BU 231

Business Law Notes

Section 5: The Law of Business and IP and Others

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Contents

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.

1. The Law of Business and IP and Others

1.1. Sole Proprietorships and Partnerships (but mostly partnerships)

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

1.1.1. 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.

1.1.1.1. 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.

1.1.1.2. 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!

1.1.2. 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:

1.1.3. 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.

1.1.3.1. Legal Nature

1.1.3.1.1. 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.

1.1.3.1.2. 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.

1.1.3.1.3. 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.

1.1.3.1.4. 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.

1.1.3.2. 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.

1.1.3.3. 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.

1.1.3.3.1. 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.

1.1.3.4. 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!

1.1.3.5. 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.

1.1.3.5.1. 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".

1.1.3.5.2. 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.

1.1.3.6. 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.

1.1.4. 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.

1.1.5. 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.

1.1.6. 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.

1.1.7. 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.

1.2. Corporations

1.2.1. 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.

1.2.1.1. 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.

1.2.1.2. 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.

1.2.1.2.1. 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.

1.2.2. 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.

1.2.3. 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.

1.2.4. 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.

1.2.5. 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.

1.2.6. 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.

1.2.6.1. Share Transfer Restrictions

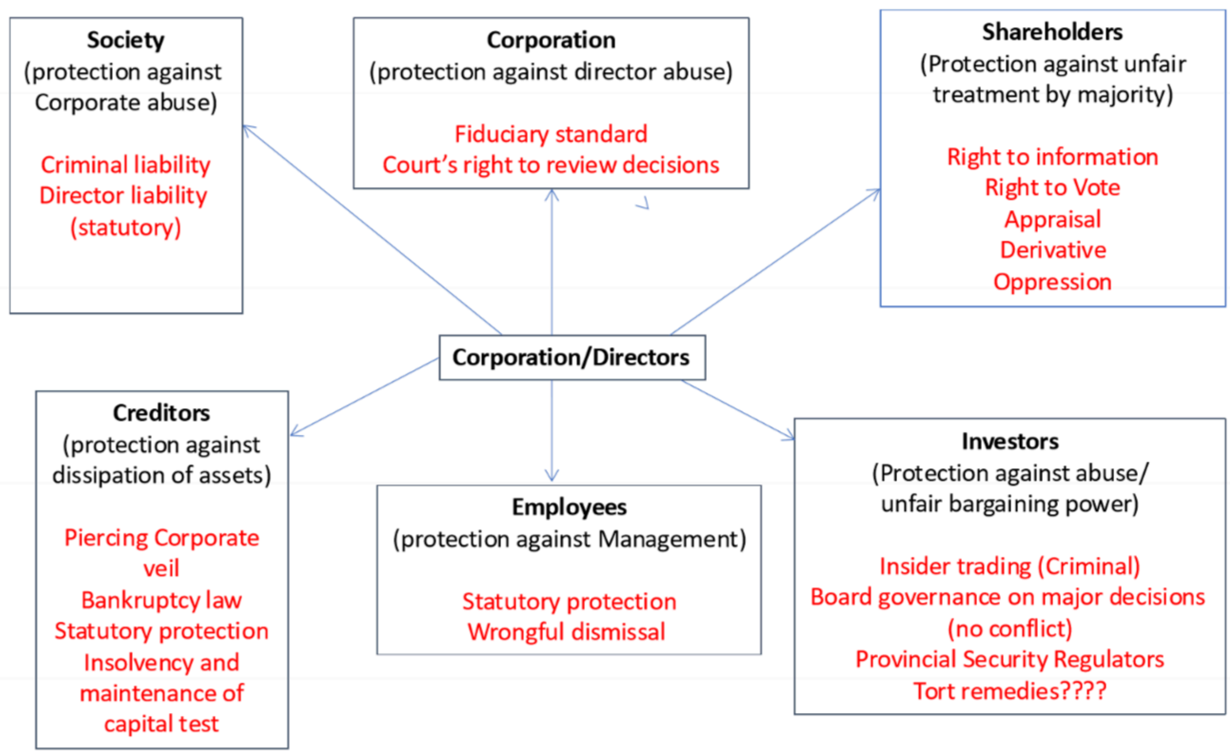
Private corporations almost always restrict share transfers, to keep them private. Under the *Securities Act*, any restrictions on share transfer must be listed in the articles of incorporation or the share certificate. Often, it is required to get prior approval of the board before transfer.

1.3. Internal Affairs of a Corporation

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

1.3.1. Overview Diagram of Corporate Governance

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



1.3.2. 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.

1.3.3. 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.

1.3.3.1. 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.

1.3.3.2. 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.

1.3.3.2.1. 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.

1.3.3.2.2. 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)

1.3.3.2.3. 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.

1.3.3.3. 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.

1.3.3.4. 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.

1.3.4. 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.

1.3.4.1. 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.

1.3.4.1.1. 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.

1.3.4.1.1.1. 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.

1.3.4.1.1.2. 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.

1.3.4.1.2. 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

1.3.4.1.3. 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.

1.3.4.1.4. 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.

1.3.4.1.5. 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.

1.3.4.2. 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.

1.3.4.2.1. 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.

1.3.4.2.2. 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.

1.3.4.2.3. 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.

1.3.4.2.4. 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.

1.3.4.3. 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.

1.3.4.3.1. 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.

1.3.4.3.2. 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.

1.4. 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.

1.5. 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.

1.5.1. 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.

1.5.1.1. Protecting Trademarks

1.5.1.1.1. 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

1.5.1.1.2. 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.

1.5.1.1.3. 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.

1.5.1.1.4. 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.

1.5.1.1.5. 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.

1.5.2. Copyrights

1.5.2.1. 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.

1.5.2.2. 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.

1.5.2.3. 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.

1.5.2.4. 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.

1.5.2.5. 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.

1.5.2.5.1. 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.

1.5.2.5.2. 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.

1.5.3. 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

1.5.4. Patents

1.5.4.1. 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.

1.5.4.2. 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)

1.5.4.3. 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.

1.5.4.4. 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.

1.5.5. 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.

1.6. 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.

1.6.1. 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)

1.6.1.1. 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.

1.6.2. 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.

1.6.3. Liability for Privacy Issues

1.6.3.1. 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.

1.6.3.2. 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.

1.6.3.3. Negligence

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

1.6.3.4. 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.

1.6.3.5. 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*

1.6.4. 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

1.7. International Law

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

1.7.1. Managing Risk

1.7.1.1. 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.

1.7.1.2. 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

1.7.2. Determining Jurisdiction

1.7.2.1. 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

1.7.2.2. 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).

1.7.3. 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.

1.8. Other Items

1.8.1. Notice of Dissolution

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

1.8.2. 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.

1.8.3. *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).

1.8.4. 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.

1.8.5. AI and IP

Ongoing. We’ll see how it goes.