

Advanced Commercial Law

Learning from Cases

Precedence allows efficiency, fairness and predictability. However it does not allow for changes in social norms and values.

Law changes to reflect social norms and values.

General rule of precedent is that decision of a court is binding on all lower courts.

Only the **Ratio Descedenda** is the only part of the case that is binding. Everything else is the **Obiter Dicta**. Which still may be persuasive towards the case.

Lawyers will look for precedent that is binding and similar to their case. If they don't have anything that is binding then they will look for persuasive precedent from other courts in possibly other countries.

If they can find neither then they will argue to try and convince that there should be a precedent.

Trial courts find facts and laws to apply them to the case. Appeal courts are only used to appeal on **matters of law**.

Plaintiff brings the lawsuit "π"

Defendant "delta"

Claim

Counterclaim - Involves a claim by a defendant opposing the plaintiff and seeking relief from the plaintiff for the defendant.

Cross claim – Involves a demand made in a pleading against another party on the same side of the lawsuit.

Defamation- Making untrue statements about someone that leads to irreparable damage to their reputation.

Tort Law Cases Pg 40-79

Battery: Malette v. Shulman- Jehovah's witness receives blood transfusion which may have saved her life even though he was aware she was a JW. She sued him for trespass to the person and battery. Freedom of religion affects a major part of this decision.

The ratio from this maybe that a when a Jehova's witness needs a blood transfusion and is incapable of making a decision then their wishes are to be respected.

Defamation: Hill v. Church of Scientology of Toronto- Hill was a Crown Attorney. COS makes a lot of revenue selling books. The CRA investigated and stated that they needed to pay tax, while COS refused on the basis that they were a church. RCMP did a search of their offices which became violent. There was a question in terms of what information that was seized could be made public. A press conference was called in which Hill was accused of a number of crimes including falsifying evidence. A lawyers highest duty is to the court.

These statements were found untrue and Hill was awarded 1.6 million including eight hundred thousand in punitive damages

Manning stated that this **infringed his charter rights to freedom of expression**. Court stated that Hill was not defamed as a member of a government but as a private person. Therefore a private individual and no charter of rights infringement as it is a tort.

Manning then stated that he had **infringed his common law rights**. Courts stated that there had to be a balance between freedom of speech and the rights of a person's reputation. In such a case the balance favours the rights of the person's reputation.

Manning then used the **New York Times v. Sullivan (Actual Malice)** where the person had to know what they were saying was false or that they acted with actual malice. Court said that the person needed to inquire as to the truth in order to actually make a potentially defamatory statement.

Manning then said that he enjoyed **Qualified Privilege**. This permits persons in position of authority or trust to make statements that would be considered slander or libel. Court said that he did this in order to create the most amount of damage and that did not advance his case. --> SSC Results not binding on itself

False Imprisonment: "Parlee v. Port of Call Holdings"

In this case a trial level court is functioning as an appeal court as it is a small claims court. Appeals of a small claim court go to the trial level court acting as an appellant level court.

***Motion** is a request by a party for some procedural remedy. I.E. to dismiss a case, exclude certain evidence etc. Motions and appeals of said motions will occur in the same court, however with a different judge. An Appeal of an appeal however will go to the appeal court.

Parlee was seen to remove a carton of milk which upon inspection was seen to be half empty after he replaced it. He was held for the police to arrest him.

For a citizen's arrest a person must believe that someone else committed a crime and that belief must be reasonable. Because the manager did not subjectively believe that he had stolen the milk as he had wanted to investigate the occurrence, which isn't legal. Thus Parlee was falsely imprisoned.

Duty of Care "Donohughe v. Stevenson" (M'Alister)

Applied the principles of negligence to manufacturers. In this case the managers owed a duty of care which they failed.

Duty of Care "John & Flynn"

Flynn drinks all day through work and into the night post work where he then has an accident and hits John. John sues Flynn, realizes he has no money and sues the employer saying that they owed him a **duty of care**.

1. Does the defendant owe the appellant a duty of care? This occurs when a reasonable person can foresee harm. It's not does the person see the harm, it's would a reasonable person have foreseen harm.
2. Did the defendant breach this duty?
3. In this breach of duty was the defendant responsible for the damages?

Case dismissed by the Ontario court of appeal as firstly there was no precedent linked to this case. The others concerned either commercial host liability, direct supply of alcohol to employees by the company. Despite the fact that there was a duty of care to the third party it was determined that they had sufficiently discharged said duty.

Standard of Care "Ingles v. Tutkaluk Construction Ltd." (all were negligent)

Renovations on a home were begun without permits. Inspectors couldn't see if the underpinnings were the correct size and the contract assured them they were. After some flooding damage it turns out the underpinnings were the wrong size. Whereupon the homeowners sued the contractor and city. Overturned on appeal and take to Supreme Court.

City owed duty of care to appellant as their duty is to ensure that standards are kept to.

"LaFlamme V. Prudential-Bache" concerns investments by a broker who negligently went against his orders and invested in a high risk portfolio.

Causation "Arndt v. Smith"

Pregnant woman with chicken pox goes to doctor and gets medicine which he fails to warn her that the medicine and a very slight chance of causing birth defects. Woman has child and baby is born with severe birth defects.

Doctor argues that even if he had warned her that she would have had the baby regardless. Court agrees and states that he is not culpable as she would not have changed her actions.

Injury & Foreseeability “Mortimer v. Cameron” (Judge: McDermid)

Two friends at a party play fighting tumble down some steps and onto a landing. Landing collapses and Mortimer becomes a quadriplegic after his friend falls onto him. He sues Cameron for damages.

As the damages were not foreseeable then he cannot award him damages from Cameron.

Negligent Misstatement “Hercules Management v. Ernst & Young”

Financials statements prepared by E&Y were wrong and misstated which were relied upon by HM and subsequently caused them financial losses. Two part test, the **Ann’s Test**:

1. Would a reasonable person foresee harm?
2. Are there any public policy consideration which would suggest that there be no duty of care?

Court states that there is no duty of care. Harm was foreseeable, but public policy considerations state that auditors should not be held liable for them. Because of the scope and scale of liability that could stem from this then the court says that public policy consideration stop them from being liable.

Considered one of the worst mistakes in the Canadian Justice System.

Employers “Queen v. Cognos”

Queen left a secure position at a previous company in order to join Cognos. He was not told it was not guaranteed job or that it was subject to board approval. Within two years he received an effective termination notice.

Sued employer for negligent misstatement. Won at trial level but reversed at appeal. For a **Hedley Byrne claim** must meet several requirements:

1. Must be a duty of care based on special relationship between representor and the representee.
2. The representation in question must be untrue, inaccurate or misleading.
3. The representor must have acted negligently in making said representation.
4. The representee must have relied in a reasonable manner, on said negligent misrepresentation.
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

Appeal allowed and appellant granted damages.

Voluntary Assumption of Risk “Poirier v. Murphy”

Two friends performing tricks using a signal system where a guy swings from a rafter in order to avoid a car. An error occurs; the guy hanging from the rafters is unprepared and subsequently hit by the car. He sues his friend who states that contributory negligence occurred. **Did they owe a duty of care, did they act unreasonably.**

Vicarious Liability “671122 V. Sagaz Industries”

Vicarious liability describes the events when the law holds one person responsible for the misconduct of another because of their relationship.

Employee of Canadian Tire received a bribe in order to take a contract from a certain company. Despite the bribery CT deemed that they still preferred the bribing company's product as opposed to 671122's. They brought a suit against the bribing company's owners whom were deemed guilty of interfering with economic relations.

According to the Hercules Management decision, the modern approach to determining the existence of a duty of care is the one established by the English House of Lords in *Anns v. Merton London Borough Council*. Which is correct:

The approach used by the House of Lords in the *Anns* case is binding on Canadian trial courts.

Contract Law I

Offer & Acceptance “Campbell v. Sooter Studios”

In this case an offer is sent to another party who makes changes to the document and signs it. The Offeror did not notice the changes but signed the agreement.

To answer whether an offer has been accepted by a party, an objective test must be performed. If the parties have to all outward appearances agreed then unexpressed reservation on the part of one will not prevent the formation of contract. Must be a meeting of the minds. **If a reasonable person would have agreed to be bound then contract has occurred.**

In this case it was concluded that a reasonable person would have signed the contract.

Must read all contracts before signing.

Revocation of Offer “Mlodzinska et al v. Malicki et al” Here, defendant is also appellant

Guided by ‘first in time, first in right’.

Motion that was appealed that why in the same level court even though it is an appeal.

Rejection & Counter Offer “Hyde v. Wrench”

Once an offer has been rejected or taken back it is no longer possible for an acceptance to bind the agreement.

Legality “Button v. Jones”

Jones sells to Button and signs a covenant saying he won’t compete. Then sets up his own business and gives notice to all his previous clients which he had sold to Button. Button sues and wins but gets an interlocutory injunction. The reason why this works is because Jones had sold his client list to Button and then opened a practice and contacted them to get them back.

Courts are much more likely to enforce a non-comp for a business than for individuals.

Acceptance “Eastern Power v. Azienda Comunale Energia and Ambiente”

Acceptance was faxed by the principals of EP in Ontario to the principals of ACEA in Italy. Contract was therefore made in Italy. **General rule is that contracts are concluded by post the place of mailing the acceptance is where the contract is made.** Defendant seeks to stay action for lack of jurisdiction

Acceptance “Kanitz v. Rogers Cable”

Kanitz sues for slow internet service. Rogers ask court to stay proceedings on the basis that the agreements provides for arbitration of all claims.

Kanitz fights because states that it wasn't in the original contract. Rogers had amended the contract and placed notification of the amendment on their website and by sending post or email to customers. Was the arbitration amendment invalid because it is unconscionable?

Unconscionable is far beyond what is considered reasonable. Three elements are required:

1. Must be an inequality in the balance of power.
2. Must be taking advantage by the stronger party.
3. There must be a resulting improvident agreement.

Court found none of these applicable as the contract was take it or leave it. Motion was granted.

Consideration "Kohler v. Porter"

Porter worked at a company for several years without signing an employment contract. Out of the blue he was asked to sign one several years into the job and he signed it without obtaining any legal advice or asking for an explanation. This agreement contained a stringent agreement on his employment should he ever leave the firm.

Test for an Interlocutory Injunction:

- a) Is there a serious issue to be tried
- b) Will the applicant suffer irreparable harm if the injunction is not granted
- c) Which party will suffer the greatest harm from granting or refusing the injunction? I.e. where does the balance of convenience lie.

In order to satisfy a) Kohler had to establish strong prima facie case. Starting with whether the employment agreement was binding on Porter. Which it wasn't because there was no consideration for signing the document.

Only first section of this decision is ratio, the rest is obiter.

Legality "Boyd v. Newton"

Boyd was a drug dealer, and during the process of selling drugs was ripped off and injured while trying to prevent the action. Court would not enforce anything during the course of illegal action.

Writing Requirement "Gendis v. Richardson"

Each party held 50% of a company they shared. Richardson and Gendis agreed that Richardson would purchase Gendis shares for \$39 million. When the written agreement was drafted and sent for Richardson's approval, Richardson said he had changed his mind. Judge stated that the written document was not the agreement but rather for the purpose of identifying terms between the parties.

Challenges to contract, Mistake: "Kassian v. Hill"

Defense of mistake is disliked by courts and thus is interpreted narrowly.

Kassian was rear ended by another vehicle on wet roads. She signed a form given to her by the insurance adjuster in return for a cheque for \$2000. She used the defense of non est factum. Must meet 3 aspects:

1. Burden is on the party relying on non est factum and this is a heavy burden to discharge.
2. Document signed must be radically different to what the person believed they were signing.
3. Person must not have been careless in signing the document.

Court stated that Ms. Kassian had intended to sign the document and that it was not radically different from what she intended to sign.

Fraudulent "Machias v. Mr. Submarine"

Test for fraudulent misrepresentation, a plaintiff must prove that:

1. A false representation was made by the defendant
2. Was knowingly false
3. Was made with intention to deceive
4. Materially induced the plaintiff to act resulting in damage

Reckless is referred to as being stronger term than mere negligence.

Contract was rescinded when the court gave the remedy of rescission to Machias.

Unconscionability "Bitz, Szemenyei v. Cami Automotive"

A statutory assignment occurs where..... In this circumstance a debtor must pay the assignee.

Mastronardi was the assigner to Bitz the assignee. Lawyers get their clients to assign the debt to themselves from where they pay out to the client after they take their fees. Cami had paid the debt but to Mastronardi instead of Bitz. The law firm went after Cami as Cami's duty was to pay them, not their client. Court agreed and Cami had to pay twice.

Damages "Lee v. Skalbania"

Lee receives a \$50k deposit on the deal. Followed by a \$725k on closing of the deal. He shall also lend Skalbania \$200k which S must use to pay him back for and takes a mortgage on the property. There was a clause in the deal which stated that Lee would receive the deposit should the deal suffer and fail. Skalbania defaulted and Lee received an even better deal in straight cash.

Court says there is a difference between a penalty and recompense. Even if you agree on a punitive measure the courts will not enforce it. However if it is a reasonable pre-estimate of damages then it is enforceable.

It was found to be a reasonable estimate of damages, so even though he did not suffer damages it had been agreed on. Therefore they agreed it was reasonable.

Part 3: Written Contracts I & II

Written contracts are used to provide clarity; evidence; reduce litigation, provides the gold standard of intent in the form of the signatures & finally process (showing paperwork for auditing mainly).

1. Good agreements **reflect your intentions**.
2. **Clear** and **unambiguous**
3. **Concise** (Services agreement is not concise)
4. **Readable**

One party will draft an agreement, discussion between client and his lawyer. Once perfected will be sent to the other sides clients and lawyers who will adjust it and send back.

Having a **boiler plate** that is copied is a mistake as it is not full proof and may not be fully applicable to your scenario.

Not having a boiler plate creates uncertainty and maybe erroneous.

The point of a contract is to demonstrate and state the intentions of the parties.

These agreements are made of 3 sections normally. **Note** the following is a form of a **robust services agreement**. The other templates will explain differences, focusing on major changes.

1. **Boiler Plate**- Things that are normal in contracts and generally copied from contract to contract. In the service it would be Article 1 and Article 9. These items are there in order to prevent other lawyers from doing a clever move. **I.e.** Time is of the essence, ensuring that anything in the contract is important in terms of time; Stating that the law is the law of Ontario; Gender clause stating that singular references are plural and that male references are references to all genders; if one clause is found to be unenforceable only that clause is unenforceable not the whole agreement. **Must not be left out**, in order to avoid uncertainty. **Must not copy**, as it has the potential to be wrong and irrelevant.
 - a. Must start by identifying the **parties** and the **date**. The company must have the legal capacity to enter into the contract. I.e. must be a limited liability corporation.
 - b. **“Whereas”** clauses are called the **“recitals”** and serve to provide context for the reader. They explain how the parties come to be in this contractual agreement.
 - c. **“Consideration”** clause is used to defend the contract from the consideration argument, providing certainty.
 - d. **“Interpretations”** clause is defined in the services section beforehand, whereas in the consulting document they are defined once used. These definitions are nested.
 - e. **“Entire Agreement”** clause draws a box around what is in and what is out of the agreement. In such way none of the correspondence outside of the agreement is valid.
 - f. **“Modification and Waiver”** clause also increases certainty as anything that was not in the agreement and not signed by both parties can be considered valid. Promissory

estoppel is removed by the remainder of this clause. Stating if an exception is made once this does not mean it is required to happen again.

- g. **“Counterparts”** clause is used to defend the agreement when it is not signed jointly in person. The parties can sign independent copies which make up the whole agreement as valid.
- h. **General Provisions**
 - i. **Survival**- Some items are intended to survive the termination of the agreement.
 - ii. **Assignment**- Provides a limitation on the ability of a company to transfer the agreement.
 - iii. **Dispute Resolution**- Negotiation, mediation and binding arbitration are final.
 - iv. **Define Notice**- being the length of time and from when the clock starts ticking.
 - v. **Time is of the essence**- time limits are essential to the contract.
 - vi. **Further Assurances**- used to fill in the gaps, reasonably necessary items. I.e. parking.
 - vii. **Enurement**- means that this agreement to bind successors.
 - viii. **Force Majeure**- If there are circumstances that render this contract impossible then we are excused from that length of time that it is impossible. This is the frustration argument.
- i. If the parties follow a draft to the letter for a period of time without signing the agreement they can still be legally bound by its provisions.

- 2. **Body**- Includes everything other than the boiler plate describing the deal being made.

Statement of Work is a set of project deliverables. It takes all of its terms and conditions from the Master Services Agreement. You do not have to renegotiate services of agreement. Makes things simpler and more efficient. This draws a line in this case between what sales people can negotiate and what they can't. It states what they're going to do and how they are going to get paid.

Changes have to be detailed in terms of what is going to happen, how these changes are going to be approved and implemented and specifically define the costs as well as both parties signing off. These are changes to the statement of work.

5. Proprietary Rights

Customer materials means that they own the right to certain materials which they provide to the supplier in order for the supplier to create a program for the customer.

- 5.3 And 5.4 are mutually incompatible but apply to situations where each operates separately. If customer owns software then 5.3 works, but if it says that supplier owns the software or nothing is said at all then 5.4 still applies. One must always be applied.

6. Limited Warranty

Provides limited warranty only on those products which they supply, not for any third party software.

6.3, 6.4, 6.5, 6.6 are limitations on the liability of the software provider.

Services Agreement Template

Old school, formalistic, legalistic and long.

Consulting Agreement Template

Short, casual, readable and valid.

Note that it complements a **schedule 'A'**. These will be different while the contract will be largely the same.

There is no **non-competition clause** as the courts have not been enforcing these. Therefore a **non-solicitation covenant** is used.

15. Payment of taxes states that if we have to pay taxes then

Notice that 3 parties sign the contract. The third is the owner of the company and we have to bind her also as she is separate to the company and therefore has to be bound for the protection of the intellectual property rights and non-disclosure agreement.

Contracts III

Software License Agreement Template

This is intended to apply to low cost or even free software. Intended for consumers and is basic, direct and to the point.

1.5 **Indemnification** means if you cause the supplier damages then you will be responsible for reimbursing them.

Note the **no warranty** clause. Also **term and termination**, if you don't want to use it, delete and stop using it.

Confidential Information Agreement Template

Need to ensure that these cover what you are going to expose. Includes the modes of displaying information.

Remember scenarios where he stated that firms wouldn't make confidentiality agreements longer than 2 years when pitching investments because of auditors not wanting to trace history.

Sales Rep Agreement Template

Ask what do you expected obligations of the parties. Understand what the relationship is intended to look like and what people are responsible for.

Commercial Lease Template

Normally 30-40 pages long. Most of it protecting the landlord as they are securing their space. While the tenant wants quiet possession, undisturbed use of the property.

Will cover scenarios which will interfere with the value of their property, surrounding properties and the tenant's responsibilities.

An example of a **gross lease** is a residential lease.

A **net lease** would be more commercial, measured in percentage of a total square footage for example.

In this contract the **Right to Assign or Sublet** is very important.

Acts of Default states what a default is and what remedies will be available in that case.

International Law

Much of international focuses on the sale of goods.

IL is challenging for several reasons:

- Which law will apply? Also which law will determine which law will apply?
- Will have to understand how to carry on business in that environment, made more complex by cultural, language and other issues.
- Different types and degrees of government regulation.
- There are also bilateral agreements and treaties between and among different countries.

International conventions help to make life easier by providing standardized terms and conditions you can use that are well established and highly regarded world-wide.

Bill of lading and **irrevocable letters of credit** are used by the two banks representing the buyer and the seller. LOC sent to bank of seller who then sends a bill of lading to the buyer. BOL is a receipt for goods that have been received by the shipping company.

Currency risk where the value of the currency may change by the time the shipment arrives and payment goes through.

Rudder v. Microsoft

Motion to dismiss the case because Ontario is not the right jurisdiction. Owe to the fact that the agreement included a clause stating that Washington law was to be used.

The fact that the parties choose a law to govern contract does not end the matter, it can be overwritten sometimes. This case examines when the courts will do so.

They will respect that choice unless:

- Unless there is a strong reason to override it.

Claim that notice was fine print and doesn't count.

Factors to be considered when deciding whether to override a selection clause:

This case stands for two principals:

1. Agreements entered into online will have the same effect as written agreements

2. When parties have agreed on a choice of law, that choice must be respected unless there is a compelling reason to override it.

Rosza v. Barclays

Motion by defendants to permanently stay the action due to lack of jurisdiction.

Rosza is plaintiff who sued Barclays bank and also sued fraudsters. DH was added by Barclays as a cross claim as a third party defendant. Where the defendant is not liable but someone else is. Money being held by Barclays for a business loan was removed by DH, DH passed it onto the fraudsters who stole it.

DH says that there is a lack of jurisdiction which is Switzerland which the parties agreed to use as the source of international law.

Despite the fact that the parties agreed on Swiss law, there was no practical solution and it didn't make sense to have the case tried in Switzerland.

You can show up and defend, or you can show up and say there is no jurisdiction. Not both. In this case Barclays had already submitted a statement of defence. In this case however DH still had that option available to them.

Court chooses to override the forum selection clause shown by the parties.

PART II is the Appeal by DH

Appeal of a motion is still in a trial court.

This court says that the matter is a decision of the judge hearing the case and it is up to him to apply the factors.

Appeal to dismiss case dismissed.

Muscutt v. Courcelles

Sets out the choice of law when the parties have not chosen an appropriate forum of law.

Interprovincial case where one party went to Alberta searching for work from London and subsequently involved in a serious car accident which rendered him severely injured. Accident occurred in Alberta, defendants reside in Alberta.

He sued in Ontario, defendants made a motion that Ontario was not the correct jurisdiction. Which was subsequently dismissed. Motion was appealed.

Issues are:

1. Is there a **Real and Substantial Connection** to Ontario. Legal Test- application of rules to facts. This can be appealed, the standard of the appeal being correctness, did the court make the right decision.

2. Is Ontario the most convenient forum. **Forum non conveniens**. Doctrine (discretionary). Different standard of appeal, did the court exercise its discretion based on the correct factors.

RASC has the effect where courts do not enter into matters where jurisdiction has little interest. It doesn't have to have the most RASC it just has to have a significant RASC.

If the answer to the RASC is no, then you don't get to question 2. This question asks would this trial be best served somewhere else.

Appeal dismissed and court judge's dismissal of the motion to stay the action affirmed.

Van Breda v. Village Resorts Limited

Both are actions in tort, one for a death occurring during a scuba dive in Cuba and another for collapse of an outdoor gym which caused serious injury.

All of defendants move to dismiss action based on RASC or to stay the motion based on forum non conveniens. Two different cases which are being tried together as they are the same.

Muscutt test is modified and clarified in 5 ways.

Both appeals dismissed.

Black v. Breeden

Black was slated as a crook by his former employers. Did so by calling a press conference and making a very blunt statement. Black sues for defamation.

In Canada freedom of speech is narrower, defamation is wider.

Appeal to stay the case was dismissed.

There was RASC based on the fact that Black was a high profile Ontario resident and that they had included in their press release the Globe and Mail, an Ontario newspaper.

Court said this was not forum shopping as it only comes into play if the defendants had placed themselves within the jurisdiction of the US. By broadcasting to Ontario the defendants chose that path and can therefore not use RASC as a defense.

Part II Purchase and Sale of a Business

Two types of purchasers for whole businesses, financial and strategic.

Financial purchasers don't care what they buy as long as it promises a return.

Strategic purchasers are looking to achieve a business goal other than investment. Such as purchasing up or down a supply channel in order to improve efficiency or quality control. They could also be doing it to reduce competition or gain control of the market.

There are two ways to acquire the business carried out by a company.

1. **Share purchase:** Acquiring the shares of another company. Between the owner of the shares being purchased and the acquirer.
2. **Asset buyout:** Acquirer purchases all the assets of the acquiree.

Typically buyers want to buy assets and sellers want to sell shares. **Why assets?**

- This because by buying the assets no liabilities are taken over.
- Another reason is that not as much due diligence needs to occur as you don't need to affirm the value of debt.
- You can also **cherry-pick** by choosing the assets that are desired and leaving the remainder.
- For tax reasons you would rather purchase assets than shares due to amortization and using the purchased assets as a tax shield. This is especially important when assets have been depreciated below their fair market value.

HST is not really an issue because as long as the parties are HST registrants then once the sale occurs then they claim it back.

Why not assets?

- However when purchasing the assets it must be done on an individual basis and all the papers concerning the assets must be adjusted also, such as registration and ownership etc. A share purchase this does not need to occur.
- When transferring assets must act according to the "Bulk Sales Act." IF you buy assets from a company, then you must have a sworn statement from the previous owner saying that all creditors have been paid. If there are creditors after the statement then the signer is responsible. If you don't comply with the bulk sales act then you are responsible.
- Assets may also have 3rd party stakeholders which may need to give their consent to purchase an item.

Why Shares?

- No HST whatsoever
- *****Recapture**- When you depreciate an asset but then sell it at greater than fair market value then the full amount is available under income to be taxed.

Letter of Intent

NOT A CONTRACT but it also is with respect to the three paragraphs stating that they are meant to be legally binding. It's a way to get the parties on the same page. Once the letter of intent is signed then all the work really begins, they don't want to do so unless they have an agreement in principle. It may also be necessary to get approval from a board of directors or shareholders.

Due diligence is a defence against negligence. This is normally carried out once the letter of intent is signed in order confirm the information that is presented to them.

'An ounce of prevention is worth a pound of cure'

Purchase Price

Purchaser wants to spread purchase payment over as long a period of time as they can. Adjustments to the purchase price normally made are **AR** and **RE** which aren't collected. As a result they prefer to hold some of the purchase price back.

If there is going to be any other arrangement than cash on closing then a whole new arrangement must be coordinated.

Buyers want to allocate the purchase price to the **capital assets** in order to have an amortizable tax shield, whereas the **seller wants** to allocate it to **goodwill** in order to avoid recapture.

Inventory and **AR** are normally problematic as they vary day by day. In order to solve this problem inventory is valued on the last day of closing and a separate purchasing price is applied to this. AR are purchased along with the business, but any uncollectable will be deducted from the purchase price.

When purchasing **land** must ensure that zoning laws, environmental controls and any regulations have been adhered to. Supertest gas station scenario...

Patents and **intangible assets** must be verified for their value and that the specific requirements for transferring intellectual property are met.

Assumed liabilities are ones which you agree to takeover, must be carefully analyzed and reported.

Warranties must also be accounted for by agreeing to hold back some of the payment as a way of insurance.

Seniority and severance pay: When taking over the company employees with a large amount of seniority are expensive depending upon when they retire or need to be let go. Several methods of dealing with this.

Share Purchase Agreement

If the representations are wrong through innocence then the only remedy is **rescission**, by putting all these remedies into the contract you can sue for damages through breach of contract.

Indemnities are **reimbursements** (all insurance contracts are indemnities), basically if there was a liability that wasn't disclosed or solved then the acquirer must be reimbursed.

Share Pledge Agreement

Closing Agenda

Escrow- All documents are given to the lawyers to hold in trust. No one can take anything away until the deal is completed.

Corporate Governance

***Must remember that corporations are separate legal entities. In law we speak of them as people, they have powers of ordinary individuals.

Another key point is to remember the law of agency. These corporations must act through their agents, being the directors and officers of a company. An agent can legally bind a principle.

Article on Corporate Governance

OSC is the government agency responsible for ensuring the security and efficiency of the Ontario stock exchange. Have a bad record of enforcing rules.

Although it is stated that corporate governance is better today, K believes that he is wrong. That the OSC is patting itself on the back. That in fact things may be worse and that the OSC has had failure after failure. In its lifetime the total number of convictions that the OSC has had for securities fraud is 1, and this was recently.

K states that we need to have good corporate governance in order to provide security for investors and thus encouragement greater investment.

Mr. Richie (speaker) believes that rules should exist in sufficient quantity to protect investors without become a burden to public companies.

Doesn't believe that the Sarbanes Oxley reforms are necessary and instead guidelines are needed.

Problem is that these guidelines are good but only guidelines. In Ontario these companies must have adopted the principles or explain why they haven't. Less than 50% have actually implemented them.

Conrad Black

Had a partner named David Radler pleaded guilty to the charges while Black pleaded not guilty. Article states how Black managed to do so with Radlers help.

Once he was in control he installed a board of directors whom he controlled, even his wife was on the board. They made decisions that benefitted him personally. He would have the board approve a dividend that benefitted him and he would use the money to acquire shares. He personally would receive non competitions fees that should have been going to Hollinger.

Lifting the Corporate Veil: Lockhart & Excalibur (Nova Scotia TC)

A couple is shareholders in two companies, Baron and Excalibur. Baron enters into an agreement to purchase a piece of land (not completed) and begin construction of a house.

The plaintiff Lockhart's supply materials to the land entered into the contract with Baron. Lockhart sues and they get a judgment and Baron does not defend. This is because Baron assigned the right to Excalibur and Excalibur has no contract with Lockhart.

When a corporation is performing corporate fraud, the court will pierce the corporate veil. Whereupon Excalibur was used for a fraudulent purpose and therefore the plaintiff was entitled to relief from said company.

Duties of a Director: UPM Kymmene Corp vs. UPM Kymmene Inc. (Ontario TC)

A director has an executive employment contract with the company. The shareholders of the company went to court and stated that the director had not acted fairly and were demanding an **oppression remedy**. In this case a court may make any remedy it sees fit.

In this case the shareholders were asking that the contract that the director has be set aside. This because as the chairman of the board he had given himself a contract that was extremely rewarding. As his appointment brought no benefits that justified such a contract the court believed that his contract was not in the best interest of the corporation.

The test is whether the directors exercised reasonable judgment. They are allowed to be wrong but not reckless. If they exercise their discretion as responsible and reasonable individuals then their decision may stand.

Court says they didn't do so. And grants the requested remedy.

Rights of Shareholders: Krynen vs. Duracap (Ontario TC)

Applicant is founder who owns half the shares of the company and president of it. Directors asked him to step back from work so he could rest and come back rejuvenated. He refused but directors insisted. They called a meeting and removed him as president. He sues for oppression remedy. They apply the business judgment rule, find that they acted in the correct fashion and dismissed the suit.

Liability of Directors: Jama vs. McDonalds (Ontario TC)

Daughter consumed a burger which contained the head of a rat and as a result suffered physical and psychiatric damage. They sued quite ambitiously against many workers and officers. Went to court but couldn't sue them as they are separate people to the company.

This is a **motion** to have their names removed from the statement of claim as they have no responsibility towards the action that occurred.

Derivative Action: Hercules Management vs. Ernst & Young (SSC)

Didn't owe a duty of care previously because of public policy considerations. It's the same case but a different part of the judgment.

Court says that they couldn't sue the auditors regardless as the contract is between the auditors and their company. They would need to have permission to perform a derivative action.

This case stands for the fact that auditors and by extension agents and officers do not owe a duty of care to the customers.

Al Rosen feels this allows the auditors, and officers to escape liability from any lawsuits by shareholders.

Winding Up: Patheon vs. Globa Pharm (Ontario TC)

Two companies come to court to wind up a third corporation that they own because they can't get along. Court doesn't like to do this as real people will lose their jobs in the winding up of said company.

The court imposes a shotgun rule. One company will determine the price of the shares and the other will determine who is buying or selling.

Intellectual Property Rights

Tort involves only a few parties can have obligations under a contract.

Under property rights you have **rights against everyone**. Broader relationship than Tort law. Lawyers don't talk about ownership as it doesn't say what my rights are vs. yours. They want to know what you can and cannot do.

IPR is an intangible personal property. It does not protect ideas; it **protects the registrable expression** and **applications that these ideas are used for**.

The **only way to protect** non-registrable ideas is to use **contracts**. However not as full proof or useful as a patent.

These are **federal statutes** and a matter of federal jurisdiction.

Copyright: Delrina vs. Triolet Systems (Ontario CA)

Only what you write down is valid and protected. Anything not written down is invalid.

Guy rewrites a program for a company. Creates a new one which is similar but not exact and is sued. Found not guilty as his program was made to compete with the other which he himself had completely rewritten.

Copyright: Gould v. Stoddart Publishing (Ontario CA)

Guy made a book on Glen Gould and published it. Was supposed to be for a magazine but ended up being made into a book.

The embodiment of Glen Gould sued Stoddart for breach of contract. **The author has the right to the images and writings he made**. Court said photographer owned the pictures and writings.

Then they said that because the origins of the book were made to become a magazine then they had no purpose writing a book with this material. Court also disagreed.

Ownership of Copyright: Cselko vs. Zellers (Ontario TC)

Zellers outsourced a company to create drawings of a Zeddy bear. Said company engaged Cselko on behalf of sellers to do the illustrations.

Cselko thought the drawings were for advertising purposes, but no limitation discussed.

Zellers took it further and started using Zeddy bear as a retail item which was quite successful. Cselko registered a copyright and proceeded to sue them.

However a license may be implied by the conduct and may not need to be in writing.

Parody: Michelin vs. CAW Canada (Federal Court)

CAW union shows the Michelin man being stamped on. Michelin gets pissed and sues. CAW says “fair deal” which is all exceptions to copyright.

The union says it is a form of criticism, parody, and to support its case it points to a US case in their supreme court.

However the Canadian court says that the American case is most fascinating but it was not found to be persuasive authority on Canada’s definition of criticism.

Therefore it constituted as **copy right infringement**.

OBITER: Court says that even if the court had won this point they would still lose because they didn’t deal with the case fairly.

Free speech is broader in the US than in Canada.

Moral Rights: Theberge vs. Galerie du Art (SSC)

Moral rights cannot be transferred. In order to prevent someone from coming back and suing you for breaking their moral rights, you get them to waive the moral rights.

In this case a poster was taken and laminated onto a canvas substrate to make it look like a painting. Artist says that this makes their art work look ridiculous. But the court said there was no copying, so they duck the issue completely.

Infringing Copyrights: SOCAM vs. Alberta Corp. (Federal Court)

In this case instead of paying the license fees for music to the collective which would have cost him 2900\$ he had to pay over 63000\$.

Infringement can lead to Criminal Convictions: R. vs. AFC Soccer (Manitoba TC)

You can criminally misrepresent your goods as those belonging to another. This is an example of fake items, such as branded clothing.

Breach of Confidence: Pastor v. Chen (BC TC)

Guy tries to patent a dance move. Doesn’t follow any of the intellectual property terms. But because there was contract of mutual confidentiality then the court found in favours of the plaintiff.

Unregistered Trademark: Lego vs. Ritvik Holdings

SSC. Lego argued after their patents had expired on Lego and competitors were trying to copy their blocks that the bricks themselves were the trademark.

Court said no as the trademark could not be purely functional.

Using competitors trademark in advertisements: Future Shop vs. A & B Sound (BC TC)

Can you use a competitors name in advertising?

Yes but not if it is untruthful or that causes confusion. Can't use another trademark to represent you.

What is Patentable: Harvard College vs. Canada (SSC)

Harvard patented a genetically modified mouse in the states. Attempted to do so in Canada but was refused because a mouse is a higher life form.

Actions for passing off are tort law matters. Therefore these items will go to a trial court and not a federal court.

The Olympic Brand Handout

The Olympics spends more money than anyone else to protect their trademarks. This is because this is all they have.

For example Lulu Lemon advertised their products by putting up billboards with a big sporting event on the West Coast of Canada. Olympics took them to court.

Open Source

Has to be redistributed for free, though can charge for other support services.

Must supply source code, and anything derived from using this product must also be made publicly available.

Everyone works on it all the time, doesn't waste time fixing problems that proprietary companies must solve individually.

Open source tends to be of higher quality and much greater security due to the level and extent of collaboration by so many individuals

Alternative Dispute Resolution

Made up of **negotiation**, **mediation** and **arbitration** and **private court**.

Negotiation involves getting together and talking.

Mediation is negotiation but with a mediator, someone who is skilled in bringing people together in order to find common ground. Mediation is most successful when the parties want to find a resolution. If they don't, and they'd rather have their day in court then it's not very likely to be successful.

Arbitration involves going before an expert or panel of experts and having them decide what the results should be. Cannot go to court to overturn an arbitrator's decision unless there are specific problems such as bias or a manifest failure of procedure or manifest error in law.

If they do go to court over arbitration and the judge finds the arbitration faulty then they won't submit its own decision, they will order a new arbitration.

They are quite short proceedings; rules of evidence are very relaxed. No discovery and hearsay evidence can be submitted. As a result of some of these safeguards being removed these proceedings occur quickly.

Private court is similar to official courts but on a smaller and private scale.

ADR Advantages:

Cost effective, faster, more efficient, private (litigations are all public).

Negotiation

Need to understand **how** the parties got there and **what** they are **looking** for.

Negotiation is conducting your business in such a way so as to avoid disputes in the first place.

Getting to Yes- Book on negotiation.

Level the playing field; remove advantages that car dealers have by separating the decision makers from the negotiators. Try and get the opposing side on your team.

Make other parties uncomfortable, you want them to leave. Make things available as rewards when you win one.

Keep track by substance and not by points, rank your items in order of importance. Give away easy points and take important ones.

Buttering people up works, reduces hostility and tension and makes things less of a matter of pride.

Negotiate not from **positions** but from a **principal**. Explain what you are trying to do, give them your goals, and get them to give you theirs. Must be truthful, sincere, with an active interest to the both party's goals. Produces a result that cannot be attacked.

Reservation price is the point at which you walk away. Zone of possible agreement is the overlap between the two reservation prices.