LAW OVERVIEW

THE LAW IN ITS SOCIAL AND BUSINESS CONTEXT

FORMATION OF A CONTRACT

GROUNDS UPON WHICH A CONTRACT MAY BE SET ASIDE

INTERPRETATION OF CONTRACTS

THE DISCHARGE OF CONTRACTS

BREACH OF CONTRACT AND REMEDIES

Contract Law

Definition

Contract: agreement between 2 or more parties creating obligations that are enforceable or otherwise recognizable at laws. Does not come into existence until an offer has been made by the offeror, accepted by offeree.

To make Contract binding, needs: Intention, Offer, Acceptance, Consideration Capacity, Legality, Writing but only if required (required for limited types of contracts).

Contract law is flexible: may be written, oral, or be by conduct.

Between Strangers and Close Friends

• The law PRESUMES that parties in arms-length transactions intend to be legally bound, especially when they are strangers in commerce
• The presumption is less clear for close friends or family members- the presumption is that there is no intent

Intention

Both parties must intend to create a legally enforceable agreement. Must be a mutual meeting of the minds.

"Would a reasonable person looking at the outward conduct of the parties say that they showed a serious intent to make a contract?" (Carlille vs Carbolic Smoke Ball Company)

= the seriousness of intention is assessed based upon the objective standard of what a reasonable person would believe

Intention and Writing

A contract does not need to be in writing to be enforceable in the courts in British Columbia, unless it is a contract, as set out in the **Law and Equity Act, RSBC**

• For certain land transactions
• For a guarantee or indemnity
• For a contract not to be enforced by either party within a year
• Wills and Powers of Attorney must also be in writing
• Writing form can be in several documents
• Document can be written up after contract was formed
• Writing no longer means just the written word – it now includes electronic transactions such as emails

Writing Requirement

For Land:

- Must be signed by the party to be charged (defendant = party denying the existence of a contract)
- May be a series of written notes or documents that are sufficiently linked, or one document
- Essential terms must be included:
  - Identity of the parties
  - Subject matter
  - Consideration

Contracts for the sale of land

- Not required for leases & agreements to lease under 3 years duration
- Contract enforceable if:
  - Signed by the party against who the contract is to be enforced
  - Document must contain an explanation of what land is involved, important details such as the persons, the property, the price
- May also be enforceable where other party has acted in a way consistent with the existence of a contract = part performance
- Usually paying a deposit, submitting an offer not "part performance"

Personal Guarantees & Indemnities

- **Guarantee=** a conditional promise to pay only if debtor defaults on payment
- **Indemnity=** a promise by a third party to be primarily liable to pay for the debt

Offer

- A contract cannot come into existence unless there is an offer and that offer is accepted
- The offer is a description of the promise of the offeror, a proposal of some sort with the intent to be bound should the offer be accepted
- without intent the proposal is merely an "invitation to do business"
- Must contain all terms clearly & unambiguously or not an enforceable agreement
- if offers are too vague or ambiguous they may form an unenforceable agreement
- Court may look at local customs and trade usage to find meaning which makes contract enforceable by the courts
- An agreement which leaves out any of the essential terms to be determined by the parties at a future time is usually unenforceable

An offer can be communicated orally, in writing or by conduct
•The form of the offer is unimportant = how it is expressed
•Offers must be communicated before they can be accepted = important for claiming a reward
•Unsolicited intervention:
•We cannot be required to pay for work done without our consent
•Business Practices & Consumer Protection Act = no longer required to reject unsolicited goods or services
•Unsolicited goods or services are NOT deemed a communicated offer with acceptance on default

Offers (Invitations to do Business)

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Offers (Standard Form Contracts)

- an offer presented in a printed document or notice, the terms of which cannot be changed by the offeree, but must be accepted as is, or rejected
- Done where large numbers of people are involved, for efficiency
- Courts presume that an unqualified acceptance of an offer is an acceptance of every term of that offer
- Specialor unusual terms usually need to be brought to the attention of the offeree
- Ticket cases always turn on their individual facts and it is difficult to set down any firm guidelines for what is sufficient notice

Offers (Lapse)

- When the offeree fails to accept within a time specified in the offer
- When the offeree fails to accept within a reasonable time
- When a counter-offer is made
- When either party dies or becomes insane prior to acceptance
- The offer is rejected
- The offer is revoked

Offer (Revocation)

What is a counter-offer?

- Until a specific offer is made by one party is accepted without change by the other party, there is no contract
- A counter-offer is any change of terms, including any alteration or modification of the offer
- A counter-offer has the effect of terminating the original offer
- If the counter-offer is rejected negotiations are over- the original offer is not revived
- When an offeree is merely requesting information the offer remains
- for example, "are drapes included in that price?"

Revocation

Revocation

- An offer may be revoked any time prior to acceptance
- Effective even where the offeror has promised to keep the offer open, unless there is an option contract (right of first refusal) or the offer is stated as irrevokeable
- To be effective, revocation must be communicated directly to the offeree or through a reliable source
- Time & notice of revocation by mail is only effective when the letter is actually received and not when dropped in the mailbox
- Actually received means delivery at the offeree's usual address
- Non-postal communication = when capable of being received – see *Electronics Transaction Act*, RSBC for details on electronic communication of Information & Records

Acceptance

- Acceptance of an offer must be unconditional
- An offer must contain all the terms of the agreement & the acceptance when made must be a mirror image of the offer
- The offeror controls the contract. The offeror sets out:
  - Terms of the contract
    - How long the offer is open for
    - How acceptance should be made

- Acceptance must be made in the manner requested or implied by the offeror
- If the offer is silent, must accept in the same mode the offer was made or by faster method
- Acceptance must be made in a positive form, whether in words or conduct – an offeree cannot stipulate silence as a mode of acceptance as the offeree would be forced to act in order to reject the offer
- Silence is acceptable only if the parties have habitually used this method to communicate agreement or where they have agreed in advance that silence will be sufficient

Offers can be accepted by

- Offers can be accepted by performing an act – *Carlille vs Carbolic Smoke Ball Company*
- Unilateral Contract: a promise in exchange for an act – the offeror is only bound to perform the promise once the offeree has done the required act= most reward situations
- Bilateral contract: each party has an obligation - there are 2 promises that must be executed, one by the offeror, one by the offeree = the usual type of contractual relationship

Acceptance is effective when communicated to Offeror

- General rule is that a contract is formed when and where acceptance becomes effective
- Electronic Transactions Act RSBC
- S.18(2) If information or a record is capable of being retrieved and processed by an addressee, the information or record in electronic form is deemed, unless the contrary is proven, to be received by the addressee
  - (a)When it enters an information system designated or used by the addressee for the purpose of receiving information or records in electronic form of the type sent

THE FORMATION OF A CONTRACT

THE POSTAL ACCEPTANCE RULE

- Acceptance by Mail:
  - 1) where the offer stipulates acceptance by mail or
  - 2) the offer has been made by mail & there is no stipulation how acceptance should be made
- acceptance is complete when a properly stamped & addressed envelope is placed in the mailbox and not when the offeror receives the letter
- If the offerer invites acceptance by the mail the contract is formed at the time acceptance is dropped in the mailbox and the contract is formed at the place where the mailbox is located
- The offeror can alter this rule by saying that acceptance will only be effective when received.

CONSIDERATION

- The benefit, essential to the existence of a contract, is called consideration = something of "value" that is exchanged for the promise of the other party
- All parties must receive some benefit
- Consideration is not restricted to the payment of money – it is the mutual gains and losses, what the parties want to get out of the contract, but must have some material value – love and affection are not sufficient consideration

Adequacy of Consideration

- The exchange does not need to be an exchange of equivalents
- The courts will not unwind bad bargains
- Adequacy of consideration is not an issue for the courts unless there is evidence of:
  - Fraud
  - Undue influence
  - Duress
  - Unconscionability

Gratuitous Promise:

- Gratuitous Promise
- A promise made without consideration being given in exchange for the other party's promise
  - = a promise made without bargaining for, or accepting, anything in return
- Not enforceable in law
  - Donations only binding if:
  - 1- made under seal or
  - 2- charity does something in response to the donor's promise

Gratuitous Reduction of a Debt

- At common law was determined by the rule from Foakes v Beer
  - Facts: Dr. Foakes became overdue in payments being made on a loan from Mrs. Beer so she agreed to accept instalments of the principal only and not claim any interest. Debt was paid off promptly but Mrs. Beer sued for the interest.
  - Held: Not bound by her promise as her promise to accept less that the total sum due was a gratuitous promise so not binding

Law & Equity Act RSBC s.40:

- A creditor who accepts a lesser sum in full satisfaction of a debt will not be permitted to later claim the balance due once the lesser sum has been paid
- where a creditor agrees to accept part payment and the debtor pays the full part payment, the debt is extinguished

Past Consideration

- Consideration must be agreed upon before a contract can be formed = Consideration given after the product/service is received is not consideration
- A Promise to reward for an at done previously done gratuitously or given something of value is not binding
- A sense of gratitude or moral duty is not binding in law – past consideration is no consideration since there is no benefit being performed in return for the promise

Existing Legal Duty

- Promise to pay something extra for what is already required under an existing contract is not binding
  = a new bargain requires new consideration
- In order to get an increased price, there has to be either new consideration or the promise to pay this amount would have to be under seal
- The consideration that the promise agrees to provide must not be something that he/she is already bound to do by the contract
- If the promisor is getting nothing new in return for the promise there is no good consideration

Payment

- The courts interpret the time set for payment as a warranty unless the parties have expressed themselves otherwise.Consequently, a seller is not entitled to rescind the contract of sale and have the goods back simply because payment is not made on time. He must be content with an action for the price of the goods.

Equitable or Promissory Estoppil

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FOR EQUITABLE ESTOPPIL TO APPLY

1 .There must be a current legal relationship between the parties
2. A promise to relax strict legal obligations is made, even by implication. The existing contract is modified/varied by the promise made
3. Promise relied upon causes some detriment or hardship if promise not lived up to
4. Equitable estoppel can only be used as a shield (defence) not as a sword (cause of action)

-Gilbert Steel case- argued university bound by agreement to pay more (see text)

Example

Duke's Cookies vs AMS

Facts: AMS leased space to Duke's Cookies, Duke's Cookies wanted to increase their space so had discussions for 8 months with the AMS.Duke's Cookies did not give the required 6 months notice for renewal of original space during ongoing discussions as it appeared that larger space would be available. Larger space did not become available. AMS denied extension of the lease for the smaller space.

Issue: Is the AMS estopped from denying extension of the lease?

Law: Estoppel will prevent a party from relying on the strict terms of a contract if that party provides a promise to relax legal obligations that is reasonably relied on to the other party

Application:

- AMS "promised Duke's a space if it were available.
- Duke's relied on this reasonably, to their detriment and did not provide the notice required by the lease
- AMS cannot now revert to the strict notice requirement

Held: AMS is estopped from requiring notice

Use of a Seal

• a seal replaces only consideration
•An alternative way to make a promise binding
•Must be affixed at the time the party signs the contract and the party signing must be aware of its legal significance = "I intend to be bound"

CAPACITY of entering a contract

•Capacity = competence (the ability) to bind oneself legally to a contract
•Parties must be capable of understanding what the effect of the contract is
•Contract may be set aside if a party did not have the capacity to contract

Categories of those who lack capacity to enter into contracts:

•Minors (anyone below the age of majority)
•Mental incompetents - temporarily
- permanently

Voidable Contracts

Contracts with Minors:

-age of majority determined by provincial legislation (Infants Act)

Rule: A contract with a minor is "voidable" at his/her option but is enforceable by the minor against the adult

•Except in BC infants are bound by contracts for the acquisition of necessaries (things required to function in society) and beneficial contracts of service
•Courts have the power to grant a minor legal capacity to form a binding contract if the court finds that the contract is beneficial to the minor
- for settling an insurance claim, using a minor in a movie

Section 19 of the Infacts Act (RSBC)

s. 19 of the Infants Act (RSBC):
(1) ...a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is
a) A contract specified under another enactment to be enforceable against an infant,
b) Affirmed by the infant on his or her reaching the age of majority,
c) Performed or partially performed by the infant within one year after his or her attaining the age of majority, or
d) Not repudiated by the infant within one year after his or her reaching the age of majority

Canada Student Loans Act

s. 19.1 provides that a student loan to a student is recoverable by a bank from the borrower as though the infant were an adult at the time the agreement was entered into

Waivers Signed by Parents

•Have no effect on the rights of a minor - parents cannot waive an infant's right to sue
•Parents can be asked to sign an indemnity agreement – so parents must indemnify an establishment for any money paid to the infant for damages or loss suffered
•Eg. Cliffhangers Rock Climbing policy

Intoxication / Insane

•Except for necessaries, contracts are voidable at his/her option but enforceable against the other contracting party
•Only liable for a reasonable price for necessary goods

REQUIREMENTS FOR AVOIDING A CONTRACT

1. Not capable of rational decision making
2. Other party was aware of this condition
3. Must at promptly once gaining capacity to repudiate

-hesitation to repudiate makes contract binding
-can accept no further benefits under the contract upon regaining capacity
- necessary evidence may be adduced from surrounding circumstances

Bankrupt debtors

•Severely limited in contractual capacity until discharged.

"Severely limited in contractual capacity until discharged" means that:

- While bankrupt, a person usually cannot sign some types of contracts or obtain credit without specific permission from the bankruptcy trustee or the court (depending on local laws).
- Until discharged, they remain under these limitations. "Discharged" refers to the point at which the bankruptcy is formally ended (often after a set period or certain conditions have been met). Once discharged, the person typically regains the full legal capacity to contract.

Maksymetz v Kostyk

-court could not enforce the agreement between partners as it was contrary to a statute

*** criteria for enforcing a restrictive covenant in employment
*** a non-compete clause will not be enforced if a non-solicit will suffice

WHEN WILL THE COURT GRANT CAPACITY?

Re Collins:

s. 16.4(1)(b) & 2: court will grant capacity where:

1. contract is for the infant's benefit
2. considering the infant's circumstances the infant does not need the protection accorded by law to infants relating to contracts

Held: Here enforcing the contract and granting capacity to Simon would ONLY benefit Simon's mother and her financial interests, not Simon, so the court would NOT grant capacity

LEGALITY of entering a contract

• Object or purpose of a contract must be legal for contract to be enforceable

• Must not be:

1. Illegal by statute – contrary to CCC, ITA, Competition Act
2. Void by statute- offends WCB, Bankruptcy & Insolvency Act
3. Contrary to public policy –immoral or contrary to public interest

• Void contract = contract never formed in law

Contracts void by statute

Agreements contrary to the purpose of legislation: can't "opt" out of agreement to avoid paying benefits
= contracts that offend statutes
- eg. WCB – agreement to avoid paying benefits
Bankruptcy & Insolvency – agreement which transfers property to avoid it being included in bankrupt's estate

Illegal by Common Law or Public Policy

Common Law: contract for indemnification for own intentional wrongful act (fraud, arson, libel, slander)

Public Interest: perverting justice, paying off a witness

Illegal by Statute:
- Some statutes state specifically that agreements that contravene the statute are illegal – under the Criminal Code, Competition Act, Customs Act, Income Tax Act

- Where the object of a contract is illegal by statute, the contract itself is illegal

Illegality and Licensing

Illegal by Statute:
But... consider licensing
-licenses required by professions or for certain tasks
- if the purpose is to protect the public from unqualified or unethical work, a contract will not be enforced if a party lacks proper licensing
-Unlicensed person being sued cannot claim own misconduct as a defence to an action
-courts have flexible attitude when violations occur, due to the variation in degree of acceptability of violations, rationale for licensing – is the license required for public safety or is it an administrative issue?

Insurance Contracts

- Considered valid if party making the contract has an insurable interest in the property or life insured
- Insurable interest: a financial benefit from the continued existence of the property or life insured or suffer some financial detriment from its loss or destruction
- Every person has an insurable interest in their own life, certain family members and persons in whom they have a financial interest
- The Insurance Act waives the requirement of an insurable interest when the person whose life is insured consents in writing to placing the insurance

Agreements in Restraint of Trade

- Against public policy so illegal unless party seeking to rely on the clause can prove it is reasonable
- More difficult to convince courts to enforce agreements between employer and employee based on being reasonable
- Undesirable as competition is desirable
- 3 categories:
  - Between 2 or more businesses that are contrary to Competition Act
  - Between vendor and purchaser of a business
  - Between employer & employee which restricts rights of employee to compete

Contrary to Competition Act

=agreements that affect competition in the industry = restrict output or fix the selling price of a commodity or service

- s. 45 of the Act: may not "conspire, combine, agree or arrange with another person to lessen competition unduly"
- Mergers forbidden if they prevent or lessen competition

Between Vendor and Purchaser of a Business

- Agreements which contain restriction on the right of the vendor to carry on business in competition with the purchaser for a certain period of time in a particular location- area & time vary with business
- Protects Goodwill
- Prima facie void
- Enforceable if party seeking to rely on it can prove it is reasonable in view of the nature of the business being sold = a mutual advantage
- Term severed if unreasonable – will not be rewritten or reduced
- Demand no more than reasonable so clause will be upheld

PG2. OF FORMATION OF A CONTRACT

Restrictive Covenants in Employment Relationships

1. In present relationships:
   =promises not to compete with present employer
2. Restrictions on revealing valuable trade secrets, confidential information to competitors during & after leaving employment
3. Agreements binding future employment
   - non-compete vs non-solicit clauses (*Phoenix* case)

Criteria used for Restrictive Covenants regarding future employment

A: Is restrictive covenant reasonable with respect to the PUBLIC INTEREST?
- Is it a restraint on competition looking at the nature of the business & the location?
- Would enforcement of covenant deprive the public of the employee's special services?

B: Is the restrictive covenant reasonable & necessary to protect the parties to the contract?
- Is there a PROPRIETARY INTEREST to protect? (goodwill, client base, secrets)
- Is the size of the restricted geographical area reasonable?
- Is the length of time reasonable given the nature & location of the business?
- Is the scope of the restriction reasonable?

INTERPRETATION OF CONTRACTS

A person who voluntarily signs a contract will be bound by its terms.

But problems arise as words can have more than one meaning, be ambiguous.

And a contract can have both express terms and implied terms.

Express Terms vs Implied Terms

- **EXPRESS TERMS**
  -Terms Explicitly Agreed To By The Parties
- **IMPLIED TERMS**
  -Deemed To Exist Where Standard In Trade, & Facilitate Business
  -Many Codified Terms Are Now Codified Into a Statute For a Particular Area of Law, for example, the SGA

Interpretation of Express Terms

- **INTERPRETATION OF EXPRESS TERMS**
- **Strict, literal or plain-meaning approach**
  = ordinary or dictionary meaning
- **Liberal approach**
  =Looks at intent of parties, circumstances surrounding the contract, knowledge of the parties, past transactions & trade usage (how terms are normally used in a particular trade or business)
- **Contra proferentem** **Contra Proferentem**
  =Against the party who is seeking to rely on it, preferring the meaning stated by the person who did not draft the term

Interpretation of Insurance Contracts

1. Use contra proferentem
2. Construe coverage provisions broadly
3. Interpret exclusion clauses narrowly

When interpreting a term, the courts will:

1. Apply the strict or literal meaning

2. If unresolved, look to the liberal approach, including circumstances, surrounding negotiations, knowledge of the parties, trade usage

3. Contra Proferentem = against the party who suggested it

"Whoever holds the pen creates the ambiguity and must live with the consequences"

The Comma that cost Millions

This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

Implied Terms:

In general, implied terms are not expressly included by the parties, but as reasonable people they would have included them had they thought about it
-they are terms codified in statute
-may be implied only but if necessary to make the contract effective
- Court will NOT imply a term which is contrary to an express term

Text book example: **Safeway Copy**

Safeway was the anchor tenant in a mall and intentionally kept the space leased but vacant (space took up over 1/2of the mall)
- This was contrary to the original intentions of the parties
- Held that it was an implied term that the space would be continuious! used as a supermarket,and that "non-use" was not an implied use

- BKDK Holdings Ltd. 692831 LTD.
- Issue: Does the adjustment clause only become operational in the precise events it sets out?

- Courts search for an interpretation that promotes or advances the true intent of the parties at the time of entry into the contract (para 15)

Adjustment clause is to interpreted as being triggered on any loss not just on loss by being an unsuccessful bidder.

The court interpreted the clause in this case in accordance with sound commercial principles and good business sense

GROUNDS UPON WHICH A CONTRACT CAN BE SET ASIDE

Misrepresentation

- Misrepresentation: = a false statement of a material fact that induces a party to enter into a contract and is not made a term of the final contract.

- A statement made during the bargaining process that persuades or induces a person to agree to a contract. If the statement is not included in the contract and proves to be false it is a misrepresentation.
- Contract may be rescinded because of a misrepresentation even though the contact would otherwise be valid, that is, contains all required elements
- A misrepresentation does not render a contract void, but the contract is voidable at the option of the harmed party

Criteria of Misrepresentation

- Misrepresentation may be :
  - Innocent
  - Negligent
  - Fraudulent

- If false statement is included in the contract as a term it would then be a breach of contract not a misrepresentation

Innocent Misrepresentation

- A false statement which the person who made it honestly believes to be true
- The maker of the statement is unaware that it is not in fact true
- If a maker of an innocent misrepresentation later becomes aware of it being a misrepresentation, failure to inform/correct the misrepresentation causes it to become a fraudulent misrepresentation

Negligent Misrepresentation

- Where parties should have known what they said was false even though they honestly believed it to be true
- So the facts are misstated because of carelessness

Fraudulent Misrepresentation

- Party makes an untrue statement of fact (not an opinion)
- Statement is made: 1. knowing it to be false
  2. without belief in its truth, or
  3. recklessly, careless as to whether it is true or false

Allegation of Fact

- The statement that forms the basis of the misrepresentation must be an allegation of fact – a statement of opinion does not amount to a misrepresentation
- However, when an expert in the area covered by the contract gives an opinion on the matter being dealt with and the other party relies on this special knowledge, the opinion will be taken as an allegation of fact and will be a misrepresentation

***So an expert's opinion is equivalent to a statement of fact

- No duty to supply factual info to the other party unless through the common law or a statute, or unless asked for info – if asked for info the answer could form the basis of a misrepresentation claim

- Occurs where a material fact is withheld by one party from the other during negotiations & that omission induces the other party to make a contract
- Can be at common law or a duty owed under a statute

Misrepresentation By Omission

- Occurs where a material fact is withheld by one party from the other during negotiations & that omission induces the other party to make a contract
- Can be at common law or a duty owed under a statute

Disclosures Required at Common Law

- A vendor of real estate must disclose latent defects in real estate = defects you are aware of but are not obvious, would not be disclosed upon a reasonable inspection or inquiries
- Patent defects (easily discovered by conducting a reasonable inspection) = caveat emptor

Contracts Requiring Disclosure under Statute

- Obligation to disclose pertinent information a party has access to not available to the other party = they are in a superior position of knowledge
- Includes contracts of utmost good faith -= contracts where there is a special trust relationship
  - Insurance - must disclose all relevant information so insurer can properly assess the risk
    - otherwise could be in breach of good faith and insurer can refuse to make payments
  - Sale of Securities – must provide prospectus with full & true disclosure of all material facts under the *Securities Act*
  - Disclosure related to credit agreements –see *Business Practices & Consumer Protection Act*, SBC, 2004 – full disclosure in relation to credit agreement

Is Silence a Misrepresentation?

Silence not usually a misrepresentation except for:

1. contracts which require utmost good faith
2. disclosure of latent defects in real estate
3. misleading "half-truths"

Entire Agreement Clauses

- With exemption clauses usually need to prove fraud to avoid the effect of the clause – it restricts rights to the obligations set out in the written agreement
- Can use an "entire agreement clause" to protect against claims of misrepresentation – but an entire agreement clause cannot override a fraudulent misrepresentation = it cannot be neutralized by an exclusion clause
- Example of an entire agreement clause: "There are no warranties, representations, guarantees, promises or agreements other than those set out herein."

Remedies for Misrepresentation

Innocent: Rescission & Indemnity only

Negligent or Fraudulent: Rescission or damages

Rescission

Rescission:

- An equitable remedy = an "unmaking" or "unraveling" of the contract
- Must be able to return both parties to the position they were in before contract was made
- Must act quickly, within a reasonable time and accept no further benefits under the contract or opportunity to repudiate is lost
- Can be compensated/indemnified for expenses
- Rescission not available if it adversely affects a third party
  - Eg, once title to property is transferred

Collins vs Dodge City East

- Court ruled issue regarding air conditioning was a negligent misrepresentation

Werle vs Saskatchewan Energy Inc.

-"padding" of resume was a fraudulent misrepresentation in the circumstances as he also did not correct bulletin circulated to all the employees

Duress

- Seldom occurs in the business world
- Is actual or threatened violence or imprisonment as a means of coercing a party to accept a contract
- When forced or pressured to enter into a contract against their will by threats of violence or imprisonment
- Traditional definition has been expanded to include threats of criminal prosecution and threats to disclose embarrassing or scandalous information and economic duress

So three types of threats:
- threat that causes harm to the person
- threat that causes harm to a reputation (like blackmail)
- threat that causes harm to finances (ex. Threatening to fire someone if they don't agree to a contract)

-Must show threat was the main inducement for entering into the contract

-Contract is voidable at the option of the victim

-but must act quickly and prove that there was a reasonable apprehension of the threat being realistically achievable

Undue Influence

- …"the domination of one party over the mind of another to such a degree as to deprive the weaker party of the ability to make an independent decision."
- The improper use of power or trust by one person in a way that deprives another person of free will and substitutes another's objectives" (Black's Law Dictionary)
- Where contracting party feels so dominated by the power or influence of another party that the decision to make the contract is not his/her own – pressure makes it impossible to bargain freely

- Is presumed where there is a "special relationship", including between spouses (where there is a marked lack of independent decision making)
- Usually a relationship where one party has special skill or knowledge or is in a position where the other party has to place confidence and trust in them - usually a long-term relationship of the parties
- The presumption of undue influence is present in certain relationships such as solicitor/client, doctor/patient, minister/parishioner – all the weaker party has to prove is that the relationship existed
- Undue influence an also occur where one person is temporarily in dire straits

Burden is on stronger party to prove that there was no undue influence

- Once it has been shown that the circumstances could lead to
- undue influence, that is, that the parties were in a special relationship, the Burden is on the stronger party to prove that there was no undue influence

Factors to determine if there is indue influence

1. Degree of domination
2. Extent of the advantage (unfairness of the bargain)
   - stronger party must prove that transaction was beneficial to the weaker party

- To avoid risk of undue influence, or to rebut presumption of undue influence, the stronger party must always inform the weaker party that he/she is entitled to seek independent advise before making an agreement
- With marriage, undue influence is presumed if spouse does not usually make independent decisions
- Having independent legal advice can rebut the presumption of undue influence

Unconscionable Contracts

- "Contracts where there is unequal bargaining power between the parties and the powerful party gets an extremely advantageous deal"
- Equitable doctrine that permits contract to be set aside where one party has been taken advantage of because of power imbalance due to desperation caused by poverty, intellectual impairment (but not lacking capacity)
- A contract where there is:
  - 1. Unequal bargaining power between parties; and
  - 2. The powerful party gets an extremely advantageous deal
    - So there is a presumption of fraud which the stronger party must repel by proving the bargain was fair, just and reasonable

Criteria for Unconscionable Contract

Must be shown that:

1. the bargaining positions of the parties were unequal
2. one party dominated and took advantage of the other &
3. the consideration involved was grossly unfair

Undue Influence and Unscionability

Overlap between the principle of undue influence & unconscionability:

- Unconscionability usually occurs in circumstances of a particular contract rather than in an on-going relationship, whereas for undue influence the parties are usually known to each other for some time
- Undue influence usually focuses more on the nature of the long-term relationship of the parties and undue influence is presumed within that relationship as a result of an abuse of trust and confidence

Business Practices & Consumer Protection Act

Business Practices & Consumer Protection Act

8(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction

b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance.

Buckwold Western Ltd. V Sager

Facts: D signed guarantee for London Carpets Ltd.(LC) and P I snow claiming for sum owing by LC

Issue: Is guarantee enforceable?

Law: If duress or undue influence present, not enforceable.

Analysis: No improper pressure on D, just standard commercial pressure, still had free will (no duress). Knew about document and what it was for (no undue influence).

Finding: Plaintiff has right to judgment for amount and pre-judgment interest and costs.

Makay v Cesar

-overwhelming imbalance in bargaining power because of the undue influence of the defendant

-87 year old rented home to defendant and entered into rent-to-own agreement

HOW TO ANSWER CASE PROBLEMS

On an exam you will be asked to examine a set of facts and identify and resolve the legal issue(s) presented by using principles you have learned in this course. The best answers follow roughly the following format:

1. Identify the legal issue or issues raised by the facts. Do not restate the facts. If it is absolutely necessary to assume facts not provided in order to resolve the problem, state those assumptions. Consider each issue in turn.
2. Give a clear statement of the legal principle you have learned which addresses the issue. If possible, identify the case or statute which is the source of the principle.
3. Analyze the facts and consider how the legal principle relates to those facts.
4. Reach a reasonable conclusion based on your analysis. The outcome may be uncertain, in which case you should discuss the possible results and indicate which you consider most likely.

Preparing for Class 1

How is the Law Defined?
The law sets basic standards of behaviour that are enforced by government and also by individuals and groups with the help of government

How does law reflect society's attitudes?
- **Rooted in Moral and Ethical Values:**
- **Establishing Minimum Standards:**
- **Reflecting Societal Evolution:**
- Contemporary issues (such as environmental protection or digital privacy) can drive legal changes that mirror current societal beliefs.
- **Encouraging Compliance:**
- Laws that are perceived as fair and aligned with societal values are more likely to be followed voluntarily.

Where do morals fit in relation to laws?
Morals and ethics are considered optional standards of behaviour that people ought to observe, even though doing so is not compulsory

What are the 3 main codes of conduct – are they considered as law?

binding codes
rules laid down by a governing body or trade association that regulate specific activities, particularly those of professionals. They're not laws, but have a similar effect.
Ex. University academic code of conduct

voluntary codes
*C*odes established by industries for their activities and often have a strong persuasive effect

Ex. The Canadian Code of Advertising Standards is another example of a voluntary code of conduct that promotes corporate social responsibility

self-imposed codes
Codes adopted and published by firms, especially concerning employment conditions and environmental protection.

Even though they're not law, they serve various important functions:
• Fill gaps that the law cannot reach
• They can impose higher ethical standards than the law requires
• They can provide evidence of appropriate standards of professional care
• They can regulate activities across jurisdictional boundaries

Limitations:
The courts have at times limited solicitor-client privilege when other public policy concerns, such as money laundering prevention, are in play**5**....
It does not confer a right to prevent the disclosure of a client's actual physical evidence of a crime if the evidence is in the lawyer's possession and the lawyer is required to produce it**8**.

Solicitor-client privilege – what is it?

Solicitor-client privilege is a fundamental aspect of the legal system that protects the confidentiality of communications between a lawyer and their clients.

Confidentiality: The lawyer must keep all communications with the client confidential, and cannot share this information without the client's explicit permission

Protection from Disclosure: A lawyer cannot be forced to reveal these communications in court, unless the client gives their consent

Client's Benefit: The privilege exists to protect the client and enable them to speak freely to their lawyer

Duty of the Professional: A member of a professional organization has a duty to ask the court for a ruling before divulging any information obtained in a confidential capacity

Privilege and Illegal Activities: A professional is not obligated to reveal confidential knowledge about a client's illegal activities to prosecuting authorities, unless keeping silent would create a serious threat to public safety

"Up the ladder" reporting in the US: The United States' Sarbanes-Oxley Act of 2002 (SOX) includes "up the ladder" reporting, which requires lawyers to report improper activities within a corporation up to the board of directors

Model Rules: The Federation of Law Societies of Canada developed model rules for lawyers' codes of conduct, which confirm client identities with independent documents and prohibit lawyers from accepting cash payments of $7500 or more

Constitution, Legislation, Common Law

Who makes our laws?
The Constitution
The constitution is the "basic law" - all other laws draw their power. Is a "higher" law that all other laws must comply with to be valid and enforceable. A constitution lists the founding legal principles accepted by the citizens of a country, which they regard as legitimate and binding. In Canada, the Constitution divides legislative powers between the federal and provincial governments. Also includes the Charter of Rights and Freedoms, which protects human rights.
Legislation
a.k.a statute law, statutes, or acts, is passed by Parliament and provincial legislatures. Must be compliant with Constitution. Legislation includes subordinate legislation, such as regulations. Regulations are administrative rules implemented by government as a result of authorization given in a statute. Administrative rulings made by regulatory bodies created by legislation are also considered a source of law4.
Common Law:
derived from court decisions. The courts make law through judgments, which are also referred to as case law. These shape the law, have relevance beyond the specific parties involved in the case. Case law precedents, not statutes, form the bulk of Canadian private law. The common law system favours case law—the recorded reasons given by courts (and judges) for their decisions and applied by judges in later cases. The term "common law" can refer to the legal system of a common law country, judge-made law as opposed to statute law, or strict legal rules as opposed to equity.

rule of law established legal principles that treat all persons equally and that government itself obeys

public law law that regulates the conduct of government and the relations between government and private persons

private law law that regulates the relations between private persons and groups of private persons

What is a constitution?
The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with its provisions is of no force or effect.

Is the federal government supreme?
In Canada, the federal government is not unilaterally supreme, as power is divided between the federal and provincial governments by the Constitution Act, 1867

Understand the division of powers under s. 91 & 92, and how jurisdictional disputes are resolved

The federal government has jurisdiction over areas such as the regulation of trade and commerce, banking, shipping and navigation, air transportation, radio and television, taxation, intellectual property, and currency

Provinces have jurisdiction over property and civil rights, municipalities, and specific industries within the province such as road transportation and stock exchanges

When conflicts arise between federal and provincial laws, the courts, particularly the Supreme Court of Canada, act as the umpire to determine if legislation is within the jurisdiction of the enacting government

Preparing for Class 2

- **Civil Law:**
  - Based on Roman law; uses a comprehensive civil code.
  - Emphasizes legislation over case decisions.
  - Common in continental Europe, parts of Africa, Latin America, Quebec, etc.
- **Common Law:**
  - Originated in England; relies on judicial precedents.
  - Follows **theory of precedence / stare decisis** (prior decisions guide future cases).
  - Predominant in the U.S., Canada (outside Quebec), Australia, and other former British colonies.
  - Consistency & Predictability:
  - Like cases should be treated alike to ensure fairness.
  - Precedents help predict legal outcomes, though judges may distinguish different facts.
- **2 Sources of Law**
  - **Legislation:** Statutes, codes, and subordinate (administrative) regulations.
  - **Case Law:** Judge-made law from court decisions, including equitable principles.
- **Statutory Interpretation:**
  - Uses a holistic approach considering language, context, and legislative intent.
- **Equity:**
  - Developed to provide remedies when money damages are insufficient.
  - Merged with common law to form a unified legal system.
  - Equitable Remedies:
    - Specific Performance: Orders a party to fulfill their contractual obligations.
    - Injunction: A court order that either prohibits or requires a specific action.
    - Rescission: Cancels a contract, restoring the parties to their pre-contract status.
    - Reformation: Alters the terms of a contract to reflect the true intent of the parties.
- **Three Levels of Courts in Canada:**
  - **Trial Courts:** Courts of first instance where cases are initiated, evidence is presented, and initial judgments are made.
  - **Intermediate Appellate Courts:** Provincial Courts of Appeal that review trial court decisions for legal errors.
  - **Final Court of Appeal:** The Supreme Court of Canada, the highest appellate court that sets binding precedents.
- **Standing to Sue:**
  - Refers to the legal right to bring a lawsuit.
  - Only individuals or entities directly affected by an issue or harm have the capacity to sue.
  - Ensures that courts address disputes where there is a genuine, personal stake.
- **Class Action:**
  - A lawsuit where one or more individuals represent a larger group with similar claims.
  - Designed to efficiently resolve numerous claims that share common legal or factual issues.
  - Requires court approval (certification) and, once approved, the judgment applies to all class members.

THE LAW IN ITS SOCIAL AND BUSINESS CONTEXT

- **Injury in an Accident – Pre-Trial & Trial Procedures, and Appeals**
- **Pre-Trial Procedures:**
  - Filing & Serving: File a statement of claim outlining the accident's facts and legal basis; serve the defendant.
  - Response: Defendant files an appearance and statement of defense (and may counterclaim).
  - Pleadings & Discovery: Exchange of documents, witness lists, and evidence to narrow the issues.
  - Pre-Trial Conference: Meet with the opposing party and a judge/mediator to attempt settlement or further narrow disputes.
- **Trial Process:**
  - Presentation: Both sides present evidence and witness testimony; cross-examinations occur.
  - Judgment: A judge (or jury) renders a decision based on the balance of probabilities.
- **Appealing a Judgment:**
  - Grounds for Appeal: If there are legal errors, misapplication of the law, or issues with evidence admissibility.
  - Process: File a notice of appeal within the set timeframe (usually 30 days) and focus on legal rather than factual issues.
- **Court Costs**
  - **Party and Party Costs:**
    - Costs awarded by the court from the losing party to the winning party.
    - Based on a regulated fee schedule, typically lower than actual legal fees.
  - **Solicitor and Client Costs:**
    i. The actual legal fees charged by your lawyer (often hourly or flat fee).
    ii. Usually much higher than party costs; you may still pay a significant portion even if awarded costs.
  - **Winning a Case but Losing Financially**
    - High Legal Fees: Even a winning judgment might not cover extensive solicitor fees and other litigation expenses.
    - Partial Cost Recovery: Party costs awarded may not fully reimburse the total outlay for legal representation and related expenses.
  - **Hiring a Lawyer – Fee Structures**
    - **Contingency Fee:**
    - Lawyer's fee is a percentage of the judgment/damages awarded; no fee if you lose.
    - **Hourly Fee:**
    - Pay based on the time the lawyer works on your case; costs can add up over time.
    - **Flat Fee:**
    - A predetermined amount for handling the entire case or specific legal services; offers predictability in costs

Preparing for Class 3

- **How the Charter Protects Human Rights in Canada:**
- Entrenched in the Constitution: Ensures that all laws must comply with the rights and freedoms listed.
- Lists Specific Rights and Freedoms: Covers freedoms (e.g., expression, religion, assembly), legal rights (e.g., life, liberty, security), and equality rights.
- Limits Government Action: Restricts government interference unless it is reasonably justified in a free and democratic society.
- Judicial Oversight: Courts can strike down or modify laws that violate the Charter.
- 5 Key Functions of the Charter (Pages 14-15):
- Embedded in the Constitution: It is a fundamental part of Canada's supreme law.
- Limited Ability to Change: Amending it requires broad, constitutional-level consent.
- Overrides Other Legislation: Any statute inconsistent with the Charter is invalid unless overridden by the notwithstanding clause.
- Reasonable (Not Absolute) Protection: Rights are protected but can be limited if such limits are demonstrably justified.
- Applies to Government Actions: The Charter primarily governs governmental behavior, not private conduct.
- Why the Charter is the Supreme Law in Canada (Pages 18-19):
- Constitutional Supremacy: Section 52(1) of the Constitution Act declares that the Constitution (and thus the Charter) is the supreme law.
- Void Inconsistent Laws: Any law that conflicts with the Charter is null and void to the extent of the inconsistency.
- Durable Framework: Its entrenched nature makes it very difficult to change, ensuring enduring protection of rights.
- Steps to Challenge a Statute (Checklist on Page 19):
- Jurisdictional Challenge: Argue that the statute addresses matters outside the legislative authority of the government that enacted it.
- Constitutional (Charter) Challenge: Argue that the statute violates one or more rights protected by the Charter.
- Interpretation Challenge: Argue that the statute's wording is interpreted too broadly, and under any reasonable interpretation, it does not apply to the conduct in question.

HOW TO ANSWER CASE PROBLEMS

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1. Identify the legal issue or issues raised by the facts. Do not restate the facts. If it is absolutely necessary to assume facts not provided in order to resolve the problem, state those assumptions. Consider each issue in turn.
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THE LAW IN ITS SOCIAL AND BUSINESS CONTEXT SLIDES

Origin and Sources of Law

What is Law?

- Law is the body of rules which can be enforced by the courts or other government agencies
- Our laws set out and codify basic standards that are enforced by government to protect people, to give power to government to act and to regulate individuals

What makes a law a law?

1- it has to be made by the proper authorities – government, administrative tribunals, the courts

2- it has to be enforceable by the proper authorities- police, courts, tribunals

3- There has to be sanctions- fines, penalties, imprisonment

Law influences behavior, and the consequences of inappropriate behavior can lead to liability :

1. Criminal liability for serious offences against the government or society
   - -prosecuted by the government = R. xxx
   - -must prove guilt beyond a reasonable doubt
2. Civil liability where actions caused harm to a private party
   - -parties suing each other
   - -proof on the balance of probabilities
3. Regulatory or quasi-criminal liability imposed for less serious offences against government or society which warrant financial penalties (fines), often imposed by a specialized agency, such as motor vehicle offences, dog licensing

The Rule of Law in Canada

-all persons are treated equally under the law and the government is bound by the laws it has created

-so our government is not "above the law"

Corporate Social Responsibility

- Requires businesses to consider ethical issues as well as economic & legal issues
- As a result, codes of conduct have been used to promote or enforce ethical behavior
- Often codes observe a higher ethical standard than that set out in the law

3 Levels of Codes of Conduct

1. Binding Codes: where the governing body or trade association sets the rules – ex. Law Society
2. Voluntary Codes: Industry codes with strong persuasive effect – eg real estate advertising regulations
3. Self-imposed Codes: adopted to affect employment relationships within the work place, such as no peanut products, no perfumed items

Sources of Law

1. The Constitution
   - -rules that define the fundamental structures of a country
   - -in Canada we have the Constitution Act of 1867 & 1982
2. Legislation
   - - known as statutes – passed by federal & provincial governments according to powers set out in the Constitution
3. Court Decisions
   - - case law from the decisions of the Canadian courts

What kind of Country is Canada?

- Canada is a federal country due to the Constitution Act (1867)
- It divided powers federally & provincially and each level of government controls subjects or areas assigned to it
  - -set out in sections 91 & 92

Federal vs Provincial

- Ex. Federal: banking, currency, postal service, tax, criminal law
  Provincial: hospitals, education, property & civil rights, administration of the courts, marriage, incorporation of companies

The Constitution

- In Canada we have 2 Constitutional Acts:
  1. The Constitution Act (1867)
  2. The Constitution Act (1982) which includes the Charter of Rights and Freedoms
- Although Parliament is supreme & traditionally has had the power to make laws that cannot be overruled, these rights have been limited by:
  1- The Constitution Act (1867) &
  2- The Canadian Charter of Rights & Freedoms (1982)

The power the Federal Government has Vs Provincial

- The Constitution Act (1867) gives any residual powers not specifically allocated to the provincial government to the federal government
- Where there is concurrent powers, the federal legislation is paramount
- If an act is overlapping or infringing, and the courts find it not to be within that government's sphere of power, it is considered void
- The courts act as arbiters of any constitutional debate and determine who controls an area of law – they will look at what a governing body is really trying to do as opposed to what it claims to be doing to determine what level of government has that power

Categories of Law

Procedural Laws: the organizational rules of a legal system
the method or steps which must be followed to enforce a claim in law
- for example, limitation dates, jurisdiction

Substantive laws: the body of law that creates & defines our rights in society = what the law on a topic is

Public vs Private Law

Public law involves government as a party:
constitutional, tax, environmental, criminal, administrative

Private law involves private citizens as parties: contracts, torts, property, family law, trusts

Differences in Criminal & Civil Law

- the parties are different:
  Regina vs Accused (by name) ex. R. v Jones
  Plaintiff vs Defendant (by name) ex. Jones v Smith
- procedure
- proof:
  beyond a reasonable doubt (criminal)
  on the balance of probabilities (civil)
- decision:
  guilty/not guilty, liable, partially liable, not liable
- outcome:
  punishment
  remedy – damages, injunction, specific performance

Canada's 2 Main Legal Systems

- The common law legal system
- The civil law legal system
- All of Canada, other than Quebec, uses the common law legal system while Quebec uses a civil law system for its private law

The Civil Law System

-originated in Roman Law, Napoleonic Code, revised in 1994

-a written code (legislation) is used to determine whether a law has been followed - the Code is a written statute specifying legal rights and obligations

-civil law judges are not expected to look at past cases- precedents are not followed

The Common Law System

-early in the 12th century royal judges started to keep track of records of trials and judges began basing their decisions of past decisions

-system developed into a rule called the *Theory of Precedent* or *Stare Decisis* =let the former decision stand

- Common law judges must look at past decisions in order to decide new cases with similar facts
- They must follow all higher court decisions of the same jurisdiction and all judges must follow the Supreme Court of Canada
- Decisions from other jurisdictions are persuasive, but not binding
- Judges can distinguish cases on their facts
- A common law system provides stability, consistency & predictability, without completely sacrificing flexibility

The Law of Equity

The Courts of Chancery or Equity decided cases on their merits or what was morally fair of just, ignoring the rule of precedence as long as the victim came with "clean hands"

In 1865 the common law courts and the courts of Chancery amalgamated and the principles of equity were integrated into the common law system – and it was decided that equity would prevail where applicable

Equitable principles such as trusts, remedies such as specific performance, unconscionability still prevail

- *Unlike common law courts, which relied strictly on legal rules and precedents, courts of equity would sometimes ignore rigid precedents if they felt it was unfair to do so.*
- *However, these equitable courts also expected the party asking for equitable relief to have "clean hands," meaning they must not have acted unfairly or unethically themselves.*

Statute Law

Parliamentary enactments are referred to as Statutes & take precedence over judge-made law, whether based on common law or equity

Statutes can:
1. codify the common law
2. create new laws
3. make changes to existing common law

Statutes

- Statutes are published
- If there is a statute on a particular point, the statute overrides any existing common law on the same point
- Judges are called upon to interpret statutes if the law is not clearly set out

3 levels of courts in Canada

The Supreme Court of Canada
The Intermediate Provincial Courts of Appeal
The Courts of First Instance

The Courts of First Instance

- these are the court that first hears a matter

Divided into: 1. Inferior trial courts &
2. Superior trial courts

-the superior courts within a province have wider geographical jurisdiction and handle all types of cases **Small claims Court $35,000**

-the provincial inferior courts are limited geographically and by subject matter, for ex. Small Claims Court has a financial limit of $35,000 in BC

Superior Trial Courts (BC Supreme Court)

-BC Supreme Court in British Columbia

-has unlimited jurisdiction in civil and criminal actions, no monetary limit

-serves as an appeal court from convictions made by Provincial court judges and Small Claims court decisions

-all serious criminal cases are decided here, such as murder, rape, treason

-hears all matters relating to divorce and bankruptcy

Provincial Court of Appeal

- Hears appeals based on mistakes of law, not fact
- No witnesses appear – appeal takes place through written "factums" which set out the legal arguments
- Is the final court of appeal within a province

Federal Court System

- a separate court system

-hears federal matters such as trademarks, patents and tax matters

-has a trial division, and appeal division, and then appeals to the Supreme Court of Canada

Supreme Court of Canada

- Leave to appeal must be granted for private law matters
- Can sit with a "bench" of up to 9 judges
- In Ottawa
- Only hears matters of national importance
- Final/top decision-making court in Canada
- Sets precedents for all lower courts in Canada

Civil Litigation Process

1. You must have standing to sue – be a party who has a right to enforce
2. You must sue within the required time frame (limitation period)
3. You must sue in the right jurisdiction

Trial Process in B.C

1. Cause of Action arises= a civil wrong either tort or contract
2. Commencing the Action and Pleadings = Notice of Civil Claim (plaintiff) & Response (defendant)
3. Discovery= under oath
4. Trial
5. Judgment = liable, not liable, partially liable, awarding of costs

Using the Courts

1. Hourly
2. By Task
3. Contingency Fees

Cost of Legal Action

- Only part of the costs are paid for by the government
- Costs are awarded by a judge, usually based on costs being given to the winning party, but can be divided between the parties
- Costs are determined according to a Tariff in the Supreme Court Rules
  - -Party and Party costs
  - - Solicitor-Client or increased costs

Human Rights Codes

1960: Canadian Bill of Rights
-applied to the federal government
-covered basic rights such as the right to
life, freedom of speech, equality

-Provincial governments have adopted various Human Rights Codes
BUT : 1- these are not entrenched, so easily repealed
2- only apply within the jurisdiction that has adopted the Code

*** Human Rights Codes apply to private relations, whereas the Charter only applies to government

DISCHARGE OF CONTRACTS

- Discharge: Contract has come to an end = all obligations are extinguished
- Four ways to discharge a contract:
  - 1. Performance
  - 2. Agreement
  - 3. Frustration
  - 4. Operation of Law

Performance

- Reaches expected result, and each party satisfactorily performs or completes its part of the bargain
- **Tender of performance and refusal to accept:** An attempt by one of the parties to perform according to the terms of the contract, whether accepted or rejected by the other party
  - Ex. Hired to paint rooms in a house but then denied access to the premises

Substantial Performance

- Performance that does not comply in some minor way with the requirements of the contract
- Cannot seize upon a trivial failure of performance when the contract has been substantially performed, but can sue for damages
  - Ex. delivered 999/1000 cases of orange in good condition, 1 of which was not sellable. You can deduct the value of the one box which didn't meet the contract specifications, but can't claim the entire contract as breached

Discharge of Contracts By AGREEMENT

- Occurs when parties agree to discharge the contract
- Must have **consensus and consideration** - necessary to support a new agreement to discharge or modify the original contract

Occurs when:

- Party may not agree to perform the contract
- They may replace the original contract with another contract
- The contract itself may provide that the parties will not have to perform if certain conditions are met or not met

Waiver

- Agreement not to proceed with performance of a contract already in its existence
- Must be consideration for this.
- If each party has rights and obligations outstanding, these are consideration for the waiver of each party
- If only one party has performed, release should be under seal or consideration provided

Substituted Agreement

- Accord and satisfaction
- Novation
- Material Alteration of the Terms

Accord and Satisfaction

- Where one party is unable to completely perform the original obligation, so the parties may agree that it should be replaced with by new obligation
- A compromise between contracting parties to substitute a new contractual obligation if the original obligation cannot be carried out
- The new arrangement is made to allow the parties to discharge the contract

Novation

- The parties agree to terminate the contract and substitute a new contract
- Can substitute a new agreement or change the parties
- All parties must consent to the novation

Material Alteration of the Terms

- If changes to a contract go "to the root of the contract" parties can agree to discharge their original contract and replace it with a new one (ex. Thornhill and Neates)
- The distinction between a material alteration of the terms and accord and satisfaction is in the purpose of the arrangement. In a material alteration, the parties are primarily concerned with creating a new arrangement; the discharge of the old contract is incidental. In accord and satisfaction, the parties are seeking a way to end their existing arrangement; the new arrangement is only for that very purpose.

Contract May Provide For Its Own Dissolution

- **Condition Precedent** - an event or requirement that must be satisfied (must happen) before either party to the contract is required to do anything. *"This contract will only take effect if Party A secures financing by June 1st." If Party A fails to secure financing, the contract dissolves automatically.*
- **Condition Subsequent** - terms are included in a contract that bring the obligations to an end upon some event or condition taking place. *"This agreement will remain in effect unless a new government regulation prohibits the activity in question."*
- **Option to Terminate** - term that gives either party the option of bringing a contract to an end before performance completed, by giving notice. Ex. Mortgage, employment. *"Either party may terminate this contract by giving 30 days' written notice to the other party."*

Frustration

- When circumstances beyond the control of parties have made performance impossible, pointless, or radically different from that contemplated by the parties at the time the agreement was made.•the frustrating event must take place after the making of the contract
- frustration event must make the contract impossible to perform, not just more difficult/expensive
- event must not be self-induced, and unless specific/unique goods are called for, if destroyed it is NOT frustration

Circumstances constituting frustration include

1.Performance of a contract becomes impossible because the subject matter of the agreement is destroyed or is otherwise unusable if unique of specific goods *ex.Performer dies.*

2. Event that forms basis of a contract fails to occur. ex.Olympics cancelled

3. Acts of the government affect performance

ex. Drug declared illegal, land expropriated before sale concluded

Duke's Cookies

Four criteria of equitable estoppil.

- **Current Contract (or Pre-existing Legal Relationship):**
- There must be an existing contractual relationship or a legal situation where one party has a recognized right (even if not yet enforced). This means the promise is made in the context of an ongoing agreement or duty.
- **Gratuitous Promise Made:**
- One party (the promisor) makes a promise or assurance that is not supported by new consideration—that is, they are not contractually obligated to make that promise. Despite being "gratuitous," the promise must be clear and unambiguous.
- **Reliance to One's Detriment:**
- The other party (the promisee) must have reasonably relied on that promise. This reliance must be significant enough that it causes them some detriment or loss. Essentially, the promisee changes their position based on the belief that the promisor will honor the promise.
- **Used as a Defense (Estoppel) Against Enforcement:**
- The promise is then invoked by the promisee as a defense, preventing the promisor from later insisting on their strict legal rights under the contract. In other words, it would be inequitable for the promisor to go back on their promise given the promisee's reliance and the harm suffered.

INTERPRETATION

- A person who voluntarily signs contract will be BOUND by its terms
- Words can have more then one meaning, be ambiguous. Contract can have both express terms and implied terms.

Express Terms

- Terms agreed to explicitly by the parties:

Implied Teams:

- Deemed to exist where it's the standard in their trade, and for facilitating business
- Many codified terms are now codified into a statute for a particular area of law, ex. SGA (sales of good act which codifies implied terms which occur for the sale of goods)

INTERPRETATION OF EXPRESS TERMS:

- Strict, literal, plain meaning approach: Ordinary or dictionary meaning
- Liberal approach: Looks at intent of parties, circumstances surrounding the contract, knowledge of parties, past transactions and trade usage (how terms are normally used in a particular trade of business)
- Contra Proferentem: Preferring the meaning stated by the person who did not draft the term. "Whoever holds the pen creates the ambiguity and must live with the consequences"

INTERPRETATION OF INSURANCE CONTRACTS:

- Use contra proferentum
- Construe coverage provisions broadly
  - When the policy said "all risks," the court interpreted it broadly to include accidental flooding in the homeowner's basement.
- Interpret exclusion clauses narrowly
  - The insurer's exclusion for "intentional damage" was read so narrowly that a child's prank still fell under coverage.

INTERPRETATION OF CONTRACT:

Order of application

When interpreting a term, the courts will:

1. Apply the strict or literal meaning
2. If unresolved, look to the liberal approach, including circumstances, surrounding negotiations, knowledge of the parties, trade usage
3. Contra Proferentum: Against the party who suggested it

Implied Terms

Implied terms are not included by the parties, but as reasonable person people they would have included them had they thought about it.

- Ex. terms codified in a statute
- May be implied only but if necessary to make the contract effective
- Court will NOT imply a term which is contrary to an express term

EXAMPLE: Safeway is anchor tenant in a mall, keeps the space leased but vacant intentionally. Contract to the original intention of the parties. The court held that it was an implied term that the space would be continuously used as a supermarket, and that "non-use" was not an implied use".

The distinction between a material alteration of the terms and accord and satisfaction is in the purpose of the arrangement. In a material alteration, the parties are primarily concerned with creating a new arrangement; the discharge of the old contract is incidental. In accord and satisfaction, the parties are seeking a way to end their existing arrangement; the new arrangement is only for that very purpose.

Breach of Contract

- Occurs when one of the parties wrongfully fails to perform its obligations under the contract
- Breach does not automatically lead to the termination of the contract:
  - The breach has to be sufficiently serious (must be of the whole contract or of an essential term, a condition)
  - The injured party must choose to terminate

Terms condition and warranty distinguish essential from non-essential terms n a contract.

Condition:

- A fundamental, essential term
- Leads to the option to discharge the contract & claim damages unless the doctrine of substantial performance applies
- Injured party must choose to treat the contract as discharged & communicate this to the other party

Warranty:

- Breach of a non-essential term
- Does not discharge the contract
- Can only claim damages

Remedies are different for a breach of a condition and the breach of a warranty. It can be necessary to write up contracts with the remedy in mind. If the term of a contract is so important that you want it fulfilled or else the contract should be discharged, write this term as a condition in the contract.

Grounds upon which a contract can be set aside

Misrepresentation:

- A false statement of a material fact made during negotiations that induces a party to enter a contract. It does not form part of the final contract.
- **Types**:
  - Innocent: The speaker believes the statement is true.
  - Negligent: The speaker should have known the statement was false.
  - Fraudulent: The speaker knows the statement is false, or is reckless as to its truth.

Remedies:

- For innocent misrepresentation: the contract can be rescinded (undone) and the party may get indemnity for expenses.
- For negligent or fraudulent misrepresentation: the aggrieved party may choose rescission or claim damages.

Fraudulent Misrepresentation:

1. knowing it to be false
2. without belief in its truth, or
3. recklessly, careless as to whether it is true or false

Silence not usually a misrepresentation except for:

1. contracts which require utmost good faith
2. disclosure of latent defects in real estate
3. misleading "halftruths"

Duress:

Definition: Involves actual or threatened harm—whether physical, reputational, or financial—that forces a party into a contract against their will.

Key Point: The contract is voidable if the threat was the main reason for entering into the contract, but this rarely occurs in business settings.

Undue Influence

- Definition: Occurs when one party exerts such dominant influence over another that the weaker party is deprived of the ability to make a free and independent decision.
- Common Contexts: Special relationships (e.g., between a solicitor and client or a doctor and patient) or situations where one party is in dire straits.
- Burden: Once undue influence is alleged, the stronger party must prove that no undue influence was exercised.

Unconscionable Contracts:

- Definition: Contracts where there is a significant imbalance in bargaining power, and the stronger party obtains an extremely advantageous deal to the detriment of the weaker party.
- Criteria:
  a. Unequal bargaining power between the parties.
  b. The dominant party took advantage of the weaker party.
  c. The bargain is grossly unfair.
- Statutory Protection: Acts like the Business Practices & Consumer Protection Act require full disclosure and protect against such unfair practices.

Case Examples:

- Buckwold Western Ltd. v. Sager:
  - A guarantee was signed under standard commercial pressure.
  - The court found no evidence of duress or undue influence, and the guarantee was enforced.
- Makay v. Cesar:
  - An 87-year-old tenant entered a rent-to-own agreement under circumstances of overwhelming undue influence.
  - The court found that the imbalance in bargaining power made the contract unconscionable, implying that the agreement should not be enforced.

DISCHARGE OF CONTRACTS (FRUSTRATION)

- Hardship is not a sufficient excuse for failing to perform.
- the mere fact that contractual obligations prove to be more onerous than anticipated will not, by itself, discharge a contract by frustration.
- so less convenient, more expensive = not frustration

Sale of Goods Act:

- where a contract involves the SGA, the SGA in B.C. provides that destruction of specific goods, (through no fault of either of the parties) before the title of the goods passes, will void the contract

gm

Frustrated Contracts Act:

- Allows the court to apportion the loss equitably
- Done by providing for the recovery of deposits/advances and retention of part of the funds to cover expenses, where a party has partly performed the contract at the time of the frustrating event

Self-Induced Frustration

- where a party willfully disables itself from performing a contract in order to claim the contract has been frustrated
- treated as a breach of contract. *Ex. Where a party does not submit plans on time for them to be okayed so cannot start project*

Discharge by Operation of Law:

- Bankruptcy & Insolvency Act operates to discharge a bankrupt debtor from certain contractual liabilities after the processes of bankruptcy have been completed
- Need certificate of bankruptcy
- Cannot be caused by misconduct on the part of the debtor
- debts can be statute-barred, for example certain debts can no longer be recovered 6 years after last confirmation of the obligation under the *Limitation Act*

In order to claim frustration, 3 criteria are required:

1 – the event must have occurred after the contract was entered into

2- it must make the contract impossible to perform

3- it must not be self induced

THE DISCHARGE OF CONTRACTS, BREACH OF CONTRACTS AND REMEDIES

THE DISCHARGE OF CONTRACTS, BREACH OF CONTRACTS AND REMEDIES

The Charter of Rights and Freedoms

The Constitution Act (1982) brought in the Canadian Charter of Rights & Freedoms

The Charter has affected both federal & provincial legislation as no level of government can bring in legislation contrary to the Charter

Breach of Contract CONTINUED

- The Charter only applies to public matters – Government agencies & bodies, providing they are exercising statutory authority
- The Charter is entrenched in the Constitution- cannot be repealed by ordinary legislation
- Rights entrenched cannot be infringed by ordinary legislation.
- Charter includes S.33, which permits legislation to override certain charter sections.
- none of the rights set out in the Charter is absolute –s1 of the Charter allows for laws "demonstrably justified in a free & democratic society"

• S1: rights are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free & democratic society
-For example, search& seizure, extradition

R. V Oakes test: for legislation to be justified:

1. Object served must be pressing & substantial
2. The means chosen must be proportionate to the importance of the objective & must impair Charter rights as little as reasonably possible in achieving the objective
3. The objective must on balance justify the infringement

1. A statute is presumed valid

2. Onus is on person trying to prove it is invalid

3. If one of the rights guaranteed by the Charter is infringed the provision in the statute will be presumed invalid, unless

4. The government can prove that the infringement is "demonstrably justified"

Liebmann v Canada (Minister of National Defence)

Facts: was denied a position as executive assistance to the commanding Officer in the Persion Gulf Operation, despite being recommended for the position, when staff became aware that he was Jewish. Liebmann challenged the decision under s. 15 of the Charter.

Issues:
1. Does the Charter apply to the decision not to appoint Liebmann?
2. Were Liebmann's equality rights under s. 15 of the Charter infringed?
3. Could the infringement be justified under s.1 of the Charter?

Decision: Yes, the Charter applies, Liebmann's equality rights were infringed, & that infringement could not be justified.

Reasons: The decision regarding Liebmann was made under authority delegated under the National Defence Act, therefore under statutory authority, so the Charter applies

Liebmann was treated differently from others based on personal characteristics of the type enumerated in s.15 and there was discrimination in a constitutional sense in that his dignity was demeaned.

The respondents did not show that it was reasonable to discriminate against Liebmann because he was Jewish.

- note that the National Defence tried to argue the constitutionality of CFAO-20-53
- this bulletin wasn't even if effect when the decision to not appoint Liebmann was made!

- And one of the deciding officers later admitted that he was unaware of the politics of the Persian Gulf war and whether being Jewish was relevant

Alternate Dispute Resolution

• -Negotiation
• -Mediation
• -Arbitration

Mediation:

- the process through which the parties to a dispute endeavor to reach a resolution with the assistance of a neutral person
- neutral third party agreed to by the parties works with disputants to help them negotiate effectively
- mediator facilitates
- mediator has no power to make a binding decision
- defuses hostility, suggests a "middle ground", keeps parties focused on the issues
- if mediation is not successful, the parties can go to arbitration or trial

Arbitration:

-a process through which a neutral party makes a decision (usually binding) that resolves a dispute
-arbitration is more formal
-arbitrator makes a binding decision after hearing the parties
- both parties agree on who the arbitration(s) will be

Why Use ADR?

- Flexibility
- Less Expensive
- Speed & Finality
- Confidentiality
- Choice Of Decision-Maker
- Certainty & Enforceability
- Relationship Preservation

Disadvantages Of ADR:

- cannot ensure full disclosure
- power in-balance
- may not be as predictable
- typically only award available is monetary damages
- can be used as a stall tactic by one party
- may depend on the good faith of the parties

ALTERNATE DISPUTE RESOLUTION

British Columbia International Arbitration Centre

- opened in 1986 to position Vancouver to become a leading centre for international trade & commerce
- provides expertise, neutrality, objectivity and stability to disputants
- not restricted to international commercial disputes- can be used for domestic disputes
- has experienced arbitrators educated in international commerce, use standard procedures set out in the UNICITRAL model
- uses INCOTERMS to determine the meaning of terms

Breach of Contract CONTINUED

- **How a breach may occur:**
  - By expressly repudiating the contract
  - By acting in a way that makes the performance impossible
  - By either party failing to perform or to substantially perform

Express Repudiation:

- Declaration by one contracting party to the other that it does not intend to perform as promised. *essentially a direct "I'm not going to fulfill my part of the deal" statement.*
- The non-breaching party can then treat the contract at an end & sue for damages or insist on performance
- If all/substantially all of the contract has been performed, contract is then discharged & the harmed party can sue for damages
- If before the required performance, this means that it's an anticipatory breach

Anticipatory Breach:

- notifies the other party in advance that it will not be able to perform its obligations = "a breach occurring in advance of the time agreed on for performance of the contract"
- If the anticipatory breach is a breach of a condition the innocent party has two choices:
  - can accept the breach & sue for damages immediately or allow the contract to continue until expressly breached and then sue for damages
  - a minor term, if repudiated, will not be sufficient to declare the contract as discharged

Action that makes the performance of the contract impossible

- Deliberate or negligent act that makes performance impossible = repudiation
- May take place before of during performance
- Ex: not returning from vacation in time to perform the contract obligations

Failure of Performance:

- Usually becomes apparent during course of performance
- Must be determined if it is a breach of a condition or a warranty
- Could be liable for wrongful repudiation if it was only a minor breach which entitled the harmed party to damages only

To avoid liability should determine:

- Is there good reason to think future performance will be equally defective
- Is the expected or actual deficiency important to the whole performance promised?

Damages

- REMEDIES AVAILABLE FOR BREACH:
- **Damages (Monetary Compensation)**
  - awarded to place the injured party in the position it would have been in had the contract been performed
    - Awarded to place injured party in position if contract had been COMPLETED
    - Compensatory NOT punitive
    - May award for non-economic injury
    - Losses must flow "naturally" from breach
    - Must be within "foreseeable limits" based on actual knowledge of parties
    - Must be "mitigated"
- **Equitable Remedies:**
  - Equitable remedies are court orders compelling or preventing certain actions, rather than simply awarding money.
    - specific performance= court order to fulfill contractual obligations
    - Injunction = court order to end or prevent an action
    - Rescission = the unmaking of a contract
    - Quantum Meruit = "as much as he deserved"
      - Allows a party to recover the reasonable value of services provided when a contract is unenforceable or has been discharged.
      - Example: If you partly performed your obligations and the contract is canceled, you may be entitled to payment for the work already done.
- -subject to:
  - **1) MITIGATION = duty of harmed party to minimize the effects**
    - The non-breaching party must take reasonable steps to minimize their losses.
    - If they fail to do so, they can't claim damages for losses that could have been avoided.
  - **2) REMOTENESS**
    - Loss must be within the foreseeable boundaries of what the parties would have expected as a likely consequence of a failure to perform, had they thought about it when they drew up their contract
    - Damages not generally awarded to compensate an injured party for some unusual or unexpected consequence of a breach – they must flow directly from breach
    - A breaching party is only responsible for those damages which, at the time the time the contract was entered into, seemed a not unlikely outcome if the contract were breached, so would be responsible for unusual damages for special circumstances if these had been communicated to them, that is, they are reasonably foreseeable

Hadley v Baxendale:

The extent of damages will extend to:

- Damages which arise naturally (in the usual course); OR
- As may reasonably be contemplated by both parties at time contract was made

Damages may extend further if:

- Special circumstances were made known to the party breaching the contract

Damages Continued (Types of Damages)

TYPES OF DAMAGES:

Expectation Damages = expected benefit of performance (ex. Expected profits)

Consequential Damages
- usual type of damages such as due to delays from defective goods
- must be reasonably foreseeable at time of contract execution

Reliance Damages
- for expenditures & wasted effort due to cancelled contract

Nominal Damages
- loss is minimal, done as a matter of principle – "token" award

Punitive Damages
- where bad faith or malicious behaviour involved

Liquidated Damages
- amount allowed to be claimed for breach predetermined in the contract
- must be genuine attempt to anticipate consequences of breach, not a penalty

General Damages
- for consequences distinct from measurable losses, such as pain & suffering

Deposits
- A form of liquidated damages, advanced at the outset of the contract
- Retained if purchaser fails to perform
- Must be an honest attempt to estimate damages that would be suffered due to breach and not a penalty.

Down Payment
- Sum paid, usually as partial payment, returned where there is a breach upon which the vendor can sue for damages.

ALTERNATE DISPUTE RESOLUTION

Legal issues with foreign trade & investment:

- Private law issues – which country's laws apply?
- Public law issues – every country has laws which govern within that country
- International laws – treaties, agreements
  - governments have bilateral agreements such as the Canada-US Free Trade Agreement

HOW TO ANSWER CASE PROBLEMS

On an exam you will be asked to examine a set of facts and identify and resolve the legal issue(s) presented by using principles you have learned in this course. The best answers follow roughly the following format:

1. Identify the legal issue or issues raised by the facts. Do not restate the facts. If it is absolutely necessary to assume facts not provided in order to resolve the problem, state those assumptions. Consider each issue in turn.
2. Give a clear statement of the legal principle you have learned which addresses the issue. If possible, identify the case or statute which is the source of the principle.
3. Analyze the facts and consider how the legal principle relates to those facts.
4. Reach a reasonable conclusion based on your analysis. The outcome may be uncertain, in which case you should discuss the possible results and indicate which you consider most likely.

Exclusion Clauses

Exemption Clauses

Parties to a contract may have an exemption clause which can exclude the contractor from liability and transfers the risk of harm to the contractee.

Used Frequently In:
- -Standard Form Contracts
- -Back Of Ticket Contracts

Ticket, invoice, or other standard document.

Used To :
- -Limit The Risk, Or
- -Transfer The Risk To The Purchaser

General Rule: Courts presume that acceptance of an offer is acceptance of ALL the terms of the offer (*Rudder*)

Unsigned Contracts

- Onus is on the Defendant to prove that the Plaintiff adequately informed
- If the contract would not normally be considered to contain an exemption clause, the fact that there is such a clause must be specifically brought to the attention of the offeree at the time the contract is made or before

= a person may not be bound by a clause that is so unexpected & unfair that a reasonable signer would not think the contract contained such a term

- See *Greevan* case

Signed Contracts

- Effective when bargaining power & knowledge of law are equal
- Ineffective if consumer protection law such As SGA applies
- Where exemption does not precisely cover the event Contra Proferentum applies and it will be construed against the party who suggested it
- If consumer is misled as to the effect of a clause it maybe unenforceable, particularly where the effect of a clause is improperly stated or explained

How courts interpret exemption clauses

- Courts will generally enforce exemption clauses because the object of contract law is to carry out whatever parties have bargained to do
- But any ambiguity, then the narrow or restrictive meaning will be used

Ex: "not responsible for lost or stolen clothing"
(narrow interpretation will not make contractor liable for damage, nor liable for a lost briefcase)

Fundamental Breach

Fundamental Breach- a breach so serious that it amounts to a non-performance of the contract

-Courts look at the entire contract as well as the exemption clause & imply from the terms whether the parties intended the clause to cover a fundamental breach

- Called the construction approach

-Judges now take the view that parties can draft an exemption clause that excludes all liability

3 Part Test to see if exemption enforceable

1. **Does the exemption clause apply to the facts?**
2. **Is the clause unconscionable, i.e. is there (1) an inequality in the process of creating a clause; AND (2) an unfair outcome?**
3. **Is the clause contrary to public policy?**

Exemption clauses will not be binding where:
- **Not reasonable steps taken to notify that there is a clause**
- **If wording does NOT cover the event**
- **Gross or criminal negligence (ordinary negligence can be excluded) or fraud**
- **Unconscionable for seller to rely on exclusion (Maloney)**
- **For Sale of Goods under s.20 of the Sale of Goods Act:**
  - **Exclusion clauses won't apply if the sale involves:**
    - **New goods**
    - **By Dealer**
    - **To ordinary customer**

Dawe V Cypress

- s.4(1) of Occupier's Liability Act, where if the occupier (i.e. in this case Cypress) wants to extend, restrict, modify, or exclude their duty of care to any person, they have to take reasonable steps to bring that exclusion to the attention of that person

-plaintiff signed the release, was under no pressure to sign
- Was aware of the conditions on the hill, was experienced skier
- Terms were brought to his attention, were not unconscionable

= Where the terms of the release are clear, where they have been reasonably brought to the attention of the plaintiff, there is no pressure on the plaintiff to sign the release and the release contains no unconscionable terms, then the party signing will be bound by the terms.

Greevan v Blackcomb

- Under Occupier's Liability Act, must use reasonable steps to bring exclusion to attention of plaintiff
- Blackcomb not entitled to rely on exclusion clauses
- Different than *Dawes*
  - Greeven was stranger to Canada
  - Lack of evidence as to location of notices and nothing about the tickets which would draw "to the attention of a reasonably alert person without prior knowledge that they contain writing other than the advertising & definition of the period for which they are issued"

Maloney v Dockside:

- Dockside knew used boat had problems, but priced the boat low
- Maloney bought boat with standard form contract with exclusion clause, did not read the contract
- Problems with boat, so Maloney had another dealer install a new cooling system, but still problems with boat
- Exclusion clause applies to the circumstances BUT unconscionable: express knowledge of problems and complaints but did not disclose AND had knowledge and expertise
- *Aside: Mercury did work on the boat in between problems, so Maloney will have to show that Mercury work was not cause of problem*

Used Goods

For USED GOODS - if there are limitations that are not readily apparent to the naked eye and which fundamentally affect the merchantability of the item - there is a higher onus on a vender for disclosure

Sales of Goods Act

Sales of Goods Act "codified" a number of important implied terms for the sale of consumer goods.

Provides a set of terms which are IMPLIED into contracts for the sale of goods - consumers buying from retail dealers have the protection of certain implied terms that the contract cannot modify. (s. 20 SGA)

FOR THE SALES OF GOODS ACT TO APPLY

For the SGA to apply there must be:
- **A Sale**
  - **where Property transfers for a money consideration**
- **Of Goods**
  - **Tangible personal property**
- **Does not apply to services**
  - **On the balance of "is it a contract of sale, or a contract of labour and materials?"**
- **Ownership must pass to the buyer**

What does "goods" include?

'Goods" does NOT include:
- **Barters** (trading bike for someone's laptop, there's no 'sale')
- **Bailments or leases** (temporary transfer of possession, only 'temp')
- **Consignments** (ex. artist selling paintings at gallery, no transfer of ownership)
- **Non-contractual transfers of properties of goods** (giving your friend old TV for free, no contract of sale, just gift or informal handoff)
- **Land or intangible property** (real estate, stocks, patent trade marks, etc. SGA only applies to tangible, movable goods, not land or non physical items.
- **The supply of services** (involve labor or expertise, not goods).

A consignment is when a seller (consignor) gives goods to another party, usually a retailer or agent (consignee), to sell on the seller's behalf. The consignor still owns the goods until they are sold. The consignee takes a cut or commission once a sale happens.

Terms in Contract of Sale:

no longer fully applicable under the SGA, ✗ The seller cannot just rely on "you should've checked" in many cases.

Caveat Emptor = "let the buyer beware"
- has been severely qualified by the SGA – it only applies where goods are chosen after inspection so that buyer has exercised their own judgement in choosing the goods

Condition- Breach of an essential term which relieves the injured party from any further duty to perform the contract and may sue for damages

Warranty - Breach of a non-essential term, contract must continue but can sue for damages suffered

Let's say you buy a laptop and the seller promises that it comes with a **free carrying case** — that's a **warranty**, not a core part of the laptop sale.
- If they forget to include the case, you **can't cancel the whole sale** and return the laptop.
- But you **can sue for compensation** (e.g., cost of buying a new case).

BRITISH COLUMBIA'S SALES OF GOODS ACT

S.16 Implied Condition as to title

- **Implied condition as to right to title**
  - The law automatically assumes (even if not written in contract that the seller has the legal right to sell the goods)
- **Implied Warranty as to befree from charges or encumbrances**
- **Meaning: The goods should be free from any hidden debts, liens, or third-party claims — unless the buyer was told about them beforehand.**
  - **If breached:** It's a warranty, so the contract continues but the buyer can sue for compensation

16 (a) Seller has the **right to sell the** goods

16 (b) Goods will be **free from any charge or encumbrance** in favour of any third party, not declared or known to the buyer when the contract is made

S. 17 Implied Condition that goods will correspond to the description

- **If the contract is based on a description (e.g., "100% cotton shirt")**

The actual product must match that description.

This protects buyers especially in online or catalogue sales, where they can't inspect the item first.

- **Sold by Sample and Description.** Even if a sample looks fine, it's not enough if the final goods don't also match the written or spoken description.

Both the sample and the description must align with the delivered goods.

Example: A fabric sample feels soft (the sample matches), but the description says "100% silk" and it turns out to be polyester — it still breaches s.17(2).

- s.17 : -implied condition that goods will correspond to the description
  -minor misrepresentation regarding secondary characteristic may be treated as breach of a warranty
  - description applies to a generic characteristic, not words of praise

- 17 (1) In a contract for the sale or lease of goods by description, there is an **implied condition that the goods must correspond with the description**.
  - If goods are sold by description, they have to meet that description.

  (2) If the sale or lease is **by sample**, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also **correspond with the description**.
  - If goods are sold by sample AND description, they still have to meet the description

S. 19 Implied Condition that goods will correspond with the sample

Applies when a contract is based purely on a sample.

Example:
- You're shown a shirt sample, and order 500 units.
- The shirts delivered match the sample in look and feel — but most have stitching defects not visible in the sample.
- Breach of s.19 → Hidden defect not caught in reasonable examination.

S. 18 Implied Condition as to quality:

S. 18a SGA: Fitness For Purpose

Implied condition goods are fit for a particular purpose if:
1. Buyer communicates expressly/by implication particular purpose for goods
2. Buyer makes it known he is relying on seller's skill & judgment
3. Goods are in seller's course of business to supply
4. Buyer not purchasing by trade name, relying on own skill & judgment

FOR FITNESS OF PURPOSE TO APPLY:

3 part test for section 18 to apply

Buyer must:
1. Make the Purpose known to the seller;
2. Rely on the Seller's Skill/Judgment; AND
3. The Seller is in the business of selling the goods

THEN the goods must be reasonably fit for the purpose UNLESS bought under trade name.

s. 18b Merchantability:

(b) if goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;

= Implied condition that goods can be used for at least one of the purposes for which goods of that description would normally be used

- **You buy a toaster. Even if it's a cheap one, it should at least toast bread.**
- **If it doesn't heat up at all, it's not merchantable, and you can reject it or sue.**

"But if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed ->
- **You buy a used chair from a furniture store and see the leg is cracked — but you buy it anyway.**
- **You can't later complain that it's defective, because the problem was visible during inspection.**

s. 18c Durability:

(c) there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease;
-covers items like tires, batteries

s. 19 Sale by Sample:

(1) First, it only applies if the contract says the sale is by sample:

(1) A contract of sale or lease is a contract for sale or lease by sample if there is a term in the contract, express or implied, to that effect.

(2) In a contract for sale or lease by sample,
(a) there is an implied condition that the bulk must correspond with the sample in quality,
(b) there is an implied condition that the buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample, and
(c) there is an implied condition that the goods must be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.

s.19: Sample will correspond to bulk

If bulk goods are sold by sample, then:
1. Buyer must have reasonable opportunity to inspect;
2. Bulk must correspond with sample; AND
3. Must be free from defects that would not be observable by the buyer (on reasonable inspection).

-Buyer deemed to be aware of defects which would be apparent on a reasonable examination – no implied condition as regards defects which such examination ought to have revealed

s.20 SGA Exclusion of Implied Terms (SAYING THESE TERMS DON'T APPLY TO ME):

With the exception of retail sales (new goods sold by a dealer to an ordinary individual for personal use), parties can expressly exclude implied terms (ss.17-19 of SGA).

For example, CAN exclude for:
- Sales to a business
- Used goods
- Someone who does NOT ordinarily sell those goods (craigslist)

Must be CLEARLY WORDED and SPECIFICALLY name the type of liability (e.g. warranties v conditions)

Cannot contract out of liability for the ENTIRE bargain (render contract void of meaning)

=Dealer is bound by SGA if he sells "new" goods to an ordinary consumer even if the contract contains an exemption clause

- may contract out of s.17,18,19 if private sale, used goods, business use, trustee in bankruptcy - but never s. 16 (TITLE)

*** - so all consumer sales in British Columbia come with non-excludable statutorily implied conditions & warranties

TRANSFER OF RISK AND TITLE

the 5 rules under the Sale of Goods Act that determine when ownership (title) passes from the seller to the buyer

Rule	Situation	When Title Passes (ownership transfers)
Rule 1	Unconditional contract for sale of specific goods in a deliverable state	Title passes **when the contract is made** (delivery and payment are irrelevant)
Rule 2	Sale of specific goods where seller is bound to do something to put them in a deliverable state	Title passes **when the thing is done** and **the buyer receives notice**
Rule 3	Sale of specific goods in a deliverable state, but seller must weigh, measure, test, etc., to set the price	Title passes **when the thing is done** and **the buyer receives notice**
Rule 4	Sale of goods on approval	Title passes **when the buyer signifies approval** or after a **specified or reasonable length of time**
Rule 5	Sale of unascertained or future goods by description	Title passes **when goods are unconditionally appropriated** to the contract by the seller **with buyer's assent**, or **delivered to a carrier** without reserving disposal rights

Sales of Goods Act (CONT.)

relevant cases

Kobelt Manufacturing Co v Pacific Rim Engineered Products (PREP)

Facts: PREP ordered brakes from Kobelt, brakes were leaking

PREP: Brakes not fit for intended purpose and liable under s.18 of the SGA

Issues: Was there implied condition or warranty of fitness for particular purpose for which PREP intended to use brakes pursuant to s.18 of SGA? Or is warranty not applicable because sale was under the trade name OR because warranty is excluded by exclusion clause?

Was PREP demonstrated breach of the implied warranty of fitness for purpose?

If there was breach of contract and damages are not limited by contractual warranty and exclusion clause, what amount is PREP entitled to?

Kobelt Manufacturing Inc. vs Pacific Rim

The 3 part test for Section 18:

1. contract was in the course of seller's business
2. seller has knowledge of the purpose of goods
3. buyer relied on seller's skill and judgment

S.18 of SGA does not apply

Kobelt was never told that the brakes were going to be used in draw works and PREP did not rely on Kobelt's expertise and not generally understood in the industry that PREP's use of brake would be common

Exclusion Clause does not exclude the statutory application: no evidence that terms were brought to the attention of other party and were not in application at the time contract was concluded (and in any case language only excludes warranties, NOT conditions)

No statutorily implied warranty of fitness

Bevo Farms Ltd v Veg Gro Inc

In a sale of unascertainable goods, title passes to buyer when goods are in deliverable state and are unconditionally appropriated to the contract

Here, they were unconditionally appropriated to the contract when Bevo contracted with the carrier company for delivery (when they were loaded onto the truck)

Bevo was selling goods (like plants or produce) that weren't picked out yet — this is called **unascertained goods**.

Under the law, **ownership doesn't pass** until:

1. The goods are ready to be delivered, **and**
2. They're clearly set aside for the buyer (**unconditionally appropriated**)

In this case:

- Bevo **packed the goods** and **loaded them onto a truck**.
- They also **hired the delivery company** to send them to Veg Gro.
- At that moment, the goods were:
  - Ready
  - Set aside just for Veg Gro
  - On their way
- 👉 So **ownership passed to Veg Gro** as soon as the goods were loaded.

BC Sales of Goods Act DOCX

If you live in British Columbia, Canada consider yourself lucky. BC has (probably) the strongest consumer protection legislation in North America. I am not a lawyer, but learning about BC's "Sale of Goods Act" was an epiphany to me. I've used it successfully many times. You should know about it so that you can benefit from it also. You can find the act at the following link (the relevant sections are 16. 17. 18. and 20): http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96410_01. Let's call it the "SOGA".

[Please note that when the act discusses a **"condition"** of a sale, it means this: A **"condition"** of a contract is an essential term of a contract. A breach of a condition by either party leads to a discharge of the contract. If the seller (i.e. the person who you bought, say, a cell phone from) breaches the contract, then the buyer can ask the court to restore them to their pre-contract position (i.e. get their money back from the seller and discharge they buyer from any further obligations). If a **"condition"** is breached by the seller, then it is up to the buyer of the goods as to the remedy, not the seller. So you can elect to return the goods for a full refund. (A **"warranty"** means that you are entitled to compensation for damages/loss, but not a full refund). So as you might imagine, **conditions** of a sale are very important and powerful.]

Section 17 of the SOGA says that the goods much match their description, e.g. if you purchase something from a catalogue. I used this clause successfully once when I purchased a textbook. It was shrink wrapped and the description on the back of the book touted the "companion web site". As it turns out, it was a new edition of the book and the companion web site was not available. So a few weeks into the course I returned the book for an older edition. I explained that the goods didn't match the description. This can be a powerful clause.

Section 18 says 3 important things:

1. Fitness for purpose is a **condition** of the sale: If you describe your purpose and rely on the seller for their recommendation, it is a **condition** that the goods will meet that purpose. Otherwise you can return the goods for a full refund. What this means is that you shouldn't go into a store and tell them you want a particular model of a product (e.g. power tool, cell phone, bicycle, skis, computer, or whatever). Rather, you should tell them what your need is and rely on their recommendation. If you buy it based on that recommendation and the product doesn't meet the need you stated, then the **condition** of the sale was breached according to the SOGA. You as the buyer can demand a full refund.
2. Goods are of merchantable quality is a **condition** of the sale: If you get a "lemon", a **condition** of the sale has been breached. Obviously subjective, but can be quite powerful. I would ask for a full refund and cite the SOGA.
3. Co. ids will be durable for a reasonable period of time. This is a **condition** of the sale. Reasonable period can be a bit subjective, but is helpfully defined for you when you are offered an extended warranty. Personally, I think that 3 years is a "reasonable period of time" for a cell phone to last if I purchase it on a 3 year contract. And just because a TV comes with a 1-year warranty, it doesn't mean that 1 year is the "reasonable period of time" for it to last under normal use. I find that the inevitable offer of an extended warranty is a good time to discuss how long something will last with the salesperson. There will probably be a lot of arm-waving and backtracking if you ask them in response to their suggestion of a thee year warranty on your TV: "But won't this TV last for at least two or three years?". The salesperson will generally say "yes, but...". Write their name on the receipt and make sure to mention their name when you take the store to small claims court because your TV died on day 366 and they refused to replace it or refund your money.

Section 20 of the SOGA says that these rights cannot be waived via a disclaimer, unless they are used goods or goods used primarily for business purposes. So be careful of disclaimers on used goods or goods you purchase for a business. But otherwise you have superhuman immunity to those silly disclaimers they put on receipts or mention when you purchase the goods, e.g. "not responsible for ...", "exchanges only", "no returns if clothes worn by purchaser", etc.

Oh, and another interesting point about the SOGA. It applies to the seller, not the manufacturer. So you should never have to deal with the manufacturer to assert your rights - only the seller who you purchased the goods from.

So if you decide to exercise your rights under the SOGA, act confidently (but not arrogantly) and talk to "12 salespeople first. They probably won't know what to do and will try to get you to go away. Ask for the manager at that point. If you still get no joy, then ask how to contact their legal department. Write them a letter citing the SOGA and you are likely to succeed in getting a refund and/or replacement of the goods (your choice). If not, don't be afraid to use small claims court. You are likely to win, and the seller will have to pay your costs when you do (about $100 to file a Small Claim). Small Claims court in BC can be used for claims up to $25,000 and is intended for just this sort of dispute.

Kovacs v Holtom

Rule 2 SGA: Risk and title pass when the work is done and the buyer notified

Fire occurred and goods destroyed prior to risk and title passing so seller liable for the cost of the car

Torts

The Law of Torts

What is a tort? Tort = tortus = crooked, twisted

A civil wrong for which the victim may claim compensation from the wrongdoer for the harm suffered

The role of tort law is to compensate the victim, rather than punish the offender (criminal law)

Tort Law vs Contract Law

1. No privity of contract is required (Donaghue v Stevenson (1932)
2. In contract law the contractual relationship makes a violation of the terms unacceptable. In tort law there is wrong conduct which falls below a socially acceptable standard.
3. Contributory negligence is allowed in tort, but not in contract

Basis for Liability in Canada

1. Strict Liability – no defence, at fault even if you took steps to prevent harm – as long as harm is caused, blame is attached
   Under statute in Canada, such as transporting hazardous goods
2. Fault – intentionally or carelessly disregard the interests of others and cause harm to their person, property or reputation
3. Vicarious liability – liable for acts of employees if "within the scope of their employment"

Vicarious Liability

- an employer is liable for torts committed by an employee if the tort is "within the scope of their employment"
-the employer has the right to sue the employee after having been held liable for the employee's negligence
- no training, screening, supervision or contract allows an employer to escape vicarious liability as the object is to provide compensation to a victim and the employer usually has more money

Principled Exception Clause

- can use a principled exception clause to avoid vicarious liability for the acts of employees
- Employers can use an exemption clause to protect their business from liability for its own breach of contract, negligence, plus any vicarious liability for the torts of employees, agents

Clause however must: 1. be intended for their benefit &
2. the damage occurred in the course of their employment

Exemption Clause Example:

A company includes a clause in a customer contract that says:

> **"We are not liable for damage caused by our employees, agents, or contractors."**

This type of clause is meant to **reduce or eliminate the company's liability** — even for

- Its own **negligence**
- Its employees' **torts** (wrongful acts)

⚠️ BUT — 2 important conditions must be met:

1. **The clause must clearly benefit the employer**
   - It has to say explicitly that it protects the employer or their employees/agents.
2. **The damage must have happened while the employee was doing their job**
   - The employee must have been **acting in the course of their employment** (not on a personal frolic).

Intentional & Unintentional Torts

Intentional torts to person include assault, battery, defamation

Intentional torts to property include trespass, nuisance

Intentional torts unique to business include inducing breach of contract, passing off, invasion of privacy, infliction of mental suffering

Unintentional torts = negligence

Occupier's Liability

Duty owed: to take care to prevent injuries from hazards of which the occupier is aware and also those of which a reasonable person ought to be aware

Occupier's Liability Act (B.C.)

s. 4(1) any exclusion of liability must be brought to the attention of the plaintiff

🔹 What is Occupier's Liability?

It's the legal responsibility of a **property occupier** (not necessarily the owner — could be a tenant, business, or manager) to make sure that **visitors to the property are safe** from hazards.

🔒 **Duty of Care Owed:**

- The occupier must prevent injuries from:
  1. Hazards they **know about**, and
  2. Hazards they **should know about** (based on what a reasonable person would notice)

✅ So even if they didn't actually know about a danger, they can still be liable if they **should have known.**

📜 **Occupier's Liability Act (B.C.) – Section 4(1):**

If an occupier wants to **exclude liability** (e.g., using a "Not responsible for injuries" sign), they **must make sure the visitor notices it.**

- ❌ You can't hide a disclaimer in fine print.
- ✅ It must be **clearly communicated** before the injury happens.

Negligence in Torts

NEGLIGENCE IN TORTS

Negligence is the careless causing of injury to another

Negligent behaviour that causes no harm is not actionable

No privity of contract is required

A	a loss
B	Breach of the duty
C	Causation
D	Duty of care owed

How to prove Negligence

1. A loss
2. Defendant owed plaintiff a duty of care
3. Defendant breached the standard of care
4. The breached caused the loss and damages are reasonably foreseeable

Duty of Care

Test: Would a reasonable person have foreseen this conduct causing harm to this plaintiff or someone in the plaintiff's position?

- Plaintiff must establish that a duty of care was owed to them by the defendant
- Must be a reasonable foreseeable victim, a "neighbor"
- Public policy may justify removing or reducing the duty = values of society as a whole, interests of Canada, etc.

Standard of Care

- The standard of care exists when the circumstances of time, place and person would make a reasonable person aware of a probability of that type of harm resulting from that activity
- Will vary according to the activity and profession
- Examines the likelihood of harm vs the social utility of the activity and feasibility of eliminating the risk

Causation

Test: Would the plaintiff have suffered damage "but for" the defendant's negligence?

- Must be a causal link between the act of the defendant and the loss of the plaintiff
- There must be damage or loss suffered by the plaintiff – can be physical or mental injury to persons or damage to property
- Pure economic loss now compensable
- Liable if type of injury foreseeable regardless of whether extent was

Thin Skull Rule

You take your victim as you find them – if a person experiences greater injury from our conduct than would be expected because of a unique physical condition, there is none the less a responsibility to compensate for all consequences of the injury

Shove someone who has a concussion and they're critically injured, YOU'RE STILL RESPONSIBLE FOR EVERY CONSEQUENCE.

Defenses for negligence

Defenses for Negligence

1. Contributory negligence – courts will apportion damages according to percentages of contributory negligence of the defendant and others
2. Mitigation – must act reasonably and quickly to minimize the extent of the damage suffered
3. Volenti non fit injuria - 1. did the plaintiff understand the risk?
   and
   2. did the plaintiff consent to the risk?

Remedies

Purpose is to restore the plaintiff to the position they would have been in if the tort had not been committed

Damages: are the usual remedy

Specific Performance: ordering something to be done

Injunction: to halt what is being done

Hollis vs Dow Incoming

relevant cases

There is a duty to warn consumers of dangers inherent in the use of product which it has knowledge of, or OUGHT to have knowledge of, and that duty to warn is a continuing duty

- must warn of dangers at time of sale and of dangers discovered AFTER product has been sold and delivered
- 3 C's: clear, complete and current warnings! All warnings must be reasonably communicated and must clearly describe any specific dangers arising from ordinary use of product
- with medical products, standard of care for manufacturers to provide proper warning is HIGH given intimate relationship between medical products and consumer's body
- in cases where it isn't realistic to directly warn the consumer, manufacturer may satisfy duty to warn by warning learned intermediary of risks (have to make sure they give the intermediary the same knowledge that they have - i.e. pass it on)

Waldick vs Malcolm

Invitees (persons permitted to enter for business purposes) and Licensees (persons with express or implied permission) and trespassers – must take care to prevent injuries from hazards of which occupier is aware, and which a reasonable person ought to be aware

3(1) Occupier's Liability Act

-occupier owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises and the property brought on the premises by those persons are reasonably safe while on the premises

Morsi vs Fermar Paving

York owed Morsi a statutory duty to keep Major Mackenzie Drive in a reasonable state of repair in all the circumstances

Fermar had a common law duty of care to Morsi to carry out its responsibilities under contract in a manner that did not create an increased risk of harm to the public

Held: No contributory negligence : If Morsi had driven even modestly above speed limit no harm would have occurred

Negligence In Torts (Cont.)

relevant cases

Rankin v JJ

Is a duty of care owed by a business that stores vehicles to someone who is injured following the theft of a vehicle?

No, a business that stores vehicles (like Rankin's Garage) does not generally owe a duty of care to someone who is injured after a vehicle is stolen, unless it is reasonably foreseeable that harm to a third party could result from not securing the vehicle.

Professional Liability

Scope of the Professional Duty of Care

- Professional = people with specialized knowledge and skills which are relied on by others
- Usually belong to licensed body
- Injury or harm from reliance on advice can be a wrong in tort or in contract or a breach of fiduciary duty

1. contractual duty
   -either expressly or impliedly promised that services will be provided with due care
   -only parties to the contract can sue for breach of contract
2. Fiduciary duty
   -special relationship of trust
   -may arise even if no negligence
3. Duty in tort
   -application of general principles of negligence but with specific factors

Fiduciary Dutry

Fiduciary duty is the legal obligation one party has to act in the best interest of another. It's the highest standard of care in law.

If you have a fiduciary duty to someone, you must prioritize their interests above your own—you can't take advantage of your position, even if it benefits you.

- **Directors of a company have a fiduciary duty to act in the best interests of the company (not themselves).**
- **Lawyers have a fiduciary duty to their clients.**
- **Trustees must manage trust assets in the best interests of the beneficiaries.**
- **Partners in a business owe fiduciary duties to each other.**

- **Duty of Loyalty: No conflicts of interest. You must be completely honest and not use your position for personal gain.**
- **Duty of Care: You must make informed decisions and act diligently.**
- **Duty of Good Faith: You must act honestly and fairly.**

Claims

- A claim could be for Tort, Contract or Breach of Fiduciary Duty
- If overlap in facts it could be tort, contract and/or fiduciary duty, a court will not award damages under all heads of damage – only one
- Statutory limitation periods apply
- Defences may differ:
  Tort – contributory negligence
  Contract – exemption clauses
- Remedies may differ

Professional Negligence

2 Specific Torts: -Fraudulent Misrepresentation
-Negligent Misrepresentation

Fraudulent Misrepresentation

Fraudulent Misrepresentation = deceit, made knowingly

Fraudulent Misrepresentation (also referred to as Deceit) has four elements:

1. false representation made by defendant
2. some level of **knowledge** of the falsehood on the part of defendant
3. false representation caused plaintiff to act
4. plaintiff's act resulted in loss

Negligent Misrepresentation

Negligent Misrepresentation = an incorrect statement made without due care for its' accuracy

Negligent Misrepresentation has 4 elements:

1. duty of care
2. breach of standard of care
3. injury to plaintiff
4. causation of damage

(same as usual claim of negligence)

Fraudulent Misrepresentation

Fraudulent Misrepresentation compared to Negligent Misrepresentation=

Fraudulent misrepresentation or deceit is different than negligence which does not require knowledge of the false information, just a **duty of care** paired with **a breach of the standard of care**

Deciding whether claim could be for Tort

- If overlap in tort, contract and/or fiduciary duty, a court will not award damages under all heads of damage - they will pick ONE
- Statutory limitation periods apply
- Defences may differ:
  - Tort: contributory negligence
  - Contract: exemption clauses
- Remedies may differ

Hedley Byrne v Heller (1964)

Hedley Bryne was an ad agency wanting to extend credit to Easipower
Asked their own bank if Easipower was "good for" credit
Hedley Bryne's bank confirmed with Easipower's bank that Easipower was good for the debt
Easipower became insolvent
Hedley Byrne sued Easipower's bank for negligent misrepresentation
Court found duty of care owed to Hedley Byrne DESPITE no direct dealings between parties – all information was processed through Hedley Bryne's bank
HOWEVER, Easipower's bank had included a disclaimer or responsibility so Hedley Byrne could NOT rely on the information

Results of Hedley Byrne v Heller (1964)

Hedley Byrne case extended the duty of care owed by professionals to a wider group of potential claimants – duty now owed not only to those in a contractual relationship but also to those relying on the information
Court said : it was possible to award compensation to the victim of a negligent misstatement even if there had been no contract, no fiduciary duty and no fraud.

Who is a duty of care owed to?

As a result of *Hedley Byrne*, experts find themselves responsible not only to their immediate clients, but to others who suffer loss because of their careless statements
However, this duty is only owed to those who are in a "special relationship" = only those persons (not necessarily identified to them in person) whom they know will have a specific use for the audited information

Rangen case

Duty of Care

- duty of care is not owed to all who are reasonably foreseeable
-liability is limited to:

1. Not only must there be a special relationship (*Rangen*)but
2. Liability only extends to the purpose for which the information was prepared
   Hercules Mgmt ltd vs Ernst & Young

-eligible plaintiffs must not only be "foreseeable" in a general sense, but also more specifically "foreseen" in relation to a contemplated transaction

Hercules Management vs Ernst & Young

Hercules was shareholder in real estate lending company
EY was auditor for company
Company went bankrupt and investors brought action against EY that audits were negligent: claimed that they were using audits to monitor investments and would have pulled money if they saw bankruptcy was impending
No contract between auditor and shareholder
The purpose of the reports was to collectively assist shareholders in overseeing management
The reports were NOT prepared to assist in making personal investment decisions or for ANY purpose other than the standard statutory purpose under the Business Corporations Act (to oversee management)

Standard of Care

Must:

1. Exercise the same degree of skill and abilities that one would expect an expert or professional in their field of professional expertise to have
2. Skill & knowledge must be commensurate with the particular task undertaken

-client not required to tolerate ineptitude due to lack of experience

What will Courts consider in Standard of Care?

professional code of conduct or guidelines
e.g. accounting: GAAP
legislation
testimony of other practitioners as to proper standard
doesn't have to be the "best" practice possible, just a well-recognized pracice
sometimes complying with normal professional standards is NOT a defence - in cases where established standards don't take into account that a professional is undertaking a task beyond the usual skills of their profession

Proving negligent Misrepresentation

1. the advice must be used by the client to trigger the loss
   - "did the client reasonably rely and act upon the advice of the professional"
   - would the client have acted in that way if he had NOT received that advice"
2. AND the reliance must be reasonable
   - should the information be used in the way that it was?
   - were there other more appropriate sources available for use?
3. AND the reliance must have resulted in damage (i.e. there is detrimental reliance - the worsening of one's situation after relying on the false information)

If you devote the appropriate amount of skill & care to meet the required standard of care, you are not liable, even if your advice turns out to be wrong

Easier to tell if there is a misstatement of fact, but harder to tell if an opinion or value judgment is wrong
Must:
(1) be considered at the time it was made and
(2) (2) inaccuracies must result from failure of professional to meet required standard of care

Must show that it resulted from a lack of skill, competence or diligence on the part of the preparer

CAUSATION

-is a question of reliance on the professional advice
-up to the plaintiff to prove that the misrepresentation caused the loss
-need not prove it was the fundamental factor that caused the loss, as long as it was a contributing factor

Legislation

advisor gives bad investment advice, client follows it. Market crashes. If client sues, only need to prove advisor's bad advice contributed to financial loss — not that it was sole cause.

Legislation holds certain classes of defendant's liable

Provincial legislation creates statutory cause of action for misrepresentation for:

- real estate agents
- securities legislation (duty on directors, officers, lawyers) for misrepresentation in financial documentation and disclosure documents, where plaintiff is "anyone completing a trade while misrepresentation remind uncorrected"

Krispee Creem Example

Krispee Creem apologized and said it would send you another 18 dozen donuts via their new independent delivery service called Freddie's Fast Food Delivery. Unfortunately, when Frank the driver, was on his way to deliver the donuts to you, he was so enticed by the smell of the fresh donuts that he reached back over his seat to get one of the donuts out of a box. Because Frank wasn't watching where he was going, he caused a serious vehicle accident.

a)As a result of Frank's negligence, serious harm has resulted to another motorist. Frank has been found by a court to be 100% liable for the accident and liable for all the resulting damages. Insurance won't cover about $50,000 worth of damages. His boss, Fred, is very worried because he had plans to invest all of the profits of his delivery business into expansion and is worried about being liable for Frank's negligence since insurance will not cover all of the loss. Fred contacted a lawyer named Mike Mistake, and Mike advised Fred that he didn't have to worry at all as Frank caused the accident and so Frank will alone be liable.

Is Mike correct? Advise Fred as to whether he could be liable for Frank's negligence with reference to all relevant law.

Is Mike liable to Fred for negligent misstatement?

- Did Mike owe Fred a duty of care? Is it reasonably foreseeable to Mike that Fred might be affected by Mike's negligence? (special relationship, purpose prepared for?)
- What is the standard of care? Mike's conduct will be compared to the reasonable lawyer practicing in the same field as Mike, and he must have used the time and skill commensurate for the task.
- Did Mike breach that duty of care?
- Did this breach cause Fred's losses? Was there reliance?

Lawyer gave wrong statement.

Fred contacted Mike to ask about any liability he may face in connection with his employee's negligence. Mike knew that Fred was relying on his advice and that he may suffer losses if the advice was negligent. Mike owed Fred a high duty of care as a professional. He breached his duty of care in giving negligent advice. Fred's reliance on the advice caused him economic losses of $50,000.

I think a judge would say that Mike is liable to Fred for $50,000 for negligent misstatement.

Fiduciary Duty

A fiduciary duty is a legal duty where one person, called the fiduciary, has to act in the best interests of another person, known as the beneficiary, in all matters within the scope of their relationship.

The beneficiary trusts that the fiduciary will act on their, the beneficiary's, behalf, in good faith.

Where there is a "special" relationship with a professional, law imposes a "fiduciary duty" on that professional

This supersedes contract law and tort: can exist even when there is no contract in place and even where there is no negligence (e.g. *Hodgkinson v Sims*)

Criteria for Fiduciary Duty

Most fiduciary relationships are found where:

1.The fiduciary has the scope for the exercise of some discretion or power on the beneficiary's behalf.

2.The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

3.The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Examples of Fiduciary Duty

Fiduciary relationships can arise in most professional relationships. For example:

- Accountant/client
- Lawyer/client
- Doctor/patient
- Trustee/beneficiary
- Between partners in a partnership
- Between directors of a company and the company

What a fiduciary must do

A fiduciary duty is a special relationship of trust, loyalty and confidentiality, requiring some of the following obligations:

- fiduciary must act honestly
- A fiduciary must act in good faith for the beneficiary.
- A fiduciary must act in the beneficiary's best interests
- A fiduciary must not place himself or herself in a conflict of interest with the beneficiary (without the beneficiary's consent)
- The fiduciary must keep the beneficiary informed of any relevant information
- A fiduciary must not earn a secret profit in the course of acting for the beneficiary or compete with the beneficiary
- A fiduciary must exercise discretion and confidentiality with respect to the beneficiary's affairs.

What a fiduciary must do

Some fiduciary duties are enshrined in statute:

Ex: trustees and corporate directors (BC BCA):

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must
(a) act honestly and in good faith with a view to the best interests of the company; and
(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances

Exceptions to Fiduciary Duty

NOT every professional relationship is automatically a fiduciary one

Example: *Schram case:*

- Broker was told to ONLY trade with authorization
- Schram sold shares without authorization
- Owners lost out on profits
- Breach of contract but NO breach of fiduciary duty
- Recognize here the broker did not have discretion or control as was only to trade with authorization

Just because a professional does something wrong, doesn't automatically mean they owe a fiduciary duty. Fiduciary duty exists when the professional has discretion, control, or power over the client's affairs and the client relies heavily on their judgement. In this case, the broker didn't have discretion - they were only allowed to act with permission. Since they weren't given control, there was no fidicuary duty, only a broken contract.

Fiduciary Duty

As noted in the *Hodgkinson* case, a fiduciary relationship exists where there is a relationship of trust and confidence **and** reliance on the advice being given by a financial advisor.

Discussing client affairs with an "outsider"

Breach of fiduciary duty may arise even though there is no negligence, for example, when confidential information is disclosed

- You are breaching your fiduciary duty if you discuss a client's affairs with an "outsider"

How long should fiduciary duty extend after directer leaves or partner leaves partnership?

A fiduciary duty has been held to extend beyond a year after a director leaves being a director of a company or where a partner leaves a partnership

Hodgkinson v Simms & Waldman 1994

Hodgkinson is 30 year old stockbroker with limited investment experience

Simms was a CA

Hodgkinson sought advice re tax shelter and accounting

he chose Simms because was not part of "high risk" world of promoters and could be independent

wanted stable and long term investments

Simms advised MURBs (development of apartment buildings where builders could deduct costs from personal incomes)

real estate market crashed in 1981 and Hodgkinson took huge losses

Simms failed to disclose fee arrangement with developers where he was collecting fees

Hodgkinson sued for breach of fiduciary duty and breach of contract

Results of case

at trial was awarded 350K (the amount that was lost on the MURBs), also found there was a fiduciary duty (because there was vulnerability in this case)

on appeal - found NO fiduciary duty because degree of vulnerability had not been proved (Hodgkinson knew the risk) and the collapse of the real estate market (which was unforeseeable) was the real reason why Hodgkinson took the loss, not the failed duty to disclose **collapse of real estate market was the reason why hodgkinson took the loss, NOT failure to disclose fee arrangement.**

Vulnerability and reasonable expectations that other party would act in former's best interests

"Vulnerability" may be common to breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation

BUT unequal bargaining powers is not NECESSARY for fiduciary duty to exist - instead the question is:

- "whether given all the surrounding circumstances one party could reasonably have expected that the other party would act in the former's best interests"

Vulnerability and reasonable expectations that other party would act in former's best interests

Test was clarified in *Galambos v Perez (2009 SCC)(see Case 5.3 page 104 of text):*

- 1) the existence of a discretionary power on the part of the fiduciary to affect the vulnerable party's legal or practical interests that the fiduciary can exercise unilaterally; and

- (2) an express or implied undertaking by the fiduciary itself that it will exercise this discretionary power in the vulnerable party's best interests

TESTING WHETHER FIDUCIARY DUTY EXISTS IN RELATIONSHIP

Test was clarified in *Galambos v Perez (2009 SCC)(see Case 5.3 page 104 of text):*

- 1) the existence of a discretionary power on the part of the fiduciary to affect the vulnerable party's legal or practical interests that the fiduciary can exercise unilaterally; and

- (2) an express or implied undertaking by the fiduciary itself that it will exercise this discretionary power in the vulnerable party's best interests

Strother v 3464920 Canada Inc. (Monarch) 2007 SCC

Strother was tax partner at Davis LLP

Tax shelter scheme where allowed to treat investment in film as risky = speculative and NOT a capital asset = deductible from other income

Monarch was Strother's biggest client

CRA closes loophole and Strother says to Monarch that he does not have a fix

Strother in 1998 (AFTER retainer with Monarch) starts business with an ex-executive of Monarch to take profit from a new tax approach that Strother has figured out

Strother did not advise Monarch about the new tax approach

1999 Strother resigned from Davis and joined Sentinel as 50% shareholder

Sentinel made profits approaching $130M

Issues:

1. Did Strother/Davis breach fiduciary duty owed to Monarch by accepting Sentinel as client?
2. Did Strother breach fiduciary duty to Monarch by accepting personal financial interest in Sentinel, and if so, is Davis liable for that breach also?
3. Did Strother wrongly use for his own/Sentinel's benefit confidential information belonging to Monarch?

Law:

- Fundamental duty of lawyer is to act in best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client

- a lawyer has a duty to avoid situations where he has, or potentially may, develop a conflict
  - the conflict must be (1) material and (2) adverse

Law: **Bright Line Test**

- the "bright line" test is the rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client

- even if the two mandates are unrelated - unless both clients consent after receiving full disclosure (and preferably ILA) and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other

The scope of the retainer was broad: in 1998, there was a continuing relationship of trust and confidence between Monarch and Strother. Monarch was not dealing with "used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell"

it was for Strother to demonstrate that the impact of Strother's financial interest in Sentinel on Monarch was NOT material and adverse

- The court found that Strother put his personal financial interest into conflict with his duty to Monarch, where it created a substantial risk that his representation of Monarch would be materially and adversely affected by his interest

Disgorgement of:

- Legal fees which Strother profited from (Davis can keep the legal fees for general corporate work done by other lawyers which was not tainted. Davis can also keep the legal fees from Sentinel, as DAVIS did not have a breach of fiduciary duty, it was only Strother's)

- Strother's profit - to serve a prophylactic purpose (deter others from breaching fiduciary duty) - here, Strother's profits from the time het got his interest in Sentinel to the time he quit Davis

Disgorgement

Disgorgement is defined by *Black's Law Dictionary* as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion"

The reason for disgorgement is to attempt to deter or prevent others from engaging in such improper behavior as they will not profit from wrong-doing.

Privity

The rule of privity means that only parties to a contract can enforce or be bound by it, unless it's an exception

Rule: A contract does not confer any benefits or impose any obligations on a stranger to a contract. To succeed in an action in contract, to enforce contractual rights, you must have privity of contract, that is, be a party to the contract.

Third party: a person who is not one of the parties to a contract but who is affected by it

Exceptions to the rule of privity

- Insurance
- Trusts
- Land
- Tort
- Principled exception
- Undisclosed principal

Insurance

-legislation allows a 3rd party beneficiary of an insurance policy to recover from an insurer

-auto insurance may insure not only the insured but someone driving with the consent of the insured

Trusts

= any arrangement whereby property is transferred with the intent that it be administered by a trustee for another person's benefit (the beneficiary)

-courts will recognize beneficiaries where there is a trust in place (through deed, constructive trust, or by operation of law), the beneficiary is entitled to the benefits of the trust

-a beneficiary is called the "beneficial owner" even though the trustee technical is the legal owner

"anna gives a trust to tom, to invest for bob's university. bob can make sure tom invests properly, even tho he's bob isn't part of contract"

Land

-land is not covered by the concept of privity – restrictions and obligations run with the land

"land built here can only be two stories tall"

- For ex., lease agreements are not affected by changes in ownership

Enurement clause (this contract keeps going)

-a clause in a contract that extends the rights & benefits to those inheriting from a party, succeeding the party, or taking an assignment from the party

Ex.: This agreement is binding upon and enures to the benefit of the parties and their respective permitted successors & assigns

-see Brown Sewer case – Brown v Belleville (City) – text Case 11.2

Tort

Historically because the consumer had a contract only with the retailer and not with the manufactuer, the consumer was considered a stranger and had no cause of action against the manufacturer

as a result of Donoghue v Stevenson (1932) the consumer has a direct cause of action in tort against the manufacturer for negligence

So no privity of contract required to sue a manufacturer for faulty goods

Principled Exception

Allows third parties to rely upon a contractual exemption clause when the parties to the contract intended to include them, and their activities come within the scope of the contract and the exemption clause

- This allows exemption clauses to cover employees, contractors, agents, etc.
- Can eliminate vicarious liability

Brown v. Belleville (City) Case 11.2 (example of "enurement")

-example of "enurement"

City of Belleville had contract to maintain drainage system near Farmer Sill's land

Obligation "enured" to the benefit of subsequent purchasers

Farmer Sills died and the Browns now seek to have Belleville held to its obligations

Held: Browns were entitled to benefit under the agreement, taking over land from original party & the principled exception to privity was also met as the contract with the enurement clause expressly named successors and was intended to benefit whoever owned the land where the sewer was located.

Peacock v. Esquimalt Nanaimo Railway

Issue:

Was Peacock a party to the purchase contract?

Finding: Privity excludes Peacock from recovery – he was not a party himself, he was an investor in a corporation and had a deal for equity

Privity excludes Peacock from recovery

Obiter: would not have been able to recover the deposit anyhow – it was owed to the landlord under the contract

Agency

An agency relationship exists where one person (the agent) is authorized by another (the principal) to bind the latter to contractual obligations

Usually is a legal contractual relationship and contracts entered into are as binding on the principal as if that person had directly entered into the contract themselves

Can be dependent (where agent works exclusively for a single principal) or independent (where he/she work for many principals or clients)

2 Types of Contracts for Agency

In the usual agency relationship there are 2 distinct contracts:

The contract the principle has with the agent:

-referred to as the Agency Contract

And the contract the agent enters into that binds the principal:

- referred to as the 3rd party contract

Examples of Agency Contracts

-employment (where employee is agent of employer)

-corporation, where officers and directors enter in to contracts on its behalf

-partnerships, where each partner is an agent of the other partners

Commission agents – insurance brokers, stockbrokers, auctioneers

-NOT an agent = real estate "agent" - because they usually do not have authority to enter into contracts on behalf of others

-can occur whenever there is delegation from one party to another

An Agency's Capacity

An agent only has the same capacity as the principal has

And what is done to the agent is done to the principal and what the agent does is done by the principal

An agency relationship can be created by:

Agreement – a definite arrangement, oral or written, creates actual authority

Be implied- implied as the principal has authorized an agent to act of their behalf

By Estoppel – principal has led others to believe person is their agent

By ratification-retroactive authority created

An agent should sign in a way that it is obvious that they are an agent (per, by, for, on behalf of)

Power Of Attorney

- A Power of Attorney is an example of an express agency agreement
- -usually under seal (since if not under seal, agent can't sign documents under seal on behalf of the principal
- - a power of attorney is written authorization to represent or act on the maker's behalf in private affairs, business, or legal matters

Authority of an Agent

- Actual
- Apparent
- By Ratification
- By necessity

Actual authority: "Any definite arrangement between principal & agent

Can be: a)Express (in writing) or

b)Implied (by commercial usage or conduct, where the position carries with it authority -

- Is part of agent's duties or understood as part of the agent's role
- Reasonably necessary to carry out the agent's express authority
- Is customary in a particular trade, industry or profession

Apparent Authority:

Apparent authority is the authority that a third party or outsider would reasonably believe the agent has, given the conduct of the **principal**

As long as an agent is acting within his/her apparent authority, the principal will be bound by the transaction unless the third party knew or ought reasonably to have known of the limitation on the agent's authority

Principal can avoid being bound to contracts by apparent authority by informing others that all contracts need the approval of the principal

"this contract is not binding unless approved and signed by XXX"

By Apparent Authority:

-A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent.

By Actual Authority

Actual authority is concerned with the interaction between the principal and the agent, whereas apparent authority is concerned with how a principal represents the authority to a third party.

Actual authority will be argued by an agent being sued by his or her principal for a lack of authority, whereas apparent authority will be argued by a third party attempting to enforce a contract against the principal where the contract was entered into by an agent on the principal's behalf.

Apparent Authority

The agent has no real authority but

The circumstances (the principal) conveys give the impression to third parties that the agent has some authority by conduct, representation (cards, title, car), acquiescence

Third party is lead to believe agent has some authority

Induced into contract based on that "impression"

Is not aware of any restrictions on the agent's authority

…then the principal is "estopped" from denying that the agent had authority

= a reasonable person could assume the agent had actual authority

Ratification

Occurs when a person represents himself as another's agent even though he is not, and when the purported principal then adopts the acts of the agent

-principal may ratify/adopt contract made by agent who exceeded their authority or who acted with no authority

Principle must have had the capacity to create the contract at the time the agent entered into it and at the time of ratification

-ratification is retroactive

-must be of the whole contract and within a reasonable time- may be express or implied

-can only ratify if principal was named or easily identified

-if party holds themselves out as an agent, and a principal does not ratify a contract made, the "agent" may be personally liable to third parties and can be sued for breach of warranty of authority

-but must first question if there was reliance & estoppel so principal is bound by apparent authority

May be express or implied, for example by accepting a benefit under a contract

In both agency by estoppel and agency by ratification, the agent has no authority to do what he does. What distinguishes the two doctrines is whether the principal has conducted himself in a misleading way. Agency by estoppel forces the principal to be bound by the unauthorized contract because the principal has represented someone as his agent and must live with the consequences when that agent purports to act on his behalf. Under agency by ratification, the agent is perhaps equally out of line but not due to any fault of or misrepresentation by the principal. For this reason, the law does not force the principal to adopt the contract, but rather permits him to make that decision for himself, according to his own best interests. (Canadian Business & The Law, 7th edition,page 320)

Necessity

-agent enters into a contract for the benefit of the principal but without authority

-allowed in a few circumstances: -salvage

-perishable goods

-where agent has restricted authority but must exceed authority to protect the principal's property

-must be able to show couldn't communicate with principal & action taken was reasonable in the circumstances

Liability

Principal alone is liable where agent acts within the scope of his actual authority

Principal alone is liable where agent acts within the scope of his apparent authority but principal may sue agent for breach of agency relationship

Termination of agency agreement:

at time specified

at completion of a particular project

upon notice of either party

upon death or insanity of either

bankruptcy of principal

upon an event that makes performance of the agency agreement impossible

can be discharged by frustration

***Once an agency relationship is terminated, it is important for the principal to ensure that all third parties who have dealt with that agent are notified about the termination

Duties of an Agent

-may be express or implied

- Obedience & Diligence
- Competence (Duty of Care) – even if gratuitous
- Personal Performance- cannot delegate unless implied
- Fiduciary Duty – utmost good faith to principal Without fully formed consent:

can only serve one principal in the same transaction

Must insure full disclosure

Avoid conflict of interest

Cannot use relationship to secure personal gain

No secret profits

Duties of a Principal, Remuneration, Costs

- Duties of a Principal:
- Remuneration
- Costs

Liability of principal & agent

Only principal is liable if agent acting within scope of actual authority & discloses they are agent

Only principal is liable if agent acting within scope of apparent authority & discloses they are agent

Only agent is liable if holds out he is the principal

Only agent liable if agent has no authority & principal does not ratify

- action for Breach of Warranty of Authority
- occurs where agent acts without authority and contracts with an outsider so is liable for breach of warranty of authority

Vicarious liability for acts within the scope of the agent's authority

- The agent can be sued by the principal if the agent exceeds his or her authority.

Tort Liability

Principal is liable for any tort committed by the agent when the agent is acting within the scope of the agent's authority – that is, the principal is vicariously liable

Pemberton Benchlands Housing Corp v Sabre Transport Ltd

- Sabre claimed that the contract was oral and that the CCDC2 was never signed by an authorized signatory
- court found that no representations were made that Paterson had authority to sign as an agent, therefore, no apparent authority to sign = no contract

Corporations

Company is a legal "person"

- Separate and distinct from its members
- Can sue and be sued

It is an entity recognized by the legal system as having rights & duties under the legal system separate from its members

It has the capacity to enter into contracts, can sue and be sued

Corporations vs partnerships

Liability:

- In a general partnership, partners liable for obligations and debts of partnership
- A corporation is liable for debts NOT shareholders
  - Shareholders only liable for price paid for shares
  - This is "limited liability"
  - Directors and officers still have certain liability

Corporations v Partnerships:

- Ownership
  - Partnership requires consent of partners for transfer
  - Corporation may be more freely transferable (in private companies may require director consent) through the transfer of shares.
- Management
  - Each partner able to bind partnership
  - Board is responsible for management and supervision of company

Fiduciary Duty or Duty of Good Faith

- Each partner owes duty to other partners
- **Shareholders** owe no duty of good faith to corporation (directors do)

Continuity

- Partnership may terminate on death or insolvency of partner
- Company will continue following transfer of shares

Taxation

- Partnership is taxed at partner level
- Company is taxed at corporate level (and each shareholder is taxed on any capital gains)

Significance of a Separate Existence

Limited liability

-company is solely responsible for payment of its debts

-liability is limited to its assets

-creditors have no claim on the personal assets of shareholders

-shareholders risk is limited to the price of their shares

-this separate legal existence is the main benefit of incorporation

- Transfer of Ownership
- Management is streamlined
- Continuous existence
- Taxation

Salomon v Salomon (1896, UKHL)

Salomon case confirmed that corporations are truly distinct & separate entities from the shareholders

Courts will NOT lift the corporate veil if no fraud or intention to deceive

Salomon transferred his sole proprietorship to a company, "Salomon Ltd", he took shares and secured debentures

Salomon Ltd. went bankrupt and Salomon had a better claim to assets than unsecured creditors

The unsecured creditors claimed Salomon and the company were one and the same, which would make Salomon personally liable for the company's debt

case established the complete separation of a company & its shareholders

where there has been no fraud or intention to deceive & the statute has been complied with, the company alone will be responsible for its debts

company can be a separate legal entity even if a 1 person company!

Limitations on Separate Legal Existence:

Associated companies -Income Tax Act deems income from associated companies, whose shareholders are closely related, to be income from just one of the companies - $500,000 lower tax rate

Personal Guarantees -shareholders may be required to give personal guarantees or other security

Improper distribution of corporate assets/funds -Shareholders who have received a dividend in situation where corporation has made no profits may liable for corporation debts to the extent of their payment

Bankruptcy and Insolvency Act requires repayment of improperly received assets

Fraud – courts will lift the corporate veil if fraud committed – reimburse harmed parties

Payment of wages

Limitations on Separate Legal Existence:

Lifting the corporate veil

- -done to prevent abuse of concept of the corporation
- -usually shareholders own an interest through the purchase of shares
- -unpaid creditors may not look to the shareholders if unpaid
- -however, court may look to the shareholders – the individual controlling the corporation will be personally liable for the actions/debts of the corporation

1. individual must control the corporation,
2. must have used control to commit improper act such as fraud,
3. wrong or breach caused loss

Incorporation

Generally incorporated either federally under CBCA or provincially under provincial act – in B.C. The Business Corporations Act

Crown corps are "creatures of statute" as are banks, trust and loan companies

Strata corporations do not offer limited liability to its' members

Various methods of incorporation: Memorandum of association, Articles of incorporation system, Letters Patent

System used depends on province chosen

End result is the same = articles of incorporation

Choice of jurisdiction to incorporate but corporation incorporated in another jurisdiction must register in B.C. as an extra-provincial company in order to conduct business in B.C.

To Incorporate under the Business Corporations Act in B.C.

Reserve the company's proposed name with the B.C. Corporate Registry

Enter into an incorporation agreement

Establish the company's articles

File an incorporation application with the Corporate Registry

Corporate Name:

name approval is strict - cannot associate with government or professional bodies, can't be scandalous or obscene, can't be confused with other existing companies

May not mimic royalty, for ex. Prince Charles' Polo Company

Ltd, Inc or Corp has to be included in the name

Incorporation Applications

-filed with the Corporate Registry

-sets out name, date, address, Notice of Articles which includes the authorized share structure, including the maximum number of shares that can beissued

Incorporation

- CBCA: Articles of Incorporation and bylaws
  - Articles of incorporation set out:
    - name of the company,
    - HQ
    - share capital (classes and any maximum)
    - share rights and restrictions
    - restriction on transfer of shares
    - number of directors
    - any restrictions on the business that can be carried out

Articles of Incorporation

-set out constitution of company

-basic document governing the existence of the corporation

-name

-place of registered office

-classes & maximum # of shares

- rights of classes of shares

-share transfer restrictions

-number of restrictions

-may set out restrictions on business

Incorporation Agreement

-simple document which contains an agreement by each incorporator that they will each take one or more share, has their signature, and lists the number of shares of each class taken

Bylaws

rules which govern the operation of the corporation

-approved or amended by a majority of the shareholders

-deal with terms of directors, powers of directors

-any new or amended by-laws brought into effect by the directors need to be confirmed by a simple majority of shareholders at the next AGM

detailed operating rules for day-to-day affairs and specific matters that require director approval

- day to day: examples being election of directors, term of office, required meeting notices, AGM meeting procedures, quorum etc.
- specific matters: e.g. confirming right of directors to undertake major loan transactions

Bylaws are not required, but are generally useful

Types of Corporations

- public = companies that issue shares directly to the public (and are freely transferable) and are reporting
- private = companies that do not issue shares to the public and have some restriction on trade

Corporations continued

Public Companies

Still governed under incorporating statute but with extra rules (proxy solicitation, number of directors, audit committee)

ALSO regulated under securities legislation- as a "distributing corporation" is subject to regulation under provincial Securities Acts

no limit on # of shareholders

-no restriction on the right to transfer shares

-permitted to make public offerings of shares –first public offered is called an IPO = initial public offering

-generally means that a company has shares listed for trading on a stock exchange

Private Companies

Do not have freely tradeable shares - -restrictions placed on the transfer of shares

Are NOT reporting

over 90% of companies in Canada are private - generally small and medium sized businesses

reduced disclosure and transparency obligations

owners are usually the managers as well - -management & ownership are substantially identical

used where shareholders seek advantages of incorporation along with advantages of a partnership

-allows shareholders to choose their business associates like partners can

-shares are usually held by a few members – not traded in the market

Professional Corporations

Many professionals are allowed to incorporate as "professional corporations", so long as "PC" appears in the name of their corporation, but remains responsible for their own negligence or misconduct to clients

Corporate Capital

Shares = equity in the corporation

- May pay a dividend
- May allow voting rights to elect a director or vote on corporate policy

Bonds/Debentures: evidence a debt owed by the corporation

- Used to borrow funds at a defined rate
- Holders are creditors of the corporation with no voting rights

Corporate Governance

The organization and management of the business and affairs of a company in order to meet internal objective and external responsibilities

Shareholders vs Directors vs Officers

The **shareholders** own the **shares** of the corporation – they elect the directors

The **directors** are responsible for ensuring the company is well-managed

The **directors** name the **officers** of the corporations, such as the president, vice-president, secretary

The **officers** accomplish the tasks assigned to them by the corporation – they hired employees and act in the name of the corporation and run the corporation on a day-to-day basis

Duties of Directors

-Not to the Shareholders

-Directors owe a duty to the corporation

-directors personal assets are available when directors are held liable for their action or inaction

- The directors are responsible for ensuring the corporation is well-managed
- The directors manage or supervise the management of the business of the corporation and the affairs of the corporation
- The directors establish business policies of the corporation
- it is the appointed officers of the company who carry out those business policies and activities of a daily basis
- Declare dividends
- Adopt bylaws

Role of Directors:

- To issue shares
- To declare dividends after deciding to distribute profits or retain them in the corporation
- To adopt bylaws governing the day-to-day affairs of the corporation (must be approved at the next AGM but are binding until then)
- To call shareholders meetings, including a mandatory AGM
- To delegate responsibilities to officers they have appointed

Directors

- must have at least one director if private, if public must have at least three (two of whom are independent and must not be officers or employees of the corporation)
- securities regulation define "independent" as "no direct or indirect material relationship with the corporation"
- if more than one director, decisions of the board of directors are made by majority vote
- not obligated to follow instructions of shareholders (they do what they think is in the best interests of the company)

Directors and Authors

Criteria for Directors

- must be at least 18, of sound mind and not declared bankruptcy
- under CBCA, 25% must be Canadian, but not if under BCBCA
- don't need to hold shares in company
- first directors are appointed on incorporation and hold office until first AGM
- casual vacancies (death or illness of director) are normally filled by remaining directors
- directors are elected by ordinary resolution of shareholders (majority), with usually one vote per share (the votes attach to the shares)
- shareholders can call special meeting to remove directors before the expiry of the term

S.140(1)(6) - law for corporations

unless altered by a company's articles, directors can hold meetings by telephone or any other device that allows participants to communicate with each other at the same time

But…there must be a real meeting at which a quorum is present

quorum refers to the minimum number of directors who must be present (physically or virtually) at a meeting for it to be legally valid and for decisions made during the meeting to be binding.

s.140 law

Use Care, Diligence & Skill of a Reasonably Prudent Person

- Care = commonsense, at cautiously and consider consequences
- Diligence = attend meetings, formally dissent within7 days of hearing of prohibited matters such as issuing shares without proper consideration, ensure proper expertise of advice relied upon and insure it is independent
- Skill = that of a "reasonably prudent person" evaluated with regard to the director's known qualifications

Officers

- responsible for day to day management of corporation- they make most of the business decisions but refer policy matters to the Board of Directors
- Subject to same duties as directors
- appointed by directors
  - directors determine responsibilities of each officer (in the bylaws for CBCA; articles for BC company)

statutory duties of directors and officers - s.142 of the business corporations act

Every director and officer must:

(a) act honestly and in good faith with a views to the bet interests of the company.

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise incomparable circumstances.

(c) act in accordance with the Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company

How are decisions usually made?

-usually decisions made by majority vote

-if a director disagrees with a decision made, that director must actively dissent within 7 days of learning of any prohibitive act taken by the other directors or they too could bear personal liability for the act – such as paying dividends when unwise to do so

Liabilities of Directors

- Duty of Skill & Care
- Liable for paying a dividend if it renders the corporation insolvent, that is, unable to meet its financial liabilities
- Liable for unpaid wages up to 2 months, under s.96(1) of the BC *Employment Standards Act*
- Liable for income tax which the corporation was required to withhold from salaries yet has not been remitted
- Liable for providing financial assistance when not permitted
- Personally liable for fraud (ex. Through lifting the corporate veil)

Liabilities of Directors continued

- At least 135 provincial & federal statutes provide for liability of directors and officers in certain circumstances
  - Many statutes provide that if the company has committed an offence under that at, every director and officer who authorized, directed, condoned or participated in the offences is liable to the same penalties as if they had personally committed the offence
  - Included in this is the *Criminal Code, Environmental Management Act, Waste Management Act, Employment Standards Act, Competition Act, Human Rights Codes*

Conflicts of Interest

- The director personally contracts with or competes with the company or is a director of two company that contract with each other = "self-dealing conract"
- Is motivated by considerations other than the "best interests of the company"
- Is involved in secret benefits, secret commissions, and bribes

Interception of Corporate Opportunity (bad):

- The director learns of or appropriates for himself or herself an opportunity for profit that should have gone to the company = the "corporate opportunity doctrine"

Insider Trading (bad)

- Occurs when confidential insider information is used in order to make a profit or avoid a loss
- insider – director, officer, employee, shareholder, or a "tippee" (a person who knowingly receives confidential information from an insider)
- Can result in: civil liability
  regulatory liability
  criminal liability

Duties of Directors & Officers:

- Fiduciary Duty: **Fiduciary Duty**
  s.142: …must
  (a) Act honestly and in good faith with a view to the best interests of the company

  - loyalty, integrity and trust
  - looks at the motives, considerations and factors that influence decision making separately from the decisions themselves
  - cannot be in a position where there is a conflict between personal interests and the interests of the corporation
  - Fiduciary duty is to the corporation, not to the creditors or anyone else

Liability for Reimbursement

-liable for reimbursement under the Fraudulent Conveyance Act & Fraudulent Preference Act

-may be liable for fraud

- Tort liability where there is gross negligence causing personal injury and the directors were the "controlling mind" of the corporation

So directors liable where:

- Breach of fiduciary duty
- Under certain statutes
- Tort liability if "controlling mind"

Defences

Due diligence – liability avoided if they show they took all reasonable care

Good faith reliance – may rely on the officers of the corporation

Corporate indemnity – where director acted honestly in best interests

D&O insurance – do not cover willful or dishonest acts

Business Judgment Rule= they used an appropriate degree of prudence & diligence while making the decision

NO DEFENCES for strict liability under certain statutes

Protection from Liability

- Used due diligence
- Insurance
- Indemnification by company
- Trust fund set up by company
- Resignation – not for matters which have already occurred

Duties & Liabilities of Directors & Officers

a) Honesty

- Described as must be truthful, open and above-board
- No secret profits or non-approved conflicts of interest

b) Good Faith & in the Company's best interests

- Is the fiduciary duty of loyalty
- -act in the best interests of the company

relevant cases

Data Business Forms Ltd v MacIntosh

- obligation on the party who wants to rely on limited liability of a company to give ample notice to suppliers of the change in status
- to be enforceable, the third party actually has to have knowledge of the agency relationship between the agent and the company - here there was no knowledge

SPC Holdings v Gabriel

Facts: Deficient roof worked done so Gabriel got a judgment and costs against SPC. SPC was "judgment proof" so action was brought to lift the corporate veil.

Held: The company is a sham-that is, a mere agent, or façade, or alter ego, of a controlling corporation

"Once SPC face potential liability as a result of the litigation, the directors formed a new company, SPC Roofing & Waterproofing and effectively emptied the assets of SPC into the new company to avoid paying the judgment of Gabriel."

Canadian Sports Specialists Inc. v Philippon

Facts: Plaintiff corporation suing Philippon, a director, for the 20% mark-up he had paid himself on computer equipment he had bought and for the 100% increase in per diem rate he had claimed for his installation of a computer system. Philippon had been the sole signing authority of the plaintiff.

Held: for CSS. The defendant was in a fiduciary capacity as a director. His act ions in taking and concealing the mark-up on the computer equipment was deceitful. The person he says he had the increased salary agreement with denied this, and in any event, such a private arrangement would have been improper and illegal.

Example

One of Jake's employees, Larry, cut his hand on a peeling volleyball and as a result has sued Jake for the resulting injury. Jake originally operated his volleyball camps without any corporate structure, but had recently completed registrations as Beach Bashers Ltd., a limited company. As fees for summers camps had not yet been submitted by registrants, Jake was still paying employees with cheques drawn on his personal account. Assuming Larry is successful, who will be liable for his damages – Jake or Beach Bashers Ltd?

Example Solution

Who is liable? Jake or Wildbeach Sales Ltd.?

Jake will argue that Wildbeach Sales Ltd. is a corporation and a separate legal entity and therefore Jake, the sole shareholder, will have limited liability; the most he can lose financially to creditors is his capital contribution.

However, we learned from the Data Business Forms case that the name of the corporation must be properly displayed otherwise Jake gives the impression that he is carrying on business as a sole proprietorship. As there was no indication in the store or on the receipt Larry was given that he was doing business with a corporation, Larry is entitled to treat Wildbeach as a sole proprietorship. The sole proprietor, Jake, faces personal unlimited liability to Larry.

Hack Example

HACK has been incorporated under the name HACK Ltd. HACK has issued a total of 100 shares. Herb, Ana, Conrad, and Kim each own 25 shares in HACK, and all of them are also directors of HACK. HACK expanded and bought $100,000 worth of equipment from Trucks, Inc. It made a cash payment of $20,000, but HACK still owed $80,000 to trucks. HACK's business has collapsed and it is unable to pay Trucks.

What share of this debt will Her, Ana, Conrad, and Kim each bear? Explain fully.

Hack Solution

As a corporation, HACK Ltd. Is a legal entity separate from its shareholders and directors. Shareholders enjoy the benefit of limited liability, and are not responsible for the debts of the corporation beyond the value of their contributed share capital. Directors are also not generally liable for obligations incurred by the corporation. Herb, Ana, Conrad, and Kim would have no personal liability for the debts of HACK.

EXCLUSION CLAUSES CASES

DAWE V. CYPRESS BOWL CB 146 (occupier's liability act)

the company had given reasonable notice that there were exclusions although he was not told what the exclusion says

Facts

• On 6 Jan 1991 the plaintiff, a 41-year-old elementary-school teacher and "low-intermediate" skier, was injured after skiing off a drop in the marshalling area for Cypress Bowl's Midway chairlift.• He had already skied the run 9–10 times that morning.• Before skiing he bought a day-pass whose face, in red print and a red border, contained an "Exclusion of Liability/Assumption of Risk" clause that released Cypress Bowl Recreations Ltd. ("Cypress") from liability for any personal injury "including ... negligence." Identical wording was printed on large signs at every ticket wicket and around the hill. • At discovery the plaintiff admitted he noticed writing on ski tickets in the past and understood it was "some form of limitation of liability," even if he had not read it on this occasion.

Issue

(The plaintiff conceded that the clause, if valid, was broad enough to cover negligence.)Whether Cypress took **"reasonable steps" (Occupiers Liability Act, s. 4(1))** to bring the exclusion clause to the plaintiff's attention so that he is contractually bound by it.

Law

• **Occupiers Liability Act s. 3** imposes a duty of care; s. 4(1) lets an occupier restrict or exclude that duty if it takes reasonable steps to notify the entrant.• Ticket-contract notice principles from Parker v. South Eastern Rail (1877), confirmed in Canada by Union Steamships v. Barnes (SCC 1956) and followed in McQuary v. Big White (B.C.S.C. 1993): an exclusion binds a patron who knows the ticket contains writing that likely includes conditions, provided the business did what was reasonably sufficient to draw those conditions to the patron's attention.

Analysis

• The clause was in bold red capital letters on the pass, ring-fenced by a red border, and duplicated on prominent signs—objectively ample notice.• The plaintiff was an educated adult who conceded general awareness that ski tickets carry liability limitations; that knowledge satisfied the Parker/Union Steamships test.• Cypress "can do no more; they cannot force the plaintiff to read" the clause.

Holding / Order

The exclusion is enforceable. The plaintiff is precluded from recovering for negligence, and the action is dismissed with costs to Cypress under Rule 18A.

•

GREEVEN V. BLACKCOMB CB 152

The company did not discharge the burden that reasonable steps were taken to notify the plaintiff that there was an exclusion policy.

Facts

- 17 Feb 1991—An English tourist was badly hurt after skiing over an unmarked drop on Blackcomb Mountain.
- She had just bought a six-day lift ticket (her first visit to Whistler/Blackcomb and first time skiing in Canada).
- The ticket and a handful of brightly coloured signs near the wickets stated an "Exclusion of Liability / Assumption of Risk" releasing the resort from all personal-injury claims, including negligence.
- The skier immediately hung the ticket around her neck, did not notice the signs, and never read or even realized there was writing on the ticket.

Issue

Did Blackcomb take "reasonable steps" **(Occupiers Liability Act, s. 4(1))** to bring the exclusion clause to the plaintiff's attention, thereby barring her negligence suit?

Key law & precedents

- Union Steamships v. Barnes (SCC1956): an exclusion binds only if the carrier/occupier does what is "reasonably sufficient" to give notice.
- Prior ski-hill cases (McQuary; Dawe) upheld similar waivers where the injured skiers already knew such clauses existed.

Analysis

- The resort relied on the ticket wording plus red-and-yellow signs near the wickets.
- Evidence about how many signs there were, exactly where they were placed, and the surrounding crowd/distractions was "vague."
- The ticket itself looked like ordinary lift-art and date numbers; nothing would alert a first-time visitor that contractual terms lurked on the back.
- Unlike McQuary and **Dawe**, this plaintiff had no prior experience with Canadian ski tickets or liability waivers.

Holding

Blackcomb failed to prove it took reasonable steps to notify this particular skier of the exclusion.
The waiver is unenforceable; the Rule18A application to dismiss the action is refused.

Practical takeaway

To rely on an exclusion clause, a ski resort (or any occupier) must do more than print the waiver on the ticket—it must ensure, with clear and well-documented signage or other measures, that every customer is likely to notice the clause before using the facility.

MALONEY V. DOCKSIDE CB 157

The law is no longer regarding fundamental breach. You look at 1), does the exclusion clause apply to the circumstances 2) if yes, was it unconscionable at the time the contract was made, and 3) if it is valid, should it be set aside to an overriding public policy.

Facts

• March 2010: Graham Maloney, an unsophisticated boat-buyer from Nanaimo, paid ≈ $49.6 k for a 2007 Bayliner sold "as-is/where-is" by Dockside Marine in Kelowna.• The written contract expressly excluded all statutory and implied warranties for used goods (Sale of Goods Act ss. 17-19).• Unknown to Maloney, Dockside's internal "Mercnet" search showed two prior warranty complaints (Aug 2007 & May 2008) that the engine stalled and would not restart.• After ~50 hours of trouble-free use, Maloney added a freshwater-cooling kit (installed by a Mercury dealer). Soon after, the engine began stalling in the same way as before. The dealer then showed Maloney the Mercnet history.

Claim & Defence

• Maloney sued for rescission and a refund, arguing Dockside's non-disclosure amounted to fundamental breach / unconscionability under Tercon (2010 SCC).• Dockside applied under Rule 18A to dismiss, relying on the "no warranties, sold as-is" exclusion.

Legal framework (Tercon test)

1 . Does the exclusion clause, on its wording, cover the loss? → Yes (used goods sold as-is).2 . Was the clause unconscionable at formation? → Potentially yes, if vendor exploited a significant informational imbalance.3 . Even if valid, should public-policy override bar its enforcement? (Not reached here.)

Analysis & Findings

• Dockside knew of the engine's chronic defect via Mercnet yet said nothing; Maloney had no way to discover it. • This knowledge gap, plus Dockside's sophistication, made the "as-is" exclusion unconscionable.• However, causation remained uncertain: the first 50 trouble-free hours and the later installation of the cooling kit might have caused (or worsened) the stalling. Expert evidence is required.

Result

• Exclusion clause declared unenforceable if the defect is proved unrelated to the aftermarket cooling system.• Case kept alive for further evidence on causation and remedy (possible rescission and refund).• Maloney awarded costs (Scale B) on the application.

A seller with superior knowledge of latent defects cannot hide behind an "as-is" warranty disclaimer when dealing with an unsophisticated purchaser; doing so can render the exclusion clause unconscionable under the Tercon framework—though the buyer must still prove the hidden defect, not later modifications, caused the loss.

Sales Of Goods Act Cases (S.18)

KOBELT MANUFACTURING CO V. PACIFIC RIM ENGINEERED

Was not fitness for purpose as the purchaser did not make sure the vendor knew how the brakes would be used, and 2) an exclusion clause cannot be delivered in a document after the contract is formed

Facts

• Kobelt sold 51 model-5027 hydraulic disc brakes (≈ C $400 k) to PREP for installation on two custom drawworks destined for gas-drilling rigs.• PREP withheld C $116,333.30, claiming the brakes leaked during field commissioning and were unfit for the intended purpose.• PREP counter-claimed ≈ C $1 million for investigation, replacement Johnson brakes, labour and customer costs.• Kobelt said the brakes passed factory and PREP hydro-tests, leaking only after PREP's installation/field use; any implied warranty was disclaimed or inapplicable.

Issues

1 Did an implied warranty of fitness for a particular purpose arise under **s. 18(a) Sale of Goods Act?** 2 If so, was it breached? 3 Were Kobelt's website warranty/exclusion terms part of the contract and, if so, did they bar or limit liability?

Key Findings

No implied fitness warranty• To trigger **s. 18(a)** the buyer must show
(i) purpose communicated,
(ii) reliance on seller's skill.
• Evidence showed only generic specs (pressure, dimensions) supplied via consultant; Kobelt wasn't told the brakes would be cycled rapidly as holding brakes on a drawworks, nor asked to advise on suitability.• PREP relied on its own consultant (Guide Technologies), not on Kobelt, in selecting the model.• Leaking emerged only after intense field cycling—an uncommunicated, non-standard use. → No statutory condition/warranty; counterclaim fails.

Exclusion clause

• Kobelt's invoice directed buyers to warranty/limitation terms on its website after the first order was placed.• Because notice came post-contract and prior dealings didn't prove awareness, the clause was not incorporated. (If it were, wording was ambiguous and would not have ousted a statutory condition.)

Result / Order

• PREP must pay the outstanding C $116,333.30 plus interest and costs.• PREP's defence and counterclaim dismissed.

To invoke the Sale of Goods Act fitness warranty, a buyer **must clearly convey the particular operating demands and demonstrate reliance on the seller's expertise.** Absent that communication—especially in sophisticated business-to-business sales—liability for post-installation performance problems will remain with the purchaser, and late-announced website disclaimers will not rescue the supplier.

KOVACS V. HOLTOM CB 208

Rule 2 with specific goods, risk and title pass when the work is done and the buyer is notified. Risk and title pass when the buyer is done and the sale is notified. Rule 2, sales of good acts

Facts

- In 1992 Ms. Kovacs paid Mr. Holtom $2,500 for a 1963 Ford Falcon convertible that he promised to restore before delivery.
- The car stayed in Holtom's garage while the restoration progressed.
- On 20 May 1995 an arson fire destroyed the Falcon together with three of Holtom's own vehicles. At that moment the restoration was unfinished and Kovacs had never been told it was complete.

Issues

1. Had property (title) in the specific goods passed to the buyer before the fire?
2. If not, what remedy was the buyer entitled to?

Key Law

- **Sale of Goods Act (Alta.) s 21(3):** when the seller must "do something to the goods for the purpose of putting them into a deliverable state," property does not pass "until the thing is done and the buyer has notice thereof."

Decision

- Title had not passed. The contract's essence was a finished, restored Falcon; because the restoration work was incomplete and Kovacs had received no notice of completion, the car was not in a deliverable state. Therefore s 21(3) governed and ownership—and the accompanying risk of loss—remained with Holtom at the time of the fire.
- Because performance had become impossible, Kovacs was entitled to treat the contract as terminated and recover the purchase price already paid. The court ordered judgment for $2,500 plus $80 in costs.

Significance

- Kovacs v. Holtom illustrates Rule 2 for specific goods under the Sale of Goods Act: when the seller must finish work to put goods into a deliverable state, property and risk stay with the seller until that work is done and the buyer is notified.
- It also shows that payment in advance does not by itself shift title if the contract as a whole indicates the parties expected delivery only after further work.

Result

Kovacs recovered her $2,500; Holtom bore the loss of the destroyed vehicle.

BEVO FARMS LTD V. VEG GRO INC CB 212

unascertained goods, risk of loss passes when goods are delivered to a carrier.

Facts

•Bevo Farms (B.C.) contracted to sell six truckloads of young tomato seedlings to Veg Gro (Ontario). •FOB Langley: Bevo put each load on an independent carrier engaged by Bevo. •One truck crashed in Ontario; all seedlings on that load (worth ≈ $54,000) were destroyed. Veg Gro refused to pay for that load and counter-claimed lost-profit damages, alleging late delivery.

Trial result

B.C. Supreme Court held that property and risk passed to Veg Gro when each shipment was handed to the carrier; Veg Gro owed the full contract price and had no claim for consequential loss.

Issues on appeal

1 When did title (and therefore risk) in the seedlings pass? 2 Did Bevo's claim on its own cargo-loss insurance amount to "evidence to the contrary" under s 36(1) Sale of Goods Act (B.C.) such that risk remained with Bevo?

Key statutory rule

Sale of Goods Act, s 36(1): risk follows property unless "otherwise agreed." Rule 5(1) (now s 20(2)(d)) provides that where goods are delivered to a carrier "free on board" and in a deliverable state, property passes to the buyer when the goods are handed to the carrier, unless "evidence to the contrary" shows a different intention.

Court of Appeal holding

•Affirmed trial judge: FOB terms and the contract language showed the parties intended property to pass at the point of shipment; Bevo's post-loss insurance claim did not rebut that intention. •Even though Bevo insured the goods and collected proceeds, this was a prudent self-protective step and did not shift risk back to the seller. CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX)

Result

Appeal dismissed; Veg Gro remains liable for the full price of the lost load and its counter-claim is rejected.

Significance

The case confirms that under FOB contracts in B.C.: 1) title and risk usually pass when the seller puts goods in the carrier's possession; 2) seller-arranged insurance does not, without more, constitute "evidence to the contrary" that keeps risk with the seller.

Negligence, Contributory Negligence and Vicarious Liability

WALDICK V. MALCOLM CB 229

Occupiers liability act, no distinction between categories of persons, reasonable care is the appropriate standard to apply.

Facts
• On a February evening Robert Waldick drove to the rural home of Fred & Marion Malcolm to discuss buying hay.• He parked in their horseshoe-shaped gravel driveway. While walking from his truck toward the house he slipped on glare ice and suffered serious ankle injuries.• The Malcolms had noticed the ice earlier that day but neither sanded nor salted it; they said nobody in the area routinely did so.

Issues
1. Under Ontario's Occupiers' Liability Act had the Malcolms breached the duty to take "reasonable care" for the safety of visitors?2. Was Mr. Waldick barred by volenti (free acceptance of risk) or contributorily negligent?

Decision / Ratio
Liability affirmed (7-0).• "Reasonable care" is an objective standard; local non-sand-salting practice is not a defence. A prudent occupier would have treated or warned of the obvious hazard.• **Volenti requires a "clear and voluntary acceptance of both the physical and the legal risk."** Knowing the driveway was icy is not enough; no evidence Waldick agreed to absolve the Malcolms.• Contributory negligence reduced damages by 20 % because Waldick wore smooth-soled shoes and failed to tread carefully after sensing ice.
Key Points
• Rural premises are not subject to a lower standard; the duty under the Act is uniform.• Customary community practice cannot override statutory reasonableness.• Volenti is rare after the Occupiers' Liability Act; courts prefe apportioning fault rather than denying all recovery.

Result
Waldick recovered 80 % of proven damages; Malcolms liable for costs.

Takeaway:
Occupiers—urban or rural—must act reasonably to prevent or mitigate known hazards; relying on "everyone around here does nothing" will not defeat liability, though careless plaintiffs may see their recovery reduced for contributory fault.

HOLLIS V. DOW CORNING CB 238

Wasn't negligent at the time of manufacture, but duty to warn is ongoing and can fulfill this duty through an intermediate third party.

Facts
• Diane Hollis received Dow Corning silicone-gel breast implants in 1973 and replacement implants in 1981.
• One implant ruptured; she later developed pain, autoimmune-type symptoms and permanent disability.
• Dow Corning's product literature given to surgeons minimized rupture risk ("one in 2 000") and said nothing about systemic illness. Meanwhile the company promoted implants directly to consumers through magazines and toll-free numbers.
• Hollis sued Dow Corning in negligence and strict liability (Rylands), alleging failure to warn of risks.
Issues
1. Scope of a manufacturer's duty to warn—does the "**learned-intermediary" rule relieve Dow from warning the patient?**
2. Standard and adequacy of the warning.
3. Causation: if warnings were deficient, is the manufacturer liable?
Decision / Ratio
Appeal allowed; Dow Corning liable.
1. **Duty to warn:** A manufacturer normally satisfies its duty for prescription devices/drugs by adequately warning the physician (learned-intermediary rule). But the rule is inapplicable or weakened when the manufacturer also markets directly to patients or makes misleading statements. In such cases the duty extends to end-users themselves.**2. Adequacy**: Dow's warnings were misleading and incomplete. Known rupture frequency was far higher and systemic risks were being investigated; silence and inaccurate statistics breached the duty of care.**3. Causation:** Where a manufacturer breaches its duty to warn, a rebuttable presumption arises that the patient would have heeded an adequate warning conveyed through the physician. Dow failed to rebut—Hollis testified she would not have consented had she known the real risks.**4. Strict liability (Rylands)** not engaged; liability rests on negligence. |

Key Points
• Learned-intermediary rule is not absolute; direct-to-consumer promotion or inadequate disclosure to doctors will require warnings to patients.

• Duty to warn is continuous: must update physicians and patients as new risk information emerges.
• Breach of duty triggers a presumption of reliance/causation shifting the evidentiary burden to the manufacturer.

| Result |
Jury verdict of $373,862 general and future-care damages restored; Dow Corning held liable for costs. |
Significance
Hollis is the leading Canadian authority on manufacturers' duties to warn for medical products. It narrows the protection of the learned-intermediary rule, establishes a patient-oriented duty when companies engage in consumer marketing, and eases plaintiffs' causation burden through a presumption of reliance.

In Hollis v. Dow Corning the Supreme Court of Canada said that rule does not apply—and the manufacturer must warn the patient directly—when either of these conditions exists:

1. **Direct-to-consumer promotion: the manufacturer markets or advertises the product to patients, thereby encouraging them (not just their doctors) to seek the device or drug; or**
2. **Inadequate / misleading disclosure to physicians: the information given to the learned intermediary is incomplete, inaccurate, or downplays known risks.**

MORSI V. FERMAR PAVING CB 243

contributory negligence not proven

Facts
• In August 2003 Highway 50 north of Toronto was being resurfaced. Fermar Paving milled off the asphalt, leaving deep longitudinal grooves; the Ministry of Transportation of Ontario (MTO) inspected and approved the traffic-control plan.• Late at night, Tarek Morsi, riding a sport motorcycle at the 80 km/h limit, entered the work zone. His front wheel caught in a groove; he lost control, crashed, and was rendered quadriplegic.• He sued Fermar and the MTO for negligence / occupiers' liability; the defendants alleged contributory negligence (speed, inattention, braking).
Trial
Jury found Fermar 60 % at fault, MTO 40 %; no fault on Morsi. Damages ≈ $12 million.
Issues on appeal
1. Did Fermar owe and breach a duty of care to motorists? 2. Was MTO liable as an occupier or for negligent supervision? 3. Contributory negligence of Morsi?
Court of Appeal
• Fermar liable: As the party in physical control of the roadway, it was an occupier under the Occupiers' Liability Act and owed a duty to take reasonable care. Failure to post "grooved pavement" signs and to bevel the edges breached that duty.• MTO not liable: It retained statutory authority but had delegated day-to-day physical control to Fermar; its role was limited to contract administration. No breach of supervisory duty shown.•
Contributory negligence: Jury misdirected—question asked only about speed, ignoring braking and lane choice. New apportionment ordered: Morsi 40 % contributorily negligent; Fermar 60 %. Judgment against MTO set aside.• Damages reduced accordingly (about $7.2 million net).
Key Principles
1. A road contractor exercising physical control is an "occupier" and bears primary safety responsibility during construction.2. Government owner may avoid liability if it reasonably relies on the contractor's expertise and retains no operational control.3. Contributory negligence must consider the whole manner of driving, not a single factor; misdirection on apportionment warrants appellate intervention.
Result
Judgment varied: MTO dismissed; Fermar liable for 60 % of damages; Morsi bears 40 %.

Conclusion
Morsi clarifies the allocation of occupiers'-liability duties on road-construction projects, emphasises contractors' direct liability to road users, and shows the Court of Appeal's readiness to reassess contributory-fault percentages where the jury's instructions were incomplete.

RANKIN V. J.J. CB 252

Rankin sets out how to impose (or impute) a duty of care.

Facts
• In rural Ontario two 15-year-olds drank alcohol and smoked marijuana at a friend's house.• They walked to Rankin's Garage, an unsecured lot where vehicles were routinely left unlocked with keys in them. They stole a Toyota, intending a joy-ride.• Driver C.C. crashed; passenger J.J. suffered catastrophic brain injury.• J.J. (through litigation guardian) sued the garage, the driver, and the homeowner who supplied alcohol. Trial jury found Rankin's Garage 37% liable (for leaving cars unsecured), homeowner 30 %, driver 23%, J.J. 10 %; Ontario CA upheld.
Issues
1. Duty of care:
Does a commercial garage owe a duty to someone injured by the negligent driving of a vehicle stolen from its premises?
2. If so, was that duty breached? (Causation and apportionment not reached if no duty.)Majority Holding (Wagner C.J., 5-2)
No duty of care.
•Foreseeability: The plaintiff must show it was reasonably foreseeable that leaving a vehicle unlocked with the keys inside could result in personal injury to a third party. Evidence only showed risk of theft/property damage, not bodily harm.
• No analogous "established" duty; court applied **Anns/Cooper test.**
Foreseeability of bodily injury is the threshold and was not met on these facts.
• Policy: Even if minimal foreseeability were found, residual policy factors (floodgates; disproportionate burden on garages relative to social benefit) would negate a duty.
Dissent (Karakatsanis & Brown JJ.)
Reasonable foreseeability was met; a garage leaving cars easily stolen should anticipate unsafe operation by inexperienced thieves, posing bodily-injury risk. No policy reason to deny duty. Would have upheld liability split.
Key Points
• Foreseeability of the specific type of harm is pivotal in novel-duty cases; property theft ≠ personal-injury risk without supporting evidence.• Commercial defendants are not insurers against all consequences of criminal acts facilitated by their negligence.• Decision narrows prospects for claims based on negligent storage of dangerous chattels unless personal-injury risk is reasonably obvious or evidenced.
Outcome
Appeal allowed; action against Rankin's Garage dismissed; liability of homeowner and driver remained; J.J.'s recovery reduced accordingly.

Anns/Cooper framework:

1. **Foreseeability and proximity (prima-facie duty)**
2.
   - **Was it reasonably foreseeable that leaving cars unlocked with keys inside could lead to bodily injury?**
   - **Was there a sufficiently close and direct relationship (proximity) between the garage and the injured teenager?**
3.
4. **Residual policy considerations**
5.
   - **Even if the first stage is met, are there broader policy reasons to negate or limit the duty?**
6.

Negligence Mistatement

RANGEN V. DELOITTE & TOUCHE CB 269

Auditors must be aware of the limited group that will be relying on their information, they are in a special relationship

Facts
Rangen, a salmon-feed supplier, extended roughly US$300 000 in trade credit to Royal Pacific Sea Farms. When the fish farm collapsed, Rangen sued its auditors, Deloitte, alleging it had relied on the company's audited financial statements (prepared to meet Company Act requirements) to decide the amount of credit to give. Deloitte moved to strike the claim; the chambers judge held the statement of claim disclosed no reasonable cause of action.
Issue
Does an auditor owe a duty of care to trade creditors who foreseeably rely on statutory year-end financial statements, so as to permit recovery of "pure economic loss" when the client defaults?
Decision
Appeal dismissed — no duty of care. The Court of Appeal (Goldie J.A.) held there was **insufficient proximity** between the auditor and an indeterminate class of trade creditors. Auditors perform their statutory function for the company and its shareholders, not for all potential users of the statements. Extending liability would expose auditors to loss "in an indeterminate amount, for an indeterminate time, to an indeterminate class"
Reasoning
• Foreseeability alone is not enough; the plaintiff must show the auditor knew the statements would be used for a particular purpose by a limited, identifiable group and accepted that risk (drawing on Haig v. Bamford and Edgeworth).
• Here, Deloitte had no actual knowledge that Rangen (or any specific supplier) would rely on the statements to set credit limits; the auditors merely knew, in a general sense, that businesses use credit.
• Credit decisions depend more on current payment behaviour than on historical audited results; reliance was therefore not reasonable.
• Recognising a duty would create the very indeterminate liability warned of in Ultramares and repeatedly rejected in Canadian case-law.
Principle
For negligent-misrepresentation claims against auditors, plaintiffs must establish proximity by showing: 1) the audit was prepared for a defined purpose, 2) the defendant knew a specific, limited class would rely on it for that purpose, and 3) some conduct linking the auditor to that class. General foreseeability that "someone" might rely is insufficient.
Outcome
Statement of claim struck; Rangen left without recourse against the auditors. The Court confirmed a restrictive approach to auditor liability for pure economic loss.

An auditor is only liable for economic loss if the plaintiff can show that the auditor knew (or ought reasonably to have known) that a specific, limited and identifiable group would rely on the audited statements for a particular purpose. That knowledge creates a "special relationship" (proximity) between the auditor and that group, giving rise to a duty of care.

HERCULES MANAGEMENT LTD V. EY CB 279

must be using the information for the purpose it was prepared

Facts
• Two related mortgage-investment corporations, NGA and NGH, collapsed in 1984.
• Shareholders (Hercules, Guardian Finance and others) sued the auditors, Ernst & Young (E&Y), alleging the 1980-82 audit reports were negligently prepared and that they relied on them (a) to make new investments and (b) to monitor management, causing personal loss when the companies failed.
• E&Y sought summary judgment; lower courts dismissed the action.
Issues
1. Did E&Y owe individual shareholders a duty of care in tort for (a) investment decisions and (b) supervisory purposes?
2. Were the claims barred by the rule in Foss v. Harbottle (only the corporation may sue for wrongs done to it)?
Holding
Appeal dismissed. No duty of care owed to individual shareholders; in any event, the claims are corporate and caught by Foss v. Harbottle.
Reasoning (La Forest J. for unanimous Court)
Duty of care analysis (Anns/Kamloops)
1. **Proximity/foreseeability**—Auditors know shareholders will receive the statements, but:
2. • The statements are prepared for the limited statutory purpose of collectively informing shareholders about corporate performance.
3. • Individual investment decisions are collateral uses; reliance for those purposes is outside the auditors' undertaking.
4. • Allowing recovery would expose auditors to liability "in an indeterminate amount, for an indeterminate time, to an indeterminate class."
5. **No prima facie duty of care.**
6. Even if a duty existed, policy factors (indeterminacy, overlap with contract/statute, alternative remedies via derivative action) would negate it.

Foss v. Harbottle
• Loss in share value or lost corporate opportunity is a wrong to the corporation; shareholders cannot sue personally. Proper remedy is a derivative action, not an individual claim.

Key Principles | • Auditors' liability for negligent misstatement is confined to situations where they knew the statements would be used for a specific transaction by a limited, identifiable group. General shareholder reliance is insufficient.
• Indeterminacy remains a decisive policy barrier to expansive auditor (and professional) liability for pure economic loss.

• Where the alleged loss is really the corporation's, individual shareholders must proceed by derivative action; Foss v. Harbottle prevents personal suits.

Significance | Hercules is the leading Canadian case limiting auditor liability. It re-affirms a narrow proximity test for negligent misrepresentation, emphasizes indeterminacy policy concerns, and integrates corporate-law doctrine (shareholder vs. corporate loss) into the tort analysis. Auditors owe duties primarily to the entity and statutory addressees—not to every foreseeable investor. |

Fiduciary Duty

HODGKINSON V SIMMS CB 289

vulnerability is key to a broad reach (or broad scope)of fiduciary duty, fiduciary expected to use discretion and act in beneficiaries' best interests

Facts
• Floyd Hodgkinson, a successful 50-year-old air-traffic-controller, engaged Peter Simms, a chartered accountant/tax adviser, to provide comprehensive personal investment advice.• Simms recommended four tax-shelter real-estate limited partnerships (LPs) and prepared all related documents. Unknown to Hodgkinson, Simms was secretly receiving substantial finder's fees and held an equity interest in the promoter's parent company.• The mid-1980s real-estate crash wiped out Hodgkinson's $2 million portfolio.• Hodgkinson sued Simms for negligence, breach of contract and breach of fiduciary duty; trial judge awarded ≈ $2 million. B.C.C.A. reduced damages, finding no fiduciary breach for two LPs.
Issues
1. Did Simms owe and breach a fiduciary duty? If so, what is the causal and remedial framework??2. Interaction between fiduciary law, contract and tort.
Majority (La Forest J., 5-2)
Fiduciary duty established and breached.•
Test for ad-hoc fiduciary duty:
(a) Vulnerability/Power-Dependency (client's trust + adviser's discretion)
(b) reasonable expectation of loyalty.
• Simms exercised discretionary power over Hodgkinson's investments; Hodgkinson was entirely dependent on honest advice. Hidden self-dealing violated the duty of utmost loyalty and full disclosure.
• **Causation:** If a fiduciary breach is shown, presumption that the client would not have entered the transaction had full disclosure been made; onus shifts to fiduciary to rebut. Simms failed.
• **Remedy:** Equitable compensation restoring Hodgkinson to position had duty been fulfilled; full loss on all four LPs ($2.05 million) + pre-judgment interest.
Dissent (Sopinka J.)
Would confine fiduciary duty to situations akin to trustee/beneficiary; here ordinary professional negligence sufficed. Would apply but-for causation and award only losses directly caused.
Key Principles
• Professionals giving comprehensive advice can owe ad hoc fiduciary duties (beyond negligence) when the client is vulnerable and reliant on their loyalty.• Failure to disclose conflicts of interest constitutes breach of fiduciary loyalty regardless of negligence.• Once breach proven, equity presumes causation; burden shifts to defendant.• Equitable compensation aims at full restitution, not mere tort damages.
Significance
Hodgkinson expanded fiduciary law into professional advisory relationships, setting a high-standard of loyalty and full disclosure for accountants, financial advisers, lawyers, etc. It also clarified the remedial distinction between negligence and fiduciary breach, favouring plaintiff-friendly presumptions and restitutionary damages in the latter.

STROTHER V 3464920 CANADA CB 284

fiduciary duty lasts for at least a year, having left a partnership, and secondly, partners are viacaroiuisly liable for the acts of their partners.

Facts
• Monarch, a Vancouver tax-shelter promoter in the film industry, had long relied on the law firm Davis & Company and partner Martin Strother for tax advice.• In 1996 new federal rules effectively ended Monarch's principal shelter structure. Strother continued as counsel under a sole-client retainer to seek ways to revive Monarch's business.• Unknown to Monarch, Strother secretly negotiated with former Monarch executive John Laiken to create a new company, Sentinel Hill (SSII/MAXX), using a different tax-motivated structure (s. 18(1.1)). Strother received a 55 % carried interest in Sentinel's profits.• When the CRA later approved the structure, Strother helped Sentinel launch funds; Monarch learned of this only in 1999 and sued Strother and Davis for breach of fiduciary duty and negligence.
Trial & BCCA
Trial dismissed Monarch's claim; BCCA reversed, awarding disgorgement of Strother's profit (~ $2 million) and $32 million in lost profits against both Strother and the firm.
Issues (SCC)
1. Did Strother breach his fiduciary duty of loyalty to Monarch? 2. Is the firm vicariously liable? 3. What remedies—equitable disgorgement, lost-profit damages, punitive damages?
Majority (Binnie J., 5-2)
Breach of fiduciary duty• Lawyers owe clients a duty of committed loyalty; a sole-client retainer bars acting for a competitor on overlapping matters without informed consent.• Strother deliberately withheld material information (possibility of s. 18(1.1) structure) and pursued a conflicting personal interest. This violated his duty of candour and good-faith service.• Causation: But-for the breach, Monarch might have re-entered the market, yet proof of lost profits is speculative. Monarch entitled to disgorgement of Strother's personal gain ($2 million) but no expectancy damages.• Firm liability: Davis & Company liable for disgorgement because partners knew (or ought to have known) of the conflict, but not for additional damages.• No punitive damages; misconduct addressed by disgorgement and reputational consequences.
Dissent (McLachlin C.J. & Abella J.)
Would uphold BCCA damages: Strother's breach directly caused Monarch to lose a clear business opportunity; lost profits were provable on balance of probabilities.
Key Principles
1. Duty of loyalty is fundamental: includes avoiding conflicts, candid disclosure, and not appropriating client opportunities.2. A lawyer's personal profit obtained through breach is subject to equitable disgorgement without proof of client loss.3. Expectation damages require proof the client would have obtained the opportunity but for the breach.4. Firms may be vicariously liable when partners know of conflicts and benefit from them.
Outcome
Judgment against Strother and Davis limited to disgorgement (~ $2 million + interest); Monarch otherwise takes nothing.

Privity

PEACOCK V EAQUIMALT & NANAIMO RAILWAY CO CB 218

No privity of contract as he was not a party to the contract, only the company is.

- **Facts –** Michael Peacock advanced an $85,000 deposit for friends who, through their company Wessex Management Ltd. and associated individuals, agreed to purchase railway land at Langford from the railway (E&N/C.P.). Before closing, the buildings burned down, frustrating the sale. Under an existing lease—which the purchasers had agreed to over-hold—the lessees were obliged to remove debris and leave the site clean. The railway used most of the deposit to pay cleanup costs and returned only $28,977.50. Peacock sued the railway personally for the balance, arguing he had been the real purchaser and that, because the contract was frustrated, his entire deposit should be refunded.
- **Issue –** Was Peacock himself a contracting party entitled to the deposit, or was the purchaser solely Wessex/its principals?
- **Holding –** Action dismissed. The court found no privity of contract between Peacock and the railway. Evidence showed Peacock was merely investing in Wessex; the written offer to purchase named Wessex, West Steel and two individuals as purchasers, not Peacock. Any assignment of the deposit to him after the fire could not create rights against the vendor that he never had originally. Accordingly, the railway was entitled to apply the deposit against cleanup costs required by clause 7 of the lease, and Peacock had no claim to the remaining funds
- **Key Point –** A person who advances purchase-money on behalf of others does not acquire contractual rights against the vendor unless clearly made a party to the agreement. Without such privity, only the named purchasers can claim the deposit, and the vendor may set off contractual obligations (here, cleanup costs) against it.

Agency

PEMBERTON BENCHLANDS V. SABRE TRANSPORT CB 295

Apparent authority, representation of authority must be made by a person with actual authoritys he was not a party to the contract, only the company is.

Facts
* Glacier Creek and Sabre formed a joint venture to service and subdivide land near Pemberton through a new company, Pemberton Benchlands Housing Corp. (PBH).
* Sabre performed the civil-works; PBH later claimed the parties had agreed to a fixed-price construction contract of $2.86 million plus a $500 000 contingency, relying on a CCDC-2 form and a 20-page "Construction Contract – Job 416" cost tabulation signed by PBH's Serge Côté and Sabre's site superintendent Dave Paterson.
* Sabre said no fixed price was ever agreed; work was on a time-and-materials basis.

Issues

1. Did the documents constitute a binding fixed-price contract?
2. Did Paterson have actual or apparent authority to bind Sabre?

Decision (Ehrcke J., Rule 18A summary trial)
* The CCDC-2 signature purporting to be Sabre's president was forged; the form was never used as a contract. ASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX)
* The cost "Tabulation" was not intended as a contract; even if it were, Paterson lacked actual authority and PBH failed to prove any representation from Sabre's principals that could create apparent authority under the Freeman & Lockyer criteria. ASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX)
* Unable to show that anyone with authority agreed to a fixed price, PBH did not meet its onus; the claim (specific performance, declaration and damages) was dismissed. CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX)

Court of Appeal
Upheld the dismissal: the trial judge correctly applied ostensible-authority principles and was entitled to resolve the matter summarily. CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX)

Key Points
* A party alleging a fixed-price contract must prove that the person who signed had authority (actual or apparent) to bind the company.
* Apparent authority requires a representation by someone with actual authority; a mere signature or job title is not enough.
* Summary trial will be appropriate where documentary evidence and affidavits permit resolution of disputed authority without viva voce evidence.

SOLE PROPRIETORSHIPS, PARTNERSHIPS

LANZ V. LANZ CB 317

When you claim a "partnership," the court looks at the substance of the working relationship—-who really manages and shares the risks —-not at labels like "partner" or a mere promise of profit-sharing.

- **Facts –** Robert Lanz worked with his father Frank from 1975-1990 in "F. Lanz Trucking." Robert said they were partners: he was entitled to 40 % of profits and now sought a final accounting. Frank said Robert was only a profit-sharing driver, never responsible for debts or assets.
- **Issue –** Did a partnership exist, obliging Frank to account and pay further profits to Robert?
- **Decision (Wimmer J.) – Action dismissed.**
  - A partnership requires carrying on business in common with a view to profit and sharing both gains and risks. Robert assumed no liability, had no say in management or assets; he merely drove a truck for 40 % of profits. Even tax returns calling them "partners" and Frank's casual "I guess so" could not create a legal partnership.
  - Alternatively, Robert failed to prove any unpaid profit share: no reliable records existed and his testimony that he lived on $50/week for 15 years was not credible. The onus lay on him to show monies owing, which he did not do.
- **Key Points**
  - Profit-sharing alone is only prima facie evidence of partnership; it is rebutted if the alleged partner takes no part in management, bears no risk, and exercises no joint control.
  - The claimant for an accounting bears the burden of proving both the existence of a partnership and the amount owing.

SCRAGG V. LOTZKAR CB 319

partners become partners when they embark on the activity in question

Parties
• Mitch Scragg (plaintiff) – long-time recycling-industry worker.
• Rod & Mark Lotzkar and D'Arcy Hipwell (defendants) – owners/managers of Regional Recycling Ltd.
Facts
• Jan 2 2001: the four orally agreed to form a partnership to obtain a Brewers Distributors Ltd. (BDL) contract and open the Government Street Bottle Depot (to be run through a new company, 614494 B.C. Ltd., "Management Co."). • Terms: equal 1/3 interests to Scragg, Hipwell, and the Lotzkars together; Scragg to manage depot for $60 000/yr once operating. • Partnership secured BDL approval; depot began July 2002. • However, defendants procured the BDL contract and incorporated Management Co. issuing all shares to themselves, excluding Scragg, and appointed another manager.
Claims & Defences
Scragg sought a declaration that defendants held one-third of Management Co.'s shares in trust for him. Defendants: (1) only an "agreement to agree," not a partnership; (2) Scragg quit in Feb 2001, so any partnership ended.
Key Findings (Bouck J.)
1. Partnership existed as of 2 Jan 2001 under s. 3 Partnership Act: they carried on business in common with a view to profit (joint pursuit of BDL contract).2. No evidence Scragg resigned or partnership was dissolved under ss. 28-29; expulsion lacked any contractual power and thus breached statutory duty of utmost good faith (s. 22).3. Once shares issued (July 2002) corporate law would normally govern, but equity will intervene where partners wrongfully exclude another.
Remedy
Declaration that, as of 1 July 2002, defendants hold one-third of the issued shares of 614494 B.C. Ltd. in trust for Scragg. No damages or accounting (not pleaded); costs to plaintiff.
Principles
• Oral agreements and conduct can create a partnership even before incorporation. • Partners cannot expel a co-partner or appropriate partnership opportunity without express power; otherwise they breach fiduciary/statutory duties. • Equitable remedies (constructive trust/declaration) protect a wrongfully excluded partner's interest in subsequent corporate assets.
  -

PEN-BRO HOLDINGS V. DEMCHUK CB 326

not partners, no indication of shared financial benefits

Facts
- Pen-Bro (landlord) owned a building in Lethbridge.
- In 2003 the landlord signed a one-page handwritten 10-year lease with Elvis Demchuk for a ground-floor pool-hall space.
- Elvis told the landlord he and his father Donald Demchuk were "partners" and that he had authority to bind his father; the landlord relied on that assertion.
- Donald never signed the lease, had no contact with the landlord, and later only lent money to Elvis and leased him equipment under a separate written loan/lease.
- When the landlord sued both Demchuks for rent, Donald applied for summary dismissal.

Issues
1. Was Donald liable as a partner (s. 4, 17 Partnership Act) or joint-venturer with Elvis?
2. Alternatively, was there a partnership by estoppel?

Decision
- Action against Donald dismissed.
- No partnership in fact: Donald took no part in management, assumed no risk, expected only repayment of his loan; sharing of profits, control and intention to carry on business "in common" were absent CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX).
- No partnership by estoppel (s. 17): landlord relied solely on Elvis's statements; there was no representation by Donald nor evidence he knowingly allowed himself to be held out as partner CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX).
- No joint venture: essential indicia (mutual control, shared profits, single ad-hoc enterprise) were missing CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX).
- Since Donald's liability could only arise on those bases, the claim had "no reasonable prospect of success" and was summarily struck out CASES and STATUTES FALL 2020-1-1 (2).docx](file-service://file-XpLrRUA1Hp2bNAowttKMMX).

Key Points / Ratio
- Profit-sharing or family financing alone does not create a partnership; courts look for intention, contribution to management, risk-sharing and profit entitlement.
- For partnership by estoppel, the representation must emanate from (or be permitted by) the alleged partner; reliance on the other party's self-serving statements is insufficient.
- Absence of partnership or joint-venture elements warrants summary dismissal; the Statute of Frauds does not impose lease liability on non-signing alleged partners unless a partnership is otherwise established.

Corporations – Formation, Legal Nature and Internal Affairs

DATA BUSINES FORMS LTD V. MACINTOSH CB 336

Must have actual notice of a change in status from a business to something like a limited liability company

Facts

- From 1976 Glenn MacIntosh, a sole proprietor trading as "MacIntosh Business Systems," bought business forms on credit from Data Business Forms Ltd. and its division Pakfold. The account, credit applications and all invoices were in the trading name.
- In 1980 he incorporated Maritime Business Forms Ltd. but gave no explicit notice to Data/Pakfold; purchase orders and stationery still bore "MacIntosh Business Systems." Some later letters, memos and cheques showed "Maritime Business Forms Ltd.", yet the suppliers never changed their account records.
- When $14,155.71 in 1981-82 invoices went unpaid, Data/Pakfold sued MacIntosh; he argued he had contracted only as agent for the corporation.

- **Issues**
  a. Did the contracts bind MacIntosh personally or Maritime as undisclosed principal/agent?
  b. If personally liable, what prejudgment interest should be awarded?
- **Holding –** Personal liability; judgment for suppliers.
- **Key Reasons**
  - Onus on defendant to prove the suppliers knew or ought to have known he was contracting as agent for the corporation.
  - Mere use of corporate cheques or occasional letterhead was insufficient notice; decisive factors were that credit applications, purchase orders and invoices consistently named only "MacIntosh Business Systems."
  - Suppliers reasonably believed they still dealt with the original sole proprietorship; following Trail Tire and Gelhorn Motors, a trader who changes status must give "ample, unmistakable notice" if he wishes to rely on limited liability.
  - No evidence Data/Pakfold had actual or constructive knowledge of Maritime's existence; thus agency defence failed.
- **Remedy**
  - Judgment against MacIntosh personally for $14,155.71 plus 2 years' prejudgment interest at 10 %, reduced because plaintiffs delayed litigation.
- **Principle / Take-away**
  - A sole trader who later incorporates must clearly disclose the new corporate status to existing suppliers; otherwise he remains personally liable on subsequent contracts. Profit remittances or corporate cheques alone will not shift liability without explicit notice and creditor consent.

"Limited liability" — the idea in plain English

- **Who is liable?**
-
  - **Sole proprietor / ordinary partnership: the owners are the business. If the business can't pay its bills, creditors can come after the owners' personal bank accounts, cars, homes, etc. This is called unlimited personal liability.**
  - **Corporation (limited-liability company): the law treats the company as a separate legal person. Debts belong to it, not to the shareholders or directors (unless they give personal guarantees or break special rules). The owners' risk is normally limited to the money they put into the company.**
-
- **Why "limited"?**
- **Because your personal loss is limited to your investment:**
- **"I bought $1,000 of shares; the worst that can happen is I lose that $1,000."**

SPC HOLDINGS V. GABRIEL CB 348

emptying assets was a sham, so corporate veil lifted

Facts

• Stefan Gabriel obtained a substantial monetary award (the "Award") against SPC Holdings Ltd. ("SPC") after earlier litigation.• Once liability loomed, SPC's three directors/shareholders stripped SPC's assets (equipment, contracts, goodwill) and transferred them to a newly-formed company, SPC Roofing & Waterproofing Ltd., leaving SPC judgment-proof.• Gabriel sued the individual directors personally, seeking to "lift the corporate veil" and hold them liable for the unpaid Award.

Issues

1. Can the corporate veil be pierced because SPC became a sham or mere alter-ego? 2. Should each director incur personal liability?

Decision (Skolrood J.)

• Veil lifted: SPC was rendered a sham/facade; the directors deliberately used the corporation to avoid paying the Award. Accordingly, the court imposed personal liability on the directors for the full judgment debt.• Ms. Zhou, an employee/bookkeeper who followed instructions and lacked control over SPC was not personally liable.

Key Principles / Ratio

1. The veil can be pierced where directors (a) expressly direct the company to commit a fraudulent or wrongful act or (b) make the company their façade to avoid an existing obligation.2. Test: effective control + improper use of that control causing injustice is sufficient.3. Remedy may be joint personal liability for the corporate obligation.

Result

Gabriel entitled to enforce the Award directly against the three controlling SPC directors; claim against Zhou dismissed.

Lifting the veil means ignoring the company's separate legal personality and holding the people behind it personally liable.

CANADIAN SPORTS SPECIALISTS INC. V. PHILLIPPON CB 350

breach of fiduacity duty to a corporate arrangement, private arrangement was both improper and illegal

Facts

- Canadian Sports Specialists Inc. ("CSS") was a buying co-op for ski-equipment retailers.
- Jean-Paul Philippon, a retailer-member, was also CSS's sole hands-on director/manager; he alone directed staff and signed cheques. While CSS had been struck off the corporate register (unknown to him), Philippon wrote cheques to himself ($13,437) and reimbursed unsupported expenses ($2,464) from CSS funds.
- CSS sued to recover the monies.

Issues & Holdings

1. Breach of fiduciary duty / director's duty? — YES. As de facto director Philippon owed CSS fiduciary duties; self-payments without authorization breached those duties. Judgment for CSS $28,996.51 (over-payments, expenses, AmEx charge) plus pre-judgment interest.
2. Effect of corporation being struck off during misconduct? — On a subsequent motion to reopen, Philippon argued CSS's dissolution meant he was not a director and liability should be set aside. Court held Companies Acts. 284 continues the liability of directors/officers even when the company is off the register; reopening refused and judgment stood.

Key Principles / Ratio

- A person acting de facto as director/manager is bound by the same fiduciary obligations as a duly elected director.
- Corporate dissolution does not extinguish pre-existing breaches; Companies Act preserves director liability.
- Courts may refuse solicitor-client costs where the company's lax internal controls contributed to the opportunity for misuse.

lambert v. lastoplex

Manufacturer owes a duty to give clear, specific warnings of hidden risks — a generic "flammable" label is not enough when vapour ignition near a pilot light is foreseeable.

Facts

• Lambert used Lastoplex "Lustrex" lacquer to refinish a basement floor.• While he was applying the product near a gas hot-water heater with a live pilot light, lacquer vapours ignited and he suffered severe burns.• The can's label stated the product was "EXTREMELY FLAMMABLE – keep away from fire, sparks and hot surfaces," but gave no specific warning about invisible vapours drifting to distant ignition sources such as a pilot light.• Lambert sued the manufacturer for negligence (failure to warn).

Issue

Did Lastoplex breach its duty of care by providing an inadequate warning, and if so, what apportionment of fault?

Holding & Result

• Manufacturer liable. A reasonable manufacturer knew or ought to have known that ordinary consumers might use the lacquer in enclosed areas where vapours could travel to a pilot light.• The general label was insufficient; a clear, specific warning ("Do NOT use near pilot lights or any ignition source—even in another room") was required.• Lambert was contributorily negligent for ignoring the existing warning and working close to the heater. Court apportioned fault 60 % to Lastoplex, 40 % to Lambert (damages reduced accordingly).

Key Principles / Ratio

1. Duty to warn: A manufacturer must warn of dangers inherent in normal or reasonably foreseeable use of its product, especially latent hazards not obvious to the ordinary user.2. Adequacy of warning: The warning must be clear, specific and comprehensive enough to enable safe use; vague or incomplete statements are not enough.3. Foreseeability: It was foreseeable a homeowner would use floor lacquer in a basement with a functioning gas appliance.4. Contributory negligence reduces, but does not eliminate, the manufacturer's liability when the user also acts carelessly.

Significance

Lambert sets the modern Canadian standard for manufacturers' warnings: when a product carries non-obvious risks, the label or instructions must spell them out in plain, direct language tailored to foreseeable settings.

SALOMON

established separate legal existence of a company from its shareholders where there is no fraud, accompanied duly incorporate

Facts

• Aaron Salomon ran a prosperous leather-boot business as a sole trader.• He incorporated A. Salomon & Co. Ltd. under the Companies Act 1862 with himself, his wife and five children as nominal shareholders (seven were then required).• The company bought his sole-proprietor business for £39,000, paying partly in cash and by issuing him 20,000 £1 fully-paid shares and £10,000 in debentures (secured debt).• When a severe downturn came, the company became insolvent owing unsecured trade creditors ~£7,000. As debenture-holder Salomon was paid first, leaving nothing for unsecured creditors.• Liquidator (for creditors) alleged the company was a mere "alias" or agent of Salomon; asked the courts to treat him personally liable for the company's debts.

Issue

Is a company validly incorporated with the statutory formalities a separate legal person, or can its controlling shareholder be made personally liable because the company is his "mere nominee"?

Decision

House of Lords reversed the Court of Appeal: the company was a distinct legal entity; Salomon was not personally liable for its debts.

Ratio / Key Principles

1. Separate Corporate Personality: Upon incorporation, a company becomes "a different person altogether" from its shareholders; its assets and liabilities are its own.2. Limited Liability: Shareholders' risk is limited to unpaid share capital; secured creditors rank ahead of unsecured creditors according to ordinary priorities.3. Form over Motive: So long as statutory requirements are met (minimum members, proper registration), courts will not look at the "degree of control," motives, or family relationships to deny personality.4. The "corporate veil" may be lifted only in exceptional, statute-based or fraud cases—not merely because incorporation produced hardship for creditors.

Significance

Salomon is the cornerstone of modern company law, entrenching limited liability and the doctrine that a corporation is a separate juridical "person." Later jurisprudence carves out narrow exceptions (fraud, agency, sham, statute) but the general rule remains robust.

CASE PAGE 1

Hood and Enwin

If the mail is used and the postal acceptance rule applies, acceptance is complete when mailed

Background and Facts

- The plaintiff (a landlord) owned a rental property at 993 Bridge Avenue in Windsor. The tenant vacated in late October 2008, and the property sat vacant until January 1, 2009.
- In late December 2008, the plaintiff discovered that electricity to the property had been shut off on December 18, 2008, and that the water pipes had frozen and burst, causing significant water damage.
- The plaintiff believed the property was enrolled in **Enwin's "Landlord Vacancy Interim Payment (LVIP)"** continuous service program, intended to prevent unexpected shutoffs by transferring services into the landlord's name when a tenant moves out.
- The plaintiff sued Enwin (the local electricity provider and billing agent for Windsor Utilities Commission) for damages, alleging breach of contract and negligence, among other claims.

Key Issues

Whether the property was validly enrolled in Enwin's LVIP program.

1. If yes, whether Enwin breached its obligation by shutting off the electricity without notifying the plaintiff.
2. Whether turning off the electricity caused the water pipes to freeze and burst.
3. Assessment of the plaintiff's damages.

Court's Findings

1. **Enrollment in LVIP**
   - The court applied the postal acceptance rule (when an offer is made by mail, acceptance is effective upon posting).
   - The court accepted the plaintiff's testimony that he completed and mailed the LVIP form on March 14, 2007.
   - Because Enwin received no contrary evidence proving it had not processed the form, the court found a binding contract existed as of the date the plaintiff mailed the enrollment form.
2. **Breach of LVIP Obligations**
   - Under LVIP, once the tenant vacated (or was shown to have vacated), Enwin was supposed to transfer services into the landlord's name rather than disconnect them.
   - Internal memos showed Enwin was aware the tenant had moved (a disconnect notice mailed to the property came back marked "moved"), yet Enwin did not contact the landlord or activate LVIP.
   - The court concluded Enwin's failure to keep the power on (or at least notify the plaintiff) was a breach of its contract under the LVIP program.
3. **Causation: Did the Electrical Shutoff Cause the Water Damage?**
   - The court took judicial notice that if electricity and heat are off in cold weather, water pipes can freeze and burst.
   - Photos showed snow and ice at the property, indicating cold conditions in December 2008.
   - The court found that the shutoff of electricity (which disabled the furnace) directly led to the water pipes freezing and bursting.

Damages

- The court awarded damages for:
  - Water and meter charges arising from the burst pipes ($1,018.28)
  - Materials to repair floors, pipes, drywall, etc. ($1,234.99)
  - Labour for repairs and related work ($2,850.00 plus other minor costs)
  - Loss of rental income for the time the property was uninhabitable ($750.00)
- Total judgment in favor of the plaintiff was $6,712.12.

Conclusion

- Enwin breached its obligations under the LVIP program by shutting off electricity at the vacant property without notifying the plaintiff.
- The ensuing loss of heat caused the pipes to freeze, burst, and damage the property.
- The court found Enwin liable for the plaintiff's repair costs and related damages.

Tulsa Heaters Inc. v. Syncrude Canada Ltd.

Equitable estoppil applied.

Summary of Collins (Re) Case:

Background:

- Andrea Collins, acting on behalf of her children—Simon (an infant, 15 years old) and Joely (now 19)—filed a petition under the Infants Act regarding a contract made on December 11, 1989. This contract involved transferring the children's beneficial interest in a residential property held in a trust (created by their father, Philip Collins) to Ms. Collins, in exchange for Ms. Collins' obligation to provide them with financial support until they reach a certain age.

Issue:

- Since the contract was made when Simon was still an infant, it is unenforceable against him under the Infants Act. The petition seeks a court order granting Simon capacity to enter into the contract, provided it is shown to be in his best interests.

Court's Analysis:

- The court examined whether granting Simon the capacity to contract under Section 16.4(1)(b) of the Infants Act would benefit him, taking into account his circumstances, the nature of the contract, and the fact that the contract would effectively transfer a substantial asset (with a market value over $700,000) away from him.
- Evidence from psychological assessments and legal advice indicated that while Simon understood the legal implications, the contract was more about providing financial security for Ms. Collins than benefiting Simon.

Conclusion:

- The court found that it was not in Simon's best interest to grant him capacity to bind himself to the contract at this time, suggesting that he should wait until he reaches the age of majority to decide on such a significant financial matter. Consequently, the petition was dismissed, and costs were awarded on a scale basis.

Duke's Cookies

If the mail is used and the postal acceptance rule applies, acceptance is complete when mailed

Summary of the Facts and Trial Decision

1. **Lease and Renewal Clause**
   - The landlord (AMS) leased premises in the Student Union Building at UBC to the tenant (Duke's Cookies) for three years, from February 1, 1984 to January 31, 1987.
   - The lease gave the tenant the right to renew for an additional two years if written notice was given between May 31 and July 31, 1986 (i.e., six months before the lease expired).
   - The tenant did not give written notice within that timeframe.
2. **Negotiations for a Larger Space**
   - Beginning in May 1986, the tenant actively sought a bigger area and a longer lease to expand its thriving cookie business.
   - The tenant claimed that the AMS's business manager (Mr. Redden) gave them reason to believe they would receive a new, longer lease and more space. Plans were drawn up by AMS's own staff to explore expansion.
   - The tenant testified that, on that basis, they felt giving written notice to renew the existing two-year option was "redundant" or unnecessary since they expected a new lease arrangement.
3. **Landlord's Notice to Vacate**
   - In September 1986, AMS wrote stating the tenant had failed to renew in time and must therefore vacate upon lease expiry.
   - The tenant responded with surprise and indignation, claiming AMS had encouraged them to believe the lease would be extended or replaced with a longer-term arrangement.
   - The tenant promptly gave written notice to renew and sought a court declaration that it was entitled to the two-year extension.
4. **Trial Court's Application of Promissory Estoppel**
   - The tenant's main argument was that AMS, through words or conduct, had promised (or led them to believe) it would not insist on the strict notice period.
   - The trial judge accepted that AMS's conduct amounted to a promise or assurance that the strict terms of renewal would be relaxed, and that the tenant reasonably relied on this promise to its detriment.
   - The judge granted the tenant a renewed lease until 1989, effectively enforcing the two-year renewal option despite the missed notice deadline.
5. **Appeal by AMS**
   - AMS appealed the ruling on the ground that there was insufficient basis for promissory estoppel. Specifically, AMS argued there was no clear promise or assurance it would waive the written notice requirement, and that any discussions about a new lease or larger space did not constitute a binding relaxation of the existing lease's renewal clause.

Why the Decision Is Potentially Appealable

1. **Nature of the "Promise" or Representation**
   - **Promissory Estoppel** requires a clear promise or representation that the promisor will not enforce a strict contractual right (here, strict compliance with the notice window).
   - If the landlord's statements amounted only to exploratory discussions or not a definite representation, then the trial court might have erred in finding a clear promise.
2. **Reasonableness of Reliance**
   - The tenant must show it was reasonable to rely on the alleged promise. If the landlord's statements were too vague or conditional, a reviewing court might find the tenant's reliance was not justified.
3. **Actual vs. Implied Waiver of Notice Clause**
   - Courts typically require some evidence the party intended to waive, or otherwise excuse, strict performance of a lease clause. The landlord's conduct in exploring expansion could be interpreted merely as potential negotiations, not a firm waiver.
4. **Lack of Express Agreement**
   - The trial judge found an implied promise. On appeal, AMS may argue the evidence did not support any factual conclusion that AMS was giving up its right to insist on timely notice.

Likely Outcome of the Appeal

- Whether the appeal would succeed depends on the appellate court's view of the evidence about the landlord's assurances and the tenant's reliance. The trial judge apparently concluded there was enough of an "implied promise" or "course of conduct" to constitute promissory estoppel.
- **For the appeal to succeed, AMS must show either:**
  a. No clear promise or representation (i.e., the judge erred in finding that AMS told or implied to the tenant that notice would not be required).
  b. The tenant's reliance was unreasonable, or not truly induced by AMS's words/conduct.
  c. The judge misapplied the legal requirements of promissory estoppel.
- If the appellate court defers to the trial judge's factual findings (especially about the parties' conversations and the reasonableness of the tenant's reliance), the appeal might fail. Appellate courts are often reluctant to overturn a trial judge's findings of credibility and fact unless there is a palpable and overriding error.

Key Takeaway

The trial judge relied on **promissory estoppel,** holding that AMS's conduct effectively waived strict compliance with the notice clause. On appeal, AMS challenges whether any such promise was made, or whether the tenant could reasonably rely on discussions about a longer lease as waiving the existing renewal provision. The success of the appeal hinges on whether the appellate court finds the trial judge erred in concluding there was a clear representation and reasonable reliance justifying estoppel.

Promissory estoppel

Promissory estoppel is a legal rule that stops someone from going back on a promise when the other person has relied on that promise to their detriment.

In simple terms:

- **Promise Made:** One party makes a clear promise or assurance.
- **Reasonable Reliance:** The other party relies on that promise and takes action or makes decisions based on it.
- **Detrimental Change:** As a result of that reliance, the relying party suffers a loss or harm.
- **Fairness:** It would be unfair for the promise-maker to break the promise now, so the law prevents them from doing so.
- **Example:** A landlord promises no rent increase if a tenant renews their lease; the tenant renews based on that promise, so promissory estoppel prevents the landlord from later raising the rent.

Collins vs Dodge City East

Negligent misrepresentation on a fundamental element which induced her to enter into the contract

Summary of Collins v. Dodge City East:

- The plaintiff, a dental hygienist, traded in her old car and purchased a "fully loaded" used vehicle from a reputable dealer, relying on the dealer's agent's demonstration that the car was equipped with functioning air conditioning.
- After the sale, the plaintiff discovered that the vehicle did not have air conditioning installed, contrary to what was represented during the demonstration.
- The court found that the sales agent's statements, although not made deliberately fraudulent, constituted a negligent misrepresentation on a critical aspect of the car that induced the plaintiff to enter the contract.
- As a result, the plaintiff was awarded damages to compensate for the misrepresentation, despite the fact that her claim was for an amount less than the actual cost of installing the feature.

Buckwold Western Ltd. v. Sager

undue influence not duress, signed personal guarantee, no improper pressure, exercised her own free will

Summary of the Case:

- **Facts:** In 1991, Ms. Sager signed a personal guarantee for London Carpets Ltd. to secure an increased credit limit from a supplier, despite not fully understanding its consequences; she did so under commercial pressure from her husband, the company's principal.
- **Issue:** When London Carpets Ltd. went bankrupt in 1995, the supplier claimed $77,415.16 under the guarantee. Ms. Sager argued she should be relieved from the guarantee, alleging she signed it without understanding its full effect and under undue influence or duress.
- **Court's Analysis:** The court examined whether Ms. Sager's consent was freely given. It found that the pressure she experienced was standard commercial pressure, not duress or undue influence, and that she had sufficient opportunity to consider the guarantee.
- **Outcome:** The guarantee was enforceable, and the supplier was entitled to recover $77,415.16 plus pre-judgment interest and costs.

Mackay v Cesar

undue influence exerted over time on elderly homeowner

Summary:

- The plaintiffs, acting as guardians for an 87-year-old, frail property owner, claimed the defendant took advantage of her diminished mental capacity by pressuring her into a rent-to-own agreement.
- Although the property owner was competent when she purchased the home and initially rented it out at $900 per month, her capacities declined in the three months before signing the rent-to-own contract.
- The rent-to-own agreement was found to be grossly unfair—it had no expiry date on the purchase option, the owner received no independent legal advice, and there was a significant imbalance in bargaining power.
- The court held that the defendant unduly influenced the property owner into signing the contract, making the rent-to-own agreement void, while her month-to-month tenancy remains valid under the Residential Tenancies Act.

Black Swan Gold Mines

Top up cause was easily interpreted as there was no ambiguity; the literal approach was used. No need to look at the surrounding circumstances.

Summary of the Case:

- Background:
- Goldbelt Resources Ltd. appealed a decision requiring it to issue additional shares to Black Swan Gold Mines Ltd. under a settlement agreement that aimed to protect Black Swan's shareholding from dilution. The dispute centered on the proper interpretation of a "top-up" clause in the agreement.
- Key Arguments:
  - Goldbelt's Position: Goldbelt argued that the trial judge ignored important contextual facts (the "factual matrix") and should have interpreted the clause narrowly—that is, the top-up right should only be triggered if Comptoir's top-up right arose.
  - Black Swan's Position: Black Swan contended that the clause was intended to adjust the purchase price simply when Meridian lost the Teck Cominco account, regardless of whether an RFP or Comptoir's top-up right came into play.
- Court's Analysis:
  - The judge applied well-established principles of contract interpretation, emphasizing that the final written document should be given primary effect and that extrinsic evidence should not overwhelm the clear text of the contract.
  - He reviewed Goldbelt's attempts to introduce evidence (including a solicitor's letter, an information circular, and affidavit evidence) but held that such evidence was either inadmissible or given no significant weight.
  - The court found that the language of the top-up clause was unambiguous when viewed in its context, and that the intended commercial effect was to protect Black Swan's shareholding, not to condition the adjustment on additional events like Comptoir's top-up right.
- Outcome:
- The appeal was dismissed, and the trial judge's interpretation of the contract was upheld, meaning Goldbelt must issue the additional shares as required by the settlement agreement.

On an exam you will be asked to examine a set of facts and identify and resolve the legal issue(s) presented by using principles you have learned in this course. The best answers follow roughly the following format:

1. Identify the legal issue or issues raised by the facts. Do not restate the facts. If it is absolutely necessary to assume facts not provided in order to resolve the problem, state those assumptions. Consider each issue in turn.
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3. Analyze the facts and consider how the legal principle relates to those facts.
4. Reach a reasonable conclusion based on your analysis. The outcome may be uncertain, in which case you should discuss the possible results and indicate which you consider most likely.

CASES PAGE 2

BlackSwan Case (INTERPRETATION)

Blackswan Gold Mines Ltd v. Goldbelt Resources
Top up cause was easily interpreted as there was no ambiguity; the literal approach was used. No need to look at the surrounding circumstances.

•Black Swan and Goldbelt had an agreement to cooperate in exploiting and mining opportunity in Russia.
• Agreement contained a confidentiality and non-compete agreement
•In contravention of that agreement Goldbelt negotiated with Comptoir and cut Black Swan out
•Black Swan started legal action against Goldbelt and after negotiations they entered into a settlement agreement. Under the settlement Goldbelt was to give Black Swan $308,000 and 1.2 million shares in Goldbelt.
•It was anticipated that Comptoir might get shares in Goldbelt so to prevent Black Swan's position being diluted, the settlement agreement contained a provision for Black Swan's share to be topped up according to a formula if any third party acquired the right to acquire additional shares in Goldbelt.
•The project was abandoned because of a decision of the Russian government.
•Goldbelt then explored an entirely different opportunity with Pegasus. Its agreement with Pegasus provided that Pegasus could acquire shares in Goldbelt.
•Black Swan said the top up had been triggered. Goldbelt said it had not — that the top up should be interpreted in context and it was never meant to apply in these circumstances.
•The court said no need to look at context - according to its terms is clearly applied - there was no ambiguity so no reason to look at the surrounding circumstances.
•Black Swan wins (and the court was absolutely right).

BKDK Holdings (INTERPRETATION)

Used liberal approach of interpretation to look at the true intent of the parties.

1. **Background and Contractual Context**
   - BKDK Holdings Ltd. (the seller) and 692831 B.C. Ltd. (the purchaser) entered into an agreement dated February 28, 2008 for the sale of shares in Meridian Travel Ltd. (later operating as Vision 2000 Travel Group).
   - The purchase price was set at $750,000, payable in three installments.
   - Clause 2 of the Agreement provided for a purchase price adjustment of $70,000 if Meridian failed to retain a significant business account—the Teck Cominco corporate travel business—which was expected to be decided through an RFP process.
2. **Dispute**
   - The parties disagreed on how to interpret Clause 2.
   - BKDK's Position:
     - The clause should be read strictly: the price reduction would only apply if Teck Cominco actually went through an RFP process and Meridian was unsuccessful, or if Meridian lost 100% of the business.
   - 692831's Position:
     - The clause was intended as a mechanism to adjust the price in the event that Meridian lost the Teck Cominco account, regardless of whether an RFP process was undertaken.
     - The reference to an RFP was merely descriptive of the situation as understood at the time, not a strict condition precedent.
3. **Factual Findings**
   - Contrary to the parties' initial assumption, Teck Cominco did not conduct an RFP process but made an internal decision to transfer its corporate travel business to Amex Travel effective December 1, 2008.
   - This decision resulted in Meridian losing almost all of the business it had received from Teck Cominco.
4. **Legal Analysis and Construction of Clause 2**
   - The Court applied established principles of contractual interpretation, emphasizing that:
     - The Agreement should be read as a whole and in a manner that gives effect to all its provisions.
     - The commercial context and the parties' intentions at the time of entering the contract are key.
     - The language should not be interpreted in a way that would render any provision ineffective or produce absurd results.
   - The Court concluded that the proper interpretation of Clause 2 is the one advanced by 692831:
     - The essential bargain was to provide a price adjustment in the event that Meridian lost the Teck Cominco account.
     - The RFP process reference was descriptive rather than a strict condition precedent.
5. **Outcome**
   - The Court ruled in favor of 692831, holding that the loss of the Teck Cominco corporate travel business (as defined in Clause 2) triggered the $70,000 purchase price reduction.
   - The calculation of any outstanding amount under the purchase price was left for a future determination, as the issue was not properly raised in the petition.
   - 692831 was awarded costs on Scale B.

Capacity section 16 of the infants act when (1) best interest of child and (2) child in need of protection What is this referring to

This refers to a provision in the Infants Act which allows a court to grant a minor (infant) the legal capacity to enter into a contract when doing so is determined to be in the best interests of the child and when the child is in need of protection. In essence, it means that even though contracts entered by minors are generally unenforceable, the court may choose to enforce or validate a contract if it would benefit the child and protect them from harm.

Westcoast Transmission v Cullen

Cullen supplied motors to Westcoast for generators.
Generator had a faulty part and broke. Westcoast had to rent replacement generators:

Can they sue for rental costs?

- Damages have to arise naturally from the breach itself
- Foreseeability depends on the knowledge which a reasonable person in the position of the party at fault should have possessed at time of contracting

Blackcomb Skiing Enterprises LP v Schneider

- is deposit clause a penalty clause?
- was there a breach with failure to discharge title?
- Whether sum is a penalty or liquidated damages (a genuine pre-estimate of damages) will depend on facts and circumstances when the contract was made

1. Factors considered: "Genuine pre-estimate of damages"
2. Parties were sophisticated and no objection to amount of deposit
3. Parties have discretion re amount of liquidated damages
4. Even if seller suffers no loss, if deposit is guarantee of performance, it is forfeited
5. 10% deposit is half of normal amount required for compareables
6. If party is NOT willing to complete, should not be able to recover deposit

R v Alberta

an advertisement is not an offer, so no breach of contract

Summary of the Memorandum of Judgment
Background and Charges

- A retailer (the "accused") repeatedly advertised a particular model of television at a bargain price.
- Would-be customers and investigators tried to purchase the advertised model but were told either it was sold out, that rain checks were not available, or that existing rain checks would not be honored.
- As a result, the accused was charged with:
  - Misleading advertising (under s. 52 of the Competition Act), and
  - Failing to supply advertised bargain goods (under s. 57 of the Competition Act).

Procedural History

- **Provincial Court:** Convicted the accused on almost all counts.
- **Court of Queen's Bench:** Allowed an appeal by the accused and entered acquittals on all counts, so it did not need to address the sentence.
- **Court of Appeal:** The Crown appealed to restore the original convictions.

Key Evidence and Findings

- The wholesaler always had a large supply of the advertised TV, which could have been delivered to the accused within half a day.
- The accused only ever had two to five sets on hand and never replenished the stock during the advertised period, despite continuing to run the ads.
- An officer from the wholesaler testified that keeping around 100 sets in stock would be reasonable for the volume of advertising. The accused's president disagreed, but the trial judge found his explanations unconvincing.
- Customers were told the TV was sold out even when the accused apparently still had some in inventory.
- The trial judge concluded the accused had essentially no honest intent to supply the TVs: it was a "bait-and-switch," steering customers to more expensive models.

Court of Appeal Decision

- **Misleading Advertising (s. 52):**
  - The Court found that repeatedly advertising a TV with little or no intention of selling it was clearly misleading.
  - Having ample stock readily available at the wholesaler but never ordering more meant the advertisement falsely implied the retailer could supply that TV to the public.
- **Failing to Supply Advertised Goods (s. 57):**
  - Section 57 aims to prevent "bait-and-switch" tactics.
  - The accused's minimal inventory and refusal to honor rain checks showed it had not supplied the TV in "reasonable quantities."
  - Simply having the wholesaler carry inventory does not fulfill the obligation if the store never actually obtains and sells the product.
- The Court rejected the accused's arguments on multiplicity of charges and on the Kienapple principle (which prevents multiple convictions for the same or very similar offenses). The Court held each offense addresses different conduct (publishing a misleading ad versus failing to supply).

Outcome:

- Except for four counts (Counts 15–18) which the Crown conceded should be acquitted, the Court of Appeal restored the original Provincial Court convictions.
- The matter of sentencing was sent back to the Court of Queen's Bench.
- Result
- **Convictions Restored (except Counts 15–18):** The Court of Appeal reinstated the convictions entered by the trial judge.
- **Sentencing:** Remitted to the Court of Queen's Bench for a full hearing on the sentence appeal.
- **Practical Effect:** The accused remains convicted on most counts of misleading advertising and failing to supply advertised goods, and the fines or penalties depend on the next stage of proceedings in the Queen's Bench.

Postal Acceptance and Revocation Timing

- **Postal Acceptance Rule: Acceptance of an offer is considered effective at the time it is posted (sent) by the offeree, not when it is received by the offeror.**
- **Revocation Timing: For an offer to be successfully revoked, the revocation must be received by the offeree before they post their acceptance.**

Rudder v Microsoft

You are bound by what you sign and the law reform or jurisdiction causes

Summary of the Case: Rudder v. Microsoft (Ontario Superior Court)

1. **Background and Parties**
   - Two individuals (the plaintiffs), both law school graduates, subscribed to MSN (The Microsoft Network), an online service offering Internet access and various information/services.
   - They sought to bring a Canada-wide class proceeding under Ontario's Class Proceedings Act, 1992 on behalf of some 89,000 MSN subscribers.
   - The plaintiffs alleged Microsoft breached its contract with users by improperly billing and charging subscribers' credit cards, and by failing to provide accurate account information.
2. **The Forum Selection Clause**
   - The MSN "Member Agreement," which new subscribers had to accept electronically, contained a clause stating that any disputes must be brought in King County, Washington, under Washington State law.
   - Microsoft relied on this forum selection clause to move for a permanent stay of the Ontario action, arguing that Ontario courts were not the correct forum.
3. **Plaintiffs' Arguments**
   - The plaintiffs argued they had not actually read, or been sufficiently made aware of, the forum selection clause (comparing it to "fine print").
   - They also contended that, in any event, Ontario was the appropriate forum for this lawsuit.
4. **Court's Analysis and Decision**
   a. Binding Nature of the Contract
      - Justice Winkler found the plaintiffs were bound by the electronic agreement.
      - The judge emphasized that requiring users to scroll through terms on a computer screen, or presenting multiple screens, does not amount to hidden "fine print."
      - One plaintiff admitted he only looked for billing details and then clicked "I Agree," meaning he knowingly accepted all terms without reading further.
   b. Enforceability of the Forum Selection Clause
      - Canadian courts generally respect forum selection clauses unless there is a strong reason to override them.
      - Justice Winkler saw no evidence that enforcing the clause would be unfair or contrary to the interests of justice.
      - Most of Microsoft's relevant witnesses, documentation, and operational activities were located in King County, Washington.
      - The law governing the contract was that of Washington State, and the plaintiffs did not show any compelling reason why this court should ignore the clause (they did not demonstrate "strong cause" to override).
   c. Resulting Order
      - The court permanently stayed (halted) the Ontario action.
      - Microsoft was awarded its costs of the motion.
      - The plaintiffs, if they wished to continue litigation, would have to do so in King County, Washington, as specified by the Member Agreement.
5. **Key Takeaways**
   - Electronic contracts—including "click-through" agreements—can be as binding as traditional written contracts.
   - Forum selection clauses are generally upheld if clearly presented and accepted, absent exceptional circumstances.
   - Courts value commercial certainty and international comity when parties have chosen a specific forum through an agreement.

Werle v. Saskatchewan

fraudulent misrepresentation induced employment contract

Facts:

- SaskEnergy hired Mr. Werle as Vice-President of Sales and Marketing based on his resume, which falsely claimed he had a Bachelor of Commerce degree from the University of Saskatchewan—a credential he never obtained. A newsletter later circulated that confirmed this degree, and when the personnel department requested proof, discrepancies were discovered.

Key Findings:

- The trial judge determined that Mr. Werle's misrepresentation about his educational credentials was not merely an innocent error but likely an intentional deception. This dishonesty, especially given the high level of trust required in a vice-president, justified the company's decision to dismiss him.

Outcome:

- Mr. Werle's wrongful dismissal claim was dismissed, and SaskEnergy was entitled to its costs, affirming that an employee who is found to have fraudulently misrepresented essential facts can be terminated for cause.

Livingston v. Evans

Offer postal acceptance rule, revocation

Detailed Summary:
The defendant's agent offered to sell the land for $1800 on specific terms. On receiving this offer, the plaintiff sent a wire message stating, "Send lowest cash price. Will give $1600 cash. Wire," which constituted a counteroffer and, under established contract law (as per Hyde v. Wrench), effectively rejected the original offer.
Agent's Response and Renewal:
The agent then replied by telegram with "Cannot reduce price." The court interpreted this reply not merely as a rejection of the plaintiff's counteroffer but as a renewal or reaffirmation of the original $1800 offer, signaling that the defendant was still willing to sell at that price.
Formation of Contract:
Following the agent's message, the plaintiff immediately accepted the renewed $1800 offer. Since the agent's response revived the original offer, the plaintiff's acceptance created a binding contract for the sale of the land.
Outcome:
The court concluded that the plaintiff was entitled to specific performance of the contract, meaning he could compel the defendant to complete the sale on the agreed terms, with his rights under the contract taking priority over any later transactions the defendant might have attempted.

CASES PAGE 3

Maksymetz v Kostyk

legality, object of contract must be legal, partnership was contrary to public policy as ___ with the statute

- **Background:**
- Steve Maksymetz sought an accounting for his share of the partnership, L.J.S. Ventures, formed with Larry Kostyk and John Schur to manage a hotel. A prior settlement agreement (from the Gateway Hotel case) set Maksymetz's share at 41% and included provisions related to share adjustments.
- **Key Findings:**
- The trial judge found that the settlement agreement was based on an illegal contract because it required approval by the Manitoba Liquor Control Commission—a condition that, given industry experience, was never expected to be met. The agreement, and its subsequent performance, were therefore deemed void **ab initio** (or at least illegal in execution).
- **Legal Conclusion:**
- Relying on authorities like Munroe v. Clarke and principles from Halsbury's Laws, the judge held that a court cannot enforce a settlement arising from an illegal undertaking. Despite any lesser degree of wrongdoing on Maksymetz's part, his involvement in the illegal arrangement rendered his claim for an accounting unenforceable, as the doctrine of "**unclean hands**" prevents someone from seeking relief when they have participated in illegal conduct.
- **Outcome:**
- **The plaintiff's request for an accounting was denied, and the defendants were awarded costs.**

Phoenix Restorations Ltd. v. Brownlee

criteria for reasonablist of post employment restrict of trade, criteria a public interests, criteria b, interest of the parties, proprietary interests,like size or scope

Background:
Paul Brownlee, a project manager at Phoenix Restorations Ltd., was bound by employment contracts containing non-competition and non-solicitation clauses. After resigning on October 7, 2010, he joined competitor Belfor (Canada) Inc. on October 18, 2010.

Phoenix's Claim:
- Phoenix sought an injunction to enforce these restrictive covenants, arguing that Brownlee's actions—such as soliciting business (evidenced by bringing doughnuts, coffee, and hockey tickets to client offices)—were in breach of the agreements.

Brownlee's Defense:
- Brownlee contended that the restrictive covenants were ambiguous, overly broad, and unreasonable, imposing significant hardship on his ability to earn a livelihood. He argued that, given his long-standing work in the industry, damages would be an adequate remedy if enforcement were ultimately justified.

Legal Analysis:
- The court reviewed the enforceability of post-employment restraints using established tests (from cases such as RJR-MacDonald and Aurum Ceramic Dental Laboratories Ltd. v. Hwang), which require that such covenants be reasonable in duration, geographic scope, and in protecting only the employer's legitimate proprietary interests.
- The Non-Competition Clause was found to be overly broad, as it prohibited Brownlee from working for any entity in the entire insurance restoration business in a large geographic area, even though Phoenix operates only within a specific niche.
- The Non-Solicitation Clause was also too wide, as it applied to all of Phoenix's customers and prospective clients, not just those with whom Brownlee had direct dealings.
- **Conclusion:**
- The court concluded that Phoenix had not established a strong prima facie case that these restrictive covenants were reasonable and enforceable. Consequently, Phoenix's application for injunctive relief was dismissed, the interim injunction was lifted, and Brownlee was awarded costs.

Douez v. Facebook, Inc

Law reform causes and BC best forum to evaluate BC law

Background:
Paul Brownlee, a project manager at Phoenix Restorations Ltd., was bound by employment contracts containing non-competition and non-solicitation clauses. After resigning on October 7, 2010, he joined competitor Belfor (Canada) Inc. on October 18, 2010.

Phoenix's Claim:
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Brownlee's Defense:
- Brownlee contended that the restrictive covenants were ambiguous, overly broad, and unreasonable, imposing significant hardship on his ability to earn a livelihood. He argued that, given his long-standing work in the industry, damages would be an adequate remedy if enforcement were ultimately justified.

Legal Analysis:
- The court reviewed the enforceability of post-employment restraints using established tests (from cases such as RJR-MacDonald and Aurum Ceramic Dental Laboratories Ltd. v. Hwang), which require that such covenants be reasonable in duration, geographic scope, and in protecting only the employer's legitimate proprietary interests.
- The Non-Competition Clause was found to be overly broad, as it prohibited Brownlee from working for any entity in the entire insurance restoration business in a large geographic area, even though Phoenix operates only within a specific niche.
- The Non-Solicitation Clause was also too wide, as it applied to all of Phoenix's customers and prospective clients, not just those with whom Brownlee had direct dealings.
- **Conclusion:**
- The court concluded that Phoenix had not established a strong prima facie case that these restrictive covenants were reasonable and enforceable. Consequently, Phoenix's application for injunctive relief was dismissed, the interim injunction was lifted, and Brownlee was awarded costs.

Liebmann v. Canada:

Law reform causes and BC best forum to evaluate BC law

Facts:
- Lieutenant Andrew Liebmann, an accomplished member of the Canadian Forces Naval Reserve, was nominated for the position of Executive Assistant to the Commander of Canadian Forces Middle East during Operation Friction. Despite meeting all the qualifications, his nomination was rejected solely because he was Jewish—decision-makers expressed concerns that his religion might impair his effectiveness or jeopardize his safety in the Middle East.

Legal Issue:
- Liebmann claimed that the refusal to appoint him constituted discrimination in violation of his equality rights under section 15 of the Canadian Charter of Rights and Freedoms. He also challenged related policies, though the policy in question (CFAO 20-53) was not applicable to his situation since Operation Friction was not a peacekeeping mission.

Decision:
- The trial judge found that Liebmann's rejection was clearly based on his religion, thereby diminishing his opportunity for professional development and personal dignity. On appeal, the Court confirmed that this differential treatment was discriminatory and infringed Liebmann's Charter rights. The government failed to justify the discrimination under section 1.

Conclusion:
- The Court held that the actions taken in rejecting Liebmann's nomination were unconstitutional, violating his right to equal treatment. Costs were awarded against the respondents, affirming that discrimination based solely on religion in such administrative decisions is impermissible under the Charter.

Caliguri v. Tumillo

Defines What consideration is, forbearance can be

Issue:
- The case addressed whether the response of the offeree to an offer constituted a clear acceptance or a counteroffer that effectively terminated the original offer.

Key Points:
- The court examined the language and intent behind the offeree's communication.
- It held that if the offeree's response introduces modifications or additional conditions, it should be treated as a counteroffer rather than an unequivocal acceptance.
- As a counteroffer, the original offer is terminated, and the offeree cannot later bind the offeror by accepting the original terms unless the offeror renews the offer.

Significance:
- Caliguri v. Tumillo emphasizes the importance of clear, unequivocal acceptance in contract formation. Any deviation or alteration in the response may be seen as a rejection of the original offer, thereby preventing the formation of a binding contract under the original terms.

Carlill v. Carbolic

Intention to enter into contractual obligations

The phrase "intention to enter into contractual obligations" is crucial in Carlill v. Carbolic Smoke Ball Company because it shows that the company's advertisement was not mere puffery but a serious offer intended to create legal relations.

Facts:
- The Carbolic Smoke Ball Company manufactured a product called the "smoke ball," which it claimed could prevent influenza and other diseases during the severe flu pandemic of 1889–1890. The smoke ball was a rubber device with a tube attached that released carbolic acid vapours when squeezed, supposedly flushing out infections. On November 13, 1891, the company published advertisements in newspapers, including the Pall Mall Gazette, stating that it would pay £100 to anyone who contracted influenza after using the smoke ball three times daily for two weeks, as directed. The ad further noted that £1000 had been deposited with the Alliance Bank to demonstrate the company's sincerity.

Mrs. Carlill's Actions:
- Mrs. Louisa Elizabeth Carlill saw the advertisement, purchased the smoke ball, and used it according to the instructions for nearly two months. Despite her compliance, she contracted influenza on January 17, 1892, and subsequently claimed the £100 reward. After her claim, the company ignored two letters from her solicitor-husband. On a third request, the company replied with an anonymous letter stating that if the smoke ball was used properly, they had complete confidence in its efficacy—but to protect themselves against fraudulent claims, she was required to come to their office each day and be checked by the secretary.

Legal Issues:
- The main legal question was whether the advertisement constituted a unilateral offer that could be accepted by anyone who performed the conditions, thereby forming a binding contract. The company argued that the advertisement was mere puffery and not a serious offer that could create contractual obligations.

Court's Analysis and Decision:
- The court determined that the advertisement was indeed a unilateral offer because it was specific and clear about the terms. The company's deposit of £1000 was taken as evidence of its intent to be bound by its promise. By following the conditions set out in the advertisement (using the smoke ball as directed) and then contracting influenza, Mrs. Carlill had accepted the offer through her performance. Thus, a binding contract was formed.

Significance:
- The decision in Carlill v. Carbolic Smoke Ball Company is a landmark case in contract law. It established that an advertisement can be a valid unilateral offer if it demonstrates a clear intent to be bound, and that acceptance occurs through performance of the conditions specified in the offer. This case has since been cited as a foundational example of how unilateral contracts operate in the common law system.

HOW TO ANSWER CASE PROBLEMS

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Sole Proprietorships and Partnerships

Maksymetz v Kostyk

legality, object of contract must be legal, partnership was contrary to public policy as ___ with the statute

- **Background:**
- Steve Maksymetz sought an accounting for his share of the partnership L.J.S. Ventures, formed with Larry Kostyk and John Schur to manage a hotel. A prior settlement agreement (from the Gateway Hotel case) set Maksymetz's share at 41% and included provisions related to share adjustments.
- **Key Findings:**
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- **Legal Conclusion:**
- Relying on authorities like Munroe v. Clarke and principles from Halsbury's Laws, the judge held that a court cannot enforce a settlement arising from an illegal undertaking. Despite any lesser degree of wrongdoing on Maksymetz's part, his involvement in the illegal arrangement rendered his claim for an accounting unenforceable, as the doctrine of "**unclean hands**" prevents someone from seeking relief when they have participated in illegal conduct.
- **Outcome:**
- **The plaintiff's request for an accounting was denied, and the defendants were awarded costs.**