Business Law and Ethics Canadian Edition

Business Law and Ethics Canadian Edition

CRAIG ERVINE

GREG MCGOVERN; KYRA MCGOVERN; AND NICOLE NICOLAS-BAYER

Loyalist College
Belleville

Contents

Preface xiii
Introduction 1
Acknowledgments 2
Accessibility Statement iii

1. OVERVIEW OF CANADIAN LAW

Background 7
Establishing Standards 8
Promoting Consistency 8
Resolving Disputes 8
The Rule of Law 10
Business Law, Ethics, and Regulation 11
Source and Types of Law 12
Substance versus Procedure 13
Public vs Private Law 14
Cause of Action 15
Courts In Canada 16
Legal Systems of the World 17
Conclusion 18
Questions for Discussion 19
Additional Resources 20

2. LEGAL RISK MANAGEMENT

Overview 23
An Approach to Evaluating Risk 24
A Model for Evaluating Legal Risk 26
Mitigating and Managing Legal Risk 29
An Introduction to Mathematics of Risk 31

Alternative Dispute Resolution (ADR) Processes for Mitigating Risk 34
Conclusion 40
Cases of Interest 41
Additional Resources 42

3. BUSINESS ETHICS AND SOCIAL RESPONSIBILITY

Business Ethics 45
Social Responsibility 52
Conclusion 57
Terms and Definitions 58
Cases of Interest 59
Questions for Discussion 60
Additional Resources 61
ENDNOTES 62

4. BUSINESS LEGISLATION IN CANADA

Overview 67
The Constitution Act and the Duty to Consult Indigenous Peoples 68
Sale of Goods Act 69
Consumer Protection Act 73
The Competition Act 78
Canadian Environmental Protection Act, 1999 82
Personal Property Security Act (Ontario) (OPPSA) 83
Conclusion 84
Cases of Interest 85
Additional Resources 86

5. BUSINESS ORGANIZATION – BUSINESS STRUCTURES

Business in Canada 89
Sole Proprietor 91
Partnerships 92
Corporations 97

Mergers, Consolidations, and Dissolutions 104
Cases of Interest 106
Questions for Discussion 107
Additional Resources 108

6. CONTRACT LAW

What Is a Contract? 111
Offer 112
Assignment, Delegation, and Third Party 119
Remedies 120
Sample Contract Structure 123
Common Mistakes in Contract Writing 128
Conclusion 130
Cases of Interest 131
Questions for Discussion 132
Additional Resources 133

7. THE TORT SYSTEM

Tort Law Overview 137
Intentional Torts 139
Unintentional Torts 141
Other Torts 144
Conclusion 146
Cases of Interest 147
Questions for Discussion 148
Additional Resources 149

8. LABOUR LAW

Labour Law - Overview 153
Labour Law – Agency 154
Labour Law - Employment 158
Employment Law Jurisdictions 164

Conclusion 172
Cases of Interest 173
Questions for Discussion 174
Additional Resources 175

9. CANADIAN PROPERTY LAW

Chapter Outline 179
Introduction 180
Personal Property 181
Methods of Acquiring Personal Property 182
Real Property 183
Methods of Acquiring Real Property 183
Interests and Scope 185
Duties of Landowners 185
Ownership Interests in Real Property 185
Scope of Interests in Real Property 186
Wills and Trusts 188
Land Use Regulation 189
Introduction to Secured Transactions 190
Other Types of Collateral 190
Attachment of a Security Interest 191
Perfection of a Security Interest 191
Conclusion 193
Cases of Interest 194
Questions for Discussion 195
Additional Resources 196

10. INTELLECTUAL PROPERTY

Introduction 199
Patents 201
Trademarks 203
Copyright 206
Trade Secrets 208

Conclusion 210
Cases of Interest 211
Question for Discussion 212
Additional Resources 213

11. TECHNOLOGY AND THE LAW

Introduction 217
Technology and Jurisdiction 218
Long-Arm Statutes 218
Extra-Territorial Reach 218
Foreign Actions 219
Technology and Privacy 220
What is confidential information in Canada? 220
Technology and Contract Law 223
Technology and Tort Law 224
Technology and Regulations 225
The Privacy Act 225
Freedom of Information and Personal Privacy Act (FIPPA – Ontario) 226
The Personal Information Protection and Electronic Documents Act (PIPEDA) 227
Provincial Privacy Laws 227
Canada's Anti-Spam Legislation (CASL) 230
Acts Under Consideration: 230
European Union (EU) General Data Protection Regulation (GDPR) 230
Technology and Bias 232
Conclusion 233
Cases of Interest 234
Questions for Discussion 235
Additional Resources 236

12. INTRODUCTION TO BANKRUPTCY

Chapter Outline 239
Bankruptcy 240
Bankruptcy and First Nations 240
Voluntary and Involuntary Bankruptcy 241

Types of Bankruptcy 242
Division 1 Proposals 242
Division 2 Proposal (Consumer Proposals) 242
Duty of Good Faith 244
Bankruptcy and Insolvency Act (BIA) 245
The Companies Creditors Arrangement Act (CCAA) 246
Bankruptcy Court 247
Roles of Receiver and Trustee 247
Discharge of Debtor 248
Conclusion 249
Definitions 250
Cases of Interest 251
Questions for Discussion 252
Additional Resources 253

13. CRIMINAL LIABILITY

Introduction 257
The Nature of Criminal Law 258
Burden of Proof 260
Classification of Crimes 262
Indictable, Summary, and Hybrid 262
White-Collar Crime 262
Common Business Crimes 262
Corporate Criminal Liability 265
Conclusion 266
Cases of Interest 267
Questions for Discussion 268
Additional Resources 269

14. INTERNATIONAL LAW

Introduction to International Law 273
Introduction 273
Sources and Practice of International Law 276

International Law Enforcement 279

The Nature of International Law 281

Conclusion 283

Cases of Interest 284

Questions for Discussion 285

Additional Resources 286

Preface

Since the beginning of creation, the people of Turtle Island (what others call North America) have always respected the land they live on, the water that flows through it and all living beings because those are the very things that sustain us. Indigenous people all over the world have always had a connection to our Earth Mother. Because she is Sacred. Because she gives us life.

The authors of this textbook want to remind everyone of the importance of commemorating Indigenous people's principle kinship to the land that we gather, teach and reside on.

Loyalist College would like to acknowledge that the land on which they gather is the traditional territory of the Wendat, Anishnaabeg, and Haudenosaunee Peoples and directly adjacent to the Kanien'keha:ka

The Importance of Land Acknowledgements

Kimmerer (2013) "To the settler mind, land was property, real estate, capital, or natural resources. But to our people, it was everything: identity, our connection to the ancestors, the home of non-human kinfolk, our pharmacy, our grocery store, our library, the source of everything that sustained us. Our lands were where our responsibility to the world was enacted, sacred ground. It belonged to itself; it was a gift, not a commodity, so it could never be bought or sold. (p. 17)"

The elders tell us that all four colours of man have a responsibility to take care of the land because the soil that we walk on has become the earth in which their ancestors have also been laid to rest. They have now become a part of this Sacred land. We take care of it, not for ourselves but for our future generations. For our children and their children's children.

Introduction

This OER Canadian Business Law textbook has been developed to provide a comprehensive and accessible overview of the legal framework and the laws that govern businesses in Canada. It covers the fundamentals of Canadian business law, including contract law, business legislation, intellectual property law, business ethics, legal risk management, and bankruptcy law in addition to other important topics. The content provides insight into the legal environment in which businesses operate and outlines the principles of identifying, managing, and avoiding legal risks. At the end of each chapter are questions for consideration, cases of interest, and links to websites and other resources that may be of interest.

Acknowledgments

Contributing authors are as follows:

Mirande Valbrune, Esq. Employment Lawyer
Renee De Assis, Texas Woman's University
Suzanne Cardell, University of Massachusetts Dartmouth
Tess C. Taylor, Walden University
Dr. Natalie Sappleton, Smartly Institute
C. M. Mitchell, Ashford University
Kenneth Mitchell-Phillips, Portland Community College

This project is made possible with funding by the Government of Ontario and through eCampusOntario's support of the Virtual Learning Strategy. To learn more about the Virtual Learning Strategy visit: https://vls.ecampusontario.ca.

Ontario

Accessibility Statement

Loyalist College believes that education must be available to everyone; this means supporting the creation of free, open, and accessible educational resources. We are actively committed to increasing the accessibility and usability of the textbooks we produce.

ACCESSIBILITY FEATURES OF THE WEB VERSION OF THIS RESOURCE

The web version of Business Law and Ethics Canadian Edition has been designed with accessibility in mind by incorporating the following features:

- It has been optimized for people who use screen-reader technology.
  - all content can be navigated using a keyboard.
  - links, headings, and tables are formatted to work with screen readers.
- All images include descriptions and alt tags.
- Information is not conveyed by colour alone.

OTHER FILE FORMATS AVAILABLE

In addition to the web version, additional files are available for downloading in a number of file formats including PDF, Digital PDF and EPUB (for eReaders).

KNOWN ACCESSIBILITY ISSUES AND AREAS FOR IMPROVEMENT

While we strive to ensure that this resource is as accessible and usable as possible, we might not always get it right. There are currently no known issues. We are always looking for ways to make the textbook more accessible. If you have any problems accessing content please let us know so we can fix the issue.

Please include the following information:

- The name of the textbook
- The location of the problem by providing a web address or page description.
- A description of the problem

You can contact us at through email cllae@loyalistcollege.com

Accessibility standards

The web version of this resource has been designed to meet Web Content Accessibility Guidelines 2.0, level AA. In addition, it follows all guidelines in Appendix A: Checklist for Accessibility of the *Accessibility Toolkit – 2nd Edition*.

1. OVERVIEW OF CANADIAN LAW

CHAPTER OUTLINE

- Background
- The Rule of Law
- Ethics and Regulation
- Sources of Law
- Public and Private Law
- Cause of Action
- Courts in Canada
- Legal Systems of the World

Learning Outcomes

Students will be able to identify and explain the relationship between the rule of law and the *Charter of Rights and Freedoms,* in addition to distinguishing between the various forms of law applied in Canada and the systems and mechanisms supporting the operation of laws.

Background

The Canadian legal system has its roots in the British common law system, the French civil law system and Aboriginal (laws developed by courts and legislatures) and Indigenous law (practices that originate and are applied by Indigenous cultures and communities). Laws are developed with the purpose of establishing standards for acceptable conduct, proscribing punishment for violations as a deterrent, establishing systems for enforcement, and peacefully resolving disputes. A primary goal of the Canadian legal system is promotion of the common good.

Establishing Standards

The Canadian legal system was developed with the goal of establishing a set of standards that outline what is to be considered minimally acceptable behavior. Broadly speaking, federal and provincial laws are those that all Canadian citizens are expected to follow. Provincial and territorial laws may mirror federal laws, but they may also differ in both content and application.

No system of law is perfect, and the Canadian system is no different as evidenced by the difficult history endured by Indigenous people in this country. A primary goal of the Indian Act (an Act that is still in full force and effect) was the assimilation of Indigenous peoples for *the common good*. The principle of the common good applied in this example is not a version that views the values, cultures, history and experience of all people equally and inclusively.

It is important to note that there are Indigenous Nations that have Self Government Agreements (for example, the First Nations within the Anishinabek Nation and Nisga) which provides the legal authority to make their own laws in certain areas of jurisdiction. This may include, but are not limited to education, elections within the First Nations, language and culture. Each Self Government agreement is unique to the context and needs of the Nations that are a party to the Agreement which may result in variations across Agreements.

First Nations self-government agreements in Canada are agreements between the federal government and a specific Indigenous community or nation that gives them the authority to create and enforce their own laws, manage their own finances and resources, and develop their own social programs. These agreements are seen as an important step in the reconciliation process between Indigenous and non-Indigenous peoples in Canada. They provide a way for Indigenous communities to have greater autonomy and control over their own affairs. The agreements are negotiated between the government and the Indigenous community and are legally binding. The agreements are also designed to ensure that the rights of the Indigenous community are respected and upheld.

PROMOTING CONSISTENCY

The Canadian legal system follows the British common law system, which is designed to reference past judicial reasoning, while also promoting fairness through consistency. Judges in the common law system help shape the law through their rulings and interpretations. This body of past decisions is known as case law. Judges use case law to inform their own rulings. Indeed, judges rely on *precedent (*previous court rulings on similar cases) for ruling on their own cases.

RESOLVING DISPUTES

Laws are typically developed and applied to promote, provide, and maintain order but conflicts are to be expected given people's varying needs, desires, objectives, values, and perspectives. The Canadian legal system provides a formal means for resolving conflicts through the courts. In addition to the federal and provincial court systems, in Canada there are alternative systems for resolving disputes including mediation, arbitration and, in Indigenous applications, restorative justice circles (a dialogical community-based healing process focusing on an offender's obligation to repair harms that they have created or actioned).

The Rule of Law

The *Rule of Law* stands against arbitrary actions undertaken by the State against its citizens and requires transparency of law, fair, predictable, and equal application of laws, an independent judiciary and due process. The *Rule of Law* ensures that the law is public and accessible – enabling people to understand legal obligations and the process governing legal procedures and processes.

Canada is a *Rule of Law* system. Canadian laws operate with the purpose and function of protecting the liberties and rights of people from violations by persons, companies, governments, or other entities. The Canadian Constitution is the supreme law of Canada, containing and explicating the conditions, rules, and regulations within which government and the people operate.

The first statement of the *Charter of Rights and Freedoms* (a section within the Canadian Constitution) states: **"The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."** The Charter provides a guardrail to ensure that laws enacted by a government do not override or infringe on the individual rights and freedoms identified within the Act. The intention is not absolute as the Charter does place limits on the exercise of rights that could result in negative outcomes for Canadian society. For example, freedom of speech is a right protected under the Charter, but such freedom does not extend to hate speech.

It should be noted that the *Charter of Rights and Freedoms* contains a controversial provision at Section 33 – the *Notwithstanding Clause*. The clause enables parliaments within Canada to disregard specific sections of the Charter (sections 2 and 7 – 15) for up to five years if "non-controversial issues" warrant the invocation of the clause. Agreement on what counts as legitimate application of the clause continues to be vigorously debated in legal, academic, and political circles throughout the country.

Additional provisions of the *Canadian Charter of Rights and Freedoms* can be accessed via the links provided at the end of this chapter.

Business Law, Ethics, and Regulation

Business law is an expansive area consisting of a range of legal disciplines, many of which are explored in subsequent chapters. To ensure that business is developed and operated with the greatest chance of success, it is important to be familiar with the laws, regulations, and ethical aspects of the context in which business activities occur.

It is not possible for law to recognize and correct every wrong that occurs in society. At a minimum, laws are developed and applied to curb the most egregious kind of wrongs. There is an association between what we generally think of as ethical behavior and what laws prescribe. For example, contract law upholds the general expectation that promises should be kept. Promise-breaking is viewed by most people as unethical. The law provides remedies for broken promises (in breach of contract cases) but not for all broken promises; as there may be valid reasons underlying an unmet obligation (for example, a *force majeure* situation).

A common challenge for students new to law is disentangling what the law says against ethical prescriptions and practices. While laws are typically based on societal ethics, mores, and customs, ethical expectations or obligations may not align perfectly with existing laws. It is important to recognize that ethics and the law are not the same and there may be times when simply following what the law stipulates may not be the ethical and responsible course of action.

Understanding legal rights and regulations including social and environmental obligations should be a primary concern for any business initiative. Failure to understand legal rights may result in customers or competitors taking advantage of your business. Failure to understand regulatory and related obligations could expose the business to risks and other negative impacts.

Source and Types of Law

The Canadian Constitution is the supreme law of Canada and consists of several documents. The Constitution Act, 1867 (formerly called the British North America Act, 1867), is the cornerstone of the Constitution and is composed of a preamble and ten parts. It sets out the structure of the Canadian government and the division of powers between the federal government and the provinces.

The Constitution Act, 1982 is the most recent document, and includes the Canadian Charter of Rights and Freedoms, which enshrines fundamental rights and freedoms in Canada. Other parts of the Constitution include the Constitution Act, 1930, the Statute of Westminster 1931, and the Canada Act 1982.

The Constitution is the foundation of Canada's system of government and is the legal basis for the laws and regulations that govern the country. It sets out the rules and processes for how federal, provincial, and territorial governments are elected and operate, and how they interact with each other. It also defines the rights and responsibilities of citizens.

Section 35 of the Constitution Act, 1982 recognizes and affirms rights of the Indigenous peoples of Canada and that the rights must be recognized and respected by all levels of government. As noted in materials shared on the Government of Canada website: "Section 35 contains a full box of rights, and holds the promise that Indigenous nations will become partners in Confederation on the basis of a fair and just reconciliation between Indigenous peoples and the Crown." (https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html)

Canada has two fundamental forms of law: *Common Law* and *Civil Law*. The civil code of Quebec Law is followed in the Province of Quebec while the other provinces and territories in Canada follow common law. Judges in the common law system help shape the law through their rulings and interpretations, a practice known as applying *precedence*. The idea that a finding from an earlier case should be binding on future cases is captured by the Latin term *stare decisis* which means 'let the decision stand'. This body of past decisions is known as case law, which is used by judges to inform their own rulings. In fact, judges rely on precedent (previous court rulings on similar cases) when determining the ruling in their own cases.

In the civil code system precedent is not a required element of the law. Laws are contained in a comprehensive legislative document referred to as a code. Judges in civil law jurisdictions refer to the code to determine how they will render their verdict. Judges may review and refer to prior legal matters and outcomes, but it is not a formal practice that is expected to be applied to all cases.

Substance versus Procedure

Substantive law is the category of law which pertains to the rights and obligations of individuals while *procedural law* focuses on the rules of procedure: the rules of the court and other administrative forums or tribunals. Substantive rules prescribe how to act, according to rights and obligations under the law.

Substantive law is a body of legal rules that define and govern individual rights and obligations, and are enforceable by the courts. It includes laws that establish the rights and obligations of citizens, such as property law, contract law, and family law. Substantive law also includes criminal law, which defines and prescribes punishments for criminal offenses.

Procedural law is the set of rules that govern the process of enforcing the rights and obligations established by substantive law. It is the body of law that outlines the procedures for filing a lawsuit, such as filing a complaint and serving notice on the defendant. It also governs the rules for discovery, hearings, and appeals.

Procedural laws delineate the rules of process that must be followed and applied where a substantive law issue arises. Courts follow procedural rules when determining substantive law matters. Procedural law is important to ensure that the rights and obligations established by substantive law are enforced fairly and efficiently.

Public vs Private Law

Laws generally fall under two classifications: *public law* or *private law.* Public law refers to the relationship between the state and the people within it and includes constitutional laws, criminal laws, and administrative laws. Criminal law concerns crimes and their punishments. Constitutional law defines the relationship between governments (federal and provincial governments primarily) and the limits of governmental power over individuals. Administrative law concerns the actions and operations of government. Other examples of public law include environmental law and tax law.

For example, if someone steals items from a store, the criminal action is a violation of public law. The crime of theft affects the entire community (not just the store owners) and the crime is defined in public legislation.

Private law governs the relationship between individuals rather than between people and the State. Business contracts are typically developed by individuals who, by virtue of their business relationship, are involved in a private law agreement. The terms of the contract apply to the parties of the contract but not to others. If the parties have a contract dispute, the terms of the contract and the remedy for breach will apply only to the parties of the contract. In addition to contracts, other examples of private law include tort and property laws.

Cause of Action

Regardless of how wrong someone's actions may seem to you, the only wrongs you can submit in a court are those tied to one or more causes of action. A cause of action is a legal claim that can be brought before a court of law to seek a remedy for a wrong or injury that has been suffered. It consists of a set of facts which, if proven in court, will entitle the plaintiff to a remedy or damages from the defendant. Common causes of action in Canada include breach of contract, negligence, trespass, and defamation.

Not every wrong that occurs will be a cause to bring a court action. Law is developed for matters or disputes that are significant and courts do not hear matters that are negligible. This idea is captured in the Latin phrase: *de minimis non curat lex* meaning "the law does not concern itself with trifles." It is a legal doctrine which states that courts will not consider trivial matters or disputes over small amounts of damages. This doctrine allows courts to focus on more serious matters and to prevent the court system from being encumbered with minor cases.

For example, if a person made plans with another to meet and the person who accepted the invitation does not show-up, feelings of embarrassment or humiliation may arise, but they cannot be pursued as legal matter as there is no cause of action (no basis in the law).

Courts In Canada

Courts in Canada are designed to resolve disputes between parties. Courts are tasked with examining and interpreting laws and ensuring alignment with the Constitution. The courts also set standards, define issues at question, and develop ongoing common law which can impact many areas of Canadian society.

The court system in Canada is divided into two levels: federal and provincial/territorial. At the federal level, the Supreme Court of Canada is the highest court in the country and hears appeals from other federal and provincial/territorial courts. Below the Supreme Court are the Federal Courts, which include the Federal Court of Appeal and the Federal Court. At the provincial/territorial level, the highest court is the Court of Appeal. Below that are the superior trial courts, which hear more serious cases, and the provincial/territorial courts, which hear less serious cases. In addition, there are specialized courts, such as family courts, youth courts, and small claims courts, which deal with specific types of cases.

In Canada, the courts are independent from other branches of government. An independent judiciary is essential for upholding the rule of law and protecting the rights of citizens. It ensures that the laws are interpreted and applied fairly and without bias. This helps to ensure that justice is served and that all individuals, regardless of their social or economic status, are treated equally under the law. An independent judiciary also serves as a check on the power of the executive and legislative branches, acting as a guardian of the Constitution and its fundamental principles including ensuring that the government is accountable for its actions and that the rights of citizens are respected and maintained.

Although it is difficult to identify specific numbers, a significant percentage of legal actions are settled outside of the court system. One reason for this is the expense of taking a case to trial and the uncertainty concerning the outcome. Lawyers are expensive and judges may not view the issues in dispute the same way as the litigants. The combination of the costs and risks involved in bringing a case to court leads many businesspeople to find alternative ways to resolve disputes which typically includes negotiation, mediation, arbitration or a combination of some or all of these mechanisms.

Tribunals are independent bodies that provide dispute resolution services in a wide range of areas and are usually established by legislation. They are a form of administrative justice, providing a less formal and less costly alternative to the court system. Tribunals are responsible for resolving disputes between individuals and organizations, and between individuals and government. They also make decisions on appeals, reviews and hearings on matters such as employment insurance, workplace safety, human rights, tenant protection, and labour relations.

Legal Systems of the World

Legal systems in other jurisdictions may be very different from the Canadian system, so it is important for any business or business person to be aware of other forms of law especially if there is an intention to operate in a different country or region.

- **Common law:** This type of legal system is based on prior court decisions and is used in countries such as the United States, Canada, the United Kingdom, and Australia.
- **Civil law:** This type of legal system is based on written codes and is used in countries such as Germany, France, and Japan.
- **Religious law**: This type of legal system is based on religious beliefs and is used in countries such as Saudi Arabia and Iran.
- **Traditional or customary law**: This type of legal system is based on customs and tradition and is used in many African countries.
- **Mixed legal systems:** This type of legal system combines elements of different legal systems, such as common law and civil law, and is used in countries such as Scotland and South Africa.

Legal systems in other countries often have different laws and regulations that may affect how the business operates. Laws can determine how goods and services are purchased, what taxes are applicable, how contracts are formed and enforced, and how intellectual property is protected. Understanding and complying with the laws of other countries is essential for businesses that operate in international markets. Failing to comply with foreign laws can have significant financial and legal consequences.

Conclusion

Understanding business law in Canada is important to help businesses operate in compliance with the law, reduce their risk of legal liability, and ensure that their operations are in line with legal requirements. Understanding the law also helps businesses recognize areas where they may need to seek legal advice or take other measures to protect themselves.

Questions for Discussion

1. What are some differences between common law and civil law?
2. Describe the purpose of *precedence* in law.
3. Share your thoughts on one or more of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples.*
4. Is doing what is ethical always legal? Is doing what is legal always ethical? Explain your response to these questions.
5. Identify some differences between public and private law.
6. What is a "cause of action"?
7. Describe some differences in the application of laws in Canada relating to Indigenous peoples.

Additional Resources

- Rule of Law – http://www.constitutional-law.net/index.php?option=com_content&view=article&id=23&Itemid=37
- The Constitution Acts, 1867 – 1982 – https://laws-lois.justice.gc.ca/eng/Const/index.html
- The Canadian Charter of Rights and Freedoms: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/
- https://laws-lois.justice.gc.ca/eng/const/page-12.html
- The Indigenous Bar Association – https://www.indigenousbar.ca/
- https://www.firstpeopleslaw.com/public-education/blog/indigenous-law-canadian-courts
- Restorative Justice: https://www.justice.gc.ca/eng/rp-pr/jr/rjilt-jrtja/p2.html
- Principles Respecting the Government of Canada's Relationship with Indigenous Peoples: https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html
- Supreme Court of Canada – https://www.scc-csc.ca/home-accueil/index-eng.aspx

2. LEGAL RISK MANAGEMENT

CHAPTER OUTLINE

- Considerations on Legal Risk in Business
- Risk Evaluation Model
- Risk Calculations
- Alternative Dispute Resolution Applications

Learning Outcomes

- Understand Business Risk from a Legal Perspective
- Apply Risk Evaluation and Risk Calculations
- Understand Approaches to Minimize and Manage Risk
- Understand Conflict Resolution Mechanisms

Overview

Often, law for business students is taught as a sort of compressed version of law school. This sort of training can be very useful, but it ignores a crucial difference between how lawyers and managers relate to the law: lawyers are trained to argue for specific legal conclusions on behalf of a client, while managers make decisions to manage legal risk (threats to the business resulting from not knowing or following legal requirements). Accordingly, it is useful to provide managers with a broad overview of legal risks associated with running a business, how their decisions alter those risks, and how to minimize risks.

For these reasons, this chapter offers a broad discussion concerning general evaluations of business legal risks. Risk management is a topic for an entire course by itself, so in this chapter we will only touch on several major points and then apply them to the law.

An Approach to Evaluating Risk

Businesses regularly face a range and variety of risks with gradations of variable severity and frequency. Some risks are minor and easily managed or mitigated while others may entail undesirable conditions and outcomes.

Measuring and evaluating risk is a multi-step process due to the variety of factors that must be taken into account in order to accurately assess the potential risks (gains and losses) associated with any given situation. These factors include the likelihood of an event occurring, the potential impact of the event, the ability to mitigate the risks, and the ability to transfer the risks to a third party. Measuring risk involves a thorough analysis of the legal consequences and related elements that contribute to the overall risk profile of a situation. Financial decision-making requires that we evaluate severity levels based upon what an individual or a firm can comfortably accept (attitudes towards risk, or risk appetite).

RISK AND CONSEQUENCE

Risky actions and activities can lead to a variety of legal consequences. Civil cases involve private disputes between individuals or organizations and are usually resolved by awarding monetary damages, but, in some cases, could involve criminal penalties. A criminal case involves a governmental decision—whether provincial or federal—to prosecute a defendant (a person or organization) for violating society's laws. The penalties assessed in the case may include, imprisonment, financial compensation, loss of license or other sanctions.

In both civil and criminal actions, attorney fees may be expensive, regardless of the outcome of the matter. On the civil side, courts can also impose injunctions (an order to perform, or not perform, a specific action) and if the financial consequences are severe enough, a firm might risk bankruptcy.

Bankruptcy law governs the rights of creditors and insolvent debtors who cannot pay their debts. In broadest terms, bankruptcy deals with the seizure of the debtor's assets and their distribution to the debtor's various creditors. In bankruptcy, the firm might be liquidated or reorganized. This is explored in greater detail in a later section of this resource.

TYPICAL RISK ATTITUDES

Different people and companies may view the legal risks described above very differently. Some individuals do not mind the prospect of personal bankruptcy, for instance, and some companies are structured to sustain substantial risk. Others view the prospect of being sued with trepidation. In other words, different people and firms have different attitudes toward the risk-return tradeoff.

People are **risk averse** when they avoid risks, preferring as much security and certainty as is reasonably affordable in order to lower their discomfort level. They may be willing to pay extra to have the security of knowing that unpleasant risks would be removed from their lives. Economists and risk management professionals consider most people to be risk averse.

A **risk seeker** is the person who hopes to maximize the value of retirement investments by investing in the stock market. Much like a gambler, a risk seeker is someone who will accept risk to access greater rewards despite limited probability and unfavourable odds.

A person or entity is said to be **risk neutral** when risk preference lies in between these two extremes. Risk neutral individuals will not pay extra to have the risk transferred to someone else, nor will they pay to engage in a risky endeavour. Economists consider most widely held or publicly traded corporations as making decisions in a risk-neutral manner since their shareholders have the ability to diversify away risk—to take actions that seemingly are not related or have opposite effects, or to invest in many possible unrelated products or entities such that the impact of any one event decreases the overall risk.

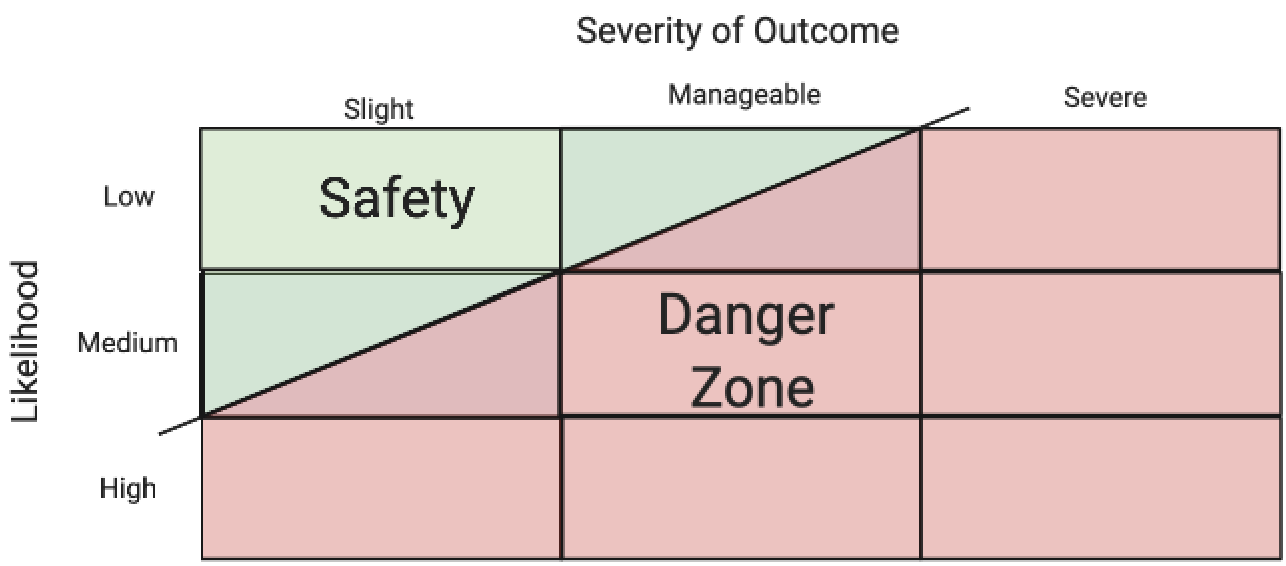
A Model for Evaluating Legal Risk

This section seeks to provide a simple, non-mathematical model for evaluating legal risk. A “model” is a simplified framework for evaluating a real-life situation. It is not intended to capture all of the nuances involved in a particular choice, but it may be useful to decision makers. The model presented here relies on simple categorization of the likelihood of an event, the consequences of that event, and the decisionmaker’s approach to evaluating risk.

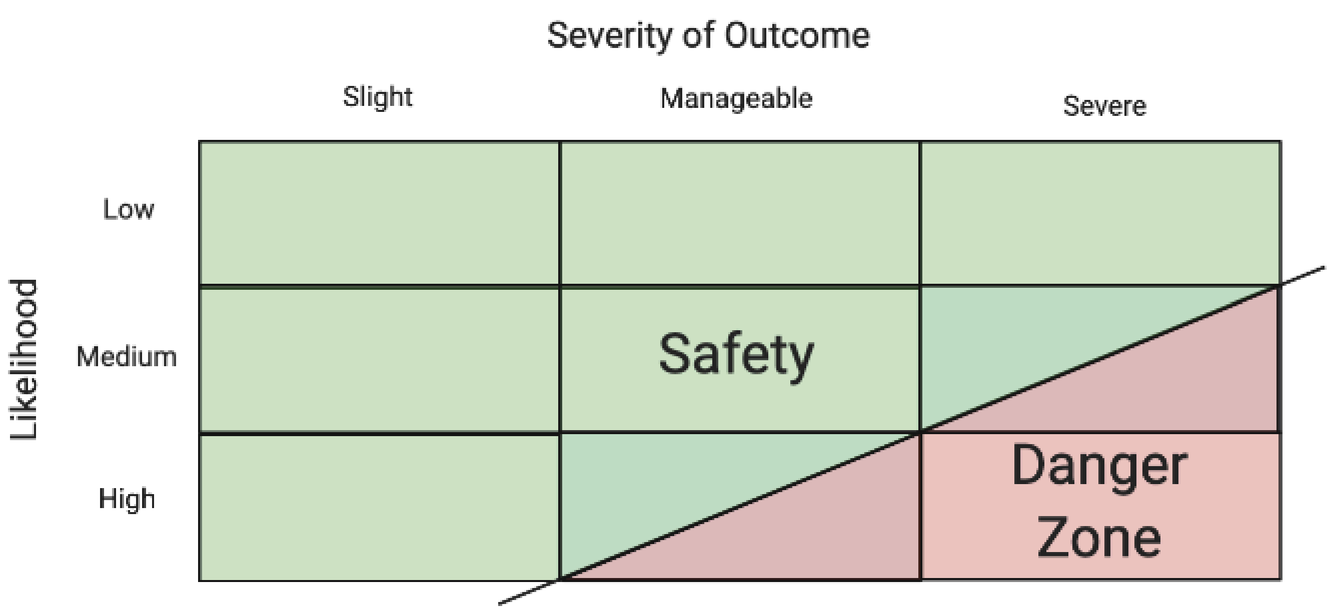
The initial step is to evaluate the likelihood of the event to determine if it is “low” (unlikely), “medium” (somewhat likely), or “high” (very likely). For example, you might think of a low probability event as one that rarely occurs in a cohort of similar companies, a medium probability event as one that has occurred several times in the last year for similar companies, and a high probability event as one that will almost certainly result in litigation.

Next, categorize the severity of the outcome as “slight”, “manageable”, or “severe”. For modeling purposes, a slight outcome is one which would not harm the financial health of the company in a significant way. An example might be a somewhat frivolous lawsuit which is settled as a “nuisance suit” for a few thousand dollars. A manageable outcome is one which would generate discussion among managers about potential budgets for a loss, such as a small-business customer injured in an accident who has major medical bills. This kind of outcome might worry managers but does not risk the future of the business. A severe outcome is one which risks bankruptcy, criminal charges, or other substantial long-term consequences for the firm.

Finally, identify the attitude towards risk. Is the firm risk averse, risk neutral, or risk seeking? In our model, the attitude towards risk forms the shaded “danger zone” in the grid, dividing causes of little from significant concern. The more risk averse the individual or firm, the farther up and to the left we shift the dividing line, and the more risk-seeking the firm, the farther lower and to the right we shift the line. An extremely risk adverse firm would avoid even low probability severe events (as shown in the first figure below), while an extremely risk-seeking firm might avoid only high probability severe events (as shown in the second figure below).



A highly risk averse firm avoids the possibility of severe legal outcomes.



A risk seeking firm might avoid only the most likely and severe legal consequences.

Applying this model might look something like the following. We (1) classify the risk tolerance of the firm, (2) then the likelihood of the legal event, and (3) the severity of the consequence. Finally, (4) we analyze how those three interact and offer a conclusion: is this a high-risk decision, in the legal danger zone, or a low-risk decision, in the zone of safety?

Suppose a ride-sharing firm was considering whether to expand to a city that has somewhat hostile regulations for ridesharing. At the same time, the consequences for entering the market and losing a legal challenge are simply to withdraw or pay an insubstantial fine. Let's apply the model:

- We might thus classify this firm as *risk seeking* based on its past attitude towards the law and the potential rewards at stake.
- As the new market appears hostile, the likelihood of legal challenge is assessed to be medium or high.
- Relative to the size of the firm, a modest fine is a small consequence. We might then classify the severity of outcome as low.
- Although the likelihood of legal action is medium to high, the potential consequence is slight.
- This decision is likely a low-risk legal decision, in the legal safety zone for the firm. They might also be classified as *risk-neutral* because the company simply finds it advantageous to engage in legally risky behaviour.

Mitigating and Managing Legal Risk

Organizations seek to reduce the legal risks they have identified and assessed. Reducing legal risk exposure may be referred to as risk mitigation. It is worthwhile to highlight some potential methods to mitigate legal risk which may be overlooked or undervalued:

INSURANCE

Both individuals and businesses have significant needs for various types of insurance, to provide protection for health care, for their property, and for legal claims made against them by others. Insurance allows individuals to pay a certain amount today to avoid uncertain losses in the future.

Businesses face a host of risks that could result in substantial liabilities. Many types of policies are available, including policies for owners, landlords, and tenants (covering liability incurred on the premises); for manufacturers and contractors (for liability incurred on all premises); for a company's products and completed operations (for liability that results from warranties on products or injuries caused by products); for owners and contractors (protective liability for damages caused by independent contractors engaged by the insured); and for contractual liability (for failure to abide by performances required by specific contracts). Depending on the business context, insurance may be required by law, or it may be a viable risk management application that businesses should consider and review regularly.

REGULATORY REVIEW

Many firms find it worthwhile to preemptively hire an attorney to review products for regulatory and litigation risk before launching the product. For a fee, a specialized attorney can examine the product and provide a report on potential regulatory violations and lawsuit risks. Many firms might be surprised at the substantial increased risk of litigation based on innocuous statements on packaging, for instance.

LIMITATION AND EXCLUSION CLAUSES AND SAFETY PROTOCOLS

The use of liability waivers, exclusion clauses, hardship clauses (f*orce majeure*), warning labels, caution signs, safety rails, and related activities can help prevent litigation. Liability waivers may reduce litigation risk by requiring that individuals specifically agree they will not sue in case of injury during an activity as long as such limitation and exclusion clauses are not contrary to public policy or are unconscionable. Physical safeguards against injury can help reduce the probability of potential negligence lawsuits by preventing injury in the first place. Businesses that practice prudent preemptive tort defense can lower their legal risks substantially.

KNOWING THE LAW

Another way to reduce legal risk is to simply be familiar with the law. An attorney will not always be around to consult, or it may be cost-prohibitive to use their services at times. The law is vast and complicated, but many legal concepts foundational to business are easy to understand.

The more one knows about the law, the easier it is to avoid compromising legal situations, to be

conversant with those that can offer legal counsel, and to make decisions that balance legal and ethical interests with other strategic concerns.

Key Takeaways

- Approaching law from a risk management approach is crucial to evaluate the legal environment of business.
- Evaluating legal risk requires understanding the likelihood of legal action, the severity of the consequences, and the risk tolerance level of the company. Even low probability legal events can be so severe that risk averse firms should take action to avoid them, while even high probability legal events may not bother risk seeking firms.
- Preemptively avoiding tort liability (employing smart contracting principles) and enacting safety messaging and protocols can help to avoid business risks. Insurance against legal claims can also reduce uncertainty, at a price.

An Introduction to Mathematics of Risk

As we consider uncertainty, we may use rigorous quantitative studies of chance, the recognition of its empirical regularity in uncertain situations. Many of these methods are used to quantify the occurrence of uncertain events that represent intellectual milestones. As we create models based upon probability and statistics, you will likely recognize that probability and statistics touch nearly every field of study today. Our discussion of these probabilities will focus on simple calculations for illustrative purposes.

First, we need to learn the idea of expected monetary value. The expected value of a situation is the sum of the probabilities of certain events multiplied by the numbers associated with those events.

For instance, supposed we played a game in which a coin flip landing heads paid out $10, and a coin flip landing tails paid out $0. Assuming a fair coin, the expected value of the game is 0.5 * $10 + 0.5 * $0 = $5. Using this information, if I charged you less than $5 to play, you might consider it a good deal, as "in expectation" you would make money from the game. If I charged you more, say $9, to play, you might consider it a bad deal, because "in expectation" you will only receive $5 back. Of course, you might get lucky, flip heads, and make a dollar on the game (the $10 payout for heads minus the $9 cost to play), but many people would not find this to be a compelling wager.

Now, consider if the game changed in two ways. First, change the payouts to $1000 for heads and $0 for tails, the amount you'd likely pay to play the game would increase. What you might have considered an unwise investment at $9 now seems like a great deal. This is because the expected value has changed from 0.5 * $10 + 0.5 * $0 = $5 to 0.5 * $1,000 + 0.5 * $0 = $500.

Finally, if the probabilities associated with the game changed, you might also change your mind about playing. Suppose instead of using a fair coin, the coin used landed on heads 90% of the time (and since probabilities must sum to 100%, it means the chance of tails becomes 10%). Now the expected value associated with the game becomes 0.9 * $1,000 + 0.1 * $0 = $900. You might be willing to pay a substantial sum to play this kind of game.

Expected value calculations are not limited to coin flips. If we have more than two potential outcomes, we can just add up those outcomes multiplied by the probabilities, making sure the probabilities sum to 100%. For example, suppose a firm was considering using a particular trademark that might possibly infringe on another's mark. The firm thinks there is a 50% chance that the other firm won't care about it and the company will reap $50,000 in additional profits from using the mark, a 20% chance the other firm will win a lawsuit for $100,000, and a 30% chance the other firm will sue but lose, costing the firm only $10,000 in attorney fees. The expected value from using the trademark is 0.5 * $50,000 + 0.2 * ($50,000-$100,000) + 0.3 * ($50,000-$10,000) = $27,000. As the expected profit is greater than zero, perhaps the firm should consider proceeding. If the profit expected from the mark were less than zero, then perhaps the firm should revisit the trademark and come up with something new.

In the next section, we will offer a technique that attempts to quantify how firms view this decision.

It is important to note that the calculated expected value does not represent the actual outcome of a decision, since only one outcome will occur. It is used to inform decision-making when more than one outcome is possible.

UTILITY THEORY

There is a simple way to adjust our expected value calculation from the last section to incorporate attitude towards risk. We do it by drawing on a bit of economics called utility theory and then weighting the probabilities in our expected value calculations.

Utility theory bases its beliefs upon individuals' preferences. It is a theory postulated in economics to explain behaviour of individuals based on the premise people can consistently rank order their choices depending upon their preferences. Each individual will show different preferences, which appear to be hard-wired within each individual. We can thus infer that individuals' preferences are intrinsic. Any theory, which proposes to capture preferences, is, by necessity, abstraction based on certain assumptions. Utility theory is a positive theory that seeks to explain the individuals' observed behaviour and choices.

This contrasts with a normative theory, one that dictates that people should behave in the manner prescribed by it. Instead, it is only since the theory itself is positive, after observing the choices that individuals make, we can draw inferences about their preferences.

When we place certain restrictions on those preferences, we can represent them analytically using a utility function—a mathematical formulation that ranks the preferences of the individual in terms of satisfaction different consumption bundles provide. Thus, under the assumptions of utility theory, we can assume that people behaved as if they had a utility function and acted according to it. Therefore, the fact that a person does not know his/her utility function, or even denies its existence, does not contradict the theory. Economists have used experiments to decipher individuals' utility functions and the behaviour that underlies individuals' utility. If you've studied economics, you will recognize that we are simplifying a vast amount of theory in this section, but our aim is to provide a framework for legal analysis.

The key to utility theory is to recognize that people will value the same good in different ways. For example, dining out at an Italian restaurant may provide a tremendous amount of utility for some people but very little for others. The dining experience might convey 1,000 "utils" worth of enjoyment for me, but only 100 "utils" of enjoyment for you. Similarly, watching a ballet might convey thousands of "utils" worth of enjoyment to you, but negative "utils" of enjoyment for me. In general, the higher the utility from an activity, the greater one's willingness to pay for it.

EXPECTED VALUE CALCULATIONS WITH UTILITY

We can use the concept of utility to provide further guidance for companies facing legal decisions. The key is that we use probabilities multiplied by utilities in our expected value calculation, rather than probabilities multiplied by financial outcomes alone. For instance, consider our trademark example from above, but now assume that the firm only has $75,000 in assets, so losing a lawsuit for $100,000 will bankrupt the company.

Nobody at the company wants to risk bankruptcy, and so our simple calculation from above needs to be modified. Recall, the firm thinks there is a 50% chance that the other firm won't care about it, a 20% chance the other firm will win a lawsuit for $100,000, and a 30% chance the other firm will sue but lose, costing the firm $10,000 in attorney fees. The expected value from using the trademark we calculated above was 0.5 * $50,000 + 0.2 * ($50,000-$100,000) + 0.3 * ($50,000-$10,000) = $27,000.

Let's change this from dollars to "utils". We will use functional notation, which uses **u(x)** to denote the utility from x. Here, let's assume that u($50,000) = 500, that is the company derives 500 in utils from making $50,000, as they are able to use the new mark without trouble. Let's also assume that u($50,000-$100,000) = -2,000 utils, as the company is very afraid of bankruptcy, and so they weight that risk much higher than the monetary loss alone, and that u($50,000-$10,000) = 400 utils, as the company wouldn't like that outcome but doesn't risk bankruptcy. Our expected value calculation is now 0.5 u($50,000) + 0.2 u($50,000 – $100,000) + 0.3 u($50,000 – $10,000) = 0.5

* 500 utils + 0.2 * (-2,000 utils) + 0.3 * 400 utils = -30 utils. Under this calculation, the huge risk of bankruptcy leads to a negative utility so the firm will likely avoid using the trademark.

A firm that puts greater weight on losses is a risk-averse firm, such as in the example above. They will shy away from risky situations. A firm that puts greater weight on gains, such as a venture capital firm, will engage in greater risk. For example, suppose a firm valued profits more than potential losses, as bankruptcy was common in the industry and would not scare future investors. Their expected utility from using the trademark might be 0.5 u($50,000) + 0.2 u($50,000 – $100,000) + 0.3 u($50,000 – $10,000) = 0.5 * 500 utils + 0.2 * 0 utils + 0.3 * 400 utils = 370 utils. This firm would be much more likely to proceed with using the trademark.

Finally, a firm might be risk neutral. In that case, they would value the utility from gains and losses at the monetary value alone. In this case, u($1) = 1, u($5) = 5, and so on. For this firm, the utility from the trademark transaction is simply the expected value of the monetary gains and losses. For them, 0.5 u($50,000) + 0.2 u($50,000 – $100,000)+ 0.3 u($50,000 – $10,000) = 0.5 * 50,000 utils + 0.2 * (-50,000 utils) + 0.3 * (-40,000 utils) = 27,000 utils. Thus, the calculations for a risk neutral firm are the simplest of the three.

Alternative Dispute Resolution (ADR) Processes for Mitigating Risk

NEGOTIATION

We frequently engage in negotiations as we go about our daily activities, often without being consciously aware that we are doing so. Negotiation can be simple, e.g., two friends deciding on a place to eat dinner, or complex, e.g., governments of several nations trying to establish import and export quotas across multiple industries. When a formal proceeding is started in the court system, alternative dispute resolution (ADR), or ways of solving an issue with the intent to avoid litigation, may be employed. Negotiation is often the first step used in ADR. While there are other forms of alternative dispute resolution, negotiation is considered to be the simplest because it does not require outside parties. A Government of Canada webpage defines 'negotiation" as: "…a discussion between at least two parties that leads to an outcome of a certain issue." (https://www.canada.ca/en/heritage-information-network/services/intellectual-property-copyright/guide-developing-digital-licensing-agreement-strategy/win-win-negotiations.html)

This is an uncomplicated definition that captures a fundamental feature of negotiation – it is undertaken with an intention to lead to an outcome. There are several ways of thinking about negotiation, including how many parties are involved. For example, if two small business owners find themselves in a disagreement over property lines, they will frequently engage in *dyadic* negotiation. Put simply, dyadic negotiation involves two individuals interacting with one another to resolve a dispute. If a third neighbour overhears the dispute and believes one or both of them are wrong about the property line, then group negotiation could ensue. Group negotiation involves more than two individuals or parties, and by its very nature, it is often more complex, time-consuming, and challenging to resolve.

While dyadic and group negotiations may involve different dynamics, one of the most important aspects of any negotiation, regardless of the quantity of negotiators, is the objective. Negotiation experts recognize two major goals of negotiation: relational and outcome. Relational goals are focused on building, maintaining, or repairing a partnership, connection, or rapport with another party. Outcome goals, on the other hand, concentrate on achieving certain end results. The goal of any negotiation is influenced by numerous factors, such as whether there will be contact with the other party in the future. For example, when a business negotiates with a supply company that it intends to do business within the near future, it will try to focus on "win-win" solutions that provide the most value for each party. In contrast, if an interaction is of a one-time nature, that same company might approach a supplier with a "win-lose" mentality, viewing its objective as maximizing its own value at the expense of the other party's value. This approach is referred to as *zero-sum negotiation*, and it is considered to be a "hard" negotiating style. Zero-sum negotiation is based on the notion that there is a "fixed pie," and the larger the slice that one party receives, the smaller the slice the other party will receive. Win-win approaches to negotiation are sometimes referred to as integrative, while win-lose approaches are called distributive.

Negotiation Style

Everyone has a different way of approaching negotiation, depending on the circumstance and the person's personality. However, the Thomas-Kilmann Conflict Mode Instrument (TKI) is a questionnaire that provides a systematic framework for categorizing five broad negotiation styles. It is closely associated with work done by conflict resolution experts Dean Pruitt and Jeffrey Rubin. These styles are often considered in terms of the level of self-interest, instead of how other negotiators feel. These five general negotiation styles include:

- **Forcing**. If a party has high concern for itself, and low concern for the other party, it may adopt a competitive approach that only takes into account the outcomes it desires. This negotiation style is most prone to zero-sum thinking. For example, a car dealership that tries to give each customer as little as possible for his or her trade-in vehicle would be applying a forcing negotiation approach.
  While the party using the forcing approach is only considering its own self-interests, this negotiating style often undermines the party's long-term success. For example, in the car dealership example, if a customer feels she has not received a fair trade-in value after the sale, she may leave negative reviews and will not refer her friends and family to that dealership and will not return to it when the time comes to buy another car.
- **Collaborating**. If a party has high concern and care for both itself and the other party, it will often employ a collaborative negotiation that seeks to maximum the gain for both. In this negotiating style, parties recognize that acting in their mutual interests may create greater value and synergies.
- **Compromising**. A compromising approach to negotiation will take place when parties share some concerns for both themselves and the other party. While it is not always possible to collaborate, parties can often find certain points that are more important to one versus the other, and in that way, find ways to isolate what is most important to each party.
- **Avoiding**. When a party has low concern for itself and for the other party, it will often try to avoid negotiation completely.
- **Yielding**. Finally, when a party has low self-concern for itself and high concern for the other party, it will yield to demands that may not be in its own best interest. As with avoidance techniques, it is important to ask why the party has low self-concern. It may be due to an unfair power differential between the two parties that has caused the weaker party to feel it is futile to represent its own interests. This example illustrates why negotiation is often fraught with ethical issues.

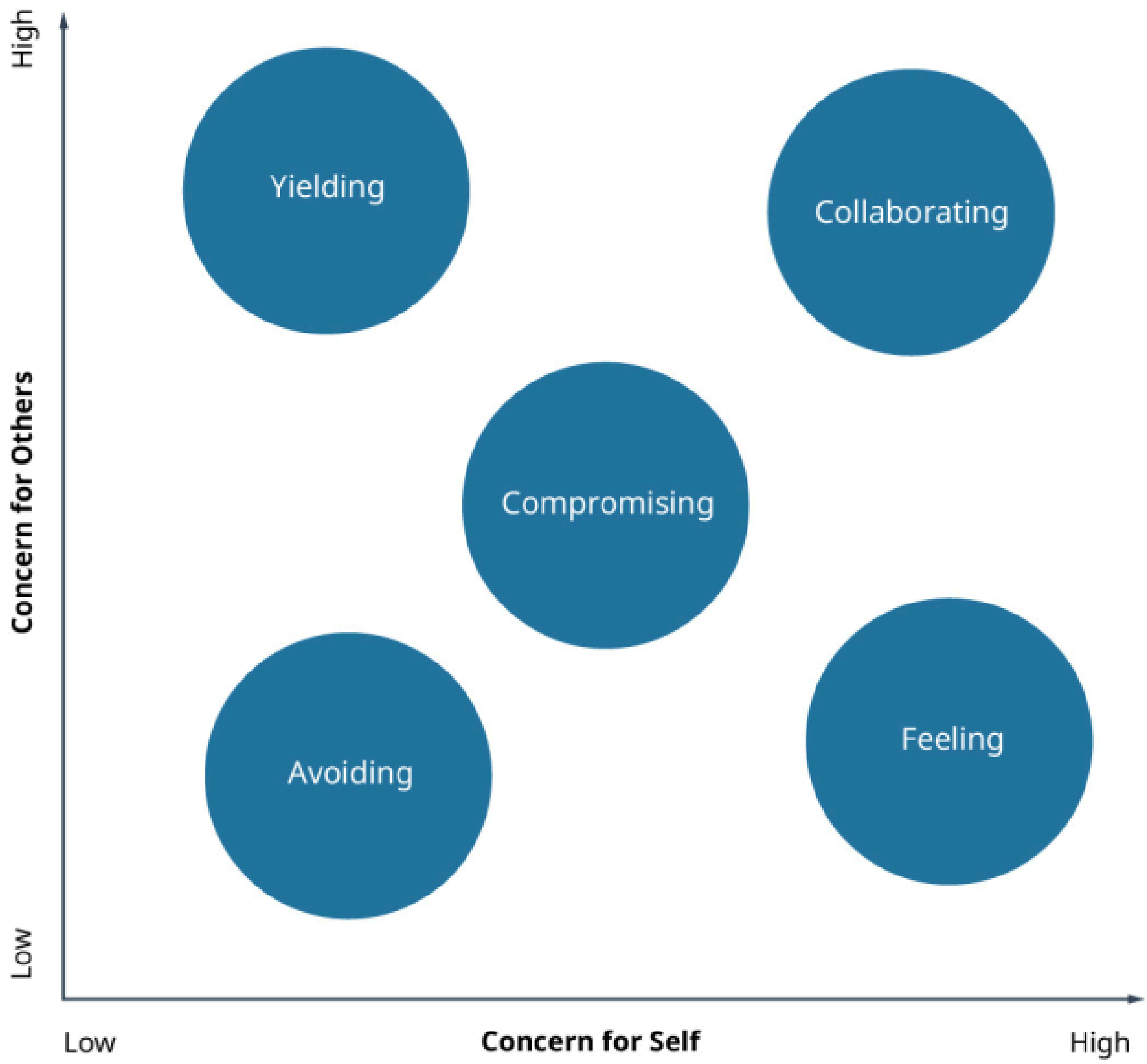


Figure 2.3 Concern for self vs. others leads to the differences in negotiating styles. (Modification of art by BNED/Rubin Credit: CC BY NC SA)

Negotiation Limitations

In a negotiation, there is no neutral third party to ensure that rules are followed, that the negotiation strategy is fair (the parties involved may have unequal bargaining power), or that the overall outcome is sound. Moreover, any party can walk away whenever it wishes. There is no guarantee of realizing an intended outcome.

MEDIATION

Mediation is a method of dispute resolution that relies on an impartial third-party decision-maker, known as a mediator, to settle a dispute. While requirements vary by location or jurisdiction, a mediator is someone who has been trained in conflict resolution, though, he or she may not have any expertise in the subject matter that is being disputed. Mediation is a form of dispute resolution. It is often undertaken because it can help disagreeing parties avoid the time-consuming and expensive procedures involved in court litigation. Courts will often recommend that a plaintiff, or the party initiating a lawsuit, and a defendant, or the party that is accused of wrongdoing, attempt mediation before proceeding to trial. This recommendation is especially true for issues that are filed in small claims courts, where judges attempt to streamline dispute resolution.

For businesses, the savings associated with mediation can be substantial. Mediation is distinguished by its focus on solutions. Instead of focusing on discoveries, testimonies, and expert witnesses to assess what has happened in the past, it is future-oriented. Mediators focus on generating approaches to disputes that overcome obstacles to settlement.

Benefits of Mediation

- **Confidentiality**. Since court proceedings become a matter of public record, it can be advantageous to use mediation to preserve anonymity. This aspect can be especially important when dealing with sensitive matters, where one or both parties feels it is best to keep the situation private. Discussions during a mediation are not admissible as evidence if the parties proceed to litigation.
- **Creativity**. Mediators are trained to find ways to resolve disputes and may apply outside-the-box thinking to suggest a resolution that the parties had not considered. Since disagreeing parties can be feeling emotionally contentious toward one another, they may not be able to consider other solutions. In addition, a skilled mediator may be able to recognize cultural differences between the parties that are influencing the parties' ability to reach a compromise, and thus leverage this awareness to create a novel solution.
- **Control**. When a case goes to trial, both parties give up a certain degree of control over the outcome. A judge may come up with a solution to which neither party is in favor. In contrast, mediation gives the disputing parties opportunities to find common ground on their own terms, before relinquishing control to outside forces. Parties often enter into a legally binding contract that embodies the terms of the resolution immediately after a successful mediation. Therefore, the terms of the mediation can become binding if they are reduced to a contract.

Successful mediators work to immediately establish personal rapport with the disputing parties. They often have a short period of time to interact with the parties and work to position themselves as a trustworthy facilitator. The mediator's conflict resolution skills are critical in guiding the parties toward reaching a resolution.

ARBITRATION

According to the Government of Canada "Dispute Resolution Reference Guide": "Arbitration is perhaps the most widely known dispute resolution process. Like litigation, arbitration utilizes an adversarial approach that requires a neutral party to render a decision." (https://justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html).

Arbitration is overseen by a neutral arbitrator, or an individual who is responsible for deciding on how to resolve a dispute and who can decide on an award, or a course of action that the arbiter believes is fair, given the situation. An award can be a monetary payment that one party must pay to the other; however, awards need not always be financial in nature. An award may require that one business stop engaging in a certain practice that is deemed unfair to the other business. As distinguished from mediation, in which the mediator simply serves as a facilitator who is attempting to help the disagreeing parties reach an agreement, and arbitrator acts more like a judge in a court trial and often has legal expertise, although he or she may or may not have subject matter expertise. Many arbitrators are current or retired lawyers and judges.

Types of Arbitration Agreements

Parties can enter into either voluntary or involuntary arbitration. In voluntary arbitration, the disputing parties have decided, of their own accord, to seek arbitration as a way to potentially settle their dispute. Depending on provincial laws (each province and territory in Canada has its own separate arbitration legislation) and the nature of the dispute, disagreeing parties may have to attempt arbitration before resorting to litigation; this requirement is known as involuntary arbitration because it is forced upon them by an outside party.

Arbitration can be either binding or non-binding. In binding arbitration, the decision of the arbitrator(s) is final, and except in rare circumstances, neither party can appeal the decision through the court system. In non-binding arbitration, the arbitrator's award can be thought of as a recommendation; it is only finalized if both parties agree that it is an acceptable solution. Having a neutral party assess the situation may help disputants to rethink and reassess their positions and reach a future compromise.

Issues Covered by Arbitration Agreements

There are many instances in which arbitration agreements may prove helpful as a form of alternative dispute resolution. While arbitration can be useful for resolving family law matters, such as divorce, custody, and child support issues, in the domain of business law, it has three major applications:

- **Labour.** Arbitration has often been used to resolve labour disputes through interest arbitration and grievance arbitration. Interest arbitration addresses disagreements about the terms to be included in a new contract, e.g., workers of a union want their break time increased from 15 to 25 minutes. In contrast, grievance arbitration covers disputes about the implementation of existing agreements. In the example previously given, if the workers felt they were being forced to work through their 15-minute break, they might engage in this type of arbitration to resolve the matter.

- **Business Transactions**. Whenever two parties conduct business transactions, there is potential for misunderstandings and mistakes. Both business-to-business transactions and business-to-consumer transactions can potentially be solved through arbitration. Any individual or business who is unhappy with a business transaction can attempt arbitration.

- **Property Disputes**. Business can have various types of property disputes. These might include
- disagreements over physical property, e.g., deciding where one property ends and another begins, or intellectual property, e.g., trade secrets, inventions, and artistic works.

- Typically, civil disputes, as opposed to criminal matters, attempt to use arbitration as a means of dispute resolution. While definitions can vary across jurisdictions, a civil matter is generally one that is brought when one party has a grievance against another party and seeks monetary damages. In contrast, in a criminal matter, a government pursues an individual or group for violating laws meant to establish the best interests of the public.

Ethics of Commercial Arbitration Clauses

Going to court to solve a dispute is a costly endeavour, and for large companies, it is possible to incur millions of dollars in legal expenses. While arbitration is meant to be a form of dispute resolution that helps disagreeing parties find a low-cost, time-efficient solution, it has become increasingly important to question whose expenses are being lowered, and to what effect. Many consumer advocates are fighting against what are known as forced-arbitration clauses, in which consumers agree to settle all disputes through arbitration, effectively waiving their right to sue a company in court. Some of these forced arbitration clauses cause the other party to forfeit their right to appeal an arbitration decision or participate in any kind of class action lawsuit, in which individuals who have a similar issue sue as one collective group.

Arbitration Procedures

When parties enter into arbitration, certain procedures are followed although not all arbitration agreements have the same procedures. It depends on the types of agreements made in advance by the disputing parties. Typically, the initial step identifies the number of arbitrators needed, along with how they will be chosen. Parties that enter into willing arbitration may have more control over this decision, while those that do so unwillingly may have a limited pool of arbitrators from which to choose. In the case of willing arbitration, parties may decide to have three arbitrators, one chosen by each of the disputants and the third chosen by the elected arbitrators. Next, a timeline is established, and evidence is presented by both parties. Since arbitration is less formal than court proceedings, the evidence phase typically goes faster than it would in a courtroom setting. Finally, the arbitrator will decide and inform the parties in writing of the award.

Judicial Enforcement of Arbitration Awards

While it might seem that the party that is awarded a settlement by an arbitrator has reason to be relieved that the matter is resolved, sometimes this decision represents just one more step toward actually receiving the award. While a party may honor the award and voluntarily comply, this outcome is not always the case. In cases where the other party does not comply, the next step is to petition the court to enforce the arbitrator’s decision. This task can be accomplished by numerous mechanisms, depending on the governing laws.

Conclusion

Legal risks related to business are often costly, time consuming, and challenging in ways that are difficult to overcome (reputational risk is one example). Understanding the nature of potential risks and developing procedures to avoid or attenuate the effects is fundamentally important for most, if not all, businesses.

Litigation may be necessary to resolve certain issues or clarify ambiguous contracts, but is very often an unpredictable and expensive way to deal with disputes. Negotiation, mediation, and arbitration are often described and considered together as alternative dispute resolution (ADR) processes. While negotiation occurs across all forms of ADR, mediation and arbitration typically involve independent, experienced professionals who are enlisted to assist in managing contentious disagreements. Mediators and arbitrators apply different tools and practices but both approaches are focused on assisting parties to arrive at an understanding that avoids court proceedings.

Arbitration is a form of private dispute resolution where an impartial third party (the arbitrator) considers all sides of a dispute and renders a binding decision. In mediation, a neutral third party (the mediator) assists the parties involved in a dispute to communicate more effectively with a view towards exploring and accessing resolution options. In both cases, the parties involved in the dispute have more control over the outcome, as compared to litigation.

Arbitration and mediation are often faster, less expensive, and more private than litigation. Additionally, the use of ADR can help businesses protect their reputations, maintain good relationships with other parties and avoid the unpredictability of court decisions. Staying current with federal and provincial laws associated with negotiation and ADR proceedings is essential for businesses looking to minimize exposure to legal risks and maximize their relational and outcome goals.

Cases of Interest

Arbitration clauses within contracts are regularly included as a means to reduce risk for businesses but the following case identifies some important limitations and considerations when developing arbitration clauses:

- Unconscionability of Arbitration Clause: Uber Technologies Inc v. Heller (SCC, 2020) – https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do

Additional Resources

- Government of Canada Dispute Resolution Reference Guide – https://justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html
- Canadian Chamber of Commerce ICC Arbitration FAQ – https://chamber.ca/arbitration-faq/
- ADR Institute of Canada – https://adric.ca/

3. BUSINESS ETHICS AND SOCIAL RESPONSIBILITY

INTRODUCTION

Doing good business requires attention to ethics as well as law. Understanding the long-standing perspectives on ethics is helpful in sorting out the ethical issues that face us as individuals and businesses. Each business needs to create or maintain a culture of ethical excellence, where there is ongoing dialogue not only about the best technical practices but also about the company's ethical principles and practices. A firm that has purpose and passion beyond profitability is best poised to meet the needs of diverse stakeholders and can best position itself for long-term, sustainable success for shareholders and other stakeholders as well.

Learning Outcomes:

- Analyze the role of ethics and social responsibility in business.

Business Ethics

Businesses must establish a clear set of values that promote ethical practices and social responsibility. In today's business climate, companies are increasingly under scrutiny by private citizens. A company that builds its foundation on sound principles will have a better chance of staying competitive in a volatile market.

Figure 1 – A group of employees who uphold strong corporate values can be an asset to the company they work for. (Credit: rawpixel/ pexels/ License: CC0)

Ethics consist of the values and principles that guide and influence the ways in which we interact with others. From a business perspective, ethical standards signal to customers, clients, employees, investors, and other stakeholders the conduct and behaviours the organization expects, supports, and endorses. Stephen M. Byars explains:

"Ethics consists of the standards of behaviour to which we hold ourselves in our personal and professional lives. It establishes the levels of honesty, empathy, and trustworthiness and other virtues by which we hope to identify our personal behaviour and our public reputation. Ethics are the standards of behaviour to which we hold ourselves accountable in our personal and professional lives. Laws and regulations set the minimal standards by which society lives out those ethical norms. Because laws are minimal standards, it is not uncommon for an act to be legal but generally deemed unethical. The fact is that law and ethics are not always the same. Always, however, they are in dialogue, and each informs the other." – Byars, S.M., Stanberry, K. Business Ethics. 2018. OpenStax, Rice University. CC BY 4.0.

For many people, it is far from easy to recognize an ethical problem and know how to proceed. Even in situations where a clear process exists to report an ethical issue, a perceived lack of support within an organization or business may serve to discourage disclosure. Reporting an ethical breach can have implications beyond the immediate and obvious ones, so it can be difficult to understand the full consequences of a particular decision which may make people uneasy and reluctant to act. Add to this the complexity and variability within organizations, where individuals and groups of employees vary in their motivations, loyalties, commitments, and values and it becomes evident that unambiguous processes and internal supports are important elements for creating and maintaining business ethics. There is no universally accepted way for developing an organization where employees feel valued, respected, and supported; where the actions of leaders are explicit; and where all the employees feel loyal and accountable to one another, so exploring and applying processes and practices that work well within the context of the business is essential.

Three Considerations:

1. Although morals and ethics are not precisely measurable, people generally have similar reactions about what actions or conduct can rightly be called ethical or moral.
2. It is generally the case that people appreciate and need ethical codes, practices and perspectives.
3. Saying that someone or some organization is law-abiding does not mean the same as saying a person or company is ethical. Laws should be ethical and principled, but it is not always the case.

Business ethics are foundational for building a successful organization. If an organization is built on socially responsible values, it will be stronger than an organization that is built on profit alone. More than just a positive reputation, the core ethics of a business dictate how every decision, process, and procedure will take place. Promotion of and adherence to ethical codes of conduct should be embedded in and expressed through the organizational culture and the way in which business is conducted both internally and externally.

How Do Law and Ethics Differ?

There is a difference between legal compliance and moral excellence. Business ethicists have talked for years about the intersection of law and ethics. Simply put, what is legal is not necessarily ethical. Conversely, what is ethical is not necessarily legal. There are lots of legal maneuvers that are not all that ethical; the well-used phrase "legal loophole" suggests as much.

Here are two propositions about business and ethics. Consider whether they strike you as true or whether you would need to know more in order to make a judgment.

Proposition 1:

Individuals and organizations have reputations. (For an individual, moral reputation is most often tied to others' perceptions of his or her character: is the individual honest, diligent, reliable, fair, and caring? The reputation of an organization is built on the goodwill that suppliers, customers, the community, and employees feel toward it.

Although an organization is not a person in the usual sense, the goodwill that people feel about the organization is based on similar perceptional impressions and indicators.

Proposition 2:

The goodwill of an organization is to a great extent based on the actions it takes and on whether the actions are viewed in a positive light. This goodwill is usually specifically counted in the sale of a business as an asset that the buyer pays for. While it is difficult to place a monetary value on goodwill, a firm's good reputation will generally call for a higher evaluation in the final accounting before the sale. Legal troubles or a reputation for having legal troubles will only lessen the price for a business and will even lessen the value of the company's stock as negative legal news comes to the public's attention.

Another reason to think about ethics in connection with law is that the laws themselves are meant to express some moral view. If there are legal prohibitions against cheating an organization, it is because people (legislators or their agents) have collectively decided that cheating an organization is wrong. Thus, the law provides some important cues as to what society regards as right or wrong.

Finally, important policy issues that face society are often resolved through law, but it is important to understand the moral perspectives that underlie public debate. Some ethical perspectives focus on rights, some on social utility, some on virtue or character, and some on social justice.

People consciously (or, more often, unconsciously) adopt one or more of these perspectives, and even if they completely agree on the facts with an opponent, they may not change their views. Fundamentally, the difference comes down to incompatible moral perspectives, a clash of basic values. Understanding the varied moral perspectives and values in public policy debates is a clarifying benefit in following or participating in these important discussions.

Why Should an Individual or a Business Entity Be Ethical?

The usual answer is that ethics is good business. In the long run, businesses that pay attention to ethics as well as law do better; they are viewed more favourably by customers. But this is a difficult claim to measure scientifically, because "the long run" is an indistinct period of time and because there are as yet no generally accepted criteria by which ethical excellence can be measured. In addition, life is still lived in the short run, and there are many occasions when something short of perfect conduct is a lot more profitable.

Maximizing profits while being legally compliant is not a very inspiring goal for a business. People in an organization need some quality or excellence to strive for. By focusing on pushing the edge of what is legal, by looking for loopholes in the law that would help create short-term financial gain, organizations have often learned that in the long term they are not actually satisfying the market, the shareholders, the suppliers, or the community. Legal compliance is not the same as acting ethically. Your reputation, individually or organizationally, depends on how others regard your actions. Goodwill is challenging to measure or quantify, but it is a significant factor in business relationships and can best be protected by acting ethically.

An Ethical Decision Model: Josephson's Core Values Model

When confronted by a decision that involves ethical judgment, Michael Josephson (founder of the *Joseph and Edna Josephson Institute of Ethics*) advises asking as many questions as necessary to obtain a full view of the relevant facts.

Then, assuming you have all the needed information, the decision process is as follows:

1. Identify the stakeholders (who might gain or lose based on the decisions being considered)?
2. Identify several likely or reasonable decisions that could be made.
3. Assess which stakeholders gain or lose with each decision.
4. Determine which decision satisfies the greatest number of core values.
5. If there is no decision that satisfies the greatest number of core values, try to determine which decision delivers the greatest good to the various stakeholders. It is often helpful to identify who (or what group) is the most important stakeholder, and why.

The Core Values

Here are the core values and their subcomponents as developed by the ***Josephson Institute of Ethics*.**

- **Trustworthiness:** Be honest; be sincere, forthright; don't deceive, mislead, or be tricky with the truth; don't cheat or steal, and don't betray trust. Demonstrate integrity—stand up for what you believe, walk the walk as well as talking the talk; be what you seem to be; show commitment and courage. Be loyal—stand by your family, friends, co-workers, community, and nation; be discreet with information that comes into your hands; don't spread rumors or engage in harmful gossip; don't violate your principles just to win friendship or approval; don't ask a friend to do something that is wrong. Keep promises—keep your word, honor your commitments, and pay your debts; return what you borrow.
- **Respect:** Judge people on their merits, not their appearance; be courteous, polite, appreciative, and accepting of differences; respect others' right to make decisions about their own lives; don't abuse, demean, mistreat anyone; don't use, manipulate, exploit, or take advantage of others.
- **Responsibility:** Be accountable—think about the consequences on yourself and others likely to be affected before you act; be reliable; perform your duties; take responsibility for the consequences of your choices; set a good example and don't make excuses or take credit for other people's work. Pursue

excellence: Do your best, don't quit easily, persevere, be diligent, make all you do worthy of pride. Exercise self-restraint—be disciplined, know the difference between what you have a right to do and what is right to do.

- **Fairness:** Treat all people fairly, be open-minded; listen; consider opposing viewpoints; be consistent; use only appropriate considerations; don't let personal feelings improperly interfere with decisions; don't take unfair advantage of mistakes; don't take more than your fair share.
- **Caring:** Show you care about others through kindness, caring, sharing, compassion, and empathy; treat others the way you want to be treated; don't be selfish, mean, cruel, or insensitive to others' feelings.
- **Citizenship:** Act with integrity; do your share, respect authority, stay informed, vote, protect your neighbors, pay your taxes; be charitable, help your community; protect the environment, conserve resources.

When individuals and organizations confront ethical problems, the core values decision model offered by Josephson generally works well (1) to clarify the gains and losses of the various stakeholders, which then raises ethical awareness on the part of the decision maker and (2) to provide a reliable guide as to what the most ethical decision would be. In nine out of ten cases, step 5 in the decision process is not needed.

That said, it does not follow that students (or managers) would necessarily act in accord with the results of the core values decision process. There are many psychological pressures and organizational constraints that place limits on people both individually and in organizations. These pressures and constraints tend to compromise ideal or the most ethical solutions for individuals and for organizations. For a business, one essential problem is that ethics can cost the organization money or resources, at least in the short term. Doing the most ethical thing will often appear to be something that fails to maximize profits in the short term or that may seem pointless because if you or your organization acts ethically, others will not, and society will be no better off, anyway.

Indigenous Ethics and Values:

Indigenous ethics focuses on trust and community – connecting to and valuing environmental, social, spiritual, ancestral relationships. While there is much diversity among Indigenous Peoples and Nations overall, Indigenous ethics resonate with the values of honour, trust, honesty, and humility; they reflect commitment to the collective and embody a respectful relationship with the natural world.

In Indigenous communities, the process of ethical thinking begins at birth with storytelling as the primary learning process. Storytelling is used to guide behaviour and solidify belonging and responsibility to the family, community, and larger world. Through stories, a child develops identity and learns about moral responsibility. Through stories, the community articulates and embraces its shared valued system or mindset. Ethical thinking emerges from a community's customs, teachings, and ideals.

Indigenous teachings involve notions of taking care of one another, collective decision-making, and sustainability. All are based on a value system that locates itself within the Anishinaabe seven grandfather sacred teachings. The sacred teachings of respect, bravery, honesty, humility, truth, wisdom, and love are significant guidelines that resonate in most Indigenous cultures. The teachings are represented by seven sacred animals each having a special gift to help the people understand and to maintain a connection to the land and to each other. The values embodied in the teachings coupled with storytelling, and articulated through Indigenous language, reinforce Indigenous ways of being and doing. In other words, fortifying ethical thinking lends itself to ethical practice.

In an analogous way, the story of an organization is embedded in the culture of the organization and it is that story which defines organizational norms and commitment to ethical practice and standards.

Why Is Corporate Ethics So Important in Business?

Few subjects are more contentious or important as the role of business in society, particularly, whether corporations have social responsibilities that are distinct from maximizing shareholder value. While the phrase "business ethics" is not oxymoronic (i.e., a contradiction in terms), there is plenty of evidence that businesspeople and firms seek to look out primarily for themselves. However, business organizations ignore the ethical and social expectations of consumers, employees, the media, nongovernment organizations (NGOs), government officials, and socially responsible investors at their peril. Legal compliance alone no longer serves the long-term interests of many companies, who find that sustainable profitability requires thinking about people and the planet as well as profits.

The idea of business ethics may seem subjective, but it comes down to acceptable levels of behaviour for everyone who makes up the organization. This behaviour must start at the top with responsible actions demonstrated by leadership. By doing so, leaders create and embody a set of rules and behaviours that are to be followed by others in the company. These rules and behaviours can be based on the deep values that the company has concerning the quality of products and services, the commitment to customers, or how the organization gives something back to the community. The more a company lives by its ethical practices, the more likely it is to be successful.

Anna Spooner, who writes for *LovetoKnow,* shares tips on how to evaluate whether or not an organization is creating ethical practices by determining the impact of each practice. Some examples include:

- **Executive compensation rates during employee layoffs.** Let's say a company is struggling during an economic downturn and must lay off a portion of its workforce. Does the CEO of the company take his or her annual raise or take a pay cut when others are losing their jobs? One could say that to take a raise is unethical because the CEO should also sacrifice some pay for the good of the company.
- **Fair compensation for employees.** Paying employees minimum wage, or just above minimum wage, is not always fair compensation. In most regions, the cost of living has not been adjusted in years, meaning that people are surviving on less money. Ethics can make a difference here.

Ethical business practices, guided by a corporate set of standards, can have many positive outcomes, including recruitment and retention improvement, better relationships with customers, and positive PR.

On the opposite side, unethical business behaviours can have a negative impact on any business. Even if an unethical decision is made by a single member of the executive team, it can have far-reaching repercussions.

Some possible results of unethical business actions may include:

- **Poor company reputation.** In an increasingly transparent world, unethical decisions made by businesspeople become permanent stains on the company. Social networks have become sounding boards for anything deemed unethical or politically incorrect, and everyone from disgruntled employees to dissatisfied customers can rate companies on public company review websites.
- **Negative employee relations.** If employees continually see a discrepancy between what's expected of

them and how leadership behaves, this contrast can create serious problems in the management of employees. Some employees may become disengaged, while others will stop working as hard. After all, if the same rules don't apply to everyone, why even bother? The downside to negative employee relations is that the entire company becomes less productive, less responsive to customers, and less profitable.

- **Recruitment and retention problems.** Once a company has developed a negative reputation, it can be difficult to recruit new talent, let alone retain the talent that's already there. Disengaged employees who grow tired of inconsistent standards and lack of commitment to fair, equitable, and inclusive practices will leave. This attrition can impact customers who then have to deal with less experienced and less interested employees, who are already overworked and frustrated.
- **Lost organizational credibility.** Customers are savvy enough to follow what's going on from an ethics standpoint. If they hear of a problem, they begin to question the actions of every person at the company. For example, if a member of the board is accepting expensive gifts from clients in exchange for favorable pricing of materials, this situation could set off major alarms for other customers, and even vendors. The company can expect to lose business if this unethical behaviour continues.

As you can see, poor ethics can quickly spiral downward, destroying every aspect of the business and making it very difficult to compete. It's critical for every business to pay attention to ethical standards and continually remind employees at all levels that their behaviour has an impact on the entire organization.

Establishing a Code of Conduct

To educate and guide others in the organization, a set of ethics, or a code of conduct, should be developed and distributed. A good code of conduct is a working document that can be updated and shared as needed. Many companies include this document as part of their employee manual, while others use a secure intranet for displaying this information. No matter where or how it is accessed, employees need to be educated about the code of conduct and refer to it regularly, beginning from their first day on the job.

What to Do When Something Goes Wrong

It should be noted that along with a code of conduct, there needs to be a clear "whistleblower" policy in which violators are identified and action is taken. This process should be handled with complete confidentiality and sensitivity to the company and all parties involved. Retaliation should never be tolerated when it comes to ethics violations. The company should have a step-by-step plan of action for dealing with ethics problems at all levels, up to and including the executive leadership of the company. A third-party investigative firm can be used to handle such matters to remove the burden and influence that internal resources may have.

Social Responsibility

Over the last few decades, there has been a movement throughout the global business community to improve the world through smarter use of resources and giving back to communities. This movement is called corporate social responsibility (CSR). The concept is catching on at companies that range in size from small startups to large Fortune 500 corporations. In the following section, you will learn what social responsibility is and how it is a win-win for businesses and consumers.

Figure 3.3 Employees often like to participate in volunteer activities through their employer. (Credit: rawpixel/ pixabay/ License: CC0)

What Is Corporate Responsibility?

Corporate responsibility refers to the idea that a business is given the opportunity and privilege to make the world a better place. This process can happen through a variety of methods, including the donation of funds, volunteerism, and implementation of environmentally friendly policies. It is up to each organization to determine the best way to demonstrate social responsibility.

Corporate social responsibility (CSR) has become a popular way for companies to improve their image and promote causes they believe in at the same time. Corporate social responsibility may involve focusing on the immediate community in which a company does business. However, there are some organizations that take it a step further and focus on more widespread global issues. For example, the shoe company TOMS has created a mission to make sure that every boy and girl in underprivileged countries has proper footwear. Blake Mycoskie, CEO of TOMS, has created a complete business model around social responsibility. Not stopping at shoes, the company now also helps with bringing fresh water to communities, as well as making birth safer for babies in developing nations.

The popularity of corporate social responsibility has only increased as millennials and Generation Z employees enter the workforce. Employees in these generations often care deeply about making a difference in the world in which they work. Whether they are buying products from brands that give back or promoting a similar activity in their own place of employment, the youngest of the workforce are making corporate social responsibility a priority.

Where Did Corporate Social Responsibility Originate?

Corporate social responsibility is not a new construct. One could go back hundreds of years and find examples of corporate philanthropy and social support. However, the earliest published book about the topic is:

> **Corporate Responsibility of the Businessman**, published in 1953. This book introduced the concept of companies giving back as a form of investment in the future. This idea came from a generation that had survived some of the hardest times in our world and wanted to make it a better place for generations to come.

How Does Corporate Responsibility Benefit a Business?

There are many ways that corporate social responsibility can benefit a business and its objectives. Aside from being able to promote the causes that are closely connected to the values of the company, a business can improve its reputation exponentially.

Benefits of corporate social responsibility include many direct and indirect effects. Based on research from the *Kellogg School of Management at Northwestern University*, these can include:

- **Improved perception by investors.** If a company reports corporate social responsibility spending that exceeds the expectations of investors, this dollar amount is a sign that the company itself is in good financial standing. This perception results in positive stock returns and increased confidence by investors.
- **Enhanced performance for going green.** Researchers have found that when companies focus on eco-friendly efforts, the positive impact on operational performance heading into the second year is remarkable. Those that expand their efforts in more complex ways and in collaboration with industry standard-setting associations (such as LEED), or other eco-friendly companies, increase their performance even more.
- **Contracting for success**. In companies that tie their CEO's salary to corporate social responsibility results, also known as contracting, the impact is felt even more. The value of the company increases while the bottom line of the business is maintained.
- **The benevolent halo effect.** When consumers understand the commitment that an organization must be socially responsible, its image becomes more positive. Customers actually perceive the company and its products in a different way because they expect a better experience.
- **Consistency of efforts and partnerships.** Researchers also found that socially responsible organizations were consistent with staying focused on the issues that mattered most to their employees

and customers. A higher level of consistency of efforts prompted better results. There are some other benefits of being a socially responsible company. These may happen as a result of internal factors, as well as how closely matched the efforts are to the culture. Alison Robins, writer for OfficeVib*e,* explains that being socially responsible can help attract positive attention from outside of a company. Some examples include:

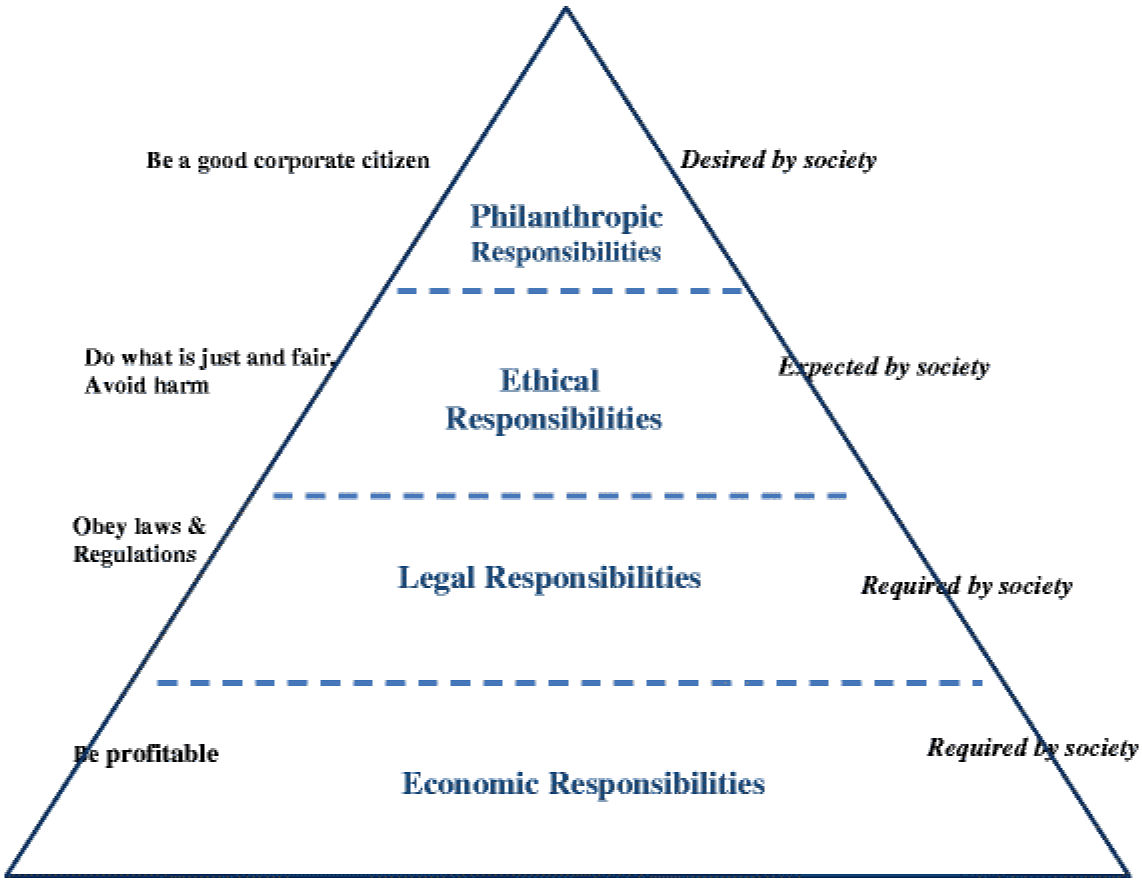
- **Talent attraction.** Many companies offer employees paid time off to participate in volunteer activities, including travel to other nations. Corporate social responsibility is often used as a recruitment tool to attract people who care about giving back to their communities and making changes that impact the world.
- **Consumer influence.** A major benefit of engaging in corporate social responsibility efforts is that consumers regularly check in with their favourite brands to see what they are doing, and they are influenced to make purchases so they can be part of this community. With the process of posting messages on social networks, entire movements can take off via the support of loyal consumers.

Archie Carroll's Corporate Social Responsibility (CSR) Pyramid

Carroll's four-part definition of CSR was originally stated as follows: Corporate social responsibility encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time. This set of four responsibilities creates a foundation or infrastructure that helps to delineate in some detail and to frame or characterize the nature of businesses' responsibilities to the society of which it is a part. This CSR definition forms a conceptual framework that includes the economic, legal, ethical, and philanthropic or discretionary expectations that society places on businesses at a given point in time. And, in terms of understanding each type of responsibility, it could be said that the economic responsibility is "required" of business by society; the legal responsibility also is "required" of business by society; the ethical responsibility is "expected" of business by society; and the philanthropic responsibility is "expected/desired" of business by society. As time passes what exactly each of these four categories means may change or evolve as well.

The four-part definition of CSR was originally published in 1979. In 1991, Carroll extracted the four-part definition and recast it in the form of a CSR pyramid. The purpose of the pyramid was to single out the definitional aspect of CSR and to illustrate the building block nature of the four-part framework. The pyramid was selected as a geometric design because it is simple, intuitive, and built to withstand the test of time. Consequently, the economic responsibility was placed as the base of the pyramid because it is a foundational requirement in business. Just as the footings of a building must be strong to support the entire edifice, sustained profitability must be strong to support society's other expectations of enterprises. The point here is that the infrastructure of CSR is built upon the premise of an economically sound and sustainable business.

Carroll's Pyramid of Corporate Social Responsibility:



Carroll, A.B. Carroll's pyramid of CSR: taking another look. Int J Corporate Soc Responsibility 1, 3 (2016). https://doi.org/10.1186/s40991-016-0004-6

The Pyramid of CSR is intended to be seen from a stakeholder perspective wherein the focus is on the whole not the different parts. The CSR pyramid holds that firms should engage in decisions, actions, policies and practices that simultaneously fulfill the four component parts. The pyramid should not be interpreted to mean that business is expected to fulfill its social responsibilities in some sequential, hierarchical fashion, starting at the base. Rather, business is expected to fulfill all responsibilities simultaneously. The positioning or ordering of the four categories of responsibility strives to portray the fundamental or basic nature of these four categories to business's existence in society. As said before, economic and legal responsibilities are required; ethical and philanthropic responsibilities are expected and desired. The representation being portrayed, therefore, is that the total social responsibility of business entails the concurrent fulfillment of the firm's economic, legal, ethical, and philanthropic responsibilities. Stated in the form of an equation, it would read as follows: Economic Responsibilities + Legal responsibilities + Ethical Responsibilities + Philanthropic Responsibilities = Total Corporate Social Responsibility. Stated in more practical and managerial terms, the CSR driven firm should strive to make a profit, obey the law, engage in ethical practices and be a good corporate citizen. When seen in this way, the pyramid is viewed as a unified or integrated whole.

The Financial Impact of the Triple Bottom Line

When examining the value of corporate social responsibility, one must understand the concept of the triple bottom line (TBL), which essentially measures the sustainability of an organization's social responsibility efforts. The term includes three dimensions of a giving business—profits, people, and the planet. Without one of these factors, there cannot be a balance. According to economist Andrew Savitz, the triple bottom line "captures the essence of sustainability by measuring the impact of an organization's activities on the world … including both its profitability and shareholder values and its social, human and environmental capital."

The challenge with the TBL model is that while profits can be measured in dollars, and people can be measured in numbers, it can be difficult to measure the impact of social responsibility. Some argue that this task is dependent upon what is being measured. For example, if one is saving the rainforest, a reasonable unit of measurement could be acreage. Progress toward protecting this resource could be recorded as how many fewer acres have been forested and how many native (people) communities have been saved as a result of the intervention.

Another example could be a social cause, such as creating housing for single parents in poverty-stricken neighbourhoods in a specific city. The impact can be felt in terms of the additional housing that is created (built or rehabbed from existing homes), and the value that this effort brings to the neighbourhood. The number of people helped can be measured. The city's rate of homelessness can be measured as it is reduced. Then, there are other equally important results of social responsibility that can be considered, such as the reduced rate of crime in areas with homeowners, and an increase in employment for those who own the homes. These indirect benefits have an impact on the company because it can eventually hire people from these areas of the city.

Businesses must be continually mindful of the image that they project to the world and be sure to align their corporate social responsibility campaigns with their culture. An authentic cause that is backed by all is far better than one that is dreamt up purely for the sake of marketing.

Conclusion

Business ethics are essential to the success of Canadian businesses. Ethical standards and ethical practices provide a framework for how employees should conduct themselves within the organization and how they should interact with customers, suppliers, and other stakeholders. Business ethics are important to ensure that a company's practices are in line with the values and standards of the society in which it operates. A commitment to business ethics helps to establish trust, loyalty, and respect between the business and its customers, employees, investors, and others, helping to create a more positive work environment and generate confidence in the company. Strong business ethics help to ensure that organizations comply with applicable laws, regulations, and standards, helping to protect the company from potential legal and financial risks.

Terms and Definitions

- **Ethics:** The code of moral principles and values that governs the behaviours of a person or group with respect to what is right or wrong.
- **Business Ethics:** The area of applied ethics that focuses on real-world situations and the context and the environment in which transactions occur.
- **Ethical Dilemma:** A situation in which a difficult choice has to be made between two courses of action with ethical consequences.
- **Ethical Relativism**: Holds that people set their own moral standards for judging their actions based on self-interest.
- **Rights:** Legal rights are entitlements that are limited to a particular legal system and jurisdiction, while moral rights are universal and based on norms in every society
- **Normative Ethics:** The field of ethics concerned with our asking how should and ought we live and act.
- **Virtue Ethics:** Grounded in one's character, focusing on what type of person one ought to be.

Cases of Interest

Wells Fargo

The Wells Fargo crisis over mismanaging customer relationships, fraudulently implementing illegal and unethical sales practices with trusted clients, has cost the company in fines, lost business, and the resignation of the CEO. The following online sources offer a narrative and factual source of what happened, when, to whom, and why. Use these sources to answer and provide evidence to the following questions to present to the class:

1. What were the sources and causes the problems in the first place? Explain.
2. Who were some of the primary decision makers that led to the illegal sales activities?
3. What were these individuals' motives and motivations?
4. How were the illegal and fraudulent activities discovered?
5. Who was to blame?
6. What unethical activities occurred before the illegal actions took place?
7. What would you have done, if anything, had you been one of the sales professionals pressured to engage in unethical, illegal practices there?
8. How would a stakeholder approach, if taken by the company's top leaders and board of directors, have possibly prevented the crisis?

Sources:

- Comrie, Harley, "Wells Fargo Fake Accounts Scandal", Seven Pillars Institute, March 15, 2017, http://sevenpillarsinstitute.org/case-studies/wells-fargo-fake-accounts-scandal ;
- "Wells Fargo Banking Scandal a Financial crisis We Can Finally Understand", The Guardian, accessed January 2, 2019, https://www.theguardian.com/business/us-money-blog/2016/oct/07/wells-fargo-banking-scandal-financial-crisis;
- Glazer, Emily, "Wells Fargo's Textbook Case of Botched Crisis Management", The Wall Street Journal, October 13, 2017, https://www.wsj.com/articles/wells-fargos-textbook-case-of-how-not-to-handle-a-crisis-1476380576

Questions for Discussion

1. Why is business ethics important?
2. Whataresomepotentialbenefitstoabusinessofhavingstrongethicalstandards?
3. How can ethical standards help build trust with customers and other stakeholders?
4. How can ethical standards help a business protect its reputation and brand?
5. How might the Seven Grandfather Teachings provide guidance for business ethics codes of conduct?
6. What's the definition of Corporate Responsibility?
7. Where did the term Corporate Responsibility originate?
8. What are some potential risks to a business of failing to adhere to ethical standards?
9. What are some ways for a business to establish and ensure ethical compliance?

Additional Resources

- *Ethics Practitioners' Association of Canada* – http://epac-apec.ca/
- *National Centre for Truth and Reconciliation* – https://nctr.ca/
- *Transparency International Canada* – https://transparencycanada.ca/
- *Business Ethics (Canada)* – http://www.businessethics.ca/
- *Responsible Business Conduct Abroad* – https://www.international.gc.ca/trade-commerce/rbc-cre/index.aspx?lang=eng

ENDNOTES

Corporate and Social Responsibility (CSR)Harvard Business School Online (03-25-2022): https://www.youtube.com/watch?v=ZoKihFLCY0s

Carroll, Archie B. "Carroll's pyramid of CSR: taking another look." International Journal of Corporate Social Responsibility. July, 2016. Retrieved from: https://jcsr.springeropen.com/articles/10.1186/s40991-016-0004-6

Environmental, Social, and Governance (ESG) UN SDGs are probably the easiest and best ways to tackle this section: https://sdgs.un.org/goals

Bisk. "6-Step Guide to Ethical Decision-Making" Michigan State University. Retrieved from: https://www.michiganstateuniversityonline.com/resources/leadership/guide-to-ethical-decision-making/#.W7KAq2hKiUl.

Ethics and Compliance Initiative. "Business Ethics and Compliance Timeline." Retrieved from: https://www.ethics.org/resources/free-toolkit/ethics-timeline/.

Georgescu, Peter. "What Are We Waiting For?" *Forbes*. Retrieved from: https://www.forbes.com/sites/petergeorgescu/2018/01/24/what-are-we-waiting-for/#6f5caff856e3.

Isidore,Chris."GravityPaymentsCEOtakes90%paycuttogiveworkershugeraise."

CNN Money. Retrieved from: https://money.cnn.com/2015/04/14/news/companies/ceo-pay-cuts-pay-increases/index.html.

Leonard,Kimberlee."ImportanceofCreatingaCodeofEthicsforaBusiness."

Chron Small Business. Retrieved from: https://smallbusiness.chron.com/importance-creating-code-ethics-business-3094.html.

Nayab, N. "Real-World Examples of Bad Business Ethics." *Bright Hub*. Retrieved from: https://www.brighthub.com/office/entrepreneurs/articles/115557.aspx.

Shen, Linda. "The 10 Biggest Business Scandals of 2017." *Fortune*. Retrieved from: http://fortune.com/2017/12/31/biggest-corporate-scandals-misconduct-2017-pr/.

Spooner, A. "Importance of Ethics in Business." Love to Know. Retrieved from: https://business.lovetoknow.com/business-operations-corporate-management/importance-ethics-business.

"About Tom's" Retrieved from: https://www.toms.com/corporate-responsibility/.

Ames, Eden. "Millennial Demand for Corporate Social Responsibility Drives

Change in Brand Strategies." American Marketing Association. Retrieved from: https://www.ama.org/publications/MarketingNews/Pages/ millennial-demand-for-social-responsibility-changes-brand-strategies.aspx.

Anyebe,Godwin."BetweenCorporateSocialResponsibilityandSocial

Marketing." *The Daily Times*. Retrieved from: https://dailytimes.ng/corporate-social-responsibility-social-marketing/.

Carroll, Archie B. "Corporate Social Responsibility." Research Gate. Retrieved from: https://www.researchgate.net/publication/273399199_Corporate_Social_Responsibility.

Corporation for National and Community Service. "Volunteering and Civic Life in America." Retrieved from: https://www.nationalservice.gov/vcla.

Fallon, Nicole. "Why You Shouldn't Jump on the CSR Bandwagon." *Business*

News Daily. Retrieved from: https://www.businessnewsdaily.com/6475-csr-brand-authenticity.html.
Lilly Family School of Philanthropy. “Giving USA 2015 Highlights.” Retrieved from: https://doublethedonation.com/forms/documents/charitable-giving-report-giving-usa-2015.pdf.
Robins,Alison.“5BenefitsofHavingaSociallyResponsibleCompany.”
Office Vibe. Retrieved from: https://www.officevibe.com/blog/socially-responsible-companies.
Slaper, Timothy F., and Hall, Tanya J. “The Triple Bottom Line: What Is It and How Does
It Work?” *Indiana Business Review.* Retrieved from: http://www.ibrc.indiana.edu/ibr/2011/spring/article2.html.
Stone,Emily.“Take5:HowCompaniesBenefitfromCorporateSocialResponsibility.”
Kellogg Insight. Retrieved from: https://insight.kellogg.northwestern.edu/article/benefits-of-corporate-social-responsibility.

4. BUSINESS LEGISLATION IN CANADA

CHAPTER OUTLINE

- Introduction to business regulation in Canada
- The Constitution Act and the Duty to Consult Indigenous Peoples
- Important Regulatory Acts

Learning Outcomes

- Recognize the intention of business regulation in Canada
- Become familiar with important regulatory Acts

Overview

Business legislation and regulation in Canada serves several purposes including promoting economic development and competitive advantage while also protecting the public interest. Finding the balance between appropriate regulation to encourage business growth and over-regulation which may constrain businesses is a difficult and constantly evolving challenge.

Business legislation provides a rules-based framework within which business operate. Without rules and the predictability and consistency they provide, investors would not feel comfortable investing in new or existing businesses. Without investment, the economy would not grow to create the jobs needed to sustain a thriving society. As a result, most governments, at every level, create regulations to support businesses with the goal to encourage investment and grow the economy.

As an example, imagine you wanted to start a new restaurant. You would begin by finding a desirable location in an area with many potential customers, and few competitors. You would invest your capital into the business, maybe taking loans, in order to develop and launch the restaurant. In addition to the capital invested, a great deal of your time, energy and creativity would be committed to establishing the business.

Soon after opening, customers arrive, and you begin to realize a return on your investment. However, someone else notices your success and decides to copy everything about your restaurant: recipes, logos, design etc., and opens a restaurant on the same street to attract your customers before they reach your restaurant. All of you hard work and investment could be lost if rules and regulations were not in place to prevent others from using and appropriating your innovations, intellectual property, and related business assets.

An important factor for business success is understanding the rules and regulations governing the business context. Across Canada, in every jurisdiction, there are regulations that businesses abide by in order to operate. Depending on the type and form of business, the level and extent of regulation can vary. A sole proprietor offering job placement services in rural Ontario will have different regulations than an offshore oil drilling corporation located in Newfoundland.

As noted, there are a lot of regulations governing how business are allowed to operate in Canada; in fact, there are too many to mention here, but some fundamental Acts include:

- The Constitution Act
- Sale of Goods Act
- Consumer Protection Act
- The Federal Competition Act
- Environmental Protection Act
- Personal Property Securities Act (Ontario)

The Constitution Act and the Duty to Consult Indigenous Peoples

The Constitution Act, 1982 recognizes and affirms the existing Aboriginal and treaty rights of Indigenous people (Section 35). To protect these rights, the doctrine of the duty to consult and, where appropriate, accommodate Indigenous groups, was developed by Canadian courts. Furthermore, the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in 2010, provides that member states must consult and cooperate with Indigenous peoples on certain matters, such as "legislative or administrative measures that may affect them," in order to obtain their free, prior and informed consent. The duty to consult is a key foundation to the rules and regulations that govern how businesses and industry interact with each other and with First Nations as having inherent and treaty rights. A deeper analysis of the duty to consult as it relates to business, industry and economic development can be accessed here: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E The Government of Canada is developing and updating programs and policies to improve access to business and investment opportunities generated via international trade for Indigenous Peoples.

Sale of Goods Act

The *Sale of Goods Act (https://www.ontario.ca/laws/statute/90s01)* was developed to regulate the sale of goods where no contract explicitly exists. The intent is to provide a basic set of regulations which are to be followed when selling goods within Canada. The regulations provide general rules to govern transactions. Businesses and individuals are allowed to contract out of the regulations of the Sale of Goods Act. Most individuals and businesses prefer to develop specific terms and conditions to govern their transactions (for example; payment terms, delivery dates, dispute resolution and other unique conditions).

It is important to note that some regulations do not allow businesses or individuals to contract out of the regulations. For example, the *Environmental Protection Act* or the *Landlord Tenant Act*.

The *Sale of Goods Act* only applies to goods that are sold or transferred between two parties. The act does allow for sellers to recoup goods in transit in the event the purchaser fails to pay in order to offset the potential loss. During bankruptcy proceedings of a purchaser, sellers often have a difficult time reclaiming their goods. Typically, these items are part of the liquidation event, and the seller receives their respective portion of the proceeds from the sale.

Under the *Sale of Goods Act*, sellers have obligations which they must follow. The regulations are designed to help protect the buyer from unfair actions by the seller. The following is a list of factors that every businessperson should be aware of:

- The seller can only sell goods that they own and have the right to sell. This is known as having 'good title'. Sellers cannot transfer any goods for which they do not have good title.
- Goods cannot be sold with any encumbrances (a claim against a good by someone other than the person representing or claiming ownership). For example, a seller could not sell a car to purchaser if the car had a lien placed on the vehicle from a bank. The seller would be required to clear the lien before transferring title to the purchaser.
- A seller must sell all goods at a standard of quality which allows them to be sold to others. For example, a seller cannot not sell inventory to a retailer which, upon delivery, is found to be such poor condition that it is unable to be sold to customers.
- Sellers must present samples of the goods that are a fair representation of delivered merchandise. A seller could not for example, show a chair which fits an adult and then deliver a chair which only fits a child.

An important condition of the *Sale of Goods Act* is the transfer of title from the seller to the buyer. This is very important relative to the risk of ownership. For example, if a buyer in Ontario purchased goods from a seller in British Columbia and during transit the goods were damaged beyond repair, who is responsible the cost of the loss? The question of who owned the goods at what point in the journey is critical; whoever owns the goods bears the burden of the loss.

Risk follows title, so unless otherwise agreed, the goods remain at the seller's risk until the property is transferred to the buyer. When the property is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. There are five rules in the Act which explain who has title when:

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both is postponed.

*Rule 2. W*here there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer;

- when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;
- if the buyer does not signify approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

Rule 5.

- Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.
- Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller shall be deemed to have unconditionally appropriated the goods to the contract.

There are several details and complex elements regarding the *Sale of Goods Act*. It is advisable to speak to a professional in this area before engaging in the sale of goods. However, there are some key elements which any business might benefit from knowing. The following information has been taken from the Ontario Government website. For additional details, the Act can be accessed here: https://www.ontario.ca/laws/statute/90s01#BK0

DELIVERABLE STATE

Goods shall be deemed to be in a deliverable state within the meaning of this Act [Sale of Goods Act] when they are in such a state that the buyer would be bound to take delivery of them.

SALE AND AGREEMENT TO SELL

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.

What constitutes a sale or agreement to sell

Where under a contract of sale the property in goods is transferred from the seller to the buyer, the contract is called a sale, but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

Where price not determined

Where the price is not determined, the buyer shall pay a reasonable price, and what constitutes a reasonable price is a question of fact dependent on the circumstances of each particular case.

Sale by description

Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description.

Sale by sample

In the case of a contract for sale by sample, there is an implied condition,

(a) that the bulk will correspond with the sample in quality;

(b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample; and

(c) that the goods will be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.

Duties of seller and buyer

It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Payment and delivery concurrent

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions – the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Where no time for delivery fixed

Where the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Delivery of wrong quantity or quality

Where the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them, but if they are accepted, the buyer shall pay for them at the contract rate.

Goods not in accordance with contract

Where the seller delivers to the buyer the goods contracted to be sold mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest or may reject the whole.

Rights of buyer as to examination

Where goods are delivered to the buyer that the buyer has not previously examined, the buyer shall be deemed not to have accepted them until there has been a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Effect of refusal to accept

Unless otherwise agreed, where a buyer refuses to accept delivery of goods and has the right to do so, the goods are not bound to be returned to the seller, but it is sufficient if the buyer communicates to the seller that acceptance of the goods is refused.

Wrongful neglect or refusal to take delivery

When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods, the buyer is liable to the seller for any loss occasioned by the buyer's neglect or refusal to take delivery, and for a reasonable charge for the care and custody of the goods.

Withholding delivery

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to other remedies, a right of withholding delivery similar to and co-extensive with the rights of lien and stoppage in the course of transit where the property has passed to the buyer.

Right of stoppage in transit

When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in the course of transit, that is to say, the unpaid seller may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price.

Consumer Protection Act

According to the Chartered Professional Accountants of Canada (CPA Canada) statistics show that 46% of Canadians have been the victim of fraud at some point in their lives. Consumer complaints, beyond fraud, are common in Canada which has led governments at all levels to take steps to proactively protect Canadians. Consumer protection law is governed under provincial and territorial jurisdiction, as well as agencies set-up by government and some non-government organizations. As a result, it can be difficult to understand what obligations a business may have to consumers. Most jurisdictions have similar guidelines which businesses are required to follow in order to ensure they are protecting the rights of consumers and meeting their legal and regulatory obligations.

GENERAL PROTECTIONS

Regardless of the jurisdictions, most legislation covers the core elements of consumer protection. For a business, the following are general guidelines to ensure they meet their obligations under most legislation within Canada:

- Consumers should expect some level of minimum quality for the goods they purchase
- Consumers should not be subjected to abusive or deceptive sales / marketing practices
- Vulnerable consumers should not be subjected to 'unconscionable' (unfair, unreasonable, excessive or unjust) sales practices by companies
- Consumers are typically allowed some type of cooling off period where they can return goods or cancel contracts without fear of reprisals
- Consumers should be informed of all terms and conditions of contracts and contracts should be explicit and transparent.
- Any financial terms, especially borrowing costs, need to be clear and in plain language

Businesses which engage in unscrupulous practices or refuse to follow consumer protection guidelines, can be subject to serious fines, injunctions, loss of licences, and related legal consequences. It should be noted that government agencies can use their enforcement powers to aggressively target non-compliant organizations.

CONSUMER PROTECTION (FEDERAL GOVERNMENT)

Protecting consumers within Canada begins with federal legislation that is developed to promote consumer awareness and consumer protection. There are several Federal agencies and departments which work to protect consumers and are responsible for enforcing legislation related to various issues, including:

Consumer product safety: The *Canada Consumer Product Safety Act* (CCPSA) regulates the safety of a wide variety of consumer products, except for motor vehicles, food, drugs and animals. The CCPSA is administered by Health Canada.

Packaging, labelling, sale, importation and advertising of prepackaged products: The *Consumer Packaging and Labelling Act* requires that prepackaged consumer products bear accurate and meaningful labelling information to help consumers make informed purchasing decisions. The Act is administered by the Competition Bureau.

Vehicle safety: The *Motor Vehicle Safety Act* regulates the manufacture and importation of motor vehicles and motor vehicle equipment to reduce the risk of death, injury and damage to property and the environment. The Act is administered by Transport Canada.

Food, meat and fish inspection, agricultural products, seeds, fertilizers, and animal feed and health: *Food Safety and Inspection related Acts* are administered by the Canadian Food Inspection Agency.

Safety and nutritional quality of all foods: The *Food and Drugs Act* establishes standards for the safety and nutritional quality of all foods sold in Canada and is administered by Health Canada.

Federally regulated financial institutions (banks, retail associations and federal trust, loan and insurance companies): Oversight of consumer issues in the federally regulated financial sector are administered by the Financial Consumer Agency of Canada.

Wireless services: The Wireless Code explains your rights and responsibilities as a consumer of wireless services. It establishes standards that all wireless service providers must follow. The Wireless Code applies to all wireless contracts. The Wireless Code was created by the Canadian Radio-television and Telecommunications Commission (CRTC).

CONSUMER PROTECTION (ONTARIO GOVERNMENT)

In Ontario, consumer's rights and businesses obligations are identified within the *Consumer Protection Act (https://www.ontario.ca/laws/statute/02c30)* which covers the most common consumer transactions. The *Consumer Protection Act* is a key piece of Ontario's consumer protection framework that came into in 2002. The fast-paced nature of today's business environment has led to changes in the way people make purchases, and how businesses work; especially with the rise in e-commerce over the years. As a result, consumer protection laws are constantly being updated to remain modern, fair and give consumers confidence that their rights are protected. Moreover, strong consumer protection laws improve Ontario's reputation as a place for businesses to grow and invest in. When people trust the businesses, products, and services they spend their money on, the economy flourishes.

CONSUMER PROTECTION ACT (ONTARIO)

The Ontario *Consumer Protection Act* applies to all consumer transactions if the consumer is located in Ontario when the transaction takes place.

Disclosure of information

A supplier is required to disclose information that must be clear, comprehensible and prominent.

Ambiguities to benefit consumer

Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer that must be disclosed shall be interpreted to the benefit of the consumer.

No payment for unsolicited goods or services

No supplier shall demand payment or make any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services despite their use, receipt, misuse, loss, damage or theft. This means that if someone just sends you something and then demands payment, the consumer does not have to pay.

If a supplier has received a payment in respect of unsolicited goods or services, the consumer who made the payment may demand a refund of the payment in accordance with section 92 within one year after having made the payment.

A supplier who receives a demand for a refund under subsection (6) shall refund the payment within the prescribed period of time.

False, misleading or deceptive representation

It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations can include:

- A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
- A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.
- A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.
- A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.
- A representation that the goods have been used to an extent that is materially different from the fact.
- A representation that the goods or services are available for a reason that does not exist.
- A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.
- A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.
- A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.
- A representation that a service, part, replacement or repair is needed or advisable, if it is not.
- A representation that a specific price advantage exists, if it does not.
- A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.
- A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

- A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.
- A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.
- A representation that misrepresents the purpose of any charge or proposed charge.
- A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers.

Unconscionable representation

It is an unfair practice to make an unconscionable representation. Determining whether a representation is unconscionable, it may be taken into account that the person making the representation or the person's employer, or principal knows or ought to know:

- that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;
- that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
- that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;
- that there is no reasonable probability of payment of the obligation in full by the consumer;
- that the consumer transaction is excessively one-sided in favour of someone other than the consumer;
- that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;
- that a statement of opinion is misleading, and the consumer is likely to rely on it to his or her detriment; or
- that the consumer is being subjected to undue pressure to enter into a consumer transaction.

Liability

Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

Cooling-off period

A consumer may, without any reason, cancel an agreement. Depending on the type of agreement, the cooling off period may differ and a consumer should check immediately to avoid any confusion.

Requirements for consumer agreements

Every consumer agreement for loan brokering, credit repair or for the supply of such other goods or services as may be prescribed shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Advance payments prohibited

Many industries are barred from requiring or accepting any payment or any security for a payment, directly or indirectly, from or on behalf of a consumer. Check to make sure that if the business is asking for a deposit, that they are in fact allowed to do so.

Motor Vehicle Estimates

No repairer shall charge a consumer for any work or repairs unless the repairer first gives the consumer an estimate that meets the prescribed requirements.

FINAL THOUGHTS

Consumer protection legislation can be complicated and confusing with overlapping jurisdictions and regulations. However, it is a critical element in the Canadian business landscape as it helps to build trust in consumers. Without trust, businesses will find it difficult to gain new customers. Consumer protection legislation should not be viewed as a burden to businesses, but rather an opportunity to illustrate to customers that they can trust the business or organization they are accessing.

The Competition Act

The *Competition Act* (https://laws.justice.gc.ca/eng/acts/C-34/index.html)provides for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition. The purpose of the Act is to maintain and encourage competition in Canada. It promotes the efficiency and adaptability of the Canadian economy, in order to expand opportunities in world markets while at the same time recognizing the role of foreign competition in Canada. Regulations are included to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy in addition to providing consumers with competitive prices and product choices.

AGREEMENTS BETWEEN COMPETITORS

The *Competition Act* prevents people or organizations from working with a competitor of that person or organization with the goal to conspire, agree or arrange activities that prevent competition. Specifically:

- to fix, maintain, increase or control the price for the supply of the product;
- to allocate sales, territories, customers or markets for the production or supply of the product; or
- to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Bid-rigging

Bid-rigging means an agreement or arrangement between or among two or more persons or organizations whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request. Persons convicted of bid-rigging may face up to 14 years in prison and Corporations can also face legal penalties.

False or misleading representations

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Telemarketing

Te*lemarketing* means the practice of communicating orally by any means of telecommunication for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product. No person shall engage in telemarketing unless

- disclosure is made, in a fair and reasonable manner at the beginning of each communication, of the identity of the person on behalf of whom the communication is made, the nature of the business interest or product being promoted and the purposes of the communication;
- disclosure is made, in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and
- disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

Deceptive telemarketing

No person who engages in telemarketing shall make a representation that is false or misleading in a material respect; conduct or purport to conduct a contest, lottery or game of chance, skill or mixed chance and skill; offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

Deceptive notice of winning a prize

No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

Scheme of pyramid selling

Scheme of pyramid selling means a multi-level marketing plan whereby a participant in the plan gives consideration (Money) for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration (Money) for the same right. Pyramid selling is punishable by fines and imprisonment.

Whistleblowing

Any person who has reasonable grounds to believe that a person or organization has committed or intends to commit an offence under this Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.

Prohibition

In the event of a whistleblower, no employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under the *Competition Act*;

Bait and switch selling

Bait and switch occurs when a person or a company advertises a product for a price and then indicates that the product is not available and then the consumer is encouraged to purchase a higher priced product. This approach to selling is prohibited.

Sale above advertised price

A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Restrictive Trade Practices

This act prevents people or businesses from any activity that restricts commerce. Specifically, preventing another business from obtaining adequate supplies of a product anywhere in a market on usual trade terms. Effectively, businesses cannot prevent selling their products to companies if they want to prevent that business from being successful.

Exclusive Dealing

Exclusive dealing means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee. Any practice whereby a supplier of a product induces a customer to have an exclusive relationship by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees is unlawful.

Market Restriction

Market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market. Businesses cannot prevent other businesses from acting in a specific way under threat of preventing supplier of a product required for that business to operate.

Abuse of Dominant Position

In some industries there is a dominate supplier which many businesses rely on for success. Any abuse of that dominant position of that supplier to its customers is classified as an *anti-competitive act*. Suppliers cannot use their position to act in any way intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition. Abuse of dominance occurs when a dominant business (or group of businesses) engages in activity that eliminates or restricts competition in a market. Anti-competitive activities may be:

- **predatory** (incurring short-term losses to force a competitor out of the market and/or gain future market power);

- **exclusionary** (seeking to prevent a business from operating in a market);
- **disciplinary** (enacted to punish a business); or
- intended to **adversely affect competition** (seeking to diminish or erode competition and denying consumers the benefits of competition)

Mergers

M*ergers* refer to the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person. Under the *Competition Act*, any merger can be reviewed by the *Commissioner of Competition* to ensure that the merger will not result in anti-competitive situation for the Canadian economy. In the event that the merger could harm competition within the Canadian economy, the *Commissioner of Competition* can stop the merger from happening.

Canadian Environmental Protection Act, 1999

The primary purpose of the *Canadian Environmental Protection Act* (CEPA) (https://laws-lois.justice.gc.ca/eng/acts/c-15.31/) is to contribute to sustainable development through pollution prevention. It provides the legislative basis for a range of federal environmental and health protection programs. These include activities related to the assessment and management of risks from chemicals, polymers and living organisms programs related to air and water pollution, hazardous waste, air pollutant and greenhouse gas emissions, ocean disposal, and environmental emergencies.

Pollution prevention is a key element of the CEPA. It has details pertaining to businesses developing pollution prevention plans with guidelines and models. The objective is for organization to develop guidelines and codes of practice to ensure that pollution is minimized to support the environment in Canada and the health of all Canadians.

Many businesses require the use of potential toxic substances to develop or manufacture the products. The CEPA identifies priority substances which businesses must manage appropriately with guidelines for handling. Specifically, it outlines regulations which govern the acquisition, management, and use of toxic substances. It also addresses the requirements businesses must complete in the event of toxic substance releases into the environment. Lastly, it sets out all regulations regarding the export of any toxic substances internationally.

The main area of the CEPA is concerned with controlling the pollution that businesses may generate as part of their operations. Moreover, it covers areas of proper waste disposal across a wide range of industries. Specific attention is place on the areas of marine life and disposal of waste at sea. It also covers fuel disposal and vehicle emissions regulations within Canada. Most importantly, it details the movement and disposal of any type of hazardous waste products.

The CEPA sets out the terms for the authorization of government to act in the event of an environmental emergency. This is critical to ensure the government can quickly respond to any situation in order to prevent or mitigate environmental impacts. For example, in the event of an oil spill, government authorities require the ability to act without having to wait for government to pass specific legislation relating to the crisis.

Any business using or generating any type of toxic substance (or by-products) must follow legislative guidelines to avoid penalties, prosecution, and potential third-party liability.

Personal Property Security Act (Ontario) (OPPSA)

The *Ontario Personal Property Security Act* (OPPSA) (https://www.ontario.ca/laws/statute/90p10) is the provincial act that regulates the creation and registration of security interests in all personal property within Ontario. The OPPSA provides a set of rules to govern the rights of creditors and debtors when personal property is used as collateral to secure payment of debt. It applies to every transaction, in the province of Ontario, where a security interest exists on that property.

If a person buys an asset but needs to borrow against that asset in order to finalize the purchase, that asset will have a security interest. Under the OPPSA there are two main requirements which must be satisfied. The first is 'attachment' – the security interest has "attached" to the asset as collateral against the loan. The second is called 'perfection' where the attached security interest in the collateral has been registered with the proper authorities within Ontario.

Perfection of security interests in any type of collateral can be achieved by registering a financing statement in accordance with OPPSA. Registrations are normally made by the secured party or its Counsel. A secured party must deliver a copy of the verification of registration statement to the debtor within 30 days of effecting the registration.

It should be noted that any security interest in a collateral asset is based on a first come first serve basis. Effectively, whoever gets to the registration first, that who has the first security interest in that collateral asset. Renewals extending the term of a financing statement may be filed at any time prior to expiry of a financing statement.

A business who has a debt against it might decide to change their name. The challenge is that if the name were to change it will become difficult to track security interest issues and conditions. To deal with this kind of situation, there are rules relating to debtor name changes to ensure that the secured interest continues with the new named entity. This protects the original loan holder and any potential future businesses from extending new credit to this business. The debtor must notify the creditor of the name change and then the creditor has a period of time to re-register the perfection in order to keep the asset collateral priority.

Similar rules apply when changing the location of the collateral asset. Interestingly, a secured party can lose *perfection* in this situation even if it is not aware that the collateral has been moved. The biggest challenge for businesses is when assets with security interests are bought and sold. When assets are transferred to other parties, there is a question of whether the secured interest is transferred as well. Generally speaking, the sale of inventory to a consumer does not have the secured interest transferred. This would not be practical and would prevent the secured asset from being sold.

However, in many other asset transactions, the collateral will be transferred to the new owner without the lender even knowing, but the new owner will be responsible for the secured interest. For example, you may buy a car for $100 knowing that the lien on the vehicle is for $5,000.00 which is a fair price to pay for that specific vehicle. You are effectively buying the car for a low price but agreeing to pay the debt on behalf of the original debtor.

In these situations, the secured party must file a financing change statement naming the transferee as an additional debtor providing that the transfer is made with the consent of the original secured party.

Conclusion

As noted in the Government of Canada *Business Regulations Guide*: “Whether you are starting or growing your business, you need to be aware of business regulations. Regulations set the standards and rules that ensure the Canadian marketplace is safe, consistent and fair to everyone.” The overview of business regulations within this chapter provides an orientation to this important and complex area of business law.

Cases of Interest

- 114957 Canada Ltée (Spraytech, Société d'arrosage) *v*. Hudson (Town), [2001] 2 S.C.R. 241, 2001 SCC 40 – https://www.canlii.org/en/ca/scc/doc/2001/2001scc40/2001scc40.html?resultIndex=1
- Mohr v. National Hockey League (2022) – https://www.canlii.org/en/ca/fca/doc/2022/2022fca145/2022fca145.html
- Attawapiskat First Nation v. Ontario, 2022 ONSC 1196 – https://www.canlii.org/en/on/onscdc/doc/2021/2021onsc1196/2021onsc1196.html

Additional Resources

- Business Reconciliation in Canada: https://www.ccab.com/wp-content/uploads/2020/09/small-business_english.pdf
- International Trade Agreements and Indigenous Peoples: https://www.international.gc.ca/trade-commerce/indigenous_peoples-peuples_autochtones/approach-approche.aspx?lang=eng
- Government of Canada Business Regulations Guide: http://sbs-spe.feddevontario.canada.ca/business-regulations-guide

5. BUSINESS ORGANIZATION – BUSINESS STRUCTURES

CHAPTER OUTLINE

- Overview – Canadian Business
- Fundamental Considerations
- Sole Proprietor
- Partnerships
- Corporations

Learning Outcomes

- Identify and explain the advantages and disadvantages of the most common forms of business structures in Canada.

Business in Canada

It is generally understood that the purpose of a business is to generate profit for its owners. Businesses exist in various sizes and configurations. Some businesses make things in factories (manufacturers), others sell things that other enterprises make (retailers) or provide expertise to assist businesses in becoming more efficient and competitive (business consultants). Businesses may also exist to obtain profit by selling their services or by lending money.

According to the *Business Development Bank of Canada* (BDC) small and medium-size companies (SMEs) (businesses with between 1 – 499 employees) account for 99.8% of businesses in Canada and data generated in 2020 showed 1.22 million SMEs operating throughout the country. Statistics Canada provides useful data showing the size and distribution of business in the following chart:

Table 1: Total number of employer businesses by business size and number of SMEs per 1,000 provincial population, December 2020

	Small businesses (1–99 employees)		Medium-sized businesses (100–499 employees)		Large businesses (500+ employees)			Number of businesses per 1,000 individuals (18+ years)
Province/Territory	**Number**	**%**	**Number**	**%**	**Number**	**%**	**Total**	
Newfoundland and Labrador	16,290	98.2	278	1.7	28	0.2	16,596	38.0
Prince Edward Island	6,183	97.9	125	2.0	9	0.1	6,317	48.7
Nova Scotia	29,561	98.0	539	1.8	75	0.2	30,175	37.1
New Brunswick	24,818	98.0	453	1.8	54	0.2	25,325	39.2
Quebec	250,724	97.7	5,098	2.0	682	0.3	256,504	36.8
Ontario	439,694	97.8	8,865	2.0	1211	0.3	449,770	37.6
Manitoba	39,617	97.7	810	2.0	112	0.3	40,539	37.9
Saskatchewan	40,916	98.4	591	1.4	71	0.2	41,578	45.9
Alberta	159,021	97.9	2,992	1.8	346	0.2	162,359	47.1
British Columbia	187,697	98.3	2,885	1.5	341	0.2	190,923	44.7
Territories	4,111	97.7	89	2.1	7	0.2	4,207	45.3
Canada	**1,198,632**	**97.9**	**22,725**	**1.9**	**2,936**	**0.2**	**1,224,293**	**39.8**

Sources: Statistics Canada, Table 33–10–0304–01 Canadian Business Counts, with employees, December 2020, Table 17–10–0005–01 — Population estimates on July 1, by age and sex; and ISED calculations.

"Of the 1,224,293 employer businesses in Canada, 21.1 percent are in the goods-producing sector and 78.9 percent are in the services-producing sector (Table 2). Micro-enterprises (14 employees) make up 55.3 percent of Canadian businesses. By adding those businesses with 59 employees, this number increases to 73.9 percent. In other words, almost three out of four Canadian businesses have 19 employees. It should be noted that the distribution of businesses according to the number of employees varies slightly between the goods-producing and services-producing sectors." [1]

BUSINESS ORGANIZATION CONSIDERATIONS

If you're starting a new business, you will need to decide which legal form of ownership is best for you and your business. Given the range and diversity of enterprises across Canada, there is no "one size fits all" approach to choosing a business organization. When choosing what form is best, several factors are important to consider:

- What is the cost and complexity involved in starting the business?
- Do you have all the skills needed to run the business?
- What are the challenges for growing or expanding the business?
- How much control would you like? How much responsibility are you willing to share?
- Do you have access to people with the skills needed to operate and sustain the business?
- Is there a financial strategy to minimize the taxes paid on earnings and income?
- Do you wish to protect your personal assets from claims (limited liability)?

Depending on the type of business and its goals, different business entities may be appropriate, so it is important to carefully consider the legal, financial, and regulatory consequences of each potential structure. A key recommendation is to think carefully about where the business is today and where it might be going to determine which business structure is best suited to meet the current and future business requirements.

The following four key elements are helpful to keep in mind when selecting a business structure:

- Legal liability risk of the business.
- Tax implications.
- Raising capital.
- Level of complexity.

Reflecting on each of these factors will help in choosing a business structure that aligns well with the intentions and aspirations of the enterprise. The following section identifies common forms of business organization in Canada.

1. https://ised-isde.canada.ca/site/sme-research-statistics/en/key-small-business-statistics/key-small-business-statistics-2021#a01

Sole Proprietor

A ***sole proprietorship*** is an unincorporated business owned by one person or married couple. The legal name for a sole proprietorship is usually the owner's name. In a sole proprietorship, the owner makes all important decisions and is generally responsible for all day-to-day activities. The owner retains income earned by the business and profits are taxed as personal income.

Anyone can start a sole proprietor without legal formalities or process. A primary advantage of a sole proprietor structure is that it is easy to create. There are limited initial costs so a business can be launched and begin operating quickly. Another advantage to sole proprietorship is autonomy and flexibility. The owner can decide how to operate the business including hours of operation, inventory control, pricing, hiring of employees, and business strategy.

However, operating as a sole proprietor has some disadvantages. The responsibility for making the business a success rests with the sole proprietor who may not possess all the different skills and knowledge that may be needed.

Raising working capital can be a problem and sole proprietors often must rely on personal resources for financing. Money borrowed by and for the business is in the form of a personal loan and it is the sole proprietor who is responsible for payment. A sole proprietor bears unlimited liability for any losses incurred by the business. The principle of unlimited personal liability means that if the business incurs a debt or suffers a catastrophe (say, getting sued for causing an injury to someone), the owner is personally liable. Sole proprietors put personal assets (bank accounts and other forms of collateral) at risk for the sake of the business. Risk can be mitigated with insurance, but liability exposure can still be substantial.

A related concern is that since sole proprietors are the business, any profit that is generated is taxed as income which is typically higher than dividend income which a business owner would receive under a corporation structure.

Sole proprietorship is a common way to start a new business as legal formalities are not required to begin an enterprise. At the same time, the absence of a liability shield means that the proprietor will be personally responsible for the liability of the business and the tax implications might suggest a different structure depending on the business needs.

Advantages	**Disadvantages**
Easy to create	Owner pays personal income tax on all business profits
No formal documents or regulatory filings required to start business	Unlimited liability
Total control over finances and management decisions	Hard to raise capital
Autonomy	Potentially difficult to sell the business
No or limited start-up costs	Cannot bring someone else into business

Partnerships

Partnerships are another common form of business structure enabling partners with different skills and resources to leverage the unique elements they possess to achieve market success. Partnerships are the default business organization when two or more people work together who are not legally married. People do not need to call themselves partners for a partnership to exist, so it is important for business professionals to understand what constitutes a partnership to avoid forming a business entity that they did not intend. If there is an intention to form a partnership, each partner should understand their rights and duties towards each other. A partnership is a voluntary association of two or more people who jointly own and carry on a business for profit. There are only two required elements to form a partnership:

- A common interest to conduct business together; and
- An understanding to share profits and losses.

There are two main types of partnerships: ***general partnership*** and ***limited partnership***.

GENERAL PARTNERSHIPS

A general partnership is in place when all partners participate fully in running the business and share in the profits or losses. Legal documents are not required to form a partnership. If two or more people do business together, share management of the business and profits and losses, they have a partnership. If a partnership is formally established, then the written agreement is called the *articles of partnership*. The articles can set forth anything the partners wish to include about how the partnership will be run.

Any profit or loss from the general partnership business is shared amongst the partners and is reported as employment income. General partnerships are exposed to unlimited liability. Every partner in the partnership is jointly and severally liable for the partnership's debts and obligations. This is a feature of general partnerships which should be carefully considered. One partner may be innocent of any wrongdoing and still be liable for another partner's malpractice or bad acts. More importantly, they may have to pay damages for other partner's actions.

General partnerships are dissolved as easily as they are formed. Since the central feature of a general partnership is an agreement to share profits and losses, once that agreement ends, the general partnership ends with it. In a general partnership with more than two persons, the remaining partners can reconstitute the partnership if they wish, without the old partner.

An issue that often arises is how to value a withdrawing partner's share of the business. Articles of partnership typically include a buy/sell agreement, including terms on valuing and compensating a withdrawing partner's share.

LIMITED PARTNERSHIPS

A *limited partnership* has two types of partners: a general partner who runs the business and is responsible for its liabilities, and any number of limited partners who have limited involvement in the business operations and whose losses are limited to the amount of their investment. The main purpose of a limited partnership is to allow people to invest in a business without having to manage the business, and without risking more than the sum invested.

IMPLIED PARTNERSHIPS

A partnership is implied when one or more people represent themselves as partners to a third party who relies on that representation. A person who is deemed a partner by a third party through implied partnership becomes liable for any credit extended to the partnership by the third party.

Each potential partner should understand, research, and develop the business agreement or proposal ahead of proceeding and, at the very least, investigate their potential partners prior to making any commitments.

PARTNER RIGHTS

All general partners have an equal right to manage the partnership's business. This does not mean that partners cannot divide up responsibility for the day-to-day management of the business. Rather, partners have the right to enter into contracts on behalf of the partnership, hire employees, and engage in business transactions.

Partners also have a right to compensation for services on behalf of the partnership if they have an agreement for compensation beyond profit sharing. Compensation provisions are particularly common in limited partnerships where some partners are active in the management of business and others are not.

Partners also have the right to receive interest on cash advances made to the partnership. An advance is not automatically considered a capital contribution unless determined to be so under the partnership agreement.

Every partner is entitled to full and complete access to inspect the business records of the partnership and each partner has the right to receive notices and information from all other partners regarding the business. Therefore, partners must notify other partners about material information related to the business and business interests.

Similarly, partners are entitled to an accounting when another partner has withheld profits from the partnership, when there are legal proceedings against the partnership, or upon dissolution. Partners also have the right to indemnification from the partnership for actions of other partners. For example, if the partnership is sued because a partner commits a tort, the other partners may lose their monetary investment in the partnership, but their personal assets are not at risk.

Partners are co-owners of partnership property. Unless altered by a partnership agreement, partners have an equal right to possess partnership property for business purposes.

DUTIES PARTNERS OWE EACH OTHER

A partnership is a fiduciary relationship, and each partner has duties to the other partners. Partners owe each other duties as a result of their relationship of trust, good faith and confidence. Typically, this requires partners to put the firm's interests ahead of their own. Breach of fiduciary duty may result in claims for compensatory, consequential, and incidental damages; recoupment of compensation; and, in some situations, punitive damages. The following is a list of important duties partners owe to one another:

- have an obligation of good faith and fair dealing with each other and the partnership.

- are liable to the partnership for gross negligence or intentional misconduct. Partners are not liable for ordinary negligence.
- cannot compete with the partnership.
- cannot take opportunities away from the partnership unless the other partner's consent.
- cannot engage in conflicts of interest.
- may not make a secret profit while doing partnership business,
- must maintain the confidentiality of partnership information.

These are some key points and not intended to represent a comprehensive list. Courts will determine on a case-by-case basis whether a duty has been breached. Extending from its roots in agency law, partnership law also imposes a duty of care on partners. Partners are to faithfully serve to the best of their ability.

Advantages	**Disadvantages**
Easy to create	Flow-through tax entity (owner pays personal income tax on all business profits)
Easy to dissolve	Unlimited liability
Allows for investment by limited partners to raise capital	May be hard to value individual partner's share of business
Flexibility in sharing management decisions	Dissolution occurs any time a new partner is added or old partner leaves
No formal documents or governmental filings required to start business	

PARTNERSHIP AGREEMENTS

A business partnership is often analogized to a marriage partnership. In both instances there is a relationship of trust and confidence between (or among) the parties and poor judgment, negligence, or dishonesty within the relationship can lead to negative outcomes.

Regardless of whether the partnership is formal or informal, all partners have important duties in a partnership, including:

- the duty to serve—that is, to devote to the work of the partnership;
- the duty of loyalty, which is informed by the fiduciary standard: the obligation to act always in the best interest of the partnership and not in one's own best interest;
- the duty of care—that is, to act as a reasonably prudent partner would;
- the duty of obedience not to breach any aspect of the agreement or act without authority;
- the duty to inform other partners; and
- the duty to account to the partnership.

A written partnership agreement is not required to form a partnership, but it is a best business practice. Given the variety of different types of partnerships, it is understandable that no formal requirements for a partnership agreement exist. When developing a formal partnership agreement, it should be clearly understood that the agreement itself is a contract and should follow the principles and rules of contract law. Because it is intended to govern the relations of the partners toward themselves and their business, every partnership contract should include the following terms:

- *Name of partnership* – partnerships may choose almost any name they would like. However, partnerships may not use the word "company" or any other word that would imply the business is a corporation. If partners choose a name that does not include their names, the fictitious name requires that they must give public notice as to the identities of the partners.

- ***Purpose and duration –*** is the partnership for a limited time or for a specific purpose? Is it a joint venture between businesses that grants partners only limited authority and property rights? Is it a general partnership with the flexibility to grow the business as the market allows?
- ***Capital contributions*** – partners may contribute cash, intellectual property rights, real and personal property, and goodwill to the partnership. Capital contributions do not include the partners' business experience. An individual may also become a partner without making a capital contribution if the other partners agree to it.
- ***Methods of sharing profits and losses –*** the default rule is that each partner shares equally in the profits and losses of the partnership. Such provisions often include any credit for capital contributions partners may receive in the event of dissolution.
- ***Effects of advances*** – if the partnership is short of cash and a partner agrees to advance money to the partnership, that cash advance could be considered either a personal loan or a capital contribution to the partnership. Determining in advance how that money will be spent, repaid, and/or credited within the partnership helps facilitate these types of transactions.
- ***Compensation –*** if general partners receive any salary or additional compensation for their management of the business, the terms of compensation should be clearly defined. In addition, the procedure for setting the amount and type of compensation should also be addressed.
- ***Fiscal year and accounting methods*** – processes for accounting and tax liabilities are important to clearly define, especially as partnerships are flow-through tax entities.
- ***Property*** – partnerships often use personal property of partners as well as property of the business. The default rule is that all property brought into the partnership or acquired by it becomes partnership property. If a partner does not want to lose property rights to the partnership or its creditors, this should be clearly specified.
- ***Dispute resolution –*** if partners are unable to agree on how to manage the business, how will the deadlock be resolved? These provisions are especially helpful when there are an even number of partners to avoid dissolution when deadlock occurs.
- ***Modification*** – how may the partners modify the partnership agreement? Is unanimous consent required to add new partners or add new terms to the contract?
- ***Rights and obligations at dissolution*** – partners should think about what will happen if a partner chooses to leave the partnership or dies. Can the remaining partner(s) buy out that partner's share of the business? If so, under what terms or process?

It is important to remember that partnership agreements exist between partners in a business, not between the partners and third parties. Partnership agreements are contracts between individuals who want to work together.

TERMINATION OF A PARTNERSHIP

The legal end of a partnership is called *dissolution*. Dissolution may occur when partners mutually agree to stop working together, a partner dies or withdraws from the partnership, or a new partner is added. A new partnership is formed when there is a change in partners, whether an existing partner leaves or a new partner is added. Often, these types of changes do not significantly impact on the day-to-day operations of the business.

However, a new partnership agreement, and sometimes a new partnership name, is necessary.

If the partnership ceases to operate, then *winding up* occurs. Winding up is the process in which a partnership is liquidated. Partnership assets are reduced to cash, creditors are paid off, and any remaining profit and assets are distributed to the partners. During winding up, there is a priority of distributing the partnership assets. In general, all creditors other than partners are entitled to be paid before the partners divide up the partnership's assets.

If the partnership does not have enough assets to cover its debts, then the priority of paying creditors is governed by the provincial law where the partnership exists. Provincial laws vary regarding the priority of distributing assets, so it is important to consult a professional for guidance or advice.

OTHER FORMS OF PARTNERSHIPS

Franchises – A franchise is an arrangement in which a business, in return for compensation, grants another entity the right to engage in a certain business or in a business using a particular trademark in a certain area. Franchises are not a separate form of business organization – they are a form of contract between businesses. Most franchises involve corporations, but they may include sole proprietorships and partnerships.

The advantage of a franchise is that under a franchise agreement, an entrepreneur can open and run a business under a proven business model. The local owner, the franchisee, uses the franchisor's trademark, intellectual property, and business model under a license agreement. The franchisee offers goods or services to the public and keeps any income earned. In exchange for the right to sell goods or services developed by the franchisor, the franchisee pays a fee to the franchisor.

Franchise agreements can be very detailed and often require the franchisee to use specific vendors, ingredients, store layouts, colors, or meet other conditions. Franchises are common in some industries such as quick service restaurants, hotels, and tax preparation services.

Joint Venture – A joint venture is when two or more individuals or businesses combine their efforts in a particular business enterprise and agree to share the profits and losses jointly or in proportion to their contributions. Unlike a partnership, which operates as a general business for as long as the partner's desire, a joint venture is for a single transaction or a limited activity. The businesses remain separate entities and they do not share financial or confidential information unless they decide to. Joint ventures automatically terminate at the conclusion of an event or project.

Joint ventures are often formed to address a common need or to reach a mutual goal. They may also be enacted to share the costs of major research or infrastructure projects within an industry. This occurs frequently when industries are impacted by advances in technology. For example, BMW and Toyota created a joint venture to research hydrogen fuel cells, electric vehicles, and ultra-lightweight materials needed in next generation vehicles. By sharing the cost of research and development, the companies can be on the forefront of technological advancements in their industry.

CONCLUDING THOUGHTS

Partnerships are very common because of their flexibility and ease of creation. However, if individuals want to create a partnership, a best practice would be to create a partnership agreement that identifies the rights and obligations of the partners. Partnerships are fiduciary relationships in which the law assigns certain rights and obligations even if there is not a formalized partnership agreement.

Corporations

HISTORY AND CONTEXT

Corporation is an ancient concept, recognized in the *Code of Hammurabi* (1792–1750 BCE), and to some degree a fixture in every other major legal system since its creation. The first corporations were not business enterprises; instead, they were associations for religious and governmental ends in which perpetual existence was a practical requirement. Thus, until relatively late in legal history, kings, popes, and jurists assumed that corporations could be created only by political or ecclesiastical authority. By the seventeenth century, with feudalism on the wane and business enterprise becoming a growing force, kings extracted higher taxes and intervened more directly in the affairs of businesses by refusing to permit them to operate in corporate form except by royal grant.

The most important concessions, or charters, were those given to the giant foreign trading companies, including the Russia Company (1554), the British East India Company (1600), Hudson's Bay Company (1670, and still operating in Canada under the name "the Bay"), and the South Sea Company (1711). These were joint-stock companies, that is, individuals contributed capital to the enterprise, which traded on behalf of all the stockholders. Originally, trading companies were formed for single voyages, but the advantages of a continuing fund of capital soon became apparent. Many shareholders were encouraged to invest due to the feature of *limited liability*. They risked only the cash they put in, not their personal fortunes.

Some companies were wildly successful. The British East India Company paid its original investors a

fourfold return between 1683 and 1692. But perhaps nothing excited the imagination of the British more than the discovery of gold bullion aboard a Spanish shipwreck; 150 companies were quickly formed to salvage the sunken Spanish treasure. Though most of these companies were outright frauds, they ignited the search for easy wealth by a public unwary of the risks. In particular, the South Sea Company promised lucrative gains. In return for a monopoly over the slave trade to the West Indies, it told an enthusiastic public that it would retire the public debt and make every person rich.

In 1720, a fervor gripped London that sent stock prices soaring. Beggars and earls alike speculated from January to August; and then the bubble burst. Without considering the ramifications, Parliament had enacted the highly restrictive *Bubble Act*, which was supposed to do away with unchartered joint-stock companies. When the government prosecuted four companies under the act for having fraudulently obtained charters, the public panicked and stock prices plummeted, resulting in history's first modern financial crisis.

Consequently, corporate development was severely hindered in England. Distrustful of the chartered company, Parliament issued few corporate charters, and then only for public or quasi-public undertakings, such as transportation, insurance, and banking enterprises. England did not repeal the *Bubble Act* until 1825, and then only because the value of true incorporation had become apparent from the experience of its former colonies. As industrial development accelerated in the mid-1800s, it was possible in many jurisdictions to incorporate by adhering to the requirements of a general statute or regulations.

CORPORATION OVERVIEW

Unlike a sole proprietorship or general partnership, a corporation is a legal entity separate and distinct from its owners. In effect, it is an artificial person with all the rights and obligations of any living person. While it can be created for a limited duration, it is typically expected to have a perpetual existence (known as an 'ongoing concern'). As a corporation takes the form of a legal entity/person, it has the distinct advantage of continuity. Ownership can be changed without the need to dissolve the business and restart it; and without affecting business operations.

Corporations must be formed in compliance with the law of Canada (Federal Corporation) or of the province (Provincial Corporation). Each jurisdiction has its own rules governing corporations and anyone considering a corporation as a business structure should research which jurisdiction's rules fit best with the business' objectives. Most corporations incorporate where their principal place of business is located, but some choose a different jurisdiction where rules may be more beneficial.

To start a corporation, the corporate founders must file *articles of incorporation* within their desired jurisdiction. Articles of incorporation typically include the following elements:

- The name of the company;
- Whether the company is for-profit or nonprofit;
- The founders' names;
- The company's purpose;
- How many shares the corporation will issue initially; and
- The par value of any shares issued.

Unlike sole proprietorships, corporations can be quite complicated to manage and often require specialized professional competencies. In addition to filing fees due at the time of incorporation, there are typically annual license fees, franchise fees and taxes, and other costs which can be burdensome on businesses. Additionally, corporations are subject to levels of regulation and governmental oversight that can be challenging and time consuming.

TYPES OF CORPORATIONS

There are different types of corporations that may operate in Canada. The first is a 'Not-for-Profit' (NFP) Corporation. While NFPs operate like a typical corporation, the purpose is not to distribute profit to members, directors or officers. This does not mean that a NFP cannot generate profit, but that any profit created is used to further the goals of the NFP rather than paying dividends to members. NFPs often incorporate specific social or environmental responsibilities into their legal structure. Non-profit corporations may be formed for charitable, educational, civil, religious, social, and cultural purposes, among others.

Another type of corporation is a governmental entity (often called a municipal corporation). Major cities and counties, and many towns, villages, and special governmental units, such as sewer, transportation, and public utility authorities, are incorporated. An example of this is *Metrolinx,* an agency of the Government of Ontario created to improve transportation access, integration and infrastructure in the Greater Toronto and Hamilton regions. Governmental corporations are not organized for profit, do not have shareholders, and operate under different statutes than do business corporations. These are typically operated independently of government but have some type of governmental oversight.

The main form of corporation is the business corporation. There are two main types of business corporations:

broadly held (or public) and closely held (or private) corporations. Both types are private in the sense that they are not governmental but are distinguished by the number of shareholders.

A public corporation is one in which stock is widely held or available for wide public distribution through such means as trading on a national or regional stock exchange. Its managers, if they are also owners of stock, usually constitute a small percentage of the total number of shareholders and hold a small amount of stock relative to the total shares outstanding. Few, if any, shareholders of public corporations know their fellow shareholders.

By contrast, the shareholders of private corporations are fewer in number. Shares in a private corporation could be held by one person, and usually by no more than thirty. Shareholders often share family ties or have some other association that enables them to be known to one another. Most corporations in Canada are closely held. Though many closely held corporations are small, no economic or legal reason prevents them from being large and some have billions of dollars in annual sales.

FORMING A CORPORATION

The goal of the incorporation process is issuance of a corporate charter. The term used for the document varies from jurisdiction to jurisdiction. Most provinces call the basic document filed in the appropriate public office the “articles of incorporation” or “certificate of incorporation”. Once filed and approved, the business becomes a ‘charter corporation’ under the respective jurisdiction.

Articles of Incorporation

As discussed above, filing for a corporation charter requires the submission of the articles of incorporation. These are the rules (the bylaws) of the corporation. Articles of incorporation typically include the following:

- the corporate name;
- the address of the corporation’s initial registered office;
- the period of the corporation’s duration (usually perpetual);
- the company’s purposes;
- the total number of shares, the classes into which they are divided, and the par value of each;
- the limitations and rights of each class of shareholders;
- the authority of the directors to establish preferred or special classes of stock;
- provisions for preemptive rights;
- provisions for the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares;
- the number of directors constituting the initial board of directors and the names and addresses of initial members;
- and the name and address of each incorporator.

MANAGING A CORPORATION

Power within a corporation is present in many areas. The corporation itself has powers, although with limitations. There is a division of power between shareholders, directors, and officers. Given this division of power, certain duties are owed amongst the parties.

Directors and Officers

A director is a fiduciary, a person to whom power is entrusted for another's benefit, and as such, must perform duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A director's main responsibilities include the following:

- to protect shareholder investments,
- to select and remove officers,
- to delegate operating authority to the managers or other groups,
- and to supervise or hold the company accountable for achieving its objectives.

The board of directors, by majority vote, may delegate its powers to various committees. This authority is limited to some degree. For example, only the full board can determine dividends, approve a merger, and amend the bylaws. The delegation of authority to a committee does not, by itself, relieve a director from the duty to exercise due care. Directors often delegate to officers the day-to-day authority to execute the policies established by the board and to manage the firm. Normally, the president is the chief executive officer (CEO) to whom all other officers and employees report, but sometimes the CEO is also the chairman of the board.

One critical function for boards of directors is to appoint corporate officers. These officers often hold titles such as chief executive officer, chief operating officer, chief marketing officer, and other titles depending on the context.

Officers are involved in everyday decision making for the company and implement the board's decisions. As officers of the company, they have legal authority to sign contracts on behalf of the corporation, binding the corporation to legal obligations. Officers are employees of the company and work full-time for the company but can be removed by the board.

Although shareholders or members own the corporation, the officers and directors are empowered to manage the day-to-day business of the corporation. The officers and directors owe a fiduciary duty to both the corporation and its shareholders or membership. This means that the officers and directors must act in the best interests of the corporation and shareholders or members.

Duty of Loyalty

As part of their fiduciary duty, officers and directors have a *duty of loyalty* to the corporation and its Shareholders or members. The duty of loyalty requires them to act:

- In good faith;
- For a lawful purpose;
- Without a conflict of interest; and
- To advance the best interests of the corporation.

Duty of loyalty issues may arise in the context of a director entering into a contract with the corporation or loaning it money. Other situations may involve a director taking a business opportunity away from the corporation for personal gain. The corporate opportunity doctrine prevents officers and directors from taking personal advantage of a business opportunity that properly belongs to the corporation.

Duty of Care

The *duty of care* requires officers and directors to act with the care that an ordinary prudent person would take in a similar situation. In other words, they have a duty not to be negligent. The extent of this duty depends on the nature of the corporation and the type of role the director or officer fills. For example, the duty of care imposed on the board of directors of a federally insured bank will be higher than the duty imposed on a small non-profit organization.

In general, directors should understand the nature and scope of the corporation's business and industry, as well as have the skills necessary to be successful in their role. Officers and directors also should stay informed about the corporation's activities and hire experts when they lack the expertise necessary to make the best decisions for the corporation. The duty of care requires officers and directors to make informed decisions.

Shareholders

Owners of corporations are called *shareholders*. Corporations can have as few as one shareholder or millions of shareholders, and those shareholders can hold as few as one share or millions of shares. Shareholders own shares in the company but have no legal right to the company's assets. As a separate legal entity, the corporation owns any property in its name.

Shareholders can be individuals or other business entities, such as partnerships or corporations. If one corporation owns all the stock of another corporation, the primary is known as the parent company and the secondary as a wholly owned subsidiary.

In a closely held corporation, the number of shareholders tends to be small, while in a publicly traded corporation, the body of shareholders tends to be large. In a publicly traded corporation, the value of a share is determined by the laws of supply and demand, with various markets or exchanges providing trading space for buyers and sellers of certain shares to be traded.

Shareholders of a corporation enjoy limited liability. The most they can lose is the amount of their investment. Shareholders' personal assets are not available to the corporation's creditors.

An exception to the rule of limited liability arises in certain cases involving closely held corporations. Many sole proprietors incorporate their businesses to gain limited liability but fail to realize that when they do so they are creating a separate legal entity. If sole proprietors fail to respect the legal corporation with an arm's length transaction, then creditors can ask a court to 'pierce the corporate veil'. If a court agrees, then limited liability disappears and those creditors can access the shareholder's personal assets.

In the modern publicly held corporation, ownership and control are separated. The shareholders "own" the company through their ownership of its stock, but power to manage is vested in the directors. In a large publicly traded corporation, most of the ownership of the corporation is diluted across its numerous shareholders, many of whom have no involvement with the corporation other than through their stock ownership. On the other hand, the issue of separation and control is generally irrelevant to the closely held corporation, since in many instances the shareholders are the same people who manage and work for the corporation.

Shareholders do retain some degree of control. For example, they elect the directors, although only a small fraction of shareholders controls the outcome of most elections because of the diffusion of ownership and modern proxy rules and requirements. Shareholders also may adopt, amend, and repeal the corporation's bylaws; they may adopt resolutions ratifying or refusing to ratify certain actions of the directors. And they must vote on certain extraordinary matters, such as whether to amend the articles of incorporation, merge, or liquidate.

In most jurisdictions, the corporation must hold at least one meeting of the shareholders each year. The board of directors or shareholders may call a special shareholders' meeting at any time as stated in the corporation's articles or bylaws. Shareholders may take actions without a meeting if every shareholder entitled to vote consents in writing to the action to be taken. This option is obviously useful to the closely held corporation but not to the large publicly held companies.

Rights of Shareholders

Not all shareholders in a corporation are necessarily equal. Canadian law allows for the creation of different types, or classes, of shareholders. Shareholders in different classes may be given preferential treatment when it comes to corporate actions such as paying dividends or voting at shareholder meetings.

Shareholder rights are generally outlined in a company's articles of incorporation or bylaws. Some of these rights may include the right to obtain a dividend, but only if the board of directors approves one. They also typically include the right to attend shareholder meetings, the right to examine the company's financial records, and the right to a portion of liquidated company assets.

One of the most important functions for shareholders is to elect the board of directors of a corporation.

Only shareholders elect a director. The board is responsible for making major decisions that affect a corporation, such as declaring and paying a corporate dividend to shareholders; authorizing major decisions; appointing and removing corporate officers; determining employee compensation, especially bonus and incentive plans; and issuing new shares and corporate bonds.

Dividends

A dividend is a portion of a corporation's profits distributed to its shareholders on a pro rata basis. Dividends are usually paid in the form of cash or additional shares in the corporation. Although shareholders have a right to a dividend when declared, the board of directors has the discretion to decide whether to declare a dividend. The board may decide to reinvest profits into the corporation, pay for a capital expense, purchase additional assets, or to expand the business. As long as the board of directors acts reasonably and in good faith, its decision regarding whether to declare a dividend is usually upheld by the courts.

Shareholder Meetings

Shareholders have the right to appropriate notice and the right to attend shareholder meetings. Shareholder meetings must occur at least annually, and special meetings may be called to discuss important issues such as mergers, consolidations, changes in bylaws, and the sale of significant assets. Failure to give proper notice invalidates the action taken at the meeting.

A quorum of shareholders must be present at the meeting to conduct business. A quorum is the minimum number of shareholders (usually a majority) who must be present to take a vote. The corporation's bylaws define what constitutes a quorum, if not otherwise set by provincial or federal regulations.

Voting

Depending on the type of share owned, shareholders may have the right to vote. In general, shareholders of common stock are entitled to a vote for each share of stock owned. Owners of preferred stock often do not have a voting right in exchange for a higher dividend amount or preference in receiving dividends. Common issues that shareholders vote on include:

- Election of directors;
- Mergers, consolidations, and dissolutions;
- Change of bylaws;
- Change in major corporate policies; and

- Sale of major assets.

Proxies

If a shareholder is not able to be physically present during a meeting, he or she may vote by proxy.

A proxy is the representative of the shareholder. A proxy may be a person who stands in for the shareholder or may be a written instrument by which the shareholder casts her votes before the shareholder meeting. Modern proxy voting allows shareholders to vote electronically. Proxies are usually solicited by and given to management, either to vote for proposals or people named in the proxy or to vote however the proxy holder wishes.

CORPORATE TAXATION

Corporations are subject to double taxation. Because corporations are separate legal entities, they must pay federal, provincial, and local tax on net income. Then, if the board of directors declares a dividend, shareholders are taxed on the dividend that they receive in the form of a dividend tax. However, as a shareholder, dividends received are typically taxed at a lower tax rate than income from sole proprietors and partnerships. As a result, for closely held corporations, there can be significant tax advantages to having a corporation as a business structure.

Advantages	Disadvantages
Separate legal entity from owners	Formal documents required to filed in state of incorporation
Corporation unaffected by change of ownership/shareholders	Can be complicated to manage
Limited liability for shareholders	High formation and maintenance costs
Considered as an “individual” with Constitutional rights	Subject to double taxation
	Heavily regulated by government

Mergers, Consolidations, and Dissolutions

MERGER

A merger occurs when one corporation absorbs another. The acquiring corporation continues to exist, but the target corporation ceases to exist. The acquiring corporation acquires all the assets and liabilities of the target corporation. Corporate mergers must conform to jurisdictional laws and usually must be approved by the majority of shareholders of both corporations.

CONSOLIDATION

Consolidation occurs when two or more corporations are dissolved, and a new corporation is created. The new corporation owns all the assets and liabilities of the former corporations. Like mergers, consolidations must typically be approved by the majority of shareholders of all corporations involved. If approved, articles of consolidation must be filed in the jurisdictions where the corporations existed.

VOLUNTARY DISSOLUTION

To dissolve a corporation voluntarily, the corporation must file a statement of intent to dissolve. At that point, the corporation must cease all business operations except those necessary to wind up its business affairs. The corporation must give notice to all known creditors of its dissolution. If the corporation fails to give notice, then the directors become personally responsible for any debt and legal liability. The corporation is required to pay off all debts before distributing any remaining assets to shareholders. Until the jurisdiction issues the articles of dissolution, the statement of intent may be revoked if shareholders change their mind.

INVOLUNTARY DISSOLUTION

The jurisdiction of incorporation has the power to create corporations through granting corporate charters. Similarly, federal and provincial authorities have the right to revoke corporate charters. Shareholders may also request dissolution when:

- The shareholders are deadlocked and cannot elect a board of directors;
- When there is illegal, fraudulent or oppressive conduct by the directors or officers;
- When majority shareholders breach their fiduciary duty to the minority shareholders;
- Corporate assets are being wasted or looted; or
- The corporation is unable to carry out its purpose.

Finally, dissolution may occur as a result of bankruptcy or when the corporation is unable to cover its debts to creditors.

CONCLUDING THOUGHTS

Articles of incorporation represent a corporate charter—that is, a contract between the corporation and the federal or provincial governments. Filing these articles, or “chartering,” is accomplished at either the federal or provincial level. In selecting a jurisdiction in which to incorporate, a corporation looks for a favorable corporate climate that meets their desired objectives. Most closely held companies choose to incorporate in their home province.

The hallmark of the corporate form of business enterprise is limited liability for its owners. Other features of corporations are separation of ownership and management, perpetual existence, and easy transferability of share interests. The corporation, as a legal entity, has many of the usual rights accorded natural persons. The principle of limited liability is broad but not absolute: when the corporation is used to commit a fraud or an injustice or when the corporation does not act as if it were one, the courts will ‘pierce the corporate veil’ and assign liability to shareholders.

Because ownership and control are separated in the modern publicly held corporation, shareholders generally do not make business decisions. Shareholders who own voting stock do retain the power to elect directors, amend the bylaws, ratify or reject certain corporate actions, and vote on certain extraordinary matters, such as whether to amend the articles of incorporation, merge, or liquidate.

Directors have the ultimate authority to run the corporation and are fiduciaries of the firm. In large corporations, directors delegate day-to-day management to salaried officers, whom they may fire. The full board of directors may, by majority, vote to delegate its authority to committees.

The general rule is to maximize shareholder value, but over time, corporations have been permitted to consider other factors in decision making. For example, allowing the board to consider factors other than maximizing shareholder value. Corporate social responsibility has increased, as firms consider things such as environmental impact and consumer perception in making decisions. Special business forms such as benefit corporations allow even greater flexibility in meeting social responsibility.

Depending on the purpose of a business and its goals, different business entities may fit the needs of owners better than others. It is important when starting a business to decide how to minimize tax and liability exposure in order to achieve the organization’s objectives. Because there is no perfect “fit” for every business need, understanding the advantages and disadvantages of the various business structures is important.

Cases of Interest

- **Personal Liability for Corporate Debt:** Kobes Nurseries Inc. v. Darren Convery et al, 2010 ONSC 6499 (CanLII) – https://www.canlii.org/en/on/onsc/doc/2010/2010onsc6499/2010onsc6499.html
- **Partner Duties**: Rochwerg v. Truster, 2002 CanLII 41715 (ON CA) – https://www.canlii.org/en/on/onca/doc/2002/2002canlii41715/2002canlii41715.html
- Tim Ludwig Professional Corporation v. BDO Canada LLP, 2017 ONCA 292 – https://www.ontariocourts.ca/decisions/2017/2017ONCA0292.htm
- **Limited Partner Liability:** ADAG Corporation Canada Ltd. v SaskEnergy Incorporated, 2021 SKCA 74 (CanLII) – https://www.canlii.org/en/sk/skca/doc/2021/2021skca74/2021skca74.html
- **Director Breach of Fiduciary Duty**: Genesis Fertility Centre Inc. v. Yuzpe, 2019 BCSC 233 – http://tevlingleadle.com/wp-content/uploads/2019/02/Judge-Sewell-re-Genesis-Fertility-Centre-Inc.-v.-Yuzpe-02-25.pdf

Questions for Discussion

1. What are the costs and benefits involved in starting a sole proprietorship?
2. What does "unlimited personal liability" mean in practice?
3. Why is it necessary—or at least useful—to have tests to determine whether a partnership exists?
4. What is the "fiduciary duty," and why is it imposed on some partners' actions with the partnership?
5. What are some advantages of a corporation business structure? What are some disadvantages?

Additional Resources

- Business Structure: Which One is Right for You? – https://sbs-spe.feddevontario.canada.ca/en/business-structure-which-one-right-you
- Choose the Right Structure for Your Business – https://www.bdc.ca/en/articles-tools/start-buy-business/start-business/advantages-different-business-structures
- Small and Medium Size Business – https://www.bdc.ca/en/articles-tools/business-strategy-planning/manage-business/10-things-didnt-know-canadian-sme
- Canada Business Corporations Act – https://laws-lois.justice.gc.ca/eng/acts/c-44/
- Not-for-profit Corporations – http://www.ic.gc.ca/eic/siTe/cd-dgc.nsf/eng/h_cs09551.html

6. CONTRACT LAW

CHAPTER OUTLINE

- Elements of Contracts
- Promissory Estoppel
- Capacity and Legality
- Forms of Breach of Contract
- Breach of Contract Remedies
- Contract Structure
- Common Errors in Contract Writing

Learning Outcomes

Analyze and elucidate the principles of contract law and how they apply to businesses.

What Is a Contract?

A contract is defined as an agreement between two or more parties that is enforceable by law. There are three required elements of a contract: offer, acceptance, and consideration. An offer is a proposal made to demonstrate an intent to enter into a contract. Acceptance is an agreement to be bound by the terms of the initial offer. Consideration occurs when one person promises something in order to get a promise back from another person. For example, Lily promises to give Jagmeet $50.00 in exchange for a backpack he is selling. This mutual exchange binds the parties together.

Some legal scholars expand this list to include whether the subject matter is legal, whether the parties have capacity to enter into a contract, and whether the law requires the contract to be in writing to be enforceable. However, these are best understood as defenses to contract formation, especially in light of the fact that the only elements that all provinces agree on are offer, acceptance, and consideration.

Generally speaking, contracts are a form of private law because the terms of the contract are binding on the parties to the contract and no one else. Parties may enter into contracts for whatever they wish and under any terms that they agree on. In other words, parties may assent to agreements even if those agreements represent bad bargains.

It is important to recognize that contract law performs three significant economic functions:

1. It helps individuals and businesses exchange goods and services efficiently.
2. It reduces the costs of economic transactions because parties do not need to negotiate a variety of rules and terms with each separate transaction.
3. It alerts the parties to problems that have arisen in the past, making it easier to avoid potential pitfalls.

Offer

All contracts start when an individual or business proposes a deal. It might involve buying or selling goods, performing services, or making an exchange. An offer is a conditional promise to do or refrain from doing something now or in the future. In other words, it is willingness to enter into a contract. Offers can be formal or informal. In some industries, such as retail and restaurants, offers are often posted on menus, signs, and advertisements. For example, a sign listing menu items hanging above a cash register is the restaurant's offer to sell customers those items at those prices.

Once made, offers can be terminated in several ways. An offer that has been properly communicated continues to exist until it:

1. Is rejected;
2. Is replaced by a counteroffer;
3. Lapses or expires;
4. Is revoked; or
5. Is terminated by operation of law.

Unless it states a specific time, an offer remains open for a reasonable time. A lapsed offer is an offer that is no longer valid because a reasonable time to accept it has expired. An expired coupon is an example of a lapsed offer.

ACCEPTANCE:

To constitute an agreement, once an offer has been made, there must be an acceptance of the offer. Legally, acceptance is an implied or express act that shows willingness to be bound by the terms of an offer. Express acceptance occurs when a party states that they accept the offer. Acceptance may be implied based on the parties' conduct.

For example, a retailer offers to sell a product to consumers for the price listed on the shelf. A consumer may accept that offer by handing the cashier the item and money to pay for it. The consumer does not need to say anything to complete the transaction. But the consumer must do something to accept. Silence, without more (such as handing over payment), is not acceptance. This is because silence may be evidence that the consumer either does not know about the offer or has rejected it. To be effective, both parties must understand and agree to be bound by the contract.

Distinguishing between knowing what constitutes acceptance and what is actually negotiation ahead of accepting an offer is important and sometimes misunderstood. If an acceptance changes, adds, or modifies the terms of an offer, it is a counter-offer and no contract is formed. The original party may decide to accept, reject, or propose another offer as a result. Although this sounds straightforward, with today's fast-paced communications, parties may respond to part of an offer, negotiate various parts of the contract simultaneously, or agree to terms in installments. As a result, there may be confusion about what the full terms of a contract are.

Offer and acceptance form mutual assent, which is also called "meeting of the minds." This is the parties' intention to enter into a binding contract on the terms they agreed upon. If parties do not agree on the essential terms, then there can be no meeting of the minds to enter into a contract. This is the basis for many of the defenses to contract formation.

CONSIDERATION:

Consideration is the exchange of something of value (money, a promise to do something or not to do something) that shows the parties intend to be bound by the contract. The "something" that is promised or delivered must be a legal detriment. A legal detriment is giving up a legal or property right.

Consideration may be concurrent or a promise to perform in the future. However, it cannot be "past consideration" based on something that has occurred before the formation of the current contract. In other words, an act or promise made before the current contract is not adequate consideration because it was not given in exchange for the current promise.

When bargained-for consideration is not present, a court may validate a promise based on *promissory estoppel*. Promissory estoppel is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise, and the promisee relied on the promise to his or her detriment. Promissory estoppel is an equitable doctrine used as a substitute for consideration that allows the imposition of contractual liability to prevent unfairness.

To establish promissory estoppel, a party must show:

1. A definite promise;
2. The party making the promise should have expected that the other party would rely on the promise;
3. A reasonable person would have relied on the promise;
4. The party relied on the promise, and it resulted in a substantial detriment; and
5. Basic justice and fairness require that the promise be enforced.

CONSIDERATION AND PROMISSORY ESTOPPEL:

Contract law employs the principles of consideration and promissory estoppel. In most cases, consideration need not be pecuniary (monetary). Most contracts are enforceable only if each party receives consideration from the agreement. Consideration can be money, property, a promise, or some right. For instance, when a music company sells studio equipment, the promised equipment is the consideration for the buyer. The seller's consideration is the money the buyer promises to pay for the equipment.

However, the promissory estoppel doctrine is an exception to the requirement of consideration for contracts. Promissory estoppel is an equitable doctrine that was developed to deal with the unfairness that can arise where a party promises to not to enforce an existing contractual right and then attempts to go back on that promise. For instance, if two people are in a contract, and one person promises that they won't enforce a contractual right they have, but later sues for breach, the promisee can use promissory estoppel as a defense. Equitable doctrines, such as promissory estoppel, have discretionary remedies. This means that the court can decide if the remedy will be given, even if it is proven there is a breach.

It is important to note that promissory estoppel requires that the parties have a legal relationship.

There are five requirements of promissory estoppel:

1. The promise must have been intended to alter legal relations. In other words, it was not simply a friendly indulgence. This can sometimes be inferred from conduct or words.

2. The promise must be voluntary.
3. The promisor must have the knowledge or relevant facts for the promise to be enforceable.
4. The promise must have been intended to be relied upon.
5. There must be a detriment/loss from acting on the promise not to enforce a contractual right.

CAPACITY AND LEGALITY:

For a contract to be legally binding, the parties entering into it must have the capacity to do so. As a legal matter, there are certain classes of people who are presumed to lack the capacity to form a contract. These include legal minors, those experiencing mental health issues, and those who are intoxicated. If people meeting these criteria enter into a contract, the agreement is considered voidable. If a contract is voidable, then the person who lacked capacity has the choice to either end the contract or continue with it as agreed upon. This design is meant to protect the party lacking capacity.

Examples of the application of these rules include the following:

Minors Have No Capacity to Contract:

In Canada, minors under the age of 18 (19 in some provinces) lack the capacity to make a contract and may therefore either honour an agreement or void the contract.

Consider this example:

> Mary, 16, an athlete, signs a long-term endorsement deal with a well-known brand and is compensated for several years. At age 20, she decides she wants to take a better endorsement deal, so she tries to void the agreement on the grounds that it was made when she was a minor and that she lacked capacity at that time. Mary will not likely succeed in having her agreement voided, as she has passed the period of incapacity.

Mental Incapacity:

If a person lacks the mental capacity to enter into a contract, then either he or she, or his or her legal guardian, may void it, except in cases where the contract involved necessities. In most provinces, mental capacity is measured against the “cognitive standard” of whether the party understood the meaning and effect of the contract.

Consider this example:

> Mr. Williams contracted to sell a patent. Later, however, he claimed that he lacked capacity to enter into the contract because at the time he signed the contract, he was at a party where he got himself drunk. He claimed that his intoxication prevented the contract from being valid.

Courts generally do not find a lack of capacity to contract for people who are voluntarily intoxicated.

The rationale for this decision is that individuals should not be allowed to avoid their contractual obligations by virtue of their self-induced states. However, courts also seek to avoid the undesirable result of allowing the sober party to take advantage of the other person’s condition. Therefore, if a party is so inebriated that he or she is unable to understand the nature and consequences of the agreement, then the contract may be voided by the inebriated party.

Legality:

Contracts must be created for the exchange of legal goods and services to be enforced. An agreement is void if it violates the law or is formed for the purpose of violating the law. Contracts may also be found voidable if they are found violative of public policy, although this is more rare. Typically, this conclusion is only invoked in clear cases where the potential harm to the public is substantially incontestable, eluding the idiosyncrasies of particular judges.

Some examples of contracts that would be considered illegal are contracts for the sale or distribution of illegal drugs, contracts for illegal activities such as loansharking, and employment contracts for the hiring of undocumented workers.

Breach of Contract and Remedies:

Once a contract is legally formed, both parties are generally expected to perform according to the terms of the contract. A breach of contract claim arises when either (or both) parties claim that there was a failure, without legal excuse, to perform on any, or all, parts and promises of the contract.

Several inquiries are triggered when a breach of contract claim is initiated. The first step is to determine whether a contract existed in the first place. If it did, the following questions may be asked: What did the terms of the contract require of the parties? Were the contractual terms modified at any point? Did the breach occur? Was the claimed breach material to the contract? Does any legal excuse or defense to enforcement of the contract exist? What damage was caused by the breach?

Typically, the remedies that will be available if a breach of contract is found can include monetary damages, restitution, rescission, reformation, and specific performance.

Rescission or reformation may be available to parties who enter into contracts by mistake, fraud, undue influence, or duress. Rescission terminates the duties of both parties under the contract, while reformation allows courts to equitably change the contract's substance.

Specific performance compels one party to perform the promises stated in the contract as nearly as practicable. Specific performance is only mandated when monetary damages do not adequately compensate for the breach. Personal service, however, may not be used to compel specific performance, since doing so would constitute forced labor.

Inevitably, when valid contracts are created, the potential for breach exists. An understanding of what happens when a contract's terms are breached is fundamental to an understanding of contract law.

Bilateral and Unilateral Contracts:

In a bilateral contract, both parties make a promise of performance. These contracts are also called mutual or reciprocal contracts. Bilateral contracts are the most common form of contracts. They include ordering food in a restaurant, buying gas for vehicles, purchasing goods and services, and related examples.

A unilateral contract, on the other hand, is a contract where one party makes a promise that the other party can accept only by doing something. For example, a business offers a reward for information leading to the arrest of a thief. A person cannot collect the reward money by promising to give information–he or she must perform under the contract by providing the information.

Express and Implied Contracts:

An express contract is a contract in words (orally or in writing) in which the terms are spelled out directly. The parties to an express contract, whether written or oral, clearly intend to make a legally enforceable agreement. For example, an agreement to buy a car for $10,000 and to take title next Monday is an express contract.

An implied contract is a contract that is inferred from the parties' actions. Although no discussion of terms took place, an implied contract exists if it is clear from the conduct of the parties that they have an agreement. A delicatessen patron who asks for a "turkey sandwich to go" has made a contract and is obligated to pay when the sandwich is made. By ordering the food, the patron is implicitly agreeing to the price, whether posted or not.

Enforceability:

A contract that is fully enforceable and reflects the parties' intent is valid. Conversely, an unenforceable contract is a contract where the parties intend to form a valid bargain, but the court declares that it cannot be enforced for legal reasons. For example, Ramesh owes Jai money, but Jai has waited too long to collect it and the statute of limitations has run out (in Ontario, the *Limitations Act (2002)* fixes this period at 2 years). The contract for repayment is unenforceable and Jai is out of luck unless Ramesh makes a new promise to pay or actually pays part of the debt.

An agreement that is lacking one of the legal elements of a contract is void because it never was a contract. In other words, it is not legally enforceable because it is not a contract at all. An agreement that is illegal is also void. For example, a promise to commit a crime in return for payment is void because neither side can enforce the agreement in court.

By contrast, a voidable contract is a contract that can be annulled. It is a contract that is unenforceable by one party but enforceable by the other. For example, a minor may "avoid" a contract with an adult; meaning the adult may not enforce the contract against the minor if the minor refuses to carry out the bargain. The adult must comply if the minor wishes the contract to be performed. A contract may be voidable by both parties if they are both minors. Usually, the parties to a voidable contract are entitled to be restored to their original position.

A voidable contract remains a valid contract until it is voided. Thus, a contract with a minor remains in force unless the minor decides he does not wish to be bound by it. When minors become adults, they have two choices:

1. Ratify the contract–that is, agree to be bound by it; or
2. Disaffirm the contract–that is, disavow or avoid it.

Ratification may be explicit or implicit. For example, by continuing to make payments or retaining goods for an unreasonable period of time, a party may ratify the contract. If a party has not disaffirmed the contract while still a minor, she may do so within a reasonable time after becoming an adult.

Degree of Completion:

An executory contract is a contract that has yet to be completed. Most executory contracts are enforceable. If some, but not all, of the terms of the contract have been performed, the contract is called partially executed. A contract that has been completed or carried out fully by both parties is called an executed contract.

Performance and Breach of Contract:

Performance simply means undertaking the legal duties imposed by the terms of the contract.

But how do we know whether the contract terms have been performed? Sometimes it's easy to determine. For instance, if someone offers to sell his scooter for four hundred dollars, a purchaser agrees, and they exchange the scooter for the money, then the contract has been fully performed. A contract was formed, the parties performed their obligations under it (known as complete performance), and they are subsequently discharged from further duties arising under the contract. Complete performance results in an executed contract.

When a party fails to perform under the terms of the contract without a legally justifiable reason, the party is in breach of contract. Not all breach of contract situations give rise to litigation. Some breaches are minor and may be overlooked by parties, especially if there is a long-term business relationship between them. Others may be major and give rise to significant issues between the parties.

Performance to the standard of personal satisfaction can be enforced if the contract expressly requires it. This means that contract performance is evaluated subjectively, either by one party to the contract or by a third-party beneficiary specified in the contract. If the subject of the contract is something for which approval is dependent on someone's subjective opinion, like personal taste, then assessment can be made on a subjective standard providing this standard is clearly specified in the contract. These contracts often occur in the entertainment industry, as well as the building of custom homes.

Undue Influence:

Undue influence occurs when one party overpowers the free will of another by use of superior power or influence. In other words, it is unfair persuasion. Undue influence is not a normal level of persuasion. Rather, it occurs when a party agrees to a contract that they would not have otherwise consented to without the unreasonable pressure of the other party. For example, an elderly person who is isolated from others due to poor health and living conditions may be lonely and eager for company. If a caretaker exerted influence over the elder to the extent that he or she could no longer exercise free will, then undue influence occurs. Contracts and transactions in which elders transfer most or all of their wealth to others are frequently reviewed for undue influence.

Duress:

Duress occurs when there is a threat to a person, family or property. Economic pressure may constitute duress if it is wrongful and oppressive. Cases involving duress often occur in emergency situations. For example, when someone is required to sign legal paperwork in an emergency room before receiving medical treatment for themselves or their children. If a person enters into a contract under duress, he or she can get out of the contract after the emergency situation has passed. Duress essentially overcomes a person's free will to voluntarily choose to enter into the contract.

Unconscionability:

Unconscionability occurs when the contract contains markedly unfair terms against the party with less bargaining power or sophistication than the party who created the terms and induced the other party to sign it. Common cases involving unconscionability claims occur when one party is an experienced business dealer, while the other party is an average consumer. If the business dealer uses a very small font and inserts terms into the contract in a way that intentionally misleads the consumer into signing on unfair terms, then the contract may be deemed unconscionable.

Mistake:

In the context of contracts, a mistake is the situation in which the parties did not mean the same thing or when one or both parties formed untrue conclusions about the subject matter of the contract. In other words, a mistake is an erroneous belief.

Mutual mistake refers to something that is a mistake by both parties that relates to an essential term of the contract. For example, a contract to buy property that is not actually owned by the seller would be a mutual mistake, if the seller believed in good faith that he owned the property. When mutual mistakes occur, either party may rescind the contract.

Unilateral mistake occurs when only one party is laboring under a mistake. Mistake does not mean bad bargaining. Courts will not step in to save parties from bad bargaining absent evidence of undue influence or unconscionability. In general, parties cannot rescind the contract when unilateral mistakes occur except when the mistake makes the contract unconscionable, the error is apparent to the other party, or when significant mathematical errors occur.

Misrepresentation and Fraud:

Misrepresentation and fraud are also defenses to contract. Misrepresentation is when a party makes a false statement that induces the other party to enter into the contract. Fraud is a closely related concept, and it simply means that one party has used deception to acquire money or property. Fraud may also be a basis for criminal charges, depending on the circumstances leading to the contract.

Commercial Impracticability:

Commercial impracticability is a defense that can be used when fulfilling a contract has become extraordinarily difficult or unfair for one party. For example, a sales contract relating to the sale of goods destroyed by a natural disaster would fall under this defense. It becomes impossible for the seller to deliver goods that no longer exist and it would therefore be unfair to enforce damages against the seller for breach of contract. This is also called frustration of purpose or impossibility in some jurisdictions.

Bankruptcy:

Sometimes a party to a contract files for bankruptcy protection. The bankruptcy court will determine which debts the bankrupt party must pay, and which are dischargeable. Contract obligations are suspended temporarily through the bankruptcy court’s automatic stay. In other words, the debt does not have to be paid during the course of the bankruptcy. At the conclusion of the bankruptcy, if the contract obligation is determined to be a dischargeable debt, then the debt will not have to be paid.

Assignment, Delegation, and Third Party

BENEFICIARIES:

Contracts are by law assignable and delegable. This means that the rights conveyed by the contract may be transferred to another party by assignment, unless an express restriction on assignment exists within the contract, or unless an assignment violates public policy. Likewise, the duties imposed on a party may be transferred to another party by delegation, unless the contract expressly restricts delegation, there is a substantial interest in personal performance by the original party to the contract, or if delegation would violate public policy.

As a general rule, a party may assign contract rights without the consent of the other party. This is common in the construction industry where a general contractor may assign rights and delegate duties to subcontractors for specific work that needs to be performed under the main contract. For example, the general contractor may delegate the duty to perform electrical work to an electrician, as well as assign the right to be paid for the work performed.

In delegation and assignment, the original contracting party is not "off the hook" if it transfers its duties or rights to another party. For instance, a subtenant assumed the rights and duties imposed on the original tenant in a lease. If the subletting tenant does not pay the rent, the original tenant is still liable. The way to excuse oneself from legal liability under a contract is through novation. Novation is essentially a new contract that transfers all rights and duties to a new party to the contract and releases the previous party from any further obligation. It is the procedure in which one party is dismissed completely from the contract because a third party is substituted. In this situation, the dismissed party no longer has any liability under the original contract. To be effective, all parties must agree to the novation.

THIRD PARTY BENEFICIARIES:

Assignment and delegation under a contract should not be confused with rights of third party beneficiaries. A third party beneficiary is someone who is not a party to the contract but stands to benefit from it. Life insurance policies are a classic example of contracts with third party beneficiaries. The insurance company and the insured are parties to the contract. But the person who receives payment upon the death of the insured is the third party beneficiary.

Third party beneficiaries can either be intended or incidental. An intended beneficiary is someone whom the parties intend to receive the benefit of the contract. For example, the named beneficiary of a life insurance policy. The beneficiary does not need to know about the contract to have his or her rights recognized and enforced.

An incidental beneficiary is someone who benefits from a contract but was not intended by the parties to benefit. For example, if a business pays for a professional to landscape its property, the neighbors are incidental beneficiaries to the landscaping contract. They benefit from the improved appearance and property values, but the business did not enter into the contract with an intent to benefit them. Incidental beneficiaries do not have a legally enforceable interest in the contract.

Remedies

The four main remedies for breach of contract are **damages, specific performance, rescission**, and **restitution**. The purpose of contract remedies is to compensate the non-breaching party for the losses suffered. In other words, remedies must put the non-breaching party in the position it would have been if there had been no breach.

DAMAGES:

Damages are the money paid by one party to another to discharge a legal liability. Compensatory damages are paid to compensate the non-breaching party for the loss suffered as a result of the breach. It is the general category of damages awarded to make the party whole. Compensatory damages include out-of-pocket losses and costs associated with the loss of the bargain. They are the primary damages in contract breach cases and are a direct, foreseeable result of the breach of contract.

Consequential Damages is a basic principle of contract law establishing that a person injured by breach of contract is not entitled to compensation unless the breaching party, at the time the contract was made, had reason to foresee the loss as a probable result of the breach. Consequential damages are damages that flow as a foreseeable but indirect result of the breach of contract. For example, a roofer takes longer to fix a leaky roof than specified in a contract. The delay results in a retailer remaining closed for an additional week until the roof is repaired. The loss of sales from that week are consequential damages.

Consequential damages often include:

- Loss of profits due to the interruption of normal business practices;
- Loss of customers due to delays or cancellations; and
- Cost of replacement goods or services.

Incidental damages are damages that are paid to the non-breaching party to avoid further loss on account of the breach. This damage includes additional costs incurred by the non-breaching party after the breach in a reasonable attempt to avoid further loss, even if that attempt was unsuccessful. For example, an electrician contracts to install light fixtures in a warehouse within seven days. The electrician enters into a purchase agreement with a supplier to buy the fixtures which are to be delivered within three days. On the fifth day, the supplier notifies the electrician that it cannot fill the order, breaching the contract. Because he cannot fulfill his contract with another supplier on time, the electrician breaches his contract with the warehouse and must refund the warehouse its money. The losses incurred by the electrician to the warehouse are a direct result of the supplier's breach of contract and are incidental damages.

Incidental costs often include:

- Inspection of items;
- Transportation or care of items;

- Expenses or commissions incurred in connection with incident or delay of items; and
- Storing defective items until the supplier can retrieve them.

The difference between incidental and consequential damages is the cause of the expense or loss. Incidental damages are the direct result of one party's breach of contract. Consequential damages are more indirect, incurred not because of the breach itself, but due to the result of the breach.

If the breach of contract caused no actual loss, the non-breaching party may be awarded nominal damages. Nominal damages are a token amount of money paid when the breach has caused no actual loss. Nominal damages are often awarded symbolically by juries when they find legal liability but believe the breach was minor or could have been accommodated in another way. For example, a buyer could have purchased the same commodity at the same price without spending any extra time or money.

Punitive damages are awarded to a non-breaching party in excess of any loss suffered to punish the breaching party. Punitive damages are awarded when the defendant acted willfully and maliciously, and the purpose is to deter similar future bad conduct. Punitive damages are not usually available for breach of contract claims unless the breach of contract itself constitutes a tort. In other words, punitive damages may be available when the contract breach itself is fraudulent or malicious. Punitive damages have been awarded against insurance companies that have refused to honor disability payments and that have acted in bad faith in denying legitimate claims.

Liquidated damages are damages agreed upon by parties to a contract to be paid in the event of a breach. Because the parties are often in the best position to know the value of their contract, they can negotiate a fixed sum or a method to calculate damages in the event of a breach. To be enforceable, liquidated damage provisions must apply equally to all parties, be negotiated fairly at the time the contract is executed and must bear a reasonable relation to the probable damage in case of a breach.

EQUITABLE REMEDIES FOR BREACH OF CONTRACT:

Equitable remedies involve a request for relief that does not include money damages. Equitable remedies are useful when money does not provide adequate relief to the non-breaching party.

Specific performance is a judicial order directing a party to deliver the exact property (real or personal) under the terms of a contract. Specific performance is an alternative remedy to damages and may be issued at the discretion of the court. Specific performance is granted when money damages are not an adequate remedy. For example, sale of specific real property (real estate is always unique), artwork, antiques, and heirlooms.

To warrant specific performance, a contract must be clear, definite, complete, and free from fraud and duress. Specific performance is generally not available for service contracts. This is because ordering someone to perform a contract against their will is a type of involuntary servitude banned by the

RESCISSION:

Rescission occurs when one party seeks to undo a contract and return to the position it was in before the contract was made. Rescission often occurs when fraud and mutual mistake occur and enforcing the contract would be unjust. Rescission may also be available when one party materially breaches the contract to such an extent that requiring the other party to perform would be unjust.

A party seeking rescission must notify the other party within a reasonable time after discovery of the facts that are the basis for rescission. The reason is that restoring the parties to their pre-contractual positions is easiest before too much time and performance has passed. Failure to rescind a contract in a timely manner may be held to affirm the contract or waive a breach of contract.

RESTITUTION:

Restitution is restoring property to the original owners. In other words, parties must return any benefit received under the contract. Therefore, only to the extent that the injured party conferred a benefit on the other party may the injured party be awarded restitution. Restitution often follows rescission of a contract. The purpose of restitution is to prevent a party from being unjustly enriched when a contract has been legally annulled.

Sample Contract Structure

Written contracts can be organized in many different ways. However, having a structure can help keep information organized, clear, and easy to find. The best contracts have clear headings that accurately describe what is contained in that section. Using emphasis, such as bold and underlining, work better than italics alone for capturing the reader's eye.

In general, contracts often contain:

1. Title
2. Introduction of Parties and Purpose
3. Definitions of Material Terms
4. Covenants and Promises of Performance
5. Conditions
6. Breach and Its Consequences
7. Representations and Warranties
8. Standard (often called "Boilerplate") Provisions
    - Procedure to Modify Contract
    - Rights of Assignment and Delegation
    - Alternative Dispute Resolution
    - Choice of Law and Forum
    - Integration
    - Severability
    - Exculpatory Clause
    - Force Majeure
    - Signature Block

Note that not all contracts will contain all these elements and provisions. The parties' needs and the purpose of the contract determine the structure of the document.

TITLE:

Contracts have a title, often in bold or CAPITAL letters, at the top of the page. Titles should be as descriptive as possible. "Contract" or "Agreement" are not useful because they require the reader to read through the contract to know what it is about. The best contracts capture the nature of the document in the title. For example, "Employment Agreement Between Jane Doe and Queen's University."

INTRODUCTION OF PARTIES AND PURPOSE:

The introduction should name the parties and describe the nature of the contract. If background information is useful in explaining the parties' interests and objectives, then it should be included here.

DEFINITIONS OF MATERIAL TERMS:

Most business contracts contain some definitions, unless the subject matter and parties are clear. Definitions are useful because it is an area readers can reference to ensure compliance with the contract. For example, did the seller provide the specific goods as defined by the contract?

Definitions are not necessary for every term, though. If not defined, legal terms are given their legal meaning. And ordinary words are given their common, ordinary meaning. Therefore, businesses should define the material terms of the transaction such as: goods, services, quantity, quality, and price. Definitions that are specific to the industry are also helpful to include.

COVENANTS AND PROMISES OF PERFORMANCE:

A covenant is a formal promise to perform. This is the section of the contract where the parties state exactly how they will perform the contract. The Buyer will pay a specific amount for the goods while the Seller will deliver a specific item at a particular location. To ensure clarity, the best contracts use active verbs in this section. For example, "Buyer will pay Seller ten dollars." It is clear who will be paying whom, and how much is owed. Passive voice injects ambiguity, which can be problematic. For example, "Seller shall be paid ten dollars." Will Buyer pay Seller the money or will someone else tender payment? If payment is not made, is Buyer in breach of contract?

CONDITIONS:

As discussed earlier, conditions are things that must occur before performance is due. Usually, conditions must be expressly stated in a contract to be legally enforceable. The best contracts identify any conditions and delineate a timeline for when performance is due after the condition is met. For example, if an inspection of a property is a condition of purchasing it, it is important to indicate the deadline by which the buyer must perform after the inspection is completed.

BREACH AND ITS CONSEQUENCES:

To constitute a violation of the contract, a breach must be material. A material breach is a substantial breach of contract that excuses aggrieved parties from further performance and affords them the right to sue for damages.

In contracts that require performance over a period of time, or payments in instalments, it is helpful to define what constitutes a material breach. This clarifies when the non-breaching party can seek a remedy. The best contracts anticipate reasons for breach and identify consequences for them.

An acceleration clause makes all future payments due immediately under the contract. Acceleration clauses often exist in contracts where periodic payments occur. For example, a contract to purchase a vehicle may require payment of all remaining money owed under the contract if the buyer misses a monthly payment. This allows the business that sold the vehicle or the bank that issued the loan to sue for breach of contract once, rather than filing a new lawsuit for each month.

A liquidated damages clause allows parties to determine the amount of damages in the event of a material breach. Agreeing to the value of the contract before any breach occurs often saves time and money should the case be litigated. To be enforceable, liquidated damages must apply to all parties equally, and be based on the value of the contract rather than acting as a penalty.

REPRESENTATIONS AND WARRANTIES:

Representations are statements of fact made to induce someone to enter into a contract. Common representations by businesses include:

- They are properly licensed;
- They are insured;
- Their financial statements are accurate;
- They own all relevant assets;
- They have legal authority to enter into contracts.

Warranties in a contract are express promises that guarantee something in furtherance of the contract by one of the parties. For example, a seller warrants that the object being sold is as represented or promised.

Warranties differ from representations in four ways:

1. A warranty is an essential part of a contract, while a representation is usually only a collateral inducement;
2. A warranty is written in a contract; while a representation may be written or oral;
3. A warranty is conclusively presumed to be material, while a representation must be proven to be material by the party claiming breach; and
4. A warranty must be strictly complied with, while a representation must be substantially true.

STANDARD PROVISIONS:

Modification:

Often with contracts that require an extended period for performance, modification becomes a concern. What happens if prices or deadlines need to be altered? Will a new contract be required or can the existing contract be modified? Good contracts often include a procedure for how to modify a contract. This may be as informal as writing changes directly on the original contract with the parties' initials and date. Or it could be through a formal addendum procedure.

Regardless of the chosen procedure, it is best practice for businesses to discuss modification procedures when entering into a contract. If the procedure is clear, less friction occurs when a party seeks modification.

Assignment and Delegation:

In general, parties are free to assign and delegate their rights and duties under a contract. Parties can limit those rights, or they can request notice if an assignment or delegation occurs. This is a provision that is often not needed unless a party has a concern about assignment, such as in the insurance industry.

Alternative Dispute Resolution:

As discussed earlier, many businesses want to reduce their risk of litigation by participating in alternative dispute resolution (ADR). Mandatory arbitration clauses are common in consumer and employment contracts. Before including an ADR provision in a contract, parties should be fully comfortable with the option that they choose. If a party agrees to mediation or arbitration, a court will enforce that choice even if the parties change their mind.

Choice of Law and Forum:

Choice of law provisions determine which province's laws will be used to interpret the contract. Choice of forum provisions determine the province in which any litigation will take place. If the parties do not select that province's law or location for litigation, the courts look to:

1. Where the contract was signed;
2. Where the contract is performed;
3. Where the parties are residents; and
4. The court's jurisdictional rules.

Integration:

An integration clause is a provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract. In other words, it is the agreement. The purpose of an integration clause is to prevent the parties from later claiming that they agreed to additional or different terms than what the contract states. This means that any statements made before the parties signed the contract are not part of the contract and they will not be used to interpret the meaning of the contract.

Severability:

A severability clause is a provision that keeps the remaining provisions of a contract in force if any portion of the contract is declared unenforceable by the court. It is also known as a savings clause because it "saves" the whole contract from being declared unenforceable. For example, if a non-compete clause in an employment contract is declared unenforceable by a court, then the rest of the employment contract remains in effect.

Exculpatory Clause:

An exculpatory clause is a provision relieving a party from any liability resulting from a negligent or wrongful act. They are often employed when the risk of injury exists. Exculpatory clauses cannot limit liability when a party acts with gross negligence, commits an intentional tort, or when public policy or provincial laws prohibit them.

Exculpatory clauses have been struck down by courts in some cases where parties to a contract have greatly unequal bargaining power, especially when the party with greater power acts unethically or with gross negligence.

Force Majeure:

A force majeure clause is a provision allocating risk to a certain party if performance becomes impossible as a result of an event that the parties could not have anticipated or controlled. Force majeure events are severe, disruptive events such as natural disasters, war, terrorist attacks, and fires. For example, if the subject matter of an international sales contract is destroyed by a hurricane, does the buyer or seller lose the money in the sale?

Signature Block Example:

For example, Ahmad's Construction, LLC By: __________ Khalid Ahmad, President

Each person signing the contract should date it next to his or her signature.

For partnerships, only general partners can sign a contract on the partnership's behalf. For corporations, the president or chief executive officer is presumed to have authority to sign. For an organization or association, a board president would have authority, but it may require a vote of the governing board to approve the contract.

Common Mistakes in Contract Writing

Four of the most common mistakes when writing a contract are: ***not understanding the content, vagueness, ambiguity, and typographical errors***. One common mistake is using free online resources without ensuring that they are appropriate for the circumstances. Just because it sounds official, a document generated by a computer algorithm may not be helpful.

It is always better to read the contract and ensure that it accurately reflects the parties' agreement. Any mistakes in drafting go against the party who wrote the contract. In other words, if the contract is unclear, the party who did not write it gets the benefit of the doubt. The idea is that the party who wrote it should have done a better job, and the party who read and signed it should not be penalized as a result of someone else's error.

When writing a contract, keep it simple and clear. It is also important to exclude provisions that are irrelevant to the contract. Contracts that are too long and contain irrelevant and contradictory terms are hard to understand. The best contracts are used as a reference between the parties during the period of performance. If a contract is too broad, too confusing, or contains too much irrelevant information, it hinders the effectiveness of the document.

VAGUENESS:

In the context of contracts, vagueness means the language is imprecise, uncertain, and not clearly expressed. Vagueness is problematic because it could mean that the parties did not have a meeting of the minds because they were not talking about the same things. Some business people think that keeping the contract "general" will facilitate a business transaction and that the details can be worked out later. However, if the parties are not in agreement up front, it is uncommon that things will work out smoothly later.

Another risk with vagueness is that it is not clear how a court will interpret the contract. If there are two or more reasonable interpretations, it is possible that the court will decide another interpretation is more reasonable. Again, mistakes in drafting are held against the drafter so if a court concludes that the vague term was a mistake, then it is hard to win in litigation.

AMBIGUITY:

In contracts, ambiguity means an uncertainty of meaning or intention. Ambiguities can be either *patent* or *latent*. A patent ambiguity is where the language of the contract itself creates uncertainty because it is contradictory. For example, a contract states two different sale prices.

A latent ambiguity exists where the uncertainty arises during the performance of the contract. For example, the contract states that goods will ship via a carrier that has a common name and could be referring to different carriers.

TYPOGRAPHICAL ERRORS:

Typographical errors are common in contracts. Some are harmless, some are embarrassing, and others are harmful. Although some typos are easy to ignore because they do not carry legal consequences, some can be fatal to the agreement. Minor errors are called ***scrivener's errors.*** The scrivener's error doctrine permits typographical errors in a written contract to be corrected when clear and convincing evidence exists that the mistake does not reflect the intent of the parties.

However, errors related to dates, price, quantity, legal names of individuals and entities, and property descriptions (such as addresses and lot numbers) may not qualify as scrivener's errors. Such errors may be fatal to the contract or may be enforced with adverse consequences against one of the parties.

Conclusion

Writing valid contracts is an essential skill to be successful in business. Most contracts are not written by lawyers, but they are critical to capturing an agreement between parties. Successful business people see contracts not just as a way to protect their interests, but also as a document that governs their business relationships with others. A well-written contract can be used throughout a transaction to guide the parties in their interactions and responsibilities.

Cases of Interest

- Margolius v. Diesbourg – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/3563/index.do
- Hunter Engineering Co. Inc. v. Syncrude Canada, Ltd., 1989, Supreme Court of Canada: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/428/index.do?site_preference=normal
- John Burrows Ltd. v. Subsurface Surveys Ltd. et al., 1968, Supreme Court of Canada https://www.canlii.org/en/ca/scc/doc/1968/1968canlii81/1968canlii81.html
- Corner Brook (City) v. Bailey, 2021 SCC 29 https://www.canlii.org/en/ca/scc/doc/2021/2021scc29/2021scc29.html?autocompleteStr=2021%20scc%2029&autocompletePos=1

Questions for Discussion

1. What is the definition of a contract?
2. What are the fundamental elements of a contract in Canada?
3. What are the ways an agreement can be invalidated?
4. What happens when a person lacks the legal capacity to enter into a contract?
5. Distinguish between rescission and reformation.
6. What is an example of an illegal contract?

Additional Resources

- *Rights Under the Consumer Protection Act* – https://www.ontario.ca/page/your-rights-under-consumer-protection-act
- *Rights When Signing or Cancelling a Contract* – https://www.ontario.ca/page/your-rights-when-signing-or-cancelling-contract
- Contracts – https://www.peopleslawschool.ca/category/consumer/contracts/

7. THE TORT SYSTEM

OVERVIEW

- Intentional Torts
- Unintentional Torts
- Defenses Against Torts
- Other Forms of Torts

Learning Outcomes

- Students will be able to identify the key elements of tort law and explain the legal principles that govern tort actions.

Tort Law Overview

Understanding tort law is important for businesses in Canada because it helps to protect them from financial loss due to legal claims from third parties. It also helps to ensure that businesses are held accountable for their actions and can be held liable for any damage or injury that is caused to another party. Through knowledge of and alignment with the principles of tort law, businesses can reduce their risk of being sued for negligence or other such claims.

At its most basic level, tort law applies to situations where a person or organization does harm to or damages another person or business. The word “tort” means “wrong” in French. Essentially, a tort can be understood as a civil wrong to a person or property other than breach of contract. A tort is any legally recognizable injury arising from the conduct (or sometimes failure to act) of persons or corporations. The damage can happen in a variety of circumstances and may be intentional or unintentional.

Tort law seeks civil remedies to repair harms or damage while criminal law seeks penalties in the form of prison terms or fines for criminal acts. Tort also differs from contract damages in that Tort applies to everyone in the jurisdiction, whereas contract damages only apply to those bound by a contract.

There are two main types of torts in Canadian law, intentional torts and unintentional torts. Intentional torts occur when an action is knowingly or deliberately committed against another. Unintentional torts refer to actions which unintentionally cause harm or injury to a person or persons.

Key intentional torts include:

- Assault and Battery
- False Imprisonment
- Trespass
- Nuisance
- Defamation

Key unintentional torts include:

- Negligence
- Product Liability
- Professional liability
- Product Defamation
- Inducing a Contract Breach
- Passing Off

Employers are ‘vicariously liable’ for the actions of employees as discussed in the section on labour law. If an employee, agent, or contractor commits a tort, then the business can be held liable for damages.

While torts are wrongs committed against others causing some form of injury or harm, many torts could also result in criminal action which would be pursued in the criminal rather than civil court system.

Tort law operates to provide remedies to individuals who have suffered losses due to the wrongful acts of another. It is the legal system's way of holding wrongdoers accountable for their actions and providing recompense to innocent parties. Remedies often take the form of financial compensation. Tort law also seeks to deter potential wrongdoers from committing similar acts in the future.

The standard of proof is lower for civil suits than for criminal cases, and a finding of liability in a tort case does not establish guilt or innocence in a criminal matter. The criminal standard for conviction is 'beyond a reasonable doubt'; meaning that the Crown must prove to a judge or jury that the crime was committed beyond a reasonable doubt. However, in a tort case, the level of finding liability is based on the balance of probabilities. This effectively means that if it is 51% or more likely that the tort was committed, then the judgement would be that the tort was committed. In many cases, judges and juries will 'determine' which party is more credible and more likely to be telling the truth.

Tort trials can be jury trials or judge only trials. In Jury trials, juries decide the question of facts (what is true and what is not true) and judges focus on the questions of law (making sure the laws and procedures of the court are properly applied). In the case of a judge only trial, the judge manages both the questions of law and the questions of fact.

Intentional Torts

Intentional torts require that the wrongdoer knew or ought to have known that their actions would cause injury or damage. Although intentional torts consist of deliberate actions, acts of omission may also count. Omission can constitute an intentional tort if the defendant has a specific duty to act and fails to do so, resulting in damages to the plaintiff. For example, if a person has a legal duty to protect someone else, such as a doctor has a duty to protect a patient, and they fail to do so, they may be liable for an intentional tort. Similarly, if someone is aware of a dangerous situation and fails to take action to prevent it, they may be liable for an intentional tort.

Assault – Assault is an intentional tort in Canadian law that occurs when a person intentionally causes another person to fear for their safety. This fear can be physical, psychological, or emotional in nature. In order for an assault to be legally defined, there must be a reasonable apprehension of harm from the perpetrator. Assault includes any physical contact, threats of physical contact, or any act that would put someone in fear of physical harm. In addition, assault may also include words or gestures that are meant to intimidate or threaten another person. It is important to note that assault does not require any physical contact to be made, and that the intention to cause fear is the key factor in determining whether or not an assault has taken place.

Battery – Battery is the application of force to another that results in harmful or offensive conduct. It includes any non-consensual touching, even if physical injuries are not present. In battery, the contact or touching does not have to be to the person. Grabbing someone's clothing or possessions they are holding is battery. Assault and battery are not always present together. Assault can occur without physically touching the victim. Similarly, a surgeon who performs unwanted surgery or inappropriately touches a patient who is sedated has committed battery but not assault because the patient did not feel fear or apprehension.

A defense against assault or battery charges is consent. Boxers have consented to being battered when competing. Self-defense and defense of others also may be available defenses, as long as the self-defense is proportionate to the initial force.

False Imprisonment – False imprisonment is an intentional tort in Canadian law. It is defined as the intentional and wrongful confinement of a person without their consent or lawful authority. False imprisonment is a form of battery and involves the intentional and wrongful restriction of a person's freedom of movement. It may be caused by physical force, threats or duress, or by the deliberate or recklessly careless act of a person or persons. The tort of false imprisonment can be committed by a government agent or private individual. In Canada, a person who is found guilty of false imprisonment can be liable for damages in a civil court.

A defense against false imprisonment is the authority to arrest. For example, a police officer has the right to restrain someone based on their authority as an officer.

Trespass – Trespass is an intentional tort that occurs when a person interferes with the possession of another person's property without their consent. This interference could be physical, such as entering the property, or non-physical, such as interfering with the person's right to exclusive possession of the property. The legal action taken in a trespass case is called a tort of trespass to land. Trespass to land is a civil wrong and can be remedied with an award of damages. In addition, the court can grant an injunction or restraining order, prohibiting the person from entering the property in the future.

There are times when trespassing is justified. Someone may have a license to trespass, such as a meter reader or utility repair technician. There may also be times when it may be necessary to trespass—for example, to rescue someone during an emergency.

Owners can eject trespassers from the property using reasonable force. Owners can also seek injunctions to force people from the land, for example, during protests.

In the case of trespassing, the owner of the property does have a duty to the person who is trespassing. For example, if there is a large hole on your property and a trespasser falls into the hole, you may be held liable under the negligence tort. Property owners have a greater obligation to minors should they trespass upon the land. The most common application of this duty of the property owner is where a swimming pool is present. Owners are required under tort to protect trespassers from falling into the pool, typically through fencing.

Nuisance – Condition or situation that interferes with the use or enjoyment of another person's property. The interference could be anything from a loud noise to a noxious odor, or it could be the blocking of access to a person's property. The plaintiff must show that the defendant's behavior caused an interference that is unreasonable and resulted in damages. If these conditions are met, the court may order the defendant to cease the nuisance and potentially award the plaintiff monetary damages for the harm suffered.

Defamation – Another intentional tort is defamation, which is the act of harming the reputation of another by making a false statement to a third party. Spoken defamation is considered slander, while written defamation is libel. Defamation is a false and injurious statement that discredits or detracts from the reputation of another's property, product or business. To be liable for defamation, the words must be communicated to a third party, and could include emails, text messages, and social media posts.

Defenses for defamation falls into three distinct categories:

- *Fair Comment* – Every Canadian can express their opinion on a public issue. The right to express an opinion extends to many different types of media. The defense of 'fair comment' exists to protect an opinion which may be harmful to another individual, but which is still a matter of public interest.
- *Qualified Privilege* – Any statement made as a result of duty to another person. For example, an emergency room doctor might make a comment to a nurse about the belief a patient is on drugs. This might not be true and could harm that person's reputation. However, the doctor needs to express this in order to properly treat the patient.
- ***Absolute Privilege*** – Statements made in parliament are protected.

Unintentional Torts

Everyone has the duty to act reasonably and to exercise a reasonable amount of care in their dealings and interactions with others. Breach of that duty, leading to an injury, is what is known as negligence.

Negligence arises when an individual or organization fails to take reasonable care in their actions and causes injury or harm to another person. Negligence can include failing to act reasonably, such as failing to take precautions against foreseeable risks, or acting in a manner that is careless or reckless. To prove negligence, a plaintiff must show that a defendant acted in a way that breached their duty of care, and that this breach caused injury or harm. If negligence is established, the defendant may be liable for any damages suffered by the plaintiff.

In order to succeed with a negligence claim in Canada, a plaintiff must prove that a defendant owed them a duty of care, that the defendant breached that duty, and that the breach caused the plaintiff to suffer damages. The plaintiff must also show that the damages were foreseeable and that the damages were quantifiable. Additionally, a plaintiff must demonstrate that the damages were a direct result of a defendant's negligence.

DUTY OF CARE

Duty of care is an obligation imposed on individuals and organizations to take reasonable steps to prevent foreseeable harm to others. It is based on the principle that we have a legal duty to act in a reasonable manner towards others, taking into account the foreseeable risks of our actions. The standard of care required is assessed objectively – what a reasonable person in the defendant's circumstances would have done. Duty of care is a cornerstone of tort law and serves to ensure that those who cause harm to another person are held accountable.

Generally, people are free to act any way they want, as long as they do not harm others. This means strangers are generally not responsible for caring for each other unless a special relationship exists. For example, parents owe their children a duty of care and doctors owe their patients a duty of care because of their underlying relationship.

In a business context, businesses owe a duty of care to their customers and managers owe a duty of care to their employees. It is important to understand that businesses and individuals owe a general duty to the community as a whole and are required to exercise a reasonable degree of care to protect the public from foreseeable risks that the owner knew or should have known about.

STANDARD OF CARE

The standard of care refers to the degree of care which a reasonable person would use in similar circumstances. This means that a person can be held liable for damages caused by a failure to take reasonable steps to prevent harm to another person. The standard of care may vary depending on the particular circumstances and can be higher or lower than the usual standard. The court will consider all relevant factors, such as the nature of the activity, the level of risk involved, the resources available and any special expertise or knowledge of the person.

Reasonable Person – A *reasonable person* is not expected to be perfect. It is an objective standard in which the expectation is to exercise reasonable care based on what he or she knows about the situation, how much experience he or she has with the situation, and how he or she perceives the situation. Professionals (such as doctors, accountants, lawyers, engineers and others) are typically held to a higher standard due to possessing greater expertise and experience within their area of practice compared to an average person.

***Reasonable Care* –** The reasonable care standard is the legal duty of care that a person must exercise in order to avoid causing foreseeable harm to another person. This standard of care requires the person to take reasonable steps to protect the safety and welfare of others. This includes taking steps that are within the realm of what a reasonable person would do in similar circumstances.

***Reasonable Foreseeability* –** Negligence case decisions are influenced by whether or not a defendant could have predicted that an action or inaction could have resulted in the tort. Responsibility is often based on whether the harm caused by an action or inaction was reasonably foreseeable – that harm or injury could be reasonably anticipated from the actions of a person or entity.

Breach of Duty – Once a duty of care and the standard of care have been established, plaintiffs have to prove that the defendant breached that duty. Breach of duty occurs when a person's conduct falls below the expected standard of care owed to another person. This occurs when a person has a duty of care to another person and does not meet the requirements of that duty. When a person breaches their duty of care, they can be held liable for any losses suffered by the other person as a result. A breach is demonstrated by showing the defendant failed to act reasonably. In practical terms, the presence of injury or harm is usually enough to satisfy the "breach of duty" requirement.

Causation – In tort law, a plaintiff must be able to prove that a defendant's actions directly caused or contributed to the injury or damages suffered by the plaintiff. In order to prove causation, the plaintiff must show that the defendant's actions or omissions were the direct cause of the harm. The legal test for causation is known as the 'but-for' test, which states that the plaintiff must show that 'but for' the defendant's actions, the harm or injury would not have occurred. In addition, the plaintiff must prove that the harm was reasonably foreseeable to the defendant.

Damages – The final element in negligence is legally recognizable injuries, or damages. If someone walks on a discarded banana peel and does not slip, then no tort occurs because there was no injury.

There are two types of damages awarded in tort law. Compensatory damages are damages that are awarded to a plaintiff to compensate them for a loss or injury caused by the defendant's wrongful act or negligence. This type of damages is designed to put the plaintiff back in the position they were in prior to the incident or to make them whole. These damages are based on the plaintiff's actual losses, such as medical expenses, lost wages, and pain and suffering.

The second type of damages is punitive damages, which are intended to deter the defendant from engaging in similar conduct in the future. The idea behind punitive damages is that compensatory damages may be inadequate to deter future bad conduct, so additional damages are necessary to ensure the defendant corrects its ways. Punitive damages are awarded to the plaintiff in addition to other damages for losses such as pain and suffering and economic losses. They are awarded only in exceptional cases where the defendant's conduct has been particularly malicious or outrageous. There are constitutional limits to the award of punitive damages.

DEFENSES

There are a number of defenses which a defendant can use in a negligence claim. Specifically, a defendant being sued for negligence has two main defenses:

- assumption of risk by the plaintiff;
- and (2) comparative negligence.

Assumption of Risk – The first defense is assumption of risk. If the plaintiff knowingly and voluntarily assumes the risk of participating in a dangerous activity, then the defendant is not liable for injuries incurred. However, a plaintiff can only assume known risks. A skier assumes the known risks of downhill skiing, including falling, avalanches, and skiing in poor conditions. However, a skier who is injured from a defective chair lift does not assume the risk of injury as a result of a manufacturing defect or poor maintenance practices.

A related doctrine, the *open and obvious* doctrine, is used to defend against lawsuits by persons injured while on someone else's property. The open and obvious defence states that a defendant is not liable for harm caused to the plaintiff, if the defect or danger was so obvious that it should have been noticed and avoided by the plaintiff. This defence is based on the idea that a plaintiff should not be able to recover damages for injuries sustained from something that was obvious and should have been avoided.

Contributory Negligence – The second defense to negligence is when the plaintiff's own negligence contributed to his or her injuries. Many jurisdictions follow the contributory negligence rule. Under this rule, the judge or jury will determine the percentage of fault of all the parties for the plaintiff's injuries. If the jury finds the plaintiff responsible for some of his or her own injuries, then any contributory damages are reduced by that percentage. For example, if a customer is 40 percent at fault for his injuries, then the compensatory damage award will be reduced by 40 percent. The reasoning for this rule is to hold people and businesses accountable for their own negligence.

Other Torts

Product Liability – Product liability refers to the legal responsibility of a manufacturer, distributor, or retailer to compensate any individuals who have suffered losses or damages due to a product they have sold or supplied. It is based on the principle that those who make, sell, or supply products owe a duty of care to users of those products to ensure they are reasonably safe for their intended use. This duty of care includes ensuring that products are properly designed, manufactured, labeled, and tested for safety. A breach of this duty of care may lead to the manufacturer, distributor, or retailer being held liable for any resulting damages suffered by an individual.

Design defects refer to products that have been designed in such a way that they are inherently unsafe and fail to meet a reasonable consumer's safety expectations. This type of defect can occur in any type of product, from appliances to medical devices. In a lawsuit, a plaintiff must be able to prove that the product was defective at the time it left the manufacturer, and that the defect caused injury or loss.

In other words, the manufacturer poorly designed a product that caused injuries which could have been avoided. The law does not require products to be perfect. Litigation in these cases centers on what is a foreseeable risk and whether there was a reasonable alternative. As a result, plaintiffs must show that an alternative design was reasonable.

Manufacturing defects refer to products that have been made with a defect that renders it unsafe or unfit for its intended use. A manufacturer can be held liable for any injury or harm caused by a manufacturing defect, regardless of whether they exercised reasonable care in the manufacturing process. The manufacturer must prove that the product was fit for its intended purpose, and that the injury or harm caused was not due to any use of the product outside its intended purpose.

Failure to warn occurs when the defect is not in the product itself but in the instructions (or lack of them). The plaintiff argues that the manufacturer failed to warn users about the dangers of normal use or a foreseeable misuse. However, there is no duty to warn about obvious dangers.

***Defenses to Product Liability* –** There are several defenses to product liability claims. First, a plaintiff's assumption of risk can be a defense. The user must know of the risk of harm and voluntarily assume that risk. Someone cutting carrots with a sharp knife voluntarily assumes the risk of being cut by the knife. However, if the knife blade unexpectedly detaches from the knife handle because of a design or production defect, there is no assumption of risk.

The other defense is a product misuse. If the consumer misuses the product in a way that is unforeseeable by the manufacturer, then liability may not apply. Modifying a lawn mower to operate as a go-kart, for instance, is product misuse.

Fraud – Fraud is defined as an act or omission that misleads another with the intention of causing harm or taking advantage of them. It can involve false statements or omissions of material facts, or may involve a breach of trust or fiduciary duty. Fraud can also take the form of taking advantage of another's vulnerability to obtain a benefit.

Professional Liability – Business professionals have a fiduciary duty to their clients requiring them to do what is in the best interest of those they serve or represent. A fiduciary duty is a legal duty imposed on a person to act in the best interests of another person or entity. Fiduciary duties are owed by a person in a position of trust and confidence such as accountants, doctors, lawyers, engineers, and others. It is typical for professionals to seek insurance (known as errors and omissions insurance) to reduce risks related to fiduciary duties.

Inducing Breach of Contract – Inducing breach of contract occurs when one party induces another party to breach a contract that is legally binding between them. This can be done through fraud, misrepresentation, intimidation, or other methods. The party who induced the breach may be held liable for damages caused by the breach.

There are four elements required to prove intentional interference with contractual relations:

- A contract exists between the plaintiff and a third party;
- Defendant knew of the contract;
- Defendant improperly induced the third party to breach the contract or made performance of the contract impossible; and
- Plaintiff was injured.

Passing Off – Passing off refers to the deceptive representation or marketing of goods or services by competitors in a manner that confuses consumers.

Conclusion

Tort law is an important and complex area of law which is constantly evolving. Tort law governs civil wrongs and provides a remedy for victims who have been injured by another person's negligence or intentional conduct. It is important for organizations and professional to understand the elements of tort law and the various defences available to those accused of negligence in order to protect their legal rights.

Cases of Interest

- Duty of Care – Rankin (Rankin's Garage & Sales) v. J.J. (2018 SCC 19) – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do?site_preference=normal
- Duty of Care (Government Liability) – Nelson (City) *v.* Marchi, 2021 SCC 41 – https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19036/index.do
- Breach of Obligation – 6362222 Canada inc. *v.* Prelco inc. (2021 SCC 39) – https://www.canlii.org/en/ca/scc/doc/2021/2021scc39/2021scc39.html
- Duty to Warn – Hollis *v.* Dow Corning Corp., [1995] 4 S.C.R. 634 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1328/index.do?site_preference=normal
- Negligence and Duty of Care – Cooper *v*. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1920/index.do
- Civil Liability and Negligence – Benhaim *v.* St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16224/index.do

Questions for Discussion

1. What is the legal definition of negligence in Canada?
2. What is a tort?
3. What is the difference between a tort and a crime?
4. What is a fiduciary duty?
5. Identify three defences against defamation.

Additional Resources

TORT LAW: CASES AND COMMENTARIES (2021)

- https://www.canlii.org/en/commentary/doc/2021CanLIIDocs1859#!fragment/zoupio-_Toc109979010/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgEYAGATh4HYeXbgEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTAARtCk7CIiQA

8. LABOUR LAW

CHAPTER OUTLINE

- Overview
- Vicarious Liability
- Agents and Principals: Types and Duties
- Termination of Agency
- Employer and Employee Obligations
- Employment Law Jurisdictions
- Employment Standards Act (Ontario)
- Related Acts
- Conclusion

LEARNING OUTCOMES

- Identify and explain fundamental regulations and conditions of employment relationships under the laws of Ontario and Canada.

Labour Law - Overview

Typically, when people hear the term labour law, they think of employees working for bosses. However, within Ontario labour law there are two different types of employment relationships. The first is known as an agent relationship and the second is the traditional employment relationship. Labour law encompasses both forms.

A services contract (Independent contractor) is a distinct kind of employment arrangement. While technically, agency and employment are 'contract' relationships, the services contract relationship is viewed as a 'supplier' contract relationship versus a labour relationship. Generally, any services contract contains the details and conditions of the relationship within the terms and conditions of the services contract.

For the purposes of this chapter, we will focus on the topic of labour law consisting of the two key relationships: *agency and employment.* The distinction is important because each relationship type is formed differently and has different obligations and rights.

VICARIOUS LIABILITY

Before proceeding, it is important to understand the concept of vicarious liability because this concept applies to both agency and employment.

Vicarious liability comes from tort law and establishes that the principal or employer, depending on the relationship, is responsible for the actions of the agent or employee when completing their work. In effect, the 'business' is responsible for the actions of employees and agents. For example, if an employee or agent were to assault a customer at a store, the owner of the store could be held liable for the conduct of the employee if the customer filed a lawsuit. Business owners should be aware that the actions of their agents and employees are their responsibility. Effective employment practices and procedures are key to reducing the risk of agents and employees who act against the interests of the business.

Labour Law – Agency

An agency relationship is created when one person or entity agrees to perform a task for, and under the direction of, another individual or entity. An *agent* is the person who is authorized to act in place of another. A *principal* is the person who authorizes another to act as an agent.

The idea of authorizing someone to do the work of someone else is critical to understanding the difference between agency and employment. Effectively, an agent does work on behalf of a principal. A good example is that of a real-estate agent: (the agent) acts on behalf of the homeowner (the principal).

TYPES OF PRINCIPALS

There are three types of principals, which are described from the perspective of a third party: disclosed, partially disclosed, and undisclosed:

- The most common form is that of a *disclosed principal* – a principal whose identity is revealed by the agent to a third party. For example, agents work for a disclosed principal when they are on the employer's premise, wear a name badge or uniform identifying the employer, or answer the phone by identifying the employer's name.
- A *partially disclosed principal* is a principal whose existence, but not actual identity, is revealed by the agent to a third party. In other words, a third party knows that the agent represents a principal but does not know the identity of the principal. For example, a realtor may represent an owner who does not want their name disclosed publicly.
- An *undisclosed principal* is a principal whose identity is kept secret by the agent. Often third parties do not realize that an agency relationship exists and believe that the agent is working on his or her own behalf. Undisclosed principals are typically arranged when the identity of the principal can lead to increased purchase prices, unwanted publicity, and security concerns.

TYPES OF AGENTS

An agent is someone who is authorized to act on behalf of a principal. Because there are a variety of authorizations that a principal can grant an agent, there are many different types of agents. In general, agents are described as either general or special. *General agents* have the authority to transact all the principal's business of a particular kind or in a particular place. General agents often include partners, managers, factors, and brokers. Special agents, in contrast, only have the authority to conduct a particular transaction or to perform a specific act. Special agents often include realtors, athlete's agents, and employment recruiters.

Some of the most common business agents include:

- Broker – Receives a commission to make contracts with third parties on behalf of a principal

- Business Agent – Has general power involving the exercise of judgment and discretion, such as a manager or officer
- Factor – Receives and sells goods or property for a commission
- Forwarding Agent – Receives and ships goods for a principal

TYPES OF AUTHORITY

Authority is the right or permission to act legally on another's behalf. In general, authority can be either actual or apparent. Authority is critical in agency as it is the key element that gives an agent the authority to act on behalf of a principal. Agency cannot occur unless authority is given. Authority matters to principals because the moment an agent has the authority to act the principal becomes vicariously liable for the actions of the agent. Therefore, principals should always take care to ensure the authority is granted clearly.

Actual authority, sometimes called real authority, is established when a principal intentionally confers authority on an agent. Actual authority can be either *express* or *implied*. Express authority is authority given by an express agreement, either verbally or in writing. For example, a principal clearly states to an agent, 'I am granting you the authority to sell my house.'

Implied authority is authority granted to the agent as a result of the principal's conduct. Imagine a principal invites a real estate agent to their property and describes the features of the house, when they want it to go on the market, at what price, and other conditions that a principal would typically share with an agent, but without clearly stating, 'you will be the agent to sell my house'. In this situation, the principal is acting as if the agent is in fact an agent but has not expressly stated that fact. However, the agent could interpret that they are in fact the agent to sell the house based on the principal's actions which imply the agent has been given the authority to sell the house.

Apparent authority is authority that a third party reasonably believes an agent has based on the third party's dealings with the principal. If a principal's words or actions lead others to believe that authority was given to someone else, then the principal is held accountable for the perceived transfer of authority. For example, if a principal fails to give notice that an agent is no longer working for the principal, the agent may still bind the principal through apparent authority when dealing with third parties. This is important because the agent's actions could bind the principal to accept a deal when the principal did not necessarily want that deal. It can also open the principal up to third-party liability if a third party was damaged during or by the outcome of the transaction.

RATIFICATION AND AUTHORITY

Ratification occurs when a disclosed principal adopts or confirms a contract entered into on his or her behalf by an agent. Ratification can be automatic if the agent has been granted signing authority.

The authority to act is critical to a principal and an agent. The agent wants authority so that they can broker a deal in good faith with a third party. A principal wants to grant authority only to those agents who will achieve their desired results and not increase their vicarious liability risk.

Retroactive Ratification and Authority

If an agent does not have the authority to act on behalf of the principal but presents an opportunity for the principal to benefit from the third-party transaction, then the principal has the right to retroactively grant the authority to the agent in order to take advantage of the opportunity.

Imagine, you have a friend who wants to sell their car. You have another friend, who does not know the seller of the car, but you know wants to buy the exact type of the car the first friend is selling. You could approach the potential buyer and say, 'I might know someone who has the car you want, what price are you willing to pay?' Once known, you could then go to the seller and say, 'I have a deal for your car at this price, do you want it? If yes, then I want to be the agent to broker the sale.' The seller (or principal) could then agree to effectively make you the agent, retroactively, to a time before you asked the buyer so that you can effectively broker the deal acting as an agent with authority.

DUTIES OF AGENTS

Agents are fiduciaries of principals and so they are required to act with the highest duty of care. Fundamentally, agency is a fiduciary relationship created by express contract or implied actions in which the agent has the authority to act on behalf of the principal and legally bind the principal to third parties.

A fiduciary relationship is a relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. Fiduciary relationships require trust, good faith, and acting in the best interest of the other. In fiduciary relationships, the law requires the fiduciary to act with the highest duty of care. This means that the fiduciary must put the interests of the other party before their own. Examples of fiduciary relationships include doctor-patient, attorney-client, accountant-client, trustee beneficiary, and guardian-child. An agent is also a fiduciary of a principal.

Beyond a fiduciary duty, an agent is required to provide:

- *Duty Description Account* – An agent must keep proper records to account for all the principal's money and property given to the agent. An agent must act reasonably, in good faith, and always avoid negligence
- *Disclosure* – An agent must inform the principal of all material facts that affect the principal's interests.
- *Loyalty* – An agent cannot engage in any dealings that compete or interfere with the principal's business or interests.
- *Obedience* – an agent must obey all the principal's instructions within scope of agency unless they are illegal or unethical
- *Protect Confidential Information* – An agent cannot use or disclose a principal's confidential information
- *Delegate* – An agent cannot normally delegate their authority to a 'sub-agent'

DUTIES OF PRINCIPALS

Principals also owe duties to agents as part of the fiduciary relationship. These duties include:

- Compensation – A principal must pay agent for work performed
- Honesty – Principals cannot deceive agents about the nature and scope of the work they are to perform
- Indemnification – A principal must hold agent harmless and free from legal liability for actions properly taken on the principal's behalf
- Loyalty – A principal cannot engage in any dealings that prevent an agent from performing agency tasks
- Reimbursement – A principal must reimburse an agent for money reasonably expended on behalf of the principal

An agency relationship affects liability to third parties. The scope of liability depends on the type of principal involved, the type of authority involved, and the nature of the dispute.

CONTRACTUAL LIABILITY

A principal is always liable on a contract if the agent has authority. However, the agent's liability on a contract depends on how much the third party knows about the principal. Disclosure, when allowed by the principal, is the agent's best protection against legal liability.

An agent is not liable for any contracts made with authority on behalf of a fully disclosed

principal. Therefore, if a third party knows the existence and identity of the principal, then all legal liability rests with the principal. The only exception to this is when an agent exceeds his or her authority. In that case, the agent has not acted with authority and becomes personally responsible to the third party. If the agent did not have authority, but the principal later ratifies the contract, then the principal will be liable for the contract.

If a principal is partially disclosed, then the third party may recover from either the principal or agent. In this situation, the principal and agent are jointly and severally liable, and the third party may sue either or both to recover the full amount of damages owed. However, the third party cannot seek "double damages" and recover more than the total amount owed for the contractual breach.

In the event of an undisclosed principal, a third party may recover from either the agent or the principal. The fact that a principal's existence or identity is hidden from third parties does not change the nature of the agent-principal relationship. Therefore, an undisclosed principal may become liable for contracts entered into by an agent acting with actual authority. An undisclosed principal has no liability to an agent or third party when the agent exceeds the actual authority granted by the principal. In addition, the type of contract must be the type that can be assigned to the undisclosed principal. If the contract is for personal services, then liability cannot be assigned to the principal in case of a breach.

TERMINATION OF AGENCY RELATIONSHIP

Agents and principals may end their agency relationship in various ways, but the most common way is through mutual agreement. Additionally, there are some events that will terminate an agency relationship as a matter of law. Death of a principal or agent automatically terminates the agency agreement, even if the other party is unaware of the death. Once the time of death is established, any transactions afterward are deemed void.

Mental incapacity of a principal or agent also terminates an agency relationship. It is often hard to determine the precise time someone loses mental capacity. Therefore, courts often hold that an agent's contract with a third party is binding on the principal unless the third party was aware of the principal's incapacity.

Bankruptcy terminates an agency relationship when the bankruptcy affects the subject matter of the agency agreement. For example, if a principal declares bankruptcy and the real property that an agent is authorized to sell is part of the bankruptcy estate, then the bankruptcy will automatically terminate the agency relationship.

Finally, the destruction or illegality of the subject matter will terminate the agency relationship. For example, if Parliament passes a law making it illegal for private parties to sell specific types polluting vehicles, then the agency relationship between a principal / car manufacturer and the agent / dealer selling those types of cars will automatically end.

CONCLUDING THOUGHTS

Agency relationships are flexible and varied depending on the needs and interests of the principals and agents. Because the agency relationship is fiduciary in nature, agents and principals owe each other certain duties. Third parties may hold principals legally liable for the actions of their agents. Therefore, it is important for businesses to select their agents carefully to minimize their risk of liability.

Labour Law - Employment

The alternative to an agency relationship is the employment relationship. Historically speaking, employment is rooted in the master–servant relationship developed in historical England. However, today an employment relationship is rooted in contract law. If you work for someone you are, in fact, working under contract.

Beyond contract law, several specialized statutes have been developed to define and establish terms and conditions regarding the employee and employer relationship. These specialized statutes are different depending upon the provincial jurisdiction in which they were created. Under the Canadian constitution, the federal government has jurisdiction over employment matters relative to their areas of control (interprovincial transportation, the Canadian military, and federal government departments are examples).

It should also be noted that there are number different types of employee relationships. For example, an employee could be part-time or full-time, temporary or permanent, in a services or employment contract or some combination of these. Generally speaking, these various forms of employment have different rules governing how the relationships are managed. For the sake of simplicity this section will refer to all these categories as simply 'employment'.

As a reminder, vicarious liability establishes that an employer is liable for any tort resulting from an employee's actions within the scope of their employment or closely related to the employment context. As a result, employers should always be mindful of the actions of their employees to ensure that they reduce the overall level of risk associated with vicarious liability.

WHAT IS AN EMPLOYEE

The recent emergence of the 'gig economy' has become a feature of the employment landscape. Gig economy refers to freelance or temporary forms of labour in which contractors supply services to an organization outside of the traditional employer / employee relationship. This form of work arrangement may enable employers to avoid many employment legislation requirements that apply to employees but do not apply to those who operate in the freelance or 'gig' space.

As an example, if a person is an employee, and their employer choses to terminate them, then the employer would typically owe the employee a notice period or a payment in lieu of a notice period. However, if the employee is a service provider under a services contract, the contract could stipulate that no notice period would be provided and as such the person could have their contract terminated without notification. This can be beneficial to employers as it reduces termination-related costs and can increase ease and flexibility around hiring replacement workers.

The rise of the gig economy has led to several contentious issues as some employers have shifted traditional employee / employer relationships to that of contracted service providers. While this may have a benefit to employers in both flexibility and cost savings, it can potentially hurt employees by increasing the precarious nature of their employment status. Recently, several cases have been filed (Canadian Union of Postal Workers v Foodora Inc., 2020 ON LRB is one example) to determine what it means to be an employee.

To clarify who is an employee and who is a services provider, Canadian law provides a test which the courts can apply to determine the nature of the relationship regardless of contract type. It is a two-step test in which both steps need to be met in order to establish an employee relationship.

Control Test

The first test is known as the *control test*. The control task asks the question of whether the employee is working under the direction of the employer. In effect, it asks, if the employer is telling the employee not only what to do, but when and how to do it. This contrasts with a services contract supplier where they control their own hours; and in most cases, how to perform the work being done. If the person providing the service under a service contract is being directed by the employer on how and when to do their work, the court could interpret that relationship as an employee / employer relationship rather than a services contractor relationship.

Organizational Test

The second test is what is known as the *organizational test*. The organizational test seeks to establish if the person doing the work is an essential part of the organization by asking if the enterprise would be negatively impacted if the worker left? If negative impact is established, then the worker in question would be viewed as an integral part of the organization and classified as an employee and not as a services contractor.

The benefit to the organization of a services relationship is that the employer can contract the specific terms and conditions of the working relationship and does not need to abide by the *Ontario Employee Standards Act (ESA)*. However, organizations should be careful to ensure that these are truly contract relationships and not employee relationships being portrayed as services contract relationships in order to bypass any provision of the ESA. If the relationship is determined under these two tests to be that of an employee / employer relationship, then the employer is obligated to follow all of the rules and regulations set forth under the jurisdiction's statues. In the case of Ontario, this means following the *Ontario Employee Standards Act*.

EMPLOYER OBLIGATIONS

Every employer in Canada has inherent obligations to employees. The first obligation an employer has is to create a safe workplace. Traditionally, this meant employers protected employees against workplace accidents related to the physical dimensions of work. However, this requirement has expanded in the past number of years to include psychosocial factors (bullying, harassment, overwork, are examples). Employers should do everything they can to create a safe work environment for their employees to ensure efficient and effective operations. Under the ESA, employees in Ontario have the right to refuse unsafe work and employers are prohibited from penalizing employees for refusing unsafe work.

Employers are also obligated to provide appropriate direction to the employees; communicating to employees know what to do, when to do it, and the expected level of quality. Employers should be clear in their instruction so that the employee fully understands the expectations and performs the tasks assigned appropriately.

Employers are obligated to provide pay to the employees for the work performed, as well as any reimbursement for expenses they may incur. Additionally, employers are required to provide the appropriate tools required to employees to perform their work. These tools could include computers, machinery, paper/pens, and other required instruments or materials required to fulfill employment duties.

EMPLOYEE OBLIGATIONS

Employees are not free to act as they want; they too have obligations to employers. Employees are expected to be competent in the job functions required, have the skills that they claim to have, and agree to perform the work to the best of their ability. Generally speaking, employees should also be punctual and honest. Most of all, employees have a duty of loyalty to the employer. This means that they can't work for one company and then do work or provide information to the competition.

Managers, executives, and employees who are critical to the business have an obligation of fiduciary duty to the employer. In effect, they must always act in the best interest of the employer and not to the benefit of themselves. Regular employees do not have a fiduciary duty to the organization.

MANAGING STAFF

It is beneficial to both employers and employees to maximize the potential of each employee. Good managers understand, and are fully aware of, the employees' rights and obligations. Great employers use fair employment practices to establish good working relationships. A key factor in achieving a positive relationship is to establish clear policies and procedures which govern the employee / employer relationship and adhere to all labour practices and statutes within the jurisdiction in which the organization operates.

From time-to-time employees will not meet the expectations set by the employers and, as a result, corrective actions may need to be undertaken. One tactic for managing successful corrective action is a process known as *progressive discipline*.

Progressive discipline is beneficial in that it not only protects an organization from potential liability, but more importantly, helps the employee to fully understand the expectations of the employer so that they can perform the duties of work as required. Progressive discipline is a process which is initiated and followed in situations where problems with performance or behaviour are identified. The identified issues or concerns are addressed with the employee directly in order to advise and allow the employee to take corrective action. If the employee's corrective action succeeds and expectations are met and both the employee and employer are satisfied, no further action is necessary.

Sometimes the identification of an issue and the corrective actions applied do not lead to the intended results and may require additional intervention by the employer. In such cases, additional progressive discipline steps may be needed to provide the employee subsequent opportunities to take corrective action. The progressive discipline process provides a record of the employee's success or failure to achieve the expected level of performance and may result in consequences to the employee's continued employment.

Ultimately, when progressive discipline fails to achieve a satisfactory level of performance by the employee, then the employer is within their rights to terminate the employee relationship. Employers need to carefully manage this process, as an error or missed step by the employer, could lead to potential liability. To minimize exposure to liability, employers typically document all progressive discipline activities.

It should also be noted that the approach to progressive discipline needs to be considered. Aggressive physical behaviour or a menacing verbal or written communication could be construed as bullying which would be a violation under harassment regulations in the Province of Ontario.

There may be times when employers discover that employees are acting inappropriately and against the goals of the organization. For example, an employee may be stealing from the organization, may be committing fraud, or may be treating other employees in an inappropriate manner. In these cases, it is critically important that employers document such situations in detail, focusing on the facts. It is also important that employers do not forget that employees have rights which they must respect.

TERMINATION

At some point it may become clear that the employee / employer relationship will need to be terminated. Often employees believe that they are guaranteed employment if they just do their job, but that is not the case.

Employers have the right to terminate employees. There are two ways in which an employer can terminate an employee relationship. The first is to provide notice under common law and the second is known as providing *just cause*.

In common law, the employer has the right to terminate the employee relationship but they must do so by providing what is known as ‘reasonable notice’. The concept of ‘reasonable’ is often difficult to ascertain. Reasonable notice is generally interpreted as the length of time an employee would need to find a similar job (similar responsibilities, status/title, similar pay).

The actual ‘notice period’ duration can vary dramatically depending upon the employee’s level of education, work experience, age, marketable skills, and other factors. As an example, imagine a 63-year-old employee, who is two years away from retirement with an educational background that is not in demand, narrow experience, and limited modern skills. It is likely that this person would require a longer notice period then someone who possesses contemporary experience, skills, and educational credentials.

Employers should know that the courts are increasingly sensitive to the difficulty in finding new work opportunities and this has, in some cases, led to awards of larger notice periods than in the past. To ensure that the correct notice period is provided to terminated employees and to limit the exposure of a wrongful dismissal suit employers should consult with legal experts.

Employers who know they no longer need an employee typically contact them to inform them that they are no longer required. One option in such cases is to provide the employee sufficient notice of their release from employment. The employee continues to work until the notice period is completed at which time their employment is terminated. This is often the case in large organizations where the employee does not pose a risk and may have other employment options within the company.

A challenge with this option is the employee continues to work for a period of time knowing that their employment will soon be ending. This may create problems if the employee were to act in an inappropriate manner. As a result, many employers choose to provide *payment in lieu of notice* to minimize risk.

Payment in lieu of notice is an amount of money equal to the notice period required under common law paid to an employee. For example, if the notice period is three months, and the employee receives $5000 a month in salary, then the organization would pay the employee $15,000 as a total payment in lieu of notice. This is an example of a lump–sum payment, but the employer could elect to keep paying the employee a regular salary until the end of the notice period. The employee would receive payment over the length of their notice period but would not actually be working for the employer.

It should be noted that pay in lieu of notice should include any payments owed to the employee like commissions or bonuses. While not required, many organizations continue to provide the terminated employee with insurance and health benefits during the notice period to help mitigate the loss of employment. Lastly, many employers also offer outplacement services to provide employees support during their transition to new employment.

In Ontario the Employee Standards Act (ESA) sets minimum guidelines for notice and Ontario courts tend to interpret the ESA guidelines accordingly, but the minimum standards may not qualify as appropriate notice in some instances. For example, the ESA states that two weeks’ notice is the minimum notice requirement for any employee with less than one year with a company. However, if the employee has limited skills that are not easily transferable to new employment opportunities the courts may impose a longer notice period.

JUST CAUSE

The second way an employer can terminate an employment relationship is through *just cause*. Just cause is typically established by the following conditions:

- Not meeting the expectations of the employer

- Not meeting the obligations that the employee has to the employer
- Employee incompetence
- Employee misrepresentation

Inability of an employee to complete the work tasks as assigned may lead to a termination of employment within the meaning of just cause. If an employee cannot fulfill their duties and assuming that the work tasks are reasonable and fair, they may be released. It should be noted that human rights regulations state that if an employee has a disability which prevents them from completing the tasks required, that the employer must make any reasonable accommodation to support the employee with a disability to perform the tasks required.

If an employee acts inappropriately to a degree that causes harm to the organization or to other employees within the organization the unacceptable conduct could qualify as just cause. In such cases, it is important that the employer identifies the inappropriate actions of the employee and explains why the actions are egregious. The employer should use any appropriate means to support corrective action by the employee (counseling, education, and coaching are examples).

In cases where an employee is unable to perform the tasks because they do not have the skills to complete the work required, an employer may dismiss the employee for just cause. An employer has an obligation to identify the specific areas of incompetence and support the employee in developing the necessary skills where practicable. If the employee is not able to perform the duties of their job at the required level, then the employer has the right to end their employment.

An employer may have just cause to terminate an employment relationship in cases of misrepresentation. Misrepresentation occurs where an employee has led an employer to believe that they had certain skills, credentials or experience which they did not have.

In cases where just cause is invoked the employer is not required to provide a reasonable notice period. However, organisations may elect to terminate an employee following a progressive discipline and appropriate notice process to save them time, money, and potential risk related to proving *just cause*.

WRONGFUL DISMISSAL

Wrongful dismissal is often misinterpreted by employees. Wrongful dismissal within Ontario labour law refers to situations in which an employee alleges that they were not given the appropriate notice period or payment in lieu of notice. Most disputes between employers and employees involving termination are concerned with the notice period provided rather than the reasons for termination.

Under tort law, anyone who has been damaged has an obligation to make all reasonable efforts to mitigate the losses they have incurred. In Ontario, an employee who has been terminated is expected to make all reasonable efforts to find suitable employment of equal value to that of their previous position within a reasonable period. An employee cannot seek a larger payment in lieu of notice and then take no action to find new employment.

CONSTRUCTIVE DISMISSAL

Has an employer ever asked you to do a different job than the one you normally do? With the fast pace of business today, this is a common practice on employers. What if that job position were a demotion? If the change in job is interpreted by the employee as a demotion, then the employer could be engaged in a 'constructive dismissal'. Constructive dismissal describes situations in which an employer changes an employee's job with the intent to demote, frustrate, or alienate the employee to the point where they resign.

Imagine an employer has an employee who, if terminated and paid in lieu of notice, the notice period payment would be one year salary which might be a large amount for the employer. However, if the employee were to quit, then the employer would not be required to pay in lieu of providing appropriate notice. Common law recognizes that if this practice were allowed, then employers would demote employees or otherwise encourage employees to quit to avoid providing appropriate notice period payments. As a result, employers cannot unilaterally change job requirements with an implicit or explicit intention to motivate an employee to resign.

It is the employee who must prove constructive dismissal and it may be challenging to show that the job change in question is a demotion. Depending on the circumstances and perspectives, changes to job duties could be interpreted as a lateral move or a promotion. An additional challenge is that the employee is required to quit their job and then bring an action against the employer for constructive dismissal. This course of action results in no access to any form of termination payment and the employee is responsible for funding their own legal bills.

EMPLOYEE RESIGNATION

An employee has obligations to the employer if they choose to terminate an employee / employer relationship. An employee may quit for just cause if they are asked to perform work that is illegal, if they're not paid, if they are placed in dangerous situations, if terms of the employment contract have been breached, as well as for other reasons. In such situations, the employee can quit immediately with no further obligation to the employer.

Alternatively, an employee may resign by providing reasonable notice to the organization. There are no specific guidelines describing a required notice period for employees who choose to terminate their employment. However, professional practice suggests two to four weeks is a reasonable notice period for any employee to transition their work requirements to a new employee.

Employees should be aware of and ensure that they leave their employment while still meeting their obligations to the employer. For example; they may not take confidential information, trade secrets, technology, products, or other tangible or intangible property when they leave the organization. They may not take any customers with them to their new company, and they are required to comply with all the terms and conditions under the employment contract in which they were hired.

Employment Law Jurisdictions

Employment law is specific to the jurisdiction that the employee is working within. For example, a company located in Alberta, but with offices in Ontario, is required to follow Ontario employment law for their employees located in Ontario (where they work, not where they live). Businesses should recognize that each jurisdiction applies rules and regulations regarding employee and employer's rights and obligations that are specific to the region in question.

Employment law concepts are generally similar across all Canadian jurisdictions. There may, however, be differences within different Acts and statutes. For example, all provinces require a notice period when terminating an employee, but the notice period may be different across jurisdictions. Federally, the minimum notice period is two weeks and one week for each additional year of service, but Ontario has a higher notice period.

THE CANADA LABOUR CODE

Although the majority of Canadian workers are covered under provincial labour laws there are some, including some First Nations bands and organizations, who are governed by federal labour law as set out in the *Canada Labour Code* (https://laws-lois.justice.gc.ca/eng/ACTS/L-2/index.html). As federal and provincial laws may be different it is important to know the regulations that apply to your business and workplace. The *Canadian Labour Relations* website provides a list and links to provincial and federal labour statutes here: https://www.canadianlabourrelations.com/canadian-labour-laws.html. Determining whether provincial or federal legislation is applicable to an employment circumstance can be particularly difficult where First Nations employers and employees are concerned. It is advisable to seek guidance from a legal professional to determine the employment and labour laws that apply if there is any uncertainty regarding jurisdiction.

Collective Bargaining Law in Canada

The Canada Labour Code (CLC) sets out the legal framework for collective bargaining in Canada, including the role of government in labour relations, the requirement for unions to be certified and for employers to recognize and bargain in good faith with unions, the right to collective workplace action (the right to strike) and procedures for resolving disputes. The CLC applies to federally regulated employers such as banks, airlines, telecommunications companies, and other businesses that operate across provincial or international borders.

Provincial Labour Relations:

Each province has its own labour relations act that governs unionization and collective bargaining in workplaces under provincial jurisdiction. These laws vary across provinces, but generally they provide for the certification of unions, collective bargaining rights, and dispute resolution procedures.

Freedom of Association:

Freedom of association is a fundamental human right that is guaranteed by the Canadian Charter of Rights and Freedoms. It is the right of individuals to join with others to form associations, such as trade unions, to collectively pursue goals of mutual interest. Trade unions are organizations of workers that are formed to protect the rights, interests, and benefits of their members. They work to ensure that workers receive fair wages and safe working conditions and promote the collective bargaining process.

Collective Agreements:

Collective agreements are formal, legally binding documents that are negotiated between a union and an employer, identifying the terms and conditions governing the employment for the workers in the bargaining unit, including wages, hours of work, and other benefits and conditions of employment.

ONTARIO JURISDICTION

The *Ministry of Labour* is mandated to advance safe and fair labour practices to support the social and economic well-being of workers in Ontario and is accountable for the administration of employment and labour legislation, compliance, enforcement, complaints investigation and settlement in the following areas of employment:

- Employment rights and responsibilities
- Occupational health and safety
- Labour relations

EMPLOYMENT STANDARDS ACT (ESA)

The Ministry of Labour is responsible for managing the *Employment Standards Act (ESA)* which outlines the rules and regulations regarding employment in the province of Ontario. At a high level, the ESA outlines the minimum requirements an employer must follow regarding the conditions of employment. The Act also outlines the legal rights and obligations which the employers and employees have to each other.

Most employees and employers in Ontario are covered by the ESA, but there are a few groups to which the Act does not apply including the following:

- Industries which are within Federal government jurisdiction like airlines, banks, the federal civil service, post offices, radio and television stations and inter-provincial railways.
- Individuals performing work under a program approved by a college of applied arts and technology or university.
- Secondary school students who perform work under a work experience program authorized by the school board that operates the school in which the student is enrolled.
- Inmates taking part in work or rehabilitation programs, or individuals who perform work as part of a sentence or order of a court.
- People who hold political, judicial, religious or elected trade union offices

Key areas of the ESA which all businesses should be aware of include:

- Minimum requirements for employee hours of work, meal breaks and rest period regulations
- Standards concerning payment of wages (including minimum wage), overtime pay calculation, and managing tips.
- Rights of employees to disconnect from work.
- Rules relating to electronically monitoring or employees
- Non-compete clause rules.
- Obligations regarding pregnancy and parental leave, sick leave, bereavement, family leave (caregiver, medical, child death, organ doner, reservists, infectious disease, emergency and related).
- Public holidays and vacation day requirements are outlined.
- Standards related to termination of employment, temporary layoffs, and severance.
- Equal pay for equal work requirements.

Reprisals are prohibited

Employees may be reluctant to identify issues regarding fair employment practices and related rights due to a fear of reprisal from the employer. Therefore, it is important for employees and employers to understand that under the ESA any form of reprisal against employees who raise employment questions or concerns is prohibited.

Imagine a situation in which a server is scheduled to work an 8-hour shift with no breaks. The employee is aware that under the ESA the employer is obligated to include break periods and explains the requirement to the employer. In response, the employer reduces the employee's weekly shifts. This reprisal is not permitted under the ESA and Ministry of Labour officials may direct employers to compensate and/or reinstate the employee, pay a penalty, or, in some cases, be subject to prosecution.

A guide to the *Employment Standards Act* provided by the Government of Ontario is available here:
https://www.ontario.ca/document/your-guide-employment-standards-act-0
It is a useful resource to help you navigate your rights and obligations.

Greater right or benefit

There may be cases in which employees agree to an employment contract or are governed by a collective agreement which provides employees with greater rights or benefits than the minimum standards under the ESA. In such cases, employees will receive the greater right or benefit.

No waiving of rights

If an employee enters an employment contract with terms and conditions that are less substantial than the ESA provisions, minimum ESA standards prevail and must be applied. Employees cannot waive or give up their rights under the ESA.

ESA Related Laws

The *Employment Standards Act* in Ontario is not the only statute addressing employee and employer rights and obligations. The ESA references and works in conjunction with several other acts including:

- Occupational Health and Safety Act

- Workplace Safety and Insurance Act, 1997
- Labour Relations Act, 1995
- Pay Equity Act
- Human Rights Code

OCCUPATIONAL HEALTH AND SAFETY ACT (OHSA)

All employers have an obligation to create a safe work environment for their employees including protection from harassment and violence in the same way as employers protect workers from harmful chemicals or dangerous machinery.

The OHSA (https://www.ontario.ca/laws/statute/90o01) contains the regulations that employers must follow. A guide to the OHSA is available here: https://www.ontario.ca/document/guide-occupational-health-and-safety-act

Some key definitions provided within the OHSA include the following:

Workplace Harassment

Workplace harassment is defined in the OHSA as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome" and includes workplace sexual harassment.

The comments or conduct typically happen more than once. They could occur over a relatively short period of time (for example, during the course of one day) or over a longer period of time (weeks, months or years). However, there may be a situation where the conduct happens only once, such as an unwelcome sexual solicitation from a manager or employer.

Workplace harassment can include unwelcome and/or repeated words or actions that are known or should be known to be offensive, embarrassing, humiliating or demeaning to a worker or group of workers. It can also include behaviour that intimidates, isolates or even discriminates against a worker or group of workers in the workplace that are unwelcome.

This definition of workplace harassment is broad enough to include harassment prohibited under Ontario's Human Rights Code, as well as what is often called "psychological harassment" or "personal harassment."

Workplace sexual harassment

The OHSA defines workplace sexual harassment as:

engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

making a sexual solicitation or advance where the person making it is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

This definition of workplace sexual harassment is similar to the prohibitions on sexual harassment and sexual solicitation found in Ontario's Human Rights Code.

Workplace violence

Workplace violence is defined in the OHSA as:

the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

This definition of workplace violence is broad enough to include acts that would constitute offences under Canada's Criminal Code.

EMPLOYER POLICIES

All employers who are subject to the OHSA, must prepare policies with respect to workplace violence and workplace harassment and review them at least once a year.

In a workplace where there are six or more regularly employed workers, the policies are required to be in writing and posted in the workplace where workers are likely to see them.

EMPLOYER PROGRAMS

Employers must set up and maintain programs to implement workplace violence and workplace harassment policies. A workplace violence program must include the following:

- measures and procedures to control risks identified in an assessment of risks as likely to expose a worker to physical injury
- measures and procedures for workers to report incidents of workplace violence
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur, and
- how the employer will investigate and deal with incidents or complaints of workplace violence.

A workplace harassment program must include the following:

- measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor, and to another person if the employer or supervisor is the alleged harasser
- how incidents or complaints of workplace harassment will be investigated and dealt with
- how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless necessary for the purposes of investigating the incident or complaint, or for taking corrective action, or is otherwise required by law
- how certain workers will be informed of the results of the investigation and of any corrective action.

Under the OHSA, an employer must provide appropriate information and instruction to workers on the contents of the workplace violence and harassment policies and programs.

All workers should be aware of the employer's workplace violence and harassment policies and programs. For workplace violence, workers should:

- know how to summon immediate assistance when workplace violence occurs or is likely to occur
- know how to report incidents of workplace violence to the employer or supervisor
- know how the employer will investigate and deal with incidents, threats or complaints of workplace violence
- know, understand and be able to carry out the measures and procedures that are in place to protect them from workplace violence, and
- be able to carry out any other procedures that are part of the program.

For workplace harassment, workers should:

- know how to report incidents of workplace harassment to the employer or supervisor
- know how to report incidents of workplace harassment where the employer or supervisor is the alleged harasser
- know how the employer will investigate and deal with incidents or complaints of workplace harassment
- know how information about an incident or complaint of workplace harassment will be kept confidential unless disclosure is necessary for investigating or taking corrective action, or is otherwise required by law
- know that the results of an investigation and any corrective actions will be provided to the worker who alleged workplace harassment and to the alleged harasser (if the alleged harasser is a worker of the same employer).

Practically speaking, workers may need other information and instruction on workplace violence and harassment, depending on their jobs. For example, supervisors may need additional information or instruction, especially if they are going to follow up on reported incidents or complaints of workplace violence or workplace harassment.

In order to protect a worker from workplace harassment, the OHSA requires that employers ensure that:

- an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
- the worker who was allegedly harassed, and the alleged harasser (if he or she is also a worker of the employer), are informed in writing of the results of a workplace harassment investigation and of any corrective action that has been or that will be taken as a result of the investigation; and
- they review the workplace harassment program as often as necessary, but at least annually, to ensure that it adequately implements the workplace harassment policy.

ASSESSMENT OF RISKS FOR WORKPLACE VIOLENCE

The employer must assess the risks of workplace violence that may arise from the nature of the workplace, type of work or conditions of work, ensure the assessment takes the circumstances into account that are specific to the workplace and circumstances common to similar workplaces, and include in the workplace violence program measures and procedures to control identified risks identified in the assessment as likely to expose a worker to physical injury.

Employers must repeat the assessment as often as necessary to ensure the workplace violence policy and related program continue to protect workers from workplace violence.

Note that an assessment of the risks of workplace violence should be specific to the workplace.

The OHSA does not require an employer to proactively assess the risks of violence between individual workers. It could be difficult for the employer to predict when violence may occur between individual workers. However, a review of incidents or threats of violence from all sources may indicate the origins of workplace violence and likelihood of violence between workers at a particular workplace.

The OHSA requires employers and supervisors to provide a worker with information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour.

Domestic violence

Employers who are aware of, or who ought reasonably to be aware of, domestic violence that would likely expose a worker to physical injury in the workplace must take every precaution reasonable in the circumstances to protect the worker.

Some indicators that domestic violence may occur in the workplace include reported concerns from the targeted worker or other workers, threatening calls or unwelcome visits at the workplace.

Measures and procedures in the workplace violence program can help protect workers from domestic violence in the workplace. For example, measures for the summoning of immediate assistance or for reporting of violent incidents could help protect workers from domestic violence when it may occur in the workplace.

Workers should be told that they can report their concerns to their employer if they fear that domestic violence may enter the workplace.

Employers must be prepared to investigate and deal with these concerns on a case-by-case basis. In addition to evaluating a worker's specific circumstances, employers should determine how measures and procedures in the existing workplace violence program could be used to support the development of reasonable precautions for the worker.

ONTARIO LABOUR RELATIONS BOARD (OLRB)

The *Ontario Labour Relations Board* is an independent, adjudicative tribunal that can issue decisions based on evidence presented and submitted by opposing parties. The OLRB function is to resolve disputes between employee and employers in a more efficient and specialized way than the traditional court system. More information on the role of the OLRB is available here: http://www.olrb.gov.on.ca/

ONTARIO HUMAN RIGHTS COMMISSION (OHRC)

The Canadian constitution identifies specific human rights that must be protected, and such rights extend to employment contexts. To align with and support national and provincial regulations, the Ontario government created the following three agencies: the *Ontario Human Rights Commission*, the *Human Rights Legal Support Centre*, and the *Human Rights Tribunal*:

The *Ontario Human Rights Commission* works to promote, protect, and advance human rights through research, education, targeted legal action and policy development.

The *Human Rights Legal Support Centre* provides legal help to people who have experienced discrimination under the Human Rights Code, including those who may not have the resources to access the help they need regarding their human rights.

The *Human Rights Tribunal* is where human rights applications are filed and decided. The Tribunal hears cases submitted by people who feel their rights have been violated without the need to file suit through the courts directly.

The three agencies that form the Ontario human rights system operate together to ensure that the rights of employees and employers are observed and protected. For more information and education, the OHRC provides a “Human Rights 101” eLearning course which can be accessed here:

https://www.ohrc.on.ca/en/learning/elearning/hr101-3rd-edition

The *Ontario Human Rights Commission* website is here: https://www.ohrc.on.ca/en

Conclusion

Labour law is a complex and ever-evolving area of law and both employers and employees should be familiar with the rules and regulations that apply to them in the context in which they operate. This chapter provides some insight and knowledge in this area and should be considered as a beginning or point of entry towards further exploration in this important and fascinating area of law.

Cases of Interest

- **Who is an Employee** – Canadian Union of Postal Workers v. Foodora Inc., d.b.a. Foodoa, 2020 CANLII 16750 (ON LRB) – https://canliiconnects.org/en/cases/2020canlii16750
- **Constructive Dismissal** – Farber v. Royal Trust Co., 1997 CanLII 387 (SCC), [1997] 1 SCR 846 https://www.canlii.org/en/ca/scc/doc/1997/1997canlii387/1997canlii387.html
- **Wrongful (and Constructive) Dismissal** – Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10 (CanLII) – https://www.canlii.org/en/ca/scc/doc/2015/2015scc10/2015scc10.html
- Matthews v. Ocean Nutrition Canada Ltd., 2020 SCC 26 (CanLII) – https://www.canlii.org/en/ca/scc/doc/2020/2020scc26/2020scc26.html
- **Discrimination –** Ont. Human Rights Comm. v. Etobicoke **–** https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2434/index.do
- **Federal vs. Provincial Jurisdiction** – Fox Lake Cree Nation v. Anderson, 2013 FC 1276 (CanLII): https://www.canlii.org/en/ca/fct/doc/2013/2013fc1276/2013fc1276.html
- **Fiduciary Duty** – RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4172/index.do
- **Just Cause** – Livshin v. The Clinic Network Canada Inc., 2021 ONSC 6796 (CanLII): https://www.canlii.org/en/on/onsc/doc/2021/2021onsc6796/2021onsc6796.html
- **Duty to Accommodate** – Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) *v*. Caron, 2018 SCC 3, [2018] 1 S.C.R. 35: https://www.canlii.org/en/ca/scc/doc/2018/2018scc3/2018scc3.html?resultIndex=7

Questions for Discussion

1. What is a fiduciary duty?
2. What is just cause?
3. Are the provisions identified in the *Employment Standards Act* minimum or maximum standards?
4. What is constructive dismissal?
5. What is progressive discipline?
6. What are some examples of wrongful dismissal?

Additional Resources

- Canada Labour Code: https://laws-lois.justice.gc.ca/eng/ACTS/L-2/index.html
- https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries/canada-labour-code-parts-overview.html
- Ontario Employment Standards Act: https://www.ontario.ca/laws/statute/00e41
- https://www.ontario.ca/document/your-guide-employment-standards-act-0
- Ontario Occupational Health and Safety Act: https://www.ontario.ca/laws/statute/90o01
- https://www.ontario.ca/document/guide-occupational-health-and-safety-act
- Ontario Labour Relations Board: http://www.olrb.gov.on.ca/
- Ontario Human Rights Commission: https://www.ohrc.on.ca/en
- https://www.ohrc.on.ca/en/learning/elearning/hr101-3rd-edition
- Human Rights Handbook for First Nations: https://www.chrc-ccdp.gc.ca/sites/default/files/fn_handbook.pdf

9. CANADIAN PROPERTY LAW

Chapter Outline

- Introduction
- Personal Property (including Reserve lands)
- Methods of Acquiring Personal Property
- Methods of Acquiring Real Property
- Interests and Scope
- Duties of Landowners
- Ownership Interests in Real Property
- Scope of Interests in Real Property
- Subsurface Rights
- Easements and Covenants
- Wills and Trusts
- Land Use Regulation
- Secured Transactions
- Other Types of Collateral
- Attachment of a Security Interest
- Conclusion
- Cases
- References
- Questions

Learning Outcomes

Students will be able to

- identify the key principles and applications of Canadian property law including duties and obligations concerning acquisition, access, maintenance and transfer of personal and real property.

Introduction

Property rights in Canada refer to the right of Canadians to own, use and dispose of their private property. Property rights are generally enforced through the law, including legislation at the federal, provincial, and municipal level. Property rights are based on the concept of ownership, which includes the right to enjoy, possess, use, and dispose of property, subject to certain limitations or restrictions imposed by law. Property rights are essential for individuals and businesses to be able to produce, trade, and invest in the economy. They provide incentives for investment, innovation, and entrepreneurship.

Property law is a dynamic area of law involving tangible and intangible items that can be owned by an individual or group. It is important to recognize that "property" as a concept does not pertain to a thing itself, but rather, it is a set of mutual rights and obligations that exist in relation to a thing. The Canadian property law systems creates a means of acquiring, retaining, and divesting property, and settling property disputes. It is important for businesses to understand the legal system of both personal and real property because they will often interact with both.

Although it may seem like owning or possessing property is always beneficial, it is important to remember that the liability that comes with owning or leasing property may not be favorable for a business. For this reason, businesses must take the time to assess the financial and legal risks of interacting with various kinds of property.

Personal Property

There are two kinds of property: real and personal. Real property includes land, and certain things that are attached to land or associated with it. Land can include things such as a forest or a field, as well as buildings, like a house or an office. Things associated with land, like mineral rights, also qualify as real property. People often talk about real property by using the term real estate, which includes both real property and its related ownership interest. Conceptually speaking, we can consider real property as pertaining to things that are tangible or generally unmovable.

Personal property, on the other hand, is property that is generally movable. It can be tangible, such as a bicycle or car, or intangible, like intellectual property. Moveable or tangible personal property can also be called a chattel. Some personal property can also be described as fungible property, which relates to property that can easily be substituted with identical property. This can include juices, oil, metals such as steel or aluminum, and physical monetary currency. Although intangible property does not physically exist, it is still subject to ownership principles, including acquisition, transfer, and sale.

Although personal property is not technically unmovable, it can become attached to the land as a fixture. A fixture is something that used to be personal property, but because it has become attached to the land, it becomes a part of the land. In this way, fixtures are treated like real property. In a situation when real property is transferred, fixtures are also transferred as a part of the real property. For example, a ceiling fan for sale at a store is personal property. However, once the fan is installed in a house, it becomes a fixture and is part of the real property.

In a similar way, some things which are real property can become personal property. Imagine a farm with planted corn. The corn crop is an example of real property that can become personal property because when the corn is growing and still attached to the land, it is classified as real property. However, once it is picked from the stalk, it becomes personal property.

Both personal and real property can be privately or publicly owned. Private property is owned by someone or an entity that is not the government. This might include individuals, corporations, and partnerships. Private property can include real property like land or buildings, as well as personal property, such as vehicles, furniture, and computers.

Property that is owned by the government is public property. Banff National Park is an example of public property that is real property. Public property can also include personal property, such as vehicles and computers owned by provincial or local governments.

Under the *Indian Act (*R.S.C., 1985, c. I-5), First Nations people who live on a reserve do not own the land they occupy. Reserve lands are owned by the federal government and provided to a Band (a First Nation community) to administer and manage. Reserve land administration is based on what is determined to be best for the community and as such, formal transfer of the lands requires approval from the Band council and the appropriate federal Ministry. Individuals or families occupying property on reserves cannot mortgage, sell or transfer land.

This condition leads to some obvious differences and limitations in the application of property rights for those living on a reserve as expressed in this comment from a Fraser Institute post: “On-reserve members are unable to earn equity on their home, use it as collateral to borrow money, sell their land to whomever they choose or bequest their wealth to their children." (https://www.fraserinstitute.org/blogs/property-rights-for-all-canadians-the-first-nations-issue-forgotten-by-all-federal-political-parties) With this in mind, it should be noted that although Indian lands cannot be purchased, lands on reserves can be leased. The *Framework Agreement on First Nation Land Management* (https://labrc.com/wp-content/uploads/2018/11/Framework-Agreement-on-First-Nation-Land-Management-Dec-2018.pdf) recognizes the rights of First Nations people to manage and govern reserve lands and to access these rights by opting-out of restrictive land management sections of the Indian Act. First Nations who enter the agreement can develop their own laws and regulations concerning land use and management.

METHODS OF ACQUIRING PERSONAL PROPERTY

Personal property may be acquired in several different ways, including through production, purchase, gift, and by finding an object. Each of these will be expanded on below.

Acquiring personal property through **production** occurs when someone produces something. For instance, if you were to plant some pumpkin seeds, the pumpkin that grew from the seeds would be yours. However, if an employee produces a good as part of their job, then the employer will own the property, not the employee. Ownership by purchase is another means of acquiring property and it is the most common method of doing so. This occurs when a customer buys goods from a manufacturer. For instance, buying a lawnmower from Canadian Tire.

Another way for property to be acquired is through **gifting.** A gift is a voluntary transfer of property. Generally, the donor of the gift must intend to gift the property, the donor must deliver the gift, and the gift must be accepted by the intended recipient. A conditional gift is a gift that requires a condition to be met before the gift will transfer.

Property that someone **finds** can be classified in several ways. If property is abandoned, a person who finds it may claim ownership. However, the original owners of abandoned property must intend to relinquish ownership in it. For example, if someone takes a chair to the landfill, he or she has abandoned the chair. However, if someone puts a chair out for a picnic in their front yard, someone else cannot claim ownership of it since the actual owner did not abandon the item.

If a piece of property is simply lost or mislaid, then the finder must relinquish it once the rightful owner demands its return. Another classification of personal property applicable to found property is treasure trove. A treasure trove is money or precious metals, like gold, which is hidden by an unknown owner. Whoever finds a treasure trove becomes the owner unless the true owner (for example, the person who hid it) comes forward.

BAILMENT

Sometimes it is necessary to intentionally leave personal property with someone else. A bailor is someone in the rightful possession of personal property who gives the property to someone else to hold. The person temporarily holding the property is known as a bailee. A bailment is an arrangement in which personal property is exchanged. The bailee agrees to accept the property and has the duty to return it. For example, a customer gives clothes to a dry cleaner. The dry cleaner is a bailee and has a duty to return the clothes (personal property) upon demand by the customer, who is the bailor.

Bailment is common in business practices. For example, placing packages with common carriers for delivery, warehousing goods with a third party, or taking clients' or customers' automobiles in a valet service. The duty of care that the bailee owes to a bailor depends on the nature and value of the property involved, as well as who benefits from the bailment. In general, a higher standard of care is required for more valuable property. Damages in a bailment case are based on the retail replacement value of the property.

Real Property

As previously discussed, real property includes land and certain things that are attached to or associated with it. It also includes undeveloped land, like a field, and it includes buildings, such as houses and office buildings. Real property also includes things associated with the land, like subsurface rights (rights to minerals and things found beneath the surface).

METHODS OF ACQUIRING REAL PROPERTY

Real property may be acquired by purchase, inheritance, gift, or through adverse possession. Having ownership of real property means that the owner has the right to possess the property, as well as the right to exclude others, within the boundaries of the law. If someone substantially interferes with the use and enjoyment of real property, the owner may bring a nuisance claim. Similarly, the owner may bring a trespass claim against those who enter the land without consent or permission. The different methods of acquiring real property will be expanded on below.

PURCHASE

Landowners may convey or sell part or all of their land interests. Different types of deeds convey different types of interests. A quitclaim deed, for instance, conveys whatever interests in title that the grantor has in the property to the party to whom the quitclaim is given. That means if the grantor has no interests in the real property, a conveyance by quitclaim will not grant any interests in the property. By comparison, a warranty deed conveys title, and the seller gives a warranty against defects in title as well as encumbrances. Buyers typically demand a warranty deed when they purchase property because the seller assumes the risk of the title not being clear.

After title is transferred by the deed, the deed is recorded in the county where the property is located. Recording a deed is important because it places others on notice about who owns the property. Provinces have different rules about who is considered the legitimate owner when a conflict in ownership claim exists. A *bona fide* purchaser is a purchaser who takes title in good faith, with no knowledge of competing claims to title.

INHERITANCE

Another common way in which real property may be obtained is through inheritance. Real property may be bequeathed through a will when someone passes away. Generally speaking, people have the right to dispose of their property as they wish when they die, providing that their will or other transfer instrument meets their province's requirements for validity. However, if someone dies without living relatives and without a will, the government becomes the owner of the property.

GIFT

Real property may also be acquired through a gift. A gift is valid when:

1. The person giving property intends to make the gift,
2. The person delivers the deed to the recipient and
3. The recipient must take possession of the gift.

If one of these elements is not met, then the title will not be conveyed.

ADVERSE POSSESSION

A less common way to acquire real property is through the doctrine of adverse possession. Adverse possession is when someone who is not the owner of real property has claimed the real property as their own. If land sits idle at the owner's hands but someone else puts it to use, then the law may favor the user's claim to the land over that of the actual owner. Adverse possession claims often occur around property lines, where one party has routinely used another's property because a fence has been misplaced.

Interests and Scope

Owning real property carries many responsibilities, as well as the potential for great profit and great liability. It is important to learn how to protect against potential liability of property ownership. For instance, if a toxic waste site is discovered on real property, the owner may be liable for its cleanup, even if he or she did not realize that such a site was there when purchasing the land. Each buyer of real property has a duty to exercise due diligence when purchasing land. A purchaser should never agree to buy land when they have not seen it or have not hired a professional inspector to view it.

It is important to know the duties of landowners, how to limit liability associated with the ownership of land, and when severance of liability occurs.

DUTIES OF LANDOWNERS

Landowners owe different duties to different types of people who enter their land. These responsibilities vary, depending on whether the person is a trespasser, a licensee, or an invitee. A trespasser is a person who intentionally enters the land of another without permission. A landowner has a duty to not intentionally injure a trespasser. For instance, setting traps and pitfalls for trespassers is illegal. Trespassers injured from such traps have valid claims against the landowner. However, if trespassers are injured from unknown or unforeseeable dangers, the owner is not typically liable.

However, landowners have a higher duty of care for licensees. A licensee is someone who has permission to be on the land. Examples of licensees include delivery people and utility workers. A landowner must not intentionally injure a licensee and must warn the licensee of known defects. For example, if a landowner knows that the steps to his or her porch are icy, he or she has a duty to warn a licensee that those steps are icy. Failure to do so may result in liability for the landowner.

An invitee is someone who has entered real property by invitation. For instance, a business may issue invitations to members of the public to encourage people to attend their office recruiting event. If this happens, landowners must inspect their property for defects, correct those defects when found, and warn invitees about such defects. For example, a grocery store must clean up spills as quickly as possible and put up a “caution” sign in that area.

OWNERSHIP INTERESTS IN REAL PROPERTY

Real property can be subject to different kinds of interests. In some cases, real property may be owned without restriction, subject only to local, provincial, and federal laws. In other cases, ownership interests may be narrower and subject to conditions, the violation of which can lead to loss of those ownership interests.

The most complete ownership interest recognized by law is called fee simple absolute. This ownership gives the owner complete control over the land and lasts until the owner dies or conveys the property to someone else. Generally, if someone wants to buy real property, they will look to buy property in fee simple absolute. However, it is slightly constrained by the right of the government to control the use of the land. It is also constrained by civil and criminal law. So, for example, even if you own your house and land, you are not allowed to carry out illegal activities on your property. Additionally, the government, through the exercise of expropriation legislation (eminent domain), has the right to buy your house and land from you if it wants to run a highway through your property.

The power of eminent domain is derived from the concept of the Crown's prerogative. The government has the authority to take private property for public use in exchange for reasonable compensation (referred to as expropriation). The power of eminent domain is mainly exercised by provincial governments and can be used to acquire land for public works, such as roads or utilities, or for public use, such as parks or schools. In some cases, the power of eminent domain is also granted to private corporations for specific projects, such as pipelines or electrical transmission lines. In all cases, the property owner is entitled to compensation for the taking of their land.

Ownership interest may also take the form of fee simple defeasible. This kind of interest is subject to a condition of ownership or to some future event. For instance, if an owner donates land to a city "so long as it is used as a public greenway," then the land would be owned in defeasible fee by the city as long as it maintains it as a public greenway. Once the condition is violated, the land would revert back to either the original owner or whoever owned the reversion interest, which is a future interest in real property.

Another ownership interest is a life estate. This interest is measured by the life of the owner. For example, a person could grant ownership rights in real property to a parent for the length of his or her life, but then the property would be returned upon the parent's death. A common investment, known as a reverse mortgage, employs the concept of life estate. A reverse mortgage is a loan that is available to Canadian homeowners aged 55 and over. It allows them to access the equity in their home without having to sell it. The homeowner can borrow a portion of their home equity, and receive this money as a lump sum, monthly payments, or a combination of both. The loan is repaid, with interest, when the borrower leaves the property, or when they pass away. The loan is secured by the home and the borrower does not have to make any payments until the loan is due. If the loan balance exceeds the value of the home, the lender will not ask for more money from the borrower or their estate.

It is important to remember that property can be owned by more than one owner. Several types of co-ownership interests are recognized in law. These ownership interests are important for matters of possession, right to transfer, right to profits from the land, and liability. For example, *tenancy in common* describes an ownership interest in which all owners have an equal right to possess the whole property. Compare this to *joint tenancy*, in which the surviving owner has the right of survivorship. If one of the owners dies, his or her property interests automatically transfers to the remaining owner(s).

These different interests are created by specific wording in the instrument of conveyance. An owner in tenancy in common may sell or transfer his or her rights without seeking permission from the other owners. This is because owners in a tenancy in common have the unilateral right to transfer their interests in property. Conversely, to transfer one's interests in a joint tenancy, the consent and approval of the other owners is required.

SCOPE OF INTERESTS IN REAL PROPERTY

Scope of ownership determines what can and cannot be done with the land. The surface of the land and the buildings that are attached are what most people think of as ownership of real property. However, land interests also include subsurface or mineral rights, and access to light or to a view. Additionally, easements (the right to cross or otherwise use someone's land for a specified purpose) and covenants (guides or restraints on how one may build on their land) grant certain rights to non-possessors of land.

SUBSURFACE RIGHTS

Subsurface or mineral rights are rights to the substances beneath the actual surface of the land. Purchasing mineral rights allows the owner to extract and sell whatever exists under the surface of the land, such as oil, natural gas, and gold.

EASEMENTS AND COVENANTS

Easements and covenants are nonpossessory interests in real property. An easement can be express or implied and it gives people the right to use another's land for a particular purpose.. It is a right of use that one party holds over another's property, such as a right of way to access a road or a right to use a water source that crosses through their land. For example, a common easement is for utility companies to enter private property to maintain poles and power lines.

A covenant is a voluntary restriction on the use of land. Common covenants include rules which restrict a homeowner's use of their land in certain ways, often for aesthetic purposes. For instance, such covenants might require houses subject to the covenant to be painted only in certain approved colors, or they might contain prohibitions against building swimming pools.

Some covenants and easements "run with the land," which means that the restrictions will apply to subsequent owners of the property. Whether a covenant or easement runs with the land depends on the type of interest granted.

Wills and Trusts

Both real and personal property may be transferred to another owner through wills and trusts. Although most people think of wills and trusts as a tool for conveying property owned by individuals, property owned by a business often needs to be transferred when the business owner dies. This is especially true for sole proprietorships and partnerships.

A will is a document by which an individual directs his or her estate to be distributed upon death. In Canada, a will must be in writing, signed and witnessed by two people who are both over the age of 18 and are not beneficiaries of the will. In some cases, a notary public may also be required. The testator must be of sound mind and must be aware of the contents of the will when signing. The witnesses must observe the testator signing the document and must then sign the will themselves in the presence of the testator. The will must also be dated.

A trust, on the other hand, is a property interest held by one person or entity at the request of another for the benefit of a third party. For a trust to be valid, it must involve specific property, reflect the person's or entity's intent, and be created for a lawful purpose. Trusts are often used when leaving property to benefit children who are under 18 years old, those who are elderly, and people with disabilities.

When planning how to distribute property upon death, it is important to understand the difference between probate and non-probate assets. Probate is the process through which a court determines how to distribute property after someone dies. Some assets are distributed to heirs by the court (probate assets) and some assets bypass the court process and go directly to beneficiaries (non-probate assets). Probate assets generally are subject to inheritance taxes and distribution can be delayed until the court orders the distribution of the assets. In light of these drawbacks, many individuals prefer non-probate assets.

Land Use Regulation

Land use regulation in Canada is primarily done at the provincial or municipal level, with each province and municipality having its own set of regulations. Land use regulations are generally designed to ensure that land is used in an appropriate and sustainable manner, while also protecting the interests of the local communities. These regulations can cover a range of topics, from zoning and building codes to environmental protection and conservation. Additionally, the federal government can enact land use regulations in certain cases, such as for national parks or for specific areas of interest.

A nuisance is a condition or situation, such as a loud noise or foul odor, that interferes with the use or enjoyment of property. Courts balance the utility of the act that is causing the problem against the harm done to neighboring property owners. For example, restrictions exist on when manufacturing plants may operate so as not to interfere with sleeping patterns of neighbors.

Nuisance can be both intentional and unintentional, as well as public or private. A public nuisance is an unreasonable interference with a right common to the general public, such as a condition dangerous to the public's health or a restriction on the public's access to public property. Many jurisdictions also include conduct that is offensive to the community's moral standard to regulate the placement of adult industries in residential neighborhoods. Public nuisance claims often include noise, smoke and smells issuing from manufacturing or other business activities. A private nuisance is a condition that interferes with a person's enjoyment of their property that does not involve a trespass. For example, cigarette smoke entering a neighbor's house from a smoker on an adjacent property is a private nuisance.

Most provinces have passed laws that allow local governments to regulate zoning. Zoning ordinances are laws passed by counties, cities, and municipalities that regulate land development including whether commercial or residential buildings can be built in an area, how tall buildings may be, and how much green space must be maintained. They also apply to existing buildings and regulate whether a building may be converted from residential property to commercial and the form of the commercial activity. For example, many zoning ordinances regulate the types of businesses that may be located next to schools and hospitals.

Introduction to Secured Transactions

Creditors want assurances that they will be repaid by the debtor. Secured transactions in Canada are contracts between two or more parties in which one party agrees to provide goods or services in exchange for a loan of money or other type of security. This security is usually provided by a third party, such as a bank or other financial institution, and is used to protect the lender in case the borrower fails to pay back the loan. The security can include things such as real estate, vehicles, or other assets, and is used to guarantee the loan. If the borrower fails to repay the loan, the lender can take possession of the security and use it to recoup the money loaned.

Security obtained through agreement comes in three major types: (1) personal property security (the most common form of security); (2) suretyship—the willingness of a third party to pay if the primarily obligated party does not; and (3) mortgage of real estate.

Secured transactions in Canada are governed by provincial and federal laws. The *Personal Property Security Act* (PPSA) is the main legislation governing secured transactions. The PPSA applies to most security interests in personal property, including equipment and inventory. Each province has its own Personal Property Security Act (PPSA) except for Quebec (secured transactions are administered by the Civil Code of Quebec).

Generally, secured transactions in Canada require the following:

1. **Creation of a security interest**: A secured party must provide the debtor with a security agreement that sets out the terms of the security interest.
2. **Perfection:** The secured party must perfect the security interest by registering it with the provincial registry.
3. **Priority:** Secured creditors must ensure that their security interests are properly perfected to obtain priority over other creditors who may have an interest in the same property.
4. **Enforcement:** Secured creditors must also be prepared to enforce their security interest if the debtor fails to comply with the security agreement. This may include repossessing the collateral and/or selling it to satisfy the debt.
5. **Discharge:** Once the debt has been paid, a secured creditor must discharge the security interest. If the debt is not paid in full, the secured creditor must follow the statutory procedure for realizing the secured property in order to discharge the security interest. This process involves providing notice to the debtor and other interested parties, selling the secured property through public auction, and applying the proceeds of the sale to the outstanding debt. The secured creditor must also comply with any applicable provincial laws governing the discharge of secured transactions.

OTHER TYPES OF COLLATERAL

Among other forms of collateral that may be used as security is the floating lien. A floating lien is a type of collateral used to secure a loan. It is a lien on all the assets of a borrower, including current and future assets. It is not attached to a specific asset, so if the borrower changes assets, the lien will still remain in place. The lender has the right to seize any of the borrower's assets if the loan is not repaid. Floating liens are commonly used in business loans, as they offer more security to the lender than other types of collateral.

ATTACHMENT OF A SECURITY INTEREST

Attachment is the term used to describe when a security interest becomes enforceable against the debtor with respect to the collateral. There are three requirements for attachment:

1. the secured party gives value.
2. the debtor has rights in the collateral or the power to transfer rights in it to the secured party.
3. the parties have a security agreement "authenticated" (signed) by the debtor, or the creditor has possession of the collateral.

The creditor, or secured party, must give "value" for the security interest to attach. Typically, this is extending credit to the debtor. The debtor must have rights in the collateral. Most commonly, the debtor owns the collateral (or has some ownership interest in it). The rights need not necessarily be the immediate right to possession, but they must be rights that can be conveyed.

PERFECTION OF A SECURITY INTEREST

In the relationship between a debtor and creditor, attachment of a security interest enables the creditor to repossess the goods and—usually—sell them to satisfy the outstanding obligation if the debtor defaults. However, unless additional steps are taken, the rights of the secured party might be subordinated to the rights of other secured parties; certain lien creditors, bankruptcy trustees, and buyers, who are not aware of the security interest. *Perfection* is the secured party's way of announcing the security interest to the rest of the world. It is the secured party's claim on the collateral.

Perfection of a security interest in Canadian law refers to the steps taken to ensure that the security interest is enforceable and given priority over other creditors. Perfection requires registration of the security interest on the applicable provincial or territorial personal property registry, as well as obtaining control over the collateral (if applicable). In addition, the parties must execute a security agreement that sets out the rights and obligations of the parties with respect to the security interest. Perfection of a security interest in Canada is necessary to ensure that the secured party's interest is protected and given priority over other creditors in the event of the debtor's insolvency or bankruptcy.

The steps for perfecting a security interest typically include the following:

1. **Determine the Type of Security Interest:** Security interests can be either fixed or floating. A fixed security interest is an interest in a specific asset, while a floating security interest is an interest in a pool of assets.
2. **Identify the Creditor and Debtor:** The creditor is the person or entity who is providing the loan and the debtor is the person or entity who is receiving the loan.
3. **Draft a Security Agreement:** A security agreement is a contract between the creditor and debtor that outlines the terms of the loan. The security agreement should include the type of security interest, the assets that are to be used as security, the amount of the loan and any other relevant terms.

4. **Record the Security Interest:** The security interest must be recorded in the appropriate registry. In Canada, this is usually either the Personal Property Security Register (PPSR) or the Land Titles Office.
5. **Perfect the Security Interest:** Perfection is the process of making the security interest enforceable. This usually involves filing the security agreement with the appropriate registry and/or obtaining a judgment against the debtor.
6. **Monitor the Security Interest:** The creditor must monitor the security interest to ensure the debtor is current on their payments and that the security interest is not subordinated to the interests of another creditor.

Conclusion

Through this introduction to Canadian property law, it should be clear that understanding fundamental aspects of this area of law helps individuals and businesses to protect their assets and investments. Property law sets the rules for the ownership, use, and transfer of real and personal property. It also sets out the rights and obligations of each party involved in a property transaction, including landlords, tenants, creditors, and purchasers. This helps businesses to understand the legal framework for their investments and how to navigate it. It also helps them to protect their investments from potential risks and legal action.

Cases of Interest

- Aboriginal Land Title Case: Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010 **–** https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do
- Security Interest Case: Bank of Montreal v. Innovation Credit Union – https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7890/index.do
- Wills and Estates Property Case: Cowper-Smith *v.* Morgan, 2017 SCC 61, [2017] 2 S.C.R. 754 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16898/index.do
- Real Property Restrictive Covenant Case: Noble et al. v. Alley [1951] S.C.R. 64 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/3691/index.do
- Real Property Adverse Possession Case: Nelson (City) *v.* Mowatt, 2017 SCC 8, [2017] 1 S.C.R. 138 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16414/index.do

Questions for Discussion

1. Explain the difference between *attachment* and *perfection* in relation to a security interest.
2. What are some examples of *nuisance* in connection with land use?
3. What is a reverse mortgage?
4. What are some limitations concerning reserve lands?
5. What is a *bailor* and a *bailee*?

Additional Resources

- Private property on Reserves: https://www.legalline.ca/legal-answers/private-property-ownership-and-matrimonial-homes-on-reserves/
- Indian Act (R.S.C., 1985, c. I-5): https://laws-lois.justice.gc.ca/eng/acts/i-5/fulltext.html
- First Nations Land Management: https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165
- Personal Property Security Act (R.S.O. 1990, Chapter P.10): https://www.ontario.ca/laws/statute/90p10
- Financial Consumer Agency of Canada: https://www.canada.ca/en/financial-consumer-agency.html

10. INTELLECTUAL PROPERTY

CHAPTER OUTLINE

- Patents
- Trademarks
- Copyright

Learning Outcomes

- Identify three main types of intellectual property available to individuals and businesses.
- Understand the limitations of each type and the available remedies.
- Recognize how to avoid infringing on the intellectual property of others.

Introduction

With the rise in unique technology and processes that drive competitive advantage for businesses, the importance of protecting those technologies and processes has become an increasingly critical aspect of business operations. In fact, many of the largest companies today exist and flourish due to their unique technology or processes. Without some level of protection, these companies could lose their competitive advantage very quickly. This is the point to 'Intellectual Property' law (often referred to as 'IP').

The *Business Development Bank of Canada* (BDC) defines IP in the following way: "Intellectual property (IP) is anything created by human minds: Inventions, literary and artistic works, designs, symbols, names and images used in business, and more. As it can sometimes have even more value than tangible assets, it needs to be properly protected." (https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/intellectual-property)

The laws developed regarding IP were designed to protect inventors so that they can have time to develop their business without the worry of having other organizations copy their inventions. IP law helps to encourage innovation and entrepreneurship, a cornerstone to a thriving economy.

Companies invest tremendous resources in developing innovative new products and services. Intellectual property law prevents competitors from immediately profiting from another's invention and provides incentives for continued innovation.

In fact, over the last decade there has been a steady increase in the number of patents filed, resulting in a multiyear delay in processing applications. An increase in the number of business method patents contributed to this dramatic increase in patent applications. A business method patent seeks to monopolize a new way of conducting a business process. For example, "Patent Filing for One-Click Web Ordering" describes a method of e-commerce by which a customer can order an item and pay for it immediately with just one click of a button. This one-click patent was granted to Amazon.com. Amazon licensed the patent to Apple so that it could feature one-click on its website. This in turn allowed Amazon to recover some of its development costs from Apple, which also wanted to use the technology.

Intellectual propery law is distinct from 'Real Property' in that IP law is specific to 'intangible assets' (a non-physical creation or resource). IP can be in either an abstract or concrete form. For example, a composer may have IP interests to both the abstract sound of the music he or she composed, as well as the concrete sheet music that instructs musicians how to play the musical composition.

Protection of IP rights generally fall into one of three major categories: patents, copyrights, and trademarks. There are other IP categories which include industrial design and trade secrets.

- Patent – Protects unique inventions and or business methods
- Copyright – Tangible expression of an idea; but not the idea itself
- Trademark – Words and symbols used to identify products or services
- Trade Secret – Valuable secrets that give a business a competitive advantage
- Industrial Designs – In Canada it is covered by the Industrial Designs Act and protect specific designs,

shapes etc. for example, integrated circuit designs.

Different types of IP may attach to aspects of the same product or service. For example, Coca-Cola has trademarks for its name and logo, a patent for the shape of its original glass bottle, a copyright for its commercial jingle, and a trade secret for its cola recipe.

It is important to understand that the generally accepted ideas, descriptions, and expectations relating to intellectual property may not be in alignment with the perspectives of indigenous artists, creators and innovators. The concept of ownership and rights related to individual, tangible, intangible, and collective creative expressions may be perceived differently within Indigenous communities and by indigenous authors, artists, and creators. Traditional knowledge and traditional cultural expressions are fluid, transgenerational, and may (and often do) take various forms (music, dance, stories, fabrics, art, ceremonies, along with other expresssions).

Defining indigenous expressions, activities, and artifacts through the lens of existing intellectual property regulations is challenging and can be problematic: "exceptions and limitations typically found in IP laws may not be considered to be suitable for Indigenous knowledge and cultural expressions, particularly if it is considered to be sacred." (https://ised-isde.canada.ca/site/intellectual-property-strategy/en/introduction-intellectual-property-rights-and-protection-indigenous-knowledge-and-cultural). For these reasons, Canadian businesses, organizations, and entrepreneurs should become aware of indigenous perspectives on intellectual property and the ways in which indigenous views provide a different way of thinking about and applying intellectual property mechanisms.

Patents

A patent is the exclusive right to make, use or sell an invention for a specified period of time (in Canada a patent is valid for up to 20 years after the data of filing the patent), granted by the federal government to the inventor. A patent holder owns a patent. Patents may be legally sold to others. Therefore, an inventor may sell a patent to others, which ends his or her property interest in the invention.

Many inventors and designers work for employers in creative and inventive capacities. Depending upon the employer / employee relationship the employer or the employee may be classified as the inventor. However, generally speaking, if an employee invents something as part of his or her employment, then the employer is the patent holder. Typically, if an employee invents something outside of work on his or her own time, and the invention is not related to his or her employment, then the employee is the patent holder. If you have questions about who own the IP, check with a professional to ensure clarity.

To apply for a patent, an inventor must meet three requirements: the invention must be (1) novel, (2) non-obvious, (3) and must be useful.

- To be *novel*, the invention must not have been previously invented and must not come from a trivial improvement to an existing invention. In other words, it must not have been previously known or used.
- To be *non-obvious*, the invention must not be obvious to a *reasonable person* (a hypothetical person of ordinary intelligence and prudence) in an appropriate field with ordinary skill. In other words, patents reward creativity that results in something new and is not considered common knowledge by someone in the industry.
- To be *useful*, the invention must create some type of value for society in general. This is somewhat obvious and an easy requirement to meet, but it should be worth noting before moving forward with any patent application.

Not all things can be patented. An idea alone (without a definite description) cannot be patented. Similarly, the laws of nature (such as gravity) and things that occur naturally (such as DNA) cannot be patented. This is because some items found in nature are not the result of human invention or creativity. If not the product of a human mind, then a patent cannot apply. This distinction can be narrow in some industries. For example, DNA cannot be patented but the scientific process of synthetically reproducing DNA can be patented (since it is a human invention). Likewise, oil cannot be patented but the process for extracting it from the ground can be.

It should also be noted that in many jurisdictions, if a granted patent is not used by the patent holder, then they can be forced by a court to grant a license to someone or some business who does plan to use the patent.

Outside of Canada, a patent granted by Canada does not automatically protect the inventor's interest in that property. Instead, IP is protected by a series of international conventions. Because international law is only binding on nations who agree to be bound by it, IP is not protected internationally in nations that have not signed the conventions.

Often people ask how to actually patent an idea. It is a complicated process. Each jurisdiction will have its own rules, requirements, fees, processes, supporting documents, etc. The differences are many. Here are a few simple examples:

- The duration of patent protection may vary from jurisdiction to jurisdiction.
- Some jurisdictions provide provisional patent protection which allows an inventor to state their idea and then have a period of time to fully develop the idea (USA is 12 months as an example)
- Some jurisdictions don't recognize other patent issuing jurisdictions; so, if you patent in a country in South America for example, it may not be accepted in a European country (just as an example)

For many Canadian companies and individuals, if they choose to attempt securing patent protection, then they will secure Canadian and USA patent protection. Many will also seek international protection from jurisdictions like the EU and the United Kingdom.

International treaties such as the *Paris Convention for the Protection of Industrial Property* and *The Patent Cooperation Treaty* contain provisions to protect patent rights in member countries. The World Intellectual Property Organization (WIPO) provides service, resources, and education concerning is an global intellectual property matters:

Securing patent protection can be a complicated and costly process. While it does provide protection of an idea, that protection must be weighed against the cost to secure that protection. In effect, is the future value of the patent protection worth the current cost to acquire the protection?

PATENT INFRINGEMENT

If someone uses a patented invention without permission from the patent holder, then that person has violated the patent holder's rights. This violation of IP rights is called patent infringement. Patent infringement is the act of making, using, selling, or offering to sell a patented invention without the permission of the patent holder. Patent infringement can be either direct or indirect.

There are two forms of patent infringements. *Direct infringement* occurs when someone copies and uses an invention or uses an invention with a slight variation or addition. *Indirect infringement* occurs when someone "designs around" a patent by creating a product that is substantially the same and performs a similar function.

If patent holders successfully sue for patent infringement, they may be entitled to damages including injunction forcing their competitors to stop using the invention. The most common defense to patent infringement claims is to challenge the validity of the patent.

Trademarks

Ordinary trademarks include designs, words, names, logos, mottos, devices, sounds, colours, scents moving images, holograms, three-dimensional shapes, graphic symbols or a combination of any of these used by a manufacturer or seller to distinguish its products. The main purpose of a trademark is to guarantee a product's genuineness. In effect, the trademark is the commercial substitute for one's signature or company brand. To receive trademark protection, a trademark must be:

- distinctive rather than merely descriptive
- affixed to a product that is actually sold in the marketplace
- registered with the trademark office or actively used for a reasonable length of time

A registered trademark in Canada last for 10 years and can be renewed after each 10 year period. Since the objective of trademark law is to prevent consumer confusion, the public good is best served by allowing companies to maintain their trademarks as long as consumers associate a trademark with a specific origin. The moment they no longer make that association, however, the trademark may cease to exist.

When it comes to trademarks, distinctiveness is good. Therefore, an invented word is the easiest type of trademark. In 1997, Larry Page and Sergey Brin were brainstorming names for their new Internet search engine, and invented the word "Google," which is a play on "googol" that means 1 followed by 100 zeroes. They felt the name reflected their goal to organize the staggering amount of information available on the Internet. Common words can also become trademarks if consumers identify them with a particular source. For example, Amazon is the name of the world's longest river, but it is also the name of an online retailer. Since consumers now identify Amazon.com as an online retailer, the name can be trademarked.

People's names may also be trademarked if they have a business presence. Over time, if consumers begin to identify a person's name with their business, then the name has acquired secondary meaning and can be trademarked. Thus, Molson is a trademark for a brand of beer, Chapmans is a trademark for a brand of ice cream, and Ferrari is a trademark for a brand of sports car.

In addition to names and logos, slogans may also be trademarked. For example, the Ford Motor company slogan; "Built Ford Tough" and Nike's "Just Do It" are both trademarked. Trademarks can also apply to a combination of distinctive words, logos, and slogans. McDonald's has a trademark for its name, a trademark for its "golden arches," and a trademark for its slogan "I'm lovin' it." McDonald's could also trademark the combination of how those three items are displayed together in its advertising materials.

Trademarks are usually granted for a specific category of goods. The same name can sometimes be used for multiple categories of goods. The slogan 'I am' was for a time both trademarked by Molson's Beer and Lotus Development (software). Since there is little chance that consumers will confuse a beer and software, trademark law allows these dual slogan registrations.

On the other hand, some brands are so strong that they may stop registration even for a completely different category of goods. McDonald's is a good example of this. The McDonald's trademark is one of the strongest in the world and is instantly recognizable. In 1988, hotel chain Quality Inns launched a new line of budget motels called "McSleep." McDonald's sued, claiming trademark infringement. McDonald's claimed that consumers might be confused and believe that McDonald's owned the hotel chain. A USA judge agreed and ordered Quality Inns to change the name of the chain, which it did, to Sleep Inns.

Trademarks go beyond a company's name or its logo. A color can be trademarked if it is strong enough to create consumer identification. Pink, for example, is trademarked when used for building insulation by Owens Corning. All other insulation manufacturers must use different colors. Sounds can be trademarked too, such as MGM Studios' lion's roar. Distinctive colors, materials, textures, and signage of a Starbucks or T.G.I. Friday's are considered trade dress and cannot be copied.

Companies or organizations providing services may receive trademark protection for their service under the designation of a *service mark*. Instagram, for example, is a service mark. A trademark can also be used to demonstrate certification meeting certain standards, such as the *Good Housekeeping Seal of Approval*.

Trademark protection can also be used to demonstrate certification meeting certain standards, called a certification mark. An example of a certification standards granting authority is the International Organization for Standardization (ISO) and its various standards for quality management (ISO 9000) or environmental quality (ISO 14000). The Forest Stewardship Council (FSC) allows its logo to be used on paper products that come from sustainable forests, while certain foods can be labeled "Organic" or "Fair Trade" if they meet certain standards as established by governmental or nongovernmental organizations. Each of these marks is an example of a certification mark.

Finally, a mark can represent membership in an organization, such as the National Hockey League (NHL), Girl Scouts of America, Chartered Financial Analyst, or Realtor. Each of these is known as a collective mark. The rules that apply to trademarks apply equally to service marks, collective marks, and certification marks.

Obviously, trademarks will not be granted if they are similar or identical to a trademark already granted. When starting a new company, businesses need to make sure that their business name is not already trademarked by someone else.

A trademark is valid if consumers believe that the mark is associated with a specific producer or origin. If the mark refers to a class of goods instead, then the trademark no longer exists. This process is called genericide. Many words today once started as trademarks: furnace, aspirin, escalator, thermos, asphalt, zipper, lite beer, Q-tip, and yo-yo are all examples of trademarks that are now generic and have therefore lost legal protection. To prevent genericide from occurring, trademark owners must actively police their use. If trademarks become generic, the owners will lose control of the marks and the public (and competitors) will be free to use those words just as they use "aspirin" and "yo-yo" today.

Trademark infringement occurs when someone uses someone else's mark, either completely or to a

substantial degree when marketing goods or services without the permission of the mark's owner. When Apple first released the iPhone, it found out that "iPhone" was already a registered trademark belonging to Cisco for a phone used for calling over the Internet. To avoid trademark infringement liability, Apple purchased the trademark from Cisco.

The elements of trademark infringement are:

- Distinctiveness (strength) of plaintiff's mark;
- Similarity of the two marks;
- Similarity of goods or services associated with marks;
- Similarity of the parties' facilities/operations;
- Similarity of the parties' advertising;
- Defendant's intent; and

- Proof of actual confusion.

Companies or persons accused of trademark infringement can rely on several defenses:

- Marks are sufficiently different;
- Fair use;
- Parody;
- Comedy and satire; and
- Consumer advocacy.

The most obvious is arguing that no infringement has occurred because the two marks are sufficiently different enough that consumers will not be misled. For example, in 2002 Jeep sued General Motors for infringing on what Jeep called its trademark grill. GM's Hummer division released the H2 that year, with a similar seven-bar grill. A district court held that there was no trademark infringement because the grills were too dissimilar to cause consumer confusion.

Another defense is fair use. Generally speaking, companies should not use someone else's trademark when selling goods. However, when a company mentions a competitor's product to draw a comparison, this is called comparative advertising and is fair use of the competitor's trademark. Honda, therefore, is free to claim that the "Honda Accord is better than the Toyota Camry" in its advertising even though Toyota and Camry are both trademarks.

Copyright

The final form of intellectual property protection is copyright. A copyright is a property interest in an original work of authorship (such as literary, musical, artistic, photographic, or film work) fixed in any durable medium of expression. The owner of a copyright has the exclusive right to reproduce, adapt, distribute, perform, and display the work. The durable medium requirement exists because otherwise it would be impossible to prove who is the original author of a work. Ideas, by themselves, cannot be copyrighted.

Like patents and trademarks, Canadian law protects copyrights. Copyright is designed to protect creativity. Copyright extends to any form of creative expression, including digital forms.

Because computer software is a compilation of binary code expressed in 1 and 0, software can be

copyrighted. Similarly, if a group of students were given a camera and asked to photograph the same subject, each student would frame the subject differently, which is an expression of their creativity.

A copyrighted work is automatically protected upon its creation. Unlike patents and trademarks, which must go through an expensive and rigorous application process, authors do not need to send their work to the government for approval. Canada signed the Berne Convention, which is an international copyright treaty. This treaty eliminated the need to write "Copyright" or place a © symbol on the work itself to receive legal protection. Copyrights may be registered with Canadian Intellectual Property Office (CIPO), if the author chooses.

In Canada copyright protection lasts for fifty years after the death of the author. If there is more than one author, the copyright expires fifty years after the death of the last surviving author. After the copyright expires, the work falls into the public domain. The works of Shakespeare and Beethoven are in the public domain and may be freely recorded or modified without permission. The copyright owner may allow the public to view or use a copyrighted work for free or for a fee. This use is contained in a copyright license. A license is essentially permission from the copyright holder to use the copyrighted material, within the terms of the license. When purchasing a book, computer software, or movie for example, the copyright license allows the purchaser to read the book, use the software, and view the movie in private.

The license does not allow the purchaser to show the movie to a broad audience, to modify the music, or to photocopy the book to give away or sell. These rights of reproduction, exhibition, and sale are not part of a license. The purchaser does have the right of first sale. This means that the owner of the physical work can do with it as he or she pleases, including resell the original work.

Copyright infringement occurs when someone uses a copyrighted work without permission or violates the terms of a license. Copyright infringement is common when someone takes someone else's work and simply repackages it as their own. For example, J. K. Rowling's Harry Potter series created an international following, and many fans gather online to discuss her books. One website, called the Harry Potter Lexicon, served as an encyclopedia to the Harry Potter world, with reference notes on characters, places, spells, and other details. When the site announced plans to publish the contents of the Lexicon in a book format, J. K. Rowling successfully sued, claiming copyright infringement.

Copyright infringement may also be indirect, such as helping others violate a copyright. Websites such as Napster and Limewire, which existed solely for the purpose of facilitating illegal downloading of music, were copyright infringers even though the websites themselves did not directly violate any copyrights. The music recording industry pursues these cases aggressively.

Copyright law makes a distinction between “fair” and “infringing” use. Fair use includes copying a work for purposes of commentary, criticism, news reporting, teaching, or research. Just because a work is used in a news article or in a classroom, however, does not make its use fair.

Factors to determine fair use of copyrighted materials are specific to the jurisdiction, but these elements generally guide fair use:

1. Is it for educational purposes or to make a profit?
2. Is the work part of the “core” of the intended protection that copyright provides?
3. Is the amount used a small portion or the entire work?
4. Does the use of the copyrighted work unfairly impact the owner’s rights or business operation?

With the rise of the internet, problem of copyright infringement has become a major issue. Governments and technology companies struggle to address copyright issues in such a fast paced and ever-changing environment. While some countries have attempted to enact legislation to address copyright infringement on the internet, copyright infringement still exists.

Trade Secrets

A trade secret is a formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors. A trade secret is, in short, secret information. This information may include a process, formula, pattern, program, device, method, technique, or compilation. For many companies, lists of suppliers, costs, margins, and customers are all trade secrets. Soft drink recipes, the Big Mac's special sauce, and even the combination of wood that is used in the burning process to make Budweiser beer are all trade secrets. Additionally, Google's algorithm for conducting web searches is a trade secret.

Elements of a Trade Secret:

1. Is not generally known or ascertainable;
2. Provides a competitive advantage;
3. Has been developed at the owner's expense & is used continuously in the owner's business; and
4. The owner intends to keep it confidential.

Trade secrets are unlike patents in that with a patent, the inventor must specifically disclose in the application the details of the invention. Thus, the inventor has not protected the secret of the invention. However, in exchange for this disclosure, a patent owner has a legal monopoly over the property for a specified period of time. Even if others discover how the invention works (which often is not difficult because patent applications are public record), they are prohibited from making, using, or selling it without the patent holder's permission. After the patent expires, the patent holder no longer has a property right to exclude others.

Trade secrets can last forever if the owner of the secret keeps it a secret. If someone uses lawful means to uncover the secret, then the secret is no longer protected. Therefore, some companies would rather not make their confidential information public knowledge through a patent application in return for a temporary monopoly. Instead, they choose to protect the confidentiality of the information or product internally with the hope of a longer period of protection. For example, Google protects its search algorithm as a trade secret to maintain a competitive advantage in the market for as long as possible.

A claim for misappropriation may be brought when a trade secret has been wrongfully obtained, such as through corporate espionage or bribery. Generally, misappropriation occurs if the secret was acquired by improper means, or if the secret was disclosed or used without permission from the secret's owner. Damages may include actual loss and unjust enrichment not captured by actual loss. Additionally, in cases of willful or malicious misappropriation, double damages may be awarded, as well as attorney's fees.

INDUSTRIAL DESIGNS

An industrial design is about how something looks. It protects a product's unique appearance, not what it is made of, how it is made or how it works.

Industrial designs can be found in many everyday products, such as the unique contour of a car hood, the graphical user interface on a phone or the specific shape or pattern of your favourite shoes.

Industrial design can give a product a competitive edge in the marketplace. To sell a product, there are multiple factors to consider, including price, functionality, reputation and its aesthetics. Consumers are often drawn to an eye-catching product and so accordingly, manufacturers put a lot of money and know-how into their industrial designs. An effective design will appeal to the consumer and even create an emotional connection between the consumer, the product, and the brand and can influence consumer behaviour, ultimately supporting the marketing and sales of the product. This is why a novel design is considered to be valuable intellectual property.

In Canada, you can secure these rights by registering your industrial design with the Canadian Intellectual Property Office. The Industrial Design Act confers exclusive right for the three-dimensional features of shape and configuration as well as the two-dimensional features such as pattern and ornament, including colour, applied to a finished article. A registered industrial design provides the owner with an exclusive right to prevent others from making, selling and importing for commercial purposes in Canada an article that embodies a design which is the same, or substantially similar to the registered design. You may obtain protection for the design of the entire finished article, or part of it. In Canada, this exclusive right can last for up to 15 years.

Conclusion

Most jurisdictions recognize the value of intellectual property. These legal protections provide a foundation for businesses, entrepreneurs, and artists to create useful and innovative works. Without the financial incentives provided by IP law, innovation would grind to a halt. The primary purpose of providing temporary IP monopolies is to advance science and the useful arts. IP law is the foundation of innovation and economic growth through entrepreneurship.

Cases of Interest

- Google Inc. v. Equustek Solutions Inc. – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do
- Diageo Canada Inc. v. Heaven Hill Distilleries, Inc. – https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/231929/index.do
- Whirlpool Corp. v. Camco Inc. – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1833/index.do?site_preference=normal

Question for Discussion

1. What is the difference between a patent, trademark, and copyright?
2. What are the common forms of intellectual property in Canada?
3. How long does copyright protection last for in Canada?
4. What are three requirements an inventor must typically fulfill to obtain a patent in Canada?

Additional Resources

- Canadian Intellectual Property Office – https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/home
- Introduction to Intellectual Property Rights and the Protection of Indigenous Knowledge and Cultural Expressions in Canada – https://ised-isde.canada.ca/site/intellectual-property-strategy/en/introduction-intellectual-property-rights-and-protection-indigenous-knowledge-and-cultural
- World Intellectual Property Office – https://www.wipo.int/portal/en/index.html
- 10 Myths About Canadian Copyright Law – https://www.copyrightlaws.com/10-myths-about-canadian-copyright-law/

11. TECHNOLOGY AND THE LAW

CHAPTER OUTLINE

- Technology and Privacy
- Technology and Contract Law
- Technology and Tort Law
- Technology and Regulations
- Technology and Bias

Learning Outcomes

Students should understand some of the many challenges faced for both individuals and businesses with the increase of technology becoming interwoven within a business environment. Students will understand how technology is changing the traditional business practices in areas such as privacy, contract, and tort.

Introduction

Technology has, and continues to, become tightly intertwined with business and society. To make things more challenging, technology is adapting at a pace previously unseen in society. While businesses struggle to keep up with dynamic and continual technological advancements, governments are lagging behind in updating laws to manage business practices to protect investors, consumers and society. It is within this rapidly changing environment that businesses and individuals need to understand their risk, rights and obligations.

The reality is that technology can greatly enhance commerce and education in ways that were unthinkable a few years ago. It is this speed of technology that makes most laws in Canada outdated and ineffective for regulating technology advancements. As an example, the advancement of streaming services which allow people to download content from anywhere in the world completely bypasses the traditional media channels that the Canadian Radio-television and Telecommunications Commission (CRTC) is still trying to manage with outdated rules.

The key element that all students should know, and they often forget, is that traditional laws in Canada still apply to the technology world. Though regulations are developing in response to new technologies and laws may not be fully developed or understood, all people and businesses need to be aware of the laws which govern and may affect their actions and outcomes relative to technology.

Technology and Jurisdiction

While the slow pace of updates of laws to meet the rapidly changing business technology environment is a big issue, the reality is that we already have a number of laws which could address many online legal situations. For example, slander/defamation laws exist and could be used to take action against someone for their online activities. The challenge is that with the internet, traditional national borders are crossed largely unimpeded. So, the question becomes which countries laws apply on the internet and where should an action be brought?

Let's deal with the easy question first: Do Canadian's need to follow Canadian laws while doing business abroad, either with technology or not? The simple answer is yes! All Canadian citizens must adhere to Canadian law despite the jurisdiction, even if that jurisdiction allows the activity. The best example of this is bribery. In many jurisdictions, this is a common practice and may be an expected part of business operations. However, bribery is an offence under Canadian law so, as a Canadian citizen, you can still face consequences here in Canada.

That is easy, but do Canadians need to follow other jurisdiction's laws? The challenge is that each jurisdiction has its own set of laws and regulations. Since each jurisdiction is different, then how do we know as businesses which laws to follow? Let's say we sell cannabis online which is legal in many parts of Canada; how can we prevent selling to jurisdictions that prohibit cannabis use? Or, in the event someone from those prohibited jurisdictions does purchase our product online; what is the risk to our organization? These are complicated questions, without easy answers which probably explains why governments struggle with developing laws to address the rapid importance of technology in business.

Why does this matter? Well, it has to do with the concept of long-arm statutes and extra-territorial reach.

LONG-ARM STATUTES

A long-arm statute is a law that one jurisdiction enacts and can be enforced against a business or organization operating outside that jurisdiction but could come in contact with that jurisdiction. For example, if one jurisdiction outlaws cannabis but drafts the legislation to include 'anyone in the world', and not just residents of the jurisdiction, this would convert the law from a single jurisdiction to a long-arm statue.

This is not just some hypothetical situation. BODOG.com, a Canadian gambling site, operating legally in Canada, was indicted in the USA for violating its state laws (https://www.cbc.ca/news/world/bodog-gambling-site-shut-down-canadian-owner-indicted-1.1159011). It is highly risky for organizations or individuals to ignore or disregard another jurisdiction's laws because these can be enforced in other jurisdictions.

EXTRA-TERRITORIAL REACH

Extra-territorial reach is where one jurisdiction has an ability to exercise authority beyond its jurisdiction. In reality, any jurisdiction can do this, but if the other jurisdiction does not allow for the effect of the law in that jurisdiction, it is difficult to apply the law and take action against the business. Ideally, the goal is to have both jurisdictions agree to the law and apply it. This is common in criminal cases.

A recent interesting situation is where the US department of revenue has been actively targeting American citizens overseas to collect taxes owed: IRS Cracking Down on US Expat Taxpayers.

These two are similar, so the easiest way to understand their difference, is that long-arm statues are to enforce laws on people or businesses that reside outside the jurisdiction; whereas extra-territorial laws focus on individuals and businesses who are 'residents' of the jurisdiction but are operating outside the jurisdiction.

FOREIGN ACTIONS

One of the new developments of technology is the ease with which individuals and businesses can be exposed to foreign government actions. As an example, foreign governments have used technology to track and monitor the activities of individuals. (https://www.washingtonpost.com/investigations/interactive/2021/nso-spyware-pegasus-cellphones/). Businesses should take precautions to protect their interests in a rapidly changing world.

Technology and Privacy

The internet and technology are changing the world at an incredibly fast pace. With those changes come the challenges to individuals and businesses to maintain privacy and protect personal information. Regardless of the type of industry, businesses need to have adequate cybersecurity policies and practices in place to protect confidential business, employee, and customer information. Workplace privacy and information security is a fast-growing area of the law that has important implications across industries.

As our society becomes more and more dependent on technology, we are seeing privacy issues explode in personal and professional contexts. Businesses would do well to consult with cybersecurity and privacy experts to ensure that they are complying with the law and protecting their networks and confidential information as much as possible. Bringing in experts after you have a security breach or lawsuit filed is too late.

WHAT IS CONFIDENTIAL INFORMATION IN CANADA?

There is a growing realization that the trend among nations is to require internet service providers to obtain consent from consumers before sharing any of their personal information.

Under the Privacy Act of Canada, personal information is defined as any information that can identify an individual that is recorded in any form including, but not limited to:

- The race, national or ethnic origin, colour, religion, age or marital status of the individual
- The education or the medical, criminal or employment history of the individual
- Information relating to financial transactions in which the individual has been involved
- Any identifying number, symbol or other particulars assigned to the individual,
- The address, fingerprints, or blood type of the individual
- The personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award, or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,
- The name of the individual where it appears with other personal information relating to the individual.

Sometimes individuals and businesses voluntarily give up their privacy rights, without considering the consequences. All individuals should be cautious about providing personal information to any organization. While businesses are required to maintain that information securely and are acting largely as a custodian of that information, no business is perfect. Businesses that collect this information are often targeted by hackers who seek to steal this information (https://dataprot.net/articles/biggest-data-breaches/)

RIGHT TO PRIVACY

While it is changing rapidly, historical common law is clear that confidential information is not to be shared or used. Privacy is the right of a person or person's property to be free from unwarranted public scrutiny or exposure. In other words, it is the right to personal autonomy and to express oneself selectively. Privacy includes both bodily integrity and the protection of confidential information, including medical and financial records.

When analyzing privacy cases, courts ask whether an individual has a reasonable expectation of privacy. If an individual does not expect their actions to be private, then no right to privacy exists. Similarly, if society as a whole does has no expectation of privacy, it does not matter what the individual may personally believe, no right of privacy exists. For example, when speaking directly with a physician concerning medical test results, there is an expectation of privacy. However, if the conversation occurs in a public space where others may overhear the conversation, it is not reasonable to have an expectation of privacy.

Privacy cases also focus on whether a person has given either express or implied consent to disclose or use personal information. Express consent is often given in the form of contracts, including end user agreements. Implied consent is usually based on the person's actions, such as a history of business transactions. In essence, implied consent means that a business has reason to believe that a person would give consent if the business asked for it. For example, customers who sign up for a loyalty program may give implied consent to receive marketing emails from that particular business.

While consent and the expectation of privacy are interrelated concepts, they are legally different concepts.

DATA BREACHES

According to the *Made in CA* website (https://madeinca.ca/online-shopping-canada-statistics/), eighty-two percent of people in Canada shop online (2020 data). Most retailers collect customer's personal and financial data so if a customer uses a form of payment other than cash, the customer's personal and financial information will be shared with the business. Rather than target an individual consumer in person, thieves today are targeting businesses to collect personal and financial information of entire consumer sets. Data breaches affect all industries, such as retail, credit bureaus, hospitals, and government agencies. The average cost of a data breach in Canada reached an all-time high in 2021 according to IBM Security research report (https://calgary.ctvnews.ca/cost-of-data-breaches-in-canada-hit-new-record-in-2021-ibm-1.5526127)

Cybersecurity experts advise that cyber criminals run automated online scripts looking for unsecured databases. While some larger businesses are particularly targeted, cyber criminals are the most successful when targeting small to medium-sized businesses that are unaware of the threat or do not want to spend adequate resources on cybersecurity.

Businesses should be aware that according to recent research, approximately eighty percent of data breaches are the result of human error (https://www.itworldcanada.com/article/human-error-tops-causes-of-data-breaches-says-verizon-report/485343) rather than outdated or insufficient technology. Therefore, by adequately training employees, many data breaches may be avoided. For example, breaches often result from sending emails to the wrong person, responding to phishing attacks, sharing passwords, and leaving computer screens open. Another avoidable risk is when people use the same password for multiple accounts, such as email accounts, bank accounts, and social media. If the password is obtained by cyber criminals and added to the database of passwords, all the accounts could be compromised.

BIG DATA

In addition to financial data, businesses collect personal information about consumers and their habits. This is called *big data*. Consumer information is very valuable because businesses can search the data to identify spending habits to target marketing to likely customers. This reduces costs and increases profit for businesses, especially as e-commerce increases the number of competitors across industries.

Another benefit to mining the data available about consumers is businesses can make more profitable decisions. For example, health insurance companies are heavily invested in big data because they want information about the lifestyle habits of the people they insure and potentially insure. If they know someone is a smoker, eats a lot of sugary foods, or has a sedentary lifestyle, then they can adjust premiums accordingly to minimize their risk. Insurance companies look for trends not just for individuals but also regions, types of occupations (including those with the highest risk of addiction or obesity), and socio-economic status.

INTERNET OF THINGS

The Internet of Things (IoT) is a system of interrelated computing devices, mechanical and digital machines, objects, animals or people that are provided with unique identifiers and the ability to transfer data over a network without requiring human-to-human or human-to-computer interaction. In other words, the IoT includes everyday devices connected to the internet, including medical devices, appliances, vehicles, and buildings.

Why is this important? The location and manner of data collection involves different expectations of privacy. For example, businesses argue that by purchasing and installing "smart home" appliances and products, consumers have consented to surveillance and data collection. Consumer advocacy groups argue that purchasing goods for a particular use does not give consent to businesses to invade consumer privacy in their homes. These issues will be heavily litigated in the years to come.

SECURITY INCIDENT PREPARATION AND RESPONSE

Businesses are not able to prevent all data security breaches. However, businesses need to take steps to protect against known and reasonably anticipated threats to confidential information. Businesses wanting information about implementing cybersecurity programs that are appropriate for their industry should consider the National Institute of Standards and Technology's (NIST) Framework for Improving Critical Infrastructure Cybersecurity. The mission of NIST is to help organizations understand and improve their management of cybersecurity risks. It is an excellent place to start when analyzing cybersecurity issues. The *Canadian Centre for Cyber Security* is another useful resource: https://cyber.gc.ca/en .

Technology and Contract Law

Recall the chapter regarding contracts; specifically, regarding the required elements of any contract. As businesses move the operational aspects online, the challenge becomes how to manage contract relationships in that new online world. For example:

- What is the validity of an electronic signature?
- How is consent formed?
- How do you know the person agreeing to the contract is sober?
- What if the person is underage?
- What is the jurisdiction for the contract?

These are just some simple examples, but they illustrate the added level of complexity for managing contracts in an online world. It is important to understand that all contract law elements apply in an online world. Governments are trying to address many of these issues. For example, in Canada the *Uniform Electronic Commerce Act* provides guidelines for online contract management that many provinces are now following.

Technology and Tort Law

Tort law exists in Canada whether it is on-line or off-line. The same rules apply, which may be surprising to some people, especially when it comes to defamation. A feeling of anonymity may encourage unfettered expression on online sites, but uninhibited posts can create potential actions. In organizational settings the actions of employees can also become problematic as the employer may become liable for certain types of employee actions. Defamation is a particular challenge because it can go viral quickly having a greater impact to the business than the person posting the content may have anticipated.

The Ontario Superior Court of Justice has recognized a new tort for online defamation and harassment issuing from the case *Caplan v. Atas, 2021*: https://www.canlii.org/en/on/onsc/doc/2021/2021onsc670/2021onsc670.html . The Court noted that existing laws are not sufficient in dealing with internet-based campaigns of defamation and harassment and effective methods of dealing with these kinds of cases are needed.

Technology and Regulations

Governments have attempted to respond to the increased pace of change that technology is generating. As a result, new regulations have been enacted over the past number of years to which Canadian organizations must adhere. Some of the key ones are highlighted below, but businesses are encouraged to do their own research into new legislation which may impact their organization or industry. Local trade groups and business associations are great resources to find updated rules and regulations.

THE PRIVACY ACT

The purpose of this Act (https://laws-lois.justice.gc.ca/eng/ACTS/P-21/page-1.html#h-39717)

is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

This Act is for governments only and does not apply to the private sector. Specifically, it applies to any department or ministry of state of the Government of Canada, or any person or office, Crown corporation, and any wholly owned subsidiary of such a corporation or government institution. The Act recognizes that personal information must be collected by governments, but that governments should be restricted in how they use information to protect individuals against government overreach.

COLLECTION, RETENTION AND DISPOSAL OF PERSONAL INFORMATION

- No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.
- A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates.
- A government institution shall inform the individual of the purpose for which the information is being collected.
- A government institution shall take all reasonable steps to ensure that personal information is as accurate, up-to-date and complete as possible.
- Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution.

These aspects of the Privacy Act are highlighted here to serve as a reference for businesses to consult as they develop their own plans regarding the collection, retention and disposal of personal information. Businesses receive the same treatment as individuals under the Act which means businesses can feel confident that Governments in Canada take privacy seriously and that these elements are enshrined in law.

FREEDOM OF INFORMATION AND PERSONAL PRIVACY ACT (FIPPA – ONTARIO)

Ref: https://files.ontario.ca/books/mgcs-foi-privacy-manual-en-2021-09-02.pdf

In addition to the Federal government's privacy legislation, the Ontario Government enacted its own legislation to enhance the existing federal statutes. One of the key areas was access to government information. The goal was to increase transparency and open government in the province. This began with the Ontario Government establishing the Commission on Freedom of Information and Individual Privacy in 1977 to look at ways to improve public information policies and public sector access and privacy legislation. The Commission was headed by Dr. D. Carlton Williams and is known as the "Williams Commission".

The framework for Ontario's legislation is set out in the Commission's report entitled "Public Government for Private People, The Report of the Commission on Freedom of Information and Individual Privacy" published in 1980.

FIPPA received royal assent in 1987 and came into force on January 1, 1988. The municipal counterpart, MFIPPA, came into force on January 1, 1991.

LEGISLATIVE GOALS

The William's Commission, in making its recommendations, considered policy goals relating to good government such as:

- Transparency: The public's right to know what the government is doing and how decisions have been reached.
- Accountability: The public's ability to hold elected representatives responsible for how they carry out their roles.
- Public participation: Citizen involvement in policy development and decision-making.
- Fairness in decision-making: An individual's ability to present their side of an issue, and their right to access the information on which a decision-maker will act, including the criteria to be applied.
- Personal privacy: The government's records of personal information and information management practices, and an individual's right to have access to government information concerning them.
- Administrative costs: The cost-benefit of the resources required to administer the legislation and the benefits to society from a more open government.

Many of the same themes from the Privacy Act are replicated in this act. However, one notable difference is the access to information known as 'Freedom in Information'. This part of the Act allows any individual resident of Ontario to request government information. This ensures that the government is held accountable for the action they take by the citizens whom they serve.

THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT (PIPEDA)

Ref Link: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief/

Unlike the Privacy Act, PIPEDA applies to private-sector organizations across Canada that collect, use or disclose personal information in the course of a commercial activity. The law defines a commercial activity as any particular transaction, act, or conduct, or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

There are several requirements to comply with the law. Organizations covered by PIPEDA must generally obtain an individual's consent when they collect, use, or disclose that individual's personal information. People have the right to access their personal information held by an organization. They also have the right to challenge its accuracy.

Personal information can only be used for the purposes for which it was collected. If an organization is going to use it for another purpose, they must obtain consent again. Personal information must be protected by appropriate safeguards.

PROVINCIAL PRIVACY LAWS

Alberta, British Columbia and Quebec have their own private-sector privacy laws that are very similar to PIPEDA. Organizations subject to a substantially similar provincial privacy law are generally exempt from PIPEDA with respect to the collection, use or disclosure of personal information that occurs within that province. Ontario, New Brunswick, Nova Scotia and Newfoundland and Labrador have also adopted substantially similar legislation regarding the collection, use and disclosure of personal health information.

INFORMATION THAT CROSSES BORDERS

All businesses operating in Canada that handle personal information which crosses provincial or national borders in the course of commercial activities are subject to PIPEDA, regardless of the province or territory in which they are based (including provinces with substantially similar legislation).

Under PIPEDA, personal information includes any factual or subjective information, recorded or not, about an identifiable individual. This includes information in any form, such as:

- age, name, ID numbers, income, ethnic origin, or blood type;
- opinions, evaluations, comments, social status, or disciplinary actions; and
- employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).

Businesses must follow the ten fair information principles to protect personal information, which are set out in *Schedule 1* of PIPEDA. Following these principles, contributes to building trust in your business and in the digital economy. The principles are:

ACCOUNTABILITY

- Comply with all ten fair information principles.

- Appoint someone to be responsible for your organization's PIPEDA compliance.
- Protect all personal information held by your organization, including any personal information you transfer to a third party for processing.
- Develop and implement personal information policies and practices.

IDENTIFYING PURPOSES

- Identify and document the purposes for collecting personal information. This step helps to identify which specific personal information to collect.
- Tell your customers why your organization needs their personal information before or at the time of collection. Depending on how the information is collected, this can be done orally or in writing.
- Obtain their consent again should you identify a new purpose.

CONSENT

- Meaningful consent is an essential element of PIPEDA. Organizations are generally required to obtain meaningful consent for the collection, use and disclosure of personal information.
- To make consent meaningful, people must understand what they are consenting to. Consent is only considered valid if it is reasonable to expect that your customers will understand the nature, purpose and consequences of the collection, use or disclosure of their personal information.
- Consent can only be required for collections, uses or disclosures that are necessary to fulfil an explicitly specified and legitimate purpose. For non-integral collections, uses and disclosures, individuals must be given a choice.
- The form of consent must take into account the sensitivity of the personal information. The way you seek consent will depend on the circumstances and type of information you are collecting.
- Individuals can withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice, and you must inform individuals of the implications of withdrawal.

LIMITING COLLECTION

- Collect only the personal information your organization needs to fulfill a legitimate identified purpose.
- Be honest about the reasons you are collecting personal information.
- Collect personal information by fair and lawful means. This requirement is intended to prevent organizations from collecting information through misleading claims or deception about the purpose.

LIMITING USE, DISCLOSURE, AND RETENTION

- Unless consent states otherwise—or unless doing so is required by law—an organization may use or disclose personal information only for the specific purposes for which it was collected and may only retain personal information for the time required to serve the identified purposes.
- Organizations must know what personal information they have, where it is, and what is being done with it.

- Updated consent is required if there is an intention to use or disclose personal information for a new purpose.
- Organizations may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.
- Guidelines and procedures must be in place for retaining and destroying personal information.

ACCURACY

- Minimize the possibility of using incorrect information when making a decision about an individual or when disclosing information to third parties.

SAFEGUARDS

- Protect personal information in a way that is appropriate to how sensitive it is.
- Protect all personal information (regardless of how it is stored) against loss, theft, or any unauthorized access, disclosure, copying, use or modification.

OPENNESS

- Inform customers and employees regarding policies and practices for managing personal information.
- Ensure the policies and practices easily understandable and easily available.

INDIVIDUAL ACCESS

- When asked, advise people about the personal information about them your organization holds.
- Explain where the information was obtained.
- Explain how that information is or has been used and to whom it has been disclosed.
- Give people access to their information at minimal or no cost or explain your reasons for not providing access. Providing access can take different forms. For example, you may provide a written or electronic copy of the information or allow the individual to view the information or listen to a recording of the information.
- Correct or amend personal information in cases where accuracy and completeness is deficient.
- Note any disputes on file and advise third parties where appropriate.

CHALLENGING COMPLIANCE

- Provide recourse by developing simple complaint handling and investigation procedures.
- Tell complainants about their avenues of recourse. These include your organization’s own complaint procedures, along with those related to industry associations, regulatory bodies and the OPC.
- Investigate all complaints you receive.
- Improve any information-handling practices and policies that are found to be problematic.

Regulation relating to ***Artificial Intelligence* (AI)** is complex and evolving, so cases involving AI technologies and tools are generally viewed as subject to the same laws and regulations governing other technology, such as data privacy laws and intellectual property laws. Use of AI innovations typically require compliance with any industry specific regulations applicable to their use, such as those applicable to the financial services or healthcare sectors. As the use of AI is still relatively new, and the technology is rapidly progressing, the legal status of AI tools is still largely untested.

CANADA'S ANTI-SPAM LEGISLATION (CASL)

Canada's anti-spam legislation (CASL) is the federal law dealing with spam and other electronic threats. It is meant to protect Canadians while ensuring that businesses can continue to compete in the global marketplace. CASL protects consumers and businesses from the misuse of digital technology, including spam and other electronic threats. It requires businesses and organizations to obtain consent before sending commercial electronic messages.

ACTS UNDER CONSIDERATION:

The Government of Canada has tabled Bill C-27, the Digital Charter Implementation Act, 2022 to strengthen Canada's private sector privacy law, create new rules for the responsible development and deployment of artificial intelligence (AI), and continue advancing the implementation of Canada's Digital Charter. As such, the Digital Charter Implementation Act, 2022 introduces three proposed acts: the Consumer Privacy Protection Act, the Artificial Intelligence and Data Act, and the Personal Information and Data Protection Tribunal Act.

The proposed Consumer Privacy Protection Act will address the needs of Canadians who rely on digital technology and respond to feedback received on previous proposed legislation. This law will ensure that the privacy of Canadians will be protected and that innovative businesses can benefit from clear rules as technology continues to evolve. Bill C-27 also proposes to establish the Personal Information and Data Protection Tribunal, which would play a role in the enforcement of the Consumer Privacy Protection Act. In particular, the Tribunal would review recommendations by the Privacy Commissioner of Canada to impose administrative monetary penalties for certain contraventions of the Act. The Tribunal would provide an accessible mechanism for organizations and individuals to seek a review of Privacy Commissioner decisions.

The first reading of Bill C-27 occurred on June 16, 2022.

EUROPEAN UNION (EU) GENERAL DATA PROTECTION REGULATION (GDPR)

Canadian businesses who operate within the European Union (EU)must follow a comprehensive set of laws to protect the privacy of European individuals and businesses known as the EU General Data Protection Regulation (GDPR). Under GDPR, individuals have the right to know how their personal data is being collected and used, to remove information from the internet, and to stop companies from processing their data. GDPR has significant penalties. For example, businesses mishandling customer information may be fined up to four percent of their annual worldwide revenue. Under GDPR, businesses must comply with six data processing principles. Personal information must be:

1. Processed lawfully, fairly and transparently;
2. Collected only for specific legitimate purposes;

3. Adequate, relevant and limited to what is necessary;
4. Accurate and, where necessary, kept up to date;
5. Stored only as long as is necessary; and
6. Processed in a manner that ensures appropriate security.

Interestingly, many of these principles were developed in Canada by the work done at Metropolitan University in Toronto by Ann Cavoukian, Ph.D. who focuses on 'Privacy by Design'. Privacy by Design is an internationally recognized privacy standard that has been endorsed globally, since 2010, by Data Protection Authorities and Privacy Commissioners. It requires building privacy into the design, operation and management of IT systems, networks, and business processes. Privacy by Design is structured around seven Foundational Principles that exist as the baseline for robust data protection. (https://www.torontomu.ca/content/dam/pbdce/certification/Privacy-by-Design-Overview_PbDCE.pdf)

Technology and Bias

In recent years, the rise of artificial intelligence (AI) technology has branched into the legal field. By automating decision making practices, the goal is to expedite and lower the costs of less complex legal matters – both those that make it to court and those that don't. However, it is important to acknowledge the limitations that these technologies present. One such limitation exists within a subset of AI, called machine learning. Briefly, the way machine learning works is by taking data, inputting it into a system which can detect patterns within the data, and provide users with a desired output.

For example, if a person seeks to determine whether someone should be given a fine for trespassing, a machine learning system could analyze the facts of the case – including demographic characteristics, when the trespass occurred, why it occurred, how it occurred, etc. – and then determine whether a fine should be applied by comparing the facts with analogous facts from prior settled cases. If the circumstances are sufficiently analogous with the majority of cases where a fine was issued, then a fine will be applied. If the facts are not sufficiently analogous with such cases, no fine will be issued. Of course, this is a simplified explanation of the machine learning process, but in essence, these are the kinds of patterns that the AI system is looking for.

An important point of concern is that the data which the machine learning system uses to make its decisions will reinforce and perpetuate a legal system which is discriminatory and biased. Dr. Gideon Christian, a Canadian researcher exploring strategies to improve the use of AI in justice and legal settings explains some of the risks associated with indiscriminate faith in big data: "AI technologies are trained and rely on big data to make predictions. Some of this data is historical data from eras of mass incarceration, biased policing, and biased bail and sentencing regimes characterized by systemic discrimination against sections of society. Police practices such as stop-and-frisk or carding and street checks have been routinely criticized for disproportionately targeting young Black and Indigenous people, which have resulted in racially biased data that can influence AI tools trained with that data." (https://ucalgary.ca/news/researcher-explores-ways-improve-ai-based-decision-making-justice-system)

This is particularly problematic when we consider the importance of integrating Indigenous methods of justice which have rarely been used in the Canadian legal system. A machine learning output which does not account for Indigenous perspectives is not only anti-progressive, but may perpetuate harmful, unfair, and unjust attitudes and outcomes.

Though there are tremendous benefits to automating parts of the Canadian legal system, we must be careful not to ignore the repercussions of AI. If the legal system wants to adopt AI into its practices, it must find a way to enforce the values of legal progress and adaptability, while also working to prevent racism and bias against the population's most vulnerable citizens.

Conclusion

Technology has become tightly intertwined with business and society at a pace previously unseen or experienced. While businesses strive to keep up to the fast paced, ongoing technological advancements, governments are struggling to update laws in a timely and comprehensive manner to regulate business practices and protect organizations and consumers. This is a dynamic and important area of business law and it is likely to continue to expand and develop into the foreseeable future.

Cases of Interest

- **Ewert v. Canada** – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17133/index.do
  "Prison authorities must show that psychological and statistical tools used to make decisions about Indigenous inmates are effective for them, the Supreme Court has said."

- **Theralase Technologies Inc. v. Lanter et al**. – https://www.canlii.org/en/on/onsc/doc/2020/2020onsc205/2020onsc205.html "The core take-away of this decision is that users of pseudonymous online profiles – a large and growing source of defamatory comments – are not insulated from default judgment. Assuming some form of substituted service can be made on a social media profile, it appears possible to have default judgment entered even if the identity of the person behind the profile is unknown and never responds to attempted service." – https://canliiconnects.org/en/commentaries/70102

Questions for Discussion

1. What are some areas of bias that are of concern in applying AI technology to legal practice?
2. Explain some potential legal issues concerning 'bias' in AI.
3. What is the purpose of the Privacy Act?

Additional Resources

- Privacy Act (R.S.C., 1985, c. P-21) – https://laws-lois.justice.gc.ca/eng/ACTS/P-21/index.html
- Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5) – https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/index.html
- Canadian Technology Law Association – https://www.cantechlaw.ca/
- International Technology Law Association – https://www.itechlaw.org/
- Responsible AI – https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai.html

12. INTRODUCTION TO BANKRUPTCY

Chapter Outline

- Overview
- Bankruptcy and First Nations
- Types of Bankruptcy
- Division 1 and Division 2 Proposals
- Duty of Good Faith
- Bankruptcy and Insolvency Act
- The Companies Creditors Arrangement Act
- Bankruptcy Court
- Conclusion
- Cases of Interest
- Definitions
- Questions for Review
- Resources

Learning Outcomes

- Students will be able to identify and explain the different types of bankruptcy available in Canada and the legal implications of filing for bankruptcy.

Bankruptcy

Bankruptcy law in Canada is an area of federal law that governs the process of how individuals and businesses can legally deal with their debts. It provides an orderly system to help those who are insolvent resolve their debts and obligations, while protecting the interests of creditors. Bankruptcy in Canada is governed by the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). The BIA provides the framework for individuals to file for bankruptcy or make a consumer proposal, and for businesses to file for bankruptcy or make a business proposal. The CCAA provides an alternative to bankruptcy for businesses, allowing them to restructure their debts and liabilities. The process of bankruptcy or insolvency in Canada is overseen by the Office of the Superintendent of Bankruptcy (OSB). The OSB is responsible for administering and overseeing the insolvency process in Canada, as well as providing education and information on bankruptcy and debt management.

Bankruptcy occurs when an individual or business is financially unable to pay off debts and meet financial obligations. Bankruptcy is a proceeding under federal law in which an individual or business is relieved of most debts and undergoes a court-supervised reorganization or liquidation for the benefit of the creditors.

BANKRUPTCY AND FIRST NATIONS

Bankruptcy is a colonial construct and a foreign term for First Nations people. This is in part because historically, First Nations lived in a way that ensured they only acquired and used what they needed. The approach or ways of being was anchored in the belief and practice of reciprocity or reciprocal relationships, reciprocal relationships with people and the lands and beings. So, taking or requiring more than you need was not a practice that was undertaken or accepted by First Nations.

First Nations lands and what is called reserves or "bands" are collectively owned lands. There is no individual ownership on First Nations lands, in accordance with the Indian Act. The First Nations perspective acknowledges that an individual cannot own the lands, they are shared lands.

More than 600 Indian Bands (Nations) are subject to the Indian Act, representing the majority of First Nations in Canada. The modern treaty making process that is being undertaken now throughout Canada and mainly within British Columbia are focused on the development of Self Government Agreements with Canada and this influences the application of the Indian Act in these Nations. Many of the Self Government Agreements (Modern Treaty First Nations) do situate First Nations people from those Nations as having the rights and obligations of "a natural person" which means they can:

- Enter in contracts and agreements
- Acquire and hold property
- Sue and be sued

The distinction between these modern treaty First Nations and First Nations under the Indian Act is important. Indian bands are not incorporated but a company related to a band can become bankrupt.

VOLUNTARY AND INVOLUNTARY BANKRUPTCY

Bankruptcies may be either voluntary or involuntary. A voluntary bankruptcy is a proceeding initiated by the debtor (a person who owes money to another person). It is the process by which an individual, a corporation or a partnership can file for bankruptcy without being required to do so by any creditor. The individual or entity will voluntarily file for bankruptcy either under the Bankruptcy and Insolvency Act or the Companies' Creditors Arrangement Act. When filing for bankruptcy, the individual or entity will be required to surrender all of their assets to a Licensed Insolvency Trustee. The Licensed Insolvency Trustee will then be responsible for distributing the assets in accordance with the Bankruptcy and Insolvency Act. The individual or entity will also be required to fulfill their obligations to creditors, including making payments to the Licensed Insolvency Trustee. Upon being discharged from bankruptcy, the individual or entity will be free from most of their debt.

An involuntary bankruptcy is a proceeding initiated by creditors (a person who is owed money from another person) to force the debtor to be legally declared bankrupt so the creditors may recover their assets. Involuntary bankruptcy is a legal procedure that allows a creditor to force a debtor into bankruptcy if the debtor has failed to pay a debt that is greater than $1,000. This procedure is initiated by a creditor filing a petition in court to have the debtor declared bankrupt. The court will then decide whether or not to grant the petition. The debtor can oppose the petition but must do so within 21 days of the petition being filed. If the court grants the petition, the debtor will be declared bankrupt and the assets will be handled by a bankruptcy trustee, who will work to liquidate the assets and distribute the proceeds to the creditors.

The purpose of bankruptcy is to provide an individual or business with a legal way to manage unmanageable debt, and to provide creditors with an orderly and fair process to resolve the debt. Bankruptcy is a last resort option and is designed to give those in financial difficulty a fresh start. But it comes at a cost: bankruptcy upends a person's life and may end a business. Often people and businesses will attempt to negotiate debt reductions, payment reductions, or other similar strategies with a creditor in order to continue the enterprise without having to declare bankruptcy; this is often referred to as 'restructuring' your debts. Often creditors will accept partial payment that is guaranteed over a claim for a larger debt that they will never receive.

Types of Bankruptcy

There are different types of bankruptcy within the Bankruptcy Act of Canada and similar statues at the provincial level that businesses can use depending on their unique situation. In the USA they are identified by the chapter number in the bankruptcy code; typically referred to as chapter 7 and chapter 11. In Canada, we often hear those terms, but under the Canadian system, there are two main types: *Division 1* and *Division 2* which are described below in greater detail.

DIVISION 1 PROPOSALS

A Division 1 Proposal in Canada is a legal binding contract between a debtor and creditors. It is a provision in the Bankruptcy and Insolvency Act that allows an individual with debt to make a formal offer to their creditors to pay a portion of their debt over a specific period of time. Once an agreement is made, the creditors are legally bound to accept the payment plan. In return, creditors are prevented from taking any legal action against the debtor for the rest of the debt.

The process is fairly straight forward, a person or business submits a notice of intention to file a proposal. The person can then stop making any payments directly to any unsecured creditors, all salary garnishments should stop and any lawsuits against the debtor by creditors will be stopped. Within five days of filing, a copy of the notice of intention is sent to all known creditors of the debtor. The proposal itself must then be filed within 30 days after the notice of intention, unless the Court has granted an extension.

Once the proposal has been submitted, the creditors have the ability to accept or reject the proposal. At least two thirds of the creditors in terms of dollar value owed and at least 51 percent of eligible creditors must approve the proposal. It should be noted that only secured creditors can vote; all unsecured creditors are bound by the proposal once it is accepted by the secured creditors.

The proposal then goes to the court for approval. Assuming it is accepted, by the creditors and the court, the debtor will be responsible for adhering to any conditions in the proposal (lump sum payment, asset sale, monthly payments, etc.); at which point they will be legally released from the debts included in the proposal.

DIVISION 2 PROPOSAL (CONSUMER PROPOSALS)

A Division 2 Proposal is a legally binding settlement between a debtor and their creditors that allows a debtor to pay back a portion of their debt over a period of time. It is available to individuals, sole proprietors and partnerships in Canada who are unable to meet their financial obligations. The debtor must have a steady source of income, and a proposal must be approved by a majority of creditors and the court. The proposal must include a plan for the debtor to repay their debt and can include a lump-sum payment, monthly payments or a combination of both. The debtor must make all payments under the proposal, and if they fail to do so, the court may declare the proposal void and the debtor may be declared bankrupt.

Regardless of the type of bankruptcy, there are some important terms under bankruptcy law. A debtor is the individual or business entity who owes money to others. Debtors either file a bankruptcy petition (in a voluntary bankruptcy) or a petition is filed against them (in an involuntary bankruptcy). A claim is the right of payment from the debtor. A creditor is an individual, business or governmental entity to whom money is owed by the debtor. Therefore, a creditor has a claim against the debtor.

Discharge of debts through bankruptcy is a privilege and should not be abused. Generally, debtors are protected from collection efforts while they are involved in creating plans for reorganization and repaying debts. Creditors are protected from assets being transferred to prevent payment of debts and the inequitable distribution of assets among creditors. These conditions often create peace of mind for those involved in the process.

However, there are situations where a debtor is not eligible for bankruptcy relief. If a court finds that the individual or organization has any of the following, the court could deny the bankruptcy:

- ***Insufficient Means Test*:** To be eligible for bankruptcy in Canada, an individual must pass a means test, which determines the amount of disposable income available to creditors. If the court finds that the individual does not pass the means test, the court can deny a bankruptcy claim.
- ***Misrepresentation of Assets or Debts***: If the individual filing for bankruptcy has misrepresented assets or debts, the court can deny the claim.
- ***Unpaid Child Support or Alimony***: If the individual filing for bankruptcy has unpaid child support or alimony payments, the court can deny the claim.
- ***Deliberate or Fraudulent Activity***: If the court finds that the individual filing for bankruptcy has engaged in deliberate or fraudulent activity, such as concealing assets or obtaining loans for fraudulent purposes, the court can deny the claim.
- ***Discharge of Bankruptcy Obligations***: Bankruptcy is not a way to avoid paying obligations; it is a way to restructure debt and repay creditors over time. If the court finds that the individual filing for bankruptcy is not making a good faith effort to pay back the debt, the court can deny the claim.

Duty of Good Faith

It is important that any individual or business who initiates bankruptcy proceedings always acts in good faith. The duty of good faith requires parties to a bankruptcy proceeding to act honestly, fairly, and in the best interests of all stakeholders. This means that all parties must provide full and accurate disclosure of all relevant information and must not take any actions that would take unfair advantage of other parties. Further, all parties must cooperate in good faith in order to reach a fair and equitable resolution to the bankruptcy. The duty of good faith applies to all parties involved, including creditors, debtors, trustees, and other stakeholders.

Bankruptcy is a privilege offered to all Canadians, who through various circumstances, often beyond their control, have found themselves with a debt load which they are unable to manage. Proceeding in a responsible, balanced and transparent manner, helps to ensure that the courts will absolve accumulated debts and allow the business or person to effectively start again.

Moreover, any debtor who takes any fraudulent actions, refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination, or makes a false entry or knowingly makes a material omission in a statement or accounting can be found guilty of an offence and is liable, to a fine of up to five thousand dollars or up to one year in prison (or both), or on conviction on indictment, to a fine up to ten thousand dollars or up to three years in prison (or both).

Bankruptcy and Insolvency Act (BIA)

The Bankruptcy and Insolvency Act (BIA) is the Canadian federal statute governing bankruptcy and insolvency matters in Canada. The BIA provides a framework for individuals and companies to restructure their debt and liquidate their assets and provides creditors with a mechanism to collect what is owed to them. The BIA is administered by the Office of the Superintendent of Bankruptcy in Canada and applies to all provinces and territories. It outlines processes for filing for bankruptcy, the duties of trustees and creditors, the rights of bankrupts, and other related matters. The BIA also provides mechanisms for consumer proposals and debt agreements, which are alternatives to bankruptcy.

The following are some key features of the BIA:

- The Bankruptcy and Insolvency Act (BIA) is the primary federal statute in Canada governing insolvency and bankruptcy proceedings.
- It sets out the rights and responsibilities of individuals and organizations facing financial difficulty, as well as the procedures for dealing with their debts.
- It provides for a trustee to be appointed to manage the financial affairs of a bankrupt, and to realize assets and distribute proceeds to creditors.
- It also provides for the discharge of certain debts and the protection of creditors' interests.
- It allows for the reorganization of businesses in financial distress, through arrangements entered into by creditors and debtors.
- The BIA also sets out the rules governing the proceedings of insolvency trustees, as well as the duties and liabilities of those who are involved in insolvency proceedings.
- It also provides for the regulation of consumer proposals, which is a form of repayment arrangement that can be used to avoid bankruptcy.

The Companies Creditors Arrangement Act (CCAA)

The Companies Creditors Arrangement Act (CCAA) is a Canadian federal law which provides relief to companies in financial distress. It allows companies that are unable to meet their financial obligations to restructure their debt and assets in an orderly fashion and to continue their operations. The CCAA is administered by the Office of the Superintendent of Bankruptcy (OSB) and is overseen by the court. The goal of the CCAA is to ensure that the company remains viable and is able to pay its creditors over the long term. The CCAA process can provide companies with a chance to survive and thrive despite financial difficulties.

Bankruptcy Court

The Bankruptcy Court in Canada is responsible for administering and overseeing the federal Bankruptcy and Insolvency Act (BIA). This Act regulates the process of bankruptcy, consumer proposals and insolvency. The Bankruptcy Court is a court of record, and its primary objective is to ensure that the rights of all parties involved in bankruptcy proceedings are upheld.

The Bankruptcy Court has decision-making power in bankruptcy cases. The court decides matters connected with a bankruptcy case, from the filing of the petition through final discharge of the bankruptcy. The court determines whether a debtor is eligible for bankruptcy, approves the bankruptcy plan, and oversees the bankruptcy proceedings.

The court determines if a trustee is required to manage the debtor's file and assets. The main job of the trustee is to execute the bankruptcy plan. The bankruptcy plan is a detailed plan of action for the liquidation or reorganization of the debtor's assets and to satisfy creditors' claims.

A trustee is the representative of the estate and is responsible for prioritizing and satisfying creditors' claims. To achieve this goal, trustees may hire professionals such as accountants, attorneys, and appraisers. The trustee is responsible for collecting the debtor's assets, selling them, and distributing the proceeds to creditors. The trustee will also provide information and advice to the debtor about their legal responsibilities and options for dealing with their debt.

ROLES OF RECEIVER AND TRUSTEE

A receiver or trustee is a third party appointed by a court through a court order or by a secured creditor through a letter of appointment to take control of property, supervise liquidation (bankruptcy) proceedings, and then, remit the proceeds according to priorities established by common or statutory law. There are two types of receivers; court-appointed receiver and privately appointed receiver, appointed by a secured creditor.

Creditors may not want to close a business immediately as the value of the business may be greater if operations are maintained. In some cases, it may make more sense to keep the business running, with paying customers, so that the creditors can receive as much of the value they are owed as possible.

Receivers or trustees can help creditors by managing the business, in the best interest of the creditors, for a period of time, thereby maximizing the value of the assets to ensure the creditor receives the greatest percentage of what they are owed.

While we often use the terms trustee or receiver interchangeably because both are tasked with securing as much value as possible for the creditors, a receiver acts primarily on behalf of secured creditors, where a trustee works on behalf of the unsecured creditors.

Bankruptcy plans identify and prioritize debts. The first debts to be paid off are to secured creditors who have interest is a particular property to "secure" the debt. Mortgages, car loans, and liens are common examples of secured debts. If the individual or business defaults on the loan payments, a secured creditor may force the debtor to sell or forfeit the property to satisfy the debt. The second category of debts are to unsecured creditors, who do not have an interest in any particular property.

DISCHARGE OF DEBTOR

Once the process is complete, the individual or business will have the debts absolved. A bankruptcy discharge releases the debtor from monetary obligations that existed at the time the petition was filed and ends the bankruptcy case. In deciding whether to grant the authorization; for example, the court may consider whether the process that led the business to begin the bankruptcy process was reasonable within the circumstances. However, depending upon whether the person or business has declared bankruptcy before or not, there are some differences.

In the case of a debtor who has not previously filed bankruptcy in a Canadian jurisdiction, the debts are automatically discharged 9 months after the date of bankruptcy unless, in that 9-month period, an opposition to the discharge has been filed or the debtor fails to make any required payments under the proposal.

In the case of a debtor who has been a bankrupt one time before in a Canadian jurisdiction, the debts are automatically discharged on the expiry of 24 months after the date of bankruptcy unless, in that 24-month period, an opposition to the discharge has been filed or the debtor failed to make payments under the proposal.

Conclusion

A fundamental goal of bankruptcy is to give debtors a financial "fresh start" from overwhelming debts. This goal is accomplished through discharging debts, which releases the debtor from liability from specific debts and prohibits creditors from undertaking collection actions against the debtor. However, bankruptcy may lead to unfavourable outcomes. It negatively impacts a debtor's credit history and impacts an individual or business's ability to obtain a loan or build up assets again. Businesses also run the risk of liquidation and business closure, even if the intention of initiating bankruptcy was to reorganize. Before filing for bankruptcy, a businesses and individuals should carefully consider and examine all options to see if there are better alternatives available to manage and pay off their debt.

Definitions

Key Terms

Bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person.

Bankruptcy means the state of being bankrupt or the fact of becoming bankrupt.

Creditor means a person having a claim provable as a claim under this Act.

Debtor includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt.

Secured creditor means a person holding a mortgage, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor.

Trustee is a licensed professional appointed by the Office of the Superintendent of Bankruptcy (OSB) to administer a bankruptcy estate. Trustees are responsible for providing creditors with information about the bankruptcy estate, as well as providing debtors with information about their rights and obligations under the Bankruptcy and Insolvency Act.

Cases of Interest

- Century Services Inc. v. Canada (Attorney General) – 2010 SCC 60: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7904/index.do
- Orphan Well Association v. Grant Thornton Ltd. (2019 SCC 5): https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17474/index.do
- Forjay Management Ltd. v. 625536 B.C. Ltd., 2020 BCCA 70 (CanLII) – https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca70/2020bcca70.html?resultIndex=1

Questions for Discussion

1. What is the purpose of bankruptcy?
2. Bob decides to borrow to buy a new house. A bank provides the money as a loan secured against the value of the home. Later Bob secures a loan from a local renovation company to complete the work, but it is unsecured. If Bob defaults on either loan, who has priority during bankruptcy?
3. What are some differences between Division 1 and Division 2 proposals?
4. Explain the role of the Bankruptcy Court.

Additional Resources

- Canada: First Nations And Insolvency In Canada: A Shifting Landscape – https://www.mondaq.com/canada/insolvencybankruptcy/347714/first-nations-and-insolvency-in-canada-a-shifting-landscape
- First Nations and insolvency in Canada: a shifting landscape – https://www.lexology.com/library/detail.aspx?g=aa3d2bb1-3147-4408-9762-20e8d6fee9ec
- The Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) – https://laws-lois.justice.gc.ca/eng/acts/b-3/FullText.html
- Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) – https://laws-lois.justice.gc.ca/eng/acts/c-36/
- Office of the Superintendent of Bankruptcy – https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en

13. CRIMINAL LIABILITY

CHAPTER OUTLINE

- Criminal Law and Civil Law
- Burden of Proof
- Classification of Crimes
- White-collar and Common Business Crimes

Learning Outcomes

- Recognize sources of criminal exposure in business.

Introduction

People rarely think about their conduct at work as being potentially illegal, or that imprisonment could result from poor workplace decisions. However, this fact is the reality. Organizations are fined, and executives are sentenced to jail, when business laws are broken. Many of the workplace violations are nonviolent crimes, such as fraud, property crimes, or substance abuse infractions. Regardless of the nature of the transgression or the employee's motivation for committing the crime, breaking the law can lead to negative consequences for the business, its employees, and its customers. Businesses must protect themselves from the bad judgment and behavior of their employees. If an employee acting within the scope of employment commits a crime from which the business will benefit, then the business can be convicted of the crime, too.

A crime is a social harm that the law punishes. At the most basic level, criminal statutes reflect the rules that must be followed for a civil society to function. Like individuals, businesses can be both victims and perpetrators of crime. Crime affects businesses both from outside and inside the organization. Criminal activity "from the outside" may include property damage, theft, shoplifting, corporate espionage, fraud, and arson. Threats "from the inside" may include crimes such as embezzlement, computer crimes, and fraud. Businesses may actively perpetrate crime, through a bad corporate culture or through organized crime, such as money laundering.

The Nature of Criminal Law

When crime occurs in the context of business, some people think that no one is "really" injured. When an insurance company must pay for a claim arising from a crime, the insurance company is injured, as are the victim and society at large. Crime undermines confidence in the social order and public safety. No crime is victimless.

In general, a crime requires someone to:

1. Commit a criminal act, known as*actus reus*, and
2. Possess the required criminal state of mind, or ***mens rea*****.**

Intent to commit a crime, without more, is not enough to convict someone. For example, if an accountant thinks about stealing money from her company but does not take any steps to do it, then no crime has been committed.

Criminal law differs from civil law in several important ways:

Features of Criminal Law

- An injury to the public
- Prosecuted by the government
- Attorney provided if defendant cannot afford one
- Burden of proof is beyond a reasonable doubt
- Conviction may result in fines or loss of liberty
- Penalties may include fines and incarceration

Features of Civil Law

- A private injury or wrong
- Plaintiff sues defendant
- Parties must provide their own attorneys

- Burden of proof is the preponderance of evidence
- Penalties are usually monetary

Because crimes are public injuries, they are punishable by the government. It is the government's responsibility to bring charges against criminals. In fact, private citizens may not prosecute each other for crimes. When a crime has been committed, the government collects the evidence and files charges against the defendant.

The civil tort system allows victims to bring a civil suit against someone for injuries inflicted upon them. Indeed, criminal laws and torts often have parallel causes of action. Sometimes these claims have the same or similar names. For instance, a victim of fraud may bring a civil action for fraud and may also be a witness for the government during the criminal trial for fraud.

Burden of Proof

In a criminal case, the defendant is presumed to be innocent unless he or she is proven guilty.

This presumption of innocence means that the government must prove the case against the defendant before it can impose punishment. If the government cannot prove its case, then the person charged with the crime must be acquitted. This means that the defendant will be released, and he or she may not be tried for that crime again. This important protection from 'double jeopardy' is guaranteed by the *Canadian Charter of Rights and Freedom* (CCRF): "Any person charged with an offence has the right, if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again." (Section 11(h) of the CCRF – https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11h.html)

The prosecution has the burden to prove its case beyond a reasonable doubt. This means that the evidence must be so compelling that no reasonable doubt exists as to the defendant's guilt. The defendant does not have to prove anything, because the burden is on the government to prove its case. It is useful to think of the criminal standard of proof—beyond a reasonable doubt—as 95 percent certainty, with 5 percent doubt. Perhaps there is some doubt about the precise time of day or the victim's exact words to the defendant. However, there is no doubt about the essential elements of the crime, such as the defendant's identity as the perpetrator of the crime, his or her *mens rea*, and the *actus reus*.

BURDEN OF PROOF IN CRIMINAL TRIALS

Compare this to the standard of proof in a civil trial, which requires the plaintiff to prove the case only by a preponderance of the evidence. This means that the evidence to support the plaintiff's civil case is greater than the evidence that does not. Preponderance of the evidence could mean 51 percent in favor of the plaintiff's case, and 49 percent in doubt. Therefore, it is much more difficult to prosecute a criminal defendant than to bring a successful civil claim. Since a criminal action and a civil action may be brought against a defendant for the same incident, these differences in burdens of proof can result in verdicts that seem, at first glance, to contradict each other.

BURDEN OF PROOF IN CIVIL TRIALS

This extra burden reflects the fact that the defendant in a criminal case stands to lose much more than a defendant in a civil case. Although no one wants to lose assets in a civil case, the loss of liberty through imprisonment is a more significant loss. Therefore, more protections are given to a criminal defendant than are given to defendants in civil proceedings. Because so much is at stake in a criminal case, our Constitutional due process requirements are very high for defendants in criminal proceedings. Section 11 (d) of the CCRF states that: "Any person charged with an offense has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal."

Due process procedures vary depending on the type of penalty that can be levied against someone. For example, in a civil case, the due process requirements might simply be appropriate notice and an opportunity to be heard. If the government intends to revoke a professional license, then the defendant might receive notice by way of a letter, and the opportunity to be heard might exist by way of written appeal. In a criminal case, however, the due process requirements are higher. For example, a criminal defendant is entitled to confront all witnesses against him or her, and to see the evidence the prosecution intends to introduce at trial. More protections must be in place because a criminal case carries the potential for the most serious penalties.

Classification of Crimes

It is important to understand that the ***Canadian Criminal Code*** (https://laws-lois.justice.gc.ca/eng/acts/c-46/) is a federal statute that applies in all provinces and territories. This means that the Parliament of Canada enacts criminal laws and the Provinces administer the laws through provincial court systems.

INDICTABLE, SUMMARY, AND HYBRID

Crimes in Canada fall under the following three categories: indictable, summary, and hybrid. Severe crimes such as murder, extortion, arson, and robbery are classified as indictable offenses and may result, upon conviction, in lengthy prison terms up to and including a life sentence. Less severe crimes such as simple assault are considered summary offences and are punishable up to a maximum of 6 months in prison. Hybrid offices are crimes that fall in between severe and summary and the maximum sentence for these forms of criminal offences is up to 18 months in prison.

WHITE-COLLAR CRIME

White-collar crime is a term used to describe nonviolent crimes committed by people in their professional capacity, or by organizations. These crimes are committed for financial gain, often through deception. White-collar crimes are not typical street crimes, like burglary or robbery, and they are not personal crimes, like murder or sexual assault. White-collar criminals frequently commit their crimes on the job and while sitting at a desk. For example, Garth Drabinsky was sentenced to seven years in prison in 2009 for defrauding shareholders of Live Entertainment Corporation of Canada (a company he founded) of $500 million. (https://www.macleans.ca/general/garth-drabinsky-gets-7-years-in-jail/)

White collar crimes are characterized by deceit, concealment, or violation of trust. They are typically committed by business professionals. They generally involve fraud, and the employees committing the crimes are motivated by the desire for financial gains or fear of losing business standing, money, or property. Fraud is the intentional misrepresentation of material facts for monetary gain. This type of crime is not dependent on threats or violence.

COMMON BUSINESS CRIMES

Fraud is the use of deception to acquire money or property. Examples of fraud may include a person or business offering 'insider' (confidential) tips, an unregistered business or operator offering investment products, theft of property or other assets, financial records misrepresentation, and a person or business defrauding investors and/or issuing fraudulent investment products or services. According to PwC Canada's *Global Economic Crime and Fraud Survey 2020*, 47% of Canadian organizations had experienced some form of fraud in the previous 24 months. BDO

Canada estimates that fraud cost Canadian businesses more than $30 million in 2017." (https://www1.ic.gc.ca/eic/site/cb-bc.nsf/eng/04423.html)

Section 380 of the *Canadian Criminal Code* (CCC) defines fraud and identifies the penalties for engaging in fraud (https://laws-lois.justice.gc.ca/eng/acts/c-46/section-380.html). Fraud over $5000.00 may result in a sentence of up to fourteen years in prison. There are many types of fraud, but one of the most well-known is embezzlement. **Embezzlement** occurs when someone takes property that was in his or her possession lawfully and then converts it to his or her own use. Embezzlement often happens by people who are in a position of trust over the assets of another person. This includes financial advisors, brokers, accountants, lawyers, and guardians. Embezzlement strategies can involve forgery, which is counterfeiting a document or someone else's signature.

Financial institution fraud is fraud against banks and other similar institutions, such as credit unions. The *Financial Transactions and Reports Analysis Centre of Canada* (FINTRAC) investigates financial institution fraud. Cases of financial institution fraud can involve people and organizations who commit money laundering, suspicious transactions enabling or enacting money laundering schemes or providing financial support to terrorist organizations, and mass marketing fraud (the use of telephone, mail, internet, email or other technological means to perpetrate or disguise illegal transactions).

Money laundering is one of the costliest forms of business crime and refers to taking "dirty" money, or money obtained through criminal activities, and passing it through otherwise legitimate businesses so that it appears "clean" in order to disguise its illegal origins. The RCMP estimates that in excess of $15 billion each year is laundered in Canada (https://www.cpacanada.ca/en/news/world/2019-04-10-dirty-money).

Ponzi schemes (also known as pyramid schemes) are investing scams that promise investors low-risk

investment opportunities with a high rate of return. The high rates are paid to initial investors with money acquired from the acquisition of new investors. The performance of the market is not a factor in the investors' rate of return. Those at the top of the pyramid may receive something that appears to be a return on their investment (ROI), but those at the bottom do not. Those who operate Ponzi schemes generally solicit investors, and those who invest in such schemes expect a legitimate ROI. However, the head of the Ponzi scheme keeps his early investors happy by bringing in new investors, whose money he gives to the old investors as their ROI. This allows the Ponzi scheme to continue, because it appears from the outside that investors are receiving a legitimate ROI. The problem is that the capital contributions eventually disappear, since they are never invested but are simply used by the head for his own purposes, including paying investors with fake ROI payments as necessary.

Pyramids will eventually collapse under their own unsustainable structure. In 2022, Charles DeBono from Barrie, Ontario, was convicted of defrauding investors in his company *Kis Media Ventures* of between $23 million to $48 million between 2012 and 2017. Investors believed they were investing in point- of-sale (POS) terminals serving high volume businesses and were promised a steady return on their investment, but the POS equipment didn't exist. Early investors were paid by later investors (enabling the Ponzi scheme) until 2017 when the payments ceased. DeBono transferred funds extracted through the scheme to accounts in the Dominican Republic (DR) between 2016 and 2017 and he attempted to flee justice by relocating to the DR under an assumed name. He was deported from the DR in 2020 to face fraud charges. (https://www.theglobeandmail.com/business/article-ponzi-schemers-guilty-plea-is-a-breakthrough-for-ontarios-new-serious/)

Section 322 of the *Canada Criminal Code* distinguishes between two categories of theft (taking or assuming the use of another person's property without their consent or permission): theft over $5000.00 and theft under $5000.00. The maximum penalty for theft under $5000.00 is up to two years less-a-day imprisonment while the maximum penalty for theft over $5000.00 is up to ten years in prison. (https://laws-lois.justice.gc.ca/eng/acts/c-46/section-322.html)

Antitrust laws do not allow activities that restrain trade or promote market domination. These laws are in place to provide guidance and supervision of mergers and acquisitions of companies to prevent market abuse. In Canada, antitrust is governed by the *Competition Act* (https://laws.justice.gc.ca/eng/acts/C-34/index.html). The purpose of the act is to encourage competition and to avoid monopolies, or the control of one organization over a specific market: "…in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices". Monopolies reduce competition and, as a result, can have a detrimental impact on consumer prices and the economy.

Bribery occurs when monetary payments, goods, services, information, or anything of value is exchanged for favorable or desired actions. You can be charged with bribery for offering a bribe or taking a bribe. Bribery is illegal within Canada and in many other jurisdictions. The *Corruption of Foreign Public Officials Act* (CFPOA) prohibits bribery payments by Canadian citizens or companies to foreign government officials with an intent to influence foreign business decisions or activities to obtain a benefit or favourable outcome (https://laws-lois.justice.gc.ca/eng/acts/c-45.2/). One example of bribery would be a situation in which a pharmaceutical company offers special benefits to individuals who agree to prescribe their medications.

Spamming; sending unsolicited commercial email or instant messages – spam, is illegal. While the onus is on consumers to avail themselves of whatever programs they can to block spam, laws are in place to discourage the sending of spam. The following points are outlined in the *Canadian Anti-Spam Legislation* (CASL):

- It is prohibited to send or cause or permit to be sent to an electronic address a commercial electronic message unless (a) the person to whom the message is sent has consented to receive it, whether the consent is express or implied.
- The message must be in a form that conforms to the prescribed requirements and must
- (a) set out prescribed information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;
- (b) set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (a); and
- (c) set out an unsubscribe mechanism

(https://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html).

The intention of CASL is to protect Canadian consumers and businesses from potential threats and misuse of digital technology.

Corporate Criminal Liability

Under section 217.1 of the *Criminal Code of Canada* (CCC) there is a duty of persons directing or guiding the work of others to take actions to prevent bodily harm associated with the performance of work: “Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.” (https://laws-lois.justice.gc.ca/eng/acts/C-46/section-217.1.html). This amendment to the CCC was in response to a 1992 Westray coal mining explosion which killed 26 miners in Nova Scotia. This workplace disaster could have been avoided if the company responded appropriately to the concerns expressed by employees, government inspectors, and union officials.

An official in an organization who has responsibility for creating policies or managing important aspects of the business activities may be criminally liable if, in the pursuit of corporate benefits, he or she directs others to commit an offense or fails to stop an organizational representative from committing an offense. Upon conviction, penalties could include a prison term, substantial fines or both.

Conclusion

It is important to know that not all people charged with business crimes or white-collar crimes are necessarily guilty. A person must be found guilty of the crime before he or she is convicted. Regardless, business crimes and white-collar crimes negatively impact the individual, the organization he or she worked for, the community, and customers.

Crime has an enormous impact on society, including business. Crime is a very important consideration in the business world. Businesses can be both victims and perpetrators of crime. Although jurisdictions may define crimes differently, there are some types of crime that businesses often face, including fraud, embezzlement, and larceny. Successful businesses must be vigilant to protect themselves from those who wish to harm them, both from inside and out.

Crime is a public injury. Criminal law can be classified both by the nature of the punishment and the type of offense it is. Criminal law differs from civil law in important ways, including who brings the claim, the burden of proof, due process, and penalties. The most important distinction is the elevated burden of proof in criminal cases. The prosecution must prove that a defendant committed a crime beyond a reasonable doubt.

Cases of Interest

- Canadian Dredge & Dock Co. *v.* The Queen, [1985] 1 S.C.R. 662 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/59/index.do?site_preference=normal
- R. v. Karigar, 2017 ONCA 576 – https://www.ontariocourts.ca/decisions/2017/2017ONCA0576.htm
- R. v. Metron Construction Corporation, 2013 ONCA 541 – https://www.canlii.org/en/on/onca/doc/2013/2013onca541/2013onca541.html
- R. v Vadim Kazenelson, 2015 ONSC 3639 (CanLII) – https://www.canlii.org/en/on/onsc/doc/2015/2015onsc3639/2015onsc3639.html
- R v Kazenelson, 2018 ONCA 77 – https://canliiconnects.org/en/summaries/39885

Questions for Discussion

1. What are some examples of 'white-collar' crime?
2. Distinguish between civil and criminal law.
3. What is 'money laundering'?

Additional Resources

- https://www.law-faqs.org/national-faqs/criminal-code/criminal-code/
- https://www.canadianfraudnews.com/
- https://www.securities-administrators.ca/
- https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04235.html
- https://www.antifraudcentre-centreantifraude.ca/index-eng.htm
- https://www.fintrac-canafe.gc.ca/intro-eng
- https://laws-lois.justice.gc.ca/eng/acts/c-45.2/page-1.html

14. INTERNATIONAL LAW

CHAPTER OUTLINE

- Introduction to International Law
- Sources and Practices of International Law
- International Law Enforcement
- Nature of International Law
- Concluding Remarks
- Questions for Discussion

Learning Outcomes

- Explain international law and its role in business.

Introduction to International Law

INTRODUCTION

International laws are based on customs, treaties, and organizations that guide partnerships among nations.

Photo Credit: GDJ/ Pixabay/ License: CC0

The purpose of international laws is to permit countries as much authority as possible over their own international business affairs, while maximizing economic benefits of trade and working relationships with other nations. Since many countries have historically allowed governance by international agreements when conducting global business, there exists an evolving body of international laws that facilitate global trade and commerce

International law relates to the policies and procedures that govern relationships among nations (Clarkson, Miller, & Cross, 2018). These are crucial for businesses for multiple reasons. First, there is not a single authoritative legislative source for global business affairs, nor a single world court responsible for interpreting international law (Cheeseman, 2016, p. 903). There is also not a global executive branch that enforces international law, which leaves global business affairs particularly vulnerable.

Secondly, if a nation violates an international law and negotiation or diplomatic activities fail, then the countries that were violated, or international organizations tasked with overseeing global trade, may act. Often these actions use force to correct the offenses and may include economic sanctions, severance of diplomatic relations, boycotts, or even war against the offending nation (Clarkson, Miller, & Cross, 2018, p. 439).

INTERNATIONAL TREATIES

Treaties and other agreements between nations are authorized and ratified by the countries that acknowledge their legality. There are two different types of agreements: bilateral, which is formed by two nations; and multilateral, which is formed by several nations. The Canada-United Kingdom Trade Continuity Agreement (TCA) is an example of a bilateral agreement. It entered into force on April 1, 2021 and will continue to be in effect until the negotiations for a Canada – United Kingdom Free Trade Agreement are completed.

The North American Free Trade Agreement, or NAFTA, is an example of a multilateral agreement. It was ratified in 1994, when Mexico joined the previous trade agreement between the United States and Canada. In September 2018, the U.S. sought to renegotiate NAFTA with Mexico and Canada resulting in the Canada-United States-Mexico Trade Agreement (CUSMA) which entered into force on July 1, 2020. Among other aims, these negotiations worked to increase auto industry wages for workers in Mexico and modify pharmaceutical regulations with Canada. Additionally, the agreement reduced trade barriers among the three nations and updated NAFTA provisions.

INTERNATIONAL ORGANIZATIONS

International organizations are comprised of officials who represent member nations that have established a treaty to oversee shared interests, including trade and commerce. International organizations adopt resolutions that standardize behavior and create uniform rules related to trade and commerce. Significant international organizations established in the twentieth century include the World Trade Organization (WTO), European Union (EU), the International Monetary Fund, and the Organization for Economic Co-Operation and Development (OECD).

UNITED NATIONS

The United Nations (UN) was created as a multilateral treaty in 1945. The UN's organizational goals include maintaining global peace and security, promoting economic and social cooperation, and protecting human rights, especially related to women and children (Cheeseman, 2016, p. 905). The UN General Assembly includes representatives from each member nation. As of 2022, the UN acknowledges 195 sovereign states, with all but two participating as full members. These two, Palestine and the Vatican City, are classified as "observer states." Six additional countries are not UN members but are recognized as a country by at least one UN member country: Abkhazia, Kosovo, Northern Cypress, South Ossetia, Taiwan, and Western Sahara.

The UN Security Council includes five permanent members and 10 countries selected by the General Assembly to serve two-year terms. The five countries that hold permanent membership are China, France, Russia, the United Kingdom, and the United States (Cheeseman, 2016, p. 558). This Council is primarily responsible for overseeing global peace and security measures. The World Bank is a UN organization, financed by contributions from developed countries and headquartered in Washington, D.C. Its primary functions include providing money to developing countries to fund projects that relieve suffering, including building roads and dams, establishing hospitals, developing agriculture, and other humanitarian efforts. The World Bank provides both grants and long-term low interest rate loans to countries, often granting debt relief for outstanding loans (Cheeseman, 2016, p. 559).

The United Nations Commission International Trade Law is one of the most important international organizations to date, establishing the 1980 Convention on Contracts for the International Sale of Goods (CISG), which will be discussed further in the next section.

EUROPEAN UNION

The European Union (EU) is a regional international organization that includes many countries in Europe. It was established to create peace across the region and promote economic, social, and cultural development (Cheeseman, 2016, p. 561). As of 2022, there are 27 countries affiliated with the EU. The EU organization has established a treaty for its members that creates open borders for trade among member nations, especially for capital, labor, goods, and services. The EU is Canada's second largest trading partner and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) entered into effect on September 21, 2017.

SOVEREIGNTY

National sovereignty defines a nation. While clearly defined borders and independent governments also set parameters for a nation, sovereignty is an important legal principle that allows nations to enter negotiated treaties with other countries and honor territorial boundaries. It is among the most important international law principles, thus greatly impacting international trade and commerce.

Since the 1800s, most established nations allowed for absolute sovereignty among the global community.

However, by the 1940s, that allowance was significantly reduced, as countries revisited sovereignty in light of globalization, transportation, and communication advances, and the rise of international organizations (Goldsmith, 2000, p. 959). Consequentially, doctrines of limited immunity were created that established guidelines for how countries may prosecute, or hold foreign nationals accountable, during international trade and commerce dealings. State immunity from civil proceedings is restricted in Canada and is governed by the *Canadian State Immunity Act* R.S.C. 1985 (CSIA).

Sources and Practice of International Law

International law is primarily governed by customs, treaties, and organizations that influence how laws are understood, interpreted, and enforced around the world. Since there is not a central court to enforce international law, each country utilizes its own courts to settle disputes. Collective action, reciprocity, and shaming are three examples of non-legislative methods that influence trade when enacted against nations that violate international law.

The two main sources of international law are: customary international law and treaties. It is important for all companies to understand the laws that apply to their activities so they can avoid criminal and civil liability.

CUSTOMARY INTERNATIONAL LAW

A custom is a widely accepted way of doing something. Before treaties and conventions started to become common during the 1900s, custom was the primary way international law was created. Customary international law is a body of international rules that has become binding through the pattern of consistent, long-standing behavior through a sense of legal obligation. For example, granting diplomatic immunity to visiting heads of state is customary international law. Historically, customary international law governed the rules of war, treatment of prisoners of war, and human rights. After World War II, many areas of customary law became the basis for UN Conventions. While customary international law still exists, the modern trend is to reduce legal obligations to writing and have nations expressly agree to their terms.

TREATIES

A treaty is an agreement between two or more nations governed by international law. In essence, a treaty is a contract between sovereign nations. A bilateral treaty is an agreement between two nations. A multilateral treaty is an agreement between three or more nations. A convention is a multilateral treaty on a specific issue that concerns issues of worldwide importance, such as human rights, property rights, and international trade rules. For businesses, one of the most important conventions is the *UN Convention on Contracts for the International Sale of Goods* (CISG). This convention sets the global standard for international trade.

A treaty is adopted when the parties agree to its final form, which is generally signaled by signing the treaty. Signing a treaty does not bind the parties to the treaty but signifies agreement in principle with the terms and conditions of the document. In order for a treaty to be binding, it needs to be ratified by the nations' governments. A treaty enters into force when it becomes legally binding on the parties. This may be a specific date identified in the treaty or when a threshold (a specified number) of states have ratified the instrument. Although many treaties may impact businesses, a few are particularly important to international trade such as the following:

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

The General Agreement on Tariffs and Trade (GATT) is a multilateral treaty to promote international trade by reducing or eliminating trade barriers, such as tariffs and quotas, between the member nations. GATT has been negotiated on and off since the 1940s as nations have sought to grow their economies through global commerce. In 1995, GATT members created the World Trade Organization (WTO) to stimulate international commerce and resolve trade disputes.

GATT and WTO are founded on three principles:

- Free trade. The major purpose of the treaty is to reduce trade barriers to increase global trade.
- Most Favored Nation Status. Member nations agree to treat every other member nation equally. If one nation receives a special discount on customs duties, then the discount must be extended to all other member nations.
- National Treatment. Member nations agree to treat imported goods the same as domestic ones after they have entered the nation. In other words, members cannot discriminate against foreign goods by imposing additional taxes after being subject to import taxes and duties. The WTO resolves trade disputes between member nations and has the power to impose trade sanctions for non-compliance with GATT. If a member nation refuses to comply with a WTO ruling, affected members may retaliate by imposing punitive tariffs or other sanctions.

For example, in the famous "banana battle," the US and four Latin American nations filed a complaint with the WTO alleging that the European Union (EU) placed unfair restrictions on imported bananas and showed favoritism to their former colonies by buying bananas from them in violation of GATT. The WTO agreed and granted the US and the Latin American nations the right to impose sanctions on EU imports to their nations. The banana battle ended in 2009 after 20 years of trade restrictions.

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

One of the most important governing documents for international law is the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), which was established in 1980. This convention governs contractual arrangements between countries that have ratified the CISG as the priority contract for trade. As of 2022, 95 countries have ratified the CISG, including the countries that account for more than two-thirds of all global trade. Those countries include the United States, Canada, China, Japan, Mexico, Argentina, Brazil, and most European countries. The CISG is enforced whenever international transactions occur without the presence of written contracts to govern those transactions. There are limits to the CISG, however, as the CISG does not apply to consumer sales or contracts for services (Clarkson, Miller, & Cross, 2018, p. 376).

The CISG promotes international trade by making sales law uniform and predictable across international boundaries. The US and most of its trading partners (except the United Kingdom) have adopted CISG, which results in the convention governing over two-thirds of the world's trade. Some of its provisions include:

- CISG applies to contracts for the sale of commercial goods between merchants. It does not apply to the sale of goods to consumers for personal use.
- CISG applies automatically to contracts between parties located in different signatory nations. The

convention does not depend on nationality; it depends on location.

- Contract parties can opt out. Parties can contract to be governed by a nation's laws instead of CISG but they must expressly state their intention to not be bound by CISG.
- CISG does not require a written contract.
- CISG requires parties to negotiate in good faith and to modify contracts in the case of unforeseen circumstances.
- A buyer can avoid payment only after giving the seller notice and an opportunity to remedy the problem.

REGIONAL TRADE AGREEMENTS (RTA'S)

Regional trade agreements are reciprocal, advantageous accords developed to promote international commerce by reducing trade barriers among member nations that are located near each other. One of the most famous is the European Union (EU) but more than half of international trade is covered by regional trade agreements throughout the world. The largest RTA to date is the *Regional Comprehensive Economic Partnership* (RCEP) which includes 15 countries comprised of 2.2 billion people (30% of global population) and 30% of global GDP. The RCEP agreement was signed on November 15, 2020 and entered into force on January 1, 2022.

RTA's typically create new opportunities for businesses because they lower the costs associated with importing and exporting within the region. The World Trade Organization (WTO) website on RTA's is located here: https://www.wto.org/english/tratop_e/region_e/region_e.html

International Law Enforcement

One of the most important considerations for international business is understanding that companies operating in foreign nations are subject to the laws of those nations (Cross & Miller, 2018, p. 212). When international laws are violated, disputes are often resolved through the legal systems within individual nations.

Most countries have either common law or civil law systems. Common law systems operate independently by developing their own rules that govern areas of business law, such as torts and contracts. Canada has a common law system (except for Quebec which is a civil-law system). One-third of all people in the world live in nations in which common law is practiced. Civil law systems base their legislation on Roman civil law, which utilizes statutory codes as the primary source of law.

IMPACT ON INTERNATIONAL TRADE

There are three international law enforcement methods that can radically impact trade: collective action, reciprocity, and shaming.

- **Collective action** occurs when businesses work collectively to strengthen their resources and achieve a shared goal. In February 2018, the UN Conference on Trade and Development Secretary-General argued that collective action can be one of the most effective methods for protecting international trade in the current global climate. Due to recent trade restructuring from the United States and the United Kingdom (withdrawal from the EU on January 31, 2020), collective action was promoted as a way to "harness energy that will not fragment the [international trade] system" (UNCTAD, 2018). By leveraging nations to defend "rules-based multilateral trading systems as a force for creating inclusive prosperity," the Secretary-General promoted collective action as the primary way to assure continued international peace and economic viability for generations to come.
- **Reciprocity** is a fundamental axiom of international trade. It happens most commonly in international business exchanges as countries lower import duties, or other trade barriers, in exchange for mutual arrangements extended by the other country (provisions within the General Agreement on Tariffs and Trade provide good examples). Various international treaties, including the Vienna Convention of 1969 incorporate reciprocity provisions with the articles of agreement (for example, Article 21(1)(b) of the Vienna Convention). Reciprocity can be beneficial to the nations involved, or it can be punitive.
- **Shaming** is a deliberate attempt to negatively impact a state, regime, or governmental leader's reputation by publicizing and targeting violations of international laws, including customary norms, treaty breaches, and violations of organizational expectations (Gopalan & Fuller, 2014, p. 75). However, shaming is not viewed as particularly effective without more concrete measures to accompany it (Klymak, 2017). A recent research study conducted by the Department of Economics in Dublin, Ireland, found that there is no evidence to suggest that there has been a decrease in the imports of goods to the United States from countries where foreign goods are likely produced by child and forced labor. Despite

media coverage and the International Labour Organization's coverage that routinely shames certain nations for producing goods by child or forced labor, those goods are nonetheless regularly imported for international sale.

PUBLIC AND PRIVATE INTERNATIONAL LAW

International law consists of rules and principles that apply to the conduct of nations, international organizations, and individuals across borders. There are two types of international law: public and private.

Public international law governs the relations among governments and international organizations. It includes the law of war, the acquisition of territory, and the settlement of disputes among nations. Public international law also includes agreements governing property rights, trade, outer space, and natural resources, such as the seas and mineral rights. For businesses, public international law is important because it defines human rights, such as the prohibition against child labor, slavery, and trafficking in people and stolen goods.

Private international law applies to private parties engaged in international commercial and legal transactions. Essentially, private international law identifies what law applies to an agreement and how the parties will settle any disputes with parties in other nations.

The Nature of International Law

As explained earlier, a sovereign state is a political entity that governs the affairs of its own territory without being subjected to an outside authority. Nations are sovereign states. Sovereign states have sovereign immunity, which is the principle that courts of one nation lack the jurisdiction to hear cases against foreign governments.

In domestic law, or law that is applicable within the nation where it is created, some authority has the power to create, apply, and enforce a rule of law system. There is a legitimate law-creating authority at the "top," and the people to be governed at the "bottom." This is a vertical structure of law, because there is some "higher" authority that imposes a rule of law on the people.

It's important to note, however, that not all law can be conceived as a vertical structure. Some, such as international laws, are best thought of as a horizontal structure. Treaties have a horizontal structure because sovereign nations are parties to international treaties. Since each nation is sovereign, that means that one nation is not legally dominant over another.

If a party to a treaty has breached the agreement, enforcement can be difficult because there is no external centralized enforcement mechanism to compel parties to comply. For this reason, many horizontal laws, like treaties, contain provisions that require the parties to submit to a treaty-created dispute resolution panel or other neutral tribunal, such as the International Court of Justice (ICJ) or the World Trade Organization (WTO).

Another common challenge in international law is that the laws are applicable only to parties who voluntarily choose to participate in them. This means that a sovereign nation cannot generally be compelled to submit to the authority of the international law if it chooses not to participate. Compare this with domestic law. Everyone within Canada is subject to the jurisdiction of certain provincial and federal courts, whether they voluntarily choose to submit to the jurisdiction or not.

CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT (CFPOA)

The *Corruption of Foreign Public Officials Act* entered into force on February 14, 1999 (amended by Bill S-14) and mandates that it is a criminal offence for companies or individuals to bribe foreign public officials to secure or maintain a business advantage. In the United States the *Foreign Corrupt Practices Act* (FCPA) is an anti-corruption law that prohibits the payment of bribes by US companies and their employees to foreign officials. Violation of this law is a criminal offense.

Canadian citizens are prohibited from conducting transactions with terrorists or terrorist organizations under both the *Criminal Code* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTA). Conducting transactions with prohibited persons, entities or businesses can result in serious criminal violations, which carry significant financial penalties and long prison sentences.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

On June 21, 2021 the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) received Royal Assent by the Government of Canada and entered into force. UNDRIP was adopted by the United Nations General

Assembly on September 13, 2007 (https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html). Canada initially voted against the Declaration (along with the United States, Australia, and New Zealand) but later changed its position leading to the introduction of Bill C-15 (UNDRIP Act) in 2020 and official acceptance in 2021.

UNDRIP: "…emphasizes the rights of indigenous peoples to live in dignity, to maintain and strengthen their own institutions, cultures and traditions and to pursue their self-determined development, in keeping with their own needs and aspirations." – https://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf

United Nations declarations are not typically legally binding, but the formal presentation and adoption of this statement generates momentum, guides, and influences the development of international legal propositions and principles to recognize, promote, and respect the rights of indigenous peoples.

UNDRIP, through the approval of Bill C-15, does not immediately change existing Canadian laws but provides a framework and process to align laws in Canada with the Declaration as explained in the following statement: "The purpose of this Act is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance implementation of the Declaration at the federal level." (https://www.justice.gc.ca/eng/declaration/about-apropos.html)

It is too early in the process to know how the alignment of Canadian laws with UNDRIP will be expressed and experienced in international trade circumstances but is important to be aware of and consider these fundamentally important principles and perspectives in all business practices.

Conclusion

Tremendous opportunities exist for companies that wish to operate in international markets. However, the international legal environment requires careful planning to avoid costly mistakes associated with violations of trade regulations, the formation of international contracts, and criminal and civil liability.

International law is an ever-evolving body of law that is shaped by the international community and is constantly adapting to meet the needs of the modern world. With its complexity and its far-reaching implications, international law is an area that requires continued attention and research in order to ensure that individuals and businesses understand their obligations under the various treaties, conventions, and agreements that form and govern international trade.

Cases of Interest

- *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5, [2020] 1 S.C.R. 166 – https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do
- *Pro Swing Inc. v. Elta Golf Inc.,* 2006 SCC 52 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2326/index.do
- *Club Resorts Ltd v Van Breda*, 2012 SCC 17 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8004/index.do
- *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69 – https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do

Questions for Discussion

1. What is international law?
2. What are the two main sources of international law?
3. What are Regional Trade Agreements?
4. What is private international law?
5. What is a treaty?

Additional Resources

- International Chamber of Commerce (ICC) – https://iccwbo.org/
- World Trade Organization – https://www.wto.org/
- Trade Commissioner Service – https://www.tradecommissioner.gc.ca/index.aspx?lang=eng
- Global Affairs Canada – https://www.international.gc.ca/global-affairs-affaires-mondiales/home-accueil.aspx?lang=eng
- Export Development Canada – https://www.edc.ca/