BU 231

Business Law Notes

Full Notes

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These are my compiled notes for **BU 231 - Business Law, Spring 2024** with Keith Masterman. These notes represent mostly material from lecture slides and lectures themselves, and content from the textbook. Some internet sources were used to complement certain content.

To the above, the usefulness of each note may vary - I have tried my best to highlight important bits with bold or italic font, but ultimately please use your own discretion. Another important thing to note is that **no case-specific information** is included here unless the case is super important.

I absolve myself from being liable for any negligent misrepresentation or omissions that may occur from using these notes. If something is wrong, or if you feel something is missing, please tell me and I will update it whenever I get around to it.

These notes were written up in Typst.

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1. Intro to BU 231

1.1.1. The Canadian Legal System

1.1.1.1. Division of Power

The Canadian Law system is essentially split into 3:

- The **Executive Government**, who are law enforcers. They operate, implement, and enforce all laws created by the legislative branch. At the federal level, there is the Crown (Governor General), the Prime Minister, and their appointed cabinet; at the provincial level, there is the Crown (Lieutenant Governor), the Premier and their appointed Cabinet Ministers
- The **Legislators**, who are law makers. They are elected officials who debate, amend, and make laws. At the federal level, there are members of Parliament and the Senate; at the provincial level, there are the Legislative Assembly, who are members of the provincial parliament.
- The **Judiciary**, who are law interpreters. They administer justice by interpreting and applying laws.

1.1.1.2. Sources of Law

Canadian Laws come from Legislation, the Criminal Code, Common Law (or Civil Law in Quebec), Equity (ensuring fairness), and the Constitution.

These laws interplay with each other:

- **Constitutional Supremacy** - every law, regardless of source, must comply with the Constitution.
- **Legislative Supremacy** - as long as they are constitutional, the legislature has unfettered discretion to pass any laws they want.
- **Common Law**: There is the policy of **Stare Decisis**, where the Courts will adhere to **precedent** when making decisions. Also, note that Quebec is special and uses the Civil Law System instead.

1.1.1.3. Forms of Justice

In addition to the Courts, we have Alternative Dispute Resolution (ADR) such as mediation or arbitration, and Administrative Tribunals like the Human Rights Tribunal or Ontario Securities Commission.

1.1.2. Legal Risk Management

1. **Identify the Legal Risks** - assess the organization's functional areas and review business decisions. Determine the organization's business relationships and assess them
2. **Evaluate the Risk** - Assess the probability and severity of the potential loss
3. **Devise a Risk Management Plan** - Either avoid, eliminate, reduce, transfer, or retain the risk - it depends on the previous steps!
4. **Implement and Monitor the Plan** - yeah.

1.1.3. Ethics

1.1.3.1. Incrementalism

Incrementalism is the act of inching deeper and deeper into ethically questionable territory, starting with something small. "People don't wake up one day and decide to start a life of crime". It is a slippery slope!

Be careful in everyday business - you can easily slip from something relatively trivial into something worse and worse, which may result in performing super illegal actions. Be aware of this, I guess?

1.1.3.2. Overconfidence Bias

Overconfidence Bias is the tendency to be overconfident in their ability, skill, economic situation, driving skills, and so on…

Executives in companies may also be susceptible, undermining the importance of luck in success. Empirical studies have shown that overconfident CFOs are more likely to commit financial reporting fraud too! It may get them into a predicament where fraud is the only way to deliver results.

Irrational correctness can blind you to your own ethical-ness, which can bleed into the workplace. Most people are overconfident in their ability to make ethically sound decisions (thus making unethical decisions), including you! Be aware of this, I guess?

2. The Law of Torts

2.1. What is a Tort?

2.1.1. Definitions

A **tort** is a wrongful act done to the property or person of another, recognized by law to be as such. Its main use is to **determine and allocate compensation** for **harm that has occurred**.

The **tortfeasor** is the person who commits a tort. Usually, they are being sued and are the Defendant.

Torts usually appear in civil cases where the burden of proof isn't absolute - instead, the evidence of proof is a **balance of probabilities** - usually $> 50\%$ chances.

Torts usually result from the Courts - so the perpetual question is, **"Did the Courts get it right?"** The legislation can sometimes disagree with the courts - they can then make their own torts lol

2.1.2. Intentional VS Unintentional Torts

Torts come in 2 flavours, **intentional torts** and **unintentional torts**. Intentional torts require that the action that *causes* the tort be done intentionally, and harm to have occurred. However, the tortfeasor doesn't necessarily need to wish for the tort to occur.

2.1.3. How Torts are Made and Change

Torts are recognized by law - the Courts have judged this matter before and decided that **"society's values have shifted such that this tort should be sueable"**. If a tort doesn't exist, the Courts must be sufficiently convinced to add it as a new tort!

As society's values change, torts can be added and removed at will to best fit!

2.2. Liability, Defenses, and Damages

2.2.1. Liability and Fault

Liability is well-named. Who is liable for compensation related to a tort?

2.2.1.1. Strict Liability

Liability is based on causation, regardless of blame or motive. If you were ultimately the person who caused damage to occur, then you're liable.

2.2.1.2. Fault

Fault is unjustifiable injurious conduct that intentionally or carelessly disregards the interests of others. If you have fault, you are liable! This was created to help deter such faulty behaviour from happening; however it is sometimes defective in undercompensating if fault cannot be shown, and sometimes overcompensation too. Also takes more time to litigate, and so on.

2.2.1.3. Vicarious Liability

Vicarious Liability states that employers (any supervisor) are generally liable for torts their employees committed while employed. The employee is not freed from liability - both victim and employer can sue. This applies to any **reasonably foreseeable torts** committed by employees.

2.2.1.4. History of Liability in Torts

Strict Liability used to be how all torts operate - regardless of blame or intention, if you did the damage, you were liable. No matter what. eventually, we moved on and started using fault for some torts, although others still operate with strict liability, notably public/private nuisance.

2.2.2. Defenses for the Tortfeasor

The tortfeasor has a few defenses against torts (negligence or intentional or otherwise). The judge however can only pick ONE defense. This changes the decision, so the judge decides how harsh to be!

2.2.2.1. Contributory Negligence

This defense says that Plaintiff in part contributed to their own injuries and thus Defendant isn't *fully* at fault. The plaintiff cannot recover damages fully - up to a % of rewards, decided when the judge/jury **apportions liability**. If they are unable to apportion it, it defaults to 50/50 though!

2.2.2.2. Voluntary Assumption of Risk

The defense says that Plaintiff knew **both physical and legal** risks (they'll get hurt + waived the right to sue) and **voluntarily** assumed the risk. Then Plaintiff is barred from recovery (zero compensation!)

2.2.2.3. Ex turpi causa (from a dishonorable cause)

If the Plaintiff's injuries occurred while performing an illegal activity, they are awarded zero. However, this defense is controversial and **rarely** used since judges are not supposed to judge morals.

2.2.2.4. Consent

If the Plaintiff **informed consents** to a tortious action, no wrong is done and no recovery is possible.

2.2.2.5. Self Defense

This defense is usually seen in intentional torts (like assault and battery). This happens when the Plaintiff took **only reasonable steps** to prevent harm to themselves, and only when it's the **last resort** and they have no other options to get out.

2.2.3. Types of Damages

Damages refer to the compensation that is awarded to the Plaintiff to offset their injuries from the tort.

2.2.3.1. Special (Pecuniary) Damages

These are **quantifiable** damages that can be claimed - extra expenses otherwise not incurred, loss of wages, any bills, funeral costs - as long as it's reliably quantifiable, it would fall under this.

2.2.3.2. General Damages

These are **non-quantifiable**, like damages for pain & suffering, loss of future earning capacity, etc.

2.2.3.3. Punitive (Rare) Damages

These technically do not correlate to any injury suffered by the Plaintiff; instead, the Courts are **punishing** the Defendant for egregious behaviour to make sure it doesn't happen again. This happens more in the US, with larger punitive damages as well.

2.3. Intentional Torts

As mentioned earlier, intentional torts require the tortious action to be **intended** (though the tort itself can be unintended). In addition, harm **must** be caused.

Each tort has **elements** that define it. All elements of the tort **must be present** for the claim to succeed; the onus is on the plaintiff to prove the elements exist.

2.3.1. Assault

This is intending to cause a trespass to the person. This is usually found together with battery.

1. **Intentionally**
2. Uttering a **threat**
3. Likely to cause a **reasonable apprehension** of imminent physical harm
4. Against a **person or an identifiable group**

2.3.2. Battery

Actually committing violence that was threatened in the assault tort.

1. **Intentionally**
2. Applying **unlawful force**
3. **Without Consent**

Interesting examples include Nonconsensual Doctoring - if a doctor operates on you without your consent, each instance they touch you counts as a battery! Another example is in sports - if there is deemed to be "too much contact" it could be a battery.

Common defenses to this tort are that it was **consented to**, explicitly or implicitly.

2.3.3. Intentional Infliction of Mental Distress

A relatively new tort that recognizes acts that lead to physical/psychopathological harm. This tort **requires intent to cause harm**, but actual harm caused does not need to be the harm intended.

1. Defendant's Conduct was **flagrant and outrageous**
2. Defendant calculated their actions will **harm the Plaintiff** (aka, they intended to harm)
3. Defendant's Conduct caused Plaintiff to **suffer visible and provable illness**.

2.3.4. False Imprisonment

Restraining/Confining someone against their will unlawfully. It **need not be physical** (psychological OK too! (like threats I guess)) It is not false imprisonment if the police lay charges, so when in doubt just **call the police** instead of doing a citizen's arrest or something.

1. **Intentional**
2. **Total Confinement** of a person against their will
3. **Without Lawful Justification**

There is a relatively new defense to this - **Shopkeeper's Privilege**. If you are **very reasonably** sure that someone is committing a crime (for instance, a shoplifter in ye shoppe), you could use this as a defense in court, even if the person ended up being innocent! However, to be clear, you still did the tort.

2.3.5. Malicious Prosecution

As described - reporting a person to the police when there is no good reason to believe that person committed a crime.

1. A Proceeding **initiated by the tortfeasor** so that:
   1. They withheld exculpatory information from the police
   2. They undermined the independence of the police investigation
   3. They communicated with police so that it misled them not to conduct an indep. investigation
   4. They undermined the indep. of the decision-making process to lay charges and prosecute
2. The Proceeding terminated **in favour of the plaintiff** (no charges laid)
3. Undertaken **without reasonable and probable cause** to commence/continue the investigation
4. **Motivated by malice** or some other reason other than carrying the law into effect.

2.3.6. Defamation

Making **untrue** statements that cause injury to the reputation of another. Can either be **slander** (spoken) or **libel** (written). Notably, **they assume that harm is done**.

1. **Defamatory material** that lowers the plaintiff's reputation in the eye of a *reasonable* person
2. Material must **refer to the plaintiff**
3. The material must be communicated or published to **at least 1 other person**

There are cases where defamation is not possible:
- In court and legislation, defamation is not possible as the speaker has **absolute privilege**
- When the speaker has a responsibility to provide a statement, and it was without malice and within the relationship or job scope, the speaker has **qualified privilege**.

2.3.7. Trespass

The act of entering another's land without their consent. It is important that **harm needs to be done**.

1. **Intentionally**
2. **Entering Property**
3. **Without Consent**

In law, your land stretches up towards the heavens and down towards the earth's center. Back then, this meant that people could (and did!) sue for airplanes trespassing on their skies lol.

2.3.8. Public Nuisance

This tort is **strict liability**. It is interference with the use of public lands, often quasi-criminal. For example, occupation of public spaces, etc. The only defense is to show damages were **trifle**.

2.3.9. Private Nuisance

This tort is **strict liability**. Interference with an occupier's use and enjoyment of their land. It includes both physical nuisance but also **amenities nuisance**, interfering with the use of amenities on the property. Like with Public Nuisance, the only defense is to show damages were **trifle**.

2.3.10. Intrusion on Seclusion

An important extra tort to know in Ontario at least; it involves **breaking the rights of privacy** and **causing harm**.

2.3.11. Negligent Investigation

An example of a new tort - a mix of classic negligence with a focus on Crown/police investigations

2.3.12. Dog Owner's Liability Act

An example of a strict liability tort - in legislation, dog owners are strictly liable for dog bites/damage!

2.3.13. Wrongful Birth

This tort exists - you can sue your doctor if they failed to advise against your birth, given extreme circumstances and lifelong suffering and the like.

2.4. Unintentional Torts (Negligence)

Negligence is the biggest type of Unintentional Tort out there - so much so that it *could* cover all.

2.4.1. Definitions

Negligence is the *careless causing of harm* to the person or property of another. It has 4 elements:

1. The defendant owed the plaintiff a **duty of care**
2. The duty of care was breached as the defendant **fell below the standard of care**
3. **Harm/Damages Occurred**
4. The defendant's actions **caused** the harm/damages.

2.4.2. History

In the past, around the Industrial Era, there was (of course) horrible mistreatment of workers, sending workers to die in the mines in droves. Workers tried to sue for Duty of Care, however back then Duty of Care was outlined in the contract - and since no contract was signed, they can't sue! Employees used to not have a duty of care to workers aside from what the contract says. Thanks capitalism.

But this all changed in the fateful **Donoghue v. Stevenson (1932)** case. Donoghue had bought a ginger beer from Stevenson, which apparently contained a decomposed snail. She got ill and sued. After lots of failure in the lower courts (since there's no direct intent to tort), this eventually got to the highest courts, who said "Nah wait sec hold on a moment". They expanded and established the General Principles of Duty of Care significantly, and the principle of "Neighbours in Law"

2.4.3. Duty of Care

A **duty of care** is any relationship to which one could foreseeably cause harm to another. As outlined by Donoghue v. Stevenson, **"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"** - you should think of them!

A **neighbour in law** is anyone who is closely and directly affected by one's actions; such that one should reasonably have thought they'd be affected when performing the negligent act.

The general test (also called the "Anns Test") has 2 steps:

1. Is there a sufficiently **close relationship** between the parties such that the damages caused by carelessness from one of the parties is **reasonably foreseeable**?
2. Are there any policy concerns or considerations that should limit the **scope**, the **class of persons** to which it is owed, or the **damages** that a breach of it should give rise to?

2.4.4. Falling Below a Standard of Care

In general, falling below a standard of care means that you did not do what a **reasonable ordinary person** would have done in the scenario; thus the negligence! There are some exceptions:

- Professionals have additional standards they are held to, and must act like a **reasonable and competent person in their profession** if the negligent act requires specialized skill/ knowledge.
- Professionals must also **avoid conflicts of interest** as part of their standard of care.
- Specialists in a field are held to a higher standard than generalists - surgeons v. the family doctor.

- Children are held to the standard of a reasonable child of the **same age**; unless they are engaged in an adult activity (like driving), then it's a reasonable adult.

2.4.5. Injury and Causing Said Injury

Harm or Loss must occur for negligence to occur, but did the defendant *cause* it to happen?

2.4.5.1. The "But For Test"

This test simply states, "**but for** the conduct of the tortfeasor, would the harm/injury have happened?" If yes, then this is the cause of the loss or harm! Essentially, outcomes that would have been inevitable cannot be sued for - the acts of the defendant must have caused it.

Note that the defendant does not need to be the *sole* cause of harm - it is sufficient to show the defendant's conduct, in part, was **a cause** for the harm.

2.4.5.2. Res Ipsa Loquitur (the thing speaks for itself)

This is a doctrine that allows judges to make a "Quantum Leap of Logic" to automatically deduce liability regardless of evidence, since the sheer fact that this accident occurs implies negligence. Usually seen in manufacturing. Formally, it has these parts:

1. The injury would not have occurred (or is really unlikely) if no one was negligent
2. The defendant (usually the manufacturer) was likely the negligent party
3. The plaintiff did not **voluntarily** contribute to the accident occurring
4. There is no other evidence that explains how the accident occurred

2.4.5.3. Malfeasance and Nonfeasance

Nonfeasance refers to failing to provide a positive act (for example, not saving a dying person). In Ontario, it is **not punishable**, unless explicitly stated to be in statute.

Malfeasance says that if a positive act was provided, but done negligently, the actor is liable for any **additional damages caused** (like saving a drowning person but dragging their face across the rocks and giving them head trauma). The positive act fell below a certain standard, and thus there is liability.

Interestingly, Google distinguishes **malfeasance** and **misfeasance** - misfeasance states that the damages caused was **unintentional**; while malfeasance states that it was **intentional**.

2.5. Other Unintentional Torts

2.5.1. Product Liability

In short, the plaintiff must prove that the product **fell short of reasonable standards**, thus harmful.

2.5.1.1. Subcategories to Product Liability

- **Negligent Design**: When the product itself was designed badly (i.e. exploding Ford Pinto)
- **Negligent Manufacture**: A glaring mishap in the manufacturing process (like a snail in ya soda)
- **Failure to Warn**: Failing to warn consumers about faulty products (not sending recalls, not putting safety warnings, etc.)

2.5.1.2. Ongoing Duty to Warn

For some products, manufacturers have an **ongoing** duty to warn users of the risks of using its products, and send notice to them if something comes up (if that advice is heed is not their responsibility - that's then voluntary assumption of risk).

This applies to dangerous products (cigarettes, explosives, corrosives), products found to be defective, and new scientific or technological advancements. This especially applies to any **unexpected risks**.

2.5.2. Occupier's Liability

This outlines that people who occupy/own (tenant/owner) a property **owe a duty of care** to anyone who enters those premises. An occupier is any person who has control over the property. Essentially, people entering your property should not die or get injured due to the condition of the property.

A separate duty of care is also owed to *trespassers* - they are still owed a **duty of general humanity** and thus you **cannot set traps** - you **cannot create harm**. Otherwise, the standard of care is minimal.

If signage is placed, it depends on the ambiguity of the wording and if a notion of consent exists. Also, if the sign is visible (and for that matter, if the plaintiff can read).

2.5.3. Failure to Supervise

An interesting new tort: says that people have a duty to supervise children, and if the child causes or incurs damages, the supervisor can be liable. This includes babysitters, teachers, etc.

2.6. Business-Related Torts

2.6.1. Passing-Off

This is essentially forgery, when you attempt to "pass off" one of your products as those of another party, unfairly taking advantage of their brand power and misleading consumers.

2.6.2. Product Defamation

Defamation but for someone's property. Not much to say here.

2.6.3. Inducing Breach of Contract

Occurs when the tortfeasor knows of a contract signed between 2 parties and takes **active** steps to break said contract. For example, stealing employees from one of your competitors. Not cool.

2.6.4. Unlawful Interference with Economic Relations

Here, unlawful is the true meaning of the word - doing something genuinely criminal or quasi-criminal, with intention to injure/interfere with someone's ability to do business or earn a living. (Ex. Bribery)

1. There is an existing business relationship the defendant **knew about**
2. The defendant **intended** to act to interfere with it
3. Acts taken to interfere are **illegal**
4. This interference caused a **loss**

2.6.5. Negligent Misrepresentation

A tort that was conceived in ***Hedley Byrne & Co. Ltd v. Heller and Partners,* [1964], A.C. 465**. Though the Plaintiff lost the courts still decided to start recognizing this and became formal in 1971.

Representation is any statement - written, verbal, or action. **Misrepresentation** is thus any untrue statement. Negligent Misrepresentation covers cases where it was untrue due to carelessness. Especially important for professionals - you're responsible for **not doing this**!

1. A statement is made that is **false**
2. The statement Maker owes the statement Hearer a duty of care (subject to policy considerations to limit liability - are you an actual client, etc? Important due to internet info spread - it could potentially open up unlimited liability to all, which is absurd)
3. The statement fell **below the standard of care**
4. The Hearer **reasonably acts** on the Statement and suffers a **loss** as a result of the action taken.

2.6.6. Fraudulent Representation

Established in the same case above, it comes misrepresentation that is **intentionally untrue**, so lying.

1. A statement is made that is **false**
2. The statement Maker knows the statement is false (They're lying!!!)
3. The Hearer **reasonably acts** on the Statement and suffers a **loss** as a result of the action taken.

Fraudulent misrepresentation often has higher damages than negligent ones - the court could rescind the contract and/or award extra damages - **or** for negligent; but **and** for fraudulent. Thus fraudulent misrepresentation is the better recourse if possible.

2.7. Liabilities Part 2

2.7.1. Fiduciary Duty

A **fiduciary duty** is an overarching "super duty" that if X breaches, X is liable. A hybrid between tort and contract that applies in certain scenarios. Please don't try to find fiduciary duty everywhere - this only applies to certain scenarios with imbalanced power.

A **fiduciary** stands in a **special relationship of trust to another**. They are the dominant party to a subservient party, who relies on them. Fiduciaries also apply to some professionals who act in a "trust" relationship with their clients.

A previous court case *Frame v. Smith*, [1987] SCR 99 at 136 defines a **fiduciary** as follows:

1. Has the scope to **exercise some discretion or power**
2. Able to **unilaterally exercise power** to affect beneficiary legally or practically
3. The beneficiary is **particularly vulnerable to/at the mercy of** the fiduciary

Some in-class examples include: the director of a company to the company; a husband holding assets for a wife; an old woman relying on only 1 banker ever; and pension investors to pensioners apparently??? (even if they never even met!) Relationships can change from contractual to fiduciary - if 1 party becomes heavily reliant or vulnerable in a way that only the other party can protect them.

As a fiduciary, your duties include (**in addition to the normal duty of care**):

1. Place the beneficiary's interests **above all** (except for the law)
2. **No conflicts of interest allowed**

2.7.2. Professional Liability

The modern-day definition of a professional is **anyone with specialized knowledge that the general public relies on**. As mentioned earlier, professionals have a higher standard of care, equivalent to any other reasonable professional in the field, and scales depending on their specialization. They also need to avoid conflicts of interest and so on.

But who do they owe a Duty of Care to? As the General Public relies on these professionals, there could be **unlimited liability** as anyone who even happens on your work (like a published financial report from an analyst on the internet) could claim a Duty of Care and ask for damages. (3rd Party Liability)

This obviously isn't good, since you would owe a Duty to Care to an absurd number of people. This is why Duty of Care for professionals often is dealt with on a **case by case basis** and is subject to lots of **policies** to limit liability - for the latter, recall the Anns test, which lets us limit liability due to policy reasons.

Here are some common ways to limit professional liability:

- Utilize Policy Reasons to limit Duty of Care: you could argue that the plaintiff is not your client
- **Retainer agreement**: A contract stating you will do exactly what is contracted of them to do and nothing more; anything else that occurs is not your problem and thus you are not liable for it.

2.8. Fun Facts

2.8.1. How long can you wait to sue someone after a tort?

In general, 6 years after a tort occurred; unless you are a child at the time, then 6 years after adulthood.

2.8.2. Tort of Harassment?

There is a tort of harassment in the US, but not in Canada, mainly due to the problem of intention - was the harassment intended, I guess?

2.8.3. Defamation and Anti-SLAPP Laws

Defamation leads to interesting free speech issues, especially when it comes to media coverage. News agencies might just find themselves being sued for exposing things, and then be silenced since the Plaintiff has lots of money to throw. This is called **strategic lawsuits against public participation (SLAPP)** and they intimidate and silence criticism by dragging critics through legal hell.

Anti-SLAPP laws try to remedy this. If the defendant makes a motion to dismiss the case since "this is a matter of public interest and this trial is frivolous". The plaintiff then needs to show they ain't bluffing - show the case has merit, with actual evidence that will cause irreparable damage to them. If they can't do this the suit is dismissed instantly!

In summary, Anti-SLAPP laws help news organizations protect themselves from being bullied with defamation lawsuits.

2.8.4. The Thin-Skulled Plaintiff

This is a principle or law that says that tortfeasors "take their victim as they find them" - if the Plaintiff suffers injuries or damages that are unexpectedly severe due to some precondition or vulnerability, they are still liable even if the damages are higher than if the victim were an "average person".

2.8.5. The Courts do not want you to sue people

They are trying to minimize the number of cases they have by limiting liability (so you can't sue everyone). In doing so, they are sometimes unfair and favour those who can pay for lawyers. They're trying their best.

3. The Law of Contracts

3.1. Introduction to Contract Law

3.1.1. What is a Contract?

A contract is a **set of promises** that the law can enforce. In general, it is any agreement.

3.1.2. The Suspicions of a John Swan, the Prof's Prof

When Prof. Masterman was learning about Contract Law, his prof. told him that

"Everything that I teach you is utter crap" - John Swan, the Prof's Prof

This seems to be due to their observations about how the courts sometimes handle similar court cases, giving contradictory verdicts without any certainty. They hypothesize that the courts are actually **manipulating the rules** to choose who they want to win. So no one really knows the rules!

In particular, the courts basically decide who gets the insurance payouts so they move accordingly. This is important to keep in mind in contract law.

3.1.3. A Rant on the failure of the Law of Precedent

The Courts follow the **Law of Precedent** - Lower Courts follow rules established by Upper Courts in their previous rulings. This is why decisions in cases matter - they set a precedent to be followed! This is ultimately because the courts are trying to **eliminate the courts** - in the end, every possible case would have had a precedent!

However, this is a bit of a failure as lawyers keep piling on ∞ exceptions as $t \to \infty$, so there is never a precedent! Keep this in mind with contract law - past contract rulings might have no effect.

3.1.4. Equity VS Common Law

Another thing to remember is how **equity** plays into the law - what is deemed fair. This could be yet another exception! For example, equitable remedies.

3.1.5. Contract Law Stairway

1. What is a Contract, formally?
2. What are the defences to a contract (how can you get out of one?)
3. How is a contract interpreted, especially where there are points of ambiguity?
4. How are damages awarded?

3.2. Elements to a Contract

There are 7 big elements to a contract. The courts **must see** 3 of the 7 - Offer, Acceptance, and Consideration; the other 4 the courts **assume to have been met** unless 1 party asks to dispute that.

3.2.1. Offer

An **offer** is a tentative promise made by one party (the **offeror**) in exchange for conditions/requests from the other party (the **offeree**). Once accepted, the terms are **binding** on both parties.

- All terms must be **definite and certain**. Specific prices, specific times, etc. No uncertainty!
- The offer must be **communicated** to the intended recipient - verbally, through writing, digital mediums (with back and forth), or even through actions and conduct. **An offer cannot be accepted until the offeree knows of it**!

3.2.1.1. Standard Form Contracts

Standard Form Contracts (**Contracts of Adhesion**) are "take it or leave it" offers, where there is no room for negotiation and you are essentially forced into taking the offer. The most prominent example is that of the parking lot ticket. Although they are fast and easy (and needed for a lot of businesses to run in linear time), they leave the offeree with highly unequal bargaining power and they cannot negotiate terms at all. The question is - how would a consumer get out of the contract?

3.2.1.2. Contra Proferentum (Against the Offeror)

The rule of Contra Proferentum can be used to get out of Adhesion Contracts. It states that **any ambiguity in a contract is leveraged against the drafter**. Ambiguities are not binding!

The specific test for ambiguity is to check that the clause is broad enough to encompass negligence (ex. you can't sue us for negligence) and broad enough to encompass another cause of action (ex. also contract breach). The most common use case for this would be against **Release/Exemption Clauses**.

If both of the above are true, the statement is **ambiguous**! This is why formal contracts are so long - they take the time to list out every specific cause of action.

3.2.1.3. Inadequate Notice of Terms

Another way out of Adhesion Contracts is through **Inadequate Notice of Terms**. If you can prove that you were not given enough time to read all clauses and were forced to accept, then you were not given adequate notice and thus the contract is not binding. The definition of "reasonably sufficient notice" may differ from case to case.

3.2.1.4. Unexpected Terms (Required Notice of Terms)

Another way out - for terms that are arguably "unexpected" to the offeree, the offerer must ensure sufficient awareness of the unexpected clause. Essentially, if you have a surprise "gotcha" clause in your contract - one that the offeree would not typically expect in a standard form contract - you must make sure the offeree knows of that clause with sufficient notice. This is usually decided on a case-by-case basis as the definition of unexpected & sufficient notice needs to be argued in court.

3.2.1.5. Lapse, Revocation and Counteroffers

Lapse refers to how contracts don't last forever. Contracts lapse after a *reasonable* amount of time, or in a timeframe otherwise specified in the contract. Note: you are allowed to set any time you want as the timeframe for acceptance! (If you don't let the Court choose for you, that is)

Revocation allows offerors to cancel offers at any time **before acceptance**. This has 2 exceptions: **option contracts**, a separate contract where the right to revoke was bought; and **contracts under seal**, contracts with a red dot/X at the end of names (this also extends the litigation period since they are specialty contracts lol). *You cannot enforce irrevocability in the contract.*

Offers usually aren't a one-and-done deal - negotiations can occur! When one side makes an offer, and the other side makes a **counteroffer** (any modification of the offer), the original offer is considered rejected and is immediately voided. Instead, the counteroffer is a **new offer** that can be accepted or rejected, and the process repeats.

3.2.1.6. Offer and Consumers

Here are some notable cases involving sales of goods and services as seen in the textbook:

- Invitations to do business (aka, *most* advertisements) are **not contracts**. They simply are ways to entice customers to start a contract of sale. It is the customer who, after being enticed, makes the offer; and the seller who holds the power to accept or reject.
- Having goods or services provided without request or knowledge doesn't form a contract, since no offer was made and thus accepted. Notably applies to unsolicited goods and services, with additional legislation to prevent "default assumed offer acceptance" if it was unsolicited but there was an untaken opportunity to reject it.

3.2.2. Acceptance

Formally, **acceptance** is the final unqualified (unconditional?) consent to the terms of the offer by the offeree, which is then **communicated** to the offeror by word or by specific conduct. Regardless, the acceptance must be a *positive* action (silence or no action cannot be an acceptance (unless agreed that it can be)).

Certain types of contracts are **unilateral contracts** - these are contracts that are accepted by performing act(s) required by the terms of an offer. In this case, acceptance happens *only through performance* of the acts specified.

3.2.2.1. The Postal Acceptance Rule

Special rules apply to contracts negotiated through mail, due to antics related to mail delay. Notably, acceptance is binding when **it is put in the mailbox**, and revocation is only binding when **the other party receives it**.

This can lead to a funny scenario where the offeree accepts an offer that the offerer was trying to revoke - but the revocation was still in transit when the acceptance was put into the mailbox. The revocation is too late and the contract is binding! lol

This is also why you DATE all your letters - you need to have your evidence for this sort of thing!

3.2.3. Consideration

Consideration is essentially the **price** - what is exchanged for which the promise of the other is bought. Consideration is usually money, but it doesn't have to be - it can be performance (a promise to act), or goods and services. **Both parties must give something** as part of the contract!

3.2.3.1. Gratuitous Promises

If one party doesn't give up anything, it **does not count as Consideration**. Both promise something! This is why charities usually provide some sort of promise back (even an annual dinner is enough)

3.2.3.2. Past Consideration

Past Consideration is not Consideration - Consideration that occurred before the contract was signed **does not count**. In addition, continuing consideration (defined as performing an existing legal duty) doesn't count either - it needs to be **new consideration**.

3.2.3.3. Adequacy of Consideration

The courts do not care if the contract is a fair trade - you are allowed to give a mere peppercorn, and it would be sufficient as consideration. However, both parties must ensure that the consideration is **something they have a legal right to** - for instance, in one case ruling, the right to complain cannot be given up so a "contract" involving that did not count.

3.2.3.4. Exceptions to the Requirement of Consideration

3.2.3.4.1. Debtor/Creditor Rule & Mercantile Law Amendment Act

This was a whole debacle of events involving the *Foakes v. Beer* case, where a debtor could only pay partially, which the creditor originally accepted. They then sued for breach of the original debt contract. The courts ruled in favour of the creditor - since the debtor has not given up **new consideration** (they're getting a freebie with debt relief), thus no new contract was formed & remaining was owed.

Immediately after that though, legislatures across Canada immediately moved to pass the Mercantile Law Amendment Act - when a creditor **accepts** part performance (positive action of some $) to settle a debt, and the debtor pays that partial amount in full, then the entire debt is extinguished. This essentially undid the ruling. Despite the lack of consideration, it's a binding agreement!

3.2.3.4.2. Sealed Contracts

As seen earlier under revocation, sealed contracts do not require any consideration to be binding.

3.2.3.4.3. Equitable Estoppel

1. Some form of legal relationship between the 2 different parties **already exists**
2. One party (gratuitously?) promises to release them from some or all of their legal duties to them
3. The other party acts on that promise in a way that **alters their position** such that if the promiser re-negs on their promise it would provide extreme hardship.

In this case, the courts use "equitable" jurisdiction to prevent the promiser from **denying the promise was untruthful** - that party can't back out. Notably this **can only be used as a shield, not a sword** - the promisee uses this to prevent action by the promisor to enforce their original rights.

3.2.4. Intention to Create Legal Relations

Unless brought up specifically during court, this element is assumed to have been fulfilled in a contract.

If it is raised though, the courts employ the **reasonable bystander test** - did the outward conduct/ context of the 2 parties lack serious intent to create legal obligations (for example, jokes or alcohol)

As a consequence of the reasonable bystander test, the Courts also generally assume you don't want to create legal relations with **family** or in scenarios that **lack common sense** (obviously joking I guess)

3.2.5. Capacity

Capacity is the ability for a party to enter a contract. For instance: minors and people with reduced mental capacity. No capacity = no contract.

Minors are still bound to contracts for supplying **necessary or essential goods or services** - anything needed for their station of life, or anything they don't have an adequate supply of (for some definition of necessary or essential - for example, does a car count?)

In addition, they're also bound by **contracts of service that benefit them** - employment contracts and the like. *Seemingly*, beneficial is defined in the sense of opportunity cost - if there is a better work contract or something it could be argued that the existing work contract is no longer beneficial.

For any other contract, the minor gets to choose whether they back out or enforce the contract, seemingly allowing them to **void contracts at whim**? As for when the minor reaches the age of majority, the following happens:

1. For contracts where they gain a permanent or continuous interest (like things paid in installments), they should back out **immediately** if they want to be released from those obligations; otherwise, they lose the right to do so for that contract.
2. Any contracts for non-continuous interests require **ratification** (acknowledgment and promise to perform) after they reach majority. This is required, for example, when you buy something where the payment happens after the date of majority.

People who have diminished mental capacity follow the same rules as a minor would.

3.2.5.1. Aside: Void VS Voidable

Void contracts refer to a contract that never existed, failing to form due to lack of requirements. **Voidable** contracts instead exist, but can be turned void at the option of one of the parties. If a contract is found void, the court tries its best to return the parties to their original positions. It can also decide only parts of a contract are void and **sever** (remove) those void parts of the contract.

3.2.5.2. Other Groups with Capacity Concerns

1. Corporations - they are separate legal entities and have their own rules on capacity.
2. Labour Unions, Associations, and other Organizations - unless they incorporate, it's not a separate legal entity - use **representative action** (1 person represents the group in court actions)
3. Aboriginal Peoples living on Reservations - thanks outdated Indian Act. They are "special unincorporated associations" and have capacity similar to that of a labour union
4. Bankrupts - under contractual disabilities (save for necessity) until discharged from bankruptcy.

3.2.6. Illegal Contracts

Contracts that violate an Act, Statute, or Public policy are **unenforceable** - the courts cannot provide assistance to remedy. There are some cases where the contract is deemed void under a statute - then the court could still intervene to restore positions but the contract still basically didn't exist.

For example, contracts going against the *Criminal Code* (robberies, assassination? idk), the *Income Tax Act* (sneaky payments to avoid them), the *Competitions Act* (no anti-competitive behaviour), and the *Law Society Act* (regulating the legal profession in Ontario) violate acts.

As for violating common law or public policy, this includes things like compensation (indemnity) for committing torts (bailing out of consequences?), as well as contracts deemed immoral, a perversion of justice, or prejudicial to the interests of the Canadian public.

Also a thing about the Competitions Act - technically NDAs are unenforceable, unless in the context of sale of business and employment (which is what you usually see them in anyways). The enforcing clauses must be unambiguous in location, activity, and time period for them to be reasonable and enforceable.

3.2.7. Certainty of Terms

The terms of a contract must be absolutely certain and unambiguous - if there are any vague or incomplete terms in the contract, it may be deemed **void** by the Courts, and thus no contract was ever formed.

Examples of vague terms include:

- **Fair Value** - instead of explaining how monetary value should be determined, they just use this or an equivalent term to hand wave it. Not OK!
- **Incomplete Contracts** - Contracts missing essential terms like price, what's being purchased, handover dates, and other items.

3.3. Contract Impeachment

Now that we have discussed what a contract is, we can discuss how a contract can be set aside - a way out, a defense, an ability to reneg.

3.3.1. Mistake

Mistakes happen, and despite our best efforts, they can sometimes make it onto contracts. Especially if people start using ChatGPT imo lol.

3.3.1.1. The General Principle to Finding Mistake

Although Mistake has its own subcategories as seen below, Prof. Masterman insists that if:

1. There was indeed a mistake in the Contract
2. The acceptor's interpretation of the mistake is reasonable to a reasonable bystander

then the contract is still binding and you will have to deal with that mistake. In other words, a contract can be voidable if the acceptor abuses the mistake to screw over the other party.

3.3.1.2. Rectification of Mistakes

Rectification is the correction of written documents to fix mistakes. The courts will fix the terms that contain mistakes, subject to the following:

For **Mutual Mistakes**, where both parties made a mistake of some sort, the contract doesn't reflect the parties' shared common intention so can be rectified through renegotiation.

For **Unilateral Mistakes**, where only 1 party claims a mistake was made, the courts need that:

1. There was otherwise a complete oral agreement between the parties on all terms
2. No further negotiations occurred to amend the contract
3. The mistake in the contract *could have* been due to fraud (optional)
4. The defendant (should have) known of the mistake and the plaintiff did not when signing
5. Any subsequent attempt to enforce the inaccurate document would be equivalent to fraud

only then would they rectify the contract. As such, for unilateral mistakes, rectification is **very rare** and an **extreme remedy**.

3.3.1.3. Mistake in Terms and Meaning

3.3.1.3.1. Inadvertent Word Usage / Typographical Errors

Typos happen! If a reasonable bystander would recognize that a mistake occurred, then the contract would be **voidable** by the discretion of the party who made the mistake. The courts could also choose to **rectify** the contract.

3.3.1.3.2. Errors in Recording Terms to Writing

Usually occurs when an oral agreement is improperly converted to writing. Usually, these parties don't want to void the full contract - thus the courts offer **rectification** as a remedy as outlined by the section on rectification above.

3.3.1.3.3. Misunderstanding the Semantic Meaning of Words

The 2 parties may interpret the same words differently. In this case:

- If there are unequally reasonable interpretations, the court will decide which meaning is the most reasonable in light of the fact matrix, and the contract is **binding** under those semantics.
- If the 2 interpretations are equally reasonable, then the courts rule there is **mutual mistake** and the contract is **void** for mistake as to the meaning of terms. This is "essentially" an instant defendant win though, if you think about it hard enough.

3.3.1.4. Mistake in the Subject Matter

3.3.1.4.1. Wrongly Assuming the Existence of Something

Oops, you tried to sell something that doesn't exist, or got destroyed; or you're getting insurance for something that's in the middle of being on fire! In these cases, the contract is deemed **void** - obviously there's no way to reasonably enforce that contract.

3.3.1.4.2. Misvalued Assets and Promises

What if a party made a mistake in the valuation of an asset (and was about to get ripped off)? The Courts will intervene if the mistake in value was present from the outset - a **fundamental egregious mistake** at the onset of the contract (subject to interpretation). The courts will not intervene due to market price flux. The contract gets **voided**.

3.3.1.4.3. False Identities in the Contract

If one party tricks the other into thinking they're someone they're not, the contract is **voided**. However, the *identity assumed must be an existing one* - if the identity was fake or non-existent, it's only **voidable** but you can only really get compensation from that "party" listed on the contract so good luck with recovery lol. Strange…

Also, if mistake in identity occurs but the 2 parties have met in person, the contract is only voidable.

3.3.1.5. Mistake in Document Nature (Non Est Factum)

In Latin, it translates to "not my doing" - essentially **"This is not the contract I agreed to"**. This was a very historical defense devised for the illiterate, who could be *tricked* by the literate party into signing - you're relying on another's word that the document is correct. Today it is often used for persons with blindness or who are illiterate.

Note - this defense **does not work if you were careless in not reading** - this was the case at some point but the courts reverted that decision. This defense is limited in the sense that you couldn't have been careless yet still signed a document while being mistaken about its nature.

3.3.2. Misrepresentation

3.3.2.1. Wait, isn't this Tort Law?

Well, yes, but **innocent** misrepresentations aren't tortious (although the professional still has a duty to correct). In contract law, any **material misrepresentations** may allow one party to gain the right to rescind the contract. Misrepresentations are not terms of the contract - false impressions!

3.3.2.2. Formal Definition of Misrepresentation in Contract Law

Misrepresentation a statement or representation that is made during the negotiation of the contract, **before the contract's formation**, that turns out to be false.

There are 3 types of misrepresentation:

- **Fraudulent**: The party making the misrepresentation intentionally did so, essentially lying
- **Negligent**: The party had a duty to ensure the statement was accurate, yet failed to take the steps needed to do so and fell below the standard of care (for instance, a professional)
- **Innocent**: Any misrepresentation that does not get categorized into the above. It is important to note that parties **must still correct these** when in a position to do so - else it may become fraudulent or negligent!

Recall the Elements of the Tort(s) Misrepresentation - the same general outline follows here:

1. A statement is made, and that statement is false
2. The statement is such that it is negligent/fraudulent/innocent
3. Relying on said statement **caused the injured party to enter the contract**
4. Relying on said statement caused harm to the innocent party.

3.3.2.3. Consequences of Misrepresentation

As mentioned in Tort, the contract becomes voidable at the option of the victim. Fraudulent misrepresentation allows for rescinding the contract and/or awarding extra damages; while for negligent misrepresentation only 1 of the 2 options are available. Note that the party should rescind promptly lest they lose their right to rescind after an unreasonable amount of time has passed.

3.3.2.4. Representations must be Statements of Fact

A statement can't be a misrepresentation if it is a statement of opinion - this is why saying "In my opinion" is important. However, there is an exception if you are an **expert** (or are perceived to be one?) - expert opinions are considered statements of fact.

3.3.2.5. Omissions as Misrepresentation

Omissions are misrepresentations only if there is a **duty of utmost good faith** owed (like a fiduciary duty or implied contractual duty of good faith); or if there is some latent defect (a defect that existed at the time of purchase, not obvious to a *prudent* buyer, yet serious and important).

Some contracts **require disclosure** - failing to do so renders that contract voidable. For instance, the insured must disclose to insurance companies info related to their risk; directors to their corporation (as a fiduciary duty); partners in a partnership; and professionals to their clients.

There is also the rule of **Caveat Emptor**, or **Buyer Beware**. The purchaser is responsible for clearing misrepresentations. This is however countered by the *Sale of Goods Act*, which makes contracts voidable for buyers if the vendor fails to disclose a problem with the ownership, quality, or characteristics of goods. However, the *Sale of Goods Act* does not apply to contracts involving services or land, so yeah I guess.

3.3.3. Undue Influence

Undue Influence is the *domination* of one party over the mind of the other to a degree that deprives the latter party of the will and ability to make an independent decision. In other words, they have such overwhelming power over them that it's impossible to go against them. If this is the case, the contract is **voidable** to the victim of the influence at their discretion.

This is often seen in issues with wills, spouses, and other special relationships where one party holds some special skill or knowledge and the other party places trust and confides in them. It also often goes hand-in-hand with duress.

3.3.3.1. Test for Undue Influence

It is up to the plaintiff (victim?) to show, on a balance of probabilities, that:

1. There was domination by the other party, as seen in 1 of the below cases:
   1. There exists a special relationship (doctor-patient, lawyer-client)
   2. OR they were in a desperate circumstance at contract formation
   3. OR they were under a threat of prosecution at contract formation
   4. OR the contract was **unconscionable** - unequal bargaining power between the parties
2. The contract was unfair or disadvantageous to the weaker party

In some cases (like spouses), it is presumed that undue influence exists - then the dominant spouse would need to establish that no undue influence was applied!

3.3.3.2. Minimizing Undue Influence

One way lawyers try to minimize undue influence when a contract is signed is through **independent legal advice**. The lawyer would send the weaker party to another independent lawyer and sign it separately to help reduce pressure and influence. But one must ask - given that special relationship still exists, does this *really* help?

3.3.4. Duress

Compared to Undue Influence, **Duress** is **actual or threatened violence or imprisonment** as a way to **coerce** a party to enter a contract. If this occurs, the contract is voidable at the victim's discretion.

While historically it outlined physical harm, nowadays the definition of duress is broadened - economic duress (forced payment backed by inappropriate pressure beyond normal competitive commercial pressure) and other types of violence also count for duress! This is part of why it is confused with undue influence so much, I guess.

3.4. The Requirement of Writing

3.4.1. Preface

For some contracts to be enforceable, they need to be **in writing**, as stated by statute. Prof. Masterman generally considers these as failures due to the court's propensity to manipulate rules and how the statutes benefit those who are aware of them. There are contradictory cases abound here.

3.4.2. What is "In Writing"?

In general, it just needs to be written down - no specific form is necessary, and it could be across multiple scattered documents (however, they cannot be connected through oral promises). Electronic writing and signatures are also sufficient. **Evidenced in writing**, not specifically in writing.

Essentially, they only need to include essential contract terms - names of the parties, subject matter of the contract, consideration (excepting guarantees), payment details, and signatures of signing parties.

The in-writing rule is known to be manipulated by Courts to get the ruling they need, as there is room for interpretation as to what counts as "in writing".

3.4.3. Contracts to be in Writing from the Statute of Frauds

1. The promise of a will's **executor** to pay for an estate's debts (after distribution) with their own $
2. **Guarantees**: A promise to pay the debt of another person IF the debtor defaults.
3. **Indemnities**: In BC only, promises to pay **on behalf** of a third party as long as the other party in the contract performs. **Not conditional on the debtor defaulting**.
4. **Marriage**: Historically for marriage contracts like bridal dowry, now it is governed by Family Law. However, it still needs to be in writing to be enforceable.
5. **>1 Year Actions**: Agreements where both parties perform only after a year or more from signing unless the contract has an indefinite time period.
6. **Land Interests**: Contracts that create an **interest in land** (ownership rights, including leases). A specific exception for these is the **Doctrine of Past Performance** - if both parties already partially performed parts of a land-interest contract, it is considered binding regardless.

3.4.4. Contracts to be in Writing from the Sales of Goods Act

This applies to all provinces but BC and Ontario. So it doesn't apply, but sales of goods usually over $50 need writing, acceptance, part payment (credit to paying the purchase price), or earnest (token sum or article to seal the deal); otherwise they are unenforceable.

3.4.5. Contracts to be in Writing from the Consumer Protection Act

This applies to B2C contracts only. For Direct Agreements of over $50 (like door-to-door sales) to be enforceable, it must be in writing and include:

1. Detailed Description of Goods/Services
2. Itemized Purchase Prices
3. Name, Address, and Contact Info of Vendor
4. Notice of Statutory Cancellation Rights
5. A Copy must be given to the consumer
6. Cost of Borrowing, if applicable

Some contracts under designated industries might be subject to further rules and exceptions too.

3.5. Tidbits

3.5.1. The Basis of the Bankruptcy Act

The Bankruptcy Act is based on the Debtor/Creditor Rule and its subsequent ruling! If you commit an act of bankruptcy (defined as owing more than $1000 to 2+ creditors with no way to pay them down), you have 2 recourses:

1. Your creditors issue a bankruptcy notice, and all* of your debt is paid and all* your assets are liquidated to pay whatever possible. You start over from ground zero with nothing.
2. File a proposal to distribute assets to your creditors in return for debt alleviation. If 2 of 3 **blocks** of creditors agree to this proposal (gerrymandering fully allowed) your debt is paid down and you don't enter bankruptcy. This is risky though since if you don't get 2/3 acceptance or can't live up to the proposal, you automatically enter bankruptcy.

3.5.2. You need not Perfect Capacity

The Capacity requirement needed for different contracts may differ. For example, a marriage contract has relatively low capacity compared to say **Power of Attorney** - allowing someone else to deal with your **financial care** (managing your finances) or **personal care** (managing your life and even when to pull the plug) when you inevitably lose the capacity to do so yourself as you become a boomer.

A general test for capacity is as follows:

1. Do they have a sense of time?
2. Do they have a sense of place? Where do they live and so on?
3. Do they know who lives near them?
4. Do they know the size of their assets?
5. Do they know the nature of the document they are about to sign?

3.5.3. Loopholing Damages for Negligent Misrepresentation

Say hypothetically a misrepresentation is negligent but the courts feel it appropriate to void the contract AND award damages. This is not usually allowed since it is a negligent misrepresentation, so only 1 can be chosen.

The trick is to claim the existence of an **auxiliary contract** - if the main contract was not entered without having the auxiliary contract, the auxiliary contract follows all 7 needed elements for a contract, and voiding the original contract isn't enough to cover damages, this argument may be allowed and now there are 2 contracts you can recover damages with!

4. The Law of Contracts II

4.1. Interpretation

As stated by the doctrine of Contra Proferendum, in the case of ambiguous statements in contracts, the courts prefer the interpretation against the drafter. But, how do they resolve the ambiguity?

A cynic might say, "Why don't we always throw out all ambiguities?". Although easy, the Courts would not be performing their role of encouraging reliance on seriously made agreements. Agreements and Contracts will not have weight if the Court just brushes it aside. Thus, **the Court will make every effort to enforce the contract**.

4.1.1. Approach to Interpretation

- **Plain Meaning**: This approach is the true dictionary purist approach, using the dictionary meaning of the word to make interpretations, recursively referencing the dictionary until a deduction is made. While this seems rigorous due to going "by the book", there is potential danger from different brands of dictionaries giving different results.
- **Liberal Approach**: Looks to the intent of the party, as well as cirumstances - notes shared between the parties, context, and existing definitions in any relevant legislature. It minimizes, but does not fully ignore, the importance of the words actually used. It can be dangerous as it allows endless speculation and bias to seep into arguments.
- **Hybridding**: The case of *Sattva Capital Corp. v. Creston Moly Corp.* has set out a new precedent in how contracts are interpreted, seemingly blending the two - using "mixed fact and law". The Courts start with the dictionary definitions (Plain Meaning), then examine their meaning in the context of the contract and parties (Liberal Approach). They may also consider "trade usages" and local customs on words, as well as the "factual matrix" and surrounding circumstances.

Third parties can also be pulled in to provide credibility to one side or confirm certain word use.

4.1.2. The Parol Evidence Rule

This rule says that if the 2 parties had a written copy of the contract that both agree is complete and accurate, then any Parol Evidence (evidence from outside the written agreement - like past negotiations and explanations) cannot be used to add, subtract or modify the final written contract. A final written contract is final, save for mistakes, rectification, and some exceptions. However, with the advent of the *Sattva* case, this rule is essentially non-existent.

4.1.3. Implied Terms

An **implied term** is a term not expressly included in the contract, but would have included it if they thought about it (as reasonable people). Think of these as terms that you would not hesitate to put in if asked. For instance, common terms in industry or statute may be implied. A **duty of good faith** is always implied in every contract in Canada, first established in *Bhasin v Hrynew*. Terms that are reasonably necessary to make a contract effective are also applied, as otherwise the fair expectations of a party would be defeated. (Ex. *Nickel Developments v. Safeway* - leasing space to open a supermarket, then keeping it vacant and not terminating to block out competitors). **Implied terms can be breached!**

4.2. Privity

4.2.1. Privity of Contract

Privity of Contract is a special term that refers to the relationship that exists between parties to a contract. 2 parties with privity impose their own rules on each other, so the Courts generally say those rights or obligations should not apply to anyone outside of the contract.

This essentially means that if A and B have a contract, **only A and B can sue each other** - no external party can sue or be sued. Without Privity of Contract, you do not have a legal right to obtain a legal remedy through Contract Law (though you can still sue in Tort Law (and apparently Tort Law was developed as an exception to this rule)).

While this may seem reasonable, there are cases where this rule leads to harsh results. Though a third party may not be signing a contract, they can still be affected by it - and can suffer immensely due to a contract breach. Thus, we have exceptions!

4.2.2. Exceptions to Privity of Contract

4.2.2.1. Novation

Novation terminates the first contract and replaces it with a new contract with similar terms but with the 3rd party to the contract instead of the original, releasing them from the contract. This requires the consent of all parties and the 7 elements of contract formation to be met. Once novation occurs the third party has entered a contract, thus gaining privity and the ability to sue.

4.2.2.2. Vicarious Performance

Vicarious Performance occurs when a 3rd party performs on behalf of a promisor, who **remains responsible for proper performance**. Think of a subcontractor, or employees to a corporation - it is the employee who performs the work on behalf of the corporation, but it is the corporation who is still liable for performance within the realm of Contract law.

So long as the contract doesn't have a "personal performance" clause, the party who needed to perform does not require consent from the other party to subcontract as it "would make no difference" with proper performance. The third party taking over does not face contractual liability wrt the **original** contract, but may still face tort liability, leading to the promising party being liable through vicarious liability. I think the subcontractor can still be sued by the party to perform if they had a contract too.

4.2.2.3. Constructive Trusts

Trusts are arrangements that transfer assets from an owner (called the **settlor**) to an administrator (called the **trustee**) who looks after them for the benefit of another (called the **beneficiary**). For example, if A is a parent to B, they may enlist C as a trustee to look after their wealth while B is still a child. Trusts split equitable and legal ownership - while the legal owner is the trustee, the equitable owner is the beneficiary. The trustee acts as a fiduciary and the equitable owner (**beneficial owner**) can compel the trustee to provide benefits to them/carry out their duties under the **trust agreement**. Here, only the original trust writer and the trustee have a contract, but the beneficiary can still compel performance even though they are a third party.

In the case where there was not an "express" trust written or described in a contract, but a clear notional trustee and notional beneficiary exist, a **constructive trust** (aka resulting trust) can be built as an equitable remedy to force the notional trustee to perform (usually to transfer the assets). However, this requires the original contract to have been irrevocable - the trust must be permanent with no option for the settlor of the trust property to later change their mind.

4.2.2.4. Insurance-Related Contracts

Each province has statutes that allow beneficiaries of an insurance contract to force the insurance company to perform and pay out the contract.

4.2.2.5. Undisclosed Principal

If an agent enters a contract on behalf of a 3rd party (called the undisclosed principal), unknown to the other signing party, the undisclosed principal may sue and be sued. See Agency Law for more info.

4.2.2.6. Contracts Concerning Land

The new owners of land must respect previous rights and obligations outlined in earlier contracts in the public record, even if they aren't a party to it. For instance, a tenant leasing land has a duty to pay rent and maintain the property. The owner of the land can swap and the tenant's duties and lease continue with respect to the new owner.

4.2.3. Exemption Clauses (Principled Exception)

Clauses in a contract that exempt liability can also extend protection to third parties such as agents, employees, and directors of companies. The third party can rely on this if the parties **intended to extend protection** to the third party, and the activities of the third party were **within scope** of the contract generally and the exemption clause in particular.

For instance, as a company, you are allowed to protect your employees, officers, agents, etc, who are vicariously performing for you. You could exclude all liability in Tort and in Contract, or limit liability to some fixed amount. The vicarious performers are technically third parties but still **gain protection** from the contract.

4.2.4. Enurement Clauses

An **enurement clause** extends the rights and benefits to those inheriting from a party, succeeding the party, or taking an assignment from a party. Basically, any "replacements" to a given party get a privity exemption so they can still enforce their inherited rights under the contract; as well as be sued to perform their inherited duties. The usual clause will say the contract "is binding on and for the benefit of parties and their respective heirs, administrators, successors, and assigns" or something like that.

4.3. Assignment

4.3.1. What is Assignment?

Contractual Rights are valuable! They are commercial commodities that can be bought and sold. **Assignment** is one party transferring its **rights** under a contract to a third party. Note that **only rights or benefits can be assigned** - liabilities and obligations are stuck and cannot be transferred.

4.3.2. Parties in Assignment

The **Promisor** is Party 1, who promises to do something. The **Assignor** is Party 2, who assigns their rights under a contract. **Assignee**, Party 3, receives the rights from Party 2. Parties 1 and 2 have a contract, and the assignor's rights are assigned to the assignee.

4.3.3. Choses in Action and Choses in Possesion

- **Choses in Possession** are rights to tangible property that can be possessed physically.
- **Choses in Action** are rights to *intangible* property, like patents, stocks and other contracts. Their value is derived from the fact they can be enforced by action in the courts. For example, the right to enforce a (separate?) contract can be assigned and is a chose in action.

4.3.4. Equitable Assignment

Equitable Assignments are any assignments that do not fully meet the statutory requirements to be legal. Usually, this is when the assignor doesn't give up ALL of their rights, as that is required for it to be a Common Law assignment. Another way for it to be an equitable assignment is if it falls under the *Conveyancing and Law of Property Act* and is not in writing (the act requires it to be in writing).

If Equitable Assignment applies, the assignee may receive the benefit of the contract from the promisor, and a contract breach would impact them. Practically, the original assignor is left as a party to the contract, and thus to enforce the contract **all 3 parties must be included in any legal action**.

4.3.5. Notice to the Promisor

Assignments **require notice** to the promisor, however **consent is not required**. The promisor ignores a notice of assignment at their peril. If they *ignore the notice* and perform for the assignor instead of the assignee, the promisor will be in breach of contract and will **need to perform again**.

4.3.6. Assignee's Title

The assignee can never acquire a better right to sue the promisor than the assignor - in legal terms, their claim is "subject to the equities", and the assignor can only assign what they have. The assignment is also subject to any rights that the promisor had against the assignor *before* they received notice. For example, the equitable right of **set-off** allows a promisor to deduct any debt owed to them by the assignor at the time of assignment. They also have a **right of recission** - apparently the right to cancel/terminate the contract?

4.3.7. Assignments by Operation of Law

In some cases, assignment is statutory and involuntary. When you **die**, any contractual rights to you are assigned to the executor of your will. In **bankruptcy**, all assets, including contractual rights are assigned to a court-appointed trustee in bankruptcy.

4.4. 4 Ways to Discharge Contracts

Contracts are **discharged** when they end - no parties have any further obligations, and notably no party can sue each other anymore.

4.4.1. Discharge by Performance

This is the good ending. Both parties finish performing their obligations (including all implied terms) satisfactorily and the contract is discharged. Yay!

Some contractual terms can survive the completion of a contract, like indemnification provisions, limitation of liability clauses, NDAs, customer privacy, and non-competes. These terms can be extended even after discharge through **survival clauses**.

The notion of **tender of performance** also exists - this is when 1 party attempts to perform. One party may attempt (tend) performance, but the other party refuses to accept it. In this case, the one tending can sue for contract breach. Debtors who tend payment but are unsuccessful are free from liability on interest; but if the payment is refused, the debt isn't extinguished. The legal principle is that the onus is on the debtor to find and pay their creditor.

4.4.2. Discharge by Agreement

This occurs when both parties agree to stop the contract and not perform, in one of a few ways.

4.4.2.1. Waiver

A **waiver** is an agreement not to proceed with the performance of an existing contract, and is also a contract, requiring the 7 elements and so on. As a waiver is a contract, both parties need consideration - thus this can only occur when **neither party has fully performed**. A waiver must be agreed to - you cannot impose a waiver on the other party and proceed to not perform.

4.4.2.2. Substituted Agreements

This occurs when the parties substitute their old agreement with a new one, where the burden to one party is lessened:

- **Material Alteration**: One party may offer money or some other substitute for performance, creating a new arrangement. The discharge of the previous contract is incidental.
- **Accord and Satisfaction**: Similar to Material Alteration but the parties seek to end their existing arrangement and the new arrangement is a means to this end. It is usually seen in out-of-court settlements with some sum of money exchanged.
- **Novation** - The parties agree to terminate the previous contract and replace it with a new one, with either a material change in terms or a change in parties.

4.4.2.3. Contracts that Provide for its Own Dissolution

- **Condition Precedents**: These clauses stipulate that a given uncertain event must occur before the obligation to perform arises (ex. insurance). It can be written in the contract or an oral understanding. The parties are discharged only when the condition precedent becomes impossible to fulfill.

- **Condition Subsequent**: These clauses are the reverse of a condition precedent - these bring a promisor's liability to an end if an uncertain event happens. The termination of liability is a discharge by agreement.
- **Option to Terminate**: These clauses allow a contract to be terminated on condition that the party provides notice to the other party. (ex. employment contracts often give the right to terminate).

4.4.3. Discharge by Operations of Law

4.4.3.1. The Bankruptcy and Insolvency Act

Bankrupt debtors are discharged from all contractual liabilities after the bankruptcy process finishes, but only if they qualify for a certificate stating that the bankruptcy was due to misfortune and not misconduct.

4.4.3.2. Provincial-level Limitations Acts

Debts that are ignored by a creditor for a long time become **statute barred** - the creditor loses the right to sue as the suit was delayed beyond the limitation period in the relevant statute. This bars a right of action, but does not fully discharge it - the claim can be rehabilitated and made enforceable through certain conduct of the promisor…? The textbook was not fully clear on this.

4.4.4. Discharge by Frustration

One party can be discharged for failure to perform if external causes have made performance impossible, pointless, or radically different from what was contemplated by the parties - essentially unpredictable events changing the context enough that performance is impossible or frivolous.

4.4.4.1. History of Frustration

Back in ye olden days, the terms of a contract were absolute - even if it were impossible to perform! This led to many hardships, especially for renters, who were required to keep the property in good repair, making them liable for fire damage, war, etc. One particular case where this happened, *Paradine v. Jane* dates back to 1647!

The courts have now begun to recognize how external actions can cause radically different situations, such as in *Taylor v Caldwell*, which seems to be one of the first cases forming the doctrine of frustration. Paraphrased, they state that "where a contract requires the existence of a person or thing becomes impossible to perform since it ceases to exist, the contract ends."

4.4.4.2. Requirements for Frustration

1. The Frustrating event must have been **unforeseen** when the contract was created
2. The Frustrating event must have been **outside the control of both parties**
3. The Frustrating event must have occurred **after** the contract was made
4. The Frustrating event makes performance **impossible, purposeless, or "radically different"** from what was originally intended by the parties

Note: Impossibility and Purposeless are confusable. According to Wikipedia, "the distinction is that impossibility concerns the **duties** specified in the contract, but frustration of purpose concerns the **reason a party entered** into the contract".

4.4.4.3. Other Caveats to Frustration

4.4.4.3.1. Self-Induced Frustration is Not a Frustrating Event

Self-Induced Frustration is where one party wilfully disables itself from performing a contract, claiming that the contract has been frustrated. Clearly shooting yourself in the foot is not a frustrating event. It is Breach of Contract. Don't footgun yourself.

4.4.4.3.2. It must be IMPOSSIBLE

It is not enough if circumstances change and performance will be more challenging than originally thought - it must be physically impossible to perform the duties outlined in the contract.

4.4.4.4. The Effect of Frustration

When a contract is frustrated, it is **discharged at the moment of the frustrating event**. The courts enforce the contract up to the moment of discharge and **let the loss fall where it lies** - obligations due before the frustrating event remain, and any obligations arising after the event are discharged.

This obviously can have some consequences. If neither party has performed, frustration completely discharges both parties cleanly. However, if either side partially performs, one party could receive a windfall for the completed performance of another party - for example, if they were to be paid after the frustrating event. This is quite unfair and harsh at times.

4.4.4.5. Fixing Unfairness in Frustration

4.4.4.5.1. The Frustrated Contracts Act

This act fixes some of the unfairness in allocating losses.

- For either party, any amount [due/paid] may be [retained/recovered], but no more than the amount [paid/due].
- Save for in BC, Yukon, or SK, if one party performs, yet no money was paid or due, and the other party hasn't received any benefit, the **performing party bears the loss**. Some extra splitting of loss occurs in those 3 jurisdictions.
- For example, say I am to perform work for Prof. Masterman, and our contract gets frustrated. If I had previously collected a deposit from him, I am entitled to an amount corresponding to the cost of my work. If, however, I had not collected any deposit, the 2nd point applies and I bear the loss.

4.4.4.5.2. The Sale of Goods Act

Under Section 8, Where:

- There is an agreement to sell **specific goods** (they must be identified & agreed on at the time of sale)
- The risk has **not been transferred to the buyer** (the seller is still responsible for goods safety)
- The goods have **perished** without any fault from the buyer or seller (this is the frustrating event)

Then the agreement is avoided, or equivalently frustrated.

4.5. Breach of Contract: The 5th Way

The last way for a contract to end is if one of the 2 parties screws up. This allows you to sue*.

4.5.1. Conditions and Warranties - Major and Minor Breaches

Some breaches of contract do not immediately discharge a contract. We need to separate the different types of terms in a contract. A **condition** is an essential term to the contract, while a **warranty** is a non-essential term.

Major Breaches are breaches of the whole contract or an essential term (condition), so that the purpose of the entire contract is defeated. If this happens, the non-breaching party can either discharge the contract (freeing them from liability), then sue for damages; or continue on despite the breach, remaining "ready willing and able to perform", forcing the other side to perform as well. If the latter happens, the non-breaching party is still liable to perform its side of the contract.

Minor Breaches are breaches of non-essential terms of the contract, or breaching an essential term of the contract in a minor way. If this happens, both parties are still bound to the contract, however, the non-breaching party can sue for damages where it has incurred losses due to the breach.

In summary, major breaches may discharge the non-breaching party from performing the contract, but not always. They get to choose whether to discharge or continue. Minor breaches do not discharge.

4.5.2. Ways to Breach Your Contract

4.5.2.1. Express Repudiation

Express Repudiation occurs when 1 party declares to the other that it does not intend to perform as promised, for whatever reason. The promisee can either:

- Terminate the contract immediately, reserving the right to sue for damages.
- Continue to insist on performance and wait for the eventual non-performance (all the while remaining ready and willing to perform). They can still sue if they don't perform by stated time.

Anticipatory Breaches are express repudiations that occur **before the time agreed for performance**. In this case, the non-breaching party either accepts it or insists on performance.

Also note that this breach can only occur after the contract has been formed, which the slides mention.

4.5.2.2. Rendering Performance Impossible

This is self-induced frustration that was mentioned earlier. This can occur either **before** or **when** performance is due.

4.5.2.3. Failing to Perform

Failure to perform can only occur at the time of performance - otherwise, the infringing party can always choose to perform later and still meet their obligations under the contract. Failure to perform also only usually becomes apparent at the time set for performance.

The degree of failure also varies - it could be a partial failure, total failure, or simply grossly inadequate performance. The extent of a failure impacts the types of remedies available to the injured party.

4.5.3. The Doctrine of Substantial Performance

This is not to be confused with "Part Performance", which only applies to contracts for land and in cases where the Statute of Fraud applies.

Substantial Performance is performance that does not comply with the contract's requirements in some minor way. If this happens, the non-breaching party **cannot avoid performance** under the contract (i.e. cannot discharge the contract). They have to perform, but can sue for damages from the inadequate performance. Essentially, trivial performance failures cannot allow obligation avoidance.

4.5.4. Exemption Clauses

As mentioned before, **exemption clauses** exempt a party from liability for failing to perform some or all of its contractual obligations. These are helpful in business to keep legal costs low. Costs are further reduced as contracts can require one party to obtain insurance, for instance in shipping contracts - then the risk assumed as part of an exemption clause gets covered by said insurance.

However, in Standard Form Contracts, the inequality of bargaining power can put risks onto parties who are unwilling or unable to accept the risk. How can they escape the effects of an exemption clause?

4.5.4.1. The Ways the Slides have

As mentioned before, the defences of **Inadequate Notice**, **Contra Proferendum**, **Misrepresentation** and **Non-Est Factum** can help make these clauses not enforecable.

4.5.4.2. The Way the Textbook has

A 3 step approach where:

1. The Court decides whether the clause covers the circumstances in question - an interpretation question, notes to ambiguity, and Contra Proferendum.
2. The Court decides if the clause is an **unconscionable term** - if it is unfair and gives one party an unfair advantage. These terms have inequality in the process of creating the clause, and also an unfair outcome.
3. Any Public Policy and Public Interest considerations. Is there greater harm to the public interest if the offending conduct is protected?

4.6. Remedies to Contract Breach

When a Contract Breach occurs, the Courts will first try to throw money at you; and if that isn't enough, they will use equitable remedy. Also, this is separate from the notion of damages in Tort Law?

4.6.1. Damages

As the *sole* Common Law remedy, damages is an award of money compensating the injured party for the loss caused by the other party's breach of contract - thus it is compensatory, rather than punitive, in nature. The purpose of damages is to place the injured party in the position they would have been in **had the contract been performed**.

4.6.1.1. Cost of Performance VS Economic Loss

What number is used for damages? The plaintiff and defendant could argue that the figure should be based on "cost of performance" - remedial costs required to restore the plaintiff to the required position. The other could argue that the figure should be based on "economic loss" - simply the difference in market value that was caused by the breach. These two estimates can give vastly different figures, especially in *Peevyhouse v. Garland Coal Mining Co.*

In *Peevyhouse* specifically, the courts ruled that they will usually give remedial costs, unless it is "unreasonably/unwarrantly expensive", in which the difference in economic profit is given.

In addition, there is a relatively new case precedent - it aims to ensure higher sums of damages actually get put into restoration work rather than being used for vacation trips to Florida. So, the higher sum of money for restoration work may be awarded if one of the following happens:

1. The Remedial Work was actually performed
2. There is sufficient intention to perform the remedial work, if you were to be compensated
3. You **undertake** in court (pinky promise or go to jail) to do the remedial work

4.6.1.2. Mitigation and Betterment

In addition for the losses to have "flowed from" the breach, damages are only awarded if you show *reasonable* **mitigation** - there was action by the aggravated party to reduce the extent of its loss caused by the breach from the other party. The injured party cannot sit around and do nothing - you must actively take steps and show **reasonable effort to reduce your losses**, or else you will get nothing! (For instance, reselling goods at the best possible price, finding alternative suppliers, or searching for alternative employment in the case of wrongful dismissal)

On a different note, **betterment** caps the amount of damages the plaintiff can receive, stating that the plaintiff **should not be put in a better position** than they were before the breach of contract. For example, depreciation must be considered when assets are damaged or destroyed as part of a breach - they should award damages equal to the fresh sale price minus X years of depreciation expense.

4.6.1.3. Measures of Damages

In most cases, the injured parties are entitled to expectation damages, consequential losses, and general damages. I guess the other damages (reliance, liquidated, nominal, punitive) are more specific or something.

4.6.1.3.1. Expectation Damages

Expectation Damages are amounts awarded based on the **expected profits** or benefits of the contract **at the time of formation** VS their current actual position. This is the usual remedy for a breach of contract. Expectation damages can also be based on **lost opportunity cost** - you lost your chance to make a similar contract with a different promisor and so should be entitled to your profits.

4.6.1.3.2. Consequential Loss

Consequential Losses are secondary losses incurred by the non-breaching party that were **reasonably foreseeable** at contract formation that flowed from the breach. For instance, if the injured party had to shut down business operations, or were unable to fulfill other contractual obligations due to this breach.

4.6.1.3.3. General Damages

Similar to Tort Law, these are damages awarded for non-quantifiable or intangible damages, such as in lost reputation. The courts will decide what award is fair to compensate for these types of damages.

4.6.1.3.4. Reliance Damages

As an alternative to Expectation Damages, **Reliance Damages** are costs of expenditures and wasted effort reasonably made in preparation for performance, essentially returning the party to a pre-contract position. Examples include preparatory research or material for a specific client who breaches that cannot be reused anywhere else.

4.6.1.3.5. Liquidated Damages

Liquidated Damages are amounts agreed on to be paid in damages by a party to a contract if it commits a breach. These are pre-estimated damages that are put in as the breach may not be worth going to court for. These are enforceable if they are accepted and are a **genuine pre-estimation** of the other party's damages.

In contrast, **penalty clauses** are terms specifying an exorbitant amount for breach of contract, aimed to frighten parties into performance. These are not genuine estimations of damages and thus are *not enforceable* in Court. They are quite effective in scaring the party into performance though.

4.6.1.3.6. Nominal Damages

Sometimes, the damages suffered by one party are negligible. However, the Courts still wish to acknowledge the "moral victory" by the plaintiff, so they will give a token sum - dollars or even pennies. They still have to pay the litigation fees though.

4.6.1.3.7. Punitive Damages

Damages aren't supposed to be punishing, but in exceptional circumstances, plaintiffs have been awarded for malicious or bad faith behaviour from the breaching party. So, yeah.

4.6.1.4. Problems in Measuring Damages

It can be hard to measure damages for certain things, such as Mental Anguish, Wrongful Dismissal, and Lost Enjoyment - damages could be awarded if it was reasonably foreseeable at formation. There is also the Cost of Performance v. Economic Loss Evaluation difference causing issues from earlier too.

4.6.2. Equitable Remedies

In some cases, pure monetary damages are not sufficient. This is where the Courts of Equity step in, providing Court orders other than money settlements, for instance being able to order a party to perform the contract!

4.6.2.1. Requirements for an Equitable Remedy

1. Not really a prerequisite, but the Courts are **discretionary** - the court decides if an equitable remedy is required as damages will not fully compensate the loss.
2. The plaintiff must come to court with **clean hands** - they cannot be partially responsible for the damages, or have acted unethically in some way.
3. The plaintiff must take action in a reasonable amount of time - the defendant cannot be misled into thinking no court action will happen against them.
4. No innocent third party can be affected by the equitable intervention.
5. The plaintiff's consideration must also be commensurate with the defendant's promise. (The price of the promise must be fair)

4.6.2.2. Specific Performance

Specific Performance is an order requiring a defendant to do a specific act, usually to complete a transaction or finish their contract. You have to show that **the damage award won't help you** - that for some reason the specific action to take is incomparable monetarily. Apparently, it is almost never granted in employment or personal service contracts - personal skill does not lend itself to an order of specific performance, and the Courts don't want to "supervise" the defendant to make sure they do it.

4.6.2.3. Injunctions

Injunctions are a court order restraining a party from acting in a particular - specifically prohibiting them from committing a contract breach or similar. For this to be an available option, the contract must have a **negative covenant** - a promise not to do something, expressly written or implied logically. This also avoids the "need to supervise" as mentioned in Specific Performance.

4.6.2.3.1. Tests for if you need an Injunction

1. There exists a **serious issue**
2. That will cause **irreparable harm**
3. And the **Balance of Convenience** favours the Moving Party (it is probably better and more convenient to just put the injunction in)

4.6.2.3.2. Types of Injunctions

4.6.2.3.2.1. General Injunctions

This is your default category of injunction. An instant classic!

4.6.2.3.2.2. Interm / Interlocutory Injunctions

Interm Injunctions are temporary injunctions preventing immediate harm from being done, before the full trial of the issue at a later court date.

To be able to get this, you must undertake (pinky promise or jail) that if you don't win the case you will receive damages. You also need to show irreparable harm will be caused without an injunction, and you have to argue your case 100% neutrally as the other party you're injuncting against isn't present when you present your case to the judge.

4.6.2.3.2.3. Mareva Injunctions

Mareva Injunctions, or freezing orders, prevent a defendant from moving any assets they own or control (regardless of where they are and whose name they are under). This is to safeguard a plaintiff's "clear and apparent" legal claims and stop the defendant from loopholing their way out of skimping on the damages they need to pay.

4.6.2.3.2.4. Anton Piller Orders

These court orders provide the right to search premises and seize evidence without prior warning. They are essentially search warrants, but from the Court! The original Anton Piller Order was used to search the premises of an agent stealing trade secrets from Anton Piller, seize the confidential information, and gather evidence of the stealing.

4.6.2.3.3. Quantum Meruit

Quantum Meruit is the amount a person deserves/merits to be paid for goods and services provided to the person requesting them. This claim can arise when "a valuable benefit is conferred at the request of a promisee." It can also be claimed when the non-breaching party has partially performed when the other party breaches the contract. Essentially, it's payment for performance already done when the contract is terminated that has not been compensated for?

This seems to be an exception to the general rule that expectation damages are to apply, and occurs when there is a wrongful termination of the contract, supposedly.

4.6.3. Enforcing Judgments

Judgments are any court order requiring one side to pay the other damages, or perform as part of an equitable remedy. Here, the plaintiff will become the **Judgment Creditor** and the defendant the **Judgment Debtor**. The JD owes money to the JC.

If the JD doesn't willingly comply, the Courts can choose the seize the assets of the JD. The judgment must first be registered with the court, and a writ filed with the Sheriff's office. Then the **execution order** can be made to the Sheriff, who gains authority to **levy execution** and seize and sell assets. (Save for some assets like pensions and annuities).

After the Sheriff acquires assets from the JD, they first take a % for Sheriff's fees, then pay out all secured creditors. After that, the remaining sum is distributed pro rata (proportionally) amongst all the execution creditors.

4.6.3.1. Garnishment Orders

This order to collect forces the JD's employer to retain a portion of JD's wages to give to the JC instead. It can also be collected from your bank account or Accounts Receivable. They are also filed with the Sheriff's office, and the sheriff gets paid before the funds get distributed to execution creditors.

4.7. Odds and Ends

4.7.1. References Exist

A **reference** is simply asking the Courts to make a decision, rather than a full-blown lawsuit. For example, *Ontario Mushroom Growers v. Learie* was a reference to ask the Courts to interpret if mushrooms were a vegetable (and thus if minimum wage law exemptions to vegetable farmers apply).

4.7.2. "Time is of the Essence" Clauses

These clauses emphasize that performance must be completed on time (for example, delivering highly perishable goods on time). The timing becomes material to the terms of the contract - could be a major breach if it wasn't delivered on time!

4.7.3. Failure to Perform and Installments

Inadequate Performance leads the non-breaching party to ask, "Do I end this now, or insist on performance"? This is troubling with installments - partial delivery for the installment now could be annoying, but in the future, they could make up for this deficit!

In this case, the innocent party could terminate and sue, but then see the courts absolve it as a minor breach. Thus the party should consider if:

1. Is there good reason to believe the other performances will be inadequate?
2. Is the expected/actual deficiency to date important relative to the whole performance promised?

If they say yes to both, they may consider themselves freed from liability.

4.7.4. Other Trivia Related to Enforcing Judgements

- Writs filed with the Sheriff do need to be renewed regularly every few years or so to stay current.
- Judgements remain in effect for 21 years.
- The notice of judgment can also be placed at various credit rating bureaus to affect the JD's credit rating and notify others of the outstanding debt.
- An **Examination in Aid of Execution** is basically an examination under oath (appear and don't lie or contempt of court) to figure out where a JD's income and assets are so they can be yoinked. As Prof Masterman says, this is perhaps the worst part of being a lawyer. Apparently, they are allowed annually.

5. The Law of Relationships

5.1. Agency

5.1.1. Definitions

Agency is a relationship between two parties - the **principal** and the **agent**. The agent acts on behalf of the principal to bring third parties into a contractual relationship with the principal.

Think of it as a system of 2 contracts - first, the contract between the principal and the agent detailing agency. The agency then aids the formation of a 2nd contract between the principal and third party. After this 2nd contract, the original agency contract ends (save for continuing agency ig) and the agent drops out of the equation, leaving only the principal-third party contract. This occurs 99% of the time.

There are a few types of agents - **dependent agents**, who act exclusively for 1 principal (ex. insurance agents for their company, employees in general), and **independent agents** who act as an independent business and work for multiple principals at once (ex. lawyers, stockbrokers). The textbook also mentions a **commission agent** who sells stuff on behalf of the principal, compensated through commissions.

5.1.2. Creating an Agency Agreement

5.1.2.1. Through an Agreement

The **Agency Agreement** is the contract between the principal and agent that outlines the relationship. As a contract, all the normal rules of contract formation apply, notably **capacity**. The Statue of Fraud also commonly applies, and performance over a year out requires it to **be in writing**. **Be sure to set out limits on your agent's authority** - if you can subcontract, timing, value of contracts you enter, restrictions on gifting assets, when to ask for permission, scope, etc.

Most commonly the agency is a **power of attorney**, authorizing the agent to sign documents on your behalf. These are important for you to be able to get financial and personal care in case you become incompetent, so you see them commonly as you get old.

5.1.2.2. Implied (Creation by Estoppel)

If the principal essentially allows the agent to behave like their agent, the courts can choose to imply an agency relationship if it is equitable to do so.

5.1.2.3. Ratification

If an agent without a principal or authority (where the principle of apparent authority does not apply), negotiates a contract on the proposed principal's behalf regardless, the principal can choose to later **ratify** the contract as their own, at which point the principal is bound to the contract and thus agency implied. If no ratification occurs, the agent is bound to the contract.

The ratification must be **timely**, of the **entire contract**, requires the principal to **be capable** of entering the contract at the time of formation, and the principal must be **ascertainable** at contract formation (the principal must exist, or be a company in the middle of being born). Conduct also works for ratification.

5.1.3. Duty of the Agent to their Principal

Basically, it's a fiduciary duty with extra caveats.

5.1.3.1. Duty of Compliance

Agency contracts are contracts and so are binding on both parties. Don't breach it. The Principal can sue if the agent acts outside their prescribed authorities

5.1.3.2. Duty to Inform

Agents need to keep their principal informed - the courts have deemed that anything the agent knows, the principal also knows, so you better keep it that way lest you become liable. This applies even if they become incompetent - just the content you would share would change.

5.1.3.3. Duty of Care

The agent must show the duty of care of a reasonable agent in similar circumstances, even without payment. Otherwise, that is negligence.

5.1.3.4. Duty of Personal Performance

The agent is expected to act **personally** - they cannot delegate their work without prior agreement. There are some exceptions though, when the nature of the relationship or trade use implies it is allowed.

For example, banks acting as agents to their customers may require a branch of a different bank to help service them in places they have no branches. If a corporation is an agent, it can only perform through its directors and employees - sub-agents.

As there is only privity between the agent and the principal, if the sub-agent breaches their contract, the principal will sue the agent, who in turn sues the sub-agent for recovery.

5.1.3.5. Duty of Good Faith

As part of the **fiduciary duty**, the agent must be loyal and act in the best interest of the principal, keeping their interests at the top of mind. No pocketing money or not taking better prices!

5.1.4. Duties of the Principal to the Agent

5.1.4.1. Pay them

Can be by commission, when the agent has introduced a prospective client who is "ready, willing and able to close the deal"; or upon closing of the sale.

Pay your workers for contracts to show consideration. If there is no express term, the agent is entitled to a reasonable fee as per the industry (quantum meruit in action!)

5.1.4.2. Cover expenses

There is an implied term that the principal will also reimburse all reasonable expenses when the agent **acts within the scope of their authority**.

There is no obligation to pay for unauthorized acts unless they are ratified.

5.1.5. Agent Authority

Authority is needed for the agent to be able to exit the picture when it comes to liability. So, what is it?

5.1.5.1. Actual Authority

Actual Authority is given **expressly** - orally or in writing in the agency agreement or subsequent documents/instructions; or is given impliedly - through implied terms, conduct, or commercial usage.

5.1.5.2. Apparent/Ostensible Authority

Apparent Authority is the authority a third party is entitled to assume the agent they are dealing with possesses. The authority is not real, but can be obtained through:

- Past manner of transacting business or trade custom: the third party maybe isn't aware the agent's agency no longer exists or does not apply here; or isn't aware they don't do things a specific way.
- **Holding out**: representing by words or conduct that a person is an agent of yours, or has particular authority. So the principal cannot deny liability in this case.

The test for Apparent Authority is "Should a reasonable third party have been aware of the agent's lack of authority, or at least been thought it was *sus*? Or, barring that, is it reasonable to assume the agency had the authority, given the business they are engaged in?".

If an agent has apparent authority, the principal is **still bound by the contract** even if they don't have actual authority. (In which the principal will sue the agent). Barring that, as a third party, make sure to do your due diligence on an agent's authority before doing business!

5.1.6. Rights and Liabilities of the Principal and Agent to the Third Part

5.1.6.1. When the Principal is Alone Liable

This happens when the relationship is functional. The agent acts with real or apparent authority, and the agent makes it clear they act for a principal (even if they did not disclose the exact identity of the principal!). If both of the above occur, the agent is no longer liable.

The principal becomes liable for payment and delivery **to the 3rd party** and not just their agent - if the agent, acting as deliverer, elopes with the money or goods, the principal remains liable to the 3rd party (and should sue the agent, presumably)

5.1.6.2. When the Agent is Alone Liable

If the agent represents themselves to be the principal (either failing to ratify or forgetting to mention they are an agent), they are fully liable and the principal has no rights or liabilities under the contract.

5.1.6.3. When either could be Liable

If the third party figures out that the principal-agent relationship exists, and the agent didn't make it apparent they were an agent, the third party can choose to sue either the agent or principal, but not both. If the principal is not known at that point only the agent can really be sued.

If the agent is successfully sued, the principal will have no liability. If the existence of a principal becomes clear during trial, the third party can choose to discontinue the action against the agent and instead go after the principal.

5.1.7. Rights of the Undisclosed Principal

An undisclosed principal has the right to enforce the contract when they can show the contract was made with their authority, and the authority was **real and not apparent** - if it was with apparent authority, they cannot ratify and enforce the contract at all.

There is also an exception that undisclosed principals cannot enforce contracts that are "essentially personal in nature".

5.1.8. Tort Liabilities

If an agent commits a tort, **both are jointly liable**. This is vicarious liability just like an employee or independent contractor.

For example, if an agent commits fraudulent misrepresentation (aka deceit), the 3rd party has the right to rescind the contract and sue both principal and agent. The principal has the right against the agent for the deceit, and the agent can also be held liable for the fraudulent misrepresentation.

5.1.9. Breach of Warranty of Authority

This is a **tort** - where a person falsely represents that they had the authority to contract on behalf of the principal. This can be innocent (when the principal went bankrupt, died, or lost capacity) or fradulent. The third party can bring an action against the agent for this tort to try to return all parties to the position they would be in if the misrepresentation did not occur.

The third party can sue for breach of warranty of authority when the agent had no real or apparent authority, as well as no ratification. **No contracts are formed** between the third party and the principal (due to lack of capacity) nor the agent (as that's how agency works), which is why this tort exists. The third party will also have an action of deceit against a fraudulent agent; and an action in negligent misrepresentation where the agent negligently misrepresents their authority.

5.1.10. Termination of an Agency Relationship

Termination can occur in one of the following ways:

- An end time specified in the agency contract itself
- Completion of the project for which the agency was formed
- Either party can give notice that they wish to terminate it and it will
- Either the principal or agent goes insane or d i e s
- The principal goes bankrupt
- An event occurs that makes performance of the agency agreement impossible (frustration?)

If no fixed time is specified, it is implied the agency agreement is terminated with one side giving reasonable notice to the other. However, if a time is set, early withdrawal is a breach of contract.

If the relationship is terminated with the principal dying, going insane, or going bankrupt, they should bring the termination to the attention of all third parties who are likely affected, as a precaution.

5.2. Franchise

Franchising and Agency can appear to have commonalities, allowing business to grow faster, and having a principal delegate work to someone else to their partial benefit. However, in law, these two relationships are different - franchisees are not in an agency relationship with the franchisor.

5.2.1. Definitions

The franchise relationship is contractual in nature, with the **franchisor** (the big guy) granting a license to the **franchisee** (the little guy), who pays for the license and operates the business independently, using its name and trademark in return for franchise fees.

This is a very special business relationship, completely determined by contract. It is **not a fiduciary relationship**, but there is a duty of good faith between the parties - they must be open, honest, and not misleading when interacting with each other.

5.2.2. Pros and Cons to Franchising

Pros	**Cons**
Marketing is covered for you	Limits on your creativity and autonomy
Free Goodwill (reputation)	Expensive. Royalties and Entering is $$$$$$$$
Training Support for your employees (nice)	Contracts are time limited. They can not renew.
Opportunities to Expand	No control over important business decisions
Lower Business Risks	Forced Supplier Lock In
	No Exclusive Territory Rights in cases

5.2.3. What's in the Franchise Contract

The **franchise agreement** is an agreement where the franchisor grants the franchisee a right to market the franchisor's products. It usually includes:

- **Consideration of the Parties**: Opening fees and royalties; trademarks and business practices.
- **Conduct of the Business**: How the business must run and look, be located, and what is sold, etc.
- **Termination of the Agreement**: usually requires franchisor consent to protect the franchisor.
- **Restrictive Covenants**: Limits on either party - exclusive territories, non-competes, etc.
- **Intellectual Property Rights**: Trademarks & business processes cannot be copied or misused.

5.2.4. The Arthur Wishart Act

As the relationship is contractual and there is minimal bargaining power for the franchisee, there is some law governing franchise agreements/relationships, mainly/only the **Arthur Wishart Act**.

- **Right to Disclose**: Within 14 days of the agreement, the franchisor should give a full financial disclosure of the franchise's economics. If not, the franchisee has the right to rescind within 2 years and then can be entitled to compensation if there is misrepresentation.
- **Fair Dealing**: The two parties owe a duty of good faith to each other, in performance and enforcement. But this tends to be a fairly weak defense with big business…
- **Right to Associate**: Franchisees are allowed to "compare notes" with each other and join an association amongst other franchisees, kinda like a union. Franchisors cannot prevent this nor penalize franchisees for doing so.

5.3. Employment

An **employment contract** outlines a contractual relationship where one party (the employer) is authorized to direct and control the work of another party (the employee). These contracts can be for an indefinite period (terminating only via resignation or firing) or be for a fixed period. They are governed by Statute (notably the *Employment Standards Act*), Labour Unions, and Common Law.

5.3.1. Independent Contractors and Employees

Whether you are an employee or an independent contractor matters a lot with employment - notably not creating the employer-employee relationship (so no suing for wrongful dismissal).

In general, it depends on how **integrated** you are into the workspace - more integrated = employee:

- An employee might be supervised and have control over workers, while contractors control their hours and own their tools to get the job done
- The duration, nature, and intention of contract formation can clue you in. Method of payment also matters - especially if it is a fixed wage or something.
- Employees could gain employment benefits, while contractors have exclusivity (?)
- Contractors bear the risk of loss when trying to profit, use their own time, and assume delivery of the result. Also, fewer/no taxes are levied against their paychecks and are not in pension plans.

5.3.2. Relevant Torts and Liability Stuff

5.3.2.1. Vicarious Performance

In contract law, although the employee may not be a signing party, their employer is. The employer (the company) is liable for breach of contract if their subcontractors (their employees) perform badly.

5.3.2.2. Vicarious Liability

The employer is jointly liable for any tort actions committed by employees. This also applies to independent contractors too! You cannot escape tort law it would seem.

5.3.2.3. Negligent Hiring

These are claims by customers or other employees against the employer for hiring someone else negligently. This tort is advantageous over vicarious liability as the “own frolick rule” doesn’t apply. Occurs when you hire someone without doing suitable tests for capability and damages occur.

5.3.2.4. Negligent Retention

This is a claim that the employer was negligent in retaining or supervising the employee. They later figured out you had issues yet kept you around. It differs from negligent hiring wrt when the issue was discovered - the issues were with the employee from the start for negligent hiring.

5.3.2.5. Wrongful Referral

Negligently referring someone to a professional who is not qualified. Usually, it is only a cause of concern if the employees refer **on behalf of the company** - personal referrals are fine, companies are just terrified of the potential legal consequence, enough to barely put anything down if they do write a referral. If they exaggerate, the other party finds out, and damages occur - the company could be liable!

5.3.3. Duties of the Parties to each other

The employee has a duty to obey (no insubordination), a duty to exercise skill and care in work, and a duty of good faith and fidelity (loyalty?) while employed. In turn, the employer has a duty to PAY.

5.3.4. *Wallace v. United Grain Growers*

This is a landmark case ruling underpinning Employment law. Wallace, a top salesperson at United Grain Growers, despite being assured job security till 65, was fired without explanation in 1986, and in a humiliating way apparently. Wallace sued for emotional distress and wrongful dismissal. The courts eventually ruled in favour of Wallace.

Before, the courts were pretty limited in when they said employers had a reason to fire. After *Wallace*, they were even more strict and read the reasons very narrowly. They recognized that employees needed protection in society due to the uneven bargaining power with employers and moved accordingly. Compensation needed for firing someone increased, and employers need to act in good faith when firing, lest they accrue extra ***Wallace* damages** in addition to wrongful dismissal damages.

The case also establishes a requirement of an independent actionable wrong (like a separate breach of duty of good faith in this situation?) for damages for mental distress to be awarded. Even if it falls short of this requirement, the notice period can be extended.

There are also now **punitive damages** if the firing was "sufficiently harsh, vindictive, reprehensible and malicious". One of the rare cases where punitive damages were given out over a contract.

5.3.5. Termination of Contracts (with Reasonable Notice)

Employment contracts are usually continuous in nature, so the usual method to discharge them is to provide some form of notice. Generally, the notice period required is governed by statutory and common law and is based on position and length of employment.

The rule is to be **reasonable** - how long will it take for the employee to find a new **suitable** job given their education, experience, and age; or how long it will take for the employer to find a new employee or fill the position internally (generally, 2 weeks notice).

Payment can also be given in lieu of notice - notice is either time or money. The money sum is the amount of compensation the employee would have earned during the reasonable notice period.

5.3.5.1. Amount of Notice Required

The ***Employment Standards Act*** often sets minimum requirements on notice. In addition, **trade practice** also often suggests longer minimums as the norm for each industry. Common law also dictates **reasonable notice** - time needed for the employee to find suitable alternative employment.

Trade Practice	Duration of Employment	Intention at Contract Formation
Frequency of Pay	Level of Position	

The above factors also determine the reasonable notice period. For instance, the contract could have clauses detailing compensation for termination for intention at contract formation; and high-level positions have fewer alternative openings, and so higher notice.

5.3.6. Termination of Contracts (Dismissal with Cause)

An employer **does not need to give notice** if they choose to **dismiss with cause** - when the employee's conduct amounts to a breach of contract, the employer can dismiss without notice and has no further obligations. Common law has classified a few types of breaches that are sufficient for this:

5.3.6.1. Misconduct

This is any crime or bad behaviour the employee commits either in or outside their employment. If either the employer's **reputation is put into disrepute**, other employees are affected, or the act causes direct financial loss, the employee can be dismissed at once. This does mean the employee does not need to cause direct financial harm - it is enough for the employer to no longer be able to trust them. Code of Conduct violations also count provided the employee is aware of it.

For instance, serious theft (not pilfering though), misappropriation of funds, or breach of the sexual harassment policy are all grounds for dismissal.

5.3.6.2. Insubordination

Wilfully disobeying a **reasonable and lawful** request from your superiors, makes sense.

5.3.6.3. Incompetence

All contracts will have express or implicit terms about your competence. For example, express terms of skill can be items on your resume, application, or interview that you say you possess (these are part of the contract! You both agree that you have these skills). Implicit terms of skill can include how you applied for the job in the first place - implicitly saying you have those certain needed skills.

There is also the **doctrine of condonation** - condoning incompetence (not firing them early/giving positive ratings) makes claims for dismissal increasingly difficult. You can't go back on your word that you are ok with it! Employers must also make an effort to **remedy incompetence** before dismissal.

5.3.6.4. Illness

If a permanent disability or constantly recurring illness inhibits the employee's ability to perform their work, the employer can consider the contract discharged. However, it is discharged **by frustration**, not breach - so the employer cannot recover damages from the employee. The employment of a person with disabilities can only be discharged after all possible ways to accommodate the disability are exhausted. EI and disability insurance help cover these issues.

5.3.6.5. How to Dismiss for Cause

Post-Wallace, employers should be very careful in how employees are dismissed:

- There needs to be **clear warnings** to the employee - multiple heads up, maybe with increasing consequences, along with opportunities for the employee to improve their behaviour.
- While they are still employed, they need to provide adequate training and assistance to rectify any shortcomings. Things like internal courses and such - employers must provide support.
- They should document the activities of both the employer and the employee, as they bear the burden of proof in the Courts.

Thanks to Wallace, employers must assist struggling employees and dismiss them with respect.

5.3.7. Wrongful Dismissal

This is a cause of action where an employee claims to have been wrongfully dismissed.

The only way an employer can defend this action is to say that either:

- They did have a cause for dismissal (which works even if a cause was discovered afterward)
- They were dismissed with adequate notice or payment in lieu of notice.

Employers recently have been very good at not being sued for this - they don't ask you to agree to the termination immediately to prevent undue influence and/or duress, and provide just enough compensation to make suing less favourable compared to the instant and no-risk compensation.

5.3.7.1. Constructive Dismissal is Wrongful Dismissal

Constructive Dismissal occurs when there is a substantial change to an employee's job that amounts to termination of the existing employment. This could be a demotion, geographic transfer, change in pay structure, etc. If done without notice this can constitute a wrongful dismissal.

5.3.7.2. Measuring Damages from Wrongful Dismissal

Damages aim to return the injured party to the position they would have been if the contract was complete - in this case, they would return the employee to a position where they were dismissed with notice. The damages here come from 3 sources:

1. **Legislative Requirements** from the Employment Standards Act have bare minimum pay. This applies only if the employer has a total payroll of over $2.5 million (aka big shots)
2. **Common Law Damages** for Wrongful Dismissal are estimates from the Court - what is reasonable notice for you to find suitable alternative employment? This figure is multiplied by the value of your employer's pay and all their fringe benefits.
3. **Punitive Damages** - also known as Wallace damages until recently, they occur from breaches of the implied term of good faith from firing.

Damages can also be levied for mental anguish (see *Wallace*), pain and suffering.

5.3.7.3. Damage Mitigation

Remember, as in all Contract cases, the Plaintiff must mitigate damages. This means job hunting!

The employee must try to obtain **reasonably comparable** employment, or else the damages award can be reduced. If the employee successfully mitigates, they will receive the difference between the Notice requirement and actual income paid during the notice period as damages, as well as special damages associated with the job hunt.

5.3.7.4. Mental Anguish and Damages

Courts generally do not consider hurt feelings as it is hard to assess the intangible "pain and suffering" and "humiliation", although there is recognition that while employment contracts are economic in nature, there is a human element as well.

I'm not sure what this builds to… perhaps this is why we have Wallace damages, which provide damages for mental anguish?

5.3.8. Employee Welfare Legislation - Worker's Compensation (WSIB)

While the common law recognized employers can be liable for injuries sustained during employment, it was notoriously hard to recover damages, with the employers having many defenses and employee dependants having a hard time showing sufficient levels of proof.

Each of the provinces replaced the common-law action with a **no-fault compensation scheme**. This only applies to certain businesses where the risk of injury is higher. Employers are required to pay into the fund, and injured employees can apply to get compensation through the fund. Contributory negligence, negligence, and assumed risk do not apply - the only way the claim fails is if the accident was shown to be caused by the employee's willful misconduct. An exception to the exception is if the accident causes death or permanent disability, to which the employee and/or defendants will be able to recover.

5.4. Secured Transactions

5.4.1. Definitions

A **secured transaction** generally is a loan or creditor where the lender acquires a "security" interest in collateral owned by the borrower. The lender is entitled to foreclose on or repossess the collateral in the event of a borrower's default. Think of a collateralized loan.

In general, there are 3 ways to create a secured transaction:

- Contractual: make a contract for it
- Statutory: for example, not paying your mechanic allows them to repossess your car
- Common Law: notably **bailment** - the rightful possession of someone else's property with the understanding it will be returned to the rightful owner later; or that they will follow the instructions of the rightful owners when asked. Basically borrowing.

In these relationships, the **creditor** is the loaner, and the **debtor** is the borrower.

A **collateral security** is an interest in the property of a debtor that gives a creditor the right to seize and sell it in the event of non-payment of debt. It is this collateral security that is given to the creditor.

5.4.2. Creditor Statuses & Priority

5.4.2.1. Secured Creditors

Secured Creditors have top priority when it comes to collection. They have the right to take possession of and sell specific assets in satisfaction of a debt. They **do not need a court judgment to seize assets**. They arise through agreements, statutory or common law rights.

5.4.2.2. Judgement Creditors

Judgement Creditors have obtained a judgment through the courts. They can obtain an execution order or writ authorizing the seizure and sale of certain assets by the sheriff. They also get examinations to discover where assets are and can garnish wages and so on.

5.4.2.3. Unsecured/General Creditors

Unsecured Creditors are creditors who have no security interest in any of the debtor's property. No security means no right to seize any of the assets. They are paid out last.

5.4.2.4. An Example

Say the debtor pays $200k to get a mortgage on a house worth $1m. The bank loans out $800k. Now, they are a secured creditor for the loan, interest, and costs. Their security interest is the house.

Say the debtor defaults with $700k in outstanding mortgage with interest and costs. They also owe judgment creditors $125k and unsecured creditors $60k. The house is seized and sold for $750k, after subtracting the **cost of collecting** from the sheriff.

Secured creditors get all $700k of their debt collected, plus interest and costs. Judgment creditors collect the remaining $50k, leaving a $75k deficit plus interest and costs. Unsecured creditors get nothing, and the debtor gets nothing.

5.4.2.5. Security in Bankruptcy

When you go bankrupt, the order of priority is slightly different:

1. Secured Creditors, but of course
2. Reasonable funeral and testamentary expenses, if you happened to die in bankruptcy
3. Administration costs, including the expenses and fees of the trustee-in-bankruptcy - they must be paid for their work, and it's not like it's coming out of their own pocket
4. **Preferred creditors** - unsecured creditors who are preferred by legislation, like employee claims, spouse claims, child support, municipal taxes, and landlord claims
5. All other unsecured creditors.

5.4.3. Real and Personal Property

Real Property is land and anything **permanently affixed** to it, called **fixtures**. Land stretches from the heavens to the core of the Earth, and fixtures are determined by how difficult it would be to move it. **Personal Property** is basically anything that isn't real property.

5.4.4. Motivation for Secured Transactions

Creditors want to take a security interest whenever it is practical to do so. Here are some factors:

- It provides incentives to the debtor to pay, to prevent their assets from being seized
- The reduced risk allows them to sell to high-risk creditors while balancing their risk (more profit)
- Goods that maintain their value over time are usually better as a security against a loan
- Security interests work better for long-term debts, reducing long-term risk

Also a Business Risk Management thing - if credit amounts are small, it might be better to simply "write-off" a small percent of the bad debt than enforce the security. What, too expensive to collect?

5.4.5. Types of Security Interest

5.4.5.1. Conditional Sales Contracts

These occur when a sale is agreed to, but the legal transfer of ownership is delayed until the buyer completes scheduled payments. Think of payment plans for a fridge. You get equitable title in possessing the good, but true ownership remains with the creditor.

The creditor has the **right to repossess** the goods if the debtor defaults, as well as sue for any balance outstanding after said goods are resold (ex. loss from depreciation). They are also a secured creditor and have priority. However, they are **not entitled to use force** - the conditional seller must deal with the debtor with **fair dealing**, like giving 2 weeks notice before seizure. These contracts are often sold/ assigned to third parties who specifically collect installments and administer the contracts.

5.4.5.2. Chattel Mortgages

Chattel mortgages are mortgages on personal property, between the **mortgagor** (debtor) and the **mortgagee** (creditor). They arise in 1 of two ways:

- The Mortgagor purchases an article of property and the vendor "takes back" a mortgage on the article sold. Title is transferred to the buyer with possession, and they are immediately charged with a debt to the buyer, who is the mortgagee.
- The mortgagor already owns the article, giving the mortgagee a mortgage against it to secure a debt. For instance, mortgaging it to a bank to pay for the article being mortgaged or some other different purchase.

Chattel mortgages are also commonly seen when a building is sold with its equipment and furnishings. 2 different mortgages would be taken out in exchange for a loan - a real estate mortgage for the real property and land, and an additional Chattel mortgage on all the equipment.

5.4.5.2.1. After-Acquired Property

Chattel mortgages on **after-acquired property** also exist, which is property acquired by the debtor after the debt is incurred. This is property that is non-existent at mortgage creation, which may include inventory. This is obviously a problem - who will buy your stuff if the bank has a right to repossess it?

The solution is that the mortgage does not transfer title to specific goods to the creditor, allowing purchasers to obtain good title in ordinary business. The creditor holds **suspended priority** over other creditors - meaning the rights of the secured creditor only kick in when they default. TLDR: It's not actually a problem - the seizures only happen after you default on your mortgage.

5.4.5.3. Floating Charges

A **floating charge** is a form of mortgage on all assets of a corporation other than those already charged. You'd take out a normal mortgage, a Chattel mortgage, and then floating charges.

5.4.5.4. Pledges

These are transfers of an asset from a debtor to a creditor to secure repayment of a debt. Think of pawn shop loans - you pawn something for money, securing your eventual repayment of that money.

5.4.5.5. Assignment of Book Debts

Through contract assignment, you can turn your accounts receivable into security interests.

5.4.6. PPSAs

Personal Property Security Act(s) are **provincial level acts** that generally cover the creation, perfection, and registration of everything that creates security interests - anything mentioned above, leases, consignments intended as security, and other less common forms.

The fundamental goals of PPSA are to:

1. Define and Standardize remedies a secured party has against a defaulting debtor
2. Create a system of registration to record and give notice of all secured interests
3. Define and set priorities between secured creditors and general creditors

5.4.6.1. Creation, Attachment, Perfection

Under PPSA, a security interest is **created** when the creditor and debtor enter some form of agreement or contract, under the normal 7 elements of contract rules. It's a contract that does the thing, ok?

Attachment is the moment in time when a debtor's property becomes subject to a security interest. This occurs when the security agreement is performed by both parties - value for the secured interest is given, the debtor had acquired a right to the interest beforehand, and the 2 parties approve the contract.

Perfection is the moment in time when a creditor's security interest becomes protected by law. This occurs when the secured party **takes possession**, OR once the interest is **registered with PPSA**.

5.4.6.2. Priority and Competing Interests

If 2 people have security over the same assets, the **first to register/perfect** their interest gets priority. The other person can still become a judgment creditor and sue - they just lose their right to the secured property. There is also special priority for **purchase-money security interests (PMSI)** - interests from when goods purchased by the debtor are charged as security as a loan to enable those goods to be bought. This is in place to get around floating charge security interests that may otherwise stall a business from being able to obtain new credit to finance purchases and unstuck itself. (Lest everything they buy becomes part of the floating charge and gets immediately taken lol)

5.4.6.3. Effects on Purchasers

1. **Possession and Ownership are separated**, which can mislead third parties and subsequent purchasers. Thus PPSA requires all goods that are security interests but in possession of the debtor to be registered, so go check.
2. After registration, a properly registered security interest **gives priority against innocent third parties** - as they are now deemed to have notice of the charge.
3. There is an exception for **good faith purchasers** - some provinces exempt good faith purchases of small value goods under $1000, as well as goods sold/leased in the ordinary course of business.

5.4.6.4. In Practice, Who Registers?

Low-valued retailers are unlikely to register, as it may not be worth the effort to register, sue and recover. However, manufacturers and wholesalers in B2B may register since businesses have higher risk and they want to maintain their priority. **Remember to maintain perfection if there are any changes to terms, or if it expires**.

5.4.6.5. Other Conflicting Priorities

Conflicts can still arise from interprovincial disputes, security interests outside of PPSA, and federal legislation outside of PPSA, like the Bank Act. Just be aware of these, I guess.

5.4.7. Intangible Property

Intangible Property are personal items of value that cannot be touched or physically held, like book debt, copyrights, patents, digital assets, etc. Can be owned by either individuals or corporations.

These can work as secured interests - assigning book debt creates a security interest in the debtor's accounts receivable, although, unlike true assignment of contractual rights, the assignment only occurs on default; Investment property (like stocks and futures contracts) gets special treatment under PPSA - they can be perfected by the creditor simply having "control" of the investment property, rather than physical ownership, as usually these are held in banks or other intermediaries. Priority goes to the creditor who first obtains control. Interests perfected by control get priority over registration.

5.5. Bonus Facts

5.5.1. Agent Criminal Liability

Agents can be criminally liable! There is this one harrowing case where the principal was an elderly widowed man and the agent (the next door neighbour's kid) gave himself the man's savings and put him in a nursing home where he was badly treated since he couldn't afford services at all. He got charged with fraud through an agency contract.

5.5.2. Why is Undisclosed Principal Allowed

Why do we let agents say, "I'm working for someone, but who it is is secret :3". This is allowed since disclosing the principal's identity might lead to higher prices, such as in the case of developers trying to accrue neighbouring plots of land to build a large thing on it.

5.5.3. Tim Hortons

Apparently, Tim Hortons always seems to have various lawsuits related to franchise lawsuits. Franchisees sue them a lot of the time and then due to the contractual nature of franchising and Tim Horton's coffers, they probably win. nice

5.5.4. Union Shops

A union shop is somewhere where all employees must be in a labour union to be hired. This means that their contracts may not be governed by common law? Since they bargained those rights away, ig.

5.5.5. Being Laid Off

Employers cannot fire someone during adverse economic conditions - even an express agreement in the contract to forfeit this protection is ineffective as it is in statute. Instead, some statutes allow for **lay-offs** - temporary dismissals with intent to rehire in the future, up to 3 months.

5.5.6. Powerful Bailments

Bailments changed a lot from what it was before - the burden of proof was much lower (just show you're in a bailment relationship and the defendant breached their standard of care), the duty of care was a lot higher (basically strict liability), and there was even a right to leave - after some time you could just sell the property? Or something? It seems to have tamed now.

5.5.7. Agreement to Award Priority

It is possible to agree to award priority over a secured interest to another party. This usually happens when a group of creditors decide internally their priority and lend as a group and they goofed up the priority order in some way.

6. The Law of Business and IP and Others

6.1. Sole Proprietorships and Partnerships (but mostly partnerships)

Say it together with me! Sole proprietorships! Partnerships! Corporations!

6.1.1. Sole Proprietorships

Sole Proprietorships are unincorporated businesses owned by a **single** individual, who bears all the pros and cons of the business. The individual is sued in their name. Business income is earned in their own name, and is taxed at the individual marginal tax rate.

6.1.1.1. Registration

There are about 44,000 registered sole proprietorships in Ontario, registered through the *Business Names Act*. You only have to register if you don't operate in the actual name of the individual - registration doesn't change liability but you just gotta.

6.1.1.2. Pros and Cons

While very simple and not requiring registration at all in most cases (simply start your business!), you are subjected to the higher personal income tax rates, and have **personal liability** for all debts which can even transfer onto your estate after you die!

6.1.2. Partnerships

Fully defined by the 45-page "readable" *Partnership Act*, **Partnerships** are relationships that exist between persons carrying on a business in common, aiming to profit. There are a few flavours:

6.1.3. General Partnerships

A general partnership is automatically created if 2 or more people:

1. Are **carrying on** (continuously performing stuff for) a **business**
2. The business performed is **in common**
3. The business has a **view to profit** (charity and non-profits can't be partnerships)

However, in more formal business settings, there is usually a **partnership agreement** that sets out the terms of the partnership, which can be fully decided by the parties, rather than being bound by statute that dictates corporate structure, as seen in corporations.

6.1.3.1. Legal Nature

6.1.3.1.1. Continuing Nature

General Partnerships have **no independent existence**. It merely represents the joint rights and duties of all the partners together. Thus, every time a new partner is added, or another dies or leaves, the partnership is terminated; and another new partnership is created in its place.

6.1.3.1.2. Partnership Property

Though having no independent existence, partnerships **can still own property** distinct from the individual partners. The individual partners don't own the property, instead having an interest in it.

6.1.3.1.3. Liability (to Creditors)

If there is a liability (debt) to creditors of the partnership, they first obtain assets of the partnership, then take assets of individual partners.

6.1.3.1.4. Legal Liability

Partnerships are treated like separate entities, and a partnership's name can be used in a suit without naming partners as plaintiffs. Individual partners are responsible for paying the judgment.

6.1.3.2. Creating a Partnership

As mentioned earlier, partnerships come into existence through agreement, express or implied; though it is a good idea to create a **partnership agreement** (get a lawyer to help too). There is also generally no formal requirement for registration, though some provinces require the filing of a declaration, providing info about the partnership, partners, and any changes.

6.1.3.3. Contractual Liability of a Partner

Based on the principles of agency (every partner is an agent to the partnership) and privity of contract, every partner is unlimitedly and **jointly liable** for the obligations of the partnership - all of them are personally liable. Choose your partners carefully as you will be liable for whatever they do.

6.1.3.3.1. Timing and Apparent Partners

Under **pre-partner liability**, a new partner does not suddenly become liable for the previous actions of the partnership; and similarly under **post-partner liability** a partner who retires does not stop being liable for debts or obligations incurred while they were a partner. The only escape is through novation with the remaining partners and the creditors.

Apparent Partners are similar to the concept of apparent authority in agency - if someone appears to be a partner of the firm, they will be liable as if they are one. This also applies to retired partners whose names appear on the firm.

6.1.3.4. Tort Liability and Breach of Trust

Firms are also liable for "any wrongful act or omission of any partner acting in the ordinary course of business of the firm". Thus **all partners are jointly liable** for injuries or damages caused by any single partner during the course of business. Pick friends wisely!

6.1.3.5. The Relationship Between Partners

In addition to what is outlined in the partnership agreement, there are some extra implied terms in statute, and ruling from fiduciary duty.

6.1.3.5.1. Implied Terms Through the *Partnership Act*

1. **Partnership Property**: all property, as well as rights and interests to property, that is brought into the partnership's accounts for doing business is **partnership property** and must be held and applied by the partners exclusively for the partnership. No private use of partnership property!
2. **Financial Arrangements**:

- (a) All partners **share equally** in the capital and profits, as well as share the loss.
- (b) If a partner incurs personal expenses or liabilities doing business, they must be paid back.

- (c) They aren't entitled to interest on their contributed capital "before determination of profits". So, if the agreement pays "interest" on a partner's contributed capital, it is not counted as an expense for the firm - it is an appropriation of profits.
- (d) No partner is entitled to enumeration for acting in the partnership business.

3. **Conduct of Business**:

- (a) All partners may take part in management of the partnership business
- (b) No change can be made to the nature of the partnership without **consensus**; however, changes to ordinary matters only need a **majority**
- (c) Books and records of the partnership are to be kept at the place of business so all partners can access and inspect a copy.

4. **Membership**:

- (a) New partners can only be introduced with the consent of all existing partners
- (b) You cannot assign your share of profits in the partnership in a way that "permits the assignee to interfere with the partnership".

6.1.3.5.2. Fiduciary Duties

Essentially, the "fiduciary obligations" are **equality, consentualism, and utmost good faith**. Here are some specific duties (that cannot be altered by the agreement):

- **Information**: All partners must have true accounts and full information on all things affecting the partnership. Equality in that no partner is excluded.
- **Secret Benefits**: All partners must tell each other about any benefit derived by them without the consent of the other partners from any transaction involving the partnership's assets.
- **Duty to not compete**: Don't compete with your own partnership.

6.1.3.6. Termination and Dissolution

Termination can be specified under the agreement, but the default rules under statute say that this occurs **by notice or expiry** (telling you want out/expiry of a fixed term), **by death or insolvency** (someone dies or goes bankrupt), or through **Dissolution by Law** (a partner is mentally incompetent, permanently incapable, guilty of conduct that will harm business, breached an agreement; or where it is just and equitable to dissolve)

When the Partnership dissolves, its assets are used to pay out debts and liabilities to the firm's creditors, and the remaining is distributed proportionally to partners.

6.1.4. Limited Partnerships

A unicorn in the partnership space, these are guided by the *Limited Partnerships Act*. There are 2 classes of partners: **general partners** who have unlimited personal liability, and **limited partners** who have liability limited to the amount invested, but **cannot actively manage the partnership**, kinda like a shareholder. (there is 1+ GP and 1+ LP as well). LPs also have strong restrictions on when they can take their money back out (6 months notice & full consensus??) so it's a bit sus to be an LP.

6.1.5. Limited Liability Partnerships

A fairly new invention to cover businesses that can't incorporate (like accountant/lawyer firms), these partnerships stipulate that while limited partners are liable for their own negligent actions (or negligence in anyone they control or supervise), **no one else is personally liable**. The LLP as a whole is liable, but the liability stops before it gets personal. However, this only applies to negligence - nothing changes for tort/contractual liability. LPs and LLPs are completely different, btw.

6.1.6. Joint Ventures

Joint Ventures are agreements between 2+ parties to collaborate on managing a **specific project**, sharing the work and profits. These are not partnerships due to the lack of continued business and other provisions, but can be determined to be one in court?

Legally, these are contractual and sometimes are called **contractual joint ventures**. However, there is a different flavour called **equity joint ventures** where the parties create a jointly-owned corporation to carry on the venture. In this case, it is subject to the general rules of corporation law, rather than contract law.

6.1.7. Income Trusts

Income trusts involve the transfer of income-producing assets from an operating company to a trust, created through an agreement known as the **declaration of trust**, which also designates trustees. All income becomes property of the trust instead of the company, which is distributed to **unitholders** (beneficiaries of the trust), rather than the shareholders. These were cool back then for tax "strategy" to avoid a layer of taxation, but they killed the tax advantage in 2008.

6.2. Corporations

6.2.1. Nature of Corporations

Corporations are legal "persons" formed by incorporation under statute. They are different:

- Shareholders have **limited liability** - they can only lose up to their initial investment and do not attract direct legal obligation.
- Transfer of Ownership exists through selling shares, though in a limited way.
- Management and control of the corporation have been separated
- There is **no duty of good faith** for shareholders - buy shares at your own risk!
- Corporations have continuity and can last forever, rather than dying and being reborn.
- They are taxed separately under corporate tax rates.
- As separate entities, they can sue and be sued.

6.2.1.1. Consequences of Separate Legal Personalities

It used to be that corporations only had the capacity to perform for purposes stated in their constitution. Now, under CBCA and provincial equivalents, corporations have **full capacity**. They have independent civil/criminal liability, and some constitutional rights.

6.2.1.2. Limitations on Limited Liability

If shareholders receive **improperly paid dividends**, where a dividend is paid when the corporation is not profitable, the director authorizing the dividends **becomes personally liable**.

Generally, smaller companies get contracts that have **personal guarantees/indemnities** on them from creditors to reduce risk, meaning the limited liability thing doesn't hold in the first place.

The *Bankruptcy and Insolvency Act* also says that directors are liable if a business goes bankrupt, for example being liable for outstanding employee wages.

There are also **preferences/fraudulent conveyances**, where you prefer 1 shareholder over others (or otherwise delay or defraud other creditors) in insolvency, you could be liable for the money owed.

6.2.1.2.1. Lifting the Corporate Veil

In rare cases where

1. One individual within the corporation controls the corporation
2. The control is used to commit a fraud, wrong, or breach of duty
3. Such misconduct caused injury to the plaintiff

The courts may choose to **lift the corporate veil**, disregarding the separate existence of corporations and exposing said controlling individual to personal liability.

6.2.2. Methods of Incorporation

In the really old days, you would incorporate through a **royal charter** - where the Crown would give you a special license to carry out a particular activity, like HBC! We then moved to **special acts of Parliament**, special legislative acts that create specific corporations, especially for large projects of public interest. They are still used today to form "utility-y" companies and special Crown corporations.

The modern way to incorporate is through a general **incorporation statute**. You get 2 main choices, which just differ in jurisdiction. There is the ***Canadian Business Corporation Act (CBCA)***, which is more suitable for large businesses which operate nationwide; and provincial equivalents like the ***Ontario Business Corporation Act (CBCA)***, more suitable for businesses that operate within the province.

6.2.3. Corporation Constitution

Two articles fully define a corporation, dictating its function and how they do things completely:

- **Articles of Incorporation**, the founding corporate document created through the incorporation of the company. This can list the corporation's name (which must include "Corp", "Inc" or "Ltd" btw), registered office, classes & number of shares, rights, and restrictions on shares, number of directors, and any other restrictions on business.
- **Bylaws**, the internal working rules of a corporation. The board of directors can adopt new bylaws or amend old ones, subject to approval by shareholders through a majority vote (or supermajority vote in cases). A bunch are passed at the first meeting of shareholders to explain general operating rules. For example, one of the first bylaws to pass is usually to designate a signing authority, so the corporation can get a bank account.

6.2.4. Public and Private Business Corporations

Private Companies are corporations with a restricted number of shareholders that are prohibited from issuing their shares to the general public. Nowadays, the distinction is that private corporations do not issue their shares to the public. In contrast, a **distributing corporation** issues its securities to the public. It is also known as an issuing corporation, reporting issuer, or publically traded corporation. Distributing corporations are subjected to more regulations on provincial levels.

Professional Corporations also exist - these are special business corporations founded by members of certain professions, as they are otherwise barred from incorporating their practices due to statute or the professional body's rules (like lawyers/doctors). PCs solve the same problem as LLPs, though the limited liability is not complete as an incorporator remains responsible for their own negligence and misconduct. The main advantage of a PC is taxes.

6.2.5. Corporate Capital

Corporations raise money by issuing shares (equity) or borrowing money (debt). At incorporation, the corporate charter places an upper limit on the number or money value of shares they can issue, which is called the **authorized capital**. **Issued capital** are shares that have been issued; and **paid-up capital** are shares that have been issued and fully paid for. (Apparently, shares must be fully paid at the time of issue, so there isn't a difference anyway. What?)

Regardless of whether an authorized capital limit is stated, the corporation must still have a **stated capital account**, stating the amount received by a corporation for the issue of its shares.

6.2.6. Corporate Securities

As per earlier, **shares** are documents that prove a member's proportional interest in the business and its capital. Shareholders can vote at the Annual General Meeting (AGM) or special meetings of shareholders.

Corporations can issue 1+ classes of shares, however, each share within a specified class must have the same rights, which can include rights to dividends, voting, and share in distribution when winding up.

A common setup is to have **common shares**, which have voting rights attached to them, but have no entitlement to dividends and are paid out last in liquidation; and **preferred shares**, which are entitled to dividends before other share classes (if any are paid), but no right to vote. Preferred shares may also have **cumulative rights** - the preferred shareholder is entitled to arrears (i.e. unpaid dividends) from previous years before any dividend is paid on common shares.

Bonds, documents evidencing a debt owed by a corporation also exist. Bondholders don't have a voice in managing the corporation, only stepping in if the corporation is in financial difficulty or in breach of the trust deed. As (usually secured) creditors, bondholders get paid out first in liquidation.

6.2.6.1. Share Transfer Restrictions

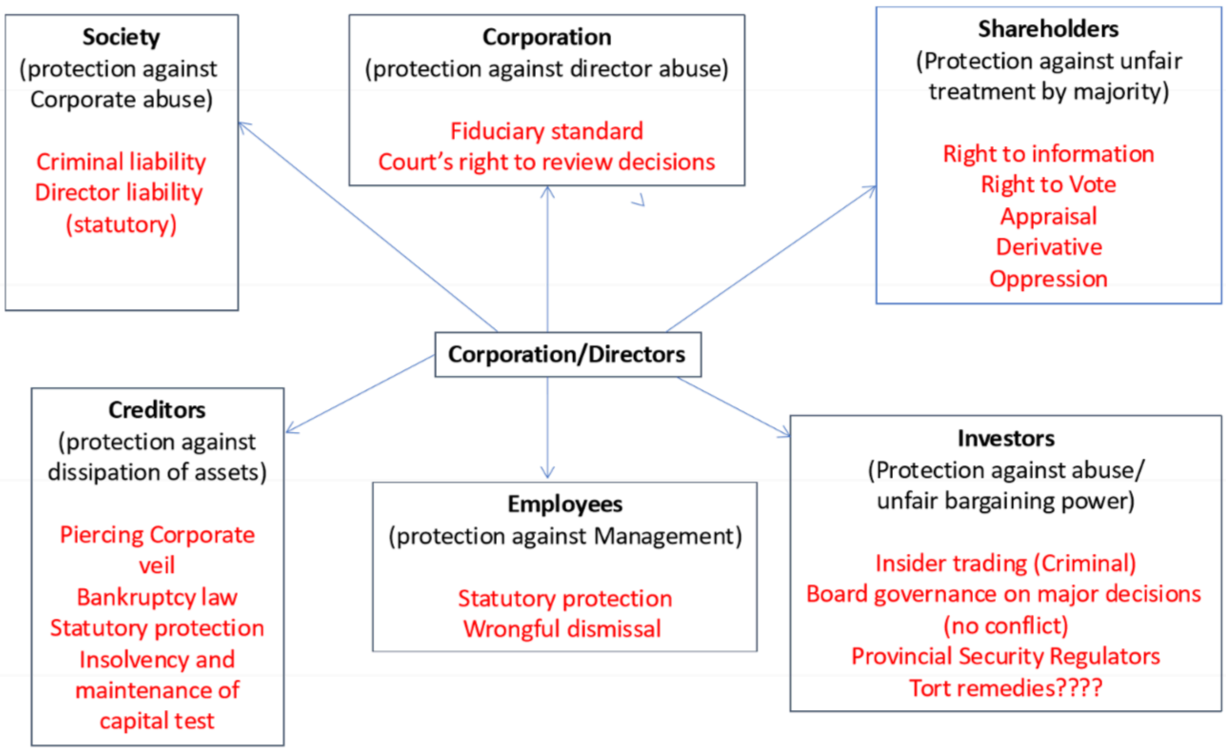
Private corporations almost always restrict share transfers, to keep them private. Under the *Securities Act*, any restrictions on share transfer must be listed in the articles of incorporation or the share certificate. Often, it is required to get prior approval of the board before transfer.

6.3. Internal Affairs of a Corporation

It is VERY easy for the corporation to cause harm to a variety of parties, even itself!

6.3.1. Overview Diagram of Corporate Governance

This also includes items from the next section about External Responsibilities. Made by Prof. Masterman.



6.3.2. Who's in the Company?

The main groups to consider are the:

- The **Board of Directors**, the governing body of the corporation responsible for the management of its business and its affairs.
- **Officers**, the high-ranking members of a corporation's management team as defined in bylaws or appointed by directors. For instance, the president, vice president, controller, C-suite execs, general counsel, and general manager.
- **Shareholders**, the actual owners of the corporation through their investment
- **Stakeholders**, other interested parties such as employees, creditors, community and so on.

6.3.3. Directors of a Corporation

Directors as a concept come from the *Business Corporation Act*(s), which set out the role of the director. However, the majority of the power comes from their ability to call the General Meeting of the shareholders.

The *CBCA* outlines the general power of management, in addition to the following:

1. The power to issue shares
2. The power to declare dividends
3. The power to adopt bylaws, or amend existing ones, subject to shareholder approval
4. The power to call the meeting of shareholders, including an annual general meeting that must be called each year
5. The power to delegate their **general responsibilities** and appoint officers; however, the specific powers cannot be delegated.

6.3.3.1. Managing Your Directors

The *CBCA* requires a corporation to have 1+ directors, and for publicly held corporations there must be 3+, 2 of which must be independent (not employees of the company). Initial directors are appointed by Articles of Incorporation, but must hold the General Meeting of Shareholders within 18 months of incorporation. Subsequent directors are elected by shareholders, and can sit for at most 3 years before needing to be re-elected (though they can be removed earlier by a Special Meeting of shareholders)

Notably, **Shareholders cannot direct directors** - directors are not obligated to follow their orders, notably meaning shareholders cannot compel the directors to declare dividends, subject to explicit requirements in the constitution.

6.3.3.2. Duties of the Director and Officers

In addition to complying with the *CBCA*, regulations, articles, bylaws, and any unanimous shareholder agreements, the directors have a fiduciary duty and a duty of care, diligence, and skill.

6.3.3.2.1. Fiduciary Duty

Under the *CBCA Section 122 (1)(a)*, every director must **act honestly and in good faith** with a view to the best interests of the corporation. This is essentially a fiduciary duty to place the corporation's interests above all else. This fiduciary duty is **only owed to the corporation**, not shareholders or stakeholders (not to say there is no duty to these parties, just not fiduciary?).

Under this fiduciary duty, directors must avoid conflicts of interest, declare any conflicts of interest, and not vote on those matters (or the board can rescind any subsequently formed contracts). They also cannot intercept **Corporate Opportunities** (any opportunity in the same line of business, that the corp. has or would have an interest in, that creates a conflict of interest when taken by the director, and that the company could've taken up if they knew of it). They also cannot carry on business in competition with the corporation.

If a breach of fiduciary duty occurs, the director can be held liable for losses from the breach. Any property acquired by the director as part of the breach will be held in a **constructive trust** in the name of the corporation, and if the property was transferred to a genuine purchaser, the director is liable to account for the profits.

6.3.3.2.2. Duty of Care and Skill

Under *(1)(b)*, every director must also **exercise the care, diligence, and skill** a reasonably prudent person would exercise in comparable circumstances. This is not just owed to the corporation, and opens up negligence as a cause of action.

Directors can be negligent, however, the standard of care used here is that of an **ordinary person**, rather than a professional. You just need to know enough about the company to ascertain whether it is being run properly. Directors can rely on information provided to them, so long as they are not **wilfully blind** - you can choose to ignore the materials, but you should read and challenge any material provided and not be blind to mistakes and misconduct.

A director can be personally liable if:

- They acquiesce in situations of misconduct or negligence
- They vote for a financially detrimental decision leading to insolvency (liable for unpaid wages)
- Taxes are not paid (in which they are liable for HST and employee deductions)

6.3.3.2.3. Defenses

- The director can argue **due diligence**, that they had indeed meet standard of care requirements
- Good faith reliance: directors that relied on audited financial statements or expert reports can argue this (even if the auditing is from their own employees and maybe sus)
- The **business judgment rule**: so long as the decision seems reasonable (being arrived at with appropriate prudence and diligence), the Courts will **not second guess business decisions**. In other words, they won't care if it's a good decision - just that the way it was reached was not negligent. But, this does not apply everywhere - for example, for failure to comply with specific legal obligations like mandatory disclosure.

6.3.3.3. Illegal Insider Trading

Insider trading is the user of confidential information relating to a corporation in dealing with its securities. Except for US politicians (for SOME reason), this is illegal and has liability in all forms - **civil** (compensation for losses), **regulatory** (fines and imprisonment), and **criminal** (fines and imprisonment but from the Criminal Code instead of the *Securites Act*).

There is also a requirement to have a **strict disclosure record**, showing each time an insider performs a trade in the company. This is essentially an insider trading record and helps enable investigation.

6.3.3.4. Conflict of Interest

As mentioned earlier, if a director has a conflict of interest wrt a particular vote, they must declare the conflict and abstain from voting.

6.3.4. Shareholders of a Corporation

Shareholders own the corporation, and their rights are derived from the Articles of Incorporation and legislation. The *CBCA* stipulates that the constitution of the corporation should set out the classes of shares, including their rights, privileges, and restrictions.

6.3.4.1. Rights and Duties of the Shareholder

At least one class of share must include all 3 of these rights:

- The **right to vote** at any meeting of the shareholders
- The **right to receive dividends** that are declared
- The **right to receive remaining property** on the dissolution of the company.

6.3.4.1.1. Voting

This is the chief method shareholders use to voice how they think the corporation should be run. These occur during **general meetings of shareholders**, and every year by statute there is at least one **annual general meeting**. Shareholders are entitled to advance notice of all GMs.

6.3.4.1.1.1. Ordinary and Special Resolutions

Voting is the passing or defeating of these resolutions, and there are 2 main flavours as per *CBCA*.

Ordinary Resolutions are passed by a simple majority, and encompass most of the day to day decisions of business. The *CBCA* also requires that approval of any **amendments to bylaws** by the director, election of the **auditor**, and election/removal of **directors** be done through ordinary resolution.

Special Resolutions require a supermajority (usually 2/3), and cover items that fundamentally change the nature of the corporation, such as **changes to articles of incorporation**, or **other fundamental changes** like mergers or sales or significant/all parts of the corporation's property.

6.3.4.1.1.2. Share Classes and Voting

Not all shareholders have the right to vote - some classes only have the right in specific cases, such as preferred shareholders, who only vote when preferred dividends are in arrears. Especially in closely-held corporations, some shares may have more votes than others. However, in commonly traded companies, it's usually 1 vote a share, or else the people would riot.

For publicly traded companies, a shareholder can nominate a **proxy** to attend the general meeting and vote on their behalf.

6.3.4.1.2. Return on Investment

As we know, shareholders purchase shares to invest in the corporation. The investment is realized through dividends and capital growth. Why does this slide exist

6.3.4.1.3. Issuance of New Shares

Given that the board of directors can issue shares, shareholder equity can be diluted easily, and a majority shareholder could lose their majority position. Additionally, there is the risk of "stock watering" - where new shares are issued at a price less than the value of existing shares, dragging down the value of existing shares.

In the US, there is the principle of pre-emptive rights, ensuring that new shares must be distributed pro-rata. However in Canada, **there is no pre-emptive right**. However, directors can only issue shares **to raise capital** or for purposes in the best interest of the corporation. In other words, directors cannot issue shares to affect voting control (like diluting a majority). If this occurs the issuance may be declared void.

While not required to, most corporations apparently do give a pre-emptive right, allowing shareholders to either gain shares or sell the rights on the open market.

6.3.4.1.4. Right to Information

Shareholders have a right to information! Annual **financial statements** must be presented to the shareholders at the annual general meeting, as seen in BU127. To assist in the analysis and evaluation, the shareholders can **elect an auditor**, who checks the statements for fairness. The auditor's report, along with the financial statements, are sent to shareholders at least 3 weeks before the AGM as part of the **annual report**.

Only the auditor and director have the right to access the books of account - **the shareholders do not**. Instead, they send requests for the auditor or directors to investigate the books, but they have no obligation to follow through. As a last resort, shareholders can ask to courts to appoint an **inspector** to look through the books.

However, shareholders do have access to **documents of record**, which can be examined by any shareholder during usual business hours. These usually include shareholder meeting minutes, registers of all share transfers (including insider trading), copies of the charter, bylaws, articles, and special resolutions, as well as registers of all shareholders and directors. Notably excluded are the *minutes of director's meetings* - only the directors alone can access those.

6.3.4.1.5. Duties of the Shareholder

Nope! The courts ruled consistently that majority shareholders can just do whatever, their obligation ended when the full price of their shares was paid. If the shareholder is a director, they of course must comply with the directorial duties to act honestly and in good faith to the corporation; but as a shareholder, they are entitled to consider their own personal interests in voting.

6.3.4.2. Protection of Minority Shareholders

When a majority shareholder exists, they get to call all the shots. This means that minority shareholders are often "frozen out" of the decision making process. Worse yet, they often can't dispose of their shares in smaller companies (very few buyers + lots of restrictions on selling shares), meaning they are effectively locked in. Completely legal, yet not very democratic, especially if the majority shareholder changes the business fundamentally or pursues their own interests.

So, how are these minority shareholders protected? We have special statutory remedies.

6.3.4.2.1. Appraisal Remedy

In some cases where the majority shareholders make a fundamental change to the corporation, a minority shareholder who dissents is entitled to the **appraisal remedy**, the right to have one's shares bought by the corporation at a fair price (or if the parties disagree, a price the courts deem fair).

This remedy is limited to specific actions by the majority, and applies less than you think. Notably, it applies when one of the following occurs:

- A change of restriction on issue, transfer, or ownership of shares
- A change of restriction on the type of business the corporation can carry on
- Any merger or amalgamation with another corporation
- Selling, leasing, or substantially changing all the assets of the corporation
- "Going Private" or "Squeezing Out" transaction

This remedy is only really useful for privately held companies (just sell your stock otherwise lmao). The dissenter must also comply with every step in the Act to take advantage - which can be quite complicated and cumbersome.

6.3.4.2.2. Winding Up

A very rare remedy, **winding up** dissolves the ENTIRE corporation. This only occurs where animosity between the shareholders grows to the extent that business is impossible, when the courts decide it is "just and equitable" to do so.

The courts have been especially reluctant to do this if the corporation is still viable and reasonably large, as it would affect other stakeholder interests like the employees. So it's commonly seen in small family businesses or "incorporated partnerships". Highly effective though - the mere threat of its use can often persuade the majority.

6.3.4.2.3. Oppression Remedy

The most common and widely applicable remedy (which applies to people beyond shareholders!), **oppression remedies** are statutory procedures that allow individual shareholders to receive a personal remedy if they were unfairly treated.

To justify the remedy, the plaintiff must show that the action they are complaining about:

- Is **oppressive or unfairly prejudicial** (ex. be a unique loss to you)
- Unfairly disregards the interests of the complainant

To determine fairness, the Courts look at the **reasonable expectation of the parties** - based on the nature of business, past expectations, and so on. Was it reasonable for the complainant to have these expectations about how their interests are managed?

The usual remedy is to have the corporation buy back the shares at fair market value, but it can be more, or less! The Courts are empowered to make any order they consider just and appropriate to remedy the situation.

6.3.4.2.4. Derivative Action

A **derivative action** is a proceeding brought by one or more shareholders in the name of a corporation, wrt a wrong done to the corporation. For instance, when the corporation suffered an injury, or the directors exploited a "corporate opportunity". Usually, an action on behalf of the corporation must be started by the directors, so if the action is against themselves, they probably won't start that action. This allows the minority shareholder to start that action.

The shareholder must obtain leave from the Court to bring an action in the name of the company. They need to show:

- The directors are unwilling/refuse to bring the action themselves
- They are acting in good faith
- The action appears to be in the interest of the corporation, or its shareholders

The courts can order that the corporation pay the costs of the shareholder bringing in the action, at any time. If the defendant loses the damages are paid in whole or in part **directly to shareholders** rather than the corporation (which would be the one suffering said damages). However, these are not given - the shareholder can be on the hook for lawsuit costs and what not.

6.3.4.3. Shareholder Agreements

As motivation, consider a group of equal partners moving to incorporate. After incorporation, instead of being partners, they will be minority shareholders, losing some of their protections from partnership law. How can this protection be approximated?

Shareholder agreements are agreements between 2+ shareholders that are distinct from the corporation's charter and bylaws. However, these agreements can only apply to the parties in their capacity as shareholders, and cannot fetter the discretion of a director. In other words, the agreement must be restricted to their role as shareholders, and cannot infringe on their role as directors.

6.3.4.3.1. Sample Terms

- **Right to Employment** - shareholders are allowed to be employed at the corporation?
- **Right to Participate in Fair Management of Business** - the shareholders promise to elect each other to the board of directors and only each other, also promising not to vote for major changes to the business without unanimous agreement.
- **Right to Fair Price for Share Interest** - the shareholders agree to a regular method for valuing their shares, and to not sell to outsiders without checking first, etc. Can also stipulate selling interest at appraised value in breach, or buying out interest in wrongful expulsion/dismissal.

6.3.4.3.2. Unanimous Shareholder Agreements

Unanimous Shareholder Agreements are ones where all shareholders are parties. The *CBCA* has specific recognition of USAs, allowing them to fetter (restrict) the power of directors. Almost as if they were part of the corporate constitution.

Any subsequent purchasers/transferees of the shares also get **assigned both rights and duties** stipulated (not just the rights as per assignment!).

An USA is really only possible in a closely held corporation, and the presence of one must be **noted conspicuously** on the face of any share certificate.

6.4. External Responsibilities of a Corporation

Not testable this time… See the slide deck if you want.

Note: This last 3 sections were covered in 1 single lecture. I'll be brief.

6.5. IP Law

Intellectual Property is intangible property that is the product of mental activity. It is regulated federally through CIPO, the Canadian Intellectual Property Office. IP law aims to incentivize invention, creativity, and commerce; while balancing public use and interest of IPs in science and the arts.

6.5.1. Trademarks

Trademarks are features used to distinguish a brand, such as logos and brand names. Some special types include **certification marks**, used to identify goods or services that conform to a specific standard; and **distinguishing guises**, the shaping of goods or their containers, or distinctive packaging of said goods. In general, trademarks can be business names, company logos, words in stylized fonts, sounds/chimes, advertising slogans, and domain names.

6.5.1.1. Protecting Trademarks

6.5.1.1.1. Common Law

In Common Law, there is the old tort of **Passing-Off**, aiming to preserve **goodwill**.

1. Goodwill must exist - some reputation worth protecting
2. The defendant must have misrepresented their goods, services, or business as that of the plaintiff
3. Deception of the public - for casual consumers in a hurry, is there potential/actual confusion?
4. The plaintiff suffered actual damages, or will potentially suffer damages

6.5.1.1.2. The *Trade-Marks Act*

Additional Statutory Causes are provided, essentially prohibiting:

- Making **false or misleading** statements to discredit a competitor
- Directing public attention to your stuff so that it **causes confusion** with another competitor's
- **Passing Off** other wares or services as and for those ordered and requested
- Making material **false descriptions** that are likely to mislead the public about aspects of wares.

6.5.1.1.3. Registering Trademarks

Though a trademark need not be registered (being something you can gain from goodwill alone), registering it is highly recommended. You don't need to indicate a registered trademark is registered with ® or ™, but it has become common practice.

With a registered trademark, under Section 19 of the *Trade-Mark Act*:

- The owner has exclusive rights to use the mark throughout Canada
- This provides a **complete defense** to claims of passing off (can only attack registration validity)
- They can register in other countries under international conventions

Trademark registration is valid for 10 years and can be renewed forever.

6.5.1.1.4. Requirements for Registration

When you apply for registration, your mark cannot be:

- A word that is merely **someone's name** or surname who is alive or died within 30 years
- Clearly descriptive or deceptively misdescriptive about the character or quality of the wares/services; or their place of origin
- Name of the wares/services in connection with which it is used
- Likely to be confused with another registered trademark
- A protected geographic indication, Olympic, or Paralympic mark (wow the Olympics are special)

Registration is done through CIPO. If the Registrar refuses registration, the owner can appeal to the Courts through **Opposition Proceedings**, which can occur if say the TM isn't "distinctive" or doesn't meet requirements. If that passes, another 2-month round exists for anyone in the public to object.

6.5.1.1.5. Actions for Infringement

Unlike passing-off, if your trademark is registered, an action of infringement only needs to show **unauthorized use** or use of a **confusingly similar** mark - regardless of whether the infringement is accidental or deliberate. The federal court only has jurisdiction to hear cases from the *Trade-Marks Act*, and judgment is enforceable throughout Canada; provincial courts can additionally handle passing-off, though judgment is only enforceable in the province.

6.5.2. Copyrights

6.5.2.1. Copyright Origin

Copyright aims to balance public interest in art and intellect with fair compensation for creators alike. It is derived solely from Statute - namely the ***Copyright Act***. International treaties like the *Berne Convention* and *Universal Copyright Convention* also extend copyright protections internationally across all signing countries. Canada is also a signatory to **WIPO (World Intellectual Property Organization)** conventions and treaties.

6.5.2.2. What is it though

Copyright is a collection of distinct rights under the *Copyright Act*, such as:

- The right to **produce and reproduce** the work or any substantial part
- The right to **perform and deliver** the work in public
- The right to **publish an unpublished work**.

Copyright arises **automatically** without registration or publication! Copyright is owned by the original author, though they may choose to assign copyrights to other people.

6.5.2.3. Moral Rights

Moral Rights are non-transferable and are the rights of an author or creator to prevent a work from being distorted or misused. It also covers the right to prevent it from being used in association with something else, and the right to be associated as the author, or to remain anonymous.

6.5.2.4. Limits to Copyright

You cannot copyright ideas - only the expression of those ideas. Still, doing so can be uncool.

Additionally, copyright exists for every *original* literary, dramatic, musical, or artistic work. This includes computer software (as a literary work), plays, ballets, movies (as dramatic works), live broadcasts, music, etc.

6.5.2.5. Protecting Copyright

Copyright automatically exists at the time of creation, though you can still choose to register it. It exists for the lifetime of the author + 50 years longer after.

6.5.2.5.1. Infringement and Defenses

Copyright is infringed when someone uses the work of the copyright holder **without consent**. Only a substantial part of the work needs to be copied, and the copied work does not need to be identical.

So what are the defenses?

- **Fair Dealing** - **minimal** use for research, private study, education, parody and satire, criticism and review, or news reporting is fine.
- Copying musical works for **private use** - like in your car only
- Using the material to generate your own content for **non-commercial purposes**, like funny memes online. This is known as the YouTube exception.

6.5.2.5.2. Remedies

Remedies for infringement include damages for profit or income lost by the owner, accounting for profits made by the defendant (if any exist), and injunctions to prevent further infringement.

Some cases can also be criminal - with fines of up to 1 million or imprisonment for up to 5 years. Instead of actual loss, the plaintiff can also request **Statutory damages** for non-commercial infringement capped at $5000.

6.5.3. Exceptions to Copyright

There are 3 big exceptions to copyright:

1. **Group Activity** - If made in group, ex, a music band, everyone has equal right to the copyright
2. **Employment** - Companies have copyright to stuff made by employees during their employment
3. **Assignment** - Copyright can be assigned

6.5.4. Patents

6.5.4.1. Patent Origin

Patents aim to balance the interests of scientific advancement with the private interests of profiting off said inventions. They are sourced purely from the *Patent Act*, with nothing from common law! There are also international treaties to extend patents worldwide, like the *Patent Cooperation Treaty* under WIPO and the *Paris Convention for the Protection of Industrial Property* under the Paris Union.

6.5.4.2. What is it though

Patents aim to protect inventions, giving the patent holder a monopoly over the invention for 20 years. However, in exchange they must **make the invention public**, filing an adequate description so that it can be fully duplicated upon patent expiry.

To be able to patent, you must have an "invention" - a new and useful art, process, machine, manufacture, composition of matter, or any new and useful improvement to such. It must have **novelty** (something new), **inventiveness** (some level of ingenuity - can't be an obvious step), and **utility** (it needs to be useful)

6.5.4.3. Obtaining a Patent

To obtain a patent, you file it with the Patent Office at the CIPO, and include a **specification** and **claims**, respectively a description and features of the invention. The examiner then examines the claim to ensure it is novel and compliant. The patent can be amended to respond to issues, and you may also appeal rejections through the Patent Appeal Board, and then the Courts.

6.5.4.4. Protection Patents

The plaintiff sues the party for patent infringement, and has the burden to prove the patent was infringed upon. If successful, possible remedies include injunctions and damages (accounting of profits, or reasonable royalties).

Other than claiming non-infringement, the defendant can defend on the patent being **invalid**:

- **Anticipation** - someone else has known about or used the invention before it was patented
- **Obviousness** - lacks ingenuity. Can't be patented.
- **Inutility** - useless. Can't be patented.
- **Insufficiency** - an insufficient description was provided at patent time.
- **Non Patentable Subject Matter** - abstract theory and scientific principles etc.

6.5.5. Trade Secrets

Trade Secrets are confidential tidbits of information received during employment. They are **not IP**, as they are not property, but they still have commercial value. They are protected by **contract** (NDAs, or agreements/provisions of confidentiality), or through obligations as fiduciaries.

The tort of **Breach of Confidence** exists to support trade secrets, requiring:

1. Confidential Information to be communicated to someone in confidence
2. The information is then misused by the person to whom it was communicated.

6.6. Privacy

Privacy is the right to be left alone, and has 3 facets:

- **Personal Privacy** - the respect of bodily integrity free from unreasonable surveillance, search, and seizure
- **Territorial Privacy** - the lack of intrusion in one's home, business, and personal spaces.
- **Privacy of Personal Information** - the protection of the trail of information left behind from daily life involving secrecy, control and anonymity.

Privacy is not absolute - it is only protected when there is a "reasonable expectation of privacy", and a privacy breach can be justified if there is a serious breach or issue, if it minimally impacts personal privacy rights of impacted people, and if society has an interest in doing so.

There is also something known as the **right to be forgotten**, saying you have the right to be forgotten about and left alone on the Internet, without a trace of existence.

6.6.1. Regulations in the Private Sector

Regulated both federally and provincially where federal law is the backup. It is mainly governed through the ***Personal Information Protection and Electronic Documents Act (PIPEDA)***, controlling collection, use, and disclosure of personal information during a commercial activity. It applies to everyone, to the extent that a provincial equivalent does not exist, and regulates **personal information** about natural persons.

Under PIPEDA, businesses should follow the following principles when collecting information:

> Accountability (having procedure and policy), Identifying Purpose, **Consent**, Limiting Collection, Limiting Use, Disclosure and Retention, Accuracy, **Safeguards**, Openness, Access (provide access to personal info about persons to whom it relates), and Compliance to Challenges (complaint handling)

6.6.1.1. Surveillance of Employees

Surveillance of employees can take many forms. It is only generally considered reasonable **as a last resort**, where all other forms of collecting information have been unsuccessful. If done, it must be limited to the **least intrusive form possible**.

Employees have a reasonable expectation of privacy, even on work computers! However, this expectation is reduced if the employer gives a notice of monitoring. If your company has over 25 employees, you must have a monitoring policy detailing how the monitoring may occur.

6.6.2. Regulations in the Public Sector

At the federal level, the *Privacy Act* governs collection, use, and disclosure of private information:

- The purpose of collection must relate to operation of progam/activity of the institution and obtained **directly**
- Consent is required to use the info for a purpose other than what it was collected for.
- Individuals are entitled to access the personal information held by gov. and correct inaccuracies
- Collected data must be retained for at least 2 years after it was last used.

Provincially, there are also similar legislations governing provincial and/or municipal public sectors, like *Freedom of Information and Protection and Privacy (FIPPA)* in Ontario.

Healthcare Records also get additionally regulated by the ***Personal Health Information Protection Act (PHIPA)***. They govern the collection, use and disclosure of highly sensitive **personal health information** by healthcare providers and custodians.

6.6.3. Liability for Privacy Issues

6.6.3.1. Intrusion Upon Seclusion

Hey, we've seen this one before! Defendant is liable for the invasion of the plaintiff's privacy if:

- The invasion is **highly offensive** to a reasonable person
- The defendant intentionally/recklessly intrudes, physically or otherwise, upon the seclusion of another, or their private affairs or concerns.

6.6.3.2. Public Disclosure of Embarrassing Private Facts

Also known as the "revenge porn tort" (no actually), liability exists for privacy invasion if:

- The defendant publicizes a matter concerning the private life of another
- The matter publicized or the act of publication is **highly offensive** to a reasonable person
- The matter is **not of legitimate concern** to the public.

6.6.3.3. Negligence

PIPEDA imposes a duty on businesses to protect personal information securely.

6.6.3.4. Criminal Liability

Willful interception of Private Communications is only allowed with the consent of 1+ parties, or with court authorization. Mostly used in consideration of admissibility of criminal evidence.

6.6.3.5. Data Breaches

If you suffer a data breach, Canada requires you report the data breach to the privacy commissioner under *PIPEDA*. Failure to report, notify and keep records may result in fines under *PIPEDA*

6.6.4. The Anti-Spam Legislation

A relatively new legislation, the *Canadian Anti-Spam Legislation (CASL)* essentially does the following:

1. Prohibit the sending of spam **without consent**
2. Provide an **unsubscribe** mechanism for free
3. Require contact information of the senders in spam messages

Consent can either be given expressly or implied, usually due to an **existing business relationship**:

1. Purchasing or leasing a product, good, or service up to 2 years prior
2. Acceptance of a business, investment or gaming opportunity within time frame of (1)
3. Bartering of anything in (1)
4. Entering a written contract that is currently in existence or expired within time frame of (1)
5. There was an inquiry or applicate made by the recipient up to 6 months prior

6.7. International Law

As trade goes international and grows complex, there is risk in financial and contractual terms.

6.7.1. Managing Risk

6.7.1.1. Incoterms

Incoterms are standard contractual terms adopted by the International Chamber of Commerce, which deal with cost, control, and liability (who pays/deals with what etc.) in trade, notably export contracts.

6.7.1.2. Financing Risk

Transport times from seller to buyer are much longer in international sales. The seller would like to receive payment as soon as goods leave the factory, but buyers want to pay only after receiving the goods. This can be accommodated through **letters of credit**:

- The buyer gets a letter of credit from their bank, who sends it to the seller's bank
- The seller's bank, reviewing the terms, gives it to the seller
- The seller then ships the goods and submits the documents back to the bank
- After checking the terms, the seller's bank sends the letter to the buyer's bank, who sends payment

6.7.2. Determining Jurisdiction

6.7.2.1. The First Step

First, the Courts decide whether the province the lawsuit is started in has jurisdiction at all. This is satisfied if the defendant is **present** in the jurisdiction, **consented** to submit to their jurisdiction, or if the case has a **"real and substantial connection"** to the jurisdiction. For example:

- Whether the defendant is a resident or does business in the jurisdiction
- If the tort was committed there, or if a contract connected to the tort dispute was made there
- If a contract was to be performed in the jurisdiction, or has terms detailing the jurisdiction
- If damages from a breach of contract were sustained there, or if the dispute concerns stuff there

6.7.2.2. The Second Step

The Courts may refuse to hear a proceeding as another jurisdiction is more appropriate or more closely connected to the matter, a principle known as **Forum Non Conveniens**. The defendant must bring this up, btw. Some factors may include the location of parties and witnesses, service (providing) of documents, relative ability to enforce judgement, avoiding multiple proceedings, standing (your case has an applicable law in this jurisdiction), and applicable laws (what laws apply).

6.7.3. Enforcing Foreign Awards

There is no obligation for one jurisdiction to enforce the judgments from another - questions can arise to its legitimacy, like whether it was made in the appropriate forum, if it was legitimately obtained, and if it offends against natural justice or public policy. They tend to be enforced only if the foreign court properly assumed jurisdiction.

To check if its enforceable, you **apply to the court** in the jurisdiction where the assets reside to request recognition, or **start a new action** in the other jurisdiction and seek judgement there.

6.8. Other Items

6.8.1. Notice of Dissolution

Remember to hand notice about your registered sole proprietorship if you decide to dissolve.

6.8.2. Sole Proprietorship Proportionality

SPs are really easy to set up, thus they tend to be small but numerous. Their numbers also fluctuate proportional to the economic situation - in boom times small businesses flourish better, while in recession they are usually the first to shut down, as they are easy to start and drop at any time.

6.8.3. *Salomon v. Salomon*

The separate existence of corporations as a legal entity distinct from their shareholders was first recognized in *Salomon v. Salomon* in 1897. Even as a one-man company, the company and its members have been separate, and have been ever since (save for circumstances to recognize shareholder interests).

6.8.4. The Sackler Family and Purdue Pharma

A case study of the potential harm corporations can do to society. Purdue Pharma was founded by 3 brothers in the Sackler family, whose prescription painkiller, OxyContin, debuting in 1995, helped raise 35 billion in profits. It also happens to be a very powerful opioid. What happened after was a lot of overdoses and an entire opioid crisis. Yay!

No clinical studies were done on its addictive nature at launch, and later when internal reports found it to be so they covered it up. Doctors were bribed to promote it, and “pill mill” doctors were targeted. Their “delayed absorption mechanism” was easy to circumvent giving way too high a dosage at once.

Also, they patented that “delayed absorption mechanism”, but when the 20-year deadline came, they simply made a minor tweak to the recipe and filed for another patent! Technically ok but like, uncool man.

All Canadian provinces and the federal government sued for 170 million in total, about 0.5% of their total profits. The Sacklers also bankrupted the company, taking all the profits through dividends and leaving none for investors and employees.

6.8.5. AI and IP

Ongoing. We’ll see how it goes.