

Business Law in Canada – Final Exam

Sunday April 17, 2011 – 7:00 PM – Alumni Hall 201

Chapter 10 – Employment

- Employment – one person doing work for another, but not all work
 - Independent contractors work for themselves and act independently
 - Employee must be in master-servant relationship
- The control test
 - Determine whether an employment relationship exists based on whether the person being paid for work is told how, when and where to do it
- The organization test
 - Supplements the control test
 - When the individual is an integral part of the organization, working only for that corporation and subject to group control
 - May be an independent contractor if free to offer services and bears risks of loss
 - Vicarious liability – independent in some circumstances but employee in others
 - No general legislated definition – courts turn to precedents
- Agents
 - Person representing and acting on behalf of a principal in dealings with third parties
 - Can be independent contractors or employees ex) sales clerk
- The employment contract
 - Obligations of employer:
 - Provide a safe workplace and good working conditions including hiring competent employees
 - Payment of wage or salary (also bonuses, benefits etc.)
 - Obligations of employee:
 - Follow reasonable orders and treat property carefully (competency)
 - Honesty and loyalty
 - Punctuality
 - Fiduciary obligation in some cases ex) senior level employees
 - Act in good faith, make full disclosure, not take corporate opportunities for one's own benefit
 - Often not formal or written (good idea though) – include provisions such as rate of pay, hours, description of services
 - Consensus, consideration, capacity, legality and intention required

- Restrictive covenants must be reasonable, specific, not be against the public interest and fully disclosed (courts reluctant to enforce sometimes)
- Termination
 - Contract may provide for its own discharge or stipulate amount of notice to be given or parties can mutually agree to bring it to an end
 - Most contracts of employment for indefinite period – can be terminated by:
 - Either party given reasonable notice
 - What constitutes reasonable notice varies with circumstances
 - Courts consider: length of service, type of job, employee's age, experience, qualifications, availability of similar employment, bad-faith conduct
 - Employer giving compensation that should have been earned in that notice period (pay in lieu of notice)
 - Or immediately with just cause
 - Dismissed without notice
 - Serious offences and must be substantiated and proportioned well
 - Must not violate human rights ex) discrimination
- Disabled workers
 - Legislated duty to accommodate disabled workers who are still able to work but illness may constitute frustration of a contract and be discharged without notice if they could no longer perform their job – legal duty does not apply when it will cause the employer undue hardship (to deal with this most have insurance or policies in benefits packages)
- Disobedience and incompetence
 - Failure to perform a reasonable order grounds for dismissal without notice
 - Incompetence also just cause however employers must inform employees what level of performance is unacceptable and provide opportunity for improvement – must not tolerate otherwise can be taken as acceptance
- Layoffs
 - Running out of tasks or experiencing financial difficulties is not just cause (reasonable notice required) even when layoff is temporary
 - Ontario Employment Standards Act – if laid off for a period longer than defined temporary (13 weeks) employment terminates and employer must compensate, but period is extended if payments made during the layoff
- Wrongful leaving
 - Key employees may be required to give substantial notice
 - Employees can leave without notice if contract breached by employer first
 - Employees may be sued for breach of duty

- Some have fiduciary duty, non compete – others may begin competing as soon as they leave but never before
- Constructive dismissal
 - Employer breaks contract when nature of job is changed without consent (inadvertently or to make the employee uncomfortable and want to leave)
 - Employee sue for wrongful dismissal
 - Like refusal to perform the original contract
 - Employee is obligated to mitigate or even accept the position
 - Can be considered constructively dismissed even when offered a comparable position ex) commute to work, relocation etc.
- Remedies for wrongful dismissal
 - Damages awarded usually based on what the employee would have received had proper notice been given
 - Obligation to mitigate losses ex) look for a new job
 - May also take into account damaged reputation or mental distress – punitive damages
 - Normally a corporation but sometimes a manager may be sued
 - Employer must have clear evidence of employees misconduct or incompetence and demonstrate that reasonable opportunity to improve was given
 - More sensible to negotiate with employee
 - Rare for court to order an employee be given back the job
- Liability of employer
 - Employer liable for torts committed by employee while on the job (vicarious liability)
 - Generally must be an employment relationship for vicarious liability to apply
 - Some jurisdictions have legislated the owner of a car is vicarious liable for torts committed by the person driving with the owners consent
 - Right to turn to employee for compensation – usually not able to pay
 - Contracting jobs out sometimes helps to avoid
 - Liability insurance is advisable
- Legislation
 - Protection of employees
 - Most provinces either the Employment Standards Act or the Labour Standards Act – set minimum standards in the areas of:
 - Wages
 - Overtime, work hours and rest periods
 - Vacation and holiday entitlements
 - Maternity and parental leave
 - Termination and severance pay

- Varies substantially from province to province
- Federal legislation (Canada Labour Code) in areas such as banking, military, aboriginal reserves, post office, telephone and broadcasting, airlines, railroads, steamships
- Employment standards
 - Notice periods less than common law standard can be set out in the contract (must be greater than the minimum statutory requirement)
 - If notice period is shorter than the minimum it will be void and employer must comply with the longer “reasonable notice” period
- Termination
 - Canada Labour Code – recognizes no notice is required when dismissal is for cause (otherwise necessary)
 - Termination entitlements determined by length of service under the Code (not nature of job)
 - Three months or more of continuous employment – two weeks’ notice
 - More than 12 months – severance pay of two days’ wages for each completed year of service plus five days’ wages
 - Layoffs may trigger termination pay
- Issue Estoppel
 - Choosing to file complaint under employment standards legislation may forfeit right to sue for damages or wrongful dismissal based on common law
 - Principle preventing an issue from being litigated again on grounds that it has already been determined in an earlier trial or hearing
 - May cause court to dismiss the wrongful dismissal suit
- Complaints
 - Legislation allows employees to file a complaint with a government board – investigated by civil servants
 - Avoid the cost of litigation
 - If dismissed determination may be appealed, if determined earnings are due may order that payment be made
- Human Rights
 - Charter of Rights and Freedoms and other federal and provincial legislation prohibit most forms of discrimination (race, national or ethnic origin, colour, religion, gender, sexual orientation, sometimes age, marital status, family status, disability, pardoned criminal convictions) in employment
 - Also must take active steps to ensure basic rights are protected
 - Tribunals hear complaints – investigate, fine, order reinstatement of employee
 - Ex) discriminating against a pregnant woman – gender

- Forms cannot require applicants to provide information concerning gender, age, marital status and so on unless a bona fide occupational requirement exists to justify such an inquiry
- Harassment also covered – form of discrimination that occurs when one subjects another person to unwelcome verbal or physical conduct because of his or her colour, gender, age or other characteristic (when things negatively affect the working environment) can take place outside of the work place, when committed by an employee the employer may be held responsible if they failed to take adequate steps to protect the employee
- Duty to accommodate disabilities and special needs ex) changing physical work environment, lighter work or part-time, scheduling around religious holidays as long as it does not cause the employer undue hardship
- Employer’s rules may be challenged as discriminatory ex) uniforms may discriminate against certain religious groups, must establish genuine occupational requirement for the rule that relates to a necessary part of the job
- Pay equity – requiring equal pay for work of equal value ex) women
- Employment equity acts – correction of employment situations where there has been a tradition of racial or gender imbalance ex) nursing
- Reverse discrimination – prejudice or bias exercised against a person or class for purpose of correcting a pattern of discrimination against another person or class
- Affirmative action – programs intended to correct racial, gender or other imbalances in the workplace, authorized under section 15 of the Charter
- Mandatory retirement – forced retirement from employment generally at age 65, often justified as social policy by opening up jobs for youth, “age” is between 18-65, Supreme Court holds that this does not violate Charter (S. 1), age under 65 can be justified if employer establishes policy as being justifiable in the circumstances of the workplace, employers not required to have this policy
- Workers’ compensation
 - All provinces and federal government have enacted legislation providing compulsory insurance program covering accidents that take place on the job
 - Sets rates of compensation to be paid for different injuries
 - Establishes a board that hears and adjudicates claims
 - No fault insurance scheme – careless conduct on the part of the worker will not disqualify, benefits are paid to injured or to their families in death
 - Financed by assessments levied by provincial boards against employers – amount varies with risk associated with the industry

- Worker give up right to any other compensation and cannot sue (when caused by someone other than the employer or other employee choice of suing or comp)
 - Limited to injury or disease that arises in the course of employment
 - Health and safety statutes
 - Work to reduce compensation claims
 - Provide safer working conditions by requiring fencing of hazardous areas, safety netting, proper shielding of equipment, environmental control etc.
 - Ensure safe employment practices such as requiring the supply and use of hard hats, goggles and protective clothing
 - Establish programs to educate both the employer and the employee on how to create a safer working environment for all concerned
 - Safety boards ensure regulations are adhered to – can order problem corrected, shut down the job site, offending business can be prosecuted
 - Employment insurance
 - Federal jurisdiction under constitution
 - Employment Insurance Act – both employers and employees pay into government supplemented fund
 - Laid off employees entitled to payment for a period of time
 - Employee entitlement based on the number of weeks worked before the claim and the amount of wages received – severance package limits
 - Protects those unable to work because of illness, disability, pregnancy or adoption
 - Other legislation
 - Apprenticeship process, trade schools, pension benefits, licensing of private employment agencies etc.
 - All jurisdictions have legislation dealing with special categories of employees ex) teachers, public servants
- Collective bargaining
 - Consequence of weaker unions – legislation was designed to reduce conflict
 - Wartime Labour Relations Regulations – Canadian regulation, similar to American Wagner Act recognizing and employees right to be a member of a union:
 - Recognition disputes – arising between a union and employer while union is being organized
 - Interest dispute – disagreement about the terms to be included in a new collective agreement
 - Rights dispute – disagreement about the meaning of a term in a collective agreement
 - Jurisdictional dispute – disagreement over who has authority; in the labour context, a dispute between two unions over which one should represent a group of employees, or over which union members ought to do a particular job

- Canada Labour Code – federal collective bargaining legislation, industries over which federal government has jurisdiction ex) railroads, shipping, air transport, broadcast etc.
- Each provincial government has also passed legislation covering its jurisdictions
- Labour tribunals regulate process – take the place of courts
- No constitutional right to belong to a union (although Supreme Court recently taking different stance) – rights created by statute
- Now a constitutional right to bargain collectively – may ensure existence of unions
- Organization of employees
 - Certification
 - Adopted from the Wagner Act
 - For a union to obtain certification as the bargaining agent for a group of employees it must apply to the appropriate labour relations board for certification and satisfy that a certain percentage of the workforce are members of the union
 - Majority of workers must be members of union – if less than 50% but more than 35% a representation vote will be held and to obtain certification it must receive the support of a majority vote and over 35% of the workforce must have voted
 - Bargaining agent – once certified only the union has right to bargain for employees
 - Unfair labour practices
 - Rules of conduct reduce conflict
 - Threats, coercion, dismissal – unfair labour practices
 - Employer cannot threaten employees or require they refrain from joining a union, cannot change conditions of employment to influence the bargaining process
 - In some provinces unfair labour practices can result in certification without a vote
 - Employer retains right of free speech – opinion or fact and do not amount to threat
 - Employer cannot participate in or interfere with formation or administration of union – undermines independence
 - Employers’ organizations – bargaining agents representing groups of employers, help employers bargain with unions, usually in industry where there are a number of small employers ex) construction
 - Local unions often associated with larger parent unions – help with finance and research
- Bargaining
 - Collective agreements
 - Anytime after union certified either party can give notice commencing bargaining
 - Parties must bargain in good faith (make every reasonable effort to reach an agreement)
 - Ratification

- Once bargain reached it's presented to the union membership and employer's board for ratification – if both sides ratify it is binding
 - Treated like an ongoing contract
 - Mediation (conciliation)
 - When negotiations break down either party has the right to apply to the appropriate government agency for the appointment of a conciliator – a neutral third party who facilitates discussion between parties to a dispute to encourage and assist their coming to an agreement (mediator), no authority to bind the parties – prevents more drastic action ex) strike
 - Only after an officer, commissioner or board has checked out of the dispute and filed a report that the parties are allowed to strike or lockout
 - Arbitrators authorized to make a binding decision on the parties
- Terms of Collective Agreements
 - Contract must be for at least one year – assumed when no time limit placed
 - When imposed by federal board it is for two years
 - May have an automatic renewal clause – if no notice to bargain given at the appropriate time it will automatically be renewed, usually for one year
 - Retroactively – changes will take effect from the date the old agreement expired
 - Arbitration
 - All agreements must contain provisions for the settlement of disputes
 - Grievance process – series of structures meetings, ultimately leads to arbitration
 - Substitute for court action – each party given opportunity to present position
 - Decision can be appealed to labour board or the courts only in some provinces
 - Always subject to judicial review if unreasonable
 - No strike/lockout when contract is in force
 - Other terms
 - Agreement must provide for technological change
 - Union shop clause – workplace where new employees must join the union
 - Closed shop clause – workplace where only workers who are already members of the union can be hired
 - Rand Formula or agency shop – option in agreement enabling employees to retain the right not to join the union, though they are still required to pay union dues
 - Check-off provision – whereby employees agree to have employer deduct union dues from payroll
 - Maintenance of membership – requirement in agreement that union members pay dues and maintain their membership though new employees need not join the union

- Strikes and lockouts
 - Lockout – an action in which the employer prevents employees from working
 - Strike – withdrawal of services by employees (other things too ex. Postal workers)
 - Work to rule – job action in which employees perform no more than is minimally required so as to pressure an employer
 - Work stoppages – strikes and lockouts, can occur only between contracts in an interest dispute, also illegal when associated with the recognition process or involving jurisdictional disputes between two unions (certification process)
 - Disputes arising when agreement in place must be resolved through grievance process
 - An interest dispute about what will go into a new agreement must be bargained in good faith first and vote before strike action
 - Proper strike notice must be given (72 hours usually) – also notice required for lockouts
 - Cooling off periods may be imposed before a strike
 - Employer prohibited from hiring replacement workers during a strike
- Picketing
 - Strikers standing near or marking around a place of business trying to dissuade people from doing business there – permissible only when a lawful strike or lockout is in progress
 - Right to picket limited by legislation
 - Picketeer who crosses the line or communicates false information can be sued
 - If information does not try to discourage people from crossing line or dealing with employer the action may not qualify as picketing
 - Violence not permitted
 - Employer can apply to have number of picketers limited – intimidation
 - Strong tradition of union solidarity makes picketing effective
 - Employees in every jurisdiction can picket the plant or factory where they work – some allow for secondary picketing (on other locations where employer carries on business)
 - No legal obligation to honor picket line (customers, suppliers, employer)
- Public sector and essential services
 - Public-sector employees have limited rights to job action
 - Strikes usually considered inappropriate
 - Most provinces permit collective bargaining but only a few allow public sector employees to participate in strikes and picketing (substituting some form of compulsory arbitration)
 - In all labour disputes (including private ones) the government retains the right to impose a settlement (statute or bill)
- Union organization
 - Policy is established by vote, executives and officers are elected
 - Members can be expelled or disciplined for misbehaviour

- Some jurisdictions have legislation saying a person who loses membership for reasons other than failure to pay dues will be able to retain employment
- Religious beliefs may prevent someone from joining a union – some governments have passed legislation exempting them, dues are still paid but given to charity
- Subject to human rights legislation – denied certification or lose status, obliged to represent all members fairly, complaints can be filed to the labour relations board
- Trade unions overseen by labour relations boards and courts – most provinces give the right to sue or be sued on its own behalf

Chapter 11 – Agency and Partnership

- Agency law is the basis of the law of partnership and an understanding is essential for coming to terms with corporate law
- An agent's function is to represent and act on behalf of a principal in dealings with third parties
- Most common example is in the creation of contracts
- Real estate agents participate in the negotiations and act as go betweens
- Agency
 - The service an agent performs on behalf of the principal
 - May be performed as an employee, as an independent agent or gratuitously
 - When an agent is acting independently, the business performing the service is often called an agency (travel agency, employment agency, real estate agency)
- Formation by Contract
 - Usually created through a contract called an agency agreement between the agent and the principal thus general contract rules apply
 - Can cover such things as the authority of the agent, the duties performed, and the nature of payment to be received
 - Principal: grants actual and implied authority → agency agreement → Agent: agrees to act on behalf of principal
 - May be imbedded in a contract of employment or the contract may create a more independent relationship between principal and agent
 - Wise practice to put agreement in writing but not always necessary unless specified by statute
 - Bill of Exchange Act – where the agent is to sign cheques or other negotiable instruments, the granting of the agent's authority must be in writing
 - Not necessary that an agency agreement be under seal unless the agent will be sealing documents on behalf of the principal as part of his or her agency function
 - Power of attorney – agency agreement in writing and under seal
 - All elements of a contract (consensus, consideration, legality, intention, capacity) must be present for an agreement to be binding
 - Will not affect the binding nature of any agreement the agent enters into on behalf of the principal - only when agents are so young, drunk, insane or otherwise incapacitated that they do not understand what they are doing does the contract between the principal and third party become doubtful on the basis of incapacity or lack of consensus
 - The actions of the agent may be binding on the principal even when the agent is acting gratuitously – only consent is necessary
- Actual Authority

- The authority specifically given by the principal to the agent and usually set out in the agency agreement
- May be expressly stated by the principal or implied from the circumstances such as from the position the agent has been given
- An agent who exceeds this actual authority may be liable to the principal for any injury caused by his conduct
- Apparent Authority – Authority Created by Estoppel
 - When a principal does something by conduct or words to lead a third party to believe that an agent has authority, the principal is bound by the agent’s actions, regardless of whether there is or is not actual authority
- Application of the principle of estoppel
 - Equitable remedy that stops a party from trying to establish a position or deny something that if allowed would create an injustice
 - It would not be fair if a principal could say “George has authority to act for me” and then later deny it and escape liability for George’s actions - principal has held out the agent to have authority even if no such authority has been granted the principal is bound
 - If a third party has relied on this representation the principal cannot then claim that the agent had no authority
 - Important not to confuse with equitable or promissory estoppel
 - Involves a promise or commitment to do something in the future
 - Although the principal may look to the agent for compensation, so long as that agent has acted within his apparent authority, the principal is still bound in contract with the third party ex) used car dealership manager
 - A principal can also be bound by the actions of an agent that would normally be beyond the agent’s authority if the principal has sanctioned similar actions in the past
 - Existence of this apparent authority is based on the statements and conduct of the principal not the agent
 - Reasonable persons test used to determine existence of authority
 - Also used to determine whether the third party should have been misled into believing that the agent had authority by the statements and conduct of the principal
 - When a principal puts an agent in a position so that it appears to others that they have authority to make certain commitments, they have that authority even though it has not actually been given
 - Is there a contract?
 - Was the agent acting within the actual authority given by the principal?
 - If yes, then there is a contract

- If no, did the principal do anything to lead the third party to believe that the agent had the authority to act?
 - If yes, and the third party relied on that apparent authority there is a contract between the principal and third party
 - If no, there is no contract
- Ratification
 - A principal can still ratify a contract even if the agent has acted beyond both actual and apparent authority
 - Effect of such ratification is to give the agent authority to act on behalf of the principal retroactive to the time of sale
 - Principal is not bound when an agent goes beyond the authority given but if the principal chooses to ratify, the third party is bound and can do nothing to change that
 - Qualification of ratification
 - The third party has the right to set a reasonable time limit within which the ratification must take place
 - The agent must have been acting for the specific principal who is now trying to ratify
 - The principal has to be fully capable of entering into the contract at the time the agent was claiming to act on his or her behalf
 - The parties must still be able to perform the object of the contract at the time of the ratification
 - Principal can inadvertently ratify by knowingly accepting some sort of benefit under the agreement
- Agency by Necessity
 - When communications were less reliable, authority was sometimes implied on the basis of agency by necessity
 - With instantaneous forms of communications it will be rare for necessity to arise
 - There must be some duty or responsibility placed on the agent to care for the goods
 - Exception in family relationships
 - Common for one spouse to have the actual or even apparent authority to act on behalf of the other when dealing with merchants, especially for the purchase of necessities
 - In the absence of notice to the contrary, the authority continues even when the spouse has been specifically prohibited from making such purchases
 - Authority can be implied by operation of law against the will of the other party
 - A wife who is deserted by her husband is presumed to have the authority to bind him in contracts

- The Agent's Duties – The Contract
 - When an agency agreement has been created by contract the agent has an obligation to act within the actual authority given in that agreement
 - Violating the contract but exercising apparent authority can be sued for breach and will have to compensate the principle for any losses suffered
 - Failure on the part of the agent to fulfil any other obligation set out in the agreement will also constitute an actionable breach unless the specified act is illegal or against public policy
 - An agent owes a duty of care to the principal – must not only have the skills and expertise claimed but also must exercise that skill in a reasonable manner
 - Agents often have considerable discretion in carrying out agency responsibilities as long as they act to the benefit of the principal
 - Agent cannot go against the specific instructions received even if it might be in the principal's best interests to do so
 - Agents also have a duty to act in the best interests of their principals
- Delegation
 - Obligation to perform the agency agreement personally
 - Not permitted to delegate responsibility to another party unless there is consent to such delegation either express or implied by the customs and traditions of the industry
 - The primary agent has the responsibility to see that the terms of the agency agreement are fulfilled
- Accounting
 - Agent must turn over any monies earned pursuant to the agency function to the principal
 - No entitlement to retain anything other than the authorized commission
 - Obligation to keep accurate records of all agency transactions
- Fiduciary Duty
 - Agents owe their principal a positive duty of full disclosure
 - Agent cannot arbitrarily decide what would likely influence the conduct of the principal and what would not
 - Principal puts trust in the agent and may become vulnerable
 - Utmost good faith relationship in which the agent is obliged to:
 - Keep in strict confidence any communications that come through the agency function
 - Act in the best interests of the principal, even if the agent may lose some personal benefit
 - Not take advantage of any personal opportunity that may come to his or her knowledge through the agency relationship
 - Disclose to the principal any personal benefit the agent stands to gain

- If there is a failure to disclose the principal can seek an accounting and have any funds gained by the agent in such a way paid over to the principal
- Agent cannot act for both a principal and a third party at the same time
- If the principal discovers the agent accepting payment from the third party the principal is entitled to an accounting and the receipt of all such funds and will likely have just cause to terminate the relationship
- In real estate transactions agent usually acts for the seller
- Another problem sometimes arises where an agent who is hired to purchase goods or property sells to the principal property actually owned by the agent as if it came from some third party
- Agent must not operate his own business in competition with the principal especially if a service is being offered nor can the agent also represent another principal selling a similar product without full disclosure
- Agent must not collect any profits or commissions that are hidden from the principal
- The Principal's Duties – The Contract
 - Principals primary obligation to the agent is to honour the terms of the contract by which the agent was hired
 - Pay a reasonable amount can be implied
 - If the agreement provides for payment only on completion there is no implied obligation to pay for part performance
 - Unless there is agreement to the contrary the agent is normally entitled to compensation for reasonable expenses
 - If the agency agreement is vague about the extent of the agent's authority the courts will usually favour an interpretation that gives the agent the broadest possible power –when the power to borrow money is involved the courts take a more narrow approach
- Undisclosed Principals
 - In some transactions principals attempt to conceal their identity from third parties they are dealing with – undisclosed principal relationship
 - Used to discourage people from holding out for higher prices once they find out who is really buying the property
 - Sign in such a way as to be consistent with them being principal or agent or will actually sign as if he or she were the principal contracting to party
 - No liability to the third party and only the principal can enforce the agreement
 - If the would-be agent acts as if he were the principal only he can be sued by the third party and only he can enforce the contract
 - Where the agent acted ambiguously so that it is not clear whether he was acting as an agent or the principal party the third party has a choice

- Commence action against the agent
 - Or upon finding out the identity sue the principal
 - Bound by decision
- Converse is also true for enforcing contract against the third party
- Undisclosed principal is liable only when the agent has acted within his actual authority
- Apparent authority applies only when the principal has held out the agent to have authority and since the principal is unknown there can be no holding out and no apparent authority
- Undisclosed principal cannot ratify since the agent must be claiming to be acting on behalf of a specific principal in those dealings with the third party
- Contract cannot be enforced where the identity of the parties is important to the third party
- Where the contract is made under seal the undisclosed principal cannot be sued – only parties to a sealed document have rights and obligations
- Signage normally done by writing per before the signature of the agent
- The Third Party
 - When an agent does not have the authority claimed either actual or apparent that agent may be sued by the third party for breach of “warranty of authority”
 - Founded in contract law
 - Agent who intentionally misleads the third party into believing that she has authority when she does not may be sued by the third party for the tort of deceit
 - Agents who inadvertently exceed their authority can be sued for negligence
 - It is important to distinguish between the tortious liability of the agent based on fraud or negligence and a contract action based on breach of warranty of authority
 - Damages limited to those that were reasonably foreseeable at the time the contract was entered into or those that flow naturally from the breach
 - If the third party could establish the agent’s fraud or negligence the lost profits might be recovered from the agent because they are the direct consequence of the tortious conduct damages are awarded to compensate for the loss caused
- Liability for Agent’s Tortious Conduct
 - An employer is vicariously liable for the acts an employee commits during the course of employment
 - When an agent is also an employee of the principal the principal is vicariously liable for any tortious acts committed by the agent in the course of that employment
 - Vicarious liability is restricted to those situations in which a master-servant relationship can be demonstrated
 - Expanding the definition of employment

- Judges will have little difficulty imposing vicarious liability on principals when the circumstances warrant – only in rare cases that a principal will be found vicariously liable for the acts of an independent agent
- Courts appear willing to hold the principal responsible for theft or fraudulent misrepresentation by an agent even when no employment exists
- A principal can also be found directly liable for his own tortious conduct
- If the principal has requested the act complained of, has told the agent to make a particular statement or is negligent in allowing the agent to make the particular statement complained of the principal may be directly liable
- Makes the principal responsible but does not relieve the agent of liability for his conduct – both can be sued
- Termination of Agency
 - As soon as the agent is notified of the withdrawal of consent the authority ends
 - Even where employment may continue the authority to act as an agent will end immediately upon notification
 - Termination as per agreement
 - No requirement that the notice be reasonable – only that it be communicated
 - Frustration may terminate agency as will request to perform illegal tasks
 - Death, insanity, dissolution of principle corporation or bankruptcy will also terminate agency
 - Insanity – apparent authority unclear, may still be binding
 - By mutual agreement – apparent authority continues until the third party is notified of the termination
- Enduring powers of attorney
 - Authority to act under a power of attorney terminates when the principal loses capacity
 - The power to act as the donor’s trustee or representative following the donor’s lack of capacity
- Specialized agency relationships
 - Some of the agents of specialized services do not enter into contracts on behalf of their clients but negotiate and act on their clients’ behalf ex) real estate agent
 - General principles apply to specialized agencies as well
 - Most specialized agencies are fulfilling a service function and are governed by special statutes and professional organizations
 - When professional advice involved often a fiduciary duty to the client
- Types of Business Organization

- Sole proprietorship – an individual carrying on business alone, employees may be hired, may be carried out through the service of an agent but business is the sole responsibility of the owner
- Partnership – ownership and responsibilities of a business shared by two or more people with a view towards profit, may employ others and act through agents, each partner acts as an agent for the other and has a fiduciary duty to them
- Corporation – a separate legal entity from its shareholders, contracts with a corporation are like contracts with a person, must conduct all affairs through employees and agents
- Non profit society – separate legal entity with different rules for incorporation than corporations
- Holding corporation – corporation that owns shares in other corporations
- Joint venture – the collaboration of several businesses to accomplish a major project
- The sole proprietorship
 - Only one entitled to the benefits derived from the business
 - Bears full responsibility for all the costs, losses and obligations
 - No distinction between the personal assets and those of the business
 - Government regulation
 - Name must be registered, licence to operate must be obtained, adhere to local bylaws, employees subject to employment legislation, pay taxes if income over \$30,000 per year
 - Subject to fewer government regulations than partnerships and corporations – only minimal records must be kept, usually not obligated to disclose information
 - Liability
 - Unlimited liability – the liability of the business owner for all debts incurred by the business to the extent of their personal resources
 - Cannot sell shares, restricted to their own credit standing
 - Can offset by purchasing insurance
 - Get to keep all the profits but must pay personal income tax
 - Professionals bound by certain rules – sometimes cannot incorporate
- Partnership
 - Carrying on business together for profit
 - Governed by contract law
 - Can own land, contract with others and sue or be sued in its own name
 - Legislation – 1890 Partnership Act adopted in all the common law provinces of Canada (still used today)
 - Creation of the partnership

- When two or more people carry on business in common with a view towards profits (does not actually have to be made but must be the goal)
- Sharing of gross returns from business does not create partnership – sharing of profits that gives rise to partnership
- Will not establish partnership:
 - Owning property in common even when it is rented out for profit
 - Debt repaid by the creditors' taking a share of the debtor's profit
 - When payment of an employee is based on shares of sales or profits ex) commission or profit-sharing schemes
 - When beneficiary of deceased partner receives their share of the profits
 - Loan is made in relation to a business and payment of interest varies with profit
 - Business is sold and the payment of the goodwill portion varies with the profitability of the business
- When there has been one of the following, established partnership:
 - Joint contribution of capital to establish a business
 - Intention to share expenses, profits or losses
 - Joint participation in the management of a business
- Partnership must carry on continuing business (generally not a one time event)
- Creation by inadvertence
 - Can be created by conduct – should be created by agreement
 - Often not in writing but preferable
- Creation by contract
 - Even when the parties clearly state (in a written contract setting out the rights and obligations) they are acting in partnership this may not be enough to establish
 - Agreement should deal with all important matters such as:
 - Duties of each partner
 - Type of work or talent each is expected to contribute
 - Amount of time to be committed to the business
 - How the profits are to be shared and how the capital is to be distributed
 - Any limitations on the powers or authority of each partner
 - Rights of third parties unaffected by any agreement between partners
 - Can arise because of estoppel – if one of the parties represents to a third party that another person is a partner and that representation is relied on the existence of a partnership cannot be denied
- The partner as an agent

- Every partner is the agent of the other partners – has the power to bind them in contract as long as it involves the business
 - Even where the authority of a partner has been limited and the partner exceeds the power given that contract will be binding if the third party is unaware of the limitation and the contract relates to the partnership business
- Vicarious liability
 - All partners vicariously liable in tort for both careless and intentional conduct of their partners in all business related activities including personal injury
 - Partners liable for breach of trust – all are responsible for compensating the victims loss (under the Act the other partners liable only if they have notice)
 - Partners liable for wrongful acts of employees in the course of their employment
- Unlimited liability
 - Like sole proprietorship – If the assets of a partnership are not sufficient to satisfy the claims of the creditors the partners must make up the difference from their own personal assets
 - Typically done in the same proportion that they share the profits
 - Third party can collect from any partner regardless of agreement – partner can seek contributions from other partners on the basis of the agreement if they have anything to contribute
 - Jointly liable – all parties must be sued together for debts and obligations
 - Severally liable – each partner can be sued separately
 - Joint liability in most provinces meaning that if someone seeks a remedy against all the partners they must be included in the original action
 - When liability arises because of wrongful conduct or breach of trust liability is both joint and several (possible to sue one partner and maintain the right to sue the others if the claim is not satisfied)
 - All personal assets at risk
 - Retiring partner remains liable for wrongs committed during the partnership period – continues unless the third party has been notified
- Registration – Most provinces require
 - Failure to register will result in fines and typically prevent partnership from maintaining action – cause joint to become joint and several action (unregistered can still be sued)
- Fiduciary duty
 - Each partner has duty to act in the best interest of other partners
 - Must account for any profits or use of property

- If a partner competes without consent he will be required to pay over any profits made to the partnership which will be distributed normally
 - Information must be disclosed and not used for personal benefit
- Provisions of the Partnership Act
 - Profits and losses shared equally or modified by agreement
 - Partner's expenses reimbursed (also to any money they have advanced before other partners can claim a share of the profits)
 - All have the right to participate in management
 - No salaries paid to partners – only a share of the profits
 - Unanimous agreement needed for major changes
 - Assignment of partnership status requires consent of other partners
 - Partners must have access to business records
- Advantages of partnership
 - Insurance coverage important
 - Unanimous consent provides protection
 - Less costly to form and operate than a corporation
 - Small businesses operating low risk industry
- Dissolution of a partnership
 - Notice required (can be implied)
 - Usually a mechanism provided in the agreement whereby one partner can leave without causing the remainder of the partnership to dissolve
 - Dissolution by death, bankruptcy, insolvency (can provide that instead partner's share be made available to the heir or creditor)
 - Partnership established for a specified time will end at expiry
 - Can dissolve by request to the courts if:
 - One of the partners has become mentally incompetent or otherwise incapable of performing responsibilities
 - The conduct of one partner is prejudicial to the partnership relationship, or the partner is otherwise in breach of the agreement
 - It is clear that the business can be carried on only at a loss
 - It is just and equitable that the partnership be dissolved
 - Effect is to end the relationship, oblige the partners to wind up the business, liquidate assets, pay off obligations, distribute remains to partners
 - Public notice may prevent liability
- Distribution of assets and liabilities
 - Debts paid out of profits first, the capital, then personal assets of partners (liable in proportion in which they were entitled to share profits)

- Any remaining assets first pay back the partners for advances and then to pay back original capital investment
 - Remaining funds divided on the established basis for sharing profits
 - Can be different based on agreement
- Limited partnerships
 - Liable only to the extent of their investment
 - Registration required to become a limited partner – declaration sets out information such as term, amount of cash/property contributed, way profits are to be shared
 - Name used cannot contain the surname of a limited partner
 - Not possible to form a partnership with only limited partners (there must be one general)
 - Limited partners cannot take part in control of the business (cannot contribute services)
- Limited liability partnership
 - All provinces except Newfoundland and PEI
 - Formed when two or more persons enter into a written agreement that designates the partnership as an LLP and states that the agreement is governed by the Act
 - Partners must be professionals authorized by statute, maintain minimum insurance coverage, be registered with LLP in name
 - LLP has unlimited liability only for own neglectful actions and for those they supervise
 - Provisions do not apply to actions for other torts, breach of contract or breach of trust

Chapter 12 – Corporations

- The process of incorporation
 - Need for a large number of people to participate financially in a venture without having active roles
 - Separate legal entity – shares represent an individual's interest in the company can be bought and sold, shareholders continually changing while company remains intact
 - Royal charters created early corporations ex) HBC, universities
 - Deeds of settlement used historically
 - Registration – a legislated requirement for incorporating a company in some jurisdictions in Canada
 - Letters patent – used in some jurisdictions whereby the government grants recognition to the company as a separate legal entity
 - Articles of incorporation – a method of incorporating based on a US approach and used in some jurisdictions in Canada
 - Possible to incorporate at the federal level or in each province – choice made on what the corporation does and where it does it (cost is a factor, must register each province)
- Registration
 - Nova Scotia only jurisdiction in Canada that uses
 - Involves registering a “memorandum of association” and “articles of association” with the appropriate government agency and paying the required fee
 - Memorandum of association – same function as a constitution, sets out important matters and restrictions ex) name, share capital etc.
 - Articles of association – deal with such matters as how shares are to be issued and transferred, requirements for meetings, voting procedures, borrowing procedures, powers, dividends, company records, notice (easier to change than memorandum) day to day rules
 - Registrar has no right to refuse incorporation except when the requirements set out in the legislation are not complied with
- Letters patent
 - Based on the practice of the monarch granting a royal charter – involves applicant petitioning the appropriate government body for the granting of the letters patent
 - Only Quebec and PEI use
 - Set out the constitution of the new company and contain important company information
 - Day to day rules governed by bylaws
- Articles of incorporation
 - Newfoundland, New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta, (kind of BC)
 - Accomplished through filing of articles, paying the appropriate fee and the granting of a certificate of incorporation

- Corporations primarily the creations of government rather than being based on contract (like letters patent)
- Articles serve the same function and contain the same types of information as the memorandum of association and the letters patent
- Day to day operation controlled through bylaws
- Government body has no general discretion to refuse a request for incorporation
- BC uses notice of articles
- Other incorporated bodies
 - Cities, universities, and other public institutions are incorporated legal entities that can sue or be sued in their own right
 - Also possible to incorporate non profit bodies or “societies”
- Separate legal entity
 - When the incorporation process is complete there are at least two legal persons – the shareholder and the incorporated company
 - “Legal fiction” – all the forces of law assume that it exists and that it can function in the commercial world
 - Shareholders → buy shares → corporation (separate legal entity) → buys assets → assets
 - Courts will sometimes ignore separate legal entity ex) when object of incorporation is to get around regulation or commit fraud
 - Allows acquisition of capital without involving shareholders in the operations, purchase and sale of the shares without interfering with ongoing operation
 - Corporation responsible for contracts made on its behalf, can be convicted and fined for crimes (not the shareholders)
 - Limited liability of shareholders derived from this principle – can lose only their initial investment
 - Creditors can protect themselves by requiring directors or shareholders to sign a personal guarantee and become liable for the debt along with the corporation
- Capacity
 - Even in Nova Scotia most companies have the capacity of a natural person
 - Problems may arise where corporations created by special acts of the legislature or Parliament limiting their activities in specified areas
- The role of agents
 - Legal fiction – all of its activities must be carried out by agents
 - Directors and employees may have actual or apparent authority to bind the corporation
 - Filed documents no longer notice of limited authority
- Funding

- Shares – the means of acquiring funds from a large number of sources to run a corporation, an interest in a corporation held by an investor
- Owning shares gives shareholder control of the corporation and sometimes a right to the assets upon dissolution
- Registration and letters patent – require authorized share capital be set out (upper limit on the shares that can be sold, usually high because hard to amend)
- Articles of incorporation – do not require limitation on authorized share capital
- Par-value vs. no-par-value shares
 - Par-value involves each share being a specific value such as \$1 at the time of issuance – misleading as the marketplace quickly sets a value on those shares that is not reflected in the stated par value
 - Common practice to issue no-par-value – allowing the marketplace to determine the value
 - Articles of incorporation jurisdictions except BC have abolished par-value
- Special rights and restrictions
 - Common shares – shares to which no preferential rights or privileges attach
 - Preferred shares – the shares giving the shareholder preference over other classes of shares; that preference often pertains to payment of dividends
 - If only one class of shares they are common
 - If there are no preferred shares common shares must include the rights to vote at meetings, to receive dividends declared and to receive the property upon dissolution
 - Usually preferred shares are attached with a promise to pay a specific dividend each year – this is not a debt, corporation not obligated to declare but once it does the preferred shareholder has the right to collect before the common, may be cumulative and if they are preferred holder has right to receive any back payments before the common gets any dividends
 - Usually only common have right to vote – preferred when the corporation fails to pay promised dividends or when major changes that would materially affect the position of the preferred
 - When corporation dissolved preferred have rights to those shares repaid before funds paid to common
 - Special shares used in estate planning – when two classes of shares can be created; one with a right to vote and with some control in the affairs but no right to dividends or to receive money, other with a right to dividends but no right to vote
- Borrowing
 - Corporations can borrow funds and take on debt
 - From large creditor (bank) or issuing bonds or debentures (secured or unsecured)

- Failure to repay constitutes breach of the corporation's legal obligation – creditor can bring action against and seize assets of the corporation
- Bond – a share interest in the indebtedness of a corporation; often used synonymously with debenture, though a bond is normally secured against specific assets not already mortgaged or pledged
- Debenture – an acknowledgment of debts by a corporation normally involving more than one creditor often used interchangeably with bond but may be unsecured or secured by a floating charge against inventory
- Bondholders entitled to a portion of the repayment at a set rate of interest – free to sell such claims to others sometimes at a premium/discount depending on the market
- Bondholder can demand repayment and enforce that right in court (not for shareholders)
- Bondholder has no right to vote and cannot affect management decisions
- Closely held and broadly held corporations
 - Private vs. public companies
 - Closely held – relatively few shareholders, shares cannot be sold to the general public openly or on the stock market, usually managed by the shareholders, much freer of government regulations
 - Broadly held – more closely regulated
- Directors (managers)
 - Shareholders choose directors at the annual meeting
 - Once directors elected shareholders have little say in the operation until the next election
 - Sometimes shareholders vote held when decisions involving fundamental change in the corporation are to be made or when required by incorporating documents
 - Closely held – shareholders usually managers and directors and participate in all decisions
 - Director must be an adult of sound mind, cannot be bankrupt or convicted of a crime involving fraud, in most jurisdictions no longer needs to be a shareholder
 - Owes a significant duty to not be negligent
 - Owe a fiduciary duty – to the corporation itself, not the shareholders, only the corporation can sue the director when this is violated (problem because directors decide what the corporation does)
 - Derivative action or representative action – a lawsuit where certain shareholder are given the right to launch a civil action against the directors on behalf of an injured company
 - May face personal liability if allow shares to be sold for consideration that is less than fair, allow transactions that are not permitted by the legislation, and if they breach specific responsibilities as set out in legislation

- Prohibited from using insider knowledge to their own advantage – strict disclosure requirements whenever an insider trades in the securities of the corporation, subject to fines and imprisonment
- External obligations
 - Directors can be held personally liable when the corporation fails while owing unpaid wages, for breaches of employment standards legislation
 - Personal liability for unpaid taxes
 - Liable for environmental regulation – potential fines, imprisonment and responsibility for damages caused
 - Due diligence – doing everything reasonable to avoid a problem leading to legal liability (can help escape liability)
 - Liability has also been imposed for offenses under consumer protection legislation, the Competition Act, securities legislation and human rights codes
 - Personally liable for torts they commit
 - Criminal code provides duty to take reasonable steps to prevent bodily harm in respect of workplace safety, can be found guilty of a criminal offence requiring fault when a senior officer (director, CEO, CFO) with the intent to benefit the organization commits an offence, directs others to commit an offence, or does not take reasonable steps to stop an offence
 - Directors, officers and employees liable for crimes
- Officers and senior executives
 - In a large corporation directors usually appoint a managing director or chief executive officer who is given overall responsibility along with a managing committee of the directors to run the affairs of the corporation
 - Operations assigned to others who report to CEO ex) president, treasurer, executives etc.
 - Fiduciary duty to the corporation, same type of general obligations, duties of care and competence to the corporation as the directors
 - May be held to an even higher standard
- Promoters
 - Someone who participates in the initial setting up of the corporation or who assists the corporation in making a public share offering
 - Securities commission – provincial agency that serves as watchdog on stock market (prevent fraud and encourage free and efficient market) also in charge of insider trading, licensing and regulation involved in the selling and marketing of shares ex) brokers
 - Prospectus – public document disclosing relevant information about a corporation (corporation and promoters responsible to ensure full disclosure and no misrepresentation_
 - Owe a fiduciary duty to the corporation

- Shareholders
 - Few obligations to the corporation or to other shareholders other than to not use insider knowledge for their own purpose
 - Rights
 - Right to see records and reports including:
 - Documents of incorporation
 - Lists of all shareholders
 - Lists of transactions or changes in the relationship to the shares
 - Lists of officers, directors and debenture holders
 - Minutes of shareholders' meetings
 - Minutes of directors' meetings and actual financial records not available to shareholders (for competitive purposes)
 - Entitled to receive copies of annual financial statements and auditors report
 - Auditor – unbiased party responsible for ensuring that financial statements for an organization are properly done (duty to the shareholders)
 - Annual general meeting – a meeting where shareholders elect directors and vote on other important resolutions
 - Shareholders have the right to vote – vote is based on number of shares held
 - Proxy – shareholders' designation of another person to vote on their behalf at an annual general meeting
 - Bylaws or articles set out how many votes each shareholder is entitled to – common shares usually entitled to one vote per share, preferred usually cannot vote unless the promised dividend has not been paid
 - Majority shareholder protected as a majority vote or greater is necessary to decide all matters
 - Some jurisdictions, right to not have their proportion of shares diluted by the sale of more shares to others – pre-emptive rights entitle shareholder to be offered any new shares first
 - Shareholder protections
 - Right to sue the directors on behalf of the corporation when they have done something actionable
 - Derivative/representative action – must show that it is in the interest of the corporation to bring action
 - Oppression action – action against the directors who have allegedly offended the rights of creditors or minority shareholders ex) directors arrange for the sale of shares just to weaken the position of a particular shareholder

- Dissent and ask that her shares be sold
 - Dissent and appraisal – right of minority shareholders who are adversely affected by major changes to indicate their opposition and force the company to buy back their shares at a fair price
 - Dividends
 - No legal right to force the payment of dividends – can require payment if one has been declared by the directors
 - Recourse is political – vote out directors at next meeting (cannot go to court and sue for a dividend)
- Advantages to incorporation
 - Limited liability – not liable for debts or other obligations, can lose only what they have invested
 - Personal guarantee – a guarantee of payment for another’s obligation, major creditors often insist when dealing with closely held corporations (eliminates advantage of limited liability)
 - Not liable for corporations contracts ex) with suppliers
 - Corporation (not shareholders) vicariously liable for torts of employees
 - In rare cases courts will lift corporate veil and hold the principals liable for obligations
 - Taxes – some advantages ex) leaving funds in corporation to defer taxes, provincial advantages
 - Succession and transferability – corporations do not die unless specific steps taken to end its existence, shares part of deceased estate and most time simply distributed to heirs, shares can be transferred at will
 - Can be dissolved – application to the courts, bankruptcy process, shareholder vote, fining articles of dissolution, statement of intent, failing to file required annual returns
 - Obligations of the participants – no duties to the corporation (only restrictions on insiders)
 - Management – managers and shareholders separate (elect board of directors who can hire professional managers, can influence change by voting in different directors)
- Disadvantages to incorporation
 - Many advantages can also be seen as drawbacks from another perspective
 - Weak position of minority shareholders
 - Hard to make changes to incorporating documents
 - Transferability of shares restricted in closely held corporations
 - Transferability might be a threat if shareholders providing key services withdraw
 - More expensive than other forms of business

- More formal record-keeping requirements
- Generally more government control
- Can be used to create a variety of business structures
- Some difficulties in franchising relationships
- Termination of the corporation
 - Dissolution can be voluntary or involuntary
 - Induced internally by the directors or shareholders or externally by the court or creditors
 - Can be ordered to dissolve when a minority shareholder treated unfairly
 - Bankruptcy – ends in dissolution (possible to avoid)
 - Neglecting to file annual return – certificate of dissolution issued one year later
 - Selling shares – corporation continues as before but with new shareholders
 - Selling assets – purchaser is not affected by contractual or other obligations of the corporation unless those assets are encumbered (if used so secure a debt, secured creditor has first claim against them)

Chapter 13 – Real, Personal and Intellectual Property

- Property – relationship existing between the item and the individual who owns it
- Ownership (title) highest form of property right to a particular item – other forms possible
- Ownership separate from possession
- Real property – land, buildings attached to the land, items called fixtures that is items which are attached to the land or to a building or to another fixture attached to the land
- Chattels – tangible, movable personal property that can be measured and weighted (goods)
- An intangible right is a claim one person has against another and is called a chose in action (a right to sue)
- Intellectual property – personal property in the form of ideas and creative work
- Copyright – control over the use and reproduction of the expression of creative work (type of intellectual property)
- Patents – government-granted monopoly prohibiting anyone but the inventor from profiting from the invention
- Trademarks – any term, symbol, design or combination of these that identifies a business service or product and distinguishes it from a competitor
- Industrial designs – unique shapes or patterns that distinguish manufactured articles (type of intellectual property)
- Trade secrets – confidential information that gives a business competitive advantage
- Real property
 - Interests in land
 - “Carrot principle” – anything above and below the surface
 - Restrictions on use of land
 - No actionable complaint about airplanes
 - Things that permanently incur airspace are actionable ex) other buildings
 - Mineral rights may be separate from surface rights (Crown has retained, no entitlement to profits just compensation for surface disruptions)
 - Estates in land
 - Right to uninterrupted possession of land for a time – amount of time determined by the nature of the estate
 - All land owned by the crown – rights and possession based on some obligation to the Crown
 - Fee Simple
 - Highest interest in land, equivalent to ownership, an estate granting possession for an infinite time (although crown still technically owns)
 - Can also sell it

- Owner subject to government and municipal regulations with respect to what the property can be used for
- Life Estate
 - An interest in land ending at death (cannot be inherited)
 - Reversionary interest – right of original owner to take possession of property upon death of life tenant (may be transferred to third party)
 - Remainderman – third party with the right to the remainder of the fee simple after the death of a life tenant
 - Holder of a life estate must pay for normal upkeep, fees and taxes and not commit waste (do anything to harm the value of the reversionary interest)
 - Dower rights – protection of the rights of spouse in certain matrimonial property, modified or abolished in most jurisdictions
 - Homestead rights – rights giving a spouse a claim to a substantial portion of family property
- Leasehold estates
 - Fee simple and life estates referred to as freehold
 - Grants the tenant exclusive possession until a specific date
 - May be short or long term (99 years) or may be periodic
 - Periodic – there is no definite termination date, term is for some recurring period of time that continues to be renewed until terminated by notice
- Lesser interest in land
 - Easement – the right of a person other than the owner to use a portion of private property (usually for a particular purpose)
 - Right of way – type of easement that allows the crossing of another’s land (usually to get to their own property or to reach another point of interest)
 - Dominant tenement – property that has the advantages of an easement
 - Servient tenement – property subject to an easement
 - Statutory easements – easements giving utilities or other bodies rights to run power or sewer lines across private property
 - Licences – a non-exclusive right to use property, revocable permission to use another’s land
 - Easement acquired by prescription – a right to the use of land acquired through free use of that land without interference over a number of years
 - Adverse possession – a right to actual possession which can be acquired by non contested use of the land for a significant number of years in an open and notorious fashion (number of years varies with jurisdiction)

- Restrictive covenant may bind future owners – typically restrictions as to the type of buildings or how property may be used, run with the land (tied to the property rather than the owner) must be expressed as a negative rather than a positive obligation ex) no building over three stories is to be built – vs. a building must be built within a certain time period +
 - Building scheme – set of restrictions placed on all the properties in a large development (similar to zoning bylaws)
- Tenancy in common – ownership of land by two or more people with equal undivided interests in it (may be entitled to a different percentage of proceeds on sale), if one dies that person's heir inherits his interest
- Joint tenancy – shared property ownership with right of survivorship (if one died the other will be left with the whole property)
 - Severance – owner's removal of chattel he or she has affixed, separation or division of joint ownership, action by one of the co-owners that is inconsistent with the joint tenancy ex) selling one's interest in the property to someone else to create tenancy in common with new third party (cannot simply will a portion of joint tenancy to another since wills operate after death)
- Option agreement – a subsidiary contract creating an obligation to hold an offer open for acceptance until the expiration of a specified time
- Agreement for sale – title will be transferred at some time in the future, typically once the property is fully paid for, an agreement that grants possession of property to the purchaser pending full payment of the price
- Mortgage – creditor lends borrower money to make the purchase and the title of the property is transferred to the moneylender as security to be re-conveyed upon receipt of the last payment
- Transfer and registration of interest in land
 - Agreement of purchase and sale – first stage in the purchase of real property, also referred to as an interim agreement between vendor and purchaser (contract governing the transaction, must contain terms and conditions, will govern relationship between the two)
 - Grants give title to property
 - Deed of conveyance – document transferring an interest in property (problem with record keeping)
 - Registration system – a means of registering and tracking property deeds, rights of parties determined by registered documents, lawyers must search the title back 40 years to ensure a chain of valid deeds to determine if the seller has good title

- Land titles system – registration system that guarantees title to real property, government guarantees, certificate of title determines the interest of the parties listed on it to the land specified, parties who sustain a loss can bring action against the registrar for damages
 - Certificate of title – conclusive evidence as to the ownership of a property
 - Newfoundland and PEI only Canadian jurisdictions that have exclusively deed registry systems
 - Widespread use of electronic registration systems
- Leasehold estates
 - Lasts for a specific or determinable period of time (or periodic)
 - Lease gives the tenant right to use the property to the exclusion of all others for the period of time stated
 - General requirements of contract law apply
 - Does not need to be in writing if less than three years – if not in writing part performance may satisfy
 - Leases run with the land
 - Some jurisdictions require long term leases be registered
 - Some jurisdictions have statute that apply frustration
- Types of tenancies
 - When a lease has a set duration it is a term lease
 - Where the lease allows the tenant to assign the lease and she does so all rights and claims in relationship to the property are given up to the new tenant
 - Sublet – tenant retains a reversionary interest given the tenant the right to retake possession at the expiration of the sublease
 - Periodic tenancy usually month to month – automatically renewed in absence of notice, notice to end must be given at least one clear period in advance
- Rights and obligations of the parties
 - May be modified by statute
 - Leases set out the rights of the parties
 - Based on contract
 - Vacant possession – landowner has an obligation to ensure that the premises are vacant and ready for occupancy at the time the lease period is to start
 - Quiet enjoyment – landlord must ensure that nothing happens to interfere with the tenant’s use of the property
 - Repair of premises – landlord has no general obligation to deliver premises that are clean or in good repair (only when it amounts to breach of quiet enjoyment), changes to these obligations can be made in the lease agreement, sometimes implied by the courts

- Termination – a lease that ends on a specific date ends when specified, notice must be given for periodic tenancy, if the tenant fails to leave after the lease has expired or after being given the appropriate notice a tenancy at sufferance relationship is established (landlord entitled to compensation)
- Tenants' obligations – tenant must pay rent when due, can ask the court for an abatement that will reduce the rent to be paid as compensation for the landlord's breach of the lease obligation, tenant not responsible for normal wear and tear, when undue wear and tear arises the tenant is obligated to make repairs, tenant's obligation determined by the state of the premises when occupied and the nature of the use of the premise, if a tenant installs a permanent fixture they are not permitted to remove it when they leave
- Remedies
 - Landlord can sue for compensation when lease breached (overdue rent, damages, may evict)
 - Forfeiture – requirement by the landlord that the tenant who breached the lease vacate the property
 - Relief against forfeiture – equitable principle that when a landlord retakes a property for failure to pay rent prior to the end of the lease term the tenant can pay the arrears and apply in the court to have the lease reinstated
 - Distress – seizure by landlord of any property left by tenant and holding of it until the rent is paid or sale of it to pay rent owing, limited in residential tenancy, notice required setting out the amount owing, can be sold once prescribed period expires, sale may result in rent being paid and continuation of lease
 - Landlord can also see contractual remedies
 - Also injunctions in some limited circumstances (either party carries out activity inconsistent with the lease terms)
 - Tenant has limited remedies – can sue for damages due to a breach, seek an injunction, cannot withhold rent, if landlord's breach significant enough to qualify as a breach of major term tenant may be entitled to treat the agreement as discharged and vacate the premises voluntarily
 - Occupiers liability imposed on tenant
- Personal property
 - Chattels
 - Moveable things ex) electronic devices, clothes, animals, vehicles etc.
 - Can become part of real property when it is attached to the land – the test is whether the purpose of the attachment as to enhance the land which leads to the conclusion that a fixture exists or for the better use of the chattel as a chattel
 - Owner of the real property free to remove a chattel that has become a fixture

- Tenants can remove fixtures they installed before moving out (too late to claim them after landlord retakes possession)
- Finders keepers
 - A finder gets good title against all but the original owner
 - If the goods are found on private property the owner of that property normally has a right to the item
 - Obligation to exercise care in looking after the found goods
- Bailment
 - One person takes temporary possession of personal property owned by another and a voluntary acceptance of the common law duty of safekeeping
 - Bailor – owner giving up possession
 - Bailee – person acquiring possession
 - Chattels or intangibles
 - Delivered – possession temporarily transferred and accepted by the bailee (control and possession)
 - No right to sub-bailment unless there is permission to do so or where it is customary in the industry
 - Fungibles – goods being of such a nature that one part or quantity may be replaced by another equal part or quantity of similar quality ex) wood, oil (the same goods need not be returned)
- Bailment for value
 - Involving a mutual benefit or consideration flowing between the parties
 - Usually commercial transaction, can arise otherwise ex) storing something for a friend and getting to use it
 - Bailee has a duty to care for the goods – reasonable person in the circumstances, may be determined by contract or common practise, exculpatory clauses may limit liability
- Common carriers
 - Trucking and bus companies, railroads, airlines, pipelines – have the duty of insurer
 - Bailees for value and have the obligation of a reasonably prudent person in the circumstances
 - When goods damaged or destroyed while in their care carrier is liable even if it was not caused by their negligence
 - Common carrier will not be liable when the damage was beyond its control, acts of war, acts of God
 - Can also include some exemption clauses
- Innkeepers' liability

- Also have the duty of insurers – responsible for lost or stolen goods of a guest unless it can be shown there was an act of God or the guest was negligent
 - To succeed guest must show that the establishment qualifies as an inn – food and temporary lodging
 - Liability may be reduced by statute in most jurisdictions to only when it can be proven that they or their employees were at fault (guests must be informed)
 - In Ontario has simply been reduced to \$40
 - Gratuitous bailment
 - When only one side receives a benefit
 - When bailee receives benefit standard of care is high
 - When bailor benefits standard of care is lower
 - Onus of proof shifts to the bailee (must prove not negligent)
 - Involuntary bailment
 - No obligation until the item is picked up – as soon as control is exercised there is a duty to take care of the goods (bailee is liable if actions were negligent), duty is lower
 - The rights of the bailee and the bailor
 - Contract terms prevail except where modified by statute
 - Statutory lien give some the right to retain goods until payment is arranged, right to resell after giving appropriate notice
- Intellectual property – Copyright
 - The Copyright Act gives the owner of the copyright a monopoly over the use of the created work prohibiting copying or reproduction of the work without permission
 - The work is protected but not the idea
 - Federal government has power to make laws with respect
 - Technological advancements have had serious implications
 - Matters covered
 - To be copyrightable work must be original and the product of the author's skills
 - Literary works – including tables, computer programs, literary compilations such as poems, stories and articles
 - Dramatic works – shows (movies, videos, television and theatre), and mime performances, including choreography and scenery
 - Musical works – compositions with or without words
 - Artistic works – paintings, drawings, charts, maps, plans, photos, engravings, sculptures, works of artistic craftsmanship and architecture
 - Performers' performances – actors, musicians, dancers and singers
 - Sound recordings – CDs, tapes, other methods of reproducing sound

- Communication signals – radio and TV
- Computer software and hardware (even where the computer code is completely different so long as it has similar look and feel)
- Creation
 - Creation of the work generates copyright protection automatically – no need to register or even publish the work (however wise because it establishes when it was created)
 - Registration can be done online at the Canadian Intellectual Property Office
 - Must be a citizen or resident of Canada (some international agreements establish common rules)
 - Need for increased international protection for copyright
- Ownership
 - Belongs to the person who create the work or to the employer where the work was created as part of employment unless there is an agreement otherwise
 - Can be assigned or licensed (in all or in part) to someone else
 - Courts will presume held by creator unless evidence to show otherwise
 - Even after assignment author will have moral rights
 - Cannot assign moral rights but author can waive them
 - If they have not been waived can still be compensated even if they don't own the copyright
 - Moral rights exist for same time as copyright and can be passed to heirs
 - Copyright holder has complete control over rights for author's life plus 50 years – exception for photos and government publications where protection limited to 50 years of creation of negative document
 - After that time work becomes part of the public domain and anyone can use it
 - Copyright infringement where person tries to obtain benefit from the sale, reproduction, distribution, performance, broadcast or other commercial use of the work
 - Moral rights infringed when plagiarism or the work is mutilated or modified in such a way that the authors reputation is harmed
 - Vicarious liability for copyright infringement
- Exceptions
 - Legislation and case law can be copied without fee
 - Fair dealing – use of copyrighted material as permitted under Canadian law for the purpose of research or private study, criticism or review or news reporting (required to give credit)
 - Educators excepted

- Libraries, archives and museums excepted
- Persons with perceptual disabilities excepted
- People making private copies of commercially recorded music or sound recordings excepted
- Remedies
 - Interlocutory injunction may be granted before trial to prevent further damage – to obtain must establish a prima facie case that there has been an infringement, that if the injunction is not granted irreparable harm will be suffered that could not properly be compensated for by an award of damages and that the balance of conveniences (who will suffer the greatest damage if injunction granted) is also in the plaintiffs favour
 - Anton Piller order – court order even before trial that the offending material be seized (typically no notice to offending party)
 - Permanent injunction – court order prohibiting offending conduct (if defendants unaware they were in violation the only remedy is an injunction, does not apply if copyright registered)
 - Delivery up – order directing the defendant to deliver all copies of the infringing items in his or her possession or control to the copyright owner (often sought with injunction)
 - When infringement took place knowingly damages (compensation for losses including lost profits) or an accounting (any profits made be paid over to the victim) may be obtained
 - Court may also award punitive damages to punish the offender
 - Limitation period in which an action can be commenced is 3 years (from the date the plaintiff discovered or ought to have reasonably discovered the infringement)
 - Statutory damages – a new remedy enabling a court to award damages that it “considers just” in the circumstances (generally between \$500-\$20000)
 - Enhanced injunction – a new remedy allowing a court to order a wrongdoer to refrain from future infringements of copyright in other works owned by the plaintiff copyright owner
 - Summary procedures - an arrangement allowing a court to make a decision based on affidavit evidence
 - Fine up to \$1 million and imprisonment up to 5 years
- The copyright board
 - Broad powers to handle disputes between individuals and otherwise supervise and regulate the industry
 - Tariffs are set fees that users must pay for using certain copyrighted material

- Royalties are sums paid as commission for sales of a work or permission to use it
- Patents
 - Must be an original invention to be patentable
 - Protection extends to the physical embodiment of the idea or concept – must be new, never disclosed before and the original work of the inventor, unique and distinguishable from other products, development or improvement that would not have been obvious, must have some utility or perform some useful function, must be possible to construct and use
 - Cannot patent a scientific principle or abstract theory
 - Cannot patent obvious improvements to other products, inventions designed for illegal purposes, things that cannot work and things generally covered by copyright law
 - No right to patent methods of carrying on business as yet in Canada
 - Creation
 - Must be applied for and registered – if someone does this before you, you are prevented from producing, using or profiting
 - Employers entitled to patent inventions of employees
 - Holder of a patent can assign to others
 - Joint patents can be obtained when several people have worked on the same invention
 - Patent records must be searched to ensure one doesn't already exist, application must be submitted with supporting documentation and fees (petition, specifications, claims statements, an abstract, a drawing – set out what it is supposed to do but also someone would have enough information to build one)
 - Office assigns an examiner, when all conditions have been met the patent will be granted to the person who first made an application (may take two or three years to complete)
 - Date of application in own country determines priority
 - Once issued patent number should be put on the manufactured item – patent pending just a warning that a patent has been applied for already
 - Gives holder monopoly for a maximum period of 20 years – requires that inventor publicly disclose how to make the item (hopefully lead to new inventions)
 - Will even protect someone who develops variations
 - Infringement make take place by unauthorized manufacturing, importing, selling or otherwise dealing with or using the invention
 - Holder entitled to same remedies that would be available in any civil action (injunction, damages, accounting)
- Trade-marks
 - Symbols or designs of business protected as trade-marks

- Registered protected under the federal Trade-marks Act
- Goodwill – reputation, ongoing relations with customers, product identification
- Name and trade-marks largely embody goodwill
- Purpose is to protect the value of the goodwill and prevent consumer deception
- Must be registered to be protected
- Gives the owner an exclusive right to use it throughout Canada for 15 years (renewable)
- Must be distinctive
- Injunctions available against imitators
- Surnames may not qualify as trade-marks – neither will words descriptive of the products function, or a functional design aspect of a product
- Trade-marks lost through common usage
- Trade names are names under which one conducts business – can be registered as a trade-mark only if it is used as one
- Registration and usage required
- Registered marked with an ®, unregistered marked with a TM
- Restrictions
 - Remedies same as copyright infringement
 - Covered federally and also by common law in the form of passing-off action (founded in tort and prevents a person from misleading the public into thinking it is dealing with some other person or business when it is not, can order compensation or that the action stop, available even with unregistered trademarks) – necessary to establish that the public has been misled, onus is on the plaintiff, if registered trade-mark may operate as a complete defence
- Industrial design
 - Federal Industrial Design Act protects a unique design, shape or pattern that distinguishes a manufactured article
 - Registration required for protection – must take place within one year of the publication and items should be marked with “D” followed by proprietor’s name or an abbreviation
 - Damages available for infringement if marked, otherwise just an injunction
 - Protection up to 10 years, maintenance fee required at 5 years to continue
 - Can be assigned or licensed
- Confidential information
 - Given in circumstances where it is clear it is not to be disclosed
 - Duty to keep confidence
 - For information to be confidential it must not be generally known and not already disclosed to others
 - Duty may arise due to parties relationship ex) fiduciary duty between principal and agent

- Trade secrets – particular kind of confidential information that gives a business person a competitive advantage, must be valuable to the business and not readily available to any other user or manufacturer
- Employers should expose covenant not to disclose trade secrets or confidential information acquired through process of employment (sometimes include restrictive covenants in contracts)
- Employees, consultants and contractors should sign non-disclosure agreements
- Remedies
 - Injunction, damages and accounting available
 - Courts reluctant to grant injunctions that prevent employee from earning a living
 - Sometimes punitive damages
 - Can sue competitor for inducing breach of contract

Chapter 14 – Information Technology and the Internet

- Abuses of the internet have created considerable demand for imposing some formal controls
- Instantaneous global communication – cheap for everyone
- Far ahead, “outside” of the law
- Need for international cooperation
- Problem of jurisdiction – internet blurs the location markers
- Often identity of the person online is uncertain
- Inadequate consumer protection devices
- Protecting the rights to the vast supplies of information also a problem
- Lack of enforcement a major problem
- Implications for tort law – Defamation
 - Mass audience – communication of statements such as deceit, negligent misstatement and defamation
 - Absence of an intervener or publisher to monitor communication
 - Is it libel (written or more permanent form) or slander (spoken)?
 - Linked to broadcasting information – libel may apply
 - Still no definitive answer
 - When author is unknown, uses a false name or resides in a different jurisdiction with different rules it is difficult to sue
 - Internet service provider can be forced to disclose the source
 - ISP will be liable only where it encouraged the offending behaviour or they knew or ought to have known of it and failed to remove it after notification
 - Canadian courts appear willing to assume jurisdiction
 - When determining damages, size of audience considered
- Nuisance
 - Current tort law likely to adapt to new technology – can be a nuisance even though it is over a distance
- Negligence and misrepresentation
 - Careless recommendations, advice or tips are given
 - Disclaimers should be used to help protect businesses (also specific instructions and restrictions)
 - Information must be kept up to date
 - Also problems with jurisdiction and who to sue
- Product liability
 - Selling products over the internet will be held liable under contract law or negligence if the product causes injury

- Injured party is the purchaser – can sue the seller
- If someone else injured – negligence action against manufacturer unless consumer protection legislation
- Problem will be where goods are sold and manufactured
- Seller should include provisions in the contract
- Internet transactions
 - Most involve valid contracts – basic requirements must be met
 - Uniform Electronic Commerce Act – an offer may be made and accepted electronically
 - Advertisements (usually just an invitation to treat) if they have clear terms, certain, complete and are communicated it can be an offer (accepted by clicking the button)
 - Consensus
 - Sometimes required to indicate that they have read and agreed to the stores terms and conditions by clicking the “I accept” button
 - Software usually begins downloading immediately – often in the form of a license
 - Form of assent (did the offeree really know and accept the terms? Conduct may constitute acceptance) and reasonableness of terms affect enforceability of electronic contracts
 - Post-box rule will likely not apply to online transactions – when instantaneous communication involved contract is formed when and where the acceptance is received
 - Difficult to determine when and where because email involves asynchronous communication and because email is mobile (can be received at multiple locations)
 - Sometimes considered effective when it reaches the information system of the recipient
 - Capacity
 - Difficult to be sure whom you are dealing with over the internet
 - Buyers beware and sellers include restrictions and disclaimers
 - Writing
 - Can be easily altered – sophisticated methods to ensure authenticity of signatures and documents
 - Statutes to make electronic documents equivalent to written ones
 - Many registries available online
 - Some jurisdictions still necessary to print a document, sign it and return it to the other party to provide written evidence
 - Constitutes as writing if the document meets the purpose for which the writing was required (all common law provinces allow for electronic substitution so long as information is accessible and useable for subsequent reference)

- E-commerce legislation
 - In common law provinces specifies how the time and place of formation of electronic contracts are to be determined
 - Ontario Electronic Commerce Act 2000– splits the risk of failed communications between the parties (creating a time when the message is deemed to be sent and creating a presumption of reception)
 - Sent when it enters the information system that lies outside of the senders control
 - Received when it enters the addressee’s information system such that it can be retrieved and processed
 - Deems the information sent from the sender’s place of business and received at the addressee’s place of business (physical location irrelevant)
 - Remains open to the parties to agree to modify rules ex) when acceptance will be effective, forum selection of jurisdiction
 - If forum is not selected governed by the laws of the jurisdiction where the acceptance is received
 - Recognizes electronic signatures for all documents except wills and negotiable instruments
- Sale of goods and consumer protection
 - Money should never be sent without independent verification that good are shipped
 - Spam – unsolicited bulk email
 - Consumer protection statutes now apply to internet transactions
 - Merchants must disclose specific information prominently – consumer must be able to print and retain this information
 - In Ontario:
 - The name of the supplier and name under which the supplier carries on business
 - Telephone number of supplier, address of the premises from which supplier conducts business and information respecting other ways in which supplier can be contacted
 - Fair and accurate description of the goods and services proposed including technical requirements
 - Itemized list of the prices at which the goods are proposed to the consumer including taxes and shipping charges
 - Description of each additional charge that may apply such as customs, duties, brokerage fees
 - Must also be notified of cancellation, return, exchange or refund conditions
 - Must provide opportunity to accept or decline proposal (clicking “I accept”)
 - Must send a copy of the contract to the consumer within a set time (15 days)

- Consumers right to cancel contract if above conditions not met or merchant fails to begin performing within set time frame
- Legislation required to prevent installation of spyware
- Securities laws need to adapt to new technologies ex) vulnerability to hackers
- Electronic money
 - Credit cards, debit cards, and other forms of electronic money replacing negotiable instruments
 - PayPal – third party internet business designed to allow efficient exchange of money
 - Ample opportunity for criminals to gain access to funds (some protection legislation in many jurisdictions)
- Criminal activity and other abuses
 - Fraudulent use of programs, piracy on the internet, hackers stealing information or service
 - Pornography, theft, gambling, defamation, harassment, paedophilia, hate literature, human rights violations
 - Often best protection is to be defensive – change password frequently, encrypt data, virus and hacker protection software
- Jurisdiction
 - Conflict of laws – rules used to resolve questions as to which jurisdictions laws are to be applied to a particular issue, includes paramountcy, a principle that if there is overlapping jurisdiction federal law prevails, also the area of law dealing with disputes with parties in other jurisdictions
 - Must be a degree of interactivity or connection to have a local court take jurisdiction
 - Some areas try to attract business by making themselves a safe haven for questionable activities
 - Hard to take a judgement from one jurisdiction and enforce it in another
 - Parties should make their own rules specified in their contract
 - Trading of securities closely controlled in whatever form – subject to all normal restrictions imposed in Canada when traded online
- Privacy
 - Voluntary protection of privacy has failed
 - Private data often sold for profit
 - Individuals with buying habits can be targeted by advertisers with this information
 - Personal Information Protection and Electronic Documents Act – applies to all jurisdictions except where provinces have substantially similar legislation
 - An organization is responsible for personal information in its possession or custody that has been transferred to a third party
 - Unauthorized interception of communications now a criminal offense

- Computer data very vulnerable
- Embedded devices called cookies that track a users activity are sometimes misused
- Employment
 - Business must develop programs to control employee conduct on computers
 - Employees can tamper with data and expose employer to liability when company equipment used for dealings with outsiders
 - Challenge to monitor use while not interfering with privacy laws
 - Employer will be responsible for data transmission that results in intentional or careless violations of intellectual property rights, privacy laws or even criminal law
 - Must also be concerned about protecting client information
 - Must be cautious about emails – can be traced
 - Employers should inform employees of surveillance – company must show that steps have been taken to prevent abuses, comprehensive company policy and education program with respect to communications, confidentiality and data storage is necessary
 - Monitoring have implications based on the Charter and the criminal code
 - Courts now recognize that the tort of invasion of privacy exists at common law
 - Prudent employers would assume employee consent
 - Also consider impact of PIPEDA before monitoring emails
 - Personal information includes information about an identifiable individual
 - Another factor is employee autonomy – if they feel overly monitored may impact productivity and quality of work
 - Employers have the right to reprimand employees for using employers computer system inappropriately – must have policy in place
- Intellectual property online
 - Current copyright and trade-mark law applies to the internet
 - Registration always recommended
 - Copyright and file sharing
 - Copying music is a massive problem that has resulted in serious litigation
 - Hard to keep in control
 - Has had serious impact on industries
 - Protected mainly under copyright legislation in Canada
 - Trade-marks
 - Viewing a website is not violation but downloading information from it may be
 - When it is used to enhance someone’s own website without permission this is an actionable infringement
 - Problems with enforcement
 - Ease of linkage of websites and information

- Domain names
 - Like a trade-mark, identifies a user
 - Can only be used once – conflicts over the acquisition and use of the same or similar name
 - Cybersquatters – buy up certain names just to sell them to others
 - Disputes often solved with trade-mark law
 - Issued domain names may be reversed because of bad faith (obtaining the name to resell at a profit, preventing someone who has a greater right from using it or to disrupt another's business)
 - Canadian Internet Registration Authority in control
- Regulation
 - More regulation coming
 - Difficult to enforce regulations
 - Taxation issues – tracing residency etc.
 - Determining who is responsible – many involved, tracing identity
 - Internet service providers may be responsible to stop abuse
 - Dispute resolution
 - Alternative dispute resolution used to settle
 - Negotiation and mediation services
 - Regulatory trends
 - Self-regulation
 - Netiquette

Chapter 15 – Sales and Consumer Protection

- The Sale of Goods Act
 - Essentially a summation and codification by the British Parliament of the case law in place in the nineteenth century
 - Only minor variations by every common law province in Canada
 - Primary purpose is to imply the terms that the parties to sale of goods transactions often leave out
 - Stated intention of the parties will override the provisions of the Act
 - Applies to all situations where goods are bought and sold
 - Normal contract rules apply to sale of goods transactions except where overridden by the Act
 - The rules with respect to mistake, misrepresentation, privity and breach apply to the contract
- Goods and Services
 - The Act affects only those contracts involving goods
 - Goods
 - Tangible items such as watches, televisions, books etc.
 - Does not include real estate
 - Does include crops still growing on land
 - Buildings and building materials are subject to the Act until they become attached to land (then treated as part of the real property and are not subject to the Act unless the contract itself provides for the building to be severed from the land before the sale or under the contract of sale)
 - Transactions involving both goods and services can pose a problem
 - Lawyers draft a will
 - Artist paints a portrait
 - Act will not apply
 - If the client were to then resell the portrait, Act would apply
 - Sometimes service can be separated ex) when parts are installed to repair a car
 - When only a service involved the court may still be willing to imply terms such as the requirement of a certain level of quality even though the Act does not apply
- Transfer of Goods
 - Act applies only when it can be demonstrated that the parties intended that the actual possession and property of the goods would transfer to the buyer
 - When goods are used to secure a loan with no intention that they actually be transferred the Act will not apply even though a bill of sale may have been used to create the credit relationship

- Monetary Consideration
 - Necessary that the sale involve the actual payment of some money
 - Act does not apply to barter
- Requirement of Writing
 - Some jurisdictions still require in their Acts that sales of goods sold over a specified amount must be evidenced in writing for the contract to be enforceable
 - Part performance when some of the goods have been accepted by the buyer will likewise make the contract enforceable
 - Giving something in earnest will also make the contract binding
 - BC, New Brunswick, Ontario and Manitoba have eliminated any writing requirement
 - BC requires a written contract for direct sales of consumer goods
- Title and Risk
 - Agreement to sell
 - When the title (the property interest in the goods) does not transfer immediately upon the sale agreement's being concluded
 - Act also applies to this future transfer of goods
 - Whoever has the title bears the risk of damage or destruction to the goods unless the parties have contracted otherwise
 - Methods for overriding this provision:
 1. C.I.F. Contracts (cost, insurance and freight) – doesn't matter when title transfers because one of the parties has been designated as being responsible for paying the costs involved in the shipping of those goods as well as arranging insurance, assumes risk in this process
 2. F.O.B. Contracts (free on board) – parties have agreed that the seller will bear the risk until a specified point in the transportation process
 3. C.O.D. Contracts (cash on delivery) – entitles the seller to maintain the title as well as control over the possession of those goods until they are delivered to the buyer's premises and paid for
 4. Bills of Lading – often used by the seller to maintain control over the goods during shipment, document given by the transporter of the goods to the shipper as a form of receipt, seller can maintain title by naming itself as the party entitled to receive delivery of the goods at their destination
- Transfer of Title
 - Determine which remedies are available
 - If title is transferred the seller can sue for the entire price
 - Otherwise only damages for breach of contract are available

- Who has title also determines who has first claim to the goods in the event of default or bankruptcy
- Rule #1
 - When 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 are postponed
 - If the goods are identified and nothing more has to be done to them the buyer gets title at the point of contracting to the purchase
- Rule #2
 - When 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
 - Notice required if repairs are needed
- Rule #3
 - When 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, property does not pass until the act 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 in them 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 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 that time and if no time has been fixed then on the expiration of a reasonable time
- Rule #5
 - When goods are not manufactured or identifiable as goods in question title passes upon unconditional appropriation and assent
 - Applies to goods that have not been manufactured at the time the contract was entered into or that exist but have not yet been separated out and identified as the particular goods to be used in a given transaction
 - Notice to the buyer that the goods are ready may be the most common method of satisfying the assent or approval provision
 - Assent is often implied from the circumstances

- Rights and Obligations of the Parties
 - An implied warranty is a minor term
 - A breach of warranty does not discharge the victim from the rest of his contractual obligations
 - A breach of an implied condition allows the victim to treat the contract as ended
 - Breach of condition does not always bring a contract to an end
 - Victim of this breach has the option to ignore it or to treat it as a breach of warranty
 - By accepting the goods, the victim of the breach may also lose the right to have a contract discharged by breach of condition
 - The parties are free to designate a term as a condition or warranty – the court retains the right to make final determination
 - Parties try to contract out of all obligations and responsibilities
 - Properly worded exemption clause can overcome even a fundamental breach – particularly where sophisticated businesspeople are involved on both sides
 - If such clauses are carefully worded they can override the provisions of the Act unless prohibited by statute
 - Several provinces have enacted legislation prohibiting the seller from excluding or limiting these provisions relating to fitness and quality in consumer sale transactions
 - Others allow parties to a contract to exclude implied terms
- Right to Convey Clear Title
 - Act implies several terms into sales agreements that cover a seller's right to sell goods to a buyer
 - S. 13(a) – makes it a condition that the seller has the right to sell the goods or will have the right at the time the title is to be transferred
 - S. 13(b) – requires that the seller provide quiet possession of the goods as a warranty of the contract
 - Means that the goods must be delivered in such a condition that they can be used and enjoyed by the buyer in the way they were intended
 - S. 13(c) – specifies that it shall be an implied warranty of the contract that the goods shall be free from any charge or encumbrance that has not been disclosed to the buyer
 - Such a lien gives the lien holder the right to retake the goods if not paid
 - Presence of such a lien without telling the buyer would be a breach of warranty
 - Even if a search is not done gives the buyer the right to claim against the seller for any losses if a lien is in fact present
- Goods Must Match Description
 - Sold on the internet, by catalogue, by mail order or through other forms of distance shopping

- Usually with a picture and accompanying text
- S. 14 – provides that when goods are sold by description there will be an implied condition that the goods delivered must match that description
- Goods Must be of Merchantable Quality and Fit for Purpose
 - Act applies to both small and large transactions whether they are consumer or commercial in nature
 - Parties can contract out of its provisions if they wish
 - S. 15 – requires that when goods are sold by description they must be of merchantable quality
 - Means that the goods must be free of any defect that would have persuaded the buyer not to purchase them at the agreed upon price if the buyer had known of the defect at the outset
 - Buyer with a particular need will rely on a seller's recommendation as to what product to use
 - Implied condition that the goods will be reasonably fit for that purpose
 - Requirement of fitness applies not only when the goods are being used for some unique purpose, but also when they are being used normally
 - Protection does not apply when the goods are purchased by trade name in such a way that it is clear that the skill of the seller is not being relied on or when it is not in the normal course of the seller's business to supply the goods
 - In BC goods leased or sold must be durable
 - Provisions of fitness and quality apply but so does caveat emptor
 - Result is that while the buyer is required to be careful when buying goods, she still has the right to expect a certain level of quality and protection when such care has been shown
- Goods Must Match Sample
 - Act uses similar approach for purchase of goods after seeing a sample
 - Implied condition that the bulk of the goods must match the sample provided and be free of any hidden effects
- Other Implied Terms
 - Unless otherwise specified by the parties
 - When no price is stated, a reasonable price must be paid for goods
 - Delivery must take place within a reasonable time and payment is due upon delivery
 - Time of payment will be treated as a warranty unless the parties state time is of the essence
 - Time of delivery will be treated as a condition or a warranty will be implied from the conduct of the parties

- Bulk goods – if significantly too little or too much is delivered the buyer is free to either reject the goods or keep them and pay for them at the contracted rate
- Sales Made Online
 - Acts vary in many jurisdictions
 - Possible for the parties to override even the requirements with respect to fitness and quality
 - Normal practice for them to include terms that override or limit these terms
 - Some sellers may fail to make those exemptions clear to the buyer by burying them at the end of the site or in pages that most buyers skim or neglect to read at all
 - Online retailers are required to take reasonable measures to draw such terms to the attention of the other party and if they fail to do so these terms do not bind the buyer
- Seller's Remedies
 - When the buyer defaults, the seller has an unpaid seller's lien against the goods
 - Gives the seller the right to retain the goods until appropriate payment has been made, even though title may have transferred
 - Seller's right of stoppage in transit
 - If the goods are en route to the buyer and the buyer defaults the seller has the right to intercept the goods and retake possession from the transporter as long as the goods have not yet reached the buyer
 - The Bankruptcy and Insolvency Act allows a seller to recover goods even after they are delivered to the buyer if within 30 days of delivery the buyer had become bankrupt or a receiver has been appointed
 - Gives the seller priority over the bankrupt's other creditors
 - When the seller exercises this power to retake the goods sold and after appropriate notice remains unpaid the goods can be sold to recover the loss
 - Notice of resale is not required when perishable goods are involved
 - In the event of breach of contract the seller has the right to sue for the price in cases of default or refusal of delivery once title has passed
 - If the time specified for payment passes the seller can sue for the price even if the title has not yet passed to the buyer
 - Seller must be careful to not do anything inconsistent with his continued willingness to perform
 - Seller may be able to claim for damages for breach of contract even in situations where it is not possible to claim the price of the goods
 - Normally include the cost involved in restocking and resale
 - Compensated when goods must be sold at a lower price
 - Seller has obligation to mitigate losses

- When a deposit is involved the seller can keep the deposit – not the case when the prepayment is a down payment only
- Buyer's Remedies
 - Those provided in general contract law
 - Misrepresentation may be able to rescind the contract or seek damages when there has been fraud or negligence
 - When a condition of the contract is breached the buyer may refuse to perform or demand return of any money paid
 - If a warranty is breached the buyer must go through with the deal subject to a right for damages
 - Damages will usually be based on the difference between what the buyer had agreed to pay for the goods and the cost of obtaining the goods from another source
 - Buyer can claim additional losses suffered as well
 - If title has passed buyer may lose right to discharge the contract in the event of a breach
 - Damages usually determined by what it costs to bring the goods back up to the specifications in the original contract or by their reduction in value because of the breach
 - Physical injury or damage to other property are recoverable provided they were reasonably within the contemplation of the parties at the time the contract was entered into ex) food poisoning, specific performance
 - Every Canadian jurisdiction has enacted an international sale of goods act – To bring the same kind of structure and certainty to import and export dealings as the Act provides domestically
 - Federal government is signatory to the U.N. Convention on the International Sale of Goods which governs trade between Canada, the US and 60 other signatory states
- Consumer Protection
 - Consumer transactions involve goods or services purchased by individuals for personal use and not for resale or for business purposes
 - Legislation imposes standards and responsibilities on manufacturers and suppliers of goods and services – Controls the use and disclosure of information and advertising, safety and quality of the goods, unethical or otherwise unacceptable business practices
 - Contractual themes of caveat emptor and freedom of contract dominated consumer transactions
 - Statutes prevent abuse of vulnerable consumers
- Federal Legislation
 - Departments enforce statutes, educates and protects consumers
 - Industry Canada established under the Department of Industry Act

- Foster a growing, competitive, knowledge-based Canadian economy
 - Fair, efficient and competitive marketplace
 - Innovative economy
 - Competitive industry and sustainable communities
- The Competition
 - Competition Bureau – to protect and promote competitive markets and enable informed consumer choice in Canada
 - Independent law enforcement agency that administers and enforces the Competition Act – criminal statute that aims to maintain and encourage competition in Canada so that Canadians can benefit from product choice, competitive prices and Quality services
 - Controls mergers
 - Competition Tribunal reviews them to determine whether they will have the effect of limiting or lessening competition
 - Horizontal – one competitor buys another
 - Vertical – merger of supplier and retailer
 - Conglomerate – companies not in direct competition
 - “Efficiency defense” – even mergers that will lead to price increases may pass the provisions of the Act if the efficiencies gained exceed the anti-competitive effects
 - Criminalizes some anti-competitive practices
 - Conspiracy to unduly lessen competition, bid rigging, discriminatory and predatory pricing, price maintenance and refusal to supply, certain misleading advertising and deceptive marketing practices
 - Criminal prosecution must be proven beyond a reasonable doubt
 - Fines, imprisonment, injunctions ordering cease-and-desist
 - Some practices subject to civil sanctions – Refusal to deal, consignment selling, tied selling, exclusive dealings, market restriction, delivered pricing, abuse of dominant position and merger review
 - Act amended in 2002 to create a new right of private access – Private persons or businesses to seek legal remedies
 - Primary purpose of the Act is to ensure the proper operation of the free-market system
 - Prohibit any attempt to unduly restrain competition
 - Not all agreements restricting competition will be illegal or in violation of the Act
 - Budget Implementation Act, 2009 amended the Act
 - Areas of price fixing, bid rigging, agreements between competitors, misleading advertising, mergers and acquisitions
 - Fines and jail sentences increased

- Now assumed that an agreement among competitors automatically impacts competition
- Other Federal Legislation
 - Food and Drugs Act
 - Intended primarily to control the sale of foods, drugs and cosmetics unfit for consumption or use
 - Prohibits misleading or deceptive claims associated with the sale, labeling and advertising of these products
 - Controlled Drugs and Substances Act
 - Certain dangerous drugs that are useful are allowed to be sold under controlled conditions
 - Offence to traffic in certain controlled drugs such as amphetamines and steroids
 - Hazardous Products Act
 - Controls the manufacture, import and sale of products that are inherently dangerous
 - Inspection, analysis and enforcement provisions
 - Explosives Act, Pest Control Products Act, Motor Vehicle Safety Act, Organic Products Regulation
- Provincial Legislation – Responsibility for Goods
 - When products are defective causing injury or loss consumers have recourse in either contract or negligence
 - Statutes overcome problems in contract and tort law
 - Sections of the Sale of Goods Act can be overridden by properly drafted exemption clauses
 - Many provinces have enacted legislation removing the right to override these provisions in consumer transactions
 - Manufacturers usually include a “warranty” with their products stating the extent of their responsibility for the product – this is an exemption clause and with recent legislative changes may not be relied upon by as sellers can sue for breach
 - Advantages to suing in contract
 - Plaintiff does not need to prove that the defendants failed in their duty of care
 - Damages awarded can go far beyond a refund of the purchase price
 - Privity is a large obstacle in contract cases
 - Can be overcome by statute or the courts (shown willingness)
 - Some provinces have extended the requirements of fitness and quality to anyone the seller could reasonably foresee might use the product and others have eliminated privity as a defense when warranties of fitness are implied
 - Duty to warn when hazardous products

- Must make them as safe as possible, warn the potential user of the dangers, provide information on their proper use
 - Injured consumer can successfully sue in contract or negligence when steps are not followed
- Unacceptable Business Practices
 - False or Exaggerated Claims
 - Prohibit or control certain unacceptable business practices such as making misleading or false statements to persuade people to buy a product
 - Controlled by statute with most provinces incorporating them into the contract and making any attempt to override them void
 - Vary from province to province
 - In addition to the penalties imposed by governments the consumer is given the right to have the contract rescind or specifically performed or sue for damages
 - Innocent but misleading statements may still qualify
 - Government bodies power to investigate complaints and deal with complaints against offending merchandisers, including the powers to impose fines, suspend licenses and pursue a civil action on behalf of the consumer
 - Unconscionable Transactions
 - Desperation, poverty, lack of sophistication or intellectual weakness
 - Prevent merchants from taking advantage legislation has been enacted in either separate statutes or included in existing
 - In some provinces this legislation is restricted to situations involving the borrowing of money
 - Courts can set the contract aside, modify its terms or order the return of money paid
 - Other provinces extend beyond loan transactions
 - Factors such as physical infirmity, illiteracy, inability to understand the language of the agreement, undue influence, price that grossly exceeds the value of the goods, lack of reasonable benefit
 - Rescission, damages and punitive damages available
 - Must be an inequality of bargaining power (without independent advice, enters where terms are unfair, impaired by reasons of his own needs or desires or ignorance coupled with undue pressures brought upon him)
 - Gift Cards
 - May not have expiry dates
 - Only certain fees can be charged
 - Certain activities such as refusing to accept as partial payment on a purchase are unfair practices

- Controlled Business Practices
 - All provinces restrict door to door sales known ad direct sales
 - Imposing a cooling off period which allows a purchaser a given period of time to change his mind and to rescind the contract
 - Some jurisdictions require disclosure of certain info, contract be in writing and extended cooling off
 - Unsolicited goods and services or credit cards, discounted income tax returns, pre-arranged funeral services, inappropriate debt collection activities, prepaid contracting, time sharing contracts, referral selling (involves purchaser supplying a seller with a list of friends)
 - Methods of control
 - Requiring that the party supplying be licensed
 - Fines or imprisonment
 - Powers to investigate, seize records and impose penalties for violations
 - Initiate actions on behalf of victimized consumers or help them start their own actions
- Loan Transactions
 - Every province has enacted legislation requiring that the true cost of borrowing be disclosed thus prohibiting excessive rates of interest and costs in loan transactions
 - Prohibit misleading information in advertisements about the cost of borrowing, require the cost of borrowing be stated in a standard format, moneylenders to be registered
 - The unconscionability of the transaction has an impact on the severity of the penalty imposed by the courts – Bargaining positions relatively equal and that each had independent advice the reduction in the eventual interest deemed payable may be less
- Debt-Collection Processes
 - Unpaid creditors turn to collection agencies
 - Common law remedies such as defamation, assault and battery, trespass and false imprisonment usually ineffective
 - Abusive debt collection practices controlled
 - Agencies to be licensed and there is a set of unacceptable collection practices they must follow
 - Some provinces require that debt-collection agencies use only previously approved form letters in their demands for payment
 - Loss of license and fines
 - Creditor reporting practices controlled
 - Require such bodies to be registered, limit the type of information that they can disclose, make it an offence for them to knowingly include false information in a credit file, give the individual the right to inspect the file and to correct or remove erroneous information and

prohibit any agency from making any report to a lender without the written permission of the borrower

- Consumer Service Bodies
 - Government agencies enforce statutes, educate and publicize
 - Usually includes the right to hear and investigate complaints, seize records, search premises, suspend licenses, impose fines or some other corrective action and initiate civil actions on behalf of the consumer
 - Consumer Measures Committee
 - Private agencies also provide services
- Negotiable Instruments
 - Often associated with consumer and commercial transactions
 - Cheques
 - Order made by the drawer to his bank to pay funds to a third party called the payee
 - These funds must be paid as soon as the cheque is presented for payment or on demand
 - Convenient means of transferring funds
 - Certified cheque – secure, payment guaranteed by the bank
 - Many banks now use bank drafts in the name of the payee
 - Give the creditor a series of post-dated cheques that are subsequently deposited on the appropriate dates
 - Bills of Exchange
 - Sometimes called drafts
 - Three parties involved
 - The drawer orders the drawee to pay the payee a certain sum of money
 - The drawee need not be a bank and the instrument may be made payable at some future time
 - Used in sophisticated financial transactions
 - Drawer retains the power to countermand even after he has given draft (or cheque) to the payee
 - Payee will often take the instrument directly to the drawee to determine if the latter will honor it
 - If the drawee accepts the instrument a direct obligation is created on the drawee to pay the payee
 - Promissory Notes
 - Involves two parties
 - The maker promises to pay a certain sum to the payee at a specified future date or on demand

- Always associated with a creditor-debtor relationship
- Transferability
 - Stop payment order may not protect drawer
 - Transferred to some innocent third party the latter can enforce that instrument despite any difficulties that arise under the original transaction
 - Holder in due course (person receiving the instrument, innocent third party) can enforce instrument dependent of problems
- Endorsement
 - Endorser adds credit to the instrument
 - If the instrument is not honored when it is presented for collection the holder can turn to the endorser for payment
- Promissory notes a part of loan transactions because they provide a great deal of flexibility making them much more attractive to third parties to whom the creditor may wish to assign the proceeds of the transaction
- Advantages to the holder in due course reduced in consumer transactions

Chapter 16 – Priority of Creditors

- Methods of securing debt
 - Security helps ensure creditor gets paid
 - Priority – when there are two or more creditors the one entitled to be paid first has priority
 - When a creditor has priority they are a “secured creditor”
- Personal property
 - Real property (land, buildings attached to the land and fixtures) and personal property (chattels and choses in action) can be used to secure debt
 - More common to take real property or chattels as security
 - Pledge – an item that a creditor (such as a pawnbroker) takes possession of as security and hold until repayment
 - Personal property security involves right to take possession upon default
 - Under modern legislation the creditor usually does not actually assume ownership of the goods – but has first claim to them in the event of default (may occur when payment is missed or when debtor fails to meet other obligations that increase creditors risk or threaten the value of the assets used as security)
- The traditional approach
 - Conditional sales agreements – possession of goods given to buyer, seller retains title, after final payment title transfers (Sale of Goods Act applies)
 - Chattel mortgages – creditor not the seller, transfer of title of goods as collateral security to secure loan from bank, debtor has possession, when last payment made title returns (Sale of Goods Act does not apply)
 - Assignments of accounts receivables – using a chose in action as security, upon default creditor has right to intercept the payment of accounts receivable
 - Leases – operating lease (goods are rented to the lessee to use during the lease period after which they are returned to the lessor), lease to purchase (essentially a credit purchases, title transferred at the end of the period to the lessee) possession of the goods goes to the lessee and title remains with lessor
- The Personal Property Security Act
 - Now used in all jurisdictions in Canada
 - Creates a unified approach toward the use of personal property as security
 - Traditional methods as well as other less common forms of securing property (licenses, shares, bonds and even intellectual property)
 - Provides rules to determine the ranking of various claims when several secured creditors have claims against those assets
 - Right to take possession of goods used as security even when they get into the hands of an innocent third party is the essential nature of a secured transaction

- To protect innocent third parties the secured creditor required to register security claim at the designated government agency
 - Purchases or potential creditors can search the title to be forewarned of other claims
- Creating a secured relationship
 - First stage – parties must enter into the contractual agreement (set out obligations and remedies available)
 - Second stage – secured interest must attach to the collateral that has been identified
 - Attachment – situation in which value has been given pursuant to the contract, giving the creditor a claim against the assets used as security if there is a default by the debtor
 - Third stage – secured interest must be perfected
 - Perfection – protection of a secured creditor’s claim either by registering the secured obligation (a financing statement requires the complete name and address of the parties, type and description of the security used and the date and time of registration) or by taking possession (when promissory notes or shares involved for example) of the collateral
- Priority of secured creditors
 - First to perfect usually prevails
 - Including after-acquired assets can cause a problem
 - Purchase money security interest – a security interest on specific goods that has priority over a general security agreement provided it is registered within a specified time
 - Buyers in the normal course of business are not bound
- Rights and remedies upon default
 - Creditor can take possession and sell collateral
 - Must hire a bailiff who can go onto the debtor’s property and seize the goods – if debtor won’t allow access bailiff can apply for court order, if still won’t cooperate police may become involved
 - Creditor must take “commercially reasonable” care to protect the good and keep them in good repair – if they require repairs to sell them those expenses will b added to the amount debtor owes
 - Before sale occurs interested parties must be given a chance to redeem the goods by paying money owing – notice must be given, party receiving the notice has the right to redeem, failure to do so will result in the sale
 - Notice – include description of goods, amount owing, debtor will be liable for any shortfall between amount owing plus expenses and the amount realized from the sale

- In some provinces right to sue for a deficiency is lost when possession of goods is taken in other provinces rule applies only when consumer goods are involved
- Creditor must consider alternatives – pursuing breach of contract vs. taking possession, can also lose the right to deficiency by failing to properly look after the goods or failing to get a fair price
- In all jurisdiction the debtor is entitled to the surplus from a sale
- In some jurisdictions creditor has the right to simply keep the goods in satisfaction of the debt instead of selling them – ends any claim the debtor might have to a surplus or creditor to a deficiency (notice must still be given)
- Guarantees
 - Common when corporations are involved
 - In consumer transactions used to make another more substantial debtor liable to pay a loan or other debt
 - Guarantors ensure that the debt will be paid even when the debtor defaults
 - Involves a secondary or conditional obligation that arises only in the event of default
 - Indemnity – when a person agrees to be directly responsible for paying the debt of another (primary obligation)
 - Evidence in writing of guarantee required
 - All elements of a contract must be present – consideration sometimes a problem (the creditor refraining to sue the debtor)
 - Problem arises with consideration when money transferred before guarantee
 - Lending institution usually require they be placed under seal
 - Rights and obligations of the parties
 - Creditor has duty to protect the interest of the guarantor – make sure they understand the full nature of the guarantee
 - Creditor should avoid subsequent dealings that may weaken the position of the guarantor – significant changes in the contract without consent will relieve the guarantor of obligations (creditor deciding not to sue and simply allowing more time to pay will not be considered a substantial change)
 - Creditor always obtain consent of guarantor
 - Releasing security may release guarantor
 - Withholding of important information from the guarantor by the creditor may discharge guarantee (substantial and unusual nature)
 - Contract can modify rights and obligations
 - Continuing guarantee – a provision in a guarantee allowing the creditor to advance further funds without affecting the obligation of the guarantor to pay in the event of default

- When default occurs creditor not required to demand payment from debtor before seeking payment from the guarantor
 - A guarantor who pays the debt is subrogated to the rights of the creditor (steps into the creditors shoes and any right or remedy available to the creditor after payment is assumed by the guarantor including the right to seize chattel used as security or to sue)
 - Defenses available to the debtor also available to the guarantor
- Other forms of security
 - The Bank Act
 - Federal statute, predates the PPSA
 - Allows banks the flexibility in what they can take as security
 - Growing crops, inventories, goods in process of manufacture can be taken
 - Most be possible to sell the collateral during the course of business without affecting the nature of the security
 - Potential conflict between the two acts
 - Floating charges
 - A security not fixed on any particular assets until default or some other specified event
 - Used by creditors when dealing with corporations that must be free to buy and sell the assets used as security for the loan ex) bonds
 - Allows business to continue but provides priority
 - Builder's liens
 - Created to overcome a problem in the construction industry
 - Suppliers often dealt with contractors rather than with the land owner
 - Statutes now give these suppliers of materials and work a claim for payment against the actual land and buildings enhanced by their goods and services
 - Once the goods are provided the suppliers and workers can register a lien giving them a claim against land/building
 - Prevents the owner of the property from unjustly benefitting from the goods and services that enhance the value of the property without paying for them
 - Holdback – a specified percentage that a person owing funds on a construction contract must retain for a specified period to protect against claims made by the suppliers of goods and services (set at 10% in most provinces)
 - Owner check land registry and if there are no liens pays out to the general contractor
 - If there are liens the amount is retained and made available to the claimants
 - Owners obligation usually limited to the amount of the holdback

- Requirement of holdback applies to anyone in the construction chain
 - Negotiable instruments – often used in secured transactions
 - Letters of credit
 - Commitment by the importers bank that the price stated will be paid upon presentation of documentation confirming delivery
 - Upon delivery exporter submits documentation to the importers bank and receives payment
 - The confirming bank plays a role similar to endorsing a negotiable instrument (commitment to honor the letter of credit)
 - Standby letter of credit – commitment by the importer’s bank that the price stated will be paid upon presentation of documentation confirming delivery used as a guarantee
 - Also sometimes used in domestic transactions
- Related laws
 - Bulk sales
 - Ontario only province
 - Prevent merchants from selling all or almost all of their assets before a creditor can take action to stop them
 - Purchaser must obtain a list of creditors, notify them of the sale and pay the proceeds directly to them if they so wish
 - Landlord’s right to distrain for rent
 - Right to seize and hold the tenant’s assets that are on the rented premises and eventually to sell them to pay for owed rent
 - Fraudulent transfers and preferences
 - Giving or selling property to a friend or relative to avoid debt is a fraudulent transfer – such a transaction is void
 - Bona fide purchaser for value – innocent third party who has paid a fair price for goods under claim by creditors (transaction valid, cannot be reversed)
 - Fraudulent preference – a debtor’s payment of money to one creditor to give that creditor preference over the other creditors (void)
- Bankruptcy
 - Creditors may take security – unpaid unsecured creditor have all the usual remedies available when someone breaches a legal obligation including right to proceed with civil judgment
 - Debtor may declare or forced to declare bankruptcy
 - The Bankruptcy and Insolvency Act – federal statute, to preserve as many of the debtor’s assets as possible for the benefit of the creditors, rehabilitate the debtor by forgiving the

unpaid debt thus removing insurmountable burden and restoring the debtor to a productive member of society

- Some insolvency reform now in force
- Insolvency – inability of a person to pay her debts as they become due
- Bankruptcy – process by which an insolvent person voluntarily or involuntarily transfers assets to a trustee for distribution to creditors
- Assignment in bankruptcy – the voluntary transfer of a debtor’s assets to a trustee in bankruptcy so that they can be administered for the benefit of the creditors
- Bankruptcy order – a statutory assignment of a debtor’s assets to a trustee in bankruptcy
- BIA does not apply to banks, insurance companies, trust companies, loan companies, railways (farmers and fishers cannot be forced into bankruptcy)
- Superintendent of Bankruptcy responsible (appoints official receivers)
- Trustee in bankruptcy – the licensed professional appointed to administer the estate of a bankrupt for the benefit of the creditors
- The process
 - Creditor petitions court to force the debtor into bankruptcy
 - Results in the statutory assignment of the debtor’s assets to the trustee in bankruptcy
 - To obtain bankruptcy order the creditor must specify in the petition that the debtor owes more than \$1000 in debt and has committed an act of bankruptcy during the previous six months ex) voluntary assignment of assets to a trustee in bankruptcy, fraudulent transfers of money or assets, giving fraudulent preference to a creditor, attempting to leave the jurisdiction – usually failure to pay debts as they become due
 - A sworn affidavit must also be filed with the registrar verifying the facts
 - If debtor opposes, hearing will take place before a judge, unopposed hearing before the registrar
 - Creditor must be careful petitioning – use lawyer, if application refused may be liable to pay losses of the debtor
 - Voluntary assignment in bankruptcy – an assignment of assets to a trustee in bankruptcy for the benefit of creditors made voluntarily by a debtor
 - Must prepare a statement of affairs showing assets and creditors
 - Trustee will administer the affairs
 - Exempt property is protected (medical and dental aids, food, clothing, furniture and appliances, tools and other items used to earn an income up to a limited value, a vehicle of limited value and personal residence where the debtor has limited equity may also be protected)
 - Trustee holds property in trust for creditors – owes a duty to preserve the property and sell it for as much as reasonably possible

- Alternatives to bankruptcy
 - Debtor should try to avoid bankruptcy – will lose most of his property, harder to do business in the future or make credit purchases
 - Personal bankruptcy remains on an individuals credit record for about six years
 - If a corporation becomes bankrupt it will be discharged
 - Talk to creditors and try to make alternative arrangements
 - Obtain a consolidation loan from a bank or other lending institution – enables the debtor to consolidate various debts they owe
 - BIA provides alternatives – debtors can make proposal to avoid
 - Division I proposals – the debtor secures some time to reorganize his or her affairs and make a proposal for partial payment that will satisfy its creditors, if the creditors reject the proposal the insolvent debtor is deemed to have made an assignment in bankruptcy from the day of the meeting of the creditors and the normal procedures follow (for corporations and people with debts over \$75000)
 - Started by filing a proposal
 - Within 10 days of filing a notice of intention a statement of projected cash flow must also be filed followed within 30 days by the filing of the proposal itself
 - Meeting with creditors held and proposal is voted on
 - Two thirds of the unsecured creditors by value and majority by number must vote to accept it in order for it to be approved
 - Same approach applies to each class of secured creditors
 - The court must also approve the proposal
 - Proposals are flexible – anything from reducing debt to new payment structure
 - Creditors prevented from taking action against debtor until the vote takes place
 - Consumer proposals – available for people with less than \$75000 debt excluding a mortgage on their home (under division II)
 - Hire an administrator to examine the finances and prepare the proposal
 - No meeting is required
 - If the creditors reject, debtor not automatically bankrupt
 - Must contain commitment that the performance of the proposal will be complete within five years
 - Action cannot be taken against debtor by creditors if they comply with obligations of proposal, participate in mandatory counseling and act honestly
 - If debtor defaults on commitments, proposal is annulled and may face normal bankruptcy procedures
 - Court approval not required
 - Secured debts not affected if not in proposal

- Orderly payment of debt program available in some provinces
- Large corporations can ask court for bankruptcy protection
 - Owing more than \$5 million
 - Companies Creditors Arrangement Act
- Priority among creditors
 - Once trustee in bankruptcy has been given the bankrupt's estate they hold these assets in trust for the benefit of the creditors
 - Right and responsibility to lease, repair, receive rents or otherwise deal with to preserve value
 - Trustee will eventually sell and distribute proceeds
 - Proof of claim – document filed with the trustee in bankruptcy establishing validity of a creditor's claim (each creditor must file)
 - Sets out the nature of the debt, how much remains
 - Trustee evaluates claims of creditors – if they are valid they form part of the body of claims against the estate, some claims may be rejected (creditors have right to challenge)
 - Suppliers of goods can reclaim goods from bankrupt or trustee – must make written demand within 30 days of delivery and debtor must still have possession of them (provided that they were delivered within 15 days preceding the bankruptcy)
 - Secured creditors maintain their claim to at least the value of the property used as security
 - Retains the right to take possession of or otherwise proceed against the property used as security
 - Can choose to file a proof of claim and give up secured property – attractive when little value in the property, considerable resources in the estate
 - Preferred creditors paid before unsecured
 - Government sometimes has priority over secured creditors
- Offences
 - Fraudulent transfers – a debtor's transfer of property in an attempt to keep it out of the hands of creditors, not a valid sale at a fair price to an innocent third party (trustee can reverse)
 - Settlements – transfer of assets where nominal or no consideration is involved (void if took place within one year of bankruptcy)
 - Fraudulent preferences prohibited – payment made in preference to one creditor over the others is also void (presumption if made within three months)
 - Bankrupt must file an affidavit setting out all of his debt, creditors and assets
 - Bankrupt has obligation to cooperate with trustee and disclose all relevant information
 - If convicted of offense may be fined up to \$10000 and imprisoned up to three years

- Bankrupt – when assets have been transferred to a trustee, must disclose any involvement with business transactions or borrows more than \$500, cannot be a director of a corporation, professional restrictions
- When estate has been distributed the bankrupt can apply to be discharged – automatic after nine months if involved in first bankruptcy
 - May be granted, conditions may be applied, may be denied
 - Unconditional discharge not granted if offence committed
- After discharge
 - Bankrupt required to continue to make regular payments to the trustee to be distributed
 - When discharged the debtor is freed from claims by creditors and is in a position to start over
 - Fines, alimony, student loans and maintenance payments may survive discharge
 - Corporations not discharge after bankruptcy unless they have been able to repay all of the money owing
 - If corporations proposed arrangements to avoid bankruptcy are accepted they will be free to carry on business
 - Corporation will often face dissolution after bankruptcy process
 - Directors of corporations owe a duty of care
 - Receivers may be appointed by creditors pursuant to security agreement
 - Corporations that go into receivership are usually not involved in bankruptcy