract" or "by signing below, you are entering into a binding agreement."

Implied intention to create legal relations occurs when the parties' words or conduct indicate that they intend to create a legally binding agreement, even if they have not specifically said so. This can be inferred from the nature of the contract, the circumstances in which it was formed, and the parties' conduct following the formation of the contract.

In order to determine whether the parties had the necessary intention to create legal relations, courts will consider various factors, including the presence of consideration (something of value given by one party in exchange for something else), the degree of formality of the agreement, and the commercial context in which the contract was formed.

It is important to note that some types of agreements, such as social or domestic agreements, may not have the necessary intention to create legal relations, even if they meet all of the other requirements for a valid contract. This is because these types of agreements are typically not intended to create legal obligations.

> "The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound."
>
> *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 37

Ultimately, in determining intention, the courts use the "reasonable person" as an objective test to assess whether the parties' conduct, and communications demonstrate an intention to create legal relations. The court asks whether a reasonable person in the position of the offeree would have believed that they intended to enter into a legally binding agreement. If the answer is yes, then the court will find that the parties had the necessary intention to create legal relations.

Example – Understanding Intention to Create Legal Relations

Imagine a scenario. Thi promises to pay her friend Elijah $500 for mowing her lawn. If Elijah accepts Thi's offer, then the reasonable person would believe that the parties intended to enter into a legally binding agreement. Thi would be legally obligated to pay Elijah the $500.

On the other hand, if Thi jokingly tells Elijah that she will pay him $500,000 to mow her lawn, and Elijah laughs and says, "yeah right," then the reasonable person would not believe that the parties intended to create a legally binding agreement. As such, Thi would not be legally obligated to pay Elijah the $500,000.

The difference in answer between these two scenarios is the idea that a reasonable person, viewing the circumstances objectively, would not expect the latter situation to be a genuine intention to craft a legal relationship.

Capacity to Enter a Contract

Another requirement for contractual enforceability is that the parties both have legal capacity. Generally, capacity to enter into a contract means that a person must be legally able to understand the terms of the contract and the consequences of entering into it. It is obvious that courts should not enforce a bargain between two parties if one or both of them do not have the legal ability to understand it.

Issues where one or both parties do not have capacity can emerge in a few potential scenarios, including where a party is a minor, intoxicated by drugs or alcohol, or suffering from a mental impairment that would prevent them from understanding the nature of the contract. Each of these circumstances will flag a capacity concern and may result in the contract being unenforceable.

Minors

A minor is considered to be a person who is under the age of majority and therefore, does not have the legal capacity to enter into a contract. This means that if a minor enters (or signs) a contract, the contract is not legally enforceable against the minor.

An initial discussion though, is what is the age of majority? The answer is that the age of majority varies from province-to-province. Each province has passed its own laws determining at what age a minor becomes an adult. The following chart outlines the age of majority across the provinces and territories:

- **18 Years Old** – Alberta, Manitoba, Ontario, Prince Edward Island, Quebec, Saskatchewan
- **19 Years Old** – British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Yukon

For circumstances involving Federal jurisdiction or Federal laws, the age of majority is set at 18.

Minors in British Columbia

Contracts with minors in British Columbia are influenced by two separate statutes:

AGE OF MAJORITY ACT

[RSBC 1996] CHAPTER 7

INFANTS ACT

[RSBC 1996] CHAPTER 223

The Age of Majority Act is what determines that the age of majority is 19 years of age in the province. However, the Infants Act is what states the effect of being an infant/minor on the contract.

Section 19(1) of the Infants Act begins by stating the following:

> Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her ...

What this means is that, if an adult in British Columbia entered into a contract with an individual under the age of 19, that contract is unenforceable against the infant. For example, if the seller of a vehicle sold it to someone who was 18 years old, this contract is unenforceable against the 18-year-old. That being said, there are a number of caveats or exceptions that general rule.

A first caveat to the section 19 unenforceability rule deals with who is attempting to enforce the contract. Section 19(2) of the Infants Act states that:

> a contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

Therefore, the minor is permitted to enforce the terms of the contract with an adult even the adult would not be permitted to enforce the terms of that same contract against the minor.

> Section 19(1) of the Infants Act goes even further in carving out specific situations where a contract with a minor will be enforceable. These situations are listed in 19(1)(a)-(d) and state that a contract with a minor can be enforced if:
>
> (a) the contract is specified under another law to be enforceable against an infant;
>
> (b) the contract is affirmed by the infant after they reach the age of majority,

(c) the contract is performed or partially performed by the infant within one year after they reach the age of majority;

(d) the contract is not repudiated (cancelled) by the infant within one year after they reach the age of majority.

Despite some of the complexity in language, if any of those exceptions apply then the contract with the minor is legally enforceable against that minor.

Section 19(a) revolves around situations where other provincial laws have expressly stated that a contract with a minor is valid. For example, a contract for residential tenancies can still be enforced against the minor even though they were a minor at the time of contract formation. Section 19(a) allows the government flexibility to institute laws which are still binding on minors.

Section 19(b) deals with scenarios where the minor reaches the age of majority (19 years old in BC). At that point, the minor has the option to affirm or ratify a contract they entered into when they were a minor. If the individual chooses to affirm the contract after turning 19, it becomes binding and valid. For example, if a person signed a contract to lease an apartment when they were 17 years old, they can choose to affirm the contract and continue living in the apartment after reaching 19. That tenancy agreement is now valid.

Under section 19(c), if a contract was entered into by a minor and they start fulfilling their obligations under the contract within one year after reaching the age of majority, the contract becomes valid. For instance, imagine a minor signed a contract for a gym membership. When they turn 19 and go to the gym for a workout, their partial performance of the contract obligations would validate the contract.

Lastly, section 19(d) states that if a minor reaches the age of majority and does not explicitly repudiate or cancel the contract within one year, the contract would be considered valid. For example, imagine if a minor entered into a gym membership contract and never used it between them turning 19 to then 20 years of age. They would have the ability to get out of the contract between their 19 and 20th birthday. However, after turning 20, the contract would be considered legally binding. Therefore, minors should cancel any contracts before turning the age of 20 (unless they have already affirmed or partially performed).

Ultimately, businesses in BC should always confirm the age of the other contracting party or get a co-signor or guarantor for the contract.

Myth-Busting

Myth: "In British Columbia, I can enforce a contract if the other party has signed it."

Incorrect. If a contract with a minor is entered, the adult cannot enforce it per the terms of the Infants Act.

To avoid a scenario where the business does not have a valid contract with anyone, they should always ask the minor to provide an adult co-signor or guarantor for their contractual obligations. By having an adult co-signer, the contract gains an additional layer of legal enforcement. If the minor fails to fulfill their obligations under the contract, the adult co-signer can be held accountable for breach of the terms even if the contract could not have been enforced against the minor.

In terms of risk management, always secure a co-signor when age is in question.

Mental Incapacity

In order for a contract to be enforceable, both parties must have the mental capacity to enter into it. If a contracting party is suffering from a mental illness, disability, disease, aging, or other condition that affects their ability to understand and make decisions about the contract then the contract will not be enforceable.

In provinces like British Columbia, the law starts with a presumption of capacity for adults. Indeed, section 3(1) of the Adult Guardianship Act, R.S.B.C., c. 6 in BC states that:

Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

As such, all adults are presumed to have legal capacity to enter into contracts unless some other evidence is shown to override that presumption.

Where there are concerns about mental incapacity, the court can step in and determine whether an individual had capacity to make legal decisions. If it is determined that an individual lacked the necessary capacity to enter into a particular agreement, the court may declare the arrangement or relationship null and void.

Legal Test for Mental Incapacity

The test for determining mental capacity often falls to an assessment of two factors:

1. whether the individual has the ability to understand the nature of the contract; and
2. whether the individual has the ability to understand the contract's specific effect in the circumstances.

iFinance Canada Inc. v. B.M., 2021 BCCRT 164 at paras. 27-28.

Ultimately, the court has to determine whether the individual is capable of processing and assessing information about the contract; this is at the heart of the factual analysis of capacity. If one party lacks the required mental capacity, the contract would be deemed unenforceable.

Intoxication

The final area where capacity can be problematic is where one party is intoxicated by drugs or alcohol. If a person is intoxicated to the point where they lack the capacity to understand the nature and consequences of the contract, they may be able to argue that the contract is unenforceable.

Legal Test for Intoxication

Generally, for a contract to be voidable because of intoxication, the court must be satisfied that:

1. the intoxication affected the party's ability to understand and agree to the terms of the contract; and that
2. the other contracting party was aware that the party was intoxicated

Davis v. Cooper, 2010 ONSC 4230 at paras. 21.

Firstly, was the intoxication severe enough to impair the person's judgment, perception, or ability to reason? For example, suppose that a person enters into a contract to purchase a car while heavily intoxicated. If it can be shown that the person did not understand the terms of the contract or that their judgment was impaired, the contract would be voidable.

As to the second part of the test, the other party to the contract must know or should have known that the contracting party was intoxicated. When the party is aware of the intoxication and enters the contract anyway, it appears as if they are taking advantage of it in a way that should render the agreement unenforceable.

An interesting example of intoxication is the SCC case of Bawlf Grain Co. v. Ross, (1917) 55 SCR 232.

Foundational Law – *Bawlf Grain Co. v. Ross,* (1917) 55 SCR 232

This case involved a dispute over the sale of wheat between Bawlf Grain Co. and Ross, a farmer. Ross had been drinking heavily on the day he agreed to sell his wheat to Bawlf Grain Co., and later claimed that he was too intoxicated to have formed a binding contract.

The case turned on whether Ross was capable of understanding the nature and consequences of the contract at the time it was made.

Ultimately, the court held that Ross was not too intoxicated to have formed a binding contract. While he had been drinking, he was still capable of understanding the nature and consequences of the contract. The court noted that Ross had experience with similar contracts in the past and that the contract in question was not overly complex. Therefore, the contract between the parties was valid.

Consent

Given that contracts are about the voluntary undertaking of obligations, it's no surprise that parties must freely and unconditionally consent to the contract terms. While consent can often be understood in terms of capacity, consent can also be problematic in situations where one party feels threatened (duress) or pressured (undue influence) into a deal.

Duress

Duress refers to the use of force, coercion, or threats to induce someone to enter into a contract against their will. If a contract was entered into under duress, it may be considered voidable.

Duress can take many forms, including both physical duress and economic duress. Physical duress refers to situations where physical force or the threat of physical harm is used to compel someone to act against their will. For example, if someone is physically restrained and threatened with harm unless they sign a contract, this would be an example of physical duress. On the other hand, economic duress refers to situations where someone is forced to agree to a contract or make a transaction due to economic pressure or threats. For example, if someone is threatened with harm to their business unless they agree to a contract with unfavourable terms, this would be an example of economic duress.

Undue Influence

While duress relates to threats, undue influence is about pressure. Undue Influence refers to the use of excessive or improper pressure on an individual to enter into a contract. This pressure can come in many forms, including emotional, physical, or psychological manipulation, or a position of power or authority over the individual.

> "Because the essential notion of a contract is based upon free consent by the parties to it, relief must be given by the courts from contracts procured by improper pressure … Such a rule is obviously needed; what is more difficult is to draw the line between improper pressure which will render a contract voidable, and the various inducements and predicaments which operate every day to induce people to enter into contracts which they would rather they did not have to make; indeed the line is probably impossible to describe in general terms."
>
> *Ermineskin Cree Nation v. Foureyes*, 2005 ABQB 522 at para. 20

It is important to note that not all forms of persuasion or influence will be considered undue. In order for a court to find that undue influence was present, the pressure or coercion must have been such that it overwhelmed the individual's ability to make a free and informed decision.

Legal Test for Undue Influence

More specifically, the legal test for undue influence typically requires proving the following:

1. there is a relationship of dependency (such as solicitor and client, parent and child and guardian and ward);
2. the contract is unfair in the sense that a party was unduly burdened or disadvantaged; and
3. the party claiming undue influence must show that the other party exercised a pervasive influence through manipulation, coercion, or abuse of power.

D.L.G. & Associates Ltd. v. Minto Properties Inc., 2014 ONSC 7287 at paras. 96.

For example, imagine there is a landlord is in a position of power over a tenant who is desperate for affordable housing. The landlord then forces the tenant to sign a lease agreement with unfair terms that are heavily in favor of the landlord. In this case, the court might find that there was an inequality of bargaining power between the parties, and that the landlord used their power to obtain an unfair advantage over the tenant, thereby exerting undue influence. Another example would be a lawyer persuades a vulnerable client to sign a document that transfers a significant portion of their assets to the lawyer without adequate explanation or advice.

Legality

To introduce the final element of enforceability of a contract, let's consider the following news story out of the state of Kansas in the United States:

Convicted Kidnapper Sues His Victims for Breach of Contract

BY DEBRA CASSENS WEISS

NOVEMBER 30, 2011, 2:51 PM CST

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A convicted kidnapper in Kansas has filed a pro se lawsuit against his victims alleging they breached an oral agreement to hide him from police in exchange for an unspecified amount of money.

Should the court enforce a contract between a kidnapper and the kidnapped involving the exchange of money in return for helping hide from the police? The answer is obviously, no. However, looking at the contractual elements we have canvassed so far, they are all met, nothing fails. Enter the concept of legality.

For a contract to be enforceable there must be legality of the subject-matter. A contract to do something illegal will generally be void and have no legal effect.

There are several types of contracts that may be considered illegal, including contracts that involve illegal activities and contracts that are against public policy. For example, a contract to purchase illegal drugs would be illegal because the subject matter of the contract is illegal.

Chapter 5 - Review Questions

1. What is the difference between an agreement and a contract?
2. Does a contract need to be in writing to be enforceable?
3. What are the essential elements of a valid contract in Canada?
4. What are the different types of offers?
5. What is "consideration" in a contract?
6. What happens if one party lacks the mental capacity to contract?
7. Can I enforce a contract signed by a minor?
8. What is "duress" in contract law, and how does it affect enforceability?

Multiple Choice Quiz

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Chapter 6: Contract Law in Canada
Part II: Defective Contracts

Learning Outcomes:

1. Identify the legal principles related to defective contracts, such as misrepresentation, mistake, non est factum, and unconscionability.
2. Analyze and apply the different types of mistakes and their effect on the enforceability of contracts.
3. Understand the doctrine of non est factum where a party mistakenly signs a contract without understanding its nature or terms.
4. Recognize the concept of unconscionability and evaluate its significance in determining the fairness and enforceability of contracts.

Just as a puzzle requires every piece to come together to form a cohesive image, a contract relies on all its components to create a legally binding agreement. A contractual defect occurs when an essential element is absent or flawed, rendering the contract incomplete or invalid. Without that final missing piece, the puzzle remains unfinished, just as a contract with a defect lacks the necessary completeness to be fully effective.

In this chapter we will examine the numerous defects which affect contractual enforceability. Most notably we will deal with misrepresentation, mistakes, and unconscionability.

Misrepresentation

Parties often make a variety of statements in the lead-up to a contract. Pre-contractual representations are statements made by one party to another before a contract is formed that are intended to be relied upon by the other party in deciding whether to enter into the deal.

Importantly, pre-contractual representations do not become terms in the contract, though they remain extremely important in law. If a pre-contractual representation turns out to be false, the party that made the representation may be liable for committing "misrepresentation" and owe damages to the mislead party. In some cases, misrepresentation can also lead to the unwinding of the contract which is legally known as rescission.

As a starting point, misrepresentation refers to a false statement of fact made by one party to another party which has the effect of inducing that party into the contract. The statement does not need to be intentionally false to establish misrepresentation; if the person making the statement honestly believed it to be true, but it was in fact false, it can still be considered a misrepresentation.

What can be challenging about misrepresentation is the fact that, under common law, there are different types of misrepresentation including: innocent, negligent, and fraudulent misrepresentation. Each of these three types has its own legal test which the plaintiff must prove to establish liability.

Innocent Misrepresentation

Innocent misrepresentation occurs when a party makes a false statement without knowing it to be false, and without intending to deceive the other party. Accordingly, a party who innocently misrepresents the facts can be liable even though there was no intent to mislead or even carelessness on their part.

Legal Test for Innocent Misrepresentation

The legal test for innocent misrepresentation is the following:

1. a positive misrepresentation of an existing fact by the other party;
2. made with the intention that the plaintiff should act on it;
3. the representation must have induced the plaintiff to enter into the subject agreement;
4. the plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract;
5. no innocent third parties must have acquired rights for value with respect to the contract property; and
6. it must be possible to restore the parties substantially to their pre-contract position.

Le Soleil Hospitality Inc. v. Louie, 2015 BCSC 2372 para. 32

If the full legal test is met, the innocent party may be entitled to rescind the contract and seek damages for any losses suffered as a result of the misrepresentation.

Myth-Busting

Myth: "I can only be sued if I lie, not if I'm just wrong"

Incorrect. Innocent misrepresentation allows claims against a party for stating false facts, not necessarily lying. When a party represents something that is false, even if they genuinely believe it to be true, they are still committing innocent misrepresentation.

For example, I offer to sell you my laptop and represent that it is has an 8th generation computer processor chip — I represent this because I genuinely and honestly believe that. If the processor is actually a 7th generation, I have misrepresented you.

In terms of risk management, always ensure that before you represent a fact, make sure it is 100% correct.

As an example, imagine a person selling a used car honestly believes that the car has never been in an accident, however they later discover that it was in fact involved in a minor accident. The seller had no intention of misleading the buyer, and genuinely believed that the car had never been in an accident however, since that statement is false, the seller has still committed an innocent misrepresentation.

Given that intent or negligence is not required, parties need to be incredibly careful about the representations they give in the lead-up to a contract.

Negligent Misrepresentation

Negligent misrepresentation refers to a false statement or representation made by a party who ought to have known that the statement was false, and which was made with the intention of inducing another party to enter into a contract or take a particular action.

Legal Test for Innocent Misrepresentation

The legal test for negligent misrepresentation is the following:

1. Is there a duty of care based on a "special relationship" between the representor and representee?
2. Is the representation in question inaccurate, untrue, or misleading?
3. did the representor act negligently in making that representation?
4. did the representee rely, in a reasonable manner, on that representation?
5. did the representee incur damages as a result of that reliance?

Queen v. Cognos Inc., 1993 CanLII 146 para. 65

If the plaintiff can successfully establish a claim of negligent misrepresentation, they may be entitled to damages to compensate for any losses suffered as a result of the misrepresentation.

For example, imagine a real estate agent who fails to do their appropriate diligence in searching the property records and incorrectly represents to the buyer that the property is free of liens and encumbrances. Assuming the buyer moved forward with the purchase and later discovered some charges or liens on the property, they could sue the real estate agent for negligently misrepresenting the clean title of the property. Importantly, it is no defence for the real estate agent to state that they did not intend to mislead, they were careless in making a false statement.

Foundational Law – *Queen v Cognos Inc.*, [1993] 1 SCR 87

Cognos Inc., a software company, was looking to hire a new accountant to work on a major project which the company had recently landed. During the job interview, the manager of product development made representations about the project's funding and that it would be for a relatively stable duration. Queen, a chartered accountant, accepted the job offer based on these representations and signed an employment contract.

Queen later discovered that the project actually faced significant funding challenges, and shortly after he was hired, he received notice of his termination. Queen filed a lawsuit against Cognos, alleging negligent misrepresentation. The trial judge ruled in favor of Queen, stating that Cognos

had a duty not to misrepresent the project's security to applicants when it was aware of funding uncertainties.

The Supreme Court of Canada upheld the trial judge's decision, emphasizing that the pre-contractual representation about the project's funding was negligently given. Cognos had a duty not to misrepresent the project's security when it knew or should have known about the uncertainties involved. The court concluded that Queen was entitled to damages for the loss suffered due to the reliance on the misrepresentation.

Fraudulent Misrepresentation

The last form of misrepresentation is fraudulent misrepresentation. Unlike the other forms of misrepresentation where intent is not involved here, intent to deceive becomes a central requirement. Fraudulent misrepresentation occurs when a party makes a false statement intentionally, with the intent to deceive the other party, and the misled party relies on it to their detriment.

Legal Test for Fraudulent Misrepresentation

The legal test for fraudulent misrepresentation requires that the plaintiff prove the following:

1. the defendant made a representation of fact to the plaintiff;
2. the representation was, in fact, false;
3. the defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
4. the defendant intended the plaintiff to act on the representation; and
5. the plaintiff relied upon the false representation and thereby suffered a detriment.

Manning v Dhalla, 2018 BCSC 2148 para. 33

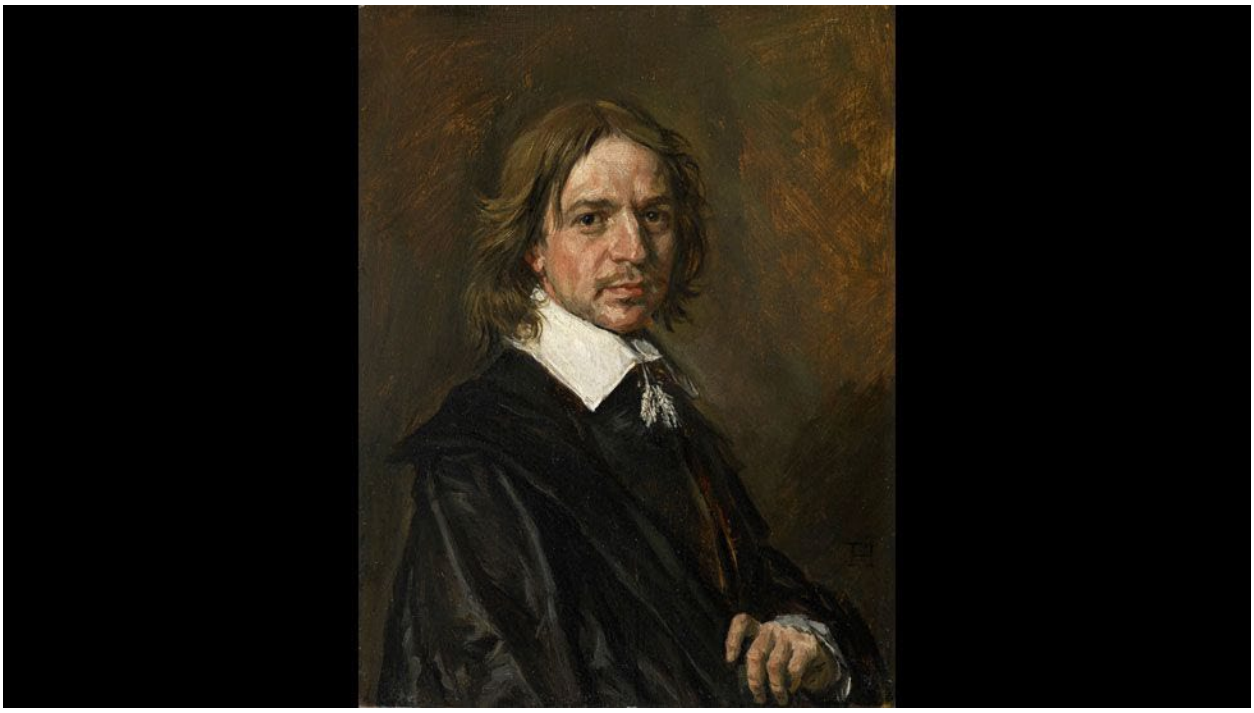
For example, in a bid to attract new investors, a company's CEO falsely tells six high-worth individuals, that the company has secured a large contract with a major corporation. Relying on his representation, the six individuals invest $1,000,000 each into the company. Later, the six investors discover that the contract did not exist, and the company has no real prospects for generating profits. The investors would sue the CEO for fraudulent misrepresentation because of the clear intent to deceive.

Mistake

It is not always the case that the parties have a full and correct understanding of the contract. Given the variety of statements that are exchanged and negotiations between the parties, it is possible that one or both of the parties may make a mistake about the contract.

For example, consider the case of parties entering into a transaction to purchase a piece of rare artwork. Unfortunately, the specific piece of art turns out to be a forgery. This has certainly happened in the past:

A 'fake' painting that sold for £8.4 million heads to court over allegations of forgery



What should happen in the case of this transaction? Is the contract valid? Does it matter if neither party knew about the forgery?

Ultimately, there are several types of mistakes that can occur in a contract; they are classified as either common, mutual, unilateral, or non est factum. The distinction between the mistake depends on how many of the parties are under a mistaken assumption and if they share the same mistake. We will explore each of those types below.

Common Mistake

The doctrine of "common mistake" refers to a situation where both parties to a contract make the same fundamental error or share a mistaken assumption regarding a material aspect of the contract. This mistake must relate to a basic assumption upon which the contract was made, and it must be a mistake that would have a significant impact on the obligations and performance of the contract. If a contract is affected by a common mistake, the contract will be void and unenforceable.

For example, suppose a buyer is interested in purchasing a rare antique painting, and they approach a seller to negotiate a purchase. During their discussions, both parties mistakenly believe that the painting is an original work by a renowned artist. Based on this shared belief, they agree on a purchase price of $100,000. However, after the contract is executed, it is discovered that the painting is actually a high-quality reproduction and not an original artwork. Both the buyer and the seller were unaware of this fact at the time of entering into the contract; as a result of this common mistake, the contract would be void.

Mutual Mistake

A mutual mistake occurs when both parties to a contract make a different mistake about a fundamental aspect of the contract.

For example, imagine if two parties enter into a contract for the sale of a painting. The parties later discover that they were each mistaken about the transaction: one party believed the painting was from painter "Artist A" and the other believed it was from "Artist B". As a result of the different mistakes, the parties have not achieved a consensus, and the contract will be void.

One prominent example of a mutual mistake is the case of Raffles v Wichelhaus, [1864] EWHC Exch J19.

Foundational Law – *Raffles v Wichelhaus,* [1864] EWHC Exch J19

Raffles, the plaintiff, agreed to sell a shipment of cotton to Wichelhaus, the defendant. A key term in the contract was that the goods were to be delivered on the "ship Peerless from Bombay." However, both parties were unaware that there were two ships named Peerless, both scheduled to depart from Bombay (now properly referred to as Mumbai) – one in October and the other in December.

When the cotton arrived in Liverpool, Wichelhaus refused to accept it, claiming that there was a mistake in the contract. Raffles argued that the contract was binding and that he had fulfilled his obligations by shipping the cotton on a ship called Peerless.

The English court held that there was a mutual mistake in the contract. They emphasized that for a contract to be binding, there must be a meeting of the minds between the parties on all essential terms. Since the parties had different ships in mind at the time of the agreement, their minds did not meet, and there was no consensus as to the subject matter of the contract. The court declared the agreement void because the mutual mistake regarding the identity of the ship undermined the common intention of the parties.

Unilateral Mistake

A unilateral mistake occurs when only one party to a contract makes a mistake about a fundamental aspect of the contract. For example, suppose that a seller agrees to sell a painting to a buyer for $1,000, believing that the painting is a copy of an original work by a famous artist. The buyer, however, knows that the painting is the original work and is worth $1,000,000. The buyer and the seller enter the contract. Should the seller's mistake be relevant?

One form of unilateral mistake is where a party is mistaken about the identity about the other contractual party. Mistaken identity occurs when one party to the contract is under the mistaken belief that they are entering into a contract with a different person. This can happen when one party uses a false name, or when one party is unaware of the true identity of the other party.

Legal Test for Unilateral Mistake

The legal test for determining whether the mistaken party can void the contract due to the mistake of mistaken identity requires the following to be proven:

1. A thinks they have agreed with C because they believe B, with whom they are negotiating, is C;
2. B is aware that A did not intend to make any agreement with them; and
3. A has established that the identity of C was a matter of crucial importance.

Shimoyama v. Frizzell, 2011 BCSC 446 para. 27

If the mistaken party can satisfy the legal test, they may be able to void the contract due to the mistaken identity.

Non Est Factum

Non est factum is a legal defense that is used in cases where an individual who has entered into a contract claims that they did not understand the terms or nature of the agreement at the time that it was signed. The principal behind non est factum is that if a person did not fully understand the nature or consequences of the contract, they should not be held responsible for it.

"Non Est Factum" = "This is Not My Deed"

Legal Test for Non Est Factum

To successfully assert the defense of non est factum, two main elements must be proven:

1. the person invoking non est factum must show that the document signed is fundamentally different from what the person believed they were signing; and
2. the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document.

Farrell Estates Ltd. v. Win-Up Restaurant Ltd., 2010 BCSC 1752 at para. 100

As to the first part of the legal test, minor differences in a contract would not be considered a fundamental or radical difference in what was agreed. For example, if a party believed that they would be purchasing 30 crates of tomatoes from the seller, but instead, the contract specifies only 29 crates of tomatoes, this would not be a sufficient enough difference to rely on non est factum to void the contract. On the other hand, if the buyer believed it was a contract to purchase 30 crates of tomatoes when, in actuality, the contract is one which is for the sale of their home, this would be a radical difference permitting non est factum.

Secondly, a person who purports to rely on the defence of non est factum cannot be careless in failing to read the contract or taking steps to understand it. It makes sense that a party who fails to try to understand their agreement should not later be able to void the transaction. Accordingly, parties must act with diligence in reviewing their contracts prior to executing them.

Successfully relying on non est factum can be challenging however, there have been a few cases where it has been used to void a contract. One of the more interesting cases is the Ontario Superior Court of Justice case of Sutton Group-Admiral Realty Inc. v. Taborovska, 2021 ONSC 2837.

Foundational Law – *Sutton Group-Admiral Realty Inc. v. Taborovska,* 2021 ONSC 2837

The Sutton-Group case involved a real estate agent, Pavlo Antonenko, who worked with the plaintiff couple to find a house for their daughter, Ganna, who lived in Ukraine. Ganna signed a "representation agreement" with Antonenko on November 12, 2018. The representation agreement entitled the agent to a 2.5% commission on any single-family home Ganna bought in the Greater Toronto Area between November 12, 2018 and March 11, 2019.

Ganna's father, who did not know enough English to read the offer documents, spoke with the Antonenko for about an hour on the night the representation agreement was signed. There was conflicting evidence on the facts as to if Ganna was also involved in that conversation. The judge ultimately found that it was more likely that Ganna was not involved in the conversation and therefore, the agent did not explain what the contract said with regards to the commission amount if Ganna bought a different home through another agent during the contract period.

Ganna made an offer on a Toronto property through a different real estate agent which was accepted and closed on January 4, 2019. After learning of this, the Agent then demanded the 2.5% commission on the Toronto property transaction that they alleged was owed under the representation agreement. In response, Ganna alleged that the contract was void because of non est factum.

The court stated that the Antonenko had mislead Ganna and her father about the representation agreement and that the agent had failed to explain the documents to both. Additionally, Ganna was found to not be careless when she signed the representation because she relied on the information she received from the agent through her father as the basis of her understanding of the documents.

In the end result, Ganna's reliance on non est factum was successful and she was able to void the contract. As such, no commission was owed on the property purchase under the representation agreement with the agent.

Unconscionability

A final defect that can affect enforceability is unconscionability. Unconscionability is where a contract or contract term is so one-sided or oppressive that it is considered commercially, morally, or ethically wrong. Where a contract is found to be unconscionable, it would be void and therefore, could not be enforced. Not every bad bargain will be unconscionable or allow the party to void the deal. Rather, the party alleging unconscionability will be required to satisfy a specific legal test.

Legal Test for Non Est Factum

In order to rely on unconscionability, the party asserting it must prove the following elements:

1. there must be an inequality of bargaining power between the contracting parties, and
2. the contract must be an "improvident" bargain.

Uber Technologies Inc. v. Heller, 2020 SCC 16 at para. 64

As to the first component, it requires that there be a power imbalance between the parties such that there is a vulnerability of the weaker party to the stronger. Given the power imbalance, the weaker is not sufficiently capable of protecting their own interests. For example, if a consumer is dealing with a large corporation that has extensive legal resources, the consumer may be at a significant disadvantage in negotiating the terms of a contract.

The second element (improvidence) requires that the transaction between the contracting parties be substantially unfair. An improvident bargain is one that, when viewed on balance of reasonableness, its terms are clearly unfair. For example, imagine a lender gives an individual a

$500 loan however, the fees for the loan amount to over $700. Given that the fees for the loan are actually greater than the loan itself, this would be an improvident bargain.

As another example, imagine a buyer who is in desperate need of a car to get to work. He finds a car dealership that offers him a loan to buy a car, but the terms of the loan are extremely unfair. The interest rate is 70%, and if the buyer misses a payment, the dealership can repossess the car immediately without any notice or chance to cure the default. In this case, the objective terms of the contract are substantially unfair and could give rise to an argument of unconscionability to void the contract.

One of the landmark Canadian cases dealing with unconscionability is the SCC case of *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

Foundational Law – *Uber Technologies Inc. v. Heller*, 2020 SCC 16

The Uber case involved Joseph Heller who was an Uber driver and Uber Eats delivery driver. Heller attempted to bring a class action lawsuit against Uber in Ontario Superior Court alleging that the company had misclassified their drivers as independent contracts rather than employees (to be discussed later in the "Employment Law" chapter of the textbook).
In response to the lawsuit, Uber argued that Heller was not permitted to file a lawsuit in Ontario since the standard employment contract signed by Uber drivers required all disputes to be resolved through mandatory arbitration in the Netherlands. Here was the clause that all drivers were required to agree to:

> ***Governing Law; Arbitration***. Except as otherwise set forth in this Agreement, ***this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws***. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. ***The place of arbitration shall be Amsterdam, The Netherlands***. . .[16] (emphasis added).

In order to start the arbitration in the Netherlands, drivers were required to pay an upfront non-refundable fee of $14,500 USD. This arbitration fee was essentially Heller's entire annual earnings from Uber. Heller argued that the mandatory arbitration clause was unconscionable and therefore, void.

In its decision, the SCC highlighted both the policy rationales of unconscionability and the importance of ensuring a party has access to seeking legal resolutions:

> the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" ... Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account
> ...
> Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty.
> ...
> It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak.
>
> *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 111 and 112

In its decision on the merits, the majority of the SCC held that Uber possessed an unequal bargaining advantage over the driver. The contract between the company and driver was a contract of "adhesion" (standard form for all drivers) and there was no prospect of negotiating different term. Additionally, the contract was an improvident bargain because the requirement to pay $14,500 USD was effectively a bar to the drivers ever being able to pursue arbitration and ultimately, get a legal remedy. As such, the Uber arbitration clause was struck down as unconscionable and ruled unenforceable.

Chapter 6 - Review Questions

1. What is a defective contract?
2. Can a statement made before signing a contract affect its validity?
3. What are the different types of misrepresentation and their implications?
4. What happens if both parties were mistaken about something in the contract?
5. Can a contract be voided if only one party was mistaken?
6. What is 'non est factum' and when can it be used?
7. What makes a contract "unconscionable"?
8. Can you provide an example of an unconscionable contract?

Multiple Choice Quiz

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Chapter 7: Contract Law in Canada
Part III: Ending a Contract

Learning Outcomes:

1. Understand the importance of contractual performance.
2. Identify situations where both parties may agree to terminate a contract by mutual consent.
3. Define frustration of a contract and recognize circumstances that may lead to it.
4. Analyze the consequences of a breach of contract for both the breaching party and the non-breaching party.
5. Understand the remedies available to the non-breaching party in cases of breach.

Introduction

When do parties to a contract get out of that contract? When do they cross the finish line of their contractual obligations? That is a surprisingly fulsome question and the subject of this chapter.

A contract, even if enforceable, will not continue on indefinitely; the life cycle of a contract has to include its end. What can sometimes be difficult to determine though is, how exactly was the contract brought to that end?

There are a number of different ways in which contractual obligations can be ended:

1. performance of the contractual obligations;
2. by mutual agreement;
3. as a result of a frustrating event; and
4. upon the breach of the contract.

Each of these forms requires different actions by the parties or different determinations by the law to fully discharge the parties from their obligations.

A key question is not just how the contract is alleged to be ended, but whether it actually was ended. Parties can intend to bring a contract to an end or think they have brought it to an end when, in actual fact, the contract may remain in place and still be enforceable. Therefore, the parties need to be precise and accurate about how their contractual obligations were ended and when that was effective.

Contractual Performance

The most common form of terminating a contract is where the parties completely satisfy their contractual obligations. Once both of the contracting parties have fulfilled their obligations then the contract is over.

Assuming the contract has been fully performed, the contract would still have effect for purposes of resolving later controversies or disputes between the parties however, no further obligations would arise. For example, if a construction company has finished building a house for a homeowner, the contract between the parties would come to an end assuming full and final payment is made. However, the contract between the parties would still persist and still be relevant for some purposes like determining if there were deficiencies in the construction and what the homeowner can do about it.

Substantial Performance

Common law also permits arguments on the basis of substantial performance. Substantial performance refers to a situation where a party to a contract has fulfilled the majority of their obligations under the contract, but there may be minor or immaterial deviations or defects in that performance. Despite these deviations, the party's overall performance is still considered to be sufficient and therefore, performed.

Substantial performance is often invoked when there is a minor breach of contract, meaning that the party has not fully complied with all the terms and conditions of the contract. However, the breach is not significant enough to undermine the purpose of the contract or deprive the other party of the benefits they expected to receive.

If the court finds that substantial performance has been achieved, the non-breaching party is still obligated to pay the performing party for their work. However, the non-breaching party may be entitled to damages or a reduction in payment to account for any remaining deficiencies or defects.

Mutual Agreement

Contracts are built on the notion of agreement and consensus. Whether a contract is enforceable demands that the parties reach a clear agreement. Well, if a contract can be made by agreement, should it not also be able to be ended by an agreement?

Parties to a contract may wish to mutually agree to bring their contract to an end. When a contract is successfully ended by agreement, it discharges the contract, and the parties are released from their contractual obligations. However, it is once again imperative that the parties fully satisfy the legal requirements to actually end the contract.

As an opening note, there is a myriad of ways in which a contract can be ended by mutual agreement. Sometimes this discharge requires contractual terms in the first agreement and, other times it involves the parties reaching a new agreement to discharge the first.

Contractual Terms Providing for Termination

When parties enter into a contract, they have the flexibility to include specific provisions regarding the termination of that contract. These discharge provisions outline the circumstances under which either party can end the contractual relationship. Most commonly, we see options to terminate, and conditions expressed in the contract by the parties.

> "A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms."
>
> Anson's Law of Contract, 20th Ed., 310-11

I. Options to Terminate

An option to terminate allows one party or both the ability to terminate the contract by exercising the option. Provided the party wishing to exercise their option does so in complete compliance with the option language then the contract will be discharged. No further obligations will be owed.

Options to terminate future prominently in many types of contracts such as professional sports contracts, real estate purchases, employment contracts, and tenancy agreements.

For example, imagine a tenant and landlord enter into a lease agreement for a commercial property with a term of three years. However, the lease includes an option to terminate allowing the tenant to bring the lease to an end after the first year if the tenant's business is not meeting certain profitability thresholds.

The precise language of that option could be:

> If the Tenant's sales revenue fails to reach or exceed $500,000 within the first [12] months of the lease term, the Tenant shall have the right to terminate this lease agreement by providing written notice to the Landlord within [30] days of the end of such period. The notice shall specify the date on which the termination will take effect which shall not be earlier than [30] days nor later than [60] days from the date of the notice.

After the first year of the lease, the tenant's business is struggling, and they decide to exercise the option to terminate the lease. What the tenant has done is successfully exercise the contractual option to terminate. There is no breach of the lease, it was ended by the exercise of the option.

It is important to remember that options allow the contractual party the choice to end the contract and, in so doing, will avoid claims that they have not performed their contractual obligations. A party objecting to the discharge of the contract will have limited legal arguments as they had initially agreed to the option to terminate when the contract was first accepted.

II. Condition Subsequent Clauses

Condition subsequent clauses are less about the choice of the contracting parties and more about the occurrence of an event. A condition subsequent is a type of term that states the contract will be discharged if certain conditions are met. As such, the parties are only relieved of their contractual obligations if the events stated in the condition subsequent actually occur.

An example of a condition subsequent in a commercial lease would be the following:

> This lease shall terminate automatically and immediately upon the revocation or forfeiture of any necessary license, permit, or governmental approval required to operate the business conducted by the tenant on the premises.

In this example, the lease is discharged not because of a choice by either party but, rather because an event has occurred: the revocation of the necessary licenses or permits.

Given their impacts on the contract, condition subsequent clauses must be clearly stated in the contract in order to be enforceable.

III. Condition Precedent Clauses

Much like condition subsequent clauses, condition precedent clauses rely on events occurring to shape the existence of the contract. However, unlike condition subsequents, condition precedents actually result in the performance of the contract (and not its termination) upon the occurrence of the event.

A condition precedent is an event or action that must occur or be fulfilled before a contract becomes effective or before a party is required to perform their obligations. Often the condition precedent is referred to as "subject to" clauses as the contractual performance is subject to the satisfaction of the event.

If a condition precedent clause is expressed in the contract and the condition precedent event does not occur, the contract is immediately terminated.

For example, imagine the sale of a piece of property. The sale contract might state that it is subject to the buyer receiving satisfactory financing. In this case, the buyer receiving financing is a condition precedent to the performance of the contract. If the buyer is unable to obtain financing, then the parties' contractual obligations are discharged.

Ultimately, even a condition precedent can result in the termination of the contract though, it is because the condition precedent event did not occur.

Reaching a New Agreement to Discharge the Original Contract

While options to terminate and conditions are expressed in the contract between the parties, separate considerations emerge when the parties wish to reach a new agreement to discharge their first agreement. In such a case, the parties are attempting to use contract law principles to affect, modify, or terminate their initial contract.

It turns out that, using a new agreement to change the first, can be a legally complex endeavour. Firstly, it requires the parties to comply with all the requirements for forming a contract: offer, acceptance, consideration, capacity, legality, etc. Should any of those elements not exist then the new or changed agreement will not be valid. Secondly, each of the various ways in which the parties would change or override their initial contract come with different consequences and different names. These names include rescission, accord, variation, novation, release, and waiver.

I. Rescission

Rescission allows the parties to a contract to agree to cancel their contract. It is used when both parties agree that the contract is no longer desirable or necessary and they want to bring the previously enforceable obligations to an end.

Both parties must agree to cancel the contract and provide each other valuable consideration as part of the bargain. When canceling, the consideration used is that each party gives up their rights that existed under the first contract. For example, suppose that a homeowner hires a contractor to renovate their kitchen for $50,000. After the contract is signed, the homeowner discovers that they cannot afford the renovations, and the contractor realizes that they could make more money on a different project. Both the homeowner and the contractor can use rescission to cancel the contract

and, if agreed to, the consideration would be that each party is giving up the promises from the initial contract (renovations and money).

Overall, rescission can be an effective way for both parties to cancel a contract provided that neither party has received any benefit under the first deal.

II. Accord and Satisfaction

Like rescission, an accord and satisfaction refer to a method of discharging a contract by agreement of the parties.

Unlike rescission, accord and satisfaction involves one party accepting something different from what was originally agreed upon in the first contract. To be valid, an accord and satisfaction must be agreed to by both parties and must be supported by consideration.

> "The accord is the agreement to discharge the existing obligation, and the satisfaction is the consideration required to support it."
>
> *Gregov v. Canocean Resources Ltd.*, [1987] B.C.J. No. 2014

For example, imagine if party "A" agreed to build a fence for $5,000 dollars paid by party "B". Unfortunately, due to lumber shortages, there is insufficient materials for the fence. Rather than cancel the contract, party "A" offers to instead do comprehensive landscaping in exchange for the same $5,000 that was originally offered for the fence. Party B agrees. In this case, the parties are exercising the legal right of accord and satisfaction which will replace the first agreement. The old contract for the fence is discharged and the new agreement ($5,000 for landscaping) becomes valid and binding.

Accord and satisfaction can be a useful way to amend a contract when one party has performed their obligation but, the original contract no longer makes sense for the parties.

III. Variation

Assuming the parties wish to make changes to the initial deal, they may use variation or novation. While variation and novation are similar in effect, changing the first agreement, they differ in that novation may result in the substitution of the initial contract.

Variation refers to a change or modification to an existing contract that does not create a new contractual relationship between the parties. In a variation, the original contract remains in force, but the parties agree to amend its terms or conditions. For example, if A and B have a contract for the sale of goods, but the delivery date needs to be changed, they may agree to vary the contract by changing the delivery date without creating a new contractual relationship.

IV. Novation

On the other hand, novation refers to the substitution of a new contract for an existing one. When using novation, the parties agree to replace the original contract with a new one — this extinguishes the original contract and creates a new contractual relationship between the parties.

Typically, novation involves the substitution of one party to the contract with another, such that the new party assumes the obligations and liabilities of the original party. For example, if A contracts with B to build a fence, but B is unable to perform the service, A may agree to novate the contract by replacing B with C, who will now build the fence and assume B's obligations and liabilities under the contract.

V. Release

When there has been a legal dispute between parties, one of the most common documents which is requested is a release. A release is a legal document that acts as a form of settlement in which one party (the releasor) agrees to give up their right to make a claim against another party (the releasee) in exchange for some form of consideration. The consideration can be in the form of money, goods, or services. The release typically specifies the claims being released, the parties involved, and any other relevant conditions.

Releases are often used to avoid the expense and uncertainty of litigation. They can be used to settle a wide range of legal disputes, including personal injury claims, breach of contract claims, employment disputes, and inheritance disputes.

Example – Release

Imagine that someone passes away and there are disputes by the children about various entitlements to that estate. Once a settlement agreement is reached between the children, a release can be executed by all of them to give up their present or future legal claims.

Consider the following release language from *Male v. McKay*, 1996 CanLII 8546 (BCSC):

> "8. Each of the parties hereto hereby releases all claims ... he or she might have to the estate of the other ...
>
> 9. Each of the parties hereto acknowledges to the following:
> (a) this agreement is intended to be a full and final settlement as to property matters and maintenance and each hereby releases the other from all claims which he or she might have against the other ...
> (b) each party has read this agreement carefully and knows well what he or she is signing"

In this case the release has the effect of giving up any legal rights (including contractual ones) that the parties may have had.

In order for a release to be effective, it must be executed by both parties and be supported by adequate consideration (something of value given in exchange for the release). The release must also be clear and unambiguous, and must not be obtained through fraud, duress, or undue influence.

VI. Waiver

A final way in which the contracting parties can end their original agreement is where one of the parties voluntarily and intentionally gives up their legal right. This sacrifice of the contractual rights or claims is referred to as a waiver — the party is waiving their rights. In effect, waiver allows a contracting to give up a legal right that they would otherwise been able to enforce. For a waiver to be legally valid, the party waiving 1) must have had full knowledge of their rights, and 2) had an unequivocal and conscious intention to abandon those rights. The waiver does not need to be in writing to be enforceable.

An example of a waiver could be a landlord waiving their right to charge a late fee for a tenant who has paid their rent a few days late. If the waiver is successfully proven, the landlord's right to collect the late fee would no longer be legally permitted as they have waived that right.

Frustrating Events

What happens if parties enter into a binding contract but, unfortunately, circumstances outside their control make it impossible to move forward with the deal?

For example, imagine a buyer and a seller enter into a contract where the seller agrees to sell a cottage to the buyer for $500,000. The contract specifies that the cottage will be transferred to the buyer's possession by a specific date, and the payment will be made upon the transfer. Both parties want and expect the transfer and payment to take place.

However, just a few days before the scheduled transfer date, an unexpected wildfire breaks out in the vicinity of the property, engulfing the cottage, and destroying it. There is now no possibility of transferring it to the buyer.

How should the law treat the contract? Is the seller still entitled to payment? Should they receive half a payment? Does the buyer just get the land? Or is the contract over because of this unexpected event. All of these questions are the purview of frustration.

Common Law Doctrine of Frustration

The doctrine of frustration relieves parties from their contractual obligations when an unforeseen event occurs that makes the performance of the contract impossible or radically different from what was originally agreed. At the heart of frustration is the idea of fairness — parties should not be penalized when events beyond their control arise and undermine the contract.

> "The doctrine of frustration is a legal mechanism which recognizes that where it is not reasonable to place the risk of a particular event on either party to a contract, that contract and the responsibilities thereunder should be discharged."
>
> *Folia v. Trelinski*, 1997 CanLII 469 (BCSC) at para. 17

Not every event will result in legal frustration of the contract, the necessary legal test must be met.

Legal Test for Common Law Frustration

Common law frustration requires three key elements:

1. the alleged frustrating event must have occurred after the formation of the contract and cannot be self-induced.
2. the contract must, as a result, be totally different from what the parties had intended.
3. the act or event that brought about such radical change must not have been foreseeable.

Folia v. Trelinski, 1997 CanLII 469 (BC SC) at para. 18

If all three elements are present, the contract will be automatically frustrated, and the parties will be released from their obligations without being held liable for breach.

When we speak about unforeseen events, one of the most impactful in modern history was the COVID-19 pandemic which occurred in March 2020 and extended for years. As a result of the pandemic, all levels of governments enacted rules compelling social distancing and, in many cases, resulting in the closure of businesses and venues. It's easy to see how such a pandemic and the resulting governmental responses could trigger claims of contractual frustration.

For example, imagine a couple signs a contract with a wedding venue in Toronto in January 2019, with plans to hold their wedding on June 15, 2020. However, in March 2020, as a result of the COVID-19 pandemic, the government imposes a lock-down that prohibits all public gatherings. Despite the venue and the couple's efforts to reschedule the wedding, the lock-down continues for months, making it impossible to hold the wedding as planned.

In such an example, the wedding venue contract would be frustrated. There was unforeseeable event (the pandemic) that made the performance of the contract impossible. As a result, the contract may be discharged, and the couple would not be in breach of the agreement for walking away.

Foundational Law – *Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934

Verigen was employed as a business development director for Ensemble Travel Ltd. (ETL) from early 2019. In March 2020, in response to the economic impacts of the pandemic on the travel industry, ETL temporarily laid off Verigen and half of its workforce in Canada and the United States.

Verigen's employment contract and ETL's employee handbook did not authorize temporary layoffs. However, Verigen accepted the layoff and subsequently agreed to two extensions of the layoff. ETL ultimately terminated Verigen's employment on August 24, 2020. Verigen brought an action against ETL alleging that she was wrongfully dismissed and sought damages.
ETL argued that the employment contract was frustrated by the pandemic, such that no severance or payment was due and owing to Verigen. Specifically, ETL relied on the global collapse in demand for travel and the loss of market value for the work Verigen was hired to do. Additionally, Verigen's job description called for her to spend up to 50% of her time traveling which she was precluded from doing at times due to public health orders.

The Court concluded that the collapse of the travel market which impacted ETL's ability to fulfill the employment contract, did not constitute a permanent event. It was a temporary situation that affected ETL's performance rather than fundamentally changing the nature of the contractual obligation.

Further, ETL's ability to retain some staff and their recent hiring of a new employee demonstrated that the effects of the market collapse were temporary in nature. As such, the pandemic was not a permanent or insurmountable obstacle for ETL.

Finally, the Court noted that ETL's decision to terminate Verigen (and other employees) as a means to navigate the financial challenges caused by the pandemic indicated that the contract was not frustrated by the pandemic. The termination was a strategic response to weather the financial impact of the pandemic rather than a result of the contract becoming impossible to perform.

Overall, considering the temporary nature of the travel market collapse, ETL's retention of some staff, and their recent hiring, the Court determined that the employment contract was not frustrated by the pandemic.

Force Majeure Clauses

A force majeure clause is a contractual provision that addresses unforeseen circumstances which make the contract impossible to perform. While force majeure clauses and the doctrine of

frustration overlap, they are distinct legal concepts because the clauses are contractual rights while frustration is rooted in the common law.

The purpose of a force majeure clause is to allocate the risk of unexpected events between the parties to the contract. Typically, the clause will excuse the affected party from performance of its obligations under the contract for the duration of the force majeure event. This means that the party will not be liable for any damages or other consequences that arise as a result of its failure to perform. The clause may also specify certain procedures or requirements that the parties must follow in order to invoke the clause.

Example – Force Majeure in a Commercial Lease

The following is an example of force majeure wording found in a commercial lease:

> Force Majeure. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labour troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, military or usurped power, sabotage, unusually severe weather, fire or other casualty or other reason (but excluding inadequacy of insurance proceeds, financial inability or the lack of suitable financing not attributable to any of the foregoing) of a like nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease (herein called "force majeure"), the performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of the delay. The provisions of the preceding sentence however shall not excuse Tenant from the prompt and timely payment of the Rent as and when the same is due under this Lease except when (i) the Commencement Date of the term is delayed by reason of force majeure, or (ii) such payment is excused pursuant to other provisions of this Lease.

While we do not need to concern ourselves about the tenancy specific issues, note how detailed the clause is about the unforeseen events contemplated by the parties.

British Columbia Frustrated Contract Act

In British Columbia, the province has enacted a statute, the Frustrated Contract Act, R.S.B.C. 1996, c. 166 (FCA), to provide clarity on how to treat frustrated contracts. All provinces have a similar statute with the exception of Nova Scotia.

The statute aims to provide a fair and balanced approach to dealing with frustrated contracts. It attempts, as best possible, to avoid placing an unfair burden on only one party, with the hope that losses can be fairly apportion.

Specifically, the FCA provides that any money paid, or property transferred under the contract before the frustrating event occurred may be returned to the party who paid or transferred it. This

means that if one party has paid money or transferred property to the other party under the contract, but the contract is frustrated before the performance is completed, the paying party may be entitled to get their money or property back.

In addition, the FCA provides that any expenses incurred by the parties in the performance of the contract before it became frustrated can be recovered from the other party as a debt. For example, imagine two companies entered into a contract to develop a new software product. However, due to a sudden change in government regulations, the project becomes impossible. The FCA allows the company that incurred expenses in the initial stages of the project to recover those costs from the other party.

Finally, the FCA provides that any losses resulting from the frustration of the contract are to be shared equally between the parties. This means that neither party is responsible for all of the losses that result from the contract's frustration. Instead, the losses are split evenly between the parties.

Breach of Contract

When parties go through the steps of entering into a valid contract, we might assume that they will perform. However, what happens if a contracting party fails to live up to their end of the bargain?

When a party fails to fulfill their obligations under a contract it referred to as breach of contract and the non-breaching party can sue and seek a legal remedy. The burden of proving the contract and its breach falls on the party bringing the legal claim. If a breaching party has a valid excuse for their non-performance (such as some of the previous concepts like frustration, waiver, etc.) then a breach of contract claim may not be successful.

Methods of Breach

Not all breaches of a contract occur in the same way. There is a difference in whether a party breaches through poor performance of their obligations versus those parties who anticipate a future breach of contract.

I. Anticipatory Breach

An anticipatory breach is a statement or action by one of the contracting parties that they do not intend to fulfill their obligations. In such a case, the breaching party is giving advance warning that they will be breaching the contract; this advance notice can be in the form of a verbal or written statement or can be an action that makes it clear they will not fulfill their obligations.

Assuming that a breaching party has provided the advance notice of an intended breach, the non-breaching party does not need to wait for the breach to actually occur. Following notice of the anticipatory breach, the non-breaching party can elect to treat the contract as immediately breached and pursue their legal action.

> "Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due."
>
> G.H.L. Fridman, The Law of Contract in Canada, 6th ed. at pg. 585

For example, imagine Company A agrees to purchase 1,000 widgets from Company B for $10,000 with payment due upon delivery. One week before the scheduled delivery date, Company A sends an email to Company B stating that they will not be able to pay for the widgets and that they want to cancel the order. This would be an anticipatory breach because Company A has made it clear that they will not fulfill their obligation to pay for the widgets upon delivery. In response, Company B could terminate the contract and seek damages for any losses suffered as a result of the breach.

Ultimately, the ability to terminate the contract for an anticipated breach makes good commercial sense as a party should not have to wait until an actual breach occurs when they have already received clear notice one will happen.

II. Defective Performance

Sometimes contracting parties do not give notice of an intended breach, but rather have inadequate contractual performance — this is called defective performance. Defective performance occurs when a contracting party fails to meet the obligations or standards set out in the contract. This can occur when one party to the contract fails to deliver goods or services as agreed upon or if the goods or services delivered do not meet the required specifications.

For example, imagine a contractor is hired to build a house using Italian marble counter-tops throughout. However, rather than marble, the contractor tries to save costs being using laminate counter tops. Here the contractor's performance is defective, and they have breached the contract.

Types of Contractual Terms that have Been Breached

Just like how there are multiple ways to breach, there are also multiple types of "contractual terms" and not all carry the same significance on breach.

Contractual terms can actually be classified into three categories: conditions, warranties, and innominate terms. These terms are differentiated based on their importance in the contract and have a sizeable impact on determining the consequences of a breach and the appropriate remedy. The categorization also assists in providing guidance to parties as to what will occur if a specific term is breached.

I. Conditions

Conditions are serious or fundamental terms that go to the very root of the contract. If a condition is breached, it means that the contract has been undermined in a significant way. After breaching a condition, the non-breaching party has the right to terminate the contract and claim damages or can continue with the contract and claim damages.

For example, if a contract for the sale of goods specifies that the goods must be delivered by a certain date, this would be a condition of the contract. If the seller fails to deliver the goods by that date, the buyer can terminate the contract and claim damages for any losses suffered. Alternatively, the buyer may wish to continue with the contract (by accepting the late delivery) and attempt to sue for whatever damages are available. The choice to affirm or discharge is given to the non-breaching party.

II. Warranties

Warranties, on the other hand, are less important terms that do not go to the root of the contract. In essence, warranties are collateral or minor terms which do not substantially undermine the contract if breached. If a warranty is breached, the other party can only claim damages but cannot terminate the contract.

For example, imagine a purchaser places an order for eight Japanese maples trees that are each 8-feet in height. When the eight Japanese maple trees arrive, they are each 7.75-feet in height. Arguably, there is a breach, but the breach does not deprive the purchaser of the reason they entered in the deal — the trees. Because only a warranty was breached, the purchaser must stay in the contract and sue for any damages.

III. Innominate Terms

The third form of contractual term, innominate terms, do not clearly fall into the category of condition or warranty (they are something in-between). The impact of an innominate term depends on the seriousness of the breach. If the breach is minor, it will be treated as a breach of warranty and the innocent party will not have the right to terminate the contract. However, if the breach is more serious, it may be treated as a breach of a condition, giving the innocent party the right to terminate the contract and claim damages.

For example, imagine the case of a buyer purchasing a new vehicle. An innominate term could be a promise made by the seller that the car will be a certain shade of red. If the ultimate colour of the car is different from that which was promised, the impact would need to be determined. What if the shade of red was meant to match the purchaser's business or favourite sports team — the colour term would have a greater impact (condition). However, if the shade of red had no impact at all then it would be more aligned with a warranty.

Determining the Type of Contractual Term

Given that the legal rights of the innocent party are drastically different depending on whether a term is a condition, warranty, or innominate term, a clear question emerges: how do we know the classification?

Much academic and judicial ink has been spilled in understanding the role of conditions, warranties, and innominate terms. One such author, Fridman, concisely sets the stage for this issue:

"Everything depends first of all upon whether the parties have identified a stipulation as a condition, warranty or innominate term. If the contract does not expressly or by implication make it clear that a term is a condition or a warranty, (the necessary implication arising from the nature, purpose and circumstances of the contract…the term in question is an innominate term."

Fridman, The Law of Contract in Canada (2d) at page 462

Building off of Fridman's quote, the law generally states a few ways in which we can get a clear determination of if a clause is a condition:

1. A statute can set a certain provision as a condition. If the government has passed a law making a certain provision a condition, then we can treat it as such.
2. If a court decision (precedent) has determined that specific clauses are conditions rather than warranties, then the precedent can be relied upon for support.
3. The parties' contract may expressly state that a certain type of clause is a condition. In such a case, the parties know the impact of the clause in advance and have certainty of the effects if breached.
4. It may be necessary to determine if a clause is a condition by implication. This means looking at the nature of the contract, the subject-matter of the contract, or the circumstances of the contract to determine if the clause is a major one and thus is a condition.

Foundational Law – *Marks v. TM Tilemart Ltd.*, 2020 BCCRT 70

A simple example of breach of contract is the British Columbia Civil Resolution Tribunal case of *Marks v. TM Tilemart Ltd.*, 2020 BCCRT 70.

Terrance Marks and Jacinda Marks filed a case against TM Tilemart Ltd. for breach of contract arising out of unsatisfactory tiling work carried out in their primary bathroom.

Marks had hired TM to do the tile work in their primary bathroom. However, on June 18, 2019, they contacted TM expressing their concerns about the poor quality of the work. The company sent a worker to remove the installed tiles and attempt a second install. Despite the second attempt at tile installation, the Marks found this work to be unsatisfactory as well. The company sent a representative to inspect the second install and offered to redo parts again. The Marks' rejected this offer having already allowed a second install which was sub-standard. On July 31, 2019, the Marks demanded TM to cease work and asked for a full refund.

The Civil Resolution Tribunal found that TM was in breach. Both attempts at tile installation were unsatisfactory, causing functional and visual defects that rendered the master bathroom unusable. This breach was of a condition because the Marks were being substantially deprived of

the reason they entered the agreement. Given that TM had breached a condition of the contract, the Marks were permitted to discharge the contract and were not obligated to give TM a third opportunity to fix the deficiencies.

The Marks had the right to terminate the contract and were awarded a full refund amounting to $4,353.67.

Chapter 7 - Review Questions

1. How can contractual obligations be ended in Canada?

2. What is substantial performance in contract law?

3. What are the different ways a contract can be ended by mutual agreement?

4. What is the doctrine of frustration in contract law?

5. How does a force majeure clause differ from the doctrine of frustration?

6. What is a breach of contract and how does it happen?

7. What are the different types of contractual terms and how do they impact breach consequences?

8. How are contractual terms classified as conditions, warranties, or innominate terms?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 7? Click here to be taken to be a roster of Chapter Quizzes:

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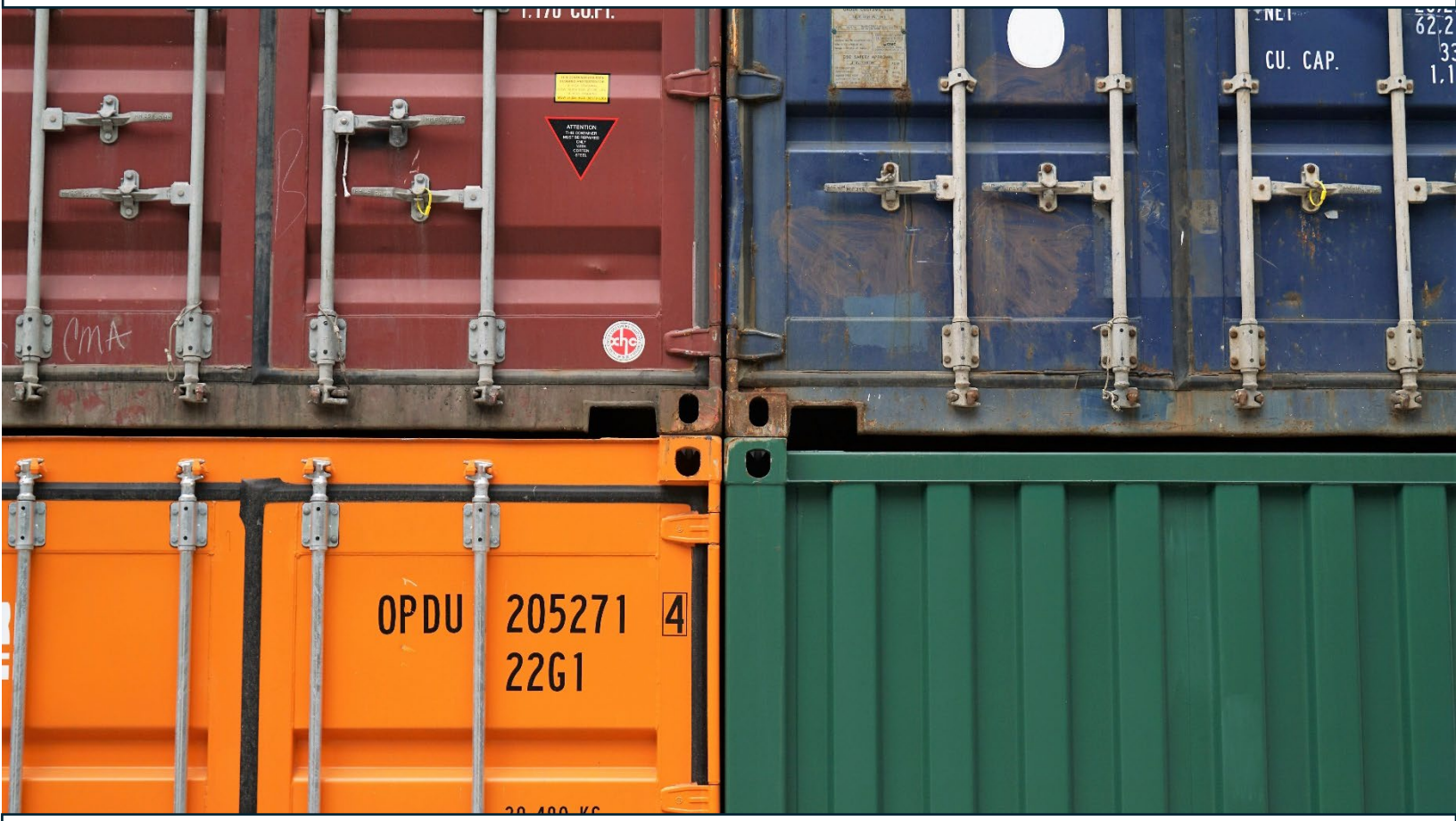
Chapter 8:
The Sale of Goods



Learning Outcomes:

1. Understand the scope and applicability of the Sale of Goods Act in transactions.
2. Explain the key provisions and requirements of the Sale of Goods Act.
3. Apply the passing of property rules in practical scenarios to determine ownership and resolve disputes.
4. Understand the significance of implied terms in protecting buyers' and sellers' rights.
5. Explain the legal tests for the various implied terms under the Sale of Goods Act.

Introduction

In commercial law, few old Latin phrases command as much judicial respect as caveat emptor:

> "caveat emptor" = "let the buyer beware"

As a principle, caveat emptor places the responsibility for discovering defects in a product or property on the buyer rather than the seller. Ultimately, the buyer is expected to exercise due diligence in inspecting the product or property before purchasing it, and any dissatisfaction with the transaction should, therefore, be the buyer's problem.

Given the significant consequences of caveat emptor, over time, legislatures have passed certain qualifications or restrictions on its use. Most notable of these qualifications has been the 1893 Sale of Goods Act (SGA) passed by the United Kingdom Parliament. The purpose of the original Sale of Goods Act was to set out a series of rights and duties relating to the sale of goods and provide a legal framework for resolving disputes. It also helped to address the power imbalance that buyers have with sellers who are the ones who typically have access to greater information about the products they deal in.

Status: This is the original version (as it was originally enacted). This item of legislation is currently only available in its original format.

Sale of Goods Act 1893

1893 CHAPTER 71

An Act for codifying the Law relating to the Sale of Goods. [20th February, 1894]

BE IT ENACTEDby the Queen's most Excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Functions of the Sale of Goods Act

At its core, sale of goods legislation tends to accomplish three main things:

- **Implied Conditions and Warranties** – The legislation sets out various implied conditions and warranties that apply to the sale of goods, regardless of whether they are explicitly stated in the contract. These implied terms help to protect buyers by ensuring that they receive goods that meet certain standards, and sellers are obligated to fulfill these requirements.
- **Allocating Responsibility on the Seller** – The legislation places a responsibility on the seller to accurately describe the goods being sold and provide any relevant information that may affect the buyer's decision. If the buyer relies on the seller's statements or descriptions and suffers a loss as a result, they may have legal recourse under the legislation.
- **Remedies for Buyers** – the legislation provides buyers with various remedies in case the goods they purchase do not meet the required standards or are in breach of the implied conditions and warranties. These remedies can include options like the right to reject the goods or claim damages.

Given how sale of goods legislation ensures legal protections for buyers and ensures fairness and transparency in transactions, it's no surprise that versions of the original United Kingdom Sale of Goods Act have been codified throughout Canada.

All Canadian provinces and territories have sale of goods legislation, and, in many respects, the provisions of those statutes mirror each other. While there are some important differences from province to province (certainly in Quebec), given that the statutes are rooted in the old English legislation, they have key overlaps.

The following table identifies the key sale of goods legislation in each province and territory:

Alberta – Sale of Goods Act, R.S.A. 2000, c. S-2
British Columbia – Sale of Goods Act, R.S.B.C. 1996, c. 410
Manitoba – The Sale of Goods Act, R.S.M. 1987, c. S10
New Brunswick – Sale of Goods Act, R.S.N.B. 2016, c. 110
Newfoundland and Labrador – Sale of Goods Act, R.S.N. 1990, c. S-6
Nova Scotia – Sale of Goods Act, R.S.N.S. 1989, c. 408
Ontario – Sale of Goods Act, R.S.O. 1990, c. S.1
Prince Edward Island – Sale of Goods Act, R.S.P.E.I. 1988, c S-1
Quebec – Governed by the Quebec Civil Code
Saskatchewan – The Sale of Goods Act, R.S.S. 1978, c. S-1
Northwest Territories – Sale of Goods Act, R.S.N.W.T. 1988, c. S-2
Nunavut – Sale of Goods Act, R.S.N.W.T. (Nu.) 1988, c. S-2
Yukon – Sale of Goods Act, R.S.Y. 2002, c. 198

The remaining parts of this chapter will focus on the specific provisions of the British Columbia Sale of Goods Act, R.S.B.C. 1996, c. 410 (the "SGA"). Again though, readers should be aware that many of the SGA discussion points will be crucially similar to those of the other provinces or territories.

The following discussion of the British Columbia SGA will track through an analysis of when the SGA applies, what are some of the key implied terms, how the SGA treats the "passing of property", and lastly, some of the statutory remedies available to buyers and sellers.

When does the SGA Apply?

Section 6(1) of the SGA defines a contract for the sale of goods:

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

In simpler terms, when two parties enter into a contract of sale of goods in BC, the seller agrees to give ownership of the goods to the buyer. In return, the buyer agrees to pay a certain amount of money as the price for those goods. This provision highlights the essential elements of a sale transaction which are the transfer of ownership of the goods and the consideration of money.

Importantly, the SGA only covers goods which is typically understood as chattels or moveable property. More specifically, the SGA states that "goods" are defined as:

> "goods" includes
>
> (a) all chattels personal, other than things in action and money, and
>
> (b) growing crops ... and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale.

As a starting point then, goods are generally physical objects that can be touched, seen, and transferred from one party to another: for example, vehicles, appliances, electronics, clothing, furniture, and other consumer goods.

There are some categories of assets which are not goods and therefore, the SGA does not apply to transactions involving them. Transactions involving money, services, and real estate are not considered a sale of "goods". Accordingly, if a consumer had an issue with a contract they entered for services or real estate, they would have to find redress through another legal framework.

The SGA also defines goods in a different way — goods include both "existing" and "future" goods. Existing goods refer to those that are already in existence and are owned or possessed by the seller at the time of the sale. Existing goods may also be "specific" goods in that the goods are identifiable and agreed on at the time a contract of sale is made. Future goods, on the other hand, are goods that are yet to be produced or acquired by the seller but are intended to be sold under the contract. This distinction between existing and future goods will have implications on certain rights that are discussed later in this chapter.

Myth-Busting

Myth: "If I bought something and the return policy expired, there's nothing I can do."

The store's return policy is a contractual agreement between the store and the buyer. The policies outline the terms and conditions under which the buyer can return or exchange a purchased item. However, these policies do not override the rights granted to buyers by sale of goods legislation. Therefore, as a buyer, you likely still have statutory rights that you can use against the store even if the return policy has expired.

Implied Terms in the SGA

The very heart of the SGA is the implication of terms (conditions and warranties) into contracts for the sale of goods. Even if parties do not discuss such terms or potentially, do not even want such terms, they can, nevertheless, be implied into the agreement by the legislation.

Implied terms are contractual terms that are not explicitly stated in the contract but are automatically understood to be part of the agreement based on the SGA. Importantly, if an implied term is breached, the buyer will have legal rights against the seller in the same way as if the term had been stated in the contract.

> "The law may include terms in contracts even if the parties did not specifically consider the terms, say them to each other, or write them down. These added terms are called implied terms."
>
> *Robertsen et al v. 1007820 B.C. Ltd.*, 2018 BCCRT 107 at para. 28

The SGA includes several very important implied terms that are designed to protect the interests of both buyers and sellers. These implied terms range from ensuring valid ownership of the goods being transferred to those which deal with defects in the goods. The following discussion will canvass the major implied terms along with noting the specific associated sections of the SGA.

Section 16 – Implied undertaking as to title, and implied warranty of quiet possession

When a seller enters into a contract to sell goods, the buyer expects to receive full ownership of the goods without any competing claims or encumbrances. Section 16 of the SGA ensures that the buyer will receive good and marketable title to the goods being sold.

Section 16 of the SGA states the following:

> In a contract of sale or lease, unless the circumstances of the contract are such as to show a different intention, there is:
> (a) an implied condition on the part of the seller or lessor that
> (i) in the case of a sale or lease, the seller or lessor has a right to sell or lease the goods, and
> (ii) in the case of an agreement to sell or lease, the seller or lessor will have a right to sell or lease the goods at the time when the property is to pass or the lessee is to take possession of the leased goods,
> (b) an implied warranty that the buyer or lessee is to have and enjoy quiet possession of the goods, and
> (c) an implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer or lessee before or at the time when the contract is made.

According to 16(a), the seller needs to have the legal right to sell the good they are selling. This implied term acts as a guarantee or assurance that the seller possesses valid ownership rights and has the legal authority to transfer those rights to the buyer. In practical terms, this means that the seller warrants that they have the right to sell the goods.

For example, examine the following news headline from British Columbia:

Imagine if you were to purchase a bicycle only to find out that it had been stolen and the seller was the thief. This would be a clear breach of 16(a) because the thief does not have legal title to the bicycle and therefore, cannot sell it.

16(b) and 16(c) of the SGA deal with related, but different concerns about title. These two provisions are meant to ensure that there are no undisclosed legal issues, liens, or claims that could affect the buyer's ownership rights. Ultimately, the buyer is entitled to enjoy quiet possession of the purchased goods, without interference from any third party.

For example, imagine you purchase a used car from a dealership. After a few weeks, you receive a notice from a bank claiming that the car was used as collateral for a loan by the previous owner and the bank now demands the return of the vehicle. In such a purchase, you never received quiet possession of the goods as they were subject to a legal claim or encumbrance from the bank.

Section 17 — Sale by Description

Section 17(1) of the SGA states:

> In a contract for the sale or lease of goods by description, there is an implied condition that the goods must correspond with the description.

Accordingly, when goods are sold by description, the ultimate goods received should have the same qualities and characteristics as what was initially described to the buyer. If the goods do not match the description, the buyer may be able to claim that the seller has breached section 17.

Legal Test for Sale by Description

In order to be successful on a claim under section 17, the plaintiff must establish the following three elements:

1. Is this is a sale by description?
2. What do the words used in the description mean?
3. Do the goods correspond to the description?

Leone Industries Inc. v. International Adjusters (Western) Ltd., [1994] B.C.J. No. 2832

For example, imagine a person purchases a smartphone online based on the description provided by the seller — this description includes that the phone is the latest model. However, when the smartphone is delivered, it turns out to be an older model. In this case, the seller has breached the implied term of description because the goods do not match the description (the model) provided.

The implied term of description applies regardless of whether the description was given by the seller orally or in writing. However, the implied term only refers to the identity or description of the goods and does not protect against quality issues in the goods (such as defects or poor construction).

In the online environment, there are numerous product descriptions which are routinely displayed. Take a look at the following ad from Best Buy and note the way in which the products are described by the seller:

In this advertisement, there are numerous descriptions relating to product including, brand, size, colour, and other specifications. If any of these turned out false or misdescribed then the buyer could pursue a claim under section 17 of the SGA.

Section 18 – Implied Conditions as to Quality or Fitness

Recall that section 17 only protects against a misdescription and does not protect against issues of poor quality. So how does a buyer get a remedy for a poor product? That is the purview of section 18.

Section 18 is not actually one implied term, but rather three. However, each of the three terms all relate to the quality or fitness of a good. We will examine each of the implied terms individually below.

I. Section 18(a) – Fitness for Intended Purpose

Section 18(a) states the following:

> (a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

Put more simply, section 18(a) requires the goods to be suitable for the specific purpose for which the buyer intends to use them. Implying such a term is advantageous because buyers frequently rely on the expertise of sellers to select products or confirm that the product is suitable for the buyer's intended use. If the seller's statements about fitness for purpose are wrong, sellers should be held accountable.

For example, if a buyer contacts the seller and indicates that they need an exterior paint for a wood fence, the ultimate goods sold by the seller (and received by the buyer) should be one that is

suitable for that purpose – namely, exterior use for a wood fence. If the seller actually sold an interior wall paint to the buyer, the SGA would say that section 18(a) has been breached.

Legal Test for Breach of Fitness for Intended Purpose

To establish a breach of the implied term of fit for intended purpose, buyer's need to demonstrate the following factors:

1. the buyer made known to the seller the purpose for which it required the goods;
2. the buyer relied on the seller's skill or judgment; and
3. the goods are of a description that is in the course of the seller's business to supply.

Clayton v. North Shore Driving School et al., 2017 BCPC 198 at para. 93

Firstly, the buyer needs to demonstrate that they communicated or made known to the seller the particular purpose for which the goods were intended to be used. This purpose must be specific and known to the seller at the time of the sale.

Secondly, the buyer must establish that they relied on the seller's expertise and advice regarding the suitability of the goods for the intended purpose. This reliance may be explicit or inferred from the circumstances.

Lastly, the goods being sold should fall within the usual scope of the seller's business operations. In other words, the goods being supplied should be of a type or description that is commonly associated with the seller's trade or line of business.

Foundational Law – *Clayton v. North Shore Driving School et al.*, 2017 BCPC 198

Clayton, a truck driver, filed a claim against North Shore Driving School (NSDS), alleging that the truck he purchased from them was not reasonably fit for its intended purpose.

In January 2015, Clayton responded to an online advertisement for the Kenworth truck priced at $18,000. He met with Tom Huynh, who represented NSDS's truck division, and decided to buy the truck based on its engine type and the reputation of the Kenworth brand. However, in June 2015, Clayton discovered a crack in the truck's structure. The recommended repairs were estimated to cost between $11,000 and $20,000.

Clayton brought a claim against NSDS on the basis of section 18(a) of the Sale of Goods Act. In order to be successful, Clayton had to expressly or implicitly communicated the purpose for which the truck was required, demonstrated reliance on the seller's skill or judgment, and that the truck was of a kind typically supplied by NSDS in the course of their business.

While there was some uncertainty regarding Clayton's intended use of the truck, the evidence indicated that he had mentioned his plans to work as an owner-operator or haul materials in the future. However, the court found that Clayton had not sufficiently established reliance on NSDS's skill and judgment. The evidence suggested that he was primarily interested in the Kenworth brand and had not explicitly expressed reliance on NSDS. Moreover, NSDS was not in the business of selling used vehicles but rather operated a driving school, selling vehicles only on a few previous occasions. Accordingly, the court concluded that Clayton failed to meet two of the three prerequisites for a breach of section 18(a). Clayton's claim was dismissed.

II. Section 18(b) – Merchantable Quality

When a product is defective, otherwise referred to as unmerchantable, a buyer may be able to rely on section 18(b) which states:

> if goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;

Therefore, when goods are purchased based on a description, either from the manufacturer or another seller who regularly deals with goods of that type, there is an implied condition that the goods will be of merchantable quality.

Legal Test for Breach of Merchantable Quality

Not every defect will permit a claim for breach of section 18(b); instead, a buyer will need to satisfy the following requirements:

1. the goods must have been purchased based on a specific description provided by the seller;
2. the goods are of a description that is in the course of the seller's business to supply; and
3. the buyer must demonstrate that the goods were not of merchantable quality.

As to the third part of the test, defining merchantability is difficult. Part of this challenge arises from the fact that the SGA does not define what merchantability means, instead this task is undertaken by the courts. So, it is judges who will ultimately decide if a good was merchantable or not merchantable.

> "It will be apparent that the concept of merchantability is an extremely flexible one … It does not seem to be going too far to say that, in effect, the concept merely requires the goods to be of the sort of quality reasonably to be expected having regard to all the circumstances of the case. [The definition], far from being, as some definitions are, a straight jacket, turns out to be largely a non-definition; it delegates to the Court the task of deciding what is reasonable [in] the circumstances of each particular case."
>
> Atiyah, The Sale of Goods 5th Ed., 1975.

As an example, imagine you purchase a laptop from a reputable computer store based on the store's description of the laptop as a high-performance device suitable for gaming. The store regularly deals in laptops and holds itself out as knowledgeable in this area. However, upon using the laptop, you discover that it frequently overheats, significantly impacting its performance and making it unusable for gaming purposes. The scenario appears to satisfy all the 18(b) criteria as the laptop was purchased based on a description from a seller dealing in laptops and it ultimately was unmerchantable.

The language of 18(b) makes clear that there is also consideration of the role of inspections. If the buyer has an opportunity to inspect the goods and fails to identify any defects or issues that should have been reasonably noticed during the examination, they cannot later claim a breach of the implied condition based on those defects.

III. Section 18(c) — Reasonable Durability

The final component of section 18 is section 18(c) which implies a term of reasonable durability into transactions for the sale of goods:

there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease.

Therefore, goods sold must meet a basic standard of durability and should last for a reasonable period of time. Relatedly, goods should be able to withstand the wear and tear associated with their normal use.

But how long is reasonable for a good to last? The specific determination of what constitutes a reasonable period of time of durability can vary depending on a number of important (and common sense) factors which are canvassed below.

- **Nature of the Goods** – the type and nature of the goods play a significant role in assessing reasonable durability. Certain goods are inherently expected to last longer than others. For example, a high-quality kitchen appliance is typically expected to have a longer lifespan compared to a disposable item like a paper towel.

- **Price and Quality** – The price and quality of the goods can be indicative of their expected durability. Generally, higher-priced goods are expected to have a longer lifespan and be higher quality than lower-priced goods.
- **Intended Use** – The intended purpose or use of the goods is an essential factor in determining their reasonable durability. The goods should be able to withstand the ordinary wear and tear associated with their intended use. Factors such as frequency of use, maintenance practices, exposure to environmental factors, and compliance with manufacturer's instructions may affect the durability.
- **Seller's Representations** – Any specific representations or warranties made by the seller regarding the durability or expected lifespan of the goods can also influence the determination of reasonable durability. If the seller explicitly states that the goods will last for a certain period, it can impact the reasonable expectations of the buyer.
- **Industry Standards** – Industry standards and practices can provide guidance on what is considered a reasonable period of durability for specific types of goods. These standards may be established by trade associations, manufacturers, or regulatory bodies. They can help establish a benchmark for evaluating the durability of goods in a particular industry.

Courts may consider these factors collectively and weigh their relative importance to reach a conclusion on what constitutes a reasonable period of time for goods to be durable.

Example – Example of Determining Durability

Imagine you purchase a brand-new laptop computer for use in your daily work. The laptop comes with a one-year warranty and is priced at a mid-range level. Within six months of regular use, the laptop starts experiencing hardware issues, such as frequent crashes and overheating.

In this case, the court would use the key factors to determine a reasonable period for durability. Laptops are generally expected to have a reasonable lifespan and be durable enough to handle everyday usage. The laptop falls within the mid-range price category, suggesting that it should have a reasonable level of quality and durability. The laptop was purchased for work purposes, and it was used under normal working conditions without any excessive or abusive use. Industry standards would likely indicate that laptops in this price range should last for several years without major hardware issues.

Based on the application of the factors, it would be reasonable to expect that the laptop should function properly and remain durable for more than six months. Therefore, your specific laptop was not reasonably durable.

Section 19 – Sale by Sample

Section 19 of the SGA states the following:

> 19(1) A contract of sale or lease is a contract for sale or lease by sample if there is a term in the contract, express or implied, to that effect.
> (2) In a contract for sale or lease by sample,
> (a) there is an implied condition that the bulk must correspond with the sample in quality,
> (b) there is an implied condition that the buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample, and
> (c) there is an implied condition that the goods must be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.

At its core, section 19 is all about situations where the seller provides a sample of the goods to the buyer to inspect and assess the quality of before completing the transaction. The sample serves as a representation or indication of the nature and quality of the entire bulk or batch of goods that will be supplied. In such as case, the buyer relies on the sample to make an informed decision about whether or not to proceed with the purchase or lease. Examples of sale by sample transactions involve bulk goods, fabric, and flooring.

To pursue a claim under section 19, the buyer must rely on the sample to determine the quality of the goods. There must also be a discrepancy between the quality of the bulk goods and the quality represented by the sample; the bulk goods should fail to meet the quality standards established by the sample.

For example, imagine Jorge is interested in purchasing a batch of T-shirts from a seller, Sandeep. They agree on a sale by sample, where Sandeep provides Jorge with a single T-shirt as a representative sample. The sample is of high quality, made of premium fabric and with excellent stitching. However, when Jorge receives the bulk order of T-shirts, he discovers that the quality is significantly inferior. The fabric is cheap, and the stitching is poorly done. The bulk of the T-shirts does not correspond with the sample provided. In this case, Jorge can sue Sandeep for a breach of Section 19(2) of the SGA.

Section 20 – No waiver of warranties or conditions

Section 20 of the SGA restricts the use of contractual terms which would limit or reduce the conditions or warranties implied by sections 17, 18, and 19 of the SGA.

The section states that any term in a contract that attempts to negate or diminish the conditions or warranties specified in sections 17, 18, and 19 will be considered void if the goods sold or leased do not reasonably appear to be used goods or if the seller or lessor has not described or represented them as used goods. As such, the section actually restricts retail sellers or leasors.

Put simply, section 20 protects consumers in retail transactions by ensuring that the conditions and warranties provided by the SGA cannot be undermined or waived by the seller's contract terms.

The Passing of Property Rules

Here's a question not often considered when purchasing goods: when does the buyer become the owner of the goods? We would expect that the contract between the parties would articulate such an important factor however, it is certainly possible that the parties do not discuss or reach agreement on this moment.

The passing of property rules refers to the legal rules that determine when ownership or property rights of goods are transferred from the seller to the buyer. These rules establish the moment when the buyer becomes the legal owner of the goods and assumes the associated risks and benefits of ownership.

The passing of property rules is codified in the SGA and are hugely important for several reasons.

- **Risk Allocation** – determines when the risk of loss or damage to the goods passes from the seller to the buyer. Depending on the specific rule in effect, the risk may shift at the time of contract formation, delivery, or some other agreed-upon event. Clarifying this allocation of risk is important for both parties, as it helps determine who bears the responsibility for any harm that may occur to the goods.
- **Title and Ownership Transfer** – determines when the legal ownership or title to the goods transfers from the seller to the buyer. This is crucial for establishing the rights of the buyer, such as the ability to use or sell the goods and, for the seller, the right to recover possession in case of non-payment.
- **Third-Party Claims** – Address situations where a third-party claim a right or interest in the goods being sold. The rules provide a framework to determine the priority of competing claims, protecting the buyer from potential disputes or encumbrances on the goods.

Ultimately, the passing of property rules provides certainty by establishing a clear point at which the buyer assumes ownership.

Section 22 – Intention of the Parties

Section 22 of the SGA is the starting point for determining when title to property passes. The section states as follows:

> If there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time the parties to the contract intend it to be transferred. For ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

So, when there is a contract for the sale of goods that are specific or ascertained, the ownership of those goods is transferred from the seller to the buyer at the time both parties intend for the transfer to occur. In other words, ownership of the goods passes to the buyer according to the mutual understanding and agreement of the parties involved.

The Five Passing of Property Rules

Absent mutual agreement between the parties, the SGA codifies a process for how to determine the passing of property. The SGA provides five rules that will dictate how and when the ownership of the goods transferred from seller to buyer. Importantly, only one rule will ever apply — the key is figuring out which.

I. Rule 1

According to this rule, if there is an unconditional contract of sale between the buyer and the seller, the property in the goods passes to the buyer at the time the contract is made. It means that once the parties have agreed to the terms of the sale without any conditions, the buyer becomes the owner of the goods immediately, regardless of when the physical possession or delivery of the goods takes place.

Example – Rule 1 Situation

Nelson enters an electronics store and selects a smartphone he wishes to purchase. He and the salesperson promptly reach a full and complete agreement on the price and other sale particulars without any conditions. At that moment, the ownership of the smartphone is transferred to Nelson, irrespective of when the physical possession or delivery occurs.

II. Rule 2

If the seller is required to do something to the goods for the purpose of getting them into a deliverable state, the property does not pass until the seller performs the necessary action and the buyer is aware of it. Under Rule 2, the property passes to the buyer when the seller completes the required action to put the goods in a deliverable state and the buyer is notified.

This rule provides protection to the buyer when additional work is needed on the goods by the seller before they are ready for delivery. It ensures that the buyer becomes the owner only when the goods are in the agreed condition, minimizing the risk of taking ownership of incomplete or unsatisfactory goods.

Example – Rule 2 Situation

Nelson purchased a dining table from a local furniture store. However, the agreement stated that the seller needed to apply a special protective coating on the table's surface before it could be considered ready for delivery. After a few weeks, the seller completed the coating process, ensuring the table was now in the agreed condition. They promptly notified Nelson by text message about the completion and requested he come to pick up the table. Upon receiving the text message, the property of the dining table officially passed to Nelson. He was the rightful owner and bore any risk of loss from that point.

III. Rule 3

In cases where there is a contract for the sale of specific goods that are in a deliverable state, but the seller has an obligation to perform certain actions like weighing, measuring, testing, or any other act related to the goods to determine the final price, the ownership does not pass to the buyer until those actions are completed, and the buyer is informed about it.

The purpose of this rule is to ensure that the buyer becomes the owner of the goods only when the seller has carried out the necessary tasks to determine the final price. Until then, the goods are not considered the buyer's property, even if they are in a deliverable state.

Example – Rule 3 Situation

Nelson, a restaurateur, enters into a contract with a seafood supplier to purchase a specific batch of fresh lobsters. The lobsters are already in a deliverable state, but the supplier has an obligation to perform a weight measurement and quality assessment to determine the final price. As per their agreement, the ownership of the lobsters will not transfer to Nelson until the supplier completes the necessary weighing and quality checks and informs Nelson about the final price. Once the measurements and assessments are done, and the supplier notifies Nelson of the final price, only then will the ownership and risk of loss for the lobsters pass to him.

IV. Rule 4

Sometimes a buyer is entitled to possess or use the goods before the transaction is finalized. The SGA refers to these transactions as "on sale or return" — it means that the seller can affirm the sale or return the goods. Rule 4 examines when property passes under an "on sale or return" transaction.

The passing of property for an "on sale or return transaction" can occur in the following ways:

(a) If the buyer signifies approval or acceptance of the goods to the seller or performs any other action that shows their intention to proceed with the transaction, the property passes to the buyer at that moment. In other words, once the buyer explicitly expresses their approval or acceptance of the goods to the seller, they become the owner of the goods.

(b) If the buyer neither signifies approval or acceptance to the seller nor rejects the goods by giving notice of rejection, but instead keeps the goods without taking any action, the property passes to the buyer under the following conditions:

- If a specific time for returning the goods has been agreed upon between the buyer and the seller, the property passes to the buyer at the end of that agreed-upon time period. Until that time, the goods remain the property of the seller.
- If no specific time for returning the goods has been set, then the property passes to the buyer at the end of a reasonable time. The concept of a reasonable time may vary depending on the circumstances of the sale.

Accordingly, there are a variety of ways in which ownership can still transfer while the buyer has the opportunity to evaluate or test the goods.

Example – Rule 4 Situation

Nelson purchased a high-end camera from a retailer "on sale or return". The retailer informed Nelson that he could try out the camera for a period of two weeks before making a final decision.

After a week of examining the camera's features and testing its performance extensively, Nelson sent an email to the retailer expressing his satisfaction with the product and his intention to keep it. At that moment, the property of the camera passed to Nelson, and he became the owner of the goods.

Alternatively, if Nelson had not taken any action after the two-week trial period, the property would still pass to him. Beyond the two-week trial period, a reasonable time period would be said to have elapsed without any indication of rejection. The property of the camera would, therefore, pass to Nelson following the end of that reasonable time.

V. Rule 5

Rule 5 applies when there is a contract for the sale of goods that are either unascertained (not specifically identified) or future goods (not yet in existence). The passing of property for an unascertained or future good will occur in the following ways:

(a) The property in the goods passes to the buyer when the seller unconditionally appropriates goods of that described type and in a deliverable state to the contract, with the buyer's agreement or assent. In other words, when the seller sets aside or designates goods that match the description in the contract and are ready for delivery, and the buyer agrees to this appropriation, ownership of the goods is transferred to the buyer.

(b) Similarly, the property in the goods also passes to the buyer when the buyer unconditionally appropriates goods of the described type and in a deliverable state to the contract, with the seller's agreement or assent. If the buyer, with the seller's consent, selects or designates goods that meet the description in the contract and are ready for delivery, the ownership of the goods is transferred to the buyer.

The utility of Rule 5 is that it ensures that the buyer becomes the owner of the goods when they are unconditionally set aside or designated for the buyer's specific contract.

"The final example concerns future goods, such as ships, manufactured to the buyer's special order. It seems clear that 'a strong prima facie presumption' exists against the passing of property in an incomplete object when work remains to be done on it."

Bridge, Sale of Goods (1988, Butterworths)

Example – Rule 5 Situation

Nelson, the buyer, approached a furniture manufacturer to purchase custom-made chairs for his newly renovated office space. The buyer carefully selected the design, material, and finish, while ensuring they matched the description in the contract. The contract specified that the chairs would take approximately three months to build. Nelson made the necessary payments and eagerly awaited the completion of the chairs.

Following three months of hard work, the seller successfully completed the chairs. At that time, the seller placed them in storage with a payment invoice and a note indicating that the furniture was for Nelson. Unfortunately, shortly after, a fire broke out in the storage facility resulting in the destruction of the furniture constructed for Nelson.

In this situation Rule 5 was successfully met. The goods were ultimately made deliverable and unconditionally appropriated through the seller's placement of the invoice and note; those chairs were for Nelson. As a result, passing of property rule 5 states that Nelson was the owner and bore the risk of loss.

VI. Summary

Recall that the passing of property rules are merely default rules and are meant to fill in the gaps when the parties do not clearly specify the moment of ownership transfer. If the parties do not wish to rely on the passing of property rules, they are always permitted to use clear contractual language to override them.

Remedies Under Sale of Goods Legislation

There are various remedies provided to both buyers and sellers under sale of goods legislation. These statutory rights are designed to give fair and flexible remedies to a party where there has been a breach.

Buyer's Remedies

Under the SGA, the buyer is entitled to certain remedies when the seller has committed a breach. The following are the most common remedies sought by a buyer:

- **Damages** – The buyer is entitled to claim damages which are intended to compensate them for any financial losses suffered due to the breach. The damages awarded aim to put the buyer in the position they would have been in if the contract had been fulfilled properly.
- **Specific Performance** – Section 55 of the BC Sale of Goods Act provides that, in certain cases, the buyer may seek a court order for specific performance. This remedy requires the

seller to fulfill their contractual obligations by delivering the goods as agreed. Specific performance is typically available when the goods are unique or when monetary compensation is inadequate to remedy the breach.

- **Right to Reject of Return the Goods** – If the seller delivers goods that do not conform to the contract, the buyer generally has the right to reject the goods and seek a refund. This remedy applies when there is a fundamental breach or non-conformity that substantially impairs the value or purpose of the goods.

The above options are not exhaustive of a buyer's remedies though they are the most commonly sought.

Seller's Remedies

Sellers also have a series of specific remedies which can be pursued against buyers:

- **Action for the Price** – if the goods have been delivered to the buyer and the buyer wrongfully refuses or fails to pay the agreed-upon price, the seller can initiate legal action to recover the amount owed.
- **Liens** – a lien allows the seller to retain possession of the goods until the buyer fulfills their obligations relating to that specific transaction. This lien applies specifically to the goods involved in the contract at hand.
- **Stoppage in Transit** – if the buyer is insolvent or fails to make payment, the seller has the right to stop the goods while they are in transit and retain possession until payment is made or other arrangements are agreed upon.

The specific remedy sought by a seller will vary depending on their possession of the goods and the terms of the contract however, the remedies can be useful pursuing a claim for unpaid goods.

Chapter 8 - Review Questions

1. What is the Sale of Goods Act?
2. When does the SGA apply?
3. What are implied terms?
4. What is meant by "sale by description"?
5. What are the implied conditions as to quality or fitness?
6. How is the "passing of property" determined?
7. Can a seller override implied terms in a contract?
8. What remedies are available to buyers and sellers under the SGA?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 8? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 8 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 8:

https://youtu.be/O1JlO_Vqjeg

Chapter 9:
Business Structures

Learning Outcomes:

1. Differentiate between the basic forms of operating a business: sole proprietorships, partnerships, and corporations.
2. Analyze how each of the various business structures impact liability on the business owner.
3. Consider the differences in the types of Canadian partnerships including general partnerships, limited partnerships, and limited liability partnerships.
4. Introduce the separate legal status of the corporation and its impact on the directors and shareholders of the corporation.
5. Examine the concept of piercing the corporate veil and understand when and how it may be used to hold directors and shareholders personally liable for corporate acts.

Introduction

For those wishing to start their own businesses, you should never overlook the critical question of how to structure that business. There is actually a myriad of ways in which one can organize their business, and each form has significant legal and financial implications for the business owner.

The structure of a business determines its legal framework, ownership arrangements, tax obligations, liability limitations, and governance mechanisms. Understanding the different available business structures and their implications is essential.

In this chapter, we will explore the basic forms of structuring a business in Canada; these forms include the sole proprietorship, partnership, and corporations. As will become clear, these structures are wildly different, and each would be adopted by the business owner in specific situations. The clear goal of the chapter is to develop a comprehensive understanding of how each business structure affects the liability of the business owner or its managers.

Sole Proprietorships

The oldest and most common business structure is referred to as a "sole proprietorship". In a sole proprietorship the individual is both the owner and operator of the business; there is no separation between the two. To put that differently, the sole proprietorship is not a separate legal entity or person.

Sole proprietorships are most common when the business is just starting out or is relatively small in scope. For example, imagine a local ice cream shop which is operated by only one individual with no other employees. It may be simplest to operate the business as a sole proprietorship where the owner makes all the decisions, generates the income, and avoids any legal complexities.

The decision to operate as a sole proprietorship should not be undertaken lightly. There are clear advantages and disadvantages to this form which are canvassed below.

Advantages and Disadvantages of the Sole Proprietorship

There can be numerous benefits from having the business and the individual owner/operator be one and the same:

- Quick Set-up – sole proprietorships are created automatically when business operations commence; they do not require any complex legal applications.
- Control – as the sole operator, the owner has complete control over the business and its decisions.
- Management Flexibility – sole proprietorships are flexible and allow changes in the business's direction or operations quickly.
- Taxation – Sole proprietorship income/liabilities is assessed as personal income/liabilities which may be beneficial to the business owner.

On the flip side, sole proprietorships are not without risk. In fact, there are many reasons why a business owner would want to avoid establishing a sole proprietorship:

- Limited Resources – sole proprietorships may have difficulty raising capital as they do not have the ability to sell ownership stakes in the business.
- Finite Business Lifespan – sole proprietorships dissolve upon the death or incapacitation of the owner. There is no indefinite lifespan of the business.
- Limited Creative Input – sole proprietorships principally rely on themselves to run operations. This can lead to situations where there is not as much creative input or business evolution.
- Unlimited Liability – as the sole owner, the individual is personally liable for all debts and obligations of the business. This means that the owners' personal assets (i.e. home or savings) may be at risk if the business is sued or is unable to pay its debts.

Hands-down the biggest risk in operating as a sole proprietorship is the notion of unlimited liability. It is easy to foresee a situation where the business is sued, liability established, and the personal assets of the owner are then pursued.

> "Though a sole proprietorship may adopt a business name and may in some instances sue and be sued in the business name it is still ultimately the individual sole proprietor who carries all legal liability. A sole proprietorship is not a separate legal entity from the owner."
>
> *Bearss v. Scobie*, 2013 ONSC 5910 at para. 20

For example, imagine our scenario of the ice cream shop operating as a sole proprietorship. If the business is sued by a customer who slipped and fell in the store, the customer may seek to collect their damages not just against the business assets, but also, against the personal assets of the owner. One would hope that the business has comprehensive insurance coverage however, the unlimited liability exposure is an ever-present concern for sole proprietorships.

Myth-Busting

Myth: "If I run a business and get sued, only the business assets are exposed."

Incorrect. Under a sole proprietorship, there is no legal separation between the business and owner. Therefore, the owner's personal assets are exposed along with any business assets. Individuals should be aware that they are personally liable for any debts or losses that could be pursued against the business.

Partnerships

As noted, one of the disadvantages of the sole proprietorship is that the owner may not have the benefit of creative, managerial, or financial input from others. When a business has multiple individuals sharing the risk, responsibilities and rewards from the business, it can result in more efficient operations; it can also result in the formation of a legal partnership.

Partnerships are a business structure where two or more individuals, called partners, join together to carry out the business. As partners, they are more than simply employees, rather they have a vested interest in the success of the business because they share in the profits.

Summary of the Advantages of Partnerships

- **Diverse Experience** – Each partner brings unique skills, knowledge, and resources to the partnership, enabling the business to benefit from a diverse range of expertise and contributions.
- **Division of Labour** – Partnerships allow partners to divide the workload and responsibilities so that the business does not hinge on only one owner.
- **Increased Capital** – Partnerships often have a broader financial base compared to sole proprietorships. Partners can pool their financial resources making it easier to expand business capital.
- **Shared Decision-making** – Partners can discuss and debate various options, leveraging different perspectives and experiences to arrive at well-informed choices.

Summary of the Disadvantages of Partnerships

While partnerships have several advantages, there are also some seismic disadvantages associated with the business structure:

- **Potential Conflicts** – disputes may arise regarding the direction of the business, strategic decisions, allocation of profits and losses, or other important matters. Resolving such conflicts can be time-consuming and potentially strain the partner relationship.
- **Lack of Continuity** – a partnership dissolves when a partner decides to leave, retire, or dies (subject to provisions in a partnership agreement). This can disrupt business operations and require the remaining partners to re-organize or even terminate the partnership altogether.
- **Difficult Transfers of Ownership** – transferring ownership in a partnership can be complex and may require the consent of all partners. This can make it challenging to admit new partners or allow existing partners to exit the partnership.
- **Unlimited Liability** – if the partnership is sued or cannot meet its financial obligations, creditors can go after the personal assets of each partner to settle the debts. This can put partners' personal wealth and assets at risk.

Based on that review, partnerships suffer from the same fundamental disadvantage as the sole proprietorship: unlimited liability.

Up to this point, we have canvassed some of the general reasons why businesses may or may not wish to operate as a partnership. However, the conversation around partnerships is actually much more nuanced. In Canadian law, there are three types of partnerships: general partnerships, limited partnerships, and limited liability partnerships. Given that some of the risks/rewards are affected by the partnership type, each merits a further discussion.

General Partnerships

The general partnership is the classic form of partnership. It involves a scenario where two or more individuals or entities come together to carry on a business for profit and share unlimited liability. It is a relatively simple and flexible form of business ownership that does not require any formal registration to become effective.

In a general partnership, each partner contributes capital, assets, skills, or labour to the business and shares in the profits and losses (this may be an equal split or otherwise determined by a partnership agreement). The partners also can participate in the management and decision-making processes of the partnership. Given their managerial/operational involvement, each partner is personally liable for the debts and obligations of the partnership, meaning their personal assets can be used to satisfy the partnership's liabilities.

Many provinces and territories have specifically passed legislation which codifies the rules surrounding partnerships and the legal obligations of partners. In much of this legislation, we see a specific definition of a general partnership. For example, below are the definitions of "partnership" in both the British Columbia Partnership Act and the Ontario Partnerships Act:

> **British Columbia** – Partnership Act, R.S.B.C. 1996, c. 348 at section 2.
>
> "Partnership is the relation which subsists between persons carrying on business in common with a view of profit."
>
> **Ontario** – Partnerships Act, R.S.O. 1990, c. P.5 at section 2.
>
> "Partnership is the relation that subsists between persons carrying on a business in common with a view to profit…"

Interestingly, the definitions in the Ontario and BC statutes are mirror images of one another and therefore, there is quite a bit of overlap on when partnerships are legally formed.

Using the statutory definitions, it is possible to develop a clear legal test for the formation of a general partnership. Across multiple cases, the court has confirmed that a partnership is when there is a: 1) carrying on of business, 2) in common, 3) with a view to profit.

Legal Test for General Partnerships

The legal test for creating a general partnership requires the following three elements:

1. carrying on business;

This refers to engaging in commercial activities, such as selling goods or providing services with the intention of making a profit. It suggests regular and ongoing business activities rather than engaging in occasional or one-time transactions. When carrying on a business, partners actively participate in its management and operation.

2. in common;

Partners should be aligned with one another in operating the business. Here, all of the partners are acting together towards their financial success or the "view to profit". There should be a joint and concerted effort by the partners for the business' success.

3. with a view to profit.

The primary objective of the partnership is to generate financial profits through the partnership's business activities. While other goals, such as providing a service to the community or promoting a cause may exist, the overarching purpose is to achieve financial gains.

It is remarkable to think how simple the general partnership legal elements are and how quickly a business relationship between two individuals could morph into a legal partnership with unlimited liability. For instance, if you and a friend or co-worker were ever acting together with a view to profit, this likely would meet the statutory definition of a partnership. For a more specific fact pattern on this evolution, see the example below.

Example – Formation of a General Partnership

Imagine a scenario. Two friends, Aisha and Carlos, decide to start a gardening business together. They meet all the requirements for a general partnership:

Carrying on business: Aisha and Carlos actively engage in the gardening business, offering services such as landscaping, lawn maintenance, and plant care. They advertise their services, purchase necessary equipment, and actively seek out clients.

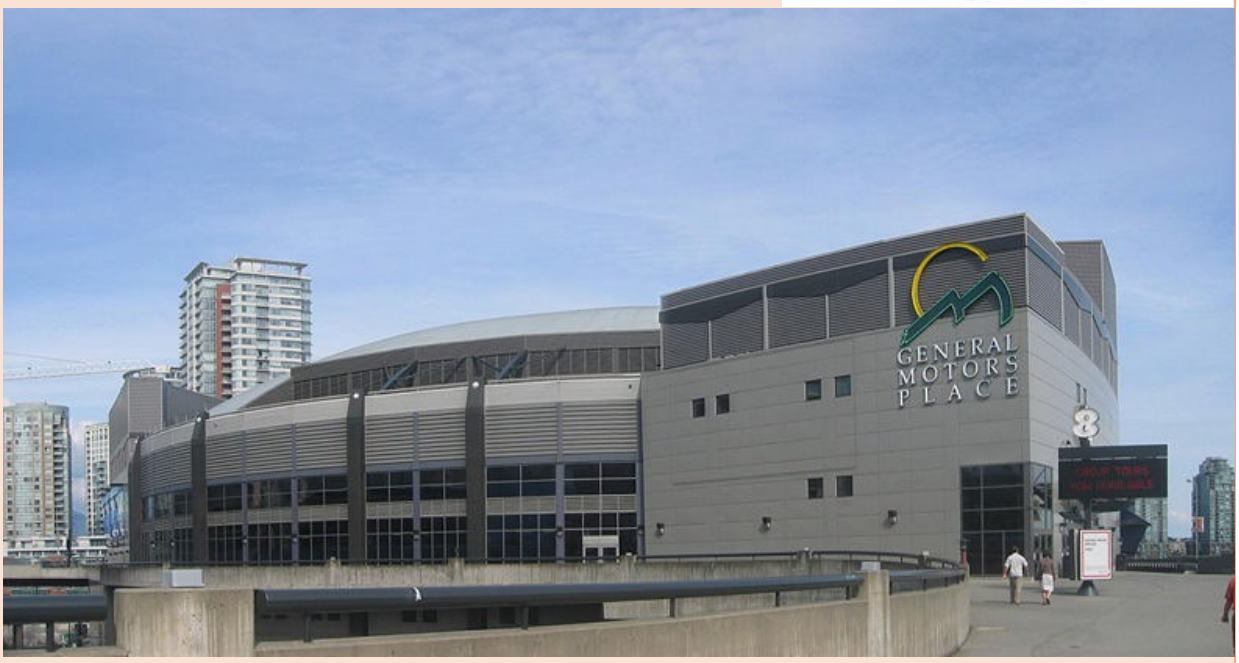
In common: Aisha and Carlos contribute their skills, expertise, and resources to the partnership. They share the responsibilities and decision-making, working together to grow and manage the business. Both partners are involved in day-to-day operations, including meeting with clients, completing projects, and managing finances.

With a view to profit: Aisha and Carlos enter into the partnership with the intention of making a profit. They expect to generate revenue by providing gardening services. Their primary goal is to grow the business and earn income from their joint efforts.

Foundational Law – *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership,* 2009 BCCA 34

In November 2003, three titans of Vancouver business, Francesco Aquilini, Tom Gaglardi, and Ryan Beedie, formed a group and began negotiating with John McCaw Jr. to purchase a 50% ownership stake in the Vancouver Canucks hockey team.

By March 2004, Aquilini had decided to withdraw from the group, leaving Gaglardi and Beedie to continue negotiations with McCaw Jr. However, unknown to Gaglardi and Beedie, Aquilini also began negotiating separately with McCaw and quickly reached an agreement to purchase a 50% stake in the team and the hockey arena (then known as GM Place).



Aquilini also obtained an option to buy the remaining 50% at a later date. Gaglardi and Beedie sued Aquilini alleging that he breached his duty to them as partners by taking advantage of a business opportunity that belonged to the partnership.

The trial judge determined that there was no formal partnership between Aquilini, Gaglardi, and Beedie; this was because the three parties had only informally agreed to "work toward [a] formal arrangement." As a result, there were no obligations of good faith or loyalty owed among them. Further, the trial judge found that the three businessmen had no authority to make binding agreements on behalf of the others — a sign of a partnership. All the proposals given to McCaw Jr. were considered expressions of interest, and a consensus among the three was still required for any proposal to become a binding agreement. They did not discuss the maximum price they were willing to pay or the specific terms they would accept. Any member could leave the group at any time. All of these factors indicated there was no partnership.

Gaglardi and Beedie appealed the trial ruling. In its decision, the BC Court of Appeal found that there was no intention, either through written evidence or the conduct of the parties, to conduct business together with the goal of making a profit. Their understanding of each other's wishes was vague, and they had only committed to paying their lawyer's fees. Additionally, there was no actual offer to purchase the hockey team; only expressions of interest were made. Aquilini was not bound to remain a member after leaving the group, and each individual was free to pursue their own interests. Once again, the court found no partnership had ever been formed.

A point that demands emphasis is that, under a general partnership, partners can be held personally liable for the partnership's debts and obligations. This means that the partners' personal assets can be sought to satisfy any creditors of the partnership. There are a few specific situations where this type of personal liability may arise.

Firstly, if the partnership is sued for any reason, each partner can be held personally liable for the damages arising from the lawsuit. Imagine if a construction business operated as a general partnership and a client sued for faulty workmanship. If the client's case for damages was successful, all partners would be personally liable for the damages awarded to the client.

Secondly, if the partnership becomes insolvent and is unable to pay its debts, the partners can be held personally liable for the partnership's obligations. For example, if a general partnership is in the real estate sector and faces significant financial losses and is unable to repay loans, the partners may be required to use their personal assets to satisfy those debts.

Lastly, partners in a general partnership have the authority to bind the partnership to contracts. If a partner enters into a contract that is disadvantageous or results in a liability, all partners can be held personally responsible. For example, suppose a partner in a general partnership signs a lease agreement for a commercial property at an exorbitant rent without the consent or knowledge of other partners. In such a scenario, all partners would be liable for the excessive rent and any associated penalties or damages.

To address the liability concerns that are present in general partnerships, there are two other forms of partnerships which may be considered; these are known as the limited partnership and the limited liability partnership.

Limited Partnerships

A limited partnership ("LP") is a business partnership that consists of at least one general partner and one or more limited partners. This structure provides a way for partners to pool their resources and conduct business while expressly limiting some of the liability concerns experienced by general partners.

Under a limited partnership, there will always be two types of partners: the general partner(s) and the limited partner(s):

I. General Partner(s)

A limited partnership must have at least one general partner who assumes full liability for the partnership's debts and obligations. General partners have management authority and decision-making power, and they are responsible for the day-to-day operations of the business. They also have personal liability for the partnership's debts and can be held personally liable for any legal actions taken against the partnership.

II. Limited Partner(s)

Limited partners are investors in the partnership and typically contribute capital or assets to the business. They have limited liability which means their personal liability is restricted to the amount they have invested in the partnership. For example, if an individual invested $50,000 into a new restaurant as a limited partner, they would have the right to share in partnership profits however, their liability would be capped at the $50,000 investment.

Limited partners do not participate in the management or day-to-day operations of the business and usually have a more passive role. This is why limited partners are sometimes referred to as "silent" partners; they are silent on any managerial or operational aspects of the business. If limited partners become actively involved in management decisions, they may lose their limited liability status and become personally liable for the partnership's debts.

In broad strokes, the LP allows individuals to invest in a business while limiting their liability to the extent of their investment. However, limited partners are legally more complex than general partnerships and can have specific filing requirements in order to permit them. For example, in British Columbia, to create a limited partnership, a certificate of limited partnership must be filed with the appropriate British Columbia registrar.

Assuming the certificate of limited partnership is filed, limited partnership's name will then be noted by the words "Limited Partnership" or the abbreviation "LP" to clearly indicate its limited liability status.

Example of a registered Limited Partnership.
Note the "LP" at the end of the name.

Limited Liability Partnerships

A limited liability partnership ("LLP") is a partnership structure that combines elements of a partnership and a corporation. It is designed to offer the partners limited liability protection while maintaining the profit-sharing benefits of the partnership.

In an LLP, the partners have limited personal liability for the debts and obligations of the partnership. This means that their personal assets are generally protected in event the LLP faces lawsuits or other liabilities. Despite this limited liability benefit, partners can still be held personally liable for their own professional negligence or misconduct.

Another benefit to LLPs (as opposed to LPs) is that, under an LLP, the limited partners are permitted to manage the partnership. We previously noted that an LP required that limited partners avoid any managerial or operational input; if the limited partner drifted in management, they lose the limited liability protection. However, the LLP address this concern — the partners can manage the partnership while also maintaining their limited protection.

LLPs are commonly used (and sometimes only allowed to be used) by professionals such as lawyers, accountants, architects, and consultants. Whether a business is permitted to register as an LLP is determined by the applicable provincial or territorial statute where the partnership operates.

As with LPs, if the specific provincial/territorial filing requirements are met, the limited liability partnership's name will be noted by the words "Limited Liability Partnership" or the abbreviation "LLP". The following are a few examples of partnerships which have successfully registered as an LLP

Goodmans LLP

LAWSON LUNDELL LLP

Corporations

In terms of legal implications, the corporation stands as completely unique from the sole proprietorship and the partnership. A corporation is a separate legal entity distinct from its owners (the shareholders) or managers (the directors or officers); the corporation is a "person". As a "person", corporations have legal rights similar to those of individuals, including the ability to enter into contracts, sue or be sued, and own property.

One of the primary advantages of incorporating a business is that the shareholders' liability is generally limited to their investment in the corporation. In most cases, shareholders are not personally responsible for the debts or obligations of the corporation beyond their initial investment unless they have provided personal guarantees for the corporation's business. Accordingly, there is a clear incentive to utilize the corporate form as it offers significant protection from liability.

While we will come back to the notion of the corporation's separate legal existence, the following is a summary of the many reasons why business owners should contemplate incorporation:

- **Ongoing Existence** – a corporation has a potentially infinite lifespan. It continues to exist even if its shareholders or directors change due to death, retirement, or transfer of shares.
- **Raising Capital** – corporations have various avenues to raise capital to finance their operations and expansion. They can issue different classes of shares, such as common shares and preferred shares that can be sold to investors. Corporations can also access debt financing by issuing bonds or obtaining loans from financial institutions.
- **Ownership Transfers** – owning shares in a corporation offers a high level of flexibility and transferability. Shareholders can buy or sell their shares freely, allowing for easy entry or exit of investors.

- **Tax Benefits** – corporations often enjoy certain tax advantages. They may be eligible for deductions and tax credits not available to other business entities or individuals. Additionally, corporations can often benefit from favourable tax rates on capital gains, dividends, and corporate income.
- **Person-hood** – unlike the sole proprietorship and partnership, the corporation is a distinct legal person. This personhood allows the company to act on its own behalf and provides a shield of protection to its shareholders and directors.
- **Limited Liability** – building off of the personhood, shareholders and directors enjoy limited liability. Neither can be held liable for the debts or liabilities of the corporation. Shareholders' liability is specifically limited to the amount of their investment in the company.

Based on the chart above, there are clear and compelling reasons for why a business would want to incorporate rather than operate under another business structure.

One of the reasons why there may be hesitation on the part of businesses to incorporate is a perceived sense of complexity or expense that goes along with incorporation. Interestingly though, incorporating a business is not as complex as it may appear. It is possible that an individual could navigate the incorporation process on their own by submitting the required documentation and paying the federal or provincial filing fees. However, in most cases, it is advisable to hire a lawyer to incorporate, as doing so, will (hopefully) ensure that all legal aspects are properly handled.

The cost of hiring a lawyer for a simple incorporation is often in the range of $1,500 to $2,500, but this can vary depending on the complexity of the business and the location. This fee typically covers the lawyer's time and expertise in drafting documents, providing legal advice, and ensuring statutory compliance. While this cost may seem significant for an upstart business with tight capital, it is a worthwhile investment to ensure limited liability for the shareholders/directors in the event something goes wrong with the business.

Federal or Provincial Companies

In Canada, incorporations can occur either at the provincial or federal level. This option exists because the Constitution Act permitted incorporation rights to both the Federal and Provincial levels of governments.

Specifically, section 92(11) assigned the provinces the authority over "incorporation of companies with provincial objects" meaning that provinces would regulate the creation and administration of provincially focused companies.

However, the Federal level of government also has the power to incorporate federally regulated companies. These federally regulated companies can operate anywhere in Canada while provincially regulated companies will be limited to the province they are incorporated in (unless the company seeks extra-provincial authority to operate in another province).

The decision to choose between federal and provincial incorporation is in the hands of the business owner and depends on several factors, including the nature of the business, its scope, and where it expects to be doing business. For example, incorporating provincially is suitable for businesses that

primarily operate within a specific province or territory and have no intention of expanding nationally.

The statutes regulating companies is also different depending on if the company will be registered federally or provincially. Federal companies are incorporated under the Canada Business Corporations Act, R.S.C., 1985, c. C-44 ("CBCA").

Canada Business Corporations Act

R.S.C., 1985, c. C-44

Once registered under the CBCA, the company can operate across Canada and conduct business in multiple provinces and territories.

Registering in an individual province requires compliance with that jurisdiction's statute permitting incorporation — those incorporation statutes are identified below:

- **Alberta** – Business Corporations Act, R.S.A. 2000, c. B-9
- **British Columbia** – Business Corporations Act, S.B.C. 2002, CHAPTER 57
- **Manitoba** – The Corporations Act, C.C.S.M. c. C225
- **New Brunswick** – Business Corporations Act, S.N.B. 1981, c. B-9.1
- **Newfoundland and Labrador** – Corporations Act, R.S.N.L. 1990, c. C-36
- **Nova Scotia** – Companies Act, R.S.N.S 1989, c. 81
- **Ontario** – Business Corporations Act, R.S.O. 1990, c. B.16
- **Prince Edward Island** – Business Corporations Act, R.S.P.E.I. 1988, c B-6.01
- **Quebec** – Companies Act, C.Q.L.R. c. C-38
- **Saskatchewan** – The Business Corporations Act, R.S.S. 1978, c. B-10
- **Northwest Territories** – Business Corporations Act, S.N.W.T. 1996, c. 19
- **Nunavut** – Business Corporations Act, S.N.W.T. (Nu) 1996, c. 19
- **Yukon** – Business Corporations Act, R.S.Y. 2002, c. 20

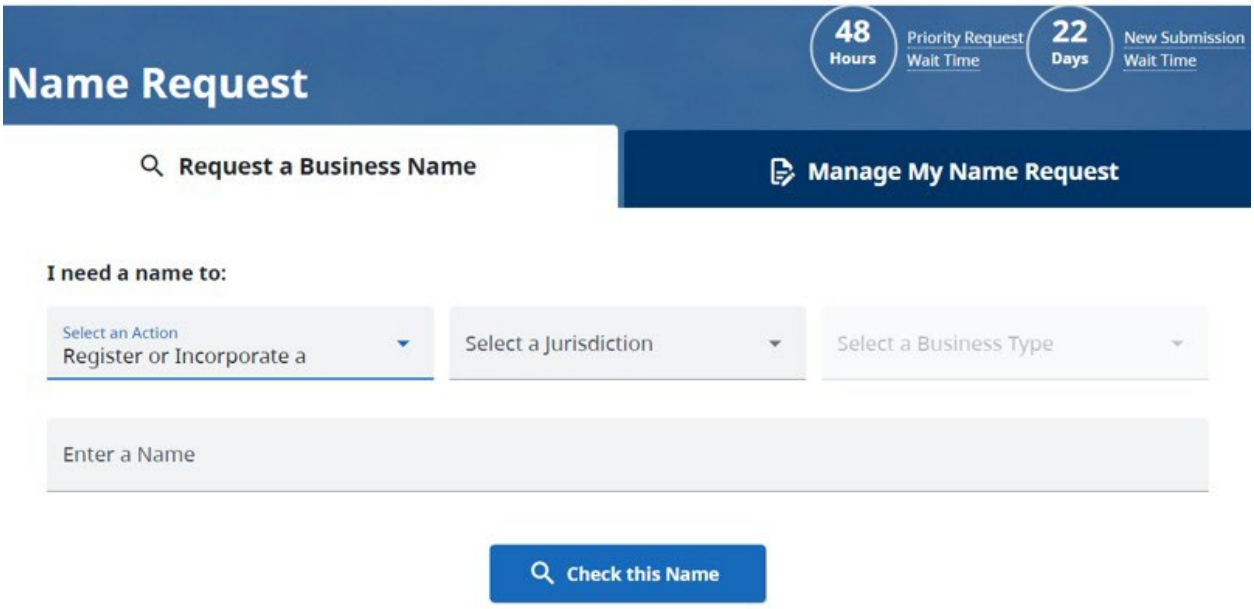
Brief Overview of the Incorporation Steps

in seeking to incorporate a company, one can expect to encounter a few keys steps. Ultimately, it begins with a name search and the completion of an incorporation application.

I. Reserve a Name

The first step in incorporating a federal or provincial business is naming the corporation and ensuring that the name is available to be registered. Businesses must request their name and have its reservation approved by the relevant Registrar of Companies.

The naming process typically starts with a search of existing company names to determine whether the name is available or if there could be conflict with an existing registered business. Certain provinces like British Columbia have actually established simple search engines to conduct corporate name searches:



The British Columbia Corporate Name Search Area:
https://www.names.bcregistry.gov.bc.ca/

Importantly, only names following a certain format will be accepted by the applicable Registrar of Companies.

Registerability of a Corporate Name

Corporate names require the following three elements to be registrable:

1. Distinctive Element

Business names require a unique and memorable component that set it apart from other businesses operating in the same industry. This element can be a word, phrase, or combination of letters that captures the essence of the company's brand identity. The distinctive element can also be a "numbered" company which is a business identified solely by a number, typically assigned by the corporate registrar.

2. Descriptive Element

The descriptive element provides information about the type of business or industry the company operates in. This element communicates the company's core activities, specialization, or field of expertise. It helps potential customers understand what the company does and what they can expect from its products or services. For example, if a company is involved in technology consulting, its descriptive element could be "Technology Solutions," "Consulting Services," or "IT Advisors". Each operates as a shortcut to what the business does.

3. Corporate Designation

The corporate designation is a suffix added to the end of the corporate name to denote the type of business entity. Common corporate designations include "Limited," "Ltd.," "Corporation," "Corp.," "Incorporated," or "Inc.".

Think back to our example of the ice cream shop which operates as a sole proprietorship; let's imagine it now wishes to incorporate. We will have to select a name that contains the distinctive element, descriptive element, and corporate designation. A few examples could be "Chilly Bliss Frozen Treats Inc.", "Creamy Swirls Ice Cream Corp.", or "Frosty Delights Ice Cream Ltd.".

II. The Articles

As part of the incorporation process in British Columbia, the incorporators (those incorporating the company) must provide "articles of incorporation". The articles of incorporation are the primary document that outlines the internal rules and regulations of the company.

Section 12 of the British Columbia Business Corporations Act refers to the necessity of the articles:

Articles

12 (2) The articles of a company must

(a) set out every restriction, if any, on

(i) the businesses that may be carried on by the company, and

(ii) the powers that the company may exercise,

(b) set out, for each class and series of shares, all of the special rights or restrictions that are attached to the shares of that class or series of shares,

More fully, the articles will typically contain a number of provisions, including:

- rights and duties of the shareholders and directors;
- procedures to be followed in electing directors or holding meetings;
- special rights or restrictions attached to the shares;
- restrictions, if any, on the business that may be carried on by the corporation; and
- powers that may be exercised by the corporation.

The articles must be signed by the incorporators and must be kept at what is referred to as the "registered and records office" of the company.

INCORPORATION AGREEMENT

We propose to form a company under the *Business Corporations Act* (BC) under the name of _____ (the "Company").

We agree to take the number of shares in the Company set opposite our names:

NAME OF INCORPORATOR	SIGNATURE OF INCORPORATOR	NUMBER OF SHARES	DATE OF SIGNING YYYY / MM / DD
		_____shares	
		_____shares	

The Company has as its Articles the Table 1 Articles under the *Business Corporations Act* (BC).

NAME	SIGNATURE	DATE OF SIGNING YYYY / MM / DD

ARTICLES

INDEX

III. Incorporation Application/Notice of Articles

Once the Incorporation Application has been approved and the corporation is officially incorporated, the Certificate of Incorporation is issued by the BC Corporate Registry. The Certificate of Incorporation is also commonly referred to as the "Notice of Articles" which serves, among other things, as proof of the corporation's legal existence.

The Notice of Articles is a publicly accessible document and can be requested by anyone interested in obtaining information about the corporation. It also contains information about the registered and records office, directors, and share capital of the corporation which is discussed below.

IV. Registered and Records Office

A corporation must establish a registered and records ("R and R Office") office to ensure proper management of its essential documents. One of the primary responsibilities of the R and R Office is to carefully preserve and organize various documents, including:

- the Certificate of Incorporation which serves as legal proof of the corporation's formation and existence;
- the Central Securities Register which contains details about the company's shares and their ownership;
- the Register of Directors which provides an updated list of individuals serving as directors within the corporation;
- copies of shareholder resolutions which are decisions passed by the shareholders; and
- the minutes of every shareholder and directors' meeting, capturing the decisions, discussions, and resolutions made during these gatherings.


D REGISTERED OFFICE ADDRESSES
DELIVERY ADDRESS OF THE COMPANY'S REGISTERED OFFICE
PROVINCE
BC
POSTAL CODE
E RECORDS OFFICE ADDRESSES
DELIVERY ADDRESS OF THE COMPANY'S RECORDS OFFICE
PROVINCE
BC
POSTAL CODE

V. Register of Directors

The Notice of Articles will list the full names of the directors of the corporation as well as indicate their consent to serve as a director. While most people can serve as corporate directors, the BC Business Corporations Act does identify a few individuals who are not qualified to act as a director such as: anyone under the age of 18 years, found by a court to be incapable of managing their own affairs, is a person who is undischarged from bankruptcy, or has been convicted in or out of BC of an offence involving fraud.

VI. Share Capital

The Notice of Articles will also outline the share capital of the corporation. This includes details such as the number and classes of shares authorized by the corporation, any restrictions on share transfers, and any other relevant provisions related to share capital.

Unless explicitly restricted, shares generally have three fundamental rights that shareholders can exercise:

- **Voting Rights** – shareholders have the right to vote in corporate elections. Each share typically carries one vote, and shareholders can participate in important decisions that require shareholder approval, such as the appointment of directors, mergers, or major changes in the company's bylaws.

- **Dividend Rights** – shareholders are entitled to receive dividends which are a portion of the company's profits distributed to shareholders. Common shareholders receive dividends after any obligations to preferred shareholders have been fulfilled.
- **Liquidation Rights** – Shareholders may have the right to receive a portion of the remaining assets after dissolution. After all debts and obligations have been settled, common shareholders are entitled to the residual value or proceeds from the liquidation in proportion to their ownership.

That being said, the rights of shareholders can be limited by the corporation's ability to create share classes.

As part of its bundle of rights, a corporation can create different types of shares with distinct characteristics. These share classes can have different rights, privileges, or restrictions associated with them. For example, a corporation may issue common shares which typically carry voting rights and entitle the shareholder to a proportional share of dividends and assets upon liquidation. However, a corporation might also issue preferred shares that may have priority in dividend payments or liquidation proceeds but do not carry voting rights.

There is tremendous flexibility in crafting different share classes. Ultimately, corporations can use the varying share classes to financially benefit some investors, offer others the ability to vote on corporate decisions, or both.

The information about the share classes will be listed in the corporation's Central Securities Register.

F AUTHORIZED SHARE STRUCTURE

Identifying name of class or series of shares	Maximum number of shares of this class or series of shares that the company is authorized to issue, or indicate there is no maximum number.		Kind of shares of this class or series of shares.			Are there special rights or restrictions attached to the shares of this class or series of shares?	
	THERE IS NO MAXIMUM (✔)	MAXIMUM NUMBER OF SHARES AUTHORIZED	WITHOUT PAR VALUE (✔)	WITH A PAR VALUE OF ($)	Type of currency	YES (✔)	NO (✔)

VII. Summary

Assuming compliance with the many requirements we saw throughout, the corporation will be registered. At this point, the corporation would be considered a separate legal entity.

BRITISH COLUMBIA

Number: BC1010751

CERTIFICATE OF INCORPORATION

BUSINESS CORPORATIONS ACT

I Hereby Certify that ACCOUNTABLE MORTGAGE INVESTMENT CORP. was incorporated under the Business Corporations Act on August 13, 2014 at 04:23 PM Pacific Time.

Issued under my hand at Victoria, British Columbia
On August 13, 2014

CAROL PREST
Registrar of Companies
Province of British Columbia
Canada

External Resource

The British Columbia government has a series of primers on the incorporation of provincial companies. You can review the following site to get further information on the steps to incorporate:

https://www2.gov.bc.ca/gov/content/employment-business/business/managing-a-business/permits-licences/businesses-incorporated-companies/incorporated-companies

The Corporate Veil

It has been made clear that one of the stark benefits of incorporation is the limited liability for the shareholders and directors. The law actually refers to this limited liability using multiple different forms of terminology: corporate personality, corporate shield, and also as, the corporate veil.

The corporate veil is a fascinating concept. It refers to the legal separation between a company or corporation and its shareholders, directors, and officers. In effect, the owners and managers of a company are behind a veil which shields them from personal liability for the debts, obligations, and liabilities of the corporation. In other words, the directors' and shareholders' personal assets are generally protected from being used to satisfy the company's liabilities.

The concept of the corporate veil is fundamental to corporate law. It's designed to ensure that corporations have access to investors and qualified individuals to serve as directors. The idea is that, if the owners and managers, are immune from the corporation's liabilities then there is greater willingness to participate in a company.

> "It is a fundamental principle of corporate law that shareholders are not, as a general rule, responsible for the actions of the corporation."
>
> *Chisum Log Homes & Lumber Ltd. v. Investment Saskatchewan Inc.*, 2007 SKQB 368 at para. 46

The principle of the corporate veil was first established by the English courts in the seminal case of Salomon v. Salomon & Co. Ltd., [1987] A.C. 22 (H.L.) referred to below.

Foundational Law – *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.L.)

The case involved a dispute between Mr. Salomon, a shoe manufacturer, and his company, Salomon & Co. Ltd.

Mr. Salomon had been operating as a sole proprietor and decided to incorporate his business (after incorporation, the business became known as Salomon & Co. Ltd.). He transferred his business assets and liabilities to the newly formed company in exchange for shares. Mr. Salomon owned 20,001 out of the 20,007 shares issued by the company, while his wife and five children each held one share.

Unfortunately, the company encountered financial difficulties, and it went into liquidation. The company had many creditors who were owed money but there were very few assets remaining in the company to satisfy all the debts. The liquidator argued that the company was a mere façade or agent of Mr. Salomon and that he should be personally liable for the company's debts. The case eventually reached the House of Lords which had to determine the legal status of the company and the liability of its shareholders namely, Mr. Salomon and his family.

The House of Lords unanimously ruled in favour of Mr. Salomon and upheld the separate legal personality of the company. The court held that once a company is duly incorporated, it becomes a distinct legal entity separate from its shareholders. The directors and shareholders are afforded protection by the corporate veil.

The court explained that Salomon & Co. Ltd. was not a mere alias or agent for Mr. Salomon but was rather a separate legal person with its own rights and liabilities. Therefore, the debts and obligations of the company were its own, and the shareholders were not personally liable for them beyond their unpaid share capital.

The case firmly established the principle of corporate personality and limited liability which has been a cornerstone of modern company law in common law jurisdictions around the world.

"The company is at law a different person altogether from the subscribers to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided in the Act."

Salomon v. A. Salomon & Co., [1897] A.C. 22 (H.L.), at para. 50

Continuing our ice cream parlour example, suppose the company "Frosty Treats Ice Cream Inc." is incorporated. Frosty Treats then borrows a significant sum of money from a financial institution to expand its operations, purchase new equipment, and develop new flavours of ice cream. However, due to unforeseen circumstances such as increased competition, the company experiences financial difficulties and is unable to repay the loan.

The lender's recourse, in this instance, would typically be limited to the assets of the company itself. The lender can seek repayment through various means, such as liquidating the company's assets or negotiating a repayment plan, but the personal assets of the shareholders and directors are shielded. The limited liability feature of the corporate veil ensures that the shareholders' personal assets, such as their homes or bank accounts, cannot be seized to satisfy the loan given to Frosty Treats.

There is still some liability on the part of the shareholders though it is limited to the amount they have invested in Frosty Treats Inc. For example, if a shareholder invested $10,000 in the company, their liability is generally restricted to that amount. They are not personally responsible for repaying the loan or any other debts beyond their initial investment.

Piercing the Corporate Veil

As noted, under normal circumstances, the shareholders and directors are not personally responsible for the corporation's obligations. However, the protection afforded by the corporate veil is not absolute.

Piercing the corporate veil allows a court to disregard the separate legal identity of a corporation and hold its shareholders or directors personally liable for the corporation's debts or liabilities. It is typically used, when a court determines that the corporation has been involved in some form of fraud, injustice, or unfair activity. The court can then disregard the corporate personhood and hold the individuals behind the company personally responsible.

Myth-Busting

Myth: "If I'm incorporated, they can never go after my personal assets."

The myth that incorporating a business provides absolute protection for personal assets is not entirely true. While incorporating a business does create a legal separation between personal and business assets, it does not provide complete immunity from personal liability. For example, personal liability is possible where there is a personal guarantee of the debt, the wrongful act was personally committed by the business owner individual, or if there is a compelling reason to disregard the separate legal status of the business — what is called piercing the corporate veil.

It's easy to see how, any time a corporation is involved, the plaintiff will want to pierce the corporate veil. However, the concept is used sparingly by courts and seen to be an exceptional remedy.

Courts want to respect the corporate form and therefore, disregarding its existence is a rare circumstance.

> "It is trite law that an incorporated entity is a legal person distinct from its directors and shareholders … The presumption is a robust one … However, the protection from company liabilities that is afforded by the corporate veil to directors and shareholders is not absolute."
>
> *SPC Holdings v. Gabriel*, 2013 BCPC 31 at para. 12

That said, there are instances where justice demands looking beyond the corporation and finding liability on the shareholders or directors. There are a number of instances where the veil can be pierced and, many of these scenarios, rely on some form of fraud on the part of the shareholders or directors.

Legal Test for Piercing the Corporate Veil

Generally, for the corporate veil to be pierced, the court must be satisfied that one of the following applies:

1. the company was formed for the express purpose of committing a wrongful act;
2. once the company was formed, those in control of it expressly directed a wrongful act;
3. the company is a sham – that is, a mere agent, or façade or alter ego, of a controlling corporator; or
4. clear and express statutory provisions permit the lifting of the corporate veil.

SPC Holdings v. Gabriel, 2013 BCPC 31 at paras. 13.

Each of the exceptions to the piercing the corporate veil is unified by the notion that it would be fundamentally unfair for the directors of shareholders to escape liability simply because the corporation is a distinct entity. While they share the same goal of fairness, each of the exceptions are slightly different in their context.

Company Formed for the Express Purpose of Committing a Wrongful Act

If it can be proven that a company was established with the specific intention of carrying out illegal, fraudulent, or wrongful activities, a court may disregard the corporate structure and hold the individuals behind the company personally liable. In this case, the court views the company as a mere instrument created to facilitate a wrongdoing — therefore, the veil can be pierced.

Company Formed and those in Control Expressly Direct a Wrongful Act

Even if a company was not initially formed with wrongful intentions, if the individuals in control of the company deliberately direct or instruct it to engage in illegal or wrongful activities, the court may disregard the corporate veil. This ensures that those in control of company cannot shield themselves from personal liability by acting wrongfully through the corporate form.

Company is a Sham, Mere Agent, or Alter Ego

In some instances, a company may be considered a mere sham or alter ego of a controlling shareholder or owner. This occurs when the company is not used as a separate entity, but rather as a facade or extension of the controlling individual. If the court determines that the corporate structure is being abused or disregarded to service the needs of the personal individuals behind the company, it may pierce the corporate veil and hold the individual liable for the company's actions.

Again, in all these scenarios, piercing the corporate veil would be seen as justified given the attempt to misuse the corporate personhood.

Example – Piercing Frosty Treats Ice Cream Inc.'s Corporate Veil

Let's circle back to the example of the incorporated company, Frosty Treats Ice Cream Inc. What are some hypothetical scenarios in which the corporate veil could be pierced, and liability attach to the directors or shareholders of the company:

Express purpose of committing a wrongful act: Imagine if the shareholders of Frosty Treats Ice Cream Inc. establish the company with the explicit intention of defrauding customers. They plan to sell substandard, unsafe ice cream products while misrepresenting their quality and ingredients so that they can make quick profits. The corporate veil could be pierced because of the wrongful purpose in setting up the company.

Those in control expressly directed a wrongful act: Imagine the company is four years old, and the directors of the company instruct their accountants to engage in tax fraud resulting in substantial losses to investors when the scam is uncovered. The shareholders could be held personally responsible for the damages caused even though it was through the form of the corporation.

Sham or Alter Ego: Here, the shareholders commingle their personal assets with those of the company, use company funds for personal expenses, or fail to observe basic corporate formalities like maintaining separate accounting records. The court may determine that the company is merely a façade or alter ego of the controlling shareholders and not a legitimate separate entity. In such a case, the shareholders could be held personally liable for the company's obligations, debts, or damages, thereby piercing the corporate veil.

Foundational Law – *SPC Holdings v. Gabriel*, 2013 BCPC 31

This case involved a homeowner named Rob Gabriel who hired SPC Holdings and Construction Ltd. ("SPC") to perform roofing work on his property. However, the work done by SPC was found to be deficient, and Mr. Gabriel refused to pay the invoices. As a result, SPC sued him for payment, and in response, Mr. Gabriel counterclaimed against the company. He was successful in his counterclaim and was awarded $25,000 (the statutory maximum at the time) by the court, along with expenses. However, SPC was unable to pay the judgment as it was no longer in operation and was effectively "judgment proof" because of its lack of assets.

Subsequently, Mr. Gabriel sought to sue the directors of SPC Holdings in their personal capacity to enforce the judgment. The case centered on the issue of whether Mr. Gabriel could pierce the corporate veil to hold the directors personally liable for the judgment.

The court uncovered several manipulations by the directors of SPC Holdings that took place shortly after Mr. Gabriel counterclaimed for the deficient roofing work. The directors purportedly brought SPC Holdings' operations to an end and formed a new company called "SPC Roofing and Waterproofing". This new company essentially succeeded SPC Holdings and continued its roofing business under the same trade name, logo, and address. Assets of SPC Holdings were transferred to the new company, including vehicles and equipment. The end result was a hollowing out of SPF Holdings while transferring the assets to SPC Roofing.

The directors' actions were found to be wrongful, illegitimate, and carried out in bad faith. The new company benefited from the goodwill and reputation of SPC Holdings while leaving the old company incapable of meeting its obligations to Mr. Gabriel. The court concluded that the directors of SPC Holdings had disregarded the corporate form of SPC Holdings when faced with a potential liability. Consequently, the directors had disqualified themselves from the protection typically provided by the corporate veil.

The court found it appropriate to pierce SPC Holdings' corporate veil and Gabriel was permitted to seek his damages against the directors personally. *SPC* reinforces the principle of corporate personality and limited liability which has been a cornerstone of modern company law in common law jurisdictions around the world.

Chapter 9 - Review Questions

1. What are the main differences between a sole proprietorship, a partnership, and a corporation?
2. What is unlimited liability and why is it a concern?
3. What are the different types of partnerships in Canada?
4. How does incorporating a business limit liability?
5. What is "piercing the corporate veil," and when might it happen?
6. What are the steps involved in incorporating a business in Canada?
7. What's the difference between federal and provincial incorporation?
8. What are the key advantages of incorporating a business?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 9? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

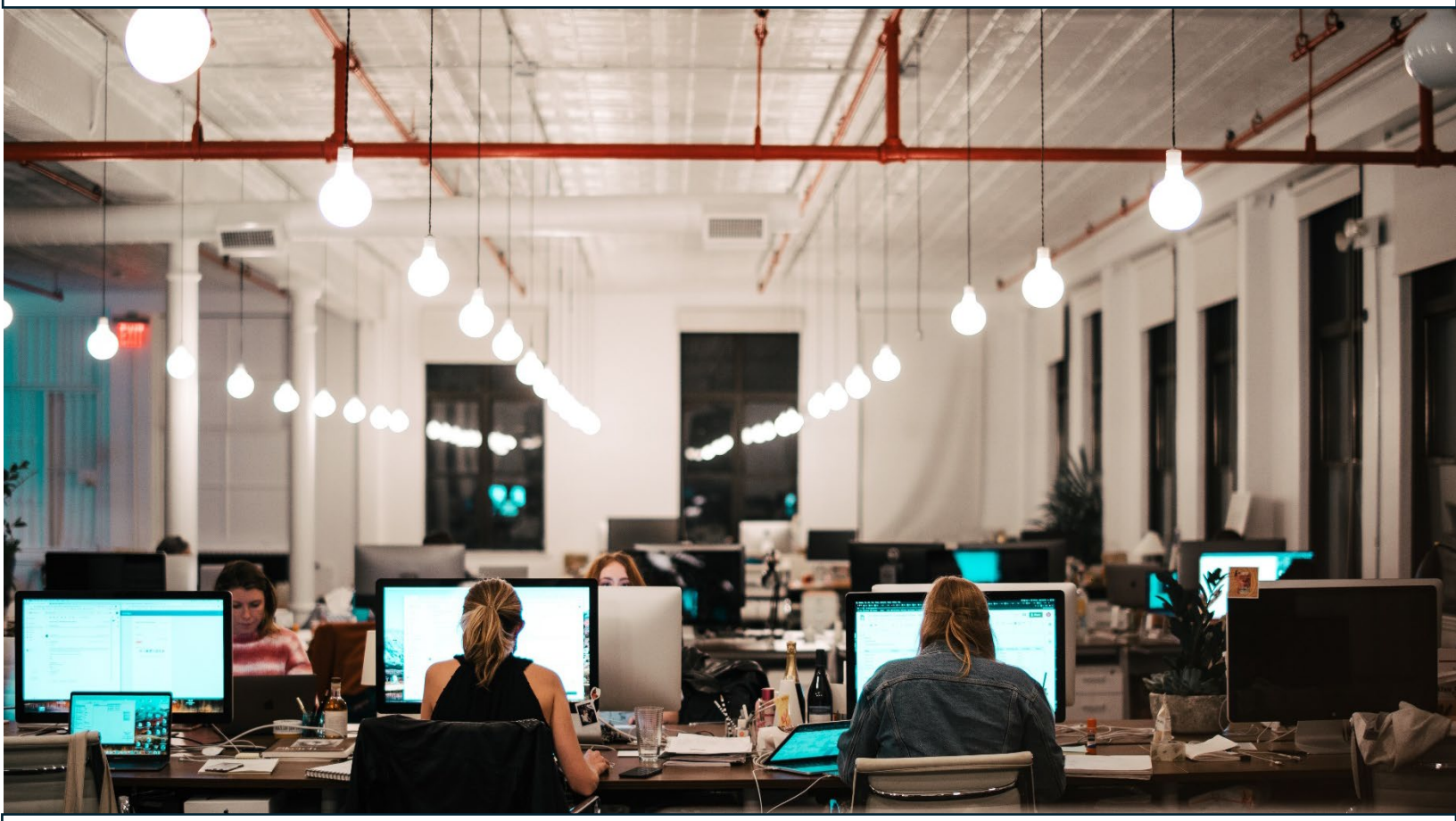
Chapter 9 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 9:

https://youtu.be/aa3nLZuojdg

Chapter 10: Employment Law



Learning Outcomes:

1. Canvass an overview of Canadian employment law, including through the life cycle of employment.
2. Identify and differentiate between different classifications of workers in Canada, such as employees, independent contractors, and dependent contractors.
3. Analyze the key elements and components of an employment contract.
4. Examine the purpose and provisions of the Employment Standards Act, including minimum wage, working hours, overtime, vacation entitlements, and other statutory requirements.
5. Evaluate the legal framework and considerations involved in terminations, distinguishing between terminations with cause and terminations without cause.

Introduction

In this chapter, we will cover employment law which serves as the cornerstone of regulating the rights, obligations, and protections of individuals in the workforce. It is admittedly, a broad topic encompassing issues such as hiring practices, wages, working conditions, and termination procedures.

Having a deeper awareness of each of these topics can help individuals navigate their employment with confidence and ensure they are better positioned to protect their legal rights. From an employer's perspective, staying up to date on ever-changing employment regulations is vital as it can help promote a successful and healthy workplace as well as avoid legal disputes with employees.

Importantly, this chapter will only focus on non-union employment and not deal with the laws and regulations in a unionized workplace. Employment law is very different from labour law and thus, it should be remembered that the laws governing unions are fundamentally different than the non-union setting.

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."
>
> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368

Employment Law Framework

Canadian employment law is a blend of statutes (the laws enacted by federal and provincial governments) and common law principles (derived from court decisions). Together, this combination creates a comprehensive legal framework governing employment relationships.

Like all the provinces and territories, there are numerous statutes in BC which place boundaries on the relationship between employees and employers. Some of the major BC statutes include:

- **Employment Standards Act (ESA)** – This statute sets out the minimum standards for employment in BC. It covers various aspects, such as minimum wage, hours of work, overtime, vacation entitlements, leaves of absence, termination, and other basic rights and obligations.
- **Human Rights Code** – The Human Rights Code prohibits discrimination and harassment based on protected grounds, such as race, gender, age, religion, disability, and sexual orientation. It ensures equal treatment and addresses issues related to workplace discrimination.

- **Workers Compensation Act (WCA)** – The WCA establishes a comprehensive system for providing compensation to workers who suffer work-related injuries or occupational diseases. It also outlines the rights and responsibilities in relation to workplace safety and health.

Importantly, these statutes govern different and specific issues of employment and therefore, it can be a challenge for employees to have a clear sense of their rights and where to seek a remedy. While we cannot canvass all aspects of the various statutes, we will cover some of the fundamental pieces to the puzzle.

Types of Work Relationships

Given that we are focused on "employment" law, we would expect that our discussion would always involve employees. However, not every person that works is an employee. There are numerous ways to structure a work relationship, including as employees, independent contractors, and dependent contractors.

The distinction between the worker categories is hugely important because it determines the level of protection and benefits that a working individual is entitled to under the law. For instance, employees are entitled to a range of protections and benefits, such as minimum wage, vacation pay, and employment insurance, while independent and dependent contractors, to varying degrees, are not.

Employees

An employee is someone who provides services to an employer in exchange for compensation and is generally subject to the direction and control of the employer in terms of their work.

A key characteristic of being an employee is continuity. The relationship between an employer and an employee is ongoing and not typically, limited to a one-time or short-term arrangement. As an employee, the work or engagement is expected to persist over a certain period of time, often as an indefinite relationship with no pre-determined end date (though this structure is by no means guaranteed).

Further, if there is an employment relationship, employers are responsible for deducting and remitting various taxes from the employee's wages, including income tax, Canada Pension Plan (CPP) contributions, and Employment Insurance (EI) premiums. These deductions are made on a regular basis and submitted to the appropriate government authorities.

Independent Contractors

An independent contractor refers to a person who is engaged by another party to perform specific tasks or services on a contractual basis. Unlike employees, independent contractors are not considered to be controlled by the employer and therefore, are not entitled to the same rights and benefits as employees. Independent contractors tend to have more flexibility and control over their work, they are responsible for their own taxes, insurance, and other business-related expenses.

> Independent Contractor: "one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."
>
> Pollock on Torts, 15th ed., p. 63

A few common occupations that are frequently based on an independent contractor relationship are the following:

- **Freelancers** – self-employed professionals who offer their skills and services to clients on a project basis. They often work in creative fields such as writing, graphic design, web development, photography, and event planning.
- **Professional Services** – professionals such as lawyers, accountants, consultants, financial advisors, etc. are experts in a particular field who provide specialized advice and guidance to businesses or individuals. They may offer strategic services, but they are not employees of that company. Instead, the professional is retained on contract to perform their specialized task.
- **Tradespeople** – Skilled tradespeople such as plumbers, electricians, carpenters, and painters can work as independent contractors rather than as employees. They are hired by individuals or businesses to perform specific tasks or projects and are responsible for their own tools, equipment, insurance, and taxes.
- **Fitness Instructors** – personal trainers, yoga instructors, and other fitness professionals often work independently, offering their services to multiple clients or fitness facilities. They may conduct one-on-one sessions or group classes for a variety of businesses.
- **Delivery Drivers** – many individuals now work as independent contractors providing delivery services. They use their own vehicles to transport goods or food from businesses to customers.

The emergence of the gig economy has certainly let to an expansion in the use of workers labeled as independent contractors. Think about the following businesses and how they rely on independent contractors rather than employees.

Dependent Contractors

Dependent contractors are recognized as a middle ground between employees and independent contractors. Dependent contractors are individuals who are economically dependent on a particular organization for their livelihood, even though they may not be considered employees in the strict legal sense. These individuals are not considered employees, but they are also not considered to be self-employed.

Dependant contractors exhibit characteristics of both independent contractors, but also employees. Like employees, dependent contractors have a significant economic dependency on a single organization, but, like independent contractors, they retain some degree of independence and control over their work.
Given that dependent contractors are a middle-ground, the law ensures that dependent contractors have access to certain types of employee protections like minimum employment standards and legal remedies in the case of wrongful dismissal.

As an example, imagine a technology company engages a software developer on a long-term basis to work exclusively on its projects. The developer is not an employee but works full-time for the company, follows its instructions, uses its equipment and software, and does not have other clients. Despite not being an employee, the developer is economically dependent on the company for their income and lacks the freedom to pursue other opportunities. In this case, the developer may be considered a dependent contractor, entitled to some of employment-related protections and benefits that employees receive.

Myth-Busting

Myth: "I'm not an employee, so I'm not entitled to work protections"

Incorrect. In reality, many workers who are labeled as independent contractors may actually be considered employees under the law and therefore, are entitled to various legal protections. The determination of employee status depends on multiple factors, such as the level of control exercised by the employer and the nature of the working relationship. So, you need to examine how you actually work to determine if you are truly an independent contractor.

Given that many rights and protections are available to employees, but not independent contractors, it becomes crucial to properly establish the classification of a worker.

It is also true that some employers may label employees as independent contractors to restrict some of the protections afforded to that worker. Given the stakes, how then do we determine if a worker is an employee or independent contractor?

The determination of worker classification is based on a legal test commonly known as the "Fourfold Test":

- **Control** – this factor considers the degree of control exercised by the employer over the worker. If the employer has significant control over how, when, and where the work is performed, it suggests an employment relationship. For example, if a worker is required to follow specific instructions, work set hours, and report to a supervisor, they are more likely to be classified as an employee.
- **Ownership of Tools** – this factor examines who provides the tools, equipment, or materials necessary for the work. If the employer supplies these resources, it leans toward an employment relationship. On the other hand, if the worker provides their own tools, it suggests an independent contractor arrangement.
- **Chance of Profit/Risk of Loss** – this factor considers whether the worker has an opportunity for profit or bears the risk of financial loss based on their performance. Independent contractors typically have a chance to make a profit or incur a loss based on their business decisions, while employees receive a predictable wage or salary.
- **Integration** – This factor evaluates the level of integration of the worker's services into the employer's business. If the worker's services are integral to the employer's operations, it suggests an employment relationship. Conversely, if the worker's services are separate and distinct from the employer's core business, it leans toward an independent contractor arrangement.

No single factor is determinative, and the entire working relationship must be considered as a whole. However, the control test is often viewed as one of the most important factors for conclusively determining the classification.

Foundational Law – *649905 Ontario Ltd. v. Sagaz Industries Canada*, 2001 SCC 59

The Sagaz case is one of the most significant legal precedents for determining the classification of a worker as either an employee or an independent contractor.

In the case, Sagaz Industries, a company engaged in the manufacture and distribution of industrial brushes, hired salespeople to promote and sell their products. The company classified these salespeople as independent contractors which meant they were not entitled to certain legal protections afforded to employees.

However, the salespeople argued that they should be classified as employees, as their level of control, dependence, and integration with the company suggested an employment relationship. In the decision, the SCC crafted what is know referred to as the "fourfold test":

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 649905 Ontario Ltd. v. Sagaz Industries Canada, 2001 SCC 59 at para. 47

Ultimately, the decision highlights the importance of focusing on the underlying nature of the working relationship rather than the specific label given to the worker. Sagaz is also the clearest conception of the four-part legal test now used to evaluate a worker's status.

Example – Utilizing the Fourfold Test

Imagine an employer, "Tech Solutions", hires a computer programmer, Sachi, to develop a software application. To determine if Sachi is an employee or an independent contractor, we can consider the fourfold test:

> Control – Tech Solutions allows Sachi to set her own schedule and work remotely. She has the freedom to decide how to approach the programming tasks and is not closely supervised by the company. This suggests a lower degree of control, indicating an independent contractor relationship.
>
> Ownership of Tools – Sachi uses her own computer, software, and programming tools to complete the work. Tech Solutions does not provide any equipment or resources. This

again, leans toward an independent contractor relationship as Sachi supplies her own tools.

Chance of Profit/Risk of Loss – Sachi's contract with Tech Solutions specifies a fixed project fee for the software development. If Sachi completes the project efficiently and within budget, she could potentially earn a higher profit. Alternatively, if she faces unexpected challenges that increase the project's cost, she would be the one to absorb these extra expenses (not Tech Solutions). This indicates that Sachi is the one who has the chance of profit or risk of loss, suggesting an independent contractor relationship.

Integration – The development work performed by Sachi is separate and distinct from Tech Solutions' core business. She is hired on a project basis and does not contribute directly to the company's day-to-day operations. This points toward an independent contractor relationship.

Considering all these factors, Sachi would likely be classified as an independent contractor. She has control over her work, uses her own tools, faces a chance of profit or loss, and provides separate services that are not deeply integrated into the company's operations.

The Employment Contract

One the principal reasons you may contact an employment lawyer is because you have just been presented with a written employment contract. It is often recommended by employers (and most certainly lawyers) that you obtain independent legal advice about your employment obligations. This is such an important principle that often the contract itself, will have a clause dealing with independent legal advice:

> The Parties agree this Agreement constitutes the full understanding between them on these issues. The Employee further acknowledges and agrees that the Employer fully understands the terms of this Agreement. The Employee acknowledges that the Employee has had independent legal representation in connection with this Agreement or the opportunity to obtain same and that the Employee voluntarily enters into this Agreement.
>
> *Ottawa (City) v. Letourneau*, 2005 CanLII 1407 at para. 57

Given the importance of the contract to the employment relationship, it certainly makes sense that understanding the law affecting the contract should be a priority. While this chapter cannot substitute for the guidance of an employment lawyer (nor is this chapter legal advice), it can highlight some of the major elements and terms dealing with employment agreements.

Form of the Employment Contract

It is worth noting that not all employment contracts are required to be in writing. Employment contracts can be formed through verbal agreements or through a combination of written and verbal terms. It is absolutely possible that an employee does not sign a written contract of employment however, they are still entitled to legal protection. When a worker agrees to provide services to an

employer and the employer agrees to compensate the worker in return, a contract is formed. That said, having a written employment contract is highly recommended as it provides numerous advantages to both parties.

For employers, the written contract allows them to clearly define the terms of employment, including job duties, work hours, compensation, benefits, and other important provisions. This clarity helps prevent misunderstandings and disputes in the future. Employers can also use employment contracts to protect their business interests by including provisions such as probation, non-disclosure agreements, non-compete/non-solicit clauses, or ownership of intellectual property rights clauses. Lastly, written contracts may provide an employer workforce flexibility by restricting the length of the employment — such as using a fixed-term contract (as opposed to an indefinite one).

Employees also benefit from written employment contracts as they can clearly see their rights and entitlements. This likely includes provisions related to wages, overtime pay, vacation time, termination notice, or severance pay, and other benefits. Having these terms in writing gives employees a legal basis to enforce their rights if any disputes arise.

Myth-Busting

Myth: "I didn't sign anything with my employer so, I don't have an employment contract."

Incorrect. The idea that having a signed document is the only way to have an employment contract is a myth. In reality, an employment contract can be created verbally or through conduct, and it is still legally enforceable. A formal written agreement is not always necessary to establish the existence of an employment contract, as the terms and conditions of employment can be implied or inferred from the actions and behaviour of the parties involved.

If you are doing work for money, you have an employment contract.

What Makes an Employment Contract Enforceable?

While parties may believe they have an employment contract, there's no guarantee that it is legally enforceable.

As an employment agreement is just a form of contract, its enforceability requires the same elements that were noted during our general discussion on the enforceability of a contract. To be valid, the following six elements must be present in the employment contract:

I. Offers

An employment contract begins with an offer typically, made by the employer to the employee. The offer sets out the terms and conditions of employment, such as job responsibilities, compensation, benefits, working hours, and other relevant details. The offer does create binding obligations on the

employer and employee (unless accepted). The offer can also be revoked any time by the employer prior to the employee's acceptance.

II. Acceptance

Once the offer is accepted, it becomes a legally binding agreement that governs the employment relationship. Acceptance signifies the employee's willingness to enter into an employment agreement and indicates their agreement to the terms and conditions outlined in the offer. Acceptance can be either explicit or implicit — explicit being the overt "yes" and implicit being an acceptance by conduct (such as showing up and beginning the work).

III. Consideration

Consideration refers to something of value exchanged between the parties involved in the employment contract. In the context of employment, consideration is usually the employee's promise to provide the work and the employer's promise to provide compensation.

IV. Intention to Create Legal Relations

For a contract to be enforceable, there must be an intention on both parties to create a legal relationship. For employment, it is presumed that both the employer and the employee intend to create a legally binding relationship unless evidence suggests otherwise.

V. Capacity

Capacity may be an issue for employment contracts though the situations are limited. A contract with a minor cannot be enforced against the minor though, it can be enforced against the adult party (Infants Act, section 19). For example, imagine a 16-year-old high school student signs a written contract of employment to work as a server in a local restaurant. Because the student is a minor, the restaurant cannot enforce the contract against the student but, the student could choose to enforce the terms against the restaurant. Additionally, individuals with mental incapacity may have limited capacity to enter into contracts, depending on the circumstances.

VI. Legality

The purpose of the employment contract must be a legal one. A contract that involves illegal activities or violates public policy will not be enforceable. For example, imagine a corporation hires an individual specifically to forge documents for clients. Since the terms of the employment contract involve illegal activities (forgery), the contract is void and unenforceable.

Sources of Contractual Terms

The terms of an employment contract can come from various sources, including statutory laws, common law principles, collective agreements, and the contract itself. The full spread of the employment terms, in many cases, contains a mix of each.

Statutory Law

Employment relationships in Canada are governed by a variety of federal and provincial/territorial laws. These laws set out minimum standards for the employment. For example, the Employment Standards Act (to be discussed later in this chapter) establishes rules regarding minimum wage,

hours of work, overtime pay, vacation entitlements, and termination notice or pay. These laws imply these protections into the employment relationship and typically, cannot be waived.

Common Law

Common law principles also play a significant role in shaping the terms of an employment contract. Courts have recognized certain implied terms that are considered to be part of every employment contract, even if they are not explicitly stated in a written contract. These implied terms will be discussed more at length in the following section.

Collective Agreements

In unionized workplaces, the terms of employment are determined through collective bargaining between the employer and the union representing the employees. The resulting collective agreement outlines the rights, responsibilities, and conditions of employment for the unionized employees. Collective agreements have the force of law and supersede individual employment contracts for employees within the bargaining unit.

As noted at the start of the chapter, the law relating to unionized workplaces will not be canvassed however, it is worth noting how the collective agreement is the source of employment terms for unionized workers.

Individual Contracts

The negotiated terms of the employment contract form the essence of the relationship between the employer and the employee. It makes sense that the written or verbal contract can expand on the terms of that relationship.

Express, Ancillary, and Implied Contract Terms

As noted above, the terms of employment can come from a cross-section of different sources. This mix can result in some terms being expressly defined in the agreements versus other terms which are implied.

Express terms are explicitly agreed upon by the employer and employee and are typically set out in writing. Express terms can cover a wide range of issues, such as compensation, working hours, job duties, benefits, termination procedures, and any other specific terms agreed upon by the parties.

What is clear about express terms, regardless of scope, is that they are clearly expressed and agreed to by the parties.

In addition to express terms, company policies or handbooks can also play a significant role in determining the terms and conditions of employment. These ancillary policies may cover areas such as a code of conduct, disciplinary procedures, leave policies, confidentiality agreements, social media use, and other rules and regulations that employees are expected to follow. While these policies may not be individually negotiated with each employee, they can have legal enforceability if they are communicated to the employee and included in the contract. For example, if an employment policy prohibits discrimination or harassment, this policy would be enforceable if

the employee is aware of the policy and the policy is properly incorporated or referenced in the employment contract.

Implied terms, on the other hand, are not explicitly stated but are assumed to be part of the employment relationship. These terms are typically required because statutes passed by the various levels of government demand them into the employment contract, or they are implied because of common law. Examples of implied terms may include the duty of an employer to provide a safe working environment, the duty of an employee to perform their job competently, and the duty of both parties to act in good faith during the employment relationship. Implied terms are not specifically negotiated but do legally exist in the employment contract.

Taking all this together, the employment terms are often more then just the written contract, it is all the myriads of other employer policies which are properly incorporated in the employee's agreement and also those implied by law.

Common Contract Terms

The following discussion highlights some of the major or most common express terms in an employment contract, including probationary clauses, ownership of intellectual property clauses, restrictive covenants, and termination clauses.

Myth-Busting

Myth: "All I need to read in the employment contract is the salary and job duties."

The myth that the only important terms in an employment contract are the salary and job duties overlook the critical aspects that come after. Terms such as probation, ownership of intellectual property clauses, restrictive covenants, and termination clauses play a significant role in defining the employment relationship.

Therefore, it is crucial to thoroughly review and understand the entirety of the employment contract to properly understand and protect your rights.

Probationary Clauses

Probationary clauses refer to a period of time during which an employee's job performance is evaluated to determine if they are suitable for long-term employment with the company. Probation provides employers with a degree of flexibility in managing their workforce, as they can terminate an employee if they are not meeting the employer's expectations during the probationary period. In order for an employee to be placed under a probationary period, there must be a probation clause in the contract.

While the probationary period is typically understood as three months, there is actually no standard length of time for probation. Employers can use a time period which they feel is required to suitably assess the employee – perhaps that is a few weeks or several months.

During the probationary period, an employer can monitor the employee's performance. If the employee meets the company's expectations, they will be confirmed as a permanent employee. If not, the company may choose to terminate the employee's employment.

Example – Probationary Clause

The following is a standard example of a probationary clause in an employment contract:

> Upon commencement of employment, the employee will be subject to a probationary period of four months. During this period, the employee's performance, conduct, and suitability for the position will be evaluated. This probationary period is intended to provide both the employee and the employer an opportunity to assess the working relationship and determine if it meets their respective expectations.

Even if a probationary period is set in the contract, a probationary clause may not be enforceable unless it meets a specific legal test.

Legal Test to Enforce a Probationary Clause

In determining enforceability of a probationary clause, a court will consider:

1. whether the employee was made aware of the basis for the employer's assessment of suitability before or, at the commencement of, employment;
2. whether the employer acted fairly and with reasonable diligence in assessing suitability;
3. whether the employee was given a reasonable opportunity to demonstrate his or her suitability for the position; and
4. whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of an employee, including not only job skills and performance but also character, judgment, compatibility and reliability.

Ly v. British Columbia (Interior Health Authority), 2017 BCSC 42 at para. 58

While probation may be used to dismiss an employee, the employer still has to follow the requirements set out in the Employment Standards Act (again, to be discussed later) and the common law, such as providing notice or pay in lieu of notice.

Foundational Law – *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42

Phuc Ly was hired as a manager by the Interior Health Authority. However, his employment was terminated after about 2.5 months without any notice or pay in lieu of notice. The employer relied on a probationary clause in Ly's employment offer which stated that "[e]mployees are required to serve an initial probationary period of six (6) months for new positions."

In his lawsuit, Ly argued, among other things, the Interior Health Authority had failed to conduct a fair assessment of his suitability for the job which meant they could not rely on the probationary clause as the basis for avoiding reasonable notice of termination.

The Court concluded that Ly had genuinely made efforts to understand the employer's expectations and the criteria by which he would be evaluated. However, the employer failed to adequately address his inquiries or provide him with a fair opportunity to demonstrate his suitability for the position. Ultimately, the employer did not meet the required standard of good faith, and therefore, the probation clause was not effective to avoid the notice obligations. As a result, Ly was entitled to damages equivalent to a reasonable notice period of three months.

Ownership of Intellectual Property Clauses

In many employment settings, the employee is not only a service provider or a technician but can also be a creator. Who then owns the intellectual property (IP) rights in employee creations?

Generally, the law of intellectual property (which will be discussed in a later chapter), states that the owner of intellectual property is the creator. As a starting point then, any works created by an employee should be the sole right of that employee. However, it is often the case that employers want to override that presumption through the written employment contract.

Employers can include "intellectual property clauses" or "IP clauses" in the contract to alter the presumption of ownership over the works created by the employee. In almost all cases, an employer-required intellectual property clause will seek to establish that the employer is the ultimate owner of the intellectual property rights, even if the creation was done by the employee.

Example – Ownership of Intellectual Property Clause

The following is a standard example of an ownership of intellectual property clause in an employment contract:

> The Employee acknowledges and agrees that all Intellectual Property created, conceived, or developed by the Employee, whether during working hours or outside of working hours, and whether or not utilizing Company resources, shall be the sole and exclusive property of the employer.

Examining the language, it is clear that there are broad rights granted to the Employer for any creation done by the Employee during working hours, but also potentially, done outside of the workplace.

Importantly, courts will not enforce intellectual property clauses which are vague or overly broad. A good reflection of this limit is the Alberta case of Questor Technology Inc v Stagg, 2020 ABQB 3 highlighted below.

Foundational Law – *Ly v. Questor Technology Inc v Stagg*, 2020 ABQB 3

Questor, an environmental technology company, specialized in selling custom incinerators designed for the oil and gas industry. Stagg (and two other defendants) were previously employed by Questor and during their time as employees, they developed a waste gas combustion solution at low pressure (referred to as the "Emission LP Burner Technology"). Upon leaving Questor, Stagg and the others established their own company and introduced a competing low-pressure waste gas incinerator that was similar to the Emission LP Burner Technology.

Questor asserted that they owned the rights to the Emission LP Burner Technology because the contracts of employment with Stagg and the others contained an ownership of intellectual property clause. The specific clause at issue stated the following:

> Questor shall have all proprietary rights and exclusive ownership, including, but not limited to, exclusive copyright, in and to all written, recorded or visual materials, compilations of information or data, and other works of authorship, furnished to Questor and developed by me in connection with my employment with Questor ("Employment Work Products"). I agree to fully cooperate and to do all things reasonably necessary to allow Questor to claim sole copyright ownership, including the execution of documents for that purpose. I agree to keep such Employment Work Products in confidence and to use them solely in the performance of my employment with Questor, unless expressly authorized in writing to do otherwise.

The language of the IP clause indicated that it covered the ownership of various forms of creative works, including "written, recorded or visual materials, compilations of information or data, and other works of authorship." While copyright was clearly emphasized, there was no explicit mention of ideas or inventions which are typically protected as intellectual property under patents.

According to the court, in the absence of clear language stating that Stagg or the others granted ownership of any inventions to Questor, the court was unwilling to enforce the clause. Therefore, Stagg and the others, as the inventors retained ownership of the Emission LP Burner Technology.

Restrictive Covenants

Restrictive covenants are legal clauses in an employment contract which impose certain limitations or restrictions on the employee's activities even after leaving the organization. The use of restrictive covenants can sometimes be controversial as it limits the employee's liberty and employment options after their current employment has ended.

At their core, restrictive covenants are intended to protect the employer's legitimate business interests, such as confidential information, trade secrets, customer relationships, or proprietary knowledge. While Canadian courts generally scrutinize restrictive covenants to ensure they are reasonable and necessary, certain types of restrictive covenants can, in many cases, be legally enforceable.

I. Non-Disclosure Agreements and Confidentiality Clauses

Non-disclosure clauses or confidentiality clauses are the least controversial of all the restrictive covenants. Such clauses prohibit employees from later disclosing or using confidential or proprietary information they obtained during their employment. Accordingly, under a non-disclosure clause, employees cannot disclose information like trade secrets, client lists, marketing strategies, or manufacturing processes, etc.

Courts have long found that requiring an employee to maintain confidentiality even after the employment has ended, is a fair concession in employment. Given that an employee is privy to confidential and sensitive information as an employee, it is only fair that they maintain that confidentiality even after leaving the workplace. For example, it is reasonable to require a software developer to sign a confidentiality clause under their employment promising not to share the company's source code or any other confidential information with any person not authorized by the employer.

Example – Non-Disclosure Clause

The following is a standard example of a non-disclosure clause in an employment contract:

> The Employee acknowledges and agrees that during the course of their employment with the Company, they may have access to and become familiar with certain confidential and proprietary information of the Company, its clients, suppliers, and other third parties ("Confidential Information"). Confidential Information includes, but is not limited to, trade secrets, customer lists, financial information, business plans, marketing strategies, software, technical data, inventions, and any other information that is not publicly available.

II. Non-Solicitation Clause

The middle ground for restrictive covenants, likely to be enforceable in most cases, are non-solicitation clauses. Non-solicitation clauses prohibit employees from soliciting or poaching

clients, customers, or other employees of their former employer for a certain period after termination. The non-solicitation obligations are subject to a timeframe established in the clause itself, and can range from a few weeks to potentially, two years.

Non-solicitation clauses aim to safeguard a company's relationships and prevent unfair competition. For example, it is reasonable for a sales representative to agree that they will be restricted from contacting their former clients or attempting to recruit colleagues from their previous organization for a period of six months after leaving the company.

Example – Non-Solicitation Clause

The following is a standard example of a non-solicitation clause in an employment contract:

> During the term of employment and for a period of one year following the termination of employment, the Employee agrees not to directly or indirectly:
>
> > 1.1 Solicit Customers: Engage in any activity or conduct that may directly or indirectly solicit or attempt to solicit any client, customer, or account of the Company with whom the Employee had material contact, connection, or relationship during the course of employment, for the purpose of providing products or services similar to those offered by the Company.
> >
> > 1.2 Solicit Employees: Recruit, hire, employ, or solicit the services of any current employee, contractor, or consultant of the Company or induce any such person to terminate or diminish their relationship with the Company.

III. Non-Competition Clause

The most controversial clauses (and least favoured by the courts) are non-competition clauses otherwise known as non-competes. Non-competition clauses prevent employees from working for or starting a competing business within a specified geographic area and time frame after leaving their current employer.

Example – Non-Competition Clause

The following is a standard example of a non-competition clause in an employment contract:

> The Employee acknowledges and agrees that during the course of their employment with the Company, they may have access to and become familiar with certain confidential and proprietary information of the Company, its clients, suppliers, and other third parties ("Confidential Information"). Confidential Information includes, but is not limited to, trade secrets, customer lists, financial information, business plans, marketing strategies, software, technical data, inventions, and any other information not publicly available.

The sample clause in the example demonstrates the precise concern with non-competition clauses — they bind the employee after the employment has ended and limit the employee's ability to practice their chosen vocation for a defined period of time.

Is it truly a fair compromise that the employee agrees to limit their chosen work opportunities even after they have left their current employer?

Myth-Busting

Myth: "I'm under a non-compete, so I cannot work for a competitor if I quit or am fired."

Incorrect. It's a common misconception that all non-competes are binding. While such clauses do exist and are used by employers to protect their business interests, courts often scrutinize them closely and may find them unenforceable if they are deemed too restrictive, unreasonable, or unclear.

Courts recognize that non-competes can have a significant impact on an individual's ability to find employment and make a living. As a result, they are very critical of such clauses to ensure they are fair and reasonable. If a non-compete is found to be overly broad or unreasonable, courts have the authority to declare it unenforceable.

Enforceability of Restrictive Covenants

All of the three types of restrictive covenant are subject to the same general legal test for enforceability.

Legal Test for Enforcing a Restrictive Covenant

The court will examine the following factors to determine enforceability of a restrictive covenant:

1. does the covenant protects a legitimate proprietary interest of the employer;
2. is the covenant reasonable between the parties in terms of:
   (a) temporal length;
   (b) spatial area covered;
   (c) nature of activities prohibited; and
   (d) overall fairness;
3. are the terms of the covenant clear, certain and not vague; and
4. is the covenant reasonable in terms of the public interest.

Aurum Ceramic Dental Laboratories Ltd. v. Hwang, 1998 CanLII 5759 at para. 11

All an employee needs to do to avoid the application of the restrictive covenant is to demonstrate that the legal test is not completely met. One deficiency in the test will render the entire clause unenforceable. For an example of this process, see the example below.

Example – Reasonableness Analysis of Restrictive Covenant

Lok Fung, a human resources associate, signed a non-compete agreement with XYZ Corporation upon joining the company. The non-compete agreement included the following provisions:

> The agreement prohibited Lok Fung from working for any competitor of XYZ Corporation for 10 years after the termination of their employment.
>
> The non-compete agreement restricted Lok Fung from working for any competitor within a 200-kilometre radius of XYZ Corporation's locations, including its headquarters.
>
> Lok Fung was barred from engaging in any work or activities that directly or indirectly competed with XYZ Corporation's human resources services.

Reasonableness Analysis:

> Temporal Length – A 10-year restriction is excessively long and would be considered unreasonable.
>
> Spatial Area Covered – The 200-kilometre radius restriction is overly broad and unnecessarily limits Lok Fung's job prospects in the HR field.
>
> Nature of Activities Prohibited – The broad prohibition on all indirect "HR" or "related activities" restricts Lok Fung's career options in an unreasonable. The clause should be clearer on what it is restricting.

Termination Clauses

One the interesting facets of Canadian employment law is that all employers are under an implied obligation to provide the employee with reasonable notice or payment in lieu of that notice if the employee is be terminated. What this means is that employees must be given notice of their termination which, as will be discussed later, can be quite extensive. Employers who wish to modify or lessen this notice period can include termination clauses in their employment contracts.

Termination clauses are written contractual clauses that define the amount of notice or pay-in-lieu of notice that an employer must provide to an employee upon termination. Termination clauses are often used to limit severance obligations and provide certainty to both the employer and the employee about what is owed on termination. Termination clauses are extremely enticing for employers because, by limiting severance obligations, it can help employers manage their financial liabilities when terminating employees.

Not all termination clauses will be enforceable. To be legally enforceable, termination clauses must meet certain requirements.

Legal Test for Enforcing a Termination Clause

The court will examine the following factors to determine the enforceability of a termination clause:

1. is the termination clause expressed in the contract?
2. is the termination clause clear and unambiguous: and
3. does the termination clause offend the relevant employment standard legislation.

McMahon v Maximizer Services Inc., 2023 BCSC 4 at paras. 18-25

On the third criteria of the test, the termination clause must not provide less than the minimum required by the provincial/territorial employment standards legislation. If a termination clause provides less notice or pay than the minimum required by that legislation, the clause will be unenforceable.

For example, what about the following clause: "Upon termination, the employer will not provide the employee with notice or pay in lieu of notice." This clause clearly falls short of the minimum standards set by the legislation because there is no notice given by the employer at all. Every employment standards legislation requires some notice to be given to the employee based on the employee's length of service.

Employment Standards Legislation

Across Canada, the provinces and territories have passed specific employment standards legislation to govern various aspects of the employment relationship. These laws establish minimum standards and protections for workers in areas such as wages, hours of work, overtime pay, vacation and holiday entitlements, leaves of absence, termination and severance pay, and other employment-related matters.

The purpose of employment standards legislation is to ensure fair and equitable treatment of employees, protect their rights, and promote decent working conditions. The legislation sets out a series of baselines that employers must comply with. Generally, the employment standards legislation applies to most workers however, there are certain exclusions for groups such as independent contractors, agricultural workers, and professionals who are regulated by their respective governing bodies (like doctors and lawyers).

The specific details and coverage of employment standards legislation can vary significantly between different provinces and territories; however, they also share some similarities. Readers as encouraged to review their own provincial statute to determine their precise legal protections.

The British Columbia Employment Standards Act

The following will describe some of the major protections under the British Columbia Employment Standards Act, 1996 R.S.B.C., c. 113 (ESA).

Minimum Wage (Section 16)

The ESA mandates that all employees are entitled to be paid a minimum wage for their work. The actual amount of the minimum wage is set by the Employment Standards Regulation and is periodically reviewed to reflect changes in the cost of living.

Hours of Work and Overtime (Sections 31-42)

The ESA regulates the maximum number of hours an employee can be required to work in a day or a week. British Columbia, unlike some other provinces, has a daily overtime entitlement and a weekly overtime entitlement.

- **Daily Overtime** – if an employee works more than eight hours in a single workday, they are entitled to overtime pay. The daily overtime rate is 1.5 times the employee's regular wage for each hour worked beyond eight hours in a day up to 12 hours in a day. Following 12 hours of work, the employee is then entitled to 2.0 times the regular wage on subsequent overtime.
- **Weekly Overtime** – in addition to daily overtime, the ESA also mandates weekly overtime. If an employee works more than 40 hours in a workweek, they are eligible for overtime pay. The weekly overtime rate is 1.5 times the regular wage for each hour worked beyond 40 hours in a week.

Statutory Holidays (Sections 44-50)

The ESA outlines the public holidays recognized in British Columbia and the entitlements of employees who work on those days, including paid time off or premium pay. The following are the current British Columbia statutory holidays:

- New Year's Day (January 1)
- BC Day
- BC Family Day
- Labour Day
- Good Friday
- National Day for Truth and Reconciliation (September 30)
- Victoria Day
- Thanksgiving Day
- Canada Day (July 1)
- Remembrance Day (November 11)

- Christmas Day (December 25)

Vacation Time (s. 57)

After 12 months of employment employees are entitled to two weeks of vacation time per year. After five years of employment, employees are entitled to three weeks of vacation time per year.

Vacation Pay (s. 58)

Vacation pay ensures that employees receive compensation for time off during their annual vacation. Employees are entitled to receive 4% of their total employee's wages as vacation pay following five days of work. Following five years of employment, the vacation pay percentage increases to 6%. When an employee takes their vacation, the employee will used the banked vacation pay to compensate the employee.

Liability for Length of Service (s. 63)

After completing three consecutive months of employment, an employee becomes eligible for compensation based on their length of service if their employment is terminated by the employer. The compensation or written notice required by the employer increases as the employee's length of service progresses. The employer must adhere to the following payment or notice requirements:

After three consecutive months of employment – One week's pay or one week's written notice.
After 12 consecutive months of employment – Two weeks' pay or two weeks' written notice.
After three consecutive years of employment – Three weeks' pay or three weeks' written notice, along with an additional week's pay or notice for each subsequent year of employment, up to a maximum of eight weeks.

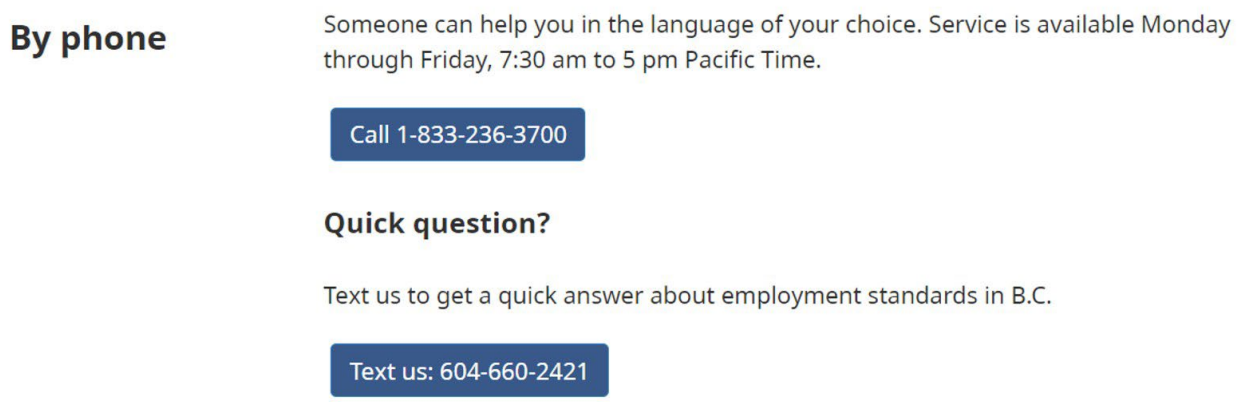
Leaves of Absence (s. 49.1-56)

The ESA includes provisions for various types of leaves, such as maternity leave, parental leave, compassionate care leave, and family responsibility leave. These leaves provide job protection and, in some cases, wage replacement for eligible employees.

Enforcing the ESA

The Employment Standards Branch (ESB) is the government agency responsible for administering and enforcing the ESA. Its role includes educating employers and employees about their rights and obligations under the legislation, conducting investigations, and resolving complaints related to employment standards.

If an employee is having a workplace right violated, they can file a formal complaint to the ESB by completing an online complaint form. Once the complaint is submitted, the ESB will review it and open an investigation. The ESB will likely contact the employer for a response and gather additional information. If a resolution cannot be reached through mediation or negotiation, the complaint will be determined by an ESB adjudicator.



When a party disagrees with a decision made by the ESB, they can file an appeal with the Employment Standards Tribunal (EST). The EST reviews the underlying case, considers the evidence presented by both parties, and makes a decision based on the merits of the appeal. The EST issues a written decision which may confirm, vary, or overturn the original decision made by the ESB. The decision of the EST is final and binding unless it is appealed to the British Columbia Supreme Court on a question of law.

Employment Terminations in Canada

In Canada, the termination of employees can occur on two large legal bases: either with cause or without cause. Both forms are seismically different in the financial obligations on employers and the potential impacts on employees.

Terminations for Just Cause

> "Just Cause is the capital punishment crime of employment law."
>
> Tong v. Home Depot of Canada Inc., 2004 CanLII 18228 at para. 1

Termination with cause (otherwise known as just cause) refers to situations where an employer terminates an employee's employment due to serious misconduct or a fundamental breach of the employment agreement. Just cause dismissals are generally considered to be the most serious form of disciplinary action an employer can take, as it severs the employment without any reasonable notice or pay-in-lieu.

When terminating an employee with cause, the employer is not required to provide notice or severance pay. This can be extremely beneficial as it allows the employer to immediately dismiss the employee and avoid any continuing financial or notice obligations. While the employee would still be entitled to any wages or benefits earned up to the date of termination, they would not be entitled to any further severance.

Myth-Busting

Myth: "My employer told I was dismissed for misconduct. They said I'm not entitled to any compensation. or severance"

Incorrect. In reality, just cause for termination is a very high standard that requires employers to prove both that the misconduct occurred and that its severity warranted summary dismissal. Some employers may rely on just cause as a justification for termination, but they would fail to meet this high threshold of proof. As a result, many terminations claiming to be for just cause might be challenged by employees as wrongful dismissals, and the employee may be entitled to legal damages.

In order for an employer to justify a just cause dismissal, they must be able to demonstrate that the employee's actions or behaviour were so serious that the employment relationship has been irreparably damaged. The burden of proof lies on the employer and, if the employer cannot prove the misconduct, then the employee could bring a wrongful dismissal action.

Legal Test for Just Cause

The case of *McKinley v. BC Tel*, 2001 SCC 38 establishes a two-part test for determining whether just cause is proven:

- The Evidence Establishes the Misconduct – The employer must have evidence that the employee engaged in the alleged form of misconduct. It is not sufficient to use cause for the suspicion of wrongdoing. Rather, the employer must have evidence that proves, on balance, the employee committed the misconduct. To satisfy this burden, employers should launch a good-faith investigation of the misconduct allegations.

- The Misconduct Warranted Summary Dismissal – The employer must demonstrate that the employee's misconduct was of such a serious nature that it warranted immediate termination without any notice or severance pay. This requirement is often referred to as "summary dismissal" or "summary termination." It means that the misconduct was severe enough to fundamentally breach the employment contract or to undermine the employment relationship to the point where continued employment is no longer feasible.

Based on the McKinley test, not every misconduct will rise to the threshold of just cause. Instead, the employer needs to prove that misconduct actually occurred and warranted the summary dismissal of the employee.

Foundational Law – *McKinley v. BC Tel*, 2001 SCC 38

McKinley was a chartered accountant who was employed by BC Tel. Starting in 1993, McKinley began experiencing hypertension which led to high blood pressure. By June 1994, his blood pressure was consistently rising, prompting him to follow his physician's advice and take a leave of absence from work. McKinley expressed his desire to return to work but requested a position with less responsibility. BC Tel assured him that they would make efforts to find a suitable role for him within the company.

However, on August 31, 1994, BC Tel decided to terminate McKinley's employment. At the time of termination, McKinley had been working for BC Tel for nearly 17 years and was 48 years old. Rather than accepting BC Tel's severance offer, McKinley asserted that his employment had been unjustly terminated without reasonable notice or pay in lieu of notice. As a result, he initiated a wrongful dismissal lawsuit in the BC Supreme Court.

BC Tel partly defended their decision by claiming just cause for McKinley's summary dismissal. They alleged that he had been dishonest about his medical condition and the available treatments for it.

In the case, the SCC established the two main principles for relying on just cause:

> (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and
> (2) if so, whether the nature and degree of the dishonesty warranted dismissal.

Applying the law to the facts, the SCC held that although, McKinley may not have fully disclosed all relevant information regarding his treatment and medication options, the jury at trial could have reasonably determined that he did not act in such as a dishonest way as to be incompatible with his employment. Therefore, just cause was not supported, and McKinley's victory was trial was upheld.

Just cause disputes occur in a variety of factual scenarios. Among others, employees may be dishonest, insubordinate, incompetent, breach a company policy, or commit some form of off-duty misconduct. Given that each of these are different forms of misconduct, various factors have been established to determine if just cause is meet.

I. Dishonesty

Imagine an employee is caught stealing from their employer or falsifying their timesheets. This dishonesty may allow the employer to dismiss without providing notice or severance.

The employee's dishonesty must be of such a nature that it fundamentally undermines the employment relationship, breaches the trust between the employer and employee, or impacts the employee's ability to fulfill their duties effectively. The seriousness of the offense is assessed based

on the context, nature of the job, and the impact of the dishonesty on the employer's legitimate interests.

Ultimately then, the employer must establish that the dishonesty was of sufficient gravity to undermine the employment relationship. This objective assessment considers whether a reasonable person, with full knowledge of the circumstances, would conclude that the dishonesty undermines the essential trust required for the employment relationship to continue.

II. Insubordination

Insubordination refers to an employee's willful refusal to comply with a reasonable and lawful instruction given by their employer. If an employer is failed with an employee who simply will not comply with its instructions, this could permit the employer to rely on cause as the basis for the dismissal.

Legal Test for Insubordination

When determining just cause based on insubordination, the court considers the following elements:

1. the order must be either clear and specific or must be a breach of policies and procedures well known by the employee;
2. the order must be within the scope of the employee's job duties;
3. the order must be reasonable and lawful;
4. the disobedience must be both deliberate and intentional rather than resulting from an honest mistake as to whether the order was still in effect or under the reasonable belief that he was not contravening orders;
5. the order must involve some matter of importance;
   unless the act of disobedience is particularly serious it has to be repeated, rather than be an isolated act of disobedience, in order to constitute cause;
6. it must be shown that as a result of the disobedience the relationship was so damaged that it could not be carried on;
7. it must be shown that the employee understood or should have understood that he ran the risk of being terminated for disregarding the order;
8. if there is a reasonable explanation for the disobedience it will not be cause for discharge; and
9. there will be more latitude shown to long-service employees.

Beaudoin v Agriculture Financial Services Corporation, 2018 ABQB 627 at para. 46

III. Incompetence

When can an employee's incompetence rise to just cause? For example, what if an office worker is consistently unable to complete assignments accurately or on time, despite being provided with

clear instructions. At what point can the employer simply say that the employment is no longer possible?

Establishing just cause for incompetence, requires an employer must be able to demonstrate that the employee is unable to perform the essential duties of their job to an acceptable standard, despite being provided with adequate training, supervision, and support.

An employee may assert that they have been wrongfully dismissed if the employer contributed to the inability of the employee to meet the standard because of inadequate training or support.

IV. Breach of Company Policy

Employers often have a myriad of company policies which provide clear instructions to employees about company expectations and operations. These policies can include workplace code of conduct's, conflict of interest policies, workplace harassment policies, confidentiality policies, or a general employee handbook. A breach of one of these company policies could be considered grounds for a just cause dismissal.

A breach of company policy occurs when an employee violates the rules and guidelines established by their employer.

Legal Test for Breach of Company Policy as Just Cause

When determining just cause based on breach of company policy, the court considers the following elements:

1. the rules must be distributed;
2. the rules must be known to the employees;
3. the rules must be consistently enforced by the company;
4. the employees must be warned that they will be terminated if a rule is breached.
5. the rules must be reasonable;
6. the implications of breaking the rules in question are sufficiently serious to justify termination; and
7. whether a reasonable excuse exists.

Balzer v Federated Co-Operatives Limited, 2014 SKQB 32 at para. 61

In summary, to establish just cause, the breach of company policy must be sufficiently serious and demonstrate a significant impact on the employment relationship.

V. Off-Duty Misconduct

Off-duty misconduct refers to situations where an employee engages in conduct during their personal time that affects their employer's interests, reputation, or the employment relationship itself.

Myth-Busting

Myth: "What happens in my personal time cannot affect my employment."

Incorrect. Employees should absolutely be aware that what happens off-duty can have job consequences. If an employee engages in misconduct during their personal time that harms or undermines the employer's interests or is incompatible with their job duties, it can provide legitimate grounds for a just cause dismissal. While employees have a right to a personal life outside of work, employers have a legitimate interest in protecting their reputation, ensuring a safe and productive work environment, and maintaining employee conduct consistent with the company's values.

Therefore, off-duty misconduct can, in fact, support a just cause termination in specific circumstances.

Off-duty misconduct can potentially be grounds for dismissal with just cause allowing the employer to terminate the employee without providing notice or severance pay.

Legal Test for Breach of Company Policy as Just Cause

Interestingly, the clearest articulation of principles relating to a legal test for off-duty misconduct comes from labour arbitration decisions. While such decisions engage different areas of law from employment, the factors used do reflect considerations for a court hearing a wrongful dismissal case.

That said, the following factors are relevant to determining if off-duty conduct is sufficient for cause:

1. the conduct of the griever harms the Company's reputation or product
2. that the griever's behaviour renders the employee unable to perform his duties satisfactorily
3. the employee's behaviour is to refusal, reluctance or inability of the other employees to work with him
4. the griever has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees
5. places difficulty in the way of the Company properly carrying out its function

Edmonton (City) v Edmonton Fire Fighters' Union, 2015 CanLII 103790

As examples, some of the following forms of off-duty misconduct may be sufficient to warrant just cause:

- **Criminal Convictions** – if an employee is convicted of a serious crime that is incompatible with their employment or has a direct impact on the employer's reputation, such as fraud, theft, or assault, it may be grounds for dismissal.
- **Significant Social Media Misconduct** – inappropriate or offensive behavior on social media platforms, such as posting discriminatory or defamatory comments about the employer, co-workers, or clients, may constitute just cause if it damages the employer's reputation or causes a hostile work environment.
- **Conflict of Interest** – engaging in activities or business ventures outside of work that create a conflict of interest with the employer's interests or competing with the employer without proper disclosure and consent, can be grounds for dismissal.

These categories are not exclusive and other forms of off-duty misconduct may support just cause.

VI. Condonation

We have already seen a variety of arguments that employers can raise to assert a just cause dismissal. However, the use of just cause may not be available if an employer has condoned the misconduct that they are now using to assert cause.

Condonation is the act of forgiving or overlooking an employee's wrongdoing. This can occur if an employer chooses not to take disciplinary action against an employee for a particular offense or misconduct.

For example, imagine if an employee is habitually late for work but is never disciplined by the employer. Now, the employer decides to terminate the employee and uses the lateness as the basis for cause. The employee may argue that the termination is wrongful because the employer "condoned" the employee's habitual late arrival.

To avoid condonation problems, employers are advised to always take steps to discipline an employee for misconduct to limit an employee's argument of condonation.

Terminations Without Cause

Termination without cause occurs when an employer decides to end the employment relationship without any specific fault or misconduct on the part of the employee. This could be due to various reasons, such as restructuring, downsizing, economic factors, or poor performance that falls short of justifying termination with cause.

There are a variety of ways in which employees can be terminated without cause. These include layoffs, notice of the dismissal, and constructive dismissal. While each of the dismissal forms result in the termination of the employment, they implement that termination in different ways and may lead to potential liabilities for the employer.

- **Lay-Offs** - layoffs occur when an employer needs to reduce its workforce due to reasons such as financial difficulties, restructuring, or technological advancements. Layoffs are

usually considered involuntary terminations, and they typically affect multiple employees rather than targeting specific individuals. While "layoff" is a common term in the business world, layoffs are restricted in Canadian law. The use of lay-offs may only be permitted when: the right to lay-off is written in the employment contract, the right to lay-off is implied by the industry of the employer, or the employee otherwise consents to the temporary lay-off.

- **Dismissals** – Dismissal refers to the termination of an employee's contract by the employer. As mentioned above, the dismissal could be on a for cause basis or may be on a without cause basis. In a without cause dismissal, the employer will be required to provide reasonable notice or pay-in-lieu of notice.

- **Constructive Dismissal** – Constructive dismissal occurs when an employee resigns from their position due to the employer's behaviour or actions that fundamentally breach the terms of the employment contract. Although the employee initiates the termination by resigning, it is legally treated as a termination by the employer's conduct. Examples of actions that may lead to constructive dismissal include significant changes in job responsibilities, demotion without valid reason, or creating a hostile work environment. Employees facing constructive dismissal may be entitled to wrongful dismissal damages.

I. Implied Term of Reasonable Notice

For without cause dismissals, the employer is generally required to provide notice or pay-in-lieu of notice, or a combination of both. This is because all Canadian employment agreements have an implied term that states employers are required to provide the employee with reasonable notice or pay-in-lieu of that notice period (commonly referred to as severance).

The purpose of reasonable notice is to give the employee a reasonable amount of time to find another job, and to allow them to make necessary arrangements for the loss of their income.

> "The purpose of the implied term of reasonable notice in an employment contract is to permit the employee to order his affairs and to seek alternate employment."
>
> *Dunlop v. B.C. Hydro & Power Authority*, 1987 CanLII 2734 at para. 9

Determining the Notice Period

When it comes to determining the notice period for a without cause dismissal, there are two primary approaches: following the provincial employment standards legislation or following the common law. These approaches provide rough guidelines for determining how much notice must be provided to an employee dismissed without cause.

I. Provincial Employment Standards

As noted earlier in this chapter, each province has its own core employment standards legislation. One of the provisions in such statutes are obligations dealing with how much compensation is owed to an employee on a without cause dismissal.

In most provinces, such as British Columbia and Ontario, the employment standards legislation specifies a minimum notice period based on the employee's length of service. This approach can require a notice period in the range of one week of notice for every year of service, up to a certain maximum.

Section 63(3) of British Columbia's ESA establishes clear benchmarks based on an employee's length of service to their employer:

- 0 – 3 months – none
- After 3 months – up to 12 months 1 week
- After 12 months – up to 3 years 2 weeks
- After 3 years – up to 4 years 3 weeks
- After 4 years – up to 5 years 4 weeks
- After 5 years – up to 6 years 5 weeks
- After 6 years – up to 7 years 6 weeks
- After 7 years – up to 8 years 7 weeks
- After 8 years – 8 weeks

No notice or pay is required for employees with less than 3 months of employment. There is also a hard cap of 8 weeks for any single employee dismissed without cause.

The amounts listed above are only for individual terminations. The British Columbia ESA prescribes more compensation to be given in scenarios where there are mass or group terminations by the employer. Section 64 of the ESA codifies the following notice periods for group terminations:

- at least 8 weeks if 50 to 100 employees will be affected;
- at least 12 weeks if 101 to 300 employees will be affected; or
- at least 16 weeks if 301 or more employees will be affected.

The employer can meet their statutory obligations by providing the employee advance notice of the termination or by paying the employee in lieu of that notice.

II. Common Law

The reasonable notice period may also be determined by reference to the common law (again, the precedent cases). The common law approach to determining the notice period is often more flexible and takes into account various factors beyond just the employee's length of service. The

essence of the common law approach is to establish an amount of time that would be required for the employee to secure alternate employment.

Unlike the one week per year of service codified by some provincial employment standards legislation, the common law establishes a rough starting point of one month of notice for every year of service. However, this is not an absolute rule and can be subject to adjustment based on certain factors that emerged from one of the most important cases in Canadian employment law: *Bardal v. Globe and Mail*, 1960 CanLII 294 (ONSC) (Bardal)

Bardal involved an employee named Edwin Bardal who sued his former employer, the Globe and Mail newspaper, for wrongful dismissal. In the case, the court re-affirmed the well-established law that when an employer terminates an employee without just cause, the employee is entitled to reasonable notice or payment-in-lieu of notice.

Justice Hall, who presided over the Bardal case, identified several factors that are to be considered in determining the employee's reasonable notice period. These factors have become known as the Bardal factors and are widely accepted as the basis for calculating reasonable notice in Canadian employment law.

> "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."
>
> *Bardal v. Globe & Mail Ltd.*,
> 1960 CanLII 294 (ONSC)

The following are the core Bardal Factors:

- **Length of Employment** – the court takes into account the length of time the employee has been with the company. Generally, the longer the employee's service, the longer the reasonable notice period should be.
- **Age of the Employee** – the court considers the employee's age at the time of dismissal. Older employees may require a longer notice period to secure comparable employment due to their potentially reduced employability.
- **Character of the Employment** – the nature of the employee's position is taken into account. Higher-level positions with specialized skills or responsibilities may require a longer notice period to find comparable employment.

- **Availability of Similar Employment** – the court considers the availability of other job opportunities for the employee in their particular industry or geographic area. If there are limited job prospects, a longer notice period may be warranted.

These factors are not exhaustive or rigidly defined, but rather serve as a guide for the courts in determining reasonable notice. Each case is evaluated based on its unique circumstances, and other relevant factors may also be considered.

Ultimately, the Bardal factors provide useful framework for courts to assess the length of the reasonable notice period, taking into account factors such as length of service, age, position, and the availability of comparable employment. This case remains seminal law and has since been cited as a precedent in hundreds of subsequent Canadian employment law cases.

Failure to Provide Proper Notice Under Provincial Employment Standards Legislation

What happens if an employer fails to provide the required statutory notice?

Should an employee not be provided with their statutory minimum notice as required under their provincial standards legislation they may be pursue a complaint to the appropriate employment standards organization.

By way of example, if an employee in British Columbia was dismissed without cause and not provided the required notice under section 63 of the BC ESA, they could file a complaint with the BC Employment Standards Branch (ESB). The ESB would then open an investigation into whether the employer provided sufficient notice or compensation and, if not, require the employer to provide it.

Employers should always remember that without cause dismissals come bound by a statutory obligation to provide some compensation. Failure to abide by that obligation can result in a complaint to the employment standards regulator.

Failure to Provide Proper Notice Under Common Law

What happens if an employer fails to provide the required common law notice period?

The process for enforcing a claim for common law notice is done through a lawsuit (resort to the courts) and not through a provincial regulator. Accordingly, a wrongfully dismissed employee must anticipate that they will be suing their employer which could result in the steps of litigation unfolding. Many dismissed employees will consult with an employment lawyer who can assess the merits of the wrongful dismissal claim and advise on the potential costs associated with the litigation.

Dismissed employees generally have a two-year limitation period starting from the date of termination to pursue their action for reasonable notice damages.

Employee's Duty to Mitigate

Even where an employee is dismissed through no fault of their own, they remain bound by certain legal obligations or duties. As we have seen these ongoing obligations could include the duty to not disclose confidential information or trade secrets of their former employer; this obligation persists even if the employee was wrongfully dismissed.

Another duty which persists is the employee's duty to mitigate. Mitigation refers to the steps that an employee must take to minimize the damages that they have suffered as a result of an employer's wrongful dismissal. This could include looking for new employment or taking on temporary work in order to reduce the amount of lost income.

Employees must take steps to mitigate their damages because, in many cases, the amount of damages that an employee can recover in their action is limited by the amount of effort they put into mitigating their losses. For example, if an employee is wrongfully dismissed and they do not take any steps to find new employment, they may not be able to recover as much in damages as they would have if they had actively sought out new work.

Chapter 10 - Review Questions

1. What is the difference between an employee and an independent contractor?
2. Do I have an employment contract even if I haven't signed a physical document?
3. What are restrictive covenants and are they enforceable?
4. What is a probationary period and can I be terminated during this time?
5. What is the difference between termination with cause and without cause?
6. How is "reasonable notice" determined in a without cause termination?
7. What is my duty to mitigate after being dismissed?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 10? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 10 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 10:

https://youtu.be/luguppzXNO8

Chapter 11:
Intellectual Property Law

Learning Outcomes:

1. Understand the fundamental principles of Canadian intellectual property law.
2. Describe the key elements of copyright law, including the types of works protected, the duration of copyright, and the rights and limitations of copyright owners.
3. Explain the requirements for obtaining trademark protection, including the distinctiveness of marks, registration procedures, and the rights and enforcement mechanisms available to trademark owners.
4. Identify the basic principles of patent law, including the criteria for patentability, the patent application process, and the rights and limitations conferred by a patent.
5. Recognize the significance of industrial designs in intellectual property law, including the scope of rights granted to the owners of registered designs.

Introduction

Intellectual property (IP) law encompasses a set of legal rules and regulations that govern the rights and protections granted over creative and innovative works. These works can include inventions, designs, trademarks, artistic creations, and literary or musical works.

The main objective of IP law is to encourage and reward creativity and innovation by granting creators and innovators certain exclusive rights over their creations. By granting exclusive rights, it encourages individuals and businesses to develop innovative products, technologies, and artistic expressions.

If you are a creator, knowledge about IP law is crucial for several reasons:

IP rights enable creators and inventors to derive economic benefits from their creations. These rights allow them to commercialize their works, attract investments, and participate in licensing and royalty agreements.

IP law helps prevent unauthorized use, reproduction, or exploitation of creative works. It gives rights holders the ability to take legal action against infringers, thereby protecting their rights and interests.

Despite these laudable goals, there are limits to the IP protection and certainly situations where the exploitative rights will be exhausted. Each of the major classes of IP will be canvassed throughout this chapter including, copyright, trademarks, patents, and industrial designs.

> "The World Intellectual Property Day is celebrated every year on April 26. The global campaign offers a unique annual opportunity … to celebrate inventors and creators …"
>
> – World Intellectual Property Organization (WIPO)

The Grant of a Monopoly

At its heart, IP law contains a significant concession. In exchange for the effort of creation and innovation, creators of the IP are entitled to a grant of a monopoly over the creation. This means that the owner has the exclusive right to use the IP in certain ways and can prevent others from using it without permission. For example, if a company has protection over a particular pharmaceutical drug it created, it has the right to prevent others from making, using, selling, or importing that drug without its permission.

The purpose of granting monopoly rights is to encourage innovation and creativity by providing creators and inventors with an incentive to create new works and ideas. By protecting their creations, IP law allows creators to recoup the costs of their research and development and to earn a profit from their creations. This can lead to tensions between the public, who may demand

immediate access to the creation, and the creator, who will wish to exploit the creation for as long as possible.

One way of navigating this delicate tension is that the monopoly rights granted by IP law are not absolute and are subject to certain time limitations and exceptions.

Forms of Intellectual Property Rights

There are several forms of IP rights which each confer specific monopoly privileges to the rights holder, allowing them to exercise control over the use, distribution, reproduction, and commercial exploitation of the creations.

The following are the major intellectual property categories protected in Canada:

- **Copyrights** – Copyright protection applies to original literary, artistic, dramatic, or musical works. It grants the creator exclusive rights to reproduce, distribute, perform, or display their works. Copyright protection typically lasts for the author's lifetime, the remaining calendar year in which the author died, plus an additional 70 years.
- **Trademarks** – Trademarks protect distinctive marks, such as logos or symbols, that are used to identify and distinguish goods or services in the marketplace. Trademark owners are granted the exclusive right to use and protect their marks (for 10 years subject to indefinite renewal), preventing others from using identical or similar marks in a way that may cause confusion among consumers.
- **Patents** – A patent grants inventors exclusive rights to their inventions for a limited period of time (20 years). It provides a monopoly right, enabling the patent holder to prevent others from making, using, selling, or importing the patented invention without their consent.
- **Industrial Designs** – Industrial designs protect the visual appearance or aesthetic aspects of a product. They grant the owner exclusive rights (for 15 years) to prevent others from manufacturing, selling, or importing products that have a similar design.

Federal Nature of IP Law

In Canada, intellectual property law falls under the jurisdiction of the federal government, meaning it is governed by federal laws and regulations. As such, the rules surrounding intellectual property apply regardless of what province or territory you live, work, or create in.

Having IP law being a national scope makes quite a bit of sense, as intellectual property rights extend beyond boundaries. Therefore, creators and inventors should be able to secure protection for their works or inventions throughout the entire country. A uniform set of federal laws ensures that individuals and businesses can rely on consistent rules and enforcement mechanisms, regardless of their location within Canada.

Legislative authority over intellectual property is derived from the Constitution Act which sets the distribution of law-making powers between the Federal and Provincial governments. Under Section 91(22) of the Constitution Act, the Federal government has the power to legislate in areas related to:

> "copyrights, patents of invention and discovery, and other proprietary rights."

This provision clearly established that intellectual property is a matter of federal jurisdiction.

In exercising its constitutional authority, the Federal government has enacted legislation such as the Copyright Act, the Patent Act, and the Trademarks Act which provide comprehensive frameworks for the protection and enforcement of those forms of IP.

The Federal government has also established administrative bodies, such as the Canadian Intellectual Property Office (CIPO), to oversee the registration and administration of IP rights:

Canadian Intellectual Property Office

The Canadian Intellectual Property Office (CIPO) is a special operating agency of Innovation, Science and Economic Development Canada. We deliver intellectual property (IP) services in Canada and educate Canadians on how to use IP more effectively.

Lastly, because of IP law being in the federal domain, Canada has become a signatory to various international IP agreements including:

- the Berne Convention for the Protection of Literary and Artistic Works;
- the Patent Cooperation Treaty; and
- the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Law of Copyright

Copyright gives creators of original works the exclusive right to control how those works are used. This includes the right to reproduce the work, distribute copies of the work, and make derivatives of the work. Copyright applies to a wide range of creative works, including literature, music, art, film, and software. It gives creators the ability to make decisions about how their work is used and to profit from it, while also allowing others to access and use the work in certain ways.

Copyright Act

R.S.C., 1985, c. C-42

Copyright in Canada is regulated and enforced by the federal Copyright Act, R.S.C., 1985, c. C-42. This statute outlines the rights and obligations of copyright holders and users, as well as the limitations and exceptions to those rights.

Works and Expressions

Under the Copyright Act, various categories of works are protected; these categories are defined in Section 5 of the Act and consist of:

- **Literary Works** – section 2 of the Copyright Act defines "literary work" as any work that is written, regardless of its artistic quality. Includes any written, printed, or spoken creations, such as books, novels, poems, articles, computer programs, and databases.
- **Musical Works** – section 2 of the Act defines "musical work" as any work of music, regardless of the quality or purpose of the work. Includes any musical compositions, whether they have accompanying words or not. It encompasses melodies, harmonies, and rhythms.
- **Artistic Works** – section 2 defines "artistic work" as any painting, sculpture, drawing, photograph, or work of artistic craftsmanship. Includes a wide range of visual creations, including paintings, drawings, sculptures, photographs, engravings, and architectural works.
- **Dramatic Works** – section 2 defines "dramatic work" as any piece for recitation, choreographic work, or mime, intended to be performed. Includes any works of action, with or without words, intended to be performed. It includes plays, scripts, and screenplays.
- **Sound Recordings** – section 2 defines "sound recording" as any recording of sounds, regardless of the nature of the material objects, such as a tape, disc, or other device. Refers to the fixation of sounds in any medium, such as CDs, digital files, or vinyl records.
- **Performer's Performances** – section 2 defines a "performer's performance" as a performance that is fixed in a sound recording or a fixation of a performer's performance. Protects the performance of an artistic or dramatic work, including acting, singing, playing a musical instrument, or dancing.
- **Communication Signals** – section 2 defines a "communication signal" as any signal transmitted by a telecommunication undertaking within the meaning of the Telecommunications Act. Encompasses radio and television broadcasts and includes signals used for the transmission of encrypted broadcasts.

These categories may overlap, and some works may fall under multiple categories simultaneously.

AI-Created Images Aren't Protected By Copyright Law According To U.S. Copyright Office

There may be situational examples where an expression or work is not protected by copyright. For example, consider the idea of AI-generated works.

Creation of Copyright

Under the Copyright Act, copyright protection in Canada is automatic upon the creation of an original work; no registration or formalities are required. However, not every expression of a work will gain protection, only those that can meet the following test will qualify.

Legal Test for Copyright

A work is eligible for copyright protection if it is:

1. an original expression;
2. fixed in a tangible form; and
3. its creation is connected to Canada.

Robertson v. Thomson Corp., 2004 CanLII 32254 (ONCA) at para. 35

I. Originality

Originality ensures that the creation is the product of independent intellectual effort and creativity. This means that the work must be the result of the author's own skill, judgment, and individual expression, rather than being a mere copy or imitation of someone else's work.

The Copyright Act does not specify a specific threshold for originality or require that a work be ground-breaking or innovative to qualify for protection. Rather, the focus is on the personal effort and creative choices made by the author. The full battery of the requirement for originality was canvassed by the Supreme Court of Canada in CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13:

> For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed

> aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit … an "original" work.
>
> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 16

According to the court's comments in CCH, even works that build upon or are influenced by pre-existing works can still be considered original, as long as they exhibit a degree of independent thought and creative expression. The example of changing a font would not be original but imagine that two authors write about the same historical event. Because their particular expressions and choices of language, style, and structure would be original, they are both entitled to copyright protection.

It is sometimes difficult to think that originality can arise even if there is inspiration from an idea of another source. Again, the idea is not protected but, instead the expression. Consider the example of movies — they may overlap, even very closely, but if there is a unique script, unique characters, unique events, then the similarities may still be said to original.

Example – *Originality or a Copyright Rip-Off?*

Look at posters for the following movies. Clearly there are similarities, but even so, is there originality?

There will certainly be cases where a work is not just similar to an existing work but is actually substantially similar or an exact replica of an existing work. In such cases, there would be a lack of originality, and the work would also likely constitute a copyright infringement (discussed later).

Foundational Law – *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13

The Law Society of Upper Canada (LSUC) ran a research library that offered photocopy services to its lawyer members. In addition to copying services, the LSUC provided members with a variety of other resources including reported judicial decisions, headnotes preceding those decisions, a case summary, and a topical index. The headnotes contained a case summary, a statement of the case, the case title, and other relevant case information. The topical index consisted of a list of cases categorized by main topics, accompanied by brief summaries of the decisions. The judicial decisions were reproductions of the original rulings, with each decision accompanied by the date of the case, the involved courts, the names of the counsels representing each side, and lists of associated cases, statutes, and parallel citations.

Furthermore, the publishers had made grammatical corrections to the decisions.
CCH Canadian Ltd., Thomson Canada Ltd., and Canada Law Book Inc. (the case publishers) filed a lawsuit against the Law Society, alleging copyright infringement due to the distribution of photocopies as well as the other materials (headnotes, summaries, etc.).

The case went to the Supreme Court of Canada where, among many other things, the court concluded that the creation of headnotes, summaries, and topical indices involved sufficient exercise of skill and judgment so as to render them "original" works. However, the court also noted that the judgments themselves were not copyrightable, nor were the typographical corrections done by the editors sufficient to attract copyright protection – these would be mechanical or trivial exercises — not original.

II. Fixation

Another requirement for copyrightability is fixation. Fixation refers to the process of embodying or recording a work in a tangible form that can be perceived, reproduced, or communicated.

In practical terms, fixation means that an idea or concept alone is not eligible for copyright protection. It is only when the work expressing the idea is fixed in a tangible form that copyright protection comes into play. For example, a song can be copyrighted once it is recorded or written down, a book is protected once it is written or saved as a file, or a film is eligible for copyright when it is captured and saved on a medium.

Fixation serves several purposes most notably, it allows for the identification of the specific work and provides evidence of the authorship of the work.

III. Connected to Canada

The final criteria for copyright protection is that the creation of the work be connected to Canada. This requirement states a work must be authored by a qualifying individual and be published in Canada or a reciprocating country to be eligible for protection.

A qualifying individual is a citizen or permanent resident of Canada, or a person who is a citizen or permanent resident of a country that is a member of the Berne Convention, the Universal Copyright Convention, or the World Trade Organization (WTO). Therefore, works created by Canadian citizens or permanent residents automatically fulfill this requirement. Additionally, works created by individuals from countries that are members of those international agreements are also eligible for protection in Canada.

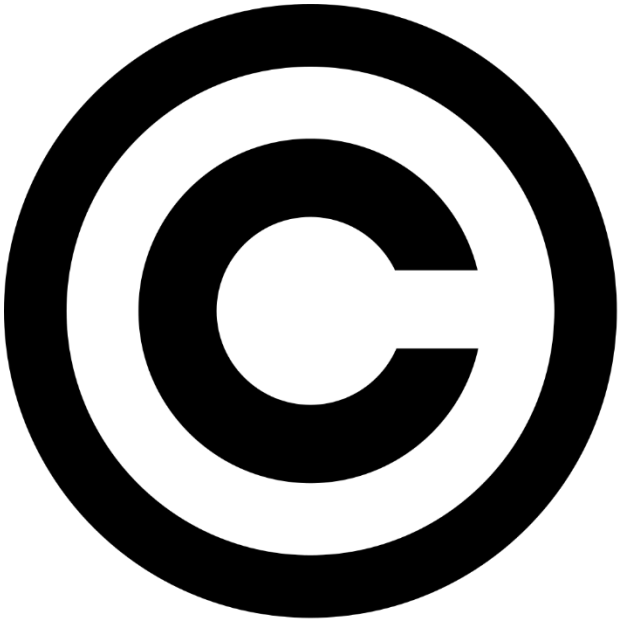
Registration of Copyright under the *Copyright Act*

Recall that copyright protection is automatic, and you do not have to register your work to protect it. That being said, registering your work under the Copyright Act with the Canadian Intellectual Property Office (CIPO) can be beneficial because it provides a public record of your ownership of the copyright. This can be useful if you need to prove your ownership of the work; for example, in the event that someone infringes on your copyright.

External Resource

CIPO maintains a free, searchable database that you can use to explore registered works: https://www.ic.gc.ca/app/opic-cipo/cpyrghts/dsplySrch.do?lang=eng

Copyright is most often denoted using the symbol of the letter “C” enclosed in a circle.



Duration of the Copyright

Once an author has a copyrightable work, how long does their protection last? The copyright duration is established in section 6 of the Copyright Act which states:

Except as otherwise expressly provided by this Act, the term for which copyright subsists is the life of the author, the remainder of the calendar year in which the author dies, and a period of 70 years following the end of that calendar year.

For anonymous works or works published under a pseudonym, the copyright duration is 75 years following the end of the calendar year in which the work is made. In the case of joint authorship, copyright lasts for the life of the last surviving author, plus an additional 70 years after their death.

Example – Duration of Copyright

Imagine, Lara Montgomery published an acclaimed novel in 1995. Tragically, she passed away on June 25, 2025. Following section 6 of the Copyright Act, the copyright protection for her work would last until the end of the calendar year in which she died which is December 31, 2025 and then, adding 70 years to that date. Therefore, the copyright for Lara Montgomery’s novel would expire on December 31, 2095. As a result, her work would enter the public domain on January 1, 2096, enabling unrestricted use and distribution by others without violating any copyright laws.

The Public Domain

What happens when the duration for protection expires? As mentioned in the example above, there is something called the "public domain". The public domain refers to a body of works that are no longer protected by copyright or intellectual property laws or works that were never subject to copyright protection in the first place. These works are freely available for the public to use, copy, adapt, and distribute without obtaining permission or paying royalties to the original creators.

OH BOTHER!: 'Winnie the Pooh: Blood and Honey' recasts beloved bear as butcher

The honey-loving Canadian-born bruin is now starring in an upcoming horror movie called *Winnie the Pooh: Blood and Honey*. A turnaround from his typical absent-minded antics.

What's changed is that early Pooh adventures penned by A.A. Milne have entered the public domain after the copyright — previously owned by Disney — has lapsed.

Some very famous works have found their way into the public domain:

- **"Anne of Green Gables" by Lucy Maud Montgomery** – Lucy Maud Montgomery passed away in 1942 and, as a result, "Anne of Green Gables" is now in the public domain, and anyone can freely reproduce, adapt, or perform the story without seeking permission.
- **Original James Bong by Ian Fleming** – Ian Fleming, the author of the James Bond series, passed away in 1964. As a result, his works, including the original James Bond novels, have entered the public domain in Canada.
- **Original Sherlock Holmes by Sir Arthur Conan Doyle** – Sir Arthur Conan Doyle, the creator of Sherlock Holmes, died in 1930. His works, including the majority of the Sherlock Holmes stories, are now in the public domain in Canada.

- **Winnie the Pooh by A.A. Milne** – A.A. Milne published the first Winnie-the-Pooh book in 1926. Milne passed away in 1956 and therefore, the original Winnie the Pooh entered into the public domain.

Economic Rights Under the Copyright Act

A major advantage of holding copyright is that the author is permitted to economically exploit it. The economic rights of an author are identified in section 3 of the Copyright Act which states the following:

> … copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

The Copyright Act then itemizes a series of rights held only by the author of the work. For simplicity, the general economic rights are frequently referred to as: the right to reproduce the work, the right to distribute copies of the work, the right to publicly perform the work, the right to communicate the work to the public, and the right to adapt the work. These rights are intended to allow the owner of a copyright-protected work to benefit financially from the use of their work.

Justin Bieber sells music rights to investment fund Hipgnosis

The purchaser of Justin Bieber's music catalogue will now have ownership over all of its economic rights. They can license it and obtain royalties for its use.

Part of the economic exploitation of a work may result in licensing and the receipt of royalties. Licensing refers to the process of granting permission to someone else to use a copyrighted work, while royalties are the payments made to the copyright owner in exchange for that permission.

Licensing agreements are contractual arrangements between the copyright owner (licensor) and the person or entity seeking to use the copyrighted work (licensee). The terms of the agreement outline the scope of the licensed rights, the duration of the license, any restrictions or conditions, and the financial arrangements, including royalties.

Royalties are the financial compensation paid to the copyright owner or rights holder for the authorized use of their copyrighted work. It is a form of payment to ensure that the creator receives fair compensation for the use of their intellectual property. The amount and structure of royalties can vary depending on certain factors, including the nature of the work, the scope of the license, the commercial value of the work, and the bargaining power of the parties involved. Royalties can be paid as a percentage of revenue generated from the use of the work (i.e., sales, ticket sales, broadcasting fees) or as a flat fee.

To facilitate the royalty collection process, there are numerous collecting societies, also known as copyright collectives or collective management organizations. Collecting societies can negotiate licenses with users of copyrighted materials, collect royalties from licensees, and distribute those royalties to the copyright owners. They often operate under tariffs which are standard rates established for different uses of copyrighted works — this provides a transparent framework for licensing and royalty collection.

These collecting societies, such as the Society of Composers, Authors, and Music Publishers of Canada (SOCAN), help streamline the licensing process.

**Image reproduced from "Society for reproduction rights of authors, composers and publishers in Canada" website: https://sodrac.ca/en/the-ecosystem-of-collective-management-organizations/*

Moral Rights Under the Copyright Act

Moral rights refer to the non-economic rights of creators that are separate from their economic rights. These rights recognize the connection between an artist and their work and protect their reputation and integrity. Moral rights allow creators to control how their works are presented, displayed, or modified, even after they have transferred their economic rights.

Moral rights are codified in section 14.1 of the Copyright Act which states:

> 14.1 (1) The author of a work has, subject to subsection (2), the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

Flowing from this section are two main moral rights for authors:

- **Right to Integrity** – the author has the right to the integrity of their work. This means they have the authority to prevent any modifications, alterations, or distortions of their work that could be prejudicial to their reputation. It protects the work from being presented in a way that may harm the creator's honour, morality, or reputation.
- **Right to Association** – the author has the right, under reasonable circumstances, to be associated with their work as its author. They can choose to be identified by their real name or by a pseudonym. Additionally, authors have the right to remain anonymous if they prefer not to disclose their identity publicly.

The bundle of moral rights codified in section 14.1 persist even after a transfer or assignment of economic rights; this means that authors can still enforce their moral rights even if they have sold or licensed their work. In effect, moral rights cannot be assigned however, those rights can be waived by an author. Assuming a waiver of moral rights is effective, it would diminish the author's claim that their moral rights have been violated.

The Copyright Act provides remedies for the infringement of moral rights, including injunctions, damages, and orders for the correction of the work or the attribution of authorship. One of the more famous cases of moral rights is Théberge v. Galerie d'Art du Petit Champlain Inc., 2002 SCC 34.

Foundational Law – *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34

In 1985, the painter, Thérèse Théberge, created a mural on the exterior wall of a building in Quebec City. The building's owner, Galerie d'Art du Petit Champlain, decided to remove the mural in 1990 without consulting Théberge or obtaining her permission. Théberge sued the gallery for copyright infringement and sought damages.

The case primarily centered on the moral rights provision of the Copyright Act. Théberge argued that the removal of her mural violated her moral rights as an artist. The gallery, on the other hand, contended that it owned the building and had the right to do what it wanted with the mural.

In its 2002 decision, the Supreme Court of Canada ruled in favour of Théberge emphasizing the importance of moral rights. The court affirmed that moral rights are independent of economic rights and cannot be assigned or transferred to others (only waived). It held that the removal of the mural constituted a violation of Théberge's moral rights, specifically her right of integrity.

Copyright Infringement

Section 27(1) of the Copyright Act defines copyright infringement as follows:

> It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Therefore, copyright infringement refers to the unauthorized use or exploitation of a copyrighted work without the permission of the copyright owner.

Myth-Busting

Myth: "It's not copyright infringement, if I don't charge for it."

Incorrect. Copyright infringement is not contingent on whether or not money is made from the unauthorized use of the copyrighted material. The core issue lies in the unauthorized use of a protected work without the permission of the copyright holder. Even if no financial gain is derived from the unauthorized use, copyright holders have the right to protect their exclusive rights to reproduce, distribute, display, or create derivative works from their copyrighted material.

Therefore, an infringement action can still be pursued, regardless of whether the infringer profits monetarily. Charging for the use of copyrighted material may exacerbate the damages claimed, but it is not a determining factor for establishing infringement.

An infringement can occur in various ways, such as copying, distributing, selling, performing, or displaying the copyrighted work without authorization.

Legal Test for Copyright Infringement

To prove copyright infringement in Canada, the following elements must be present:

- A work protected by copyright – this includes original literary, artistic, dramatic, and musical works, as well as sound recordings, performances, and communication signals.
- Unauthorized use of the work by the alleged infringer – this includes reproducing, distributing, performing, or displaying the work, or creating a derivative work based on it. Importantly, it does not need to be use of the exact work, it may still be an infringement if the work is substantially reproduced.

If these elements are present, the copyright owner may be able to bring a lawsuit against the alleged infringer seeking damages or an injunction to prevent further infringement.

Fair Dealing Defence

We began this chapter by noting intellectual property attempts to balance the dual interests of the general public and creators. With copyright, it is important to recognize the time, effort, and skill that creators invest in their works and provide them sufficient legal protection. However, the law also recognizes that there should be exceptions to those protections to ensure that copyright does not unduly restrict access to knowledge, creativity, education, research, and other important societal interests.

One the main exceptions to the copyright monopoly is the defence of fair dealing. Fair dealing allows individuals to use copyrighted material without permission from the copyright owner or payment of royalties under certain circumstances. Section 29 of the Copyright Act states:

Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

The precise limits of those categories for fair dealing are not explicitly defined in the Copyright Act but have been explored through judicial interpretation:

- **Research and private study** – this category covers the use of copyrighted material for research purposes or personal study. It allows use of copyrighted works to facilitate learning.
- **Criticism and review** – fair dealing allows the use of copyrighted material for the purpose of criticism, review, or commentary. This category enables individuals to engage in discussions and express opinions about creative works without infringing copyright.
- **Education** – allows the use of copyrighted material in educational settings, such as schools and universities. It enables teachers and students to access and incorporate copyrighted works into their educational activities.
- **Parody and satire** – allows artists and creators to engage in creative and humorous commentary on existing works.

Each of these categories of use reflect instances where expanded public access may be more "fair" and thus, authors are required to ease up on their monopoly rights over the works.

When precisely will the use of a work be fair? Would the use of an entire textbook for a post-secondary law course be fair? What about playing a short, copyrighted video clip? To better assess the limits of fair dealing, the landmark case of CCH Canadian Ltd. v. Law Society of Upper Canada (referred to earlier in this chapter), crafted a series of six factors used in assessing whether fair dealing applies.

Foundational Law – *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC 13

As a reminder, the CCH case involved the Law Society of Upper Canada which operated a Great Library providing legal research services to its members. The Law Society had a practice of photocopying portions of legal texts for its members upon request. However, the publishers believed that this practice infringed on their copyright and sought compensation for the copying.

One of the key issues before the SCC was whether the Law Society's photocopying activities constituted fair dealing, thereby exempting them from the requirement of obtaining permission from copyright holders.

The Supreme Court unanimously held that the Law Society's photocopying activities fell within the fair dealing exception.

The following are the factors used to determine if fair dealing applies:

- **Purpose of the Dealing** – the court emphasized that the purpose of the dealing should be considered including, whether the dealing is for commercial, research or educational purposes. In CCH, the Law Society's photocopying was for research and private study purposes which were deemed to be legitimate purposes under fair dealing.
- **Character of the Dealing** – the court examines how wide the distribution of the work was and whether that distribution is an ongoing or persistent exercise. It is less likely to fair dealing if there are ongoing uses. In CCH, the Law Society's copying was limited to specific requests by lawyers for legal research purposes. The court considered this to be a fair and reasonable dealing.
- **Amount of Dealing** – the amount of the dealing is relevant to an argument for fair dealing. The more of the work that is used, the less it is considered fair. In CCH, the court acknowledged that the Law Society copied substantial portions of the works but held that the amount was justified in the context of legal research as lawyers required access to the full text to carry out their work effectively.
- **Nature of the Work** – is there any public interest or value in the distribution of the work? In cases where there is, the use may be considered to be fairer. In CCH, the court recognized that the legal texts being copied were published works intended for wide distribution, suggesting that they were more likely to fall within fair dealing.
- **Effect of the Dealing on the Work** – does the fair dealing have an adverse interest on the original work? Undermining the market for the original work will limit the fairness of the dealing. In CCH, the court concluded that the photocopying by the Law Society would not adversely affect the market for the works as the copying was for the purpose of research and not for commercial distribution.
- **Alternatives to the Dealing** – is there any alternate means to obtaining the work in question? Individuals relying on fair dealing should not be granted privileges to use the work if there was an easy alternative to source the material. In CCH, the court noted that the photocopying was a necessary and reasonable practice given the nature of legal researc, and there were no reasonable alternatives available to the Law Society.

Rather than drawing clear bright lines for use, the CCH approach favours flexibility and understanding context to determine if a use is fair.

The fair dealing defence is quite powerful as a means for using copyright protected works. For example, it could allow a student to copy a few pages from a textbook to use as notes for a term paper, a journalist to quote a short passage from an article or allow a teacher to copy a short excerpt from a textbook to use in a lesson plan. These would all likely be considered fair dealing for the purpose of education.

Law of Trademarks

Copyright protects more comprehensive works like songs, painting, and novels however, what about shorter phrases or slogans? For these types of creations, a new world of intellectual property applies known as trademarks law.

Trademarks are distinctive signs, symbols, or logos used to identify and distinguish goods or services of one company from those of others. They serve as a means of brand identification and protection in the marketplace. Trademarks can include words, names, slogans, logos, colours, sounds, or even product packaging. You will be familiar with many famous trademarks such as:

Trademarks play a crucial role in commerce and provide several benefits to businesses, including:

- granting the owner exclusive rights to use the mark in connection with the specified goods or services;
- providing legal remedies against unauthorized use, including the ability to take legal action against infringement, counterfeit products, or misleading use of similar marks; and
- building and protecting a company's reputation and goodwill by ensuring quality and consistency associated with the brand.

Many of these benefits are best enforced by registration under the main trademarks' statute in Canada, the Trademarks Act, R.S.C., 1985, c. T-13. Once again, this statute is federal legislation because of the constitutional division of powers allocating intellectual property to the federal level of government. Because it is a federal statute, the Trademarks Act applies uniformly throughout all provinces and territories in Canada.

Trademarks Act

R.S.C., 1985, c. T-13

The Trademarks Act establishes a comprehensive framework for the registration and protection of trademarks in Canada. It sets out the criteria for registration of trademarks, the rights and obligations of trademark owners, and the remedies available for infringement or misuse of trademarks. The actual administration of the Trademarks Act and its implementation are carried out by CIPO.

External Resource

As with copyrights, CIPO maintains a searchable database for you to look for registered trademarks: https://ised-isde.canada.ca/cipo/trademark-search/srch

Registered versus Unregistered Marks

Another similarity between copyright protection and trademark protection is that both do not explicitly have to be registered. However, registration of a trademark under the Trademarks Act gives the mark a much greater range of protections and easier enforcement mechanisms versus unregistered marks.

The following are some of the benefits for registering a trademark:

- **Presumption of Ownership** – registering grants the owner the legal presumption of ownership and the exclusive right to use the mark. This protection allows the owner to prevent others from using a similar or identical mark in connection with similar goods or services.
- **National Protection** – a registered trademark provides protection throughout Canada. It helps to establish a stronger legal foundation for defending the mark against potential infringers.
- ® – After registration, the trademark holder can denote it with an "R" enclosed in a circle (®) – indicating the mark is registered and protected.

On the other hand, an unregistered trademark, also known as a common-law trademark, is a mark that has not been formally registered with CIPO but is still used in business. Unregistered trademarks can still receive some level of protection based on common law principles, but they also suffer some serious draw-marks:

- **Geographically Limited Protection** – unregistered trademarks are protected within the specific geographic regions where they are used. This means that the scope of protection is generally narrower compared to registered trademarks.
- **Burden of Proof** – if an unregistered trademark is challenged by another party, the burden of proof lies with the owner to establish their prior use and reputation in connection with the mark.
- ™ – unregistered trademarks cannot use the "R" enclosed in a circle (®) designation. However, unregistered trademarks are typically denoted with "TM" to indicate that the mark user still asserts its protection (just not under the Trademarks Act).

"R" enclosed in a circle indicates that the mark is registered under the Trademarks Act

"TM" indicates that the mark is unregistered and therefore has no protections under the Trademarks Act

Types of Marks Available for Registration

Not all trademarks seek to protect the same types of things. Generally, trademarks are categorized into several types, including ordinary marks and certification marks.

Ordinary marks are the most common type of trademarks and are used to distinguish the goods or services of one entity from those of others. Ordinary marks can be in the form of words, designs, symbols, or a combination thereof. For example, "Tim Hortons" may have an ordinary mark over its name and any slogans, or the stylized word and design combination of the "Roots" logo would be an ordinary mark.

Certification marks are marks used to certify the origin, material, quality, or other characteristics of particular goods or services. Certification marks are owned by an organization that sets specific standards and authorizes others to use the mark if they meet those standards. Very commonly, we see products that have a "Canadian Standards Association" (CSA) mark; this mark certifies that products meet specific safety standards. Another common example of a certification mark is the "Fairtrade Canada" mark which certifies that products meet fair trade standards.

Types of Marks Not Available for Registration

While may slogans, logos, and other marks should qualify for trademark registration, there are actually quite a few reasons why a mark could not be registered.

If the proposed mark is defective for any one of the following reasons listed in the summary chart below, its registration will be rejected:

- **Generics** – Generic terms are common names or terms that are used to describe a particular product or service. They cannot be protected as trademarks because they are considered to be too descriptive of the goods or services they represent. For example, the term "computer" cannot be registered as a trademark for computers.
- **Descriptive Terms** – Descriptive terms directly describe a characteristic or quality of a product or service. They are generally not distinctive enough to be registered as trademarks unless they have acquired distinctiveness through extensive use and recognition. For example, the term "crispy" for potato chips may not be granted trademark protection.
- **Deceptively Misdescriptive** – These are terms that may mislead consumers about the nature, quality, or characteristics of the product or service. They cannot be registered as trademarks. For example, if a company produces non-alcoholic beverages and attempts to register a trademark like "Pure Vodka" for their drinks, it would likely be considered deceptively misdescriptive.
- **Names or Surnames** – Generally, surnames cannot be registered as trademarks unless they have acquired distinctiveness through extensive use and recognition in association with specific goods or services. Common surnames are considered to be too ordinary to serve as trademarks on their own. For instance, the surname "Smith" would likely be considered too common to be registered as a trademark for a specific product or service.
- **Confusingly Similar** – A proposed mark that is confusingly similar to an existing registered mark is not permitted due to the principle of avoiding consumer confusion in the marketplace. Consumers need to be able to confidently identify the source of the goods or

services and make informed purchasing decisions; if a trademark is confusingly similar to an existing registered mark, it can lead to consumer confusion which undermines this objective.

- **Prohibited Trademarks** – Certain types of trademarks are prohibited by law and cannot be protected. These include trademarks that are likely to offend public morals, or that are likely to bring the Canadian government or its symbols into disrepute.

The latter category of "prohibited"" marks largely speak to section 9(1) of the Trademarks Act which expressly prohibits certain marks from registration. Section 9(1) aims to maintain the integrity of the trademark registration system by preventing the registration of marks that could be considered offensive, misleading, or inappropriate in relation to certain specified categories. While the statutory section is lengthy, there are a few categories of marks which are prohibited.

Firstly, section 9(1) explicitly prohibits the registration of trademarks that includes national flags, armorial bearings (such as coats of arms), official emblems, and any name or portrait of a member of the Royal Family. These restrictions are in place to prevent the misuse or misrepresentation of national symbols or the likenesses of members of the Royal Family for commercial purposes.

Secondly, there is also a prohibition on the registration of trademarks that are considered scandalous, obscene, or immortal. The determination of what constitutes scandalous, obscene, immoral, can be subjective and dependent on the view of societal norms by CIPO. Generally, trademarks that are offensive, vulgar, or contrary to accepted morality are likely to be considered scandalous or obscene and therefore not eligible for registration.

The issues relating to obscenity are challenging for CIPO to navigate and have resulted in inconsistent determinations on what will be rejected for registration. An example of this inconsistency was in CIPO's rejection of the "Lucky Bastard" mark for "Distilled spirits, alcoholic beverages." While "Lucky Bastard" was deemed to be "scandalous, obscene, or immoral," there had been previous registrations granted for trademarks that incorporated the term "bastard," such as the mark "FAT BASTARD" for wine.

While certain types of trademarks may not be eligible for registration, they can still be used as unregistered trademarks if they meet the requirements under common law (to be discussed later).

Duration of Trademarks Protection

How long does an individual or company obtain protection over their marks? This important question is answered by section 46 of the Trademarks Act:

Subject to any other provision of this Act, the registration of a trademark is on the register for an initial period of 10 years beginning on the day of the registration and for subsequent renewal periods of 10 years if, for each renewal, the prescribed renewal fee is paid within the prescribed period.

Accordingly, trademark protection lasts for an initial period of 10 years from the date of registration. During this time, mark holder can enforce the protection of their mark by preventing registration of confusingly similar marks or pursuing enforcement actions against those who are using their marks in an unauthorized way.

Interestingly, trademarks are the only form of intellectual property which can be renewed. When the initial 10-year period of protection nears expiry, trademark holders have the opportunity to renew their trademark registration again, giving them yet another 10-year window of protection. This renewal process can be indefinite allowing mark holders to, in effect, have protection for their branding marks in perpetuity. The major restriction though, is that the mark holder needs to ensure they renew before the expiry date otherwise, they may no longer have statutory protection over the mark.

Example – Duration of Trademarks

Imagine that Lululemon registered a trademark for a new logo design on January 1, 2025. The trademark protection for their logo design will be valid until January 1, 2035 — the end of the initial 10-year period. To extend this trademark protection, Lululemon must file for a renewal of their trademark before the expiry date (January 1, 2035). Assuming they file for renewal on time, their trademark protection will be extended for another 10-years. This process of renewing the trademark can be repeated indefinitely, ensuring continuous protection for Lululemon's logo design.

Trademarks and the Public Domain

As we just noted, trademarks can be renewed however, what happens if a registered mark is not renewed. This often happens when companies forget to renew their trademarks or intentionally choose not to continue protecting them. In very similar fashion to copyrights, on the expiry of legal protection, the mark loses its legal exclusivity and falls into the public domain.

When a trademark falls into the public domain, it means that it is no longer protected by exclusive rights and can be freely used by anyone without obtaining permission or facing legal consequences. This again reflects the ongoing balance in intellectual property law of allowing exploitation of the monopoly, but when there is an indication by the mark holder that they are no longer asserting protection, the marks should be able to be freely used by the public.

Trademark Infringement

Under the Trademarks Act, a registered trademark owner has the exclusive right to use the trademark in connection with the goods or services for which it is registered. Trademark infringement occurs when anyone else uses the same or similar mark in a way that could confuse the public or deprive the registered trademark owner of the benefits associated with the trademark.

Section 20 of the Trademarks Act specifically addresses infringement and provides a list of prohibited acts. According to this section, it is considered trademark infringement if a person does numerous things:

- **Identical Use Infringement** – the infringer uses trademark that is identical to a registered trademark without the consent of the registered trademark owner.

- **Confusing Use Infringement** – the infringer uses a trademark that is confusingly similar to a registered trademark for goods or services that are the same as or similar to those covered by the registered trademark, without the consent of the registered trademark owner.
- **Directs Attention** – directs public attention to their goods, services, or business in a way that is likely to cause confusion with a registered trademark.
- **Imports or Sells** – imports or sells goods with a registered trademark applied to them without the consent of the registered trademark owner.
- **False Association** – falsely represents goods or services as being associated with a registered trademark owner.

In some cases, a company may use the identical registered mark which would clearly constitute a case of trademark infringement. However, in many cases, the issue is not the use of an identical mark, but rather one which is a confusing use.

Example – Identical Use Infringement

Let's go back to the previous example of Lululemon developing a design logo and registering it. If a new company, Company X, starts using the name "Lululemon" to sell clothing items without Lululemon's permission, it would constitute trademark infringement. Lululemon could take legal action under the Trademarks Act against Company X for trademark infringement and seek remedies such as injunctive relief, damages, and the destruction or delivery-up of the infringing goods.

In some cases, a company may use the identical registered mark which would clearly constitute a case of trademark infringement. However, in many cases, the issue is not the use of an identical mark, but rather one which is a confusing use.

Section 6(5) of the Trademarks Act addresses the issue of confusing use as trademark infringement. It states that the use of a trademark that is likely to cause confusion with the owner's trademark, constitutes trademark infringement.

How one determines whether a mark is confusing is the purview of section 6(5) of the Trademarks Act which provides various factors for assessing confusion:

> 6(5) In determining whether trademarks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including
>
> > (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known;
> > (b) the length of time the trademarks or trade names have been in use;

(c) the nature of the goods, services or business;
(d) the nature of the trade; and
(e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.

By balancing these factors, a court can determine whether the trademark in use is similar to a registered trademark in a way that could confuse consumers. The key factor is whether the use of the trademark is likely to cause confusion in the minds of consumers regarding the source of the goods or services. An interesting case outlining these issues is Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée, 2006 SCC 23.

Foundational Law – *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23

This case involved the famous champagne producer Veuve Clicquot Ponsardin, known for its distinctive yellow labels, and Boutiques Cliquot Ltée, a clothing retailer.

Veuve Clicquot Ponsardin argued that Boutiques Cliquot Ltée's use of the word "Cliquot" in its name and logo, as well as its yellow storefront, was infringing on their trademark rights. Veuve Clicquot Ponsardin claimed that the similarity between the names and the use of the colour yellow would cause confusion among consumers and dilute the distinctiveness of their brand.

The Supreme Court of Canada examined whether there was a likelihood of confusion between the two marks. The Court considered several factors under section 6(5) of the Trademarks Act, including the inherent distinctiveness of the marks, the degree of resemblance between the marks, the nature of the products or services, the channels of trade, and the extent to which the marks had become known.

The Court ruled in favour of Veuve Clicquot Ponsardin stating that there was a likelihood of confusion between the marks and thus, a trademark infringement was made out. The court found that the use of the word "Cliquot" and the colour yellow by Boutiques Cliquot Ltée was likely to create an association with Veuve Clicquot Ponsardin's champagne brand in the minds of consumers. The Court concluded that this association could lead to confusion and harm the distinctiveness and reputation of Veuve Clicquot Ponsardin's trademark.

Unregistered Marks

Unregistered marks can still enjoy some level of protection under common law through the principle of common law trademark rights. These rights arise from the actual use of a mark in association with specific goods or services, establishing a reputation and goodwill in the marketplace. Common law rights can provide certain limited protections, such as the ability to prevent others from using a confusingly similar mark as a tort.

The primary mechanism to enforce an unregistered mark is the tort of passing off. As a claim, the tort of passing allows the owner of an unregistered mark to prevent others from misrepresenting

their goods or services as those of another. It is based on the notion that no one should be allowed to pass off their goods or services as those of another and thereby deceive or confuse consumers.

Legal Test for Passing Off

To establish a claim in passing off for an unregistered mark, the following elements must be proven:

1. the existence of goodwill:
2. deception of the public due to a misrepresentation; and
3. actual or potential damage to the plaintiff.

Under the first element of passing off, the claimant must demonstrate that their unregistered mark has acquired goodwill or a reputation in association with their goods or services. Goodwill refers to the positive reputation or value attached to the mark which can arise through extensive use and promotion over time. According to the court, goodwill is georgraphically specific and therefore, the goodwill only develops in areas where the mark is used.

Secondly, the claimant must show that the defendant made a misrepresentation to the public, leading or likely to lead to confusion between the defendant's goods or services and those of the claimant. This could be using a similar mark, packaging, or other elements that are likely to confuse consumers.

Lastly, the claimant must establish that they have suffered, or are likely to suffer, actual harm or damage as a result of the defendant's actions. This harm can include loss of customers, dilution of reputation, or economic loss.

If these three elements are successfully proven, the claimant may be granted common law remedies such as an injunction, damages for any losses, or an order for the delivery or destruction of infringing goods.

Remember that, while the tort of passing off gives some rights, the protection is more limited compared to the protection granted for registered trademarks under the Trademarks Act. Therefore, individuals and business should heavily consider registering the marks they develop.

Example – Passing Off Infringement

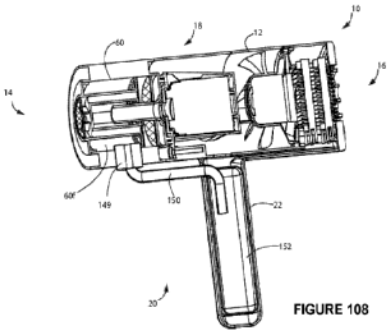
One more example involving Lululemon. Imagine that the name mark "Lululemon" is unregistered. A competitor, Fitzen Studios, enters the market and uses a strikingly similar mark, "Lululemmon," along with packaging that resembles Lululemon's branding. This misrepresentation could confuse consumers and lead to a decline in Lululemon's customers and sales. Lululemon can file a claim against Fitzen Studios for passing off. Lululemon will then need to demonstrate their existing goodwill, the deception caused by Fitzen Studios' misrepresentation, and the actual or potential harm suffered as a result.

Patent Law

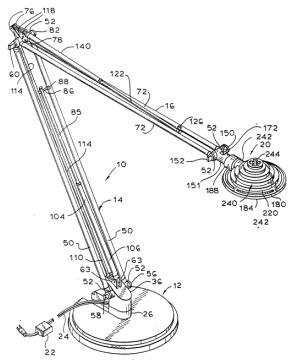
We have now seen that copyright protect expressions of ideas and trademark protects marks which distinguish one business from another; the third form of intellectual property is patents.

A patent is a time-limited monopoly granted to an inventor which gives them exclusive rights to exploit their invention and prevent others from making, using, or selling the patented invention without permission.

The primary purpose of patents is to encourage innovation by providing inventors with the monopoly in exchange for disclosing their invention to the public. This disclosure requirement allows others to learn from the invention, build upon it, and contribute to further advancements in the field. Patents also provide a financial incentive for inventors to invest in research and development by allowing them to profit from their inventions.



Patent over a Hairdryer



Patent over Halogen Light

As with other forms of intellectual property, patents are regulated and enforced by a federal statute, the Patent Act, R.S.C, 1985, c. P-4. Again, as a result of patents being federally regulated, the registration and enforcement of patents apply nationally, throughout the entire country.

External Resource

As with copyrights and trademarks, CIPO maintains a searchable database for registered patents: https://www.ic.gc.ca/opic-cipo/cpd/eng/search/basic.html?wt_src=cipo-search-main

Legal Test for Patentability

The starting point for patentability is to understand that the Patent Act only protects inventions. Section 2 of the Patent Act defines an invention as:

> any new and useful art, process, machine, manufacture, or composition of matter, or any new and useful improvement in any art, process, machine, manufacture, or composition of matter.

Accordingly, this definition sets the scope of what can be considered patentable subject matter in Canada.

Legal Test for Patentability

The legal test for patentability involves meeting the following specific requirements outlined in sections 27 and 28 of the Patent Act:

1. Novelty

According to Section 28(1), an invention is considered novel if it is not disclosed to the public anywhere in the world before the filing date of the patent application. In other words, the invention must be new and not part of the existing knowledge base.

2. Utility

The invention must also have a specific utility or usefulness. It should be capable of practical application and provide some tangible benefit or advantage. The utility requirement ensures that patents are granted for inventions that have utility.

3. Inventiveness (non-obviousness)

The third requirement is that the invention must be inventive or non-obvious. This means that the invention must not be obvious to a person skilled in the field of technology to which the invention pertains. In other words, the invention should involve an inventive step beyond what is already known in the field.

If the CIPO determines that an invention satisfies the legal test for patentability, a patent may be granted, conferring the exclusive monopoly rights to the inventor.

Inventions which are Not Patentable

Even if inventive, there are certain things that cannot be patented under the Patent Act and therefore, fall outside the scope of patent protection. A few examples of what cannot be patented are the following:

- **Higher Lifeforms** – patents cannot be granted for higher life forms, including humans and genetically identical or modified organisms. However, certain biotechnological inventions, such as genetically engineered microorganisms, plants, or animals, may be patentable.

- **Scientific Principles** – pure discoveries of natural phenomena or scientific principles cannot be patented.
- **Mathematical Methods** – abstract mathematical formulas or algorithms cannot be patented. However, specific applications or implementations of mathematical methods may be eligible for patent protection.
- **Medical Methods** – methods of medical treatment or surgery performed cannot be patented. However, devices or apparatus used for medical treatment may be.
- **Illegal Processes** – inventions or processes that are intended for illegal purposes cannot be patented. This includes any inventions or methods that are designed to facilitate or promote illegal activities, harm individuals, or violate existing laws and regulations.

Many of these exclusions results from tensions with public policy. While we wish to support invention and grant monopolies to inventors, those monopolies should not take away public access to important general scientific, medical, or business knowledge. Also, there remains societal and public policy concern with granting a monopoly over inventions that facilitate illegal acts.

A significant area of legal and societal debate over the past few decades has been over the patentability of higher lifeforms. One of the most substantial legal cases was *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, a decision from the Supreme Court of Canada.

Foundational Law – *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76

The "Harvard Mouse" case involved a patent application filed by Harvard College for a genetically modified mouse, commonly known as the "oncomouse." The ultimate question before the court was whether the oncomouse met the criteria for patentability under the Patent Act. Harvard argued that the oncomouse which was a genetically modified life form, was patentable subject matter under the Patent Act.

Photo of Harvard's Oncomouse.
Courtesy of National Museum of American History.
Website: https://americanhistory.si.edu/collections/search/object/nmah_1449806

In its decision, the Supreme Court of Canada determined that the oncomouse did not meet the criteria to be considered an "invention" under the Patent Act. The SCC, though split 5-4, concluded that Parliament did not intend to allow the patenting of higher life forms, as they did not fit into any of the specified categories of "art, process, machine, manufacture, or composition of matter". Without a clear Parliamentary statement including higher life forms from patentability, the SCC found that the oncomouse, as a higher life-form, was not patentable. More precisely, the court noted:

> ... only Parliament is in the position to respond to the concerns associated with the patenting of all higher life forms, should it wish to do so, by creating a complex legislative scheme as in the case of crossbred plants or by amending the Patent Act. Conversely, it is beyond the competence of this Court to address in a comprehensive fashion the issues associated with the patentability of higher life forms.

Accordingly, higher lifeforms remain unpatentable in Canada.

Duration of Patent Protection

The specific statutory section that deals with the duration of patent protection is Section 44 of the Patent Act which states:

where an application for a patent is filed under this Act on or after October 1, 1989, the term limited for the duration of the patent is twenty years from the filing date.

Accordingly, the inventor gains exclusive rights to their invention for a period of 20-years from the filing date of the application. During this time period, the inventor can take steps to enforce its patent prevent the making, using, or selling the patented invention without their authorization.

In some cases, the duration of patent protection can be affected by the failure to pay required maintenance fees before the end of the full 20-year term. Additionally, some patent holders, such as pharmaceutical companies, may be permitted to extend their patent slightly to compensate for the time taken during the regulatory approval process. However, these extensions are the exception and not the rule and generally, once the 20-year protection window is over, the patent is no longer protected.

Example – Duration of a Patent

Suppose a patent for a fingerprint scanner technology was filed in Canada on April 1, 2005. According to the Patent Act, the duration of the patent is twenty years from the filing date. Therefore, the patent for the fingerprint scanner would expire on April 1, 2025.
Once the patent expires, other companies and manufacturers would be able to the fingerprint scanner technology into their devices without infringing on the expired patent. This demonstrates the time-limited monopoly for exploiting the invention.

Once the patent protection period has expired, the patent falls into the public domain. At this point, the exclusive rights granted to the patent holder expire as well, allowing others to freely use, manufacture, sell, or improve upon the invention without obtaining permission or paying license fees.

The loss of patent protection for a company can have significant implications. Once the patented product enters the public domain, competition increases, leading to a decrease in prices as multiple companies offer generic versions. However, as a trade-off, this increased accessibility, and affordability can benefit consumers who can now access the product (or similar products) at lower costs.

One of the main industries where generics (derived from lapsed patents) truly benefit the public, is in pharmaceutical drugs. When a pharmaceutical company's drug loses patent protection, it enters the public domain, allowing other companies to produce and sell generic versions of the drug; this results in wider accessibility for the medication. The original patent holder will certainly experience a decline in market share but is free to seek new patents by developing improvements to the old pharmaceutical.

One notable example of this lapse of patent protection was in the drug molecule known as raloxifene. Raloxifene is used in the treatment of osteoporosis (the development of brittle or fragile bones) and prevention of breast cancer in postmenopausal women.

Eli Lilly, a pharmaceutical company, obtained a Canadian patent for raloxifene under the brand name Evista. The patent was granted in 1993 and expired in 2010, after 17 years of exclusivity. Once the patent expired, other pharmaceutical companies were able to produce and sell generic versions of raloxifene in Canada without needing permission from Eli Lilly. When raloxifene entered the public domain, it became more accessible to patients as generic versions were introduced at lower prices.

Patent Infringement under the Patent Act

According to the Patent Act, a patent owner has the exclusive right to make, construct, use, and sell the patented invention within Canada during the term of the patent. Based on this understanding, a person would be committing patent infringement if they were found:

- **Use of Patent** – making, constructing, using, or selling a patented invention without the consent of the patent owner.
- **Importing Patent** – importing or causing to be imported a patented invention for the purpose of selling, using, or constructing it within Canada, without the consent of the patent owner.
- **Offering to Sell** – offering to sell or rent, or using for the purpose of trade, a patented invention without the consent of the patent owner.
- **Inducing Infringement** – inducing or procuring another person to commit any of the above-mentioned acts without the consent of the patent owner.

One of the largest patent infringement cases in Canadian history was the case of Nova Chemicals Corp. v. Dow Chemical Co., 2022 SCC 43.

Foundational Law – *Nova Chemicals Corp. v Dow Chemical Co.*, 2022 SCC 43

This case involved Dow Chemical Co., a multinational corporation specializing in chemical products, including polyethylene plastics. Nova Chemicals Corp. is also a company in the chemical industry, involved in the production and sale of various chemical products.

Dow accused Nova of infringing its patent related to polyethylene plastic products. The Federal Court of Canada agreed and found Nova Chemicals Corp. liable for patent infringement and awarded Dow Chemical Co. $645 million in damages. At the time, this was the largest damages award in Canadian history for patent infringement.

Much of the appeal surrounded whether the award for damages was appropriate. The SCC confirmed both the infringement finding and also that the calculation of damages done by the court was appropriate.

Industrial Designs

One last form of intellectual property worthy of discussion is industrial designs. Industrial designs protect the visual features of a product, including its shape, configuration, pattern, or ornamentation. As has been the case throughout, industrial designs, as intellectual property, are federally regulated. In the case of industrial designs, they are governed by the Federal Industrial Design Act, R.S.C., 1985, c. I-9.

Industrial Design Act

R.S.C., 1985, c. I-9

Industrial designs are aimed at protecting the aesthetic appeal and commercial value of a product, rather than its functional aspects. The owner of an industrial design enjoys exclusive rights to prevent others from making, selling, or importing articles that embody the claimed description of the registered design. If others copy or significantly imitate the design, the industrial design registration can be enforced.

For example, imagine a designer creates a unique and aesthetically appealing chair design with distinctive patterns. The designer can apply for an industrial design registration to protect the visual features of the chair.

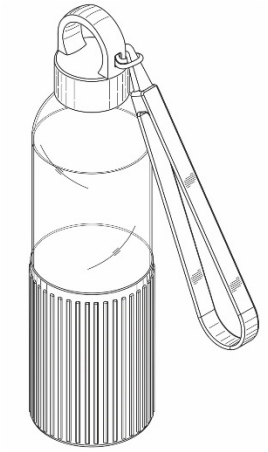


FIG. 1

Example of a registered industrial design for a water bottle.

External Resource

As with the other forms of intellectual property, CIPO maintains a searchable database over industrial designs: https://www.ic.gc.ca/app/opic-cipo/id/bscSrch.do?lang=eng

To be eligible for registration, the design must focus on the aesthetic features of a product and must be new (unpublished or disclosed less than 12 months prior to the application filing). It is crucial to file an industrial design application promptly to maintain its novelty requirement. If the design has already been made public, the application must be submitted within 12 months of that disclosure. Failure to comply with these requirements will result in the rejection of the registration application.

An industrial design registration provides protection for either 10 years from the registration date or 15 years from the filing date, depending on which period ends later. To maintain the registration, a maintenance fee must be paid by the fifth year to cover the remaining years of the 10-year or 15-year period.

Chapter 11 - Review Questions

1. What is the difference between an employee and an independent contractor?
2. Do I have an employment contract even if I haven't signed a physical document?
3. What are restrictive covenants and are they enforceable?
4. What is a probationary period and can I be terminated during this time?
5. What is the difference between termination with cause and without cause?
6. How is "reasonable notice" determined in a without cause termination?
7. What is my duty to mitigate after being dismissed?
8. What can I do if I believe I've been wrongfully dismissed?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 11? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 11 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 11:

https://youtu.be/2HL-jX2nho4

Chapter 12:
Real Property Law

Learning Outcomes:

1. Explain the historical development of private property rights and their significance in the Canadian legal system.
2. Define and differentiate between various interests in land, including fee simple, life estate, leases, strata ownership, adverse possession, easements, and restrictive covenants.
3. Identify and describe common land torts, such as trespass to land.
4. Outline the typical process for purchasing and selling real property, including key legal considerations and documents involved.
5. Compare and contrast different land titles systems, such as the Registry system and Torrens systems

Introduction

As we have already seen in previous chapters, the law protects a variety of different forms of property, including chattels (moveable property) and intellectual property. In this chapter though, we will be discussing the "realest" of all modern property – land and interests in land.

Real property law has evolved from its historical roots in English common law to a complex system which encompasses a myriad of forms of interests; it has also expanded on the rights of those who hold such interests. Throughout the chapter, we will explore the various interests one can have in real property, how such interests can be transferred and the systems that ultimately shape dispute and keep track of property transactions.

Historical Development of Real Property Law

To understand modern Canadian real property law, it's essential to examine its origins in Medieval England.

The Feudal System

The evolution begins with the Norman Conquest of 1066, led by William the Conqueror which introduced the feudal system to England. Under the feudal system, all land ultimately belonged to the Crown (William as the King); however, the King had the power to divvy up interests in the land and grant them to others. William granted such interests to ensure greater protection over his lands – the idea was that citizens would have a deeper investment in the protection and productivity of the land if they also had a right to it.

William the Conqueror.
*Photo attribution. National Portrait Gallery. https://www.npg.org.uk/collections/search/portrait/mw06792/King-William-I-The-Conqueror/zct4r2p

During this feudal period, most land was held by "vassals" as "fiefs." While these vassals - typically nobles and knights - had rights to the land, it was subject to various conditions and could revert back to the Crown under certain circumstances. The most frequent conditions were that the fief holder had to engage in military service and provide agricultural payments to the Crown.

The feudal system effectively created a pyramid-like structure of landholding, with the King at the top, followed by tenants-in-chief (usually the nobles), then sub-tenants (knights), and ultimately the peasants (serfs):

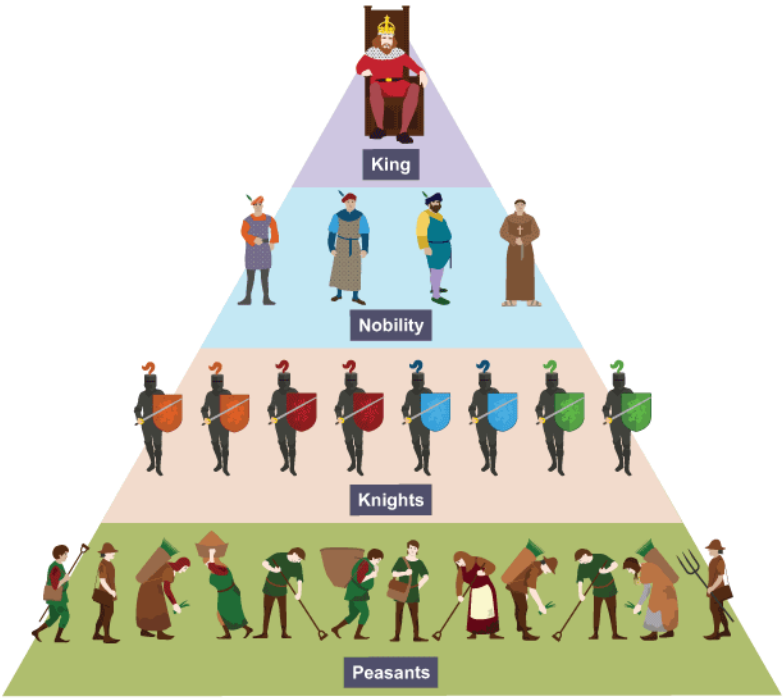


*Photo attribution. *The Feudal System*. BBC: https://www.bbc.co.uk/bitesize/articles/zct4r2p

The benefit of this system was that maximized the use of the land – individuals were permitted to profit from their work on the land and so were incentivized to do so. It also led to a clear organization of responsibility for the land as each level owed obligations to the one above it.

One of the most profound developments of the feudal system was the emergence of the idea of a *fee simple*:

Fee Simple

The word "fee" comes from the feudal term "fief," meaning land held in return for service, while "simple" indicates that the estate is free from limitations.

In modern property law, the *fee simple* represents the most complete ownership interest one can have in land, reminiscent of the broader control that lords had over their fiefs.

Statute of Quia Emptores

Another significant development in the evolution of property law came with the passage of the Statute of Quia Emptores in 1290. This statute, enacted during the reign of Edward I, prohibited subinfeudation - the practice of tenants granting portions of their land to others as sub-tenants. Instead, it allowed tenants to sell their lands freely, with the new owner becoming a direct tenant of

the original lord. The most crucial element of this transfer was that the permission of the lord was not required.

Quia Emptores (1290)

1290 CHAPTER 1 18 Edw 1

A STATUTE of our LORD THE KING, concerning the Selling and Buying of Land. The Title Statute d'ni R. de t'ris vendend' emend' is in the Margin of the Roll, and of the *Vetus Codex* at the Tower, *fo.* 20: On the Close Roll 18 *Edw. I. m. 6. d,* this Statute is entered with the following Title in the Margin, 'Statute qd null emat tras de aliis tenend qa de capitalibz dnis, &c.' In the Printed Copies and Translations it is intituled, 'Statutum Westm. iij. The Statute of Westminster the Third, *viz.* of Quia Emptores Terrarum.' [xi]

The rights under the Statute of Quia Emptores meant that land could be transferred directly to another person. In effect, the feudal system was suddenly shifted from a system of personal loyalty to the noble/King to one that was more contractual. This ultimately laid the foundation for what would become modern conveyancing (transfers of real property interests).

Tenures Abolition Act 1660

The end of the feudal system and its appointment of land is most commonly associated with the Tenures Abolition Act of 1660 (also known as the Statute of Tenures or 12 Charles II, c.24).

By the 17th century, the dominant feudal system was in serious decline. This was mostly because the core military obligations of feudal tenants were no longer relevant as standing armies became established. Because the Crown had access to more highly trained and more permanent armies, it relied less on feudal obligations of military service.

King Charles II.
*Photo attribution. Britannia.
https://www.britannica.com/biography/Charles-II-king-of-Great-Britain-and-Ireland

Recognizing this new reality, King Charles II, sought to eliminate the feudal obligations. This was all done through the passage of the Tenures Abolition Act of 1660. According to the text of the Act, it converted most of the remaining feudal tenures from ownership based on military obligations into something called "socage" tenures which relied on obligations to provide rent or agricultural payments.

Tenures Abolition Act 1660

1660 CHAPTER 24 12 Cha 2

[F1An Act takeing away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance, and for setling a Revenue upon his Majesty in Lieu thereof.]

However, King Charles II also sought to secure compensation through the Act – of course the monarchy still wanted money from land.

As such, the Tenures Abolition Act also included new forms of taxation in which the tenure holder would have ongoing financial obligations to the Crown.

While the Crown received new compensation the net result of the Tenures Abolition Act was a reduction in the Crown's direct control over land. It's this reduction that allowed for the growth of private property rights.

Summary

The development of private property was gradual and occurred only when the Crown agreed to diminish its claim over the land. However, over time, there was a clear shift to a system whereby individual owners could transfer their interests in land to others without permission of the King; that entitlement remains the bedrock of our modern system of real property law.

Interests in Real Property

From our traditional beginnings in Medieval England, Canadian property law now permits a variety of forms of interests in land. These real property interests define the nature and extent of a person's rights in relation to a particular piece of land. Below are some of the main forms of Canadian property interests.

Fee Simple

We previously saw that the feudal system resulted in the establishment of the fee simple. The fee simple grants the owner *full* rights to the property, including the authority to use the land, develop it, or alter it as they choose. To this day, the fee simple remains the most comprehensive form of property ownership in Canada.

The bundle of rights within the fee simple also extends to the right to sell, lease, or otherwise transfer the property, either permanently or temporarily, to another party. Even more stark is the ability of the fee simple holder to dispose of the property *after death* through will or inheritance, allowing the property to be passed down to heirs.

Fee simples are perpetual in nature; they do not have a predetermined end date. Unlike other forms of tenure or interests that may revert back to someone or expire after a certain period, a fee simple continues indefinitely. This means that the ownership can be maintained across generations, without any requirement to renew or re-establish the interest.

For example, imagine an individual, Sunmi, purchases a house in Vancouver. If she holds it in fee simple, she has the right to live in it, rent it out, renovate it, or even demolish it (subject to bylaw regulations in Vancouver). Sunmi can also sell the property whenever she chooses or leave it to her children in her will. This type of control over the land is what makes the fee simple so desirable.

In some very rare cases, a fee simple interest may be lost. This typically occurs when the holder of the fee simple dies without heirs and otherwise has not designated a beneficiary of the property in their will. If there are no heirs (as defined by the law) and no beneficiary under a will, then where does the property go? The answer is a concept called *escheat* which states that the property ownership reverts back to the Crown as the ultimate owner of land. Therefore, in our above example with Sunmi, if she died without a will and without any heirs, the Province of British Columbia would become the owner of her land.

The fee simple is noted on the land title documents showing the owner of the property:

TITLE SEARCH PRINT 2015-04-07, 16:10:34
File Reference: 2015-04-07 Requestor: Tracy Rawa
Declared Value $ 375500

CURRENT INFORMATION ONLY - NO CANCELLED INFORMATION SHOWN

Title Issued Under	STRATA PROPERTY ACT (Section 249)
Land Title District	VANCOUVER
Land Title Office	VANCOUVER
Title Number	BX211991
From Title Number	BW378981
Application Received	2005-02-22
Application Entered	2005-02-25
Registered Owner in Fee Simple	
Registered Owner/Mailing Address:	JOE SMITH, PROFESSOR/WRITER MARY SMITH, MANAGER #321 - 1234 TEST DRIVE TESTLAND, BC V8V 8V8 AS JOINT TENANTS

Joint Tenancy and Tenancy-in-Common

If we examine the above land title documents again, we can see that there is actually not one fee simple owner, there are two:

Registered Owner in Fee Simple	
Registered Owner/Mailing Address:	JOE SMITH, PROFESSOR/WRITER MARY SMITH, MANAGER #321 - 1234 TEST DRIVE TESTLAND, BC V8V 8V8 AS JOINT TENANTS

It is very common for there to be multiple owners of a fee simple; however, how that ownership is

structured can be different. For various reasons, parties may choose to be listed as joint tenants while others may wish to be tenants-in-common.

I. Joint Tenancy

Joint tenancy is a form of co-ownership where two or more individuals hold equal shares in a property. For example, if two people hold the fee simple as joint tenants, they would each be entitled to a 50% share of the property. There is no limit on the number of joint tenants that can hold one property - if there were four joint tenants, then each would have a 25% share in the land.

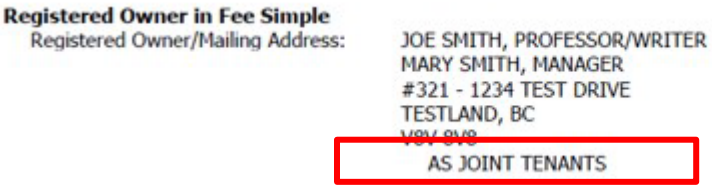
As the joint tenants hold identical shares, if the property were to be sold, they would be entitled to equal profits (assuming there was no other contractual agreement altering that presumption). Accordingly, if the two joint tenants sell the property for $1,000,000, they would each receive $500,000.

Without a doubt, the defining aspect of joint tenancy is the right of survivorship. The right of survivorship means that when one joint tenant dies, their share of the property automatically passes to the surviving joint tenants rather than being distributed according to the deceased's will or the rules of intestacy (dying without a will).

One of the clear advantages of having property pass through survivorship is that it helps sidestep the probate process - the legal process through which a deceased person's will is validated and their assets are distributed. One of the byproducts of probate are “probate fees” which are calculated on the assets in the estate. Accordingly, survivorship allows joint owners to pass the property to the remaining survivor without it being counted in the probate process.

For example, imagine three individuals own a property as joint tenants and one dies. The remaining two owners automatically inherit the deceased’s share, continuing to hold the property as joint tenants with equal shares. If one of the other joint tenants passes away, then the last surviving joint tenant will hold the property in its entirety. At each stage, probate was avoided.

In our land title documents, we see that Joe and Mary Smith have elected to be “joint tenants” to access those advantages.



II. Tenancy-in-Common

Tenancy-in-common, on the other hand, allows two or more individuals to own property together but with unequal interests and without the right of survivorship.

Under a tenancy-in-common, each owner has a specific share of the property which can be equal or unequal, depending on the contributions or agreement among the co-owners. For instance, one tenant might own a 60% interest in the property, while another owns 40%. If the property were to be sold, the owners would take their share of the profits in accordance with their share of the

ownership. Assuming a $1,000,000 sale of the property, the 60% holder would receive $600,000, and the 40% holder would receive $400,000.

Unlike joint tenancy, if a tenant in common dies, their share does not automatically pass to the surviving co-owners. Instead, it becomes part of the deceased's estate and can be inherited by heirs or transferred according to their will. Without the automatic survivorship rights, co-owners have the flexibility to leave their share of the property to someone other than the other co-owners.

Example – Joint Tenants versus Tenants-in-Common

Jaspreet and Michael are considering pooling their money and purchasing a fee simple interest in a Vancouver townhome. They must decide whether to hold the property as joint tenants or as tenants in common - each option has different implications for ownership, inheritance, and the division of profits if the property is sold.

If Jaspreet and Michael choose joint tenancy, they will each own an equal share of the townhome, and their ownership will include the right of survivorship. This means that if either Jaspreet or Michael passes away, the deceased's share of the townhome will automatically transfer to the surviving co-owner. If Michael were to pass away, Jaspreet would become the sole owner of the townhome, regardless of any provisions in Michael's will. The property would not form part of Michael's estate, and his heirs would not inherit any interest in the townhome. If the property is sold while both are alive, they would typically split the profits equally.

On the other hand, if Jaspreet and Michael opt for tenancy in common, they can each own a specific percentage of the townhome which does not have to be equal. They could agree that Jaspreet owns 60% of the property while Michael owns 40%, reflecting their individual contributions to the purchase. In this arrangement, there is no right of survivorship. If Michael were to pass away, his 40% share would not automatically go to Jaspreet; instead, it would become part of his estate and be distributed according to his will. Michael's heirs could inherit his share of the townhome and potentially become co-owners with Jaspreet. If they later decide to sell the townhome, the profits would be divided according to their ownership percentages, meaning Jaspreet would receive 60% of the proceeds and Michael's estate would receive 40%.

Life Estate

A life estate is a more limited form of property ownership compared to the fee simple. A life estate grants the right to use and occupy property for the duration of a person's life (or the life of another person). Upon the death of the life tenant, the property reverts to the fee simple owner or their designated beneficiary.

The main difference between a fee simple and a life estate is that the fee simple owner can dispose of the land - either during the owner's lifetime or upon their death. A life estate is much more limited, as it does not grant similar disposition rights despite the fact that it provides exclusive possession.

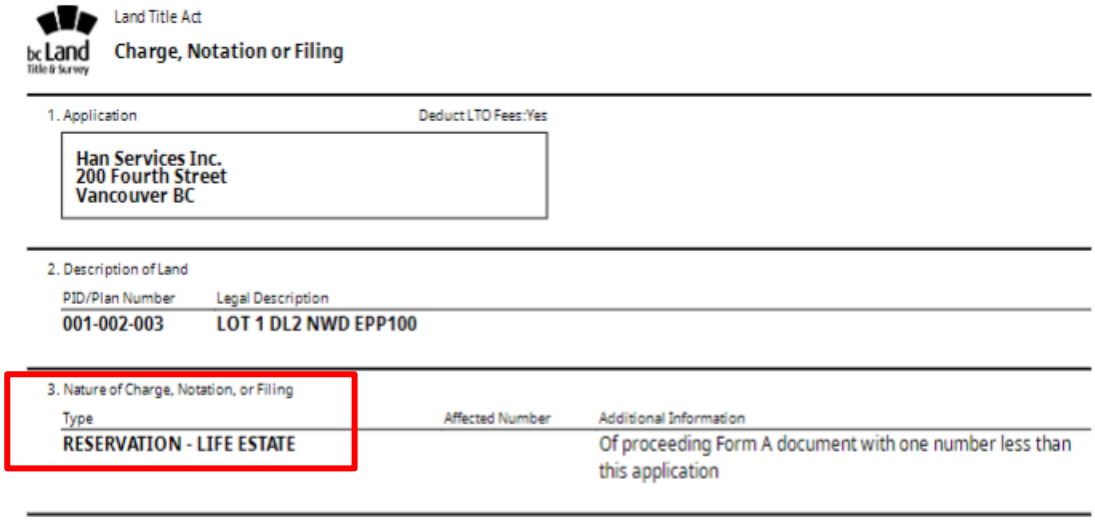
Life estates are less common but can be useful in certain situations, as seen in the following example.

Example – Life Estate

John owns a fee simple interest in a cottage that he only infrequently uses. Mai, John's sister, has recently found herself without a place to live. John, wanting to help, grants his sister a life estate in his cottage.

The life estate allows Mai to use the cottage for her lifetime, providing her with secure housing. However, upon Mai's death, the property would revert back to John as the fee simple owner or pass to whomever John designates (his spouse, children, or another designated beneficiary). The life estate allows John to provide for his sister while ensuring the property ultimately passes to his chosen heirs.

As with the fee simple, the life estate interest will also be noted on the land title documents:



Land Title Act

Charge, Notation or Filing

1. Application — Deduct LTO Fees:Yes

Han Services Inc.
200 Fourth Street
Vancouver BC

2. Description of Land

PID/Plan Number	Legal Description
001-002-003	LOT 1 DL2 NWD EPP100

3. Nature of Charge, Notation, or Filing

Type	Affected Number	Additional Information
RESERVATION - LIFE ESTATE		Of proceeding Form A document with one number less than this application

*Photo attribution. BC Land Title and Survey Authority
https://help.ltsa.ca/myltsa-enterprise/freehold-transfer-form

Leasehold

A leasehold interest grants the right to exclusive possession of property for a specified period. Leaseholds are very common interests and are held by tenants in rental properties (residential or commercial).

As with life estate interests, the holder of a leasehold gets exclusive possession; however, it is limited by a set duration. Leasehold interests can vary greatly in duration and terms. A residential tenant might have a one-year lease while a commercial tenant could have a 10-year lease with

options for renewal. Once the term of the lease expires, possession of the property reverts to the fee simple owner.

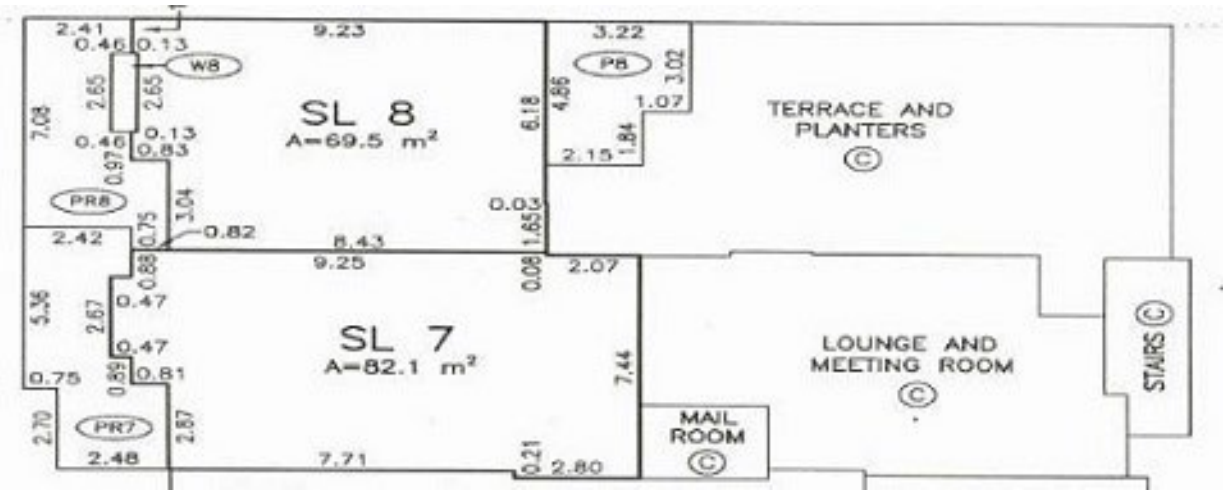
For example, if a person rents an apartment for a one-year term, they have a leasehold interest in that property for the duration of the lease. During this period, the tenant has the right to exclusive possession and use of the property (subject to the terms and conditions outlined in the lease). The tenant also has obligations under the lease, such as paying rent, not damaging the property, and complying with other legal rules.

One of the unique features of leaseholds is the heavy degree to which they are regulated by various levels of government. In British Columbia, there are statutory obligations for both landlords and tenants, as specified in the *Residential Tenancy Act*, SBC 2002, Chapter 78.

Strata Ownership (British Columbia)

One of the hottest real estate markets involves "condos" or "stratas." This is a type of shared ownership structure that involves a mix of fee simple and co-ownership. The language can sometimes be confusing because, while we are typically speaking about multi-unit buildings, such units are referred to differently depending on which part of Canada you are in. In British Columbia, it is called strata ownership, while in other provinces, it is referred to as condominium ownership.

In a strata property, individuals own their units in a larger area while sharing ownership of common property. Consider the following strata area:



"SL 7" and "SL 8" represent specific strata lots within the property - these are individual units owned separately by different owners under fee simple ownership. The owners of SL 7 and SL 8 therefore have full control over their specific units and can sell, lease, or transfer them as they wish (subject to any restrictions imposed by the strata corporation).

In addition to owning their respective strata lots, the owners of SL 7 and SL 8 also have a shared ownership interest in the common property of the building. In the image, the common property would include the "Terrace and Planters," "Lounge and Meeting Room," and "Stairs." These areas are co-owned by all the individual unit owners, and they share the responsibility for maintaining and managing these spaces through a strata corporation (called something different in other provinces).

Ultimately, stratas are dual ownership structures. While the owners of SL 7 and SL 8 have fee simple ownership of their individual units, they also participate in the co-ownership of the common property which involves the upkeep of shared spaces.

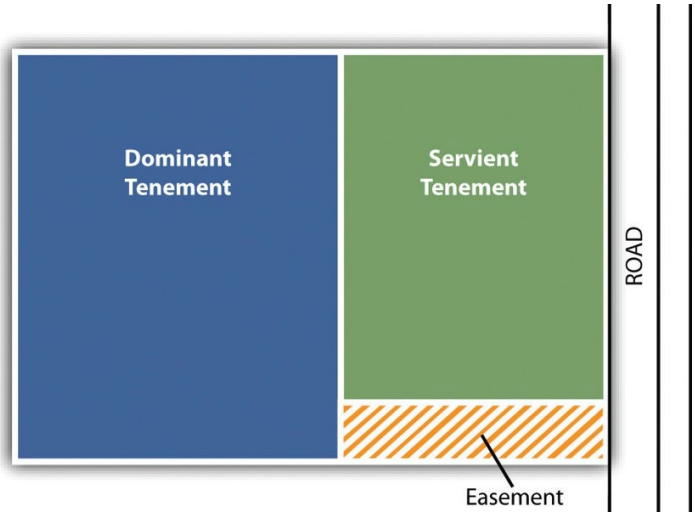
To resolve some of the disputes that can arise between strata owners, the Province of British Columbia has passed the *Strata Property Act*, SBC 1998, c. 43. The Act governs strata properties in British Columbia and provides a framework for the creation, operation, and management of strata developments.

Easements

An easement is a right to use another person's land for a specific purpose. Easements are interesting as they are referred to as a non-possessory interest, meaning the easement holder does not own or possess the land but has certain rights over it.

The most common type of easement is a right-of-way which allows someone to pass through someone else's property to access their own, especially in cases where direct access to a public road is not available. In some cases, this right-of-way could be sought by a utilities company (electrical, sewer, water) needing access to a certain area.

Easements involve two key types of land: the *servient* tenement and the *dominant* tenement. The servient tenement is the parcel of land that is burdened by the easement, meaning it is the land over which the easement runs and where the specific rights are exercised. On the other hand, the dominant tenement is the land that benefits from the easement, gaining certain rights, such as access or utility use, over the servient tenement.



Easements can be granted in several ways. They may be created through a formal agreement between property owners outlining the scope of the grant of easement. Additionally, easements can be imposed by law or court order particularly, in cases where access or utility services are essential for the reasonable use of a property. Once established, easements are generally permanent and bind future owners of the land.

Legal Test for Creation of an Easement

Generally, for a valid easement to be created, it must meet the following criteria:

1. there must be a dominant and servient tenement;
2. the easement must accommodate the dominant tenement;
3. dominant and servient tenements must be different people; and
4. the right must be capable of forming the subject matter of a grant.

Kaminskas v. Storm, 2009 ONCA 318 at para. 27.

Lastly, it is common for easements to be formally documented and registered with the various land title registries (in British Columbia it is the Land Title & Survey Authority). The easement will be noted as a legal notation or charge on the title, signifying that the easement has been granted.

Foundational Law – *Ellenborough Park, Re* [1956] Ch 131

One of the principal English cases dealing with easements is *Ellenborough Park, Re* [1956] Ch 131. The case concerned a piece of land, Ellenborough Park which was a large private garden in Weston-super-Mare. Surrounding the park were several houses and the owners of these houses had rights to use the park for recreational purposes, as granted by the original property deeds. However, a dispute arose about whether this right to use the park constituted a valid easement under English law.

The Court of Appeal ruled that the right to use the park did indeed constitute an easement. The court's decision hinged on the typical characteristics for an easement:

- is there the existence of a dominant tenement
- does the easement accommodate or benefit the dominant tenement;
- are the dominant and servient owners different persons; and
- right claimed must be capable of forming the subject matter of a grant.

In applying these criteria to the case, the Court found that the houses served as dominant tenements while the park was the servient tenement. Also, the right to use the park provided a clear benefit to the homeowners who were able to access it as they so chose. The ownership of the homeowners and the park were appropriately distinct. And finally, the right to use the park was indeed grantable.

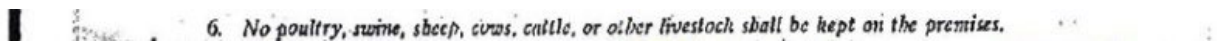
As such, there was a valid easement taken over the park area.

Restrictive Covenants

Another form of non-possessory interest is called a restrictive covenant. A restrictive covenant is an agreement that limits the use of land. Unlike easements which result in an easing of the enforcement of property rights, restrictive covenants do the opposite - they restrict some rights that would otherwise be held by the fee simple owner.

Restrictive covenants allow property owners, developers, or communities to exercise a degree of control over how land is used; this is true even after the land has been sold. In effect, restrictive covenants are a private form of land-use regulation, imposing certain restrictions on what can be done to the land. For example, restrictive covenants could be used for environmental protection, prohibiting the removal of certain trees or preserving designated green spaces. In historical districts, covenants can help preserve the architectural integrity of buildings by limiting changes to the building.

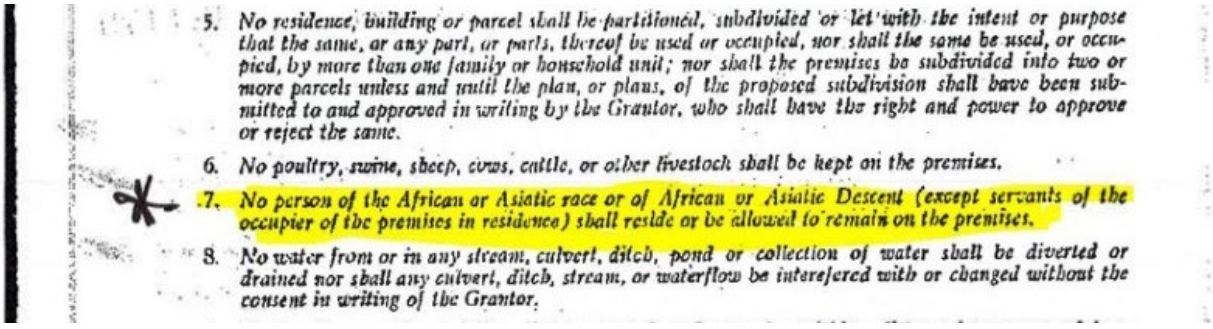
What makes restrictive covenants particularly "restrictive" is that they run with the land, meaning they bind not only the original parties but also subsequent owners of the property. Accordingly, if an individual buys a property subject to a restrictive covenant, they are bound by its restrictions whether they like it or not. For example, the following is a restrictive covenant registered against a West Vancouver, BC property:



6. *No poultry, swine, sheep, cows, cattle, or other livestock shall be kept on the premises.*

Based on the restrictive covenant, no buyer of this property could ever keep poultry, swine, etc., as they would be in breach of the covenant registered against title. Buyers always have to be careful to understand if the property they are purchasing are bound by any such restrictive covenants.

While restrictive covenants can be beneficial in maintaining specific property elements or uses, they can also be controversial. In the past, restrictive covenants have been used to discriminate against certain groups from buying specific properties. Again, we can turn to the West Vancouver, BC property title that restricted poultry and swine - if we read further in the covenant, we can see another restriction in section 7:



5. *No residence, building or parcel shall be partitioned, subdivided or let with the intent or purpose that the same, or any part, or parts, thereof be used or occupied, nor shall the same be used, or occupied, by more than one family or household unit; nor shall the premises be subdivided into two or more parcels unless and until the plan, or plans, of the proposed subdivision shall have been submitted to and approved in writing by the Grantor, who shall have the right and power to approve or reject the same.*

6. *No poultry, swine, sheep, cows, cattle, or other livestock shall be kept on the premises.*

7. *No person of the African or Asiatic race or of African or Asiatic Descent (except servants of the occupier of the premises in residence) shall reside or be allowed to remain on the premises.*

8. *No water from or in any stream, culvert, ditch, pond or collection of water shall be diverted or drained nor shall any culvert, ditch, stream, or waterflow be interefered with or changed without the consent in writing of the Grantor.*

This racist restrictive covenant was applied to the property to prevent certain ethnicities from owning the property.

Over time, courts generally sought to undermine the enforceability of discriminatory covenants, including in the Supreme Court of Canada case *Noble v. Alley*; however, legislation has ensured that any such covenants are void. In British Columbia, section 222 of the *Land Title Act*, [RSBC

1996] CHAPTER 250 specifies that covenants that restrict the sale, ownership, occupation, or use of land on account of sex, race, creed, colour, nationality, ancestry, or place of origin of a person are void and of no effect. Therefore, discriminatory covenants are not enforceable.

Foundational Law – *Noble v. Alley* [1951] SCR 64

The case arose when Annie Noble, a property owner, sought to sell her land to Bernard Wolf. However, the restrictive covenant on the property stated the following;

> (*f*) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

Noble and Wolf challenged the validity of this covenant, arguing that it was contrary to public policy and unenforceable.

The Supreme Court of Canada ruled in favour of Noble and Wolf, declaring the restrictive covenant unenforceable. However, the Court's reasoning was not primarily based on the discriminatory nature of the covenant. Instead, the majority opinion focused on the technical legal grounds that the covenant was too vague and uncertain to be enforced. The Court reasoned that terms like "Jewish" or "Hebrew" were not sufficiently precise in legal terms, as they could refer to religious, cultural, or ethnic identities, making the covenant's application ambiguous.

The decision did effectively strike down the racist covenant; however, the broader issue of whether such discriminatory covenants were fundamentally against public policy remained unresolved. This dodge has resulted in legal criticism of the case, with many arguing that the Court missed an opportunity to make a stronger statement against racial discrimination in property law.

Interests Acquired from Legally Taking the Land

We would typically imagine that acquiring a fee simple in land requires a buyer to pay for it or that ownership was granted by the fee simple owner upon their death. However, there are rare cases in which property interests can be taken or acquired in law. The principal means by which this can happen are adverse possession and expropriation.

Adverse Possession

Can someone who squats on property ever become the owner? As with many legal questions, the answer is: it depends.

Adverse possession is a legal doctrine that allows a person who is not the legal owner of a property to acquire title to that property by occupying it for a specified period of time and that the possession is adverse to the interests of the actual owner. The principle is that land should be used productively and that long-term neglect by the legal owner should result in a loss of title.

Despite some controversies, adverse possession has had an incredibly long and robust history. It played a significant role in the settlement and development of Canadian territories during the 18th and 19th centuries. In the early stages of Canadian settlement, many areas lacked formal land registration systems. Settlers would often claim land by simply occupying it and improving it through farming, building homes or wells, or other forms of development. If they maintained this occupation for enough time (typically 20 years, though it varied by province), they could potentially claim legal ownership through adverse possession.

The argument for adverse possession in settler cases had some pragmatic appeal. Rural and frontier areas had no proper formal surveying, and land registration was incomplete or non-existent. Settlers might inadvertently occupy land beyond their official boundaries or even intentionally expand their holdings into adjacent unclaimed areas. Over time, if these actions went unchallenged by the true owner (likely the Crown), the settlers could argue that they had become the rightful owners.

In the modern context, adverse possession raises more delicate debates. Should the original owner of a house have to do anything at all on their property to keep ownership? Should someone who openly violates the property interest of another be permitted to evolve from a trespasser to become the fee simple owner? Should this still be allowed when Canadian property is so expensive?

Today, the law of adverse possession falls into two legal worlds: 1) the common law, and 2) provincial statutory rules.

I. Common Law

Under the common law, it is possible to obtain ownership through adverse possession. Generally, the test requires actual possession of land for a prescribed period of time - typically between 10 and 20 years. The possession must be open and adverse to the owner's authority (generally, without the owner’s permission).

Legal Test for Adverse Possession

In order to establish adverse possession, all of the following elements are required:

1. actual possession for the statutory period (typically between 10-20 years);
2. such possession was with the intention of excluding from possession the owner or persons entitled to possession; and
3. discontinuance of possession by the owner for the statutory period.

Teis v. Ancaster (Town) (1997), 1997 CanLII 1688 (ON CA)
citing *Pflug v. Collins*, 1951 CanLII 80 (ON SC)

To lawfully obtain a fee simple interest through adverse possession (where it is still possible), the adverse possessor would need to demonstrate that their possession met all the required elements consistently throughout the statutory period. An example where common law adverse possession might have applied would be a squatter occupying an abandoned rural property and treating it as their own for the required time. Another good example would be where a neighbour unknowingly builds a structure (shed/garage) that encroaches on adjacent land and uses it undisturbed for the statutory period:

II. Provincial Statutory Rules

Provincially, adverse possession has been largely eliminated due to legislative changes. As real estate has become more valuable, provinces have enacted specific rules heavily restricting adverse possession claims or eliminating it altogether.

In British Columbia, adverse possession has been effectively eliminated due to the enactment of the *Limitation Act*. Section 28 of the Act explicitly states the following:

> 28(1) Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession.

> 28(2) Nothing in this Act interferes with any right or title to land acquired by adverse possession before July 1, 1975.

As written, adverse possession claims are abolished with the only exception being occupations of land prior to July 1, 1975. Given the new wording, it will be extraordinarily rare to see modern claims for adverse possession in BC.

Foundational Law – T*eis v. Ancaster (Town)*, 1997 CanLII 1688 (ON CA)

Teis v. Ancaster (Town) involved a dispute over a strip of land between the Teis family's property and a public road owned by the Town of Ancaster. The Teis family had been using this strip of land for over 40 years, maintaining it as part of their front yard. They claimed ownership through adverse possession when the town attempted to assert its rights over the property.

At trial, the Teis family was granted adverse possession of the strip; however, the trial judge also ordered that the public was entitled to travel over part of the laneway on foot.

The Court of Appeal emphasized that for adverse possession, there must be actual possession of land and an intention to exclude the true owner for the statutory period which in Ontario was ten years. The court clarified that the intention to exclude the true owner does not require hostility or antagonism, but rather an intention to use the land as one's own.

Ultimately, the Court of Appeal found that the family had indeed established adverse possession and upheld their claim over the strip. Their long-term use and maintenance of the land, coupled with their belief that it was part of their property, satisfied the common law test. The court also upheld the public right-of-way to travel by foot.

Expropriation

The second situation where land may be transferred without the consent of the fee simple owner is expropriation. Expropriation is the act of a government or authority taking private property for public use or benefit. In some jurisdictions, including the United States, expropriation is also known as eminent domain, though its features are the same - the allowance of governments to acquire land or property rights for projects deemed to be in the public interest. While the land may be taken by the public authority, in Canada, the original owner is entitled to compensation for the land.

Under British Columbia law, various public authorities, including provincial ministries, municipalities, and Crown corporations, have the power to expropriate property. Examples include large infrastructure projects where there would be tremendous benefit to the public. Think of governments needing to acquire land for highway expansion, constructing public buildings like schools or hospitals, or developing utility infrastructure such as power lines or water treatment facilities. In such cases, the compelling public interest outweighs the private property interest of the owner.

To lawfully expropriate property in BC, the expropriating authority must follow specific steps outlined in the *Expropriation Act* [RSBC 1996] CHAPTER 125. These typically involve providing

notice to the property owner, conducting surveys and appraisals, negotiating in good faith, and, if necessary, proceeding with a formal expropriation process through the courts.

Surrey's Riverside Golf Centre closes after city expropriates land

City of Surrey says it wants the land to increase outdoor recreation space for residents

CBC News · Posted: Jan 23, 2016 9:34 PM PST | Last Updated: January 23, 2016

The Riverside Golf Centre in Surrey has been operating for nearly 50 years. (CBC News)

An example of expropriation in British Columbia.
CBC News. Original article link:
https://www.cbc.ca/news/canada/british-columbia/riverside-golf-course-surrey-expropriation-1.3417461

Despite having the power to expropriate, governments must still comply with the requirements established by the *Expropriation Act*.

According to the Act, there are numerous considerations to ensure that the expropriation is lawful and fair. First, the expropriating authority must have the legal power to expropriate - not all organizations are empowered to expropriate though governments certainly are. There must also be a determination of whether the expropriation is necessary for a public purpose or in the public interest.

The authority is required to make reasonable efforts to acquire the land by agreement with the owner before resorting to expropriation. If these negotiations fail, the authority must serve a notice of expropriation on the owner and file it with the Land Title Office. The owner then has the right to request an inquiry to determine if the expropriation is necessary and in the public interest. If the expropriation proceeds, the authority generally provides an advance payment based on its estimate of market value and serves a notice of possession.

Throughout this expropriation process, the owner has the right to object, to be heard at an inquiry, and to claim compensation.

Above and Below the Land

An interest in land includes, first and foremost, the soil and physical land of the property. However, interests in land involve more than just the surface area of a given parcel. Real property interests also extend vertically both above and below the earth's surface, as well as to various attachments to the land itself. In the following, we will canvass those extended rights held by the interest holder.

Fixtures

Fixtures are personal property (chattels) that have been attached to the property in such a way that they become part of the land. This can include buildings, permanent structures, and even certain types of equipment or machinery that are seriously integrated into the property.

The distinction between chattels and fixtures is important because it affects what is included in the sale or transfer of property. When real property is sold, fixtures are typically included in the sale unless explicitly excluded in the contract while chattels remain the personal property of the seller unless specifically included.

Generally, whether an item is a fixture or chattel comes down to determining the degree and purpose of the attachment of the item. More specifically, the BC Court of Appeal has highlighted key principles for determining whether an item is affixed to the land in *Scott v. Filipovic*:

Legal Test for Determining a Fixture versus Chattel

Determining whether an item is a fixture or chattel involves the following core principles:

1. Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances show that they were intended to be part of the land.
2. Articles affixed to the land even slightly are to be considered part of the land unless the circumstances show that they were intended to remain chattels.
3. A different intent is determined objectively by facts "patent to all to see," such as the degree and purpose of attachment to the land.
4. Fixtures installed by a tenant are still fixtures, although the landlord may agree to sever them and return them to the tenant as chattels.

Scott v. Filipovic, 2015 BCCA 409 (CanLII)

In commercial contexts, the treatment of fixtures can be particularly complex. Tenants often install significant equipment or improvements, and the lease agreement should specify whether these become fixtures (and thus property of the landlord) or remain the tenant's property to be removed at the end of the lease.

Airspace and Subsurface

An interesting legal maxim is “cuius est solum, eius est usque ad coelum et ad inferos,” which means “whoever owns the soil owns up to the heavens and down to the depths.” The notion is that ownership rights are expansive and include more than just the soil. While true as a starting point, modern law has placed some limitations on its literal interpretation.

Air rights are the rights to the space above the land surface. The extent of airspace rights is often described as the area that can be reasonably used and enjoyed in connection with the land. This might include, for example, the space needed for buildings or trees. However, airspace rights do not extend to the point of interfering with air traffic. While limited, air rights can be incredibly lucrative, especially in city settings, where the airspace above existing structures can be bought, sold, or leased to preserve views.

Subsurface rights extend below the earth’s surface and can include ownership of minerals, oil, gas, and other resources found beneath the property. However, the law generally presumes that an owner’s subsurface rights extend only to a depth necessary for the ordinary and “reasonable” use and enjoyment of the land.

If a neighbouring landowner or another party were to encroach on the subsurface of the fee simple owner’s property, the fee simple owner might have a claim for trespass provided the depth of the intrusion is within a reasonable use of the land. For instance, unauthorized drilling under someone’s land could be considered trespass if it interferes with the owner’s subsurface rights.

Certain subsurface rights may be subject to Crown reservations. This means that even though a person may own the land in fee simple, the minerals beneath the surface may be owned by the provincial or federal government. In such cases, the fee simple owner does not have the right to exploit these resources without obtaining a lease or permit from the government.

Trespass to Land

Trespass to land is a tort (civil wrong) that occurs when someone enters another’s property without permission. It’s one of the primary legal protections for property owners’ right to exclusive possession of their land.

Trespass can include physical entry onto the land, placing objects on the land, or causing harm to the land. For example, if a neighbour builds a fence that encroaches on another person’s property, this could constitute trespass to land. The property owner may seek legal remedies, including damages or an injunction to remove the encroaching structure.

Legal Test for Trespass to Land

For a claim of trespass to land to be successful, there must be:

1) entry onto another's property; and
2) without authority.

Veness v. Kamloops et al, 2000 BCSC 1042 (CanLII) at para. 27.

Unlike some tort claims, trespass is actionable "per se," meaning that the property owner does not need to prove any actual damage to succeed in a trespass claim - the mere fact of unauthorized entry is sufficient.

Foundational Law – *Kranz v. Shidfar*, 2011 BCSC 686 (CanLII)

In *Kranz v. Shidfar*, 2011 BCSC 686, the plaintiffs, Frederick and Katarina Kranz, owned a property adjacent to the defendant, Mohammad Shidfar, in West Vancouver, BC. The dispute arose when Shidfar directed his worker to cut down trees near the boundary between the two properties as part of renovations on his land. Unfortunately, several trees on the Kranzs' property were mistakenly felled. The Kranzs sued for trespass, claiming damages for the unauthorized removal of their trees.

The Supreme Court of BC held that Shidfar was liable for trespass, emphasizing our previous point that trespass is actionable without proof of damage. Shidfar admitted that his worker, under his direction, mistakenly cut down the trees on the Kranzs' property.

Justice Groves awarded the plaintiffs $42,000 for the cost of restoring the trees, $20,000 for loss of enjoyment of their land due to the loss of privacy, and $35,000 in punitive damages. The punitive damages were particularly justified by Shidfar's recklessness in failing to ascertain the true property boundary before instructing the tree removal, as well as by the fact that he cut down a final tree after being expressly asked not to by the Kranzs. The total damages awarded to the plaintiffs amounted to $97,000.

Property Transactions in British Columbia

While it is beyond the scope of this chapter to lay out every step in a real estate transaction, it is worth noting some of the major requirements in land transactions. The following discussion briefly outlines a few key factors in the purchase of real property in British Columbia.

Contract of Purchase and Sale

British Columbia land transactions will involve a Contract of Purchase and Sale ("CPS") which is also referred to as an "Agreement of Purchase and Sale" or "Purchase Agreement." The CPS is typically a standardized contract that outlines the terms and conditions of the property sale.

The starting point for the CPS is the identification of the buyer and seller and a description of the property subject to the transaction:

CONTRACT OF PURCHASE AND SALE

BROKERAGE: _____ DATE: _____

ADDRESS: _____ PC: _____ PHONE: _____

PREPARED BY: _____ MLS® NO: _____

SELLER: _____	BUYER: _____
SELLER: _____	BUYER: _____
ADDRESS: _____	ADDRESS: _____
_____	_____
_____ PC: _____	_____ PC: _____
PHONE: _____	PHONE: _____
	OCCUPATION: _____

PROPERTY:

_____

UNIT NO. ADDRESS OF PROPERTY

_____

CITY/TOWN/MUNICIPALITY POSTAL CODE

Within the CPS there will also be a variety of other terms including the following:

I. the purchase price

The CPS describes the purchase price for the property:

1. **PURCHASE PRICE:** The purchase price of the Property will be _____

_____

_____ DOLLARS $_____ (Purchase Price)

II. deposit amount

The CPS identifies whether the buyer has paid a deposit to secure the purchase of the property and, more importantly, what is to happen to the deposit if the buyer or seller backs out of the transaction:

2. **DEPOSIT:** A deposit of $_____ which will form part of the Purchase Price, will be paid **within 24 hours of acceptance** unless agreed as follows:

All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to _____ _____ and held in trust in accordance with the provisions of the *Real Estate Services Act*. In the event the Buyer fails to pay the Deposit as required by this Contract, the Seller may, at the Seller's option, terminate this Contract. The party who receives the Deposit is authorized to pay all or any portion of the Deposit to the Buyer's or Seller's conveyancer (the "Conveyancer") without further written direction of the Buyer or Seller, provided that: (a) the Conveyancer is a Lawyer or Notary; (b) such money is to be held in trust by the Conveyancer as stakeholder pursuant to the provisions of the *Real Estate Services Act* pending the completion of the transaction and not on behalf of any of the principals to the transaction; and (c) if the sale does not complete, the money should be returned to such party as stakeholder or paid into Court.

III. Subjects or Conditions on the Sale

Even if the offer is accepted, the CPS will likely contain conditions that must be satisfied before the contract is fully enforceable (these are referred to as conditions precedent or "subjects"). Typical subjects that must be met include the buyer obtaining financing or a satisfactory home inspection. In effect, the subjects allow the buyer to back out of the deal if certain criteria are not met; however, once the conditions are successfully removed, the contract becomes binding.

3. **TERMS AND CONDITIONS:** The purchase and sale of the Property includes the following terms and is subject to the following conditions:

IV. completion date

On the completion date or closing date, the transfer of title is registered at the Land Title Office and the funds are transferred to the seller.

4. **COMPLETION:** The sale will be completed on _____, yr. _____ (Completion Date) at the appropriate Land Title Office.

V. possession date

The possession date identifies when the buyer takes possession of the property and can move in or begin using it. The possession date also marks the transfer of responsibilities such as taxes, utilities, and insurance over the property.

5. **POSSESSION:** The Buyer will have vacant possession of the Property at _____m. on _____, yr._____ (Possession Date) OR, subject to the following existing tenancies, if any:

_____

VI. Included items

In the CPS, the parties should clearly indicate what is included in the sale. For example, the buyer and seller will want to ensure that they have described whether appliances run with the sale or any other specific items. As noted previously, fixtures are presumed to run with the land unless some contrary intention is stated by the parties.

7. **INCLUDED ITEMS:** The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attachments thereto, and all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Buyer at the date of inspection, INCLUDING:

VII. Expiry of the Offer

Both buyers and sellers want there to be specificity on how long an offer remains open for acceptance. As such, the CPS will contain a specific deadline by which the seller must accept the buyer's offer. If the seller does not accept the offer by this date and time, the offer automatically expires (meaning it is no longer binding on the buyer) and the buyer is not obligated to proceed with the purchase.

24. **OFFER:** This offer, or counter-offer, will be open for acceptance until _____ o'clock _____m. on _____, yr. _____ (unless withdrawn in writing with notification to the other party of such revocation prior to notification of its acceptance), and upon acceptance of the offer, or counter-offer, by accepting in writing and notifying the other party of such acceptance, there will be a binding Contract of Purchase and Sale on the terms and conditions set forth.

VIII. Summary

For the most part, the CPS is a standard form; however, parties will obviously want many customizations. As contracting parties, the buyer and seller can make whatever changes they wish to the terms by modifying the CPS language or attaching addenda to the agreement.

Once submitted by the buyer, the seller reviews the CPS and may choose to accept, reject, or counter the offer. The negotiation phase can involve multiple rounds of offers and counteroffers until both parties reach an agreement or decide to walk away. If the seller accepts the offer, the buyer then has a period to satisfy or remove any of the listed conditions/subjects such as securing financing or completing a satisfactory home inspection.

The CPS is a legally binding document once accepted and all the conditions are removed. If one of the parties then has remorse about the deal or wants to walk away, they could be sued for breaching the terms of the agreement. Assuming a breach, any penalties listed in the agreement could be enforced by the court (such as the loss of the deposit).

Land Title Forms

Where the CPS leads to a successful sale, the parties will also execute a transfer of the legal title of the property and register it with the Land Title & Survey Authority.

In British Columbia, the key transfer form is called Form A. The execution of the Form A (Freehold Transfer) will formally transfer ownership of land from the transferor to the transferee.

LAND TITLE ACT

FORM A
(Section 185(1))

Province of
British Columbia

FREEHOLD TRANSFER (This area for Land Title Office use) PAGE 1 of *[number]* pages

1. APPLICATION: (Name, address, phone number and signature of applicant, applicant's solicitor or agent)

2. (a) PARCEL IDENTIFIER AND LEGAL DESCRIPTION OF LAND:*
[PID] *[legal description]*

(b) MARKET VALUE: $

3. CONSIDERATION:

4. TRANSFEROR(S):*

5. FREEHOLD ESTATE TRANSFERRED:*

6. TRANSFEREE(S): (including occupation(s), postal address(es) and postal code(s))*

7. EXECUTION(S):** The transferor(s) accept(s) the above consideration and understand(s) that this instrument operates to transfer the freehold estate in the land described above to the transferee(s)

Officer Signature(s) | **Execution Date** (Y M D) | Transferor(s) Signature(s)

OFFICER CERTIFICATION:
Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, R.S.B.C. 1996, c. 124, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* as they pertain to the execution of this instrument.

* If space insufficient, enter "SEE SCHEDULE" and attach schedule in Form E.
** If space insufficient, continue executions on additional page(s) in Form D.

Form A Freehold Transfer.
*Photo attribution. BC Land Title & Survey Authority.
https://ltpm.ltsa.ca/form

To effectively transfer the property interest, Form A must be registered with the BC Land Title & Survey Authority (LTSA).

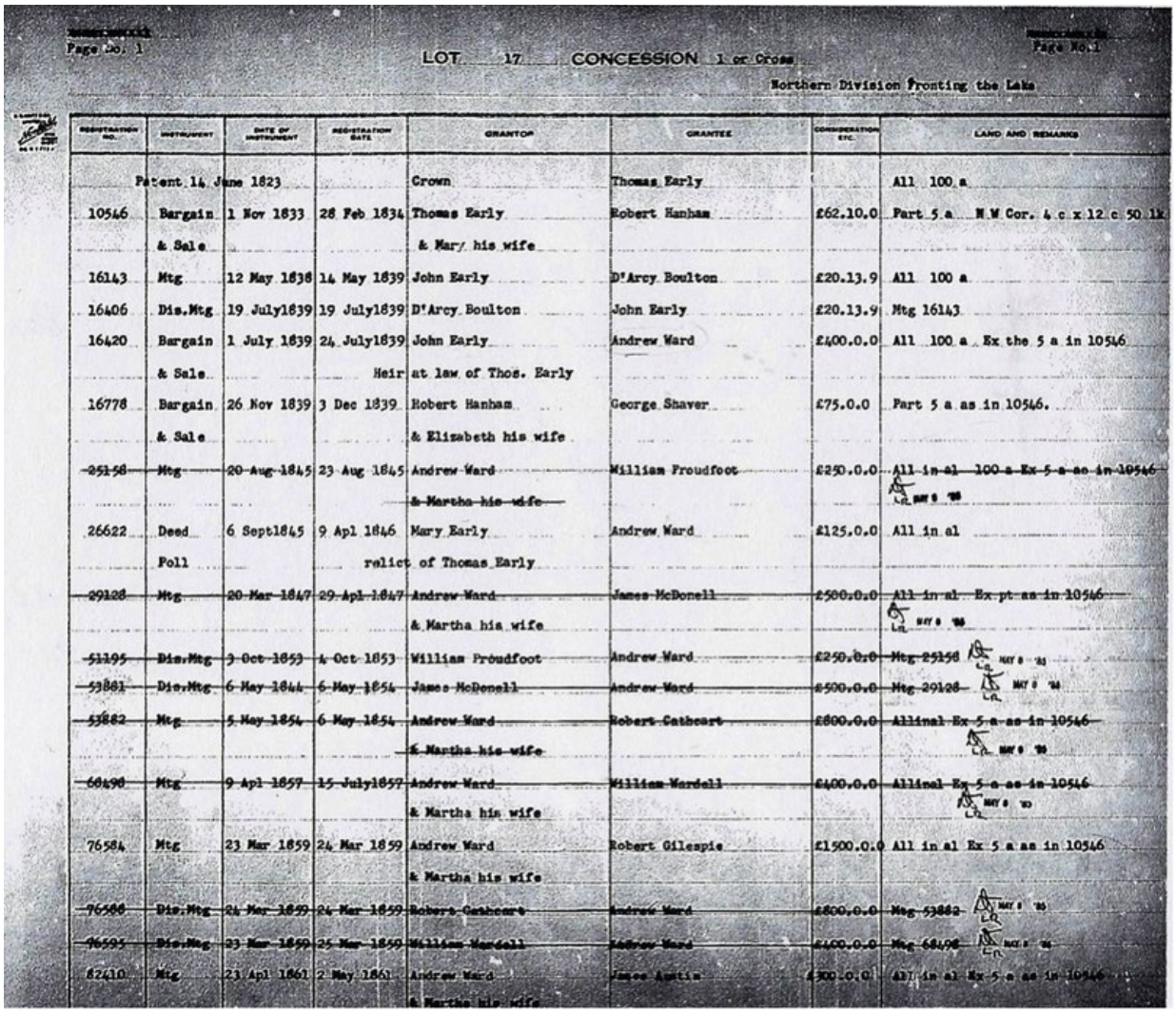
Land Title Systems

So far in this chapter, we have discussed numerous forms of interests in land, from possessory interests like the fee simple to non-possessory easements and restrictive covenants. A question remains, though: how do we keep track of the holders of these interests? How do we know who holds what interest over a specific property? The answer is the use of a property registry.

Canada uses two main systems for recording interests in land - the registry system and the land titles system (also known as the Torrens system). While both systems attempt to keep a log of what interests are held over what property, their structure and impact on real property are substantially different. Below, we canvass both forms of system for tracking real property interests.

Registry System

The Registry system for tracking real property interests in Canada has a long history dating back to the country's colonial era. This system, also known as the "deed registration system," was inherited from English common law and was widely used across Canada before the introduction of the Torrens system. Under a Registry system, all documents related to land transactions, including deeds, mortgages, and liens, were recorded chronologically in public registries maintained by local government offices:



Page No. 1 LOT 17 CONCESSION 1 or Cross Page No. 1

Northern Division Fronting the Lake

REGISTRATION NO.	INSTRUMENT	DATE OF INSTRUMENT	REGISTRATION DATE	GRANTOR	GRANTEE	CONSIDERATION ETC.	LAND AND REMARKS
Patent 14 June 1823				Crown	Thomas Early		All 100 a
10546	Bargain & Sale	1 Nov 1833	28 Feb 1834	Thomas Early & Mary his wife	Robert Hanham	£62.10.0	Part 5 a N W Cor. 4 c x 12 c 50 lk
16143	Mtg	12 May 1838	14 May 1839	John Early	D'Arcy Boulton	£20.13.9	All 100 a
16406	Dis.Mtg	19 July1839	19 July1839	D'Arcy Boulton	John Early	£20.13.9	Mtg 16143
16420	Bargain & Sale	1 July 1839	24 July1839	John Early Heir at law of Thos. Early	Andrew Ward	£400.0.0	All 100 a Ex the 5 a in 10546
16778	Bargain & Sale	26 Nov 1839	3 Dec 1839	Robert Hanham & Elizabeth his wife	George Shaver	£75.0.0	Part 5 a as in 10546.
~~25158~~	~~Mtg~~	~~20 Aug 1845~~	~~23 Aug 1845~~	~~Andrew Ward & Martha his wife~~	~~William Proudfoot~~	~~£250.0.0~~	~~All in al 100 a Ex 5 a as in 10546~~
26622	Deed Poll	6 Sept1845	9 Apl 1846	Mary Early relict of Thomas Early	Andrew Ward	£125.0.0	All in al
~~29128~~	~~Mtg~~	~~20 Mar 1847~~	~~29 Apl 1847~~	~~Andrew Ward & Martha his wife~~	~~James McDonell~~	~~£500.0.0~~	~~All in al Ex pt as in 10546~~
~~51195~~	~~Dis.Mtg~~	~~3 Oct 1853~~	~~4 Oct 1853~~	~~William Proudfoot~~	~~Andrew Ward~~	~~£250.0.0~~	~~Mtg 25158~~
~~53861~~	~~Dis.Mtg~~	~~6 May 1854~~	~~6 May 1854~~	~~James McDonell~~	~~Andrew Ward~~	~~£500.0.0~~	~~Mtg 29128~~
~~53862~~	~~Mtg~~	~~5 May 1854~~	~~6 May 1854~~	~~Andrew Ward & Martha his wife~~	~~Robert Cathcart~~	~~£800.0.0~~	~~Allinal Ex 5 a as in 10546~~
~~60496~~	~~Mtg~~	~~9 Apl 1857~~	~~15 July1857~~	~~Andrew Ward & Martha his wife~~	~~William Wardell~~	~~£400.0.0~~	~~Allinal Ex 5 a as in 10546~~
76584	Mtg	23 Mar 1859	24 Mar 1859	Andrew Ward & Martha his wife	Robert Gilespie	£1500.0.0	All in al Ex 5 a as in 10546
~~76586~~	~~Dis.Mtg~~	~~24 Mar 1859~~	~~24 Mar 1859~~	~~Robert Cathcart~~	~~Andrew Ward~~	~~£800.0.0~~	~~Mtg 53862~~
~~76595~~	~~Dis.Mtg~~	~~23 Mar 1859~~	~~25 Mar 1859~~	~~William Wardell~~	~~Andrew Ward~~	~~£400.0.0~~	~~Mtg 60496~~
82410	Mtg	23 Apl 1861	2 May 1861	Andrew Ward & Martha his wife	James Austin	£300.0.0	All in al Ex 5 a as in 10546

Historical land deed showing property transfers.
*Photo attribution. Etobicoke Historical Society.
https://www.etobicokehistorical.com/appendix-3-how-to-do-research-at-the-land-registry-office.html

The Registry system operated on the principle of "first in time, first in right," meaning that the order in which documents were registered determined their priority. This system required extensive title searches to establish a property's ownership history and any encumbrances, as each transaction built upon previous ones in a continuous chain of title. Lawyers or title searchers would need to examine all recorded documents affecting a property, sometimes going back decades or even centuries, to ensure the validity of a title. If those lawyers or researchers made a mistake, the remedy for the buyer would be to sue for negligence to recover any losses.

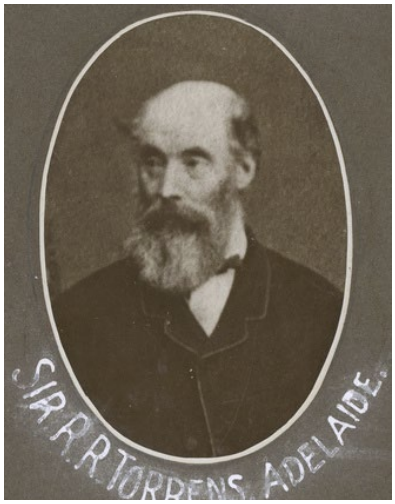
While the Registry system provided a public record of land transactions, it had several significant drawbacks. The system did not guarantee the accuracy or completeness of the recorded information, leaving room for errors, omissions, or fraudulent entries. Additionally, as properties changed hands over time, the chain of title became increasingly complex and time-consuming to

search. This complexity often led to uncertainties in land ownership and increased the risk of title defects.

As a result, many Canadian provinces began to transition away from the Registry system in favour of what is known as the Torrens system of land registration.

Land Title System (the Torrens System)

The Torrens system (also known as the Land Title system) represented a significant advancement in the tracking and registration of real property interests. The system is named after its creator, Sir Robert Torrens:



Sir Robert Torrens.
*Photo attribution. State Library South Australia.
https://collections.slsa.sa.gov.au/resource/B+6912/D10

Sir Robert Torrens emigrated to South Australia from England in 1840. He quickly realized there were rampant issues with the registry-style system for tracking property interests, including errors and fraud. He sought to evolve the system to be closer to how ships were registered which had a clear system for recording ownership and charges against them. Torrens believed that land could be registered in a similar manner.

In 1858, South Australia formally adopted the various changes proposed by Torrens and was the first jurisdiction to use the Torrens-style system for land.

The Torrens system operates on the principle of "title by registration," where the act of registration itself creates or transfers title to land. This is in contrast to the older registry systems where registration merely recorded the existence of title documents.

Owners in a Torrens system benefit from the principle of indefeasibility of title. Once the title has been registered, a certificate of title is issued:

TITLE SEARCH PRINT 2015-04-07, 16:10:34
File Reference: 2015-04-07 Requestor: Tracy Rawa
Declared Value $ 375500

CURRENT INFORMATION ONLY - NO CANCELLED INFORMATION SHOWN

Title Issued Under	STRATA PROPERTY ACT (Section 249)
Land Title District	VANCOUVER
Land Title Office	VANCOUVER
Title Number	BX211991
From Title Number	BW378981
Application Received	2005-02-22
Application Entered	2005-02-25
Registered Owner in Fee Simple	
Registered Owner/Mailing Address:	JOE SMITH, PROFESSOR/WRITER MARY SMITH, MANAGER #321 - 1234 TEST DRIVE TESTLAND, BC V8V 8V8 AS JOINT TENANTS
Taxation Authority	CITY OF VANCOUVER
Description of Land	
Parcel Identifier:	026-018-250
Legal Description:	STRATA LOT 4 DISTRICT LOT 264A GROUP 1 NEW WESTMINSTER DISTRICT STRATA PLAN BCS933 TOGETHER WITH AN INTEREST IN THE COMMON PROPERTY IN PROPORTION TO THE UNIT ENTITLEMENT OF THE STRATA LOT AS SHOWN ON FORM V

Certificate of Title showing property description and interests/charges.
*Photo attribution. Land Title Survey Authority.
https://ltsa.ca/wp-content/uploads/2021/04/Sample-Land-Title.pdf

This certificate of title is guaranteed by the government to be accurate and complete. This governmental guarantee provides a high degree of certainty and security to property owners and potential buyers that the owner is, in fact, the owner. If an error occurs in the register resulting in some form of loss, the affected party can seek compensation from a government-administered assurance fund rather than having to pursue a negligence claim against the lawyers or title searchers.

British Columbia adopted the Torrens system in 1870, making it one of the earliest adopters in Canada. That adoption significantly modernized and streamlined the BC's approach to land registration. Over time, there has developed a sophisticated online system managed by the Land Title & Survey Authority and regulated by the *Land Title Act*, RSBC 1996, c. 250. The electronic land

title system now allows for searches of BC property and for the registration of interests against them.

External Resource

Individuals can register for an LTSA explorer account and conduct property searches for a fee:
https://apps.ltsa.ca/iam/signup

Chapter 12 - Review Questions

1. What is "fee simple" in real estate?
2. What's the difference between joint tenancy and tenancy-in-common?
3. What is a life estate?
4. Can I acquire property without buying it?
5. What are easements and restrictive covenants?
6. Do my property rights extend above and below the ground?
7. What is trespass to land?
8. How are property transactions handled in British Columbia?

Multiple Choice Quiz

Looking for 20 multiple quiz questions about Chapter 12? Click here to be taken to be a roster of Chapter Quizzes:

https://legaltools.ca/foundations-textbook-chapter-quizzes/

Chapter 12 Podcast

Looking for a podcast-style conversation about the content in this chapter?

Click the following link to listen to an AI-generated discussion of the major themes in Chapter 12:

https://youtu.be/r2ZoLgUgEoY

Appendix A:
Answering Case Study Questions

The following is an overview of how to answer legal case study questions using the "IRAC" method.

In some respects, we begin with the end. For many readers, this textbook is part of an educational journey in law which will require the successful completion of written examinations. It is extremely typical in post-secondary law exams to see the use of "case study questions" and this section offers some tips to navigate such as style.

While every professor will be different, law case study questions tend to follow a similar style of answer and demand that students tackle a few major sections. The format for answering a case study question is commonly referred to as:

IRAC

IRAC is an acronym that stands for Issue, Rule, Application, and Conclusion. The purpose behind requiring the IRAC format for answers is to ensure that a student has provided a structured approach to organizing and presenting their legal analysis.

Each of the IRAC letters pinpoints a different section for a student's answer:

> **Issue** – The first step is to identify and state the legal issue or topic being raised in the case question. This involves correctly identifying the specific legal problem or dispute that needs to be resolved.
>
> **Rule** – Once you have identified the issue, you move on to discussing the relevant legal rules or principles that apply to the situation. What is the key law? This typically involves referencing a legal test, statutes, case law, or any other legal authority that you have been taught by your professor and is relevant to the issue at hand. Importantly, students are not reaching conclusions; they are merely stating the principles of the law.
>
> **Application** – After stating the applicable legal test or legal rules, you proceed to apply them to the facts of the question. Is the law met based on the facts that were presented in the question? This involves analyzing how the rules or principles relate to the specific facts and circumstances of the case. As to the "Application", the purpose is to test whether students can merge the facts and law together to create arguments or an application about the underlying issue.
>
> **Conclusion** – Finally, draw a conclusion based on the application of the legal rules to the facts. What is the final answer? In this section, you provide a clear and concise answer to the legal issue or question raised in the case study. Your conclusion should be supported by the analysis and reasoning you have presented throughout the IRAC process.

In terms of grading, the "Rule" and "Application" sections tend to be worth the most marks.

While there has been some push-back against the rigidity of the IRAC method over the years, it remains the gold-standard method for answering law-based case study questions.

The IRAC method is also what is typically used by judges and tribunal members in formulating their judgments. After stating the facts of the dispute, the judge or tribunal member then typically, discusses the issues, rules, application, and a final conclusion.

Example – Sample IRAC Case Answer

Question Facts

Mr. Jordan was driving home from work when he came across a terrible fire that was engulfing a small house. Seeing no one else around, Jordan rushed into the house and began to search for anyone that might have been inside. He managed to find a young man, Suresh, pinned under a cabinet which had crashed down in the fire. Being highly stressed and wanting to get out, Jordan, rather than attempting to lift the cabinet, instead yanked as hard as he could on Suresh's arms. While the cabinet moved enough for Suresh to wiggle free unfortunately, Jordan's actions caused both of Suresh's wrists to break in multiple spots. Would Jordan be liable for the injuries he caused to Suresh's arms?

Sample IRAC Answer

Issue

The issue is whether Jordan would be liable for the injuries he caused to Suresh's wrists while rendering emergency aid during a fire.

Rule

The applicable law is the Good Samaritan Act. According to the Act, a person who renders emergency medical services or aid to an ill, injured, or unconscious person at the immediate scene of an accident or emergency is not liable for damages for injury or death caused by their act or omission, unless they are grossly negligent.

Application

In this situation, although Jordan's actions resulted in injury to Suresh's wrists, it can be argued that his conduct does not amount to gross negligence. Given the stressful and time-sensitive circumstances, it is reasonable to assume that Mr. Jordan's actions were driven by the urgency of the situation rather than a gross disregard for Suresh's safety. Further, Jordan's intention was to save Suresh from the fire, and he managed to free him from the pinned cabinet. His actions, although resulting in harm, were not indicative of gross negligence. Therefore, because the injuries occurred while Jordan was acting as a Good Samaritan and he was not grossly negligent, he would not be liable.

Conclusion

Jordan would likely be protected from liability for the injuries caused to Suresh's wrists.

Throughout this textbook, there will be a number of case study questions available which should help students practice the IRAC method. Look at the end of each individual chapter for sample case study questions.

Appendix B:
Answers to Chapter Review Questions

The following appendix contains the answers to the individual review questions noted after each chapter.

Chapter 1 – Introduction to the Canadian Legal System

1. What are the key differences between rules and laws?

Rules are guidelines specific to an institution or organisation (like a school or workplace) to regulate conduct and ensure smooth operation. They're often more flexible and adaptable. Conversely, laws are official regulations established by a governing body (usually a legislative authority) to govern behaviour within a larger society. Laws are more rigid, universally applicable, and enforced by the legal system with penalties for non-compliance.

2. What is stare decisis and how does it impact the Canadian legal system?

Stare decisis, meaning "to stand by things decided", is a legal doctrine emphasizing the importance of following precedent (prior court decisions). This ensures consistency, predictability, and stability within the legal system. By relying on past judgments, courts can maintain fairness and allow the law to evolve gradually. However, courts may deviate from precedent if a previous decision was flawed, the legal landscape has changed, or it no longer aligns with societal values.

3. What are the distinctive features of the two legal systems operating in Canada?

Canada has a dual legal system. Firstly, there is the **Civil Law System** (in Quebec) which is based on French legal traditions and Roman law. The Civil Law system emphasizes comprehensive codes as the primary source of legal principles. Secondly, there is the **Common Law System** (in the rest of Canada) which originates from English legal traditions. The Common Law system relies heavily on precedent and case law to interpret and apply the law.

4. How does the Canadian court system work?

The Canadian court system is hierarchical and contains the following courts:

Supreme Court of Canada	The highest court, it hears appeals from lower courts on matters of national importance.
Courts of Appeal	Each province/territory has a Court of Appeal that reviews decisions from lower courts for legal errors.
Supreme/Superior Courts	These courts handle serious criminal and civil trials and appeals from lower courts.
Provincial Courts	The first level of court for most legal proceedings, they handle a wide range of cases, including criminal offences, family disputes, and small claims.

5. What is the burden of proof in civil and criminal cases?

The burden of proof refers to the obligation to prove a claim. In criminal cases, the prosecution must prove the accused's guilt "beyond a reasonable doubt" (near certainty). In civil cases the plaintiff must prove their case on a "balance of probabilities" (more likely than not).

6. What are the main steps involved in a civil lawsuit in Canada?

1. Determining the Jurisdiction and figuring out which court has the authority to hear the case.
2. Parties exchange their pleadings which are the written statements outlining their claims and defences.
3. Parties undertake discovery by gathering evidence through document exchange and questioning under oath.
4. Following discovery is the trial which the plaintiff presents their case, followed by the defendant, with witnesses and evidence presented.
5. The judge or jury (mostly judge-alone in civil proceedings) will deliver a verdict and the losing party may be responsible for legal costs.
6. Parties can choose to appeal the decision to a higher court if they believe the decision incorrect in fact or law.

7. What are the alternatives to litigation for resolving disputes?

Alternative Dispute Resolution (ADR) are methods help resolve disputes outside of court. The principal mechanisms are negotiation, mediation, and arbitration.

Negotiation is where the parties communicate directly to find a mutually acceptable solution. This negotiation can sometimes lead to a settlement even before the pleadings have been filed. If the parties choose a mediation path, a neutral third party facilitates communication to help them reach a resolution. Finally, arbitration is when a neutral third party acts as a private judge, issues a binding decision that is difficult to appeal.

8. What is a limitation period and why is it important?

A limitation period is a time limit for initiating legal proceedings. In B.C., it's typically two years from the date a claim is "discovered" (when a reasonable person would have investigated the claim). Limitation periods encourage timely resolution of disputes and ensure evidence remains available. Failing to file within the limitation period usually bars the claim.

Chapter 2 – Canada's Constitution: The Supreme Law

1. What makes up Canada's Constitution and why is it important?

Canada's Constitution is unique in that it is composed of two key documents - The Constitution Act and The Charter of Rights and Freedoms. Both elements of the constitution represent the supreme law of Canada and any law or government action which conflict with it is of no force or effect. This supremacy ensures the rule of law is upheld and that there is a check on government power.

Another feature of the Constitution Act is that it outlines the framework for government; most notably, the division of powers between federal and provincial governments in sections 91 and 92.

The Charter of Rights and Freedoms guarantees fundamental rights and freedoms for all individuals in Canada. It provides protections over a wide array of personal freedom including, freedom of religion, expression, peaceful assembly, association, mobility, life, liberty, security of the personal, various legal rights, equality, and more.

2. How does Canada's federal system work in terms of law-making?

Canada has a federalist structure with two levels of government, the federal government and provincial government, holding legislative power. Sections 91 and 92 of the Constitution Act speak to the division of powers by allocating specific areas of jurisdiction to each level. The federal government holds authority over areas of national importance such as criminal law, trade and commerce, national defence. The provincial governments have jurisdiction over matters of local concern such as healthcare, education, and property rights.

3. What is the Charter of Rights and Freedoms and who does it protect?

Enacted in 1982, the Charter primarily protects individuals from government actions that infringe upon their rights. While the Charter does not directly apply to private businesses or individuals it does guarantee certain political, legal, and equality rights for all individuals against governmental action. Human rights legislation exists at the provincial level to address discrimination when it involves individuals or businesses.

4. Can the rights and freedoms guaranteed by the Charter ever be limited?

Yes, the rights outlined in the Charter are not absolute. Section 1 of the Charter allows for "reasonable limits" on rights and freedoms if those limitations can be demonstrably justified in a free and democratic society.

The Oakes Test, established in *R. v. Oakes*, is used by the courts to determine if a limit on a Charter right is deemed reasonable and justifiable under Section 1.

5. What are some examples of fundamental freedoms protected by Section 2 of the Charter?

Section 2 of the Charter outlines fundamental freedoms, including the following:

2(a) - Freedom of conscience and religion	Individuals have the right to practice their chosen religion without government interference, as demonstrated in *R. v. Big M Drug Mart Ltd.*, where the court struck down a law prohibiting Sunday shopping.
2(b) - Freedom of thought, belief, opinion, and expression	This includes freedom of the press. However, this right is not absolute, as seen in *R. v. Keegstra*, where the court upheld the conviction of a teacher for promoting hatred against an identifiable group.
2(c) - Freedom of peaceful assembly	Individuals can gather peacefully for common purposes.
2(d) - Freedom of association	Individuals can join and participate in organizations of their choosing, including trade unions, as affirmed in *Lavigne v. Ontario Public Service Employees Union*.

6. How does Section 7 of the Charter protect the "Life, liberty and security of the person"?

Section 7 safeguards individuals from arbitrary government actions that infringe on their life, liberty, or security.

Section 7 has been instrumental in significant legal cases concerning medical assistance in dying (*Carter v. Canada* which challenged the prohibition on assisted dying) and abortion (*R. v. Morgentaler* which struck down restrictive abortion laws based on a woman's right to security of the person).

7. What are some key rights protected by the Charter for individuals accused of crimes?

The Charter provides several protections for those involvement with police or, more specifically, being detained and facing criminal charges. The idea behind the following rights is to ensure fairness during police investigation, detention, and the ultimate legal proceedings.

Section 8	Protection against unreasonable search and seizure, requiring police to have warrants or reasonable grounds for searches.
Section 10	Rights upon arrest or detention, including the right to be informed of reasons, retain counsel, and challenge the detention's legality.
Section 11	Rights during a trial, such as the presumption of innocence, the right to a fair and public hearing, and protection against self-incrimination.

8. Other than s. 1, does the Charter contain any other provision that allows governments to override some Charter rights?

Yes. Section 33, known as the "notwithstanding clause," allows the federal or provincial governments to pass laws that may temporarily override certain Charter rights for a period of up to five years. This clause, while controversial, aims to provide flexibility in policymaking while acknowledging potential conflicts between societal concerns and individual rights.

Chapter 3 – Tort Law in Canada Part I: Intentional Torts

1. What is the difference between battery and assault in tort law?

While often occurring together, battery and assault are distinct torts. Battery involves intentional, non-trivial, and offensive physical contact with the plaintiff. The contact must be unwanted, even if intended to be helpful, as demonstrated in *Malette v. Shulman* where a doctor performing a life-saving blood transfusion against a patient's religious beliefs was found liable.

Assault, on the other hand, focuses on the apprehension of harm rather than contact itself. It requires an intentional threat of imminent, offensive contact from the tortfeasor, causing the victim to fear immediate harm.

2. Can an employer be held responsible for an employee's wrongful actions?

Yes, under the principle of vicarious liability. According to vicarious liability, an employer can be held responsible for the torts committed by their employees during the course of their employment. This liability exists even if the employer was not directly involved in the wrongdoing.

The landmark case of *Bazley v Curry* established that the "scope of employment" extends beyond explicitly authorized activities. In situations where an employee has power and authority over vulnerable individuals, unauthorized wrongful acts closely connected to their position can lead to vicarious liability for the employer.

3. What constitutes 'unreasonable' interference in a nuisance claim?

Not every disturbance will rise to the threshold of a legal nuisance. For a nuisance claim to work, the actions of the tortfeasor must be considered “unreasonable”. This unreasonableness determination hinges on a balance of factors.

Firstly, the Character of the neighbourhood of the neighbourhood is considered as there is a legal difference between a disturbance in a residential area versus an industrial zone. Secondly, the severity of the interference is examined with minor inconveniences unlikely to be a nuisance while significant disruptions likely would. Thirdly, whether the defendant's activity is beneficial to the community would be considered. And finally, the law considers the overall sensitivity of the plaintiff versus a “reasonable person”.

4. How does the tort of “intrusion upon seclusion” protect privacy?

“Intrusion upon seclusion” is a common law concept which safeguards privacy by addressing situations where someone intentionally intrudes upon another person's private affairs in a highly offensive manner. This intrusion can be physical, such as entering someone's home without permission, or non-physical, like intercepting private communications. The intrusion must be such that a reasonable person would find it highly offensive and causing distress.

5. Can someone be held liable for persuading another to break a contract?

Yes, the tort of inducing breach of contract applies when someone knowingly and intentionally encourages a party to breach their contractual obligations to another. A successful claim requires

proving 1) the existence of a contract, 2) the defendant's knowledge of the contract, 3) their intention to cause a breach, 4) the actual inducement of the breach, and 5) resulting damages to the plaintiff.

The case of *Drouillard v. Cogeco Cable Inc.* serves as an example where Cogeco was found liable for inducing a breach of contract by pressuring Drouillard's employer, Mastec, to terminate his employment contract.

6. What is the difference between libel and slander?

Both libel and slander fall under the tort of defamation that aims to protect a person's reputation from false and damaging statements. Libel refers to defamation in written form such as newspaper articles or online posts. On the other hand, slander pertains to spoken defamation including public speeches or even casual conversations.

7. What are the key elements required to establish a claim for malicious prosecution?

To prove malicious prosecution, a plaintiff must demonstrate that 1) the defendant initiated a criminal proceeding against them, 2) the proceeding ended in the plaintiff's favour (e.g., acquittal), 3) the defendant lacked reasonable and probable cause for initiating the prosecution, 4) the defendant acted out of malice or with a primary purpose other than upholding the law.

Chapter 4 – Tort Law in Canada Part II: Unintentional Torts

1. What is negligence and what are its key elements?

Negligence is a legal concept in tort law that applies when a person acts carelessly, breaching their duty to take reasonable care and causing harm to another. To prove negligence in court, four elements must be established:

Duty of Care	The defendant owed a legal duty to the plaintiff to act with reasonable care and avoid foreseeable harm. This duty arises from the relationship between the parties and the foreseeability of harm.
Breach of Duty	The defendant's actions fell below the standard of care expected of a reasonable person in similar circumstances.
Causation	The defendant's breach of duty was both the actual and proximate cause of the plaintiff's injuries. Actual cause means the injury wouldn't have occurred "but for" the defendant's actions. Proximate cause means the injury was a foreseeable consequence of those actions.
Damages	The plaintiff suffered actual harm or loss as a direct result of the defendant's breach, such as physical injury, emotional distress, or financial loss.

2. What is the difference between professional negligence and product liability?

Professional Negligence is when someone with specialized skills or expertise, like a doctor or lawyer, breaches their duty of care. The standard of care is that of a reasonably competent professional in the same field, not just a reasonable person.

On the other hand, product's liability deals with injuries caused by defective products. In Canada, product's liability is based on negligence so, the plaintiff must prove the manufacturer or seller was negligent in design, manufacturing, or warnings. Unlike the U.S. system of strict liability, simply proving a defect isn't enough in Canada.

3. Does the 'thin skull' rule apply in Canadian negligence cases?

Yes, the "thin skull" rule is a well-established principle in Canadian law. It means a defendant is liable for the full extent of a plaintiff's injuries, even if those injuries are more severe than expected due to a pre-existing vulnerability. Essentially, you take your victim as you find them.

4. What defenses can be raised against a negligence claim?

Several defenses can reduce or eliminate liability in a negligence case:

1. Contributory Negligence is where the plaintiff's own negligence contributed to their injuries, damages can be reduced proportionally.
2. Assumption of Risk is where the plaintiff knowingly and voluntarily assumed the risk of injury, the defendant may not be liable.
3. Statutory Immunity applies when a law grants immunity from liability in specific situations, like Good Samaritan laws.

4. Illegality prohibits a plaintiff from seeking compensation for injuries suffered while engaged in illegal activity.

5. What is occupiers' liability and how does it differ from general negligence?

Occupiers' liability refers to the specific duty of care owed by those who control property (occupiers) to ensure the safety of people on their premises. It differs from general negligence in that it focuses on the relationship between a property owner and those who enter their property.

6. Are there different standards of care owed to different types of visitors on a property?

Historically, Canadian common law distinguished between invitees, licensees, and trespassers, each with varying levels of duty owed. However, many provinces, like British Columbia, have enacted Occupiers' Liability Acts to simplify this. These acts generally establish a single, broad standard of "reasonable care" owed to all persons entering a property, regardless of their status.

7. What is the “Rule in Rylands v. Fletcher” and does it apply in Canada?

The Rule in “Rylands v. Fletcher” establishes strict liability for damages caused by the escape of a dangerous thing from a property, even if the occupier wasn't negligent. This rule has been adopted in Canadian law and applies when an occupier brings something onto their land that is likely to cause harm if it escapes, even if they took precautions.

8. Does an occupier always owe a duty of care to someone injured on their property?

Not necessarily. While occupiers owe a general duty of care, there are exceptions. For instance, under the British Columbia Occupiers Liability Act, an occupier has no duty of care to a person who willingly assumes the risk of injury, except to avoid intentionally causing harm or acting recklessly. Additionally, someone trespassing while committing a crime is deemed to have willingly assumed all risks.

Chapter 5 – Contract Law in Canada Part I: Creating a Contract

1. What is the difference between an agreement and a contract?

The key difference lies in enforceability. An agreement is a mutual understanding between two or more parties. It can be verbal, written, formal, or informal, and it may not be legally binding. A contract, on the other hand, is a legally binding agreement that creates obligations enforceable in court.

2. Does a contract need to be in writing to be enforceable?

Contrary to popular belief, no. While written contracts are preferred for clarity and evidence, oral contracts (verbal agreements) can also be enforceable. The enforceability hinges on the presence of essential elements, not the form. However, proving the terms of oral contracts can be challenging.

3. What are the essential elements of a valid contract in Canada?

Seven key elements constitute a valid and enforceable contract:

1. Offer – this is the clear proposal by one party to another, outlining the contract's terms.
2. Acceptance – the Unconditional agreement to the offer's terms by the other party.
3. Consideration - something of value (money, goods, services, or a promise) exchanged between the parties.
4. Intention to Create Legal Relations - a mutual understanding that the agreement is legally binding.
5. Capacity - both parties must be legally capable of understanding and entering into the contract (not minors, mentally incapacitated, or severely intoxicated).
6. Consent – both parties must give free and informed agreement to the contract terms without coercion or deception.
7. Legality - the contract's purpose must be legal and not violate any laws or public policy.

4. What are the different types of offers?

The two main types of offers are called bilateral and unilateral. A bilateral offer is where both parties make promises to each other. For example, a job offer where the employer promises a salary and the employee promises work. A unilateral offer is where one party makes a promise in exchange for the other party's performance of a specific act. For example, a reward offer for finding a lost pet.

5. What is "consideration" in a contract?

Consideration is the "something of value" that each party exchanges in a contract. It can be money, goods, services, or even a promise to do or not do something. Crucially, the law doesn't require the consideration to be of equal value, just that something of value is exchanged.

6. What happens if one party lacks the mental capacity to contract?

If a party lacks the mental capacity to understand the contract's nature and consequences due to mental illness, disability, or other conditions, the contract can be deemed unenforceable. The court assesses if the individual could understand the agreement and its effects.

7. Can I enforce a contract signed by a minor?

Generally, contracts with minors are unenforceable against them. However, there are exceptions, such as contracts for necessities or if the minor affirms the contract upon reaching the age of majority (18 or 19 depending on the province). In British Columbia, additional rules apply under the Infants Act.

8. What is "duress" in contract law, and how does it affect enforceability?

Duress involves forcing someone into a contract through threats, coercion, or pressure. It negates genuine consent. If proven, a contract made under duress can be voided. Examples include threats of physical harm or economic ruin.

Chapter 6 – Contract Law in Canada Part II: Defective Contracts

1. What is a defective contract?

A defective contract, much like a puzzle missing a piece, is an agreement where an essential element is absent or flawed. This defect renders the contract incomplete or invalid, preventing it from being legally binding and fully effective.

2. Can a statement made before signing a contract affect its validity?

Yes, pre-contractual representations, although not terms within the contract itself, hold significant legal weight. False statements, termed "misrepresentations", can lead to legal action. The consequences can range from awarding damages to the misled party to completely unwinding the contract, known as rescission.

3. What are the different types of misrepresentation and their implications?

There are three types of misrepresentation. Firstly, there is innocent misrepresentation which is a false statement made unknowingly and without intent to deceive. Even so, it can lead to contract rescission and damages. Secondly, is negligent misrepresentation which is a false statement made by someone who should have known it was untrue and was intending to induce action; this can result in damages awarded to the misled party. Lastly, a fraudulent misrepresentation is a deliberate lie made with the clear intention to deceive, leading to detrimental reliance. A fraudulent misrepresentation has the most serious legal consequences, including damages, rescission, and potential criminal charges.

4. What happens if both parties were mistaken about something in the contract?

Mistakes in contracts can also render them defective. When both parties share the same fundamental misunderstanding, it's a common mistake, and the contract becomes void. If each party has a different misunderstanding about a key element, it's a mutual mistake, again voiding the contract due to a lack of true consensus.

5. Can a contract be voided if only one party was mistaken?

Sometimes, yes. A unilateral mistake, where only one party is mistaken, can lead to the contract being voided, but only under specific circumstances. For instance, if the mistake involves the other party's identity and that identity was crucial to the agreement, the contract might be voided.

6. What is 'non est factum' and when can it be used?

"Non est factum", meaning "this is not my deed", is a legal defense used when someone signed a contract without understanding its nature or terms. This defense applies if the signed document is radically different from what the signer believed and if they were not careless in failing to understand it.

7. What makes a contract "unconscionable"?

Unconscionability refers to a contract so one-sided or oppressive that it's deemed commercially, morally, or ethically unjust. This happens when there's an imbalance of bargaining power, and the resulting agreement is significantly unfair to the weaker party, making it unenforceable.

8. Can you provide an example of an unconscionable contract?

The landmark case of *Uber Technologies Inc. v. Heller* provides a clear example. The SCC found Uber's contract clause which forced drivers into a potentially costly and unfair arbitration process in the Netherlands, to be unconscionable and therefore unenforceable. This decision underscored the importance of fair access to legal remedies for all parties involved in a contract.

Chapter 7 – Contract Law in Canada Part III: Ending a Contract

1. How can contractual obligations be ended in Canada?

Contractual obligations can end in several ways:

1. performance where both parties fulfill their obligations.
2. mutual Agreement where the parties agree to end the contract.
3. frustrating events where an unforeseen event makes performance impossible or radically different from what was agreed upon.
4. breach of contract where one party fails to fulfill their obligations.

2. What is substantial performance in contract law?

Substantial performance occurs when a party fulfills most of its contractual obligations with only minor deviations. While not perfect, the performance is sufficient to satisfy the contract's purpose. The non-breaching party may claim damages or a reduced payment for the deficiencies.

3. What are the different ways a contract can be ended by mutual agreement?

Essentially, there are two ways this could occur – either through contractual terms or a new agreement. Firstly, contracts can include provisions outlining termination circumstances, such as options to terminate or condition clauses. On the new agreement front, parties can create a new agreement to discharge the original one. This can involve rescission (cancellation), accord and satisfaction (accepting something different), variation (modification), novation (substitution with a new contract), release (giving up legal claims), or waiver (voluntarily giving up a right).

4. What is the doctrine of frustration in contract law?

The doctrine of frustration relieves parties from obligations when an unforeseen event makes performance impossible or radically different from the agreement. For frustration to apply, the event must occur after the contract's formation, be beyond the parties' control, and render the contract fundamentally different.

5. How does a force majeure clause differ from the doctrine of frustration?

While both address unforeseen events, force majeure clauses are contractual provisions whereas frustration is a common law doctrine. Force majeure clauses allocate risk by outlining specific events that excuse performance, while frustration relies on a broader legal test.

6. What is a breach of contract and how does it happen?

A breach of contract occurs when a party fails to fulfill its contractual obligations. This can happen through either anticipatory breach of defective performance. Anticipatory Breach is when one party announces its intention not to perform before the due date. On the other hand, defective performance arises when one party performs inadequately or delivers substandard goods or services.

7. What are the different types of contractual terms and how do they impact breach consequences?

Conditions, warranties, and innominate terms are all forms of contractual terms though they differ in significance to the contract.

Firstly, conditions are the fundamental terms. A breach of a condition allows the non-breaching party to terminate the contract and claim damages or continue and claim damages.

Secondly, warranties are less important terms. A breach of a warranty only allows for damages but not contract termination.

Lastly, innominate terms fall between conditions and warranties. The consequences of breaching an innominate term depend on the breach's seriousness.

8. How are contractual terms classified as conditions, warranties, or innominate terms?

While there are varying ways to classify the contractual terms, there are also different mechanisms through way those classifications can arise. It’s possible that specific statutes may define certain provisions as conditions. Additionally, court decisions can establish specific clauses as conditions. Of course, the parties can clearly identify a term as a condition in the contract. Lastly, the classification may also arise by implication; based on the contract's nature, subject matter, and circumstances, a court may determine if a clause is significant enough to be a condition.

Chapter 8 – The Sale of Goods

1. What is the Sale of Goods Act?

The Sale of Goods Act (SGA) is legislation that exists in all Canadian provinces and territories. The SGA sets out a series of rights and duties relating to the sale of goods, provides a legal framework for resolving disputes, and addresses the power imbalance between buyers and sellers. Essentially, the SGA protects buyers by establishing standards that goods must meet and by providing legal recourse if those standards are not met.

2. When does the SGA apply?

The SGA applies to contracts for the sale of "goods," which are defined as tangible, moveable property. This includes items like vehicles, appliances, clothing, and furniture. The SGA does not apply to transactions involving money, services, or real estate.

3. What are implied terms?

Implied terms are contractual terms that are not explicitly stated in a contract but are automatically understood to be part of the agreement based on the SGA. These terms protect buyers by ensuring that goods meet certain standards. If a seller breaches an implied term, the buyer has the same legal rights as if the term was explicitly stated in the contract.

4. What is meant by "sale by description"?

A sale by description occurs when buyer purchases goods based on a description provided by the seller. The SGA states that the goods must match the description provided, whether given orally or in writing. For instance, if a seller advertises a phone as the latest model but sends an older model, they have breached the implied term of description.

5. What are the implied conditions as to quality or fitness?

The SGA outlines three implied conditions relating to the quality or fitness of goods: fitness for intended purpose, merchantable quality, and reasonable durability.

Fitness for intended purpose means the goods must be suitable for the specific purpose communicated by the buyer to the seller.

Merchantable quality essentially means the goods must be of acceptable quality and free from defects.

Reasonable durability means the goods should last for a reasonable period considering their nature, price, intended use, and industry standards.

6. How is the "passing of property" determined?

"Passing of property" refers to when ownership of the goods transfers from the seller to the buyer. The SGA provides five rules to determine this moment if it's not specified in the contract. These rules consider factors like whether the goods are in a deliverable state, if the seller needs to

perform any actions before delivery (like weighing or measuring), or if the goods are purchased "on sale or return."

7. Can a seller override implied terms in a contract?

Section 20 of the SGA states that any contractual term attempting to negate or diminish the conditions and warranties implied by sections 17, 18, and 19 of the SGA will be void in retail transactions for goods not identified as "used goods." This ensures that sellers cannot bypass the basic consumer protections offered by the SGA.

8. What remedies are available to buyers and sellers under the SGA?

Buyers' remedies can include damages to compensate for financial losses, specific performance (a court order compelling the seller to fulfill the contract), and the right to reject or return non-conforming goods.

Sellers' remedies include the right to sue for the price of delivered goods not paid for, liens (retaining possession of the goods until payment), and stoppage in transit (stopping delivery of goods to an insolvent buyer).

Chapter 9 – Business Structures

1. What are the main differences between a sole proprietorship, a partnership, and a corporation?

The sole proprietorship is the simplest structure where the business owner and the business are one and the same. It's easy to set up with the owner having complete control, but it comes with unlimited liability, meaning personal assets are at risk.

A Partnership is where two or more individuals share the business's profits, losses, and responsibilities. Partnerships benefit from pooled resources and expertise but may face unlimited liability (unless structured as a Limited Partnership or Limited Liability Partnership).

A corporation is a separate legal entity from its owners, offering limited liability protection to shareholders. It has a more complex structure, requiring incorporation and adherence to regulatory requirements but, it provides a shield against personal liability and allows for various ways to raise capital.

2. What is unlimited liability and why is it a concern?

Unlimited liability means that the personal assets of the business owner(s) are not separate from the business. If the business incurs debts or faces lawsuits, the owner's personal assets (like their house or savings) can be seized to cover those obligations. This is a significant risk for sole proprietorships and general partnerships.

3. What are the different types of partnerships in Canada?

There are a variety of different types of partnerships including the general partnership, limited partnership, and limited liability partnership.

In a general partnership all partners share in the business's operational management, profits, and liabilities. Each partner faces unlimited liability. A limited partnership (LP) involves both general and limited partners. General partners manage the business and have unlimited liability, while limited partners invest capital with liability limited to their investment. Lastly, a limited liability partnership (LLP) offers limited liability protection to all partners for the partnership's debts and obligations, except for those arising from their own negligence or misconduct. LLPs are common among professionals like lawyers and accountants.

4. How does incorporating a business limit liability?

When a business is incorporated, it becomes a separate legal "person" distinct from its owners (shareholders) and managers (directors). This separation, often referred to as the "corporate veil," protects the personal assets of shareholders and directors from business debts and lawsuits, limiting their liability.

5. What is "piercing the corporate veil," and when might it happen?

"Piercing the corporate veil" is a legal exception where a court disregards the separation between a corporation and its shareholders or directors holding them personally liable. This typically occurs in

cases of fraud, wrongful acts, or when the company is used as a mere extension of an individual's affairs, abusing the corporate structure.

6. What are the steps involved in incorporating a business in Canada?

Incorporating federally or provincially typically involves the following steps:

1. A name search is conducted along with the reservation of an available business name with the appropriate corporate registry.
2. The articles of incorporation which outline the company's structure, rules, and regulations will be prepared and filed.
3. A physical or digital will need to be established as the Registered and Records Offices to maintain corporate records.
4. The applicant will have to submit an incorporation application and pay the required fees.
5. After receiving a Certificate of Incorporation or Notice of Articles as proof of the corporation's legal existence, the corporation will be established.

7. What's the difference between federal and provincial incorporation?

Incorporating federally allows the company to operate anywhere in Canada and provides greater name protection. On the other hand, provincial incorporation confines the company's operations to that specific province but may offer lower incorporation costs and simpler regulatory requirements.

The choice of federal versus provincial depends on factors like the business's scope, future expansion plans, and desired level of legal protection.

8. What are the key advantages of incorporating a business?

There are a number of clear benefits to incorporating. Firstly, there is limited liability which protects personal assets from business debts and lawsuits. Secondly, the corporation continues even if owners change or pass away. Businesses are often perceived as more professional and trustworthy as opposed to operating as a sole proprietor. Lastly, businesses have access to a wider range of funding options and preferential tax treatment.

Chapter 10 – Employment Law

1. What is the difference between an employee and an independent contractor?

While both employees and independent contractors provide services for compensation, the nature of their relationship with the hiring party differs significantly under Canadian law.

Employees work under a *contract of employment*, meaning they are subject to the employer's control and direction in their day-to-day tasks. Key characteristics of an employee include ongoing service, typically with no fixed end date, and a relationship where the employer dictates the work process.

Independent contractors, conversely, operate under a *contract for service*. They retain a high degree of autonomy in determining how and when they complete the work. Unlike employees, independent contractors typically manage their own taxes, insurance, and benefits.

The distinction between these classifications hinges on the "fourfold test" established in *649905 Ontario Ltd. v. Sagaz Industries Canada* such as:

1. Does the hiring party dictate the worker's schedule, methods, or specific tasks? Greater control points towards an employment relationship.
2. Does the worker provide their own tools, or are these supplied by the hiring party?
3. Does the worker have the potential to make a profit or incur a loss based on their work, or do they receive a fixed wage regardless of outcome?
4. How integral is the worker's role to the hiring party's core business operations?

2. Do I have an employment contract even if I haven't signed a physical document?

Yes, an employment contract can exist even without a formal written document. While it's advisable for both employers and employees to have a written contract, verbal agreements or implied contracts based on conduct are also legally binding. The terms of an implied contract are inferred from the actions and expectations of both parties involved in the employment relationship.

3. What are restrictive covenants and are they enforceable?

Restrictive covenants are clauses within an employment contract that limit an employee's actions *after* the employment relationship ends. Restrictive covenants come in three large categories:

1. non-disclosure agreements that prevent the disclosure of confidential company information, such as trade secrets.
2. non-solicitation clauses that Prohibit former employees from soliciting clients or poaching employees from their former employer for a specific period.
3. non-competition clauses that restrict employees from working for competitors or starting a competing business within a defined geographic area and timeframe.

The enforceability of restrictive covenants is principally determined based on its reasonableness. Restrictive covenants are heavily scrutinised to ensure they protect a legitimate business interest without being overly broad and unnecessarily restrictive on the employee's future opportunities.

4. What is a probationary period and can I be terminated during this time?

A probationary period is a trial period at the beginning of employment where the employer assesses the employee's suitability for the role. While probationary periods are common, they must be explicitly stated in the employment contract to be enforceable.

During probation, employers have more latitude to terminate the employment relationship. However, even during probation, employers must adhere to minimum notice periods or pay in lieu of notice as mandated by provincial employment standards legislation (in British Columbia, that's the *Employment Standards Act*). To enforce a probationary clause, courts will consider factors such as whether the employee was aware of the assessment criteria, whether the employer acted fairly, and whether the employee had a reasonable opportunity to demonstrate their suitability.

5. What is the difference between termination with cause and without cause?

Termination with cause, or just cause, occurs when an employee is dismissed due to serious misconduct or a breach of contract. This is a high threshold for employers to meet. Examples of just cause might include theft, fraud, gross insubordination, or consistent and serious breaches of company policy. When terminated for cause, employees are generally *not* entitled to reasonable notice or severance pay.

Termination without cause happens when an employer ends the employment relationship for reasons unrelated to the employee's conduct. This could be due to economic factors, restructuring, or a decision that the employee is not the right fit, even if they haven't done anything wrong. In these cases, employers are legally obligated to provide reasonable notice or pay in lieu of notice, as well as any accrued vacation pay.

6. How is "reasonable notice" determined in a without cause termination?

In Canada, employees are generally entitled to reasonable notice (or payment in lieu of notice) when terminated without cause. Two avenues determine this notice period:

1. Provincial Employment Standards Legislation where each province sets out minimum statutory notice requirements based on length of service.
2. Common Law where the courts may award a longer notice period than the statutory minimum based on the "Bardal factors" established in the landmark case *Bardal v. Globe & Mail Ltd*. The Bardal factors include the employee's age, length of service, character of employment, and the availability of similar employment.

7. What is my duty to mitigate after being dismissed?

Even if you believe you've been wrongfully dismissed, you have a legal duty to mitigate your damages. This means you must take reasonable steps to minimize your financial losses, such as actively searching for new employment. Failure to mitigate can reduce the compensation you're entitled to receive from your former employer.

Chapter 11 – Intellectual Property Law

What is Intellectual Property (IP) law?

IP law in Canada safeguards creations and innovations. It encompasses areas like inventions, designs, trademarks, and creative works. One of the principles of IP law is to grant creators exclusive rights over their creations allowing them to control how their work is used and to profit from it.

How does the Canadian government protect IP?

Canada's IP law is a federal matter meaning uniform laws and regulations apply across all provinces and territories. The federal government enforces IP rights through legislation like the *Copyright Act*, the *Patent Act*, and the *Trademarks Act*. These laws are administered by the Canadian Intellectual Property Office (CIPO), ensuring consistent rules and enforcement mechanisms nationwide.

What does Copyright protect and how long does it last?

Copyright protects original literary, artistic, dramatic, or musical works. It grants creators exclusive rights to reproduce, distribute, perform, or display their work. Copyright protection in Canada is automatic upon the creation of an original work and typically lasts for the author's lifetime to the end of the calendar year of their death plus an additional 70 years.

What is Fair Dealing and how does it relate to Copyright?

Fair dealing is an exception to copyright in Canada that allows individuals to use copyrighted material without permission from the copyright owner under specific circumstances. This exception ensures that copyright does not unduly restrict activities relating to education, research, or commentary. For example, using a limited portion of a copyrighted work for educational purposes may fall under fair dealing.

What is a Trademark and why is registration beneficial?

A trademark distinguishes goods or services from those of others using unique signs, symbols, or logos. Registration under the *Trademarks Act* provides significant advantages including a presumption of ownership, national protection, and the right to use the ® symbol. It offers a stronger legal footing to prevent others from using similar marks and protect a brand.

How long does Trademark protection last?

Trademark protection in Canada initially lasts for 10 years from the registration date. Unlike other forms of IP, trademarks can be renewed for consecutive 10-year periods indefinitely, as long as the renewal fees are paid. This indefinite renewal option allows for perpetual protection of valuable branding elements.

What is a Patent and what can be patented in Canada?

A patent is a time-limited right granting inventors exclusive control over their inventions. To be patentable in Canada an invention must be new, useful, and non-obvious. However, not everything is patentable. Items like higher life forms (humans, genetically modified organisms), scientific principles, and abstract mathematical methods are excluded from patent protection.

How long does Patent protection last?

A patent in Canada is generally valid for 20 years from the filing date of the patent application. After this period the protection lapses, and the invention enters the public domain, meaning anyone can use it without permission. This "trade-off" between incentivizing innovation and eventual public access is a key characteristic of patent law.

Chapter 12 – Real Property Law

1. What is "fee simple" in real estate?

The fee simple is the most comprehensive form of land ownership in Canada. It grants the owner exclusive rights to use, develop, and dispose of the property without a predetermined end date. This means the owner can sell, lease, or pass down the property to heirs. For instance, if you own a house in fee simple, you can live in it, rent it out, renovate it, or even demolish it (subject to local regulations) and you can decide who inherits it after your death.

2. What's the difference between joint tenancy and tenancy-in-common?

Both joint tenancy and tenancy-in-common involve multiple individuals owning a property, but they differ in terms of survivorship rights and ownership shares:

Under a joint tenancy, each tenant holds an equal, undivided interest with the right of survivorship. If one tenant dies, their share automatically passes to the surviving tenant(s), bypassing probate.

With a tenancy-in-common, each tenant owns a specific share (which can be equal or unequal) without the right of survivorship. Upon death, a tenant's share is distributed according to their will or inheritance laws.

3. What is a life estate?

A life estate grants someone the right to use and occupy a property for the duration of their life (or the life of another designated person). However, they cannot sell or dispose of the property. Upon the life tenant's death, the property reverts to the original owner or a designated beneficiary.

4. Can I acquire property without buying it?

While rare, acquiring property without buying it is possible with adverse possession and expropriation.

Adverse possession is where title is acquired by occupying and using another's property openly and continuously for a specific period (typically 10-20 years) without the owner's permission. In British Columbia, this has been largely eliminated by the *Limitation Act*.

When expropriation occurs, the government takes private property for public use. This can occur when there is a compelling public project like building a highway or hospital. The original owner is entitled to fair compensation.

5. What are easements and restrictive covenants?

An easement arises when someone grants the right to use another person's land for a specific purpose. Frequently easements are in the form of rights-of-way to access property.

Restrictive covenants, on the other hand, are a legally binding agreement that limits land use, often imposed by developers or communities to maintain specific standards. For example, a covenant might restrict building height or exterior colour schemes.

6. Do my property rights extend above and below the ground?

Yes, but with limitations. You have rights to the airspace above your land to the extent that you can reasonably use it, such as constructing buildings. However, these rights don't interfere with air traffic. Similarly, subsurface rights grant ownership of minerals and resources below your land, but these are generally limited to a reasonable depth and may be subject to Crown reservations (government ownership).

7. What is trespass to land?

Trespass to land occurs when someone enters your property without permission, regardless of intent or actual damage. This includes physically entering, placing objects, or causing harm to the property.

8. How are property transactions handled in British Columbia?

British Columbia uses a Land Title System (Torrens System) which involves the execution of a Contract of Purchase and Sale (CPS). The CPS is a legally binding document outlining the terms of the sale, including price, deposit, conditions, and dates. Upon successful completion of the CPS, ownership is formally transferred through registered forms (e.g., Form A Freehold Transfer) that is filed with the Land Title & Survey Authority.

The Torrens system guarantees the accuracy of the registered title which provides a high level of ownership security and thus, helps minimizes disputes about who is the true owner of a property.

Appendix C:
Legal Dictionary

The following is a legal dictionary resource for understanding certain words or phrases.

Throughout this textbook, there have been a variety of legal terms used. The following QR code and link will take you to an easy and accessible legal dictionary which offers another explanation for some of those terms.

https://legaltools.ca/glossary/

Appendix D: Index

The following is a comprehensive index for the textbook content.