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COMM 315 Lecture Notes

Lesson 1-Introduction to Law

INTRODUCTION TO LAW

Law: a set of rules and principles to maintain order and provide fair treatment to all

In a democracy, laws govern the conduct of society and laws promote the goals of peace, order and good governance.

Laws must be in written form because there is a risk of unfairness in application otherwise.

Laws are adopted by the government

LAW & JUSTICE

Justice- the process of applying the law

Why do we respect the law?

- Fair in lawmakers or fear of punishment?
- Is it applied to all in a fair manner?

Law is enforced by the courts (the judges) and it is very important we the people respect the judges.

Justice has to be perceived by the public by having been rendered fairly.

- Is the law always perceived as fair?

LAW & ETHICS

Ethics- are moral values, our personal view on what is right and wrong

- Ethical principles are not decided by the government lawmakers
- Society's ethical views on appropriate behaviour and acceptable conduct changes over time
- Changes in ethical beliefs will help foster changes to the law
 - Views are always changes= laws will change

Laws are slow to change b/c lawmakers must deal with conflicting ethical views of their constituents

Ex: Young people may have diff views on certain behaviour from views of parents or grandparents.

Concern: you may win the vote of certain constituents but may lose the vote of others

- Laws set out defined standards and are enforced by the courts
- Ethical principles on the other hand are subjective in nature and are not enforced by the courts
 - Ex: Laws set minimum wage rates
 - Ethical side → Is the minimum wage fair?

PRIVATE VS PUBLIC LAW

Private law- deals with the relationships between persons

- Does not involve the government acting under its official capacity
 - EXCEPT: government can be involved in private law when they're acting in a commercial capacity.
 - EX: when you're employed by government or buying goods or services from government
- **Contractual responsibility** → deals with your obligations in contractual situation
- **Non-contractual responsibility (Civil Liability)** → deals with your duty under the law not to injure

The breach of private law = COMPENSATION for bodily, moral or material injury (damage)

Compensation → puts you back into the position before the breach occurred and looks at the actual and direct damage you have suffered.

Public law- deals with the relationship between the government acting in an official capacity and its citizens

- Deals with enforcement of citizens' duties to the state
 - EX: criminal law and income tax act

The breach of public law = PUNISHMENT

Punishment → is to punish you for not respecting the law and to set an example to other people for them to not breach public law

CIVIL VS COMMON LAW

Civil law- deals with matters under Quebec provincial jurisdiction

- Why? → Laws of Quebec were based on private law used in France prior to 1760s
- French law continued to apply after the colonies were ceded to Britain

All general principles of law are collected and codified into one rule book called the **Civil Code**

When faced with legal question, lawyers and judges refer to:

- 1) Civil Code
- 2) **Jurisprudence** → previous court cases

Common Law: deals with Federal laws that have common application all across Canada, also applies in all other Canadian provinces for matters under provincial jurisdiction

- Based on British legal system
 - General principles of law were NOT codified into a Civil Code

When faced with a legal question lawyers and judges refer to:

- 1) Jurisprudence- previous court cases in order to determining how judges treated similar situations in the past
- 2) Statutes = LAWS would be examined

SUBSTANTIVE VS PROCEDURAL (Procedural) LAWS

Substantive laws: sets out the specific rights and responsibilities that persons are bound by
EX: Civil Code, Consumer Protection Act

Adjectival/Procedural: rules set out on how substantive laws should be applied

- EX: Code of Civil procedure sets out steps to take and the order to file documents when suing someone

LITIGATION

Litigation/Lawsuit-the formal procedure by which a person takes a court action against another person to claim damages / recover a debt / enforce an obligation

- **Creditor**- the person to whom a debt is owed
- **Debtor**- the person who owes a debt / obligation to another
- **Plaintiff**- the person who initiates a lawsuit (litigation) against his/her debtor
 - **USUALLY CREDITOR**
- **Defendant**- the person against whom the lawsuit is take
 - **USUALLY the DEBTOR**

CLASS ACTION

Class Action- where multiple persons have a similar claim against a common Defendant, proof of one person's claim will be sufficient to prove the damages suffered by all Plaintiffs

- EX: A Class Action might be taken when Volkswagen has a car defect in one of its car brands. The cost of repairing the defect in each car is sufficiently similar to allow the judge to render a decision on a compensation number.
 - **BENEFITS:**
 - Saves court time, one lawyer represents all of the Plaintiffs collectively
 - Saves legal costs to Plaintiffs, facilitates access to court for those who may not otherwise be able to afford a lawsuit on their own

WHERE TO INSTITUTE A LAWSUIT

General rule: the Plaintiff (Creditor) sues the Defendant (Debtor) in the city in which the Defendant is domiciled

What if they live in different countries?

- If the lawsuit is based on breach of contract, then:
 - **Choice of Venue**→The parties can stipulate in the contract which court (city) will be competent to hear the case.
 - **Choice of Law**→ The parties can stipulate in the contract which law will apply to govern the contract
 - **Can be very relevant if you live in Quebec and you enter a contract with someone who lives in Washington. You want laws of Quebec to apply and they want law of Washington to apply. In the contract you can choose.**

PRESCRIPTION

- Just because you have a legal recourse against somebody doesn't mean you can institute a lawsuit anytime you want.

Prescription: after a certain lapse of time, from the date that the obligation was due or from the date that the damage was caused, a Creditor will not be permitted to take a lawsuit to enforce his/her right. Under Common Law this is referred to as a **Limitation Period**.

- In Quebec as a General rule, for breach of contract or non-contractual liability under the Civil Code, Prescription = **three years or less from the time the offense occurred**

FEDERAL & PROVINCIAL AUTHORITY

- In Canada, the power to pass laws is divided between the Federal & Provincial government.
 - Certain areas of laws will fall under Federal governments exclusive authorities and

some under the Provincial governments exclusive authorities.

- EX: Income tax falls under both
- Federal Laws includes: **NOT IN THIS COURSE**
 - Criminal
 - Currency/banking
 - Immigration
 - University
 - Intellectual property
- Provincial Laws includes:
 - Property
 - Ownership
 - Civil rights
 - Contracts
 - Employment law
 - Non-contractual responsibility (Civil responsibility)

SOURCES OF LAWS

- Where do laws come from?
- The sources are:
 - **Statutes:** written laws adopted by the government (Fed & Prov)
 - **Jurisprudence (Case law):** court judgements, decisions rendered by judges interpreting statues or making new law if the statutes are silent
 - **Doctrine:** articles / essays written by legal experts analyzing particular area of legal concern, especially relevant in areas of law which are new and emerging
 - **EX:** internet transactions/ contracts (duties, responsibilities, jurisdiction)
 - **EX:** liability for defamation on social media, cyber bullying
 - **Custom and Usage (Tradition):** commonly accepted historical practices used in a particular community
 - **EX:** practices used by the same parties in previous transactions. Look for a pattern of previous activity which can be relevant in interpreting how a transaction should be interpreted today.

INTRODUCTION TO THE QUEBEC LEGAL SYSTEM

Quebec Court System

- **Trial Court (Court of First Instance):** what we see on TV (Judge Judy)
 - **Court of Quebec** → where the judges are appointed by Quebec government
 - **Quebec Superior Court** → where judges are appointed by Federal Government
- **Quebec Court of Appeal:** decisions from Court of Quebec and Quebec Superior Court would go here
- **Supreme Court of Canada:** common final appellant court which hears appeals from all court of appeals from all of the provinces in Canada

1) **Trial Court (Court of First Instance)**

a. Characteristics:

- i. Cases are heard by one judge
- ii. In Quebec, Civil law court cases (not criminal) have no trial by jury
- iii. Parties referred to as Plaintiff vs Defendant
- iiii. It takes approx. 4 years for a judgement to be rendered from the date you filed the papers to the court

Division of Authority Between Trial Courts

- **Court of Quebec**

- Judges are appointed by the provincial government
- Claims for an amounts of $\$15000 < x < \85000
 - **Small Claims Court:** a branch of the Court of Quebec
 - Claims are $< \$15000$
 - Plaintiffs must be an individual or a company with < 5 employees
 - There is no Appeal, no lawyers, judge= arbitrator

- **Quebec Superior Court**

- Judges are appointment by Federal Gov't
- Claims for an amount of $> \$85000$

2) **Quebec Court of Appeal**

- Cases are heard by 3 judges and decision by majority not by unanimity
- Appellant (the party who is appealing the Trial Court decision) vs Respondent
 - Appellant can be either Plaintiff or Defendant
- It takes approx. 3 years from the date the Trial Court rendered its judgement
- Appeals heard from both Court of Quebec and Quebec Superior Court
- YOU CANNOT JUST APPEAL IF YOU FEEL LIKE IT
 - 2 factors** to be able to Appeal
 - Grounds of Appeal:** judge made a material error in interpreting the facts or the law
 - Right to Appeal:**
 - Automatic Right of Appeal:** where the object in dispute in the Trial Court is = or $>$ than $\$60000$
 - With Permission** from the Quebec Court of Appeal in all other cases when $< \$60000$

3) **Supreme Court of Canada:** highest court allowed, any decision made here is final.

- Cases heard by 9 judges and decisions rendered by majority not by unanimity
- Appellant (the party who is appealing the Quebec court of Appeal decision) vs Respondent
- It takes approx. 3 years to rendered a decision from the date Quebec Court of Appeal rendered its judgement
 - Special Cases where you can go through the system within a year
- Hears the appeals from Courts of Appeal of all provinces
 - YOU CAN'T JUST APPEAL IF YOU FEEL LIKE IT
 - Grounds of Appeal:** judge made a material error in interpreting the facts or the law
 - Right to Appeal:**
 - In all cases, only permission from the Supreme Court of Canada allowed
 - USUALLY, the Supreme Court of Canada will respect the decisions of the Provincial Courts of Appeal
 - EX:** They may agree to hear cases involving a new law that it has not ruled on before
 - EX:** They may agree to heat cases issues in public order or national importance and those dealing with potential Charter of Human Rights infringements
 - EX:** The amount of money in dispute is **NOT** a relevant factor in deciding whether they will hear your case

Lesson 2-Personal Rights 1/2

INTRODUCTION TO CHARTER OF HUMAN RIGHTS

What is a Charter of Human Rights?

- The goal is to balance the rights of individuals in relation to the rights of society
 - State should not overly control or repress its citizens, citizens cannot just do whatever they want; there needs to be order in place
 - A Charter of Human Rights should therefore promote **reasonable accommodation**
- The Canadian Charter of Rights and Freedoms
 - Federal government has jurisdiction over certain areas
 - EX: Rights of First Nations communities

INTRODUCTION

The Quebec Charter of Human Rights applies to all human beings in Quebec (anyone who resides here)

- The charter covers fundamental freedoms and rights
- There are no Charter protections for corporations (legal persons) or animals (property)

QCHR=**Law of public order**: an individual cannot give up (waive) their rights under the Charter

- EX: cannot waive rights in a contract

JURIDICAL PERSONALITY (S.1)

- Every human has the right to life, and to personal security, inviolability and freedom. He also possesses **Juridical Personality**
- Everybody is recognized by the law and has the same rights and responsibilities

ASSISTANCE (S.2)

- Every human being whose life is in peril has a right to assistance
- Every person must come to aid of anyone whose life is in peril, either personally or by calling for aid unless it involves danger to himself or anyone else around him.
 - EX: Do not need to run into traffic to save someone
- If you aid someone whose **life is in peril**, they can sue you for compensation claiming you gave him additional damage
 - To encourage people to aid others in these situations Quebec came up with:
 - Good Samaritan legislation: to prevent an injured person suing the person coming to his aid, unless the injured person can prove **gross negligence or intentional fault**
 - 3 degrees of fault:
 - 1) **Negligence (Simple Negligence)** → carelessness, didn't act in reasonable fashion
 - 2) **Gross Negligence** → reckless disregard for people around you
 - 3) **Intentional fault** → intentional act

FUNDAMENTAL FREEDOMS (S.3)

Every person is a possessor of the fundamental freedoms including the following:

- Freedom of conscience: beliefs
- Freedom of religion: right to openly practice any religion
- Freedom of opinion
- Freedom of expression
 - Does not give you right to **defame** another person
- Freedom of peaceful assembly: meet in groups
- Freedom of association: associate with anyone you want

- Restrictions: If you get out of prison; can't talk to convicted felons

There are limitations to freedoms:

- You can't exercise your fundamental freedoms in such a way as to unjustly impair the rights of society.

DIGNITY, HONOUR, REPUTATION (S.4)

Everyone has the right to the safeguard of their dignity, honour, and reputation

- Defamation of character: one cannot say, print or distribute information about people that is untrue and will damage their reputation
 - EX: Social media blogging

PRIVATE LIFE (S.5)

Every person has the right to respect for his private life

- How to interpret?
 - **EX:** One may not take a photograph of an identifiable person in a public place and distribute/sell the photograph without the subject person's consent
- What about paparazzi?
 - In Quebec it might be an issue.
 - Celebrities and celebrities are held at diff standards than normal people so they probably notify paparazzi to do that to boost their image.
 - EXCEPTIONS:
 - Parades, public events, sporting events

PROPERTY (S.6)

Every person has the right to the peaceful enjoyment and free disposition of their property to the extent provided by law:

- You can do what you want with your property
- You can own property (house, car), no one can take it without your consent
- EXCEPTIONS:
 - 1) **Expropriation** → gov't must pay fair value
 - 2) **Gun ownership** → you need legal permits to own and can only sell to someone with permits
 - 3) **Zoning** → need legal permission to build, make use of real estate

HOME (S.7)

Nobody can enter your home without your consent (ownership or rent)

- Who can enter home without consent?
 - **Reasonable grounds:** emergency responders (firefighters, police) can enter if they deem it an emergency
 - If they enter without permission and find anything illegal **IN PLAIN SIGHT** they can charge you with a crime (need search warrant to investigate further)

CONFIDENTIAL INFORMATION (S.9)

Every person has the right to the non-disclosure of **confidential information**

- **EX:** medical records, employment records, bank records
- **PURPOSE OF SECTION 9:** to prevent persons in possession of confidential information

- **PURPOSE OF SECTION 9a** to prevent persons in possession of confidential information about you from disclosing your information to others without your consent
- **Third parties can sometimes request confidential information from you in order to assess eligibility**
 - **EX:** Employers, Insurance, Residential Landlords
 - **Law enforcement can request your ID anytime**

PROFESSIONAL SECRECY (S.9)

Professional Secrecy: No person bound to professional secrecy by law may release, even in a court proceeding, confidential information revealed to them by reason of their position or profession, unless the person who confided this information authorizes it or unless an express provision of law authorizes the release

- **EX:** your relationship with your lawyer. IF you cannot tell your lawyer the truth, how can he prepare proper defense for you?
- **EXCEPTIONS:**
 - Hospital/Health care professionals have to report gunshot wounds or suspicious injuries to an infant
 - A judge will stop a witness from divulging confidential information during his testimony

REASONABLE LIMITS (S.9.1)

A person should maintain a proper regard for the democratic values, public order, and general well-being of the citizens of Quebec when exercising their fundamental freedoms and rights

- In this respect, the scope of the freedoms and limits to their exercise may be fixed by law
- **The rights of the individual** are not absolute and an individual cannot exercise his rights in such a fashion as to cause unreasonable inconvenience to the community
- In the same manner, the same applies for the **rights of the community**
- The principle of balancing the rights of the individual with the rights of the community is referred to as a **reasonable accommodation**
 - **Must recognize that individuals live in communities so need to find accommodation so that everyone can live together**

Lesson 3-Personal Rights 2/2

DISCRIMINATION (S.10)

Everyone has the right to full and equal recognition and exercise of their human rights and freedoms without distinction, exclusion or preference based on: race, colour, sex, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap

EX: a guide dog assisting a disabled person can't be forbidden in a restaurant b/c it says no dogs allowed.

- Discrimination exists where such a distinction, exclusion or preferences has the effect of nullifying or impairing such right
 - Closed list: only those factors listed are to be considered
 - EX: do not include weight and height
 - There is no presumption of discrimination so the burden of proof is on you to prove that you have been discriminated against
 - EX: you've been discriminated and accuse the person of doing so. They do not need to prove that they didn't, you need to prove that they did!

HARASSMENT (S.10.1)

Nobody can harass you based on the grounds listed in section 10

EX: Verbal, electronic harassment (emails, blogs)

SIGNS / SYMBOLS / NOTICE (S.11)

Nobody can distribute, publish, or display pictures, signs, or symbols involving discrimination or authorize anyone to do so

EX: the editor of a newspaper—the editor cannot argue that they did not publish or display b/c they didn't write it. But as editor you are authorizing the publication b/c you have approved the publication

EX: graffiti, tags

While one has the freedom to express oneself, one cannot use this freedom to justify discrimination

GOOD AND SERVICE (S.12)

No one, through discrimination, may refuse to make a juridical act (contract) concerning goods and services ordinarily offered to the public

- **EX:** you cannot refuse to serve someone in a store based on the fact that they look “poor” (social condition)
- **EX:** Accepted forms of payment VS the ability to pay
 - If someone uses debit and credit but both bounce, and offers to use a cheque, is refusing this type of payment discrimination? **NO, the person already showed that they have no money in their bank account.**

CONTRACTUAL CLAUSES (S.13)

No one may in a juridical act (a contract) stipulate a clause involving discrimination, such a clause (a paragraph) is deemed without effect

- EX: landlord in lease agreement says you cannot have a baby in the apartment. This clause is invalid (nul) but the rest of the lease remains valid. The clause is deemed to be unwritten

PUBLIC PLACE (S.15)

No one may through discrimination inhibit access of another to public transportation or a public place, such as a commercial establishment, hotel, restaurant, theatre, cinema, park, camping ground or trailer park, or his obtaining the goods and services available there

- You cannot tell a family with kids that you cannot serve them in your restaurant because the kids are loud.
- EX: However, Restaurants can refuse to serve someone for health or safety reasons
 - The person is intoxicated or is very dirty and smells really bad; **NOT BC POOR**
- **ISSUE=Loitering** a shopping center invites the public to come in and shop. A shopping centre is not simply a place where you go to spend the day to stay warm in the winter and cool in the summer
 - Security can tell you to leave b/c you cannot use the facility for your own personal advantages. **NOT DISCRIMINATION**
- **Nuisance:** obligation not to cause undue disturbance to others
 - **EX: movie theatre:**
 - Parents bring young kids to movie theatre and baby starts crying; security can tell you to leave because you're creating a nuisance. **HOWEVER**, they cannot put a sign up that says “NO BABIES”

- **Think about this:**

- **EX:** Must a very large passenger purchase two airline seat tickets? What about a very tall people?
 - Is this discrimination?
 - **Need to look at the closed list**

EMPLOYMENT (S.16, 18.1, 20)

Section 16: No one may practice discrimination in respect of the hiring, apprenticeship, duration of probationary period, vocational training, promotion, transfer, displacement, laying off, suspension, dismissal, or conditions of employment of a person or in the establishment of categories or cases of employment.

- No one may refuse to hire, fire, demote or refuse to promote for discriminatory reasons in S.10.

Section 18.1: No one may in an employment application form or employment interview require a person to give information regarding any ground mentioned in section 10 UNLESS:

- The information is useful for the application of section 20
- Is useful for the implementation of an affirmative action program in existence at the time of the application. An affirmative action program is discussed in section 86 of the Charter and gives a preference to those groups who have been historically discriminated against in the past—especially women and members of visible minorities

Section 20: A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment is deemed non-discriminatory

- Section 10 list: are there any aptitudes listed there that could be considered aptitude required for employment in QC
 - EX: Language? Is the ability to function in French a relevant aptitude required for employment in QC?
 - You can't use language as a distinction when it comes to employment however, under Section 20, if language is relevant as an aptitude required for employment, you CAN MAKE DISTINCTION.
 - In QC this is the case.
- Section 20 also creates exceptions for charitable, religious and non-profit institutions which we will not focus on in this course
- What about being asked for a photograph of yourself for job application?
 - Are they using photos for pre-rejections or filters, or for administrative reasons, like the photos making it easier for recruiters to remember certain people.

EQUAL SALARY (S.19)

Every employer must without discrimination grant equal salary and wages to his personnel who perform equivalent work at the same place

- Why does the law refer to equivalent work as opposed to equal work? Which would be fairer for the employees, equivalent or equal?
 - EX: people working in a call center but all speaking in different languages= Equivalent work not equal work

CRIMINAL RECORD (S.18.2)

No one may dismiss, refuse to hire or otherwise penalize a person in their employment owing to the mere fact that they were convicted of a penal (provincial laws or criminal offence **IF:**

- If the offence was in no way connected with the employment or if the person has received a pardon for the offense
- If you have received a pardon, you are not required to disclose the fact that you have a

previous conviction in a job interview or application. Members of the public, such as employers, will not be able to have access to your criminal record

- If you have received a pardon, you cannot be asked in an employment interview whether you have ever been arrested. Being arrested does not mean that you were ever convicted (pleaded guilty in front of a judge)
- When you sign a job application form there is usually a printed paragraph on same for, which states that you authorize the employers to verify all of the facts and information that you have written on the form. You are therefore authorizing the release of confidential information including a verification of your criminal record.
- Other part of section 18.2 refers to the offence being in **“in no way connected with the employment”** Who determines whether your criminal conviction is in any way connected to your current employment or the job that you are applying for?
 - **EX:** convicted of shoplifting shampoo in a pharmacy. One year later, you apply for a job in retail in shoes. Is the shampoo in any way connected to the shoes? YES
 - **EX:** convicted of shoplifting shampoo in pharmacy, and one year later, you apply to work in a bank. Is the shampoo in any way connected to the job at the bank? YES, b/c it has to do with personality traits, you working with coworkers and customers.

RISK DETERMINATION FACTORS (S.20.1)

In an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis thereof is a risk determination factor based on actuarial data

- EX: Women live longer than men. Young women drivers (under 25 years old) have better driving records than young men in the same age group. Therefore, it is not discriminatory to charge men higher insurance premiums
- In such contracts or plans (insurance and pensions) the use of health as a risk determination factor does not constitute discrimination within the meaning of Section 10
 - EX: For smokers, actuarial data shows that they have a higher risk of getting ill— therefore they will pay higher life and medical insurance premiums than will non-smokers

Special and Interpretative Provisions

- When a complaint has been made with the Quebec Human Rights Commission, the Commission after investigation has the authority to render a decision. Under section 49 of the Charter, any unlawful interference with any rights or freedoms recognized by the Charters entitles the victim to obtain the cessation of the interference (an order to make the violation stop) and compensation for the moral or material prejudice (damages) resulting therefrom

DAMAGES (S.49)

If the Commission finds that you have breached your obligation under the Charter you may be held liable for damages under Section 49.

2 types of damages you can be held liable:

- 1) **Compensation** (S.49 1st paragraph): held liable to compensate for moral (dignity, humiliation) and material (monetary) injury
 - **Punitive Damages** (S.49 2nd paragraph): this is one of the few exceptions in Quebec law where punitive damages are available
 - **Punitive (or Exemplary) damages serve two functions:**

- **A)** Punish the wrongdoer financially and
- **B)** Set an example so that others in the community will not act in the same fashion as did the wrongdoer who was punished

OTHER LAWS (S.52)

No provision of any Act (other Quebec laws) even subsequent to the Charter may derogate from section 1 to 38 except so far as provided by those sections unless such Act expressly states that it applies despite (notwithstanding) the Charter

- The laws of Quebec have to respect the Charter unless the government for Quebec clearly says that a special law applies notwithstanding the Charter
- Remember that a government that passes a law can also repeal it or pass a different law the applies notwithstanding the Charter

INTENT OF CHARTER (S.53)

If any doubt arises in the interpretation of a provision of the Act (another Quebec law) it shall be resolved in keeping the intent of the Charter

- The intent of the Charter is to protect human beings and to balance rights between individuals and society

SECTIONS 54, 55 & 86

binds the State (S.54)

- The charter binds the government. If the Government of Quebec is your employer, then they are bound by the Charter. The government is not exempted from complying with the law

Jurisdiction of Quebec (S.55)

- The Quebec Charter only applies within the boundaries of the Province of Quebec

Affirmative action programs (S.86)

- The goal of an affirmative action program is to improve the situation of persons belonging to groups historically and systematically discriminated against in the past

The Civil Code of Quebec (CCQ): Sections 6 & 7 and 8 & 9

The **Civil Code of Quebec (CCQ)** is a collection of laws that deals with property, ownership and civil rights

- **Introductory provisions of the CCQ: Enjoyment and exercise of civil rights**
 - **Good faith (CCQ S.6) & reasonable manner (CCQ S.7)**
 - Every person is bound to exercise his civil right in **good faith. No right may be exercised with the intent** of injuring another or in an excessive or unreasonable manner and therefore contrary to the requirements of good faith
 - The CCQ creates an obligation to act in good faith
 - Do people always act in good faith? **OBVIOUSLY NO**
 - **Renouncing Rights (CCQ S.8) & Public Order (CCQ S.9)**
 - A person may only renounce the exercise of his civil rights to the extent consistent with public order. In the exercise of civil rights derogation may be made from those rules of this Code which supplement intention but not from those of public order
 - **Public order:** Where a law is deemed in the best interest of society, all parties must respect it and you cannot voluntarily give up your rights under said law
 - Laws of public order protect the weaker party who does not have bargaining power.
 - EX of Quebec laws which are of public order: The Quebec Charter

- EX of Quebec laws which are of public order: The Quebec Charter of Human Right, residential leasing legislation, Consumer Protection Act

Affirmative Action

- A hiring program that provides an advantage to specific groups of persons including women and members of visible minorities, who have historically been disadvantaged in the job market
 - Why should a company adopt an affirmative action program?
 - Ethical duty to help correct historical wrongdoings
 - To ensure that work force better reflects the ethnic and social diversity of the community
 - Promote company's public image
 - Benefit from government incentive programs

Reverse Discrimination

- A possible legal recourse where an affirmative action program has not been properly applied
 - EX: a male candidate sees a less experienced female colleague promoted above him—Is this reverse discrimination?
 - If the female colleague had the required skill set to perform the job and if the employer had a formal affirmative action program in place and properly applied it, then this situation should **not be considered reverse discrimination**. Just b/c the male candidate may have stronger “objective skills and qualifications” does not guarantee him the promotion where the company has an affirmative action program
 - In order for an action of reverse discrimination to succeed you have to show that the company did not properly apply the affirmative action program OR the company did not have affirmative action program in place however applied affirmative action criteria in the hiring process. They applied the affirmative action criteria however, they need to adopt the formal affirmative action program and make the candidates aware that the affirmative action is in place prior to job interviews.

Lesson 4- Personal Rights- CASES

How to Analyze a Court Case

- **Step 1:** Names of the parties
- **Step 2:** Facts of the case → what is going on what happened
- **Step 3:** Legal issues in dispute
- **Step 4:** Position of each party
- **Step 5:** What is the court judgment (decision and reasons)

CASE 1: Commission Scolaire Marguerite Bourgeoys vs. Singh Multani: Quebec CA (SINGH MULTANI)

Step 1-2: Parties and the Facts

- Parties involved: School commission and a boy and his family
- Facts: a 12 year old boy goes to school and a knife falls from his clothing
- Boy was told he cannot bring a knife to school
- The boy said this is a Kirpan, an integral part of his religious heritage

Step 3: Legal issue and position of each party

- **Is the Kirpan a religious artifact that would be protected under the Quebec Charter, or is it a dangerous item that the school can legitimately restrict**
- School says the knife could be used as a dangerous weapon and they have a duty to ensure that the school is a safe place
- Family claims that this is a religious artifact and freedom of religion is protected under section 3 of the Quebec Charter
- School board refused to allow the Kirpan—it is a knife
 - School board proposes that the boy can wear a ceremonial small Kirpan around the neck
- Is it a knife or a religious artifact? Or is it both?
 - It is part of a religious practice (Sikh men wear religious attire that includes the Kirpan)
 - It is also a 20cm steel knife—it cut its way out of the clothing in the first place
 - The boy in question is not a trouble maker
- The wearing of a Kirpan is a recognized religious practice, although not every Sikh man does so
- The exercise of fundamental freedoms does not enjoy absolute protection
- A public organization cannot accept requests or actions that go against public order and the well-being of the community. There is a greater likelihood that the enjoyment of a freedom that contains within it an actual threat to the security of others will rightly be restrained, because it may represent an infringement on the fundamental liberties of others

Step 4: Court judgement

- **The Kirpan is a religious artifact that would be protected under the Quebec Charter, however it is potentially a very dangerous item and therefore may not be worn in school**
- **The Court of Appeal** discusses the earlier judgement of the Superior Court and of the school board
- **Quebec Superior Court** overturned school board ruling—the boy can wear the Kirpan as long as he complies with 6 conditions:
 - 1) Worn under clothing
 - 2) Carried in a sheath of wood not metal
 - 3) Kirpan in sheath, must be wrapped in fabric, worn under the clothing
 - 4) The school is authorized to verify, in a reasonable manner, that the boy complies with the conditions
 - 5) The Kirpan must be in the boy's possession at all times, must report if lost
 - 6) If the boy breaches any of the above conditions, he can no longer bring the Kirpan to school
- **Court of Appeal** decides no Kirpan in school
 - School board's decision was based on removing weapons from school, not based on religious discrimination
 - Wearing Kirpans in courts and on airplanes have already been prohibited by court—a reasonable line must be drawn and an inherently dangerous object is beyond this line
 - **Reasonable accommodation:** section 9.1 of the Quebec Charter, balances the right to religious freedom with the right of the community to keep student's safe
 - **Supreme Court of Canada (SCC)** overturns the Quebec Court of Appeal decision
 - Infringes on the boy's freedom of religion
 - School board acting in good faith
 - The boy acting in good faith

- Other objects more available at school could be used as a weapon especially if Kirpan properly carried as per Superior Court ruling
- Banning the Kirpan sends the incorrect message that some religious practices do not merit the same respect or value as others
- SCC overturns Court of Appeal decision but states that since the boy is now going to a different school, the issue is moot
- SCC states that they would support conditions similar to those proposed by the Quebec Superior Court

CASE 2: B.C. Government and Service Employees' Union v. Government of the Province of B.C (TAWNEY MEIORIN)

Step 1-2: Parties and the Facts

- Parties involved: Tawney Merorinà Female firefighter (forest fires), her union vs. the Government of B.C
- Lost her job after 3 years of service because she failed a fitness test required to run 2.5km in 11 minutes—she ran it in 11 minutes and 49 seconds
- Union filed a discrimination suit on her behalf against the Government of British Columbia

Step 3: Legal Issue

- **Was the aerobic test imposed by the government a Bona Fide Occupational Requirement (BFOR)**
- In order for the employer to be able to fire the employee for failing to pass the fitness test, the employer **MUST** prove that the test is a Bona Fide Occupational Requirement (BFOR)
- To make this proof, the employer must show three things:
 - BFORà Bona Fide Occupational Requirement
 - **1)** The test is rationally connected to the job
 - **2)** The employer adopted the test in good faith and for a legitimate work related purpose
 - **3)** It would not be possible to employ anyone who could not meet these minimum skill sets (could not pass the test) without the employer experiencing undue hardship
 - Puts an onus on the employer to prove that this test is the absolute minimum requirement for someone to safely perform the job, and if they cannot meet it, it would be impossible for us to employ them

Step 4: Court Judgement

- **The aerobic test imposed by the government failed to meet the conditions of a Bona Fide Occupational Requirement (BFOR)**
- **Supreme Court of Canada**à The evidence showed that men and women physically respond differently to aerobic training. Men through practice and repetition(studies show) can improve their aerobic performance greater than women can. Since the test did not analyze the aerobic performance of men and women separately, the test is inherently flawed and cannot be relied upon. She gets her job back because the data was incorrectly collected.
- It is interesting to note that the Court of Appeal of BC commented that allowing Ms. Meiorin (the firefighter) to win her case might create reverse discrimination, setting a lower standard for women than for men, and might discriminate against men who could meet the standards of women but not the standards of men
 - Supreme Court of Canada does not support this argument. Where men and women

perform differently, there should be different tests.

CASE 3: Therrien v. Ministry of Justice (THERRIEN)

Step 1-2: Parties and the Facts

- Parties: Judge Richard Therrien vs. The Government of Quebec
- Therrien, soon after being appointed judge, was dismissed after it was revealed that he had been convicted of a criminal offence relating to the 1970 FLQ October Crisis and served time in jail
 - After release from jail, he went to law school and was admitted to the Quebec Bar to practice law
 - In 1987 he applied for and received a pardon
 - In 1991 and again in 1993, he applied to become a judge of the Court of Quebec
 - Both times when interviewed for this position, he mentioned his pardon and his troubles with the law. In both instances, he was not appointed judge
 - He applied a third time in 1996 and did not mention his criminal past in the appointment interview process
 - He was appointed judge, but as soon as his criminal past came to light, he was dismissed

Step 3: Legal Issue

- **Is a judge who has received a Pardon for past criminal conviction entitled to rely on the Quebec Charter prohibition on termination of employment?**
- Therrien protests being fired: he argues that under section 18.2 of the Quebec Charter states that one cannot be refused a job or fired because of a criminal conviction if one has received a pardon for the offence
 - He therefore claims discrimination under section 18.2 of the Charter

Step 3: Court Judgement

- A judge who has received a Pardon for a past criminal conviction is not entitled to rely on the Quebec Charter prohibition on termination of employment since the position of Judge is an Office and is not considered as Employment
- The Judgement
 - The Supreme Court of Canada ruled that the Judiciary is one of the three branches of the Government. The position of judge is therefore not a Job, but an Office. While the government pays the judges salary, the judge is not an employee of the government and does not take orders from the government
 - **3 Branches:**
 - 1. **Executive Branch**
 - 2. **Legislative Branch**
 - 3. **Judiciary Branch** → responsible to make sure that everyone including the government respects the law
- Section 18.2 of the Charter therefore does not apply to a Judge
- The court furthermore stated that judges are held to a higher standard than ordinary persons, and if a judge appears to have not respected the law, this undermines the public confidence in the court system

CASE 4: Syndicat Northcrest v. Amselem (NORTHCREST)

Step 1-2: Parties and the Facts

- Parties: Moise Amselem and others v. Northcrest Condominium co-owners association
- Succot (Sukkot) is a religious Jewish festival lasting nine days during which time men eat and sleep in outdoor huts called Succahs
- Since the Appellants lived in a condominium complex, they needed to obtain permission from the Condominium co-owners association to build Succahs on their individual balconies
- The Condominium co-owners association refused to allow the Appellants to build Succahs on their balconies

Step 3: Legal Issue

- **Would celebrating Succot and building a Succah, while a recognized Jewish religious practice, unduly prejudice the rights of the condominium owners as a whole**
 - Section 9.1 Question of reasonable accommodation
- Did the Appellants give up their rights to build Succahs by signing the co-ownership agreement that gave the decision power over the use of exterior spaces to the condominium association

Step 4: Court Judgment

- The construction of Succahs by several families would unreasonably injure the rights of the condominium owners as a whole
- The Judgement
 - Quebec Superior Court: rules no Succahs can be built on the balconies
 - Quebec Court of Appeal: no Succahs can be built on the balconies
 - Supreme Court of Canada: this case deals with freedom of religion. The court must balance the rights of the Appellant under section 3 of the Charter, with the rights of the condominium owners as a group under section 6 of the Charter. This is an application of the principle of reasonable accommodation as set out in section 9.1 of the Charter
 - Is there proof that building a Succah would lower the value of the condominium building? No such proof was made by the condo association
 - **Supreme Court:** the potential annoyance of a few Succahs for nine days a year is trivial especially if they are built in a way not to block doors, windows, and fire escapes.
- **Majority decision (5 of 9 judges):** The building of a succah is a religious practice under section 3 of the Charter. Under section 9.1 of the Charter no proof has been made to show that building Succahs will unduly prejudice the rights of larger community (all condo owners as a whole)
- **Minority decision (4 of 9 judges):**
 - Condo association said they can build communal Succah in parking lot, which is reasonable and would respect section 3 of the Charter
 - By signing the co-ownership agreement, the Appellants gave up their rights to build Succahs on their balconies

CASE 5: R. v. Kapp (KAPP)

Step 1-2: Parties and the Facts

- Parties: Non-native B.C salmon fishers v. The Government of Canada
- The rights of members of First Nation Communities to fish for food for their own consumption is entrenched in law
- The Federal Government is actively promoting the principle that members of First Nation Communities should have a stake in the commercial fishery market since Native

- Communities have historically been economically disadvantaged
- To promote participation of First Nation Communities in the commercial fishery market, Government of B.C granted Native fishers 24hr exclusive right to fish in the Fraser river estuary at the beginning of the salmon season
- Non-native fishers were unhappy with what they felt was an unfair advantage given to native fishers. The non-native fishers protested by fishing during the restricted, Native-only, fishing period. The non-native fishers were arrested and charged with breaking the law

Step 3: Legal Issue

- Does granting special fishing rights to aboriginal persons constitute reverse discrimination against non-aboriginal fishers**
- Non-Native fishers claim reverse discrimination against them based on race
- First Nation matters fall under the authority of the Federal Government of Canada, so the Canadian Charter applies
 - Section 15 (subsection 1) of the Canadian Charter prohibits discrimination on grounds similar to those mentioned in section 10 of the Quebec Charter
 - Section 15 (subsection 2) of the Canadian Charter however state that subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability
 - Therefore, not all distinctions are discriminatory—An affirmative actions program will inevitably lead to a perceived disadvantage for a majority group
 - The government can therefore adopt a program that provides an advantage to a specific disadvantaged group of persons, based on race or ethnicity, without this program being considered reverse discrimination

Step 4: Court Judgement

- Granting special fishing rights to aboriginal persons does not constitute reverse discrimination against non-aboriginal fishers**
- Court of Appeal of BC:** held non-natives were in breach—legitimate affirmative action program
- Supreme Court of Canada:** legitimate affirmative action program—since the government was able to prove that the special Native fishing program falls properly under section 15 (subsection 2) of the Canadian Charter, the court will not recognize the claim of non-native fishers for reverse discrimination

Lesson 5- Principle of Contract Law

INTRODUCTION TO CONTRACTS

What is a Contract?

- An agreement of wills CCQ 1378:
 - A binding agreement between two or more parties (**individuals and or corporations**) to perform an undertaking
- Law presumes that both parties will act in **Good faith CCQ 1375:**
 - Parties are required to perform their contractual obligations in good faith
 - People do not always respect their contractual undertakings
 - So law provides mechanism for **Breach of contract CCQ 1458**
- Contracts can be (CCQ 1381):**
 - 1. Onerous**→ both parties have an obligation
 - 2. Gratuitous**→ only one party has an obligation (giving a gift)

- **4. Gratuitous** only one party has an obligation (giving a gift)
- Instantaneous vs. Successive performance (CCQ 1383):
 - **Instantaneous:** the obligations of both parties can be carried out immediately (contract of sales)
 - **EX:** If you want to buy something, you can pay the price and receive the item at the same time
 - **Successive performance:** the obligations of both parties are carried out over time (lease—even if you pay 12 months’ rent up front you still have ongoing obligations to take care of apartment/car until the end of the lease)
 - **EX:** your obligation to take care of apartment and maintain it. You can pay 12 months’ worth of rent however, those other obligations cannot be done right away, only over time.
- Are contracts Oral vs. Written?
 - **Oral Contracts** → contracts are enforceable but more difficult to prove
 - Oral evidence not always sufficient
 - Valid in non-commercial situations
 - **Written Contracts** → contracts are enforceable and easy to prove
 - Certain contracts must be in writing (public order—residential lease, real estate deeds, mortgages)

FORMATION OF CONTRACTS

Essential Elements CCQ 1388

- Essential elements: to have a valid contract, the parties must agree on the essential elements of the contract
 - **EX: Contract of sale** has 2 essential elements: item and price
 - **EX: Lease contract** has 3 essential elements: item (car/apartment), term (duration), price (rental)
 - Therefore, for an offer to be valid, the **Offeror** (the person making the offer) must state all of the essential elements in the offer. The person to whom the offer is made is known as the **Offeree**
- Offer can be **Determinate or Indeterminate (CCQ 1390)**
 - **Determinate:** offer directed to a specific person
 - **Indeterminate:** an offer to the public at large
 - **EXCEPTION:** Invitation to treat (EX: Kijiji advertisement for sale)
 - **EX:** An advertisement placed by a cat owner on Kijiji or in a local newspaper stating that he/she has a cat for sale, is not considering an offer to sell, but rather it is considered a notice that the cat owner is interested in receiving offers from 3rd parties to buy his/her cat
 - **EX:** Professional sellers however, under the Consumer Protection Act, must indicate “while supplies last” and also must have a reasonable quantity of merchandise on hand when they advertise a sale
- An offer can be made with a **Term (CCQ 1390)**
 - **Term CCQ 1390:** the period of time during which the offer is available for acceptance
 - If not term is stipulated, you can withdraw your offer at any time prior to acceptance
 - **Lapses CCQ 1392:** When the term expires, the offer lapses
 - If not term is stipulated, after a reasonable amount of time the offer will lapse
 - **EX:** If I offer to buy your blue book for 2\$ and you do not accept and

3 hours later you come and say you accept my offer; reasonable amount of time has lapsed.

- If an offer is refused, it will lapse

Acceptance

- **Acceptance can be expressed or tacit (CCQ 1386)**
 - **Express:** a clear verbal response of Yes, or by signing a written contract
 - **Tacit:** a demonstration of your acceptance through your actions when you do not say anything and do not sign anything
 - **EX:** holding your hand out to receive an item or payment
- **Where acceptance occurs CCQ 1387:**
 - If the Offeror is in one city (Montreal) and the Offeree is in another city (Toronto), the contract is formed when and where the Offeror receives notice of acceptance (Montreal)
- **Counter offer CCQ 1393:** Refusing initial offer by making a new offer
 - Original offer is no longer open for acceptance once a counteroffer has been made
- **Silence CCQ 1394:** Deemed to mean NO
 - Silence on its own with no positive action does not equal tacit acceptance of an offer

VALIDITY OF A CONTRACT

In order to have a valid contract, Four Elements (CCQ 1385) need to be proven:

- **1. Capacity CQQ 1398:** you are allowed by law to enter into a contract on your own behalf, unassisted
 - Age of majority (18 years +), if under 18 years old you need a parent/guardian to co-sign with the minor
 - Over 18 years but are a **protected person** of full age (the person is subject to a court judgment requiring a tutor or a curator to assist him/her in certain transactions), cannot contract alone.
- **2. Cause CCQ 1411:** A contract must have a valid cause—the underlying reason for entering into the contract cannot be illegal or against public order
- **3. Object CCQ 1413:** A contract requires a valid object—the goods/services cannot be illegal or against public order
 - **If contract is illegal, it will not be enforced in court.**
 - **EX:** a contract to purchase stolen goods, and you do not pay for the contract, the person who sold you the goods cannot bring you to court
- **4. Consent CCQ 1399:** Consent' must be free and enlightened (you must understand the material facts regarding the contract and you must voluntarily want to enter into the contract), your consent may be vitiated (rendered null) by error, fear, or lesion

Error CCQ 1400

- **Error:** there are two types of error, excusable and inexcusable
 - **1. Excusable error:** (Honest) both parties in good faith, a mistake
 - **EX:** you purchase a silver necklace at a jewelry store but when you opened the box the necklace says its plated silver and not silver. This is an excusable error by the store so you can get your money back.
 - **2. Inexcusable error:** Honest error but court feels that your actions are

- **4. Inexcusable error:** Honest error but court feels that your actions are unreasonable/inexcusable
 - You, as a reasonable person, should have known better
 - You cannot annul a contract because of inexcusable error
 - EX: you go to a souvenir store and buy a statue that looks like an authentic Inuit statue that can be sold for 100ths of dollars, however, when you get home you see that it's made in China and not authentic. This is an inexcusable error; you cannot get your money back.

Fraud CCQ 1401

- **Fraud:** Error on the part of Party A induced by fraud committed by Party B (or with Party B's knowledge) vitiates consent whenever but for the error Party A would not have contracted or would have contracted on different terms
 - **Fraud (Misrepresentation):**
 - 1. Intentionally mislead (lie)
 - 2. Conceal information
 - 3. Silence (do not correct any misconceptions of the innocent party)
 - **EX:** selling you a car but I fail to tell you that car had a huge accident but I do not mention it because you didn't ask
 - Fraud allows you to nullify a contract but the burden of proving fraud is on you (victim of the fraud)—so remember, buyer beware

Consent may be vitiated due to Fear CCQ 1402 and 1403

- **Fear:** Fear of serious injury to the person or property of one of the parties vitiates consent given by that party where the fear is induced by violence or threat. Fear may also be induced by the abusive exercise of a right or power over someone
 - **EX:** employer says "do it or I will fire you"
- Fear of serious injury to a third party or to third party's property may also constitute fear under CCQ 1402, depending on the circumstances
 - **EX:** Someone comes to you and says sell me your car for 1000 or ill break the legs of your neighbor

Lesion CCQ 1405, CCQ 1406

- **Lesion:** Resources is only available for minors or protected persons of full age when they act without proper representation (parent/tutor). They can claim lesion to nullify a contract
 - **1. Serious disproportion between prestations:** Where there is a serious disproportion (in value) between what you received and what you paid
 - **EX:** you buy a car for 5000\$ worth 200
 - **2. Patrimonial situation:** No experience or understanding of the true costs associated with the transaction. In reality the purchaser cannot afford the transaction
 - **EX:** Teen buying a used car and does not understand the extra costs involved besides simply buying the car itself (fuel, insurance, registration plates, parking, repairs, etc.)

Invalid Consent CCQ 1407

- **Invalid consent:** Contract can be annulled if you can prove error, fraud, fear, or lesion
 - Compensatory damages (CCQ 1458) awarded in cases of fraud, fear or lesion if proof of loss can be shown
 - No damages available in case of Excusable error because there is no bad faith
 - No action in nullity in the case of Inexcusable error

NULLITY VS. CANCELLATION

- **Contract that is null CCQ 1422:** deemed never to have existed, retroactively dissolved as of the date that the contract was originally formed
 - Give back what you received and get back what you paid
- **Cancellation:** contract is valid up to a specified date after which the contract is no longer valid
 - Contract was valid for the past, but ceases to be valid as and from the date of cancellation

SPECIAL RULES

Adhesion Contract CCQ 1379

- **Adhesion contract:** A contract in which the essential stipulations are imposed or drawn up by one party and are non-negotiable
 - Standard form contract where one party has no bargaining power
 - Strong party imposes contract on the weaker party (take it or leave it)
 - **EX:** employment contract where employer has strong bargaining power and employee has weak bargaining power
- If contract isn't an Adhesion contract, it is considered a **Contract by mutual agreement:** both parties have some power to negotiate and agree upon acceptable terms

Consumer Contract CCQ 1384

- **Consumer contract:** a human being buys something for personal/domestic use from a professional seller
 - The professional seller is considered the strong party

Interpretation CCQ 1432 of Contracts

- **Interpretation:** courts recognize that the weaker party may have signed the contract without having any power to modify the terms and conditions. Just because you signed a contract does not necessarily mean that you really agreed to it
- In a **case of doubt**, the contract is interpreted in favor of the person who contracted the obligation (weaker party) and against the person who stipulated the obligation (stronger party)
 - In all cases it is interpreted in favor of the adhering party or the consumer
 - The law is making special provisions with regards to Adhesion and Consumer contracts
- It is important to remember that the stronger party has the knowledge, resources, money, and wrote the contract. If the contract is not clear, is vague or incomplete, then the stronger party is presumed to be responsible. The stronger party should have taken more care in drafting the contract

Illegible CCQ 1436

Sometimes a clause in a contract is **Illegible (CCQ 1436)**

- **Illegible:** in a consumer contract or a contract of adhesion, a clause that is illegible or

incomprehensible to a reasonable person (does not make sense) is null if it is detrimental to the consumer or adhering party (weaker party suffers injury therefrom)

- The contract will be interpreted in favor of the weaker party, unless the stronger party knows that the clause is illegible or incomprehensible and can prove that they explained the clause to the weaker party
 - **EX:** Words cannot be read because font is too small, or are illegible handwritten changes
 - **EX:** Illogical language, contracts pieced together from online samples
- Loss will be taken from stronger party because they had responsibility and power to make a good contract

Abusive CCQ 1437

- **Abusive:** An abusive clause in a consumer contract or a n Adhesion contract is null, or the obligation arising from it may be reduced
- An abusive clause is a clause that is excessively or unreasonably detrimental to the consumer or the adhering party, and so deviates from the obligations arising from the rules normally governing the contract, that it changes the nature of the contract
 - **An abusive clause:**
 - 1. Deviates from norms of the industry
 - 2. Deemed to be in good faith

BREACH OF CONTRACT

Breach of Contract CCQ 1590

- While CCQ 1375 states that one shall perform one's contractual obligations in good faith, this is not always the case and the law provides recourses for breach of contract and damages
- **Breach of contract:** one party did not perform his/her contractual obligations
 - **Recourses for breach of contract:**
 - 1. Performance by equivalence CCQ 1602
 - 2. Specific performance CCQ 1601
 - 3. Resolution (nullity) CCQ 1606
 - 4. Resiliation (cancelation) CCQ 1606
 - 5. Reduction of obligations
 - 6. Other measures
 - **1. Performance by equivalence CCQ 1602:** find a third party to perform the contract and sue breaching party for difference of cost
 - EX: you hired Contractor A to paint your house for \$2000. Contractor A refuses to do the job so you hire Contractor B to paint your house for \$2300. You can sue Contractor A for the difference in price, \$300.
 - **2. Specific performance CCQ 1601: injunction (a court order)** to do, to stop, to prevent — court order
 - **To do**
 - **EX:** You force a seller to sell you real estate. They refuse to go through with the sale so you take an injunction to force the sale.
 - **To stop**
 - **EX:** You take an injunction against a former employee to stop them from using confidential information that they took from your company when they left
 - **To prevent**

- **EX:** You take an injunction against a former employee to stop them from using confidential information that they took from your company when they left
 - You can prove that they took it, but they haven't started to use it yet. So you ask for injunction to prevent them from using it.
 - Two steps involved in Injunction:
 - **1. Interlocutory (temporary) injunction:** issued when legal action is first taken
 - **2. Permanent injunction:** rendered as part of the final judgment of trial court
- **3. Resolution (nullity) CCQ 1606:** ask the court to nullify the contract
- **4. Resiliation (cancelation) CCQ 1606:** ask the court to cancel the contract at a specific date
- **5. Reduction of obligation:** if contract was only partially performed request an appropriate reduction of payment price
 - EX: you order 200 pairs of shoes and vendor only delivered half. Clearly you only want to pay for a portion of contract price. You will want to cancel remainder of contract. You'll pay for what you received.
- **6. Other measures**
 - EX: Seizures before judgment to preserve assets
 - EX: You sold assets or goods, they have not been paid for yet, and you want to sue the person or party you sold them to but you have concerns that the other party will try to hide assets or move money out of the country.

DAMAGES

Contractual Damages

- **Contractual Damages:** In addition to your recourse under CCQ 1590, you can also claim damages under CCQ 1458
 - **CCQ 1458:** Whenever there is a breach of contract (CCQ 1590) you can sue for compensatory damages
 - **Compensation:** provides compensation for actual bodily, moral and material losses
 - **CCQ 1607:** damages claimed must be immediate consequence of the debtor's fault (breach of contract)
 - **CCQ 1611:** damages must relate to creditor's actual loss (including lost profits if there is proof), future damages can only be claimed if they are a result of a current injury (future expenses relating to a serious physical injury suffered)
- **Punitive Damages (if specific law allows) CCQ 1621:** are only available in Quebec law where a specific statute (Law) expressly authorizes punitive damages
 - Punitive damages are not a general recourse available to all creditors in all situations of abuse or bad faith
 - **EX of laws that expressly provide punitive damages:**
 - Quebec Charter, Consumer Protection Act, psychological harassment under the LSA
 - Punitive damages are also known as **Exemplary damages**
 - **Purpose of punitive damages:**

- 1. Punish the person who committed the act
- 2. Prevent others from doing the same (exemplary function)
- Punitive damages unlike compensatory damages are not calculated based on the actual damage that the actual victim has suffered
 - **Calculation of punitive damages:** punitive damages are assessed in light of all appropriate circumstances including:
 - The gravity of the debtor’s fault
 - Debtor’s patrimonial situation (how much money does he have?)
 - How much compensatory damages has the debtor been required to pay
 - Has a third party paid this compensation (insurance company)?—if so, the debtor will have suffered little financial hardship

Penal Clause

- **Penal clause (also known as Liquidated damages clause, or Penalty clause) CCQ 1622:** parties to a contract agree in writing in advance as to what quantum of damages will be incurred in the event of breach of contract
 - EX: Construction contract with a fixed date of completion. **Clause:** “If the contractor does not finish on the contractor will be liable to pay \$X per day until the job is completed
- **CCQ 1623:** As a general rule, the creditor is entitled to sue on the penal clause without having to actually prove that he suffered the amount of damage stipulated in the penal clause. A judge does however have some discretion when there has been partial benefit received by the creditor and the judge can reduce penalty clause accordingly
 - **EX:** There is a contract to build a house with a fixed delivery/move-in date. The house is ready for occupancy by owner on the date stipulated in the contract. The driveway however and some of the grass lawn has not been finished. If there is a penal clause, the contractor could undoubtedly argue under CCQ 1623 that the owner can move in and live in the house with little impediment. For this reason, the contractor would ask that the penal clause be reduced

Lesson 6- Principles of Contract Law Cases

CASE 1: GIROUX V. MALIK

Step 1-2: Parties and the Facts

- Parties: Mr. and Mrs. Giroux (buyers) and Mr. Malik (seller)
- The Facts:
 - Mr. and Mrs. Giroux want to buy a piece of land on which to build a home
 - Bought a residential building lot on the Island of Laval
 - No lawyer or notary involved to help them with purchase
 - Mr. Malik, the seller of the lot, claims he had not built on it because his family was now grown up
 - Giroux hired an architect to draw up plans for new home
 - Giroux sold his existing home
 - Giroux went to Laval city office for building permit—found out land was actually a landfill, not connected to city pipes for sewage, septic tank construction was therefore very difficult and the city would not give him a building permit

Step 3: Legal Issues

- Fraud (misrepresentation): Failure to disclose problems with lot, Malik remained silent about issues relating to building on the land
 - Third time Malik had attempted to sell land
 - Malik had previously tried to build on land himself therefore he knew about sewage problems
 - Buyers (Giroux) did not ask, but should have been told by seller about the inability to build on land
- Vendor must disclose all known problems concerning the property to potential buyers
- **FYI:** to be safe, buyers of real estate should always have a notary check the zonage of the lot and research the history of the property with the city, prior to agreeing to buy

Step 4: Court Judgment

- Malik committed fraud of omission: CCQ section 1401, the sale was annulled for fraud CCQ section 1407
- Giroux got their money back \$45 000 (refund of the purchase price) plus \$10 000 in compensatory damages
- Got to trial within the year—a special rule for a case that the court rules as urgent (Giroux had no money or home)
- Trial judge also made exceptional ruling that defendant Malik must pay judgment now, notwithstanding appeal

CASE 2: PETER V. FIASCHE

Step 1-2: Parties and the Facts

- Mrs. Peter's husband lost his job so family was looking for a new business/job for him
- Fiasche, their trusted friend, suggested that they buy a franchise of his business operation —“Chez Gino Smokey's”
 - Fiasche offered to train them in his existing store and then sell this store to them. The Peters would in fact be buying the shares of the existing tenant company from Fiasche
 - Financial records for the store show an annual deficit of \$6000 but Fiasche told them that he has a secret system: putting about \$100 000 cash tax-free into his pocket annually
- Fiasche wants to sell franchise for \$250 000, Peters offer \$200 000—Fiasche accepts their offer
 - Peters mortgage their house and brother's house for \$135 000 to raise capital to buy the franchised restaurant
- Fiasche has his lawyer draft all of the contracts governing the sale and franchise relationship
 - Peters find a lawyer but the lawyer is going on vacation. They tell Fiasche that they want to wait until the lawyer is back—Fiasche says no, it's now or never and he demands a \$100 000 cash deposit immediately. Peters pay the money without consulting their lawyer
 - Since Peters have already paid the money to Fiasche they have no bargaining power when it came time to sign the franchise agreements
- Peters open for business but sales are very low (even lower than the officially reported sales shown them by Fiasche for the previous year)
 - Peters realize that they can buy raw materials cheaper from a local grocery store than the price Fiasche was charging them
 - Peters have great difficulty in getting in touch with Fiasche

- Peters notice a lady snooping around the store—Fiasche says she was simply checking weight scale calibration—but in reality she was an investigator from Revenue Quebec, investigating Fiasche and his companies for suspected tax fraud
 - 10 months after buying the business, Revenue Quebec seizes and closes the restaurant for unpaid taxes dating back 3 years
 - Peters have lost the business and have lost their purchase price

Step 3: Legal Issues

- Peters had no prior business experience, trusted and respected Fiasche
 - Claim Fiasche fraudulently misrepresented the business to them
- Judges says Fiasche appears to have explained the tax scheme to Peters, and no evidence of actual fraud was proven by Peters
 - Peters were voluntary participants in the tax scheme. If in fact the Peters acted on error—it was an inexcusable error—Peters understood that the only way to make money was to defraud the government

Step 4: Court Judgment

- It took 8 years to get to trial (Creating an abnormally long delay is often a strategy used by the stronger party to discourage the weaker party from continuing the court case)
- Judge says there is no fraud—Peters admitted that they knew about the tax fraud scheme
 - Inexcusable error
 - However even though fraud could not be proven, the judge ruled that the Cause of the contract was illicit CCQ 1411
 - Since the only way that this contract could make economic sense was to defraud the government the reason and motivation behind the contract was contrary to the law, therefor the Cause of the contract is illicit and against public order
- Judge nullifies contract based on **ABSENSE OF CAUSE not based on Fraud**
 - Each party must return what they received (CCQ 1422)
 - But Peters could not return the restaurant since it had been taken by the government in seizure 8 years before
 - Judge rules Peters do not have to return the restaurant since Fiasche had bought the restaurant at the Revenue Quebec auction 8 years before
 - FYI: nullify under CCQ 1422 does not allow the plaintiff to claim compensatory damages, it only allows for the refund of the purchase price (the return of what you paid)

CASE 3: RICHARD V. TIME INC.

Step 1-2: Parties and the Facts

- In 1999, Richard receives a notice in the mail that said he won a large cash prize
 - It was in fact only an advertisement to encourage people to enter a contest by purchasing a subscription to Time Magazine
- Richard subscribed and waited for the money (over \$800 000 USD to arrive)
 - Called Time Inc. in NYC about the prize
 - Richard was told by Time Inc. that the letter was just an advertisement

Step 3: Legal Issues

- Richard claims that the letter was false advertising and sues Time Inc. under the Quebec Consumer Protection Act (CPA)
- Was the letter simply an invitation to participate in a contest or was it misrepresentation?

- Under the CPA, s.272, the awarding of punitive damages are allowed in the even that a merchant breaches his fundamental obligations under this law including
 - Consumer Protection Act s.219: no merchant, manufacturer, or advertiser may, by any means whatsoever, make false or misleading representations to a consumer
 - Consumer Protection Act s.228: no merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer

Step 4: Court Judgment

- **FYI:** it took 12 years for this case to get to the Supreme Court of Canada (1999 to 2012)
- **Trial court judgment:** awarded Richard \$100 000 in punitive damages
- **Court of Appeal judgment:** \$0 to be awarded to Richard
- **Supreme Court of Canada:** \$1000 in compensatory damages plus \$15 000 in punitive damages awarded
 - Punitive damages awarded under CPA for false advertising
 - Time Inc. knowingly misled consumers and did not attempt to correct mistake
 - The document mailed to consumers conveyed the general impression that the consumer had won a prize and the document was riddled with misleading representations

CASE 4: COPISCOPE INC. V. TRM COPY CENTERS (CANADA) LTD.

Step 1-2: Parties and the Facts

- Copiscope and TRM are two photocopy machine providers
- TRM representatives make contracts with convenience stores to place machines in the stores, and share revenue with the store operators
- Copiscope representatives went to at least 21 convenience stores that already had TRM machines and offered the stores a better deal to switch to Copiscope machines
- Under their contract with TRM, TRM customers had the right to cancel the contract but there was a non-competition clause: if contract is cancelled, the store that had a TRM machine is not allowed to have another copy machine in that store or in any other store that they are directly or indirectly involved in within a 5000 km² (25-mile radius) area surrounding the existing store
- Copiscope drew up documents to give notice of cancellation to TRM on behalf of stores that switched to Copiscope

Step 3: Legal Issues

- TRM applies for injunction against Copiscope: induced their clients to breach their non-competition clause
 - Injunction is a court order and at court's discretion
- Copiscope claims non-competition clause is invalid
- Is this a contract of adhesion?
- TRM has the burden of proof to convince the court that the non-competition clause is reasonable and therefore enforceable

Step 4: Court Judgment

- Courts finds non-competition clause in TRM contract with convenience store to be unenforceable and therefore refuses to grant injunction against Copiscope
 - Non-competition clause is unenforceable because it too unreasonable and broad in area and there is no unique business model
 - Court makes an important statement to the effect that non-competition clauses are

generally considered against public order and therefore courts are unwilling to enforce them

Lesson 7- Mandate

INTRODUCTION TO MANDATE

What is a Mandate? (CCQ s.2130)

- A mandate is a contract of representation
 - The mandator (principle) enters into a contract with the mandatory (agent) pursuant to which the mandatory agrees to represent the mandator in the performance of a contract (juridical act) with a third party. Mandates can be oral or written
 - The mandatory has the power to bind the mandator to the contract that has the mandatory negotiates
 - FYI: real estate “agents” are not agents (mandatories) in the true sense. They are brokers who mediate and assist the parties in negotiations
- **Witten mandate:** called a power of attorney
 - **EX:** an adult child represents an ageing parent
- Mandate is a contract. To have a valid contract you have to have:
 - **Acceptance (CCQ s.2132):** acceptance of a mandate may be express or tacit
 - **1. Express:** mandatory says “yes” (oral mandate) or signs the written mandate
 - **2. Tacit:** acceptance is indicated through the actions of the mandatory
 - **EX:** you ask somebody to represent you as mandatory. Please sell my dog for at least 200\$ and I'll pay you 10% of sale price. Mandatory doesn't say anything and there is no written document to sign but the mandatory reaches out takes the dog from you and walks away.
 - Can be an indication of tacit acceptance however, maybe a month later when you acquire with mandatory and asks if you sold his dog. You say no you gave me your dog before you left town.
- Mandates can be:
 - **Gratuitous or onerous (CCQ s.2133):** a mandate can be either **gratuitous** (perform the mandate without payment) or **onerous** (get paid to perform the mandate)
- How much are you getting paid?
 - **Remuneration (CCQ s.2134):** if a mandate is onerous then the sum payable to the mandatory should be stipulated in the written mandate

DUTIES OF AN AGENT

- The mandatory has a:
 - **Fiduciary duty of mandatory (agent):** agent is bound to fulfill the mandate that he has accepted and he shall act with prudence and diligence in performing the mandate. Agent shall also act honestly and faithfully, in the best interest of the principle (mandator)
- The mandatory also has a duty to:
 - **Inform principle of the status of the mandate:** the agent must inform the principle as to the progress of the mandate. As soon as the mandate is completed, the agent must diligently advise the principle to this effect.

- **EX:** If you the mandatory have to sell a car for the mandatory and receive \$10000, you cannot use the money on behalf of the mandatory. You need to remit the money back to the mandatory as quickly as possible.
- The mandatory as a general rule is allowed to:
 - **Delegation (CCQ s.2142):** agent can **delegate** the performance of the mandate to a “sub-agent” unless delegation is expressly prohibited in a contract of mandate, but if the sub-agent causes loss/damage, the original agent remains liable
 - A risk for a mandatory is if you delegate the mandate to a sub-agent and the sub-agent makes a mistake, you are liable for damages performed.
 - FYI: if mandatory (agent) gets the approval of the mandatory (principle) to TRANSFER the mandate to a new mandatory, then the original mandatory would not be liable for damages caused by the new mandatory. A transfer is different from appointing a sub-agent.

Double Mandate (CCQ s.2143)

- **Double mandate:** an agent who represent two mandators (two different interests in the same transaction)
 - Agent must get the consent of both principles in order to act as a double agent. Pursuant to **CCQ 2138**, the agent must act in the best interest of the principle. If an agent has 2 principles with conflicting interests, it is not possible to act in the best interest of both principles at the same time. Therefore, the agent needs to get the consent of both principles to act as a double agent
 - **EX:** Principle A hires you to sell his car for at least \$5000 in return for which he will pay you, the agent, 10% of the sale price. You are then approached by Principle B who is looking to buy a good used car and who is prepared to spend a maximum of \$5000. Principle B tells you that if you can find her a good used car, she will pay you \$100 as commission. You cannot simply sell Principle A’s car to Principle B, and get paid by both, unless both Principle A and Principle B agree.
 - You CANNOT simply take the car belonging to Principle A and sell to Principle B and get paid by both parties without consent by both. You won’t be acting in best interests of both parties. Principle A wants to sell the car as much as possible over \$5000 and Principle B wants to get a good deal and will not spend more than \$5000. If you sell the car you will be violating the best interests of both parties therefore, you have to get prior approval by both, preferably in writing.

Confidential Information (CCQ s.2146)

- **Confidential information:** The mandatory may not use for his benefit any information he obtains or any property he is charged with receiving or administering in the performance of his mandate unless the mandatory consents to such use or such use arises from the law or the mandate
 - If mandatory uses property or information belonging to the mandatory, for mandatory’s personal profits, without mandator’s consent, mandatory is liable to turn over all profits made and pay all damages that mandatory may suffer from said actions
 - EX: mandatory is hired to purchase real estate on behalf of the mandatory, for future development by mandatory. Mandatory realizes that the surrounding real estate will go up in value once the mandatory undertakes his development project, so mandatory, without the knowledge of the mandatory, buys some real estate for himself next to the land that the mandatory buys for the mandator. Under CCQ 2146, this personal purchase of land by the mandatory (whether done directly or indirectly) is prohibited unless the mandatory agrees.

Party to Act (CCQ s.2147)

- Party to act: where the mandatary is engaged to sell an item for the mandator, if the mandatary wishes to personally purchase same, the mandatary must prove that he has advised the mandator to this effect. A mandatary cannot “secretly” (directly or indirectly) purchases an item that he has been engaged to sell.
 - EX: A mandator owns a very antique car and asks the mandatary to sell the car. He asks for the mandator for \$10000 for the old Porsche and that he would give 10% to mandatary. However, the mandatary knows the car is worth \$30000. So if the mandatary respects his fiduciary duties, he would tell the mandator that its worth that and will sell it for that much. However, if he is greedy, he can try and screw the mandator over and tell his friend to purchase the car for \$10000, collect the commission and then sell the car for \$30000 dollars on KIJJI and split the profits.
 - If the mandatary breaches CCQ 2147, **ONLY the mandator** (principle) can nullify the transaction. The mandator can also sue the mandatary for damages
 - Why would the mandatary want to nullify the contract?
 - If the cars didn’t have the right engine and the car was actually worth \$10000, the mandatary through his haste, bought the car for \$10000 in hopes to resell it and make a profit. However, it isn’t worth \$30000 so he spent 10000 for no reason.

DUTIES OF A MANDATOR

Cooperation (CCQ s.2149)

- The mandator under s.2149 of the Civil Code of Quebec has an obligation of cooperating
 - Cooperation: Mandator must cooperate with mandatary
 - Mandator should answer relevant questions and provide pertinent information to the mandatary
 - EX: Mandatary is trying to sell a car for the Mandator. A potential buyer might ask if the mandator is the original owner or if it has suffered a serious accident.
 - **Does not include telling the mandatary how to sell the car.**

Ratification by Mandator (CCQ s.2152)

- Mandatary exceeding (breaching) mandate: where the mandatary acts outside of the scope of the mandate (exceed his authority) then the mandatary will be personally liable for this breach
 - EX: Mandatary has to sell the Mandator’s car for \$5000 but sells the item below the price stipulated at \$4000. The Mandatary will be personally liable for that excess.
 - If the mandatary was to sell an item higher than the safe price stipulated in the mandate, would this also be considered exceeding the mandate?
 - If you do exceed the mandate to the benefit of the mandator, there is no need for the mandator to approve that error after the fact because the law says the mandator is deemed to approve that excess.

Ratification (CCQ s.2152, 2153)

- **Ratification:** Mandator can ratify (approve after the fact) errors made by mandatary in the performance of the mandate.
 - **EX:** Mandatary sells items for a price below the minimum price stipulated in the

mandate. When mandatory later tells mandator, the mandator accepts mandatory's judgment call and approves the breach of mandate after the fact.

- **What should mandatory have done in the above circumstances?**

Mandatory should have contacted the mandator prior to selling the item below minimum price and obtained mandator's prior approval to sell at a reduced price. This approval would constitute a modification of the terms of the mandate and the mandatory could then sell at the lower price without breaching the mandate.

LIABILITY

Liability of Mandator (CCQ s.2160)

- The mandator is liable directly to the third party where the mandatory has acted within the limits of the mandate.
 - Where the mandator engages the mandatory to sell the mandator's car for a certain minimum price and the mandatory performs the mandate correctly, then the contract of sale is deemed to have been formed between the mandator and the third party buyer of the car. The mandatory has no personal liability
- The mandator is also liable to the third party where the mandatory has exceeded his mandate and the mandator has ratified said excess.

Liability of Mandatory (CCQ s.2157, 2158)

- In order for the mandatory not to be personally liable, the mandatory must show 2 things:
 - 1. Mandatory acted within scope of mandate
 - If Mandator says you didn't perform the mandate properly, how do you prove you did? You should have the mandate written in a contract.
 - 2. Mandatory disclosed the mandate to third party
 - How does Mandatory prove that he disclosed the mandate to the third party buyer? If you cannot prove that the third party knew that you were selling the car for a mandator, you can be liable. Get the third party to sign a contract with you, an acknowledgement of sale.
 - EX: Mandator tells you to sell his dog. You sell the dog to a third party and the dog dies two days later. The third party buyer wants his money back and comes to you, the mandatory. You said you're not liable because it's not your dog. However, if you didn't disclose that the dog was the Mandator's, you are liable.

Apparent Mandate (CCQ s.2163)

- Where a person (i.e. a store owner) has allowed it to be believed that another person was his mandatory, then the store owner would be liable as mandator to a third person (customer) in good faith who has contracted with the apparent mandatory, unless the store owner can prove that he took appropriate measures to prevent the error in circumstances in which it was foreseeable
 - This situation covers someone (i.e. an employee) who does not have authority to do something, but the employer allowed the employee to act as if the employee was authorized
 - **EX:** a cleaning staff employee pretending to be a cashier. You walk into a store in good faith and you see a person nicely dressed behind the cash register. You bring a pair of jeans and buy the jeans. You thought the person behind the desk was a cashier. You leave the store and security comes to you saying you stole the jeans. You say no I paid them \$40 but the guard says they are \$200. They say the person behind the cash wasn't authorized to sell something. This is an example of

apparent mandate. You as a customer in good faith can assume that this person can act on behalf of the store owner.

- The responsibility is on the employer to make sure that unauthorized staff do not have access to the cash register, so the courts will deem that the employee was in fact an apparent mandatary.

Vacarious Liability (CCQ s.2164)

- Covers the situation where you are liable for damages caused by someone else
 - The mandator is liable for damages caused by the mandatary in the performance of the mandate **unless** the mandator proves that he could not have prevented the injury

Termination of Mandate (CCQ s.2184, 2185)

- **CCQ 2184:** upon termination of the mandate the mandatary is bound to render an account and hand over to the mandator everything that he has received in the performance of his duties even if what he has received is not due to the mandator (gift from third party)
- **CCQ 2185:** from the sums payable to the mandator, the mandatary is entitled to deduct his commission. Until such time as the mandator has paid the mandatary, the mandatary can hold onto any other property he may have belonging to the mandator
 - **EX:** you as mandatary sell car or property for mandator. Any documents you have from the process of selling the car or property can stay with you until you are paid.

CASE 1: WONG V. LEUNG

Step 1-2: Parties and the Facts

- Two ladies (Wong sisters) from Hong Kong bought an apartment building in Montreal in 1987 through a corporation that they set up
 - Wongs moved from Montreal to Toronto soon after and then back Hong Kong in 1996
 - Leung was hired as manager (mandatary) to maintain/manage the building in 2000
- As mandatary, Leung received a gas bill for the building in excess of \$16000, which he did not pay
 - Gas company got a court judgment against the building owner and sold the building at public auction in 2002 to collect their \$16000 plus interest and costs
 - Building was sold for \$170 000 to a third party purchaser in good faith, no fraud involved, legally valid sale
- After payment of judgment and costs, \$145 000 remained from the auction sale and was payable to owner of building. Leung forged the signatures of the Wong sisters so that the money was paid directly to him
- From 2002 until 2007, the Wong sisters were unaware that their building had been sold
 - On several occasions from 2002 until 2007 Leung contacted the Wong sisters and told them that he had been approached by potential buyers for the building
 - In 2007 Leung sent the Wong sisters a deed of sale and a cheque of \$182 000 and told the Wong sister that he had sold the building for them. The cheque for \$182 000 had in fact been misappropriated from another business that Leung was working for
 - The Wong sisters became suspicious on receiving the deed and cheque, and flew back to Montreal to investigate. They sued Leung in 2007 when they discovered that their building had been sold five years before

Step 3: Legal Issues

- Wong sisters sued Leung claiming:
 - Breach of fiduciary duty CCQ 2183, the mandatary had not acted in the best interests of the mandator by allowing the building to be sold by a commercial creditor
 - Failure to keep the mandator informed as to the status and performance of the mandate CCQ 2139
 - The mandatary used the property (money) of the mandator for his own benefit CCQ 2146

Step 4: Court Judgment

- Court held that Leung's actions were a flagrant breach of the duties of a mandatary
 - Wong sisters' can claim all direct damages relating to said breach (CCQ 1458)
 - Court calculated damages as follows
 - Wong sisters' equity in building
 - In 1987 purchased building for about \$272 000 with mortgage- about 40% of purchase price appears to have been already paid when the building was sold, so sisters should receive 40% of the value (2007) of the building at time of sale
 - 2007 value of building was approx. \$500 000, so Wong sisters should get approx. \$187 500
 - Loss on rental revenue
 - Yearly net rental revenue had been approx. \$15 000
 - Since Leung had not given a rental statement to the Wong sisters for the past 6 years, the courts estimated lost rental revenue at approx. for an amount of \$93 750.
- Wong sisters suffered damages: moral damages for stress and inconvenience \$3500 plus \$2000 in material damages to cover the cost of flight from Hong Kong

CASE 2: DOWELL V. HAY ELLIS

Step 1-2: Parties and the Facts

- Dr. Dowell knew a man name Joseph who found a "deal" to buy a building in Montreal on Sauve Street. The seller was prepared to pay the buyer several hundred thousand dollars to take the building off his hands and to free the seller from existing mortgage on the property
 - Similar to the subprime mortgage crisis in the U.S.—evaluation (current value) of building drops below the amount of money that the owners owe on the mortgage of the building, therefore if you try to sell the building the selling price would not even cover your mortgage (loan debt)
 - This can happen with commercial spaces: evaluation is not based on square footage (as with residential buildings) but is based on the actual revenue from rent. IF rental rates drop, the evaluation of the building drops.
- 3 months after buying the building, Dowell gets a letter from the bank threatening to sue Dowell since the mortgage in the amount of \$94 000 had not been paid. Dowell as owner of the building is fully liable for payment of the mortgage
 - When contacted by Dowell and told to pay the mortgage out of the trust fund, the Notary advised Dowell that no money was available
 - Upon investigation it was shown that approx. \$68 500 appears to have been spent out of the trust fund, at Joseph's request, on matters unrelated to the building

Step 3: Legal Issues

- The trust account is a contract of mandate. Dr. Doeel is the mandator, and the Notary Hay-Ellis is the mandatory. Dr. Doweel claims that the Notary breached his fiduciary duty under CCQ 2138
 - Trust account set up for maintenance of building—not to be used for any other unrelated expenses
 - Notary Hay-Ellis had an obligation to act in the best interest of the mandator (Dr. Doweel) and had a duty to verify that any payments that were requested by Joseph were directly related to the Sauve Street property

Step 4: Court Judgment

- Notary Hay-Ellis (mandatory) breached his fiduciary duty to his mandator and has to pay Dr. Doweel the \$68 500 that was incorrectly given to and spent by Joseph on matters unrelated to the Sauve Street property

Lesson 8- Introduction to Forms of Business Ownership

FORMS OF BUSINESS OWNERSHIP

- Business can be defined as an enterprise that carries on an organized economic activity for profit.
 - Three forms of business ownership:
 - 1. Sole proprietorship
 - 2. Partnership
 - 3. Corporation

Sole Proprietorship

- Simplest form of business
- One owner, owns 100% of business, must be a human being
- Business operates under the name of the proprietor (owner) or under a trade name
- Must be registered with the province in which you operate (online form) → pay a yearly fee
- **Proprietor is personally liable for ALL debt of the business—high risk**
- **Termination:** the business of the sole proprietor will terminate with the death of the owner or when the owner decides to stop operating. There is no business that can be sold as a going concern, only the assets can be sold
- **FYI:** few businesses operate as sole proprietorships due to the high risk of personal liability and due to the tax advantages available through incorporation

Partnership (CCQ 2186)

- Partnership: a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise (a business), to contribute thereto by combining property, knowledge, or activities and to share among themselves any resulting pecuniary profits
 - General partnership
 - **Partnership agreement:** a private contract signed by all of the partners which specifies the roles, contributions, function and share of profits of each partner. This contract should also provide for a mechanism to buy/sell/transfer the interests of a partner
 - Partners may be human beings or corporations

Corporation

- We will be examining two company laws in this course:
 - **Federal law: Canada Business Corporations Act (CBCA)**
 - **Quebec law: Quebec Business Corporation Act (QBCA)**
- **Corporation/ Company** are legal persons and have similar rights to those human beings (natural persons) (CBCA 15, CCQ 298, 301)
 - Own property
 - Enter into contracts
 - Have employees
 - Since a corporation cannot speak or act for itself (it is a legal person, not a natural person), corporations make decisions through mandataries (directors, officers or managers) based on the rules of Mandate
 - Corporation is **Mandator** and managers / BoD = **Mandataries**

Federal Incorporation / Provincial Incorporation

- One can choose to incorporate under the federal law or under the law of any of the provisions. These laws, as a general rule, contain similar provisions
- Choosing a corporate name: CBCA 10, QBCA 20, CCQ 305
- A corporation's name will generally end with Incorporated (Inc.), Limited (Ltd.) or Corporation (Corp.). When choosing a name in the French language the corporate name can also end with Société par Action Regime Federal (SARF) or Société par Action (SA)
 - Cannot use a name that is the same or similar or confusing with the name of another company already in existence
- A corporate name can consist solely of a number, example 12345 Canada Inc. We commonly refer to these companies as "numbered companies". From a legal standpoint numbered companies are no different than companies that have an actual "word name."
 - **EX:** IF you set up a company which you want to hold personal assets or stock portfolio, you do not care of the name because you are not marketing name to the public.
 - **FYI:** When doing a name search to choose the name of your future company, the names of Federally incorporated companies and all trademarked names will show up in the Federal database. A search in a Provincial incorporation database will not necessarily indicate whether the name that you are searching, and wish to use, has already been taken by a Federal company or is already in use as a trademark. Caution must be taken in doing a thorough name search before choosing a corporate name
 - **FYI:** A practical tip! Google the name that you want to use. If the website is already taken, choose a new name
- Registration: The corporation must file an annual registration form (online) with the government of each province in which the company has a physical office, and with the Federal government if incorporate federally (CBCA 32(1)(2), Quebec Legal Publicity Act 21)
 - **EX:** Federal corporation you are filing 2 forms a year; one for the federal government and 1 for province you are incorporated in. Provincial corporation operating in QC, you file your renewal **ONLY** in QC.

PERONS OF NOTE

Shareholders

- Shareholders: **the defacto** owners of the company; buy shares/invest, do not manage the

company, can be legal persons (other corps) or human beings

- **Principle function:** shareholders vote to elect the directors at annual shareholder's meetings
- A shareholder can be a director and/or an officer of the company if the shareholder is a human being

Directors (CCQ s.321)

- Directors: mandataries of the company
 - Must be a human being
 - Have full power to manage all affairs of the company: issue shares, dividends, raise/borrow money
 - Can delegate day-to-day management of the company to officers
 - Can be a shareholder and/or officer of the company

Officers (CCQ s.312)

- Officers: responsible for the day-to-day running of the company. They are mandataries of the company
 - Must be a human being
 - Officers are the senior employees of the company: President (CEO), Vice-President (EX: COO), Treasurer (CFO), Secretary (Corporate Council)

OWNERSHIP

Shares

- **Shareholders have limited liability (QBCA s.224, CBCA s.45(1)):** only liable to pay for their shares, shareholders not personally liable for company debt
- **Common shares** (also known as Class A shares) (CBCA s.24(3), QBCA s.44, s.47): If company only has one class of shares they are referred to as a Class A shares (historically Class A shares were referred to as common shares)
 - **Holders of common shares are generally entitled to the following three rights:**
 - 1. Right to vote
 - 2. Right to receive dividends (surplus of profits) – if declared by the company
 - 3. Right to receive residual property (if company liquidates)

Issuing Shares (Equity Financing)

- Shares are issued to generate working capital for the company
 - More shares mean dilution of votes
 - Common analysis → whether to issue more shares and dilute ownership to raise money or not.
- **Preferred shares** (also known as Class B shares) CBCA s.24(4), QBCA s.44): the articles of incorporation may provide for more than one class of shares, and must stipulate what rights (of the three rights referred to above in the discussion of Common shares) are attached to each class
 - As a general rule, Preferred shares have no right to vote
 - Preferred shares will receive a fixed dividend (a set dollar amount as stipulated in the articles of incorporation), if declared by company. Dividends are paid to Preferred shareholders prior to paying dividends to Common shareholders
 - **Preferred S/Hs get paid before Common S/Hs**

Dividends

- **Dividends:** surplus profits paid to shareholders at the discretion of the directors of the company. When referring to the dividend rights attached to Preferred shares, these shares might be cumulative and/or participating
 - **Cumulative:** If no dividend is declared and paid in year one, then the dividend, if declared and paid in year two, will be doubled. Remember a Preferred share dividend is an amount which has been fixed in advance
 - **Participating:** Preferred shares will get counted as Common shares and receive a second dividend (as if they were Common shares) after having first received the Preferred fixed dividend. See the example on the next slide.

Example of Non-Participating Dividends

- 1000 Class A voting shares
- 1000 Class B non-voting shares
- Class A shares (by law) have no fixed dividend rate
- Class B shares have a fixed rate dividend \$1/share (this rate is fixed by the Company directors and is referred to on the same certificate)
- The directors of the Company have decided to distribute \$1M in R/E as dividends
- Rule: Preferred (Class B) share dividends are paid in full before Common (Class A) share dividends
 - Therefore, the 1000 Preferred (Class B) shares get paid one dollar each
 - Then, as there is \$999,000 left to distribute, each of the 1000 Common (Class A) shares will receive \$999

Example with Participating Dividends

- Same facts as previous example
- \$1M dividends declared by company
- Rule: Preferred (Class B) share are paid in full before Common (Class A) share dividends
 - Therefore, the 1000 Preferred (Class B) shares get paid \$1/each
 - Since the Preferred (Class B) shares are participating they will receive in the dividend that is payable to the Common (Class A) shareholders. As there is \$999 000 left to distribute, each of the 1000 Common (Class A) shares and each of the 1000 Preferred (Class B) shares will receive \$499.50
 - When the Preferred (Class B) shares are participating, they receive two separate dividends

Other Share Rights

- Other rights that can attach to shares:
 - **Convertible Rights:** shareholder has option to convert Preferred shares to Common shares
 - Reason: to gain voting rights
 - **Redeemable Rights:** company can force shareholder to sell shares back to the company
 - Reason: because they can sell Preferred shares at a lower share price

SOME SPECIAL RULES

Fraud

- **Fraud (CCQ s.316) (against the corporation):** where the persons running the company (directors / officers) are defrauding the company / misappropriating company assets for

their personal benefit

- **Derivative action:** any interested person (a person with a legitimate legal right/stake in the business) can petition the court to authorize said interested person to represent the company in a lawsuit against those who are defrauding the company
 - **EX of interested person:** a director, an officer, a minority shareholder, a representative of a union/employee group
 - **EX:** directors are stripping assets which risks the bankruptcy of corporation and status of employee jobs
- Another principle of company law related to fraud is the principle of:
 - **Corporate veil (CCQ s.317):** one cannot hide behind a corporation to commit fraud on the general public/customer/creditors
 - While the company is separate from its directors, officers and shareholders, any person who uses the company to commit a fraud can be held personally liable by the courts. Lifting the corporate veil means that the court will look behind the “corporate entity” and can hold the “directing mind” of the company personally liable for frauds committed in the name of the company

Pre-incorporation Contract

- **Pre-incorporation contract (CCQ s.319, 320):** before setting up a company, you can sign a contract, as mandatary, on behalf of a company not yet incorporated. You, the mandatary, must stipulate when signing (on the contract) that you will not be personally liable and that the company has not yet been incorporated, may never be incorporated and may never ratify the contract. If you follow the provisions of CCQ 319 and 320, you will not be personally liable.
 - **EX:** Can be used in a situation where you want to rent premise for your new business that hasn't been incorporated yet and want the lease to be in the name of the corporation. So providing the landlord has faith in you and is prepared to accept that kind of signature, you as agent of company not yet incorporated will sign a lease stipulating that that you are not personally liable, that the corporation might never be formed and that if the corporation is formed that it might not accept the lease. If landlord accepts, then it is a valid contract.

Indoor Management Rule (VERY IMPORTANT)

- **Indoor management rule (CCQ s.328):** persons dealing with a corporation, in good faith, can assume that the directors, and senior officers have the usual powers associated with their positions to represent the company in contractual undertakings
 - **EX:** you go to the office of a corporations and want to rent them a photocopy machine. So you ask who is in charge of this and they send you to operations department to the Chief Operating Officer who has access to computers and all equipment in office and you negotiate a contract with that person. You can assume that that person has the power to do what someone in that office or position would normally be entitled to do. You do not need to ask for proof for employment contract and job description from this person.
 - **Even if there is a mistake in their appointment, there actions are deemed to be valid.**
 - **Not talking about a parking lot at 2AM, this is not in good faith**

Directors

- **Board of Directors (QBCA s.106) (CBCA s.102(2)):** one or more persons, directors have full power to manage the operations of the company. Directors can delegate the power to manage the day-to-day operations of the company to officers, who they appoint
- **Qualifications of Directors (QBCA s.108, CCQ 327, CBCA s.105):** a person of sound mind, of legal age, and not prohibited by the court from holding such a position, and not bankrupt (until discharged from bankruptcy)
- **Election of Directors (QBCA s.110, CBCA s.106 (3)):** elected by shareholders
- **Fiduciary Duty (CBCA s.122(1)(a), QBCA s.119, CCQ 322, 312):** directors and officers have a fiduciary duty to act in the best interests of the corporation
- **Confidential Information (CCQ 312, 323, 2146):** directors and officers have a duty not to use for their personal benefit any property or information belonging to the corporation
- **Conflict of Interest (CBCA s.120, CCQ 312, 324, 2138):** directors and officers must not allow their own interests to be in conflict with the interests of the corporation, and any such conflict (actual or potential) must be disclosed to the corporation

Personal Liability of Directors

- As a general rule, directors are not personally liable for the debts of the corporation. However, directors may be personally liable in the following situation. In all situations where directors are personally liable, their liability is solidary (CCQ 1523) which means that each and every director can be sued for 100% of the debt.
 - **1. Liability for wages (QBCA s.154, CBCA s.119):** directors are personally liable for up to six months of unpaid wages owed to employees of the company, while they were directors of the company—if the company becomes insolvent and the employee after suing the company is unable to collect payment from the company
 - **The rationale behind this statutory liability is to encourage directors to make all efforts possible to ensure that employees are paid when the corporation is having financial difficulty**
 - **2. Liability for dividends (QBCA s.156, 104, CBCA s.118, 42):** if the directors issue a dividend that renders the company insolvent, they are personally liable to pay that dividend back to the company
 - **Other examples of directors' statutory liability:**
 - **GST & QST (provincial and federal sales tax)** – the company, as agent for the government, must collect sales tax and keep it separate—if this money is not paid to the government the directors are personally liable
 - **Employee income tax deductions at source**—the company has an obligation of withholding a percentage of every employee's paycheck, and paying same directly to the government—if this money is not paid to the government the directors are personally liable

Officers

- **Officers (s.116) (QBCA CCQ 2138) (CBCA s.121):** officers are mandataries of the corporation
 - Officers have the same fiduciary duties to the company as do directors
 - Officers are appointed by the directors and are responsible for the day to day running of company
 - Officers must be human beings of full capacity and officers can be directors and/or shareholders of the company

Shareholders

- **Liability (QBCA s.224, CBCA s.45(0)):** as a general rule the shareholders are not liable for the debts of the company
- **Unanimous Shareholders Agreement (also known as USA) (QBCA s.112, 213, 214) (CBCA s.146 (1) & (5)):** a private contract signed by 100% of the shareholders of the company that allows the shareholders to restrict the powers of the directors and to take on those powers themselves
 - **EX:** As a general rule the power to elect all of the directors of a corporation rests in the hands of the holders of 50% + one of the voting shares of the corporation. This means that a holder of a small numbers of shares (a minority shareholders) effective has no say whatsoever in the election of directors. A USA can be used to grant a form of veto power to minority shareholders (EX: a USE may stipulate that the owners of 80% of the voting shares of the company must approve certain actions taken by the directors). This allows minority shareholders (often financial investors in the company) to have some input and control over the management and direction of the company)
 - Another important use of the USA is to restrict the sale of shares owned by the existing shareholders by requiring existing shareholders to offer their shares, under a right of first refusal, to the remaining shareholders of the company. This allows the remaining shareholders to control to whom the shares of the shareholder who wants to leave will be sold
 - **EX:** if a shareholder dies, you do not want that person to still own the shares because they will be wasted. Formula used to pay the dead shareholder an amount and give those shares to the other shareholders.
 - To the extent that the shareholders take on the powers of the directors under a USA, the shareholders also take on the duties, responsibilities and liability as if they were directors
 - A USA can only be used for private (not publicly traded) company

CASES 1: PEOPLES DEPT. STORES INC. (TRUSTEE OF) v. WISE

Step 1-2: Parties and the Facts

- Wise was a large department store chain based in Montreal, run by the Wise brothers who were also the company directors
- Marks and Spencer (M & S) owned a chain of department stores in eastern Canada called Peoples
- Wise bought the Peoples department store chain in early 1990s from M&S
 - After the purchase Wise needed to streamline the collective operating costs of the two businesses
- After the purchase Wise was unable to generate sufficient profits to meet ongoing business expenses
 - Could not meet payment schedule to M & S
 - Becoming insolvent
 - In December 1994, M&S as creditor petitioned Wise and Peoples into bankruptcy
- The Trustee in bankruptcy sold off the assets of the bankrupt business and generated enough money to pay the bank debt and the amounts owed to M&S. No funds were left to pay the ordinary trade creditors (EX: suppliers of merchandise) of the business
 - The Trustee then sued the Wise brothers personally (as directors of the bankrupt companies) on behalf of the unpaid trade creditors

Step 3: Legal Issues

- **Does the Trustee in bankruptcy have the legal authority to hold the directors personally liable for dividends declared and issued contrary to the provisions of the CBCA?**
- Trustee of Peoples sued Wise brothers personally: As directors of both the Peoples stores and Wise stores, did the Wise brothers have a fiduciary duty to act in the best interests of the creditors of the companies?
- Trustee claimed that the Wise brothers did not act in the best interest of the creditors, which resulted in the bankruptcy of the department stores and large financial losses to trade creditors
 - Did the directors breach their duty under Section 122(1) of the CBCA which reads as follows:
 - (CBCA s.122(1)) Every director and officer of a corporation, in exercising their powers and discharging their duties, shall act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances
 - Trustee claims that “acting in the best interests of the corporation” means acting in the best interests of the stakeholders of the corporation including trade creditors

Step 4: Court Judgement

- Supreme Court of Canada ruled that there was no fraud or dishonesty on the part of the Wise brothers, so personal liability on these grounds
- The fiduciary duty owed by directors under CBCA s.122(1)(a) is owed to the company itself, and not to the shareholders or to the creditors of the company
- Supreme Court of Canada supported a very important principle:
 - **Business judgement rule:** the duty of the directors to act in a reasonably prudent fashion under CBCA s.122(1)(b) should be judged based on the knowledge that the directors had at the time that the decision was taken, and should not be judged on events that occurred after the fact. The court will look at whether the decision was reasonable, not whether the decision, in hindsight, was a perfect decision
 - Providing that the Wise brothers can show that their actions, as directors, were reasonable based on the knowledge that they had at the time the decisions were taken, and providing that the Wise brothers had not committed any fraud, then the Wise brothers did not breach their duty under CBCA s.122(1)(b) to the creditors of the company.

Lesson 9-10-11- Introduction to Employment Law

INTRODUCTION TO EMPLOYMENT LAW

Employment Law

- **Employment law CCQ 2085:** a contractual agreement between an employer and an employee
 - **We will study individual contracts of employment as covered by the CCQ. This course does not cover unions or collective agreements.**
 - A contract of employment is a contract where a person, the employee, undertakes for a limited period to do work for remuneration according to the instructions and under the direction, or control of another person—the employer
 - **Subordination**—employees do what they are told to do by their employer
- **Fixed or indeterminate term CCO 2086**

- **Fixed or indeterminate term CCQ 2088**
 - o **Fixed term:** hired for a period with a finite ending date
 - o **Indeterminate term:** no end date in contract

Duty of Employer

- **Health safety dignity CCQ 2087:** the employer has the obligation to provide employee with a physically and morally safe working environment
 - o **Clean, heating, lighting, safe from physical and emotional intimidation**

Duty of Employee

- **Fiduciary duty CCQ 2088:** employee has a fiduciary duty to employer—the employee is bound to not only carry on his work with prudence and diligence but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work
 - o **Confidential information:** all information relating to the employer’s business including clients lists, pricing, intellectual property, financial information, etc...
 - Information that you, as an employee, created as part of your job, belongs to your employer
 - When you leave your employer you cannot take confidential information with you, even the information that you created on the job

NON-COMPETITION CLAUSE

Non-competition

- **Non-competition CCQ 2089:** the parties may stipulate in **writing** and in **express** terms that even after the termination of the contract, the employee may neither compete with his employer, nor participate in any capacity whatsoever in an enterprise which would then compete with the employer
 - o Such a stipulation shall however be limited as to time, place and type of employment, to whatever is necessary for the protection of the legitimate interests of the employer
 - o The burden of proving that the contractual non-competition clause is valid is on the employer (this is an example of a reverse burden of proof where the employer not only has to prove that the employee breached the contract but the employer also has to prove that the contractual clause is valid)
 - o The employer must therefore prove to the court that all three elements referred to in CCQ 2089, **time**, **place** and **type of employment**, as set out in the written non-competition clause, are **reasonable** in their scope (very hard proof to make)
 - **Very rare for courts in Quebec to enforce a non-competition clause for regular employee that leaves the job**
 - **Why?**
 - Because Employment contracts are often contracts of adhesion (CCQ 1379). The courts recognize that employees will often sign just about anything in order to get a job. Since the employee has no bargaining power, the employer who has all the bargaining power, can impose harsh terms in the contract that he makes the employee sign
 - **CCQ 2095:** IF the employee was not fired for a serious reason (CCQ 2094), the courts will **NOT** let the employer plead the validity of a non-competition clause in a court action (**WILL NOT EVEN LET YOU TRY TO CONVINC THEM**)
 - **EX:** If you are in a B2B situation with equal bargaining power and you sell your company to another company, there may be Goodwill associated with the transaction for buying the brand name. The buyer may want a

with the transaction for buying the brand name. The buyer may want a non-competition clause to prevent you from selling your current business and opening up another competing business.

WHISTLE BLOWING

Whistle Blowing vs. Fiduciary Duty of Employee

- **Internal whistle blowing:** an example would be where an employee tells his/her manager/supervisor about a problem that is occurring in the business
 - **EX:** the employee has become aware that the company is producing defective products
- **External whistle blowing:** an example would be where the employee's internal complaint to his/her manager/supervisor was not acted upon by the company, and the problem has not been solved. The employee may wish to make his/her complaint/concern about the problem public, by advising the appropriate government agency
 - **EX:** problem in company and employee tells manager but he does nothing. Employee can make it public
 - External whistle blowing can damage company reputation, and/or cause financial losses to company—fines, shares/stock price drops
- Revealing confidential information to parties outside of the company is technically a breach of the employee's fiduciary duty to the company
- Whistle blowing is an ethical recourse; employees are **not required** by law to whistle blow on their employer. It is an optional recourse
- While the employee has a fiduciary duty to the company and must protect confidential information, the employee has a parallel ethical duty to society to protect society against harmful business practices. Under **CCQ 1472** a person who whistle blows in good faith **CANNOT** be sued by the company for damages
 - **IMPORTANT:** always a threat to employee that employer (the rich side) will take employee to court and bankrupt them. This section provides protection to employees for external whistle blowing.
- However, a whistle blower may not be very popular within his/her organization, colleagues may resent or distrust the whistle blower as they may think that the whistle blower will be spying on them, or they fear losing their jobs if the whistle blowing complaint leads to a company closure

TERMINATION UNDER THE CCQ

Reasonable Notice

- **Reasonable notice CCQ 2091:** either party can terminate an employment contract for an indeterminate term by giving notice to the other party. The notice of termination shall be given in reasonable time taking into account, in particular, the nature of the employment, the specific circumstances in which it was carried on (EX: moving for job), and the duration of the period of work (the longer you work there, the longer the notice period)
 - When employed under a contract for an **indeterminate term**, you can be fired at any time, as long as you receive reasonable notice, and as long as the reason for firing you is not contrary to the law (EX: discrimination under the Quebec Charter)
 - When hired for a **fixed term**, employment terminates at the end of the term, on a fixed date. No notice of termination needs to be sent by employer
- Can you terminate an employment contract for a fixed term before the end date of the contract? For serious reason (CCQ 2094), either party may terminate at any time. If there is no serious reason, the only way to terminate an employment contract for a fixed term would be by agreement of the two parties. Fixed term employment contracts therefore often contain a contractual clause allowing either party to cancel the contract by giving a pre-determined notice

pre-determined notice

- General rule → both parties must respect for full term
- Where the employer terminates an employee under CCQ 2091, the employer has the option of giving the employee severance pay (equal to the notice period that the employee would otherwise have had to work). This way the employer can insist on the employee leaving the premises **immediately**.
 - **Employee can't say "hey can I leave immediately I want to travel."**

Serious Reason

- **Serious reason CCQ 2094:** one of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice
 - **EX:** employee caught stealing, violent behavior, habitual lateness, insubordination
 - **CCQ 2094** applies to both fixed term and indeterminate term employment contracts
- Under CCQ 2094 the employee does not receive prior notice (or severance instead of notice). Certain actions on the part of the employee, (**EX:** arriving late for work) do not on their own constitute a sufficient breach to be considered a serious reason to terminate. However, if the employee begins to arrive habitually late for work, the employer should document this series of events by giving the employee written warnings that both identify the breach and refer to the possible disciplinary actions available to the employer. Having given the employee fair warnings to correct the inappropriate behavior, should the employee continue to be late, the employer can now consider this series of events as a serious reason to terminate the employee under CCQ 2094

Probationary Period

- **Probationary period:** a contractual clause in an employment contract, usually three to six months, during which period either party may, for any reason whatsoever, terminate the employment contract by giving a pre-determined prior written notice
 - **EX:** where the employee after having an opportunity to work with his/her co-workers, appears to not fit well with the corporate culture
 - **NOT A LAW but a contractual clause**

Public Order Unjust Termination

- **Public order rights CCQ 2092:** the employee may not renounce his rights to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation (termination of employment contract) is abusive.
 - **Basically the employee cannot in an employment contract give up his rights to sue the employer if the employee has been fired unjustly. If the employee does sign such a clause, then this clause is deemed to be unenforceable**
 - **EX:** employer cannot stipulate in an employment contract for an indeterminate term that the employee agrees in advance that the employer can terminate the employee at any time, for any reason, on giving the employee a 2 week prior notice. The provisions of CCQ 2091 are of public order and the employer must respect same. The employee cannot, by contractual agreement, give up his/her public order rights
 - **Employer must give REASONABLE NOTICE.** Who is to say that it is reasonable? If you worked for employer for 6 years, 2 weeks isn't reasonable notice, however, if you worked for 2 weeks, then it is.

Death of Employee and Sale of Business

- **Death CCQ 2093:** when employee dies, the employment contract automatically ends
 - Unlike most contracts that do not end when one of the parties dies, employment contracts are personal service contracts that terminate when the employee dies

- contracts are personal service contracts that terminate when the employee dies
- Sale of business CCQ 2097: sale of business as a going concern (continue operation), employers cannot sell the business without employees. The employment contracts of the employees do not automatically terminate when the business is sold or amalgamated.
 - **EX:** Company B buys Company A. Company B must decide after the purchase which employees in the combined operation are now redundant. Company B can then terminate redundant employees pursuant to CCQ 2091. They have to be given **REASONABLE NOTICE**.

WORKPLACE BEHAVIOUR

Privacy Issues at Work

- Are cameras allowed in the office?
 - Employees should be given notice of camera surveillance, or cameras should be visible
 - Cameras are allowed for safety reasons and to prevent theft—in corridors, exits, storerooms. Cameras should not be used simply to spy on employees or to coerce them to “work harder”. This could be a violation of the employer’s obligation to treat employees with dignity

Privacy Issues at Work

- Monitoring phones, emails, and computers
 - Can your employer restrict your access to technology for personal use? When you are on the job, you are being paid to work for the best interests of the employer, and therefore you should not use employer’s equipment for personal use
 - **EX:** some companies block access to certain websites on company owned computers

Workplace Code of Conduct

- **Workplace Code of Conduct:** a written or electronic document that is given to every new employee that helps employees know what is appropriate and inappropriate behavior at work
 - **Rationales to having a Code of Conduct:**
 - **1.** To help the employees do their job better
 - **2.** As proof in court cases
 - Should an employer wish to discipline an employee for “breaking the rules” it is important for the employer to show the courts that the employee had already received a copy of the Workplace Code of Conduct, and therefore should have known what the rules were

INDEPENDENT CONTRACTOR

Independent Contractor

- **Independent contractor CCQ 2098-2100:** a person engaged (not employed) by the company to perform a specific task
 - **Independent contractor is not subject to subordination**—not under the direction and control of an “employer”
 - **Independent contractor has a client**—not an employer
 - Receives no benefits as would an employee
 - Given full discretion to perform the task
 - Similar fiduciary duty as would an employee, independent contractor must act in

the best interest of the client

- Cannot use confidential information belonging to a client
- **Bills client a fee for services, is not paid a salary**
 - **EX:** lawyer engaged to review a contract for a client

Breach of Duty

- Employees are subject to subordination and control
 - If an employee injures another in the performance of the job, is the employee liable, and/or is the employer liable?
- **Duty not to injure CCQ 1457 can be found in the chapter on Civil Liability):** every person has a duty to abide by the rules of conduct incumbent on him according to the circumstances, usage, or law so as not to cause injury to another
 - **Requires fault**—an accident is without fault
 - Who decides the scope and limitations of this duty?
 - The courts make this decision
 - Where he is endowed with reason (general a person over the age of 7 who knows the difference between right and wrong) and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury whether it be **bodily, moral, or material** in nature
- Vicarious liability CCQ 1457, 1463: if the employee is in the performance of his/her job, and injures someone due to his/her fault, the employee is liable and the employer is automatically also held liable
 - The Principle (employer) is bound to make reparation for injury caused by the fault of his Agents or Servants (employees) in the performance of their duties, nevertheless he (employer) retains his remedies against them (the employee)
 - The employer can sue the employee for the reimbursement of all damages paid by the employer that resulted from the fault of the employee
 - **EX:** if employee is on lunch and injures someone, employer **ISN'T** liable.

ASSESSMENT OF DAMAGES

Compensation

- **Compensation:** damages for breach of CCQ 1457, the employee's duty not to injure, can be either bodily, moral and/or material in nature. These damages are calculated in the same fashion as damages for breach of contract (CCQ 1458). These damages compensate the victim for the actual provable damages that the victim (credit/injured person) suffered.
 - **EX:** if employee breaches his duty, the damages that the victim may claim may be either bodily, moral or material in nature. If you cannot prove damages the courts will not award you damages.

PSYCHOLOGICAL HARASSMENT UNDER THE LSA

Psychological Harassment

- New law circa 2004, deals with all forms of on the job harassment, including sexual harassment
- **Psychological harassment Labour Standards Act (LSA) 81.18:** any vexatious behavior in the form of repeated and hostile or unwanted conduct, verbal comments, actions, or gestures that affects the employee's dignity, or psychological, or physical integrity and that results in a harmful work environment for the employee
 - A single serious incident of such behavior that has a lasting harmful effect on the

employee may also constitute psychological harassment

- **EX:** employer getting angry and publicly yelling at employee, calling employee stupid and lazy
- FYI: Step 1: If you feel that you are being psychologically harassed on the job by a co-worker, by a boss or by an employee who reports to you, you should tell that person in writing (email) to stop harassing you. This written warning will help you build your case, if the harasser after receiving your written warning, continue to harass you

Employer's Obligation

- **Employer's obligation LSA 81.19**
 - Related to general obligation set out in CCQ 2087: Health, safety, dignity
 - **Every employee has the right to a work environment free from psychological harassment**
 - The employer must take reasonable action to prevent psychological harassment, and whenever they become aware of such behavior, to put a stop to it
 - **EX of prevention:** regularly remind employees of Code of Conduct obligations and prohibition against psychological harassment through HR memos and meetings
 - **FYI:** Step 2—If you told harasser to stop, and he/she did not, then report harassment to HR department or to the appropriate person designated in the company Code of Conduct
 - Employee should have provided in the corporate Code of Conduct detailed information and a clear procedure to report such concerns and issues

Reporting Psychological Harassment

- **Filing a complaint LSA 123.6, 123.7:** if you believe you have been victim of psychological harassment you have 90 days from the last incident of harassment to file a complaint with the Labour Standards Commission
- **Powers of commission LSA 123.15:** if the Commission feels that the employer has failed to fulfill its duty under section 81.19, then the commission can render any decision they believe fair and reasonable taking into account all circumstances of the matter, including:
 - **1. Order employer to reinstate employee** (if victim has been fired—possibly because quality of work degraded due to harassment or if employee quit job in despair because employer was not supporting his/her complaint)
 - **2. Order employer to pay employee lost wages**
 - **3. Order the employer to take reasonable action to put a stop to harassment** (possibly fire harasser)
 - **4. Order the employer to pay punitive and moral damages to employee**
 - Moral (psychological) damages for stress and aggravation that the employee suffered
 - Punitive damages to punish the employer for not stopping the harassment and to send a warning to other employers not to act in a similar fashion
 - **5. Order the employer to pay to employee an indemnity for loss of employment**
 - If you do not want your job back the indemnity would be the severance pay
 - **6. Order employer to pay for psychological counselling**
 - Psychological counselling services might not be covered by Medicare, if employee has been traumatized the employer must pay for the counseling treatment
 - **7. Order the modification of the employee's disciplinary work record**
 - Employee's work record should be corrected if it contains false

information (**EX:** employer filed false complaints against the victim in an attempt to discredit the victim). The record should also be corrected if the employee has received disciplinary notices regarding poor performance where employee's work quality deteriorated due to stress and employer's refusal to take appropriate steps to stop the harassment

TERMINATION UNDER THE LSA

Recourse Good & Sufficient Cause

- **Recourse good & sufficient cause LSA 124:** an employee credited with 2 years of uninterrupted service in the same enterprise who believes he has not been dismissed for good and sufficient cause may file a complaint with the Commission within 45 days of being dismissed
 - The employer must prove good and sufficient cause
 - Valid reasons for termination include economic reasons or serious workplace offense (**serious reason CCQ 2094**)
 - **Example of NON-sufficient cause:** an employer cannot abolish a position and fire the corresponding employee, then hire a new employee under a new job title who is doing effectively the same thing that the fired employee had been doing
 - **EX:** you fire someone who had been working for 30 years for the reason of diminishing jobs in that department, you then hire a 22-year-old out of university and pay him a starting salary.
 - **The recourse under LSA 124 does not apply to senior managerial personnel**

Power of the Commission

- **Powers of commission LSA 128:**
 - Tribunal (quasi judicial labour board)
 - 1. Order employer to reinstate employee
 - 2. Order employer to pay the employee back pay
 - 3. Render any other decision that the tribunal believes is fair and reasonable in the circumstances including, where the employee does not get his/her job back the payment of severance pay under LSA 82
 - **NOT payable under CCQ 2091, it's a different calculation**
 - LSA 82: where you do not get your job back, you are entitled to the following notice/severance
 - Based on amount of time that you worked for the employer:
 - **Between 3 months and 1 year = 1 weeks' notice/pay**
 - **Between 1-5 years = 2 weeks' notice/pay**
 - **Between 5-10 years = 4 weeks' notice/pay**
 - **10 years or more = 8 weeks' notice/pay**

Notice of Termination

- **Notice of termination LSA 82, 82.1:** these articles apply with regards to a complaint filed under LSA 124
 - **Section 82 does not deprive the employee of the rights granted to him/her under another Act (EX:** the employee can sue for unjust dismissal under CCQ 2091, 2091 where the employee wants severance pay compensation and does not want his/her job back
 - **The employee can choose to file a complaint under the LSA or a lawsuit under the CCQ – an employer cannot, in an employment contract, force an employee to**

the CCQ – an employer cannot, in an employment contract, force an employee to choose one law over the other. The employee's right to choose under which law he/she wishes to sue is of Public Order

- **LSA 82 does not apply to employees in the following situations:**
 - 1. Worked < 3 months
 - 2. Hired under a fixed term contract that has expired
 - 3. Committed a serious fault: terminated for serious reason CCQ 2094
 - 4. For whom the end of the contract of employment or layoff is a result of superior force (an act of man or of nature beyond one's reasonable control)
(EX: earthquake, massive flood)

Termination Under the LSA vs. the CCQ

- Parallel provisions in place for different factual situations:
 - **LSA** used for situations where employee wants his/her job back and can file at the Commission without hiring a lawyer
 - **The CCQ** provides a recourse for those who do not want their job back. Such employees can sue in traditional court, represented by a lawyer, for compensation based on the failure to receive reasonable notice/severance pay from the employer
 - **You want monetary compensation**
- On a final note, an interesting point should be noted with regards to the power of the Commission to render decisions under LSA 128
- In the case of a domestic or a person whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped, or aged person, the tribunal will never order the employer to rehire the employee in question. Why is this?
 - B/c this type of work is almost exclusively done in the employer's private home, the tribunal will not force you to bring an unwanted person back into your home. The job of the employee in question was also to care for a very young/old/ill/disabled person who could not defend themselves—there is therefore a risk that this disgruntled employee, if you are forced to rehire them, may take out their anger on the defenseless person under their care

CASE 1: KING V. BIOCHEM THERAPEUTIC INC.

Step 1-2: Parties and the Facts

- Dr. King is an American scientist who was recruited in the USA by Biochem, and moved to Montreal to work for Biochem. Her family came to Montreal with her
- Dr. King worked from November 1996 to September 1997 (10 months)
- She was allegedly fired by Biochem under 2094 of the CCQ: for a serious reason—for being a “bad worker”
- Dr. King contested the termination claiming the employer had no grounds under CCQ 2094

Step 3: Legal Issue

- Employer Biochem argued Dr. King was fired under section 2094 of CCQ – for a serious reason
- Dr. King argued that she had done nothing wrong, had received no warning and therefore if Biochem wanted to fire her, CCQ 2091, not CCQ 2094, should apply
 - Under CCQ 2091 the employee is entitled to receive reasonable notice (severance) based on: the nature of the employment, the specific circumstances of the employment and the duration of the employment

- The burden of proof is on the employer to prove the reasons for termination

Step 4: Court Judgment

- The court held that the employer was unable to prove valid grounds to fire Dr. King under CCQ 2094. Dr. King's termination was therefore governed by CCQ 2091 and she was entitled to receive reasonable notice of termination. Since she had already been fired, Dr. King would receive severance pay instead of notice plus direct damages resulting from her unjust termination. The trial lasted 9 days and 11 witnesses were heard. The judge ruled that the employer had acted in bad faith when they fired Dr. King for a fictitious reason
 - Under CCQ 2091, Dr. King received 12 months of salary as severance pay (\$125 000) even though she had only worked for Biochem for 10 months
 - Dr. King was awarded all vacation pay owed to her by law
 - **Material damages:** Dr. King was awarded \$18 000 in relocation expenses
 - **Value of stock options:** Biochem had given Dr. King stock options to buy Biochem shares. If Dr. King had been allowed to work through her 12-month notice of termination period, she would have been eligible to purchase some of these stock options. The court felt that it would have been reasonable for her to have bought and immediately resold these shares even though she was leaving the company. Based on the mathematical calculation of the difference between her stock option purchase price and the market price that the shares were publicly trading at, the court calculated that her profit would have been approximately \$3 000. She was awarded this \$3 000 as material damages.
 - **Bonus:** Judge says no to any salary bonus since the bonus was discretionary and not guaranteed
 - **Moral damages:** Awarded \$25 000 for stress, anxiety and inconvenience plus an additional \$25 000 for damage to her reputation as a result of unjust termination
 - **Loss of employment benefits:** eCourt did not award any damages for loss of medical/dental benefits but did award damages to compensate for special Quebec tax benefits: At that time Quebec was offering a special provincial tax credit to encourage workers with specifically defined skills credit to encourage workers with specifically defined skills to come and work in Quebec. Dr. King qualified for this program. Had she been allowed to work during her 12-month notice of termination period, she would have benefited from a Quebec provincial tax credit of \$27 800. The court awarded her this amount as material damages.
- **Total judgment award to Dr. King was approx. \$240 000.**

CASE 2: DUBE V. VOLCANO TECHNOLOGIES INC.

Step 1-2: Parties and the Facts

- Dube worked for two years and two months at Volcano
- Terminated for lack of work (economic reasons)
- Dube received two weeks' notice
 - The employment contract he had signed when hired said he would receive the appropriate notice as set out in section 82 of the LSA
- Dube claimed he was entitled to 9 months' notice (severance)

Step 3: Legal Issue

- Can Dube be forced by his employer to accept the termination provisions of section 82 of the LSA instead of the provisions of CCQ 2091

Step 4: Court Judgment

- Judge said that the protections granted to an employee under LSA 82 and CCQ 2092 are of public order. Employee can always choose to sue under the LSA or under the CCQ. Employer cannot force employee to make this choice in advance. Dube can therefore sue under CCQ 2091 and ask for reasonable notice (severance). The judge awarded Dube a total of 18 weeks' severance.
- Dube asked additionally for:
 - **Material damages for bonus:** not awarded as bonus was discretionary
 - **Material damages for car allowance:** employer had provided Dube with a car simply so that he could travel to and from work. Since he was no longer working for Volcano he is not entitled to a car allowance
 - **Moral damages:** not awarded as no bad faith on the part of the employer was proven

CASE 3: HASANIE V. KAUFEL GROUPE LTD.

Step 1-2: Parties and the Facts

- Hasanie hired by Kaufel (light fixture company) in 1988
- In 1998, Kaufel is sold, Hasanie was the third most senior employee and he felt that he might get fired by new owners
- In 1999, Hasanie actively attempted to purchase a competing company while still working for Kaufel
- In July 1999, Hasanie was told that he would be terminated from Kaufel under section 2091 of the CCQ. Kaufel proposed that they would pay him 10 months' severance
 - Hasanie asked for 12 months' severance and was told that this matter would be resolved after Hasanie returned from his scheduled vacation
- During Hasanie's vacation, Kaufel discovered that Hasanie had tried to buy a competitor and claimed that this action was breach of Hasanie's fiduciary duty to his employer (CCQ 2088). Hasanie was therefore immediately fired for serious reason (CCQ 2094)

Step 3: Legal Issues

- Kaufel argued tht the company was justified in terminating Hasanie under CCQ 2094 due to his breach of fiduciary duty
- Hasanie raised three defenses:
 - **1.**Hasanie never actually bought the competing company
 - **2.**Hasanie claimed that he had told his boss in advance that he wished to purchase a competing business, and that he obtained his boss' approval
 - **3.**Hasanie claimed that he was being forced out o the company through constructive dismissal (employer changing the terms of the employment contract in the hopes that the employee will not accept and voluntarily resign). Hasanie claimed that he therefore, due to the bad faith actions of his employer, had no choice other than to actively look for a new business opportunity

Step 4: Court Judgment

- Judge ruled the following in response to Hasanie's three possible defenses
 - The fact that Hasanie attempted to purchase a competing business is a breach of his fiduciary duty to his employer, even if Hasanie never completed the purchase of the competing business
 - Hasanie's claim that he had obtained his boss' prior approval to purchase a competing business was denied by his boss. Judge said that an experienced

business person like Hasanie (30 years' experience) should have obtained this approval in writing.

- Regarding Hasanie's claim that the employer was acting in bad faith and attempting to force Hasanie to quit his job (constructive dismissal), Hasanie was unable to make any proof of these bad faith actions
- The Court therefore upholds Hasanie's dismissal for serious reason under CCQ 2094

CASE 4: COPYFAX INC. V. LAMBERT

Step 1-2: Parties and the Facts

- Lambert began working for Copyfax, a photocopier servicing company, in 1992
- Lambert was fired under CCQ 2094 in 2000 when Copyfax found out that Lambert had set up and was operating a competing business

Step 3: Legal Issues

- Lambert was terminated by Copyfax due to breach of fiduciary duty (CCQ 2088, 2094)
- Lambert's employment contract contained both a confidential information clause and a non-competition clause
- Copyfax asked the Court to issue two injunctions:
 - 1. To prevent Lambert from using confidential information belonging to Copyfax
 - 2. To stop Lambert from breaching the non-competition clause
- Lambert did not contest the first injunction and agreed to an injunction to prevent him from using confidential information belonging to Copyfax
- Lambert contested the second injunction to prevent him from breaching the non-competition clause
 - Under CCQ 2089 to enforce a non-competition clause the employer must prove three things:
 - 1. Time period is reasonable
 - 2. Geographical area is reasonable
 - 3. Job description and prohibition of type of work is reasonable

Step 4: Court Judgment

- Copyfax won the first injunction preventing Lambert from using a confidential information because Lambert agreed to (did not contest) this injunction
- Regarding the second injunction to enforce the non-competition clause, the Court ruled that:
 - 1. A 14-month time period is unreasonable: Copyfax had not even replaced Lambert's position with a new employee to service Lambert's former sales/service district
 - 2. An area of 25 square miles (5000 km²) surrounding the islands of Montreal and Laval was unreasonable and unjustifiable: this type of business was in now was unique to Copyfax (servicing copy machines)
 - 3. The employment contract was also a contract of adhesion: unequal bargaining power (CCQ 1379)

CASE 5: CABIKMAN V. INDUSTRIAL ALLIANCE LIFE INSURANCE CO.

Step 1-2: Parties and the Facts

- Cabiakman was hired by insurance company Industrial Alliance
- After a few months of working, Cabiakman was charged with a criminal offense (attempted extortion)

- Cabiakman told his superiors about the charge and the company decided to put him on an administrative suspension until his legal issues were resolved
- Cabiakman remained available to work during the two-year administrative suspension. It took two years for his case to go to trial at which time he was acquitted
- Once Cabiakman was acquitted, Industrial Alliance let him come back to work. Industrial Alliance refused to pay him the two years of salary arrears covering the period of the administrative suspension

Step 3: Legal Issues

- Section 2087 of CCQ: employer has the obligation to protect the health, safety, and dignity of workers
- While the employer has the right to suspend employees when there is a lack of work, can an employer unilaterally and without further notice (justification) impose an administrative suspension of an employee without pay?

Step 4: Court Judgment

- The Supreme Court of Canada held that the suspension was justified based on the facts of the case. The Court stated that because the suspension was administrative and the employee was therefore required to remain available for work when called, the employer was required to pay the employee's salary during said suspension. The employer cannot require the employee to remain available for work while not paying the employee's salary. This would be a violation of CCQ 2087
- The Supreme Court of Canada also stated that such a unilateral administrative suspension without pay could have been treated by the employee as constructive dismissal, allowing the employee to sue the employer for breach of contract and damages under CCQ 2091

Lesson 12- Civil Responsibility

INTRODUCTION TO CIVIL LIABILITY

Contractual vs. Non-contractual Liability

- **Liability can be either contractual or non-contractual**
- **Contractual liability (CCQ 1458):** Liability for breach of contract. If you breach your contractual obligation, you are liable for the bodily, moral and material damage that you breach of contract causes to the other party
- **Non-contractual liability also known as Civil Liability (CCQ 1457):**
 - Breach of your duty not to cause injury to others. Other CCQ 1457, every person has a duty to abide by the **rules of conduct** incumbent on him according to the **circumstances, usage, or law** so as to not to cause injury to another. Where he is **endowed with reason** and fails in this duty he is **liable for any injury he causes** to another by such fault and **is bound to make reparation (compensation)** for the injury, whether it be **bodily, moral, or material in nature**
- In order to be liable under CCQ 1457, the creditor must show that the debtor committed a fault. There are 3 degrees of fault: negligence (carelessness), gross negligence (reckless disregard for the safety of the people around you), and intentional fault (where it can be proven that you intended to injure the creditor)
- In order to be liable under CCQ 1457, the creditor must show that the debtor was endowed with reason. The courts will determine whether the debtor is a rational person who can distinguish the difference between right and wrong. Generally, a person who is 7 years of age, will know the difference between right and wrong, and will therefore be considered to be endowed with reason. ~~EXE~~ the endowed with reason test is used to determine

to be endowed with reason. F 11, the endowed with reason test is used to determine liability in civil matters; in a criminal matter however the minimum age in Canada for criminal liability is 12 years old.

- If you are found by the courts to have breached your duty under CCQ 1457, you will be liable to compensate the victim (creditor) for all bodily, moral and material damage that he/she suffers as a result of your faulty act
 - EX: You're running down the hall not paying attention and knock someone down the stairs. The courts will decide that you as a reasonable person should look where you're going when running down a busy corridor. You were negligent and breached your duty not to injure by not paying attention to what you were doing. You are over the age of 7 you know the difference between right and wrong and you are liable for all injuries you caused to the person.

INDIRECT LIABILITY

Vicarious Liability

- **Vicarious liability (CCQ 1457, 3rd paragraph):** A person is also bound in certain cases to make reparation for injury caused to a third party by the act or fault of another person or by the act of things in his custody
- Vicarious liability refers to the legal concept that a person, who has committed no fault, will be held liable for the fault committed by another person
 - **EX: Liability of employer CCQ 1463-** the employer is always liable for damages caused by the employee in the performance of his/her work—the employer has no defense under CCQ 1463, the employer's liability is absolute

Parental Authority

- **Parental authority CCQ 1459:** A person having parental authority is bound to make reparation for injury caused to another by the act or fault of a minor under his authority— unless he proves that he himself did not commit any fault with regard to the custody, supervision, or education of the minor
 - **EX:** a 12-year-old child throws a rock through a neighbor's window—a 12 year old child should know the difference between right and wrong, and therefore he/she will be liable for his/her faulty act. On the other hand, are the parents also liable?
 - **THE PARENTS HAVE A DEFENSE:**
 - If the parents can demonstrate that the child has no record of bad behavior and attends school regularly, the parents might be able to exonerate themselves from liability the first time that the child gets into trouble. If a child has a history of bad behavior, it will be much more difficult for the parents to convince the court that they have provided adequate custody and supervision of the child.

Custody of Minor

- **Custody of minor CCQ 1460:** a person who does not have parental authority but is entrusted by delegation or otherwise with the custody, supervision, or education of a minor, is bound in the same manner as the parents to pay reparation for any injury caused by the act of a child in their custody
 - **EX:** school teachers and staff would be covered under this article
 - Babysitters would also be covered under this article, but where they are acting gratuitously (not paid) they will not be held liable unless it can be proven that the person supervising the child for free committed a separate fault
 - **EX:** if you give a knife to a child to play with and they injure someone

else

Tutor or Curator

- **Tutor or curator CCQ 1461:** (assisting a protected person 18 years old or older)
tutor/curator is not liable for damages caused by the protected person unless the tutor/curator has committed a separate fault

Custody of a Thing

- **Custody of a thing CCQ 1465:** the custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing unless he proves that he is not at fault
 - **EX:** car is parked on a hill and rolls down the hill and hits someone. Question is did the transmission fail on its own or did the owner forget to put the hand brake on.

Owner of an Animal

- **Owner of animal CCQ 1466:** the owner of an animal is bound to make reparation for injuries it has caused whether the animal is under his custody, that of a third party, or has strayed or escaped
 - A person making use of an animal is also, during that time, liable along with the owner
 - **EX:** you borrow your neighbor's horse to go riding, and the horse kicks somebody passing by on a bicycle. The owner of the horse will be liable and so will you, the person using the horse.

Ruin of an Immovable

- **Ruin of an immovable CCQ 1467:** The owner of an immovable, without prejudice to his liability as custodian, is bound to make reparation for his injury caused by its ruin, even partial, whether the ruin has resulted from lack of repair or from a defect in construction
 - **EX:** bricks fall out of the wall of a building due to a flaw in **original construction** or due to **failure/lack of maintenance**

PRODUCT LIABILITY

Manufacturer's Liability

- **Manufacturer's liability CCQ 1468:** the manufacturer of movable property is bound to make reparation for injury caused to a third person (anyone injured by the product) by reason of safety defect in the thing, even if the movable property has been incorporated with or placed in an immovable for the service or operation of the immovable
 - **EX:** Ceiling tiles. Originally was movable property that turned into immovable property. Manufacturer cannot say that it is now immovable and that they aren't liable.
 - This liability also covers all professional sellers of the goods including the importer, distribution, wholesaler and retailer
 - Since retailers are liable for defects, as if they were the manufacturer, retailers are wise to ensure that the products they sell meet minimum safety standards. If a consumer is injured by a defective product, under CCQ 1468, the consumer can sue the retailer directly from damages.
 - **EX:** Buy a product from a retailer in Montreal that comes from Singapore. You can sue Singapore manufacturer but it will be very

expensive. You can sue the retailer just as much as the Singapore manufacturer here in Montreal. They are equally liable.

Safety Defect

Manufacturer and professional sellers are liable for safety defects in movable property:

- **Safety defect CCQ 1469:** a thing has a safety defect where having regard to all circumstances, it does not afford the safety which a person is normally entitled to expect particularly by reason of a defect in design or manufacture, poor preservation or presentation (packaging), or lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them (labeling/safety instructions)
 - **Safety instructions are required to warn about all foreseeable dangers associated with using the product for its intended purpose**
 - **EX:** the safety instructions for a lawnmower will warn you about the dangers of using the lawnmower with all four wheels on the ground. If you were injured holding the lawnmower off the ground, in your hands, trying to trim branches of a small tree, you could not argue that the lawnmower manufacturer is liable. Lawnmowers are not designed or intended to be used as a handheld trimming device. Using a lawnmower in this fashion (for an improper purpose) would undoubtedly raise the issue that the victim, through his contributory negligence, was the cause of his own injury

Special Knowledge

- Special knowledge CCQ 1473: where the victim of the injury is considered by the courts to possess special knowledge about the product in question, the courts might not hold the manufacturer (professional seller) liable even if the warning labels are inadequate
- Furthermore, where the existence of the defect could not have been known at the time of manufacture (distribution), the manufacturer (professional seller) may be exonerated from liability where he can prove that upon becoming aware of the defect, he diligently sent out warnings/recall notices
 - **EX:** a carpenter getting injured by a drill when not wearing safety goggles may have difficulty convincing the court that his injury was due to the failure of the manufacturer to provide adequate warning notices that people should wear safety goggles when using the drill. The carpenter might be seen by the court as being an expert in the use of power tools and therefore the carpenter should have known better than to drill without wearing goggles. The ordinary consumer/home owner, on the other hand, would not be considered an expert in the use of power tools, therefore the warning labels must be sufficiently detailed to warn the inexperienced consumer about all foreseeable dangers associated with the proper use of the drill.

LIMITATION OF LIABILITY: CCQ 1470-1472

Superior Force (Acts of God)

- Superior force (formerly known as Acts of Gods) CCQ 1470: as a general rule, where the performance of an obligation is delayed due to forces beyond your control, forces that are irresistible (not your fault) and unforeseeable (not reasonably foreseeable) then the party who is delayed in performing his obligation will not be penalized
 - **EX:** Truck company gets stuck in a huge snow storm and is delayed in delivering the package. The carrier will not be liable.

Good Samaritan Legislation

- **Giving assistance CCQ 1471:** if you come to the aid of someone and in the process of helping them, you cause additional injury to them, you will not be held liable unless the courts finds that the injuries you caused are due to your **gross negligence** or **intentional fault**
 - **EX:** CCQ 1471 would be a defense if you came to the aid of someone whose life is in peril (as per your duty under Quebec Charter: sec. 2) and caused injury to the person you saved

Whistleblowing

- **Whistleblowing CCQ 1472:**
 - By externally whistleblowing on your employer you will be disclosing confidential information belonging to your employer
 - Disclosing confidential information is a breach of your fiduciary duty to your employer
 - Whistleblowing can also cause damage to the company's reputation and could affect their stock value
 - Under CCQ 1472, whistleblowers cannot be sued by the company where the disclosures of information by the whistleblower was justified for reasons of public health or safety (**PROTECTS WHISTLEBLOWER**)

LIMITATION OF LIABILITY: CCQ 1474-1480, 1621

Waiver

- **Waiver CCQ 1474:** a contract signed by a participant in a potentially dangerous event (a marathon run, whitewater rafting, bungee jumping, etc.) whereby the participant agrees not to sue the organizer or its employees/agents if the participant, while participating in the event, suffers damage, injury and/or death, no matter how, or by whom, this injury and/or death is caused.
 - Notwithstanding the fact that you signed the contractual waiver, under CCQ 1474 some of the provisions of the waivers will not be enforceable
 - Civil liability (CCQ 1457) encompasses three degrees of fault which are:
 - **1.** Negligence (or carelessness)
 - **2.** Gross negligence: (a reckless disregard for the safety of those around you)
 - **3.** Intentional fault (where it is shown you intended to injure the victim)
 - FYI: injuries caused through gross negligence or intentional fault could conceivably lead to criminal charges in addition to a civil lawsuit for damages.
- The waiver referred to in CCQ 1474 will only protect the operator from being sued for material damage caused by the negligence of the operator/employees/agents. If you can prove that you suffered material damage due to the gross negligence or intentional fault of the operator/employees/agents, then the waiver that you signed does not prevent you from suing them.
 - **EX:** if you fell out of the whitewater raft because of simple negligence and lost your shoes, you **CANNOT** sue for material damages
 - **EX:** if you fell out of the whitewater raft because of gross negligence or intentional fault and lost your shoes, you **CAN** sue for material damages
 - **CCQ 1474 expressly states that one may not give up (waive) their rights to sue for bodily or moral injury**
 - **EX:** if you suffer bodily or moral injury, the waiver will not apply. You fall out of water rafting boat and break your leg. Can you sue the operator? Was the operator at fault? Was he negligent, gross negligent, or intentional fault.
 - **GENERAL RULE:** you must show fault

Notice

- **Notice excluding liability CCQ 1475:**

- **EX:** coat checks in a restaurant/club/museum usually have a posted sign that states that the establishment will not be liable for any loss of, or damage to, the coats which are put into the custody of the coat check. This is a **verbal contract of deposit**. The establishment must prove that their limitation of liability sign was placed in such a position that the **reasonable person**, on approaching the coat check, would have seen the sign before depositing their coat. The fact that the person, after reading the sign, chose to leave their coat is considered proof that the person tacitly accepted the limitation of liability clause as one of the terms of the contract of deposit. Naturally the coat check operator would not be protected from actions which the court felt were grossly negligent or which resulted from intentional fault. If the coat check operator left his post, and during his absence, a coat was stolen, the establishment would be liable. A contract of deposit implicitly requires the establishment to supervise the coats at all times. However, you come back and get your coat and there is a button missing from your coat, is the operator liable? Maybe or maybe not?
 - **You would have to prove if button was on before you gave it in**
- **Another EX:** you get the coat back and claim that you had leather gloves inside the pockets. Can you prove that they were even there beforehand?
- **EX:** if they give you the wrong jacket because they messed up the numbers, they are liable. This is gross negligence.

Risk & Fault

- **Assuming of risk CCQ 1477:** Example—when you are playing a game of baseball you assume the ordinary risks of injury associated with participating in the sport, but you do not assume the risks of injuries caused by somebody breaking the rules of the game
 - **EX:** being hit by a bat from angry player
- **Apportionment of fault CCQ 1478:** to what degree are your own injuries caused by your fault? To what degree is the victim liable?
 - Contributory negligence is the principle that determines to what degree the victim is liable (partially or 100% liable) for his own injury
 - **EX:** an adult victim ignores warning signs, climbs a fence and gets injured trespassing on a private construction site
- **Solidary (joint & several) liability CCQ 1480:** where more than one person has collectively participated in a wrongful act (**EX:** three people collectively smash another person's car) the court will hold each of the debtors liable for 100% of the injuries (damages) suffered by the victim. The victim will have the option of collecting up to 100% of the judgment award from any one of the debtors, if the victim so chooses. If the victim collects 100% of the judgment from debtor #1, debtor #1 may now sue debtor #2 and debtor #3 to collect 1/3 of the judgment value from each of them

Punitive Damages

- **Punitive damages CCQ 1621:** punitive damages are only available under Quebec Law where a specific Statute (law) authorizes them. Punitive damages are not a general recourse available in all cases of breach of contract or civil liability.
 - **EX of Punitive Damages may be applied in Civil Liability:**
 - In cases of civil liability (CCQ 1457), if you can prove that your Quebec Charter Rights have also been violated, the courts may award punitive damages.
 - **EX:** attacking someone and beating them up might be considered to be a violation of their dignity, honor and reputation under Quebec

- **You can conceivably combine an action for civil liability CCQ 1457 asking for compensatory damages bodily, moral or material damages or a request for punitive damages for violation of charter rights.**

CASE 1: HARRIS V. OSTROMOGILSKI

Step 1-2: Parties and the Facts

- Harris drove a taxi owned by Ostromogilski, so Harris visited Ostromogilski's house often
- Harris claimed Ostromogilski attacked him during a regular visit
- Ostromogilski claimed he was defending himself and protecting his family
- Medical evidence showed that Harris had numerous bodily injuries, while Ostromogilski only had injuries to his hands
- Ostromogilski was charged with and convicted of two criminal charges of assault resulting from his attack on Harris

Step 3: Legal Issue

- CCQ 1457—a person has a duty not to cause injury to another
- Can a plaintiff combine an action under CCQ 1457 for compensatory injury with an action under the Quebec Charter claiming punitive damages for breach of sections 4 and 49 of the Charter

Step 4: Court Judgment

- Harris sued Ostromogilski under CCQ 1457 for bodily, moral and material damages to cover lost income, permanent partial disability, the cost of an ambulance ride, broken glasses and torn clothing
- Harris won his civil case and was awarded \$5,880 in compensation
- In his court action, Harris had also claimed punitive damages from Ostromogilski claiming that Ostromogilski's attack on Harris constituted a violation of Harris' rights under section 4 of the Quebec Charter
- The awarding of punitive damages is always discretionary. The judge decided not to grant punitive damages in this case because the judge felt that Ostromogilski has been sufficiently punished by receiving two criminal convictions with monetary fines for assaulting Harris

CASE 1: WALKER V. SINGER

Step 1-2: Parties and the Facts

- Mr. Walker and Ms. Singer dated for a short period of time, and both were living in a mutual friend's home
- Walker broke up with Singer
- Singer cut up Walker's clothes with a knife/scissors
- Walker called the police and filed a criminal complaint against Singer
- Singer retaliated and filed a false criminal complaint that Walker had physically assaulted her
- No criminal charges were formally brought against Walker (Singer's claims were false), however the criminal assault accusations against Walker remained on record
- Walker sued Singer for compensatory damages and for punitive damages

- Walker sued Singer for compensatory damages and for punitive damages

Step 3: Legal Issue

- **Would filing a false police report charging a man with sexual assault entitle the man to sue his false accuser for both moral and punitive damages?**
- Walker sued Singer for compensatory damages under CCLC 1053. This article has been replaced by the new Civil Code and today the appropriate article to sue under would be CCQ 1457
- Would filing a false police report against Walker allow Walker to claim punitive damages for a violation of his Quebec Charter rights?

Step 4: Court Judgment

- **Willfully filling a false criminal complaint for assault constitutes a violation of the rights of the accused under section 4 of the Quebec Charter, allowing the accused to sue his wrongful accuser for punitive damages**
- Walker claimed \$78 800 in damages. The judge awarded \$760 in material damage for his destroyed clothing plus \$5000 in moral damage to Walker's reputation plus \$2000 as moral damage for psychological stress
 - In addition to the \$7760 in compensatory damages that Walker received, the judge also awarded Walker an additional \$3000 in punitive damages under section 4 and 49 of the Quebec Charter
 - The judge felt that punitive damages should be awarded in this case since the judge felt that Singer had not been sufficiently punished. Singer was a lawyer and should have known better than to file a false police report. While Singer has been convicted of the criminal charge of Mischief for destroying the clothing, her criminal record was unconditionally discharged immediately (so as not to have repercussions on her ability to practice law), so the criminal conviction did not really punish her.

CASE 1: WALFORD V. JACUZZI CANADA (C.A.)

Step 1-2: Parties and the Facts

- A teenage girl broke her neck sliding down a slide into an above ground swimming pool
- Walford family had owned a used above-ground swimming pool for 2 years and wanted to add a pool slide
- Mrs. Walford purchased a used pool slide from a private individual and then took it to a pool supply company to buy missing parts. While at the pool supply company she asked the company's representatives if this slide was suitable for her pool
- Pool supply company told her that the slide would be "okay" to use
- Walford's 16-year-old daughter wanted to use the slide and was told by her mother not to slide backwards. The girl didn't listen to her mother, slid backwards and broke her neck rendering her paralyzed.
- Trial judge assessed the daughter's injuries (damages) at over 5 million dollars

Step 3: Legal Issue

- **Apportionment of fault**—to what degree was the girl at fault (contributory negligence) for her injuries?
- **Duty of care**—did the pool supply company owe a duty to warn the Walfords that the slide was too big for their pool when the pool supply company was asked by Mrs. Walford about compatibility?

Step 4: Court Judgment

- Trial court found that the girl was 100% responsible (contributorily negligent) for her injuries, since she should have known better
- Court of Appeal ruled that the girl was 20% contributorily negligent and that the pool supply company was liable for 80% of the girl's damages
 - When the pool supply company said that it was "okay" and "no problem" to install the slide on the pool, the consumer was entitled to rely on the statements and to believe that such an installation would be safe to use. This slide was in fact too large for the Walford's pool and the pool supply company was therefore found to have acted negligently in giving this advice. The Walfords had been customers of the pool supply company for two years before the accident and this business relationship was sufficient to create a duty of care on the part of the pool supply company. The Walfords were therefore entitled to rely on the advice of the pool supply company
- While this is an Ontario case, a similar action in Quebec would be taken under CCQ 1457, negligence and breach of duty to warn, contributory negligence CCQ 1478 (the girl)

CASE 1: MORSE V. COTT BEVERAGES

Step 1-2: Parties and the Facts

- A 16-year-old girl in Skuskatchewan tried to open a two liter soda pop bottle with a nutcracker because the twist top was on too tightly for her to open it by hand
- Cap flew off the bottle due to pressure and injured her eye
- She was claiming bodily, moral and material damages (compensation) from the manufacturer for her injuries. In Saskatchewan these compensatory damages are referred to as General Damages

Step 3: Legal Issue

- Product safety issue/defect— Under the Consumer Products Warranties Act of Saskatchewan— where a manufacturer has committed a willful and knowing violation of the Act, in addition to actual compensatory damages the judge can also award exemplary (punitive) damages
 - Were the actions of Cott Beverages in breach of the Consumer Products Warranties Act? Cott Beverages had purchased the capping machine from a company called Alcoa. The capping machine came with a booklet of instructions stating that:
 - The tops of bottles should not be put on too tightly because consumers might then try to use tools to open the bottle and these actions might result in tops flying off bottles and injuring consumers
 - The instruction booklet specified the maximum safe torque pressure to be used to cap bottles
 - Proof was shown to the court that Cott Beverages was shipping bottles capped too tightly

Step 4: Court Judgment

- The judge ruled that Cott Beverages knew or ought to have known that selling bottles that were capped too tightly could result in consumers being injured trying to open to bottles. Cott Beverages should therefore have warned consumers to return for a refund, any bottle that they could not open by hand. Judge awarded Morse:
 - \$18000 in general damages (compensatory damages)

- \$36000 in exemplary damages (punitive damages) since the Saskatchewan Law provided that exemplary (punitive) damages may be awarded by the judge in cases where the manufacturer willfully and knowingly violated the Act (law)
- In Quebec the cause of action for this case would be CCQ 1468, 1469
 - Punitive damages would not be available under Quebec Law

Lesson 13: Ethics

INTRODUCTION TO ETHICS

Defining Ethics

- Ethics has no universal definition:
 - Ethics is **subjective**
 - Differs from person to person; based on culture, religious beliefs, personal values
 - A concerns for the well-being of others
 - Moral values of society
 - The “right thing” to do
 - Fairness, conciliation and good faith

Some Fundamental Principles of Ethics

- In your personal life, one should:
 - Be respectful of others, act honestly and fairly, comply with the law, not act maliciously and inspire trust

In Your Business Dealings

- You should:
 - Maintain objectivity and impartiality, act prudently and diligently (Fiduciary duty comes from this principle), ensure confidentiality and full disclosure, avoid conflicts of interests, comply with professional standards, company policies and the law
 - As a general rule, treat others as you would like to be treated

LAW VS. ETHICS

Law

- Sets minimum standards
 - **EX:** minimum wage— all employers must comply
- Adopted by government and enforced by the courts

Ethics

- Deals with personal ideas, beliefs, and values
- It is subjective because moral views differ from person to person
- Not enforceable by courts

Society, Ethics, & Law

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 - Ethical principles become incorporated into legislation
 - EX: Legalization of same-sex marriage
 - EX: Decriminalization of marijuana and legalization of medical marijuana
- Is compliance with the law sufficient?
 - It may not be. Society may feel that merely respecting the minimum requirements of the law is not sufficient. Paying a minimum wage is legal, but society might feel that it is not fair or equitable
- **Can law offer an adequate solution to all social issues? Does the law reflect the views and beliefs of all of the population? Do we feel that the lawmakers are acting in society's best interests?**
 - Law maker adopts set of laws that set minimum standards. Standards are good they set minimum protecting. Over time views of society changes and today's world people might think that a law doesn't represent views of society. Government might not be representing society's best interests.
- As society's ethical views change, pressure is placed on the government to modify its law to reflect the changing views of society. Laws change very slowly because the government tries to take into consideration the conflicting views of different groups within society. Some groups are promoting change while other groups wish to maintain the status quo.

INTERNATIONAL BUSINESS ETHICS

Global Marketplace

- Why operate a business in a developing country?
 - Cheap labor and wages
 - No or less unions
 - No or less health and safety regulations
 - No or less taxes/better tax exemptions
 - No or less environmental protection
 - Abundance of inexpensive raw materials

Stricter Laws at Home vs. Weaker Laws in Developing Countries

- Legally, a Canadian company operating in a developing country must comply with the laws of the host country where they are operating. If the laws of the host country provide weaker protection for workers and the environment than do the laws of Canada, can the Canadian company, in good conscience, merely comply with the weaker laws of the host country? **Legally YES, ethically NO.**

United Nations Global Compact (UNGC)

- UNGC is a Convention that encourages businesses operating in developing countries to adopt socially responsible policies and to apply ethically standards of operation which exceed the legal requirements of the host countries in which the companies are operating
- UNGC promotes replacing the historical approach of maximizing short-term profits with policies that promote long-term values:
 - Long-term value includes reducing pollution to protect the environment for future generations and includes educating and improving the social and economic conditions of the local workforce

VOLUNTARY COMPLIANCE WITH ETHICAL STANDARDS

The UNGC Consists of 10 Principles: Human Rights

- 1. Businesses should support and respect the protection of internationally proclaimed human rights; and
- 2. Make sure that they are not complicit in human rights abuse
 - When talking about human rights were talking about same issues we see in Quebec Charter of Human Rights (protection of fundamental freedoms and prevention of discrimination)
 - **Complicità** the warning here to foreign business doing business in developing country is that even if you're not directly violating human rights you may be complicit you may be facilitating the violation the human rights by sub-contractors.

The UNGC Consists of 10 Principles: Labour

- 3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- 4. The elimination of all forms of forced and compulsory labour;
- 5. The effective abolition of child labour; and
- 6. The elimination of discrimination in respect of employment and occupation
 - When it comes to hiring practices or promotion it is important for company to be aware of historical issues that took place in developing countries like animosity between certain groups based on tribal, ethnic or religious affiliations. These issues might exist, the company cannot change that but should be aware and make sure discrimination does not occur.

The UNGC Consists of 10 Principles: Environment

- 7. Businesses should support a precautionary approach to environmental challenges;
- 8. Undertake initiatives to promote greater environmental responsibility; and
- 9. Encourage the development and diffusion of environmentally friendly technologies
 - **Simply put, businesses should be aware of harm that pollution causes to the environment. Just because law of host country is weak and would allow environmental pollution, this is not a justification for business to pollute.**

The UNGC Consists of 10 Principles: Anti-Corruption

- 10. Businesses should work against corruption in all its form, including extortion and bribery
 - **EX:** Canadian company operating in developing country where everyone expects to receive a bribe. Should you pay? NO. UNGC says no and there is a Canadian law that says NO.
 - **Extra-territoriality:** as a general rule, Canadian laws only apply to actions taken within the territorial boundaries of Canada. If a Canadian law is adopted with Extra-territorial effect, this law will apply to actions taken by Canadians outside of Canada
 - **EX:** Corruption of Foreign Public Officials Act—Canadian companies can be charged, tried and convicted in a Canadian court for bribing or attempting to bribe Foreign Public Officials, even if under the laws of the foreign country where the officials are from bribing public is not illegal

RESOLVING ETHICAL ISSUES

Resolving Ethical Issues

- Is there always one correct answer to an ethical problem? NO

- In solving an ethical problem one must try to balance the interests of all stakeholders
 - Business owners (shareholders)
 - Employees—fair wages, health and safety, job security
 - Management—director/officers
 - Customers/clients—products/services, quality/safety issues
 - Suppliers—dependent on your business
 - Creditors—financial interest in the success of your business
 - The community—effects that the presence of your business has on the local economy, stable employment, municipal institutions, property values, infrastructure
- In resolving an ethical problem one tries to promote a win-win situation
 - Win-win does not mean that every stakeholder has to be happy with the final decision. Win-win refers to the fact that every stakeholder should be given the opportunity to be heard and to express their views on the issues

PROFESSIONAL STANDARDS AND CORPORATE CODES OF CONDUCT

Professional Standards

- Professional standards: professional associations adopt these ethical standards
 - Promotes public trust in the organization and in the integrity of its members
 - Informs all members as to what their duties and obligation are to both organization and to their clients
 - **They deal with:**
 - Objectivity
 - Members have to act in objective fashion when rendering decisions
 - Compliance with the law
 - Inappropriate conduct
 - EX: Insiders trading, misappropriation of confidential information
 - Confidentiality
 - Any information gathered from client cannot be used
 - Duty of care: fiduciary duty
 - Client hired you to take on specific task and youre being paid
 - Conflict of interest

Corporate Codes of Conduct

- **Employee rules and guidelines:** clearly explains what behavior on the part of employee is acceptable, and what behavior is unacceptable.
- Deals with the same issues as addressed in **Professional Standards**
- **Why do you need a CODE of CONDUCT?**
 - Important for employer to show what the employee knew or ought to have known what the employee's obligations were.
 - **EX:** If you try firing an employee

One important issue that should be addressed in Code of Conduct is:

- Whistle blowing
 - **Internal whistle blowing:** advising your supervisor or upper management about a problem that you have noticed is occurring within the business organization

- **External whistle blowing:** if your own organization has failed to address the problem that you brought to their attention internally, you then disclose this problem to outside governmental authorities and possible to the media
- **FYI: CCQ 1472**—the company cannot sue you in damages for externally whistle blowing where you disclose this problem in order to protect public health of safety

Responsible Investing

- Responsible investing: identifying industries and/or companies in which to invest taking social impact into account
 - Replaces short-term profit as a success measurement with the creation of long-term value
 - Avoiding ethically harmful industries such as tobacco, munitions, alcohol, gambling, strip mining
 - Institutional investors such as Pension Funds wield enormous financial power and can influence the socially responsibility behavior of companies in which they invest
 - Pensions reflect the people and employees so by doing this they're looking out for the best interests of the public and can influence companies to act a certain way to invest in them

Corporate Governance

- **Corporate governance:** looks at the issue of WHO is running the company. This is a very important issue for potential investors
 - Examines the internal management procedures and controls
 - Examines the relationship between the three principle corporate stakeholders
 - **Shareholders:** own the company (do not manage the company but elect the Directors)
 - **Directors:** run the company, full authority over management, have the power to delegate day-to-day operations to Officers
 - **Officers:** appointed by the Directors, manage company day-to-day operations
- **Corporate governance examines the following issues:**
 - **Influence:** to what degree do the shareholders influence the decisions of the Directors and Officers
 - **Independent:** Directors should focus on what is best for the company—not on what is best for the Shareholders who elected them
 - **Competence:** are the Directors/Officers independent professional's business people, or are they family members of, or related to the majority Shareholders
 - **Transparency:** all corporate records should be written, detailed and complete. Particular attention should be paid to all salaries, bonuses, stock options and other perks and benefits awarded to Directors and Officers