

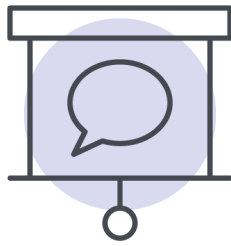
OneClass

# P0210

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## FINAL EXAM STUDY GUIDE

*Fall 2018*



# Lecture Notes

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**Chapter 1 – Introduction**

- Case Based Philosophy of law
- There is never a 'correct' answer
  - Law is a continuing process of attempting to solve problems of a changing society, rather than a set of rules

**Law:**

- Can apply to a system that governs human activities through threat of punishment in an organized society by a government
- Can refer to the documents behind the law (the legislation, regulations, legal principles)
- Can refer to a specific type of law
- Usually law is imposed by an external body to control conflict so that individual's needs are met and so good of society is preserved
- Enforcement mechanism is the state which is comprised of courts, police, governments
- Does law extend too far (i.e. regulating name of child)?

**Types of Law in Canada:**

- Civil Law
  - Disputes between individuals are private law (or civil law)
    - Tort law, civil litigation, contract law
  - Civil law also means a system of law based on Roman tradition
- Common Law
  - Legal system practised in many countries (Canada except Quebec)
  - Common law = Case based law
- Criminal Law
  - Disputes between the individual and the state is called public law and includes criminal law

**Different Views of the Law****Natural Law Approach**

- Un just law is no law at all. If it is not moral, than it cannot be a law at all.
- Mortality cannot be divorced form the law; but rather they are one in the say
  - Clear and necessary link between these concepts
- Law is fixed and has natural order
- Law should reflect principles of mortality
- If law does not conform to mortality, then it is invalid
  - Lex iniusta non est lex = "unjust law is not a law"
- Moral validity is necessary to have law
- How to determine what is moral?

**Legal Positivism**

- British based law. Opposite of natural law
- Often referred to as black something
- Law needs to be clearly expressed
- What is stated is what matters
- If there are different interpretations of the law than it needs to go back to the legislators to be corrected.
- Predominant approach of the courts today
- Came from parliamentary supremacy (only parliament can make laws and no one is above)
- Law should be divorced from morality

- Derives from scientific positivism, where all knowledge can be observed and measured and does not consist of things like morality
- Process behind law is more important than individual laws
- Must use clear language
- Nula poena sine lege = there is no penalty without a valid law
  - If people do not agree with law, it should be redrafted
- Adhere to the black letter of law
  - What is written and established is what should be applied
- Critics say morality not taken into account
- The living tree – law is always growing and changing. It changes and evolves. If you cut off one branch, other branches will off too – laws getting struck down and new ones emerging. (\*\*EXAM: WHAT DOES IT MEAN THAT A LAW IS LIKE A LIVING TREE?)
- As society changes (cell phones become more prominent) new branches grow and new laws are made.

#### Judicial (Legal) Realism

- Judges sets of norms and biases has influence on how they make their judgements
- Judges are most important elements in a case
- Was a reaction to the failure of many to predict what was going to happen in case
- Rejection of natural law and positivism
- Realists argue that law is not natural like positivism suggests, but rather it depends on who the parties are, their life experience, and their values in relation to the case
- ‘Law is what a particular judge deems it to be’
- ‘Right side of the bed’ theory
- Some say it is wrong to have so much emphasis on the judge
- Sugar level example

#### Introduction to Civil Law

- Law is a universal part of our society that attempts to limit and minimize the conflict based on our individual interests
- Important to look at the law as a living tree – evolves and expands over time
- Law not always concerned with justice
- Law attempts to make best decisions possible
- Plaintiff and defendant
  - Defendant is found liable and pay damages after the judgement

#### Quebec Law

- Quebec system of law is based on Roman law
  - Operates on Civil Code (civil law)
- Rest of Canada uses common law

#### Introduction to Constitutional Law

- Between civil and criminal law
- Includes elements of civil, but reached into criminal
- Constitution is a body of law that establishes the framework for government, which frames the supreme law

#### Introduction to Criminal Law

- Tort = private crime (civil)
- Crime = a public matter
- Purpose of criminal law is to protect society from dangerous conduct

- Case is heard by provincially or federally appointed judge with or without a jury and the case is brought in the name of the state
- Crown attorney employed by state will prepare case and the accused will plead guilty or not guilty
- Victim has little control over matter, and the victim often gets no personal benefit as the convicted will either face incarceration by the state (after being found guilty beyond a reasonable doubt), or they have to pay a fine to the state
- The injured party in criminal law is the state! Not the victim
- Victim and accused
  - Accused is found guilty and will be convicted and punished
- Better to have guilty go free than innocent convicted
- Most intrusive form of public law

### Supernatural Theories of Crime

- Prior to 18<sup>th</sup> century, supernatural causes were used to explain many things
  - Crime blamed on the supernatural
  - People were tried as witches!
- Exorcism and punishment/torture were the solutions to crime
- Crime was considered crime against god
  - Witch Hunts to kill criminals
- The witch hunts contributed to social order and deterred people from challenging those in power – this was a form of moral panic based on no evidence
  - Spreads through rumour, gossip
- Torture was often used to extract confessions from suspected witches because conviction under the Roman code of canon law required 2 eyewitnesses or a confession

### Biological Theories of Crime

- Physiognomy – study of facial features in relation to behaviour of humans
- Phrenology – study of contours of the skull to determine human interaction

### *Lombroso's Theory of Atavism*

- Lombroso claimed that criminals could be identified by various atavistic traits
  - Ex. Criminals had big lower jaw, canine teeth, ape like arms
- Developed phrenology – measuring the size and shape of skull and concluded that there were significant and measurable differences in the skulls of criminals
- Genetically disposed to crime
- Female Offender:
  - Women less prone to crime than men
  - Women more evolutionary advanced
  - For a woman to be criminal, she was worse than a man because she had to overcome her natural childlike weakness
- Discrediting:
  - Charles Goring concluded that atavistic didn't exist

### Are we Just Making it up?

- Eugenics movements believed they could cure ills of society by better breeding (accepted in Nazi Germany)
- Craniometrics made use of skull measures to determine criminal propensity
- Job of lawyer is not to determine why an individual may have committed a crime, but to focus on what to do with that person when he or she enters the legal system

- Ex post facto = after the fact...instead of an absolute focus on why crime occurs, the law student works with evidence and people accused of crime

## Chapter 2 Legal Professionals, Rules of Conduct, Legal Ethics

### **The Legal Profession**

- Lawyers are self regulated – control of lawyers is by lawyers
- However, legal professions can be sued in the civil law system for incompetence, breach of duties
- Lawyers have monopoly on legal services in Canada
  - Lawyers are barristers and solicitors in Canada

### **The Law Society**

- Law society control who becomes a lawyer, what admission requirements are necessary, what education is needed...
- Governing body of the law society is called convocation
  - Composed of benchers many of whom are elected by lawyers
- All provincial bars belong to Canadian Bar Association
  - Each province has a law society; Quebec has 2

### **The Role of Lawyers**

- Lawyers take a personal complaint and make it actionable in law
- Large corporations have in house counsel
- Sole practitioner
- Public perception of lawyers not good
  - Seen as expensive, unethical, ethical dilemmas

### **Lawyers and Demographics**

- More females being called to the bar; older lawyers are 9 men to 1 women
- Most are white

### **Legal Aid and Pro Bono Work**

- Legal Aid – exists to allow those who could not afford lawyer to be represented
  - Only available for young offenders and adults charged with serious offences
  - Other offenses only qualify if accused is at risk or going to prison or having livelihood changed
- Legal aid only granted to those making \$12,500 a year which is below poverty line
- Pro Bono – free legal work
- Rationale is since that lawyers have monopoly; they also have responsibility to provide public service
- Legal aid for civil matters only available from community legal clinics

### **Rule of Professional Conduct**

- CBA has professional conduct code
- Each province can also make rules

### **Relationship to the Administration of Justice**

- Certain standards (i.e. lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients...)
- Must give advice to clients without overstating merits of case
- Disclose all costs
- Integrity – living up to word

### **Relationship to Other Lawyers and the Court**

- Courteous, civil, good faith to everyone they encounter

### **Lawyers Responsibility to Clients**

#### *Competence*

- Competent service is owed to the client
  - Need professional knowledge
- Must prepare and communicate affectively with clients
  - They must admit if they are not competent

## *Confidentiality*

- Oldest type of privilege
- Privilege with client and lawyer is one of the highest
- Reason is that Clients should be able to have full and unreserved communication with lawyer
- Continues even after lawyer has ceased the services
- If info inadvertently disclosed to other side, they have duty not to use it
  - Lawyer shall avoid 'sharp practice'
  - Lawyer can not use honest mistake to their advantage
- Exceptions:
  - When required to do so by law or court
  - Some provinces you need to report sexual or physical abuse and disclose if crime is about to be committed
  - When lawyer believes future harm may occur:
    - Was there a clear risk to an identifiable person or group?
    - Was there a risk of serious bodily harm or death?
    - Is the danger imminent?
  - The disclosure should be as limited as possible to disclose only what is necessary
- Solicitor client privilege – is an evidence rule, means that material that is prepared between lawyer and client may be inadmissible in court

## **Does a lawyer have to represent every client?**

- Fiduciary relationship between client and lawyer, meaning lawyers loyalty must not be questioned
- Reasons to refuse to retain:
  - Conflict of interest
  - Potential to be a witness
  - Client already has a lawyer
  - Illegality (if client asks lawyer to do something illegal)
- They need to help find them another lawyer
- Can work for both sides if it is independent legal advice, but many don't

## **Making Services Available**

- Lawyers must seek to ensure that access to the law is made available to as many people, especially the disadvantaged
- Lawyer cannot refuse client on race, language, etc.

## **Advertising**

- Need to do it in a tasteful way, can't mislead

## **Ethics in Civil Law**

- Ex. In House Counsel and lawyer knows company will do something that would hurt public...does that lawyer have an obligation to the public or the company?
  - They need to report to CEO
  - May need to resign if company doesn't change
- Deals with the concept that if there is a conflict between a lawyer's duties and a particular case, how does the lawyer decide what to do?

## **Ethics in Criminal Law**

- Main duty is to defend client
- There are also duties to court, society, him/herself
- 2 requirements:
  - Identify the problem as an ethical issue
  - Figure out a plan to deal with it (ex. Had an informant screened)
- Convict, or drop charges to let a sick accused go free?

## How can you defend that guilty person?

- Justice or injustice is to be decided by the judge, not lawyer
- The personal opinion of criminal defence lawyer of guilt/innocent is irrelevant and must not be expressed in court

## Limitations if a Client Confesses

- If lawyer knows, limited defence as they cannot mislead the court
  - Some lawyers don't want client to tell them the full truth!
- Cannot question a witness's character out of spite
  - Defence can test the evidence

## Client Perjury

- False testimony on the stand = perjury
- Every accused has right to testify, but the lawyer must not knowingly attempt to deceive the course of justice by offering false information
- Perjury is a crime, lawyer can threaten to withdraw
- If client tells you they will commit perjury:
  - Lawyer may withdraw
  - Refuse to call the client to the stand
  - Disclose the perjury to the court
  - Refuse to use the testimony
- If it happens suddenly
  - Lawyer needs to be discreet, call a recess

## Client Who Maintains Innocent and Pleads Guilty

- Plea bargaining process
- Pleading guilty to a lower charge is an option
- Should only occur if client instructs lawyer

## Incriminating Physical Evidence

- "Smoking gun, bloody shirt"
- Lawyer owes a duty of confidentiality to the client, also has an obligation to the administration of justice so that the lawyer is not permitted to destroy evidence
- Lawyer cannot suppress evidence, but they do not need to disclose all evidence in criminal cases
- Exceptions to disclosure:
  - Alibi
  - Psychiatric defence
  - All other experts should be disclosed
- Must not 'knowingly' attempt to deceive a tribunal or influence course of justice by offering false evidence, etc.
  - Very vague language though

## Termination of the Client Lawyer Relationship in Civil and Criminal Law

- Lawyer may withdraw from the relationship if it will not unduly prejudice the client
- When lawyer withdraws, they must give back all documentation and property to the client or new lawyer, disclose info, account for fees, and cooperate with the new counsel
  - Best interests of clients should always be first in mind
- Lawyer must withdraw:
  - If fired
  - Asked to do something in contrary to lawyer's duty to court
  - If client has dishonourable conduct
  - Belief of Dishonesty or fraud
  - If lawyer not competent

- Client has right to discharge lawyer at any time

### **Discipline**

- Penalties include: revocation of license, surrender license, fine, training

### **Disbarment**

- Relatively rare for Bar Associations to disbar
- Usually just sanctions

### **Paralegals**

- Individual qualified who is retied by legal professional to perform managerial duties
- Non lawyers who provide access to justice

### **Judges**

- Judiciary is third arm of government (separate from legislative and executive)
- Its goal is to uphold the constitution and administer law in fair and impartial way
- Judges have highest authority in court room
- Judge must maintain impartiality
- Judge rules on interpretation of law when jury – they give the jury the info to consider
- Private chamber, higher chair, clerk, own entrance, very symbolic
- 'Your Honour'
- Can charge anyone who shows disrespect with contempt of court
- Highest authority is supreme court of Canada
  - Final decision to appoint comes to PM
  - Supreme Court has 9 judges- 3 from Quebec, 3 Ontario (convention), 2 West, 1 Maritimes
  - Chief Justice is highest – decides which of judges hear motions and cases, has power of Governor General if they die
  - Decisions made by panel of 7-9
- Who is eligible to be appointed as judge?
  - Needs to be in good standing with law society
  - Superior Court judges appointed by Canadian government
  - Inferior Court judges by provincial government
- Investigations
  - Judges can be investigating for wrong doing
  - Self regulated – judges investigate judges
  - Canadian Judicial Council investigated

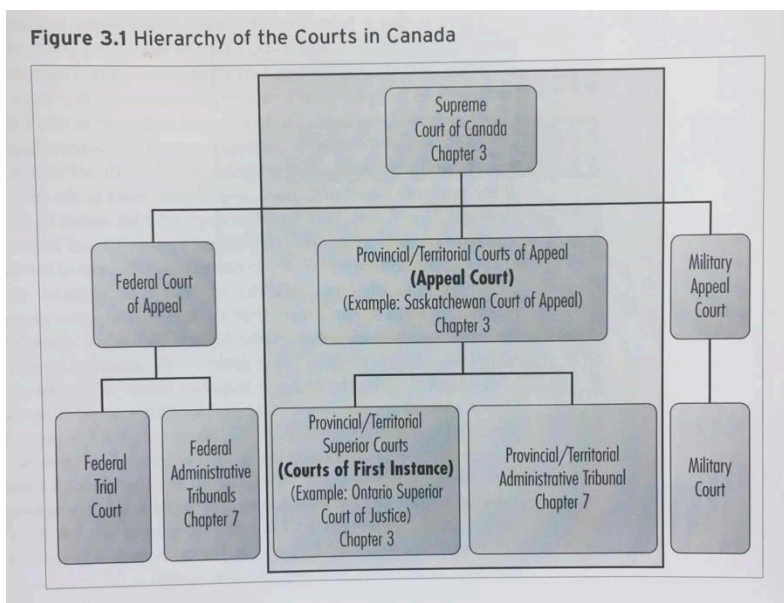
## Chapter 3 Civil Litigation

- Civil law governs the interactions between individuals, but can also include governments and other initiations
  - Includes all non criminal cases under contract law, tort law, family law, admin law...
- Civil law is governed by statutes and/or common law
  - Common law is predominant system of case law used in Canada (case law = common law)

### Legal Theory

- Rule of Law (from Aristotle) – distinguishes between government of law and government of men
- Canadian system is a government of laws, as no one is above the law
  - Basis of our system is parliamentary supremacy – parliament creates laws, courts just interpret and enforce

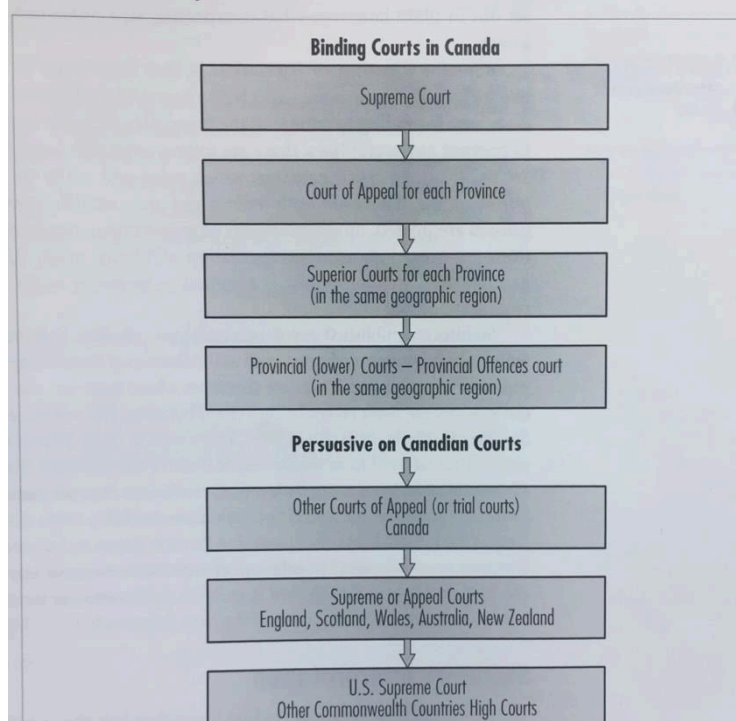
### Hierarchy of the Courts



- Courts of first instance (trial courts like Superior Court of Justice of Ontario) where all evidence is raised, disputed, and decided
- All cases above small claims go to provinces Supreme or Superior Court or Court of Queen’s Bench
- Appellate courts are higher courts which can review the decisions of lower courts if there was a mistake of law (Court of Appeal for each province, and Supreme Court of Canada)
  - Do not examine evidence, but simply examine written briefs on the law
  - Usually 3 or more judges on panel
  - Split is not uncommon
- Federal Court System
  - Hears matters like immigration law, patent law, tax law
  - Trial level, Federal Court of Appeal, Supreme Court
- Supreme Court is ultimate court in Canada and hears appeals from the common law system and the Federal Court of Appeal and Quebec’s Civil Law system
  - Before Supreme court, everything went to Privy Council in London
  - AKA Court of Last Resort

- Higher courts can bind lower courts that are within the same geographical region and the lower are bound to follow the higher
- Decisions of Courts by same level are persuasive – meaning that their decisions should be respected, but not binding
- Case law from a higher level court is binding
- Case law from another court on same level is persuasive
- Case from Supreme Court is binding everywhere
- Canadian courts not bound by cases in UK
- Persuaded by UK and USA
- Judges may give special weight to Court of Appeal (or Supreme Court) cases where the decision is unanimous, where a series of cases all discuss the same principle, older cases that may be given new precedent, cases by prominent judges
  - If case has dissenting decision, if the judges disagreed, if case is old or in quickly changing area of law = less consideration

Figure 3.4 Binding Courts in Canada



### Statue Law

- Federal and provincial government draft legislation
- Other people (i.e. Governor General, cabinet ministers, tribunal) can make laws call regulations
  - Can be quickly and easily enacted to meet changing needs of that area of law
- Each level of government must be careful not to go beyond its authority
  - Ultra Vires = “beyond the power of the body” or acting beyond the given jurisdiction
  - If law is deemed ultra vires, it is invalidated
- Major function of legislation is that laws must be published in promulgated
  - Citizens expected to know what laws are, as ignorance of law is no excuse for breaking the law
- Gazettes make all new laws available to Canadians
- Statues are published in volumes yearly called Statues of Canada (SC), and are followed by year of publish!

## Statutory Interpretation

- Goals of legislation:
  - General enough to apply to population required
  - Clear so there are no contradictory provisions
  - No conflict of municipal/provincial/federal law
  - Should not make the demands that are impossible to comply with
  - Should stand the test of time
  - Mechanism of enforcement
- Judges play crucial role in interpretation of law
  - Judges may refer to the definitions in the statute
  - Or may refer to the Interpretation Act which provides guidance of how to interpret
  - May also refer to Hansard – the parliamentary debates of the legislation

## Traditional Rules of Statutory Interpretation

1. Literal Rule (Plain or Ordinary Meaning)
  - If words of legislation are clear, they must be given their ordinary meaning and grammatical punctuation rules apply
  - The statute alone is the only thing to be considered, and no other context is permitted
  - Judges must apply ordinary meaning
2. Absurdity Rule (Golden Rule)
  - Adds to the literal rule in that the normal meaning of the legislation should be used unless this reading would result in absurdity
  - If absurd or unacceptable results come from the legislation, then judge can assume it was not intended and is allowed to move from literal meaning only as much as necessary to remove the conflict
  - Judge A may think absurd, Judge B may Not
  - Ex. Skoke-Graham v R
    - i. Church members who kneeled to receive communion; the law said “willfully...do anything that disturbs...”; kneelers were charged; court had to reject “anything that disturbs” as it would have absurd consequences
3. The Mischief or Purposive Analysis Rule
  - The court can seek the legislative purpose of the legislation
  - The court can look to the language of the act, or the Hansard, or legislative committee reports
  - It looks to what the legislations were trying to see how the act should be interpreted
  - The court can look to the reason for the legislation, and what it was trying to prevent
4. Contextual Analysis Rule
  - Courts may look at the act as a whole, other legislation, social conditions surrounding the formation of the legislation
  - The judge must realize that the legislators had a plan and goal for the legislation
5. The Plausible Meaning Rule
  - Court can depart from the ordinary meaning of a statute only if there is a more plausible meaning to the words
  - Courts will be limited in determining what is plausible only with the language that is in the text
6. Modern Rule of Interpretation
  - Takes on many characteristics of the other rules
  - Entire act is to be read grammatically and in an ordinary meaning, the context of the legislation and the intent of parliament also taken into account
  - Room for every other rule

### Case Law

- Move to more readable and understandable language
- Transcript is a word for word account of what happened at trial
- Written discussion is shorter and just discusses the judge's conclusion
  - This is what will be relied upon in the future
- Common law system is built on previous cases – common law
- Each case forms a precedent to be followed in the future

### **Stare Decisis, Ratio Decidendi, Obiter Dicta**

- Stare decisis = stand by decided matters
  - States that courts are bound to follow precedent and to adhere to decided cases that have similar facts
- However, there are ways that a judge can decide not to follow precedent – distinguishing the case
  - A judge may find key differences in the law, facts which suggest it should not be followed
  - The value of a precedent case is not just who won or lost, but the reason the judge decided the case
  - Ratio decidendi = root for the decision
    - Only the ratio is binding on future courts
    - All the other material is just background to the particular case
  - Finding the ratio is challenging, especially among a panel of judges who disagree
- Obiter Dicta = words in passing
  - All the other discussion in case is not binding on future courts
- A decision by a judge has 2 functions:
  - To decide that particular case and solve the dispute
  - To establish legal principle for the future
- Res judicata = matter adjudicated - is the goal of our system
  - We can't people to have finality from legal system
  - Once matter is heard, that is the end of it
- Advantages of precedent:
  - Parties are given predictability and practicality
  - Courts can deal with matters through incremental changes
- Disadvantages
  - Rigidity
  - Illogical distinctions between cases
  - Lose touch with the legislation

### **Law Reports**

- Decisions written by judges are published in case reporters
- Headnote is written that provides a summary
- Citation of case contains important info
  - Ex. R vs McCraw [1991]
  - R = Regina or Rex which means criminal
  - Decided in 1991

### **Case Brief (page 69 – 70)**

### **Role of Legislation and Case Law in Judicial Decision**

- There is partnership between case law and legislation

- If statute is introduced that does not follow previous case law, the statute overrules the old case law
- However, case law regularly interprets legislation, giving meaning and correcting any mistakes
  - Case law can sometimes change the applicability of statute
- Judges must consider:
  - Is there a statute that applies? (If yes, apply it with the plain meaning and then add other statutory interpretation rules)
  - Is there a case that addresses the situation (If yes, apply the case)?

### **Civil Litigation and the Trial Process**

- Out of Court Settlement – trying to settle with other party before litigation
  - Parties may agree to divide the damages
- 90-99% of case end in default judgement, settlement, abandonment, or diversion to alternate dispute resolution
- If settlement is unsuccessful, lawyer must determine if client has a cause of action
  - This means that a person must have an established right to use the civil court system
  - Lawyer usually gives an opinion
- Some provinces have mandatory mediation – a process before the case can proceed
- Once an individual decides to proceed with formal litigation, there are rules about how to act
- In Ontario, lawyers governed by the Courts of Justice Act and the regulations under Rules of Civil Procedure
- You need to have standing to sue
  - You must have a particular kind of relationship to the facts of the case (i.e. you are child/parent/witness)

### **Stages of Litigation**

- **Pleadings**
  - First step is filing the pleadings within the court (originating process)
  - Refers to the beginning of the paper work
  - In Ontario, action is started by filing a notice of action that informs the defendant that an action has been started
    - With this document, you are telling the other side that you are going to sue
  - Notice is filed by the plaintiff and taken to a court to register
  - Court seal attached to it – this issuing the document
  - Plaintiff must serve the notice of action on the defendant in person or by mail
    - There are rules of service to make sure documents received
    - Many go through personal service
    - Lawyers may retain process servers to find and deliver the documents
    - The person sending them must file an affidavit of service – states name and info, day and time when materials were sent, and this document is sworn to be true
  - Defendant is given a specified time period to respond to the action or plaintiff can go to court to seek a default judgement
  - When defendant put under notice, the plaintiff must make a statement of claim that outlines the allegations and damages
  - Defendant has options:
    - Pay amount in the claim
    - Do nothing
    - Defend – defendant needs to prepare statement of defence
  - In the statement of defence defendant can admit:

- That the allegations are true, deny the allegations (which puts the facts in issue that must be proven at trial), state that the defendant lacks knowledge of allegation (has to prove), or can give own version of facts
- Defendant will often make a counterclaim against the plaintiff saying there is actually a claim against the plaintiff
  - Plaintiff will now have to respond
  - Defendant may also bring a third party claim saying that there are additional parties who should be added to the suit
- In cases where there are two or more defendants, defendants can claim against each other in what is called crossclaim
- Most never go to trial!
- **Discovery**
  - Objective of early stages of litigation is to uncover info about case before trial
  - Each side delivers an affidavit of documents and each side can request to view any of all of documents that the other side has
  - Examination for discovery is the term used for the process that allows the parties to gather info before trial but after all pleadings have been submitted
    - May go to testimony under oath or affirmation of both parties by the lawyers of each side
    - This saves time in court
  - A lawyer can give an undertaking about additional documents
    - If the lawyer is not sure if client will be able to produce these documents, the lawyer may tell the other side that the lawyer will take it under advisement
- **Pre Trial Procedures and Conferences**
  - If discovery is complete and the parties still cannot settle, plaintiff or defendant can set down the matter for trial by filing a trial record
    - Parties are also subject to pre trial conference – last step before trial (the lawyers meet with judge to explain why settlement cannot be reached...occurs in judge's chambers)
    - Judge may pressure to come to an agreement
    - If no settlement, goes on trial list
    - Used to discourage people from proceeding with court case and encouraging settlement
- **The Trial**
  - Lawyers start with an opening statement where case is summarized
  - Plaintiff and defendant testify under oath and being examined in chief and cross examined on the witness stand
  - Civil cases largely heard without a jury
  - Closing statement at end
  - At the end of trial, judge/jury comes to a verdict
  - Judge makes a determination based on the balance of probability and sums up argument in writing
  - Offending party is found liable or not legally responsible
  - Plaintiff has the burden of proving that the judge and or jury should accept the plaintiff's version of what happening
- **Civil Juries**
  - Composed of 6-8 members and decision can be made with a majority of the civil jury
- **Damages and Remedies**
  - Court needs to formally put \$ value on what plaintiff lost...if defendant found liable, it isn't just over immediately
  - Special damages refer to those losses that are tangible (lost wages, lost property)

- General damages involve something less clear (pain and suffering, loss of future wages) and very hard to measure
  - Limit on general damages of ~\$300,000
- Judge may award punitive damages to deter others from acting in a similar manner to the defendant and to punish the defendant's actions
- Aggravated damages are only appropriate when the defendant's behaviour is so outrageous that it needs to be separately compensated
  - Address matters of humiliation, indignity, shame
- Nominal Damages in small amounts to show support for the party
- **Costs**
  - Costs often awarded to the successful party, including lawyer fees (not all, but a scale system is used 1/3 to 50% of other sides lawyer fees)
- **Small Claims Court**
  - Hears cases in which the damages contested are under a certain monetary limit
  - Truncated version of normal civil law process
  - Lawyers are often not present since claims are small
  - Reduces cost of civil litigation
  - Unpaid bills, unpaid wages
  - \$25,000 limit in ON
- **Appeals**
  - 1-9% of civil trials are appealed by the unsuccessful party
  - Can be made based on questions of law but rarely on question of fact (only if error can there be appeal)
  - Appellant launches appeal and respondent replies to the action
- **Enforcement**
  - Victor needs to take steps to get the money
  - If the person has money or assets, the successful party can take steps to garnish wages or bank accounts
    - In a garnishment, successful party can apply to the employer to take some off paycheque of loser per pay period (20-30%)
  - Successful party may obtain a writ of seizure and sale from court
    - Debtor is prohibited from selling property or assets

### Court of Equity

- Clean Hands – i.e. court will not help you if you come to court with unclean (i.e. you hired hitman but they didn't listen to contract, you have unclean hands)
- Individual will not "suffer a wrong and be without a remedy"
  - I.e. you enter contract to buy something, common law says you need a remedy if they don't give it to you, but you want the particular item
  - Equity court orders a specific performance – which would force the seller to give you the item
- Injunction – if one person violated a contract and the only thing that the plaintiff could receive at common law is damages, the court of equity would step in and order someone to stop the wrongful behaviour
  - Used to halt something
- Equity can also issue a declaratory order – states that someone is right in the dispute
  - If they don't obey, find them in contempt of court

## Chapter 4 – Contract Law

- Contract law is a dichotomy between two ideals: freedom of choice, and the protection of society

### Basic Principles of Contract Law

- Determines which relationships form contracts and which do not
- Law of contracts is largely common law – most rules of contracts are derived from precedent
- Law of contracts is universal
  - Law of contracts is concerned with exchanged of goods and services for money and/or for other goods and services
- People voluntarily enter into contracts
- Parties rely on civil litigation and allow courts to resolve disputes if not settled through negotiation
- Courts generally not concerned with the ‘fairness’ of the contract
  - Main goal of courts is to enforce the clean intention of the parties
- Courts will interfere when faced with unfair or unconscionable contracts (i.e. consumer protection laws)

### Definition of Contract

- An agreement that is recognized by law between two or more persons, which gives rise to rights and/or obligations that the courts *may* enforce
- Contract usually starts with a promise, but important to remember that not all contracts are promises
- Court wants the parties to have ability to be free to contract with each other
- Terms of contract (statements, promises, stipulations) can be expressed (stated) or implied (unstated)
  - Determine each party’s rights and obligations and remedies available if the terms are broken
- Language of contract must be reasonably clear
  - If not, the courts could dispose of the contract or deem the term unenforceable
  - When terms are not stated, court may use evidence of custom
- Normal course of action is action for financial damages

### Bilateral Contracts

- One where there are promises made by each of the parties to the other, which they are both bound to perform
- This is a contract where the offeror and the offeree trade promises

### Unilateral Contracts

- One party promises to do something in exchange for the act of the other party, not a promise
- Offering a reward for lost laptop is example
  - Offer is accepted by doing the act, or series of acts, per the contract
  - Only one person makes promise while the other person just performs
  - Made to world at large, not contracting anyone in particular
- Unilateral offer can be accepted by more than one person, but there must be action
- Subsidiary promise
  - An implied promise that the offer cannot revoke once the individual begins the task (i.e. looking for lost laptop), in good faith, and continues to perform
  - Court may assist the offeree by implying in the contract that there was a promise not to revoke the offer

### Written Contracts

- Contracts do not need to be in writing, but makes for good evidence when they are
- Some need to be in writing: indemnities, contracts not to be performed within the year, promise of consideration of marriage, executor of will
- Written carry more weight than testimony
- One individual cannot change terms of contract once agreement is made, unless both parties agree
- Standard form contracts – are written beforehand and have standardized clauses and conditions, and clients have no room to negotiate or discuss terms (i.e. signing up for Credit Card)

## Ingredients to a Contract

### Consensus

- Including an offer and an unqualified acceptance
- The most important qualification to a contract is that a consensus must be reached between parties
- Consensus ad idem = meeting of minds
- The test used is the reasonable person test – what would a reasonable person who was prudent and careful in his or her dealings have understood the contract to be?
- Courts will not allow someone to escape from contract by claiming not to have read or understood
- Consensus is comprised of an offer, acceptance and communication

#### 1. Offer

- An offer is defined as a tentative promise or statement of willingness by one party to enter into a contract with another part on certain terms and conditions
- Offeror makes the offer, and the offeree is the person to whom the offer is being made
- Offeror sets out the terms including things like price, length of time to complete
  - Offeree accepts them
  - Thus a contract is formed
- There is an understanding that if the offer is accepted, the parties will enter a legally binding contract
- Offer may be expressed or it may be implied by conduct
- May be addressed to one person or to a group (ex. An offer of a reward)
- An offer is not just about the intention inside of a person that he or she wants to form a contract, but rather it is the outward indications to show this intention so that the other party also knows that he or she is entering into contract
- ‘Agreement to agree’ sometime in the future is not a contract
- Conduct of parties can also be an offer (ex. At an auction where a purchaser lifts a hand)
- *Advertisements – Invitations to Treat*
  - Before an offer is made and accepted, attempts are often made to attract the attention of the party to invite him or her to enter into a contractual relationship
  - Invitation to treat (i.e. advertisements) and must be distinguished from offers because an invitation has no legal effect
- *Termination of an Offer*
  1. Refusal – offers that are refused by the offeree cannot be later accepted
  2. Lapse of time – when a person states the offer will be open for a specific period of time, offer will end when the time has lapsed
  3. Lapse of reasonable time – when there is no specific period of time for the offer, the courts will determine a reasonable amount of time for offer to be open
  4. Failure of a condition – there may be a failure of one of the conditions surrounding the offer (i.e. contract to sell, get in accident day before)
  5. Revocation – offeror is in control of the offer and can generally revoke anytime before it is accepted; revocation must reach ofeeree before that person accepts offer
  6. Counter offer – introduction of new terms is considered a termination of an offer; counteroffer is whole new deal; when counteroffer offered old offer is dead; ‘battle of the forms’

#### 2. Acceptance

- Second basic ingredient to contract
- Acceptance indicates that the expressed terms and conditions are acceptable and that the individual is willing to be bound by them
- Acceptance merely indicates a willingness to be bound
- Two requirements:

- Acceptance must be unqualified
- Must be communicated to the person who made the offer
- Needs to be clear and unconditional
- 3. Communication
- Communication of the offer is also very important and is final ingredient to contract
- To be a valid offer, it must be communication to the other party either orally, in writing, or by conduct
- Only the group or person to whom the offer is made may accept the offer
- Identical offers that cross in the mail
- Contracts cannot be communicated silently
- Post Box Rule:
  - Exception to the communication principle
  - When traditional communication employed, the acceptance is deemed to be effective at the time and place it is posted
  - Thus, acceptance happens at the moment the offeree puts the envelop in the mailbox

### Consideration

- The second ingredient of a contract is consideration which is a tool see if they should enforce a promise
- This is a requirement that both parties to an agreement pay a price and that both parties receive a benefit
  - A contract is not a gift, but an exchange and if there is no bargain there is no contract
- Does not need to be money
- Only time you don't need consideration is when contract is under seal
- Rules of consideration
  1. Consideration must be sufficient but not necessarily adequate and specific
    - Sufficient means that what is exchange must have some value, but does not need to be adequate; courts do not care about value of it
    - Needs to be specific – amount needs to be specific
  2. A gratuitous promise is not consideration
    - Gratuitous promise is unenforceable – one sided promise in which only one of the party's commits
    - If you say you will paint my house for \$300 and I agree, but then demand \$100 extra and I agree there is no consideration as you were already obligated to paint house
    - Consideration not sufficient in cases where people simply perform what they are legally bound to do either because of statutory duty (ex. promise to pay someone to testify in court when they are already obligated to do so), or because of a pre existing contractual duty
      - No true exchange
  3. Consideration is distinct from motive, but discharge of a moral or legal obligations is generally not sufficient
    - Consideration cannot be illegal and an agreement in which someone agrees to perform an illegal act is not binding
    - You need to come to court with clean hand
    - Cannot misrepresent
    - Cannot go to court for contract help if you are in the wrongs
    - Motive behind the contract has been found to be irrelevant
    - In pari delicto, potior est condition defendetis = both parties are equally in the wrong, the position of the defendant is stronger

4. Consideration may be present or future, but not past
  - “I will pay you \$100” or “I will pay \$100 when you finish job”
  - “Because you painted my house, I will give you \$100” – this is past consideration and is not enforceable
- Good example on Page 100

### **Intention**

- Intention to enter into a legal relationship
- Ex. Agree to play soccer is not contract
- Agreements made by ‘honour’ are not enforceable

### **Capacity**

- To form a contract, person entering into the agreement has to have certain characteristics and those individuals we view as vulnerable are in need of protection
  - Some groups are said to lack capacity

### **Minors**

- Under age of majority, you are a minor child (18 in Ontario)
- Minor Child’s entry into a contract is restricted
  - Necessities (food, shelter, clothing) – when a minor contract to purchase, the minor is bound by the agreement and can be sued
- Child is free to enter the contract, the adult that the child is bargaining with cannot enforce the contract against the minor
  - Ex. Buy computer, can’t pay -> they can only get the computer back
- Void contract is one treated as if it never existed
- Ex. 16-year-old buys something that is not necessity, but adult contracted finds out that other party is a minor and wants to rescind the contract...adult is bound to fulfill the terms if the minors wishes it to be so; adults should contract with minors at right

### **Mental Disorder**

- Disorder must be serious enough that the individual did not understand the nature of the agreement
- Court will look at deal if it was unconscionable
- Part must show they he or she repudiated (or sought to void) the agreement time after becoming sane (if that happens)

### **Intoxication**

- Person needs to be so intoxicated that they did not understand the nature of the agreement; and the other person needs to know they were intoxicated

### **Consent**

- Each of the parties to a contract must understand to what they are agreeing to be bound
- Representations are statement that induce the contract but are not part of the contract (ex. This will help you reduce your costs\_
- If representations are false, then the remedy may include an action for misperception
- Condition is used to describe an important term in contract and is one that, if not met, voids the contract (i.e. conditional offer on home)
- Warrant denotes a term that is less important than a condition – allows only one party to claim damages if there is a breach but does not discharge the person from the contract

### Mistakes

- Mistakes often occur when a person has a mistake belief about the subject matter or the content of the agreement
- 3 types of mistakes:
  - Common mistakes that are shared by both parties and can be fixed through rectification (i.e. a typo that can be fixed)
  - Misunderstanding between the parties about the terms of the agreement
    - Court will use Reasonable Person argument
  - One side or unilateral mistake where only one person knows there has been a mistake but does nothing to remedy ... as long as person did not actively contribute to error, there is no remedy
    - Caveat empor = let buyer be ware
    - If one can prove there has been a unilateral mistake, the contract is void

### Misrepresentations

- Although parties must accept consequences of contracts, a misrepresentation is a false statement or fact that induces a person to enter into contract that they would otherwise not enter
- Seller cannot actively mislead the purchaser or provide false information about a material fact or this is misrepresentation
- Misrepresentation may void contract, depending on if it was innocent or fraudulent
- Rescission – if misrepresentation is accident, it puts parties back to state before contract
- If fraudulent, victim may ask court to rescind, or undo, the contract and or sue for damages because seller was trying to defraud

### Undue Influence

- Occurs in situations where one person has power over another or is in a position of higher authority
- May be declared void if unduly influenced because of authority of the other
  - Weaker party can show stronger party took advantage

### Duress

- 2 elements:
  - Pressure amounting to compulsion of the will
  - Illegitimacy of the pressure exerted

### Issues Affecting the Contractual Relationship

#### Exclusion Clauses

- An exclusion clause inserted into a contract aims to exclude or financially limit one party's liability
- Exclusion clause do not protect parties from a fundamental breach, even when clause says it does
  - One cannot contract out of the law
- Ex. Parking garage signs saying not responsible
- Lots of things in place to protect consumers

#### Privity

- In general, a person who is not a part to a contract (a third party) cannot sue or be sued on a contract
- Exceptions:
  - Privity Runs with the land – have rights even through you don't own property
  - Trust / insurance
  - Agency (review on page 106)

### Discharging the Contract

- **Can end in four ways**
- 1. Performance
- When contract performed, it comes to an end

- Some contractual obligations may be ongoing even though it seems that performance has been completed (i.e. warranties)
- 2. Agreement
  - By agreement of the parties
  - If both agree to change or end the contract, that brings an end to the rights and obligations
  - The contract may explicitly provide how a contract can come to an end
    - This may be through a condition precedent (ex. Subject to sale of my home within 30 days, I will enter into a contract to buy another home)
    - The deal to purchase home is contingent on selling old house
  - Condition subsequent
    - Is that a contract may end when something happens?
    - Contingent on something that might happen sometime in future, contract will end
- 3. Frustration
  - When some outside events take place that makes performance of contract illegal or impossible
    - Cannot be either party's fault and cannot be anticipated
  - 3 situations where it can arise
    - Contract becomes impossible to perform (house burns down)
    - Change in law renders it illegal
    - There occurs a radical change in circumstance, leading to the requirement of something radically different
  - Cannot be induced
- 4. Breach
  - If one party has not fulfilled obligations, victim is entitled to treat contract as finished and can sue for breach and seek to recover damages
  - When refusal to perform is involved, act is referred to as repudiation

Anticipatory breach is when repudiation takes place before performance is required under the contract

## Remedies

### **Rescission**

- Contract has been breached and several remedies
  - Most common: take to court to rescind contract; returning to state before contract

### **Damages**

- Damage is monetary compensation
- Not meant to punish person who broke contract, just to put victim as near as possible to the position they would have been in if the contract was properly performed
- You have responsibility to mitigate your losses by trying to limit amount lost

### **Quantum Meruit (Quantity and Merit)**

- This is a claim for reasonable remuneration ('as much as one deserves')
- Ex. You don't pay repair bill, worker entitled to as much as they deserve

### **Specific Performance**

- Courts may order the party in breach to finish the agreement through specific performance
  - This remedy only available when damages are inadequate
- Ex. For sale of land – land is unique; damages are not enough to compensate

### **Injunction**

- Opposite of specific performance and can be used to make person stop what he or she is doing if it is inconsistent with terms of contract

**Emerging Issues in Contract Law: Online Contract Formation**

- Cyberspace fallacy to treat online contracts different...just a fallacy
- Post box rule – like when you click send or it leaves your control
  - But when you click sent, when it leaves outbox...?

## Chapter 5 Tort Law

- Tort ('tortus') = twisted or curved, and now come to be known in law as the French word for injustice
- Torts deal with civil wrongs (not criminal wrongs), other than breach of contract, that one person commits against another, resulting in damages
- Unintentional torts (negligence) are the major cause of action in tort
- Intentional torts are also litigated within distinct categories of wrong
  - Restore person to point before the injustice

### **Basic Principles**

- Person who begins the action is the plaintiff, person defending is the defendant
- A tort action is an attempt to use civil law to bring an action to seek compensation
- Balance of probabilities
- One of the first steps in action is to determine whether the cause of action is a tort, and if so what kind of tort has been committed

### **Differences between Crime and Torts**

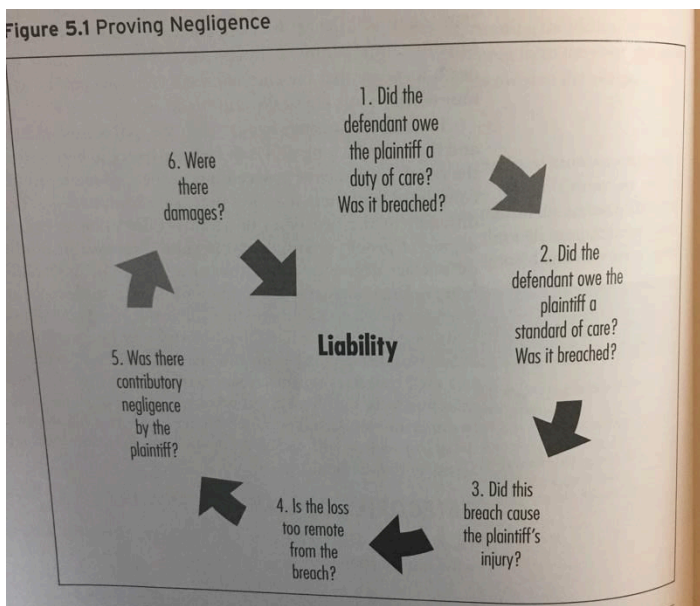
- Criminal cases also involve a wrong, but these behaviours are considered more serious because they threaten all of society
  - Crimes against state
  - Object is the protection of society
  - Interests of victims largely ignored and they are relegated to the role of witness in the criminal process
- Tort:
  - Object is to compensate victim
  - Balance of probabilities – 51% basis
- Some overlap (i.e. hit with a bat is a criminal and tort)
  - Sometimes stay of proceedings occurs when criminal trial ongoing before civil occurs

### **Categories of Liability in Tort**

- Negligence, strict liability, intentional torts, other unique torts

### **Negligence**

- Negligence is the failure to take reasonable care to prevent foreseeable harm to another
- It is about the tortfeasors relationship with the victim
  - There must be a relationship between parties



### 1. *Duty of Care*

- Whether or not the plaintiff owed a legal duty to the defendant to be careful, and then must examine the nature of that duty
- Whether or not there was a duty of care for the defendant to the plaintiff and if it was breached
- Fault determined by a reasonable foreseeability test in which the court examines the defendant's actions and attempt to determine whether or not that person acted in a prudent fashion
- What would a reasonable person could foresee?
- Foreseeable plaintiff test

### 2. *Standard of Care*

- What is the standard of care required of the particular defendant?
- Most often, defendant to conform to the standard of a reasonable person
  - What would reasonable person in same situation have done?
- 2 stages of standard of care:
  - What standard of care is defendant required to meet?
  - Can the plaintiff prove that there was a breach of care?
- Reasonable Person:
  - A reasonable person is an imaginary person who is not perfect, just careful and considerate of others
- Foreseeable Risk:
  - The court must see that the defendant avoided foreseeable risk to others
  - The court will also look at the likelihood that damage will occur and how severe the harm will be if it does occur, but the court will also weight social utility of the act (was the act done in pursuit of some higher goal?)
  - Review on page 121
- Failure to Act
  - Common law distinguished between injuries caused by misfeasance (positive action that is actionable because one acted, but acted improperly) and nonfeasance which is a failure to act
  - Generally, a failure to act is not a tort unless there is a statutory obligation to act
  - Good Samaritan Law – at the least, call 911
  - People in trust and reasonability have duty to act (i.e. lifeguard must try to save)
    - Duty often attaches to someone's

### 3. *Injury and Causation*

- Must prove that injury was directly caused by the conduct of the defendant
- Damage or injury must be present for liability for negligence to be imposed
- History of psychological injury counts
- For causation to be proved, there must be a sufficiently close causa connection between the action and the injury, and the test used is the 'but for test'
  - Plaintiff must show that but for the defendant's conduct, injury or loss would not have taken place, proved on balance of probabilities
- Defendant does not need to be the sole cause of injustice, just on cause

### 4. *Remoteness of Damages and the Thin Skilled Plaintiff Rule*

- A defendant is not responsible for every outcome; if the damages are too remote in law to be recoverable, the plaintiff will not be able to receive damages
- At times, loss is so unexpected that it is unfair to find the defendant legally responsible
- 'take victim as is'

### 5. *Contributory Negligence*

- In order to prove negligence, there must also be no prejudicial conduct – called contributory negligence – on the part of the victim

- Plaintiff's behaviour may cause their own victimization
- If so, plaintiff disqualified from seeking compensation, or compensation will be reduced
- Apportioning of loss between parties when there is dual fault (i.e. plaintiff 50% and defendant 50% responsible)
- 6. *Damages*
- Anyone who suffered a loss because of the defendant's negligence is awarded damages
- Damages are intended to put plaintiff in position that he or she would have been in if the negligent act had not happened
- Insurance companies sometimes have subrogation rights
  - They can start a tort against person who was negligent to insurer
- *Put it all together on page 126*

### **Intentional Torts**

- Intentional torts involve actions that are wilful, deliberate and conscious
- Negligence is relatively new, intentional older
- Through intentional torts, one need only intend the act and not the harm that results for the defendant to be liable, but the conduct is almost always intentional and voluntary
- Transferred intent – ex you mean to shoot someone, but shoot someone else you are still liable
- 3 types of intentional torts: trespass to another, intentional infliction of nervous shock, false imprisonment

### ***Trespass to Another***

- Battery:
  - The first and intentional physical interference with another person, which is harmful or offensive to the reasonable person and is exercised without consent
  - There must be direct touch to the individual although
  - Can be proven even if there is no damage (unlike negligence)
- Assault:
  - Intentional creation in mind of another of a reasonable apprehension of immediate physical contact
  - Refers to an attempt at injury where no physical contact takes place, but rather there is a threat of immediate danger
  - If plaintiff threatens but not act, it is assault
  - Can have assault without battery (yelling or shaking fists without touching), battery without assault (surprise attack from behind – they didn't see it coming), or both (threaten to hit me and then does)

### ***Intentional Infliction of Nervous Shock***

- Psychological harm
- 3 elements to prove that someone has psychologically injured the plaintiff
  - 1. Outrageous or extreme conduct and a severe impact on mental well being of plaintiff
  - 2. Plaintiff must prove the creation of a mental illness or disorder
  - 3. Plaintiff must show that he or she did not have a predisposition to shock (becoming less important)

### ***False Imprisonment***

- Wrongful incarceration and not where an individual's movement is limited
- Actionable even if no damage occurred
- Physical boundaries, restraint, or by authority of person restraining
- Plaintiff just needs to show that there was director imprisonment

- Ex. Can sue police for false imprisonment

## Unique Torts

### **Nuisance**

- Private:
  - Protects individuals from the substantial and unreasonable interferences with the use, enjoyment, and comfort of their land
  - Secures property from indirect physical or intangible interference
  - Ex. Smoke, water seepage, smells, noise, loud music
  - Not actionable unless there is unreasonable interference (ex. Can't move beside pig farm and say it smells)
- Public:
  - Deals with the protection of the public to exercise the rights that are given to all citizens, like the right to use public highways (ex. Brothels are public nuisance)
- Nuisance can be intentional or unintentional, while trespass to property is always intentional
- Injunction and damages are possible resolutions

### **Defamation**

- Refers to the publication of a false statement about another person that defames or reduces esteem or respect in the eyes of others
- Can be intentional or unintentional and measured on an objective basis of a reasonable person
- Damages can be sought if injury to reputation is significant
- Innuendo can be defamation when statement is indirect but is made to people who have sufficient information to know who the defendant is
- Defamatory comments must be heard or read by a third party to be liable – this is referred to as having been published or broadcast
  - Publication to one person is still defamation
- Libel is written defamation (also cartoons, billboards – considered more serious as it is permanent) and slander is oral in nature (or facial expressions, features)
- Damages can be reduced if retraction of apology (for News)
- Truth is a defence for defamation

## Special Categories of Torts

### **Strict Liability**

- Absolute liability was created in order to find a defendant liable if they cause the plaintiff's loss, without having to prove that the conduct was intentional, negligent, or blameworthy
  - No defences are available
  - Exclusively found in provincial regulatory offences
  - No modern torts based on this
- Strict liability
  - Without intent or negligence
  - You are guilty of doing that and you are given an opportunity to prove that you acted with due diligence, but no fault has to be established
  - Does not play a large role in tort
  - Ex. Car manufacture can be sued if their products are defective and result in injury

### **Vicarious Liability**

- Involves situations in which a person is held responsible for the actions of others – for example, those under that person's employ

- It must be proven that the employee acted while under the course of employment and that there was a special relationship of master/servant between the parties
- Employer can be strictly liable for the action of the employees, regardless of fault on the part of the employer
- Can go after employee and employer, but more likely to get resolution from employer

### **Occupiers Liability**

- Imposes a duty on owners of land (the occupiers) to ensure that anyone who comes onto that land is not subject to injury
  - Occupiers were those people who were in control of land
  - 3 classes of people who may fall under occupiers' liability:
    - invitees – on property for something other than social visit (each party benefits thus highest standard of care)
    - Licensees – entering for social purposes
    - Trespassers – no legal right to be on property
- Negligence law is similar to occupier's liability; but separate as court needs to look at relationship between occupier and visitor

### **Class Actions**

- Are used so that one individual (representative plaintiff) can bring an action on behalf of a group of people with similar actions
  - Can receive a decision that applies to all of group
- Saves time and money
- Need to advertise the class action to possible victims
- Lawyers who do this work on a contingency fee often
  - If there is a settlement, lawyers get portion

### **Defence to Torts**

#### **Consent-Defence to Intentional Interference with the Person**

- Self defence, defence of a third person, defence of property, discipline, legal authority, illegality and consent are complete defences
  - Consent – some circumstances where one can consent to fight (which would normally be batter under tort law)
- Provocation and contributory negligence are partial defences
- Mistake and duress fall somewhere along the defence continuum

#### **Illegality (Ex Turpi Cause Non Oritur Actio – Defence to Intentional Interference with the Person**

- Intentional interference with the person may be defeated by the illegality or immorality of the plaintiff when the tort occurred
- Only compensatory damages may be permitted (you can't get other damages if you were doing wrong)

#### **Voluntary Assumption of Risk-Defence to Negligence**

- Volenti non fit injuria = 'no injury to one who consent'

### **Damages**

- Special damages = calculated precisely (i.e. cost of fixing car)
- General damages = awarded when it is difficult to precisely determine the loss or injury (pain and suffering)
- Punitive/exemplary damages = rare and are meant to punish the defendant and to make an example of them

- Aggravated damages = designed to compensate for the humiliation and loss of dignity caused by the outrageous behaviour of the defendant
- Other judgements include injunction (making defendant stop something); replevin – defendant needs to return wrongfully held goods

### **Joint Tortfeasors, Several Tortfeasors, Joint and Several Tortfeasors**

- Joint tortfeasors – are those who combine mentally together for a common purpose
  - Joint wrongdoers
  - 4 types:
    - 1. Individual who encourages others to commit a tort
    - 2. Employee and employer who are joint within the scope of their employment
    - 3. Principle and their agent
    - 4. Catch all category – ‘guilty by participation’
  - Double recovery not allowed (can only get the action amount back)
- Several tortfeasors – are those who act in the same event, but who have not acted in common with each other
  - Responsible for the same damage, but not necessarily the same tort
  - Separate action against each of the tortfeasors

## Chapter 6 Family Law

### Families in Canada

- Family law deals with the relationships among individuals in conjugal and other family relationships
- 2006 definition: “Family: composed of a married couple of two persons living common law with or without children or of a lone parent living with at least one child in the same dwelling”
- Family law closely relates to contract law

### Defining Marriage

- Marriage is a status that is given to individuals by the state
- Marriage is a public affair (cannot get married in secrecy)

### Federal and Provincial Powers

- Federal government has ability to pass legislation on divorce (division of property, custody of children); can dictate who can be married; capacity to marry; annulments
- The provincial government is responsible for laws prior to the actual divorce (including creation of marriage, documents on the breakdown of marriage, separation, spousal and child support, division of property, adoption; solemnization of marriage)

**Table 6.1** Levels of Government in Family Law

Issue	Level of Government
Cohabiting couples	Provincial legislation
Married but have not applied for divorce	Provincial legislation
Property issues	Provincial legislation
Married and have applied for divorce	Federal legislation
Custody issues	Federal legislation

### Courts in Family Law

- Unified family courts
  - These courts have ability to deal with all aspects of family law in one court system, thus preventing some of the conflicts about the level of courts to hear a certain matter
  - In Ontario the unified family court is the Family Court of the Superior Court of Justice

### Engagements

- Contract entered into before marriage
- Engagement ring is usually a gift in contemplation of marriage – party who is at fault forfeits the ring
- Cannot demand return of unconditional gift

### Marriage

- Capacity to marry:
  - Little statute law and instead provinces legislate their own requirements
  - If formality not completed, marriage contract may be voided
  - Each person needs to have the legal capacity to appreciate the nature and quality of the legal commitment and must do so without influence of drugs/illness
- Consent:
  - If consent is coerced or affected by drugs/alcohol, then the marriage can be declared void
  - To invalidate a marriage, the person’s impairment must be such that he or she does not understand the ceremony of marriage and the duties and responsibilities that arise
  - Can be invalidated if one was pressured into marriage

- Duress involves the exertion of pressure or fear (but not necessarily violence)
- May also be set aside if there was fraud that induced a person to marry or if there was a mistake as to the identity of one of them, or the nature of the ceremony
- Mistaken beliefs as to wealth, religion, habits are not a reason to have marriage voided
- Prohibited Degrees
  - Not allowed to marry someone who is related by consanguinity or adoption
- Non Consummation
  - Requirement to consummate a marriage is still required for valid marriage in Canada
  - If one person wishes to invalidate marriage, a permanent inability to have intercourse is a reason, but this must be an inability and not simply a refusal
- Prior Marriage
  - One must be unmarried to enter into a marriage
  - A marriage is void if one of the parties had a prior marriage that is still in force
  - If loose contact with prior marriage, can presume them dead after usually 7 years
    - If the person reappears, new marriage is voided
- Bigamy and Polygamy
  - Bigamy is being married and nonetheless going through the processes of being married again; can't be married to more than one person at same time
  - Polygamy also illegal in Canada (conjugal union with more than one person at same time)
    - Arguments that it should be legal
- Age
  - Matter of federal power
  - Ranges from 16-19 across provinces
    - Under 18, need parental consent
    - Under 16, need a court order
  - Often differs by sex
  - No upper limit...but should there be?
- Non Compliance with Formalities
  - Need a marriage license, or banns of marriage (anointment of marriage in religious context), witnesses, registration of marriage, specific things that need to be said in marriage
  - If enter into marriage in good faith, marriage will be valid even if there are small technical issues
- Change of Name
  - Last name given to children in Canada recognizes the child's biological parents whether or not they are married/in common law/same sex marriage
  - Must register child within 30 days of birth
    - If they do not agree, last name will be hyphenated of both surnames in alphabetical order
  - Spouses can change name, but don't need to legally
- Domestic Contracts-Marriage Contracts and Cohabitation Agreements
  - Domestic contract refers to marriage contracts, cohabitation agreements, and separation agreements (prenuptial agreement)
    - Used as a tool to ensure that they agree on the division of assets
  - Cohabitation agreement turns into marriage contract once they get married
  - Matrimonial home if excluded from agreement
  - Marriage agreement is used by those who are married or planning to be, while a cohabitation agreement is the equivalent when parties are not married
    - Can include things like: Division of property, career issues, raising of children

- Contract for personal service will not be enforced (i.e. contract to have kids not enforced)
- Marriage contracts can be disputed just like other contracts on grounds like fraud, duress, misrepresentation, improvidence (manifest unfairness) and non disclosure of assets
- Both parties should seek independent legal advice
- Cant include child support in contract...courts rule in best interests of child

### Common Law Marriages

- People who cohabit share their lives with each other, but not formally married often perceive themselves as being in a common law marriage – this is a misnomer
- Common Law Marriages are legally binding contracts (just like marriage) without a marriage ceremony
- Often occur because of religious issues, don't want legal responsibilities of marriage, try living together before marriage

### Same Sex Marriages

- Legal in Canada, lots of legislation changed provincially
- Don't need to solemnize marriage if it goes against religious beliefs

### Separation

- When a relationship breaks down, first step is separation which is a status between marriage and divorce
- The parties agree not to live as partners but rather to live separate and apart
- Couple is still legally married
- Separation agreement:
  - Written contract between spouses in which they agree to live apart
  - Voluntary
  - Will include things like:
    - Division of assets, provisions for child and spousal support, how to pay debts, matrimonial home
  - If there is a valid and enforceable separation agreement, those terms will prevail over other legislation that may apply (but when it comes to children, judge can always overrule)
  - Has a reopening clause – provision that can reopen the agreement and discuss the matters further if certain things happen (i.e. party becomes ill or disabled, loses job, promotion or raise, hiding money, life altering event)
  - Can be overruled for injustice (i.e. one party waives right to support and would be unconscionable to do so, hidden issue, fairness of contract)

### Divorce

- Termination of relationship is governed by province, but divorce mandated by federal
- Divorce legally ends marriage
- Grounds for divorce
  - Breakdown of marriage only established if the spouses have lived separate and apart for at least one year preceding the divorce petition, or if there is adultery or cruelty
  - Separate and apart: one person decides they no longer wish to live as conjugal couple and they disengage from marriage
  - Must wait 12 months
- Reconciliation
  - If court believes there is possibility of reconciliation, it must adjourn the divorce
  - Lawyers must draw attention to client of reconciliation
- Adultery
  - Divorce if the spouse against whom the divorce proceeding is brought has, since marriage, committed adultery

- Allows for immediate divorce without 12 month waiting period
- Definition of adultery comes from common law and cases
- Cruelty
  - Only other modern ground for divorce, after adultery, that results in immediate divorce without waiting period
  - Something that gravely impacts individual; can be mental or physical
  - Still may be easier to use one year separate and apart method
- Condonation and Connivance
  - Condonation is a bar to divorce based on the grounds of adultery or cruelty
    - If you know spouse has cheated, forgive them, you cannot use this later for a divorce
    - 3 elements: knowledge of offence, intention to forgive, restoration into the marriage of the guilty spouse
  - Connivance is a bar to divorce based on adultery or cruelty
    - Where the person filing for divorce and complains that the spouse is guilty of misconduct is actually consenting to or willfully contributing to the offence to the extent of a corrupt intention
- Procedures for obtaining a divorce
  - Easy, as long as it is uncontested (the couple agree on the conditions of custody, support, and division of property)
  - Person wanting to start the process fills in a document called a Petition for Divorce
    - Person who files is the petitioner and the other is the respondent
  - Judge reviews and then issues divorce order
  - Contested divorces take longer (i.e. don't agree to terms)

### Annulments

- Annulment declares that the marriage never existed
- May be annulled if it was never void from the start because of age, if marriage was not consummated, if consent was coerced, not performed by an authorized person
- Decree of nullity – says the marriage did not exist

### The Division of Property After Divorce

- Spouses have identical rights and obligations owed to each other
- Marriage creates a statutory right to share in the value of property acquired during marriage
- Net family property should be distributed equally
- Matrimonial Home
  - Home in which parties live in during marriage
  - On separation, court decide who lives in house (usually person who has custody)
  - Then, spouses may divide sale of home through equalization or there may be an agreement of one spouse to buy the other's interest in home

### Spousal Support

- Alimony was old law that said women only could exercise over there husbands after separation and adultery was an absolute defense
- Must apply for spousal support; one person paying the other; not meant as punishment
- Self Sufficiency
- Support under the Family Law Act
  - Spousal support setout in Family Law Act
  - Not set formula for deterring amount (time together, financial needs, future and present earning ability, NOT misconduct)

- Compensated for contributions made (supporting a spouse through school, raising children) and losses (lower educational attainment, lack of pension plan) made as consequences of marriage
- Reopening Support Awards
  - Can be change if there is a material change in the circumstance of either party
  - The support order could be discharged, suspended, increased or decrease
  - Change in job, illness, promotion, salary increase
- Support obligations enforcement
  - Ontario has system of automatic payroll deductions
  - Various enforcement offices
- Remarriage and Support
  - Common for payments to be reduced or terminated when the recipient remarries
    - It is not automatic
  - Self Sufficiency needs to be proved
- Child Support
  - Parents have obligation to contribute to needs of their children, even if they have more children in subsequent relationships
  - Legally binding guidelines depending on salary, number of children
  - Non biological who stood as parent can also be forced to pay
  - Must support until they reach age of majority but may be ordered to continue if child pursues schooling

### Child Custody

- Court decides who has access and who has custody of children
- Key factor: best interests of the child
- Court will look at health of parent, relationship between parent and child, home situation, support available from friends, scheduling, goal of keeping siblings together, and if the child is old enough his or her wishes
- Mediation important in these situations
- Custody refers to the rights and obligations of a parent towards a child (child's day to day control, rights to determine education, religious upbringing, medical care)
- Joint Custody used to describe situation where both parents take a significant role in the raising of child
  - Joint physical custody = equal time with each parent
  - Joint legal custody = decision making equal, but only one has care and control and the other has liberal access
- Shared parenting or co parenting used for parents with joint custody but where the child resides with each of the parents for a significant time
  - Parallel parenting – where one parent can divide on some issues, and the other on other issues
- Split Custody – one child lived with one, and the other with the other parent
- What happens if parties cannot agree?

## Chapter 7 Administrative Law

- Regulates matters such as obtaining driver's license, immigration issues, taxation, landlord Tenant issues
- It is Public Law and deals with relationships between individuals and the state
- Defined as "a body of rules and principles which governs the exercise of powers granted by statute"
- Govt departments and agencies are established through legislation and they run programs and perform other government business outside of the court system
  - Their function is to implement administrative processes and ensure they are run efficiently, fairly, and according to law
- 3 branches of government:
  - Legislative: elected MPs, appointed Members of Senate – create, debate and repeal statutory laws
  - Judicial: Consists of courts which hear legal cases
  - Executive: consists of government departments that are responsible for implementing laws and social policies and ensuring compliance through boards, commissions, and tribunals
- Often disputes arise between citizens and government agencies and the civil servants who are making decisions in these departments
- Administrative tribunals function to help resolve disputes
  - May be created by municipal, provincial, federal
  - The tribunals that administer the system may look like formal courts, but there are part of executive branch and not the judicial
  - The decisions are binding
- Administrative law must not be ultra vires = beyond power of the body
  - The tribunal must adhere to the jurisdiction that it has been granted by statute
  - Citizens can still recourse to courts if they feel tribunal acted out of jurisdiction
- The government delegates certain powers to each tribunal, including specific jurisdiction and authority
  - Tribunals established to provide an impartial body that is intended to ensure that the government's authority is exercised in fair way

### Fairness and the Rules of Natural Justice

- Tribunal's purpose is to hear grievances from citizens against government departments and resolve these conflicts according to certain principles that are consistent with law
  - Natural duty to observe natural justice
  - It is the role of the tribunal to decide whose interests will prevail
  - If the powers given to the tribunal are not used properly, the person can allege that the tribunal did not act in accordance with rules of natural justice
- Rules of natural justice
  - Rules of Fair Play
  - Right to fair hearing
  - Right to be allowed to cross examine a witness
  - Right to be notified of the hearing
  - The right to know and answer the case against the individual
  - Right to an unbiased decision maker
- Tribunals have duty to act fairly when dealing with parties before them
  - Hard to define
  - What is fair depends on the circumstances
  - Tribunals are given latitude as to what is fair in each case

- Effect of decision
  - More serious the consequences of the decision, the more procedural protections must be followed

### **Differences between a Tribunal and a Court**

- Courts interpret and apply the law; administrative tribunals may also regulate the law
- Courts are bound by stare decisis, while tribunals are not although tribunals attempt to be consistent with their own decisions
- Tribunals more informal and flexible than courts; they often do not have do not have strict rules of procedure, and tribunal decisions can be made on public policy rather than strictly on law
- Tribunal members usually come with a wealth of experience and knowledge in particular area; while a judge may not have expertise in field the law is being laid on
- Courts maintain a supervisory role and will overrule a tribunal if there has been some violation of due process or if decision contrary to Charter of Human Rights
- One of the operational variables relevant to administrative tribunals is the issue of due process/procedural fairness
  - This means that the procedures followed are relevant, lawful, fair, impartial

### **Advantages and Disadvantages of the Administrative System**

#### **Pros**

- They are not government by the strict procedures or rules of evidence that the courts must follow
- Tribunals combine formal and informal characteristics in their hearings and members are allowed a degree of discretion in making decisions
- Members allowed to use their expertise, which is often considerable, and this experience can assist with decisions
- Cost can be reduced when there is an expert panel ready to hear matters in a flexible way
- Different types of tribunals: administrative, judicial or quasi judicial, legislative
- Largely open to public
- Better brings the part into the matter (unlike traditional justice system)

#### **Cons**

- Problems when they do not use strict rules of procedure
  - Good in that evidence can be entered in an easier way
  - Bad as evidence not admitted in court may be admitted in tribunal
- No transcripts – impact on precedent
- Many decisions in admin law concern an element of discretion, but this discretion is not absolute
  - Should only be used to follow the policies and objectives of their governing legislation
  - Improperly used discretion can be alleged on: bad faith; acting for an improper purpose or motive; taking account of irrelevant factors; failing to take account of relevant factors; undue fettering of discretion; acting under the dictation of someone without authority
- Abuse of Discretion:
  - If tribunal accused of operating in bad faith, the parties may be asked to prove that the tribunal was using improper considerations, or elements such as discrimination
  - Bad Faith can also include a refusal to exercise discretion – refusal to follow a statutory purpose is also not permitted
- Bias
  - Rules of natural justice provide that decisions must not be biased and no one should be a judge in his or her own case

- Bias is the inability of a tribunal members to be natural on the issue at hand
- If tribunal member is biased, he or she may be disqualified from hearing a matter, or if the bias is discovered after the hearing the decision may be quashed
- One of most common grounds of bias is that the decision maker would get some monetary benefit from the decision and is interested in the outcome (situations involving relatives, friends)
- Even appearance of bias may be enough to disqualify a member
- The reasonable apprehension of bias is a key phrase in admin law
  - The tribunal will ask whether that magical reasonable person would have understood that there was unfairness in a particular situation
  - The reason why the appearance of bias is treated so harshly is that there is great difficulty in proving that a person is actually biased
- Other issues in admin law
  - Members of the tribunal may feel it is their duty to uphold the policies or reputation of the department, which pays their salaries and promotes them, against the needs or rights of individuals

### Appeal

- The decision of a tribunal may not be the final word
- There are rights of appeal built in to the statutes of many administrative bodies
- Depending on what is set out in the legislation, the parties may be entitled to a new hearing without reference to original decisions
  - A new hearing with some defence to the body who heard the matter, or a review of the decision without an oral argument, which looks for errors made by the body on the board
- Appeal must be based on rules, procedure, and evidence used to get the rules
- Common grounds for appeal:
  - Jurisdiction
  - Question of law that was used by the tribunal
  - Question of the evidence

### Judicial Review

- If one is still unsatisfied after all appeals have been exhausted to the particular tribunal, the parties can apply for judicial review where the court system can review what was done
- All possible appeal possibilities must be sought before going to court
  - Must come to court with clean hands, must not have waived to the errors made, and must not have taken too long to seek this remedy
- Having the courts review a decision of a tribunal should be left as last resort

### Privative Clauses

- Some statues will attempt to contract their way out of judicial review by a court by drafting sections indicating that their decision is not reviewable by the courts and no remedies can be ordered by the courts
- One must be careful to ensure that there is not a privative clause in the governing legislation of a particular matter

### Remedies

- When it is appropriate for a court to intervene, a court may decide to quash a tribunal, prevent a tribunal from taking action, require a tribunal to take action
- The court can use writs to remedy the situation cause by the tribunal

- 7 Available:
1. Quashing the decision of the tribunal
    - A court may find that a tribunal did not have jurisdiction, did not use a fair procedure, or the decision was made in bad faith, and for this reason the decision should be quashed
    - The court can order tribunal to revisit the matter in light of these comments
  2. Prohibition – Stopping the tribunal from acting
    - Usually a court will only take such a drastic step as a prohibition if the tribunal lacks the authority to make the decision
    - May be in the form of an injunction that can be enforced by holding the non compliant party in contempt of court
    - A prohibition may occur in a situation where the parties are facing a lengthy trial by a disqualified decision-maker and they would like to stop trial before it even starts
  3. Mandamus – Force an official to act
    - The Latin term for ‘we command’
    - This is a remedy that will force a decision-maker to make a proper decision if that person is not currently completely his or her duties
    - If an official has a power and must exercise that power, an order of mandamus will force him or her to act
  4. Certiorari
    - If a remedy used to access the record of the proceedings to be certain that there was not an error made by the tribunal
    - The consequence of this finding is an error that would lead to the quashing of the decision of the government administrator, usually because there was not jurisdiction
    - This may require a tribunal to deliver the written form of the decision so it may be reviewed and possibly set aside
  5. Habeas Corpus
    - Is an ancient writ that was sent to the government from the court saying ‘let me have the body (alive)’ of the person named in the application
    - This document called those responsible to provide the individual so that the validity of that person’s detention could be determined
    - Today, this writ is used where a person is improperly detained in criminal matters – used infrequently
  6. Declaratory Judgment
    - Declaratory order or declaration, is a statement of the court that sets out the legal standing of the parties and/or confirms the law that applies
    - No way to enforce, it is usually respected and used in admin law to determine if the tribunal has the power to take the actions that it did
  7. Damages
    - The court has the power to award punitive or exemplary damages where a tribunal may have acted maliciously

## Chapter 8 – Constitutional Law

- A constitution is a body of law, which establishes a framework for a government and is the supreme law of a country
- Is the system of written and unwritten principles that defines what power we give to our government while still protecting individuals and certain groups?
- Formed from conventions, statutes, proclamations, and court decisions
- Three branches of government
  - Executive – power lies with Cabinet
  - Legislative – House of Commons, Senate
  - Judicial – Judges who interpret and apply the Constitution to actual cases
- Separation allows system to run efficiently in that the rule of law is maintained
- Rule of law dictates that the law is supreme over both individual and the government, as the power of the government must find its root in a legal principle
- Overrides all other laws in Canada

**Privy Council and the Supreme Court**

- Supreme Court was created in 1949 giving Canadians more freedom by having their own courts without going to the British Privy Council

**Parliamentary Supremacy**

- Only parliament can make laws and that no one individual should be above those laws
- Parliament can make or repeal any laws on all topics
- If law is inconsistent with Constitution, it is of 'no force and effect'
- Parliamentary Supremacy unique in that Constitution must be acknowledged as the supreme law of Canada

**Conventions and Prerogative Powers**

- Parliamentary supremacy and rule of law operate on convention
- Main convention is the independence of the judicial from executive and legislative
- Conventions 'clothe the legal framework of the formal constitution and provide a large measure of flexibility...'
- Convention is a rule that officials apply that is somewhere on the continuum between custom and constitutional law
- Prerogative powers are the privileges accorded to the Crown, but there are few surviving powers as most are defined by statute
  - Ex of still remaining: Crown's power to dissolve parliament, to make treaties, issue passports, grant honours or awards, take action in emergencies

**Amendment**

- Amending formula in 1981 – contained the Canadian Charter of Rights and Freedoms
- Amending formula makes it hard to change constitution so it is fairly consistent
  - Needs to be consent from Parliament
  - 2/3 of provinces must agree to the changes and must contain 50% of population of Canada
  - Provinces can opt out if 3 provinces find it unacceptable

**Structure of the Constitution Act, 1982 (Chart of Rights and Freedoms)**

- Part 1: Charter of Rights and Freedoms
- Part 2: Rights of Aboriginal Peoples of Canada
- Part 3: Equalization and Regional Disparities
- Part 4: Constitutional Conferences
- Part 5: Procedure for Amending the Constitution
- Part 6: Amendment to Constitution Act, 1867

- Part 7: General

### Division of Powers

- Constitution lists the powers of the federal, provincial, and territorial governments and which level of government is permitted to legislate in that area
- Section 91 outlines the powers of federal government, Section 92 outlines the powers of provincial and territorial, 93 gives powers to the provinces and territories over education
- Often there are disputes between the levels of government about whether one level of government has exceeded its jurisdiction
- Chart of 209 that outlines
- Peace, order, and good government (POGG) clause gives the rest of the legislative power that is left over to the federal government
  - Done to avoid leaving residual powers to provincial governments

### Territorial Powers

- Territories have a different status than provinces
- Powers can be taken away by federal government without an amending formula that is required for provinces

### Constitutional Issues and the Courts

- Much of the time, it is up to courts to interpret whether an area is within the jurisdiction of the federal or provincial government
  - Difficult to do so
  - Can be good and bad
  - Ex. Prisons = federal, rehab centres = provincial...i.e. 2 years or more = federal, less = provincial
- Various ways a constitutional issue can come before the court:
  - 1. Factual dispute with the government or an individual who alleges that a statute is unconstitutional because it is outside the powers of the legislative body
  - 2. If a part to a legal dispute contends that the interpretation of the legislation makes it ultra vires of that level of government
  - 3. By way of reference – federal government may ask for courts opinion regarding provincial or federal legislation
    - Although decisions are non binding, governments treat them as they are
    - Governor in Council orders a reference, but Supreme Court can refuse to hear if there is not enough material in the record, or there is no foundation to the reference
    - Ex. Reference Re Same Sex Marriage

### Intra Vires and Ultra Vires

- Fundamental parts of constitutional law are determining whether a body is acting within its mandate
- Intra vires = within jurisdiction; ultra vires = outside

### Double Aspect and the Paramountcy Doctrine

- Double Aspect = meaning that it may be a federal matter from one perspective and provincial from another perspective
- If both aspects are of = importance and it is possible to operate without conflict, they can be upheld as double aspect
- Thus, parliament may define the rights that will operate federally, and the legislature will have regulation to structure the matter from a provincial viewpoint
- Conversely, if laws conflict and the law cannot comply with both elements, the court has developed a system of federal paramountcy to be used where the federal trumps provincial
  - Provincial aspect will be inoperable

**Interjurisdictional Immunity Doctrine**

- This doctrine governs what happens if there is an overlap between federal and provincial jurisdiction in the essential core of a constitutional power
- Thus, provincial legislation may not apply if there is federal legislation to govern the core principle
- Interjurisdictional immunity there need not be a law in conflict, and there may not even be any federal legislation
  - Paramountcy Doctrine requires a valid provincial and federal legislation
  - For this, despite the lack of federal law, the provincial would still be inapplicable
- Works to invalidate provincial law and not federal

**Municipalities and Delegation**

- Municipalities are given responsibilities by the provinces
- The bodies can use delegation in order to request that one level of government assume responsibility for an area of public policy

**Criminal Law**

- Constitutional law is link between civil and criminal law
- Divides criminal between provincial and federal
  - Provinces: policy, laying charges, prosecuting; bylaws
  - Federal: defines what is illegal under the Criminal Code
- 3 factors to justify federal criminal legislation:
  - Prohibition of a certain activity
  - Penalty if there is an offence
  - Must be enacted for criminal public purpose (public peace, order, security, healthy, morality)
- Lots of overlap between provincial and federal

## Chapter 13 – A Delicate Balance

### The Delicate Balance...And Lawyers

- Examples of lawyers being disbarred:
  - T Sher Singh Disbarred Order of Canada lawyer after 20 years of service
  - Breach of trust: Sexual conduct with 16-year-old client
- Litigation lawyers
  - Litigation sometimes does not go well, despite the best preparation
- Passionate lawyers
  - Cases of lawyers going over line:
    - District Attorney in Missouri: “[The defendant should be] thrown into a manure pile to rot”

### The Delicate Balance...And Judges

- Victims in the criminal justice system
  - Prejudice that women ‘deserve’ the criminal actions of others
  - 1. Justice Jean of Quebec Superior Court saying that women seep to deeper darker states than men
  - 2. Quebec Justice Denys said “rules are like women = they are made to be violated”
  - 3. Sexual assault is okay if women do not dress right
    - Justice McClung and Justice L’Heureux Dube
- Justice Robert Dewar
  - R v Rhodes
  - Victim was sexually assaulted in middle of night by Rhodes who was convicted of sexual assault
  - Judge said: “Misread signals and inconsiderate behaviour” ...said that the way defendant dressed was leading him on
  - Investigated but cleared by Canadian Judicial Council (CJC)
- Justice Lori Douglas – Is it important what judge does in spare time?
  - **See class notes**

### The Delicate Balance...And Police

- Wrongful convictions:
  - Issues of police conduct, incompetent defense counsel, eyewitness error, tunnel vision by police and prosecution, discrimination, errors in science
- False Confessions
  - Confession = a criminal’s suspect’s acknowledgment of guilt, usually in writing and often including details about the crime
  - Coerced confession = a confession obtained by threats or force
  - Confession only admissible if the Crown shows that the statement was voluntary and was not obtained because individual believed they would get an advantage, or for fear of repercussions
  - Investigator bias = whereby officers focus on one suspect because they are concerned they are guilty – this plays large role in false confessions
- False Confessions Generally
  - Innocence project in US estimates that in 25% of DNA exonerations cases, innocent defendants made incriminating statements
- The Typology of Coerced Internalized Confessions
  - 3 types:
    - 1. Voluntary confessions
      - Sometimes falsely confess because of reasons ranging from desire for fame, difficulty in telling reality vs fantasy, desire to aid actual perpetrator

- 2. Coerced Complaint Confessions
  - Individual does not believe the suggestions of the interrogators, but only confesses to escape a situation that involves physical violence and aggressive interviewing tactics
- 3. Coerced Internalized Confessions
  - Individual actually believes he or she committed crime, and is one of the most difficult types to comprehend
  - Individual comes to believe they committed the crime
  - Produced by gentle persuasive interview
  - Voluntary, and not actively or necessarily cognitively coerced by police
  - No clear memory of not committing the crime
  - Distrust their own memory
- Case Examples:
  - R VS Phillon
    - Previous trial thrown out due to unreliable confession (brain wash tactics)
  - Paul Ingram – 23 interrogations, hypnotized, influenced by church

### **The Delicate Balance...And Experts**

- Expert witness is meant to assist court with unbiased perspective
- Expert report must be accompanied by signed form by expert confirming that they have duty to be impartial
- Dr. Charles Randal Smith
  - Leading child pathologist, served as expert in trials
  - Report found that he misleads those overseeing him in medical duties, made false statements in court, exaggerated his expertise in trial

### **The Delicate Balance...And Technology**

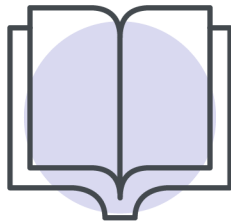
- Is forensic evidence infallible??
  - Forensic evidence can include crime scene material (hair fibres, soil, gun residue, blood)
  - However, evidence not perfectly preserved at crime scene...humans make mistakes
  - Jurors often see this evidence as perfect
  - Cases:
    - 1. Peter Hamkin charged with murder based on DNA...right before extradition turned out not to be a match
    - 2. Chimeras = people with different strands of DNA in different parts of body; or even different types of DNA found in blood
      - Karen Keegan – DNA found she was not biological parent of her children (but she had 2 types of DNA in her body, and the other turned out to match)
    - 3. Evidence planted on scene
- The CSI Effect
  - 1. Shows like CSIS make it more difficult for prosecutors to get convictions
    - jurors expect forensic evidence in every case
    - Harder to get conviction with no forensic evidence
  - 2. CSI raised scientific evidence to the rate of infallibility, making scientific evidence impenetrable
    - Cant always follow the 'scientific' evidence (maybe it was manipulated, chimera effect)
  - 3. CSI is allowed the average person understand scientific evidence
    - Think someone is in clear if no DNA evidence
    - Always expect DNA evidence, when this is not always the case

**The Delicate Balance...And The Charter**

- Kevin Wiener and 0 Blood Alcohol
  - Kevin brought charter challenge against new law in 2010 that all drivers under 21 must have 0 BAC
  - He argues it is age discrimination

**The Delicate Balance...And Legal Oddities**

- Strange Laws
  - Commit offense in Space = committing it in Canada
  - Cant water lawn during rainstorm in Guelph
  - Vessel is really anything...illegal to operate a vessel drunk, so even a floating toy is a vessel
- Weird Cases
  - Rogers and Aliant – one coma changed the reading of a contract and cost Rogers millions



# Textbook Notes

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### CANLII Assignment

- Pick one of two case scenarios
- At the end of the case scenario, there will be a question asked of you
- Find a case that answers the posed question
- Summarize the facts of the case – not the case scenario, the case that you've found
  - o Apply tests/legal principals within the case to answer the question
- Provide your personal opinion about the case
- 2 pages max. due May 15<sup>th</sup>
- Double-spaced and use headings
- Provide a hard copy + hand it in class
- 1 mark for finding the right case
- 1 mark for summarizing
- 2 marks for identifying the tests or principles yo
- 2 marks for determining the tests or legal principles being used and answering the questions
- 1 mark for opinion
- 2 pages max, double spaced
- Pet peeves: running sentences, paragraph should be 3-4 sentences,
- Due Tuesday
- Do not have to attach the case, just the site where you got the case from
- Hard copy and soft copy
- 

### Group Assignment

- Spend 2 hours at local courthouse and do court observation
- Write a 5-page report on what you have observed
- Civil motions every Wednesday
- Dress business casual when visiting courthouse
- Put phone on airplane mode
- [www.ontariocourtdates.ca](http://www.ontariocourtdates.ca)
  - o go into Kitchener

### Case Brief

- Have headings
- 8-10 pages
- Will review outline if shown prior to due date
  - o At least 3 days ahead of when it's due i.e. by June 4<sup>th</sup> submit an outline

### Midterm

- In class, 2 hours long

- Essay question, case scenario question, short answers (about 15-16)
- ^ Final same format, few extra questions + half an hour

How lawyers charge clients:

- Time Docket
- Flat Rate
- Contingency Rates

Chapter 1:

- What is the law?
  - o A set of rules and regulations that set structure within a society
  - o Four components of law:
    - 1. Law can be a specific type of law
    - 2. Law can be the process or the machine (the courthouse, judges, crown attorneys)
    - 3. Deal with legislations and statutes (i.e. Bill C51)
    - 4. Applies to human behaviour, to regulate human behaviour in society
    - 5. Case law – judge-made law
- Civil law: a dispute between two private individuals
  - o If dispute between state or crown and an individual, then criminal law
- 3 Basic Types of Legal Theory
  - o 1. Natural Law Approach
    - Composed by certain political theorists, Plato, Socrates, Aristotle, whose basic belief is that you cannot separate morality from the law. If the law is not moral, you do not have to follow it. An unjust law, is not law. Question then – what is moral, and who decides morality?
  - o 2. Legal Positivism
    - British-based law, based upon parliamentary supremacy. The only law that we need to follow is law that's been created by legislators by elected officials. Key to legal positivism is the language, so you need to clearly define in the legislation, what the intent of the legislation is. To some people referred to as the Black Letter of the Law
  - o 3. Judicial or Legal Realism

- There is the understanding that judges' thoughts, experiences, and backgrounds may have an impact on how they approach the law. i.e. blood sugar level + number of accused put on parole

## Chapter 1 -7, 13 Cases

### Chapter 1

#### R v Drummond

- Mother goes into bathroom, shoots pellet gun at genitals and fires into her uterus; she was pregnant; two days later gives birth; pellet lodged in child's brain
- Drummond alleged she did not know she was pregnant
- Charged with attempted murder
- Black letter of law came into play: "homicide is committed if a child dies after birth from injuries inflicted by that person before birth as a result of which the child dies after becoming a human being"
- Immoral, not illegal the judge found
- Criminal Law

#### Dobson v Dobson

- Pregnant, car she was driving collided with another car...as a result fetus suffered injured and the child had mental and physical injuries when born
- Grandfather brought action against the mother alleging negligent driving
- Court found: Legal duty cannot and should not be imposed on a pregnant woman and her subsequent child; should not impose restrictions like driving on the mother
- Civil Law

#### Paxton ET Al v Ramji

- Paxton sue civilly
- Child may sue once born if injuries suffered during pregnancy
- The defendant prescribes acne medicine; causes fetal malformation; issue was whether there was a duty of care from doctor to the unborn child
  - No! there would be a conflict of interest between what is best for female patient and potential child
  - Cannot take instruction from the non-existent child

### Chapter 2

#### Law Society of Upper Canada v Boldt

- Boldt was never a member of law society and never licenses to practise in Ontario, but was carrying out a full service paralegal business
- Was held in contempt of court as she was previously ordered not to practice in Ontario

#### Szarfer v Chodos

- Chodos was Mr. Sarfer lawyer in personal injury case
- Mr. told Chodos that relationship was bad with Ms.
- Chodos and Ms. had an affair
- Chodos used the confidential info to his benefit! Breach of confidentiality upheld

#### Smith v Jones

- Mr. Jones charged with sexual assault, went to psychiatrist Mr. Smith
- Mr. Jones described vivid details of future crime; Smith called Mr. Jones's lawyer and then an application to tell the court
- In this instance, confidentiality could be breached

#### Tuckiar v R

- Accused confessed to lawyer that they committed the crime; but client pleaded not guilty and went forward with trial

- But lawyer recounted confession to judge and prosecution
- Huge breach of confidentiality
- “Whether he be guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish they he committed, and it is not incumbent on his counsel by abandoning his defense to deprive him of the benefit of such rational arguments as fail arise on the proofs submitted”

#### R v Li

- Mr. Li charged with robbery, admitted to lawyer he did
- Lawyer did not put him on the stand but put other witnesses to bring a reasonable doubt
- OK for lawyer to test the proof of the case even if they know client is guilty

#### Nix v Whiteside

- Whiteside charged with stabbing drug dealer to death...told lawyer he killed because he thought dealer had a gun
- Whiteside changed story at trial, lawyer tried to convince him not to perjure
- Client finally agreed not to lie, was convicted
- Took to appeal arguing that lawyer did not do the right thing, but appeal said that the lawyer did

#### R v Murray

- Murray retained by Paul Berndado
- Murray later charged with supressing video evidence
- Murray went to client’s house on instruction to get the tapes in a way that the crown wouldn’t know
- Lawyer kept the tapes for 17 months without telling crown
- Murray then passed on the case to annoy lawyer
- Client released Murray from retainer but in that letter said to not give tapes to new lawyer
- Murray went to law society for advice
- Murray charged with attempt to obstruct justice by concealment of videotapes
  - Acquitted because Murray lacked the mental element of consciously concealing the evidence
  - Found that it was a defense strategy to retain the tapes

#### Adams v Law Society of Alberta

- Adams appealed decision of law society of disbaring him from practicing law since he pleaded guilty to sexual exploitation with 16-year-old
- “money can be restored, honour cannot”
- Disbarment upheld

### Chapter 3

#### Skoke-Graham V R

- Kneelers charged with disturbing peace
- Judge found that it would have absurd consequences to follow the literal meaning of the legislation

#### Miller v Carley

- Parties fighting over lotto ticket worth \$5M
- Plaintiff was a shifty drug dealer who was selling drugs that day...didn’t come to court with clean hands and thus the court didn’t help him

### Chapter 4

#### Goldthorpe v Logan

- Goldthrope underwent electrolysis
- Advertisement guaranteed permanent hair removal
- Found that the advertisement was a unilateral offer to people of the public
- Strong cannot take advantage of weak!

**Brogden v Metropolitan Railway**

- Revised contract sent that was just filled and not signed (like a counter offer than was not accepted)
- But the conduct indicated acceptance, so contract upheld (i.e. shipping and receiving goods is equivalent to acceptance)

**Bank of Nova Scotia v Maclellan**

- Turing in husband to not be chased by bank was consideration!

**Williams v Carwardine**

- Reward posted by defendant for information leading to arrest and conviction of a murder suspect
- Plaintiff performed terms of the advertisement, and regardless of the motivation, was entitled to the reward

**Eastwood v Kenyon**

- Commitment to pay loan years after consideration was given is not enforceable (i.e. you loan me money and 10 years later I say I will pay you back is not enforceable)

**Beacock v Wetter (putting it all together)**

- Not all elements of contract were present thus contract void

**Carlill v Carbolic Smoke Ball Company**

- Company advertised that if you used product, would not get flu...offered reward to anyone who took product and got flu
- This is a unilateral contract to world at large
  - The reward was an offer!
  - Acceptance was fulfilled when Carlill used the product
  - Consideration present as there was inconvenience as Carlill used it many times a week
  - Intention was present

**Watmough Et Al v Cap's Construction Ltd**

- Defendant refused to deliver a piece of construction equipment to the plaintiff after they had signed an agreement
- But defendant was drunk at time and thus contract void

**Cummings v Ince**

- Forcible confinement in an asylum of a mother by her two married daughters and their husbands
- Contract was obtained by duress
- Contract void for duress

**Saskatchewan Ltd V Astonished**

- Frustration was an issue in the case because defendant placed mother in personal care and within 48 hours of being placed in home mother was taken to hospital and never returned
- Nursing home sued for fee of \$3000 (\$3000 was the monthly fee)
- Defendant claimed frustration s neither party could predict what would happen
- Only 700 was ordered to be paid

**Wang v HMTQ**

- Wang sued BC for discontinuing student leads
- But Wang breached the contract of student loans and he in fact owed

**Chapter 5****Donoghue v Stevenson**

- Duty of care and reasonable foreseeability
- Friend of Donoghue bought her a bottle of ginger beer which the plaintiff drank
- Stopped drinking when she noticed a decomposed snail coming out of bottle
- Sued manufacture for shock and stomach issues

- Couldn't sue pub since friend bought it; couldn't sue servers since they did nothing careless; but the manufacture sold to distributor who sold to plaintiff's friend -> no direct relationship between plaintiff and defendant
- Court found it was reasonably foreseeable that allowing snail in bottle would cause harm to person drinking
- Manufacture owes duty of care

#### Palsgraf v Long Island Ry CO

- Foreseeability and who is a foreseeable plaintiff
- Palsgraf buying ticket, man got on train but package fell and exploded after being pushed by rail staff...she was injured and sue railway company
- Court found that it was not negligence in relation to the plaintiff who was standing a long way away
- She was not a foreseeable plaintiff and thus railway was not liable for her

#### Ware's Taxi V Gillihan

- Gillihan fell out of taxi when being taken from school to home
- Taxi company found to be under a duty to exercise reasonable care in their conveyance of the children
- Reasonable man would foresee the risk of the child pressing the button to open door
- Company found to be negligent since the company did not act to enforce safety
- Failure to act example

#### Kauffman v TTC

- Kauffman using escalator -> two men fell and hit person in front of her who fell and hit her
- Sued TTC for installing moving handrail without testing the friction -> alleged that if old handrails were in place she would not have fallen
- But for test fails (no evidence that she tried to hold on or that she was unable to hold on due to the type of handrail installed by defendant)

#### Wickberg v Patterson

- Wickberg injured when motorcycling trusts the rear of truck driven by Patterson
- Patterson was backing up at the time in shoulder and Wickberg was novice rider
- Each party was 50/50 responsible

#### Walford v Jacuzzi Canada

- Long time pool owners get new pool and install slide, child goes head first and breaks neck
- Walford said she relied on the expertise of Pioneer pools

#### Spencer v Rozon

- Battery and assault
- People from care yell at Spencer, then turn around get out and beat him up
- Assault = the slur; battery = the attack

#### Nichol v London Police Service

- Nichol sued for false imprisonment
- She was wrongly arrested – no jurisdiction for the arrest

#### Kenny v Schuster Real Estate

- Kenny bought condo, before she bought asked restaurant that was below if they made certain goods
- Later the restaurant did make those foods and install a loud fan below her
- Court found this was actionable nuisance became substantial and unreasonable interference with her property

#### Henderson v Pearlman

- Internet defamation
- Alleged misinformation as spread by the defendants
- Permanent injunction and damages awarded

**Mo v En**

- 14-year-old stole computer from another child; boy was charged and convicted with theft in YO court
- Mother of child who had computer stolen sued offenders mother
- Vicarious liability example

**Norberg v Wynrib**

- Norberg addicted to painkillers...went to doctor to get drugs, doctor said they would give prescription if they had sex
- Sued doctor for battery.... Dr used full defence of consent
- But did not apply due to power difference

**Dube v Labar**

- Voluntary risk
- Both drinking, took turns driving...took voluntary risk together
- Not actionable

**Chapter 6****Gajamugan v Gajamugan**

- Attempted to consummate on night of wedding, Mr. said he saw mental revulsion to marks on Ms' face
- Inability to consummate and thus marriage was voided

**Feng vs Sung Estate**

- Sung was 70-year-old depressed...met Feng who was 47 and became his housekeeper
- Engaged in sexual relationship, but Sung was impotent
- Sung married Feng without telling 5 children; attempted to form marriage contract
- Marriage was found void as Feng pressured ill Sung...lack of mental capacity

**Rushton v Rushton**

- Married in 1936, by 1960 lived separate lives but in the same suite of apartment building
- Sex stopped by 1965...no contact between them, lived in separate bedrooms, bought their own groceries
- This counted as separate and apart

**Rogler v Rogler**

- Period of separation interrupted? Had sex during the separation period
- No intention to reconcile, sex was just for pleasure so it was not interrupted and divorce was granted

**Watkins v Watkins**

- Petitioned for divorce based on adultery, but then had sex
- But 3 aspects of condonation not fulfilled

**M v H**

- Same sex partners
- Led to change in legislation of spousal support to extend to same sex

**Leskun v Leskun**

- Court considered emotional situation of spouse for spousal support

**Serra v Serra**

- Reduction in value of family business taken into account during divorce, even if there was contract to payout a certain amount before the value decrease

**Bruni v Bruni**

- Child custody
- Can be a very long and tiring process

**Chapter 7**

## Glover v Canada Pension Plan

- Alleged discrimination from 2 government bodies
- But there was a jurisdiction issue as she went to Ontario Human Rights Tribunal

## Cardinal and Oswald v Director of Kent Institution

- Prisoners when they took guard hostage
- Transferred to max security in segregation
- Natural justice not followed as they weren't given a fair hearing

## Knight v Indian Head School

- Contract worker still has right to be heard -> fairness

## Roncarelli v Duplessis

- Abuse of power in revoking liquor license because owner was a Jehovah's witness
- Use of too much discretion

## Baker v Canada

- Immigration made decision based on irrelevant factors (mental illness, single mother) = bias
- Decision to deport was set aside

## Khan v University of Ottawa

- Commission -> Divisions Court -> Appeal Court

## Mcintosh V Metro Aluminum Products

- McIntosh was employee who engaged in sexual relationship with boss
- Remedies were made available (damages, injunction, declaration)

Activity:

## Facts:

George has come to see you, as his lawyer, and he's been hired for his first summer job. He's just turned 16. Finished grade 10 going into 11. Trying to think about how to spend the money he earned at McDonalds over the summer. As he thought about it, he reviewed the Waterloo record, and in the record was the following ad "used bike for sale". George wants to spend his money like that. When George went to store to purchase used bike, he discovered that he didn't have enough money – used bike was \$300, George had only saved \$50. He knew that if he worked hard, he'd have enough money for the bike. The store owner, Mr. Smith, had George sign a contract that said that George would pay off the balance of \$250 by August 31<sup>st</sup>, 2018. Unfortunately, George had some issues with the fryer at McDonalds, and his employment was terminated for cause, so he did not have enough money by the end of the contract date to pay off the bike. In the mean time, George has been using the bike everyday for the past two months. Although the bike was initially used, it's not really used. Apologizes to Mr. Smith at the end of the two months.

## Questions:

- George wants to know what's going to happen to him now, if anything
- George wants to know if Mr. Smith can sue him, and what would happen if he went to court
- George wants to know if he can just give Mr. Smith the bike back and "be even"

Answer: George is a minor, without a legal co-signer, the contract is void.

- If George is 18: He would have to negotiate a settlement, or if he is unable to pay back the bike, he'd return the bike, discounted at its depreciated value, and pay the rest back.

## Chapter 2:

- **RETAINER AGREEMENT:** sets out the rules, understandings, terms, of your relationship between a lawyer and a client. Should cover:
  - o **Scope** of the services: what are you going to provide to the person? Are you repping them in a court proceeding, are you preparing a testament? Are you going to do their real estate transaction? Really important bc there's a new trend in law to provide limited retainers: a retainer where you only provide a specific service but not the complete service
    - i.e. Limited Retainer: Helping with the paperwork, specifically setting out that the only responsibility you have is to help them draft their motion. They do the rest.

- **Fees and Disbursements:** Hourly rates, all time spent on the case is charged
    - disbursement: any incidental costs you might incur over time (photocopying, etc.)
  - **Communications with the Client:** How are you going to communicate with the client? Email? Letters? At the very least, send out reporting letters that say “from this date to this date, this is your account and this is what I did for you”
  - **Process of Withdrawing from Representation:** If you don’t think you can represent the client anymore, what happens.
  - **Importance of Retainer:**
    - It can save your ass if you’ve ever sued or reporting to the Law Society.
    - If you have to sue your client, the retainer can be used to provide justification and so you’re never in a situation where your client needs to pay you
- What is the role of the lawyer?
    - Settle disputes, provide legal knowledge, and advice, advocate for the clients’ interests to the best of the lawyers’ abilities either in negotiation, in settlement, in mediation, or in arbitration
  - Legal Aid of Ontario
    - Organization in Ontario that provides people of a certain income with free legal services.
    - Currently a legal aid crisis, so rn Legal Aid will hire legal aid facilitators that try to mediate files instead of taking them to court to help them know which ones are worth pursuing for Legal Aid
    - Benefits/Reasons to pursue (as a lawyer):
      - Legal Aid certificate guarantees that you’ll get your payment
      - Get to work on Novel cases, where it’s new and interesting
      - You could like the client
      - If you think that both lawyers are shit on both sides you should step in and help out or they’re gonna get fucked
  - Rule of Professional Conduct
    - What lawyers are governed by
      - Clients can complain if these rules aren’t followed
      - Lawyers can be punished for it
      - RULE 2: Got to have integrity
      - RULE 3: A lawyer must perform any legal services undertaken on a client as a competent lawyer
      - Rule 3.3 CONFIDENTIALITY: a lawyer should at all time hold into strict confidence information on client ... unless client gives u permission, u r required by law to release the info, law society requests info, or as otherwise permitted.
        - A lawyer cannot provide absolute legal advice without all that info abt them, so clients need to be able to share all that information without repercussion

- Exceptions:
  - imminent risk of death, serious bodily or psychological harm, child abuse, about to commit a crime
  - threat of crime or person's about to commit a crime
  - or if the lawyer needs to defend themselves against an allegation
- Reasons a lawyer might not take a client:
  - Conflict of Interest: i.e. you saw the husband a month ago, and now the wife came to see you, you can't give the wife advice now
  - You Might be a Witness: i.e. Phaedra saw judge wasn't acting biased, so had to sign an affidavit saying she saw that and then had to remove herself from the case
  - Client decides they don't like you so they switch off to another lawyer, or vice versa
  - If the client asks you to do something illegal i.e. notarize a document to say it's the same as the original
- Reasons to Terminate client relationships
  - Breakdown between you and a client
  - Dumb requests
  - If they fire you
  - If they ask you to do something that's contrary to your ethics
  - If the person has been dishonest or committed fraud
  - If you aren't competent in the area
- Paralegals
  - Fantastic to do things like adjournments in criminal courts, lawsuits
- Branches of Government
  - Legislative
  - Executive
  - Judiciary
- Role of a judge:
  - uphold constitution
  - Administer law in a fair and impartial way
  - Sits higher up so they look down @ u bc u ain't shit
- Paul Bernardo's Lawyer
- Facts of the Case:
  - Mr. Murray (Bernardo's lawyer) was charged with the obstruction of justice, found in ss 139.2 of Criminal Code: "everyone who willfully attempts in any manner to obstruct, pervert, or defeat the course of justice, is guilty of an indictable offence, and liable to imprisonment, to a term not exceeding 10 years". Burden of proof: must be proven beyond a reasonable doubt. In civil, it's 51 – 49
  - The accused (Mr. Murray) was retained by B initially in regard to rape charges and thereafter were charges of murder and related offences. ON May 6<sup>th</sup>, 1993,

acting on B's instructions, accused removed video tapes in a place of concealment from B's home. Two of the tapes that they refer to as the criminal tapes, depict B and his wife sexually assaulting two of the women, who were later murder. The other tape showed Karla in sexual scenes. Karla pled guilty to two counts of manslaughter, prior to police getting knowledge of the tapes. The accused did not turn the tapes over to the Crown, or describe their contents to anyone, although his co-counsel and his law clerk were permitted to view short portions of the tape. On May 4<sup>th</sup> 1994, B was arraigned of the homicide and he plead not guilty. In August 1994, the accused persuaded R (B's other lawyer), to take over as B's lawyer. When switching over, accused didn't disclose the existence of the tapes, instead he personally asked another lawyer for advice (from the Law Society). The lawyer advised the accused to deliver the evidence in a to a judge in a sealed package. R viewed the tapes and realized he might have an obligation to hand over the tapes to the authorities. According to R, every case found by his research team showed that he was obliged to hand over this evidence to the police. The tapes demonstrated conclusively that Bernardo was guilty of forcible confinement, assault, and sexual assault. **The accused was charged w willfully attempting to obstruct justice.**

- Things to consider: confidentiality, etc.

Every criminal act must have BOTH:

- Actus Reus: done the act
- Mens rea: intention of doing the act

**IMPORTANT QUESTION:**

- **Is the law just?**

## Lecture 3 – Chapters 3 + 4

**Tickler System (Bring-Forward System):**

- a system that lawyers employ when they're either sole practitioner or part of a corporation, for the purpose of setting up limitation periods
- Limitation period: the time period that you have to sue someone
- For most civil lawsuits, limitation period is 2 years
- Limitations Act of Ontario sets out the various limitation periods that there are
- If you're involved in a slip and fall, while in a municipality period, u have to give the notice to municipality in 7 days
- Spousal agreements: 6 years from the date of separation or 2 years from year of divorce
- Discoverability: When would be a reasonable period of time for someone to discover they have a claim
- Law Society sets out what lawyers should have in place in terms of Tickler System:
  - o Name of the client
  - o Description of the subject matter
  - o File number
  - o If in a firm setting, name of responsible lawyer
  - o Clear indication of the deadline that you have to meet
- If you miss a limitation period, you're probably looking at a professional negligence lawsuit

**Chapter 3: Litigation**

- Rule of law – the law is supreme, no one is above the law, (not even the King himself)
- Levels of government: legislative, executive, and judicial
- What we need to know about the judiciary, or judges, in the law:
  - o If a judge renders a decision that Parliament does not like, Parliament cannot overrule that decision, they would have to change the legislation
    - A judge makes a decision that can't be overruled, but if there's enough pressure made on government or Parliament because of changing societal pressures or norms, then legislation can be changed
  - o One of the key things judges have to do is interpret statutes
    - Statute/Legislation: a piece of legislation enacted by Parliament, (Federal), Provincial and municipal
  - o Goals of legislation
    - Legislation should be broad in scope to apply to the population it's aimed to address
    - Has to be clear, not ambiguous.
    - Should be no contradictions within the legislation
    - Should not conflict with other laws (i.e. municipal shouldn't contradict w provincial)
    - Should not make demands that the average citizen could not comply with

- Should stand the test of time as much as possible
  - Judges when approaching a case:
    - First look at statutes and legislation, then look at case law
- The only cases that are reported that have a unique factor or have unique circumstances
- When judges distinguish cases:
  - They'll look at the principles but say that it doesn't apply because the facts are different
  - One of the most important advocacy skills, if your friend is using a case that's gonna fuck you up, you need to try and convince the judge to distinguish
- Idk what this is – get this note
  - 
  - If it's a new or novel area of the law, a judge may look at legislative documents
  - If those don't help, 6 dif rules to help judge
    - Literal rule: if the words are clear and unambiguous, you give the section of the legislation its ordinary meaning. Advantage: it provides certainty in terms of interpretation
    - Absurdity rule: In those types of cases where a judge might say "if I apply this legislation to this case, it's going to result in an absurd determination". i.e. marijuana plants, 4 is max, but u have 5<sup>th</sup> dead plant, so if ur charged w having 5 ur in jail forever
    - Mischief rule: What was the mischief that the legislature was trying to remedy or eradicate when this piece of legislation was implemented.
    - Contextual Analysis rule: You can't read a paragraph or a section of the act in isolation, you need to look at the whole piece of legislation as a whole, to determine the outcome that should be made
    - Plausible Meaning rule: does the legislation make sense? Is there more reasonable meaning?
    - Modern rule of interpretation: What is the spirit of the legislation
- STARE DECISIS: stand by what's already been decided
  - Ensure stability
  - Consistency
  - Predictability
  - Fairness
  - Respect for the law
- RATIO: Root of the decision, what does the case stand for? What are the principles?
- OBITER DICTA: words in passing; not binding and not precedence setting
- Majority Opinion: winning
- Dissenting Opinion: Rely upon different test/principles – does that mean it's opposing view or is the result still the same?
- **WHAT HAPPENS IF THERE ARE 4 FOR 4 AGAINST SPLIT DECISION ON THE BENCH AMONGST JUDGES! BONUS QUESTION! GONNA BE ON EXAM!**
- Intra vires: Within the power of the court?
- Ultra vires: Beyond the power of the court?
- 1. Pleadings:

- Statement of Claim: if you're claiming something
- Statement of Defense: if you're defending something
- Can ask for specific, general, or punitive or aggravated damages in your pleadings
  - Specific: things you have incurred out of pocket personally
  - General: Overarching things like pain and suffering
  - Punitive: the behaviour of the defendant is so bad, that they need to be punished (very unusual)
- 2. Exchange of Documents: Affidavit of documents
- 3. Examination of Discovery:
- 4. Pre-trial
- 5. Trial
- Jurisdictions:
  - Small Claims Court: most u can sue is for \$25,000
  - Rule 76 - Simplified procedure rule
    - Claim can only be between 50,000– 100,000
    - Can only deal w money, real property or personal property
    - Affidavit documents don't have to be as extensive as for a higher amount
    - 2 hours of time
    - Matter can be dealt with a lot quicker
    - Refer to MyLS for handout

#### Activity:

- Facts Scenario:
- Susan jons Kitchener buying hose grad frm wlu
- Parents gave 10000for down payment
- Tree planting, signs contract
- Thinks can make 20 000 , depends how many trees she can plant
- Finds ad for house on her parents street, up for sale for 300000 bucks
  - Goes to open house
  - Sign in foyer: please remove your shoes, thank you, steve and Kelly smith
  - Real estate agent sitting there
  - Bill takes shoes off leaves on socks, jill takes ff flip flops, susan takres off heels leaves panty hose
- Susan slips n falls backwards and hits her head on hardwood
- Take her to the hospital: head ok, broke her right arm in 3-4 dif places, in lot of pain,
  - On paid medication, costs about \$500 a month, and would have to pay this out of pocket
  - Dr said she'll be on pain meds for at least a year
  - Also, she needs physiotherapy for her arm for about 6 months, at \$300/month
- Needs to tell her contract ppl at WePlantYourTreesRight that she can't work, her dominant arm is in a cast

#### Questoins:

What court would you be in?

Who's the plaintiff?

Who are the defendants?

What city would you commence the proceeding in?

What orders/relief are you seeking

What are the main facts you'd be relying on to get relief that you're seeking.

Now, you're working on the defendant side – what are you gonna do to refute the claim?

How much do you settle for?

### **GUEST SPEAKER – Melanie R – Employment Law**

- When someone loses their job, there's either a termination without cause or a termination with cause
- Termination without Cause:
  - o Some form of severance payment
  - o Statutory entitlement: Employment Standards Act
  - o Wrongful dismissal: oftentimes, just employer failed to give reasonable notice prior to dismissal
- Termination with Cause:
  - o Serious misconduct
  - o Performance-related cause
- Constructive dismissal: employer doesn't terminate employment, but makes fundamental changes to the terms of the employment, or if employer acted in an egregious manner

## Lecture 4

### CANLII ASSIGNMENT FEEDBACK:

- Make sure you're answering the question asked
- Make sure, if anything is being quoted directly from the case you're referring to, you use in-text citations or footnotes to reference the exact paragraph

### Phantom Clients

- People that will come up to you anywhere outside of work like at a party or something, and ask you for legal advice, and then all of a sudden something happens and they hold you out to be their lawyer

## Chapter 4 – Contract Law

- Contract: legally binding agreement between two persons or entities
- Three types of contracts:
  - o Contract of sale: i.e. buying a car
  - o Lease or hire of services: i.e. legal services, employment contract
  - o Lease or hire of goods: i.e. renting out an apartment, leasing a car
- Contract does not have to be in writing for it to be legally binding
- Carbolic Smoke Ball: CASE
  - o 1892, carbolic smoke ball case
  - o Carlil said she'd try to give the carbolic smoke ball a try, it was advertised that anyone who could prove the smoke ball wouldn't work would be given 100 pounds
  - o She had influenza (it was an epidemic at the time) and the ball was supposed to cure it
  - o Ad: 100 pound reward will be paid by the Carbolic Smoke Ball Case to any person who contracts the epidemic influenza after having used the ball three times daily for two weeks according to the printed instructions
  - o Carlil did that, but she got the flu, so she demanded the money but they ignored her
  - o So she sued
  - o They said it wasn't a contract – what the court held was that it was in fact a contract based on the following conditions:
    - The advertisement wasn't a unilateral offer to everyone in the world, but it restricted the offer to ppl who had used the products
    - If you satisfied the conditions set out in the ad, that constituted an acceptance of the offer
    - By purchasing and using the smoke ball, that was considered proper consideration

- The company's decision to actually post the 1000 pounds with the local bank showed a real settled attention to be legally bound by their offer
- Puff: no contract, exaggeration, does not have legal consequences; a statement made by one of the parties in an attempt to induce the other to enter into an agreement; usually unspecific, like "this is a good car"
- **READ THE GLOSSARY OF THE TEXTBOOK TO STUDY FOR THE MIDTERM**
- Factors for proper contract:
  - Has to be consent or consensus
  - Has to be an offer
  - Has to be an unqualified/unequivocal acceptance
  - Must be communication of the offer and the acceptance
  - Has to be a shared understanding as to what the contract will entail
    - Test used is Reasonable Person Test (RPT); what would a reasonable person who was prudent and careful in her or her dealings have understood what the contract mean.
  - Has to be a statement of willingness of one party to enter into agreement w the other one
  - Person who makes offer is offeror
  - Person who accepts the offer is the offeree
  - Must lay out a date?
  - Must be accepted?
  - Contract is now formed
  - Must have consideration, or something in return
  - Gratuitous promise is not consideration
  - Agreement to agree to something in the future is not a contract
- CONSENSUS AD IDEM: meeting of the minds, u need this with contracts
- 6 ways an offer can be terminated
  - offer is refused
  - if the time lapses (u miss the deadline)
  - lapse of reasonable time
  - failure of a condition
  - if there is irrevocation (it can be revoked before it is accepted and must be communicated before the acceptance)
- To accept, two requirements:
  - Must be communicated
  - ONE MORE THING I MISSED
  - Could be done in writing, verbal, or in conduct but lawyers always want everything in writing
- Contract may be suspect:
  - Lack of capacity (i.e. person is under 18, has a mental disorder, are intoxicated)
  - Whether or not the person has been unduly influenced or duressed to make/accept the offer
- How to get a contract to end
  - By performance (got the car, paid the money)

- Both parties agree to change the terms so they end that contract and start a new one
- Through frustration, where it's impossible to do that (i.e. u agreed to buy a car but the guy crashed the car)
- Breach of contract:
  - Most common remedy is suing for damages
    - Obligation to try and remedy or limit ur damages
    - Quantum mariot – want to be rendered for the services I performed
  - I for

## Chapter 5: Tort Law

- Tort: An injustice or a wrong
  - o Can be for assault, trespass, a nuisance, manufacturer's liability, occupier's liability, negligence
- Moving party: plaintiff
- Responding party: defendant
- Four categories of torts
  - o **Negligence**
  - o Strict liability
  - o International torts
  - o Unique torts
- Negligence
  - o **Duty of care:** does the defendant owe a duty of care to the plaintiff?
  - o Test: In terms of establishing duty of care is this: would a person reasonably foresee that my conduct or lack of conduct could affect someone. In other words, whether a reasonable person in the circumstances of the defendant could have foreseen an injury to someone due to my action or inaction. If the answer is yes, then you move to the next step of the test. If the answer is no, then there is no liability.
  - o Next, **standard of care:** have to find out if the standard of care was breached and can the plaintiff actually prove that there was a breach.
  - o If standard of care is met, next test is, did the breach cause the damage/injuries
    - Is the action too **remote**?
    - Is it reasonably foreseeable
  - o **Causation.** The "but for" test... but for the actions of the defendant, the plaintiff would not have sustained the injuries
  - o Was there **contributory negligence**? Did the defendant contribute to anything, i.e. not wearing the best shoes that protect from slip and fall. They can be anywhere from 1-100% contributory negligent
  - o Were there damages?
  - o **Thin skull doctrine:** you find your plaintiff as you find them. If that person's got a preconceived health issue, and bc of that their injuries are excessive, too bad so sad for the defendant
  - o Damages
    - Punitive
    - General
    - Specific
  - o **Donahue v Stevenson: 1932 England**

## Case Example:

- Class Action Lawsuit – multiple plaintiffs seeking the same relief, so they do it all under one lawsuit

- Maple Leaf Foods: brought n behalf of certain franchisees of Mr. Sub, as a result of recall in August of 2008 of their ready to eat meats due to the possible contamination of listeria? Mr. Sub had a number of damages including economic loss, loss of goodwill, loss of capital value. The defendants brought a motion for summary judgement, which was denied. Issue on appeal: whether or not Maple Leaf owes a duty to care to teh class and whether ot not the economic claims are feasible in these circumstances. Maple Leaf foods was the exclusive provider of 14 dif types of deli meats to Mr. Sub. 2/14 products were affected by Maple Leafs product recall. Once they know there was a problem w
- No evidence that any customers acc ate the product and purchased the product
- For the time the plan was shut down, Maple Leaf couldn't provide those two meats to customers
- Q: Should Maple Leaf foods be liable for any economic loss the Mr. Sub franchisees suffered primarily as the result of the recall and as damage to their reputation.
  
- Defenses to torts:
  - o No negligence
  - o Plaintiff contributed 100% to the injuries/damages
  - o Consent
    - Waiver of liability
    - Voluntary assumption of risk
  - o Illegality involved

**THIS IS ALL THAT'S GOING TO BE ON THE EXAM ^^^^ so read everything about negligence, know what a tort is, and dif steps of negligence, dif types of damages**

## Chapter 6: Family Law

- At the basic trial level there's three dif family courts
  - o Ontario Court of Justice
    - Cases regarding custody, access, child support, spousal support, additional expenses, Children's Aid Society
    - Cannot go for cases for divorce or division of property because it does not have jurisdiction to deal with federal issues (property + divorce)
  - o Superior Court of Ontario
    - Cases on custody, access, child support, spouse support, property and divorce
  - o Unified Family Court
    - Combination of the other two, jurisdiction to deal with everything
    - Depends on the city you're practicing in
    - Can only go if the city in which the case is going to be brought in has a Unified Family Court, i.e. Barrie, London, Newmarket
- If it's a custody case, you MUST bring the case where the child is habitually or ordinarily resident
- 2 types of custody
  - o Joint Custody:
    - Any major decisions affecting the kids lives have to be made by the parents together i.e. who's their dr, their dentist, their religion, their school
    - does not mean 50/50
    - Hammer Decision: if parents are in conflict, one parent has authority to decide (i.e. one decides their religion, one decides their education)
  - o Sole Custody
    - One parent makes the decision, but the parent still has to advise the other parent on the decision
- Residency
  - o Develop a parenting plan: how you're going to co-parent from house A to house B, i.e. who takes them to soccer, to appointments, when they get their ear piercings, etc.
- Child Support
  - o 1997, government standardized child support in Canada, based on the Child Support Guidelines (CSGs)
  - o Right to child support is the child's right
- Spousal Support
  - o SAGSs - Spousal Support Advisory Guidelines
    - How old are the people, how long were they together and married, how old are the kids and how many do they have, where do they live and what's their income
  - o Main dif between Child Support and Spouse Support
    - Child support – the number's a number

- Child support is payable on a tax-mutual basis – tax neutral
  - Spouse support, person paying gets a tax break, person receiving has to declare it as income
- Extra Expenses – Section 7 Expenses
  - Health and dental costs, post-secondary costs, books, tuition, orthodontics counseling, etc.
  - Paid above and beyond child support and paid in proportion to the income of the parents'
- Division of property:
  - Equalization
    - You take some eggs, you scramble them up n mix up, mom gets half the egg, dad gets half the egg
    - If there's a dif, person who gets more owes the other the difference
  - Matrimonial home
    - If jointly held, and parties can't agree on a buyout, judge must list it for sale and sale it, if principal residence??
  - Basically, calculate wif's Net Family Property and husband's NFP, and split it in two
  - Exceptions:
    - any assets u own on date of marriage, u get to subtract from ur net worth on date of separation. Subtract net worth on date of marriage from net worth on date of separation
    - inheritance/ gifts
    -
- Contracts:
  - Cohabitation agreement/Prenup
    - If living together but not yet married
  - Marriage contract
    - If you're married
  - Separation agreement
    - If you're married and separated or if you're common-law spouse and separated
- Separations Key Dtes
  - Date of marriage
  - Date of separation
- Annulments: can marriage be annulled?
  - Lady married prisoner on death row

Child Protective Guest Speaker Jim Woodstock

- Family Law
  - Divorce Act + CLRA
- CFSA now CYFSA
  - Children's rights
  - Now includes 16+17 year olds as children
  - Systemic Racism
    - Indigenous peoples
    - Black Children one vision one voice
    - ADR- alternative dispute resolution

### Chapter 13

- Robin Camp – judge – look into his news story
- Since 1971 only two judges have been recommended to be removed from the bench
- Chimera – a population that has two dif strands of DNA
  - o Lydia Fairchild
- Huh idk what these three things are
  - o Has to be voluntary
  - o Cannot be made on the basis of the accused thinking there will be an advantage
  - o Cannot be made on the basis of fewer repercussions
- Why does a judge need to be impartial?
- How are judges held accountable?
  - o Decisions can be appealed
  - o Judicial committees are put together to complain to
- When will a judge have a conflict of interest
  - o When they know one of the parties

### Chapter 8

- What is the constitution? Contains four parts
  - o By of law
  - o Establishes a framework for government
  - o Supreme law of that country
  - o System of written and unwritten principles
- What it made out of?
  - o Statutes and legislations
  - o Case law
  - o Proclamation
  - o One more thing that I didn't hear
- What does it do
  - o Sets out a framework for legitimate government power
  - o Has to be capable of growth and development
  - o One more thing that I didn't hear
- Three levels
  - o Exec
  - o Legislative
  - o Judicial
- Omg what's she saying
- Section 52 - Any law that's not consistent with the constitution is of not force and effect
- Section 91 and 92 - Division of Powers, federal and provincial
- Facts of a case example
  - o 1873, a treaty was signed between Canada and the Ojiblee Chiefs from NW Ontario, Ojibways yielded ownership of their territory except for certain lands hey reserved for theselves, there were .....

- Trial judge held that the Ministry of Natural Resources could not take up land within the area and limit the harvesting rights of this first nations community without first obtaining the federal government's approval, so the nations one
- According to the Trial judge the treating from 1873 imposed a certain process that required federal approval
- Court of appeal held that the Trial Judge was wrong, bc it submitted that the lands which were being used to issue licenses were actually within provincial jurisdiction
- Then appealed to the Supreme Court of Canada,
- Sections to know
  - 109 – all lands, mines, and mineral,s and development of those lands is under provincial power
  - 9.2 a – the province has exclusive jurisdiction to make laws in relation to the development of lands
  - 35 – all governments be it provincial or federal have to abide by treaty rights
- What happened: First Nations lost
- Law Society of British Columbia v. Mangat
- Gehl and Gehl law firm in Ontarioo
  - Nadia, daughter of Gale, murdered on her way to work
  - Long story short, her husband had hired two people to kill her
-

## Criminal Law

- Talking about some case about shipwrecked ppl eating some kid... Get notes/facts from Anu
- Defense of necessity case
  
- Two main sources of Criminal Law:
  - o case law and legislation
- Most of the legislation found in Criminal Code
  - o Once a crime not always a crime
    - i.e. same-sex marriage, marijuana, assisted suicide, abortion
    - Before 1972, if you committed suicide, that's considered a criminal offense
- Second course of criminal law is in case law
  - o Judges make case law
- Two types of judges
  - o Federally appointed in superior court
    - Would result in imprisonment of more than two years?
    - Would go to a federal penitentiary
  - o Provincial appointed in provincial court
    - Would result in imprisonment of more than two years?
    - Would go to Maple Hearst something facility in Milton
- If someone's trying to claim a defense in a criminal trial, where do they find the defenses?
  - o Common law/case law, or the Criminal Code
- Difference between the offense and the defense?
  - o Offense: doing something to someone, i.e. assault, theft under 5000, breaking and entering
  - o Defense: no I didn't do it, no it was self-defense, etc.
- Balance of proof for a criminal case: beyond a reasonable doubt, 100%
  - o For civil case, balance of probabilities
- Main Differences between Criminal and Civil Law
  - o Nature of the matter – civil is private, between individuals or corporations, whereas criminal is seen to be a public matter, and is a public matter so it's a state matter
  - o Focus – in criminal is protection of society, whereas civil is ppl individuals
  - o What the action looks like – in civil, you bring a statement of claim/defense, pleadings etc. whereas with criminal matter, a charge is laid.
  - o Names of the parties – plaintiff and defendant in civil, accused and complainant in criminal
  - o Burden of Proof – Balance of probabilities in civil, Beyond a reasonable doubt in criminal

- Who controls the matter – in civil case, the plaintiff controls the matter, in criminal, the state or the Crown controls
- What the outcome of the proceeding is – in civil, outcome is often payment of money/damages, in criminal, you see guilty or not guilty
- What the outcome looks like: Civil, successful outcome usually looks like financial restitution, whereas Criminal, is some sort of punishment
- \*\*\*Three types of offenses found in the criminal code\*\*\* v important
  - Indictable Offense: most serious i.e. murder
  - Summary Offense: least serious i.e. harassment, breaking and entering
  - Hybrid Offense: somewhere between the two offenses i.e. impaired driving, child abandonment
  - Key considerations when deciding how to proceed:
    - How much evidence they have
      - More serious the offense, the more concrete evidence u need, less serious, burden not as high
    - Impact on society
    - Prior charges
- Structure of the Criminal System
  - Adversarial System
    - Must be based on due process: a legal requirement that the state must respect all legal rights that are owed to a person. Due process balances the power of the law of the land and protects the individual person from it. When the state harms an individual without following due process, this constitutes a due process violation, which in turn violates the rule of law.
- Who are the players in the criminal justice system:
  - Jury – lawyers cannot be called into jury duty,
  - Crown Attorney – act on behalf of the state. Burden of proof relies on the Crown's shoulders
  - Defense counsel – their job is to represent their client to the best of their abilities and provide the best defense possible to their client. Under the rules of prof conduct, they have to vigorously present their client's case
  - Judge – Provincially appointed and superior court judges
- Criminal Offenses – Crown has to provide:
  - Actus reas: the actual criminal act, physical action that constitutes a crime, u are doing something without the right ot be able to do soething. To satisfy you have to have a willing mind and there has to be some sort of mental element to it. Crown would have the burden of proof to show that you did the acti voluntarily.
  - Mens Rea: The intent – the requirement of a guilty mind that accompanies the crime. Doesn't have to be a malicious intention, if you cannot find the mental element of the crime, then there is no offense. It's a hybrid offense.
    - Exceptions to mens rea:
      - Mental Disorder
      - If you're under the age of 12
    - Two tests for mens rea in Canada:

- Objective mens rea: Reasonable person test. What is expected of a reasonable person in those circumstances? What is expected from society? Is there a significant departure from the standard of care of a reasonable person. The test is this: would a reasonable person in the same situation as the accused have understood that his or her conduct would create a risk of illegal consequences and should avoid the situation?
    - Subjective mens rea: What is actually going on in the mind of the particular person who's been charged of the offense at the time in question. Looking at more blame-worthy conduct. i.e. murder
  - Case examples:
    - R. v Lamb – manslaughter
      - Facts: Defendant, Mr. Lamb, was charged w killing Timothy O'Donahue. Lamb possessed a gun, and that gun had a five-cylinder chamber, and Mr Lamb and Donahue were best friends. Lamb was joking with Donahue, and pointed a gun at him, and there were two bullets in the gun, Lamb went to shoot him thinking that the chamber was empty, but it wasn't. SO, he acc shot his best friend and killed him. Lamb's defense was that he didn't have mens rea, did not have intention to harm his friend, he claimed that the killing was a mistake, and that he didn't think that when he pulled the trigger there were two bullets in the chamber.
        - Court held: Mens rea was an essential element to assault and because he didn't have the intention, he was let go.
      - Subjective mens rea:
        - Intention or knowledge – several offenses require underneath the heading of mens rea, that the accused intended a consequence. Did the accused foresee a consequence as virtually certain?
        - Recklessness – Understands the risk as a consequence, but does not foresee the consequence as certain
        - Willfull blindness?! – Someone intentially shuts their eyes to something. Not an excuse from the law
    - R. v Malfara
      - Not whether accused should be suspicious of an act, but was she actually suspicious? Bc that's when willfull blindness would apply
  - Parties to Offense:
    - Principal -- person who acc committed the offense
    - Aider – person who enabled someone else to commit the criminal act. Helping someone without encouragement or instigation
    - Abetter – person who encouraged another person to commit a crime by promoting or instigating
    - Counsellor – person who did something to insight someone to commit a crime

- Codified in Criminal Code Section 21. 1 – everyone is party to an offense who
  - a) acc commits it, b) does or admits to do anything with the purpose of aiding the person who's committing it c) abets anyone committing it
- 22 continued if there are two informed person who carry an intention in common to carry out an unlawful purpose to assist each other there in and then in carrying out the co mon purpose commits an offense each of them who knew or ought to have known that the..... *honestly just get the notes from the textbook.*
- R. v Kulbaki
- Absolute vs. Strict Liability – NOT ON THE EXAM!!
  - Sous-something case NOT GNA BE ON THE EXAM!!!
  
- Mr. Big case (the Gael one u read)

Guest Speaker – Val – Criminal Law

- Section 24(2) analysis
  - If the judge is convinced that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded having regard... would bring the administration of justice into disrepute
- R v. Harrison
  - 35kg of cocaine in the van
  - Textbook
  - Didn't have reasonable grounds to search, besides suspicion
- 24(2)
  - Seriousness of the charter infringement and state's conduct in infringement
  - The impact of the breach on the Charter and protecting the interests of the accused
  - Society's interest in adjudication of the case on it's merits
- Ascov motion
  - Conspiracy to commit extortion and related offences
  - Burden of proof
    - The accused
- **Ascov motion test\*\*\***
  - Length of the delay
  - Any waiver of the right by the accused
  - Reason for delay
  - The prejudice to the accused because of the delay
- R v Williamson
  - School teacher who was previously a court mentor
    - Sexually assaulted a young boy
  - Case thrown out because it wasn't tried in a reasonable time
    - Was found guilty at trial level
- R v. Jordan
  - Charged Dec 2008
    - Released on bail Feb 2009
    - From the time he was charged to the time the trial was heard, was 49.5 months later
      - Figure out which delays are attributable to which side
      - Only 5.5 months was because of the accused's conduct
        - Most of it was from the crown
  - Supreme Court of Canada decision
  - Sets out a hard-line ceiling of 30 months
  - Post Ascov
- R v. Stinchcomb
  - Stinchcomb was a lawyer
  - Duty to provide the defence with all evidence
- **Oakes case pg. 266\*\*\***

- Caught with 8 vials of hashish oil
  - Claimed he bought 10 for \$150
- Had \$600
- Charged him with s. 8 of the narcotics act
  - If you get found with that amount of hashish oil you get charged with possession and trafficking
- He claimed the reverse onus violated s. 11(d) of the charter
  - Presumption of innocence
- The court was unanimous in deciding s. 8 violated Oakes' s. 11(d) rights
- **6 step test\*\*\***
- The Charter
  - S. 1
    - Proportionality test
  - S. 2
    - Fundamental freedoms
  - S. 3
    - Suffrage
  - S. 7-14
    - Legal rights
    - S. 7 – right to liberty
  - S. 15
    - Equality rights
  - S. 16-22 (check this)
    - Language rights
  - S. 23
    - Minority language education rights
- Sub 4 sub 3 of the Canada Act
  - No husband is compellable to disclose any communication made to him by his wife during the marriage and no wife is compellable to disclose any communication made to her by her husband during the marriage
    - If a person decides not to testify against their spouse an adverse inference can't be drawn
      - Can't assume they're guilty or hiding something
- S. 9, S. 52, S. 11b
- **Remember 5 Supreme court of Canada decisions\*\*\***
- **Question on exam**
  - **Have to show there's a violation before you employ s. 1**
  - **Know the parts of s. 1**
- Plea bargaining
  - Advantages
    - Work with the Crown to make a more ideal outcome
    - Could possibly be a light sentence
    - Wastes less court time

- Prevents delays (pk)
- Protect someone else
- Saves emotional distress
- Cons
  - Justice wasn't served
    - Could feel like that
  - No trial
  - Can justice be served in the short time the plea is given
  - Specific deterrence
    - If you commit a crime and can get off on a lower charge with a plea what deters you from committing that crime
  - Defense may pressure you into a plea because you can't afford their retainer
- Heresay evidence
  - Inadmissible because you can't verify
  - Exception
    - Children
      - Ex. You overhear a child saying something to someone else, it can be admitted as evidence if \_\_\_\_\_ and \_\_\_\_\_

#### CRIME STOPPERS

- General
  - No call display
  - No recordings
  - Recorded on a specialized software
- Why it works
  - Fear of reprisal
    - Offer anonymity
    - Never have to give their name or go to court
  - Apathy
    - Offer a cash reward
  - Concerned citizens
    - Don't want go to police/court
  - Revenge
    - Some criminals want to get rid of their competition
- Can volunteer for them
- Court disclosure
  - 'Confidential for the Crown attorney' note with tip package
  - Have to be in accordance with R v. Stinchcombe
- R v. Leipert
  - Reaffirmed informant privilege
- Informer privilege rule
  - Common law rule

- Fundamental

## Defenses

- Defense of Necessity
  - o Must be clear and imminent danger
  - o Must be absence of legal alternative
  - o Harm inflicted must be less than what's been avoided
- Defense of Duress
  - o Must be duress of serious bodily harm
  - o Threats must be serious enough that the accused believes they'll be carried out
  - o Threats are so grave that using the RPT, a reasonable person might've acted in the same manner
  - o There was not safe avenue of escape
  - o Must be proportionality between the threat and the reaction
  - o Defense is not available to an accused if the accused has placed themselves in a place where there is criminal activity happening
  - o Key Case in Canada: R v Ruzic
- Defense of Mental Disorder
  - o Section 16 of the Code
  - o Key Case: R v Oomen
    - Don't just look at general intellectual ability, but are they able to apply that knowledge to their acts
- Defense of (non-insane) Automatism
  - o Sleepwalking case
- R v Daviault
  - o Being so drunk that you don't have mens rea to commit crime –it was found that extreme intoxication cannot be used as a defense
- Defense of Self-Defense
  - o Section 34 of the Criminal Code
  - o Test
    - The person who's acting in self defense has to have been attacked first
    - You have not provoked the other person in order to assault you
    - The person did not attempt to cause death
    - The proportionality person test – you used no more force than was necessary
  - o The Battered Woman
    - R v Lavallee
      - Lavallee was in an abusive relationship w her common law boyfriend, the guy hit her, at some point during the altercation he handed her a gun, which he first fired through the screen, and then she shot him in the head.
    - In order to provide justification what she did, they called in a psychiatrist, who explained the effects of her circumstances affected her belief and she honestly thought she was going to be killed if she didn't kill him
  - o Mr. Big Case
    - R v Hart

- Hart murdered his two kids, ended up confessing to an undercover cop, Mr. Big, and was convicted and found guilty of first degree murder
- Hart argued it was police entrapment – was successful in having Big's evidence excluded on the basis of police entrapment, and was let in the Court of Appeal
- Went to Superior Court, unanimous decision in the court that confessions arising from Mr. Big operations like this one presumptively inadmissible – aka, the Crown has reverse onus, and has to follow this test:
  - Crown has to overcome this presumption by demonstration that the probative value of the evidence outweighs its prejudicial effect
  - Crown has to demonstrate that there was no other way that that evidence could have been presented to the Court

## Chapter 12 – Sentencing

- When the judge renders a decision with respect to sentencing, must consider:
  - The offender
  - The victim
  - The society
- In the past, focus was on retribution, eye for an eye
  - Don't have this anymore, bc Section 12 of the Charter – criminal can't be expected to face cruel and unusual punishment
- Court has to consider
  - Denunciation: Society's disapproval of the criminal act that's been committed
  - Deterrence
    - General Deterrence – Deals w society as a whole. Sends a message to society as a whole that law won't tolerate this kind of conduct
    - Specific Deterrence – to the person that's been convicted & providing a sentence that deals w that particular individual. Hoping sentence will prevent the individual to never do this again.
  - Imprisonment
    - If it's two years or less, correctional facility bc it's less of an offense
    - Two years or more, more serious offense, federal penitentiary
    - Intermittent Sentence: Only serve on weekends, or part time
  - Rehabilitation
    - Drug Court
    - Mental Health Court
    - Indigenous Persons Court
  - Restitution
    - Paying back for the crime
    - Breaking and entering

- i.e. if you break in and steal/damage DVDs, you pay the damages
    - Victim surcharge fee
      - A fine paid by someone who committed an offence
      -
- Mediation
  - Part of Alternative Dispute Resolution (ADR) Process
  - Where parties try to resolve their differences and come up with a win-win situation, to avoid the cost of court
  - Advantages
    - Less costly
    - More timely (quicker)
    - Can be a fairer result
  - If it doesn't work, can proceed with Arbitration
- Arbitration
  - Arbitrator's decision is as binding as a court order
  - Reasons to go through/Advantages
    - Quicker
    - May take more time on your case
    - You can choose a person to arbitrate that specializes in the area you're discussing

**PO210 – CHAPTER**

- R v. Dudley and Stephens
  - In the 1800s
  - Not a Canadian decision!!
  - 4 men got shipwrecked, were on a small row boat, the bigger
    - One of them was a cabin boy (17 years old)
    - Had no food or water, realized they had to eat someone to survive
    - Cabin boy was kind of unconscious, was the weakest and was about to die
      - Two of them agreed but one didn't consent
    - Killed and ate him
      - Three days later they were rescued
    - Human flesh and blood under their fingernails
      - Parker's remains were left in the boat
    - Cut him open to draw his blood before killing him
  - Defence
    - Necessity
      - The court ruled it was not and they were to be hung
      - Granted them Queen's mercy
        - Queen let them go free
    - Common law
      - Human life is precious and is to be protected
      - Necessity is no excuse
        - Life should not be taken or sacrificed even to preserve one's own
  - Dudley gave evidence
    - Stabbed him in the neck and drank his blood
    - Cut him open and ate his liver and heart
  - People had sympathy for them
    - Even Parker's parents were sympathetic to the captain and his mates
  - Brookes and Stephens died of alcohol poisoning
    - Dudley moved to Australia to avoid publicity
      - Died of the plague
- Sources of criminal law
  - Legislation
    - Criminal Code
      - Codifies various criminal offences in Canada
      - Federal power (s. 91) – federal legislation
  - Case law
    - Chapter 10 – charter cases
      - With respect to interpretations of various legislation
    - Judges make case law
- An act is only a crime if parliament says it's a crime

- Once a crime not always a crime
    - Gay marriage
    - Abortion
    - Assisted suicide
    - Marijuana
  - Before 1971 if you killed yourself – that was a criminal offence
- Judge
  - Federally appointed
    - Superior court
      - Offences that could lead to imprisonment of two years or more
  - Provincially appointed
    - Provincial court
      - Offences that could lead to imprisonment of less than two years
- Serving time
  - Federal penitentiary
  - Maplehurst Correctional Facility
    - Ex of provincial
- Defences
  - Common law
  - Legislation
    - Criminal Code
- Offence
  - Something you're charged with
    - Ex. Assault
- Research on CANLII
  - Smith v Smith
    - Civil case
  - R v Smith
    - Criminal
    - R – Rex or Regina or State
- Who can lay charges
  - Client is 4'9 and 80 pounds her husband is over 6 feet 280 pounds
    - He thought she was having an affair, confiscated her phone
  - She was jumping up and down to get the phone
    - She sliced him on the chest with her nails
  - He calls the ambulance
  - Cops want to lay charges on her
    - He didn't want to lay charges
  - Police said it was not up to him to lay charges
    - Responsibility of the state
    - Beyond a reasonable doubt
- Differences between civil and criminal law
  - The nature of the matter

- Civil is private, between individuals
  - Criminal is a public matter, it's a state matter
- The focus of the matter
  - Civil the focus is the individual
  - Criminal the focus is protection of society
- What the action looks like
  - Civil – statement of claim
    - Statement of defence or counterclaim
  - Criminal – charge is laid
- Names of parties
  - Civil – plaintiff and defendant
  - Criminal – accused and complainant
- Burden of proof
  - Balance of probabilities
  - Beyond a reasonable doubt
- Who controls the matter
  - The plaintiff – moving party
  - The crown (or the state)
- The outcome
  - Damages
    - Often payment of money
  - Guilty or not guilty
- Outcome
  - Money
  - Imprisonment
    - Some sort of punishment
- Three types of offences found in the Criminal Code\*\*
  - Summary offence
    - Least serious type of crime
      - Ex. Harassment, peeping tom
  - Indictable offence
    - The most serious type of crime
      - Ex. Murder
  - Hybrid offence
    - Can be either
      - Ex. Impaired driving, child abandonment
    - Considerations
      - Criminal record (class)
      - Harm to society (class)
      - How much evidence they have (pk)
      - Where are they likely to get a better conviction (pk)
        - Lesser offence won't need as much evidence
- Structure of criminal system

- Adversarial
  - Involving conflict or opposition
- Due process
  - A legal requirement that the state must respect all legal rights that are owed to a person
    - Balances the power of law of the land and protects the individual person from it
    - When the state harms an individual without following due process, this constitutes a due process violation, which in turn violates the rule of law
      - Undermines the justice system
- Players in criminal justice system
  - Judge
    - Provincially appointed
    - Superior court
  - Jury
  - Crown attorney
    - Act on behalf of the state
    - Burden of proof lies on the crowns shoulders
  - Defence council
    - Represent their clients to the best of their ability
    - Provide the best defence possible on behalf of their clients
    - Vigorously present their clients case as much as possible
- What does the crown have to satisfy to meet the burden of proof?
  - Actus Reas
    - The guilty act
      - Act or violation of a law
      - Physical act that constitutes a crime
    - Have to have a willing mind
      - Have to physically do the act
  - Mens Rea
    - The intent
    - Requirement
      - Guilty mind accompanies the crime
      - Doesn't have to be a malicious intention
    - If you can't find the mental element, then there is no offence
    - RPT test
    - Lesser mens rea with a lesser offence
    - Exceptions
      - Mental illness
      - Child
        - Under the age of 12
- Two tests for mens rea
  - Objective mens rea

- The reasonable person test
  - What is expected of a reasonable person in those circumstances
  - What is expected from society
    - Is there a significant departure from behaviour of a reasonable person
- Would a RP in the same situation as the accused understand that his or her conduct would result in illegal consequences and avoid the consequences
- Subjective mens rea
  - What is actually going on in the mind of the specific person at the time of the offence
    - Blame worthy conduct
    - Ex. Murder
- R v. Lam
  - The defendant Mr. Lamb was charged with killing Timothy O'Donoghue
  - Possessed a gun with a 5 cylinder chamber
    - They were both friends
    - Mr. Lamb pointed a gun at his friend (they were joking around)
      - 2 bullets in the chamber
        - He thought it was empty but it wasn't
  - Lamb's defence was that he didn't have the mens rea, he didn't have the intention to harm his friend
    - The killing of his friend was a mistake
    - He didn't think that there was a bullet in the gun when he went to shoot
  - What the court held
    - Mens rea is an essential element to assault
    - Because he didn't have that he was let go
    - Actus reas was there for sure
- \_\_\_\_\_
  - Intention or knowledge
    - Several offences in the CC requires that the accused desired a consequence
      - Did the accused see it as virtually certain
  - Recklessness
    - The accused understands the risk as a consequence
      - Does not foresee the consequence as certain
    - Ex. R v Sansgret (?)
  - Willful blindness
    - Someone completely shuts their eyes to something
      - Not an excuse of the law
    - R v Malfara
      - Given \$50 to deliver a package to prison
      - Doesn't ask any questions

- It has drugs in it
      - Willful blindness can't be accused
        - Convicted at trial, set aside at appeal
    - Its not whether the accused should be suspicious but whether she was in fact suspicious
      - Objective look not subjective
- Parties to a defence
  - Principal
    - The person who commits the offence
  - Aider
    - Enables someone else to commit the act
      - Helping someone without encouragement or instigation
      - Also helping after the fact
        - Accessory after the fact
  - Abetter
    - Encourages another person to commit another crime
      - Promote or instigate
  - Councillor
    - The person who did something to incite another to commit a crime
  - Established in common law but codified in CC s. 21
    - Common intention
      - Two or more persons, they form an intention to carry out an unlawful purpose to assist each other therein
        - Carrying out the common purpose commits an offence
      - If you supply a gun to a person that says 'one day I'm going to rob a bank' and the principal actually robs a bank, you could be charged as well because you know or ought to have known
  - Aiding and abetting
    - Don't have to actually do something
- Won't be on the exam:
  - Absolute liability
  - Strict liability
  - Sault Ste Marie Case
- Police entrapment case/Mr. Big case
  - Nadia Gale
    - Was murdered on her way to work
    - Husband was having an affair and ordered a hit on her
  - Son-in law gets a job at bad boy
    - Plant an undercover police officer at bad boy
  - Defence
    - Police entrapment
      - Any evidence gathered through this couldn't be used at trial
  - Convicted of murder

- Ran out of money
- Mr. Rosen came and defended him
  - Bernardo's second lawyer
- He appealed but it was dismissed
- The tree was poisoned but any fruit from the tree are poisoned

#### GUEST SPEAKER – VAL

- Crown attorneys generally on contract
- Criminal Code
  - Federal – applies all across Canada
  - Offences, defences, procedure, sentencing
- Criminal charge
  - Police to investigate a complaint
    - Whether there's probable or reasonable grounds to lay a charge
    - Only the police can determine a criminal charge
  - If charged, the police arrest that person
    - They decide what to do with that person
  - Bail
    - Determined on a number of basis
      - Primary grounds
        - Will they come back to court if required to do so
          - Ex. If they have previous record of not coming back to court when summoned
        - Flight risk
        - Have they lived here the past 20 years or are they visiting?
      - Secondary grounds
        - Will they commit further offences if released?
          - Ex. If they have a long rap sheet, or convictions for previously failing to comply with bail terms
        - Sureity
          - Person who is bailing accused out
      - Tertiary grounds
        - Will the administration of justice be put into disrepute if we release this person?
          - Ex. Charged with child pornography
        - How will the public feel about this person being released back into the community
      - If all grounds are met someone is released back into the community
        - Presumed innocent
        - Easier to prepare for a case; can bring witnesses or evidence to your office
  - Can be arrested and released on a Summons

- Or a promise to appear
    - Less serious offence
  - Arrested and brought into the bail court system
  - The first time a lawyer will meet a client for this charge
  - Helps you as a criminal defence lawyer to deal with someone's case
  - Before a justice of the peace
- Disclosure
  - Evidence from crown attorney's office
    - Everything they will rely on as a piece of evidence
  - If evidence is coming in late
    - Crown will have to give an explanation
    - There may be an adjournment for the defence to prepare
      - Crown is liable when discussing delays
      - Defence can request a stay (throw out case) based on delays
        - If a judge orders a stay it can't be revived
        - Only if a court of appeal overturns the decision
    - Onus on the crown to prove guiltiness
      - They have a multitude of resources to gather evidence
  - Head crown
    - Most crown attorneys have discretion for their own cases but have to go back to the head crown because of things like political pressure (ex. drinking and driving cases, need permission if they want to dismiss, etc.)
- Guilty plea or trial
  - Client decides what they want to do
  - A guilty plea has to be voluntary and informed
    - S. 606 (4)
  - Trial can be by judge alone or by judge and jury
    - Indictable offences are usually by judge and jury
  - Acquitted
    - Freedom
  - Convicted
    - Sentencing
  - Judge can reject a guilty plea
    - Strike it
    - Trial process is longer
      - Can have a peace bond; not a guilty plea but is a court order with requirements
- Sentencing
  - All laid out in the criminal code
  - Ex. Conditional discharge

- Facts scenario
  - Marian asked Sarah to take care of her infant son for a few days
  - Asked Sarah to give her son a teaspoon of 'medicine' every night
    - It was poison
  - Sarah didn't think the infant needed medicine so she decided not to give it to him
    - She put it on the table
  - Sarah's son gave the baby a lethal dose and the baby died

**PO210 – CHAPTER 13**

- A couple fighting over furniture (?) in a cottage
  - About \$10 000 of contents
- Small claims court – the judge reserved
- Judges are supposed to be objective
- When parties separate, separate properties
  - Separate RRSP
    - Ex. If you've accumulated a \$50 000 RRSP, you have to split it
  - If you start to struggle financially
    - You can't have half of the assets and use RRSP for income (?)
- Since 1991, only 2 judges have been recommended to be removed from the bench
  - 19 year old woman sexually assaulted by a man in a Calgary house party
    - 'Why didn't you just keep your knees together?'
    - She was raped over a sink
      - Why didn't you sink your bottom into the basin so he couldn't rape you
- Judge wearing 'make America great again' hat to trial
  - Complained about
    - He said it was a joke
  - Have to be impartial
    - Didn't get in trouble
- Chinera
  - A person who's DNA from their saliva doesn't match her hair for example
  - A man wants to do a DNA test to confirm his children with a woman are hers
    - His DNA matched the children
      - The woman's however did not
    - She was pregnant but the state wanted to take away her other 2/3 children
      - After she gave birth to her 3/4<sup>th</sup> child and her blood didn't match but a social worker witnessed her give birth, she was tested and found to have two different strands of DNA
- Serial killer in Germany
  - Found the same DNA at many different crime scenes
    - Thought it was a serial killer
  - Turns out the person taking swabs and collecting DNA was accidentally leaving their DNA at the crime scenes
- Crown to admit a confession
  - Has to be voluntary
  - Can't be made on a basis that the accused is being taken advantage of
    - Ex. If you plead guilty you'll be given a lesser sentence
  - Can't be made on the basis of fear of repercussion
- Father (40ish) and 18/19 year old son
  - Driving around weber area

- Cut a guy off on the way into a gas station
  - The guy they cut off is yelling at them when they're pumping gas
- Father says lets leave
  - Head up to St. Clemens
    - North of Waterloo
  - The guy follows them, on their tail (egging them on)
- Father wants to call 911
  - Pulls over on a county road
  - The guy pulls over too and puts on his floodlights
    - He pulls out a tire arm and the father pulls out a Swiss army knife
  - The father ends up puncturing the guy's artery
    - The guy starts driving away and dies
- The father was going to be charged with first degree murder and his son would be charged with accessory to murder
  - Pled guilty so his son wouldn't have any chance of having a criminal record
- Had a perfect record before, changed in prison; learned stuff
- Kevin Weiner?
- Why is it important the judiciary is independent?
- Why is it important for a judge to be impartial?
  - If not it undermines rule of law and the whole system
- How are judges held accountable for their actions?
  - Decision can be appealed
- What is the constitution
  - Value of law
  - Establishing framework of government
  - Supreme law of that country
  - System of written and unwritten principles
- \_\_\_\_\_
  - \_\_\_\_\_
  - Statutes and legislations
  - Case law
  - Proclamations – interprets constitution
- \_\_\_\_\_
  - \_\_\_\_\_
  - Framework for legitimate exercise of government power
  - Capable of growth and development
  - Like our living tree
- Who works with the constitution
  - Executive
    - Powers of the cabinet (technically the queen)
  - Legislative
    - House of commons (?)

- Judicial
  - Need these three for checks and balances
  - Separation permits for rule of law to be upheld
    - Principle that no person is above the law
    - Not even the state is above the law!
    - –
    - Predictable and ordered society
    - Prevents arbitrary exercise of power
      - By the state and individuals
  - Each level has their own rules and duties
  - No branch can control the other branch
- Charter of Rights and Freedoms
  - Part of the Constitution Act
    - Parliamentary Supremacy
      - Only parliament can make laws
      - Can't be overwritten by anyone
      - Elected officials
- Constitution Act
  - Section 52
    - If a law is introduced that contradicts the constitution it is not valid
  - Section 91
    - Federal powers
  - Section 92
    - Provincial powers
- Grassy narrows vs. administration of education (?)
  - In 1873, a treaty was signed between the dominion of Canada and the Ojibwa Chiefs (northwestern Ontario) Ojibwa forfeited ownership of their territory except certain areas kept for themselves
    - Restricted mining or lumber?
  - After treaty territory was under exclusive control of the Government of Ontario
    - Annexed to Ontario
  - In 2005, a few members of the Grassy Narrow's first nations
    - Ministry of natural resources had provided a forestry license to a paper manufacture which authorized the company to clear the forest
    - First nations said Ontario government couldn't do that because they relied upon the tree (dealt with federal control)
      - You can't provide this license (Ontario) to a private company
  - Trial judge held
    - First Nations community was successful
      - Ministry of natural resources couldn't take up land and limit the harvesting rights of this community without federal governments approval

- The tree from 1873 required approval of the federal government to remove
  - Court of appeal
    - Trial judge was wrong; the land which was being used to issue license was within provincial jurisdiction
  - Supreme Court of Canada
  - Section 109 of the Constitution Act
    - All lands, mines and minerals is under provincial power
  - Section 92 sub a
    - The province has exclusive legislative authority (jurisdiction) to make laws in relation to the development of land
  - Section 35 of the Constitution Act
    - All governments have to abide by treaty right
- Law Society of British Columbia vs Mr.
  - Didn't study law, wasn't a member of BC Law Society of Canada
  - Engaged in activities dealing in immigration
    - Representing people at immigration boards
  - Law society
    - Was seeking an injunction
    - You are not permitted to represent these people at these immigration hearings
      - According to provincial legislation
  - Immigration Act
    - You don't need to be a lawyer to represent people
    - Immigration consultant
  - Decision
    - Immigration Act trumped
    - Unanimous judgment
  - Paramouncy doctrine
    - Federal legislation trumped federal
- Gehl law firm (?)
  - Nadia – daughter of Gehl
  - Nadia was on her way to work, crossing a field, she was murdered
  - Couldn't find murderer
    - Her husband hired two people to murder her
  - Issue
    - Should he receive legal aid funding?
    - Legal aid was ordered to pay for his representation, case was to complicated for him
- Dealing with case
  - Factual dispute
  - Doctrine of paramouncy
  - Reference

- Facts (interference, making sure there's rule of law, independence)
  - Plato smith owned a popular Waterloo pub (purple and gold forever – name)
    - On King Street
    - Environmentalist
    - Belonged to an activist group – the green warriors
  - Would post bail for fellow Green Warriors with money from pub
    - Arrested for chaining themselves to trees, animals, doors of forest companies etc.
    - 500 charges laid against the Green Warriors
      - Charged over and over again when fines weren't paid
  - This bothered the premier of Ontario and the Attorney General that Plato was doing this
    - Plato was in danger of losing his liquor license if he didn't stop posting bail for the Green Warriors
    - Last December the pub's liquor (\$20 000 of it) was seized
      - Plato's liquor license was revoked
      - He was forced to sell his business
  - Mr. Smith sued the premier of Ontario and the ag of Ontario
    - Hired Tony Stark as his lawyer
  - Goes before a trial judge – Justice Braid
  - What are the issues
  - What's the decision
  - Based on real case in Quebec (guy helping Jehova's witnesses)

#### CASE BRIEF

- No other research
- No facts scenario
  - Don't give an opinion on whether or not you agree
- Headings!!
- Purpose of the brief
  - Make an argument about certain principles of law
- Facts
- Judicial history
  - Levels of court
- Legal issues
- Analysis
- Decision
  - Majority and minority or unanimous
  - If the decision is unanimous
    - Strong case
- 8-10 pages
  - Check grammar
  - Use one tense throughout the paper

- Paragraph shouldn't be more than 3-4 sentences
  - Concise sentences
- Cite
  - In-text or footnote

#### GUEST SPEAKER – SOCIAL WORKER

- Indigenous court
  - Refer to the judge on a first name basis
  - Lawyers there are told to not be lawyers
    - Sit and listen and be a support person
    - Judge talks directly to the hurt or the harmer
  - The sit in a circle
  - Gladue report
- IPC Court (indigenous persons court)
  - Go around the table
  - Lawyers don't say much
  - Everyone will tell their story
  - Transgendered are known as dual spirited
    - No judgment
- Role with lawyers
  -



# Exam Notes

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## **Constitutional Law, Chapter 8**

### **a. Concept of Parliamentary Supremacy**

- Only parliament can make laws.
- s. 52 of Constitution Act 1982, "no force no effect"

### **b. Structure of the Constitution Act, 1982**

*Part 1:* Canadian Charter of Rights and freedoms

*Part 2:* Rights of the aboriginal peoples of Canada

*Part 3:* Equalization and Regional Disparities

*Part 4:* Constitutional Conferences

*Part 5:* Amending the constitution

*Part 6:* Amendment to the constitution

*Part 7:* General

### **c. Division of powers**

- Powers: federal, provincial, or territorial.
- s.91, outlines the powers of federal
- s.92 outlines the powers of provincial
- s. 93 power to provinces and territories over education
- POGG: Peace Order and Good governance  
and "leftovers" are federal responsibilities.

### **d. Intra Vires versus Ultra Vires**

- federal gets the power for anything not explicitly mentioned

### **e. Constitutional issues and the Court**

When federal and provincial powers are conflicting

How constitutional issues can come to court

*Double Aspect:* federal in one aspect and provincial in another.

*Interjurisdictional immunity doctrine:* governs what happens if there is an overlap. But federal law will override any provincial law.

## **Criminal Law, Chapter 9**

### **a. Sources of Criminal Law**

Division of powers, which is outlined in s.91, lawmaking is federal responsibilities.

- Criminal code is a federal document. Only the federal government can enact laws.

-Provincial government

-results in punishment.

Rule of law: all people are even.

Legislation: making written law by a branch of government.

Substantive criminal law: talks about specific crimes and defences

### **b. Civil Law versus Criminal Law versus Common Law**

<b>Criminal</b>	<b>Civil</b>	<b>Common</b>
-state and accused	-Plaintiff and a defendant.	
-accused found guilty and convicted and punished.	-defendant found liable and plaintiff collects damages.	
-if one person is punished wrongly it called the whole system into question.	-only a few people affected if there is a wrong decision made.	
-federally appointed judge, with or without jury.		
-beyond reasonable doubt.		

**Crimes**

<b>Offence</b>	<b>Description</b>	<b>Code</b>	<b>Example</b>
<b>Summary</b>	Less serious	787. liable to a fine no more than 5000, or imprisonment not exceeding 6 months	Trespassing
<b>Indictable</b>	More serious	235. Could be 2 or more years in prison	Murder
<b>Hybrid</b>	Could be either or	s.218. Depends on which offense they are tried for. Until crown decides it will be indictable.	Abandoning a child

**c. The adversarial system**

-Crown has to prove beyond a reasonable doubt.

Defined in the case. r v lachance.

-Due process, playing by the rules.

S.1

-focus on fairness rather than the searching for the truth.

**d. The Court system**

**Provincial inferior Courts**

-Seen by the justices of peace

-minor criminal offenses

-under control of the higher courts

-all summary convictions and some indictable.

-also hears preliminary hearings.

**Provincial Superior Courts-Trial Division**

-superior court justice, for special circumstances. And can include a jury.

-treason, murder, and other serious crimes.

-also hears appeals from lower courts

**Provincial Superior Courts of Appeal**

- reviews lower court decisions
- Appealed judges use deference since they were not at the actual trial to see witnesses and their mannerisms.

**The Supreme Court of Canada**

- eight justices and one chief justice.
- only takes in certain trials
- if it raises an issue of public importance.

**e. Elements of a criminal offence**

**Actus reus:** act or omission in violation of a law.

- physical action that violates the law.
- mala in se: evil within itself.
- mala prohibita: prohibited evil.
- First thing to do when looking a crime is to look at actus reus and the voluntariness

*Voluntariness*

- must be a willing mind.
- crown has to prove if an act was voluntary.

*Causation*

- Crown has to prove that the act was caused by the accused actions.
- But-for test, direct line between actions of the accused and the crime.

*Omission or a failure to act*

- can be convicted of for failing to act a certain way.
- cannot be convicted unless they were under a certain duty.

*Duty to Provide the Necessaries of Life*

- parents and caregivers.
- if you cause the circumstances that create a crime than you are at fault.

*Duty to Rescue*

- failure to perform a duty imposed by law.

**Mens rea:** criminal intent

- guilty mind
- need to foresee the outcome.
- crown must prove all mental elements.
- if someone is mentally unstable or unable to comprehend what is right and wrong, they cannot be held criminally responsible.

*Objective Mens Rea*

- what is expected from society.
- what is expected of a reasonable person
- crown has to prove that the person fell below what a reasonable person would do.
- a reasonable person would in the same circumstances understand the risk of what they are doing and the fact that it was illegal.

### *Subjective Mens Rea*

-objective is what should be going on subjective is what is going on.

-subjective is worse than objective.

-takes in personal circumstances.

Forms on intent: in order to be found guilty someone must have some sort of intention.

Intention/Knowledge: has to have actual knowledge of what they are doing.

Indirect Intention: might not directly want something illegal to happen, but may break the law in order to get results.

Wilful Blindness: just because you close your eyes to the possibilities. You know the danger but decide to do it anyways.

## **f. Parties to an offence**

### **4 key Players**

1. Crown attorneys: act on behalf of state

2. Criminal Defense lawyers: represent those who are being prosecuted by the crown. Most represent client to the best of their abilities no matter what they are on trial for.

3. The judge: impartial and makes informed decisions. Controls evidence.

Justice of peace: lower end of criminal matters. Do not need lawyer. They reviews summons and warrants, and see the oaths and affidavits.

4. Jury: Retain all evidence and information about the case. They are a trier of fact. Can be hard for them to understand that evidence is relevant and what is not. Are interviewed by the lawyers before ever becoming apart of the jury.

### **Aiding and Abetting**

Aiding is helping without encouragement.

Abetting is helping with encouragement, instigating, promoting or procuring the crime to be committed.

-supplies the weapon, acts as a lookout, or drives the getaway car.

-must join in before or during the actual crime, helping after makes one accessory after the fact.

## **g. Inchoate Offences**

Offenses in which the crime is incomplete.

### **Attempts-Actus Reus**

-Will not be complete. No universal test, so must be examined on a case by case basis.

### **Attempts- Mens Rea**

-Easier to convict someone with this since the crime is half committed there was still intent.

The bar is set high in order to make sure not to arrest the wrong criminal.

## **h. Regulatory Offences**

A non criminal charge that regulates conduct in the public interest for areas such as securities regulations and trade. Often dealt with at administrative tribunals.

### **True crimes and regulatory Offences**

true crimes are inherently wrong and harmful but the majority of the population.

Regulatory offences on the other hand are meant to control activities that are unlawful in the field of business, trade, transportation and various activities related to industrial production.

### **Offenses of Absolute Liability**

-useful in preventing harms to the public. They eliminate loopholes that business could use in order to avoid responsibility.

## **Chapter 10- The Charter**

a. Overview of Charter of Rights and Freedoms

### **b. Exclusion of evidence**

#### **R v Feeney**

Officers went into his house without a warrant and used things they found for evidence.

Since they went in unpermitted that evidence has to be thrown out.

**Fruit of from a poisoned tree:** all evidence that comes from an illegal act must be discarded because it is all tainted.

### **c. Arrest procedure**

**Right to be informed of Arrest:** must make a person aware of what they are being arrested for, or else they have the right to resist arrest.

**Arrest:** touching somebody with the goal of detaining them or verbally directing the person that they are under arrest.

-Peace officers can make arrests as long as they are not for a summary offense.

**Citizens Arrest:** a citizen can arrest as long as the person has committed an indictable offense, or you believe they have committed a crime, or are escaping from the police.

**Arrest and the charter:** must be informed why they are being arrested, retain or instruct counsel, validity of the detention determined by habeas corpus.

**The right to remain silent:** A police officer cannot compel anyone to answer any questions. Or to detain a person solely for the sake of asking questions.

**The right to retain counsel:** Everyone has the right to retain or instruct a lawyer without delay.

**Right to be tried within a reasonable time:** The time in question is from time of charge to the end of the trial.

### **d. Limitation of Rights**

-Charter only deals with government and individuals.

#### **R v. Oakes**

-prior to this it was on the defendant to prove he or she was not going to traffic.

-contradictory to the innocent until proven guilty.

-this is called a reverse onus and the court found this to be unjustified.

1. Reason why you are limiting the charter must be very important.
2. Is there a good reason to take the right away? Proportionality test
  - a) Law must accomplish what is stated.
  - b) Should impair the rights as little as possible.
  - c) Must be proportionate effects.

**e. Confessions**

-A criminal suspect's acknowledgement of guilt usually in writing and often including details about the crime.

Tactics used in police interrogations

- isolation as means to increase anxiety.
- Confrontation, accuse the suspect using real/fake evidence.
- Minimization where the investigator conveys sympathy and provides moral

justification.

Interrogations are designed to be stressful.

**f. Plea bargains**

-AKA pre trial negotiations.

The Law Reform Commission of Canada made it so a plea is an agreement by the accused to plead guilty in return the prosecutor will take or refrain from a certain course of action.

- A deal between the two lawyers, for sentencing reductions.
- can occur at any stage of the process. But usually happens early on but before trial.

Pros	Cons
<ul style="list-style-type: none"> <li>-speed up the court system. Cheaper.</li> <li>-could lead to a lesser sentence.</li> <li>-saves police time and money because they do not need to testify.</li> <li>-victims and witness also get that same benefit.</li> <li>-90% are resolved through plea bargains.</li> </ul>	<ul style="list-style-type: none"> <li>-making bargains with criminals in order for lesser sentence brings justice into question.</li> <li>-element of secrecy.</li> <li>-informal and hurried affair that often occurs just prior to trial.</li> <li>-takes away from would be criminals because they do not see any punishments.</li> <li>-risk of false confessions</li> </ul>

**g. Burden of proof**

- ultimate burden of proof is always on the crown.
- must prove beyond a reasonable doubt.
- evidentiary burden**, can fall either on crown or the defense. Presenting certain facts to the court.

**h. Election**

- ss. 236 and 560, the accused may decide what kind of court and trial he or she wants, for some offences.
- If it is summary offense the case will be tried before a provincial judge.
- If it is an indictable Offense the accused has the choice of, provincial or higher courts and the choice between a single judge or judge and jury.

**i. Presumption of innocence**

Innocent until proven guilty.

- No one is guilty of an offense unless they are convicted of the offense.
- Accused does not need to reply to the charge and adverse inference cannot be made against those who do not respond.

**j. Testimony**

- A witness can only testify to what is in their knowledge.
- they cannot use hearsay, second hand knowledge.
- witness can not give their opinion.
- Voir Dire to see if evidence is admissible.

**Criminal Law Defences and Sentencing****Chapters 11****a. Types of defences****Ignorance or Mistake of Law**

- ignorance of the law is no excuse.
- ignorance of the existence of a law or its meaning or ignorance of the scope of the law.

**Mistake of Fact**

- prevents the accused from forming the proper mens rea for the crime
- someone who acts innocently under a flawed understanding of the facts.

**Necessity**

- when crimes can be seen as involuntary.
- someone is forced to do something they might not have done otherwise in relation to certain circumstances.
- common law defense, comes from case law.
- evil trying to be avoided is greater than breaking the law.
- Ex a hiker breaks into a cabin for warmth.
- dudley and stephens.

**Defence of Duress**

- linked closely with necessity.
- if being threatened by another person.
- ask if the person acted voluntarily.
- 6 elements of duress defense: 1. threats must be of death or serious bodily harms, 2. threats must be sufficient, 3. threats make someone act in the same way a reasonable person would, 4. no safe avenue for escape, 5. proportionality, 6. not reasonable if they were put in that situation because of criminal activity.

**Defense of Mental disorder**

- cannot be convicted if they have a sufficient mental disorder.

**Automatism**

-state of impaired consciousness, though someone may be capable of their action does not have voluntary control.

1. Normal condition (not-insane)
    - sleepwalking and hypnosis.
    - nothing that could be considered a mental disorder.
  2. Insane or mental disorder
  3. External trauma
    - blow to the head can cause a state of automatism.
  4. Involuntary intoxication Induced by Alcohol or Drugs
    - if your drink was laced with drugs you may not be responsible for your actions.
- Definition of intoxication: self induced intoxication is never a defense.

**Provocation**

- when someone in the heat of the moment acts out in rage.
- this is an affirmative defence, elements of offense are present.
- completed mens rea.

**Self-Defense**

-when someone has no choice.

Battered women syndrome

**b. Double jeopardy and Res Judicata**

-called autrefois acquit in Canada.

-cannot be put on trial twice for the same crime.

-the accused has the right to be spared from many trials.

**Chapter 12****a. Sentencing principles**

-Sentencing is defined as the judgement that a court pronounces after finding a criminal defendant guilty.

-Must adhere to lex talionis, an eye for an eye. Must restore balance in society.

-under the charter though no one should have to be subjected to any cruel and unusual treatment or punishment. This means any punishment that is grossly inappropriate to the crime.

**Principle of sentencing, s.718 crim cod**

1. Denunciation:

-used to express disapproval.

-suspended sentence: serves time in community rather than prison.

2. Deterrence-Specific/General:

-General deterrence: harsh sentences used to deter others that may commit the same crime.

-Specific deterrence: This is targeting specific offenders into not become repeat offenders.

3. Imprisonment:

-imposed on people that may be a threat to society.

-Intermittent prison sentences: no more than 90 days based on various reasons.

4. Rehabilitation:

-future oriented.

-only effective if the offender is motivated and willing.

5. Restitution and Victim Surcharge:

-compensate the victim for harm that was done

6. The individual offender and offence:

-sentence should be similar to other sentences.

-when sentences are consecutive they should not be unduly long or harsh.

-offender should not be deprived of their liberty.

-all other sanctions should be considered that are reasonable besides imprisonment.

**b. Sentencing options****Absolute and Conditional discharge:**

-discharge: guilt without a conviction being registered.

-Absolute discharge: effective immediately. Allows the person to say they do not have a criminal record.

-Condition discharge: certain conditions attached such as community service that the offender must complete within a certain time.

**Probation:**

-May be imposed alone or in addition to other sentencing options.

-meant to be rehabilitative.

-max is three years.

-has a probation officer.

**Suspended Sentences:**

-given a term to serve but is then suspended, usually for them to complete probation.

-used for denunciation purposes.

-but if failed to complete probation orders they can be brought back in and original sentence can be imposed.

**Remand:**

-when you are held temporarily when you await trial.

**Mandatory Minimums:**

-only for 30 crimes, 16 related to firearms.

**c. Types of alternative dispute resolution**

**Restorative Justice**

-healing relationships between individuals who have been involved in the justice system.

-offender, victim and large community.

-must be voluntary.

-Sentencing circles: aboriginal communities. Offender , their supporters, victim and their supporters, community leaders and judges.

**Negotiation**

-voluntary process

-formal or informal

-two parties that are in conflict sit down and talk to each other.

-parties identify the issues and discuss how to solve them.

-parties empowered to find the resolution themselves.

Advantages:	Disadvantages:
-cost efficient -dont need to hire lawyer -privacy can be maintained. -good if they want to have business relationship -more likely to adhere to requirements.	-cannot force someone into ADR -power imbalances. -one more skilled in negotiating. -often not binding in court.

**Mediation**

-cooperation

-neutral third party used to solve the problems between two people.

-mediator has no authority over the parties.

-they are a facilitator rather than a judge.

Advantages	Disadvantages
-more willing to abide -lower cost -quicker -can leave at anytime. -money saved. -beneficial for children.	-no guarantee of success -then will have to pay lawyer fees. -must have equal bargaining power. -have to both participate.

**Arbitration**

-more formal process.

-uses an arbitrator and they can impose a solution.

-hired to make the final decision.

-knowledgeable on the subject.

-makes a binding decision on the matter.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>-made by panel of experts</li> <li>-social and economic factors used.</li> <li>-can hear witness and examine evidence.</li> <li>-binding decisions</li> </ul>	<ul style="list-style-type: none"> <li>-parties are responsible for all actors.</li> <li>-more costs.</li> <li>-not always quick.</li> <li>-not always win-win</li> </ul>

Adjudication

-traditional court system

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>-precedent</li> <li>-deterrence</li> <li>-uniformity</li> <li>-full and final resolution</li> <li>independent from the two parties.</li> </ul>	<ul style="list-style-type: none"> <li>-expensive</li> <li>-lawyers</li> <li>-judge shave limited remedies</li> <li>-no comprmise.</li> </ul>

-most important chapter is charter chapter.

-oakes test

-short answer from guest lectures

-essay 25 marks

-case scenario 15

-canadian cases, can atleast say enough of the facts.

-stuff repeated between guest speakers

-dont need to remember the 7 parts of constitution

-know criminal code sections, can just say the section dealing with numbers