

CHAPTER 7: EMPLOYMENT LAW

7.1 – Introduction

Relation btwn EE and ER: form of contract – verbal or written (must conform rules of contract).

Must be considered under 2 broad areas of study:

1. The **Individual Contract**: terms agreed + negotiated btwn EE and ER. These conditions apply only to this particular employment relationship, and these 2 parties.
2. The **Collective Agreement**: btwn ER and group of EEs; group also called **Union, Brotherhood, Syndicat** ... Negotiating team is formed and meet with ERs representatives to negotiate terms that will govern the relationships.

7.2 - The Individual Contract of Employment

7.2.1 Introduction

Contract governed by rules in *Civil Code of QC*

- Also important provisions in *QC Labour Standards Act* + the *QC Charter of Human Rights and Freedoms*
- Other acts related: *Act Respecting Occupational Health And Safety, The Act Respecting Industrial Accidents And Occupational Diseases, The Pay Equity Act And The Empl.Equity Act*

7.2.2 The Civil Code of QC

Defines + outlines what constitutes an employment contract: **term, form, renewal and termination, restrictive covenants and non-competition clauses + distinction btwn an EE and a contractor** (Articles 2085-2097)

7.2.2.1 The Contract

Defined by Art. 2085 and contains these essential elements:

1. It is a contract; subject to all the general rules of contract
2. Bilateral – requires both parties to undertake to do something for the other:
 - a. EE to do work, ER to pay EE for the work
3. Work to be done continuously until contract termination
4. Work to be done under direction of ER and his instructions → EE to be the subordinate
 - a. Subordination is essence to the contract of employment
5. EE must personally do work, cannot be delegated
6. Contract is for limited time, cannot bind one forever; this would be equivalent to slavery

7.2.2.2 Term

Fixed Term: no notice or other formality is required

- If work is completed before termination date, ER cannot “lay-off” EE/ Full contract term must be respected
- If EE wants to terminate contract before its end, ER still pays for full term
 - Parties could agree on settlement for lesser amount without waiting for term to expire

Indeterminate Term: NOT same as unlimited duration which is prohibited (slavery)

- Ends when one party wishes to terminate contract, will give notice to other party
- ER can create “pause” and “lay-off” EE for short period; NO MORE THAN 6 MONTHS
- Whoever wishes to terminate contract must give appropriate period of notice

7.2.2.3 Form

No specific form required for a contract of employment; verbal or written

7.2.2.4 Employer/ Employee Obligations and Rights

ER Obligations	EE Obligations
To allow EE to carry out the work	Do the work carefully, promptly and to the best of their ability
To pay the wage or salary agreed upon	Be honest in dealing with ER and loyal, no divulge confidential info (Ex: trade secrets) UNLESS question of public security and safety (whistle blowing)
To ensure that work can be done safely w/o danger	After reasonable time period from contract termination, EE no longer bound to maintain info confidential <ul style="list-style-type: none"> - But never divulge info about reputation + private life of an individual; may also be bound by restrictive covenant or non-competition clause

- **ER** has the right to insist on having work done in particular way, or EEs follow certain pattern of behavior → EE does not conform, ER can discipline
 - o Begins w/ verbal and then written warning
 - o Penalties may be applied, **Ex:** suspension w/o pay for a day, week +
 - o Transfer one position to another
 - o Demotion to lower position
 - o Fire
- **EE** who causes serious danger may be dismissed on the spot w/o notice. Grounds for instant dismissal are:
 - o Starting fire in plant, smoking where dangerous to do so, damaging EE's equipment, stealing, fighting with other EEs, falling asleep on job, staying away from work w/o notifying ER → **"DISMISSED FOR CAUSE"**

7.2.2.5 Restrictive Covenants & Non-Compete Clauses

Clauses restricting the EEs:

- Right to use or reveal confidential info, even after leaving
- May state that he cannot work for another company in same business
- May not setup new business in same or closely allied field
 - o Even if prevents one from working in his or her field of experience, still considered acceptable, providing they are not unreasonable
 - Reasonableness measured in terms of time and space

7.2.2.6 Renewal & Termination

If there is no objection from the ER and the EE continues to carry out the work for 5 days after the original contract expires → there is a "TACIT RENEWAL"

- Automatically renewed w/ same conditions but now with an indeterminate term (to cancel, one party must give notice)
 - o No specific time for notice, Art. 2091 states "in reasonable time"
 - If job doesn't require much skill, training, education or experience → time period short (2 weeks, 1 month)
- When business sold or its legal form is changed, EEs cannot be fired. New owner takes over legal contract obligation of former one
- When contract of employment is terminated; ER required to give EE *Certificate of Employment*
 - o States length of employment term + work done by EE (nothing performance related)

7.2.2.7 Contractors

*The nature of the work to be done is identified, a price is established for the work, and parties agree on a **contract of enterprise** or **contract for services**.

EX: Contractor decides when the job will be done, what quality of materials to use, what tools to use, and how many people will carry out the work.

Difference summarized:

1. Subordination and Control – ER has control over how/when work is to be done, compared to contractor who controls the job.
 2. Tools and equipment – ER provides, contractor owns.
 3. Profit – EE earns wage/salary
 4. Risk of loss – ER bears loss of inefficiency of staff, contractor suffers loss directly
- EE paid, there are withholding (income tax, employment insurance, pension plan contributions, etc...)
 - Contractor, no deductions

7.2.3 The QC Labour Standards Act

QC law provides several minimum conditions of work which apply to EEs but not senior management (must invoke the *Civil Code* and *The QC Charter* to argue employment contract violations and discriminations)

- Minimums concern: wages, hours of work, vacations, statutory holidays, breaks ...
- Declared to be of “**public order**”
 - o ER may not offer any wage or other condition that is less than min, conditions set out by law

Minimum Conditions

7.2.3.1 Wages

- **May 1, 2013 = \$10.15/hr, EE w/ tips = \$8.75/hr**
- Each yr minimum salary is reviewed + published in newspaper well in advance
- Must be paid cash, chq or direct deposit
- Must receive pay slip: #hrs worked, hourly pay + deductions
- Deductions such as pension or retirement fund must be requested in writing by EE
- Wages must be paid at intervals of not more than **16 days**
 - o Managerial personnel, not more than **1 month**
- ER must keep track of tips for personal income tax purposes
- May not require EE to pay credit card costs

7.2.3.2 Hours of Work

- 40 hrs/week, overtime x1.5
- EE may request to be compensated by paid leave = overtime worked + 50% instead of \$
 - o Leave must be taken within 12 months following overtime/ otherwise overtime paid

EE considered to be at work when:

- Available at the place of employment + required to wait for work to be assigned
- During the break periods permitted by the ER
- Travelling required by ER

“**Call in pay**”: if EE comes to work at required time is is able to work only 3hrs and less, still pay for full 3 hours (**Ex:** lack materials, problems heating, fire ...)

7.2.3.3 Paid Vacations

1. EE entitled to be absent while taking an annual vacation without fear of losing job
2. EE entitled to vacation pay while on holidays based on gross wages during the past yr

Vacation based on length of time EE has worked continuously for ER – “Reference year” which runs from May 1 – April 30.

- Less 1 yr → 1 day for every month worked during reference yr
 - o **Ex:** EE starts Feb.1 = 3 months by April 30 = 3 vacation days
 - o Max is 10 days (2 weeks)

- 1 to 5 years → 2 weeks' vacation
- 5 years + → 3 weeks
- *Can give more but not LESS!
- EE entitled to know date of annual vacation at least 4 weeks in advance
- Must take it within 12 months following end of reference year
- If 2 weeks or less → entitled to 4% of gross wages earned during reference year
- Entitled to 3 weeks → receive 6% gross wages

7.2.3.4 Paid Statutory Holidays

GVT has declared the following holidays:

- 1 January
- Good Friday or Easter Monday (ER's choice)
- Monday before 25 May
- National holiday – 24 June (25th if 24 is Sunday)
- July 1 (2nd if 1 is Sunday)
- Labour day (1st Monday in September)
- Thanksgiving (second Monday in October)
- 25 December
- **Section 62:** For each statutory holiday, ER must pay 1/20 of wages earned during the 4 complete weeks of pay before holiday, excluding overtime.
- If EE needs to work on that day, paid usual wage + amount in sec. 62 (above)
 - o **Section 63:** Or given compensatory holiday to be taken within 3 weeks before/after holiday
- **Section 64:** If EE is on vacation, still needs to be paid or compensatory day off; generally extend leave by 1 day.
- **Section 65:** to benefit from statutory holiday, must not be absent from work day before/after holiday

7.2.3.5 Rest Periods

- Unpaid 30 min lunch break; every 5 hour shift
- One day off a week
- Coffee breaks not required by law BUT if ER provides them, must be paid

7.2.3.6 Other Leaves

Notice must be given ASAP except for first 2 items:

- **Weekly rest** (s.78): 32 consecutive hours of rest each week
- **Meal Break** (s.79): 30 min meal break after 5 hours work; not paid unless EE not permitted to leave work station.
- **Sickness or accidental leave** (s.79.1): after 3 months of service, can request in writing up to 26 weeks of unpaid leave
- **Family responsibilities** (s.79.7): up to 10 days/yr, unpaid
 - o can be requested to look after matters concerned with care, health (or health of any other family member) or education of child
- **1 day paid on the death of consort, child, parent, brother/sister.** Additional 4 days off w/o pay may be taken. (s.80)
- **1 day unpaid on the death of son/daughter-in-law, brother/sister-in-law, grandparent or grandchild** (s.80.1)
- **5 days off the birth or adoption of a child.**
 - o First 2 paid if EE has been working for at least 60 days. If < 60 days, can take 5 days unpaid.

7.2.3.7 Maternity Leave (s.81.4)

- Not more than 18 weeks unpaid, to begin no sooner than 16 weeks before expected birth
- ER must be notified of start and end date of leave
- After leave, EE entitled to return to her job + receive any increased wages or other benefits put in place while she was on leave

7.2.3.8 Parental Leave (s.81.10)

- 52 consecutive weeks, unpaid → Parents of newborn or adopted child
- Possible to obtain benefits through the *QC Parental Insurance Plan*
- If EE doesn't return to work on the expected date, considered to have resigned

7.2.3.9 Psychological Harassment (S.81.18)

EEs entitled to a work environment that is free from any vexation behavior in the form of:

- Repeated and hostile or unwanted conduct, comments, actions, or gestures that affect their dignity, physical/psychological integrity
- ER needs to take serious actions to prevent/stop it
- Protection extends to senior managers

7.2.3.10 Notice of Termination of Employment Contract

ER must give written notice to terminate the employment contract of an EE:

Less than 3 months → none required

3 months – 1 year → 1 week

1 – 5 years → 2 weeks

5 – 10 years → 4 weeks

+ 10 years → 8 weeks

- *No notice given to EE who has committed a serious a serious fault and is fired "for cause"*

7.2.3.11 Dismissal not made for Good and Sufficient Cause (s.124-128)

If EE has been working there for 2+ years w/o interruption, ER needs valid reason for dismissal. 3 main reasons justifying dismissal:

1. EEs incompetence
2. Restructuring of business
3. Business dealing w/ financial difficulties

Unjustified Dismissal: EE needs to file claim with the *Commission des relations du travail* within 45 DAYS or time frame allocated by collective agreement.

Ex: hiring nephew or child instead, private matters, jealousy against EE, refusal by the EE to break the law

- If dismissal found to be unjustified then:
 - EE be reinstated – not possible if EE did domestic work or care of a child, sick person, elderly person or someone with handicap
 - Order payment of lost wages or other decision given circumstances

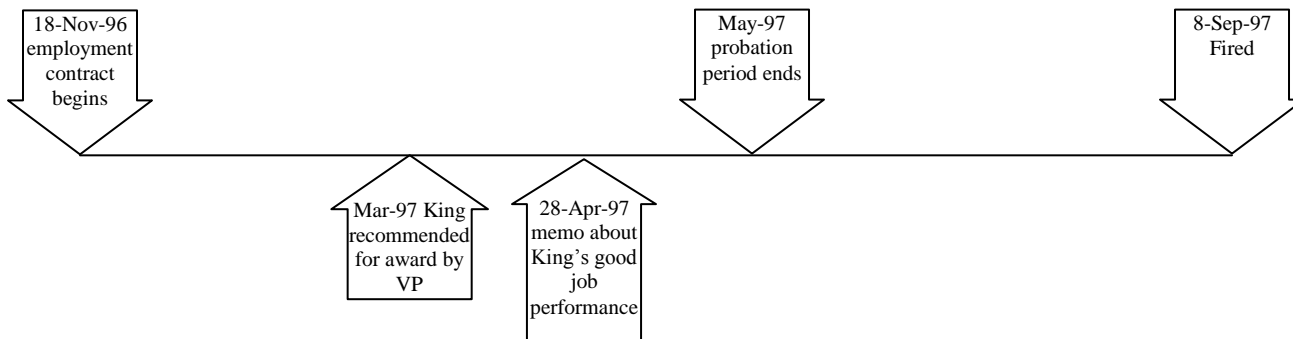
7.2.4 The QC Charter of Human Rights and Freedoms

Appendix 7-A Selected Articles from the Civil Code of Québec

Appendix 7-B Selected Sections from the Québec Labour Standards Act

King v. Biochem Therapeutic (QC Superior Court) p. 29

Timeline:



Facts	<ul style="list-style-type: none"> • Biochem says <ul style="list-style-type: none"> • Dr. King was fired after being given due warning for insubordination and lack of respect for fellow EEs during interactions with them • Gave her a <i>verbal</i> warning at 5.5 months, and another one month prior to termination • She should have expected to be fired because of [2094] serious reason (insubordination) • King says: <ul style="list-style-type: none"> • There was no prior warning • It was all because of jealousy • She did not get [2091] reasonable notice
Question	<ol style="list-style-type: none"> 1. Did Dr. King deserve to be fired for [2088] cause? 2. Had she been warned before hand?
Ratio	<p><i>Burden of Proof</i> is on ER to explain why fired, and prove she had been warned</p> <ol style="list-style-type: none"> 1. <i>Argument:</i> Recommended for award in March, memo about highly satisfactory performance in April – <i>Answer:</i> No [2088] cause for being fired 2. <i>Argument:</i> HR Director supposedly verbally warned her, but the witness testifying wasn't the director who gave the supposed warning so the testimony was hearsay,¹ (HR Director did not take stand) – <i>Answer:</i> No proof of warning
Decision	King awarded [2092] indemnity plus interest (also additional [1619] damages)

Dubé v. Volcano Technologies (QC Superior Court) p. 35

Timeline:



Facts	<ul style="list-style-type: none"> • Dubé received only 2 weeks severance pay, says he deserved [2092] 9 months indemnity including compensation for salary, car allowance, bonuses, moral damages • Volcano said terms of Dubé's contract said only 2 weeks notice was necessary
Question	<ol style="list-style-type: none"> 1. Are we in an [2090] indeterminate contract? 2. Can Volcano [2091] fire Dubé? 3. Is economic difficulty a [2094] serious reason for Volcano to fire Dubé? 4. Is 2 weeks [2091] reasonable notice?
Ratio	<p>Contract included \$75K salary plus car allowance and potential bonus + clause that serious reason or cause for termination will result in only 2 weeks severance pay</p> <ol style="list-style-type: none"> 1. <i>Answer:</i> Yes

¹ Hearsay = objectionable, therefore not allowed and not proof

	<p>2. <i>Answer:</i> Yes with [2091] reasonable notice or [2092] indemnity in lieu of reasonable notice</p> <p>3. <i>Answer:</i> No, [2087] it's not EEE's fault (Dubé would have received [2094] nothing if fired with serious reason)</p> <p>4. <i>Argument:</i> Dubé signed a contract that said 2 weeks notice was sufficient if fired for serious reason <i>Answer:</i> [2092] says you can't waive your right to [2091] reasonable notice</p>
Decision	Volcano must pay [2092] indemnity in lieu of reasonable notice of 16 weeks salary plus interest (but not the bonuses and car allowance)

Hasannie v. Kaufel Groupe Ltd. (QC Superior Court) p. 38

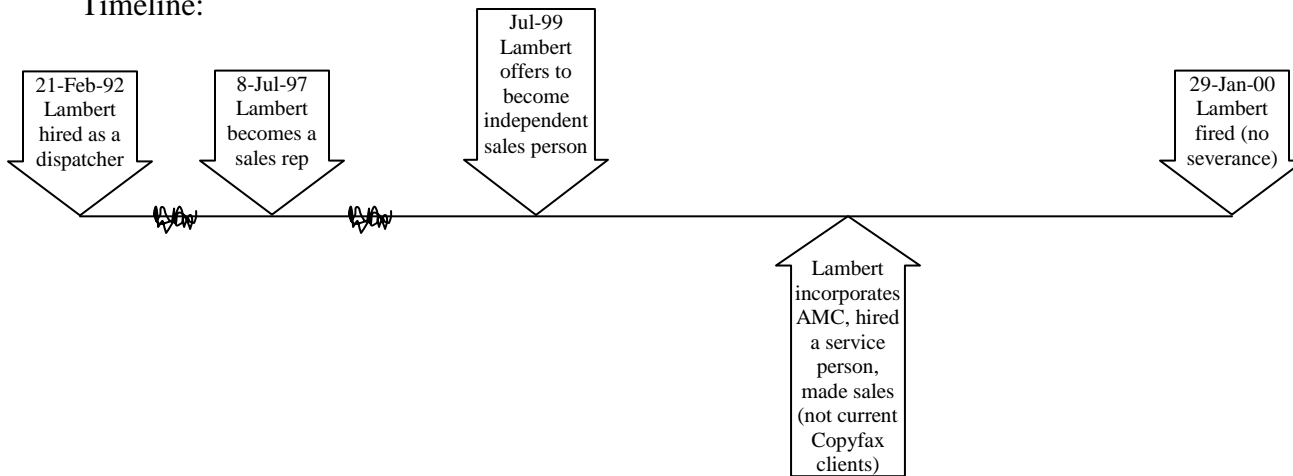
Timeline:



Facts	<ul style="list-style-type: none"> • Hasannie is a professional (CMA, lawyer), hired as controller, later promoted to director • His contract was being terminated following a buyout of Kaufel by T&B since his services were no longer needed • Thomas and Betts discovered disloyal acts were committed by Hassanie and fired him for disloyalty (gave him no severance pay) • Hasannie says there was no cause and he deserves severance + damages
Question	<ol style="list-style-type: none"> 1. Is T&B required to maintain Hasannie's contract following the buyout? 2. Before they found out about the disloyalty, was T&B required to provide Hasannie with a severance package? 3. Did T&B have the right to fire Hasannie without a severance package?
Ratio	<ol style="list-style-type: none"> 1. <i>Answer:</i> yes, company was amalgamated but [2097] T&B required to honour terms of employment contracts from Kaufel 2. <i>Answer:</i> yes, Hassanie is in a [2090] indeterminate contract and must be offered [2092] indemnity in lieu of [2091] reasonable notice 3. <i>Argument:</i> Hasannie did not have permission from new management to personally pursue purchase of the rival company – <i>Answer:</i> Disloyalty is [2094] serious cause so no [2091] reasonable notice is necessary, and therefore no severance package is necessary
Decision	T&B wins, not required to pay [2092] indemnity or damages

Copyfax v. Lambert (QC Superior Court, Civil Division) p. 44

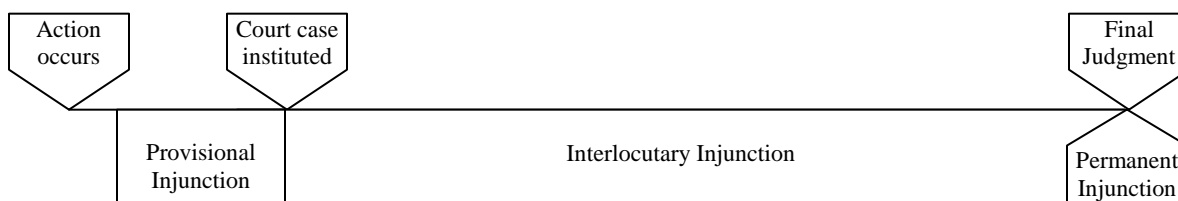
Timeline:



Facts	<ul style="list-style-type: none"> Copyfax had Lambert sign a non-competition clause, so seeking an injunction to prevent Lambert from acting as a salesperson in the photocopier industry
Question	<ol style="list-style-type: none"> Was there [2094] serious reason for Copyfax to fire Lambert Should Copyfax be granted an injunction to stop Lambert from acting as a sales person in the industry? Should Copyfax be granted an injunction to stop Lambert from using the client list he appropriated?
Ratio	<ol style="list-style-type: none"> <i>Answer:</i> yes, disloyalty, Lambert didn't even contest the firing or ask for [2091] reasonable notice <i>Argument:</i> Copyfax says the non-competition clause prevents Lambert from acting as a sales rep. But Lambert appears to have solicited none of Copyfaxes clients. And the [2089] time constraint appears excessive since Copyfax wasn't attempting to replace Lambert so there's appears to be a doubtful right for the injunction. And the [2089] geographic limitation appears unclear (epicenter of stated 25 km radius not clear), and even if it was clear the limitations [2089] do not appear reasonable (a huge area covered) therefore there's further doubtful right for the injunction. Doubtful rights exist therefore we do the Balance of Inconvenience Test: <ol style="list-style-type: none"> If he is allowed to work he would have to pay \$6K fee If he is not allowed to work he would have to move For inconvenience, (a) << (b), therefore – <i>Answer:</i> no injunction granted <i>Answer:</i> Lambert is obliged to not use any [2088] confidential information from Copyfax for a reasonable time following his dismissal so – <i>Answer:</i> injunction granted
Decision	Copyfax denied the interlocutory injunction for Lambert working as a photocopier sales rep, but is granted interlocutory injunction against use of the client list (and Lambert must return the list)

Three types of Injunctions

- Provisional
- Interlocutory
- Permanent



1. Provisional Injunction (AKA “Safeguard Orders”)

- See judge in Chambers (i.e. in his office)
- Judge writes out an order
- Bailiff delivers it
- Only good for 10 days (can be renewed)
- Granted on the basis of urgency

Two options following initial grant of a Provisional Injunction:

- go to court every ten days to renew (expense)
- institute an action: ask for damages and ask for a permanent injunction (+ make a motion for an interlocutory injunction)

2. Interlocutory Injunction based on:

Clear Right	
X	

Injunction granted

Doubtful Right*	
	X

Decision made by judge

Non-existent Right	
	X

Injunction not granted



Judge decides based on two tests:

- Balance of Inconvenience Test:*
 - If I don’t grant the injunction and should have, who is harmed?
 - If I grant the injunction and I shouldn’t have, who is harmed?

i.e. who will be most inconvenienced?
- Irreparable Harm:* Is the harm irreparable? i.e. money can’t fix it.
e.g. Olympic fencer dropped from Olympic team (can’t pay for the missed opportunity)

Both tests must be passed for Interlocutory Injunction to be granted

A.R. Medicom inc. v. Bergeron (QC Superior Court) p. 49

Facts	<p>Employees leave Medicom but have non-competition clauses</p> <ul style="list-style-type: none"> • Bergeron: 2-year world-wide from similar commercial activity/ working for competition • Hubert: 3-year in Canada from similar commercial activity/ working for competition
Question	1. Is the non-competition clause valid?
Ratio	<p>1. <i>Argument:</i> [2089] test for non-competition clause:</p> <ol style="list-style-type: none"> Is the clause in writing? Yes Is time/ place/ type of employment stipulated? Yes Does the EER have a legitimate interest to stop the former EEEs from working in the industry? Yes (to protect company against competition) Are all limitations reasonable? No! Both world-wide and Canada-wide limitations are unreasonable because Medicom serves only the South Shore (a more focused area) <p><i>Answer:</i> therefore test not passed</p>
Decision	Neither Bergeron nor Hubert are bound by the clause

CHAPTER 8: PRINCIPLES OF CONTRACT LAW

- 8.1 Obligations

Contracts: business agreements that people enter into voluntarily

Contracts create obligations that are building blocks to contract structure

Example:

- ♦ *Billy agrees to buy Nancy's book for \$10*
- ♦ *Billy has obligation to give Nancy \$10*
- ♦ *Nancy has obligation to give Billy the book.*
- ♦ *What happens if these conditions aren't met?*

In order for obligation to exist in law, 3 requirements:

1. There must be at least 2 parties who agree to do something for each other
2. Must be a prestation that is object of the obligation
3. Must be lawful reason for undertaking obligation

(Prestation: payment or performance, rendering of service, doing/not doing something)

Obligations come into existence in 2 ways:

1. Contracts: verbal or written, some must be in writing (marriage, mortgage contracts)
2. Arise from act carried out: causing damage to property

Legal vs Natural Obligations

Legal: sanctioned by law and enforceable by the courts, failure to perform obligation gives right to person to whom obligated to DEMAND performance/damages, can obtain judgment against you.

Natural: bind you in conscience only => debt to supplier; do not pay him for over 3 years, prescribing debt, giving supplier no more legal right to enforce you to pay through court. You still owe him money but it is now a Natural and not a legal obligation. Pay only if you feel morally bound to do so. Another natural obligation = promise Charitable organization you would pay them each year.

- 8.2 Contracts

○ 8.2.1 Definition

- Most common source of obligation => BUSINESS CONTRACT
- Obligation = consequence of agreement/contract between 2 parties
- Contract = “Bilateral” agreement since obligation operates in both directions and both parties have to commit to certain acts. Considered as creating the law between the parties, terms of contract must be followed.
- If clauses of agreement DOES NOT provide solution to a specific problem, general provision of **Civil Code** used to fill missing elements of contract.

○ 8.2.2 Classification of Contracts

Civil code identifies many different types of contracts base on different criteria and causing different legal effect. Often between 2 or more parties and it is common that there is very little negotiation, with one party having to accept or reject conditions.

- **Contract of adhesion:** where conditions drawn up only by one party and only choice available for the other is to accept them or not to enter into contract (airline tickets, app store)

- **Contract by mutual agreement:** Both parties discuss and agree on all the conditions of contract.
- **Synallagmatic or bilateral contracts:** Both parties have agreed to perform an obligation (“A” pays \$10 to “B”, “B” gives “A” book)
- **Unilateral contracts:** Only one party undertakes to perform an obligation (will/pledge to donate to charity)
- **Onerous contracts:** Each party receives something in return for undertaking obligation to other party (“A” get book and “B” gets \$10)
- **Gratuitous contracts:** One party undertakes obligation that benefits the other, but other does nothing for 1st party. (donating money to charity)
- **Commutative contracts:** Both parties know in detail how much each has to pay and how much each will receive. (food corp buys 10,000 units and agrees to pay \$3/unit)
- **Aleatory contracts:** Full extent of obligations uncertain at the time the contract is entered into and will only be established at a later date. (food corp agrees in Jan to pay for all units of supplier in summer and pay \$3/unit, number of units to be sold and dollars to be paid unknown till summer harvest of units)
- **Contract of instantaneous performance:** There is a one-time discharge of the obligations undertaken (bicycle sold/delivered and price of \$175 paid)
- **Contract of successive performance:** obligation is to continue doing something on regular basis for specific period of time. (employment contract – going to work every day and getting paid)
- **Consumer contracts:** Natural person (not business) acquires for personal use some property or service from business that offers it to public (dealt with at length under *Consumer Protection Act*)

Typical agreement can be a blend of several types of contracts.

○ 8.2.3 Offer and Acceptance

- Contracts = agreement that people enter into **voluntarily**. Must be clear meeting of minds of people concerned (*consensus in idem*) where both parties clearly understand their obligations and willingly undertake to discharge them. This meeting takes place as a result of negotiation. One party offers something and another accepts it.
- If parties agree to the same thing at the same time, contract comes into existence.
- In business, it is important to identify a legitimate offer; if one has been made then it only requires acceptance to create a contract with legal obligations. Whereas if there is only an INVITATION to make an offer, merchant can accept/refuse offer.
- **OFFER** => must be clear/precise with firm proposition containing genuine intention to enter into binding contract.
- **General rule;** offer will exist where there is specific merchandise for sale (lawn mower with price tag attached), general newspaper ad = invitation for members of the public to make an ad to merchant. Merchant is free to deal with anyone, but merchant must have available for sale advertised merchandise in reasonable quantities.
- Both federal and provincial laws govern misleading ads and misrepresentation.
- Once specific offer made, **acceptance** will create a contract. But acceptance must be in same terms as offer. Any conditions added or any changes to offer make it a **counter-offer** which is then subject to acceptance

- **WHERE** does this communication take place: contract is formed **WHEN & WHERE** acceptance is received by “**offeror**” (**person making offer**) from “**offeree**” (**person accepting offer**) (if both in same room contract is made right there as soon as accepted; if on phone offeror, in London, offers offeree, in Montreal, who accepts offer: contract formed in London).

○ **8.2.4 Conditions for the Formation of Contracts**

Civil code states that essential elements required for contract to be valid are:

1. An exchange
2. Consent
3. Between persons
4. Having capacity to contract
5. In any form, unless special “form” required
6. A cause
7. An object

Each of these elements merits special consideration. This will enable us to determine is contract is actually valid under terms of Civil Code.

▪ **8.2.4.1 Exchange**

Exchange of consent may be express or tacit

Express: when there is clear indication on the person’s part: statement like “Yes I accept your offer”

Tacit: nothing is said, but person carries out action to indicate acceptance: person walks into barber shop and sits down in the barber chair and allows barber with no objection to cut his hair. Nothing is said yet it is clear the person is prepared to pay for getting his hair cut.

▪ **8.2.4.2 Offer and Acceptance**

- Except for specific cases, contract comes into existence when/where acceptance was received. This applies where parties are standing right next to each other at the time or if parties are each on either sides of the world.
- If party making offer states that it will be open for specific amount of time, like 30 days, the offer **CANNOT** be revoked (cancelled) before that time. If no time period is stated, offer may be revoked at any time. If no acceptance is received before time expires, the offer **LAPSES** (becomes null)
- Acceptance doesn’t correspond to terms of offer, it is not an acceptance. But it will be considered as a new counter-offer, which now needs to be accepted by the initial person making the initial offer for contract to be valid.
- Silence = Not a form of acceptance, assume offer was refused
- Promise to enter into contract = Not a form of acceptance, however having made the promise, this party cannot change his mind and refuse to go through with deal once promise is accepted. Refusal can lead to an action in damages by the person to whom the promise was made.

▪ **8.2.4.3 Consent – Qualities and Defects**

Consent to enter contract must be given **FREELY** and **WILLINGLY**. Must not be any undue or illegal pressure put on a person in order to obtain consent, this will vitiate (nullify) the consent and the contract and all its obligations

>>>>Defects of consent making it invalid = error, fraud, fear & lesion.

- **Error:** not just simple or inexcusable error. Deciding that recently bought desk doesn't look good in office and that it was a purchase mistake is not a legal reason to cancel contract or refuse to pay (simple error). Example where purchase of art at garage sale that is thought to be valuable but turns out to be fake (inexcusable error). Not types that Civil Code refers.

When person believes the contract is one of sale and the other believes in good faith that it is a contract of lease, this is an error as to the nature of the contract. In this case, the court may be persuaded to annul the contract.

- **Fraud:** Closely related to error, Civil Code describes this defect as error induced by fraud. Occurs when one person tricks another into making an error or gives us untrue info, and based on this victim enters into contract. Example: Supplier tells buyer that unit is made of hard wood, but it is actually plastic worth half the price. Buyer in possession of truth wouldn't buy product or buy it at lower price. Fraud occurs when seller FAILS to deliver relevant info.
- **Fear:** If a person uses fear in for of violence or threats to extract consent, such agreement is not legally valid and cannot produce any legal effects. Fear can also be derived from use of a position of authority over another person, like creating fear for job security. The contract, even if it is at market value is invalid.
- **Lesion:** meaning Harm, used in context of economic harm, like taking financial advantage of a person who doesn't know better. Lesion can only be used by persons who do not have full legal capacity, can be the basis in annulling consent. Example: merchant sell item to minor at price of \$600 when worth is of \$250; law allows contract to annulled based on fact that minor wasn't aware of actual worth and was exploited. Or price can be reduced to true level. Lesion can apply to contracts entered into by minors or people under protective supervision.

▪ 8.2.4.4 Capacity to contract (legal capacity)

To enter into contract parties must have legal capacity (authority or right) to enter into contracts. 12 year olds physical ability to sign a contract doesn't mean he/she has legal right to enter into contract.

>>>>Law set out specific rules as to who can/cannot enter into contracts:

- **Minors**

- Person under 18
- If 14, considered full age for employment of operating business
- May validly enter in contract to look after usual needs (clothing, books, food ...)
- May be assisted by legal guardian/tutor to engage in contracts
- Can avoid responsibility for contracts for which they do not have legal capacity
- Legally represented by their mother & father being automatically become tutor of minor, other adults may be appointed as tutor and tutorship supervised by council made of 3 people appointed by members of minor's family
- May be emancipated, minor may be given legal capacity to enter into contract alone, as result of judicial decision, or result of minor's marriage.

- **Person under protective supervision**

- Unable due to physical/mental illness/disability to look after their own affairs and declared legally incapable.
- Have no legal capacity, can no longer enter into legal contracts even if over 18

▪ 8.2.4.5 Cause

Person who enters into contract has a reason for undertaking obligations contained in it. Not necessary for this reason to be expressed as part of the contract. However, if reasons are ILLEGAL ones, contract will not be considered valid. Example: Person who purchase printing machine to operate printing business = valid contract.

Example: Person who buys machine to make counterfeit money, contract would not be enforced by court.

- **8.2.4.6 Object**

All contracts carry out juridical operation: sale, lease, exchange. Only restriction the law places on subject of contract => prohibition of contracts in which something is illegal or contrary to public order.

- **8.2.4.7 Form**

Most do not require particular wording or form to be used. But for certain contracts, a form specified by law must be used to preserve validity of contract. Eg: Contracts of Marriage; mortgages; notarial wills; insurance policies; and collective labour agreements.

- **8.2.5 Nature of Nullity**

Contracts entered into that do not meet above conditions, risk being declared null and to be deemed to have never existed. 2 degrees exist: absolute and relative nullity

- **8.2.5.1 Absolute Nullity**

Contract that violates law, deemed of public order, doesn't meet conditions of formation is absolutely null => contract that puts general public at risk = absolutely null. Any interested party, non contracting party or court could invoke absolute nullity. Party cannot decide to maintain contract regardless of the fact that it fails to meet conditions of formation. Example: contract to sell body parts = contrary to public order => can be absolutely nullified and cannot be maintained

- **8.2.5.2 Relative Nullity**

Contract that violates protections of private individual interests can be declared relatively null. Only parties directly involved in contract in question can invoke relative nullity. No other party may invoke nullity, not even the court. Unlike absolute nullity, parties involved can choose to confirm OR maintain contract regardless of the problem in the conditions of its formation. This is achieved by expressing their intent to keep contract or by some tacit action that clearly indicates this desire. Example: person who donates property to another though fraud/treat can take legal action to have it declared relatively null. Involving the rights between these 2 private parties, it is possible for aggrieved donating party to confirm in part or in whole the contract.

- **8.2.5.3 Effect of Nullity**

Contract deemed null = considered to have never existed. Parties involved must be placed in same state as they were before the contract was formed. Each party must return any prestation (payment/good/service) they have received under terms of the contract.

- **8.2.6 Interpretation of Contracts**

To assist businesspeople and the courts to understand and interpret contracts, there are a number of articles in the Civil Code that set out the principles of interpretation. Most are self explanatory and are rooted in fairness and good faith. These rules state:

- Even if words in contract can be interpreted in different ways, the courts should try to uncover the real intentions or purpose of parties when they originally enter contract
- Historical nature between parties must be examined when interpreting contract
- Clauses in contract must be interpreted in line with other clauses in contract
- Existing clause should have effect vs no effect. Otherwise, why include it in contract.
- Words having multiple meaning should be given definition in terms of contract

- In case of doubt of contractual obligations, courts favor party that agreed to obligation rather than the one who imposed them. Always in favor of consumer, or the one who agreed to contract.
- Incidental, non-expressed, associated obligations must be recognized by courts.
- External clause, cited in contract, binds all parties except when it's a consumer contract or contract of adhesion in which consumer or adhering party could not have known or was not informed of its existence
- Illegible or incomprehensible clause in consumer or adhesion contract has no effect and is null, unless adequately explained.
- Abusive clause which is excessive or detrimental to consumer or adhering party is automatically nullified.
- Clause that is nullified does not render whole contract invalid, if it is possible for contract to exist without this clause.

○ **8.2.7 Performance of Contracts**

Each party must fulfill obligation. Failure, without justification, gives creditor, under civil code, the right to:

1. Force performance through injunction (court order) or having obligation performed at expense of debtor
2. Have contract annulled by **resolution**; where each party must restore all prestations and is deemed to have never existed. Or cancel by **resiliation**; where contract ceases to exist without returning any prestation. Cancellation may not be possible if default is of small importance.
3. Reduce scope of his share of related obligations
4. Refuse to perform his/her share of obligations
5. Hold on to debtor's property till he is paid for work related to property.

How do injunctions function?

- **Injunction:** Creditor seeks court order instructing debtor to cease doing/not do/perform particular act. Permanent injunction granted as part of final trial judgment.
- **Interlocutory Injunction:** Temporary injunction granted for duration of proceedings until trial judgment rendered. If plaintiff can show:
 1. Interest and seriousness of issue
 2. It is necessary to avoid irreparable injury before final judgment
 3. On balance of convenience he will suffer much more than defendant
- **Provisional Injunction:** In case of urgency, plaintiff can request that injunction be issued before defendant get notice of interlocutory hearing. Cannot last more than 10 days.

○ **8.2.8 Default of Contracts**

Before taking any action against debtor, Civil Code requires debtor to be placed in default:

1. By the contract itself, when debtor fails to meet obligations by deadline
2. By extrajudicial demand, where creditor sends debtor a letter requesting performance of obligations within a certain period of time
3. By operation of law, where debtor fails to perform obligation within useful time, fail to perform immediately in case of urgency or if performance is impossible due to debtor.

If creditor files legal action against debtor without placing him in default first, the debtor maintains right to perform obligation within reasonable time.\

○ **8.2.9 Damages**

▪ **8.2.9.1 Present Damages**

Failure to perform obligation may result in bodily, moral or material damages. These damages have to be attributed to fault of debtor and in their present value. Creditor may claim damages that were foreseen or foreseeable upon contracting.

▪ **8.2.9.2 Future Damages**

Possible to seek future damages as long as they are certain to take place and are assessable. Example: damages suffered by owner of trade secrets, will be deprived of future profits

▪ **8.2.9.4 Punitive damages**

Failure to perform contractual obligations may open possibility to seek punitive damages as directed by law. Used as a tool to teach debtor a lesson and for preventive purposes, amount awarded cannot surpass these purposes. Employer paying employee fee for discriminatory remarks, amount cant render employer bankrupt, just enough to teach a lesson.

For calculation, take into consideration:

1. Gravity of fault committed by debtor
2. Patrimonial value of debtor
3. Amount already awarded to creditor
4. If debtor is insured, on must determine how much will be covered by insurance company.

▪ **8.2.9.4 Penal Damages**

Penal clause = contractual stipulation used as means of motivating a contracting party to perform obligations. Failure, allows creditor to claim from debtor the stipulated amount of damages. Creditor may not exercise penal clause and require performance of debtor obligations.

But this is possible if clause is for purpose of punishing debtor for time delays.

Penal clauses can be exercised without having to demonstrate that any actual damages were suffered. Simple fact that debtor failed to meet obligations that are attached to penal clause is sufficient. Creditor only needs to prove that debtor violated penal clause.

APPENDIX “8-A”
Selected Article from
The Civil Code of Quebec

For the notes on the appendix, I will only include articles that were not mentioned already in the actual chapter itself. To validate this, in the book after most explanations there is an article number which I crossed off from the appendix which left me with the following. Also the remaining articles are quite similar to what has been said in the chapter, ill just leave short summaries.

Enjoyment and exercise of civil rights

6: Every person is bound to exercise his civil rights in good faith

7: No right may be exercised with intent of harming another, not in good faith

Obligations in general

General Provisions

1371: There must be a prestation, object, cause in case of an obligation

1372: Obligations arise from any contract

1373: Debtor is bound to render a prestation that is possible and that is not illegal

1375: The parties shall act in good faith

Contracts

1378: Contract = agreement

1415: Promise to enter into contract does not require a form.

- 1416: Any contract that doesn't meet conditions for its formation may be annulled
- 1439: Contract cannot be resolved or resiliated except on grounds recognized by law
- 1458: Every person has duty of honor to respect contractual undertakings, if failed person remains liable
- 1595: Default must be made in writing
- 1596: If creditor files judicial demand without defaulting debtor, debtor gets more time to perform obligation
- 1598: Creditor shall prove one of the cases of default by the debtor
- 1599: Default can be done by solidary creditors
- 1600: Object of performance is money; debtor is liable for delay in performance of obligations
- 1608: Obligations of debtor to pay creditor damages doesn't change if creditor is receiving it from 3ed party
- 1609: Transaction goes without effect if it is damaging to creditor
- 1610: Right of creditor to damages may be assigned or transmitted
- 1616: Damages in form of injury are payable in form of cash, unless otherwise specified
- 1617: Damages consist also of interest if there is a time delay
- 1618: Interest rate agreed by parties
- 1619: Indemnity may be added to amount of damages for any reasons
- 1620: Interest accrued on principle does not bear interest, unless specified.

CASES

CASE 8.1

Giroux v. Malik (Qc Superior Court)

Judgment: Anne-Marie Trahan J

- Scope of obligation of prudence and diligence of the purchasers of a piece of land.
- To what extent do they have to protect themselves from fraud.

The Action

- Dec 29 1999
- Plaintiffs: Ms Giroux and Mr Fafard
- Buy piece of land on Lac-de-Mai street in Laval
- From => Defendant: Mr Malik

- Jan 2000
- Plaintiffs going to city hall to get building permit
- Find out that none will be issued; zoning is residential but nature of soil does not allow presence of septic tank or building of a dwelling

- Plaintiffs claim Malik was aware of situation since 1988, by not revealing it; he committed fraud for which he is responsible.
- **Plaintiffs are claiming REFUND of sale price of \$45,000 and \$10,000 in damages**
- **Malik claims he told everything to his agent Mr Yaakoubian, who should have notified Plaintiffs.**
- **Malik testifies** he advised Agents and Plaintiffs that property was land filled, if they have been more prudent and diligent, Plaintiffs would have found out from the city before signing the deed of sale, and that it could not be built upon.

The evidence

- July 13, 1988
- Malik purchases property to build house for his family
- He pays \$1050 for building permit
- He gets "Services of Laboratoire de Construction 2000 inc." to get report to determine if a septic tank can be installed

- Report says (in French): The site is on old wetlands and they concluded that the land doesn't offer the draining properties needed to install a septic tank according to the rules of "Le Ministere de l'Environnement". Also the soil consists of landfill and black earth and the costs to construct the foundation would now be much higher than the average.
- 1992 & 1995, Malik tries to sell property, in both cases notifying agent of issue
- 1995, city hall tells agent, that tells Malik that an "Eco-Flow system" would be allowed
- June 28, 1999, Malik puts it for sale 3ed time with "La capital" represented by Mr. Seguin and Mr. Yaakoubian; writing up in following contract (in French)
- "Seller declares having no knowledge of any factor about the land that could significantly lower the value or revenues, or increase expenses, and municipality would provide "aqueduct and sewer services", except sewer."
- Malik didn't understand why "except sewer" was added, and then he recognizes he told Mr. Yaakoubian that there were NO SEWER SERVICES and that he would need city's permission before installing septic tank.
- Malik testimony as to what he told Yaakoubian is not clear, however obliged to do so, Yaakoubian failed to provide this info to plaintiffs.
- Malik says he knows city refused him in 1988 but he didn't know it was the same in 1999 since he didn't re-inquire about it since 1988.
- Sept 11, 1999 Plaintiffs drive by property and call agent involved, Mr. Seguin to find out if zoning is residential, city employee Mr. Beaudoin confirms this fact.
- Plaintiffs call their real-estate agent friend Mr. Paquet to get him to prepare "promise of purchase" signed by plaintiffs 18 Oct. 1999 and given to defendant 20 Oct 1999 to be accepted.
- 20 Oct 1999, Yaakoubian and Paquet go to Malik's residence, where Malik's son Havez was present. Malik accepts without adding anything to clause.
- Son (Havez) confirms that his father asked both agents if purchasers were aware the property had been land-filled.
- Plaintiff requests "Dessin Drummond" to prep plans for their house for a fully paid fee of \$1,363.06.
- Deed of sale was to be signed 30 Nov. 1999, but due to heavy work schedule, plaintiff only signed it 29 Dec. 1999.
- Notary Mr. Lebeau, prepared deed and did a search 30+ years and saw (in French): "The land has been land-filled", this did not draw plaintiffs attention since this situation is found from time to time.
- Signature of deed 29 Dec. 1999 attended by agents Paquet and Yaakoubian, plaintiff asked Yaakoubian why Malik never built on land, and Yaakoubian said since Malik's kids are all leaving one by one, he didn't want to continue with building project.
- As notary is reading the clause for the deed, he get to the part that asks seller if there was any aspect to the property that wasn't conforming to federal and provincial ruling, Malik answer No.
- Plaintiff asks as well right after and Malik still answers NO. And Malik does recall being asked these questions.
- Deed of sale is signed and notary fees are of \$567.22 and paid in full.
- Jan 20, 2000 Plaintiff goes to city hall to get building permit and a Mr. Lortie tells them about the 1988 expertise report stating that no septic installation is to be built on property.
- Plaintiff is really pissed off, since they have to leave their current sold house may 27th 2000, and relocate their kids for school.

- Mr Dupuis, president of “Services of Laboratoire de Construction 2000 inc” testifies and confirms that no septic tank can be installed on property not even Eco-Flow. He says the only solution would be to connect the property to the city sewer and to build dwelling pipes that would greatly increase the cost.
- Plaintiff paid a total of \$7,597.16 in legal fees and trial estimate.
- Projects of building their dream house is gone
- They had to relocate the kids for school
- \$45,000 of their life savings are locked into a worthless property.

Analysis of the Evidence and Findings of the Court

A. The Reimbursement of the Sale Price

- Evidence is clear that Malik knew about condition of property, he admitted to it himself in plea and testimony
- Malik did not reveal to real-estate agent the existence of the report
- Previous unsuccessful sales attempts probably turned him off from doing so
- If Yaakoubian would have known he would have made mention of it, presuming good faith
- How to interpret reasons Yaakoubian gave to Plaintiff for Malik having never built:
 - ♦ Article 2160: Mandator (Malik) liable to 3ed person (Plaintiffs) for acts performed by Mandatary (Yaakoubian) in limits of mandate
 - ♦ Meaning Malik is responsible for answer Yaakoubian gave to Plaintiffs
- No mention is made about absence of sewer service in offer of purchase, this is an **omission** of either Malik or Yaakoubian, but being the Mandator Malik bears the consequences.
- Notary and CEO Dupuis said it is NOT unusual that soil is added to property, Dupuis said no specific conclusion should be made from this.
- So Court CANNOT accept defendants suggestion that Plaintiffs antenna should have been raised
 - ♦ Article 6: Every person is bound to exercise their civil rights in GOOD FAITH
 - ♦ Article 7: No right should be exercised with intent of injuring another, contrary to good faith
 - ♦ Article 1375: Parties shall conduct themselves in good faith.
- **Good faith presumed, Bad faith MUST BE PROVED**
- The fact that Malik knew of the 1988 report and did not reveal it, directly or indirectly is Plaintiffs evidence of Malik’s **BAD FAITH**
- Malik may have gone through something similar as plaintiff, but Court cannot use sympathy to render judgment.
 - ♦ Article 1399: Consent may be given only in a free and ENLIGHTENED manner. It may be vitiated (cancelled) by error, fear of lesion
 - ♦ Article 1400: Error Vitiates consent, an inexcusable error does not constitute a defect of consent
 - ♦ Article 1401: Error on part of one party induced by fraud committed by other party, vitiates consent.
- **Fraud may result from silence of concealment**
- For these reasons Plaintiffs consent was vitiated!!!
 - ♦ Article 1407: Error caused by fraud, fear, lesion, plaintiff can claim in addition to annulment, damages
- Where one party is in bad faith, cost are paid by that party alone

➡ **Court Condemns Defendant to pay \$45,000 + interest**

B. The Claim for Damages

- Court finds plaintiffs suffered great stress & inconvenience
- Could not build dream house

- Their house was sold
- Problems with school registration of 2 young children
- Now live in bungalow 10min away from old house
- Need to cope with all problems arising from the situation

➔ **Court considers Plaintiffs entitled to \$10,000 in damages**

C. Provisional Exclusion

- Evidence reveals that Defence is frivolous (treating it lightly)
- \$45,000 represent Plaintiffs life savings and now they only have worthless piece of land
- Party should not suffer for frivolous appeal

➔ **FOR THESE REASONS: defence responsible to repay \$45,000 + interest, and \$10,000 + interest for damages and to take back his land for error of omission. Judgment made Oct. 16 2000.**

CASE 8.2

Peter v. Fiasche (Qc Superior Court)

Judgment: William Fraiberg J.

Introduction

- This is a challenging confusion of contractual cause and consent
- If purchase contravenes public order for reasons like tax evasion known by the buyer when she makes it, can she invoke her ERROR induced by the vendor's fraud to justify her demand for ANNULMENT of sales and damages?
- Is contract invalid even if she has perfect knowledge of all material facts?
- Does it matter if she did not?
- Would this render any error of the buyer inexcusable?
- To justify voiding contract, the buyer invokes NOT her error, but the offence to public order its formation presents
- Must she be denied restitution of the price because she knew contract was illicit when she entered into it?

The Facts

- **Plaintiff: Agnes Peters** ("Mrs. Gucciardo") wife of **Francesco (aka Frank) Gucciardo**
- **Defendant: Biagio (aka Gino) Fiasche**
- Gucciardo and Fiasche are long time acquaintances, both natives of the Siculiana region of Italy, both immigrated to Canada in 1950's with their families
- Gucciardo and Fiasche associated with each other on continuing basis as founding members of the Siculiana association, keeping social ties among natives of the region who lived in Montreal.
- Fiasche once helped Gucciardo with political difficulties when he was newly elected president of the association, thus reasonable to believe that Gucciardo trusted Fiasche
- Gucciardo was impressed by Fiasche's business success with his restaurant kiosk "Gino's" or "The Restaurant" at Marche de L'Ouest in Dollard-des-Ormeaux, that was operated under the name "Chez Gino Smokey's (for smoked meat)" Fiasche was able to get himself a suburban home, condo in Florida and Cadillac.
- Gucciardo on the other hand was a salaried computer programmer-analyst with a wife and 4 kids to support. And Mrs. Gucciardo sometimes did clerical work to ease family finances; they both had no business experience.
- Giacomo ("**Jack**"), Gucciardo's brother, when visiting from Toronto would often stop by Gino's to get a sandwich.
- Jack expressed that he would like to invest in a franchise of the Restaurant in Toronto, Around Easter 1991.
- Fiasche informed Gucciardo brothers that he actually wanted to give up running the Restaurant.
- May 1991, Gucciardo learned his job would be terminated in a month.

- Feeling an urgent need for a secure source of income, he began to frequent Gino's no longer as a customer but as a potential purchaser.
- Fiasche told Gucciardo that the Restaurant was a Gold mine, he suggested that Gucciardo could buy one of the franchises he was offering for sale price of \$125,000, however the REAL MONEY was in the Restaurant, which Fiasche wanted to sell to someone he knew. This appealed to Gucciardo.
- Fiasche was asking a price of \$250,000, but Gucciardo got the price down to \$200,000, but Gucciardo would need to act fast since there were other buyers
- Fiasche gave Gucciardo the financial statements of 1991 of the Restaurant
- **It showed a loss of (\$6,235) on Sales of \$172,551**
- Fiasche said this didn't mean much since he had "**A SPECIAL WAY OF REPORTING INCOME TO THE GOVERNMENT**"
- [The Restaurant was **actually extremely profitable!!! Generating annual sales of \$300,000.**]
- Fiasche said he would not give away any secrets until Gucciardo showed he was a serious buyer by giving him \$100,000 deposit.
- Fiasche suggested that Gucciardo mortgage his house that he just finally paid off.
- Gucciardo immediately applied to the bank which he was approved for a \$100,000 loan by mid-June
- Gucciardo also borrowed another \$40,000 from Jack who also mortgaged his own house
- Gucciardo planned to use \$130,000 for purchase price and \$10,000 for professional fees and start up costs.
- Fiasche also gave Gucciardo a draft of franchise agreement, so Gucciardo could have his lawyer review it.
- Gucciardo phoned his friend Mark Paci, attorney, told him he want to buy the Restaurant and sent him the draft agreement. But Paci left on vacation leaving the document behind and not yet agreeing to represent him.
- June 1991, Gucciardos spent time taking orders to get a feel.
- Mrs. Gucciardo claims there was a woman who came to talk to Fiasche that was a **Revenue Quebec tax auditor.**
- Fiasche got the Gucciardos to but it.
- According to Mrs. Gucciardo, Fiasche said the tax auditor was only doing a routine check, and will not come back for a few years.
- Fiasche showed Gucciardos on a piece of paper that the weekly sales would be of \$5,600, rounded down to \$5,000
- Fiasche says cost of food = \$350/day or 35% of gross sales
- But he denies ever stating that the sales were any higher than what was on financial statements.
- Fiasche's accountant Joe Pietracupa worked hard to get statements ASAP so Gucciardo can see it before purchase, this statement showed losses of \$1,482 on sales of \$ 151,845 with accumulated deficit of \$7,717
- Gucciardos insist they did not see statement until September after buying Restaurant.
- This is the fundamental point of dispute between the parties
- Gucciardo claims they would have never invested to get into lifetime debt, unless they were going to get what Fiasche promised, they also say that Fiasche promised that is the Restaurant want profitable, that he would buy it back for the money they paid.
- Fiasche says that he made no guarantee of sales figures, and also insists that he never asked for a deposit and was surprised when he was brought to the notary and was given the \$100,000 and signed the required documents and completed the sale July 5th 1991.

- Fiasche testifies that he would have gladly refunded all the deposit if Gucciardo had only asked, but he never did.
- Gucciardos began to work July 5th 1991 after making the deposit, and kept all sales proceedings other than \$150 for opening cash
- Gucciardo learned Fiasche's special accounting system: **After hours preparation of a 2nd cash register tape for each business day what showed half actual sales and relocated large portion of taxable meals as non-taxable sales like sliced meat.**
- Gucciardo testifies that Fiasche kept 2nd cash register at home to prepare false tapes to avoid max tax, even the wives got in on it. He also say that Fiasche bought 2 new cash registers for this purpose
- Fiasche doesn't deny these purchases but says Gucciardo didn't trust the existing one and insisted that a new one would be bought with purchase of Restaurant and the second one was a back up.
- According to Gucciardo, Fiasche gave false tapes to his accountant who used them for tax purposes. This was denied by accountant.
- Fiasche testifies that he instructed the accountant to give Gucciardo full access to statements, but Pietracupa (Accountant) says he only kept records to make statements and returned them to Fiasche as soon as they were prepared. He didn't want to keep copies in case of tax audit and to protect himself against professional liability.
- Gucciardo claims he had no access to any records
- Monthly gross sales ended up being much lower than Fiasche's kitchen table figures, Gucciardos became disappointed and worried about low revenues.
- Gucciardo kept what he claims were the true Restaurant register tapes for a few days, and showed in evidence the false tapes for the same days showing about half the figures.
- Gucciardo got the general ledger of 1991 that Pietracupa sent him after terminating his accounting services for the Restaurant in 1992. This showed half of the daily receipts comparing to the true tapes
- Fiasche did not deny this since his handwriting was on them. The general ledger also showed only 1 employee working there, himself, but there were actually at least 3.
- The Restaurant was also being used as a delivery depot for Smokey's restaurants and it was difficult to separate purchases from the restaurant from the others to do an effective analysis.
- Sales were never as good as their first day, July 5th, the money Gucciardos took home decreased.
- Gucciardos testified that there were some of the customers in June and July that where **fictitious**, presumably consisting of Fiasche's friends to create desired impression of busyness. Tax auditor continued to show up, but Fiasche told Gucciardo that she was just making sure that the cash register worked accurately.
- Paci, the attorney finally came back from vacation, surprised to find out that Gucciardo made a deposit of \$100,000.
- Paci stated that he had accepted a mandate from Gucciardo before going on vacation; he would have been very upset to learn of the deposit and would have probably withdrawn from the file.
- Paci learned that the franchise manual referred to in the draft franchise agreement never existed.
- He too saw the statement of 1990 showing a deficit, but Gucciardo told him what Fiasche said: not to worry, not all income was reported.
- Paci visited the Restaurant having agreed to represent Gucciardos, but he was not impressed; the space was tiny and the equipment was very old.

- Fiasche suggested Gucciardos to have Mrs. Gucciardo become purchaser of record, so Mr. Gucciardo could collect unemployment for 6 months to help finance the purchase. The court was satisfied that Gucciardo informed his wife of the essential transactions and acted as her mandatary.
- Gucciardo had reservations about completing the purchase, sales were low and they worried about the constant presence of the tax auditor.
- Fiasche no longer showed up every day to provide guidance and the increased sales never came true
- Between Sept. 23 1991 to Feb. 5 1991, Gucciardos wrote 27 letters to Fiasche complaining about the quality and price of the food, they also did cost analyses in Sept and Jan showing that cost of food exceeded 50% of sales instead of 35% like Fiasche promised
- Gucciardo testifies, he had to dip into their savings to meet all payments to Fiasche and the bank, having barely enough left over for groceries.
- December 1991 Gucciardos met with Fiasche and asked him to buy the Restaurant back as he had promised; **He refused, saying he had promised only to help them if he could.** He suggested they sell the restaurant to another franchisee.
- In December, Gucciardo began buying salami from a nearby supermarket; he found that the retail price was less than what Fiasche was charging wholesale, eventually they were buying all food directly from suppliers, avoiding Fiasche's mark up.
- Gucciardos complain that Fiasche wanted cash for their purchases from February on, saying that Gucciardos were so far on payments that he did not want to extend further credit.
- **February 1992, Mrs. Gucciardo sued Fiasche to have the share purchase agreement annulled based on his false representations and failure of his franchise company to provide food of acceptable quality at reasonable price, as well as to perform his obligations under franchise agreement.**
- **She claims \$148,501, comprising of payments made thus so far on account of the purchase price and the amount of \$133,501 and \$15,000 in damages.**
- **In his defence, Fiasche says Gucciardos had ample opportunity to verify the sales at the Restaurant before and after the deposit was made and seeks the balance of the purchase price of \$66,499 by cross demand.**
- **In 1992, the franchise company sued the restaurant company for the price of goods and franchise fees owed in agreement of \$7,214.92. The restaurant company cross-demanded for annulment of the franchise agreement, on basis of failure of performance and had the file move to the Superior court, joined by the hearing with Mrs. Gucciardo's action.**

Position of the parties

Mrs. Gucciardo's contends that the sales and franchise contracts should be resolved and Fiasche condemned to pay her for damages for reasons that go both to the formation and performance of the contracts

Issues

Important questions: how to decide on credibility of facts?

Did Fiasche tell Gucciardos, as they claim, that there was \$300,000 of profits, which he denies?

Did the Restaurant owe profitability to systematic tax evasion, as they claim and which he denies?

Was Mrs. Gucciardos error excusable misunderstanding induced by Fiasche's fraud?

Or was it a deliberate wrongful choice?

Contract would have been void due to her own negligence.

Discussion

○ CREDIBILITY

Gucciardos testimony is much more credible than Fiasche's:

- With no business experience, Gucciardo wouldn't raise \$140,000 and deposit \$100,000 unless there was some assurance that the venture was profitable, especially knowing that he lost his job.
- Fiasche also regularly prepared false tapes and bought 2 new cash registers.

○ FORMATION OF CONTRACT – FRAUD

- Deal was flawed at core, all of Gucciardos complaints = irrelevant
- Fiasche defrauded them grossly, overstating weekly sales and going back on his promise of buying it back if it turned out not profitable
- Gucciardo should have recognized it was unprofitable since he saw the statements
- Gucciardo's error inexcusable since his misperception of reality came from closing his eyes to the risk he was running, better understood as a conscious wrongful choice, he could not avoid being aware of tax evasion
- Court thinks Gucciardo and Fiasche lied about \$100,000 deposit; Fiasche claiming he never asked for it and Gucciardo claiming he didn't understand the illicitness of the operation

- If Gucciardo did not see financial statements before placing deposit, the court would have his sympathy, he could have credibly claimed that he didn't realize he was taken into illegal business, this would have been an excusable error.
- Gucciardo had nothing to guide him other than blind trust in Fiasche, author of fraud.

○ CAUSE

Valid contract need 4 elements:

1. Parties legally capable of contracting
 2. Their consent is legally given
 3. Need object of contract
 4. Need lawful cause or consideration.
- Parties must give their free and enlightened consent and must have a valid reason/motive to enter contract.
 - **Contract with unlawful consideration HAS NO EFFECT, not valid either if consideration not expressed in writing or is incorrectly expressed in writing**
 - **Consideration = unlawful when prohibited by law or is contrary to good morals or public order.**
 - **Cause of contract = reason each party enters into it**
 - **Contract whose cause is prohibited by law or contrary to public order = NULL**

○ PUBLIC ORDER

(2 CATEGORIES):

1. Direction = protect public interest, providing political, social and economic direction
 2. Protects individual interest
- Basis of business = falsifying documents in order to defraud the public treasury
 - ➔ Anyone with intent to defraud:
 - a) Destroys, mutilates, alters, falsifies or makes false entry
 - b) Omits a material, alters particular, book, writing, valuable security or document
 - Guilty and liable to imprisonment for max of 5 years
 - ➔ Intent to defraud creditors

➤ Guilty and liable to imprisonment for max of 5 years

- Violation of these laws can be invoked by court as grounds of absolute nullity of both share purchase and franchise agreement.
- Motives of the parties were unquestionable illicit
- Gucciardo's initial complaint: Fiasche not keeping his promise of buying back if Restaurant proved unprofitable. But Gucciardo was also infringing public order.
- Question here => should parties to an illicit contract get benefit of restitution (compensation), even if they harmed society?
- In previous cases (1985), no restitution was given for similar case; in other cases restitution was given.
- Objective is not to punish transgressor but not to profit from annulment of illegal bargains.
- Article 1422: Contract that is null is deemed to have never existed, party is bound to restore all prestation he got from other party
- Fiasche was left with obligation to pay damage arising from his delay to refund price

○ **PERFORMANCE**

- Gucciardo's complaints unfounded because of failure to pay income tax
- Assessment of \$19,000 issued in March due to nonpayment of tax, May 1992, Revenue Qc threatened execution if it wasn't paid.
- Gucciardos then abandoned business, they lacked the funds to pay for assessment
- Court emphasizes that even if Fiasche did all the Gucciardos expected of him, the whole transaction would have been void due to initial illegal nature of business

○ **DAMAGES AND CROSS-DEMAND**

Gucciardos are NOT entitled to damages arising from breach of agreement, Fiasche's cross-demand for balance of purchase price dismissed for the same reason

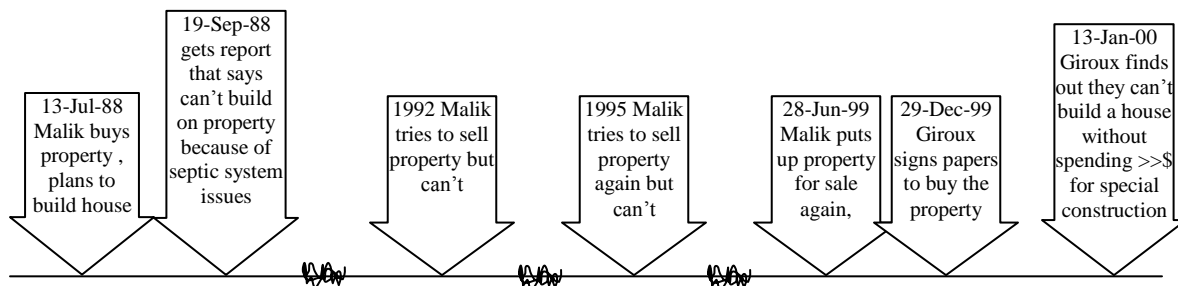
○ **COST**

- It is fair that Fiasche pay the costs to Mrs. Gucciardo since he unjustifiably resisted restitution\
- Public interest served by denying Gucciardo her claim in damages

○ **FOR THESE REASONS THE COURT:**

- **MAINTAINS: Plaintiff Gucciardo action**
- **DECLARES: Share purchase between parties Jul. 5 1991 null and void**
- **ORDERS: Defendant Fiasche to pay Plaintiff sum of \$133,501 with interest**
- **DISMISSES: Plaintiff cross demand for costs**

Giroux vs. Malik (p. 86)



Facts	<ul style="list-style-type: none"> Malik informed agents in 1992 and 1995 sales attempts about issue with building on the land – the land was never sold Malik less forthcoming with issues in 1999 selling attempt Giroux says he didn't know he couldn't build, now he's out \$45k purchase price, had to buy another house (already sold old house), had problems getting kids in school
Question	<ol style="list-style-type: none"> Did Giroux know ahead of time that the land was bad? If not, was contract still formed? Are damages allowed?
Ratio	<ol style="list-style-type: none"> <i>Answer:</i> judge says no, Malik didn't tell Giroux that he could not build a house on the land (based on evidence presented). Thus, he did not conduct in good faith. <i>Argument:</i> Malik had the obligation to tell G about the problem with the land, [1375] conduct himself in good faith. Giroux's consent was [1401] vitiated by Malik's silence on the building issues. Fraud resulted from Malik's silence. <i>Answer:</i> [1407] contract can be annulled or ratified with reduced obligations. Via [1419] relative nullity, contract was cancelled. <i>Answer:</i> Contact vitiated by fraud so [1407] damages allowed
Decision	<p>Contract annulled Malik found guilty. Malik and Giroux placed in their [1422] pre-contractual state (Malik gets land back, Giroux gets money back), damages awarded to Giroux for "great stress and inconvenience"</p>

Red herring: agency issue

- If Malik told his agent about the problem, then agent and Malik both are responsible.
- If Malik didn't tell his agent, then Malik is the only one responsible
- Either way, Malik is responsible

Even though Malik told the problem to his agent, he is still responsible for wrongful acts of his agent, e.g. misrepresentation. He may go after his agent after, but now, Malik is responsible.

CONTRACTS

Peter vs. Fiasche (p. 93)

Mrs. Peter (AKA Mrs. Gucciardo) buys restaurant for herself and her husband

Facts	<ul style="list-style-type: none"> Gucciardo and Fiasche are longtime acquaintances. Gucciardo's losing his job, hears that Fiasche is selling his restaurant. Gucciardo mortgages his house to buy into restaurant, Fiasche says his restaurant makes money with a special scheme, shows Gucciardo the scheme (faking receipts to show lower income and pay less taxes) once \$100k deposit received. Tax auditor visits restaurant while Gucciardo's taking over, Fiasche says don't worry she's just there to check cash register Gucciardo's losing money from onset, Fiasche says don't worry, will pick up but business never picks up. Gucciardo sues fiasche
Question	<ol style="list-style-type: none"> Should contract be annulled because G's consent vitiated by G's error caused by F's misrepresentation? Does contract exist?

	3. Should G receive damages?
Ratio	<p>1. <i>Argument</i>: G's consent was [1400] vitiated by the error of believing F's claims about inflated income <i>Answer</i>: The error of G's believing F's claims was inexcusable because of conscious wrongful choice (there's no way he didn't know that tax evasion was the root cause of this special scheme for >> income than shown on the financial statements), and [1400] only excusable errors can result in vitiation of consent</p> <p>2. <i>Argument</i>: The [1410] cause of the contract (reason why G's contracting) is to buy a restaurant and make money through illegal tax evasion <i>Answer</i>: [1411] an illegal contract is absolutely null, so it is as if [1418] there never was a contract in the first place (absolute nullity)</p> <p>3. <i>Answer</i>: the contract is absolutely null, so it is as if it never existed, therefore no obligations were produced under the contract, therefore no damages</p>
Decision	Judge says the contract is null (never existed), and requires Fiasche to resume the ownership of the restaurant and pay back the \$100k to G*

*A judge can do two things when a contract has been annulled:

- #1: Act in equity (in fairness): There's no contract, but it's not fair to leave Fiasche with the restaurant and Gucciardo's \$100k, so F must give the \$100k back to G.
- #2: Dismiss the plaintiff and defendant and let them do whatever they want to settle it

(p. 103: the trial judge has a wide discretion to grant or deny restitution as he or she sees fit)

Inexcusable error (p.100)

- "G's error was inexcusable, since G's misperception of reality arose from closing his eyes to the risk he was running into"
- "conscious wrongful choice"

Carrefour Langelier vs. Cineplex Odeon Corp. (p. 106)

About performance of contract, how do we enforce performance of contract?

Facts	<ul style="list-style-type: none"> • Langelier (lessor) contracts with Cineplex (lessee) (first contract: lease) • Cineplex sub-contracts with Guzzo to operate the theatre (second contract: sub-lease) • Before sub-lease can occur, have to tell the landlord, but the landlord wanted Cineplex • Guzzo offered to run it as Cineplex, with obligation to continuously operate as a Cineplex Odeon • One year later, Guzzo takes down Cineplex signs and puts up Guzzo signs • Landlord says no, must remain Cineplex Odeon • Guzzo says there are no damages to lessor by operating as Guzzo instead of Cineplex, so landlord shouldn't worry • Landlord says "specific performance," Guzzo said it would specifically perform as Cineplex so now must do it • Guzzo says no. Carrefour asks for mandatory permanent injunction (specific performance) i.e. an injunction to force Odeon and Guzzo to operate as Odeon according to contract.
Question	<p>1. Should the contract be annulled?</p> <p>2. Guzzo says not a case [1601] which admits of specific performance (because no damage)</p>
Ratio	<p>1. <i>Argument</i>: Guzzo says it was under pressure when signed, it was "fearful," because it was going against a bigger competitor and its consent was [1403] vitiated by fear, so contract should be [1418] annulled. <i>Answer</i>: Judge says no more fear experienced than any other business (subjective not objective fear) so [1403] can't be used to vitiate consent</p> <p>2. <u>Argument: Specific performance is not allowed when:</u></p> <ol style="list-style-type: none"> Obligation has become impossible to perform (e.g. snow shoveller has a stroke, so can't continue. The other party can claim damages related to non-performance of obligation, but cannot get an injunction forcing the snow shoveller to shovel the snow, because it is impossible for him to perform the job.) The time in which to perform the obligation has elapsed (e.g. a Celine Dion concert, if she refuses to perform for some reason, once the concert date/time has passed it's too late. The sponsor cannot get an injunction to force her to sing, because

	<p><i>the time has elapsed, but he can sue her for damages.)</i></p> <p>iii. The property has perished (e.g. <i>ship sunk at sea. You can claim damages, but cannot ask the sailor to bring you your coat that sunk in the sea.</i>)</p> <p>iv. The property has left the patrimony (e.g. <i>You want to sell your Lada; you get two offers, and sell to one of them. When you accept one of the offers, you cannot accept the other one. You no longer own the Lada</i>)</p> <p>Answer:</p> <p>i. Impossible means absolutely impossible, therefore not applicable here.</p> <p>ii. Time elapsed? No, because lease = successive performance</p> <p>iii. Property perished? No</p> <p>iv. Property left patrimony? No</p> <p>Therefore case does admit specific performance of the obligation. “Specific performance is a remedy separate from that of reparation” – therefore do not need to prove damages to get a permanent injunction, only need to prove the obligation promised must be performed & specific performance is admissible.</p>
Decision	Injunction granted, Guzzo must operate as Cineplex Odeon

Copiescope vs. TRM Copy Centers (p. 115)

Facts	<ul style="list-style-type: none"> • TRM got an interlocutory injunction against Copiescope to prevent Copiescope from encroaching on TRM’s business (placing photocopiers in convenience stores, etc.) because of a non-competition clause that TRM made the business owners sign; • TRM said to Copiescope to stop taking away TRM’s clients and stop placing its copiers in stores according to the non-competition clause. • Copiescope appeals the injunction
Question	1. Is a clause of the contract [1437] abusive and therefore to be annulled? (for consumer and adhesion contracts); i.e. Is the non-competition clause manifestly unreasonable and therefore invalid?
Ratio	<p>1. <i>Argument:</i> contract is one of [1379] adhesion (business owners couldn’t negotiate terms), and non-competition clause is [1437] abusive because business operators received no real “trade secrets” and conditions for business-owners were too strict.</p> <p><i>Answer:</i> excessive non-competition clause means [1437] the clause is annulled (invalid) and unenforceable, because it is abusive; and since the injunction was based on the non-competition clause there are no longer grounds for injunction.</p> <p>2. There is no proof of any valid reason why a business operator who decides to terminate the contract with TRM copy should be deprived for one year from providing the product of a competitor to its customers. Neither is there any reason given to justify this prohibition over the vast area of 25 miles covering any other business in which it may have an interest or in which it may wish to have an interest.</p> <p>3. the restrictions set out in the non- competition clause are exorbitant and are grossly excessive for the reasonable protection of the interest of TRM Copy.</p> <p>The adhesion contract laws say that if there is any excessive or abusive clause, such a clause is annulled or deemed unwritten. If it had been a mutual contract, this clause would not be void.</p>
Decision	The noncompetition covenant is manifestly unreasonable and therefore invalid. Respondent (TRM Copy) has not established an apparent right which is necessary for an interlocutory injunction. Dismiss the motion for interlocutory injunction with costs. Copiescope’s appeal is successful (Copiescope can sell photocopy machines again)

Note: not the same type of non-competition clause we saw in employment law

- Business non-competition clauses also have regional, type, time, business restrictions, but are generally for longer periods of time.

CHAPTER 9: CIVIL LIABILITY/RESPONSIBILITY

9.1 - Introduction

- People must be held liable for their actions, and consequences of actions

Vicarious Liability: held responsible for injuries caused to others, even though they did not personally cause the damage. Under certain conditions, a party will be called upon to compensate those injured not through his direct action.

- When damage/injury caused by people who are under their control (children or EEs)
- Or things under their control (Autos, machines, buildings)

9.1.2 Contractual v. Extra-Contractual Liability

Article 1458 Civil Code –“every person has a duty to honor his contractual undertakings”

- If one party fails to carry out obligations, may result in legal action, other party can claim compensation for the damage the failure cost
- Damage can also be caused **without a contract**
 - o Ex: kid breaks window while playing baseball
 - o Even with no contract person at fault is held “civilly liable”

Contractual Damage: failure to respect obligations in a contract– every person has a duty to abide by the rules of conduct, not to cause injury to one another

Extra-contractual Damage: no contract

Ex: John rent apartment from Mr. Bedard. One day he is sitting on balcony with friend Sandy when balcony falls and also seriously injures pedestrian.

- John can sue Mr. Bedard under Art.1458 of the *Code* given his lease as a contractual agreement → safe living environment in return for rent
- Sandy and pedestrian sue Mr. Bedard under Art. 1457, because no contract

9.2 - Personal Responsibility

9.2.1 Conditions

Conditions must exist before injured party expects compensation in courts, set out in Art.1457:

1. Person who caused damaged to be endowed with reason
2. Person be at fault; as a result of fault, real damages caused to another person

9.2.1.1 Endowed With Reason

- Person capable of discerning right from wrong; enough intelligence and an age old enough to appreciate consequences of actions
 - Person with mental faculties (handicap, old age, illness or other factors) or young child free of any responsibility
 - Child must be 7 years + to be held responsible (but depends on circumstances)
- Person endowed with reason, actions are considered FORCE MAJEUR or superior force, over which they have no control and cannot be held responsible
 - Victim could seek compensation from a parent of a child or those in charge who is not able to make distinction

***Exception:** person causing damage under the influence of drugs/alcohol → even if you can't tell right from wrong, can still be held liable because they deliberately created this condition

9.2.1.2 Fault

To determine if person is at fault, need to compare actions (or inactions) to reasonably prudent/diligent person within the same context

- If person was not reasonably prudent/diligent then: person has committed a fault that departs from acceptable standards of action in our society

- If more than 1 person take part in wrongful act → all said persons may be held solidarily liable (each person held liable for 100% of damages)

Art. 1457 CC- “**Fault**” is the violation of a duty imposed by law, that requires a person to be aware of the consequences of their actions.

Ex: Lorenzo parks outside store and leaves car on with window open. 11 yr old kid passes and tries to move the car. He puts it in motion and hits front of store across the street. Lorenzo should have foreseen the damage or injury such a situation would have caused. Failure to do so means he was not reasonably prudent and diligent.

9.2.1.3 Damages

- Person being sued must have committed a fault that also resulted in actual damages
 - **Bodily** (physical injury)
 - **Moral** (psychological or mental illness or damage to reputation)
 - **Material** (medical expenses, damage to property, Ex: clothing, cars, houses, merchandise or causing loss of income)
- Damages must be certain + in present form (Art. 1611 CC)
- Can also be for future damages if they are certain to take place + can be easily assessed; also possible for bodily injury
 - Creditor can petition to reserve right to apply for additional damages within a 3 yr period of initial judgment
- Family member suffer shock from being a witness, can claim compensation for having to stay home for several days
- **Punitive damages:** if proven the defendant’s fault was intentionally and violated the *Charter of protected rights* → to teach defendant a lesson
 - **If** defendant was found guilty under criminal law, cannot request punitive damages (no double punishment)

9.2.1.4 The Causal Link

Ex: Michel goes up stairs to 2nd floor where his dad lives, step brakes and he injures himself. Owner at fault, evident from Michel’s broken arm – was the fault the cause of the damages? Did the owner comply with his duty to foresee possibility of damage and precaution?

- If steps had been examined few days ago, and that morning of was loosened by mover then → **no causal link**
- Cannot be expected to verify several times a day
- Reasonable and regular examinations
- Link between the fault and damage has to be proven in court to succeed with a claim for compensation under Civil Liability

9.2.2 Defences

Law offers person being sued for civil liability some possible defences, which may pardon them partially or totally from having to compensate another person for damages resulting from personal act.

9.2.2.1 Victim’s actions

Can argue that injuries are directly linked to victim’s **fault, victim’s acceptance of the risk or that he aggravated the damages suffered.**

Contributory Negligence:

- Victim’s injuries may be partially or wholly attributed to his own fault

Ex: victim broke leg skating on private ice rink. Owner proves he was skating in reckless manner.
Result → owner pays 60% damages, victim 40%

Acceptance of risk: possible in 3 methods

- Signing of contractual waiver, defendant isn't responsible: does not protect from claims on bodily or moral damages
- Displaying a notice. **Ex:** coat checks, states that owner will not be liable for any loss/damage to the coats
- Posting a warning sign. **Ex:** no trespassing, beware of dog

Victim aggravates damages

Ex: victim refuses medical attention after being injured by defendant, injury becomes more serious.
Defendant only responsible for damages before aggravation.

9.2.2.2 The Good Samaritan

Caused damages in process of helping others.

***Tricky:** as a result of a person's disclosure of a trade secret for public health and safety reasons (Ex: an EE violating a contractual secrecy obligation by whistle blowing on the ER's toxic pollution of a lake)

→ must demonstrate the interest of general public over that of the organization

9.2.2.3 Superior Force

Unforeseeable and unstoppable acts (earthquakes, floods, lightning and ice storms)

9.2.2.4 Another Person made it Worse (Novus Actus Interveniens)

Person being sued may be totally or partially free of liability because fault of another weighs heavier than theirs.

Precedent → *Beaudoin v. T.W. Hand Fireworks (1961)*

- Kids found abandoned fireworks from T.W. Hand Fireworks after a show
- Almost all kids handed over fireworks to parents who gave them to police
- 1 kid gave them to his father, who gave them to an EE to dispose of, EE used them in presence of children and 1 got injured
- Supreme court found company free of any liability because father should have disposed of the fireworks or handed them over to police as did the other parents

9.2.2.5 Improper Use

Defence on improper use of object, or used in a manner that it was not designed for

Ex: use of hairdryer to remove paint from a wall and starts fire, or to defrost a window and breaks it

9.3 - Indirect Responsibility

9.3.1 Liability of Parent

2 possible recourses towards obtaining compensation:

1. Sue child if he is at least 7 years old
 2. Sue the parents
- *Both can be sued at the same time

For parents to be held responsible, 3 conditions:

1. Child is a minor
2. Parent must have parental authority over the child
3. Damages must be the result of an act or fault of minor

In their **defence:**

- Must prove sufficient surveillance (could not have foreseen what happened) or education over the child to instill good values (taught child difference btwn right and wrong)
- If parent not held liable, court may hold child liable; likelihood of collecting compensation may not exist; court judgment gives plaintiff 10 years to exercise this rights against a child

9.3.2 Liability of Non- Parent

- Baby sitter, teacher
- Can also be held liable for damages caused by a child
- Persons/organizations acting free of charge cannot be held responsible unless they personally commit a grave fault. **Ex:** child causing damages to another under grand-parents supervision.
- Victim needs to demonstrate the existence of 3 conditions:
 1. P/[p-arent must have delegated authority over child to non-parent
 2. Child caused damages by an act or fault
 3. Child is a minor

In his **defence:**

- Must prove adequate surveillance or education over the child
-
-

9.3.3 Liability for EEs (agents or servants)

Business may be held responsible for damages caused by EEs while carrying out their duties

Ex; gym EE seriously injures client during training session, painter drop paint on home- owners couch and ruins it

Injured party needs to prove that :

- Person who cause damage is an EE
- EE was at fault
- Took place during the course of their employment
- Control over the EE by the ER; ER having some authority over the person. If ER can prove that EE was acting for his own benefit, not within his employment functions, and outside of workplace, ER will be free of responsibility.

9.3.4 Liability for acts of an animal

Victim must demonstrate that the owner or person having custody (control) of animal failed in their surveillance of the animal. 3 points of interest must be considered:

1. Animal must be domesticated
 2. Owner + any person given custody may be held responsible at the same time
 3. Damages caused by animal need not be the result of direct contact. **Ex:** animal running in cyclist path, bicyclist avoids it and loses control, falls + suffers injuries.
- Owner/guardian can invoke superior force or the victim's fault in his **defence**
 - Unforeseeable/ unstoppable nature of act must be proven (animal becoming rabid)
 - Victim's provocation of the animal will be considered in attributing responsibility

9.3.4 Liability for damage due to ruin of an immovable

Owner of immovable (building, elevator, land ...) may be held responsible for any damages caused by its partial or total ruin.

- Should building as a whole or part fall apart and injure a person, owner automatically presumed responsible and can be sued for failure to conduct repairs or defect of construction
- Owner can rebut (contradict)m by proving damages were the result of victim's fault, who failed to inform of necessary repairs or improper use
- Owner can also claim superior force (lightning, earthquake, flooding)

9.3.6 Liability of Manufacturer, Distributor, and seller for safety defects in movables

- Damage from improper manufacturing. **Ex:** toaster with faulty assembly, causes electrical short-circuit

and fire

- Design itself may lead to damages when being used
- Improperly preserved or presented products
- Improper use as a result of a lack of information or indications of safety precautions on how product should be handled. **Ex:** lawn fertilizer doesn't indicate instructions or possible danger of staining natural stones on patio

- Labeling complexity depends on product. **Ex:** Car vs. Hammer
- If product shown to have safety defect, liability for damage may rest on all of the following:
 - Manufacturer of object
 - Person who distributes it under his name (wholesaler + retailer)

*Cannot escape liability by claiming they weren't aware, when sold as new, presumed to know of defect, whether it's true or not.

- Can be avoided if can prove the victim knew the safety defect, bought it and used item in spite of this knowledge
- Or damages result of superior force, item improperly used by victim, defect unforeseeable and did not neglect to warn purchaser when they became aware of it

9.3.7 Responsibility for acts of a thing

Movable/ immovable thing causing damages → can sue owner or person in control for damages

Ex: heating unit explodes and injures someone standing nearby. Person who has custody may claim superior force in his defence, the victim's fault or an absence of fault on his part.

9.4 - Limiting Civil Responsibility

No-fault system in QC: *Automobile insurance act, workers' compensation act, act respecting industrial accident and occupational diseases*

CASES

Harris vs. Ostromogilski (p. 124)

Facts	<ul style="list-style-type: none">• H rents a cab from O• There was an altercation when H went to O's house to pay the rent for the cab• H says O beat the crap out of him• O says that H slipped and fell• H is suing for damages
Question	(endowed with reason) Fault + Cause + Damages = Civil Liability 1. Is there fault? 2. Is the damage the immediate and direct cause of fault? 3. Is there damage? 4. Are there compensatory damages paid? 5. Are there punitive damages paid?
Ratio	<i>Argument:</i> 1. Judge believes that O did beat up H (significant injuries indicate more than a slip and fall), and it's a fault (breach of law) to beat someone up 2. H's injuries are the immediate and direct cause of fault (i.e. beating) 3. Yes = damage <i>Answer:</i> [1457] All three therefore there is civil liability 4. [1457] H should receive compensation for bodily, moral, and material damages 5. [49] (p.6) says potential for punitive damages when illegal and intentional action, so punitive damages warranted in this case – but O is already punished in criminal court, so [1621] no need for punitive ² damages (no double punishment for the same fault)
Decision	O pays H compensatory damages (no punitive)

² Punitive AKA exemplary damages

Note:

This case involves criminal court and civil court; criminal court is designed to sentence criminals; in a civil court, the wrong doer is forced to pay damages, no sentencing involved.

Criminal trial has two stages:

1. verdict (guilty or not guilty)

If not guilty: go home

If guilty, then judge must decide on sentencing:

2. Sentencing: (from \$0 to \$X fine, and/or jail time)

- O was sentenced to jail time, his punishment under criminal court prevented H from receiving punitive damages. O was punished under criminal trial; therefore, H could not get punitive damages, because O is already receiving punishment for the same fault.

CIVIL LIABILITY (AKA PERSONAL INJURY)

Walker vs. Singer (p. 128)

Walker = man

Singer = woman

Facts	<ul style="list-style-type: none"> • Walker meets Singer , moves in with Singer • Their relationship turns sour • Singer gets pregnant and has abortion • Next day, Singer destroys Walker’s clothes, steals some ties and socks • Walker calls police. Police charges her with mischief. • Walker sues Singer (criminal complaint) • Singer found guilty but receives no fine/sentence. She just receives a warning. • Singer makes up story that Walker sexually assaulted her, • Walker gets charged with sexual assault • Judge doesn’t believe Singer • Walker found not guilty • Walker sues Singer in Civil Court for: <ul style="list-style-type: none"> i. Material damages (clothes) ii. Moral damages (damage to reputation)
Question	<p>Fault + Cause + Damages = Civil Liability</p> <ol style="list-style-type: none"> 1. Is there fault? 2. Is there damage? 3. Is the cause immediate and direct? 4. Are there compensatory damages paid? 5. Are there punitive damages paid?
Ratio	<p><i>Argument:</i></p> <ol style="list-style-type: none"> 1. Fault = false accusation by Singer 2. Damage = Walker can’t establish a stable relationship with women because of sexual assault charge. He can’t sleep. Damage to his reputation. 3. Cause = Singer’s lies, it’s the immediate and direct cause of the damage <p>Answer: All three answers are positive, therefore [1457] civil liability</p> <ol style="list-style-type: none"> 4. [1435] Compensation for moral damages 5. Punitive damages warranted per [49] and awarded because no punishment in criminal case (no sentence/fine)
Decision	Singer pays Walker compensatory and punitive damages. Singer was not convicted under criminal court, so she had to pay punitive damages plus compensatory damages.

CIVIL LIABILITY (AKA PERSONAL INJURY)

Farmakis vs. Canadian Tire (p. 134)

Facts	<ul style="list-style-type: none"> • Farmakis retires and wants to live in Greece • He buys a step ladder from Canadian Tire. • He’s renovating his home, and after hours of renovations, he falls off the step ladder and cracks his heel.
-------	--

	<ul style="list-style-type: none"> • He comes back to Canada for medical treatment. • 1.5 years later, his wife ships the ladder back to Canada <ul style="list-style-type: none"> • Expert examines the ladder, says there's a pre-purchase defect in it. • Farmakis sues Canadian Tire
Question	<ol style="list-style-type: none"> 1. Was there a defect in the product? 2. Was there sufficient indication of attendant dangers of using the ladder?
Ratio	<p style="text-align: center;">Fault + Cause + Damages = Civil Liability</p> <p>1. <i>Argument:</i> expert says ladder had a pre-purchase defect. <i>Answer:</i> No way to prove the defect was pre-purchase after years of ownership and globe-trotting undergone by ladder</p> <p>2. <i>Argument:</i> Farmakis says there weren't [1469] sufficient warning labels on ladder, claimed there originally were three stickers, which he removed, but only kept two of them. Ladder displays evidence of there being four labels originally (four areas where there was adhesive – looked like there were four stickers) <i>Answer:</i> four labels indicate it appears there[1473] was sufficient indication of dangers and Farmakis knew or could have known about these dangers.</p>
Decision	Farmakis loses suit – no damages awarded

CIVIL LIABILITY (AKA PERSONAL INJURY)

Walford vs. Jacuzzi (p. 138)

Facts	<ul style="list-style-type: none"> • Walford Family buys a 4-foot deep above-ground pool and then a 10-foot slide • Mom <u>warned her daughter not to go down the slide face-first</u> • Girl slides down head-first and breaks her neck, became a quadriplegic • Girl sues Jacuzzi because didn't warn you couldn't put a 10-foot slide in a 4-foot pool, sues Pioneer because didn't advise not to put the slide and pool together
Question	<ol style="list-style-type: none"> 1. Is there a fault on the part of Jacuzzi and Pioneer? 2. Is the fault direct and immediate cause of the damage?
Ratio	<p style="text-align: center;">Fault + Cause + Damages = Civil Liability</p> <p>1. <i>Answer:</i> Fault = daughter's fault, sliding down head-first (she's [1473] endowed with reason, so she should have known better and paid attention to her mother's warnings)</p> <p>2. <i>Answer:</i> Daughter's fault was the immediate and direct cause of the damage (There was also fault on the part of Jacuzzi because they didn't warn, but this was not the direct and immediate cause of the injury – the girl's fault was the direct and immediate cause)</p> <p>All under [1457]</p>
Decision	"not guilty" – no damages awarded, because the direct and immediate cause of damage was the fault of daughter.

Morse vs. Cott Beverages (p. 139)

<p>Facts</p>	<ul style="list-style-type: none"> • Morse can't twist the cap off the 2-litre cola bottle, so • She uses a nutcracker to open it • Cap pops off and hits her in the eye, she loses consciousness, and goes to hospital • She Experiences significant damage to her eye, lasts for a prolonged period of time • She hires a lawyer, lawyer takes a look at Cott's capping process control manual, finds that: <ul style="list-style-type: none"> • Cott has a manual on appropriate capping regulations (says don't cap at >15 lbs of torque) • Cott changed from recommended 13lbs to 20lbs to avoid spoilage (At 13lbs, caps were popping off in storage, Cott raised the torque to prevent this spoilage) • Cott did not follow the recommendation of capping machine manufacturer, Alcoa, and ignored its cautions. • Morse sues Cott
<p>Question</p>	<ol style="list-style-type: none"> 1. Was there Cott's fault? 2. Was there damage? 3. Was the fault the direct and immediate cause of the damage? 4. Should there be compensatory damages? 5. Should there be punitive damages?
<p>Ratio</p>	<p style="text-align: center;">Fault + Cause + Damages = Civil Liability</p> <p><i>Answer:</i></p> <ol style="list-style-type: none"> 1. fault = Cott not following recommended way to use the machine, 2. Yes, Mores incurred significant physical, moral and material damages, 3. Yes, the fault was the direct and immediate cause of the eye injuries. All under [1457] 4. [1457] Compensatory damages for bodily injury. It was gross negligence on the part of Cott, because as mentioned in their manual, they knew what was going to happen, but they didn't try to fix it. 5. Section 28(1) of Consumer Products and Warranties act says can collect punitive damages or exemplary damages if willful and knowing violation of act, this is the case for Cott's so damages awarded
<p>Decision</p>	<p>Compensatory plus punitive damages to be paid to Morse by Cott</p>