

TOPIC 1 – DISPUTE RESOLUTION

SOURCES OF LAW

CIVIL LAW

- The purpose of civil law is to compensate victim with \$\$.
- The PLAINTIFF commences the lawsuit and the other party is the DEFENDANT.
- The PLAINTIFF has the burden of proof.
- The amount of proof needed is “on a balance of probabilities” (51% rule) where one party needs to prove that the other party is 51% guilty or is guiltier than them.
- The defendant can decide whether to have a jury and a jury consists of 8 members in Civil Law.

CONSTITUTIONAL LAW

The Constitution Act (1982) does 2 main things:

1. It governs the relationship between persons and the country.
2. It provides the fundamental laws of the country.

CHARTER OF RIGHTS AND FREEDOMS

The CHARTER OF RIGHTS AND FREEDOMS is now entrenched into the Constitution.

- Therefore, it cannot be repealed by an ordinary act of Parliament or of provincial legislatures.
- Any change can only occur as stated in the Constitution Act; thus, the Charter is much more difficult to change than any ordinary statute.

If a statute offends a right in the Charter, the statute will be declared invalid.

- The human rights entrenched in the Charter cannot be infringed upon by ordinary legislation because it is a “higher law”.

S. 33: There are 2 parts to this section of the Charter:

1. “Notwithstanding clause” = the government is permitted to pass laws that can override/violate certain sections of our rights and freedoms if the statute states expressly that it will operate “notwithstanding” (aside) those specified sections.
2. “Sunset clause” = a law passed under S. 33 that overrides certain sections of our rights and freedoms expires automatically after 5 years and expires every 5 years after it is re-enacted by the legislature.

S. 1: None of the rights set out in the Charter are absolute. They are all subject to examination of whether “such reasonable human rights limitations prescribed by law can be demonstrably justified in a free and democratic society”.

- Courts want evidence that society as a whole would accept and support the statute that infringes our constitutional rights.
- The objective/infringement of the Charter must not be trivial but pressing and substantial.
- The burden of proof shifts to government to establish that the human rights limitation of the law or decision is justified.

S. 15: Every individual is equal before and under the law and has the right to the equal protections and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- S. 15 deals with a person's Equality Rights with respect to the law being examined
- However, the "law" includes administrative decisions made under statutory authority.

There are 3 broad tests, which ALL must be met, to determine whether there is discrimination under S. 15 of the Charter:

1. Does the law draw a distinction on the basis of personal characteristics or fail to take into account the claimant's-already disadvantaged position resulting in differential treatment?
2. Does the differential treatment discriminate under Section 15?
3. Is the claimant's dignity demeaned?

The Charter ONLY applies to government and government action or decision made by government officials. (**Liebmann Case**)

- It keeps government in check so they don't violate rights & freedoms

The Human Rights Codes in the Charter also extends to private relationships

If a statute is challenged and found unconstitutional because it offends the Constitution/Charter of Rights and Freedoms, then the law is "ULTRA VIRES" (beyond the powers of the government to enact) and becomes null and void.

Also, ALL legislation of the Constitution Act, even the Charter of Rights and Freedoms, is presumed VALID until challenged in court.

Liebmann v. Canada Case Summary

- Liebmann was qualified for the position as EA and he had good chances of being hired.
- They decided not to hire Liebmann because he was Jewish; they claimed his religion might have a detrimental impact on his ability to effectively carry out duties.
- The decision to not hire Liebmann to the EA position due to his ethnicity infringes upon S. 15 of the Charter because this decision was made by a government official and it met all 3 tests for discrimination.
- Also, the limitation of Liebmann's equality rights was not a reasonable limit that can be justified in a free and democratic society because the CFME failed to fulfil the burden by not providing any arguments

COURT SYSTEMS AND PROCEDURES

There are 3 types of court systems in Canada and each system decides cases differently:

1. Civil law system – Quebec
 - Codified by government
2. Common law system – rest of Canada
 - Based on the "Theory of Precedent"
 - "STARE DECISIS" = let the former decision stand

- Common law judges MUST look to past cases with similar or identical facts from a higher or equal court to decide new cases.
 - Judges won't perpetuate "bad" decisions because they "distinguish" cases based on facts
3. Equity – rest of Canada
- Can sue for money, unlike Common law & Civil law

ALTERNATE DISPUTE RESOLUTIONS

EQUITABLE REMEDY

Today in the BC Supreme Court, there are 2 types of remedy that one can ask for:

1. Common Law Remedy \$\$
 - Remedy in the form of money only; might not be full value of goods sued for
2. EQUITABLE Remedy
 - Remedy that can be cash (full value) or actions

There are 3 types of equitable remedy:

1. Specific Performance
 - Court order to live up to promise
 - NOT granted for a service/contract employment
 - Plaintiff must prove subject matter of contract is UNIQUE
 - Can reward \$\$ or action (\$\$ - full value of goods rewarded unlike common law remedy where full value might not be rewarded)
2. Injunction
 - Court order to STOP doing something you promised you wouldn't do
 - Court order to STOP someone from doing something
3. Rescission
 - A court unravels a contract and places parties in pre-contract position → STATUS QUO

HOWEVER, a plaintiff can ONLY ask for an equitable remedy IF:

1. \$\$ is NOT an appropriate/adequate remedy
2. Plaintiff acts quickly (fast feet)
3. Plaintiff acts with "clean hands"; has not misbehaved

Even then, the remedies in EQUITY are discretionary

TOPIC 2 – FORMATION OF THE CONTRACT

INTENT, OFFER, ACCEPTANCE AND WRITING REQUIRMENTS

CONTRACT LAW

In contract law, the plaintiff ALWAYS has burden of proof.

A K exists ONLY when there are 6 ELEMENTS present:

1. INTENT
2. OFFER
3. ACCEPTANCE
4. CONSIDERATION
5. CAPACITY
6. LEGALITY

Plaintiff has to prove all 6

Defendant only has to disprove 1

A K can be written or oral.

HOWEVER, under the Law & Equity Act, 2 kinds of K MUST be written for it to be enforceable:

1. K for "land" – includes mortgages & leases greater than 3 years
 - The ACT does NOT apply to a lease/mortgage of 3 years or less
- AND
2. Personal Guarantees (Caliguiri case)

If the K is breached, the damages are those that are recoverable + those that the party could reasonably predict at time of contract. (Hadley v. Buxendale Rule)

INTENT (1st element of a contract)

For a K to exist, BOTH parties must intent to be bound by their promises.

The law PRESUMES intent to generally exist in commerce & where parties don't really know each other → "at arm's length"

- However, this presumption that intent exists can be rebutted/argued against.

The law also presumes that parties have NO intent if they are close friends or family members because close friends/family don't usually have intentions to create legal relations.

- This presumption can also be rebutted by proving there was intention of creating legal relations.

When intent is the ISSUE, the courts will consider whether a reasonable person looking at the OUTWARD CONDUCT of the parties would say they showed intent to live up to their promises.

- Intent determined by OUTWARD CONDUCT of parties = objective test (Carill v. Carbolic case)

OFFER (2nd element of a contract)

An offer is a "proposal" (with intent) and it can be oral or written.

For an offer to be valid, it must have clarity on at least 3 terms:

1. Parties

2. (Price) → sometimes no price
3. Subject matter

HOWEVER, solicitation for an offer = invitation to treat

- An invitation to treat is NOT an offer that can be accepted
- Ex. Ads stating a good's price is only an invitation to treat
- However, when customer pays for the goods that is an offer and seller has option to accept or decline the offer

An offer lapses or expires if any one of these occurrences happens:

- When the time limit specified in the offer expires
- After a "reasonable time" if no time is specified (up to the judge)
- If the offer is rejected by the offeree
- If the offer is revoked (withdrawn) by the offeror
 - Revocation of an offer must happen BEFORE acceptance
- If a COUNTER OFFER is made
 - Any change to the terms of the offer is a counter offer
 - Original offer lapses once counter offer is made
- If either party dies or becomes insane PRIOR to acceptance

R v. 279707 Case Summary

- The issue of this case was whether the defendant used misleading advertisement and if they supplied the bargain goods advertised.
- During the period in question, the accused had on hand a very small number of right models of television set.
- The President said he didn't know that his sales people were telling that the store had been out of the model for some time.
- While various shoppers were attempting to buy televisions that were apparently sold out, the accused repeatedly ran advertisement with the identical wording.
- 2-5 sets are far too small to have in stock while the advertisements ran in the Calgary Sun, a large publication.
- The accused was charged for failing to supply the goods advertised in reasonable quantities.
- The defendant was accused of:
 - Misleading advertising under S. 52 of Competition Act
 - Not supplying bargain goods advertised under S. 57 of Competition Act
- S. 52 is a false advertising charge that prohibits publishing an advertisement that is untrue.
- S. 57 of Competition Act charges parties that fail to sell after the advertisement has come out to prevent "bait-and-switch" advertising.
 - Must have adequate supply of bargain goods before advertising
 - Calculate adequate supply by time, duration, etc. of advertisement
 - "Until quantities supplied" → must have had adequate supply first
- Since the defendant was using misleading advertisement AND also failed to supply bargained goods to the customers, the accused cannot say that the convictions were redundant; both are sound and valid.
- There was no true intention by supplier to provide bargain goods advertised.

ACCEPTANCE (3rd element of a contract)

There is NO K, until there is acceptance of all the terms in an offer w/o change.

Acceptance is the unequivocal acceptance of ALL the terms in an offer and it is the “mirror image” of the offer.

There are 3 things an offeror or person making a counteroffer should control:

1. Terms of the offer
2. How long offer is open for by adding a date and time
3. **When acceptance is complete

When dealing at a distance, there are different requirements for when acceptance is complete but these can all be modified by terms in K:

- Acceptance by telephone is complete when WORDS are HEARD.
- Acceptance by email is complete when the email is capable of being retrieved by offeror. (Electronics K Act)
- Acceptance by fax is complete when “received”.
- For government mail (Canada Post), acceptance follows the POSTAL ACCEPTANCE RULE (PAR).

The Postal Acceptance Rule states that there are 2 situations when you should reply by mail:

1. If the offer comes by mail w/o any directions about acceptance → mirror image rule
OR
2. The offer stipulates acceptance by mail

Also, the PAR states that acceptance is complete when the letter of acceptance is POSTED (sent) → dropped in mail box (registered mail)

- The acceptance takes place where letter was posted
- The K is made where acceptance takes place/where letter was posted
- The law and the courts that applies are under the jurisdiction where acceptance occurred

The PAR also states that an offeror can revoke by any method BEFORE acceptance is complete

HOWEVER, revocation by mail is complete when it is DELIVERED (sent & received) to offeree’s usual address, even if offeree has not read revocation yet.

Rudder v. Microsoft Corp Case Summary

- A class action was filed on behalf of two Canadian citizens, representing a common class of Canadian subscribers to the MSN Messenger service, against the Microsoft Corporation.
- The suit alleges that the corporation engaged in unfair billing practices relating to subscription fees charged to its clients; the suit was filed in the Ontario Supreme Court (OSC.)

- The defendants have filed for a permanent stay on these proceedings, pursuant to a clause in their “membership agreement” referring all disputes related to the Messenger service to the jurisdiction of King County, WA.
- The plaintiffs claim that, as they were not aware of this clause when agreeing to the service, they should not be bound by its terms.
- Judges LIKE forum selection clauses because it reassures court and judges that agreement about jurisdiction is made
- **Forum selection clause states that all disputes will be resolved in a particular court and waives the right to file suit in any other (parties select the forum of jurisdiction)**
- Legally defensible exemption clauses will bind parties to all terms and conditions provided within the clause (where defensible means that the clause has consideration)

Montane Ventures v. Schroeder Case Summary

- Schroeder is contracted to sell land to Montane but there is a condition precedent, a subject to clause, where Montane requires copy of leave from the renter on that land before the K is completed.
- Condition precedent = the completion of the K is suspended until an event/condition is fulfilled
- Once this subject to clause is fulfilled, it must be removed by writing an addendum to the K and this addendum is not a rejection of original offer or c/o.
- Therefore, Montane removes this condition precedent after he receives a copy of leave as an addendum to K but Schroeder thinks this addendum is a c/o or rejection
- The courts state that inquiring if the negotiating party can provide additional considerations to the agreement, without explicitly demanding such considerations, does not amount to rejecting a current offer or substituting such for a counter-offer
- Specific performance will normally be awarded to the injured party, at their request, when the dispute involves the sale of land

CONSIDERATION

CONSIDERATION (4th element of a contract)

Consideration is the exchange where one party gives something in return for a promise from the other party.

- There is consideration when a promise is made and something is received in exchange for that promise.

There are 2 different types of consideration given:

1. Unilateral: promise given for an act/service
2. Bilateral: promise given for a promise
 - promise NOT to do something is a forbearance
 - **Forbearance = giving up of a right**

Also, a SEAL can be used as a consideration substitute

- A promise under a seal is binding w/o further consideration being required

Caliguiri v. Tumillo Case Summary

- Mrs. C promises to loan her son \$50,000 and her son transfers the money to a corporation to become a shareholder.
- To avoid Mrs. C from calling the loan, the corporation gives Mrs. C a promissory note to promise to repay the loan and so do the other shareholders + the son.
- Two months later, Tumillo becomes a shareholder and to become a shareholder, he had to sign a personal guarantee to promise to repay the loan as well to ensure Mrs. C would not call the loan
- When Mrs. C calls the loan back, Tumillo argues that he did not receive consideration for his personal guarantee, so it is a gratuitous promise and is not enforceable.
- However, Mrs. C argues that the consideration she gave Tumillo and the company was forbearance, which was to NOT call the loan, so Tumillo's promise is enforceable.
- Personal guarantee is consideration for forbearance and vice versa.
- Mrs. C should sign & seal Tumillo's promise to pay to avoid confusion.

HOWEVER, when a promise is made without anything in exchange, it is a GRATUITOUS PROMISE and they are unenforceable in common law.

BUT, equity law says that gratuitous promises should sometimes be enforceable by PROMISSORY/EQUITABLE ESTOPPEL and equity law prevails over common law.

PROMISSORY/EQUITABLE ESTOPPEL → under consideration

There are 6 elements that need to exist for equity to enforce a gratuitous promise or for equitable estoppel to be used:

1. K existed
2. K was modified by a gratuitous promise (perhaps implied)
3. Reliance on promise by promisee
4. Altered conduct because of promise
5. Great hardship if promise is not kept
6. Equitable estoppel can ONLY be used by the promisee as a defense (or "shield") to defend a claim (or "sword") made by the promisor

THEREFORE, to avoid gratuitous promises when modifying a K after it is created

- The alterations must be mutual
- The changes should be documented – add as addendum to the K
- AND ensure there is NEW CONSIDERATION or get the new promise under seal!

Tulsa Heaters v. Syncrude Case Summary

- Tulsa was contracted to build a heater for Syncrude with seamless pipe. → **A K existed between the parties**
- Tulsa could not find seamless pipe so they ordered welded pipe from Bristol and told Syncrude they ordered from Bristol but did not mention pipes were welded.
- Tulsa requested that Bristol be added to the approved suppliers list in the K and Tulsa provided documents to Syncrude that said pipes were welded.

- Tulsa sent drawings of the heater made with welded pipe to Syncrude to review and Syncrude told Tulsa to go ahead with building the heater using welded pipe (gratuitous promise). → **K was modified because of gratuitous promise**
- Syncrude told Tulsa that Bristol was added to the approved suppliers list so Tulsa continued using welded pipe to build the heaters. → **There was reliance on the gratuitous promise & promisee altered conduct**
- Syncrude found Kaiser who could make seamless pipe and told Tulsa to order and use the seamless pipe from Kaiser to build the heater instead of welded pipe. → **Claim made by promisor that is considered the “sword” of Equity**
- Tulsa purchased and used the seamless pipe but it had an additional cost of \$587,170,000 of making the heaters so Tulsa billed syncrude for this amount; Syncrude denies liability for this cost. → **Gratuitous promise caused financial “hardship” for promisee**
- Therefore, since all **6 elements of equitable estoppel** existed, Equity enforced Syncrude’s gratuitous promise for Tulsa to use welded pipe instead of seamless pipe to produce the heaters.

TOPIC 3 – INSIDE THE CONTRACT

INTERPRETATION

INTERPRETATION

Interpretation is used to interpret a K that is unclear.

In any K, there are

1. EXPRESS terms
2. IMPLIED terms

EXPRESS terms are those written in the K and there are 3 approaches the court takes to interpret these terms:

1. Literal/Plain/Dictionary Approach
2. Liberal/Contextual analysis (must be kept in the background)
 - Liberal interpretation cannot revoke terms explicitly stated or alter their basic meaning
3. As a last resort, the court may use “CONTRA PROFERENTEM”
 - Case decided against the party having the best opportunity of selecting the language for the K (who wrote the K)
 - Contra Proferentem = interpretation against the draftsman

There may also be IMPLIED terms in a K, which don’t really exist but MAY be deemed to exist by a judge and can be used in the courts IF:

1. They give effect to the OBVIOUS intent of the parties
- OR
2. If a STATUTE allows court to imply a term from a set of implied terms (SGA)

BKDK Holdings Ltd v. 692831 Case Summary

- Purchase Price Adjustments was a clause included into the K.
- Meridian Travel is an existing corporate account of Teck Cominco Company and 692831 buys shares of Meridian Travel Ltd for \$750,000 from BKDK Holdings.
- The true intent of the parties' actions was determined through contextual interpretation of the facts.
- Therefore, the value of shares should go down because Teck Cominco lost shares, specifically shares should decrease by 70%.
- Interpretation with contextual/liberal approach.

Blackswan Gold Mines Ltd v. Goldbelt Resources Case Summary

- The trial judge ruled that Black Swan might enforce their top-up provision in holdings of Goldbelt Resources, pursuant to the agreement of companies.
- This agreement was constructed in order to prevent the dilution of interest in Black Swan's holding of Goldbelt to less than 5% of the company less 19,500 shares.
- Goldbelt has argued that the agreement relates exclusively to new capital issues to Comptoir holdings, and all other new issues are therefore not subject to automatic top-ups.
- This appeal is made to re-interpret the context of the agreement, as it relates to the issuance of shares of ownership in Goldbelt Resources to a third party (Pegasus Gold Inc.)
- Interpretation with contextual/liberal approach.
- Any agreements between parties not finalized in the contract form may be revoked or altered at any time.
- In cases of intense negotiations, the final contract is strictly interpreted by the courts.
- Parties to contracts do not show acceptance of views of interpretations simply by being silent or showing complacency

SALE OF GOODS

SALE OF GOODS ACT

Sale = where a dealer transfers "title" in "goods" to a buyer for MONEY consideration only.

For "goods", there are 2 types of property:

1. REAL property = land + whatever is attached to land + whatever is growing on land (land is NOT a good in the SGA)
2. PERSONAL property = anything NOT attached to land
 - There are tangible & intangible personal property
 - CHATTELS = tangible personal property
 - Moveable goods & no damage inflicted on property by moving
 - **These are "goods" in SGA so SGA applies to chattels
 - "CHOSES IN ACTION" (right to sue) = intangible personal property
 - Patents, trademarks
 - There are NOT "goods" so SGA does not apply

THEREFORE, the SGA applies to chattels but does NOT apply to LAND, "CHOSSES IN ACTION", or SERVICES.

SGA does NOT apply to GIFTS or BARTER either because they don't have MONEY consideration.

SECTION	LAW STATES	DESCRIPTION
S. 15	Can treat a breach of condition as a breach of warranty	<p>Condition</p> <ul style="list-style-type: none"> An important and <u>essential term</u> of the K breach <u>DOES</u> discharge K Non-breaching party can sue for <u>DAMAGES</u> or <u>RESCISSION</u> <p>Warranty</p> <ul style="list-style-type: none"> A minor or <u>non-essential</u> term of the K Breach <u>DOES NOT</u> discharge K Both parties <u>MUST STILL PERFORM</u> Non-breaching party can later sue for <u>damages</u>
S. 16 (a), (b), (c)	Seller must transfer good title	Implied undertaking as to title, and implied warranty of quiet possession.
S. 17	Sale by description	Bulk of goods must comply with description if sold by description, not comply with sample.
S. 18	Implied condition as to quality or fitness	<p>These terms override the seller's terms (ex. warranty, final sales, etc.)</p> <p>ALSO, buyer chooses remedy, not the seller.</p>
S. 18 (a)	Implied condition as to fitness for purpose	<p>Must meet 3 requirements for implied condition:</p> <ol style="list-style-type: none"> Buyer conveys <u>PURPOSE</u> to seller Buyer <u>RELIES</u> on seller's skill or judgment Goods are in the seller's <u>BUSINESS TO SUPPLY</u> <p>EXCEPT no implied condition if buyer "specified" to buy certain good under a patent or trade name → therefore buyer did not RELY on seller's skill or judgment</p>
S. 18 (b)	Implied condition as to merchantability	<p>Goods are of merchantable quality to meet a buyer's purpose so buyer would pay full price for goods.</p> <p><u>EXCEPT</u> no implied condition if buyer examines goods before a purchase AND misses an <u>OBVIOUS</u> defect</p>
S. 18 (c)	Implied condition as to durability	Goods will be durable for a <u>reasonable</u> period of time under normal use
S. 18 (d)	The buyer's purpose may	There is no need to specify the exact purpose

	be attached to the use of the good	because purpose may be implied from the goods <u>BUT</u> must meet the 2 other requirements for implied condition as to fitness for purpose → reliance & business to supply
S. 18 (e)	A condition or warranty in S. 18 of SGA cannot be overridden unless inconsistent with it	A condition or warranty cannot override a condition or warranty in this section (S. 18) of SGA unless it is inconsistent with it.
S. 19	Sale by sample	Bulk of goods must comply with sample if sold by sample
S. 20	Exclusion clauses to <u>exclude liability</u> for breaches of <u>S.17-19</u>	<p>SGA may be <u>modified</u> for a <u>private sale</u> to exclude the seller of liability for breaches of S. 17-19 SGA → only way seller is <u>not</u> liable for breach is if there are exclusion clauses in K.</p> <p>Exclusion clauses may <u>NOT</u> apply to <u>NEW goods</u> sold to an <u>ORDINARY customer</u>.</p> <p>Exclusion clauses <u>MAY</u> apply to <u>USED goods</u> sold to an <u>ORDINARY customer</u>.</p> <p>Exclusion clauses <u>MAY</u> apply to <u>NEW or USED goods</u> sold to a <u>buyer for business</u>.</p> <p><u>NEW or USED goods, business customer</u> → MAY include exclusion clauses</p>

Kobelt Manufacturing Co v. Pacific Rim Engineered Products Case Summary

- Kobelt sold 51 brakes to Pacific who manufactures draw works.
- Guide Technologies sends the designs for these draw works to Pacific and Guide Tech also sends the specs to Kobelt for those 51 brakes.
- Since Guide Technologies sent specs and did not disclose purpose of the brakes and did not rely on seller's skill or judgment, there is no implied condition as to fitness for purpose or S. 18 of the SGA does not apply here.
- Therefore, Kobelt did not breach an implied condition of S. 18 in the SGA when the brakes they supplied to Pacific did not work well.
- Since Guide Tech did not rely on Kobelt's skill or judgment, Kobelt could not inform them that those brakes were not supposed to be used for draw works.

EXCLUSION CLAUSES

EXCLUSION CLAUSES → under Sales of Goods Act S. 20

For an exclusion clause to be valid, seller must do what is "reasonable" to bring the "terms to the buyer's attention".

- **Dawe v. Cypress Bowl case** states that even if contract is unread, if seller has done what is "reasonable" to bring the "terms to the buyer's attention", the buyer would be bound by the terms

- “Reasonable” = clear wording, bold print, CAPS, highlight, borders, colour, signs in prominent places

Dawe v. Cypress Bowl Case Summary

- The plaintiff (Ted Dawe) was injured in a skiing accident, which was allegedly caused by the negligence of the ski-lift operator, “Cypress Bowl Recreations Ltd,” whom the plaintiff argues did not adequately inform him of the risks associated with a section of the skiing area.
- At argument is whether the exemption clause on the lift purchase ticket should waive Cypress Bowl’s liability for the injuries experienced by the plaintiff.
- However, since Cypress Bowl included exclusion clauses on their tickets, signs, and in other prominent places, they are not liable even if Dawe did not read the clause.
- Also, since Dawe is a regular and longtime customer, he was most likely aware of the terms of the exclusion clause and took his own risk of skiing anyways.
- Therefore, since Cypress Bowl has done what is “reasonable” to bring the terms to the buyer’s attention, even if the terms were unread, the buyer is bound by the terms and Cypress Bowl is not liable.

HOWEVER, **there are 5 situations where exclusion clauses DO NOT APPLY or an exclusion clause is nullified:**

1. Seller has NOT done what is reasonable to bring terms to buyer’s attention

2. There is evidence of GROSS OR CRIMINAL NEGLIGENCE and the only predictable consequence of carelessness is serious injury/death

3. There is evidence of FRAUDULENT MISREPRESENTATION

- **Where a false statement is made by a seller to deliberately attempt to mislead a buyer into a contract with the seller**

4. There is a FUNDAMENTAL BREACH OF CONTRACT

- **The breach of contract is so serious that the workable nature of the good is destroyed and cannot be repaired**

5. There is a sale of a NEW good to an ordinary customer

Porelle v. Eddie’s Auto Sales Ltd Case Summary

- The plaintiff purchased a used car from the defendant but after driving the car for a short time, the engine had to be replaced for \$2000.
- Since the car was USED, the seller was ABLE to include an exclusion clause in the K for breaches of the implied terms in the SGA.
- The terms of the exclusion clause were clearly written into the K and the buyer signed it.
- The buyer argued that the exclusion clause should be nullified because there was a fundamental breach of contract by the seller BUT since the car was reparable for a cost of \$2000, there was NO fundamental breach of K.
- Therefore, the courts decided that the exclusion clauses were binding and the buyer had NO remedy.
- Terms agreed to in contractual negotiations (i.e. exemption clauses) can alter or negate these implied terms, provided it is not during: a retail sale of new goods to an individual for non-business use.

Greeven v. Blackcomb Case Summary

Maloney v. Dockside Case Summary

- Exclusion clause was unconscionable because of the difference in position

TRANSFER OF TITLE OF GOODS → under Sales of Goods Act S. 23

For the transfer of the title of goods:

- Buyer and seller DICTATE title and passing of title in K
BUT
- TITLE OF TRANSFER RULES applies when passing of title not dictated/written in K

ALSO, the risk of loss follows the title. Therefore, the owner of title is responsible for insuring goods and is responsible for any losses.

5 rules of transfer of title (subsections of S.23):

	TYPE OF GOOD	WHEN DOES TITLE PASS
RULE 1	Specific goods or ascertained goods (specific goods have been chosen for customer)	When the <u>contract is made</u>
RULE 2	Specific goods	After <u>work</u> has been done <u>AND</u> buyer has been <u>notified</u>
RULE 3	Specific goods	When <u>necessary action</u> has been taken to determine price <u>AND</u> buyer has been <u>notified</u>
RULE 4	OMIT	OMIT
RULE 5	Unascertained or future goods (goods that have not yet been made or goods that are incapable of being identified as the goods of the K) Ex. flower shop, warehouse, etc.	When goods <u>correspond to the description</u> and are in <u>deliverable state</u> and <u>unconditionally appropriated to the contract</u> with consent by seller or buyer <u>OR</u> goods are delivered Unconditionally appropriation = when a seller can't substitute other goods for delivery to buyer

Kovacs v. Holtom Case Summary

- Plaintiff purchased a "restored car" from the defendant but work needed to be done to the car in order for it to be restored.
- The defendant was paid by the plaintiff and kept the car in his garage for the purposes of restoring it.
- However, before the restoration was complete, a fire destroyed the garage and the car.
- The plaintiff wanted her money back but the defendant refused.

- The courts ruled that under Rule 2 in S. 23 of the SGA, the title to the car had not yet passed and the defendant still owned the car because the car still needed work to be done and the plaintiff was not notified of the restoration being complete.

Bevo Farms Ltd v. Veg Gro Inc. Corp Case Summary

- Bevo Farms in Langley sells seeds to VegGro in Ontario
- Since the K terms are ambiguous about title passing and the seeds are unascertained goods because VegGro doesn't know which seeds they would get, the 5th rule of title passing under S. 23 of the SGA is applied
- Rule 5 of transfer of title goods states that title passes when goods delivered to TRUCKER for transmission to VegGro
- Since risk of loss follows title, Bevo is no longer liable to VegGro but the TRUCKER is liable to VegGro

CAPACITY

CAPACITY (5th element of a contract)

For there to be capacity, the parties to the K must be capable of understanding the terms.

The law protects Infants under the age of 19 (in B.C) and mentally incapacitated persons.

There are 2 different laws for capacity:

1. Law for INFANTS CONTRACTS → people under the age of 19
2. Law for mentally incapacitated persons → intoxication or "insanity"

For the laws for infant contracts, the B.C Infants Act is used.

SECTION	LAW STATES	DESCRIPTION
S. 19 (1)	Contracts made by someone <u>when they were an infant</u> are <u>UNENFORCEABLE AGAINST</u> that person.	(Subsections of S.19(1)) HOWEVER, Infant Ks are <u>ENFORCEABLE</u> if: a) Specified under another statute. b) Affirmed by infant when 19 years old. c) Performed or partially performed within one year after turning 19 years old. d) NOT rejected by infant WITHIN ONE YEAR after turning 19 years old → Ks become enforceable one year after turning 19 years old if contract is not rejected, even if contract was made as an infant. (The infant is bound by a K at 20)
S. 19 (2)	Contracts can be <u>ENFORCEABLE BY</u> an infant <u>AGAINST</u> an adult	
S. 19.1 (1)	Student loan agreement enforceable against infant.	

S. 20	Applications for relief for other parties	<p>Other party may apply to the courts to relieve them of K or to enforce K if an infant has breached contract.</p> <p>The court will consider many things before granting other party relief or enforcement, including if an infant induced the other party into K by misrepresenting their age.</p> <p>However, if the other party does not provide “reasonable ground” or a good explanation for believing that the misrepresentation of age was true, then the infant did NOT induce the party into a K.</p>
S. 21	Application for capacity	<p>The court may grant an infant:</p> <ul style="list-style-type: none"> • Full capacity OR • Capacity to enter into a contract <p>HOWEVER, the court must see that granting capacity is beneficial for infant.</p>

RE: Collins Case Summary

- Father left the ownership of the home & property to his son & daughter, but not his ex-wife/their mother.
- The mother wanted ownership of the home & property so she convinced the daughter to transfer her portion of the ownership since she was over the age of 19 and the K can be enforced.
- At the time, the son was a minor (under 19 years old) so he could not transfer his portion of the house because the K would not be enforced, so the mother asked the courts to grant the infant capacity to make a K under S. 21 of the Infants Act.
- However, the courts will only grant an infant capacity to make a K enforceable against infant if it is in the best interests of the infant and if the infant is not in need of the protection of the courts under the Infant’s Act.
- The courts did not deem this K with the mother to be in the best interest of the son, so the courts did not grant the infant capacity.

Those who are mentally incapacitated persons include those who are intoxicated or “insane”.

- Insanity can be temporary/permanent and are mental health issues that prohibits understanding of K
- Laws for both intoxication & insanity are the same

The law for mentally incapacitated persons states that:

- 1) These persons MUST pay a “reasonable” price for “necessaries”, which is based on their “station in life” (food, transport, clothing, etc.)
- 2) For “NON necessaries”, these persons can only get out of K IF
 - a) They can prove they were SO intoxicated or SO insane, they didn’t understand K

AND

- b) They must prove the OTHER party to the K was AWARE of their condition at the time of K (difficult to prove)

TOPIC 4 – CONSEQUENCES OF THE CONTRACT

DISCHARGE OF THE CONTRACT

DISCHARGE OF CONTRACT

When a K is discharged, all of the obligations are extinguished.

There are 4 ways to discharge a K:

- 1) Performance → when both parties perform & all goes well
- 2) Agreement → parties mutually discharge K
- 3) Frustration
- 4) BREACH of condition & ANTICIPATED of breach of condition

Jedfro Investments (USA) Ltd V. Jacyk Case Summary

- The issue was whether a joint venture agreement between Morris, Peter, and Louis had been discharged.
- The court said that it was NOT discharged by performance or frustration, so it was either discharged by agreement or by breach of condition.
- The joint venture purchased land from Air Products Ltd and they owe Air Products a 3.8 million secured promissory note over the land.
- Peter purchased the note to save the joint venture and this was permitted under their agreement so there was NO breach there.
- Although none of the parties acted as though they were bound by the Joint Venture agreement AFTER the note was called it does NOT end the obligations under the agreement.
- Prombank foreclosed on LAND and since there was no breach of contract, Morris lost his investment of 1.4 million USD
- Morris is now suing Louis & Peter for BREACH but court determined there was NO breach so he lost.
- It is not the function of the court to rewrite a K for the parties OR it is not the courts role to relieve one of the parties against the consequences of an unwise K.

FRUSTRATION

If a K is discharged by FRUSTRATION, neither party is liable to the other.

HOWEVER, there are 4 requirements in order to prove frustration:

1. There must be CRITICAL EVENT that happens, beyond the contemplation of the parties, completely unforeseeable, catastrophic, without fault by either party.
2. Event must be “supervening”; must have happened AFTER K is made
3. Event must make performance of the K IMPOSSIBLE or radically different than intended

4. Event must be directly or indirectly referable to the K and NOT an extraneous event (**Saturley v. Lund case**)

Saturley v. Lund Case Summary

- The Lunds made a contractual agreement with the Saturleys to buy their home.
- The Lunds then discovered an oil leak in their own house and could not sell their home so they didn't have the money to buy the Saturley's home.
- The Saturley's are now suing for specific performance since they argue that the Lunds are in breach of K.
- The Lunds argue that the K is discharged by frustration and they are not liable to purchase the house.
- However, the courts ruled that the oil spill was an extraneous event that had no connection to the K since it was NOT mentioned in the agreement of purchase and during the sale. (No subject-to-clause was created)
- The court says that the event must be directly or indirectly referable to the K and NOT be an extraneous event for frustration to exist
- The judge also said that the performance of the K would not render the K impossible to perform for the Lunds as financing could have been arranged elsewhere.

Impecuniosity (having little or no \$\$) is not a frustrating event.

BREACH OF CONDITION

Breach of condition, which is an essential term, DISCHARGES K and the remedy is either damages or rescission.

Breach of warranty, which is a non-essential term, does NOT discharge K and the remedy is only damages.

HOWEVER, there is also Anticipatory Breach of Condition where one party gives advance notice to the other that they will NOT perform on the date set for performance.

- Usually companies provide notice to hint for an extension
- From the **BRELTA case**, the notice of anticipatory breach must be a definite clear statement of intention NOT to perform on the K when performance is due.

There are 3 options once a party provides notice of anticipatory breach of condition:

1. Can treat K as discharged on date of notice
OR
2. Can WAIT until performance due date to discharge K
OR
3. Give an extension → watch out for gratuitous promises – need new consideration

The duty to mitigate (lessen losses) arises on the date of discharge regardless of which option is chosen for the discharge of K.

Brealta Energy Inc. v. First Capital Management Ltd Case Summary

- The notice of anticipatory breach must be a definite clear statement of intention NOT to perform on the K when performance is due

Blackcomb Skiing Enterprises v. Schneider Case Summary

- Schneider made a K with Blackcomb to purchase condo but a deposit of \$150,000 was required.
- The deposit would be retained, at Blackcomb's option, as "liquidated damages" in lieu of Blackcomb suing.
- The deposit is NOT used as consideration, but used as a guarantee for damages if buyer defaults.
- After repeated breaches/anticipatory breaches, Blackcomb discharges the K by breach of condition and demands Schneider sign the \$150,000 deposit over.
- Blackcomb mitigates its damages by selling the property.
- However, Schneider refuses to release the deposit from trust because they argue Blackcomb has suffered NO LOSSES so it should not be entitled to retain the deposit.
- The judge found that Blackcomb was entitled to retain the deposit even though it had no suffered any losses because the clause was a genuine pre-estimate.
- If the clause is perceived to be a genuine attempt by the firm to pre-estimate damages, the courts will hold that it is a deposit; if it is interpreted as punitive in nature, it will be construed as a penalty and declared invalid

If damages for the discharge of K are PRESET by a "LIQUIDATED DAMAGES CLAUSE" in the K, then courts will enforce this clause IF it is a "genuine pre-estimate" of losses that could have been estimated at the time of the K.

There are 4 factors that the courts consider to determine whether the clause is a "genuine pre-estimate of the damages":

1. What do the terms of the K say about damages? Look at the wording of the contract.
2. Whether the parties are equally sophisticated. Is there a power imbalance between the parties? (Would it be unconscionable or unfair for one party to rely on clause?)
3. What are the industry standards for such clauses? Real estate industry standard for deposits is 10-20% of the purchase price.
4. The ACTUAL amount suffered by the plaintiff is irrelevant as long as the above factors are met (factors 1-3).

Also, liquidated damages clauses are unenforceable if it is found to be a "PENALTY" clause, which is an unconscionable amount that is oppressive and used to scare the buyer into performance.

- An amount that has no relationship to the true losses that are capable of pre-estimation at the time of the K

HOWEVER, if damages are NOT preset in the K, the Hadley v. Buxendale Rules from the Westcoast Transmission case should be applied to determine the remedy of damages.

The Hadley v. Buxendale Rules says that a plaintiff can recover only the damages that are reasonable foreseeable to BOTH parties at the time of the K and the damages recoverable should flow naturally and directly from the breach.

- Anything NOT foreseeable = CONSEQUENTIAL & NOT recoverable

Westcoast Transmission v. Cullen Case Summary

- Kato engineering, the supplier of power generators to Cullen for assembly into "genset" power units for sale to Westcoast Transmissions, was found liable to Cullen for the sale of unmerchantable (non-workable) products in reference to the Sale of Goods Act.

- This liability, which Cullen was then liable to Westcoast Transmissions for, was calculated as the purchase price of the defective units.
- Westcoast Transmissions appeals this decision to include the costs of replacement power generation (i.e. alternate power generators) required to maintain operations, as well as the purchase price of the units, in the calculation of damages.
- Since Kato had no idea that the gensets were Westcoast's SOLE source of power, Kato could NOT have anticipated that if the gensets failed, Westcoast would not have a backup and would have to rent power.
- Also, it is possible to include a clause in your K that limits your liability against consequential damages and the courts treat these types of clauses with LESS hostility than exclusion clauses.
- Damages are meant to be equal to the amount that would return the injured party to the position they would be in presuming the other party performed their contractual obligations
- Damages are limited to the amount the offending party should reasonably expect the injured party to incur in costs as a result of their breach
- The injured party has the obligation to take all necessary steps to minimize their injury due to the breach of the other party

TOPIC 5 – OUTSIDE THE CONTRACT

Parol Evidence Rule

Parol evidence rule = a rule preventing a party to a written K from later using parol evidence to add to, subtract from, or modify the final written contract.

Parol evidence = evidence, written or oral, that is extraneous to a clear unambiguous written K (ex. notes of meeting, emails, etc.)

Parol evidence rule applies when:

1. The parties have a clear, written unambiguous K (no formation issues, no interpretation issues)
2. Later, one party alleges there are further terms that are NOT included in the K (this party WANTS these terms to be enforced along with the written K)
3. If this extraneous evidence adds to, varies, subtracts from, or qualifies the written K, THEN the court ONLY gives effect to the written K and not the extra terms

HOWEVER, there are 3 exceptions to the Parol Evidence Rule and Parol evidence is only admitted to prove the existence of:

1. A misrepresentation
 - A false statement made pre K of an important fact that induces plaintiff to enter into a K
2. A condition precedent (subject-to-clause)
3. A collateral K (satellite contract → another contract made)

General Tire Canada v. Aylwards Ltd Case Summary

- General Tire has supplied goods on credit to a Debtor Corporation for their promise to pay and the Debtor Corporation shares a president and majority shareholders with Aylwards Ltd.
- General Tire got a written promise that if they supplied the Debtor with goods on credit, Aylwards UNCONDITIONALLY guarantees payment to General Tire for the Debtor's account.
- When the Debtor goes bankrupt though, General Tire sues Aylwards because Aylwards says they are NOT liable based on "ORAL" promises made at time of K.
- The plaintiff seeks summary judgment for money payable to the company under a loan guarantee.
- Aylward agrees on the principle debt outstanding, but argues against its company's liability on the debt due to collateral agreements of the debt structure. → Parol evidence.
- The defendants argue that the guarantee was contingent upon conditions that were not met and is therefore legally unenforceable
- The Parol evidence provided by Aylwards does not meet the exceptions when Parol evidence is admitted.

Misrepresentation

A misrepresentation occurs in negotiations PRECEDING the formation of the K, not in the K, where

- There is a false statement made
- Of a material fact
- Which induces the plaintiff to enter into the contract

There are 3 types of false statements made, which include:

1. Innocently – the maker of a statement honestly believes the statement is true, but it is false.
2. Negligently – the maker of the statement is negligent (careless) in making the statement but it is unintentional. The maker should know better!
3. Fraudulently – the maker of the statement deliberately tries to mislead the other party and can occur by commission or by omission.
 - Fraudulent omission is where the maker of the statement is aware of a hidden defect and fails to disclose it at the time of the K.

For the 3 types of misrepresentation, remedy is rewarded for each, which includes:

1. Innocent misrepresentation – the remedy is rescission ONLY. HOWEVER, if the remedy of rescission is not available, then there is NO remedy for the plaintiff.
 - The right to rescission is lost once title to land has passed to an innocent purchaser for value.
2. Negligent misrepresentation – the remedy is either rescission or damages
 - If plaintiff gets damages, they only get the maximum of what they ask for and never more.
3. Fraudulent misrepresentation – the remedy is either rescission or damages and for damages, plaintiff will only get the maximum of what they ask for.
 - If there is evidence of fraudulent misrepresentation, exclusion clauses in the K will be nullified.

Collins v. Dodge City East Case Summary

- The plaintiff purchased a used motor vehicle from the defendant.
- The defendant's agent purported that the vehicle would be "fully equipped," including an Air Conditioning (AC) feature that the agent himself actively demonstrated to the plaintiff.
- Several months after the plaintiff owned the vehicle (and during the season in which the AC was first needed to be and was used) the plaintiff realized that the AC was not actually installed.
- Subsequently, the plaintiff had AC installed by a certified mechanic, and brought this action to seek the damages equal to the costs of AC installation.
- Whether or not the agent knowingly made the misrepresentation, the agent's words and action lead the plaintiff into a false assumption that AC would be included in the vehicle.
- This was a material misrepresentation, as it altered her incentives and ultimately to purchase the vehicle that she otherwise would not have.
- Both the agent's words and actions are construed to be misrepresentation.
- Remedies for Misrepresentation: A person need only show that he or she was misrepresented about a material aspect of the contract in order to receive the appropriate remedy

Weinman v. Brinkman Case Summary

- Weinman bought a home from Brinkman but in the K, there was an exclusion clause that stated Brinkman is not liable for innocent or negligent misrepresentations.
- Weinman noticed that there was water leaking into the basement and has to spend \$10,400 to repair the basement and sues Brinkman for damages.
- Weinman argues Brinkman lied by not disclosing information about the basement leak.
- Weinman has to prove that the defect was hidden in order to claim that there was fraudulent misrepresentation.
- However, for obvious defects, if you can find the defects then the rule of caveat emptor applies ("buyers beware") and the sellers shouldn't be held liable.
- In the "PCDS", Brinkman says they are aware of moisture problems in basement and the problems are obvious basement leaks.
- Since Brinkman did NOT fail to disclose a HIDDEN defect because the defect was OBVIOUS, there was no fraudulent misrepresentation on Brinkman's part.
- The exclusion clause protected Brinkman so Weinman lost and was not rewarded anything.

Undue Influence, Duress and Unconscionability

Different forms of pressure of entering into a K include:

1. Misrepresentation
2. Undue influence
3. Duress
4. Unconscionability

Remedy for all 4 of these pressures is rescission.

UNDUE INFLUENCE

Undue influence is a mental domination that one party has over another to the extent that the weaker party is robbed of their free will when entering a K.

Sometimes undue influence is presumed to exist and then the burden shifts to the stronger party to prove there was NO undue influence.

- The relationships that presume undue influence are ones that professionals have with their clients. (Ex. doctor/patient, lawyer/client, etc.)

To avoid the presumption of undue influence, the process of forming a K must be slowed down by sending the parties home with a copy of the K and suggesting they seek INDEPENDENT ADVICE before they sign.

DURESS

Duress is a physical domination by one party over another to the extent that the weaker party is robbed of their free will when entering a K.

- This includes the threat of physical violence or imprisonment against the weaker party or a close family member of the weaker party.
- This also includes psychological domination.
- The K is voidable at the option of the injured party

UNCONSCIONABILITY

There are 2 aspects to unconscionability:

1. Starts out with undue influence but the stronger party abuses that position of power and preys on the weaker party to sign a contract.
2. The K signed is grossly unfair to the weaker party
 - HOWEVER, for undue influence, the K is likely “fair” it’s just that the weaker party was robbed of their free will in signing it.

Buckwold Western Ltd v. Sagar Case Summary

- Ms. Sager (the defendant) signed a loan guarantee on a loan from Buckwold Western Ltd. to her husband’s company (London Carpets.)
- Ms. Sager was a principal owner of shares in her husband’s company, and maintained (unbeknownst to her) a substantial equity position in the company at the time of signing.
- As a condition of extended credit being provided by the plaintiff to London Carpets, both Mr. Sager and his wife were required to provide personal guarantees of repayment.
- Mr. Sager presented the documents to his wife without consultation of a legal professional, and after some debate she signed the documents.
- Ms. Sager raises the defense that, due to signing under duress or undue influence, she should not be required to repay the outstanding loan balance.
- This is not a case of duress, undue influence or unconscionability because no improper pressure (duress) was ever placed upon Ms. Sager to sign the documents since she had the documents for “sometime”.
- Any pressure that was implied by Mr. Sager to sign the documents was purely commercial, and did not influence her ability to make a sound and reasonable judgment free of pressure from a party to the contract.

Legality

A K must be LEGAL to be enforced

There are 2 types of illegal K:

1. STATUTORY illegalities
 - Some government law makes the K illegal
 - Ex. Maksymetz Case → partners sell liquor without a liquor license and then one partner sues other partners for not proportioning profits fairly. However, illegal K because no license so K is not enforced.
2. K that are illegal because of PUBLIC POLICY
 - In business: any K that restricts competition is PRIMA FACIE (at first glance) VOID & ILLEGAL
 - This includes NON COMPETITION CLAUSES/ Restrictive Covenants in employment K or K for purchase or sale of business

Maksymetz v. Kostyk Case Summary

- Masymetz (the plaintiff) seeks an accounting of the value of shares owing him in a settlement reached during a prior legal action.
- This ownership interest in the firm (the Gateway Hotel Ltd.) was to correlate to Masymetz's interest in a partnership that managed the hotel (and which subsequently obtained an option to purchase the hotel.)
- However, due to legal and regulatory requirements the purchase was denied by a governing body (the Manitoba Liquor Board), which declared the option to purchase illegal and thus "void ad initio."
- The plaintiff wishes to have the court enforce compensation for the value of the interest in the hotel owing from the settlement.
- The defendants argue that, since the contract was illegal to begin with, it is "ultra vires" for the court to order such an accounting.
- The original contract was not legal and was therefore invalid so the court will not force an order upon the defendants based on an illegal contract.
- Legality: A contract that involves illegality cannot be enforced by a party that knowingly agreed to the illegality

RESTRICTIVE COVENANTS (NON-COMPETE CLAUSE)

ALL contracts in restraint of trade are "PRIMA FACIE" void and illegal.

HOWEVER, courts may find a K in restraint of trade to be enforceable if the party seeking to uphold the K can prove that it is "reasonable".

To prove that a K in restraint of trade is "reasonable", the courts will ask the following questions:

1. Is the restrictive covenant reasonable with respect to the PUBLIC INTEREST?
 - Is the restrictive covenant a restraint on competition looking at the nature and the location of the business?
 - Would the restrictive covenant deprive the public of some special service?

2. Is the restrictive covenant reasonable and necessary to protect the PARTIES to the K?
 - ******Is there an exclusive interest entitled to be protected?
 - Is the size of the restricted geographical area reasonable in light of the nature and location of the business? (Where do clients come from?)
 - Is the length of time the individual is restricted from carrying on business reasonable in light of the nature and location of the business?

The party seeking to uphold the restrictive covenant must prove EVERY element of the test for it to be reasonable. ALSO, if the restriction is too BROAD on any one of these criteria, the clause will be struck down as VOID AND ILLEGAL.

Phoenix Restorations Ltd v. Brownlee Case Summary

- Brownlee entered into a written employment K with Phoenix Restorations and the K contained a non-competition and non-solicitation clause.
- Brownlee worked for the two biggest clients of Phoenix Restoration and 80% of what he did was for the two clients.
- Phoenix has one big competitor, Belford, which works in the same niche market.
- Brownlee then resigned from Phoenix and weeks later, he commenced employment at Belfor.
- At Belfor, Brownlee tries to solicit two of Phoenix's biggest clients over to Belfor.
- Phoenix is commencing legal action against Brownlee and Belfor, asking the courts to apply an injunction to prohibit Brownlee from working for any competitor in the lower mainland, including Belfor, and to stop him from soliciting business from Phoenix.
- Judge issued an interim injunction prohibiting Brownlee from soliciting business and working for Belfor.
- However, since the Non-Solicitation Clause was too broad, it cannot be enforced and the injunction relief is dismissed while the interim injunction is resolved.
- An employer seeking to rely on a restrictive covenant must show that the restrictions are no wider than reasonably required to adequately protect its interests.
- If the Non-Solicitation Clause was restricted to customers with whom Brownlee dealt, then Phoenix would have established a strong PRIMA FACIE case in favor of its enforcement.

TOPIC 6 – WHO IS AFFECTED BY THE CONTRACT

Privity of Contract & Assignment

PRIVITY OF K

The relationship between contracting parties is "PRIVATE".

Courts say a "STRANGER" to a K is

- Someone that is NOT a party to the K
- AND
- Someone who has provided NO consideration

Only the parties to the K are "PRIVY" to the K so a "stranger" to K CANNOT sue to enforce a K in contract law.

- To succeed in an action in contract law, the plaintiff **MUST** prove that they have privity to the agreement.

Peacock v. Esquimalt & Nanaimo Railway Case Summary

- Peacock put up a deposit on a land purchase on behalf of a syndicate of buyers (Wessex Management, West Steel Corp, Darrell Brown, and Alan Parkin) from Esquimalt & Nanaimo Railway Company.
- As a condition of the purchase agreement, if the contract is breached the purchasers are entitled to a refund of deposit (net the necessary costs of clean-up.)
- A fire occurred which rendered the land non-manageable for the purchasers (a subsequent frustrating event,) thus discharging the contract.
- Peacock pursues a claim to the value of the deposit, claiming that an oral agreement between itself and the defendants obligates the firm to return the deposit in the event the purchase is not completed.
- The defendants claim the plaintiff has no privity to the contract (as a third party) and has no title to repayment of the deposit.
- The courts find that there is no established truth to the claim that an oral agreement existed between the plaintiff and the defendants.
- Since the plaintiff is not a contracting party to the defendants, they have no financial or legal obligation in the courts to repay any charges that are components of the contractual agreement.

HOWEVER, there are 2 exceptions when “strangers” who are not privy to K can sue to enforce K:

1. Equity – wills/trusts
 - Executor (someone who distributes will/trust) is a “stranger” to K but can be sued for a breach of “FIDUCIARY” duty
2. Tort
 - Allows strangers to sue if there is a duty of care; based on fault

ASSIGNMENT OF DEBT (see textbook for detailed notes)

Debtor = person who OWES money

Assignor = person who is OWED money and assigns the debt to others

Assignee = financial institution that purchases debts or loans money to Assignor

When Assignor “assigns” debt to Assignee, the Assignor is transferring the debt and the right to sue (“choses in action”) to collect the debt from the Debtor.

- “Choses in action” = the right to sue
- Assignor owns “choses in action” and can sue Debtor if Debtor defaults
- Assignor can also sue Assignee
- HOWEVER, Assignee can NO longer sue Debtor

Once debt is assigned to the Assignee, Debtor either pays Assignee OR pays the court; NOT to the Assignor

There are also conditional assignments of debts for loans, which are used when:

- Assignor loans \$ from Assignee and provides conditional assignment of debt from Debtor as security to prove they can pay back loan
- HOWEVER, NOTICE from Assignee to Debtor for payment is conditional on Assignor’s default
- Therefore, if Assignor defaults, Assignee can get payment for the loan from Debtor.

The debt that the Debtor owes has to be GREATER than the amount of the loan/payment that the Assignee gives to the Assignor for the Assignee to purchase assignment of debt. (Assignee is looking to make profits)

In B.C, Assignee of debt MAY register the debt to the “Personal Property Security Act” in VICTORIA (online), HOWEVER

- IF the assignment is registered, then it takes priority over UNREGISTERED interest (debt)
- IF 2 interests are registered, the 1st registered takes priority
- IF all interests are registered, then 1st to give NOTICE takes priority

Assignee of a debt takes “SUBJECT TO THE EQUITIES”

- SUBJECT TO THE EQUITIES = Assignee of a debt only has as much right to collect the debt as the Assignor does. If Assignor LOSES the right to collect on the debt, then so does the Assignee.
- Used as a defense for Debtor to avoid being sued by Assignee

Negotiable Instruments

NEGOTIABLE INSTRUMENTS

Bills of Exchange Act (Federal)

S. 17: Legal requirements for a VALID negotiable instrument

1. In WRITING (does not have to be on bank forms/cheques)
2. UNCONDITIONAL (promise to pay → no subject-to-clause)
3. Payable on or after a certain date OR a future date (post-dated)
 - Cheques – 6 months expiry
 - Government cheques – NO expiry
 - Post-dated cheque IS a valid negotiable instrument
 - Can cash post-dated cheque BEFORE cheque date
4. Sum certain in dollars
5. Payable to PAYEE or “BEARER”
6. “Signed” by MAKER or DRAWER
 - Hand written or printed

There are 3 types of negotiable instruments and these are the requirements for each:

1. Promissory Notes → 2 parties = payee & drawer
2. Cheques → 3 parties = payee, drawee, drawer
 - Drawee = bank/financial institution; expected to accept cheque
3. Accepted Time Draft → 3 parties = payee, drawee, drawer

ENDORSEMENT

The purposes of endorsement:

1. **Transfer title to the negotiable instrument to a “holder”
2. To identify payee
3. To acknowledge any receipt of cash
4. **To provide security for the holder
 - An endorser of a negotiable instrument becomes, legally, a guarantor of the negotiable instrument

If the cheque you deposited bounces because there are “NSF” from drawer’s account, your bank will debit your account as a guarantor (will take \$ from your account as a charge for a fine.)

- Therefore, banks will usually hold cheques to ensure that the cheque will be honored by the bank on which it is drawn.

Restrictive endorsements:

- Sign back of cheque & include “FOR DEPOSIT ONLY” w/ account number underneath signature
- Infants CANNOT be guarantors

HOWEVER, there are 2 ways to avoid liability as a guarantor:

1. If payee takes cheque to the drawer’s bank & branch
2. Sign & include “without recourse” under signature = “qualified endorsement” → bank has NO recourse against person

HOLDER IN DUE COURSE (HDC)

Drawee = HOLDER

HDC protects a purchaser of debt against charges that either party to the original transaction might have against each other.

- HDC then takes the instrument NOT subject to the EQUITIES so Assignee can get the money regardless defenses by the other parties

HDC is immune to stop payments, holds or any defenses.

S. 55: A holder of a negotiable instrument can become a “holder in due course” (HDC) if certain requirements are met:

- A holder must take the instrument through endorsement
- Before cheque is stale dated
- For “value” (some \$ must be paid in exchange for the instrument)
- In good faith

- W/o notice of fraud by payee
- W/o notice of stop payments (countermands) or holds
- Cheque must be complete & regular on its face (S. 17 requirements must be met)

A bank may acquire the rights of a holder in due course if it meets all of the above conditions except endorsement, and in the absence of such endorsement credits the payee's account for the face value of the instrument.

Bank of Nova Scotia v. Rock Corp of Canada Case Summary

- The Rock Corp of Canada wrote a cheque on RBC payable to the order of Bruno Tessonni.
- Tessonni took the cheque to BNS and cashed it for face value, without endorsing it in any way.
- By the time the cheque made its way to RBC, a stop order had been placed on the cheque and it was dishonored.
- BNS claims that it was a "holder in due course" to the provisions of the Bill of Exchange Act (s. 165[3]) and therefore is due the face value of the cheque from the drawer.
- The relevant section of the Act, s. 163(5), states that: "where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course."
- The Bank of Nova Scotia is not a holder in due course because the bank did not actively deposit the funds to the credit of Tessonni's account, or make any dealings with the subject's account whatsoever.
- Also, by not having the subject endorse the cheque in any manner when cashing it, the bank waived its rights to assume the role of a "holder in due course."
- BNS is not a HDC because it does not meet the requirements of a HDC, so it CANNOT sue RC and is NOT immune to the stop payment
- Since there is no endorsement from Tessonni, BNS CANNOT sue Tessonni either.

2203850 Nova Scotia Ltd v. Sarkar Case Summary

- Dr. Sarkar wrote a postdated cheque to Mr. Gardiner for \$800 and Mr. Gardiner receives \$750 when he endorses and cashes the cheque at Money Mart.
- Money Mart effectively cashed the post-dated cheque but prior to cashing, Sarkar placed a stop payment for the amount at its financial institution, thereby dishonoring the cheque.
- However, Money Mart was unaware of the stop payment and was unaware of any defect in the title of the cheque.
- The appellant (the Money Mart) brings an action against the respondent (Dr. Sarkar) that the respondent should be held liable for the face value of an instrument to which the appellant alleges they are a holder in due course of.
- The appellant brings this action to establish that it is in fact a holder in due course because it accepted the cheque under endorsement so it is subject to the appropriate equities provided by this role.
- The appellant shall receive payment from Dr. Sarkar for honoring the post-dated instrument because post-dated cheques can be cashed before the date.
- The appellant is found to be a holder in due course because they meet the requirements to be a HDC so they are NOT subject to equities and are IMMUNE to stop payments or other defenses.

AMENDMENTS TO THE BILL OF EXCHANGE ACT RELATING TO CUSTOMER PURCHASES

There are special rules which apply where a consumer issues a negotiable instrument relating to a consumer purchase.

A consumer purchase is one involving:

- A sale of goods or services
- To an individual for own (non-business) use
- By a dealer
- Paid for by a promissory note or cheque postdated for more than 30 days

The seller has an obligation to mark the instrument “CONSUMER PURCHASE” on its face when there is a consumer purchase.

A holder of an instrument marked with “consumer purchase” takes SUBJECT TO THE EQUITIES between the parties and does NOT have the rights of a holder in due course.

A seller who does not mark the instrument “CONSUMER PURCHASE” is guilty of a criminal offense and the instrument becomes void.

- HOWEVER, instrument does not become void in the hands of a holder in due course that is UNAWARE that it relates to a consumer purchase.

Stamping “CONSUMER PURCHASE” lets the financial institution know that they will be subjected to the equities.

Therefore, financial institutions will be more wary or will NOT buy because they won't be a HDC.

- Financial institutions only buy negotiable instruments that will give HDC

TOPIC 7 – OBLIGATIONS BEYOND THE CONTRACT

Negligence, Contributory Negligence and Vicarious Liability

TORT (wrong) = improper behaviour of one person that causes injury to another, sometimes intentionally but more often unintentionally.

NEGLIGENCE (Under unintentional tort)

Negligence = carelessness that caused injury to a person or property of another

PLAINTIFF'S RESPONSIBILITY

For plaintiffs, they must prove the NEGLIGENCE FRAMEWORK:

- Duty of care
- Breach of the required standard of care
- Causation

All elements of this framework must be proved on a balance of probabilities to find the defendant liable.

DUTY OF CARE

The responsibility or the legal obligation of a person or organization to avoid foreseen acts or omissions that will likely cause harm to others.

To determine if the defendant owed a duty of care to the plaintiff, the court must consider:

- Would a “reasonable person” have foreseen the defendant’s conduct causing harm to this plaintiff?
- Is this duty of care limited or negative by public policy considerations? (Rangen & Hercules case)

HOWEVER, once it is determined that a duty of care is owed, the court must decide what STANDARD OF CARE is owed by the defendant:

- Standard of care = watchfulness, attention, caution and prudence that a reasonable person in the circumstances would exercise; specific duty of care.
- What would the “reasonable man” foresee as being dangerous conduct having regard to the probability and seriousness of the harm?
 - If party does what the reasonable person sees as dangerous conduct causing harm, then the party has breached standard of care.
- The test for a standard of care for professionals is whether the conduct of the “professional” was up to the standard of the person of reasonable competence practicing the same field.

The “REASONABLE MAN/PERSON” is NOT average, they are almost near perfect. Therefore, conduct has to be almost near perfect and NOT average/what everyone else is doing.

Waldick v. Malcolm Case Summary

- Fractured skull when he slipped and fell on the Malcom’s property/walkway.
- Malcolm has a duty of care to ensure that persons and properties on his property are reasonable safe in the circumstances.
- Therefore, Malcolm breached a standard of care by not shoveling snow from his walkway.

Hollis v. Dow Corning Case Summary

- Ms. Hollis got breast implants from Dow Corning Corp and Dow Corning did not inform her or her physician that vigorous upper body movement would cause the breast implants to rupture.
- Ms. Hollis worked in a bakery and engaged in vigorous upper body movement frequently.
- Her breast implants ruptured and she sued Dow Corning for her injuries and for not providing the duty of informing her that the breast implants would rupture.
- The SCC stated that a manufacturer of a product has a duty in TORT to WARN customers of the dangers of using the products that it has knowledge or SHOULD have knowledge of.
- ALSO, the manufacturer’s duty to warn is a CONTINUING one that requires the manufacturer to warn users of the dangers known at the time of sale AND known after the product has been sold and delivered. (Recalls on products)
- The manufacturer can discharge its duty to warn by giving adequate information of risks and dangers to a LEARNED INTERMEDIARY – ex. doctors.

Morsi v. Fermar Paving Case Summary

- Mr. Morsi was driving along Mackenzie drive, where there was construction, and as Mr. Morsi exited the long left turn at 90 km/hr, he accelerated and hit the transition point at 120 km/hr, which caused him to lose control, crash and die.
- Along Mackenzie drive, there was a reverse curve sign that stated the speed limit was 40km/hr and 2 temporary signs that said “construction ahead”.
- Also, at the transition point, the speed sign here stated 60km/hr.
- The trial was appealed because the trial judge did not apply the law right but the law used was the right one.
- The appeal judgment was that since the duty of care was owed by the defendant to people who drive the speed limit, the defendants were not responsible for Morsi’s death, only Morsi was.

BREACH

The court will determine whether the defendant breached that required standard of care owed to the plaintiff.

CAUSATION

If the defendant did breach that duty of care owed, then the court must decide if the defendant’s breach was the cause of the plaintiff’s damage.

- The negligent conduct of the defendant must be the direct cause of the plaintiff’s damage.

Once the court decides that the defendant was the cause of the injury, then it has to determine whether the losses suffered by the plaintiff are those that a reasonable person could foresee.

The defendant will be liable for damages that are reasonably foreseeable regardless of whether the extent of the damage could be foreseen.

- So if the loss or injury is only different in degree and not in kind, then the defendant is liable for the full extent of the loss.

DEFENDANT’S DEFENCES TO NEGLIGENCE

For defendants, they will try to:

1. Disprove the negligence framework of duty, breach, causation
2. If that is unsuccessful, the defendant may argue “VOLENTI”
 - Volenti is a COMPLETE DEFENCE where ALL (not partial) the blame is shifted from defendant to plaintiff

For Volenti to be applied, defendants must prove that:

1. Plaintiff was aware of the legal & physical risks
 - Legal risk = plaintiff has to be aware they can’t sue if something happens to them
- AND
2. Consented to them (Porier v. Murphy case; car stunt)

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a PARTIAL defense for negligence, where defendants prove that plaintiffs also contributed to the harm they suffered from their own negligence.

THEREFORE, if Volenti FAILS, then defendants can:

1. Try to shift PARTIAL blame to plaintiff (partial defense) based on plaintiff's own negligence.
 - ****NEGLIGENCE ACT – S. 1:** Allows court to apportion or split damages between the parties (represented in % or fraction)
2. Prove that plaintiff failed to mitigate as a partial defense → Q: did the plaintiff do what was reasonable to mitigate loss? If not, damages reduced.

VICARIOUS LIABILITY

If an employee is negligent in the scope of employment then the employer is JOINTLY liable with the employee.

Plaintiff can sue the employee, employer, or both.

Plaintiff can collect from whoever it is easier to collect from.

- Usually employer
- Doesn't mean remedy is doubled if plaintiff sues both

Negligent Misstatement

Negligent MISSTATEMENT = unintentional TORT imposing liability where an incorrect statement is made without care for its accuracy by one party causing injury to another party

- An action for negligent MISSTATEMENT can occur whether or not a contractual relationship exists between the parties; used in TORT
- Used when there is NO actual K between parties, just a duty of care

Negligent MISREPRESENTATION is DIFFERENT than misstatement because misrepresentation is ONLY for contract law where it induces parties into a K

There are 5 requirements for proving negligent misstatement, which are:

1. There must be a duty of care based on a "special relationship" between the representor and the representee
2. The representation in question must be untrue, inaccurate, or misleading
3. The representor must have acted negligently in making the misrepresentation
 - The representor must have fallen below the necessary standard of care required of a professional making such a representation
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation
5. The reliance must have been detrimental to the representee in the sense that damages resulted

Rangen v. Deloitte and Touche Case Summary

- Rangen provided \$300,000 worth of salmon feed on credit to Royal Pacific Sea Farms because they relied on RPSF audited financial reports.
- RPSF then failed and went bankrupt so Rangen lost about \$35,000.
- Rangen discovered that Deloitte was negligent in the preparation of the audited financial reports for RPSF.
- However, for some negligence cases, the courts limited the duty of care owed to ensure that defendants are not liable to an unreasonably broad and unknown extent.
- The courts have limited the duty of care for financial statements.
- The ONLY foreseeable purpose of AUDITED FINANCIAL STATEMENTS in accordance with the Company Act is to guide the company & the shareholders to assess the performance of the board & to decide whether to retain management.
- THEREFORE, accountants preparing audited financial statements ONLY owe a duty of care to the company & the shareholders, NOT to other users
- Accountants only owe a duty of care to others IF auditors are aware of the other users and they consent to meet those terms BEFORE the documents are prepared
- Deloitte didn't know that the financial statement would be used by Rangen in making a decision to extend credit to RPSF so Deloitte did not owe Rangen a duty of care.

Hercules Management v. Ernst and Young Case Summary

- Shareholders of North Guard Acceptance who belong to Hercules Management used the audits made by Ernst & Young to make personal investment decisions but the reports were negligently prepared.
- North Guard Acceptance went bankrupt and Hercules Management is suing Ernst & Young for negligent misstatement
- Since the auditors actually knew the shareholders, they owed them a duty of care prima facie BUT the auditors were NOT aware of the shareholders' purpose for using the audit.
- The standard purpose of the audit is to guide shareholders to make decisions about how the corporation is managed, assess the performance of directors and officers and decide whether to retain management.
- When shareholders use audits for personal investment decisions, they are using the audit for purposes that are NOT "foreseen"

Professionals ONLY owe a duty of care to the parties that are reasonably "foreseeable" and to those that use the information given by the professionals for the purpose actually "foreseen".

- This tort of negligent misstatement stops professionals from carelessly giving inaccurate advice to the parties that they owe a duty of care to.

Liability for negligent MISSTATEMENT arises when a "PROFESSIONAL" is asked for ADVICE and they give it KNOWING that the other party may RELY on it and where that party, in fact, relies on the misstatement to their DETRIMENT.

Fiduciary Duty (Equity Duties)

A fiduciary relationship is created when one party puts trust and confidence in another.

- Where one party expects the other to act in their best interest; TRUST

There are 3 characteristics of a fiduciary relationship:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can individually exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
 - Vulnerability does NOT mean weaker
 - Vulnerability does NOT have to be present for a breach to exist
 - A party is vulnerable when the fiduciary CAN abuse the power to the detriment of the other party

****To determine whether a fiduciary duty exists, a key question to ask is whether one party could reasonably have expected that the other party would act in the former's best interests.**

The responsibilities of being a fiduciary include:

- Acting with absolute honesty
- Acting in honorable good faith
- Must have an undivided loyalty to the principal
- Have NO conflict of interest
- Complete disclosure of all material facts/information
- A duty of confidentiality to the principal
- A duty to account to principal – no secret bonuses or commissions

The DAMAGES of a breach of fiduciary duty include:

- The party must give up the profit gained from the breach to the principal
AND
- The party is liable for the principal's losses on investment plus consequential losses, such as legal and accounting fees.

Hodgkinson v. Simms Ltd Case Summary

- The plaintiff approached the defendant with the objective of receiving independent financial advice.
- After an initial consultation in which the plaintiff explained his circumstances and investment objectives, the defendant made the suggestion that Hodgkinson purchase a stake in "Multiple Urban Renewal Buildings" (or MURBs.)
- Subsequently, the real estate market collapsed, and the plaintiff lost a substantial portion of his investment funds (\$350,507.62 in total.)
- What the plaintiff did not know at the time, however, was that the defendant also acted on behalf of the firm the plaintiff invested in.
- As such, the plaintiff argued, the defendant should be held liable for his damages suffered due to the breach of fiduciary duty.
- Simms is a fiduciary to Hodgkinson because Hodgkinson is vulnerable since he asks Simms for "independent" advice and relied on that advice, which caused him harm.

- Therefore, Hodgkinson receives his loss of investment, Simms is stripped of his secret commission and Hodgkinson's accounting and legal fees are paid for by Simms.

Any OPINION given by a "PROFESSIONAL" = FACT

- HOWEVER, there is NO breach of fiduciary duty IF professionals disclose ALL information that can distort professional opinion

Agency

Principal = "person" giving authority to an agent

Third Party (T.P)

Agent = "person" receiving authority and agreeing to act on behalf of P in a business transaction

- Role of an agent is to bring principal & T.P into K
- Agent owes a fiduciary duty to Principal

There are 2 types of authority that is given to an agent:

1. Actual Authority

- Can be express or implied
- Express authority is authority given orally or in writing by the principal, which is stated in the K
- Implied authority supplements express authority to get things done since principal can't always give express authority for everything
 - Implied authority is given by commercial usage or by conduct
- If Agent acts within actual authority given to them by Principal, then P & T.P are liable in K
- Agent is NOT a party and is NOT liable in the K

2. Apparent Authority (aka. Agency by Conduct, Agency by Estoppel)

- Commercial usage = usual authority
- Holding out = representing by words or conduct that a person is the principal's agent or has particular authority
 - Ex. business cards, letterheads, position titles, etc.
- An agent acting within apparent authority ALSO binds the T.P & P in K
- Agent is NOT liable in the K

To test for Apparent Authority, the plaintiff must prove:

1. Principal created an impression or made a representation to the T.P that the Agent has SOME authority
2. The T.P relies on that representation
3. The T.P is induced to enter the K
4. **The T.P must be aware of any restrictions on the agents authority

The Agent ALONE is liable to the T.P when the Agent contracts by stating that they are the REAL contracting party, though in reality they are acting or intending to act for an undisclosed principal.

When an Agent does not mention their status and deals with a T.P without making it apparent that they are acting as an agent, the T.P is entitled to sue the Agent on the K.

- HOWEVER, if the agent had authority to make the K, the T.P can EITHER sue the Agent or the Principal, but NOT both

Pemberton Benchlands Housing Corp v. Sabre Transport Case Summary

- Glacier Creek and Sabre Transport created a Joint Venture together called Pemberton Benchlands Housing Corp.
- Sabre Transport was contracted by Glacier Creek to develop the lots into 54 lots and after phase 1, 30 lots were developed.
- Glacier Creek says its owed \$3,351,000 from Glacier Creek for time and materials of developing the lots, but Glacier Creek says the price is a fixed price of \$2.85 million based on a K.
- The president of Glacier Creek is Serge Cote and the president of Sabre Transport is Art DenDoyf
- Art DenDoyf argues that he never signed a K that stated such a fixed price and after Glacier Creek provided a copy of the K as evidence, it was found that Art's signature on that K was produced by fraud.
- Next, Glacier Creek got Dave Patterson, an employee of Sabre Transport, to sign the K that stated such a fixed price.
- However, Dave Patterson does not have apparent authority since it does not meet the requirements of apparent authority so the K is not binding or enforceable.

TOPIC 8 – BUSINESS ASSOCIATIONS

Sole Proprietorship

Worst kind of ownership because NO division between personal & business assets when sued; unlimited distinction of liability

- No name protection offered

Partnership

Under the PARTNERSHIP ACT:

No name protection offered either.

There are 3 types of partnerships:

1. General Partnerships – express (bad type of ownership)
 - Implied
 - Apparent
2. "Limited Partnerships" (good type of ownership)
 - A partnership in which some of the partners limit their liability to the amount of their capital contributions
 - General partners & limited partners; at least 1 general partner with unlimited liability

- Limited partners cannot take an active part in the management or else they become general partners; they take an advisory role
 - Must be created by filing docs to gov't (no implied)
 - Name of business MUST end with "Limited Partnership"
3. "Limited Liability Partnerships" (good type of ownership)
- A partnership in which non-negligent partners are not personally liable for losses caused by the negligence of a partner
 - May carry on business ONLY for the purpose of practicing an "eligible profession"
 - MUST end with "Limited Liability Partnerships OR LLP
 - Must be created by filing docs to gov't (not implied)

GENERAL PARTNERSHIPS

Express partnership = the parties agree orally or in writing to BE partners & to split profits/losses proportionally

- If partnership is NOT expressed or is implied, then the courts will split profits/losses evenly

The courts can deem/imply a partnership if these factors are met:

- A contribution by the parties of money, property, skill, effort, knowledge or another asset to a common undertaking
- A joint property interest in the subject matter of the adventure
- The expectation of profit or the "presence of adventure"
- ****The right to participate in net profits if any are generated (this factor is "PRIMA FACIE" evidence of a partnership**
- Joint participation in management

The courts do NOT require all of the components/factors to exist to find an implied partnership but do require a majority of the elements to exist on a balance of probabilities.

- The more factors that are met, the more there is a partnership; balance of probabilities

The courts will look at the SUBSTANCE of the relationship and not the FORM of the structure or what the parties call their relationship.

Courts can also find an "apparent partnership" → S. 16 of Act in B.C.

Lanz v. Lanz Case Summary

- The plaintiff (Robert Lanz) associated himself with the business of his father, the defendant.

- After fifteen years working together, the pair had a falling out and left the business.
- The son's interest in the firm was a claim to 40% of the profits, with no obligation for debts and no clear title to assets.
- The son charges in this action that, since their arrangement was a partnership, he is entitled to an equal share in the returns of the business upon its dissolution in 1990.
- The firm will not be considered a partnership, as it does not meet the definition as described in "the Partnership Act" because the plaintiff did not actively engage in any management of the firm, and made no more contribution than the driving of a truck in exchange.
- As well, the plaintiff assumed no liability for the risks of the business and could not establish any title to any of the firm's assets.

Disadvantages of a general partnership:

- NOT a separate legal entity therefore the partners have unlimited personal liability! (same as sole proprietorship)
- Partner is an AGENT with actual authority. The acts of 1 partner bind the others if partner is acting in usual course of business of the firm.
- Partners are FIDUCIARIES of each other
- Partners are jointly liable for debts of the firm
- Partners are jointly liable for the negligence/fraud of each other
 - The negligence of one partner can cause a client to sue any or all partners AND the client can go after all personal assets if the business assets are insufficient.

Pen-Bro Holdings v. Demchuk Case Summary

Limited Liability Partnerships

All of the same rules that applied to General Partnerships apply EXCEPT:

1. Partners are jointly liable for debt UP TO THEIR CAPITAL CONTRIBUTION
2. Liable for their OWN negligence (or any they know about) UP TO capital contribution

Corporation

- Must be created by filing docs to gov't (not implied)
- Name MUST end with Corp. /Corporation, Inc. /Incorporation, Ltd. /Limited

A corporation is considered a "separate legal person" therefore shareholders are protected by a "CORPORATE VEIL" and have LIMITED LIABILITY.

HOWEVER, if there is fraud, then the separate existence of a corporation is disregarded and the corporate veil is lifted to impose the liability to creditors on those that control it.

Specifically, 3 conditions must be met to find an individual in a corporation liable and to lift the corporate veil:

1. The individual must control the corporation
2. That control must have been exercised to commit fraud, a wrong, or a breach of duty
3. The misconduct must be the cause of the plaintiff's injury

Challenor v. Nucleus Financial Network Inc. Case Summary

- Plaintiff has a K with Corporation A and Corporation A owes her \$10,000
- Corporation A also has a subsidiary called Corporation B.
- Since Corporation A has no money and cannot pay the plaintiff, the plaintiff wants the courts to pierce Corp A's corporate veil to get to the assets of Corp B.
- However, since there is no fraud here, the corporate veil cannot be lifted.
- The corporate veil can NEVER be lifted unless there is FRAUD.

Data Business Forms Ltd v. Macintosh Case Summary

- Data created a K with Glenn MacIntosh, who is a sole proprietor but 4 years later, Glenn MacIntosh incorporated his company to Maritime Business Forms Ltd.
- Later Data is owed \$ and sues Glenn but Glenn says he is NOT liable, only Maritime Business Forms Ltd is liable since his company is now incorporated.
- HOWEVER, the K was formed between Data & Glenn, so Glenn is liable and there is unlimited personal liability since his company was a sole proprietorship when the K was made.
- Glenn should have let Data know that he incorporated his business so that a new K could be made with his corporation to exclude him from unlimited personal liability.

ALSO, if there is a change/alteration/shortening of a business' name that is different from what is incorporated, then other companies can treat the business as a sole proprietorship.

Universal Property Management v. Westmount Case Summary

- A third party to this action, Centennial Management Ltd., maintained a debt obligation outstanding with the defendant that had yet to be repaid.
- Patrick Copeland (a co-defendant) owned a majority stake in the defendant firm (Westmount Windows and Door Ltd.)
- At one meeting between managers of these two firms, Copeland was offered a sum from a third party (the plaintiff, Universal Property) as an assignment of the debt owed by Centennial.
- The reason that this offer was made was in large part due to the closeness of Universal and Centennial, with the owners of both firms being from the same family.
- The defendant declined to accept this offer, and continued to hold Centennial's debts on its ledger without conducting any business with the plaintiff.
- By mistake, the plaintiff sent a cheque to the defendant meant for another firm, "Westmount Draperies", totaling \$30,635.41.
- The defendant's accountants immediately applied the funds to the credit of Centennial's account (which at that time stood at \$20,154.46) for which they assumed the funds were meant for.

- When the plaintiff firm informed Copeland that the funds were sent in error, Copeland refused to repay the funds to Universal.
- Westmount then goes Bankrupt.
- This action is brought by Universal to seek remittance of funds by Westmount for the \$30,635.41, along with punitive damages to Copeland for his disregard in refusing to repay the balance.
- Universal wants to sue to pierce corporate veil to expose shareholders/owners for personal liability.
- However, since Copeland did not keep the funds from Universal for himself and only applied to it to company, there was no fraud by Copeland and shareholders so corporate veil is not lifted and Universal does not get damages.