

BU231 Spring 2022 Lecture Notes
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Corporate Governance/External Responsibilities of a Corp (26, 27)

Corporate Governance (26)

- Directors/Officers/Shareholders/Stakeholders

Director Terms and Roles

- **Directors**
 - supervise the officers and are appointed by the shareholders
- **Officers**
 - run the business of the corporation
- **Shareholders**
 - owners of the corporation
- **Stakeholders**
 - other interested parties (employees, creditors, community, etc.)
- **CBCA s. 102** – director's role set out – however, majority of power comes from General Meeting of the shareholders
- Act conveys general powers and specific powers (**Canada Business Corporations Act**):
 - Power to issue shares
 - Power to declare dividends
 - Power to adopt by-laws
 - Power to call meetings of the shareholders
- CBCA requires a corporation to have 1 or more directors; and for a publicly held corporation **minimum of 3 directors**
- Shareholders cannot direct directors (they only appoint directors)
- Initial directors are appointed by **Articles of Incorporation**, but must hold General Meeting of Shareholders within 18 months of incorporation
- Subsequent directors are elected by SH (SH stands for shareholders in this document)
- Director can sit for 3 years before the need to be re-elected, but can be removed earlier by a Special Meeting of the SH

Director Duties

CBCA s 122 sets out directors' duties:

- every director and officer of a corporation in exercising his powers and discharging his duties shall:
 - a) Act honestly and in good faith with a view to the best interests of the corporation; and
 - b) Exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances
- Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws, and any unanimous shareholder agreement

Duties of Care and Skill

- Cannot be negligent – standard of the ordinary person

- Can rely on information provided to them as long as they are not wilfully blind
- If a director acquiesces in situations of misconduct or negligence, then s/he can be held **PERSONALLY** liable
- If a director votes for a decision that is financially detrimental to the corp. & the corp. becomes insolvent, then s/he can be held **PERSONALLY** liable – for employee's unpaid wages
- If taxes are not paid – directors can be held **PERSONALLY** liable – for HST, and employee deductions
- **Illegal insider trading** - the use of confidential information relating to a corporation in dealing in its securities
 - If you trade on inside information, you can be criminally liable

Defences

- Due diligence
 - Acted diligently (reasonable degree of care has been exercised)
 - Relied on audited financial statements
- Business Judgment Rule
 - courts will defer to the business decisions of directors and officers provided they are arrived at using an appropriate degree of prudence and diligence
- Corporate Indemnity
- Good faith

Fiduciary Duties

- Must place corp. ahead of own interests
- Must avoid conflicts of interest
- Must declare a conflict of interest and cannot vote on the matter
- Cannot intercept a Corporate Opportunity
 - Opportunity that arises in the course of the director's position
 - Cannot use director's position to seize opportunity that belongs to the corporation as this favours personal interests over those of the corporation
- May not carry on business in competition with the Corp.

Breach of a fiduciary duty

- Held liable to corporation for loss sustained arising from breach
- Any property acquired by the director as part of the breach will be held in the name of the corporation as a **constructive trust**

A type of trust that is formed as a remedy to prevent unfair results.
- Where property has been transferred to a **bona fide purchaser** for value, director will be liable to account for profits

Conflict of Interest

- If a director is in a conflict of interest with respect to a particular vote, then they must **declare** that conflict and may need to recuse themselves from the vote.

- Shareholder Rights

- Ordinary vs. Special resolutions
- ROI
- Who issues shares / how?
- Protection of Minority Shareholders (Oppression/Derivative/Appraisal/Winding Up)
- Shareholder Agreements

Shareholder Rights

- Derive from Articles of Incorporation and from legislation
- CBCA requires that the constitution of the Corporation set out classes of shares (including rights, privileges, or restrictions associated with the class)
- Where there is only one class, the rights must include:
 - Right to vote at any meeting of the shareholders
 - Right to receive any dividend declared
 - Right to receive remaining property on dissolution

Voting Rights

- Method by which SH can exercise their voice on how the corporation should be run
- Takes place at General Meeting of SH
- SH entitled to advance notice of any meeting
- Voting is the passing or defeating of resolutions
 - Ordinary resolution requires a simple majority vote (usually 50%)
 - Special resolution requires 2/3 majority

Ordinary Resolutions:	Special Resolutions:
-Approval of any amendments made by the directors to the by-laws	-Approval of alterations to articles of incorporation
- Election of the auditor	-Approval of certain other fundamental changes, such as amalgamations or sale of substantially all of the assets of the corporation
- Election or removal of directors	

Voting

- Ability to vote depends on class of shares
- Closely held corporation – often some classes of shares have more votes
- In widely held corporations, SH can nominate a proxy to vote on their behalf

Return on investment

- SH purchases shares in corporation as an investment

- Can realize on that investment in 2 ways:
 - o By way of dividends paid
 - o By capital growth (or depreciation in the share value)

Issuing new shares

- o Power lies with the board / the directors
- o Majority SH could lose majority position with a new issue
 - o In USA – concept of “pre-emptive rights”
 - o Right of SH to first purchase the shares in a company’s stock issuings
 - o In Canada – no such right, but directors can only issue shares for purpose of raising capital
 - o If purpose is to affect voting rights of majority, then the issue may be declared void

Right to Information

- o SH are entitled to examine documents of record including:
 - o Minute books of meetings of SH
 - o Register of all transfer of shares
 - o Copy of the corporation’s charter
 - o Copy of by-laws (or articles) and special resolutions
 - o Register of SH
 - o Register of directors
- o Documents of record excluded:
 - o Minutes of directors’ meetings

Duties of SH

- o None
- o Even if s/he is a director, s/he is entitled to consider her/his own interests when voting as a shareholder

Protection of Minority Shareholders

- Where there is a majority shareholder, often minority shareholders are “frozen out” of the decision-making process
- especially in closely held corporations
- Often, they can’t dispose of their shares, so they are “locked-in”

Appraisal Remedy:

- CBCA s.190 - allows a minority SH who dissents on changes to the corporation to have the corporation buy back his/her shares. Where a price cannot be decided, the court will set a price.
 - o The right to have one’s shares bought by the corporation at a fair price
 - o Restricted to only certain types of actions

- changing any restriction on the issue, transfer, or ownership of shares
- changing any restriction on the business that the corporation may carry on
- amalgamating or merging with another corporation.
- selling, leasing, or exchanging substantially all the assets of the corporation
- “going private” or “squeezing out” transactions.
- In order to take advantage, the SH must abide by all requirements in the act – can be quite cumbersome
- Really only useful in closely held corporations

Winding Up

- Dissolution for liquidation of a corporation
- Under the CBCA, where it is “just and equitable to do so”
- Courts are often reluctant to do this if the corporation is viable and of a reasonable size and there are other stakeholder interests intertwined
 - This is a drastic remedy and is typically used when the corporation is a small family business or an “incorporated partnership”

Oppression Remedy

- Statutory procedure allowing individual shareholders to seek a personal remedy if they have been unfairly treated
- Most popular remedy in Canada, typically used when a minority SH is frozen out
- Remedy has been granted wider scope by allowing judges to make alternative orders
- To justify the remedy, plaintiff must show that the action complained of:
 - Has been oppressive or unfairly prejudicial
 - Unfairly disregards the interests of the complainant
- Remedy is usually to have corporation buy back the complainant’s shares at fair market value
- Must look at the reasonable expectation of the parties

Derivative Action

- Proceedings brought by one or more shareholders in the name of the corporation in respect of a wrong done to the corporation
 - a) The wrongdoers could be the directors such that the action would not be brought by the directors. This common law recognized the right of a minority SH to start an action on behalf of the corporation
- SH must make application to court to obtain leave to bring the action and show:
 - a) The directors are unwilling to bring the action
 - b) That he is acting in good faith; and
 - c) It appears to be in the interest of the corporation or the shareholders that the action be brought

- Court can order the corporation to pay the costs of the shareholders in bringing the action
- Should defendant lose, court may order any amount awarded be paid directly to the shareholders, rather than the corporation

Shareholder Agreements

- An agreement between two or more shareholders that is distinct from the corporation's charter and by-laws
- Shareholder agreements can only apply to the parties in their capacity as shareholders – it cannot fetter the discretion of a director
- Shareholder agreements may include such terms as:
 - Right to employment
 - Right to participate in management of the business
 - Right to a fair price for a share interest

Unanimous Shareholder Agreement

- A shareholder agreement to which **ALL** shareholders are parties
- CBCA allows for a USA to fetter powers of directors
- USA is only possible in a closely held corporation
- Presence of the USA must be conspicuously stated on any share certificate – new shareholders are held partly to the agreement

External Responsibilities of a Corporation (27)

- **Protecting Stakeholders**
 - **Creditors** – Maintenance Test
 - **Investors** – Securities Act
 - **Environment** – *Environmental Protection Act* – liability of directors

Creditors

- No minimum investment required to start a corporation beyond the cost of incorporating.
- Lack of capital = inability to pay creditors particularly debts arising from tort or breach of K

Protection of Creditors

- CBCA covers protection of creditors
 - Share capital cannot be repaid by way of dividends or redemption of shares if the transaction would render the corporation insolvent.
 - **Insolvency**: Having liabilities in excess of the realizable value of one's assets or being unable to pay one's debts as they fall due.
 - Where a payment of dividends or redemption of dividends is made and causes an insolvency, then directors may be held personally liable for the shortfall caused.

Maintenance Test (Maintenance of Capital Test)

(CBCA s. 42): Corporations cannot declare a dividend where:

- (a) The corporation is, or would after the payment be, unable to pay the liabilities as they become due
- (b) If the realizable value of the corporation's assets would thereby be **less than** the aggregate of its liabilities AND its stated capital of all classes.

Investors

Securities Legislation: *Securities Act*, R.S.O. 1990 c. S. 5.

- Governed by Ontario Securities Commission
- Two Broad Goals
 - Prevent and punish frauds
 - Require full disclosure of financial information to prospective buyers of shares and bonds.

To accomplish these goals (protection of investors)

- Brokers and other dealers in securities are licensed
- Corporations must publish a prospectus if they intend to distribute shares
- Corporations are required to meet ongoing disclosure obligations for material changes.
- Regulations of takeovers or reorganizations of corporations.

Public Interest

- Legislation governing the control of corporations where their actions would be contrary to the public good
 - o Health and safety
 - o **Environment**
 - o Consumer legislation
 - o Anti-monopoly legislation
 - o Employment legislation
 - o Labour legislation

Environment

Environmental Offence: *Environmental Protection Act*, R.S.O. 1990 c. E.19 – presumption of negligence that can be refuted.

- Regulatory, not criminal, offence.

Corporations must demonstrate (liability for environmental offences)

- Effective system to prevent offences is in place
- Regular monitoring of that system
- Implement improvements wherever identified
- Keep up to date on technological and scientific advancements.

Standard of Care of Directors and Officers: need for expertise when engaged in hazardous activities.

- Held to the higher standard of the specialized skill and knowledge in the area; or
- If no skill and knowledge – then failed to employ the necessary expertise.

Who should be held responsible?

- The **actor** who caused the environmental damage can be held **personally responsible**.
- The directors/officers can also be held personally liable if they acquiesced to the hazard in questions.

Principles of Sentencing

- *R. v. Varnicolor Chemical Ltd.* (1992), 9 C.E.L.R. (N.S.) 176 – **Reasons for punishment:**
 - Protect the public
 - Deter and rehabilitate offenders
 - Promote compliance with the law
 - Express public disapproval of the act

Factors to be considered in determining appropriate Sentence

- Nature of the environment affected
- Extent of the damage inflicted
- Deliberateness of the offence
- Attitude of the defendant
- Attempts to comply with the Regulations

- Pre-incorporation Contracts

Torts: Vicarious liability

Contracts: Breach of contract (rules of agency) – “indoor management rule”).

Pre-incorporation contract – CBC s. 14(1)/(2)

- Subject to this section, a person who enters, or purports to enter, a written contract in the name of or on behalf of a corporation before it comes into existence is **personally bound** by the contract and is entitled to its benefits.

Pre-incorporation and pre-amalgamation contracts

- A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence in its name or on its behalf, and on such adoption
 - the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
 - a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

- Criminal Liability
 - Corporate Identity Doctrine
 - Sentencing Principles

Standard: Beyond a reasonable Doubt

Criminal laws require showing both the **Actus Reus** (the guilty act) and **Mens Rea** (the guilty mind).

Strict liability offences: do not require *mens rea*, and usually have a due diligence defence or a mistake of fact defence. (any party can be held liable, ranges from individuals to corporations)

Absolute liability offences: do not require *mens rea* and no due diligence defence or mistake of fact defence. (Cannot include incarceration) (only an enterprise can be made liable)

Criminal Code, R.S.C. 1985, c. C-46

s. 22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- a) Acting within the scope of their authority
 - i. One of its representatives is a party to the offence, or
 - ii. Two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence
- b) The senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

If corporations can't think, then how does a corporation meet the *mens rea* requirement?

- **The Directing Mind:** Any person who has **policy making authority** can be construed as the "directing mind" and can therefore fulfill the *mens rea* requirement for the corporation to be convicted. (*Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705)

Purpose of Criminal Law: to punish the wrongdoer

Purpose of Sentencing

- Denounce the wrongdoing
- Protect the public
- Rehabilitate the offender (specific deterrence)
- Deter others from committing the offence (general deterrence)
- Repair the harm done; and
- Promote public confidence.

Problems with criminal liability of corporations:

- **Finances:** costs are just passed on to consumers, employees, or shareholders.
- **Incarceration:** Can't imprison the corporation; difficulty for widely held corporations to determine the person responsible beyond a reasonable doubt.

Employment Law (18)

(less collective bargaining / labour disputes)

- Employee vs. Independent Contractor
- Employment Law
 - o Contract between parties = employment agreement
 - Can be for continuous service
 - Can be for fixed term
 - o Governed by:
 - Statute
 - Labour Union
 - Common Law

Employment Contract: A contractual relationship whereby one party, the employer, is authorized to direct and control the work of another party, the employee

Employment:	Independent Contractor:
-Degree of supervision & control over worker	- Ownership of tools
- Duration of the K	- Duration of the K
- Nature of the K	- Nature of the K
- Intention at the time of K formation	- Intention at the time of K formation
- Method of payment	- Method of payment
- Benefits	- Exclusivity
- Integration in the workplace	- Risk in profit/loss
	- Use of time & delivery of result

- The employer pays taxes for employees

- The most significant difference is the degree of supervision
- Risk in profit/loss: the independent contractor is more likely to experience higher risks with respect to the profit or loss than business is experiencing
- The employer usually dictates hour of work (under the requirement of employment legislation). Independent contractor usually has the right of controlling their own working hours.

- Torts of Employer

- Vicarious Liability / Negligent Hiring / Wrongful Referral
- Contract liability
- **Torts**
 - **Vicarious Liability:** Employer jointly liable for actions of employee.
 - **Negligent Hiring:** Claim by customer/employee for negligently hiring someone else (e.g. sexual harasser)
 - **Wrongful Referral:** negligently referring someone to a professional who is not qualified
- **Contracts**
 - Vicarious Performance

- Employee Duties

- Obey / Skill / Good Faith

Duties of the parties:

- **Employees' Duties**
 - Duty to obey (insubordination)
 - Duty to exercise skill and care
 - The reasonable test is being applied in this case
 - Duty of good faith and fidelity (while employed)

- Employer's Duty (to pay)

- Duty to pay

- Termination of Employee

- **Notice / Lieu / For Cause**

Termination of Employment Contract (Notice)

- Employment contracts are often **continuous in nature** – so, how are they discharged?
- By way of notice
 - Statutory and common law notice periods based on position and length of employment (must be reasonable)
 - Can provide payment in lieu of notice. (notice = time = \$)

How much notice is required?

- **Employment Standards Act, S.O. 2000 c. 41** – minimum requirements

- **Trade Practices** – often suggest longer than minimum as normal within an industry
- **At common law** - Reasonable notice
- Period ranges from two weeks to two years based on the seniority and the term of K

Dismissal for Cause

- **No Notice Required** for Dismissal for Cause
- **Dismissal for Cause:** Dismissal without notice or further obligation by the employer when the employee's **conduct amounts to a breach of the contract**
 - **Reasonable Notice Period**
- **Factors for Determining Reasonable Notice Period**
 - Trade practice
 - Duration of employment
 - Intention at time of K formation
 - Frequency of pay
 - Level of position
- **When/how can you dismiss for cause?**
- **Misconduct:** Crimes/Bad Behaviour
 - Does not necessarily need to cause economic loss
 - Where reputation of employer is affected
 - Other employees are affected
 - Causes direct financial loss
- **Insubordination:** Wilfully disobeying a **reasonable and lawful** request from your superiors.
- **Incompetence:**
 - Is there an implied or express term?
 - **Express:** Resume or application or interview, where you say you possess certain skills.
 - **Implied:** Applying for a job that requires certain skills when you don't have them.
 - **Doctrine of Condonation (similar to estoppel):** Condoning incompetence makes claim for dismissal for incompetence difficult.
- **Illness**
 - Not a breach of contract. It is a **frustrating event**.
 - EI / Disability Insurance covers these issues.
- **Employer should:**
 - (1) Need for warnings to employee – providing the opportunity for the employee to improve their behaviour
 - (2) Need to provide adequate training and assistance
 - (3) Need to document activities of both employer and employee

- Wrongful Dismissal
 - Constructive Dismissal
 - Mitigation
 - Punitive damages / mental anguish
 - Reinstatement

Wrongful Dismissal (Cause of Action): Where an employee claims they have been wrongfully dismissed.

- **Employer's Defenses:**
 - (1) Dismissed for cause
 - (2) Dismissed and adequate notice (or payment in lieu of) provided.
- **Even if cause is discovered after dismissal, this can be used as defense.**
- **Constructive Dismissal = Wrongful Dismissal.**
- **Defence of Adequate Notice:**
- Proving Adequate Notice – Factors considered by the court as per *Bardal v. Globe and Mail*:
 - Character of the employment
 - Length of service
 - Age of the employee
 - Availability of similar employment
 - Experience, training, and qualifications of employee
- Other Factors (may rise to punitive damages):
 - Whether the employee was induced to leave secure employment
 - Bad faith on the part of the employer
 - Expenses incurred seeking other employment

Notice Requirement (source)

- Contract law – place the injured party in the position s/he would've been had the contract been performed
- A reasonable timeframe is required to fulfill this purpose, hence the role of Notice

Payment in lieu of Notice

- Once the court sets the reasonable notice period (6 months for example)
- (Rate of pay + benefits) * notice = money

Mitigation

- As in breach of K cases, plaintiff must mitigate their damages
- Mitigation
 - Contract law requirement to act reasonably to reduce losses
 - Must try to obtain reasonably comparable employment
 - Court will reduce damages award if there is a failure to mitigate

- If a plaintiff (employee) successfully mitigates, then they receive the difference between notice requirement and actual income paid during the notice period as damages, and any costs associated with mitigation

Mental Anguish

- Courts generally do not consider hurt feelings
- Recognition over time that while employment contracts are economic in nature, there is decidedly a human element as well
- Problems of trying to assess intangibles such as “pain and suffering” and “humiliation”

Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 313

- Requirement of independent actionable wrong for damages for mental distress
 - Can extend notice period if it falls short of this requirement.
- Punitive damages can be paid if the firing was: sufficiently "harsh, vindictive, reprehensible and malicious"

Reinstatement

- Equitable remedy, not generally allowed unless provided by statute
 - Canada labour code - for federally regulated companies
 - Provincial legislation - Quebec, Nova Scotia
- Employee Welfare
- **Human Rights:** Applies to all employers in the private sector – cannot discriminate based on enumerated grounds (race, nationality, ethnicity, etc.)
- **Charter of Rights and Freedoms:** Only applies to government.
- **Pay Equity Legislation:** equal pay for equal work (has existed in Canada for over 30 years)
- **Employment Equity Legislation:** requires federal jurisdiction employers to engage in proactive employment practices to increase the representation of four designated groups: women, people with disabilities, Aboriginal peoples, and visible minorities
- **Regulation of Working Conditions:** Employment Standards Act, Labour Codes, Health and Safety
- **Employment Insurance Act:** Insurance against unemployment.

Worker's Compensation (WSIB):

- No fault compensation scheme.
- Employers are required to pay into the fund
- Injured employee can apply to the fund except if it was the employee's wilful misconduct that caused the injury

Business Organizations (24, 25)

- Sole Proprietorship
 - *Business Names Act*

Sole Proprietorship:

- Unincorporated business owned by a single individual
- Individual is sued in his/her own name
- Income is earned as business income in his/her own name and taxed at the individual level

Business Names Act

- Usually operate in the name of the individual
- Can register a business name under the **Business Names Act** if it is not the actual name of the owner
 - Advantages: the process is simple and no registration
 - Disadvantages: taxation (personal marginal tax rate) + liability
- **Partnership**
 - **How is it created (3 requirements) / Terminated**
 - **Legal Nature**
 - **Liability – Contracts / Torts**
 - Implied Terms of Partnership Agreement (4 terms)
 - Fiduciary Duties
 - General Partnership / LP / LLP

Partnership

- Relationship which subsists between persons carrying on a business in common with a view to a profit (*Partnership Act*)
- **There are three different kinds:** General Partnership, Limited Partnership and Limited Liability Partnership.

Partnership is automatically created if: two or more people are carrying on a (1) business (2) in common (3) with a view of profit.

- Two or more people
- Carrying on a business in common
- With a view of profit
 - However, in more formal business settings, there is usually a **partnership agreement** to set out the terms of the partnership

Legal nature of Partnership: Partnership has **no independent existence** and merely represents the collective rights and duties of all the partners.

- **Every time a partner dies or a new one is added, then the partnership is dissolved, and a new partnership is created.**
- **Nonetheless, partnerships can own property distinct from the property of the individual partners.** Individual partners just have an **interest** in the property.

- **Liability to Creditors:** Creditors first can obtain the assets of the partnership, then the individual assets of the partners.
- **Legal liability:** a partnership's name can be used in the cause of action. Individual partners are responsible for paying the judgment.

Creating a partnership

- comes into existence through agreement (express or implied)
 - **Good idea to create a partnership agreement**

Registration: no formal requirements to register a general partnership. Some provinces require **filing of a declaration** providing information about the partnership and if there are changes.

Contractual Liabilities of Partners

- Every partner is jointly liable for the obligations of the partnership. This is based on principles of agency and privity of contract.
 - **Pre-partner liability:** A new partner does not become liable for the previous actions of the partnership.
 - **Post-partner liability:** A partner who retires from a firm does not cease to be liable for partnership debts or obligations incurred before the retirement.
 - **Apparent partner:** Similar to ostensible/apparent authority in agency – they will be liable as if they were partners of the firm.
 - Applies equally to retired partners whose name still appears on the firm.
 - Anyone who **represents** himself as a partner will be liable to anyone who has extended credit based on the representation

Tort liability / Breach of Trust: the firm is liable for “any **wrongful act or omission** of any partner acting in the ordinary course of the business of the firm”. Therefore, the firm, including all the partners, are **jointly liable** for injuries or damages caused by a partner doing the firm's business.

Relationship between Partners: Contractual in nature – found in the partnership agreement.

There are implied terms through statute:

- **A. Partnership Property:** The Act provides that all property and rights and interests in property originally brought into the partnership stock or acquired...are called partnership property and must be held and applied by the partners **exclusively for the purpose of the partnership**.
- **B. Financial Arrangements:** The Act provides:
 - 1. All partners entitled to share equally in the capital and profits of the business and must contribute equally towards the losses
 - 2. If a partner incurs expenses or liabilities, the partnership must indemnify him/her
 - 3. A partner is not entitled, before determination of profits, to interest on the capital.
 - 4. No partner is entitled to remuneration.

- **C. Conduct of the Business:** The Act provides:
 - 1. Every partner may take part in the management of the partnership business
 - 2. Any difference arising as to **ordinary matters** connected with the partnership business may be decided by **a majority of** the partners; no change may be made in the **nature** of the partnership business without the consent of all partners.
 - 3. Partnership books and records are kept at the place of business of the partnership.
- **D. Membership:** The Act provides:
 - 1. Can only introduce a new partner with consent of all existing partners.
 - 2. You can't assign your share in the partnership

Fiduciary Duties: Cannot be altered by partnership agreement

- **A. Information:** Partners must render true accounts and full information of all things affecting the partnership.
- **B. Secret Benefits:** Every partner must account to the firm for any benefit derived by him/her without the consent of the other partners from any transaction concerning the partnerships
- **C. Duty not to compete:** Must account for any breach.
 - There might be **non-competing clause**
- **Termination of Partnership:** Can be agreed to in a partnership agreement but the default rules under the Statute are:
 - **Termination by Notice or Expiry**
 - **Termination on Death or Insolvency**
 - **Dissolution by Law:** mentally incompetence, permanently incapable, guilty of conduct that can negatively affect business, breaches agreement, or just and equitable.
- **Effects of Dissolution:**
 - Assets are used to pay creditors, remaining distributed proportionally.

Limited Partnerships (LP): *Limited Partnership Act*

- **General Partner:** unlimited personal liability (at least one)
- **Limited Partners:** liability limited to amount invested (like a shareholder).
 - Limited partners cannot take part in the active management of the partnership.

Limited Liability Partnership (LLP): Individual partners remain liable for their own negligent actions, but the non-negligent partners are not personally liable for losses caused by the negligence of another partner.

- Nothing changes for other torts or contractual liability.

- Joint Ventures / Income Trusts
- **Joint venture:** agreement between two or more parties to collaborate on the management of a specific project, to share the work and share the profits.
 - o **It is contractual in nature**
 - o **Equity Joint Venture:** corporation formed, and jointly owned, by the parties to the joint venture for the purpose of carrying on the venture.
- **Income Trusts:** transfer of income-producing assets from an operating company to a trust.
 - o **Declaration of trust**
 - o **Unitholders:** beneficiary of the trust.
 - o Used to predominantly be used for tax strategies (more difficult now).
- **Corporation**
 - **Unique Attributes**
 - Private vs. Public
 - **Corporate Capital (Equity vs. Debt)**
 - Share Transfer Restrictions

Corporation

- A separate legal entity formed by the act of incorporation in accordance to a prescribed legal procedure (*OBCA/CBCA*)

Corporation: a legal person formed by incorporation under statute.

- Some differences from partnerships:
 - o Limited liability of shareholders.
 - o Transfer of Ownership (can sell shares, but often limited)
 - o Separation of management and control
 - o No duty of good faith for shareholders
 - o Continuity
 - o Taxation
- Consequence of separate legal personality:
 - o **Capacity:** *Salomon (a case)*
 - o Independent civil liability
 - o Independent criminal liability
 - o Constitutional Rights
- Limitations on limited liability:
 - o Improperly paid dividends
 - o Bankruptcy and **Insolvency Act**
 - o **Lifting the corporate veil:** control, control exercised to commit a fraud/wrong/breach, misconduct must have caused injury.

Methods of Incorporation

- **Early Methods:** royal charter / special acts of parliament
- **Modern Method:** General incorporation statutes
- **Choice of Jurisdiction:**

- **CBCA:** more suitable for large businesses who operate nationwide;
- **OBCA:** more suitable for businesses that operate only within Ontario (but not necessary).

Constitution of a Corporation

- **Articles of Corporation:** Name, registered office, classes/# of shares, restrictions on classes/transfer of shares; # of directors; restrictions on business
 - Name must include “corp”, “inc.”, etc.
- **By Laws:** Board of Directors adopt new or amend old bylaws, shareholders then must approve them by majority vote (although some issues require two-thirds)

Public vs. Private Business Corporations

- **Private Companies:** corporations with a restricted number of shareholders prohibited from issuing their shares to the general public.

Public corporation:

- **Distributing Corporation:** A corporation that issues its securities to the public; also referred to as an **issuing corporation** or reporting issuer.
- **Professional Corporations:** Some professions (lawyers/doctors) allow for professional corporations – don’t have same limited liability.

Requirements for formation:

1. Permitted by rules of profession
2. Professional controls the voting shares

Can incorporate alone or with other members of the profession

- Each member = responsible for their own negligence

Corporate Capital

- **Equity vs. Debt:** Corporations raise money by issuing shares (equity) or borrowing money (debt or most commonly referred to as bond)
- **Share Capital:**
 - **Authorized Capital:** maximum amount of shares a corporation is allowed under its articles.
 - **Issued Capital:** shares issued by corporation
 - **Paid-up Capital:** shares that have been issued and fully paid for.
 - **Stated Capital Account:** amount received by a corporation for the issue of its shares.

Corporate Securities

- **Share:** a document evidencing an equity interest in the business.
 - Shareholders can vote at the Annual General Meeting or at special meeting of shareholders.
 - **Class of shares:** each share within a class of shares must have the same rights. Rights usually include – dividends / voting / share in distribution upon winding up.
 - **Common shares:** usually have voting rights attached to them.

- **Preferred shares:** usually entitled to dividends before other classes of shares. (but with no voting rights)
 - **Cumulative Rights:** the right of a preferred shareholder to be paid arrears from previous years before any dividend is paid on the common shares.
- **Bond:** A document evidencing a debt owed by a corporation
- **Share Transfer Restrictions:** Under the *Securities Act*, the articles of incorporation or the share certificate must limit the ability to transfer your shares without prior approval of the Board.

Secured Transactions (28)

(Less security for bank loans)

- Bailment
 - Duty of Care (take care of goods and return on time)
 - Contract/No Contract

Bailment - possession of personal property without a transfer of ownership

- The receiving party agrees to return the property at a later time
- **Parties:** bailor (owner) and bailee (receiver)
- During bailment, the bailee must take care of the bailor's goods
- Does NOT require a contract, as essential elements are delivery of possession without the intention to transfer title and with the intention that the property be returned to the bailor
- **Contractual bailment** - if there is not payment made, then the bailee may have a "lien" against the bailed goods in its possession, which gives the bailee a right to possess the goods until the bailor pays the sum due.

- What is a secured transaction
 - **Personal Property vs. Real Property**

Definition of a secured transaction

Generally, a loan (or credit) whereby the lender acquires a "security" interest in collateral owned by the borrower and is entitled to foreclose on or repossess the collateral in the event of the borrower's default.

Collateral Security: An interest in property of a debtor that gives a creditor the right to seize and sell it in the event of non-payment of debt.

Parties: creditor and debtor

What is personal property?

- Pretty much anything that is not "real property" (i.e., land/homes)

When does a creditor want to take a security interest?

- Whenever it is practical to do so. Some factors to consider:

- *It provides an incentive to a debtor to pay*
- *When goods maintain their value, then those goods are good security against a loan*
- *Better for longer term debts since it lowers long-term risk.*

– Business Risk Management

- *If credit amounts are small, it may be better to “write off” a small percentage of bad debt than enforce a security*

- Rights of a Secured Creditor

- **General Creditor vs. Judgment Creditor vs. Secured Creditor**
- **General Creditor:** Creditor with no security interest
- **Judgment Creditor:** Can obtain Execution Order to seize property
 - **Execution order:** an order that gives the sheriff authority to levy execution
 - **Levy execution:** to seize and sell a debtor’s chattels or arrange for a sale of his lands
- **Secured Creditor:** Does not need a judgment to realize on its security
 - Associated with an issuance of a credit product that is backed by collateral
 - Has priority over other unsecured creditors.

- Creating a Security Interest

Created by agreement between the parties:

- Conditional Sales Contracts
- Chattel Mortgages
- Pledges
 - Bailment of personal property as security for repayment of a loan where possession passes to the bailee
- Assignment of book Debts
 - Security interest in the debtor’s accounts receivable
- Floating Charges

- Various Types of Security Contracts

- **Conditional Sales Contract**
 - **Similar to a lease:**
 - Debtor in possession of the good, but ownership remains with the creditor.
 - Creditor has right to repossess the goods upon default.
 - Creditor has right to sue for balance outstanding after resale of goods.
- **Chattel Mortgage**
 - **Definition:** A mortgage of personal property.
 - **Parties:** Mortgagor (debtor) and Mortgagee (Creditor).
 - **Arises in two ways:**

- Mortgagor purchases property and vendor “takes back” a mortgage; or
- Mortgagor already owns property and gives mortgagee a mortgage against it to secure a debt.
- **Equipment in Buildings (chattel mortgage example)**
 - Mortgagee can hold 2 mortgages:
 - Traditional mortgage on the land/building and its fixtures
 - On real properties
 - Chattel mortgage on the equipment in the building.
- **After-acquired property:** (i.e., property that is not in existence at the time the mortgage is created)
 - Often used in **inventory in a business** (always changing)
 - Does not transfer title to specific goods to the creditor, allowing purchasers to obtain good title in ordinary course of business.
 - Creditor holds a **suspended priority** over other creditors.
- **Floating Charges**
 - **Definition:** A form of mortgage on all of the assets of a corporation other than those already specifically charged.
 - In addition to those assets that are already pledged or mortgaged to the security

- **PPSA**

Personal Property Security Act

- **Creation / Attachment / Perfection**
- Each Province has its own Act since it is the **jurisdiction of the provinces** (not the federal government).
- **Generally, it covers the creation, perfection, and registration of:**
 - Conditional Sales Contracts
 - Chattel Mortgages
 - Assignment of Book Debts
 - Floating Charges
 - Pledges
 - Leases
 - Consignments intended as security
 - Other less common forms of security.
- **(1) Creation of security Interest:** Agreement between the parties
- **(2) Attachment of a Security Interest:** The **moment in time** when a debtor’s property becomes subject to a security interest
- **(3) Perfection of the security interest:** The moment in time when a creditor’s security interest becomes **protected**.

- 2 Ways to perfect

Perfection can occur in two ways:

- (1) Where the secured party takes possession of the assets (e.g., bailment; pledge); OR
- (2) Once registration under the PPSA is complete.

- Priority/Competing Interests

- Time of Perfection
- What if two people have security over the same assets?
 - **Timing of Perfection:** First to register/perfect gains priority.
 - **Special priority for Purchase Money Security Interest (PMSI):** the interest that arises when assets purchased by a debtor are charged as security for a loan to enable acquisition of those specific assets. It is given special priority above other perfected security interests.
 - **Is required to get around “after acquired property” or floating charge security interests that may stall a business from being able to finance new purchases.**
- Effects on third parties
- What is the effect of a security interest on purchasers?
 - **There is a separation of possession and ownership, which may mislead third-party and subsequent purchasers:** Therefore, PPSA requires all security interests in goods left in the possession of a debtor to be perfected by registration – so you can look it up before you purchase it to see if there is a charge on the asset.
 - **Effect of registration:** A properly registered security interest can give priority against innocent third parties since they have now been deemed to have notice of the charge.
 - **Exceptions for Good Faith Purchasers:**
 - Some provinces exempt good faith purchases of small value goods (e.g. <\$1000);
 - Goods sold or leases in the normal course of business.

Who registers a PPSA in practice?

- **Low-valued retailers:** unlikely to register.
- **Manufacturers or wholesalers to other businesses:** likely to register since high-risk business and likely to be other creditors with priority.
- **Must maintain perfection if there are any changes / it expires.**

Intangible Property

- **Assignment of book debt:**
 - Security interest in debtor’s accounts receivable.
 - Different from assignment of contractual rights since assignment is only triggered on default of an underlying debt.

- **Investment Property:** stocks/bonds, securities accounts, futures contracts, or futures accounts.
 - Under the PPSA, financial assets are treated differently.
 - Creditor can perfect by having “control” of the investment property, does not need to have physical possession (since they are often held in banks)

Conflicting Priorities

- Registration generally sorts out proprieties, however, conflicts can arise:
 - **Interprovincial disputes:**
 - **Other types of security interests not governed by security interests**
 - **Federal legislation (e.g. *Bank Act*) outside the scope of the PPSA**

Agency & Franchising (17)

- **Creating an Agency Relationship**
 - **Two contracts**

Agent: a person acting for another person in contractual relations with third parties

Terminology: the agent acts on behalf of the principal to bring third parties into a contractual relationship with the principal

- Employees are agents of their employer, but not all agents are employees
- An employee’s work is often under direction and supervision of employer
- An employee often has a very limited ability to bind their employer to a contract
- Rights and responsibilities between employer/employee differ from principal/agent
- **There are three parties:**
 - Agent
 - Principal
 - Third-party
- **Two Contracts:**
 - **Principal and Agent:** Agency Contract
 - **Principal and Third-Party:** Contract for goods/services, etc.

Agency Agreement: The K between principal and agent whereby the agent undertakes to act on behalf of the principal

- **Normal rules of contract formation apply** (offer, acceptance, and consideration)
- **Statute of Frauds:** If greater than **1-year**, then must be in writing to comply with *Statute of Frauds*
- **Should set out limits of agent’s authority.**

Power of Attorney

- A type of agency agreement authorizing the agent to sign documents on behalf of the principal

- Commonly used when unable to enter contracts on your own (out of country/city, health issues, etc.)
- Apparent / Ostensible Authority
 - Ratification
 - Authority that is not real, but is acquired from a past manner of transacting business or from trade custom
 - This is as opposed to actual authority (explicitly given to the agent by the principal)
 - Test for Apparent Authority:
 - Should the 3rd Party have been aware of the agent's lack of authority or at least been suspicious? Or is it reasonable to assume from the type of business that the agent is engaged in, that the agent had the authority in question?
 - **If the Agent had apparent or ostensible authority, then the principal is bound by the contract even if the agent exceeded his/her authority or did not have authority.**
 - Otherwise, you would always need to do due diligence on an agent's authority before entering a business transaction with them.

Holding Out: Representing by words or conduct that a person is one's agent or has a particular authority

Ratification: process of confirming the terms of the contract.

- Where apply: Where an agent exceeds his/her authority, and principle of apparent authority does not apply, then principal may still ratify the contract
- Definition: Subsequent adoption by the proposed principal of a K made by an agent acting without (both actual and ostensible) authority
 - Must be timely
 - Must be of entire K
 - Can be by conduct
 - Principal must have been capable of entering K at time of formation
 - Principal must be ascertainable at time of K formation
- Duties of Agent to Principal
 - Duty of Care / Good Faith
 - Duty to comply with the agency agreement:
 - Just like any other K – binding on both parties
 - Principal can sue for breach of K where agent acts outside authority
 - Agent has the duty to keep principal informed as courts have deemed that what the agent knows, the principal also knows
 - Duty of Care:
 - At a minimum: Reasonable care, diligence and skill in transacting business on behalf of the principal

- Standard of care will depend on agent's own knowledge & skill; as well as the nature of the task
- Duty of Good Faith:
 - Fiduciary relationship (Agent owed fiduciary duty to principal)
 - Agent must put principal's interests ahead of his/her own
 - Agent cannot make secret profits on any transaction made for the principal
 - Agent has duty to disclose any and all relevant information

Acting for two principals:

- Potential conflict of interest
- Potential breach of duty of good faith
- MUST obtain consent of both principals if there is a potential conflict/breach of duty.

- Duties of Principal to Agent

- Duty to comply with K / Pay
- **Remuneration:**
 - Obligation to pay as per K or as per reasonable fees of industry
 - Often paid on a commission basis – when the agent has brought the prospective client who is “ready, willing and able” to close the deal; or;
 - Upon closing of the sale
- **Expenses:**
 - Implied term that principal will cover the reasonable expenses of the agent when acting in his/her real authority

- Rights and Liabilities of Principal and Agent to Third Parties

- When is Principal only liable? Agent? Both?
- Undisclosed Principal
- Liability for Torts – Joint/Several
- **Principal alone is liable when:**
 - Agent acting with real or apparent authority
 - Agent must make clear to 3rd Party that s/he is acting for a principal – even if an undisclosed principal
 - Where principal alone is liable, payment or delivery must be made to the 3rd party and not the agent – if agent absconds with money/goods, principal remains liable to 3rd party
- **Agent alone is liable:**
 - Where agent represents him/herself to be the principal
 - Under these circumstances the principal has no rights or liabilities under the K
- **Either the Principal or the Agent is liable:**
 - Where agent did not disclose status as an agent – third party can sue either the agent or the principal but not both
 - If agent is sued successfully by 3rd party then principal has no liability

- If existence of principal becomes apparent during court proceedings, 3rd party can have the action discontinued against the agent and brought against principal instead

Rights of Undisclosed Principal

- Right to enforce the contract against 3rd party where:
 - s/he can show that the K was made with his authority
 - The authority must be real and not apparent
 - EXCEPTION: the undisclosed principal cannot enforce a K that is essentially personal in nature
- Third party cannot hold undisclosed principal liable in a situation where the agent acted without real authority.
- **Principal is jointly and severally liable for torts committed by agent within real or apparent authority**
- **Examples:**
 - **Fraudulent Misrepresentation (Deceit)** – 3rd party has right to:
 - Rescind K (as if the K has never been formed)
 - Sue BOTH agent and principal for tort of deceit
 - Principal will have right against agent for the deceit
 - Agent can also be held liable for negligent misrepresentation
- Breach of Warranty of Authority
- **Warranty of Authority:** Where a person purports to act as agent represents that she has authority to contract on behalf of a principal
- **Purpose:** put parties back in the position they would have been had the misrepresentation not occurred
- **Third party has the right to sue for Breach of Warranty of Authority where:**
 - **Agent has no real or apparent authority** (and no ratification by principal) – there is no contract
- **Third party will have an action in deceit against a fraudulent agent** – there is no contract
- Terminating Agency Relationship
 - End of K / Completion of P / Notice / Death / Bankrupt / Impossibility
- **Agents authority is terminated when:**
 - At the end of a time specified in the agency K
 - At completion of the particular project
 - Upon notice by either party (if there is a termination clause)
 - Upon death or insanity of either principal or agent
 - Upon bankruptcy of principal
 - Upon an event that make performance of the agency agreement impossible (like frustration)

- Franchise Law
 - Franchisor/Franchisee
 - *Arthur Wishart Act* – Disclosure / Fair Dealing / Right to Associate
- **Relationship:**
 - Franchisor (e.g. McDonalds) and Franchisee (e.g. person who owns McDonalds franchise and runs the store)
 - Relationship is contractual in nature
 - This is not a fiduciary relationship, but there is a **duty of good faith** between the parties (i.e. must be open, honest and not misleading).

Franchisor – grants a licence to Franchisee

Franchisee – pays for the licence, but operates the business as a independent operator

The Franchise Agreement

Usually includes:

- **Consideration of the Parties:** i.e. franchise opening fees / royalty payments in exchange for using trademarks/business practices.
- **Conduct of the Business:** Restrictions on how store / restaurant must look, where it can be located, what you can sell, etc.
- **Termination of the Agreement:** how franchise agreement can be terminated by either party.
- **Restrictive Covenants:** limits on what you can do (for example, non-competition clauses)
- **Intellectual Property Rights:** using trademarks and business processes.
- ***Arthur Wishart Act*** - governs franchise agreements/relationships
 - **Right to Disclosure:** Franchisor must provide franchisee
 - **Fair Dealing:** duty of good faith.
 - **Right to Associate:** right to join an association of other franchisees (like a Union)

Contracts (12, 13)

The Effect of Breach of Contract and Remedies for Breach (12, 13)

- **Condition vs. warranty**
 - Time is of the essence clauses
- **Condition:** An essential term of the Contract.
- **Warranty:** A non-essential term of the contract.
- **Breach of Condition:** Allows the non-breaching party to opt for a discharge of the Contract and sue for damages. Otherwise, they can remain “ready willing and able to perform” and force the other side to perform.
- **Breach of Warranty:** Both parties remain **bound** to the Contract, but the non-breaching party can **sue for damages** where it has incurred a loss.

- Effect of Breach
 - Minor vs. Major Breach
 - **Minor Breach:** A breach of non-essential term of Contract or of an essential term in a minor respect.
 - **Major Breach:** A breach of the whole Contract or of an essential term, so that the purpose of the Contract is defeated.

Effect: Major breach may discharge the non-breaching party from performing the contract.

- How does breach occur?
 - Express repudiation / failure to perform / impossibility

Express Repudiation: Declaration of intention by one party to not perform.

- ▶ **Options to Non-breaching party:**
 - ▶ Terminate Contract and reserve the right to sue for damages; or
 - ▶ Insist on performance and wait for non-performance (must remain ready and willing to perform their side of the contract).
- ▶ **Anticipatory Breach:** Breach before performance is due.
- ▶ **Timing:** Breach can only occur after contract has been formed.

Rendering Performance Impossible: One party purposefully makes the contract impossible to perform.

- Also likely a breach of the implied duty of good faith
- A.k.a. self-induced frustration
- **Example:** double booking, not getting building permits on purpose, not buying materials required to complete the project, etc.
- Can occur before or at the time performance is due.

Failure to Perform / Inadequate Performance: breaching through conduct.

- ▶ Can only occur when performance is **due** (otherwise the party can always perform later and still meet their obligations under the contract).
- ▶ Can be total or partial failure.
- ▶ Can also be grossly inadequate performance.

- Doctrine of Substantial Performance
- **NOT to be confused with “part performance”**, which only applies to contracts for land, and only in cases where the *Statute of Frauds* applies.
- **Substantial Performance:** performance that does not comply in some minor way with the requirements of the contract.
 - The non-breaching party cannot avoid his or her performance under the contract.
 - Instead, they must **perform and can sue for damages** resulting from the inadequate performance.

- Exemption Clauses
 - *Tercon Contractors*

Exemption Clause: A clause in a contract that exempts a party from liability for failing to perform some or all its contractual obligations.

- These are not always enforceable.

***Tercon Contractors Ltd. v. BC (Transportation and Highways)*, 2010 SCC 4** – 3-part test where exemption clauses will not be applied to protect a breaching party from liability.

- **(1) Interpretation of Exemption Clauses:** Does the clause apply to the facts?
- **(2) Unconscionable clauses:** terms agreed to between parties of unequal bargaining power that gave an unfair advantage to a powerful party over the weaker party.
- **(3) Public Policy / Public Interest:** court can still refuse to enforce it if the injured party can “point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract”.

- Remedies
 - Damages / Equitable Remedies / Quantum Meruit

Damages: Monetary award to compensate an injured party for the loss caused by the other party’s breach of contract.

- **Compensatory not punitive**
- **Purpose: place the injured party in the position they would have been had the contract been performed.**

Measurement of Damages: In most cases, you are entitled to expectation damages, consequential losses and general damages.

- **Expectation Damages:** Expected profits under the contract at the time of contract formation.
 - **Opportunity cost:** Lost your chance of making a similar contract with a different promisor, so should be entitled to your profits.
- **Consequential loss:** other reasonably foreseeable damages that flow from the breach (e.g. shutting down business operations).
- **General Damages:** Damages that are not quantifiable (e.g. lost reputation).
- **Reliance Damages:** Damages for wasted effort
- **Liquidated Damages:** An amount agreed to be paid in damages by a party to a contract if it should commit a breach.
- **Nominal Damages:** Where loss sustained is negligible.

Problems in measuring damages:

- Hard to estimate damages for:
 - Mental Anguish
 - Wrongful dismissal
 - Lost enjoyment

- Cost of Performance vs. economic loss

Equitable Remedies

- ▶ **Courts of Equity:** Court orders other than money settlements
 - ▶ Where damages are not sufficient
 - ▶ Can order a party to perform the Contract (**Specific Performance**)
 - ▶ **Specific Performance:** An order requiring a defendant to do a specific act; usually to complete a transaction.
 - ▶ **Almost never granted in employment or personal service contracts**
- ▶ Discretionary
- ▶ Must come to court with “clean hands”
- ▶ Action must be brought within reasonable time
- ▶ No innocent 3rd party can be affected
- ▶ Consideration must be commensurate with promise

Injunctions:

- ▶ A court order restraining a party from acting in a particular manner
- ▶ Need for a negative covenant in the contract
- ▶ Injunctions are rare in employment Contracts.

Quantum Meruit: the amount a person merits to be paid for goods or services provided to the person requesting them.

- ▶ Is an exception to the general rule that expectation damages are to apply
- ▶ Exception occurs when there is a wrongful termination of the contract.
- ▶ What is breaching party entitled to if they partly performed their requirements under the contract?

- Mitigation / Causation

Mitigation: action by an aggrieved party to reduce the extent of its loss caused by the breach of the other party.

- Requirement is “reasonable” mitigation.

Causation: damages must be causally connected to the breach of contract (“but for” test again)

- **Special circumstances:** breaching party may not be held liable for additional damages arising from special circumstances, where the breaching party was not made aware of them.
 - **Test:** from past experience and knowledge between the parties, and taking into account trade usages, should the parties have reasonably expected the loss at the time of contract formation
- Cost of Performance vs. Economic Loss

Refer to the **Peevyhouse v. Garland Coal Mining** case

We usually consider the cost of economic loss as the damages awarded.

- Enforcing a judgment
 - Steps to take to enforce a judgment
 - Execution / Garnishment / Examination

What is a judgment: A court order requiring one party to pay to the other damages or perform as per an equitable remedy.

The parties become:

- Judgment Creditor and
- Judgment debtor.

The steps to seize assets of the JD:

- Judgment must be registered with the court.
- Writ must be filed with Sheriff's office.
 - Sheriff's Office:
 - Must pay out all secured creditors first.
 - Takes a percentage for Sheriff's fees.
 - Difference remaining is paid *pro rata* amongst all of the execution creditors.
 - Execution order must be made to the Sheriff; and then
 - The Sheriff can levy execution – seizes and sells assets for the benefit of all execution creditors.
 - Some assets are exempt from seizures (pensions / annuities).
- Other processes:
 - Garnishment order (bank account / wages / AR)
 - Filed with Sheriff's office, payments made to Sheriff, and sheriff distributes to execution creditors).
- Writs must be renewed regularly (every couple of years) to stay current
- Judgments remain in effect for 21 years
- Notice of the judgment can be placed on various credit bureau to affect the credit rating / notifies others of outstanding debt.
- Examinations in aid of execution - allowed annually

E-Commerce (31)

- Web-Wrap Agreements
 - A website document setting out contractual terms, the acceptance of which is indicated by “clicking” on the appropriate icon.
- Contract Issues
 - Proper law of the contract
 - Statute of Frauds still Applies
- **Formal Requirements:**

- - *Statute of Frauds* still applies
 - Electronic signatures are sufficient (even e-mail signatures may be sufficient);
 - Electronic document meets “writing” requirement.

- Tort Issues

- Negligence/Defamation/IP

Unique negligence issues: Malfunctions in computers, servers, or software can be the result of negligence and can cause huge effects.

Defamation: publishing something online is considered “in writing” so would be libel if it were false.

Intellectual Property Issues: Copyright vs. patents vs. Trademark.

- Intellectual Property

- Copyright vs. Trademark vs. Patent

Copyright Act

- Copyright is the right to “copy” a literary or artistic work (includes software)
 - Limitations: “Fair Dealing” defence – reproduction for the purpose of criticism or private study, but need to cite author.
- Publishing work on the internet does not make the work “public domain”
- Protection:
 - Copyright does not protect ideas, only their expression or fixation.
 - Protect original works against the unauthorized reproduction in different media, publication, public performance and telecommunication to the public.
- Copyright **does not** need to be registered
 - In Canada, copyright in a written work lasts for the life of the author **+ 50** years.

Trade-Marks Act

- A trademark is a word (or words), a design, or a combination of these, used to identify the goods or services or brand of a person or organization.
- Trademarks are registered or unregistered (based on use, under common law jurisdiction).
 - **Registration of a trademark:** Good for 15 years and renewable every 15 years.
 - Exclusive right to use the mark throughout Canada in respect of the goods and services for which it is registered.
 - **“Passing Off”:** The tort for breaching trademark – can become an issue online.

Patent Act

- A patent is an exclusive right to invention for 20 years
- Inventor must make the invention available to the public, by filing a description so that it can be duplicated once the patent expires.
- Must “file the patent” – they are approved as long as requirements are met, then people can challenge them as unenforceable.
- Business methods are patentable

- Patents can't be on "ideas", they must be novel, useful, ingenious. Must have sufficient proof at priority date.

- Jurisdiction

- Traditional factors / "Real and Substantial Connection" test / *Forum Non Convenien*
- Courts will take jurisdiction over a matter if:
 - **(1) Traditional Factors:** Defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction.
 - **(2) There is a "Real and Substantial Connection" to the Jurisdiction:**
Presumptive connecting factors:
 - The Defendant is domiciled or resident in the province
 - The defendant carries on business in the province
 - The tort was committed in the province; or
 - A contract connected with the dispute was made in the province.
 - **(3) Forum Non Conveniens:** Even if the court has jurisdiction over the matter, it can decline to exercise its jurisdiction if another jurisdiction would be clearly more convenient or appropriate.
 - **Factors:** service of documents, availability of witnesses, enforcement of judgment, avoidance of multiplicity of actions, standing, applicable law

Forum Non Convenien

- There is no obligation for one jurisdiction to recognize the judgment of another jurisdiction. Questions arise to its legitimacy, including:
 - Was the judgment made in the appropriate forum?
 - Was the judgment legitimately obtained?
 - Does the judgment offend against either natural justice or public policy?
- Need to apply to the court in the jurisdiction where assets reside and request recognition or start a new action and seek judgment.

- Privacy / Anti-SPAM

- When can you collect / store / use private information?
- When can you send an advertising e-mail under CASL?
- Under CASL, unless exempt, commercial electronic messages ("CEMs") require consent from the recipient, either **express or implied**.
- Unless exempt, CEMs must contain:
 - 1) prescribed disclosure; and
 - 2) an unsubscribe mechanism in prescribed form.

International Business Law (30)

- International vs. Multinational Business
- **International Business:** Located in one place but dealing with foreign countries in the course of its business.
- **Multinational Business:** Offices set up in other countries and carries on business in the other countries as well as their HQ country.
- Insurers/Carriers/Financiers/Export Houses

- Incoterms / Bill of Lading / Certificate of Insurance / Invoice / Letter of Credit

INCOTERMS: released by the International Chamber of Commerce (ICC)

- a set of rules issued by the ICC which define the responsibilities of sellers and buyers for the sale of goods in international transactions.

Bill of Lading: Document signed by a carrier acknowledging that specified goods have been delivered to it for shipping.

Certificate of Insurance: Insuring goods against loss or damage

Invoice: Contains important information about the transaction – names of parties, date, description of goods, details of packaging, price of contract, etc.

Letter of Credit: after supplier's shipping (used for financing purposes)

- Proper Law of the Contract
 - Conflict of laws analysis – surrounding circumstances / system of law that is most closely connected.
 - **The Proper Law of the Contract:** The law of the country or jurisdiction by which the provisions of a contract are to be interpreted and its effect determined.
 - **How do you determine the Proper Law of the Contract?**
 - The Contract may set out the Proper Law of the contract by agreement; or
 - Conduct a conflict of laws analysis – which is a complex set of rules to resolve questions concerning private relationships that are affected by the laws of two or more countries. Courts will look at:
 - Surrounding circumstances and the intentions of the parties.
 - The system of law that is most closely connected to the contract – or different systems may apply to different parts of the contract.
- Trade Law
 - NAFTA/USMCA, GATT, WTO
 - **NAFTA/USMCA** - An agreement signed by the governments of Canada , Mexico and the United States, creating a **trilateral trade bloc** in North America.
 - **General Agreement on Tariffs and Trade (GATT)** – A multilateral agreement regulating trade among 153 countries. Based on the perception that international trade is beneficial, that the gains to society from trade outweigh the losses to those who are hurt by competition from abroad, and that value is created through specialization and exchange in open markets.

- **WTO** – An international organization to supervise and liberalize world trade.
- Foreign Investment
 - Passive vs. Active
 - **Passive Investment:** Buying shares in foreign companies or foreign government bonds
 - **Active Investment (Foreign Direct Investment):** Purchasing foreign property, setting up an office in foreign country or joint ventures.
- Jurisdiction vs. Law of the Contract
- **Issues of Jurisdiction arise** – even where the Proper Law of the Contract has been set out in the contract (court can still refuse to exercise jurisdiction).
 - A court must consent to the action being brought in its jurisdiction, and courts generally dislike “forum shopping”

Each domestic court sets out its own grounds for when it will exercise its jurisdiction – there must be some real and substantial connection to the jurisdiction.

There is a difference between “Jurisdiction” and the “Law of the Contract”

- Arbitration
- Alternative to Court Action:**
 - International, neutral third parties set up to arbitrate disputes.
 - Often forms a term of the contract (binding arbitration).
- Advantages:** Under the New York Convention, courts will recognize an arbitrator’s judgment; decision often remains private.

Ethics

Role Morality

- People tend to do things in their roles at work that they otherwise would not do in their normal lives.