



Business Law Notes

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PART 1: LEGAL FUNDAMENTALS

SECTION 1-1: INTRODUCTION TO LAW

Law is essential to any society in that it provides the rules by which people and businesses interact. Law affects almost every function and area of business. The authors of one business law text go so far as to say that “the difference between winning and losing in the business world often depends upon the ability to make good choices from a legal perspective.”¹ This is because almost every business decision has legal repercussions, including deciding whether to incorporate a business, obtaining financing, protecting proprietary knowledge used to develop products/services, entering into contracts to purchase raw materials, ensuring that products meet safety standards, disposing of plant wastes, promoting and pricing products/services, entering into contracts to sell products/services, and providing product warranties and after-sales service.

At all stages of business, running afoul of the law can hurt a business, while playing within the boundaries of the law can help the business to succeed. For this reason, accountants, who play a key role in almost every aspect of operations, must have a solid working knowledge of the law.

Definition and Purpose of Law

The word “law” is generally associated with the word “rules.” McInnes, Kerr, and Van Duzer provide a simple definition of law as “a rule that can be enforced by the courts.”² Similarly, Yates defines law as “the body of rules that can be enforced by the courts or by other government agencies.”³ DuPlessis and O’Byrne define law as “a set of rules and principles intended to guide conduct in society, primarily by protecting persons and their property; facilitating personal and commercial interactions; and providing mechanisms for dispute recognition.”⁴ Smyth, Soberman, Easson, and McGill describe what law does, which is to “set standards of behaviour that are enforced by government, and also by individuals and groups with the help of government.”⁵

¹ Mitchell McInnes, Ian R. Kerr, and J. Anthony VanDuzer, *Managing the Law: The Legal Aspects of Doing Business, Third Edition*, (Toronto: Pearson Canada, 2011), p.2.

²McInnes et al., p. 7.

³ Richard A. Yates, *Legal Fundamentals for Canadian Business, Second Edition*, (Toronto: Pearson Canada, 2010), p. 1.

⁴ Dorothy DuPlessis, Steven Enman, Shannon O’Byrne, and Sally Gunz, *Canadian Business and the Law, Third Edition*, (Toronto: Nelson, a Division of Thomson Canada Limited, 2008), p. 4.

⁵ J.E. Smyth, D.A. Soberman, A.J. Easson, and S.A. McGill, *The Law and Business Administration in Canada, Twelfth Edition*, (Toronto: Pearson Canada, 2010), p. 3.

With these definitions in mind, business law could be defined as rules that govern business relationships. DuPlessis and O'Byrne suggest that business law performs many functions, including:

- Defining general rules of commerce;
- Protecting business ideas and business assets;
- Providing mechanisms that allow business people to determine how they will participate in business ventures and how much risk they will bear;
- Ensuring that losses are borne by those responsible for causing them; and
- Facilitating planning by ensuring that commitments are honoured.⁶

Business Law versus Business Ethics

While staying within the confines of an increasing array of business laws is necessary for success in business, it is not sufficient. Businesses must also recognize additional limitations and expectations placed upon them by **business ethics**, those principles and values that define what is right and wrong. While ethical principles normally start with what is legal, they often impose a higher standard that recognizes a multitude of stakeholders beyond just suppliers, customers, and employees.

While the focus of this document is on what the law requires of business, ethical standards will also be discussed.

SECTION 1-2: SOURCES OF CANADIAN LAW AND THE LEGAL SYSTEM

We begin this section with an overview of the Canadian legal environment to set the stage for subsequent sections, where specific types of law pertaining to businesses, such as tort law and contract law, will be examined.

Categories of Law

The law can be categorized in several ways. First, there is the distinction between substantive law and procedural law. **Substantive law** consists of the rights and duties that each person has in society, e.g., the right to own property or to make contracts and the duty to avoid injuring others and to obey various laws. **Procedural law** deals with the protection and enforcement of the rights and duties of substantive law; it provides the machinery by which these rights and duties are realized and enforced. To put it briefly, substantive law relates to *what* the law is, whereas procedural law relates to *how* it is enforced.

Substantive law is divided into two fields:

⁶DuPlessis and O'Byrne, p. 4.

1. **Public law** is concerned with the conduct of government and with the relationship between government and private individuals. Public law is divided into categories such as constitutional, criminal, and administrative law.
2. **Private law** consists of the rules governing relations between private individuals or groups of persons. Private law—which can be divided into categories such as torts, contracts, business entities, business relationships, and property rights—forms the substance of business law and is the main focus of this document.

While the predominant concern in a business law course is substantive law, we will first consider the basics of procedural law, the form or organization of the legal system and its methods of conducting trials.

Systems of Law: Civil Law and Common Law

Around the world, two basic legal systems exist, civil law and common law. In brief, civil law emphasizes legislation, while common law emphasizes decisions handed down by the courts.

Civil law is the system of law derived from Roman law. Its focus is on the development of a comprehensive legislated code. Civil law developed in continental Europe and was greatly influenced by the Code of Napoleon in 1804. Most of the private law in Quebec is civil law, but the rest of Canada falls under common law (to be described next). Civil law applies to only a few southern states in the United States (e.g., Louisiana), as well as to Mexico, continental Europe, most of Scotland, much of Africa, and all of South and Central America.

Common law is the system of law in most of the English-speaking world and many non-English-speaking countries that were once part of the British Empire, such as India, Pakistan, and the Caribbean. Within Canada, all provinces and territories except Quebec have adopted common law. Common law is based on **precedent**, the recorded reasons given by judges for their decisions and adopted by judges in later cases.

Common law is designed to facilitate two important aspects of justice:

1. *Consistency*, so that there is equal treatment in like situations;
2. *Predictability*, so that people can find out ahead of time where they stand and act with reasonable certainty in making decisions about whether to sue or to defend themselves.⁷

The system of determining law by following already-decided cases, or precedent, is known as **stare decisis**, a Latin phrase meaning "to stand by a previous decision." On the one hand, we want the law to be stable and certain enough that it can be consulted confidently to predict the

⁷ Smyth et al., pp. 22-23.

legal consequences of our conduct. On the other hand, we want the law to be flexible enough to relate to changing conditions and social attitudes—we do not want to be judged by out-of-date standards. *Stare decisis* implies a preference for the objective of certainty ("let the decision stand"), but the courts have reserved for themselves a considerable amount of flexibility while still formally accepting the authority of their earlier decisions. Thus, there is an attempt to strike a balance between accommodating change and achieving consistency.⁸

Stare decisis means that a lower court is bound by a decision of a superior court in the same jurisdiction when the superior court has decided the same issue. A decision in one province will have persuasive value in other provinces but will not be binding. Sometimes, a court of appeal in another province will come to a contrary decision, leaving the law in an uncertain state that can be resolved only by a decision of the Supreme Court of Canada, which is binding on all other courts in Canada. However, lower courts are constrained only to the extent that the facts of a case before them substantially coincide with, i.e., are not "distinguishably different" from, the facts of the earlier Supreme Court decision.

Therefore, lower courts still have considerable scope to **distinguish** the earlier case on the basis of its facts. When a losing party believes a lower court has incorrectly distinguished the facts, it may appeal to a higher court on these grounds. While the decision of a lower court is not a binding authority on other courts, the facts of the case may still be of wide general interest and the reasons for judgment so easily understood that the decision may have considerable influence and even be "followed" in other later cases unless and until the Supreme Court of Canada rules on the matter and comes to a contrary decision. The decisions of respected English and American judges as well as the decisions of judges from other common law countries may similarly influence the decisions of Canadian courts.

Sources of Law: The Constitution, Legislation, and the Courts

There are three sources of law: the Constitution, legislation, and the courts. The Constitution is the foundation law from which all other laws draw their power. In turn, legislation is passed by Parliament and by provincial legislatures in compliance with the Constitution. Such statutes may codify case law that developed in the courts, or it may change case law. Lastly, the courts hand down judgments that also develop and shape legal principles.⁹ Each of these sources of law will be discussed in more detail in the sections to follow.

⁸ Smyth et al., p. 23.

⁹ Smyth et al., p. 10.

The Constitution

The Constitution provides the basic skeleton or framework for Canada's legal system. It creates the basic rules for Canadian society and its legal and political system. The Constitution is also the highest source of law. Section 52(1) of the Constitution states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."¹⁰ The Constitution is also very difficult to change—the normal amending formula requires the consent of Parliament as well as the consent of the legislatures of at least two-thirds of the provinces, which represent at least 50% of Canada's population.¹¹

The Constitution implements the federal system of Canada by setting out the **division of powers** between the federal and provincial/territorial jurisdictions, that is, by setting out the areas for which each level can create laws. For instance, the federal government is responsible for criminal law, taxation, unemployment insurance, banking and money, bankruptcy and insolvency, trade and commerce, shipping, and copyright, while the provincial governments have jurisdiction over property and civil rights (e.g., contracts and torts), corporations with provincial objects, and the creation of municipalities. The federal government also has **residual power**—power over anything that is not otherwise mentioned, which gives it jurisdiction over areas that did not exist when the Constitution was written in 1867, including telecommunications and air travel. As well, if federal and provincial statutes are ever in conflict, the **doctrine of federal paramountcy** determines that the "federal law wins."¹²

The Charter of Rights and Freedoms

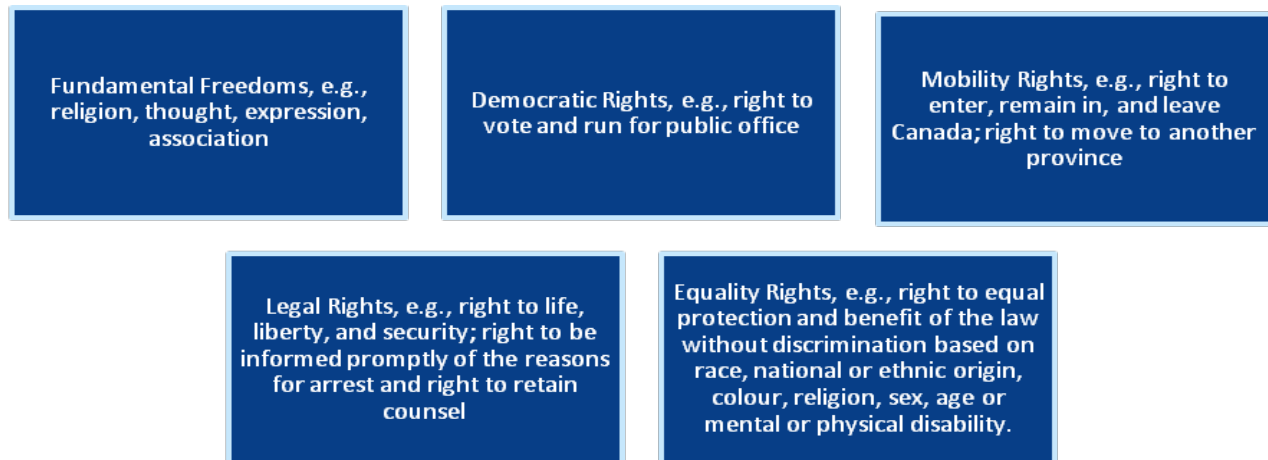
In 1982, the Charter of Rights and Freedoms became part of the Constitution. The Charter places limits on many aspects of government actions and protects human (versus property) rights. Figure 1-1 highlights some of the rights and freedoms protected by the Charter.

It is important to note that the Charter does not describe **property rights** (the right to own and enjoy assets) or **economic rights** (the right to carry on business activities).

¹⁰Section 52(1) of the Constitution.

¹¹McInnes et al., p. 12.

¹²McInnes et al., pp. 13-14.

Figure 1-1: Fundamental Charter Rights and Freedoms

The Charter is also subject to a number of other important restrictions:¹³

1. The Charter's rights and freedoms are fully applicable only when a person complains about government behaviour. Thus, the Charter does not directly apply to disputes involving private parties; however, the Supreme Court of Canada has ruled that private law should be developed in a way that is consistent with Charter values.
2. The Charter also generally does not apply in favour of or against private corporations.
3. Section 1 of the Charter states that its rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It is for this reason that limitations may be placed on selling violent pornography or advertising to children.
4. Section 33 of the Charter may allow Parliament or a legislature to create and enforce a law "notwithstanding" the fact that it violates the Charter. However, this section has only been used once in the common law provinces and territories.

When the Charter is violated, the court may award whatever remedy it considers "appropriate and just in the circumstances." For instance, the court may simply issue a **declaration** that the Charter has been violated and leave it to the legislature to solve the problem. The court may impose an **injunction** that requires the government to resolve the problem in a specific way. Going even further, the court may **strike down** a statute that violates the Charter, leaving the legislature to enact a new law that adheres to the Charter. The court may also save a statute by re-writing part of it—by **severing** out the offending law, **reading down** a statute that is applied

¹³McInnes et al., pp. 16-17.

too broadly, or **reading in** a statute that is written too narrowly. The court may also award damages to people who suffer a Charter violation.¹⁴

Statutes: Law made by Parliament, Provincial Legislatures, and Municipal Governments

Legislation may be passed by either Parliament or provincial legislatures. The most important kinds of legislation are **statutes** or **acts**. For example, every jurisdiction in Canada has an act that allows corporations to be created.

In most cases, a **bill** is introduced into the House of Commons by a Member of Parliament. If the bill receives majority support at the First Reading, it goes to the Second Reading, where it is debated. If it receives majority support, it is sent to a legislative committee for detailed study. At the Third Reading, if it receives majority support, the bill passes and is sent to the Senate, where the process is repeated. The final step, a mere formality, is Royal Assent, where the bill is approved by the Attorney General, as the representative of the Queen.

There are two main classes of legislation—passive and active. **Passive legislation** either prohibits an activity that was formerly permitted or permits an activity that was formerly prohibited. Passive legislation provides a framework within which people legally go about their business and puts the onus on either an injured party or a law-enforcement official to complain about any activity that violates the legislation. In contrast, **active legislation** gives government the right to carry on a program such as levying taxes, providing revenues, and supervising economic activities. Every government department, agency, and tribunal is established by the legislature in a statute. In exercising its regulatory powers, an administrative agency creates new law (**subordinate legislation**), such as the criteria for obtaining business licences.¹⁵

One of the most important types of subordinate legislation involves municipal by-laws. The Constitution is concerned with only two levels of government (federal and provincial) but it gives provinces the power to create municipalities and, in turn, it gives municipalities the power to pass rules and laws that govern the city or town.

Common Law: Law Made by Judges

In the context of a discussion of legal systems, the term **common law** refers to a legal system that can be traced to England, and the term **civil law** refers to a system that can be traced to France. The term **common law** has a second meaning—it refers to the source of a law. When used in this connection, **common law** refers to laws that are created by judges rather than by

¹⁴McInnes et al, pp. 18-19.

¹⁵Smyth et al., p. 25.

legislators or by the drafters of the Constitution. In this sense, common law is also known as case law.¹⁶

Common law is still the main source of private law. Of course, the earliest judicial decisions could not depend on precedent. Instead, they were influenced by local customs, **canon law** (created by the Church and related to matters of the Church), Roman law, feudal law (derived from the feudal system of land ownership), and **merchant law** (rules and practices developed by merchants in medieval trade guilds and administered by their own courts).¹⁷

The early courts of common law could offer only monetary damages to the injured parties. Thus, another set of courts came into existence—the **courts of chancery** or **courts of equity** where petitions were heard by the king and his chancellor and vice-chancellors. The rules of law that these courts administered became known as **equity**. **Equity courts** could offer **equitable remedies**. If they saw fit, they could order **specific performance**—the carrying out of a binding obligation. Defendants who refused were jailed for **contempt of court** until they agreed to carry out the court's order. As equity law developed, its principles—such as trust, loyalty, and consideration of the relative position of the parties—became accepted as common law principles. In 1865, the British Parliament passed legislation to merge the two systems of court into the common law system we have today; the Canadian provinces passed similar legislation shortly thereafter.¹⁸

Relationship Between Statutes and Common Law

A **statute** overrides all the common law dealing with the same point. Legislatures may change common law or simply **codify** the law, i.e., summarize in a statute the common law rules governing a particular area of activity. The courts are often called upon to interpret a statute to decide whether it applies to the facts of a case and, if so, to decide on the consequences of breaking the law. These decisions then form part of judge-made law.

Courts regularly use precedent even though the facts in the original case may be quite different from the case at issue. However, they adhere to **strict interpretation** of statutes: the courts apply the provisions of a statute only where the facts of the case are specifically covered by that statute. Nevertheless, Canadian courts are encouraged by the federal Interpretation Act to take a “fair, liberal, and large” interpretation of statutes.¹⁹ Such a **liberal approach** to the

¹⁶ When used in conjunction with courts, the term **common law** has a third meaning: it refers to the original body of precedents developed by common-law courts as opposed to those developed by courts of equity, to be discussed shortly.

¹⁷ Smyth et al., p. 26.

¹⁸ Smyth et al., pp. 26 and 27

¹⁹ Interpretation Act, R.S.C. 1985, c. I-21, s. 12 (Can.).

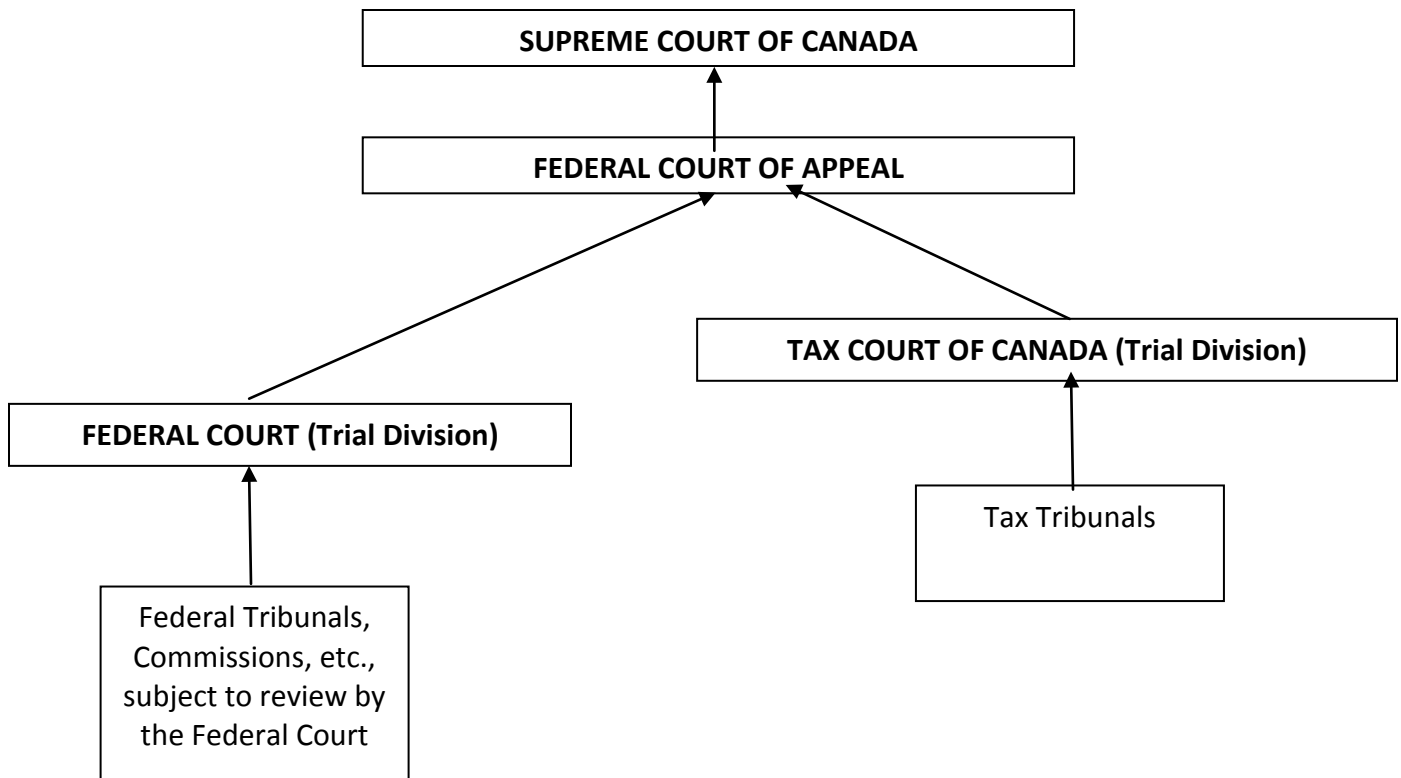
interpretation of statutes considers the context, the custom and trade usage of the language, and the intent or purpose of the statute when it was passed.²⁰

SECTION 1-3: USING THE COURTS - An OVERVIEW OF CIVIL PROCEDURE

The Court System

Canada has a three-tier system similar to that of England, with courts of first instance (trial courts), intermediate courts of appeal, and the Supreme Court of Canada. Figure 1-2 illustrates the federal court system and Figure 1-3 illustrates the Ontario provincial court system.

Figure 1-2: The Federal Court System



The Federal Court (Trial Division) has jurisdiction over claims against the federal government, litigation in areas of federal jurisdiction under the Constitution, and appeals from federal tribunals.

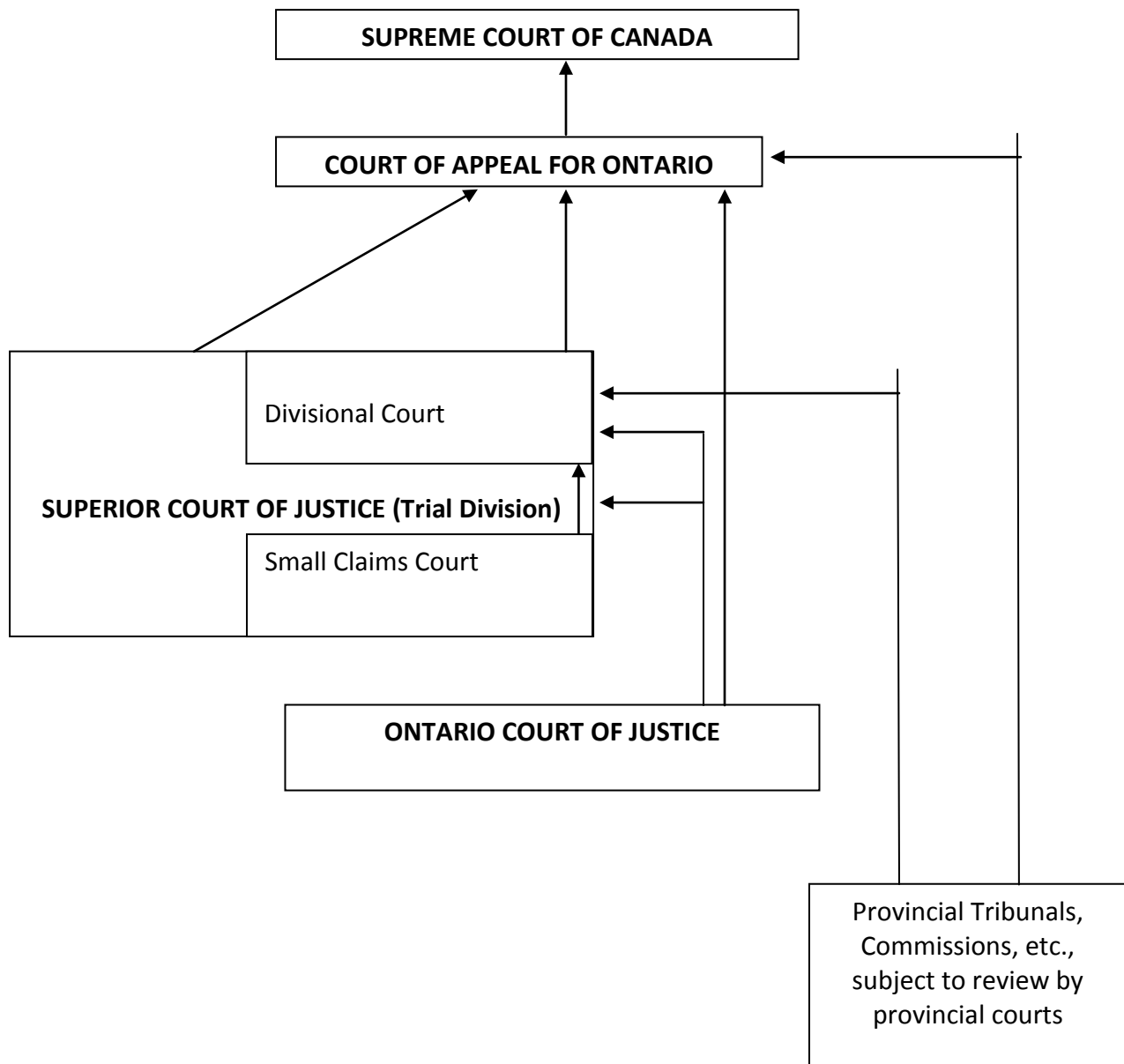
The Tax Court of Canada has jurisdiction over goods and services tax, income tax, employment insurance, and appeals from tribunals in these areas.

²⁰ Smyth et al., pp. 24-25.

The Federal Court of Appeal hears appeals from the Tax Court and the Federal Court (Trial Division).

The Supreme Court of Canada is the highest court in the country. It is necessary to have **leave**, or permission, to appeal to the Supreme Court. The Court generally agrees to hear only cases that raise an issue of national importance. Appeals are almost always heard by five, seven, or nine **justices** (as the judges are called).

Figure 1-3: The Ontario Court System



The Ontario Court of Justice (Trial Court) uses provincially appointed judges for family-law (custody, support, and adoption) cases and for less-serious criminal offences. Justices of the Peace are used for provincial offences (traffic tickets), search warrants, and bail hearings.

The Superior Court of Justice (Trial Court) uses federally appointed judges. It handles all civil litigation, family litigation (custody, support, and divorce), and more-serious criminal offences. For civil litigation, Ontario has a Small Claims Division that handles claims up to \$25,000. Claims between \$25,001 and \$100,000 are resolved out of the Superior Court using a special set of simplified rules.²¹ Claims in excess of \$100,000 are dealt with by the Superior Court of Justice under the regular Rules of Civil Procedure.²² The Divisional Court of the Superior Court has appellate jurisdiction for review of government action, appeals from the decisions of government tribunals, and appeals of civil cases up to \$50,000.

The Court of Appeal for Ontario (Appellate Court) decides cases in panels of three judges or more. It hears appeals from the Superior Court. In most other provinces, the Small Claims Court is a division of the Provincial Court. Ontario's "provincial court" is the Ontario Court of Justice. Finally, the Supreme Court of Canada has jurisdiction over all appeals from provincial appeal courts.

The Litigation Process

Litigation is the system of resolving disputes in court. As a general rule, all adults are free to use the Canadian courts, whether or not they are Canadian citizens. Minors or adults with a mental disability can be sued or sue only through a court-appointed representative.

Corporations are legal persons and therefore can sue or be sued. Unincorporated associations, with the exception of trade unions, cannot sue or be sued, but their individual members can.

The general rule is that the "king can do no wrong," which means governments cannot be sued unless a statutory authority permits it.

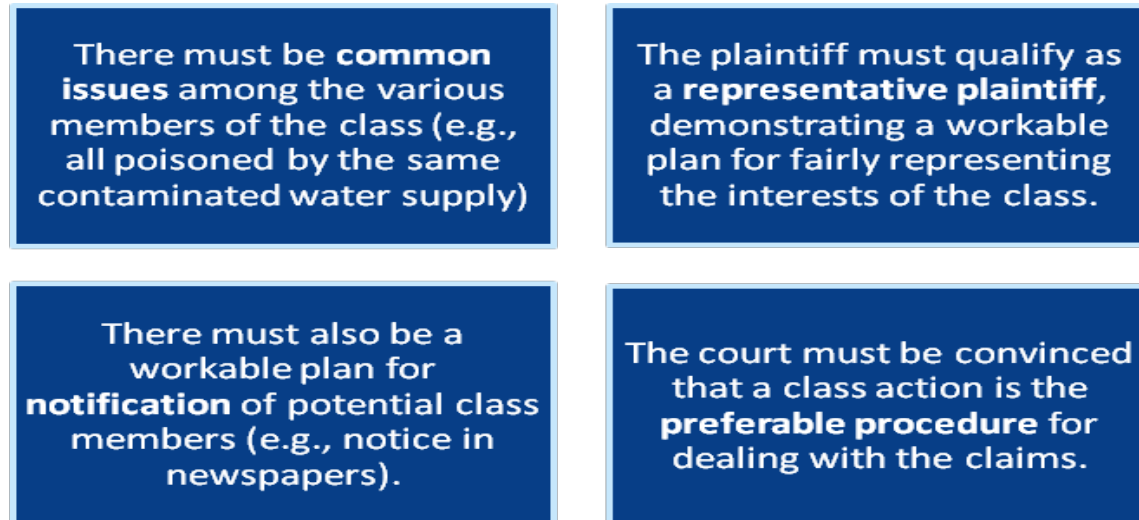
Class action suits are also allowed, where a single person or a small group of people sues on behalf of a larger group of claimants. Class action claims are becoming increasingly prevalent in areas like product liability, mass torts (e.g., contaminated water supply), gender discrimination in the workplace, banking (e.g., improper service charges), business law (e.g., price fixing), and securities law (e.g., insider trading).

²¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

²² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Figure 1-4 sets out the basic requirements that must be met before a class action receives **certification** by the court to allow the various claims to be joined together in a class action.²³

Figure 1-4: Class Action Suits



Legal Representation

If you sue or have been sued, you need to choose who will be your legal representative. Although you can represent yourself, an old expression states that, if you do, you have “a fool for a lawyer and a fool for a client.” Therefore, most litigants are represented by either a lawyer or a paralegal.

Procedures Before a Trial

The legal action begins with the filing of a **statement of claim**, in which the **plaintiff** (the person bringing forward the dispute) sets out the facts that allegedly have given rise to the cause of action and the plaintiff’s damages.

The **defendant** (the person being complained about) responds by filing a **statement of defence**, in which the defendant outlines his or her version of the facts complained about by the plaintiff. The defendant may also file a **counterclaim**, a document that outlines any complaint the defendant wishes to counter against the complaint of the plaintiff.

²³ Ontario is one of seven provinces, along with the federal jurisdiction, to enact legislation to clarify rules of class actions. The details vary by jurisdiction, but the basic rules are shown in Figure 1-4. McInnes et al., pp. 31-32.

The plaintiff then files a **reply**, which outlines the plaintiff's response to the version of the facts set out by the defendant in his or her Statement of Defence. If a Counterclaim was made, the plaintiff also files a **defence to counterclaim**, in which the plaintiff outlines his or her version of the facts complained about by the defendant in the Counterclaim.

These documents form the **pleadings**, the documents that provide the information each party intends to prove in court. If, after receiving the basic pleadings, the parties are still not sure what the other side has in mind, a **demand for particulars** may be used to require the other side to provide additional information.

There are also **examinations for discovery**, in which parties examine each other to further narrow the issues and decide whether to proceed with a trial. During discoveries, information is gathered under oath outside of the court, with the parties and their representatives meeting before a licensed legal reporter. Each party must also produce a list of witnesses and relevant documents. Since many of the documents are in electronic form, production of these documents may be referred to as **e-discovery**. Each party learns about the strength of the other party's case, which enables the parties to make an informed decision about whether to settle or press forward.

A **settlement** occurs when the parties agree to resolve their dispute out of court. The vast majority of claims—more than 95%—are settled out of court.²⁴ The legal system is designed to encourage settlements because of the cost and time involved in using the court system. After the examinations for discovery, the judge may meet with the parties at a **pre-trial conference** to summarize the case and narrow down and/or resolve the issues between the two parties. The judge may also indicate which party is likely to win if the case goes to trial, thus encouraging the likely loser to settle. Depending on the jurisdiction, a pre-trial conference may be required, or it may be initiated either by the parties or the judge. Since 1999, Ontario has had a **mandatory mediation program (MMP)**, which applies to most claims brought in large urban centres. Under the MMP, the parties must meet with a **mediator** (a neutral third party) within 90 days after the defence has been filed. Even when this process does not produce a settlement, it is likely to speed up the litigation process.

The Trial

A **trial** is an oral hearing of the issues by a judge alone, or by a judge and jury, to render a judgment on the matter. If a jury is used, the judge determines the law, while the jury is responsible for finding the facts and applying the law.

²⁴McInnes et al., p. 36.

The plaintiff is the first to present his or her evidence to the judge. This involves the plaintiff and the plaintiff’s witnesses taking the stand and answering questions from the plaintiff’s lawyer under oath. The plaintiff and the plaintiff’s witnesses are then **cross-examined** by the defendant’s lawyer. Following the plaintiff, the defendant has an opportunity to present his or her version of the facts to the judge and call witnesses. Once the defendant and the defendant’s witnesses have been questioned by the defendant’s lawyer, they are cross-examined by the plaintiff’s lawyer.

Rules of evidence apply to determine the **admissible evidence** that may be provided in support of an argument. Ordinary witnesses may testify only about the facts they know first-hand, while expert witnesses may provide information and opinions based on the evidence. The courts also do not normally listen to **hearsay evidence** (information that a witness heard from another person). As well, if a party attempts to introduce surprise evidence, the court may refuse to hear it or may delay proceedings to give the other side an opportunity to reply and, in addition, may penalize the party with loss of costs.

The **burden of proof** in a non-criminal action is on the plaintiff. To win, the plaintiff must establish the facts that prove the plaintiff’s case and then prove the case in law. The plaintiff must prove his or her complaint on a **balance of probabilities**. This means that the “defendant will be held *liable* only if the scales are tipped in the plaintiff’s favour.”²⁵ (This is in contrast to criminal cases, where the higher standard of **beyond a reasonable doubt** is imposed. In complex cases, the judge will **reserve judgment** and postpone giving a decision until after the court hearing ends and the judge has had time to review the evidence.

In civil litigation, a variety of remedies are available, as illustrated in Figure 1-5.²⁶

Figure 1-5: Remedies in Civil Litigation

Remedy	Purpose
Compensatory damages	Financially compensate for a loss.
Punitive damages	Punish the party for acting very badly.
Nominal damages	Symbolically recognize that the party acted wrongfully even though the other party did not suffer any loss/harm.
Specific performance	Require the party to fulfill its obligation or promise.
Injunction	Require the party to act or not act in a particular way.
Rescission	Terminate a contract.

²⁵McInnes et al., p. 37.

²⁶McInnes et al., p. 38.

The winning party is also normally awarded **costs**, the expenses incurred by it during the litigation. However, the costs are usually **partial indemnity costs**, which only partially indemnify (usually around 40 to 50%) the winner for fees and disbursements paid to his or her lawyer. In exceptional cases, if the action is deemed to be frivolous or vexatious, or if a reasonable settlement offer is rejected, **substantial indemnity costs** may be awarded (usually around 65 to 75% of the winner's actual costs). Neither of these costs in any way compensates the winner for the time, energy, and emotional toll that a court case can take. Thus, in the end, it may be questionable whether the winner really won at all.

Appeals

An appeal must be requested within a certain time limit, usually within 30 days after the trial court renders its decision. The person who challenges the decision of the lower court is the **appellant**, and the person who defends the original decision is the **respondent**. The **appellate court (appeal court)** decides whether a mistake was made in the trial court. Normally, appeals are heard by at least three judges. The judges hear and read arguments from the parties or their lawyers, but do not hear witnesses or receive evidence. Generally speaking, appeal courts accept the findings of fact of the trial judge and reconsider only the application of the law. However, sometimes an appeal may be launched on the basis that the judge made procedural errors such as excluding important evidence or admitting improper evidence or, more rarely, on the basis that the evidence does not support the judge's finding of fact.

Alternative Dispute Resolution

Alternate dispute resolution (ADR) refers to private procedures to resolve disputes without going to court. The advantages of ADR include speed, reduced cost, choice of mediator or adjudicator, confidentiality (not generating bad publicity or divulging confidential information), and the preservation of ongoing relations between the two parties.²⁷ ADR may be preferable because the outcome of a trial is unpredictable, given the number of factors that go into a trial. Furthermore, sometimes no amount of money awarded in damages by a judge will make the situation right, and ADR may allow for an alternative outcome, such as an explanation and an apology.²⁸ Finally, ADR may allow for a win-win resolution.²⁹

There are three major types of ADR:

1. **Negotiation** does not involve a third party, nor is there any guarantee of binding resolution. It is the most common type of ADR since business people routinely settle their differences through discussion.

²⁷ Smyth et al., p. 44.

²⁸ McInnes et al., pp. 50-51.

²⁹ Yates, p. 19.

2. **Mediation** is a process by which a neutral third party who is acceptable to both sides assists them in reaching a settlement by clarifying issues, outlining the strengths and weaknesses of both sides, and suggesting possible solutions. The mediator does not render a decision. Mediation is usually voluntary but may be required by contract or, as is sometimes the case in Ontario, by law.
3. **Arbitration** is a process where the parties agree to be bound by the decision of a neutral third party who adjudicates the matter, although there may be a right to appeal to the courts. The arbitrator, who is chosen by the parties for his or her expertise in an area, hears witnesses and reviews evidence. Again, arbitration may be required by contract or law. For example, pursuant to the Canadian Motor Vehicle Arbitration Plan (CAMVAP), contracts between customers and dealers require disputes to be arbitrated before that body rather than through litigation.

Increasingly, mediation and arbitration are combined into Med-Arb, a two-step process that first attempts mediation but, if that does not work, empowers the mediator to impose a binding solution.³⁰

Administrative Tribunals

An **administrative tribunal** is a body that resolves disputes arising in administrative law. It is sometimes said to exercise a “quasi-judicial” function. It can make binding decisions that affect legal rights but generally operates more informally than courts in that, for instance, strict rules of evidence typically don’t apply. Thus, it is “somewhere between a government and a court.”³¹ The members of a tribunal are usually selected by the parties or by a statutory process, and are appointed on the basis of special knowledge or extensive experience in an area. Tribunal decisions are highly respected and not easily overturned. If a party is dissatisfied with a tribunal decision, the party can sometimes ask a court for judicial review.

A court will apply one of two standards during a judicial review. If it uses a **reasonableness standard**, the court will defer to the tribunal’s expertise and will overturn only those tribunal decisions that are unreasonable. On the other hand, a **correctness standard** does not require judicial deference, and the court is free to impose the “correct” judgment. The latter standard is used for general issues of law that are not within the tribunal’s area of special knowledge.

The government often inserts a **privative clause** into legislation that creates and empowers a tribunal. Such a clause attempts to prevent a court from exercising judicial review over a tribunal decision. If the clause is properly drafted, the tribunal’s jurisdiction is “final and conclusive” and not usually subject to judicial review.

³⁰ Yates, p. 19.

³¹ McInnes et al., p. 49.

STUDY QUESTIONS FOR PART 1: LEGAL FUNDAMENTALS

1. When referring to a system of law, common law refers to:
 - a. The legal system in which laws are based on precedent, i.e., the recorded reasons given by judges for their decisions, which are adopted by judges in later cases with similar facts.
 - b. The legal system derived from Roman law that focuses on the development of a comprehensive legislated code.
 - c. The rules of law administered by the courts of equity.
 - d. The rights and duties that each person has in society.
2. Which of these is **not** true regarding the doctrine of *stare decisis*?
 - a. A lower court is bound by a decision of a superior court in the same jurisdiction when the superior court has decided the same issue.
 - b. A decision in one province is binding in other provinces.
 - c. Lower courts have considerable leeway to distinguish the earlier case on the basis of its facts.
 - d. All of the above are true.
3. This type of statute prohibits an activity that used to be permitted or permits an activity that used to be prohibited:
 - a. Bill
 - b. Passive legislation
 - c. Active legislation
 - d. Subordinate legislation
4. This is **not** a fundamental freedom under the Charter of Rights and Freedoms:
 - a. Religion
 - b. Thought
 - c. Mobility
 - d. Association
5. In Ontario, the Small Claims Court hears:
 - a. Less-serious criminal offences
 - b. Civil claims up to \$25,000
 - c. Taxation disputes
 - d. Appeals of civil cases up to \$50,000
6. In Ontario, if you commenced a civil case claiming damages in excess of \$100,000, the courts you would potentially work your way through are:
 - a. Small Claims Court, Divisional Court, Court of Appeal for Ontario
 - b. Small Claims Court, Court of Appeal for Ontario, Supreme Court of Canada
 - c. Ontario Court of Justice, Superior Court of Justice (Divisional Court), Court of Appeal for Ontario
 - d. Superior Court of Justice, Court of Appeal for Ontario, Supreme Court of Canada

7. This requirement for a class-action suit refers to one or a few people having a workable plan for pleading the case on behalf of a whole class of people:
 - a. There are common issues
 - b. There is a representative plaintiff
 - c. There is a workable notification plan
 - d. The court is convinced a class action is the preferable procedure

8. Which of these is **not** true about evidence at a civil litigation trial?
 - a. The plaintiff is the first to present evidence to the judge.
 - b. Ordinary witnesses may testify about evidence they heard from another person.
 - c. Expert witnesses may provide opinions based on the evidence.
 - d. The court may refuse to hear surprise evidence.

9. This remedy in civil litigation is designed to make amends to the victim for loss suffered by the victim:
 - a. Compensatory damages
 - b. Punitive damages
 - c. Nominal damages
 - d. Specific performance
 - e. Injunction

10. This remedy in civil litigation is designed to make the guilty party fulfill his or her obligation or promise to the injured party:
 - a. Compensatory damages
 - b. Punitive damages
 - c. Specific performance
 - d. Injunction
 - e. Rescission

11. This type of alternative dispute resolution method is sometimes required by law in Ontario; the third party does not render a decision but only clarifies issues and suggests possible solutions:
 - a. Mediation
 - b. Arbitration
 - c. Med/Arb
 - d. Negotiation

ANSWERS TO STUDY QUESTIONS FOR PART 1: LEGAL FUNDAMENTALS

1. A. One of the meanings of common law is a legal system where laws are based on precedent. B is civil law. C refers to a second set of courts that came into existence to provide remedies other than monetary damages. D refers to substantive law, which in turn, is divided into public and private law.
2. B. A decision in one province is persuasive in other provinces but not binding, whereas a decision of the Supreme Court is binding in all jurisdictions.
3. B. Passive legislation either prohibits an activity that was formerly permitted or permits an activity that was formerly prohibited. Active legislation gives government the right to carry on various programs, which in turn gives rise to the need for subordinate legislation created by administrative agencies to exercise their regulatory powers. A bill is a proposed law that has not yet received Royal Assent.
4. C. Mobility rights are protected rights under the Charter, but they are not fundamental freedoms as are freedom of religion, thought, and association.
5. B. In Ontario, the Small Claims court hears civil claims up to \$25,000. Less-serious criminal offences are heard by the Ontario Court of Justice (Ontario's trial court). The Divisional Court of the Superior Court of Justice hears appeals of civil cases up to \$50,000. Taxation disputes are heard by the Tax Court of Canada.
6. D. In Ontario, cases over \$100,000 would start in the Superior Court, proceed to the Court of Appeal of Ontario, and finally be heard (provided leave is given) in the Supreme Court.
7. B. The representative plaintiff is the person or persons who are judged to have a workable plan for pleading the case on behalf of a whole class of people.
8. B. Ordinary witnesses may testify only about facts they know first-hand, while experts may provide opinions based on the evidence. The courts do not normally listen to hearsay evidence (information a witness heard from another person).
9. A. Compensatory damages are monetary damages designed to make amends to the victim for the loss suffered.
10. C. Specific performance would require the defendant to fulfill his or her obligation. Compensatory damages make amends to the victim for the loss suffered.
11. A. Mediation uses a neutral third party who is acceptable to both sides to help the parties reach a settlement.

PART 2: THE LAW OF TORTS

SECTION 2-1: INTRODUCTION TO TORT LAW

What is a Tort?

The word **tort** derives from the French word *tort*, meaning "wrong." DuPlessis and O'Byrne define a tort as "any harm or injury caused by one person to another—other than through breach of contract—and for which the law provides a remedy."³² McInnes et al. define a tort as "a failure to fulfil a private obligation that was imposed by law."³³ Smyth et al. conclude that "there is no entirely satisfactory definition of "tort" but define it as a wrongful act done to the person or property of another."³⁴ Willes and Willes also emphasize that the area of tort law is "so broad that to determine its limits with any degree of precision would be an impossible task" but that tort law has characterized a tort as a "wrong committed against another, or against the person's property or reputation, either intentionally or unintentionally."³⁵

The basic premise of tort law is as follows: An obligation in tort law is owed to a person (e.g., there is an obligation to provide a client with sound accounting and business advice). If that obligation is broken, the accountant is a **tortfeasor** (one who has committed a tort), and the client would be entitled to sue the accountant for any injury or losses suffered. If the client wins the lawsuit, the court will hold the accountant liable and will probably order the accountant to pay damages to the client.

Although a tort and a crime may arise from the same set of facts (e.g., hitting someone involves both the tort of battery and the crime of assault; taking someone's golf clubs is both a tort of conversion and a crime of theft), it is important to distinguish between the two.

Figure 2-6 draws four key comparisons.

According to the Supreme Court of Canada, "A primary object of the law of tort is to provide compensation to persons who are injured as a result of the actions of others."³⁶ A second reason why tort law exists is to deter individuals from failing to fulfil private obligations.

³²DuPlessis and O'Byrne, p. 221.

³³McInnes et al., p. 60.

³⁴Smyth et al., p. 51.

³⁵John A. Willes and John H. Willes, *Contemporary Canadian Business Law: Principles and Cases*, Tenth Edition, (Toronto: McGraw-Hill Ryerson Limited, 2012) p. 60.

³⁶Hall v. Hebert, [1993] 2 S.C.R. 159 at para.58, per Cory J.

Figure 2-6: Tort vs. Crime³⁷

	Relevant law	Obligation	Parties involved if obligation is broken	Usual Remedy
Tort	Private law	Defendant owes an obligation to plaintiff	Plaintiff sues defendant	Compensatory damages (usually money)
Crime	Public law	Accused owes an obligation to society	Government prosecutes accused	Punishment (e.g., fine, probation, imprisonment)

Since both torts and contracts involve private obligations, it is also necessary to distinguish between torts and contracts. Both torts and contracts involve **primary obligations** that tell people how they ought to act and **secondary obligations** that tell people how they must act after breaking their primary obligations. Figure 2-7 identifies four important differences between torts and contracts.

Figure 2-7: Tort vs. Contract³⁸

	Source of Obligation	Enforceability	Compensatory Damages	Risk Management
Tort	Imposed by law	Enforceable even if the parties have no agreement	Place plaintiff in same position as if tort had not occurred	May take a person by surprise and require more than person is able to bear
Contract	Voluntarily created by parties	Enforceable only by or against a party to the contract	Place plaintiff in same position as if contract had been performed	Obligations are known in advance and can be limited to promises that can be fulfilled

Contracts are enforceable only by parties to a contract under the **doctrine of privity**. More will be said about this in the next section on contracts.

Tort damages are backward looking, placing the plaintiff in the position he or she would have been in had the tort not occurred, whereas in contracts, damages are forward looking, placing the plaintiff in the position he or she would have been in had the contract not been breached. Managers are expected to anticipate the torts that are likely to occur in the course of operating their businesses and to make provisions for any liability that might arise as a result of those torts, either through insurance or self-funding.

³⁷ Smyth et al., p. 61.

³⁸ McInnes et al., pp. 62-63.

Development of Tort Law³⁹

In our increasingly complex society, the risks of harm have grown rapidly. Often, injuries are discovered only "after the fact," e.g., illnesses suffered by women with breast implants or illnesses suffered by residents and workers in asbestos-insulated buildings. The basic issue is who should bear the loss? This question is often very difficult to answer in a society committed to increased productivity, because society as a whole benefits from advances in technology and production. Therefore, before proceeding to the specifics of tort law, it is worthwhile to review how the basis for liability has changed under tort law as society has developed.

Originally, the approach taken was one of **strict liability**, in which the person who was the direct physical cause of injury was held liable regardless of the reasons for the injury or whether the conduct of the "injurer" was justified. Because this was not perceived as fair, other bases for liability have come into play over the years. However, strict liability still persists in some areas of modern tort law, specifically for activities that are inherently dangerous regardless of the amount of care taken, such as transporting explosives. Strict liability may be imposed by legislation, or the courts may simply raise the standard of care so high that it is tantamount to strict liability.⁴⁰

Fault evolved as another basis for liability, where **fault** refers to "blameworthy or culpable conduct—conduct that in the eyes of the law is unjustifiable because it intentionally or carelessly disregards the interest of others." Basing liability on fault makes sense if one believes that people will be more inclined to be careful if they have to pay the consequences for being careless. However, many activities where tort liability arises—driving a car, operating a store, practising medicine or accounting—are covered by insurance. As well, relying totally on fault could potentially leave victims uncompensated or undercompensated.⁴¹

Social policy also plays a role in whether liability should be based on fault, strict liability, or some other principle. For instance, society may believe that those who reap profits from producing potentially hazardous products should bear the risk of loss, in part because they can either insure themselves or pass along costs to consumers.

Social policy may go so far as to eliminate lawsuits for personal injuries and compensate victims through a government fund, as is the case for no-fault insurance schemes and workers' compensation.⁴² Such alternative compensation schemes recognize that victims deserve compensation even if their injury occurs innocently instead of as a result of a wrongful act. No-

³⁹ Smyth et al., pp. 51-54.

⁴⁰ Smyth et al., pp. 51-52.

⁴¹ Smyth et al., pp. 51-52.

⁴² Smyth et al., pp. 52-53.

fault schemes also respond to complaints about the cost and inefficiency of the adversarial tort law system. “Studies suggest that less than one-third of all the money involved in the tort system is actually used for compensating injuries.”⁴³

On the other extreme, responding to the pressure of social needs has resulted in the principle of **vicarious liability**, to be discussed in more detail shortly, where an employer may be held liable for torts committed by employees in the course of their employment.⁴⁴

Main Types of Torts

There are three main categories of torts as shown in Figure 2-8. Each of these will be discussed in more detail later on.

Figure 2-8: Main Categories of Torts

Type	Necessary to prove:	Examples
Intentional torts occur when a person intentionally acts in some ways.	Generally that the person intended to do the specific act; in certain intentional torts, that the person intended the harm that resulted.	Assault, trespass to land, interference with contractual relations, deceit.
Negligence torts occur when a person acts carelessly.	That a reasonable person would not have acted that way.	Negligence, professional negligence, and product liability.
Strict liability torts occur when a person does something wrong without intending to do so and without acting carelessly.	That the act occurred.	Extremely dangerous activities like storing hazardous goods or keeping wild animals.

SECTION 2-2: GENERAL PRINCIPLES OF TORT LAW

Several general principles or concepts apply throughout tort law: burden of proof, liability, defences, and remedies. Therefore, these concepts will be discussed before exploring specific torts.

⁴³McInnes et al., p. 74, quoting from the Ontario Ministry of Financial Institutions Ontario Task Force on Insurance, Final Report (1986) at 66.

⁴⁴Smyth et al., pp. 52-53.

Burden of Proof

Since torts are civil actions rather than criminal actions, the plaintiff must prove his or her case on a **balance of probabilities**. In numerical terms, this means that there is a better than 50% chance that the plaintiff was harmed by the defendant.⁴⁵

In certain circumstances, because it can be difficult for a plaintiff to know all of the particulars about a tort committed against him or her, the plaintiff may initially meet this burden of proof using circumstantial evidence. The burden of proof then shifts to the defendant to prove—also on a balance of probabilities—that he or she was not at fault.⁴⁶

Liability

Tort law recognizes both **primary liability**, which arises from one's own personal wrongdoing, and **vicarious liability**, which arises because of a relationship with the person who actually committed a wrong. It also recognizes that more than one person may be responsible for a tort (**joint tortfeasors**) and that the defendant may be at least partially to blame for the harm that has happened (**contributory negligence**). Finally, it also recognizes the role of **insurance** in managing risks associated with torts.

Vicarious Liability

Under the doctrine of **vicarious liability**, an employer is liable for a tort that was committed by an employee provided that the tort was committed during the course of the employee's employment. An employer is not liable for torts committed by independent contractors. The courts are inclined to view a person as an employee rather than an independent contractor, regardless of what the person is called by the employer, if:

1. The employer generally controls what is done, how it is done, when it is done, and where it is done.
2. The worker uses the employer's equipment and premises.
3. The worker is paid a regular wage or salary instead of a lump sum at the end of each project.
4. The worker is integrated into the employer's business and is not in his or her own business.⁴⁷

Under the doctrine of vicarious liability, tort victims may sue both the employer and the employee and may recover all or some of their damages from either defendant. If the employer pays, it can claim that amount from the employee. This is seldom done due to the employee's

⁴⁵DuPlessis and O'Byrne, p. 226.

⁴⁶Smyth et al., pp.59-60.

⁴⁷McInnes et al., p. 68.

inability to pay and the poor impact it would have on productivity if employees were fearful of being held liable for actions done in the course of their jobs.

Vicarious liability serves tort law's compensatory function by allowing collection from an employer who is more likely to be able to pay or to have insurance. It serves as a deterrent since it encourages employers to avoid very hazardous activities and to hire qualified people and engage in training. It is also viewed as fair to require a business to bear responsibility for the losses its activities create, even if those losses were due to the misdeeds of employees.⁴⁸

Liability and Joint Tortfeasors

When two or more people are held to be jointly responsible for the victim's loss, the plaintiff "can sue any or all of them, with recovery apportioned between the joint tortfeasors according to their level of responsibility." Nevertheless, the plaintiff can actually recover 100% of the judgment from any one of those defendants, thus making it possible for the plaintiff to collect from those in the best position to pay the damages.⁴⁹

Contributory Negligence

The plaintiff may be held by the court to be partially responsible for the harm or loss that was incurred. If the defendant's defence of contributory negligence is successful, the amount of damages awarded to the plaintiff will be reduced by the proportion for which the plaintiff is responsible. For example, if damages are \$25,000, and the plaintiff is held to be 20% responsible, the damages paid would actually be \$20,000.

Liability Insurance

In keeping with good risk management by businesses, it is considered prudent to purchase **liability insurance**. This is a "contract in which an insurance company agrees, in exchange for a price, to pay damages on behalf of a person who incurs liability."⁵⁰ Liability insurance also includes a **duty to defend**, whereby the insurance company pays the expenses related to lawsuits against the insured party.

While liability insurance contributes to the **compensatory function** of torts, which aims to fully compensate those who are wrongfully injured, it can also undermine the **deterrence function** when people know that their insurance companies will pick up the tab if something goes wrong. However, there may still be a deterrent since excessive claims will translate into higher insurance premiums or difficulty obtaining insurance. Insurance contracts may also contain exclusions that shift some liability to the insurer.

⁴⁸McInnes et al., pp. 67-68.

⁴⁹DuPlessis and O'Byrne, p. 229.

⁵⁰McInnes et al., p. 66.

Defences

More will be said about specific defences when individual torts are discussed since the defence varies depending on the tort. However, there are a few common defences:

- *Contributory negligence* – This was discussed earlier.
- *Consent* – The defendant either consented to the action or voluntarily assumed the risk inherent in the event that gave rise to the loss.

Limits to Damages in Torts

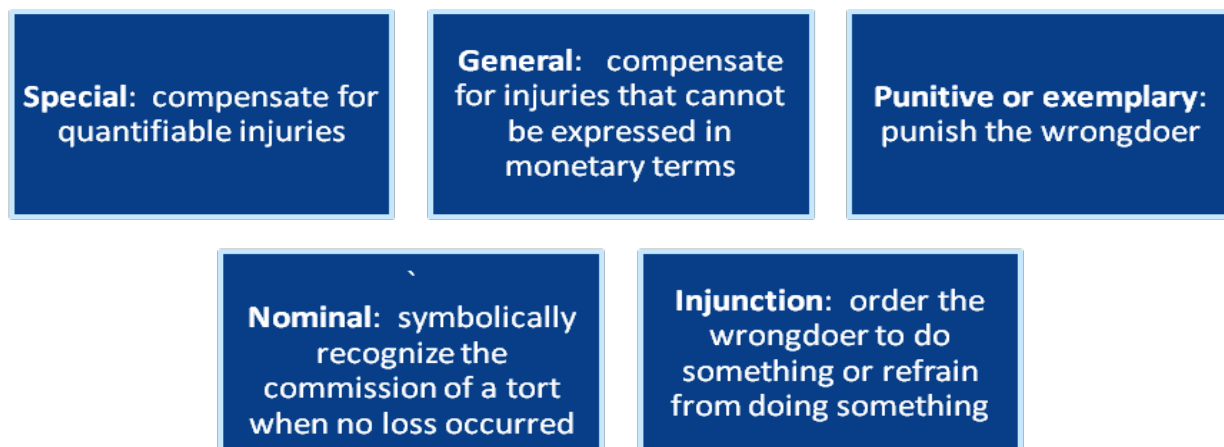
In tort law, there are various legal limits to compensation for losses suffered as not every conceivable loss of a plaintiff can be compensated. These include:

- **Lack of causation** – The defendant's action did not cause the plaintiff's damages.
- **Too remote** – The relationship between the defendant's action and the plaintiff's loss is too remote, i.e., the defendant could not have reasonably foreseen the type of damage that occurred.
- **Failure to mitigate** – Where the plaintiff fails to take reasonable steps to minimize losses, the damages awarded will be capped at what the court deems they would have been had the plaintiff mitigated his or her damages.

Remedies under Tort Law

Figure 2-9 identifies the various categories of remedies available under tort law and their purposes.

Figure 2-9: Tort Law Remedies and their Purposes



Compensatory Damages

Compensatory damages require the defendant to pay for the losses the plaintiff suffered as a result of the tort. As noted earlier when comparing torts and contracts, the goal is to put the plaintiff back to the position the plaintiff enjoyed before the tort occurred. There are two types: special and general.

Special damages compensate the victim for out-of-pocket expenses that are fairly easy to quantify, e.g., medical bills, the cost of repairing a car, or actual lost wages. **General damages** include more speculative items like future loss of earnings due to disability and non-pecuniary (non-monetary) losses such as awards for pain and suffering, loss of enjoyment of life, and loss of life expectancy.

Compensation will be awarded only if the defendant's wrongdoing caused the plaintiff to suffer a loss and if the connection between the tort and that loss is not too remote. A loss is **too remote** if a reasonable person in the position of the wrongdoer could not have reasonably anticipated the harm that flowed from the act. As well, it is in the plaintiff's best interest to take reasonable steps to **mitigate** the loss because the plaintiff will only be compensated for those losses that could not reasonably be avoided.

Punitive Damages

Punitive damages are rare. They are awarded to punish a defendant who has acted in a "harsh, vindictive, reprehensible and malicious" manner.⁵¹ The Supreme Court also requires that punitive damages be proportional to the tort and "no more than necessary to punish the defendant, deter wrongdoers, or convey denunciation of the defendant's conduct."⁵²

Nominal Damages

Nominal damages are nominal monetary amounts awarded to recognize that a tort was committed but that no damages occurred. They are restricted to intentional torts and strict liability torts.

Injunctions

Injunctions are court orders that require the offending party to do something or to refrain from doing something. They are used when compensatory damages are inadequate to replace what the plaintiff has lost. For instance, an injunction may restrain the defendant from trespassing on the plaintiff's property; or in the case of **conversion of property** (wrongful exercise of control

⁵¹McInnes et al., p. 72.

⁵²DuPlessis and O'Byrne, p. 234.

over another’s property), the court may order **restitution**, the restoring of the property to its rightful owner.

SECTION 2-3: INTENTIONAL TORTS

Intentional torts “involve intentional, rather than merely careless, conduct.” Intention does not always mean that the defendant intended to cause harm but may simply mean that the defendant “knew that a particular act would have particular consequences.”⁵³ Figure 2-10 describes common intentional torts that are relevant to businesses.⁵⁴

Figure 2-10: Intentional Torts

Tort	Description of Harmful Act	Defences
Assault	Reasonable belief that threat of offensive bodily contact (see battery) is imminent.	For both assault and battery: Informed and complete consent Necessity: act was justified by emergency.
Battery	Offensive bodily contact: touching plaintiff or plaintiff’s clothing with fist, knife, bullet, etc.; applies to businesses that control crowds or rude customers and to medical doctors who perform procedures against a patient’s wishes.	Self-defence; the force used must be reasonable Provocation: words and actions that would cause a reasonable person to lose self-control; this is a partial defence that would only reduce damages.
False Imprisonment	Complete physical restraint or psychological submission without authority, e.g., a security guard demands that a customer accompany him back inside store.	No actual confinement. Authority to arrest because crime had been committed.
Defamation	A published false and derogatory statement in spoken (slander) or written (libel) form.	Justification: statement was true Absolute privilege: statement was made in Parliament or court. Qualified privilege: statement was made in the course of duty, in the belief that it was true, and communicated only to those who needed to know (e.g., reference letter). Fair comment: statement expressed an opinion on matter of public interest.

⁵³McInnes et al., p. 79.

⁵⁴ Yates, pp. 30-37; McInnes, pp. 79-96.

Trespass	Entering or putting something on another's land without authority; includes customers overstaying their welcome or breaking rules of premises.	Legal authority (e.g., meter reader) or consent.
Nuisance	Use of property so it interferes with neighbour's usage and enjoyment of his/her property; includes fumes, water, noise, etc.	Appropriate use of property for area Interference was not reasonably foreseeable.
Conversion	Use of another person's property in such a way that is it serious enough to justify a forced sale to the defendant.	Consent.

Some of the torts in Figure 2-10 (e.g., assault and battery, defamation) also give rise to criminal prosecution, but the Crown is concerned only with the criminal aspect. The victim must pursue an action in civil court to obtain compensation for any losses.

Regarding the tort of defamation, use of the Internet to make and disseminate defamatory statements can make it difficult to identify and locate the maker of the statements, but the full range of remedies is available once defamation is proven. Compared to the traditional tort of defamation, the harm associated with **Internet defamation** is not limited to a particular geographic area, and damages awarded may reflect this. In a 2008 case, *Griffin v. Sullivan*, the B.C. Supreme Court "awarded the injured plaintiff not only substantial general damages, damages for breach of privacy, special damages, and aggravated damages, but an injunction as well."⁵⁵

Surprisingly, until very recently Canada had not yet recognized a general tort of **invasion of privacy**. The courts have been reluctant to recognize such a tort because they want to support freedom of expression and freedom of information. They also want to balance the interests of both parties. However, privacy has been indirectly related to several torts. A photographer who sneaks onto someone's land to take unauthorized pictures commits the tort of *trespass*. Employees who publish embarrassing information about their employer's private life may be guilty of *breach of confidence*. English courts have also recognized a tort of *abuse of information*. Unauthorized use of celebrity images to sell products may be *misappropriation of personality*.

In a unanimous decision, in January 2012, the Ontario Court of Appeal recognized a tort of invasion of privacy. Part of the rationale was that "The internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store,

⁵⁵Willes and Willes, pp. 66-67.

and retrieve information...It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our society and political order.”⁵⁶

Therefore, in Ontario, “(o)ne who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy if the invasion would be highly offensive to a reasonable person.” The elements to be proven are that 1) the defendant’s conduct is intentional or reckless; 2) the defendant invaded, without lawful justification, the plaintiff’s private affairs or concerns; and 3) “a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.” Examples of significant invasions include “one’s financial or health records, sexual practices and orientation, employment, diary or private correspondence.” Proof of economic harm is not required, and the judgment rendered specifically states that “given the intangible nature of the interest protected, damages...will ordinarily be measured by a modest conventional sum.”⁵⁷

In addition, legislators have also begun to provide protection from invasion of privacy either through the Criminal Code or through statutes that “impose liability if a person ‘wilfully’ violates another’s privacy by doing something that they know to be wrong.”⁵⁸ For instance, B.C.’s Privacy Act creates the tort of breach of privacy, and mentions eavesdropping and surveillance as some ways to violate the privacy of another.⁵⁹

SECTION 2-4: TORTS FROM BUSINESS OPERATIONS

Business operations involve many activities from which torts can occur, especially involving customers and competitors. The most important tort involving customers is negligence, including product liability and professional negligence. Negligence will be discussed separately later. The intentional torts outlined above may also be perpetrated in a business context, as several of the examples illustrated.

Figure 2-11 outlines the main business torts and what the plaintiff must prove to win the lawsuit. Although the torts in the previous section were labelled “intentional,” the court must normally be satisfied that the defendant in these business torts either intended to hurt the plaintiff or at least

⁵⁶ Jones v. Tsige, (2012), 108 O.R. (3d) 241, 89 C.C.L.T. (3d) 221 (Court of Appeal), at paras 66 and 67.

⁵⁷ Jones v. Tsige, (2012), 108 O.R. (3d) 241, 89 C.C.L.T. (3d) 221 (C.A.), at paras 70, 71, and 72.

⁵⁸ McInnes et al., pp. 82-83.

⁵⁹ DuPlessis and O’Byrne, p. 282.

knew that loss or harm was reasonably foreseeable. Some of these business torts may also give rise to an action for breach of contract. While the victim may sue the defendant for both a tort and a breach of contract, the plaintiff cannot recover full damages under both actions. This will be discussed in more detail in the section on contract law.

Figure 2-11: Business Torts

Tort	Description	Elements of Proof
Conspiracy	Two or more people agree to act together to cause the plaintiff financial loss.	If act is otherwise lawful: primary purpose was to hurt plaintiff. If act is otherwise unlawful: defendants should know the act might hurt plaintiff.
Intimidation	Threat to commit an unlawful act directed against plaintiff (two-party intimidation) or a third party (three-party intimidation).	Threatened party gives in to threat. Plaintiff suffers a loss because of threat.
Interference with contractual relations (inducement to breach of contract)⁶⁰	Disruption of a contract between plaintiff and a third party by persuading a third party to break its contract with plaintiff; e.g., hire a third party for a job that will make it impossible for that person to work for plaintiff.	Defendant knows about contract. Defendant intends to cause third party to breach contract. Defendant actually causes third party to breach contract. Plaintiff suffers a loss because of breach.
Unlawful interference with economic relations	Unlawful act committed for the purpose of causing plaintiff to incur an economic loss; this is a more general tort than the previous three.	There is intent to injure plaintiff. There is an unlawful or illegal act or, more generally, something that a person is not entitled to do. Plaintiff suffers an economic loss.
Deceit	Making a false statement—includes telling a half-truth and failing to update information; under the general rule of caveat emptor (buyer beware), a seller is usually not obligated to volunteer information.	Defendant knows statement is false or acted recklessly and without regard to the truth. Defendant intends to mislead plaintiff Plaintiff suffers a loss as a result of reasonable reliance on statement.
Passing Off	Represent another’s goods or services as one’s own, either expressly or by implication.	Goodwill exists in terms of look or distinctiveness of plaintiff’s product. The public is deceived by this misrepresentation. Plaintiff suffers actual or potential loss.

⁶⁰Drouillard v. Cogeco Cable Inc., (2007), 282 D.L.R. (4th) 644, (Ont. C.A.).

Injurious falsehood (slander of quality; product defamation)	Falsely discredit another person's products or services, causing potential customers to take business elsewhere (e.g., negative advertising).	False statement was made with malice or improper motive; a reckless disregard for the truth or falsity of the statement is sufficient. Defendant's statement caused plaintiff to suffer a loss.
Occupier's Liability	Failure by occupier of premises to take adequate precautions to protect visitors.	Varies by jurisdiction and may depend on whether the visitor is a trespasser, licensee/invitee, or contractual entrant.

In Ontario, Alberta, British Columbia, Manitoba, Nova Scotia, and Prince Edward Island, occupiers' liability is now covered by legislation. The basic principles of such legislation are that it covers both activities that occur on the premises as well as the condition of the premises (only the latter is covered under common law). The same standard of reasonable care applies to all visitors, but the standard imposed depends on the potential danger to the visitor, the occupier's cost of removing the danger, the purpose of the visit, and the nature of the premises. For example, in Ontario, an exemption within the statute requires only that the occupier refrain from intentionally hurting certain types of trespassers. Occupiers can normally avoid liability by issuing a warning, such as the warning signs posted at a ski resort or parking garage.⁶¹

SECTION 2-5: NEGLIGENCE

Negligence is a careless act that causes harm to another person. As with other torts, the victim is entitled to take legal action to be compensated for that loss or injury. In adjudicating tort cases, the goal is to find the right balance that appropriately compensates victims of negligence yet does not discourage legitimate activity or make the legal standards for businesses too onerous. While the term "professional negligence" is often used, there is no separate tort by that name; it merely refers to negligence committed by a professional person like an accountant or lawyer.

Burden of Proof

To succeed in a negligence action, the plaintiff must prove that the defendant: 1) owed a duty of care; 2) breached the standard of care; and 3) caused harm to the plaintiff. Each of these elements will be discussed in more detail in the following pages.

⁶¹McInnes et al., pp. 111-112.

Step 1: Was a Duty of Care Owed?

According to the **neighbour principle**, “a defendant owes a duty of care to anyone who might be reasonably affected by the defendant’s conduct.”⁶² Based on *Donoghue v. Stevenson*, the Canadian courts have developed a unique test for whether a duty of care is owed. In the first place, the judge will ascertain whether or not the duty of care question has already been answered for the particular type of case being litigated. For example, a duty of care is owed by a beverage bottler to a consumer. If there is no existing precedent, a duty of care will be established only if 1) it is reasonably foreseeable that the plaintiff could be injured by the defendant’s carelessness, 2) there was a relationship of sufficient proximity, and 3) there are no public policy grounds for denying the duty of care.⁶³

Reasonable Foreseeability

This is an objective test of whether a reasonable person in the defendant’s position would have recognized the possibility that his activities might injure the plaintiff. The theory is that the plaintiff should not be denied compensation simply because the defendant was not paying attention; on the other hand, it would be impossible for any defendant to foresee all possible dangers.

Proximity or Causation

Put simply, “there must somehow be a close and direct connection between the parties.” Therefore, depending on the facts of the situation, a relationship of proximity may arise from:

- Physical proximity;
- A social relationship (e.g., parent and child);
- A commercial relationship (e.g., store and patron);
- A direct causal connection between the defendant’s carelessness and the plaintiff’s injury; and/or
- The plaintiff’s reliance on the fact that the defendant represented that it would act in a certain way.⁶⁴

In establishing proximity, the law treats careless statements differently from careless actions. This is because the risks associated with statements are often far less apparent than the risk associated with actions. As well, the impact of a careless statement can be almost limitless whereas the risks associated with physical actions are limited in time and space. Finally,

⁶² *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.)

⁶³ *McInnes*, pp. 132-133.

⁶⁴ *McInnes et al.*, p. 133.

careless statements generally result in a pure economic loss, and the courts are more reluctant to provide compensation for pure economic losses compared to property damage or personal injuries.⁶⁵

In *Hercules Managements Ltd. v. Ernst & Young* (1997), 146 DLR (4th) 577 (S.C.C.), the court established that a duty of care is more likely to be imposed with respect to a professional statement if the defendant:

- Possessed, or claimed to have, special knowledge;
- Made the statement during a serious occasion, such as a business meeting;
- Was responding to an inquiry made by the plaintiff;
- Received a financial benefit for making the statement;
- Communicated a statement of fact or an opinion based on fact (e.g., a professional evaluation) rather than a purely personal opinion; and/or
- Did not issue a disclaimer.

Moreover, to avoid “indeterminate liability,” a duty of care will be recognized only if:

- The defendant knew that the plaintiff, either individually or as a member of a defined group (e.g., shareholders), might rely on the statement; and
- The plaintiff relied on the statement for its intended purpose (e.g., management of the company vs. investment advice).⁶⁶

In summary, whether a duty of care is imposed on a professional depends both on the existence of a close relationship with the defendant and the extent to which the client relied on the professional.

Policy

Lastly, even if there was foreseeability and proximate cause, the court may deny liability on policy grounds for the wider benefit of the legal system and society. For example, the courts may be concerned that acknowledging a duty of care will flood the legal system with similar lawsuits (e.g., if a regulatory body was held liable for the actions of the professionals it governs), interfere with political decisions (e.g., how much money a municipality spends repairing potholes), or hurt a valuable relationship (one reason a mother does not owe a duty of care to her unborn child).

⁶⁵McInnes et al., pp. 133-134.

⁶⁶McInnes et al., pp. 134-135.

Step 2: Was the Standard of Care Breached?

The **standard of care** indicates how a defendant should act; it is **breached** when the defendant acts less carefully.

The standard of care is based on the mythical **reasonable person**, someone of “normal intelligence who makes prudence a guide to his conduct.”⁶⁷ In other words, it is “someone of average intelligence who will prudently exercise reasonable care, considering all of the circumstances.”⁶⁸ Some of the relevant factors pertaining to the reasonable person test are shown in Figure 2-12.⁶⁹

Figure 2-12: Reasonable Person Test

The test is an objective test. It does not make allowances for a defendant’s personal characteristics, including, to a certain extent, mental or physical disability. For instance, the law would not expect a blind person to see but it would expect the person not to drive a car. Children are expected to act like a reasonable child of a similar age, intelligence, and experience.

The standard relates to how a reasonable person would act in similar circumstances.

A reasonable person takes precautions against reasonably foreseeable risks even if they are unlikely to occur.

A reasonable person takes greater care the more likely harm is to occur and the more severe the harm might be.

A reasonable person takes affordable precautions.

A reasonable person may act in a way that has great social utility even though it creates a risk (e.g., an ambulance driver going through a red light).

Step 3: Did the Breach Cause the Harm?

The third and final element to be proved in a negligence case is that the defendant’s carelessness caused the plaintiff to suffer a loss. The test used is the “but-for test.” The question to be asked is: “‘but for’ the defendant’s actions, would the injury or damage not have occurred?”⁷⁰ While an affirmative answer to this question would suggest that there is proximate cause, the facts of the situation can often make it difficult to tell whether there is proximity, especially when there are intervening events.

As was discussed under intentional torts, a loss may be held to be too remote. A loss is too remote if it was not reasonably foreseeable that the careless action could cause the loss.

⁶⁷Arland v Taylor [1955] 3 DLR 358 (Ont. C.A.) per Laidlaw JA.

⁶⁸Willes and Willes, p. 81.

⁶⁹McInnes et al., pp. 137-138.

⁷⁰Willes and Willes, p. 81.

Generally speaking, the closer in time the defendant's conduct is to the injury suffered by the victim, the more likely it is to be found to be the cause of the injury.

The **thin skull theory** says that if it was reasonably foreseeable that a normal person would have suffered some damage from the defendant's negligence, the plaintiff who is unusually vulnerable due to either physical or psychological infirmity is entitled to damages for all his or her losses. However, if a normal person would not have suffered any damages, the plaintiff would not be entitled to damages. Similarly, the **thin wallet theory** says that a defendant is generally not responsible for the fact that the plaintiff suffered to an unusual extent because he or she was poor.⁷¹

The remoteness principle is also used to deal with **intervening acts**, events that occur after the defendant's carelessness and that cause the plaintiff to suffer an additional injury. In view of an intervening act, the loss may be ruled to be too remote from the defendant's carelessness and therefore save the defendant from liability.⁷²

As is the case with the other elements, the plaintiff has to prove causation on a balance of probabilities. The courts generally apply an *all-or-nothing approach*, meaning that if there is at least a 51% chance that the defendant's carelessness caused the plaintiff's loss, the defendant will be awarded damages for *all* of that loss. As well, the plaintiff has to prove only that the defendant's carelessness was *one* cause, not *the only* cause.

In the case of multiple defendants, if different defendants cause the plaintiff to suffer different injuries, liability is apportioned accordingly. However, if different defendants cause a single injury, they will be held jointly and severally for the loss, meaning that the plaintiff can recover all of the damages from one defendant or some from each defendant.⁷³

Defences

Defences to the tort of negligence are typically contributory negligence, voluntary assumption of risk, or illegality.

In the case of **contributory negligence**, the plaintiff is judged to be partly responsible for the loss incurred and, therefore, the plaintiff's damages will be reduced to the extent of the contributory negligence.

⁷¹McInnes et al., pp. 145-146.

⁷²McInnes et al., p. 147.

⁷³McInnes et al., pp. 144-145.

For **voluntary assumption of risk**, the plaintiff is judged to have freely agreed to accept the risk of injury or loss. In contrast to contributory negligence, which is a partial defence, voluntary assumption of risk is a complete defence that would result in the defendant not being held liable. For instance, parking garages usually post signs to indicate that people who park there do so at their own risk.

Another complete defence is that the plaintiff suffered a loss while participating in an **illegal act**, which will also exonerate the defendant from liability.

Product Liability

Product liability (manufacturer's liability) is the standard of care imposed on manufacturers in relation to the design, manufacture, and/or sale of their products. It is one of two important torts of negligence that warrant separate attention. Product liability also gives rise to actions for breach of contract; however, end consumers do not typically have a contractual relationship with manufacturers, limiting their recourse to retailers.

Pursuant to the case of *Donoghue v. Stevenson*, under the principle of **res ipsa loquitur** (the facts speak for themselves), if a product is defective, then it can reasonably be assumed that there has been negligence at some stage of its design, production, or inspection, and the onus is now on the manufacturer to prove that it took due care at all stages to try to prevent defective goods from reaching the distribution system. This duty has also been extended to other businesses in the distribution chain.⁷⁴ In the United States, liability is not limited to cases of negligence; rather strict liability is often found, making the manufacturer liable for injury regardless of efforts taken to prevent faulty products from reaching the consumer.⁷⁵

More recent cases—*Lambert v. Lastoplex Chemical Co. Ltd.* (1972; inflammable lacquer) and *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1984; side effects of contraceptive pills)—impose a duty on Canadian manufacturers to give consumers proper warning when, even though a product may not be defective, dangers may arise if the product is not properly used. In the 1995 case *Hollis v. Dow Corning Corp.*, the Supreme Court of Canada made it clear that the duty to warn is a continuing one so that if, after a product has been placed on the market, the manufacturer becomes aware of potential dangers in its use, it must issue appropriate warnings to the public. The Court also ruled that the duty to warn may be discharged in some cases by issuing the warning to "learned intermediaries" like surgeons who use silicone breast implants. If the plaintiff's claim is based on a failure to warn, she must prove that she would not have used

⁷⁴ Smyth et al., pp. 63-64.

⁷⁵ Willes and Willes, p.87.

the product or would not have used it the way she did had proper warning been given. In other words, the failure to warn must have caused the injury.⁷⁶

Professional Liability

Professionals have specialized knowledge and skills that clients rely on and are willing to pay for. The value of professional services lies not in their infallibility but in their capacity to reduce risk for the client. In defining liability for professional incompetence or negligence, the courts have tried to balance the social objective of assisting innocent victims with the need to avoid discouraging legitimate professional activity.

A professional's duty of care may arise from one of three possible sources⁷⁷:

1. **Contractual duty:** An agreement to provide professional services to a client implies a certain duty of care. More will be said about this under contract law.
2. **Fiduciary duty:** Equity imposes a duty of care on a person who stands in a special relationship of trust to another, as in the professional-client relationship. It is a higher duty of care than that owed under a contract since it requires complete fidelity and loyalty and may be breached even though there has been no negligence. Examples of obligations imposed on the professional include avoiding conflicts of interest; refraining from using the relationship for personal profit; following the client's instructions; disclosing all relevant information to the client; acting honestly, in good faith, and with due care; and maintaining confidentiality.⁷⁸
3. **Duty in tort:** A duty of care is imposed by tort law to a much broader class of people than under contractual duty. A duty in tort also imposes a time limit for tort action from the moment the breach is discovered (as opposed to the moment the breach occurs, as in contract law). The form of action chosen may also affect the amount of damages. Plaintiffs may choose to "cover the bases" by pleading all three causes of action.

Standard of Care for Professionals under Tort Law

The standard of care imposed on a professional in a tort action is as follows:⁷⁹

1. Professionals are held to the standard of a *reasonable professional in similar circumstances*. This includes living up to their training (regardless of how inexperienced they might be) but depends on whether they are a specialist or generalist.

⁷⁶ Smyth et al., pp. 63-64.

⁷⁷ Smyth et al., pp. 77-79.

⁷⁸ DuPlessis and O'Byrne, p. 548.

⁷⁹ McInnes et al., pp. 138-139.

2. The standard of care is based on the information reasonably available to the defendant *in foresight, not in hindsight*.
3. Carelessness results in liability while an *error of judgment* does not.
4. A professional who follows an *approved practice* cannot be found liable.
5. Compliance with a *statutory standard* will be considered in deciding whether a professional acted with reasonable care.

Third-Party Liability and the Tort of Negligent Misrepresentation

Under tort law, potential **third-party liability** exists to people other than the client who pays for the services and has a contractual relationship with the professional. For instance, accountants may provide a business valuation that will be relied upon by a third party, or architects may design a building in a way that presents risks to subsequent occupants.

Hedley Byrne Co. Ltd. v. Heller & Partners Ltd. (1964) established the principle that professionals are liable for **negligent misrepresentation** (an incorrect statement made without due care for its accuracy) to third parties whom they could foresee would rely on information or advice they provide. *Haig v. Bamford* (1976) narrowed that duty to a limited class of persons with whom the professional has a special relationship. Thus the test is not just that users must be foreseeable in a general sense but that they must be specifically foreseeable in relation to a contemplated transaction.

Causation as a Requirement for Liability Under Tort Law

As is the case with negligence in general, a duty of care owed to the plaintiff and a breach of that duty are necessary but not sufficient conditions for liability. There must also be a clear causal link between the breach of the duty by the defendant and the injury suffered by the plaintiff. A plaintiff must have relied on the negligent misrepresentation before that misrepresentation can be said to have "caused" the plaintiff's loss. Reliance includes the willing cooperation of the plaintiff—an element not present in the commission of most torts. Therefore, proving causation is a subtle feat since a whole host of factors may enter into someone's decision, say, to buy shares, make a loan, buy a house, or undergo surgery.

STUDY QUESTIONS FOR PART 2: THE LAW OF TORTS

1. Which of these is **not** true about a tort as distinguished from a crime?
 - a. The relevant law is private law.
 - b. The accused owes an obligation to the plaintiff.
 - c. The plaintiff sues the accused.
 - d. The usual remedy is punishment.

2. Using fault or blameworthy conduct to assess liability under tort law:
 - a. Is the only basis for assigning tort liability under tort law.
 - b. Is a more onerous standard for assigning liability under tort law than is strict liability.
 - c. Is problematic since it is not always possible to establish fault, and this may leave deserving victims uncompensated.
 - d. Is problematic because it would make people liable for careless acts.

3. In a strict liability tort, it is necessary to prove that:
 - a. The other person intended to do the specific act.
 - b. The other person intended to do the specific act and, in some cases, that the person intended harm.
 - c. A reasonable person would not have acted that way.
 - d. The specific act occurred.

4. This intentional tort involves reasonable belief that threat of offensive bodily contact is imminent:
 - a. Assault
 - b. Battery
 - c. False imprisonment
 - d. Nuisance
 - e. Conversion

5. The defence of qualified privilege in a defamation case means that:
 - a. The statement was true.
 - b. The statement was made in Parliament or court.
 - c. The statement was made in the course of duty and in the belief that it was true.
 - d. The statement expressed an opinion on a matter of public interest.

6. This needs to be proved by a customer who accuses a business of the tort of deceit:
 - a. The defendant knew the statement was false or acted recklessly and without regard to the truth
 - b. The defendant intended to mislead the plaintiff.
 - c. The plaintiff suffered a loss because he relied on the statement.
 - d. All of the above.

7. You insist that a supplier send a rush shipment of parts, thereby leaving the supplier out-of-stock and unable to send parts to the plaintiff with whom it had a prior agreement of sale. You are:
 - a. Guilty of the tort of intimidation.
 - b. Guilty of the tort of interference with contractual relations.
 - c. Guilty of the tort of deceit.
 - d. Not guilty of anything—that is just the way business works.

8. In an action for negligence, there must be a close and direct connection between the parties. This refers to:
 - a. Proximity
 - b. Reasonable foreseeability
 - c. Policy grounds
 - d. The neighbour principle

9. Under tort law, a reasonable person is defined as:
 - a. Someone of average intelligence.
 - b. Someone of average intelligence who will prudently exercise reasonable care.
 - c. Someone of average intelligence who will prudently exercise reasonable care considering all of the circumstances.
 - d. Someone of average intelligence who takes all possible precautions to avoid causing harm to another.

10. Under tort law, a loss may be held to be too remote if:
 - a. It was not reasonably foreseeable that the careless action could cause the loss.
 - b. The careless action does not pass the “but-for test.”
 - c. Too much time has elapsed between the action and the injury suffered.
 - d. All of the above, leading to a finding that the loss was too remote.

11. Under the thin skull theory, plaintiffs who are unusually vulnerable due to physical or psychological infirmities would:
 - a. Be entitled to damages for all of their losses.
 - b. Be entitled to damages for losses a normal person would have suffered.
 - c. Not be entitled to any damages for their losses.
 - d. Be entitled to damages suffered because they are unusually poor.

12. This complete defence to a tort action asserts that the plaintiff freely agreed to accept the risk of injury or loss:
 - a. Contributory negligence
 - b. Voluntary assumption of risk
 - c. Illegality of the act that caused the harm
 - d. Lack of a standard of care

13. In terms of product liability, there is a duty of care on a Canadian manufacturer to give consumers warning:
- About risks of a product that are not reasonably foreseeable to the manufacturer.
 - When, even though a product may not be defective, dangers may arise when it is used.
 - When, after a product has been placed on the market, the company becomes aware of potential dangers in its use.
 - Both b and c.
14. A professional's duty of care may arise from:
- Contractual duty.
 - Fiduciary duty.
 - Duty in tort.
 - All of the above.
15. Which of these is **not** true about the standard of care imposed on a professional in a tort action?
- The standard is that of a reasonable professional in similar circumstances.
 - It is based on information reasonably available in foresight, not hindsight.
 - An error in professional judgment will result in liability.
 - A professional who follows an approved practice cannot be found liable.
16. Professionals are liable for negligent misrepresentation when they make an incorrect statement:
- Without due care for its accuracy, and someone relies on that statement.
 - And someone they could foresee would rely on the information does so.
 - Without due care for its accuracy, and a third party who they could foresee would rely on the information does so.
 - Without due care for its accuracy, and a limited class of persons with whom the professional has a special relationship relies on the information.

ANSWERS FOR PART 2: THE LAW OF TORTS

1. D. The usual remedy in tort is compensatory damages, whereas punishment is the usual remedy for a crime. For a crime, the relevant law is public law, under which the accused owes a duty of care to society and is prosecuted by the government.
2. C. Circumstances can often make it hard to establish who was at fault, and it would be unfair to leave a victim uncompensated just because of this. Thus, while fault is one consideration in assigning liability, it is not the only basis. Fault is a less onerous standard than strict liability. Basing liability on fault would make people more careful since they would have to pay the consequences for being careless, but that would be a desirable result.
3. D. In a strict liability tort, the plaintiff need only prove that the specific act occurred (along with the fact that that act caused a loss).
4. A. The formal distinction between assault and battery is that the former is the reasonable belief that threat offensive bodily contact is imminent while the latter is actual offensive bodily contact.
5. C. Qualified privilege occurs when the statement was made in the course of duty with the belief that it was true, and was communicated only to those who needed to know. A is the defence of justification, B the defence of absolute privilege, and D the defence of fair comment.
6. D. To prove deceit, it is necessary to prove the defendant knew the statement was false or acted recklessly and without regard to the truth, that the defendant intended to mislead the plaintiff, and that the plaintiff suffered a loss as a result of reliance on that statement.
7. B. The behaviour constitutes interference with contractual relations since you persuaded a third party (the supplier) to break its contract with the plaintiff. Intimidation involves threat to commit an unlawful act.
8. A. Proximity is a close and direct connection between the parties. The neighbour principle is the general test of whether a duty of care was owed.
9. C. A reasonable person is someone of average intelligence who will prudently exercise reasonable care considering all of the circumstances. Thus, the standard considers the situation. The law does not require a person to take all possible precautions, only those that are affordable.

10. D. A loss may be too remote if it was not reasonably foreseeable that the action could cause the loss or if it does not pass the “but-for” causality test: but for the act, a loss would not have arisen. As well, too much time between the action and the injury might lead to a finding that the loss was too remote from the tortious act.
11. A. Under the thin skull theory, plaintiffs who are unusually vulnerable are still entitled to damages for all their losses. However, if a normal person would not have suffered any damages, the plaintiff would not be entitled to damages.
12. B. Voluntary assumption of risk—when the plaintiff freely agrees to assume the risk of injury or loss—is a complete defence that would lead to the defendant not being held liable.
13. D. Under Canadian product liability law, there is a duty of care to give consumers warning when, even though a product is not defective, dangers may arise when it is used. The duty to give proper warning is a continuing one so that notice is required whenever a company becomes aware of potential dangers in a product’s use.
14. D. A professional may owe a duty of care by contract, because of a fiduciary relationship, and/or under tort law.
15. C. An error in professional judgment does not result in liability. Professionals are not expected to be perfect. The remaining statements are all true.
16. D. Negligent misrepresentation is the making of an incorrect statement made without due care for its accuracy. The plaintiff must prove he or she relied on the statement. However, the professional’s duty of care has been limited by case law to a class of persons with whom the professional has a special relationship (i.e., who used the information as part of a contemplated transaction).

PART 3: CONTRACT LAW

A **contract** is “an agreement that creates rights and obligations that can be enforced in law.”⁸⁰ It is “a voluntary exchange of promises or commitments between parties that are legally enforceable in our courts.”⁸¹

Contracts, and the legal right to rely on their enforcement, form the foundation of day-to-day business interactions. Therefore, it is essential that accountants have a good working knowledge of contract law.

This coverage of contract law in this document focuses on seven main topics:

1. The elements required to enter into a valid contract;
2. Privity of contract (identifies who can enforce a contract) and assignment of rights;
3. The requirement of writing;
4. Interpretation of contracts;
5. Contractual defects;
6. The various ways a contract can be discharged or brought to an end; and
7. Breach of contract, including remedies for breach.

SECTION 3-1: ENTERING INTO A CONTRACT—ELEMENTS OF A VALID CONTRACT

For a valid contract to exist, seven elements must be present:

1. **An intention to create legal relations** – The parties must have intended to create a legally enforceable agreement.
2. **Offer** – One party indicates its intention to enter into a contract on certain terms.
3. **Acceptance** – The other party agrees to enter into the contract proposed by the offeror.
4. **Consideration** – When conveying acceptance, the offeree promises something of value to the offeror.
5. **Certainty of terms** – The parties must reach agreement on all of the essential terms in the contract.
6. **Capacity to contract** – The parties are legally permitted to enter into the contract.
7. **Legality** – The purpose of the contract is legal.

Each of these elements will be discussed in more detail below.

⁸⁰McInnes et al., p. 155.

⁸¹Yates, p. 55.

An Intention to Create Legal Relations

Both parties to an agreement must intend to create a legally enforceable agreement in order for a valid contract to be formed. In answering the question of whether there was intention to create legal relations, the courts use an *objective test*: whether a reasonable person would believe that the parties intended to enter into a contract. The rationale for this is that a subjective test of what the parties themselves actually thought would be difficult to apply because the parties could easily lie about their intentions. As well, since the law of contract aims to protect reasonable expectations, it is appropriate that people be entitled to rely on outward appearances. Therefore, the law presumes that people entering into agreements intend their promises to be legally binding.

The courts usually presume that an intention to create legal relations exists in a business context but not between family members or close friends. People often make promises to family and friends that they would not make to strangers.

Advertisements are not normally taken as enforceable promises. Advertisers are given a certain amount of latitude in how they describe their goods to the public. As well, the courts view an advertisement or a display of goods as a mere *invitation to do business* rather than an intention to enter into a contract with members of the public.

However, the above presumptions may be *rebutted* or *disproved*. The court may be persuaded that promises made by family members or advertisers were intended to be promises binding in law.

Offer

An offer is “a tentative promise made by one party (the offeror), subject to a condition or containing a request to the other party (the offeree).”⁸² It is an “indication of a willingness to enter into a contract on certain terms.”⁸³ Making an offer entails a risk because, as soon as it is accepted, a binding contract exists.

To be valid, an offer must be:

1. **Complete** – It must contain all the major terms of the agreement;
2. **Precise** – If the offer is too vaguely worded, a court may later find the agreement to be too ambiguous to be enforced; and
3. **Communicated to the offeree** – This may be done by act (sitting in the chair at the hair salon), words, writing, or a combination of these.

⁸² Smyth et al., p. 101.

⁸³ McInnes et al., p. 158.

Difference Between an Invitation to Treat and an Offer

An offer has to be more than a willingness to enter into negotiations. The latter is merely an **invitation to treat**. Whether what is communicated is an offer or an invitation to treat is a question of degree and is dependent upon the language used. In making the distinction, the courts use an objective test of how a reasonable person would interpret a particular statement in that specific situation.

As a general rule, the courts have held that an advertisement of goods for sale at a stated price is not an offer to sell the goods at that price but merely an invitation to do business or an invitation to treat (a willingness to receive an offer). However, if an advertisement offers a fixed number of items at a fixed price on a first-come, first-served basis, this may constitute a valid offer.

Similarly, advertisements that offer a reward to any person who uses a preventive medicine but still catches the illness have been found to be valid offers. This was the subject of the landmark case *Carlill v. Carbolic Smoke Ball Company* where a company was forced to pay the £100 offered to Carlill, who used its carbolic smoke ball yet still contracted influenza. The courts viewed the advertisement as an offer to the world, especially since the advertisement stated that £1,000 had been deposited with a bank to show the company's sincerity.⁸⁴

In a self-service store, the customer is the offeror and the cashier is the offeree. The display of goods is an invitation to do business. The customer makes an offer by taking the goods to the cashier who accepts the offer by ringing them in. This was the subject of *Pharmaceutical Society of Great Britain v. Boots*, where Boots Pharmacy started selling some pharmaceutical products on a self-service basis, and the Pharmaceutical Society held that these transactions were unsupervised in contravention with legislation.⁸⁵ The court found that the items on the shelf were merely an offer to treat.

Section 38 of the Ontario Consumer Protection Act, 2002, states that an Internet supplier "shall provide the consumer with an express opportunity to accept or decline the agreement,"⁸⁶ thus suggesting that the Internet consumer is the offeree. This contradicts the traditional rule in retail sales that the retailer is only making an invitation to consumers to make offers and that the consumers are the offerors.⁸⁷

⁸⁴ *Carlill v. Carbolic Smoke Ball Company*, [1893] EWCACiv 1 QB 256 (C.A.).

⁸⁵ *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 401 (C.A.).

⁸⁶ *Consumer Protection Act, 2002*, S.O. 2002, c. 30 Sch.A, s. 38 (Ont.).

⁸⁷ Smyth et al., pp.116-117.

Standard Form Contracts

A **standard form contract** is an offer presented in a printed document or notice, the terms of which are uniform for everyone, e.g., an airline ticket or parking receipt.

In general, by accepting a standard form contract, the offeree is deemed to have accepted every term of it; that is, the offeree is presumed to have knowledge of all of its terms and to be bound by them. Thus, if the offeror has taken reasonable steps to bring terms to the attention of the offeree, the offeree will be bound despite a lack of actual knowledge of the terms (e.g., even if he or she does not read the notice on the back of the parking receipt that makes reference to liability disclaimers posted throughout the lot). In the absence of reasonable steps, such as where the term is in small print or is inconspicuous, the offeree may not be bound by the term.

Ways in Which an Offer May Be Terminated

Once it has been determined that there is an offer, the question then becomes for how long the offer is valid. A contract may be terminated in a range of ways, as shown in Figure 3-13.

Figure 3-13: Termination of Offers

Method	Description
Lapse	An offer lapses if: <ol style="list-style-type: none"> 1. The offeree fails to accept the offer within the time period specified in the offer; 2. There is no set period for acceptance, and the offeree fails to accept within a reasonable time—the court will look at the subject matter, volatility of the market, and industry practices; or 3. Either party dies or becomes incapable (unless the contract states that it is intended to bind heirs and estates).
Revocation	Revocation is withdrawal of an offer prior to acceptance by the offeree. Revocation must be communicated in a way that a reasonable person would understand it to be revoked. It is effective when the revocation is actually received by the offeree.
Rejection	This is refusal of an offer by the offeree. It may be done expressly, by stating that the offeree will not accept the offer, or it may be indicated by conduct that justifies the offeror's belief that the offeree did not intend to accept the offer.
Counter-Offer	The offeree responds to the offer by indicating a willingness to enter into a contract but on different terms. A modification of an offer usually amounts to a counter-offer. If a counter-offer is made, the offeree has rejected the original offer, and it is terminated.

An inquiry by the offeree regarding the terms of the offer does not amount to either a rejection or a counter-offer.

It is possible for the offeree to protect itself from revocation of the contract by the offeror by purchasing an **option**, a separate contract where the offeror is paid to hold an offer open for acceptance for a specified period.

Similarly, in the case of **tenders** (offers to undertake specific projects on specific terms), the courts will probably find that the bidding process immediately creates a **standing offer** that the bidder is not entitled to withdraw. This gives the party calling for tenders the opportunity to review all offers before selecting the winning bid.

Acceptance of an Offer

Acceptance “occurs when an offeree agrees to enter into the contract proposed by the offeror.”⁸⁸ The moment an offer is accepted, a contract is formed and each party is bound to comply with its terms.

To be valid, acceptance must be:

1. **In a positive form**, whether oral or by act;
2. **Unequivocal** – It must be complete and unconditional;
3. **Without any variation in the terms** of the offer or, as noted above, it will constitute a counter-offer and terminate the original offer; and
4. **Communicated to the offeror** – Some contracts may specify that notice of acceptance is not necessary and that the contract will be binding as soon as the offeree has performed whatever was required of him in the offer. *Carlill v. Carbolic Smoke Ball Co.* established that an offer may be made to an indefinite number of people who remain unknown to the offeree even after they have accepted.⁸⁹

Bilateral Contracts and Unilateral Contracts

How an offer is accepted depends on the type of contract. A **bilateral contract** occurs when a promise is exchanged for a promise.⁹⁰ In that case, acceptance may occur through written or spoken words or by conduct (e.g., shaking hands or nodding agreeably). Silence will be viewed as a manner of acceptance only in very limited circumstances. When there is no face-to-face contact, it may be necessary to determine where and when a contract was formed or, if the lines of communication have broken down, whether a contract was even formed.

⁸⁸McInnes et al., p. 165.

⁸⁹Smyth et al., p. 109.

⁹⁰McInnes et al., p. 164.

The **general rule** is that acceptance by instantaneous communication (where there is little or no delay in the interaction between the parties) is effective when and where it is received by the offeror. Otherwise, according to the **postal rule**, acceptance by non-instantaneous communication is effective where and when the offeree sends it.

The format of communication may be detailed in the offer. However, as long as the way in which acceptance is communicated results in the acceptance being received within the same time frame as if it had been done using the method specified in the offer, and as long as industry practice is followed, the court will deem it proper communication. More specifically, acceptance by mail is deemed to be effective when a properly addressed and stamped letter of acceptance is dropped in the mail unless the offer indicates that acceptance should be by means other than post; in that case, acceptance is not effective until the offeror receives the letter.

In a **unilateral contract**, the offer is accepted by performing one or more acts required by the terms of the offer. For example, the purchaser of a preventive medicine accepts the manufacturer's offer of a money-back guarantee simply by purchasing the product. There is no expectation of formally communicating an acceptance to the manufacturer. The obligation now rests with the manufacturer to perform its part of the bargain.

Consideration

Consideration is the price for which the promise (or the act) of another is bought.⁹¹ It is an exchange of value that must move from each party of the contract but not necessarily to the other party. It is enough to promise a benefit to someone; it is not necessary to provide a benefit to the other party to the contract.

"The main goal of contract law is to enforce bargains. And as business people know, a bargain involves more than an offer and an acceptance. It also involves a *mutual exchange of value*."⁹² Consideration offers a sure legal test for binding commercial relationships. Without consideration, a contract is simply a **gratuitous promise** that is not enforceable. There must be **sufficient consideration**, which is anything of value in the eyes of the law. However, consideration does not have to be **adequate**, meaning that it does not need to have the same value as the consideration given in exchange. The court will not assess the adequacy of the consideration unless there are special circumstances such as suspicions of fraud or undue influence. However, a person who requests goods or services from another is obligated by an implied promise to pay a reasonable price for the goods or services. Rather than seeking damages for breach of contract, the supplier of the goods or services would seek payment under the principle of **quantum meruit** (reasonable payment for services rendered).

⁹¹ Smyth et al., p. 123.

⁹² McInnes et al., p. 177.

Figure 3-14 helps to answer the question of what constitutes consideration in the eyes of the law.

Figure 3-14: What is consideration?

Examples of Consideration	Examples of Items that are NOT Consideration
Money	Natural love and affection.
Forbearance to sue: promise not to pursue a lawsuit	Past consideration: something a party did prior to contemplation of a contract cannot given in exchange for the other party's consideration; in this case, there is no mutuality of consideration.
Promise to perform a pre-existing contractual obligation to a third party	Pre-existing public duty: public servants cannot use a promise to complete their public duties as consideration for a new contract since that would be offering nothing new.
	Pre-existing contractual obligation to the same party: the law does not allow the same person to pay twice for the same benefit.
	Promise to forgive an existing debt is not generally good consideration.

The rule that forgiving an existing debt is not consideration is often viewed as unjust and unrealistic. After all, a creditor may find it more beneficial to settle for a reduced amount than to insist on full payment if it would mean getting some cash sooner or avoiding pushing the debtor into bankruptcy. Therefore, the courts have ruled that a promise to accept less money is enforceable if the debtor gives something new in exchange, even if that only means paying one day earlier than required or accepting goods/services in exchange for cancelling the debt. Finally, in Ontario, the *Mercantile Law Amendment Act* binds a creditor who agrees to accept part performance of an obligation in settlement of a debt.⁹³ Many other Canadian jurisdictions have similar acts.

Exceptions to the Requirement for Consideration

There are two situations where the law will enforce promises not supported by consideration.

Use of a Seal

The law recognizes and enforces agreements made under seal since the seal is accepted in lieu of consideration. A **seal** is a mark that is put on a written contract to indicate a party's intention to be bound by the terms of the document even though the other party has not given

⁹³*Mercantile Law Amendment Act*, R.S.O. 1990, c M.10 (Ont.).

consideration. An insignia used to be pressed into hot wax, but now a small red adhesive circle is used instead. It is even sufficient to write “seal” on the document as long as this is done at the same time as the party signs the document.

It may be that the click of a mouse will become the newest seal when it is tested in the court by the first party that tries to enforce a promised but undelivered Internet-based benefit.⁹⁴

Equitable Estoppel (Promissory Estoppel)

Under the **principle of equitable estoppel**, the courts have provided equitable relief when one person asserts certain facts as true or makes gratuitous promises, and another relies on the statement or gratuitous promise to his or her detriment. The maker of the statement or promise will be *estopped* or prevented from denying the truth of the original statement or claiming that he or she was not bound by the promise despite the fact that consideration has not flowed.

In Canada, equitable estoppel is limited to a *defence* against a claim by the promisor where the statement is made in the context of an existing legal relationship. It applies when 1) a promise or statement was made by one party—by words or conduct—that was intended to affect their relationship and be acted on; 2) the defendant relied on the statement in a way that makes it unfair for the other party to retract its promise; and 3) the defendant’s own conduct was beyond reproach.

Recent cases have raised the question of whether Canadian courts are moving towards the American principle of **injurious reliance** as a cause of action, which allows an injured party to force the promisor to perform the promise. In 2008, for example, the Ontario Superior Court upheld an employee’s claim for a promised wage increase on a number of grounds including promissory estoppel.⁹⁵

Certainty of Terms⁹⁶

The parties must reach agreement on all of the essential terms in a contract. It must be possible to determine the meaning of the contract with a reasonable degree of certainty.

Three issues could arise that will cause a contract to fail for lack of certainty of terms:

1. *Incompleteness*: The omitted terms are so important that they warrant the conclusion that the parties have not yet reached an agreement; for example, lack of a price or a formula to determine the price.

⁹⁴Willes and Willes, p. 141.

⁹⁵*Hepburn v. Jannock Limited* [2008] 63 C.C.E.L. 3d 101, (Ont. C.A.) at para 109-126.

⁹⁶John D. McCamus, *The Law of Contracts*, (Toronto: Irwin Law Inc. 2005), pp. 91-104.

2. *Agreements to agree*: A fundamental item is explicitly left subject to negotiation or agreement within a contract.
3. *Vagueness*: A term is so vague or imprecise that multiple meanings can be reasonably supported.

Capacity to Contract

Capacity refers to the competence to enter into legally binding agreements. Minors and people with diminished mental capacity may lack capacity to contract.

Minors (or Infants)

Minors are people who have not yet reached the **age of majority** according to the law of their province (usually 18 or 19). Because minors have less bargaining power than adults, as a general rule, contracts made by minors are not enforced against them but are enforceable by them. There are two exceptions to a minor's immunity from contractual liability: necessities and beneficial contracts of service.

Necessaries

Contracts made by a minor for the provision of necessities are binding. To be a necessary, the good must be necessary to this particular minor, and the minor must not already have an adequate supply of it. Although a minor only need pay a reasonable price for necessities, the contract price is presumed to be reasonable in the absence of evidence to the contrary.

The court requires the adult who is supplying goods to establish what is in fact necessary for the minor, and this may be difficult for an adult who does not know of the infant's particular circumstances. The courts have identified food, clothing, lodging, medical attention, legal advice, and transportation (means to get to and from work, but not purchase of a vehicle) as necessities.

Based on the *Sale of Goods Act*, an infant may repudiate a contract even for necessities where the goods have been ordered but not yet received, since the Act defines necessities for an infant as goods sold and delivered.⁹⁷

Beneficial Contracts of Service

Beneficial contracts of service made by a minor are binding. These include contracts of employment or apprenticeship when they are found to be for the minor's benefit and not

⁹⁷ *Sale of Goods Act*, R.S.O. 1990 c. S.1, s.3 (1) (Ont.).

exploitative. However, when a minor is in business for himself, the courts are less likely to consider this as beneficial to the minor.

Other Contracts with Minors

Figure 3-15 sets out some of the other common law rules regarding contracts made with minors. The distinction between void and voidable contracts is important in this context as well as in other contexts. A **void contract** is a nullity from its inception, i.e., it is not really a contract at all and thus cannot be enforced by either party. A **voidable contract** may be terminated by one or perhaps either of the parties but is in force unless and until one party acts to bring it to an end.

Figure 3-15: Rules Regarding Contracts with Minors

Topic	Implication
Repudiation	A minor may always repudiate a contract for non-necessaries, even when those items are clearly beneficial to him or her. The minor must return goods still in his or her possession. If the minor sells goods, she cannot recover the goods unless she returns the money paid. If the minor has already received a benefit or non-returnable goods as a result of a contract for non-necessaries, he will be able to repudiate only future liability and cannot recover monies already paid for the benefit received.
Loans to a minor	An adult can recover money lent to a minor only if the minor used the money to purchase necessities.
Liability under Tort law	Although a minor may be free from liability under contract law, she is still liable for torts like negligence, defamation, and deceit.
Liability under Criminal law	A minor might be tempted to buy goods on credit, sell them to a third party, and then repudiate the original contract and pocket the profit. However, this type of conduct might be criminally fraudulent. Minors are responsible for actions under the <i>Criminal Code</i> , R.S.C. 1985, c. C-46 and, upon turning 16, could be subject to criminal sanctions; conduct of minors under 16 could lead to penalties under the <i>Young Offenders Act</i> , R.S.C. 1985, c. Y-1.
Lying about age	A minor cannot gain capacity by intentionally misleading an adult about his or her age.
Parents of minors	Parents may be held liable for contracts made by their children only if the child is acting on behalf of (as the agent of) the parents.
Minor reaches age of majority	For ongoing contracts (e.g., fitness club memberships, car leases, cell phone plans, and agreements dealing with land, shares, or partnerships), unless a minor promptly repudiates the contract after becoming an adult, the minor will be liable under its terms as if he had been an adult all along.

	For contracts that concern a single transaction, unless the minor ratifies it at majority, she will not be bound; under the <i>Statute of Frauds</i> , ratification must be in writing and signed by the minor-turned-adult to be enforceable. ⁹⁸
Prejudicial contracts	Contracts that are prejudicial and unfair to minors are void. Therefore, they need not be repudiated if ongoing nor can they be ratified.

The safest course for anyone making a contract with a minor is to have an adult (parent, older sibling, or guardian) guarantee the minor's contractual obligations.

Diminished Contractual Capacity

A person who is insane or incapacitated through drink or drugs also lacks capacity to contract. As is the case with minors, such a person will have to pay a reasonable price for necessities, while other contracts are voidable at his or her option but enforceable against the contracting party.

While it is usually easy to establish whether or not a person was a minor at the time of making a contract, it can be hard to prove that a person was insane or drunk at that moment, especially if the contract was not negotiated in person. Therefore, the courts require a person of diminished contractual capacity to demonstrate that the other party knew of the condition at the time of the agreement. In the absence of clear evidence, the courts will assess the probability of knowledge from the circumstances, including the apparent fairness or unfairness of the contract for the party lacking capacity.

If a person has been declared incapable by the courts, any contract the person attempts to make is always void.

Statutory Limitations on Contractual Capacity

Various statutes limit, in various ways, the contractual capacity of corporations, labour unions, bankrupt debtors, Aboriginal peoples, and enemy aliens (i.e., citizens of countries Canada is at war with).

Under business corporations acts, corporations are treated as legal persons and, as such, are given the right to contract. Because it can often be difficult to ascertain who in a corporation has the authority to act on the corporation's behalf in entering into a particular type of contract, the **indoor management rule** prevents the corporation from relying on any provision in its articles or by-laws, or on any unanimous shareholder agreement, that creates a defect in the agent's

⁹⁸ *The Statute of Frauds*, R.S.O. 1990 c. S.19, s.7 (Ont.).

authority. The corporation also cannot claim that a person held out by the corporation as an officer, director, or agent does not have the authority that a person in that position usually has in the business of the corporation.⁹⁹

Statutory corporations, such as public school boards, are given authority to contract only as specified in the statutes creating them. Any contract not made in accordance with this statutory authority may be unenforceable.

Associations are unincorporated business organizations (e.g., private clubs, charities, and churches) that do not have the legal capacity to contract. Some provinces have enacted statutes to grant authority to contract, but that authority is limited in much the same way as a statutory corporation's constitution limits its authority. Trade unions may also be given capacity to contract.

Legality of Object

Lastly, a contract formed without any of the procedural defects outlined so far may still be unenforceable if it has an object or purpose that offends public policy or violates statute law. In the absence of evidence to the contrary, it is presumed that transactions are legal. If the defendant introduces evidence that this presumption is not correct, the contract may be either void or unenforceable.

Some contracts are void simply because their object is not "legal." If either party to a void contract has partly performed, the court will attempt to restore the parties to their original positions and release both parties from future performance. If only a term of a contract is void, that term will be severed if it leaves the meaning of the rest of the contract intact, and the balance will be upheld.

Other contracts are illegal as well as void. Such contracts are unenforceable since the courts will not assist any party who knowingly participated in such an agreement. For example, if Party A were to pay Party B in advance the sum of \$1,000 to steal a car, and B later refused to steal a car, A could not proceed through the courts against B for return of \$1,000 because the contract would be illegal. Since the plaintiff cannot force the defendant to perform or to return money, the defendant's position is the stronger one.

⁹⁹ *Canada Business Corporations Act*, (CBCA), R.S.C. 1985, c.C.44, s. 18 (Can.); *Business Corporation Act (Ontario)* (OBCA), R.S.O. 1990, c.B.16, s. 19. (Ont.).

Contracts Affected by Statute

Contracts may be rendered void or illegal by statutes such as laws governing workers' compensation, bankruptcy, competition, taxation, customs, and betting. Statutes that make contracts illegal are created to express disapproval of actions that run contrary to the purpose of the legislation.

Contracts Illegal by Common Law

Two categories of illegal contracts at common law are:

1. **Agreements that contemplate commission of a tort** such as slander, libel, trespass, deceit, and incitement to break an existing contract with someone else; and
2. **Agreements where one party undertakes to indemnify the other against any damages arising from any wrongs committed in the course of performance**, except for automobile or professional insurance designed to provide protection from negligence as opposed to deliberate harm.

Agreements Against Public Policy

Finally, an agreement may be regarded as illegal if the subject matter is contrary to public interest, particularly in the areas of relations with foreign countries, national defence, public service, or administration of justice in Canada.

Examples include agreements in restraint of trade (also the subject of statute law). To a limited extent, the courts recognize the legitimate interest of an employer to protect itself from an employee who might leave to start a competing business. However, the courts have been more sympathetic in allowing a purchaser of a business to protect herself from having the vendor open a competing business.

SECTION 3-2: PRIVACY OF CONTRACT AND ASSIGNMENT OF CONTRACTUAL RIGHTS

So far the focus has been on the original parties to the contract. However, sometimes people outside of the contract are affected by it, termed **third parties**, in which case the question is what rights and obligations third parties have. This section discusses the concept of **privity of contract**, vicarious performance by a third party, and assignment of rights to a third party.

Privity of Contract

In general, the **privity of contract rule** stipulates that a contract does not confer any benefits or place any obligations on a third party. Such a third party would also be prohibited from suing on the contract. Figure 3-16 outlines the rationale for the privity rule and some of the reasons why the courts have found it to be problematic.

Figure 3-16: Privity of Contract

Justification for Privity Rule	Problems and Detractions
1. Only the people who create the contract should have a say in its disposition.	1. The rule can be circumvented and there are a series of exceptions to it.
2. Third parties have not given consideration.	2. In tort, there is no requirement for privity of contract. <i>Donoghue v. Stevenson</i> afforded a remedy in negligence even in the absence of a contractual relationship.
3. The rule prevents undue numbers of lawsuits on a single contract.	3. The main purpose of some contracts is to confer benefits on a third party. It is unduly harsh that the party who is to benefit is unable to enforce the contract.

Exceptions to the Privity Rule

Figure 3-17 discusses exceptions to the privity rule and situations when the rule does not apply based on common law or statutes.

Figure 3-17: Exceptions to Privity of Contract

Exception	Description
Interests in land	Interests in land always go with the land; for example, a lease will bind the original owner and tenant as well as anyone who purchases the land during the lease term.
Constructive trust	A third party can sue for performance of a promise included in a contract for his benefit.
Life insurance	A beneficiary can enforce a policy taken out by the deceased.
Undisclosed principal	A contracting party who, unbeknownst to the other party, is represented by an agent may sue or be sued on the contract; the agent is just a go-between.

Consumers in New Brunswick	New Brunswick has passed legislation that gives the user of a consumer product a right to sue the seller or manufacturer even though she is not the buyer. ¹⁰⁰ In other jurisdictions, consumers may still have recourse against sellers of goods and manufacturers under the tort of negligence.
Novation	A third party replaces an existing party to the contract. The existing party is relieved of the contract's rights and obligations, and the new party assumes them. Novation can also amount to the substitution of a new contract for an old one.
Collateral contracts	These implied contracts bind a third party who made a representation or promise that induced a person to enter into a contract with another party. For example, a manufacturer that publishes sales brochures used by dealers can be sued for breach of warranty by the end consumer.
Exemption clauses	An exemption clause between the owners of goods and a storage or transportation company may protect employees and intermediaries who are not parties to the contract.

Vicarious Performance

Vicarious performance refers to the situation where a party to a contract obtains someone else to carry out his or her duties. Vicarious performance is permitted only when personal performance by the promisor is not the reason why the promisee entered into the contract, as would be the case, for example, when a musician is hired for a concert.

The original promisor remains accountable for proper performance. The employee who does the work can look only to the promisor for payment. As long as the work is done as well as expected, the party entitled to performance has no complaint. If there is a problem with performance, and there was an implied or express promise to perform personally, the party entitled to performance could sue for breach of contract.

Tort Liability

In the case of an employee who is negligent under tort law while performing a contract vicariously, the employer is normally held liable for damages. The employee would also usually be named as a co-defendant in the event that such negligent conduct fell outside of the normal course of employment.

Exemption Clauses

Employers may use exemption clauses to protect themselves from tort liability. For example, carriers and storage companies often use standard form contracts to limit or exclude their

¹⁰⁰ *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C.18.1 (NB).

liability and thus keep the cost of their services affordable for purchasers, who often buy their own insurance against loss.

Assignment of Rights

Contracts also affect third parties when one party to the contract gives away, or assigns, his or her rights to a third party. Rights assigned under contract are part of a larger classification of rights to intangible property (such as patents, stocks, and contracts), called **choses in action**, distinguishable from rights to tangible property (land, goods), called **choses in possession**.

Assignments Made by a Party to the Contract

Figure 3-18 compares the two types of assignment of rights to a third party: statutory and equitable.

Figure 3-18: Assignments

Statutory Assignment	Equitable Assignment
Must be in writing.	May be oral or written.
Must be absolute (unconditional and complete) at the time it is created.	May be conditional (e.g., subject to some future event occurring) or incomplete, thereby allowing more freedom for an ongoing transaction (e.g., where the amount of debt varies over time).
Promisor must receive written notice.	Notice is advisable but not required.
	Equitable assignment is not available if the contract states that rights are non-assignable.

In either case, the other party has to complete his obligations only once. Therefore, if he completes the obligations to the assignor because he is unaware of the assignment, the assignee cannot require completion of the obligations as well. However, if a debtor ignores a notice of assignment and pays the original party, he can be sued by the assignee and required to pay the debt a second time. Where notice is received from two or more assignees, the debtor must pay the assignee who first gave notice.

Equity requires that the assignor, assignee, and promisor all be parties to any court action so that all those affected by the decision have an opportunity to argue on their own behalf. An assignee **takes subject to the equities**, which means that the assignee can never be in a better position to sue the promisor than the assignor was. So, if the promisor had defences and counterclaims to an action by the assignor, the assignee would have the same defences and counterclaims. However, the promisor has **the right to set off**, that is, the right to deduct existing debts owed to her by the promisee.

Involuntary Assignments or Assignments by Operation of Law

When someone dies, the law automatically assigns that person's rights and obligations to a personal representative (executor or administrator). The personal representative is able to stand in the deceased's shoes and assert the rights of the deceased and fulfil his or her obligations.

A person who does not voluntarily declare bankruptcy but whose creditors are successful in obtaining a **receiving order** has both his assets and liabilities, including contractual rights and obligations, assigned to the trustee in bankruptcy.

Negotiable Instruments

Negotiation is the process of assigning a negotiable instrument, such as a cheque or promissory note. The law for negotiation differs in three important aspects from the law for assignment in general:

1. Notice does not have to be given to the promisor;
2. The assignee may stand in a better position than the assignor in either suing the assignor or defending an action by the assignor; and
3. The assignee can sue in his or her own name without joining the assignor as a party to the action.

SECTION 3-3: THE REQUIREMENT OF WRITING

In general, there is no legal requirement that contracts must be in writing to be binding. However, to avoid disputes and costly litigation, all important contracts should be in writing, and some should be witnessed as well to attest to their authenticity.

When a contract is wholly oral, it may be difficult for the parties themselves, let alone a court of law, to be entirely sure exactly what they agreed to. When contracts are part oral and part written, it can still be difficult to be sure what was agreed to. Even when contracts are in writing, words may still be open to several interpretations. Not only does it make good business sense to enter into written contracts, the law requires some contracts to be written if the parties want to ensure that their interests are protected by law.

The Statute of Frauds¹⁰¹

The Statute of Frauds renders some types of contracts **unenforceable** unless they are in writing. Despite the fact that an oral contract is otherwise valid, if it falls within the Statute, it is unenforceable. Thus, neither party will be able to sue the other party to force the party to perform as promised. Figure 3-19 outlines contracts that the Statute of Frauds requires to be in writing.

Figure 3-19: Contracts Covered by the Statute of Frauds

Type/Subject	Rationale for Requirement to be in Writing
Guarantee – This is a promise to pay if a debtor defaults; the debtor retains primary responsibility for the debt.	Because of the continuous nature of the guarantor’s potential liability: “As with any agreement extending over a long period of time, memories become hazy, facts may be forgotten, and interpretations may change.” ¹⁰²
A contract concerning an interest in land.	Due to the permanent nature of land and the system of public records that allows parties to discover who owns land.
Marriage and cohabitation agreements.	It is expected that these agreements will apply to relationships over a long time.
An agreement that is not intended to be performed by either party within a year.	Because memories fail over time.

Except in British Columbia, **indemnities** do not need to be in writing to be enforceable. In contrast to a guarantee, a person who makes a promise to indemnify makes himself primarily liable to pay the debt.

In the case of land, the **doctrine of part performance** stipulates that performance begun by a plaintiff in reliance on an oral contract related to land may be accepted by the courts as evidence of the contract in lieu of a written memorandum. For instance, if the plaintiff has taken possession of the land and has begun to make improvements on it, this would constitute part performance.

Requirements for a Written Memorandum

The Statute requires a “note or memorandum of the contract,” which must:

1. Contain all essential terms of the contract, including the parties, a description of the subject matter of the contract, and all material terms such as price; and

¹⁰¹ *The Statute of Frauds*, R.S.O. 1990 c.S.19 (Ont.).

¹⁰² Willes and Willes, p. 179.

2. Be signed by the party who is being sued; it need not be signed by the other party. (This has been liberally construed by the courts so that handwritten initials or a hand-printed name will suffice.)¹⁰³

It may be one document or several taken together; it may be a formal contract or something less formal such as a letter or note.

Effect of Contracts within the Scope of the Statute

The Statute of Frauds makes an oral contract unenforceable. Although no action may be brought on the contract itself, the contract still exists for other purposes. The Statute has these implications:

1. The court will not permit the repudiating party to gain further advantage by allowing recovery of a down payment after her own breach.
2. A party who has accepted goods and services under a contract that is unenforceable will not be able to retain any benefit without paying for it (the other party will have a *quantum meruit* claim).
3. A written memorandum brought into existence after the contract was formed but before the action was launched will suffice.
4. The defendant must expressly plead the statute as a defence to the legal action.
5. An oral contract may effectively vary or dissolve a prior written contract even though the oral contract could not itself be enforced.
6. Only the party who has signed can be sued.

Consumer Protection Act¹⁰⁴

Growing concern about the power imbalance between businesses and consumers has led to the creation of consumer protection laws covering both goods and services. As shown in Figure 3-20, these laws take a detailed approach to writing requirements and regulate a broad range of contracts as well as high-risk industries.¹⁰⁵ Unless the business has complied with the requirements of the law, the customer will not be bound by the contract.

¹⁰³ McCamus, p. 171.

¹⁰⁴ *Consumer Protection Act, 2002*, S.O. 2002, c 30, Sch.A, s 30 (Ont.). Similar statutes exist in the other common law provinces.

¹⁰⁵ Smyth et al., pp. 215-217.

Figure 3-20: Consumer Protection Act Coverage

Common Writing Requirements
Detailed description of goods and services
Itemized purchase price
Detailed disclosure of cost of borrowing
Name, address, and contact information of vendor
Notice of statutory cancellation rights
Complete copy provided to consumer

Types of Contracts
Future performance contracts (delivery, performance, or payment in full is not made when parties enter into agreement)
Direct sales contracts (e.g., door-to-door)
Distance or remote contracts
Internet contracts

Designated Industries
Time sharing
Health, fitness, or personal development (services, facilities, and incidental goods)
Lending and credit card
Car repair
Funeral services

Sale of Goods Act

British Columbia (in 1958) and Ontario (in 1994) have followed the lead of the English Parliament and repealed the sections of the Sale of Goods Act that required special types of evidence to enforce contracts for the sale of goods. Other common-law provinces still have such requirements to protect sales of goods over a certain dollar amount. They require either a written memorandum or one of three kinds of conduct: 1) acceptance and actual receipt of the goods by the buyer; 2) part payment; or 3) **earnest**—a token sum or article given to seal the bargain.

SECTION 3-4: INTERPRETING CONTRACTS

While great care may have been taken to ensure that a valid contract was created, problems may later arise in the interpretation of the contract as its performance unfolds. The best advice to any business person who wishes to avoid subsequent problems related to interpretation of contracts is to take special care and seek advice when making a contract. As the old maxim goes, "An ounce of prevention is worth a pound of cure." The parties to a contract should think about what is contained in the wording of the agreement as well as anything that should be included and is not.

When a court is called upon to interpret a contract, its goal is to explain the meaning of the agreement in a way that would most fairly give effect to the expectations of the two parties. More will be said about how the courts interpret contracts in the next section on defects. However, a few basic concepts will be covered in this section.

Interpretation of Express Terms

When interpreting express terms in contracts, two approaches are possible:

1. The **literal** or **plain-meaning approach** relies on the dictionary meaning of words to determine what meaning a term of a contract should bear.
2. The **liberal approach** determines the purposes the parties had in mind in drafting the contract (or term) and construes the words actually used in light of that purpose.

The courts usually use a balance of the two approaches, with emphasis on one or the other depending on the circumstances. In making their decisions, the courts will consider oral evidence from the parties and give the most weight to that which is corroborated or most credible. The courts also consider evidence of special usage of words in business, specific trades, and geographical regions.

The Parol Evidence Rule

The **parol evidence rule** does not allow a party to later add a term that was previously agreed upon orally but was not included in the written contract. (The legal definition of *parol* is oral or unwritten.) To do justice to the parties, however, the courts often find ways to avoid the rule, as shown by the various exceptions in Figure 3-21.

Figure 3-21: Exceptions to the Parol Evidence Rule

Parol evidence about a missing contract term is admissible when:

The written document was not intended to contain the whole contract.

The missing term is:

- Part of a subsequent oral agreement with its own consideration that is a collateral agreement to the written contract or that was made by the parties after the written contract.
- A condition precedent to the written contract coming into force, i.e., a set of circumstances or events the parties stipulate must be satisfied or must happen before the contract takes effect, such as the purchaser obtaining financing.

Parol evidence may also be admitted to:

Prove that a contract is illegal or invalid due to incapacity, misrepresentation, fraud, duress, or undue influence.

Explain an ambiguous or incomplete contract.

Assist in interpretation of the express terms of the contract.

Implied Terms

An **implied term** is a term not expressly included in the contract by the parties but one that reasonable people would have included had they thought about it.

Interpretation of contracts by acknowledging the existence of implied terms is very tricky. The courts will consider a number of factors when a party wishes to have an implied term read into a contract: the intentions of both parties, the type of contract, trade customs, previous business dealings between the parties, business efficacy, and the comprehensiveness of the contract.

Since the courts may be reluctant to find implied terms in contracts, business people are encouraged to make anything that is important to them an express term of the agreement.

SECTION 3-5: CONTRACTUAL DEFECTS

This section considers how, despite having created a valid contract and adhered to the requirements of writing, the parties may still not have an agreement that both parties may enforce because of a contractual defect in the form of **mistake**, **misrepresentation**, or **unfairness during bargaining**.

Contractual defects may either render a contract void (as though it never happened, with no legal effect from the beginning) or voidable (valid unless and until it is rejected at the option of one of the parties).

Although these notes have dealt with capacity and legality as essential parts of a valid contract and have given separate consideration to the requirement of writing, the *lack of capacity*, *illegality*, and the *absence of writing* could also be viewed, instead, as types of defects.¹⁰⁶

Mistake

The courts may grant relief when a party enters into a contract under a basic misunderstanding, although not in every case. The maxim "mistake of law is no defence" applies because all parties are presumed to know the law. Furthermore, a mistake in judgment is not a basis for escaping contractual liability. For example, a contract that proves to be more onerous than anticipated will not provide a basis on which to have the contract set aside.

Remedies may be available to a party who makes a factual error, but a party cannot escape contractual obligations for all factual mistakes. Contracts negotiated on the basis of a factual mistake may be void, voidable or, in certain cases, valid, depending on the type of mistake.

A. *Mistakes About the Terms*

When it comes to mistakes about terms, the issue is really whether there is *consensus ad idem*, or a meeting of the minds.

A **unilateral mistake** occurs when, prior to the formation of a contract, one party is mistaken with respect to the meaning of a contract term, and the other party is aware of that mistake. In such cases, the courts tend to treat the contract as unenforceable. A **mutual mistake** occurs when both parties are unaware of the mistake at the time the contract was formed. In that case, the remedy afforded depends on the type of mistake, as discussed below.

(i) Words used inadvertently

If one party inadvertently uses the wrong words in stating the contract, and the court concludes that it was reasonable for the second party to rely on the inadvertent words and enter into the contract (e.g., a price of \$354 instead of \$345), the contract will be binding on the first party. Conversely, if the court concludes that a reasonable bystander would know that the first party had made a mistake in expressing the terms of the contract (e.g., a price of \$350 instead of \$3,500), the contract is voidable by the first party since the second party will not be allowed to

¹⁰⁶ As espoused in *McInnes et al.*, Chapter 10 (Contractual Defects) and *McCamus*, Chapter 12 (Illegality).

"snap up" an offer that is obviously mistaken. The courts will also consider the potential hardship to each of the parties.

(ii) Misunderstandings about the meaning of words

When the parties to a contract put differing interpretations on words correctly recorded in the contract, the court will try to arrive at and enforce the most reasonable interpretation. In the very rare situation where neither interpretation is more reasonable than the other, and the words form a major term of the contract, the court will hold that no contract had been formed.

In the case of standard form contracts, if a vague contract is held to be enforceable, the **contra proferentum rule** would result in the courts using the meaning that is least favourable to the author.

If two equally careless parties use an ambiguous phrase, the court will refuse to decide between their two conflicting interpretations with the result that the defendant's position becomes stronger than the plaintiff's since the latter did not succeed in proving his or her interpretation.

B. Mistaken Assumptions

Mistaken assumptions can be defined as mistakes concerning a matter relevant to the decision to enter into a contract. They relate to the motive to enter into a contract as well as to assumptions about events at the time of contract.

(i) About the existence of the subject matter of a contract

When the subject matter of a contract does not exist, but both parties thought it did when they made the contract (for instance, when the goods being sold are unknowingly destroyed in transit), the contract is void.

(ii) About the value of the subject matter: allocation of risk

When both parties find that the quality of the subject matter of a contract is substantially different from what they contemplated, the court will first decide who should bear the risk of loss or damage. The court will grant relief only when it decides that the party adversely affected should not be the one to bear the risk. The injured party may be allowed to repudiate the contract.

The guiding principle is whether a party could reasonably have foreseen the consequences of a particular risk at the time of making the contract. When both parties were aware at the time of

the contract that the value of the subject matter might rise or fall quickly, the agreement will bind them.

(iii) The challenge of achieving a fair result

Where one or both of the parties change their position or forego an opportunity because of a mistake in a contract, the court gives relief where it can achieve results reasonably fair to both parties. Solutions may require ingenuity or imagination in the exercise of discretion. Where no remedy appears available, the loss will often be left to lie where it fell.

C. Errors in recording an agreement: Mistakes in integration

Often parties will reach an oral or informal written agreement and later record the agreement in a formal written contract. When a mistake is made in recording an agreement, the court may **rectify** the mistake in the written document only when it is satisfied that a final, unambiguous, and unconditional agreement had been reached, and there were no further negotiations, i.e., that this really was just an **error in recording**. The credibility of the parties often becomes an issue in this context because one party may well assert that the written form actually reflects the true agreement. In such circumstances, strong evidence is required to move the court to order rectification.

D. Mistake and Innocent Third Parties

In some situations, a “rogue” may deceive a gullible or imprudent second party and thereby gain possession of goods or valuable signed documents. Whether the mistake is about assumptions (the victim is misled about the identity of the rogue) or about the terms (the victim is misled about the terms of the document), by the time the victim discovers he has been “duped,” the rogue is usually long gone, and the victim is left dealing with an innocent third party who has paid to receive the goods or documents.

(i) Mistake about the identity of a party to the contract

For contracts not negotiated in person, if the party whose identity was mistaken assumed the name of some person or business known to the seller, as was the case in *Cundy v. Lindsay*, the contract would be void.¹⁰⁷ Consequently, if the purchaser has since sold the goods to an innocent third party, the duped seller would be able to recover the goods from that third party as if the goods were stolen rather than purchased in good faith.

¹⁰⁷ *Cundy v. Lindsay*, (1878), 3 App. Cas. 459 (H.L.).

On the other hand, if the party whose identity was mistaken assumes the name of someone completely non-existent, as was the case in *King's Norton*,¹⁰⁸ the contract would be voidable since the court holds there is no one else with whom the seller could have intended to contract. In such a case, the vendor could not recover the goods from an innocent subsequent purchaser. It is arguable that the *King's Norton* case reflects a general dissatisfaction with the earlier *Cundy* precedent, where the more innocent rather than the more careless of the two parties bore the loss. In general, the courts tend to protect the innocent third party rather than the original seller who took the risk of selling on credit without checking the rogue's identity.

(ii) Mistake about the nature of a signed document

Since the decision of the Supreme Court of Canada in *MarvcoColor Research Ltd. v. Harris*, a signer can avoid the consequences of a document he or she has signed only if a) the mistake is a serious one and b) the signer has not been careless of his or her own interests.¹⁰⁹

People who are blind, illiterate, or unable to read the language the contract was written in are usually protected under the plea of ***non est factum*** (it is not my deed) since these people must ultimately rely on the integrity of other people. The relevant contract would be void. However, it is now unlikely that other people who sign documents can avoid liability to innocent third parties except in extraordinary circumstances.

E. Mistakes in Performance

When a party to a contract mistakenly gives a benefit to the other party (e.g., pays too much), the recipient will be required to restore the benefit to the mistaken party if that recipient knows of the mistake. Where the recipient honestly believes she is entitled to the benefit, the remedy is more difficult. The courts have been moving gradually toward imposing an obligation based on the concept of **unjust enrichment**: if in all circumstances the recipient would be unjustly enriched by keeping the benefit, she will be ordered to make restitution to the mistaken party.

Misrepresentation

Misrepresentation occurs when one party induces another party to enter into an agreement by making a material pre-contractual statement of fact that is false. A pre-contractual statement is **material** if a reasonable person would consider the fact relevant to the decision to enter into the contract. It is an inducement if there is a causal connection between the statement of fact and the person's decision to enter into the contract, although it does not have to be the predominant reason. Figure 3-22 discusses what constitutes a statement of fact, including the role of silence.

¹⁰⁸ *King's Norton Metal Co. v. Eldridge*, (1879) 14 T.L.R. 98 (C.A.).

¹⁰⁹ *Marvco Color Research Ltd. v. Harris*, (1982) 2 S.C.R. 744.

Figure 3-22: Misrepresentation?

Item	Description and Whether Fact or Not
Sales talk	A reasonable person would not rely on vague and imprecise expressions or statements “puffing up” or aggrandizing the virtues of the product. He would realize that this is just sales talk, not facts.
Opinion	If a person with no particular expertise in an area gives his understanding of what something is capable of, this is an opinion. Someone with expertise rendering an opinion, on the other hand, may be held to have made an implicit statement concerning the nature of the information (facts) on which the opinion is based. ¹¹⁰
Promises	Promises and statements of future conduct are representations that something will happen in the future, not facts.
Law	Descriptions of the law itself are not facts, while descriptions of the consequences of the law are expression of facts.
Silence	There is typically no duty to disclose, so silence in and of itself is not a misrepresentation. However, it can be misrepresentation if it distorts a previous statement, if it amounts to a statement of half-truth, if the contract is a special type where the law requires disclosure (insurance contracts), or if there is a fiduciary relationship.

There are three types of misrepresentation, as set out in Figure 3-23.

Figure 3-23: Types of Misrepresentation

Type	Description	Remedies Available
Innocent	A statement made carefully without knowledge of the fact that it is false	Rescission
Negligent	A statement made carelessly without regard to whether it was true or not	Rescission plus damages for tort of negligence
Fraudulent	A statement made knowing it was false	Rescission plus damages for tort of deceit

Most misrepresentations occur during the bargaining that precedes formation of a contract, but sometimes a misrepresentation becomes incorporated into the agreement itself as a warranty. The remedy for breach of a warranty is contractual damages, and contractual damages may well be a more effective remedy than rescission or even than damages for deceit or negligence.

Misrepresentation may result in one or more of these consequences:

1. **Rescission** – the contract is voidable or cancellable at the option of the victim; the aim is to restore the parties to their pre-contract state.

¹¹⁰McCamus, p. 328.

2. **Restitution** – involves the giving back of benefits already received under the contract, e.g., supplies or funds; it often accompanies rescission.
3. **Damages** – monetary compensation for losses that a person suffered as a result of relying on a misrepresentation (arise under tort law).

Unfairness During Bargaining

A. *Undue Influence*

Undue influence refers to improper use by one person of the power he or she has over another person to compel the other person to enter into a certain contract. For the court to find undue influence, the mental domination by one party over the other must be of such a degree as to rob the former of his or her free will. A contract reached through undue influence is voidable at the option of the victim, provided he or she acts promptly upon being freed from the domination.

Undue influence is presumed if there is a special relationship between the parties such as accountant/lawyer/doctor and client; teacher and student; trustee and beneficiary; or parent and child. The "stronger" party may rebut the presumption by showing that no undue influence was exerted. A special relationship is one where there is a history of a relationship of trust and confidence between the parties such that the influenced party believes the stronger party is acting in his or her best interest. The courts have tended to reject allegations of undue influence where the parties have received independent legal advice at the time of the contract.

B. *Duress*

Duress is the use of actual or threatened violence as a means of coercing a party to enter into a contract. This conduct may well amount to a criminal offence such as extortion or assault. As far as the contract is concerned, the agreement is voidable at the option of the victim. Here again, it is up to the injured party to repudiate the contract promptly once freed of the violence or the threat of that violence.

SECTION 3-6: THE DISCHARGE OF CONTRACTS

When a contract is discharged, all obligations under it are brought to an end. Figure 3-24 illustrates the various ways a contract may be discharged.¹¹¹

Discharge by Performance

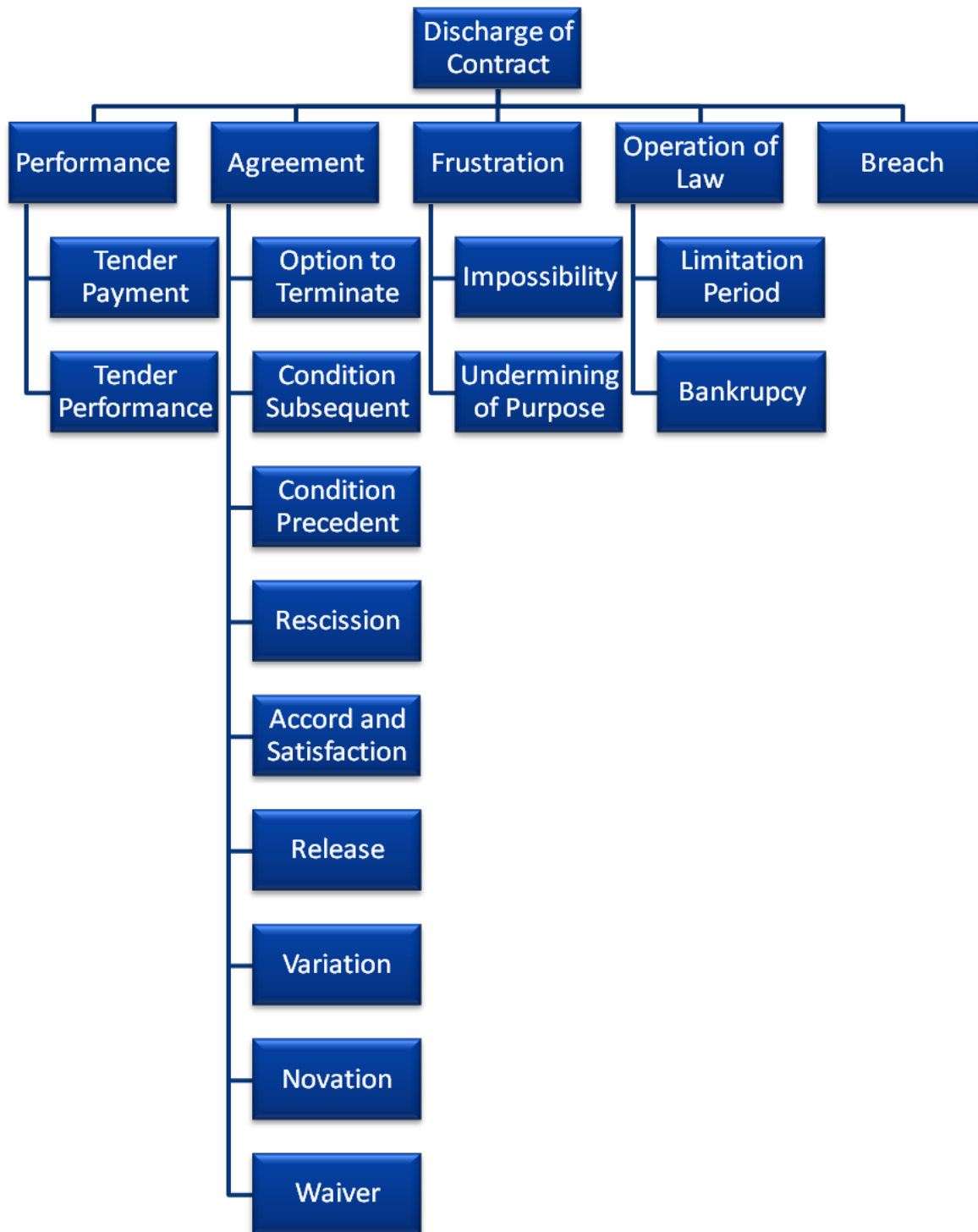
Discharge results when adequate performance in accordance with the contract has been completed by **both** sides. Of course, when the contracting parties enter into an agreement, this is the anticipated outcome. In some contracts, time is not of the essence and late performance will be allowed, although the party who performs late will be liable for any losses the other party suffers as a result. In other instances, time is of the essence and late performance can be refused.

Tender of Payment

Most contracts require payment of money by at least one of the parties. Unless a contract states otherwise, a creditor can insist on receiving **legal tender**, payments of notes and coins to a certain value (e.g., up to \$25 in one-dollar coins). As well, the debtor has the primary obligation of locating the creditor and tendering payment, but he is not required to actually tender payment if the creditor has indicated beforehand that it would be refused. There are also specific rules governing payment by debit card, credit card, and cheque. For debit and credit cards, the most common issue is unauthorized use. In the case of cheques, the discharge is conditional until the cheque has cleared the bank.

¹¹¹Adapted from McInnes et al., p. 252.

Figure 3-24: Ways a Contract May Be Discharged



Tender of Performance

Performance may also take the form of tendering performance. A party is discharged of its duty to perform if the other party renders performance impossible. It becomes necessary for one party to demonstrate that it was willing and able to perform a contract in order to show that the other party was in breach. For example, one party may have a contract to make repairs to a house, but the other party denies access to the premises when the person arrives to do the work. In this case, the repairer has tendered performance, which may be used as evidence when he sues the defaulting party.

When a person tenders performance, she should have the tender acknowledged or least witnessed by a third party who can testify to the person's willingness to complete her contractual obligations. Tendering performance can be of vital importance in contracts concerning land if a party seeks the equitable remedy of specific performance.

Discharge by Agreement

A contract can also be discharged when the parties agree not to perform the contract, as illustrated in Figure 3-25.

Figure 3-25: Discharge of a Contract by Agreement

Method	Description
Option to terminate	The contract may include a clause giving one or both parties the right to end the contract on certain terms without the consent of the other party.
Condition subsequent	The contract states that the agreement will be terminated if a certain event occurs, e.g., a ticket to an open-air concert may state that the musician's obligation to perform is no longer valid in the event of rain, although the ticket holder may be entitled to a refund or rain date.
Condition precedent	The contract states that the agreement will come into existence only if and when a certain event occurs, e.g., an employment contract conditional upon spouse finding employment in the same city.
Rescission	The parties agree to bring their contract to an end.
Accord and satisfaction	The parties agree to substitute a new contractual obligation and to release a party from the existing one.
Release	The parties agree to discharge a contract without any new consideration, signing an agreement under seal.
Variation	The parties agree to make minor changes to the terms of a contract. It requires fresh consideration.

Novation	The parties agree to make substantial changes to the terms of a contract. In effect, one contract is discharged and replaced with a new contract. The agreement to discharge the old agreement must be supported by fresh consideration.
Waiver	A waiver is an agreement not to proceed with the performance of a contract. When a waiver is gratuitous (one party has no obligations left to perform and releases the other from its obligations), the document should be under seal. The person receiving the waiver is entitled to rely on it, although a party can retract a waiver with reasonable notice.

Discharge by Frustration

Discharge by frustration results when performance of the contract becomes impossible or purposeless. Frustration is similar to mistaken assumptions, but it relates to *future events* rather than events that existed at the time the contract was made. Figure 3-26 compares the two basic types of frustration: impossibility and undermining of purpose. The **doctrine of frustration** excuses a party from performance when external circumstances make performance impossible or have changed so much that performance would mean something much different than originally intended by the parties.

Figure 3-26: Discharge by Frustration

Impossibility	Undermining of Purpose
Performance requires existence of a specific thing, and that thing perishes or is otherwise unavailable for a prolonged period of time (e.g., a beach house that Party A was going to rent to Party B burns down).	A person rents accommodations with a view to attending a special event, but the event is cancelled.
Contract requires personal performance by the promisor, who dies or becomes incapacitated through illness.	
Performance is subsequently prohibited by law.	

There are several key elements to frustration:

1. The frustrating event occurred after the making of the contract.
2. The frustrating event makes performance impossible or undermines the purpose of the contract—it does not just create an unforeseen hardship, such as making something more expensive to do.
3. The frustration must not be self-induced.

If the contract is for sale of goods, the *Sale of Goods Act*¹¹² will apply if 1) the goods are **specific**, 2) the risk or responsibility for their safety still lies with the seller, and 3) the frustration is caused by the goods perishing. Both parties are immediately discharged from liability under the contract.

Otherwise, the *Frustrated Contracts Act*¹¹³ applies in provinces like Ontario that have enacted such a statute to apportion the loss when a payment has been made or remains owing by one party. The performing party who has incurred expenses can retain or recover an amount not exceeding the payment made or due. The performing party can recover a just proportion of any valuable benefit already received by the other party regardless of whether a deposit has been paid.

In provinces without a *Frustrated Contracts Act*, the common law position is that:

- The contract is discharged, and both parties are freed from further performance under its terms; any performance already due under the contract is still enforceable.
- If the buyer has paid a deposit for goods/services, he can recover the deposit as long as he has received no benefits from the other party when the frustrating event occurs. If he has received even the slightest benefit, the deposit is forfeited.

Discharge by Operation of Law

Discharge also results in certain circumstances described by statute, such as when the statute of limitations has passed (for example, in Ontario, a party who has suffered a breach of contract must typically sue within two years) or when a bankrupt debtor receives a certificate of discharge because his or her discharge was caused by misfortune instead of misconduct.

Breach of Contract

A breach of contract occurs when one or other of the parties fails to live up to its obligations under the contract. Although breach of contract is another way to discharge a contract, not all breaches are serious enough to warrant termination, and even those breaches that are sufficiently serious do not lead to automatic termination but instead give the injured party the right to elect to end the contract. Therefore, breach of contract will be dealt with in a separate section below.

¹¹² *Sale of Goods Act*, R.S.O. 1990 c. S.1, s.8 (Ont.).

¹¹³ *Frustrated Contracts Act*, R.S.O. 1990 c.F.34, s.3(2) (Ont.).

SECTION 3-7: BREACH OF CONTRACT

Essential and Non-Essential Terms

Whether breach of contract leads to discharge depends on whether it is a major or minor breach, which, in turn, depends on whether the term breached is essential or non-essential.

A **minor breach** of contract is the “breach of a non-essential term of a contract or of an essential term in a minor respect,” while a **major breach** is a “breach of the whole contract or of an essential term so that the purpose of the contract is defeated.”¹¹⁴ In the case of a major breach, the innocent party may elect to treat the breach as a discharge of the contract and will then be free from her own obligations under the contract; she will also be entitled to claim damages. Alternatively, the innocent party may elect to continue with the contract but will still be entitled to claim for damages. In the case of a minor breach, the injured party is entitled only to claim damages; she must still fulfil her part of the bargain.

In distinguishing between a major breach and a minor breach, the law distinguishes among three types of contractual terms. A **condition** is “an essential term of a contract,” while a **warranty** is “a non-essential term.”¹¹⁵ Breach of a condition would deprive the other party of the expected benefit of the contract, while breach of a warranty would not. An **intermediate term** is a “wait-and-see” term; depending on the circumstances, breach of it may or may not substantially deprive the innocent party of the expected benefit of the contract.¹¹⁶

Ways to Breach a Contract

There are four different ways a breach of contract may occur: express repudiation, implied repudiation, self-induced impossibility, and failure of performance that constitutes a fundamental breach.

Express Repudiation¹¹⁷

One of the parties to the contract declares that he will not perform under the contract as promised. Such a declaration may occur before (**anticipatory breach**) or after performance begins. The injured party may treat the contract at an end, find another party to perform, and

¹¹⁴ Smyth et al., p. 285. A condition in this context should not be confused with the use of the word “condition” as part of a condition precedent or a condition subsequent, discussed earlier under discharge of contract by agreement.

¹¹⁵ Smyth et al., p. 285.

¹¹⁶ McInnes et al., pp. 265-266.

¹¹⁷ Smyth et al., pp. 286-288, and Willes and Willes, pp. 244-246.

sue for damages for breach. Alternatively, the injured party may continue to insist on performance and then sue for breach if the other party fails to perform; however, he risks that intervening events might provide the other party with an excuse for non-performance. The advantage of anticipatory breach to the breaching party is that it gives the other party a chance to mitigate his losses if the other party accepts the breach and reserves the right to claim damages. However, if the breach is not accepted, the duty to mitigate does not start until the breach actually occurs. One of the reasons the innocent party might not accept the breach is because he would lose the right to the remedy of specific performance. This remedy and others will be discussed later.

If repudiation relates only to a minor term of the contract, the other party is not entitled to treat the contract as discharged but will still be entitled to claim damages.

Implied Repudiation¹¹⁸

This type of anticipatory breach has to be inferred from the actions of one of the parties or from statements made by her before the time fixed for performance of the contract. While it may not initially be permissible for the innocent party to treat the initial failure to perform as a breach of contract, continued failure to meet the requirements may permit her to do so. However, it is always risky to treat the contract at an end and stop performing one's own obligations, since if the other party does end up performing, one may actually end up being in breach of contract.

Self-Induced Impossibility

A contract may also become impossible to perform because of a deliberate or wilful act by one of the parties.¹¹⁹ In effect, this is a self-induced frustration. The conduct that makes performance impossible may occur either before or during performance.

Failure of Performance (Defective Performance)

Failure of performance, or inadequate performance, occurs when one party fails to properly perform an obligation due under a contract. It can vary from slightly inadequate performance to grossly inadequate performance to total failure to perform. For example, failure of performance would occur if a wedding photographer did not show up for the wedding. Grossly inadequate performance might occur if only the outdoor pictures turned out, and there were no pictures of the ceremony. Finally, slightly inadequate performance might occur if the photographer took only 375 pictures instead of the promised 400. There can also be satisfactory performance on

¹¹⁸Willes and Willes, pp. 246-247.

¹¹⁹McInnes et al., p. 269.

some terms of the contract but failure to perform on other terms. The extent of failure determines the remedies available to the other party.

Unlike the other types of breach discussed so far, failure of performance does not usually become apparent until the time for performance has come or until performance is already in progress. Therefore, it can be difficult for the other party to decide whether he or she should proceed with the contract. More will be said about this in the next section.

Effects of a Breach

If the breach is of a minor term (**warranty**), the injured party is entitled to damages for the amount of defective performance but cannot repudiate the contract and must complete his or her own obligations under the contract. This is according to the **doctrine of substantial performance**, which stipulates that where a contract is substantially performed but defective or incomplete in some minor respect, the other party must perform its part of the bargain.

If the breach is of the whole contract or of an essential/major term (**condition**), also known as a **fundamental breach**, the injured party can elect to treat the contract as discharged. If an injured party elects to proceed with the contract and take benefits under it despite a major breach, he or she may not later treat the contract as discharged.

If an injured party does not learn of a major breach until performance was complete, and he has received the benefit of the contract, he cannot treat the contract as discharged.

Often, it is difficult for the injured party to assess whether the breach is of a serious enough nature for her to consider her own obligations at an end, especially when the breach involves only one or two terms of the contract. If the injured party considers her obligations at an end, but the court later finds that it was only a minor breach, she risks being held liable for wrongful repudiation.

If a contract price is to be paid by instalments or goods are to be delivered by instalments, a missed payment or deficient delivery may not be serious enough to free the injured party unless he or she can establish a likelihood of further defective performance and a significant loss in relation to the whole contract. In an attempt to avoid such problems, a seller may include an acceleration clause that makes all future instalments immediately due upon the breach of any instalment, or a buyer may include a clause stipulating that one missed shipment entitles the business to treat the contract at an end. Consumer protection legislation in some provinces restricts the use of acceleration clauses in consumer contracts.

Exemption Clauses

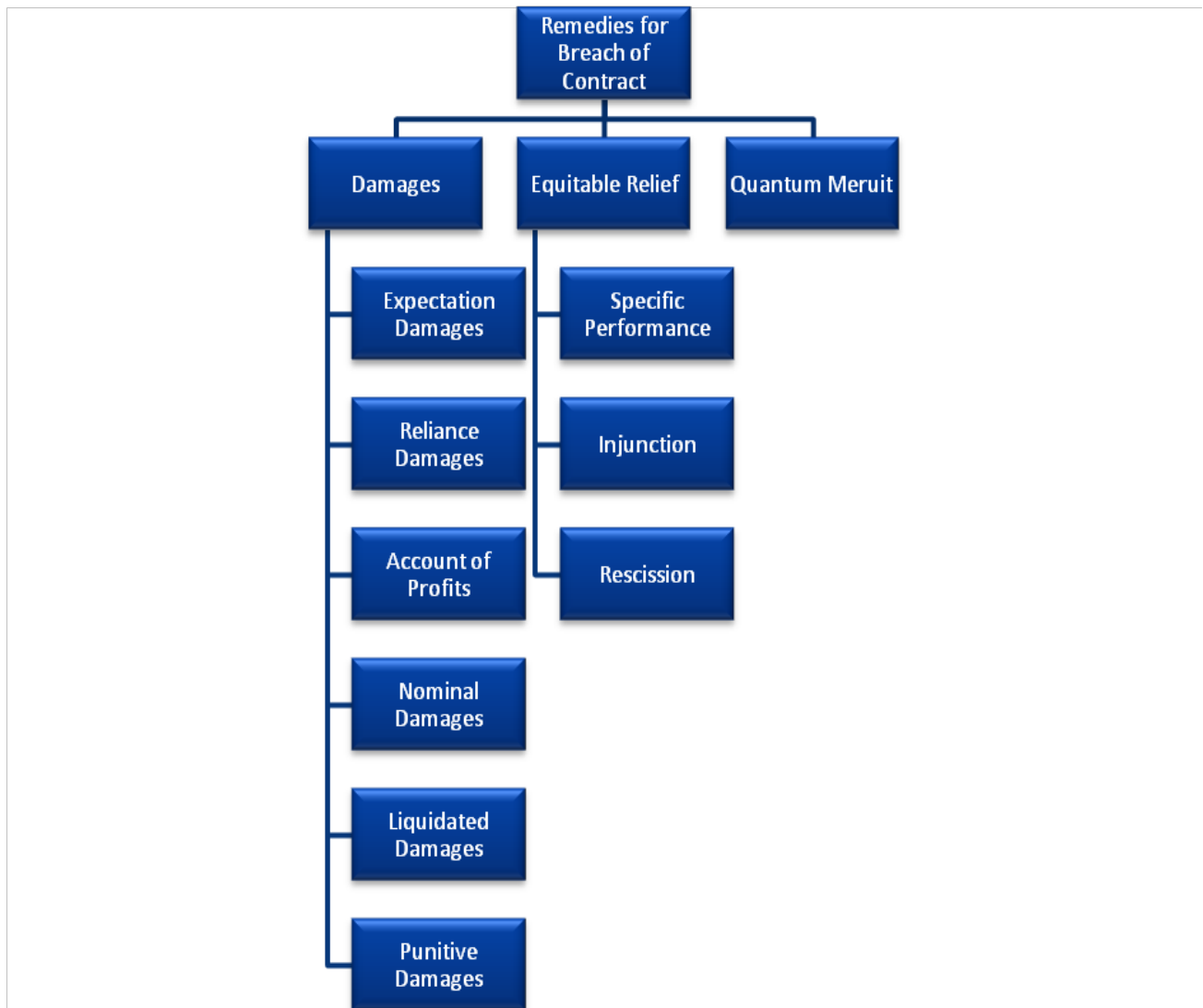
Exemption clauses limit the liability of one party to the contract by either excusing liability completely for certain things or by limiting liability to a fixed dollar amount. Courts are wary of exemption clauses because of the advantageous position of the party creating a standard form contract. Therefore the courts try to circumscribe their application in several ways:

1. If there was inadequate notice of the term (and the onus is now on the defendant to prove that was the case), the injured party will not be bound by it.
2. An exemption clause will be very strictly construed against the drafting party.
3. An exemption clause will not excuse a fundamental breach, i.e., one so serious that it defeats the whole purpose of the contract, unless the clause directly excuses such a breach or unless the clause was intended by both parties to have such an effect.

Remedies for Breach of Contract

There are three main types of remedies for breach, as shown in Figure 3-27: damages, equitable relief, and *quantum meruit*. Each will be discussed below, with most of the attention focused on damages.

Figure 3-27: Remedies for Breach of Contract



Damages

Damages are the most common remedy for breach of contract. The goal of damages in contract law is to place the injured party in the same position as if the contract had been completed. The purpose is not to punish the offending party, as it is in tort law.

To qualify, damages must be for losses that are **reasonably foreseeable**. The test is whether from past dealings between the parties and from the knowledge of both of them at the time of the contract, the parties could reasonably foresee such a loss to result from breach. As well, damages will not be paid for losses that the plaintiff did not take reasonable steps to **mitigate**. Figure 3-28 describes various types of damages awarded for breach of contract.¹²⁰

Figure 3-28: Types of Damages

Type	Description
Expectation Damages	An amount awarded based on the expected profit or monetary benefit the plaintiff expected to receive pursuant to the contract.
Reliance Damages	The monetary value of the time, effort, and expenditures the plaintiff wasted in preparation for performance under (or “in reliance on”) a contract.
Account of Profits	Where the defendant ends up with a gain as a result of the breach, the plaintiff may sue for damages based on that gain (rather than on his or her own loss).
Nominal Damages	If the breach resulted in neither a loss for the plaintiff nor a gain for the defendant, symbolic damages may be awarded in very small amounts.
Liquidated Damages	This is an amount of damages agreed to in advance by the parties for breach of contract. The amount must not be a penalty (an exorbitant amount) but must be a genuine attempt to estimate the loss.
Punitive Damages	Unlike the other categories of damages, which all compensate for a loss, these damages are intended to punish the defendant and discourage bad behaviour.

In addition to the main form of compensatory damages (**expectation damages**), the courts may allow **consequential damages** other than lost profits if they flow from the breach and were reasonably foreseeable at the time the contract was made. As well, the courts may award **general damages** for harm that cannot be quantified with precision but which the courts believe are necessary to fairly compensate the injured party. General damages are often awarded to compensate for **pain and suffering** and sometimes **mental anguish**.

¹²⁰McInnes et al., pp. 275-286.

Equitable Remedies

Equitable remedies recognize that there are circumstances when monetary damages alone are inadequate. Such remedies are given at the court's discretion, and a plaintiff cannot claim such a right automatically on breach of contract. Impediments to obtaining an equitable remedy are lack of clean hands by the plaintiff (i.e., the conduct of the plaintiff has not been good), unreasonable delay by the plaintiff in bringing the action, adverse effect on an innocent third party, and lack of valuable consideration, as well as situations where the plaintiff could not have had the remedy awarded against him if he had been the defendant.

Specific performance requires one party to the contract to perform what he or she has agreed to do in the contract. It is commonly granted in contracts dealing with land or unique chattels. For example, the defendant may be required to proceed with the sale of the house to the plaintiff.

An **injunction** is a court order restraining the party from acting in a particular manner that will be granted when there is a **negative covenant** in the contract (a requirement that a party not do something). An injunction is generally not awarded against an employee when the effect would be to leave the employee no alternative but to work for the original employer or remain unemployed.

An **interlocutory injunction** is a temporary restraining order to limit the harm done pending resolution of a dispute at trial.

Rescission attempts to return the parties to the positions they were in before the contract was made. The plaintiff may feel she would be better off to have the contract set aside (to be returned to the position that would have existed had the contract never been entered into) than to sue for damages (to be placed in the position she would have been in had the contract been completed as planned). Rescission is generally used for durable goods that fail to perform as promised but have not been damaged. The plaintiff would usually just prefer to return the goods and get her money back. It may also be used in sales of land, where, for example, the vendor would prefer to just return the down payment and retain possession of the land.

Quantum Meruit

Quantum meruit is available as a remedy for breach of contract where there is no express agreement on how much is to be paid or where the work that has been done is less than that which had been contracted for, and there is no express agreement covering progress payments. The court will award what is reasonable under the circumstances.

STUDY QUESTIONS FOR PART 3: CONTRACT LAW

1. An intention to create legal relations:
 - a. Is determined by a test of whether the parties themselves actually intended to enter into a contract.
 - b. Is determined by a test of whether a reasonable person would believe the parties intended to enter into a contract.
 - c. Is usually presumed in a family context but not a business context.
 - d. Both b and c.
2. This method of termination of an offer occurs when the offeree responds with a willingness to enter into a contract but on different terms:
 - a. Lapse
 - b. Revocation
 - c. Rejection
 - d. Counter-offer
3. Which of these is **not** consideration or acceptable in lieu of consideration?
 - a. Something a party did prior to contemplation of the contract.
 - b. A promise to perform a pre-existing contractual obligation to a third party.
 - c. Money.
 - d. A little red sticker.
4. A cell phone contract:
 - a. Is considered necessary since all minors need cell phones and therefore would be binding on the minor.
 - b. Is considered a contract for beneficial service and therefore would be binding on the minor.
 - c. Would have to be repudiated by a minor promptly after becoming an adult or the minor would be liable under its terms as if he or she had been an adult all along.
 - d. Could be repudiated by the minor, and the minor would not have to pay for cell-phone services received before or after repudiation.
5. The privity of contract rule:
 - a. Stipulates that a contract does not confer any benefits or place any obligations on a third party.
 - b. Can be justified by the third party's lack of consideration.
 - c. Can have exceptions, as would be the case if a third party replaced an existing party to the contract.
 - d. All of the above.
6. Where personal performance by you is not the reason for the contract, a third party, such as an employee, may actually perform your obligations under a contract for you by virtue of:
 - a. The privity of contract rule.
 - b. Vicarious performance.
 - c. Vicarious liability.
 - d. A statutory assignment.

7. Under The Statute of Frauds, a note or memorandum of the contract must:
 - a. Contain all essential terms of the contract.
 - b. Be signed by both parties.
 - c. Be in one document.
 - d. All of the above.

8. A statutory assignment:
 - a. Must be in writing, with notice to the promisor.
 - b. May be conditional or incomplete, thereby allowing freedom for an ongoing transaction.
 - c. Means that the other party must complete his or her obligations to the assignor and the assignee.
 - d. Puts the assignee in a better position than the assignor in a lawsuit.

9. This is a term not expressly included in the contract by the parties but one that a reasonable person would have included had the person thought about it:
 - a. Express term.
 - b. Implied term.
 - c. Parol term
 - d. Mistaken term

10. A void contract is:
 - a. A contract that does not meet seven key requirements from intention to create relations through legality.
 - b. A contract with no legal effect from the beginning, as though it never happened.
 - c. A contract that is valid unless and until it is rejected at the option of one of the parties.
 - d. A contract with a mistake in it.

11. When one party inadvertently uses the wrong words in stating the contract, the contract will be:
 - a. Void.
 - b. Binding on the party making the mistake.
 - c. Binding on the party making the mistake only if it was reasonable for the other party to rely on the inadvertent words and enter the contract.
 - d. Voidable by the party making the mistake since the second party should not be allowed to "snap up" the mistaken offer.

12. When both parties find that the quality of the subject matter of a contract is substantially different from what they contemplated:
 - a. The contract is void.
 - b. The injured party may be allowed to repudiate the contract if the court decides he or she should not be the party to bear the risk.
 - c. Either party may repudiate the contract since they were both aware at the time of the contract that the value of the subject matter might change.
 - d. All of the above.

13. *Non est factum* is:
- A defence that protects people who are blind, illiterate, or unable to read the language of the contract they signed from being bound by a contract with a serious mistake. The contract would be void.
 - A rule used in standard form contracts that are vague but held to be enforceable. The courts use the meaning of the words least favourable to the author of the contract.
 - A mistake about the terms of the contract that occurs because there was not a meeting of the minds.
 - An obligation for a party who benefits from the contract to make restitution to the mistaken party.
14. Which of these may be a statement of fact when determining whether misrepresentation has occurred?
- Vague statements that aggrandize the product's virtues.
 - An expert opinion.
 - A statement of future conduct.
 - All of the above.
15. Which of these are **not** true of undue influence?
- It refers to improper use by one person of the power he or she has over another person to compel the other person to enter into a contract.
 - It is presumed in a special relationship of trust, as between a teacher and student.
 - It makes the contract void.
 - All of the above are true.
16. This method of discharge involves making minor changes to the terms of a contract and providing fresh consideration:
- Condition precedent
 - Rescission
 - Variation
 - Novation
17. Discharge by frustration happens when the frustrating event occurs after the contract was made and external circumstances:
- Create unforeseen hardship on one or both of the parties.
 - Make performance impossible to do.
 - Undermine the purpose of the contract in that performance would mean something much different than originally intended by the parties.
 - Both b and c.
18. This type of breach occurs when one party does not properly perform an obligation under a contract, either to a small degree or a large degree:
- Express repudiation
 - Implied repudiation
 - Self-induced impossibility
 - Failure of performance

19. This remedy for breach compensates the victim for the time, effort, and expenditure wasted in preparation for performance of the contract:
 - a. Reliance damages
 - b. Expectation damages
 - c. Account of profits
 - d. Nominal damages

20. This remedy requires payment of a reasonable amount to cover work done, even though there was no agreed upon sum or the work is less than what was contracted for:
 - a. Specific performance
 - b. Injunction
 - c. Rescission
 - d. *Quantum meruit*

ANSWERS FOR PART 3: CONTRACT LAW

1. B. An intention to create legal relations is determined by an objective test of whether a reasonable person would believe the parties intended to enter into a contract. A subjective test, as in A, would be too difficult to apply because people could lie about their intentions. It is presumed that an intention to create legal relations exists in a business context but not between family members or close friends.
2. D. This is a counter-offer, which has the effect of being a rejection of the original offer and a termination of it.
3. A. This is “past consideration”; there is no mutual exchange of consideration, so it is **not** held to be consideration. B and C are consideration. D, the sticker, is an example of a seal, which is accepted in lieu of consideration.
4. C. A cell phone is an ongoing contract and, as such, would need to be repudiated promptly upon the minor reaching the age of majority, or the minor will be liable as though an adult all along. Regarding A, necessities must be necessary to this particular minor, and the minor must not have an adequate supply of it; there is not enough information to determine if this is true. Regarding B, beneficial contracts of service are things like employment and co-op terms. Regarding D, a minor cannot recover monies already paid for benefits received, even for non-necessaries.
5. D. All are true about privity. C is novation, which is one of a number of exceptions. Another exception is an interest in land and a life insurance policy.
6. B. Vicarious performance refers to a situation where a party to the contract obtains someone else to carry out his or her duties. This is permitted when personal performance is not the reason for the contract. Privity is the rule that states a contract does not confer benefits on or place obligations on a third party. Vicarious liability refers to the fact that an employer may be held liable for acts committed by his or her employee. Assignment refers to the giving away of contractual rights to a third party.
7. A. The note must contain all essential terms. However, it need be signed only by the party who is being sued. It may be in one document or several taken together.
8. A. A statutory assignment of rights to a third party must be in writing, while an equitable assignment may be oral or written. It also requires written notice, whereas notice is advisable but optional for equitable assignments. B applies only to the latter. In either case, the other party has to complete his or her obligations only once. Only for negotiable instruments can the assignee stand in a better position.
9. B. It is an implied term. Parol means a term that is outside of the written contract; it refers to something agreed on orally but not included in the written contract. A mistake regarding a term means that there never was a meeting of the minds about that term.
10. B. A void contract is one with no legal effect from the beginning. The requirements in A are for a valid contract. C would be a voidable contract. A contract with a mistake may be void, voidable, or even valid, depending on the type of mistake.

11. C. The contract will be binding on the party making the mistake if the court concludes that it was reasonable for the second party to rely on the inadvertent words (e.g., price of \$872 instead of \$827). The contract will only become voidable by the party making the mistake if the court concludes that a reasonable bystander would know a mistake had been made in expressing the terms of the contract.
12. B. The court will first decide who should bear the risk of loss or damage; it will grant relief to the injured party if he or she is not the one who should bear the risk. When both parties were aware at the time of the contract that the value of the subject matter might rise or fall quickly, the agreement will bind them. A contract would be void if the subject matter of the contract does not exist, but the parties thought it did when they made the contract, not if the value of the subject matter changes.
13. A. The *non est factum* defence (“it is not my deed”) is available only to select people such as those mentioned since they have to rely on the integrity of other people. B is the *contra proferentum* rule. C is *consensus ad idem*, referring to a meeting of the minds. D is unjust enrichment.
14. B. Only an expert who gives an opinion could be held to have made an implicit statement of fact. The others are sales talk and promises.
15. C. Undue influence makes the contract voidable at the option of the victim as long as the victim acts promptly upon being freed from domination.
16. C. Variation makes minor changes and requires fresh consideration. In contrast, novation involves substantial changes to the terms of the contract.
17. D. Both impossibility and undermining of purpose result in frustration, but they constitute more than just the creation of hardship.
18. D. Failure of performance can vary from slightly inadequate performance to grossly inadequate performance to total failure to perform.
19. A. Reliance damages compensate the plaintiff for time and money spent in reliance on or in preparation for fulfilling his or her part of a contract.
20. D. *Quantum meruit* provides a reasonable payment, based on the circumstances, as a remedy for breach when there is no express agreement on how much is to be paid or when the work that has been done is less than what was contracted for.

PART 4: BUSINESS ENTITY LAW

This section examines the law related to business entities. It begins with the basic rules of agency relationships and then provides a discussion of the basic forms of business organizations (sole proprietorships, general partnerships, limited partnerships, and corporations). Finally, it ends with a more in-depth treatment of corporate law, including corporate governance.

SECTION 4-1: AGENCY RELATIONSHIPS

What is Agency?

Most people are familiar with the use of the word “agent” from interactions in their daily lives. Common examples of agency relationships are real estate agents, who buy or sell a house on your behalf, or stockbrokers, who buy and sell shares on your behalf. More formally, **agency** “is a relationship that exists when one party represents another party in the formation of legal relations.” The **agent** is the “person who is authorized to act on behalf of another” and the **principal** is the “person who has permitted another to act on his behalf.”¹²¹ Agents are often given authority to bind principals in contractual relationships.

Creation of an Agency Relationship

Agency relationships arise in one of three ways:

1. **Express authority (agency by express agreement)** – An oral or written contract appoints the agent and gives her specific authority to act on behalf of the principal.
2. **Apparent authority (agency by conduct; agency by estoppel)** – No agreement exists, but the actions or statements of the principal give a third party a reasonable impression that the agent has authority to act on behalf of principal.
3. **Ratification** – There is no express or apparent authority, but a principal accepts a contract that was negotiated on his behalf without his authority. Figure 4-29 sets out the requirements for ratification.

¹²¹DuPlessis and O’Byrne, p. 291.

Figure 4-29: Ratification of an Agency Relationship

Requirements:
1. Acceptance by the principal must be clear (may be written, oral, or implied by the principal's behavior).
2. Ratification must occur within a reasonable time after creation of the contract; what is reasonable depends on the facts.
3. The principal must accept the whole agreement. If not, a new agreement is formed between the principal and the third party directly.
4. The principal must have been identified by the agent at the time of negotiation.
5. The principal has the legal capacity to enter into the contract both at the time of negotiation and ratification.

The Scope of an Agent's Authority

Actual Authority

A principal is bound by any actions that are within the agent's **actual authority**. In this context, **actual authority** refers to authority that was:

1. Expressly given (orally or in writing); or
2. Could be implied by the principal's conduct (e.g., principal pays for the goods); or
3. Could be implied based on the **usual authority** given to a person appointed to that position (e.g., corporate secretary) (also referred to as **commercial usage**).

The principal is bound whether or not the third party is aware of the exact scope of the agent's actual authority.

Apparent Authority

Apparent authority is authority that a third party is entitled to assume the agent possesses, based on either usual authority or the conduct of the principal. The term **holding out** is used to refer to conduct where a principal represents someone to be its agent. A principal is bound by contracts within the agent's apparent authority only if the third party relied on the appearance of that authority. A third party will not be able to enforce a contract if it knew, or should have known, that the agent did not have authority to bind the principal.

Ratification

Finally, a principal will be held liable if it **ratifies** (subsequently adopts, based on words or actions) a contract that was made by an agent without authority. In effect, the principal

establishes the contract retroactively, thus placing the principal, agent, and third party in the same position as they would have been in if the agency relationship had existed at the time of the contract.

When is the Agent Liable?

An agent can be held liable when she is acting on behalf of an undisclosed principal. As long as the agent had authority to act on behalf of the principal, the third party can hold either the agent or the principal liable if the third party later discovers the person it dealt with was only an agent.

As well, an agent can be held liable when he indicates that he is authorized to act for a principal but is in fact not authorized—regardless of whether or not the agent is honestly mistaken. This would be considered a **breach of warranty of authority**.

Responsibilities of Agent to Principal

Figure 4-30 identifies the four main duties an agent owes to his or her principal.

Figure 4-30: Responsibilities of Agent to Principal

Responsibility	Description
Duty to comply with the agency agreement	The agent has to comply with the express and implied terms (based on custom) of the agency agreement.
Personal performance	In general, because a principal places a high degree of trust in the judgment and skill of an agent, the latter cannot delegate his or her duties without the principal’s consent. When a business is appointed an agent, responsibility may, of necessity, be delegated to others in the organization.
Fiduciary duty (“fiduciary” comes from Latin, meaning “holding in trust”)	<p>From a legal standpoint, this is one of the strictest standards of care imposed on relationships. The agent has to act in good faith and in the best interests of the principal. It requires that the agent:</p> <ol style="list-style-type: none"> 1. Avoid conflicts of interest, where personal interests conflict with the best interests of the principal. 2. Disclose anything that may be relevant to the principal’s interests. 3. Not personally profit from information or opportunities as a result of the agency relationship. 4. Not compete with the principal. <p>A fiduciary duty may be displaced by the agent’s specific instructions.</p>
Duty of care	The agent is required to take reasonable care in the performance of its responsibilities. The skill demanded depends on the agent’s task and competence.

Responsibilities of Principal to Agent

The principal is required to:

1. Pay reasonable remuneration (unless the parties expressly agreed otherwise).
2. Indemnify the agent from expenses reasonably incurred in connection with relationship.

Termination of Agency Relationship

Termination of an agency relationship may occur in a number of ways:

1. At the end of a time, event, or project specified in the agency agreement;
2. On notice by either party; or
3. By circumstances; for example, it becomes impossible for the agent to perform tasks, the principal or the agent dies or becomes insane, or the principal becomes bankrupt.

SECTION 4-2: LEGAL FORMS OF BUSINESS

In Canada, there are three basic ways to carry on business: sole proprietorship, partnership (general, limited, and limited liability), and corporation. Each of these is examined below.

Sole Proprietorships

A **sole proprietorship** is one individual carrying on business on his or her own (under his or her own name or a business name) without adopting any other form of business organization such as incorporation.

Because the business and the person are one and the same, the sole proprietorship brings with it three key implications, as set out in Figure 4-31.

Figure 4-31: Implications of Sole Proprietorship

The sole proprietor is legally responsible:

1. To complete all contracts entered into by the business.
2. For any torts committed in the course of undertaking business activities, including being vicariously liable for the torts of employees.
3. For the income/losses of the business for tax purposes.

Thus, the main disadvantage of the sole proprietorship is **unlimited personal liability**, which means that third parties are entitled to take the sole proprietor's personal assets, as well as the assets of the business, to satisfy the business's obligations.

On the other hand, a sole proprietorship is easy to form and has few legal requirements. An HST number may be required depending on the type of business and if the supply of HST taxable goods/services exceeds \$30,000. As well, the *Business Names Act* requires the proprietor to register the business name if he is carrying on business using a name other than his legal name,¹²² e.g., Perfect Hair Styles. Registration would have to be done in every province/territory in which the business operates. Finally, depending on the type of activity being carried out by the business, a **business licence** may be needed. For example, a municipal licence is required by taxi drivers, electricians, and restaurant operators. A provincial licence is needed by real estate agents, car dealers, insurance brokers, and securities brokers.

General Partnerships

While there is no distinct body of law relating to sole proprietorships, there is a well-developed body of law—initially common law and now codified by statute—governing the affairs of a partnership.

The *Partnership Act*, passed by the British Parliament in 1890, defined **partnership** as “the relation which subsists between persons carrying on a business in common with a view of profit.”¹²³ Thus, a partnership is a joint business enterprise carried on for profit. In determining whether or not a relationship constitutes a partnership, the courts look at the substance rather than the form. The sharing of profits is an essential element of a partnership, as evidenced by the phrase **with a view of profit**. However, merely sharing profits does not by itself prove that a partnership exists but would be used in connection with other factors such as those outlined in Figure 4-32 to assess whether a partnership exists.

Figure 4-32: Is the Relationship a Partnership?

Factors besides sharing of profits that suggest the existence of a partnership:
• Contribution of property or labour to the enterprise
• Guarantee of partnership debts
• Joint ownership of property
• Participation in management, including having signing authority for contracts and bank accounts, and access to information about the business
• Holding oneself out as a partner, or allowing others to do so.

¹²²*Business Names Act*, R.S.O. 1990, c. B. 17, s 2(2) (Ont.).

¹²³*Partnership Act*, 1890, 55 & 54 Vict.c.39, s. 1(1). The same wording is used in the *Partnerships Act*, R.S.O. 1990, c. P.5, s.2 (Ont.).

The Legal Relationship Between Partners

Partners have both obligations and rights pursuant to either statutes and/or a partnership agreement.

Partnership Liability

A partner is personally liable for:

1. Debts and obligations of the partnership incurred while he or she is a partner;
2. Negligence and other torts perpetrated by any of the partners acting in the ordinary course of the partnership business; and
3. Misapplication of trust funds placed in the care of the partnership.

Each partner becomes the **agent** of the other partners. Therefore, actions taken by one partner bind all of the partners. Although partners may wish to restrict authority by an internal agreement, such restrictions are only binding on third parties who have actual notice of the restrictions. As well, each partner owes a **fiduciary duty** to the other partners, i.e., a duty to act honestly and in good faith with a view to the best interests of the partnership.

Another key feature of a partnership is **joint and several liability**, which means that each partner is individually as well as collectively responsible for the entire debt. The implications of this are discussed in Figure 4-33.

Figure 4-33: Partnership Liability

Implications of partners being joint and severally liable:

1. Each partner is personally liable to creditors to the full extent of his personal assets, regardless of his partnership contribution and share of the profits.
2. Partnership assets are also available to personal creditors of a partner. If a partner becomes insolvent, her share may have to be sold to satisfy the claims of personal creditors, which may lead to winding-up of the partnership business.
3. While, in principle, a partner is only liable for obligations created by the firm while he is a member, the retiring partner can be held liable as a partner if he gives people dealing with the firm cause to believe that he is still a partner and they advance credit on that basis. To free himself from liability, a retiring partner must notify all persons who have dealt with the firm and must place an appropriate newspaper advertisement for other persons.

Partnership Agreement

The relations of partners are essentially governed by the terms of the **partnership agreement**. A partnership agreement does not have to be in writing to be legally enforceable unless it

extends beyond one year, and performance has not yet begun. A partnership agreement can be created orally or it can be implied from the conduct of the partners.

A good partnership agreement will clearly set out the business objectives, partners' responsibilities, capital contribution, sharing of profit and losses, procedures for settling disputes (usually by arbitration), and provisions for an efficient and peaceful dissolution. Generally speaking, partners may agree to whatever terms they wish, provided the terms are not illegal and do not offend public policy. However, Ontario's *Partnerships Act* sets out certain terms that will be implied if those matters are not expressly covered in the agreement. These are described in Figure 4-34.

Figure 4-34: Implied Statutory Partnership Rules¹²⁴

Term	Description
Sharing of Profits/Losses	Each partner is entitled to an equal share of profits and is responsible for an equal share of losses.
Reimbursement	Each partner is entitled to be reimbursed for payments made in the ordinary course of partnership business.
Partnership Property	Property brought into the partnership or purchased with partnership monies (except if designated to remain personal) must be held and used exclusively for the partnership.
Capital Contributions and Loans	A partner is NOT entitled to interest on capital contributed to the partnership but is entitled to 5% interest on loans made to the partnership.
Salaries	A partner is not entitled to be paid a salary for engaging in partnership business.
Management	Each partner has the right to participate in management.
Access	Each partner has equal access to books/records.
Ordinary Decisions	Decisions about ordinary business matters are decided by majority rule.
Other Decisions	Unanimous consent is required to admit a new partner, terminate a partner, change the nature of the business, or change the default partnership rules.
Fiduciary Duties	There is a duty to render true accounts and full information to the other partners, to disclose any secret benefits, and not to compete without the consent of the other parties. These implied terms cannot be opted out by agreement.

Because a partnership is not a separate legal entity, each partner's share of profits is the personal responsibility of that partner for income tax purposes.

¹²⁴*Partnerships Act*, R.S.O. 1990 c. P.5, ss. 20-31 (Ont.). Other provinces have similar rules.

Legal Requirements

As is the case with sole proprietorships, partnerships also require an HST number and business name registration. In addition, as with sole proprietorships, depending on the type of activity being carried out by the partnership, a **business licence** may be needed

Termination of Partnership

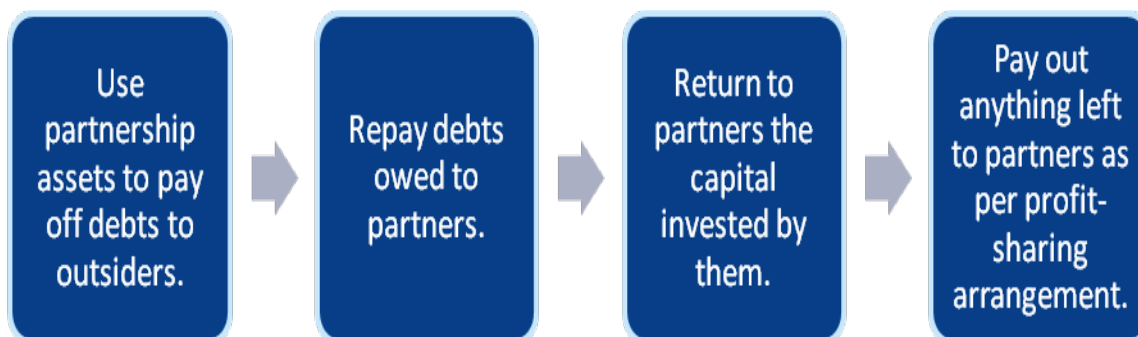
A good partnership agreement will make express provision for what is to happen on the retirement or death of a partner, including what will justify termination, how much notice a partner must give when leaving the partnership, whether the partnership will continue with the remaining members, how the retiring partner's share is to be valued, and how continuing partners will buy out the share of a deceased or retired partner.

In the absence of express agreement, the *Partnerships Act* specifies rules governing termination. In particular, the Act allows for termination in a number of ways:¹²⁵

1. Expiration of a fixed term, if there was one;
2. Notice by a partner to the others;
3. Death, bankruptcy, or insolvency of any partner;
4. Charge or assignment of a partner's interest;
5. Application to the court by one or more partners under certain circumstances (e.g., partner becomes incompetent or incapable, acts prejudicial to the business, or breaches the partnership agreement); or
6. Agreement of the partners.

On dissolution of a partnership, section 44 of the *Partnerships Act*¹²⁶ provides a framework for dealing with claims against the partnership, as shown in Figure 4-35.

Figure 4-35: Dissolution of Partnership



¹²⁵ *Partnerships Act*, R.S.O. 1990, c. P.5, ss. 20-31 (Ont.). Other provinces have similar rules.

¹²⁶ *Partnerships Act*, R.S.O., 1990, c. P.5, s. 44 (Ont.). Once again, other provinces follow a similar process.

Limited Partnerships

In a **limited** partnership, one or more of the partners limits their liability to the amount of their capital contributions. There must be at least one or more **general partners** whose liability is unlimited. A **limited partner** may not take an active part in the management of the partnership, but she is permitted to be an employee of the limited partnership and may provide management advice. It can be a difficult balancing act—if the limited partner chooses to exercise some control, she will incur unlimited liability; but if she does not, there may be instances where the business is at risk to fail.

While a general partnership exists as soon as the partners start carrying on business together, a limited partnership does not exist until a declaration has been filed with the appropriate government authority. Limited partnerships are not often used, except for tax-planning purposes. Incorporation is a more effective way to obtain limited liability.

Limited Liability Partnerships

A **limited liability partnership (LLP)** is a special form of partnership for certain professions, such as lawyers and accountants.

Individual partners are not **personally** liable for the professional negligence of their partners or for certain other obligations provided certain requirements are met. A partner remains liable for his own negligence and for that of people under the partner's direct supervision or control. The firm itself also remains liable. Therefore, a non-negligent partner may still lose the entire value of his partnership share but will not lose personal assets.

In Ontario, the protection of non-negligent partners from personal liability extends only to negligence; it does not apply to other torts, breaches of trust, or contractual obligations. By contrast, legislation in other provinces provides broader protection. For example, in Alberta, a member of an LLP is not liable for the "negligence, wrongful acts or omissions, malpractice, or misconduct" of a partner, or of an employee or agent of the firm, unless that partner knew of the act and did not take reasonable steps to prevent it or unless the act was committed by a direct report over whom he failed to provide adequate supervision. Saskatchewan holds only partners in an LLP personally liable for obligations that a director would have. New Brunswick and Nova Scotia adopt both approaches.¹²⁷

¹²⁷ S.O. 1998 c. 2 amending *Partnerships Act*, R.S.O. 1990, c. P.6 (Ont.) and S.A. 1999 c. 27 amending *Partnership Act*, R.S.A. 1980, c. P.2 (Alta.).

All provinces require a written agreement that designates the partnership as an LLP. An LLP must register its firm name, and the name must contain “limited liability partnership,” LLP, or L.L.P. An LLP is the same as a general partnership in all other respects.

Corporation

A **corporation** is a separate legal entity created for carrying on business. As an artificial person, a corporation has a continuous existence **independent** of the existence of its owners, and it has powers and liabilities distinct from its owners. As such, it is responsible for its own debts. It may enter into contracts, sue, and be sued. It can commit torts, such as negligence, or crimes. The corporate form of ownership is covered extensively in the next section.

SECTION 4-3: CORPORATE LAW

“The corporation is the most common form of business organization. It is used for all types and sizes of businesses, from one-person operations to large multinationals.”¹²⁸ This section will deal with the basic characteristics of a corporation, the process of incorporation, and the legal rules for corporate governance.

Nature of a Corporation

As noted above, a corporation is a person in the eyes of the law. Figure 4-36 highlights the distinct characteristics of the corporate form of ownership, along with the implications for the corporation and its owners (shareholders). It also draws attention to the special impact on shareholders of small private companies.

Figure 4-36: Distinct Characteristics of a Corporation

	Implications for Corporation	Implications for Shareholders
Liabilities	A corporation incurs its own debts and is responsible for their repayment.	Shareholders have limited liability : their liability for the corporation’s debts is limited to their investment (i.e., what they paid for their shares). From a practical perspective, banks may be unwilling to lend to small corporations without a personal guarantee from major shareholders, thus putting personal assets at risk. Limited liability will not necessarily protect shareholders from personal liability for their own acts.

¹²⁸McInnes et al., p. 531.

Distinct from Shareholders	A corporation is a distinct entity from its shareholders.	Shareholders may enter into contracts with the corporation, be employed by it, and make loans to it. They owe no duty of good faith to the other owners and can deal with the corporation as though they were strangers.
Change in Ownership	The existence of the corporation is unaffected by the death or withdrawal of a shareholder.	Shareholders are free to sell their shares to someone else, subject to certain requirements that may be set out in the articles of incorporation (i.e., the consent of majority of directors). For small companies, it may be hard to find a market for the shares.
Control	An elected board of directors has authority to make all decisions. The board, in turn, delegates responsibility for managing the corporation to the officers they appoint.	Shareholders elect a board by a majority vote. Beyond that, they do not participate in ownership. In a small corporation, however, shareholders are often also directors and officers.
Taxation	A corporation is a separate taxpayer, although special rates apply to corporations.	Shareholders pay tax only on dividends (cash or property) received as a return on their investment.
Contracts	A corporation can enter into contracts with third parties. Only duly appointed officers, employees, or agents may bind the corporation to contractual obligations.	Unlike partners, who are agents of the firm, shareholders have no authority to enter into contracts on behalf of the corporation.

Methods of Incorporation

Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Newfoundland and Labrador, and the federal Parliament all permit incorporation by **articles of incorporation**. Quebec and P.E.I. still use the older system of **letters patent**, while Nova Scotia uses a memorandum system, in which corporations file a memorandum and are issued a certificate of incorporation.

The choice of jurisdiction dictates the filing and registration requirements (e.g., name selections and use, fees, proportion of directors that must be Canadian residents, annual filings). However, a business incorporated in one province or under the federal jurisdiction is free to carry on business throughout Canada and abroad. Certain types of businesses, such as banks, are required to incorporate federally. Once incorporated, a company is bound by the laws of the jurisdiction where incorporation occurred.

Under the *Business Corporations Act*, incorporation in Ontario is accomplished by filing signed **articles of incorporation**, a name search report on the proposed name of the corporation, and the requisite fee. The government office, in turn, issues a **certificate of incorporation**. Articles of incorporation set out information that is central to the corporation, such as name, registered office, number of directors, restrictions on business, classes of shares and the rights and restrictions of each class, and any restrictions on the transfer of shares.

Once the company has been incorporated, **by-laws** are adopted.¹²⁹ **General by-laws** provide the basic operating rules of the company, such as number and terms of directors, quorums necessary for meetings, the categories and duties of executive officers, and voting rules. Other by-laws give directors or officers authority from the shareholders to carry out specific transactions that require approval under terms of the statute or charter.

Types of Corporations

Although the terms **public corporation** and **private corporation** are often used, only two jurisdictions in Canada (Nova Scotia and P.E.I.) permit the formation of **private companies**, where the right to transfer shares is restricted, the number of shareholders is limited, and no invitation can be made to the public. Therefore, a better distinction is between corporations that issue shares to the general public and those that do not.

The two types of corporations are also distinguished by the terms *widely held* and *closely held*. **Widely held corporations** issue shares to the general public and usually list their shares on a stock exchange. **Closely held corporations** restrict the transfer of their shares and do not issue shares to the general public; thus, they have a small number of shareholders. Over 90% of corporations in Canada are closely held, and most of these are small- and medium-sized businesses.¹³⁰

Incorporation statutes apply to both widely and closely held corporations, but they impose additional obligations on the former. For example, the *Canada Business Corporations Act* refers to widely held corporations as **distributing corporations** and imposes requirements related to proxy solicitation, number of directors, and the need for an audit committee. These companies are also subject to regulation under the relevant provincial securities acts for the provinces where shares are issued or traded.¹³¹

¹²⁹ Many of the provisions contained in by-laws are included in the Articles in Nova Scotia and BC. McInnes et al., p. 532.

¹³⁰ Smyth et al., pp. 617-618.

¹³¹ Smyth et al., p. 617.

Corporate Financing

Corporations are financed in one of two ways: equity or debt. **Equity** financing refers to “what shareholders have invested in the corporation in return for shares,” while **debt** financing “consists of loans that have been made to the corporation.”¹³² The distinction between a **share** and a **bond** (or debenture) can become blurred as more features are attached to corporate securities. However, Figure 4-37 sets out some of the basic differences between equity and debt financing. Determining the ideal proportion of debt-to-equity financing is a complex decision that is beyond the scope of this document.

Figure 4-37: Equity vs. Debt Financing

Equity	Debt
Shares represent ownership interests.	Bonds represent debt.
Shareholders have a claim to the residual value of the corporation after all debts and other claims have been paid.	Bondholders have a claim for a fixed amount (principal and interest).
Dividends are a repayment of capital. They are paid out of after-tax profits and thus are not tax-deductible by the corporation.	Interest on debt is deducted in arriving at the taxable income of the corporation.
If dividend payments are not made, shareholders may have no remedy.	If debt is not repaid, the creditor can sue for breach of contract and even force the corporation into bankruptcy.
On dissolution of the corporation, at least one class of shareholders will receive property that remains after all other claims have been paid.	Holders of bonds secured by property or assets in general are entitled to be paid out ahead of general creditors on dissolution of corporation.

Share Capital

Most corporations have one class of shares called **common shares**, whose holders have the three rights referred to above: “rights to vote, to receive dividends, and to receive the remaining property of the corporation upon dissolution”.¹³³ In contrast, holders of **preferred shares** are entitled to receive specified dividends, to be paid in priority over common dividends, and to receive a return of the amount invested before any payments are made to common shareholders. They may or may not have the right to vote. Large multinational corporations often have many classes of shares, and the distinction between common and preferred shares can also begin to blur as the bundle of rights given to each class to attract investors becomes more complex.

¹³²McInnes et al., p. 536.

¹³³McInnes et al., p. 536.

Authorized capital is the maximum number (or value) of shares a corporation can issue according to its charter. Only letters patent or memorandum jurisdictions impose such an upper limit. **Issued capital** refers to shares that have been issued by a corporation; since shares must now be fully paid for when issued, it equals **paid-up capital** (shares issued and fully paid for). **Stated capital** equals the amount received for the issue of shares. **Par value** is a nominal value attached to a share at time of issue; most jurisdictions (those using articles of incorporation) no longer have par value shares.

Corporate Governance

Corporate governance refers to “the rules governing the organization and management of the *business and affairs* of a corporation in order to meet its internal objectives and external responsibilities.” This definition refers to the two distinct types of corporate activities delineated in the *Canada Business Corporations Act* (and the corresponding provincial statutes, including the *Business Corporations Act*):

- a) “The *affairs*: the internal arrangements among those responsible for running a corporation”: directors, officers, and shareholders.
- b) “The *business*: the external relations between a corporation and those who deal with it as a business enterprise—its customers, suppliers, and employees—as well as relations with government regulators and society as a whole.”¹³⁴

Internal Affairs

Role of Directors

The shareholders of a corporation elect a board of directors to manage the affairs and business of a corporation. The most important powers conferred on directors by the CBCA are set out in Figure 4-38.¹³⁵

Figure 4-38: The Role of Directors

Powers of Directors:
1. To issue shares.
2. To declare dividends – the directors determine how much profit to retain in the corporation and how much to distribute as dividends.
3. To adopt by-laws governing the daily affairs of the corporation.
4. To call meetings of the shareholders, at least once per year.
5. To delegate responsibilities and (except those outlined above) and appoint officers.

¹³⁴ Smyth et al., p. 628.

¹³⁵ *Canada Business Corporations Act*, R.S.C. 1985, c. C.44, ss. 102, 25, 103, 133, 115, 121 (Can.)

Role of Officers

The officers exercise authority (as delegated by directors) for managing the day-to-day operations of the company. It is up to the directors to define and designate the responsibilities of each officer (e.g., president, vice-president, treasurer).

Duties of Directors and Officers

Section 122 of the CBCA imposes two main duties on directors and officers:

1. **Fiduciary duty** – This is a duty to “act honestly and in good faith with a view to the best interests of the corporation.”
2. **Duty of care** – The directors are required to “exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.”¹³⁶

These duties are also imposed at common law. The fiduciary duty includes a duty to avoid any conflict of interest with the corporation.

Traditionally, in British and Canadian common law, these duties are owed to the corporation (not the individual shareholders, other stakeholders, or the public). However, the Supreme Court recently extended the duty of care and skill to other stakeholders, including shareholders, creditors, and employees, but refused to extend the fiduciary duty beyond the corporation. However, the court also stated, “We accept as an accurate statement of the law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate...for the board of directors to consider *inter alia* the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment.”¹³⁷

Potential Liability of Directors and Officers

Directors and officers may be liable for their actions in relation to the corporation under tort law, contract law, regulatory law, and criminal law.

While some courts have held that directors and officers are not personally liable for tortious actions as long as they were acting in “furtherance of their duties to the corporation and their conduct was justifiable,” recent Ontario case law seems “to suggest that directors and officers will almost always be responsible for their own tortious conduct even if they were acting in the best interests of the corporation.”¹³⁸

¹³⁶ *Canada Business Corporations Act*, R.S.C. 1985, c. C.44, s. 122 (Can.).

¹³⁷ *Peoples Department Stores Inc. v. Wise* (2004), 244 DLR (4th) 564 (S.C.C.), at p. 582.

¹³⁸ *DuPlessis and O’Byrne*, p. 385.

Contract law generally puts directors and officers in the position of agents and makes the corporation liable to the third party.

Directors may also face statutory penalties (including imprisonment) and fines for unpaid taxes as well as under environmental protection and other regulatory schemes.¹³⁹ This and criminal liability will be discussed later.

Rights of Shareholders

Shareholder rights derive from two main sources: the articles of incorporation and securities legislation. At least one class of shares must have three basic rights: 1) to vote at any meeting of shareholders; 2) to receive any dividend declared; 3) to receive the remaining property, after payment of debts, on dissolution of the corporation.

Shareholders also have a right to access certain information, including articles, by-laws, minutes of shareholder meetings and shareholder resolutions, the share register, and financial statements. In small corporations, shareholders may have a **right of first refusal** that requires existing shareholders to be offered a chance to buy shares from another shareholder before those shares are offered to non-shareholders.

Shareholder Remedies

There are several shareholder remedies to assist shareholders whose interests have been injured by the acts of the corporation or its directors and officers. These are summarized in Figure 4-39.

Figure 4-39: Shareholder Remedies

Remedy	Description
Derivative Action	Allows shareholders to pursue a legal claim against a wrong done to the corporation if the directors and officers fail to do so. This requires court approval.
Oppression	Allows shareholders to apply to the court to obtain relief against management and the corporation when management fails to act in their best interests (e.g., when management’s actions benefit the majority shareholder to the exclusion or detriment of minority shareholders or when management is planning to eliminate minority shareholders).
Winding Up	Also called liquidation and dissolution , on application by a shareholder, the court may direct that the corporation’s assets be sold, its creditors paid, the remaining money distributed to shareholders, and the corporation’s existence terminated.

¹³⁹McInnes et al., p. 553.

Dissent and Approval	Entitles shareholders who dissent from fundamental changes (e.g., sale of all or substantially all of the assets of the corporation) to have the corporation buy his or her shares.
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The “Business”: External Relations

The external obligations of corporations, pursuant to corporate governance, can be broken down into three broad categories:

1. Ordinary civil liability in contract and tort, including the large areas of service contracts and employment law that apply to individuals, partnerships, and corporations.
2. Statutes and regulations to protect creditors, investors, and the public in general, which apply especially to corporations.
3. Criminal and quasi-criminal liability of corporations for the acts of their officers, and the potential liability of officers and directors for their own acts and omissions committed in the course of performing their duties.

Civil Liability

Civil Liability in Contract

A corporation is liable for acts of its agents under the ordinary rules of agency. The **indoor management rule** is a specialized version of the apparent authority rule of agency law: in the absence of notice of irregularity or suspicious circumstances, everything in the operation of a corporation that appears to be properly done may be relied on by an outsider and will bind the company. However, a contracting third party who knows about a particular restriction will be bound by it.

Civil Liability in Torts

A corporation may be directly liable when a person who is a **directing mind** of the corporation committed the tort. A **directing mind** is “a person who has responsibility to establish corporate policy in the area in which the offence occurred”.¹⁴⁰ A corporation may also be vicariously liable for torts committed by employees in the course of their employment.

¹⁴⁰McInnes et al., p. 560.

Regulatory Protection of Creditors, Investors, and the Public

Protection of Creditors

Because of limited liability, a creditor's only protection is the fund of assets owned by the corporation. Therefore, two types of rules have been designed to preserve the capital of a corporation:

1. **The solvency test** – A corporation is prohibited from making any payment to its shareholders when it is insolvent. A corporation becomes **insolvent** when it has liabilities in excess of the realizable value of its assets or when it is unable to pay its debts as they come due. A corporation also cannot make any payment to its shareholders that would render the corporation's assets insufficient to pay the outstanding claims of creditors at that time.
2. **The maintenance of capital test**– A corporation is prohibited from "returning capital" to shareholders (e.g., by payment of excessive dividends or repurchasing corporate shares) if it depletes the capital fund made up of the assets paid into the corporation by the shareholders.

If the directors violate either of these two tests, they might become liable for debts of the corporation.

Protection of Investors

The major purposes of securities legislation are to prevent and punish fraudulent practices in the securities industry and to require full disclosure of financial information to prospective buyers of shares and bonds offered for the first time to the public. These objectives are accomplished by registering or licensing those engaged in various aspects of the securities business, by requiring the issuer of securities to the public to file a prospectus with the securities commission, and by imposing continuing disclosure requirements.

Current investors are also protected by a complicated set of statutes dealing with corporate reorganization, mergers, and winding up.

Protection of the Public Interest

Liability imposed under statutes and government regulations more closely resembles criminal liability than civil liability. "In addition to the exposure that directors face for breaching their general management duties, dozens of pieces of legislation place obligations on them."¹⁴¹ Penalties for failure to comply include both fines and imprisonment. Statutes that impose a

¹⁴¹DuPlessis and O'Byrne, p. 385.

liability include provincial and federal revenue acts, provincial workplace health and safety legislation, the federal *Competition Act*, and environmental legislation.

A regulatory offence imposes a broader definition of *mens rea* (“guilty mind”) than under criminal law; it may be sufficient to show that the accused **should have known** that his or her conduct would result in the commission of the offence.

Criminal Liability

There are three broad categories of criminal offences, each of which has a different standard for corporate liability, as shown in Figure 4-40

Figure 4-40: Categories of Criminal Offences

Type of Offence	Burden of Proof
Absolute Liability	The mere doing of the act makes the accused guilty of the offence.
Strict Liability	The accused can avoid liability by showing she took all reasonable care.
<i>Mens Rea</i>	A "guilty mind" must be shown. In general, the prosecution must prove, beyond a reasonable doubt, that the accused committed the act or omission that is the subject of the offence and also that the accused had <i>mens rea</i> .

*Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*¹⁴² first established the principle that a corporation can commit an act requiring a guilty mind. It opened the door to finding the actions of senior officers and directors to be those of the corporation itself with regard to committing acts and to the requirement of a guilty or negligent mind.

Thus, the corporation and/or its directors and senior officers may be found guilty of criminal offences. Prosecuting the latter, of course, opens up the possibility of deterrence by way of imprisonment rather than just fines.

Recent changes to the Criminal Code have increased the exposure to criminal liability in three ways:

1. The physical act and mental intent of any offence do not have to be found in the same person. Therefore, corporate criminal liability can be established in multiple employees with different responsibilities.
2. The physical act may be committed by any employee or contractor or a combination of them.

¹⁴²*Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915) A.C. 705 (H.L).

3. Corporate *mens rea* may be found not only in those with policy-making authority but also in those senior officers with operational responsibilities.¹⁴³

¹⁴³ Criminal Code, RSC 1985, c. C.46, ss. 22.1, 22.2 (Can.).

STUDY QUESTIONS FOR PART 4: BUSINESS ENTITY LAW

1. When an agency relationship is ratified, which of these is **not** true?
 - a. Acceptance by the principal may be implied by the principal's behaviour.
 - b. Ratification must occur within a reasonable time after creation of the contract.
 - c. The principal may accept only part of the agreement.
 - d. All of the above are true.
2. The term "holding out" refers to:
 - a. The principal having legal capacity to enter into contracts.
 - b. Authority that is implied by the conduct of the principal, such as paying for the goods.
 - c. Authority that is implied by the usual authority given to someone in that position.
 - d. Conduct where the principal represents that someone has authority to act as an agent and bind him or her.
3. In this legal form of business, a relationship exists between/among persons carrying on a business with a view of profit:
 - a. Sole proprietorship
 - b. General partnership
 - c. Corporation
 - d. Franchise
4. What determines whether a business relationship constitutes a partnership?
 - a. The substance of the relationship, not the form.
 - b. The sharing of profits.
 - c. Factors such as contribution of property or labour, participation in management, and holding oneself out as a partner.
 - d. All of the above.
5. Which of these is **not** a partnership rule implied by statute in case it is not expressly covered in the agreement?
 - a. A partner is entitled to be paid a salary for engaging in a partnership basis.
 - b. A partner is not entitled to interest on capital contributions to the partnership but is entitled to interest on loans to it.
 - c. Unanimous consent is required to admit a new partner.
 - d. All of the above are implied terms.
6. In this type of partnership, individual partners are not personally liable for professional negligence of their partners:
 - a. General partnership
 - b. Limited partnership
 - c. Limited liability partnership
 - d. All of the above

7. Which of these is **false** about shareholders of a corporation?
 - a. They have limited liability that is limited to their investment.
 - b. They elect a board of directors.
 - c. They pay tax on their proportionate share of the corporation's earnings.
 - d. All of the above are true about shareholders.

8. Which of the following generally have the authority to bind a corporation in contractual relations?
 - a. Shareholders and the board of directors they elect.
 - b. The board of directors and the managers they appoint.
 - c. Duly appointed officers, employees, or agents.
 - d. All of the above.

9. In most jurisdictions, including Ontario, these types of corporations may restrict the transfer of shares:
 - a. Private
 - b. Public
 - c. Widely-held
 - d. Closely-held

10. Dividends are:
 - a. Established in the incorporation certificate and represent capital repayments tax-deductible by the corporation.
 - b. Declared by management and represent interest owed on shares.
 - c. Declared by the directors and represent capital repayments not tax-deductible by the corporation.
 - d. Declared by the directors and represent capital repayments owed on shares.

11. The amount received by a corporation for the issue of its shares is referred to as:
 - a. Authorized capital
 - b. Stated capital
 - c. Paid-up capital
 - d. Issued capital

12. This shareholder remedy entitles a shareholder who is opposed to fundamental changes such as the sale of substantially all of a business's assets to have the corporation buy his or her shares:
 - a. Dissent and approval
 - b. Derivative action
 - c. Winding up
 - d. Oppression

13. Corporation A was issued a loan by Bank B. Corporation A is now claiming that its Chief Financial Officer did not have the authority to obtain the loan and therefore is refusing to honour the terms of this bank loan. Based on the indoor management rule:
- Corporation A will not be bound by the loan because the CFO would not normally be involved in a borrowing transaction.
 - Corporation A will be bound by loan since everything appears to have been done properly in the eyes of Bank B as an outsider.
 - Corporation A will be bound even if there was a restriction on the CFO's authority to transact loans as long as Bank B did not know about this restriction.
 - Both B and C.
14. In the case of a regulatory offence by a corporation involving a serious violation of health and safety legislation, the "guilty mind" in the burden of proof refers to the fact that:
- There was a directing mind, a person in the corporation with responsibility to establish policy in that area, who failed to do so.
 - The directors did not take all reasonable care.
 - The directors should have known their conduct would result in the commission of an offence.
 - The directors knew they were committing an offence and did so anyway.

ANSWERS FOR PART 4: BUSINESS ENTITY LAW

1. C. If the principal does not accept the whole agreement, a new agreement is formed between the principal and the third party directly.
2. D. Holding out refers to conduct where a principal represents someone to be its agent. C refers to commercial usage.
3. B. This is a close summary of the definition in the *Partnership Act*: the relation that subsists between persons carrying on a business in common with a view of profit.
4. D. The court does look at substance, but sharing of profits is an essential element of a partnership by virtue of the *Partnership Act*. Other factors such as those mentioned in C are also considered.
5. A. Partners are not entitled to be paid a salary.
6. C. It is true only of limited liability partnerships, designed for professionals such as lawyers and accountants, where individual partners are not personally liable for the professional negligence of their partners. In some provinces, this protection also applies to other torts, breaches of trust, and contractual obligations, but not in Ontario.
7. C. Shareholders pay tax only on dividends received as a return on their investment, not on their proportionate share of the corporation's earnings.
8. C. Only duly appointed officers, employees, or agents may bind the corporation to contractual relations.
9. D. In most jurisdictions, the term for a company that restricts transfer of shares is a *closely held corporation*. Nova Scotia and P.E.I. actually permit the formation of private companies.
10. C. Dividends are declared by directors at their discretion—they are not owed and shareholders may have no remedy if they are not made. They are repayments of capital, not interest. They are made out of after-tax profits and thus are not tax-deductible.
11. B. Stated capital is the amount received by a corporation for the issue of its shares.
12. A. Dissent and approval entitles a shareholder who is opposed to fundamental changes such as the sale of substantially all of a business's assets to have the corporation buy his or her shares.
13. D. In the absence of notice of irregularity or suspicious circumstances, everything in the operation of a corporation that appears to be properly done (such as a CFO borrowing money) may be relied on by an outsider and will bind the company—unless a contracting third party knows about a particular restriction, in which case such restriction would be binding.
14. C. Since this is a statutory offence, the definition of *mens rea* is broader than under criminal law. It may be sufficient to show that the accused should have known that their conduct would result in the commission of an offence.

PART 5: BUSINESS RELATIONSHIPS

The law also impacts the relationships businesses have with customers at the time of sale (*Sale of Goods Act*) and thereafter (consumer protection law), as well as with banks, creditors, employees, competitors, the environment, and trading partners around the world. These notes deal with these topics from a high-level perspective given the number of topics, their scope, and space limitations.

SECTION 5-1: SALE OF GOODS

Contracts for sale of goods are the most common type of contract. The purpose of the *Sale of Goods Act* was to codify the vast amount of case law that had been generated in this area.¹⁴⁴ Freedom of contract is preserved since the parties may come to their own terms. However, the Act sets out the terms that will be implied in a contract of sale in the absence of an express agreement to the contrary. In other words, the Act provides a set of default rules. These notes will refer to the Ontario *Sale of Goods Act*. The statutes in the other provinces are almost identical.¹⁴⁵

Application of the *Sale of Goods Act*

The Act applies only to a **sale of goods for money** as described in Figure 5-41.

Figure 5-41: Definition of a Sale of Goods

	What is Covered	What is NOT Covered
Sale	A <i>transfer of ownership</i> of goods as soon as a contract is created (sale) or sometime thereafter (agreement to sell)	Leases, gifts, security for loans, consignments
Goods	Tangible (physical) things that can be moved, e.g., cars, books, crops	Land and anything attached to it; intangible items such as trademarks or shares; services
Money	Cash, cheques, credit cards, debit cards, money and goods	Trade of goods

When goods are sold together with services, the courts will determine whether the essence of the contract was the performance of a service or a transfer of goods.

¹⁴⁴ *Sale of Goods Act*, R.S.O. 1990, c.S.1.(Ont.).

¹⁴⁵ McInnes et al., p. 298.

Ontario, British Columbia, Manitoba, and New Brunswick do not require a contract to be in writing if the price exceeds a certain amount. In other jurisdictions, the price generally ranges from \$30 to \$50; in the Yukon, it is \$1,000.¹⁴⁶

Passing of Property

An important implied term is the **passing of property**. **Property passes** when the ownership or title in goods is transferred from the buyer to the seller.¹⁴⁷ Difficulties arise when the seller of the goods still has possession or physical control of the goods. The Act provides rules for determining when property passes under five situations,¹⁴⁸ as delineated in Figure 5-42. These rules are important for three reasons: 1) they affect remedies available for breach; 2) the buyer may have to prove that he or she owns the goods in the event that the seller goes bankrupt; and 3) risk for loss or damage to the goods passes with the property unless the parties agree otherwise.

Figure 5-42: Rules on Passing of Property

Rule:	Ownership Passes to Buyer When:
1. Unconditional contract for sale of specific goods in deliverable state	The contract is made, irrespective of when delivery or payment takes place.
2. Contract for sale of specific goods where seller has to do something to put goods into deliverable state	Such thing is done, and buyer receives notice.
3. Contract for sale of specific goods in deliverable state where seller has to weigh, measure, test, or do something else to ascertain price	Such thing is done, and buyer receives notice.
4. Contract where goods are delivered to buyer on approval	Buyer gives approval or acceptance. If buyer does not give approval or acceptance but retains goods without notice of rejection, ownership passes when the time fixed for return of goods expires or, if no time was fixed, on expiration of a reasonable time.
5. Contract for sale of unascertained or future goods by description	Goods of that description in deliverable state are unconditionally appropriated to the contract, either by seller with assent of buyer or by buyer with assent of seller.

¹⁴⁶McInnes et al., p. 301.

¹⁴⁷McInnes et al., p. 301.

¹⁴⁸*Sale of Goods Act*, R.S.O. 1990, c. S. I. s. 19 (Ont.).

Implied Contractual Obligations of the Seller

The Act distinguishes between **conditions**, or essential terms, and **warranties**, or minor terms. Breach of a condition allows the injured party to repudiate the contract and obtain release from any further obligations under it. Breach of a warranty allows only the possibility of recovering damages.

The Act implies three types of terms: those regarding 1) the seller's title, 2) the nature of the goods, and 3) delivery and payment.

Seller's Title

1. The seller has the right to sell the goods.
2. The buyer will enjoy quiet possession of the goods.
3. The goods will be free from unknown liens and encumbrances to any third party.

Nature of Goods

1. Goods ***sold by description*** will conform to that description.
2. Goods ***sold by sample*** will correspond with the sample in type and quality.
3. Goods will be of ***merchantable quality***, that is, a reasonable person would buy them without a reduction in price despite knowing of their imperfections. This applies only if the seller normally deals with those sorts of goods. If the buyer has examined the goods, it does not cover defects that he or she should have noticed.
4. Goods must be ***fit for their intended use***. This applies when the seller normally deals with those sorts of goods. When the buyer makes known to the seller the particular purpose for which the goods are required and relies on the seller's skill or judgment, the goods will be suitable for that purpose. This does not apply when the buyer requests a product by its patent or trade name.

When it comes to quality and fitness for use, the buyer is, to a certain extent, subject to ***caveat emptor*** ("let the buyer beware"). If he or she has had an opportunity to examine the goods, it is assumed that the buyer can and should determine the quality and fitness for his or her purpose.

Delivery and Payment

1. Delivery and payment should occur concurrently.
2. Time of delivery is a condition, but payment is a warranty. Hence, while the buyer may be entitled to discharge the contract if delivery is late, the seller will be entitled to sue for damages only if payment does not occur promptly.
3. Delivery normally occurs at the seller's place of business.
4. The goods delivered will conform to the contract.

Contracts may contain clauses that exempt the seller from certain implied terms. However, such clauses are strictly interpreted against sellers and cannot be used to such an extent that the seller can default without penalty or harm.

Remedies

There are four general remedies and some specific remedies for an unpaid seller, as described in Figure 5-43.

Figure 5-43: General Remedies under Sale of Goods Act

Remedy	Application
Discharge	Innocent party generally has the right to discharge the contract if there was a breach of a condition.
Compensatory Damages	Innocent party always has the right to claim compensatory damages. This is normally the only remedy for breach of a warranty. For breach of a condition, innocent party may be entitled to both damages and the right to discharge the contract.
Liquidated Damages	The courts will enforce a contractual term for liquidated damages. The most common application is that the seller may be allowed to keep a deposit if the contract is not performed.
Specific Performance	In exceptional circumstances, the court may require the guilty party to go through with the contractual promise (e.g., unique goods such as a priceless painting).

Specific Remedies for an Unpaid Seller

Remedy	Description
Action for the Price	If a buyer refuses to take delivery even though title has passed to the buyer, the seller is entitled to its full price.
Lien	The seller can withhold goods from a buyer until the buyer has paid for them as long as the seller still possesses the goods and the contract makes no provision for credit to be extended to the purchaser, or the credit terms have expired, or the buyer is insolvent.

Stoppage <i>in Transitu</i>	If a buyer becomes insolvent after an unpaid seller has delivered the goods to a carrier, the seller can order the carrier to withhold them from the buyer.
Repossession	Except in special circumstances in relation to bankruptcy, a seller has no right to repossess goods even if the buyer fails to pay for them.
Resale	After exercising a lien or stoppage <i>in transitu</i> , a seller can resell the goods to a third party after giving notice to the original buyer.

SECTION 5-2: CONSUMER PROTECTION

Consumers are “individuals who purchase goods and services from a business for their personal use and enjoyment.”¹⁴⁹

Modern developments that have led to the advent of consumer protection legislation include:¹⁵⁰

1. Large enterprises that have considerably more power than buyers;
2. Complexity of manufactured goods so that retailers cannot detect or remedy defects;
3. Bulk shipping in sealed packages so that neither the retailer nor the shopper can examine products until they are purchased;
4. High profile advertising through mass media that often plays a bigger role in inducing consumers to buy than the retailer plays;
5. Extensive use of credit to purchase expensive goods with borrowing terms that are often difficult to understand; and
6. Expanded use of Internet contracts with detailed terms that consumers may be unaware of and/or that may be one-sided.

Principal Areas of Consumer Protection Legislation

This section reviews the basic requirements imposed by the five main areas of consumer protection laws: advertising, quality, business conduct, disclosure of cost of credit, and dealing with the public.

Misleading Advertising and Other Representations of Sellers

The federal *Competition Act*¹⁵¹ prohibits misleading representations about the qualities of a product, its "regular" selling price, and warranties. The Act also makes certain selling practices offences, such as publishing test results or user testimonials that cannot be corroborated and

¹⁴⁹ Smyth et al., p. 744.

¹⁵⁰ Smyth et al., p. 744.

¹⁵¹ *Competition Act*, R.S.C. 1985, c. C-34, ss. 52 (Can.).

have been used without permission of the testing agency or user, double ticketing, bait-and-switch advertising, pyramid selling and referral selling, and advertising an article or service at a lower price than that asked of the customer.

Ontario's *Consumer Protection Act, 2002*, makes it an unfair practice to make "a false, misleading, or deceptive consumer representation," and provides a long list of examples, including failure to reveal a material fact and making unconscionable representations.¹⁵² A consumer who is subjected to an unfair practice can terminate the contract and, where rescission is not possible, may recover any amount in excess of the fair value of goods or services received. The court may also award exemplary or punitive damages.

Regulation of Labelling, Product Safety, and Performance Standards

Since the statutes are numerous, Figure 5-44 identifies only some of the more important ones and their key provisions.

Figure 5-44: Key Regulations for Labelling, Product Safety, and Performance Standards

Legislation	Key Provisions
<i>Consumer Packaging and Labelling Act</i>¹⁵³	Provides rules for packaging and labelling products, including requirements for identifying products by a generic name, stating the quantity, and using standardized package sizes.
<i>Textile Labelling Act</i>¹⁵⁴	Requires labels bearing the generic name of the fabric to be attached to all items of clothing.
<i>Hazardous Products Act</i>¹⁵⁵	Lists products that are banned (e.g., toys containing lead) and products that must be manufactured and handled in a certain way (e.g., bleaches).
<i>Food and Drugs Act</i>¹⁵⁶	Regulates many aspects of food, medical, and cosmetic products, including sanitary production, contamination prevention, listing of ingredients, and shelf life dating.
<i>Motor Vehicle Safety Act</i>¹⁵⁷	Regulates national safety standards for motor vehicles whether manufactured in Canada or abroad. Requires notification of defects to purchasers and Department of Transport.

¹⁵² *Consumer Protection Act, 2002*, S.O. 2002, c.30 Sch. A. s. 14 (Ont.).

¹⁵³ *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C.38 (Can.).

¹⁵⁴ *Textile Labelling Act*, R.S.C. 1985, c. T.10 (Can.).

¹⁵⁵ *Hazardous Products Act*, R.S.C. 1985, c. H.3 (Can.).

¹⁵⁶ *Food and Drugs Act*, R.S.C. 1985, c. F.27 (Can.).

¹⁵⁷ *Motor Vehicle Safety Act*, S.C. 1993, c. 16 (Can.).

Regulation of Business Conduct Towards Consumers

To reduce **pressure selling**, statutes provide a **cooling-off period** after door-to-door sales.¹⁵⁸

To discourage businesses from sending **unsolicited goods** to consumers, the recipient of such goods may use them without becoming liable for their price.

To discourage sellers from creating standard-form contracts that provide self-help remedies in the event of consumer default, statutes impose two constraints. First, once a buyer has paid a specified portion of the purchase price, a seller loses the remedy of **repossession**. Second, there are limits on the circumstances in which a seller or creditor can enforce an **acceleration clause** (whereby the unpaid balance of the price becomes payable as soon as the buyer defaults).

As a result of concerns about fraudulent **telemarketing** (use of telephone communications to promote a product or business interest), the federal *Competition Act* made deceptive telemarketing a criminal offence. The rules require agents to disclose the company's name, purpose of the call, product and service being promoted, terms and restrictions pertaining to product delivery, and other information. The *Telecommunications Act* was amended in 2008 to establish a **National Do Not Call List**, which prevents telephone solicitations to registrants except for charities, political parties, or businesses that have an existing relationship with the registrant.¹⁵⁹

Businesses often assign consumer credit contracts to finance companies. Consequently, most consumer protection acts state that the assignee of a consumer credit contract has no greater rights than the assignor and is subject to the same obligations. This ensures that consumers do not end up owing money to a finance company (who would otherwise be a **holder in due course**) with no opportunity to refuse to pay for defective goods or being forced to waive their rights against an assignee in a **cut-out clause**.

Disclosure of the True Cost of Credit

There must be a detailed statement of the terms of credit in dollars and cents, the effective interest rate, and charges for insurance or registration. Failure to comply will result in the consumer not being bound by the contract. As discussed under Contract Law, the Ontario

¹⁵⁸ *Consumer Protection Act, 2000*, S.O. 2002, c. 30, Schedule A, s. 43(1) (Ont.).

¹⁵⁹ *An Act to Amend the Telecommunications Act*, S.C. 2005, c. 50 (Can.); Telecom Decision C.R.T.C. 2008-6.

Consumer Protection Act, 2002 imposes high standards of disclosure on specific industries including time-share, personal development, leasing, and motor vehicle repair contracts.¹⁶⁰

Regulation of Businesses by Licensing, Bonding, and Inspection

Licensing of businesses is another common way to protect consumers. Examples include inspection and licensing of restaurants, registration of door-to-door sales persons and collection agencies, bonding, and registration of travel firms.

SECTION 5-3: BANKING

“Banks have become financial marketplaces, offering services in cash management, investment advice and brokerage, and business financing.”¹⁶¹ As a result, the relationship between businesses and banks is a complex one. These notes will highlight some of the key legal requirements related to the banking agreement, negotiable instruments, and electronic banking.

Banking Agreement

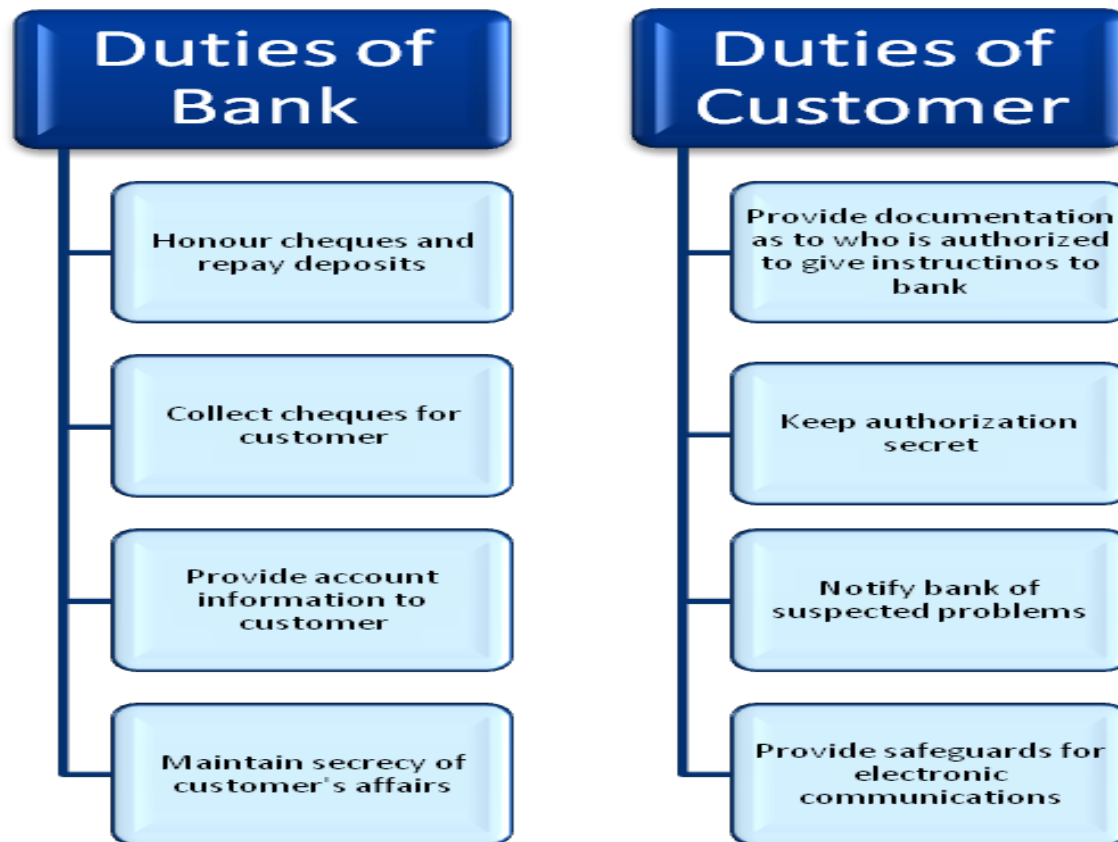
The **banking agreement** sets out the rights and obligations of a bank and the customer. Its purpose is to specify who has authority to issue instructions to the bank on behalf of the customer and to allocate the risk of loss associated from difficulties with verifying the customer’s authority and carrying out the customer’s instructions.

An **operation of account agreement** sets out service charges, chequing arrangements, and release of information. Common law imposes additional duties on both parties to a banking contract. These are set out in Figure 5-45.

¹⁶⁰ *Consumer Protection Act, 2002*, S.O. 2002 c. C. 30, Part VII (Ont.).

¹⁶¹ DuPlessis and O’Byrne, p. 620.

Figure 5-45: Implied Duties of Bank and Customer



Standard banking documents are designed to protect the bank, not the customer. However, in instances where the bank provides services like financial advice, a fiduciary relationship exists that imposes a duty of care and skill, as well as the requirements to disclose actual and potential conflicts of interest and to consider the consumer's interests ahead of the bank's.

Negotiable Instruments

A **negotiable instrument** is "a written contract containing an unconditional promise or order to pay a specific sum on demand or on a specified date to a specific person or bearer."¹⁶² The federal *Bills of Exchange Act* governs the law relating to negotiable instruments. Cheques, bills of exchange (a written order to a person to pay a specified amount to another person), and promissory notes are all included under the act as negotiable instruments.¹⁶³

Negotiable instruments are negotiated by endorsement and delivery, although an instrument that is payable to the holder or "to bearer" need only be delivered to complete negotiation.

¹⁶²DuPlessis and O'Byrne, p. 623.

¹⁶³*Bills of Exchange Act*, R.S.C. 1985, c. B.4 (Can.).

There are three distinguishable features of a negotiable instrument that are not common to the ordinary assignment of contractual rights, as discussed below. These are designed to facilitate the free transfer of negotiable instruments from party to party. Even if an instrument is not negotiable, in that it fails to meet one or more of the criteria, it still may be assignable as a contractual right as discussed under contract law.

1. Notice of the assignment need not be given to the original promisor.

This makes a negotiable instrument enforceable at face value and allows the holder to collect on the instrument even if the original debtor has not been notified of transfer(s) that have taken place.

2. The assignee may sometimes acquire a better right to sue on the instrument than its predecessor (assignor) had.

This gives an innocent party who acquires possession of a negotiable instrument the right to collect on it whether the original contractual obligations have been met or not, unless there has been fraud or forgery with respect to the instrument. In commercial transactions, banks and other institutions are willing to discount drafts or cash cheques drawn on other banks or institutions because the law provides them the protection of **holders in due course** and allows them to enforce payment despite defects of title such as a forged signature, incapacity to contract as a result of drunkenness or insanity, or discharge of the instrument by payment. For example, where a purchaser pays for goods with a cheque and the goods turn out to be defective, the purchaser can stop payment on the cheque as long as it is in the hands of the person/business to whom it is made out. If the cheque has been transferred to an innocent third party (even the payee's bank), the purchaser will have to pay and seek recourse through contractual law against the vendor of the goods.

3. A holder may sue in its own name any other party liable on the instrument without joining any of the remaining parties.

There are seven essential criteria for negotiable instruments to acquire the desirable features set out above. These are shown in Figure 5-46.

Figure 5-46: Criteria for Negotiable Instruments

- | |
|--|
| 1. The promise or order must be in writing. |
| 2. The obligation must be for money payment. |
| 3. The money promised must be a "sum certain." |

4. The promise or order must be unconditional.
5. The money must be payable at a fixed or determinable time or on demand.
6. Negotiation must be of the whole instrument.
7. The instrument must be signed by the drawer or maker (or an authorized agent).

Electronic Banking

Although electronic banking is cheap and efficient, the absence of paper can make it challenging to safeguard the authority for such transactions. Problems may also occasionally be caused by transmission failures or system crashes. Consequently, banking contracts now include provisions for the risks of electronic transactions, including the customer's duties to report problems, to select personal identification numbers (PINs) that are not obvious, and to safeguard those numbers, and the bank's responsibility for electronic failures. Banks also impose daily and weekly limits on transactions to control losses due to fraud. Finally, there is greater reliance on international rules, such as the UNCITRAL *Model Law for International Credit Transfers*.¹⁶⁴

SECTION 5-4: SECURED TRANSACTIONS AND CREDITORS' RIGHTS

Businesses have relationships with banks, finance companies, and other businesses, both as lenders (creditors) and borrowers (debtors). Therefore, it is important to understand the rules of debt collection. This section begins by dealing with secured transactions and the rights of secured creditors to recover what is owed to them. It then discusses the rights of creditors in more general terms.

Secured Transactions

A **security interest** allows a creditor to seize specified assets of the debtor (usually referred to as **collateral**) if a debt is not repaid. **Secured creditors** do not need to bring a court action to enforce these rights. In contrast, **unsecured creditors** have to go through court and obtain a judgment against the debtor and an execution order authorizing seizure and sale of certain of the debtor's assets. Although acquiring security minimizes risk to the creditor, it may alienate customers; it is also more expensive and complex to acquire security. Typical transactions that involve security interests include vehicle, appliance, and furniture purchases on payment terms, and a bank or private lender providing a line of credit to a business that does not own real property. Security interests are regulated provincially for the most part under *Personal Property*

¹⁶⁴ UNCITRAL Model Law on International Credit Transfers (1993), 32 ILM 587.

Security Act (PPSA) legislation. Banks that are incorporated federally also have the option of federal regulation of security interests pursuant to the *Bank Act*.¹⁶⁵

How Security Interests are Created

Conditional Sales

In a **conditional sale**, title is not transferred to the buyer until he or she has completed a series of instalment payments. While the buyer has possession of the goods, the seller's retention of ownership provides full security since the seller may either sue for the unpaid balance, or repossess the goods and resell them. (An Ontario seller may then also sue for any deficiency between the amount owing and the sale price.) Ontario allows for an acceleration clause in a conditional sales contract, whereby the buyer must pay the whole balance owing upon default. An assignee of a seller under a conditional sales contract gets the same rights as the seller.

Assignment of Accounts Receivable

If accounts receivable are used as security for a loan, the bank can collect the assigned receivables owing to the business if the loan is not repaid. As long as the loan remains in good standing, the debtor is usually free to collect its own receivables and carry on business as usual.

General Security Agreement

The advantage of a **general security agreement** is that it gives a creditor the right to *all* of the debtor's assets—both those in existence at the time of the agreement and those acquired after—if the debtor defaults on repayment. For the most part, general security agreements have replaced the floating charges that were used before modern PPSA legislation to give creditors first priority security interests in all personal property of debtors, not otherwise mortgaged or pledged, at the time of default under the loans secured by the floating charges.

Chattel Mortgages

While in a conditional sale, the security is represented by the very goods themselves, in a **chattel mortgage**, the debtor may give security over a variety of personal property, even property acquired after the chattel mortgage has been executed. A chattel mortgagee (bank) has remedies similar to those of a conditional seller. It can sue on the covenant to pay, take possession of the goods and resell them, and sue the mortgagor (debtor) for any deficiency. As long as the goods remain in the mortgagee's possession, the mortgagor may redeem them by paying the balance of the debt with interest and costs.

¹⁶⁵ *Bank Act*, S.C. 1991, c. 46 (Can.).

Personal Property Security Legislation

PPS legislation was passed to try to reconcile the conflicting security interests in goods. It creates a single registration system for all secured interests, defines the secured parties, gives remedies against the debtor, and defines priorities among various secured parties and third party purchasers or general creditors.

To create a valid security interest, the security interest must **attach** (both parties must have begun performing the agreement) and be **perfected** (either the secured party files a **financing statement** under the PPSA or takes possession of the collateral—the latter method is not common).¹⁶⁶ A financing statement sets out the debtor, the secured party, and the general nature of the security interest.

Competing priority claims to the same asset are resolved by assigning priority to the creditor who first perfects its interest. If registration of a security interest is required (rules vary by province), failure to do so means third parties may acquire interests that prevail over the secured creditor, although their interests may not have priority over other claimants. Purchasers who fail to do a search under the PPSA may find that the seller did not have title to the goods, and the goods may be repossessed by the original owner.

Creditors' Rights

Often creditors, in the normal course of business, cannot afford the time or expense of securing debt against the property of the debtor. The remainder of this section outlines three statutory provisions intended to protect legitimate rights.

The Bankruptcy and Insolvency Act

A person is **insolvent** when he is unable to meet his debts to creditors as they fall due or when his liabilities exceed realizable assets. The federal *Bankruptcy and Insolvency Act* (BIA):

1. Establishes a uniform practice in bankruptcy proceedings throughout the country.
2. Provides for an equitable distribution of a debtor's assets among creditors.
3. Provides a framework for preserving and reorganizing the bankrupt's affairs by working out an arrangement with the creditors.
4. Releases an honest but unfortunate debtor and permits a fresh start.

¹⁶⁶ *Personal Property Security Act*, R.S.O 1990, c P.10 s 11 (OPPSA) (Ont.).

The Act distinguishes between potential candidates for bankruptcy (insolvents) and those who have declared bankruptcy (bankrupts). Insolvency “frequently precedes bankruptcy, but is only one of ten possible conditions that can help trigger bankruptcy.”¹⁶⁷ Figure 5-47 provides further insights into the differences between being insolvent and bankrupt.¹⁶⁸

Figure 5-47: Insolvent v. Bankrupt

An insolvent person is not bankrupt, has liabilities that exceed \$1,000, and meets one of three conditions:	A bankrupt person has liabilities that exceed \$1,000 and:
Is unable to meet obligations as they become due;	Has performed any of ten specified acts of bankruptcy within the preceding six months;
Or has ceased paying his current obligations as they become due;	And has had a petition in bankruptcy filed with the courts against him or her by creditors;
Or has debts that exceed the realizable value of his or her assets.	Or has made a voluntary assignment in bankruptcy with the Official Receiver.

A commercial business that finds itself in financial difficulty has a third option, and that is to file with the Official Receiver a notice of intention to make a **proposal** to its creditors. A **proposal** is a plan to restructure the business’s affairs for the purpose of enabling it to continue. Under the *Companies’ Creditors Arrangement Act*, there is a similar means of avoiding liquidation by means of a **compromise and arrangement**.¹⁶⁹ The proposal requires approval of a majority of creditors (who are divided into classes with common interests) who constitute at least two-thirds of the value within that class. If approval is denied, there is a deemed assignment in bankruptcy by the debtor. If the creditors approve, the proposal must be approved by the court, which may withhold approval if the proposal is unreasonable, e.g., creditors are likely to get less than 50 cents on the dollar. Unless the proposal provides otherwise, the debtor retains control of its property, but payments are made to a trustee who distributes monies to the creditors.

Administration and Settlement of a Bankrupt’s Affairs

A trustee in bankruptcy takes possession of the bankrupt’s assets, although some assets (up to prescribed limits) are exempted for personal bankrupts (e.g., personal clothing, household furniture, motor vehicle). The trustee also takes possession of all books and documents relating to the bankrupt’s affairs. A **stay of legal proceedings** occurs, which means that creditors are not allowed to sue for payment of pre-bankruptcy debts, and all legal proceedings presently against the debtor are suspended.

¹⁶⁷Willes and Willes, p. 597.

¹⁶⁸*Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B.3, ss. 2 and 42 (Can.).

¹⁶⁹*Companies’ Creditors Arrangement Act*, R.S.C. 1985, c.C.36 (Can.).

Although the principal duties of a trustee are to recover all property that should form part of the debtor's estate and to apply that property in satisfaction of creditors' claims, the trustee has wide-ranging powers that also permit her to carry on the debtor's business and to borrow money, etc., as long as she has the agreement of the inspector(s) appointed by the creditors to supervise her. Anything that happened up to one year before bankruptcy can come under scrutiny as to whether there was improper preferential treatment of certain creditors (**fraudulent preferences**). These can be unwound and become part of property for distribution to creditors generally. This is also the case for gifts of property made to the bankrupt before he or she became bankrupt (**settlement**) or non-arm's length transactions (**reviewable transactions**).

In paying out claims, the trustee must pay claims in proper priority, or he may be personally liable to the creditors. Figure 5-48 identifies the priority among creditors.

Figure 5-48: Priority of Claims in Bankruptcy Proceedings

Priority	Description	Entitlement
1st: Secured Creditors	Those with a security interest in a particular asset of the debtor or all of the debtor's assets	Are exempt from the stay and can take possession of the secured assets for themselves.
2nd: Preferred Creditors	Include creditors owed wages, taxes, rent, support payments, and administrative costs of trustee in bankruptcy	Have preference over unsecured creditors; preference and order of priority is defined by the Act.
3rd: General Unsecured Creditors	Residual class of creditors	Are paid out rateably from the debtor's liquidated assets after all other prior claims are settled.

After the trustee has liquidated the debtor's assets and distributed the proceeds, the **discharge** of a bankrupt usually cancels the unpaid portion of debts remaining; the debtor has a clean slate and can start business again. A discharge is given at the court's discretion when it thinks that it is proper to do so. Reasons to refuse or suspend the discharge include payment of less than 50 cents on the dollar to unsecured creditors unless the debtor can't be held responsible under the circumstances, failure to keep proper books, continuing to trade once the debtor knew he was insolvent, causing bankruptcy by extravagant living, and being a bankrupt before. A bankrupt debtor who attempts to carry on business before a discharge is received must disclose that he is an undischarged bankrupt or be liable to criminal penalties.

Other Statutory Protection for Creditors

Bulk Sales

A **bulk sale** is the sale of all, or essentially all, of the assets of a business. Ontario's *Bulk Sales Act* (Ontario and Newfoundland and Labrador are the only provinces that have not repealed this legislation in view of comprehensive PPSA) establishes a procedure that makes it difficult for the owner of a business to dispose of stock-in-trade and business fixtures outside the normal business course without the payment or concurrence of trade creditors.¹⁷⁰ The rationale behind such legislation is that if a debtor sells his stock-in-trade and business fixtures, the cash flow that creditors anticipated would arise from these assets (which formed the basis for extending credit in the first place) would be impaired. Application can be made to a court to exempt a bulk sale from the *Bulk Sales Act*.

Construction Liens (Mechanics' and Builders' Liens)

Persons who have extended credit in the form of goods and services to improve land have a statutory right to record a security claim against the land that they have improved. If the claim of the lienholder is not paid, the lienholder may be able to cause the land to be sold and can receive payment from the sale proceeds.

A mechanics' lien is available, under most provincial acts, only to creditors who participate directly as workers or supply material for use directly in construction. The courts have held that an architect who prepares building plans is entitled to a lien. Ontario's *Construction Lien Act* and some other provincial statutes entitle a lessor of equipment used in construction (but a seller of such machinery or tools is not entitled).¹⁷¹

Registration of a mechanics' lien provides public notice of the lienholder's claim and establishes the lienholder's priority over unsecured creditors of the property's owner, subsequent mortgagees, and subsequent purchasers. A lien that is not registered within the statutory time period (usually 90 days) ceases to exist. A principal contractor can achieve protection against the owner, but the Act also ensures that the principal contractor meets obligations to subcontractors.

¹⁷⁰ *Bulk Sales Act*, R.S.O. 1990, c. B. 14 (Ont.).

¹⁷¹ *Construction Lien Act*, R.S.O. 1990, c. C.30, ss. 1(1) and 14(1) (Ont.).

SECTION 5-5: EMPLOYMENT LAW

The employment relationship is a complex one that extends from pre-employment through employment to termination and post-employment.

Pre-employment

Employee or Independent Contractor?

The first of two main areas of pre-employment law is whether the relationship is one of employee or independent contractor. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account (independent contractor) or is performing them as an employee. A variety of tests exist to help answer this question, including those in Figure 5-49.

Figure 5-49: Employee or Independent Contractor?

Test	
Control	If the employer has the right to give orders and instructions about how the person is to carry out the work, the person is an employee.
Entrepreneur	An entrepreneur who has control, ownership of tools, chance of profit, and risk of loss is an independent contractor.
Organization / Integration	An employee's work is done as an integral part of the business, whereas an independent contractor's work, although done for the business, is only accessory to it.
Enterprise	The person is an employee if the employer controls the activities of the person, is in a position to reduce the risk of loss, benefits from the activities of the person, and bears the true cost of a product or service.

Recruitment

The pre-employment relationship is governed by laws designed to prevent discrimination in employment relationships. The Ontario Human Rights Code (parallel legislation exists in all jurisdictions, including federally) prohibits businesses from publishing an advertisement that expresses a limitation, specification, or preference as to race, colour, ancestry, place of birth or origin, political belief, religion, marital status, physical or mental disability, gender, sexual orientation, or age (**prohibited grounds**) unless such limitation, specification, or preference is based on a **bona fide occupational requirement** (something imposed in good faith and with the sincere belief that it was imposed in the interests of adequate performance on the job).¹⁷²

¹⁷² *Human Rights Code*, R.S.O. 1990, c. H. 19, s. 23 (Ont.).

Care must also be taken on application forms and during interviews not to ask questions that relate directly or indirectly to the prohibited grounds.

During Employment

Employees owe a number of obligations to their employees. The concept of **vicarious liability** has already been covered. Two other important obligations are **supervision** and those imposed by **statutory protection**.

Supervision

The risk of vicarious liability and other workplace hazards imposes a responsibility to supervise employees. In the absence of direct supervision, which is not always possible, employers can use employment policy manuals, performance reviews, promotion and other rewards, and a progressive discipline system to direct and control the behaviours of employees. The legal implications for each of these mechanisms are discussed in Figure 5-50.

Figure 5-50: Supervision Mechanisms

Mechanism	Legal Ramifications
Employment policy manuals	Ensures employees know what conduct is expected of them in the course of their employment.
Performance reviews	Use of a standard written evaluation will <ul style="list-style-type: none"> ensure all employees are treated the same identify and correct workplace problems early provide a written record in case the employment relationship breaks down. The form should provide space for employees to respond to the contents of the review and to sign the form.
Rewards	It is also important to avoid discrimination on prohibited grounds when promoting employees or providing other rewards.
Progressive discipline program	Is a means to correct inadequate or inappropriate behaviour, starting with a verbal or written warning, progressing through suspensions of increasing length, and finally leading to dismissal. May protect against claims of unjust dismissal by an employee.

Statutory Protection

There are also a variety of statutes that are designed to protect employees. Most of the legislation falls under provincial jurisdiction, although there are sometimes federal equivalents. A broad summary of the most important statutes is found in Figure 5-51.

Figure 5-51: Labour Laws

Statute	Key Provisions
Employment Standards Act ¹⁷³	Establishes minimum requirements for holidays, minimum wage, work hours, overtime, rest days and leaves, and vacation time and pay. Some jobs may be exempted from many of these standards.
Human Rights Code	Prohibits direct discrimination (rule or practice that treats one person differently from another) and indirect discrimination (seemingly neutral practices that are discriminatory in their impact) on prohibited grounds (see Recruitment in previous section). Imposes a duty to accommodate , to make reasonable adaptations to the workplace to meet the needs of an employee who would otherwise not be able to work there. Prohibits harassment and sexual harassment (unwelcome or objectionable conduct).
Occupational Health and Safety Act ¹⁷⁴	Obligates employer to provide information, training, supervision, and instruction on all health and safety matters. Gives employees right to refuse to work in unsafe conditions.
Employment Insurance ¹⁷⁵	Requires mandatory contributions by employers and employees to a compensation fund for unemployed workers who meet certain criteria.
Workers' Compensation ¹⁷⁶	Takes away employees' ability to sue employer in event of injuries. Provides benefits, funded by compulsory employer contributions, to cover partial disability, total incapacity, or death benefits.
Pay Equity ¹⁷⁷	Requires equal pay for work of equal value for women compared to men. Value is based on skills, effort, responsibility, and working conditions. In Ontario, applies to public sector and private sector employers with more than 10 employees.
Personal Information and Electronic Documents Act (PIPEDA) ¹⁷⁸	Places restrictions on how employers collect, use, disclose, retain, and safeguard personal information about employees. Requires the appointment of a personal information supervisor. Places limitations on use of surveillance.
Various statutes regarding unionization	Safeguard right of employees to join trade unions. Regulate a union's certification as the legal bargaining agent. Regulate collective bargaining. Provide dispute-resolution processes, including grievance and arbitration.

¹⁷³ *Employment Standards Act*, S.O. 2000, c. 41 (Ont.).

¹⁷⁴ *Occupational Health and Safety Act*, R.S.O. 1990 c. O.1 (Ont.).

¹⁷⁵ *Employment Insurance Act*, S.C. 1996, c. 23 E.5.6. (Can.).

¹⁷⁶ *Workplace Safety and Insurance Act*, S.O. 1997, c. 16.(Ont.).

¹⁷⁷ *Pay Equity Act*, R.S.O., c. P-7 (Ont.).

¹⁷⁸ *Personal Information and Electronic Documents Act*, S.C. 2000, c. 4. (Can.).

Termination and Post-Employment

Employees may be terminated for cause and without cause. Employers are not required to give notice when terminating for cause. Acts that may provide cause include:

- Absenteeism and regular lateness;
- Substance abuse, although there is a duty to accommodate this illness;
- Incompetence – employee lacks basic skills or qualifications;
- Disobedience – repeated and deliberate defiance of supervisor;
- Dishonesty if it gives rise to a breakdown of the employment relationship; and
- Conflicts of interest – actions of employee conflict with the employer's best interests (e.g., employee provided confidential information to a competitor).

Employers are required to give notice when terminating without cause. The *Employment Standards Act*¹⁷⁹ includes statutory requirements as to the amount of notice. The courts also look at common law factors, including:

- Employee's age,
- Nature of position held,
- Length of service,
- Salary level of employee, and
- Employee's likelihood of securing alternate employment.

There is an upper limit of 24 months, even for senior executives.

Wrongful dismissal arises when an employee has been dismissed for cause and the employee claims there was no just cause or when an employee receives notice of dismissal but claims it was inadequate. An employee has a **duty to mitigate**, to take reasonable steps to minimize losses by seeking reinstatement or new employment. **Constructive dismissal** occurs when an employer fundamentally changes the nature of a person's job without the employee's consent by reducing salary/benefits, altering job status or responsibility, or changing geographical location. **Wrongful resignation** occurs when an employee fails to give the employer reasonable notice. This period is not necessarily the same as the period that an employer would be required to give for dismissal.

¹⁷⁹ *Employment Standards Act*, S.O. 2000, c. E. 14, (Ont.).

SECTION 5-6: COMPETITION

Governments intervene in the marketplace to ensure an efficient market economy that is characterized by free competition. In particular, the *Competition Act*¹⁸⁰ deals with the following anti-competitive practices: conspiracies, monopolizing, and mergers.

Conspiracies

The Act prohibits **cartels** (called trusts in the U.S., hence the expression “anti-trust law”) and any **conspiracy** by two or more persons to unduly lessen competition. To determine whether an agreement has seriously reduced competition, the courts must first determine the relevant market in terms of product and geographic area and then decide whether the accused parties had a large enough market share to injure the competition.

Because it is difficult to prove that there was an agreement to lessen competition, the existence of such an agreement is often inferred from tactics used. Methods of reducing or eliminating competition include **parallel pricing** (adopting similar pricing strategies), **setting quotas** (limiting production), **market sharing** (agreeing to divide up the market by territory), and **product specialization** (agreeing to each make/sell different products).

Another specific prohibited offence is **bid rigging**, where an agreement is made not to submit a bid, or an agreement is made in advance regarding what bids will be submitted in response to a call for bids or tenders.

Monopolizing

The Act also prohibits certain types of conduct by a monopoly or very powerful, dominant firm that are contrary to the public interest. In particular, it bans four types of pricing practices, as set out in Figure 5-52.

¹⁸⁰ *Competition Act*, R.S.C. 1985, c. C-34, (Can.)

Figure 5-52: Illegal Pricing Practices

Practice	Description
Discriminatory pricing	A seller makes it a practice to knowingly discriminate between purchasers in terms of prices.
Regional price discrimination	A seller charges lower prices in one region than elsewhere with a view to eliminating competition.
Predatory pricing	A seller temporarily reduces prices to an unreasonably low level with the intent of driving away competitors
Resale price maintenance	A supplier of goods attempts to control their retail price.

Other practices related to distribution identified in Figure 5-53 are not illegal but are subject to review. The tribunal may order the practice to be stopped or modified.

Figure 5-53: Reviewable Distribution Practices

Practice	Supplier makes it a condition that the buyer:
Exclusive dealing	Deal only or primarily in the supplier's products.
Tiered selling	Also deal in other products of the supplier.
Market restriction	Sell the product in a prescribed area only.

Abuses of dominant position are also reviewable; these include buying up products to prevent price drops, pre-emption of scarce facilities or resources, and requiring a supplier to either refrain from selling to a competitor or to sell only to certain customers.

Mergers

The tribunal can prevent a merger that it concludes will likely prevent or significantly lessen competition in Canada. There are also pre-notification requirements for proposed mergers of firms whose combined revenues exceed \$400 million per year or whose combined assets exceed \$35 million.

SECTION 5-7: ENVIRONMENTAL PROTECTION

Protection of the environment is the shared responsibility of the federal and provincial/territorial governments. Although municipal governments also play a significant role in environmental protection by passing by-laws related to zoning, garbage disposal, and water use, these notes focus on federal and provincial statutes.

Historically, environmental concerns were dealt with under tort law. Canada now takes a **stakeholder approach**, which considers the broadest community of interested persons rather than the narrow rights of people harmed by a specific action.

Federal Legislation

The *Canadian Environmental Protection Act* (CEPA) is the most important federal environmental protection statute.¹⁸¹ It has four guiding principles. The focus is on **prevention** of harm rather than remediation. Under the **precaution** principle, “where serious damage may occur, lack of full scientific certainty shall not be used to postpone cost-effective measures to prevent environmental degradation.” The goal is **sustainable development**, which means “outcomes should meet the needs of the present generation without compromising the ability of future generations to meet their own needs.” Finally, the principle of **polluter pays** places the obligation on a polluter to pay for environmental damage resulting from a violation of environmental legislation.”¹⁸²

CEPA applies to all elements of the environment, including air, land, water, atmospheric layers, organic and inorganic matter, and living organisms. Separate sections of the Act deal with toxic substances, hazardous wastes, nutrients, international air pollution, and ocean dumping. The Courts have the authority to require a polluter to stop polluting, clean up a polluted site, or pay for the cost of an environmental cleanup by the government. A fine of up to \$1 million per day may be assessed while the offence continues, and prison terms of up to three years may be given. Corporate directors and officers can be held personally liable.

Other federal statutes dealing with environmental protection are shown in Figure 5-54.

Figure 5-54: Federal Environmental Legislation

Act	Coverage
<i>Canadian Environmental Assessment Act</i> ¹⁸³	Regulates the requirement for and conduct of environmental assessments undertaken to predict the impact on the environment of a particular activity or initiative before it is executed.
<i>Transportation of Dangerous Goods Act</i> ¹⁸⁴	Deals with safety in the movement of hazardous materials.
<i>Canada Shipping Act</i> ¹⁸⁵	Sets emission standards for ocean-going vessels.
<i>Fisheries Act</i> ¹⁸⁶	Regulates marine pollution.

¹⁸¹ *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33 (Can.).

¹⁸² Willes and Willes, pp. 671-672.

¹⁸³ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (Can.). Similar statutes exist in all provinces.

¹⁸⁴ *Transportation of Dangerous Goods Act*, S.C. 1992, c. 34 (Can.).

¹⁸⁵ *Canada Shipping Act*, R.S.C. 1985, c S-9 (Can.).

Provincial Legislation

All provinces have a general environmental protection law. Under Ontario's *Environmental Protection Act*,¹⁸⁷ which is overseen by the Ministry of the Environment, liability for environmental offences generally arises from one of four categories of activity, as shown in Figure 5-55.¹⁸⁸

Figure 5-55: Environmental Protection Act

Offences	Description
Substantive	Pollution and improper waste disposal that is contrary to the Act or done without a required licence or permit.
Reporting	Failure to notify government that pollution has been released into the environment.
Information	Failure to provide accurate and timely information to government inspectors and other officials.
Regulatory	Failure to obey government orders, directives, certificates, and other mandatory requirements.

Each of the provinces also has an assortment of other laws covering more specific environmental matters. For instance, in Ontario, other provincial environmental laws include those related to air pollution,¹⁸⁹ water conservation and pollution,¹⁹⁰ pesticides,¹⁹¹ and environmental assessments.¹⁹²

Corporate Liability

Ontario's Environmental Protection Act expands the basis for corporate liability to anything that is done by someone who is an officer, official, employee, or agent of a corporation so long as the person is acting within the course of his or her employment.¹⁹³

Most environmental offences are based on **strict liability**. This means that while responsibility is triggered by a prohibited act, the offender can avoid liability by proving that it acted carefully and with due diligence. Whether a corporation has exercised due diligence depends on whether

¹⁸⁶ *Fisheries Act*, R.S.C. 1985, c F-14 (Can.).

¹⁸⁷ *Environmental Protection Act*, R.S.O. 1990, c. E.19 (Ont.).

¹⁸⁸ McInnes et al., p. 632.

¹⁸⁹ *Environmental Protection Act*, R.S.O. 1990, c. E.19 (Ont.).

¹⁹⁰ *Water Resources Act*, R.S.O. 1990, c. O. 40 (Ont.).

¹⁹¹ *Pesticides Act*, R.S.O. 1990, c. P.11 (Ont.).

¹⁹² *Environmental Assessment Act*, R.S.O. 1990, c. E. 18 (Ont.).

¹⁹³ *Environmental Protection Act*, R.S.O. 1990, c. E.19 (Ont.).

a person who is the **directing mind** of the corporation acted reasonably under the circumstances.

Furthermore, Ontario’s *Environmental Protection Act* imposes a duty of due diligence on every director or officer of a corporation “to take all reasonable care to prevent a corporation from...discharging or causing or permitting the discharge of a contaminant,...failing to notify the Minister of [such an event]...[or] failing to install, maintain, operate, replace or alter any equipment or other thing [required by law].”¹⁹⁴

SECTION 5-8: INTERNATIONAL BUSINESS LAW

The laws that impact a Canadian business that engages in the export and import of goods fall roughly into two categories: 1) laws that control or facilitate trade and 2) laws that govern international contracts of sale. Of course, a Canadian business that has operations in foreign countries is also required to follow the laws of those countries.

Laws to Control or Facilitate Trade

A sampling of Canada’s federal statutes that regulate imports and exports is found in Figure 5-56.

Figure 5-56: Exports and Imports

Statute	Purpose
Customs Act ¹⁹⁵	Regulates procedures for imports and rules for collection of custom duties.
Customs Tariff Act ¹⁹⁶	Regulates duties imposed on imports.
Special Import Measures Act ¹⁹⁷	Prohibits dumping (selling goods abroad at lower prices than those in the country of origin) of foreign goods into Canada.
Export and Import Permits Act ¹⁹⁸	Controls imports from countries with extremely low production and labour costs. Controls exports, which are, by and large, encouraged. Assistance is available through the Canadian International Development Agency (CIDA) and the Department of External Affairs.

¹⁹⁴*Environmental Protection Act*, R.S.O. 1990, c. E. 194 (Ont.).

¹⁹⁵*Customs Act*, R.S.C. 1985 (2nd Supp.), c. 1., as amended (Can.).

¹⁹⁶*Customs Tariff Act*, S.C. 1997, c. 35, as amended (Can.).

¹⁹⁷*Special Import Measures Act*, R.S.C. 1985, c. 5.15, as amended (Can.).

International trade is also regulated by **international agreements**, where signing nations agree to limit their controls and duties on goods. For Canada, these include the World Trade Organization (WTO), which provides a forum for negotiating trade rules and a mechanism for resolving disputes, and the North American Free Trade Agreement (NAFTA), which includes a phased-in reduction and elimination of tariffs among Canada, the United States, and Mexico.

International Contracts of Sale

An export sale requires four documents, each of which plays a distinct role in the sale transaction:

1. **Contract of Sale**

- a. Trade terms and terminology must have the same meaning to both parties, so reference is often made to published interpretations of international trade terms.
- b. There should be a reference to the governing law.
- c. The contract is very detailed as to quantity, quality, price, shipping, etc.
- d. There is usually an arbitration clause to resolve disputes.

2. **Bill of Lading** – This is a contract between the seller and the carrier of goods.

3. **Insurance** – This is required to protect against the hazards associated with shipment of goods.

4. **Commercial Invoice** – This is usually required by the buyer's customs office.

STUDY QUESTIONS FOR PART 5: BUSINESS RELATIONSHIPS

1. Which of these would **not** be covered under the *Sale of Goods Act*?
 - a. Sale of car, paid for by credit card.
 - b. Sale of crops, paid for by cheque.
 - c. Sale of services, paid for by cash.
 - d. All of the above are covered.
2. In general, under the *Sale of Goods Act*, a purchaser becomes responsible for risk of loss or damage to goods he has purchased when:
 - a. The purchaser makes the contract with the vendor, even if the vendor still has something to do to put the goods into a deliverable state.
 - b. The purchaser notifies the vendor he is ready to receive delivery.
 - c. The purchaser receives delivery.
 - d. Passing of property has occurred.
3. This specific remedy under the *Sale of Goods Act* allows a seller to receive full payment if a buyer refuses to take delivery, even though title has passed:
 - a. Liquidated damages
 - b. Specific performance
 - c. Action for the price
 - d. Lien
4. Misleading advertising and other representations of sellers are:
 - a. Prohibited by the federal *Competition Act*.
 - b. Prohibited by Ontario's *Consumer Protection Act*.
 - c. Prohibited by the federal *Competition Act* and Ontario's *Consumer Protection Act*.
 - d. Not prohibited—it is a case of *caveat emptor* (buyer beware).
5. This Act provides general rules related to identifying products, stating the quantity, and using standardized sizes:
 - a. *Consumer Packaging and Labelling Act*
 - b. *Textile Labelling Act*
 - c. *Hazardous Products Act*
 - d. *Food and Drugs Act*
6. When the bank provides services like financial advice to your business, it is required to:
 - a. Provide account information and maintain secrecy of your affairs.
 - b. Maintain secrecy of your affairs and provide safeguards for electronic communications.
 - c. Provide a duty of care and skill and disclose potential conflicts of interest.
 - d. All of the above.

7. Which of these is a distinguishing feature of a negotiable instrument?
 - a. Notice of any assignment has to be given to the original promisor.
 - b. An innocent party who acquires possession of a negotiable instrument has the right to collect on it, even when original contractual obligations have not been met.
 - c. A holder may sue only if all remaining parties join in the suit.
 - d. None of the above.

8. This type of security interest gives a creditor the right to sell all of the debtor's assets:
 - a. Chattel mortgage
 - b. Conditional sale
 - c. General security agreement
 - d. All of the above

9. Which of these persons is bankrupt?
 - a. Owes more than \$1,000 and cannot meet obligations as they become due.
 - b. Owes more than \$1,000 and has debts which exceed the realizable value of his or her assets.
 - c. Owes more than \$1,000 and has performed any of ten specific acts within the preceding six months.
 - d. Owes more than \$1,000, has performed any of ten specific acts, and has had a petition filed with the courts against him or her by creditors.

10. When bankruptcy occurs, which of these has first priority?
 - a. Secured creditors
 - b. Preferred creditors
 - c. General unsecured creditors
 - d. Employees owed wages

11. Which of these is **not** a prohibited grounds of discrimination?
 - a. Race
 - b. Political belief
 - c. Sexual orientation
 - d. All of the above are prohibited grounds

12. Which of these may protect an employer against claims by an employee of unjust dismissal?
 - a. Employment policy manuals
 - b. Performance review
 - c. Progressive discipline program
 - d. Both b and c

13. This labour law obligates employers to provide information, training, and instruction, as well as gives employees a right to refuse unsafe work:
 - a. *Employment Standards Act*
 - b. *Occupational Health and Safety Act*
 - c. *Employment Insurance Act*
 - d. *Workers Compensation Act*

14. An employer makes significant changes to your job status or responsibility without your consent. This constitutes:
- Wrongful dismissal
 - Constructive dismissal
 - Insufficient notice
 - None of the above—making such changes is an employer's prerogative
15. Under the *Competition Act*, this is a reviewable abuse of dominant position:
- Discriminatory pricing and regional pricing
 - Conspiracy by two or more persons to unduly lessen competition
 - Buying up products to prevent price drops
 - All of the above
16. Which of these is **not** one of the principles of the Canadian *Environmental Protection Act*?
- Remediation of harm
 - Precaution
 - Sustainable development
 - Polluter pays
17. This Act prohibits dumping of foreign goods into Canada:
- Customs Act*
 - Customs Tariff Act*
 - Special Import Measures Act*
 - Export and Import Permits Act*

ANSWERS FOR PART 5: BUSINESS RELATIONSHIPS

1. C. Services are not covered, even when the payment is money. Basically, three conditions must be met: a **sale of goods for money**.
2. D. Passing of property occurs when ownership or title in goods is transferred from the buyer to the seller. At this point, the purchaser assumes risk. The exact point at which property passes depends on five different rules. A is not true since passing of property is affected by the vendor's need to still do something to get the item ready.
3. C. An action for the price gives the seller its full price in the event the buyer refuses to take delivery, even though title has passed to the buyer.
4. C. Both the federal and provincial acts have relevant provisions that prohibit misleading representations or false representations to the consumer.
5. A. The *Consumer Packaging and Labelling Act* provides general rules, such as identifying products, stating the quantity, and using standardized package sizes.
6. C. These two duties are unique to the fiduciary relationship that occurs when the bank provides services like financial advice. A are the implied duties of the bank for services in general. B are your duties to the bank.
7. B. This arises because of the fact that, under law, the assignee may sometimes acquire a better right to sue on the instrument than its predecessor (assignor) had. Without such a provision, it would be difficult to persuade commercial parties to accept negotiable instruments. The opposite of A and C are true.
8. C. A general security agreement covers all of the debtor's assets, including those acquired after the agreement was put in place. A covers only specific asset(s) given as collateral, while B covers accounts receivable.
9. D. The other option for describing a person who is bankrupt is a person who owes more than \$1,000, has performed ten specified acts of bankruptcy within six months, and has made a voluntary assignment in bankruptcy.
10. A. Secured creditors have first priority. Preferred come next (of which wages and taxes are a subset), and then general unsecured.
11. D. All of these are prohibited grounds.
12. D. Together, B would show that an effort was made to identify and correct workplace problems early, and C would show that termination was a last resort.
13. B. The *Occupational Health and Safety Act* obligates employers to provide information, training, and instruction, as well as giving employees a right to refuse unsafe work.
14. B. Constructive dismissal occurs when an employer makes significant changes to your job status or responsibility without your consent. It amounts to wrongful dismissal.

15. C. Under the *Competition Act*, buying up products to prevent price drops is a reviewable abuse of dominant position. A includes illegal pricing tactics. B is also prohibited.
16. A. The first principle of the *Canadian Environmental Protection Act* is prevention of harm, not remediation.
17. C. The *Special Import Measures Act* prohibits dumping of foreign goods into Canada.

PART 6: PROPERTY RIGHTS

In law, the term *property* actually refers to a person's rights in relation to something other than the thing itself.¹⁹⁹ The acquisition and use of real property (immoveable property like land and buildings) and personal property (tangible moveable property and intangible things like copyrights) is a key part of business decisions and operations.

The last part of these notes will begin by discussing real property, including mortgages and leases. It will then cover personal property, including contracts of bailment (where possession of property is temporarily given to another party) and insurance against loss of or damage to property. The final topic is an important sub-category of personal property: intellectual property.

SECTION 6-1: REAL PROPERTY

Estates in Land

Real property includes land and anything attached to land, such as fences and buildings. The most significant interests in land are called **estates**. An **estate** is an exclusive right to possess a property for a period of time. The extent of your bundle of rights with respect to real property is dependent on the type of estate or interest you hold. The most extensive rights are acquired under **fee simple**, as shown in Figure 6-57.

Figure 6-57: Fee Simple Estate

Right	Restriction
Possess and use	Subject to municipal bylaws.
Exclude others	Subject to legislation that permits certain government officials to enter onto property.
Sell/transfer all or part	Subject to legislation setting out rules as to how a transfer becomes effective and subject to the <i>Planning Act</i> ²⁰⁰ regulations for subdivision of land.
Lease	Subject to the <i>Planning Act</i> and regulation of commercial and residential tenancies.
Mortgage	Subject to legislation.
Give/bequeath	Subject to the <i>Succession Law Reform Act</i> . ²⁰¹

¹⁹⁹ Yates, p. 202.

²⁰⁰ *Planning Act*, R. S. O. 1990, c. P.13 (Ont.).

Under a **life estate**, the holder is entitled to exclusive possession of a property for her lifetime. However, a life tenant cannot commit acts of **waste** (change the property in a way that significantly reduces its value). On the death of the life tenant, the property **reverts** back to the person who holds the fee simple unless the latter person has transferred the reversionary interest to a third party (called a **remainder**). As well, the life tenant cannot bequeath the property since on her death, the property reverts to the person who bestowed the life estate. Life estates are often used in family situations but are rare in business situations.

The holder of a **leasehold** estate has exclusive rights to a property for a specified period of time.

Shared Ownership

Title can be held by more than one person as either **joint tenants** or **tenants in common**. The differences are explained below.

1. **Joint tenancy or joint ownership** – Two or more people have an equal undivided interest in the property with the right of survivorship. This means that a joint tenant has no ability to bequeath his ownership interest at death as the surviving joint tenant automatically becomes the sole owner. Most married couples hold title as joint tenants. A joint tenant can avoid the right of survivorship by **severing** the joint tenancy by acting in a way inconsistent with joint ownership, i.e., selling his interest to a third party without notice to the other joint tenant or by **partition**, where there is a division of either the property or its sale proceeds. The joint tenancy is also severed if one of the parties becomes bankrupt or murders the other.
2. **Tenancy in common or co-ownership** – Two or more people have undivided interests equally or as specified by percentages on the deed. When one owner dies, her interests pass to her estate and are bequeathed in accordance with the terms of her Will or, if there is no Will, in accordance with the provisions of the *Succession Law Reform Act*.

Condominiums

A **condominium** owner has both individual ownership and shared ownership. The owner obtains title to a specific apartment or unit (more specifically a slice of air space above the real property). He or she becomes a tenant in common of all common areas such as hallways, walkways, and recreational areas. The condominium owner also obtains a third set of rights, the right to vote on matters concerning the condominium corporation, such as the creation of bylaws and the election of directors. A monthly fee is also paid to the condominium corporation for maintenance of common elements.

²⁰¹ *Succession Law Reform Act*, R.S.O. 1990, c.S.26 (Ont.).

Cooperatives

In a cooperative, the entire building is owned by a group or corporation. An individual buys shares in the corporation, and takes an apartment or unit under a long-term lease.

Interests Less than Estates

None of these interests gives the right of exclusive possession as do the freehold and leasehold estates discussed in the previous section.

Easements

An easement is the right to enter land owned by another for a special purpose, e.g., a right of way to pass back and forth over the land of another to get to and from your own land. An easement can be created by:

1. **Express agreement**
2. **Implied grant** – There is a right of necessity implied if the front half is severed, and no provision is made to reserve a right-away to get to the road at the front; there is an implied right of mutual support for owners of semi-detached homes.
3. **Prescription** – An adjoining landowner continuously exercises a right for 20 years without interruption or consent; the user must prove the owner knew he was using it, had the right and power to stop him, and refrained from doing so.
4. **Statute** – Although not strictly an easement, since the party benefiting from the easement does not own property, statutes give utility companies the right to run wires and cables either underground or overhead on poles.

Restrictive Covenants

A **restrictive covenant** is a promise to refrain from certain conduct on, or use of, land. It runs with the land, i.e., it passes to the next owner. It is commonly used in new developments to put restrictions on the type of homes to be built, use of siding/brick, paving of driveways, minimum square footage, size of satellite dishes, etc.

Mineral Leases and Profit à Prendre

A **mineral lease** permits a person to extract and retain something of value (e.g., gold or oil) from another's property. Since the 1880s, the government has reserved mineral rights when making grants of land. Therefore, most mineral leases are made by the government, even though someone owns the fee simple to the property. **Profit à prendre** is similar but gives the right to take something of value from a piece of land, such as timber or berries.

Leases

A **lease**, or **tenancy**, is a contract for the transfer of use and possession of land from the landlord to the tenant. The two key characteristics of a lease are that the interest in land is for a definite period of time and the tenant is entitled to exclusive possession. In other words, the tenant controls the land and has the right to exclude all others, including the owner (subject to the right to inspect with notice as set out in legislation and/or the contract), for a fixed period.

Figure 6-58 describes four types of tenancies. It is sometimes said that the third and fourth types are not really leases because there is no set term (in the first case) or there is no longer any lease at all (in the second case).

Figure 6-58: Types of Tenancies

Type of tenancy	Duration of tenancy
Fixed-term tenancy	The lease is set for a specified time period, with no renewal rights or options.
Periodic tenancy	The lease is for a set period of time but renews automatically at the end of the term until one of the parties provides notice of termination.
Tenancy at will	There is no set term, and either party can terminate the lease at any time.
Tenancy at sufferance	The tenant continues to possess the premises at the end of a fixed-term tenancy without the landlord's permission.

A lease of three years or longer duration must be in writing to be enforceable, by virtue of the *Statute of Frauds*.²⁰²

Covenants and their Breach

A commercial lease normally provides certain covenants or promises, as set out in Figure 6-59.

The landlord has access to five remedies for breach of a lease contract:

1. Damages (for any breach of covenant other than payment of rent)
2. Recovery of rent
3. Eviction
4. **Distress** (right to seize assets of the tenant found on the premises and sell them for arrears of rent)
5. **Injunction** (right to order the tenant to stop a prohibited use).

²⁰² *Statute of Frauds*, R.S.O. 1990, c. S.19, ss1-3 (Ont.).

The tenant has three remedies: damages, injunction, and termination of the lease.

Figure 6-59: Standard Covenants in Commercial Leases

Rent	Tenant covenants to pay rent.
Quiet enjoyment	Tenant obtains an assurance against the consequences of landlord's title being defective and an assurance that landlord will not interfere (or permit anyone obtaining an interest in the land from it) with tenant's enjoyment of the premises.
Assignment and subletting	<p>Either tenant or landlord can assign their contractual rights to a third party. The original tenant or landlord can still be liable under the lease if assignee fails to perform obligations under the lease unless the other party agreed to release the assignor from its obligations.</p> <p>Tenant may also sublease leased premises to a third party, in which case she remains a tenant under the lease with original landlord but is also the landlord to the third party.</p> <p>A lease may contain a term prohibiting assignments and/or subleases or requiring landlord's consent. Ontario law implies a term that such consent cannot be unreasonably withheld.</p>
Restriction on use of premises	<p>Landlord will often require an express covenant that restricts use of premises to particular trades.</p> <p>Tenant, in turn, may obtain a covenant that landlord will not rent adjoining premises to a competing business.</p>
Fitness for occupancy	Courts have found that the course of dealings between parties may create an implied covenant that premises will be fit for tenant's purpose if disclosed to landlord.
Repairs	<p>Landlord is not liable to make repairs unless there is an express covenant, but landlord may be liable to repair structural defects that interfere with quiet enjoyment and is liable for maintenance of halls, stairways, and elevators.</p> <p>Tenant is not liable to make repairs, but s/he must not cause excessive wear or commit waste.</p>
Insurance	In absence of an express provision, neither landlord nor tenant must insure premises; however, a prudent landlord will usually insure the building to protect its investment.
Fixtures	It is wise to include an express agreement about which fixtures (personal property attached to land or building) remain tenant's property.

Termination of a Lease

A lease may be terminated by one of the following:

1. **Surrender** – The tenant vacates the premises at the expiration of the lease (or during the lease, by agreement with the landlord).
2. **Forfeiture** – The landlord evicts the tenant.

3. **Notice to quit** – A periodic tenancy is ended by either the landlord or the tenant serving a **notice to quit** upon the other party. The length of notice required is normally set by provincial legislation, although the parties may alter the period by an express term in the lease.
4. **Renewal** – A lease for a term certain often provides for a renewal at the option of the tenant.

Transfer of Interests in Land

A person may dispose of interests in land during his or her lifetime by transferring them to another in a **deed of conveyance (deed)**. On the death of a person, land will pass either under the Will or according to the statutory rules of inheritance. There could also be a compulsory transfer of land (**expropriation**) to the government for public purpose, for which the government must pay appropriate compensation.

A person may acquire title to land by **adverse possession**. To do so, he must stay in exclusive possession of the land, using it as an owner and ignoring the claims of other persons including the true owner. Possession must be open, notorious, and continuous. An example of adverse possession would be if a neighbour built a fence on your property or had a portion of his garage on your property. Adverse possession is based on a wider principle, the **law of limitations**, whereby a person who has a right of action against another will lose that right if it is not pursued within a specified period of time. To prevent acquisitions by adverse possession, a property owner must interrupt the other's possession before the limitation period (10 years in Ontario, 20 years in other jurisdictions) elapses by ejecting the possessor, demanding and receiving rent, or receiving a signed acknowledgment that he is using the property with permission. Adverse possession is not possible in most land titles systems (see below).

Mortgages

The purchase of real property often requires financing. A **mortgage** is an interest in land that provides security for the repayment of that debt.

At common law, a mortgage is, in fact, a conveyance of an interest in land as security for a debt. If the debt is repaid as promised, the conveyance becomes void, and the interest in land reverts to the **mortgagor** (borrower). If the debt is not repaid, the land becomes the property of the mortgagee (bank), subject to the right of the mortgagor to redeem (the grace period the courts allow a defaulting mortgagor is known as the **equity of redemption**). Under the land titles system, mortgages (called **charges**) are not conveyances of the legal title but are liens upon the land. If the debt is not repaid, the mortgagee must start foreclosure proceedings to gain title to the land.

Normally, a mortgagor promises to repay the amount borrowed plus interest at specified times, to maintain adequate insurance on the land and buildings, to pay the taxes, and to keep the buildings in a proper state of repair. In turn, the mortgagee promises to discharge the mortgage upon payment in full and to allow the mortgagor quiet enjoyment of the land as long as it is in good standing. The mortgagee's remedies upon default are shown in Figure 6-60.

Figure 6-60: Remedies of Mortgagee

Remedy	Description
Sue	Like any creditor, a mortgagee can sue a mortgagor on the basis of the covenant to pay contained in the mortgage.
Possession	Mortgagee may take possession of property.
Foreclosure	Mortgagee may proceed with an action for foreclosure, whereby the court will end the right of mortgagor to redeem the property if it is not paid within a fixed time (generally six months from the date of the hearing).
Foreclosure and sue on the debt	Mortgagee may, after foreclosure, still sue on covenant to pay the debt as long as it is willing and able to re-convey property to mortgagee.
Sale by court	Mortgagee may request to have the property sold under the court's supervision, by tender or auction. If sale proceeds exceed principal, interest, and expenses of court action and sale, surplus is returned to mortgagor or to other secured creditors of property; if there is a deficiency, mortgagee may obtain judgment against mortgagor for that amount.
Sale of land by mortgagee under power of sale	Mortgagee may sell property without court action or supervision; the same rules apply concerning the proceeds as in a sale by the court.

A **second mortgagee** has rights (and remedies) similar to the first mortgagee, except that its interest is in the equity of redemption, not the legal title, and it ranks behind the first mortgagee in priority of payment

Recording of Interests in Land

Under the registry system, you must register a copy of a document creating an interest in land (or your interest will not be protected). A prospective purchaser will have his or her lawyer search title to the land in the registry office; based on that search, the lawyer will "certify title." Under the land titles system, (which covers parts of Ontario), the land titles office provides a document showing the state of the title and the purchaser is entitled to rely on that document.

SECTION 6-2: PERSONAL PROPERTY

Personal property can be divided into three main types:

1. **Chattels or goods** – tangible, moveable things such as cars and furniture.
2. **Choses in action** – intangible things (*chose* is the French word for *thing*) such as cheques, shares, and promissory notes.
3. **Intellectual property** – results of the creative process and the protection attached to those ideas through patents, copyrights, etc.

This section focuses on the first two types. Intellectual property is discussed in the next section.

Acquiring Personal Property Rights

Because chattels are moveable, they can easily change hands from one person to another. Therefore, an important question is who has the right to the goods. “Personal property rights are usually acquired through the intention of one or more people,”²⁰³ as is the case, for instance, when someone purchases the item or receives it as a gift. However, sometimes personal property is simply found; in that case, the finder may have a better claim to it than anyone else except the rightful owner who lost it. The order of priority of claims to found property is summarized below in Figure 6-61. At all times, the finder or the employer, depending on who has a second claim to the property as set out above, has the obligation to make reasonable efforts to locate the rightful owner of the property.

Figure 6-61: Finder’s Rights to Personal Property

	First Claim	Second Claim
Found on public property	Rightful owner	Finder
Found on public part of employer’s property by non-employee	Rightful owner	Finder
Found on public part of employer’s property by employee	Rightful owner	Employer
Found on private part of employer’s property by non-employee or employee	Rightful owner	Employer

Bailment

Many things can be done with personal property. For instance, goods can be sold, cheques can be negotiated, and contractual rights can be assigned. Goods can also be turned over to someone else temporarily. **Bailment** occurs when an owner of personal property temporarily

²⁰³McInnes et al., p. 401.

gives up possession of property with the expectation of getting it back. Leasing is a form of bailment, where the owner of a chattel permits another person to have temporary possession of it in return for payment of rent.

Duty of Bailee

Generally, the bailee’s primary obligation is to return the property, in good condition, to the bailor at the end of the arrangement. If the bailor proves that the goods were lost or damaged during a bailment, then the burden of proof shifts to the bailee to prove that he or she was not to blame. Despite the shift of the burden of proof, the bailee is not generally required to guarantee the safety of the bailor’s property. Liability arises from failure to take reasonable care. What constitutes reasonable care depends on the factors set out in Figure 6-62.

Figure 6-62: Bailor's Duty of Care

Type of Bailment	Low Duty	High Duty
Involuntary bailment (e.g., you forget your tools at a friend's house).		
Gratuitous bailment for benefit of bailor (e.g., you store a friend's tools at your house because he has no room).		
Gratuitous bailment for benefit of bailee (e.g., a friend borrows your tools to use on a home-construction project).		
Bailment for value (or mutual benefit) (e.g., a friend pays you to store her tools at your house).		

Other factors that affect the duty of care include standard business practices and customs, the nature and value of the property, how easily it can be damaged or stolen, and the bailee’s expertise. In addition to the duty of care imposed under tort law, responsibilities may be imposed pursuant to a contract.

There are also special types of bailment where reasonable care is dictated by statute. These are discussed below.

Specific Liabilities for Various Types of Bailees

Bailees for Storage and Safekeeping

There is a duty to take reasonable care of goods stored with them (e.g., warehouse storage, car parking lot where operator takes car keys). Unless the goods are fungible (replaceable with identical goods also in storage, such as grain), the bailee must return the exact goods stored. The contract may contain an express or implied authority to subcontract for storage of the goods

with another warehouse, with the nature of the goods being a determining factor. The terms of a contract may reduce liability.

Repairers

Repairers are bailees for value with a standard of care similar to that of a warehousing company and an obligation to do the repairs in a workmanlike manner and in the time promised.

Carriers

A **common carrier** (a business that specializes in transportation of goods) is really an insurer of the goods since it will be held liable regardless of fault unless it can prove that damage or loss occurred through an act of God, an inherent vice (latent defect or dangerous condition) in the goods, or default by the shipper (improper labelling or packing). A carrier may limit its liability by inserting an exemption clause in a bailment contract that limits liability to a set amount.

A **private carrier** (carries on some other business but occasionally transports goods) owes only the normal standard of care.

Hotelkeepers

A hotel or inn (a place of lodging that cannot choose its customers) has a duty to take reasonable care and, in some instances, acts as an insurer against theft or loss of its guests' goods. Provincial legislation enables a hotel to limit liability for loss or theft of goods except if the loss of theft occurs through a wilful act of an employee or through the hotel's refusal to accept a guest's goods for safekeeping.

Remedies of the Bailee

If the bailment is contractual, the bailee has the usual contractual remedies. For complete performance, the bailee is entitled to the contract price. Where performance is partially complete, the bailee can make a *quantum meruit* claim (a reasonable price for services) and may also be able to make a claim for lost profits.

If the bailee has performed its services and payment is due by the owner, common law and various statutes give some bailees (warehouses, repairers, common carriers, hotels, and boarding houses) a **right of lien**: the right to keep the goods until the owner is paid. If the owner doesn't pay, the bailee may eventually sell the goods after following certain provisions but must give any surplus monies to the bailor.

Insurance

Personal property rights are often fragile. Because personal property is moveable, it is often difficult to locate goods that have gone missing. As well, personal property is subject to damage either innocently or in a way that does not make it worthwhile to take action against the offending party under either tort or contract law. Therefore, property owners are wise to purchase **property insurance**, whereby, in exchange for a premium, an insurance company promises to pay money if property is lost, stolen, damaged, or destroyed.

A person cannot buy property insurance unless he or she has an **insurable interest**, that is, “if a person benefits from the existence of the property and would be worse off if it were damaged”.²⁰⁴ Property insurance should, of course, be purchased for real property (i.e., buildings) as well as personal property housed in those buildings and used elsewhere in the business.

All provinces have passed legislation to require certain mandatory terms in an insurance policy as well as to suggest terms that may be included at the option of the parties. Although insurance policies are based on the ordinary law of contracts, they have certain unique features:

1. An offer is made by the proposed insured in his application. Acceptance is made by the insurer upon issuing the policy, unless interim arrangements are agreed upon between the parties to effect their earlier coverage.
2. A policy of insurance ends upon the expiry of its term unless renewed specifically or in accordance with the intentions and past dealings of the parties. Thus, a mere renewal notice does not extend insurance contracts.
3. For reasons of public policy, claims arising out of criminal or tortious acts (except claims arising under negligence insurance) will generally not be enforced.
4. Ambiguous standard form provisions will be interpreted strictly against an insurer because it is the insurer who drafted the clauses in question.
5. An insured owes a duty of **utmost good faith** to provide full, true, and complete disclosure of all material facts affecting the risk, failing which the insurance contract is voidable by the insurer. Virtually all insurance policies contain strict notice provisions by which the insured must immediately notify the insurer in the event of a loss.
6. Where an insured is reimbursed for a claim by the insurance company, the insurer steps into the shoes of the insured (**subrogation**) and has the right to sue any third party.

In addition to insuring against the risk of property loss or damage, businesses usually insure against a variety of other business risks, as shown in Figure 6-63.

²⁰⁴McInnes et al., p. 416.

Figure 6-63: Other Types of Insurance for Businesses

Type of Insurance:	Protects against losses from:
Business interruption	Downtime due to loss or damage of facilities and equipment
Liability	Wrongs committed by the business against a third party
Hacker	Computer saboteurs
Key person	Death or incapacitation of an important member of the organization, e.g., president
Life, health, and disability insurance	Health problems of employees and their families
Fidelity bond	Theft by an employee of the business's assets or those of a client
Surety bond	Failure to perform obligations as promised (protects client)

Property insurance is an example of **first-party coverage** since it does not involve an outsider—if the insured suffers a loss that falls within the scope of the policy, she receives payment. In contrast, liability insurance is an example of **third-party coverage**, whereby the insurance company renders payment to a third party.

SECTION 6-3: INTELLECTUAL PROPERTY

The Nature of Intellectual Property

Intellectual property is the product of mental activity, i.e., ideas or inventions, of which individuality or originality is an essential feature.

Intellectual property is **non-exclusive**. Ideas cannot be possessed exclusively nor can a person prevent another from coming up with the same idea or a similar one. Ideas are also **non-rivalrous**. My possession and enjoyment of an idea does not diminish your ability to do the same.²⁰⁵

In both common law and statutes, Canada has sought to balance the moral rights that creators have to reap the rewards of their efforts with the social costs of protection and the inefficient use of resources resulting from restrictions placed by intellectual property rights.

The main types of intellectual property are copyrights, trademarks, patents, and industrial designs.

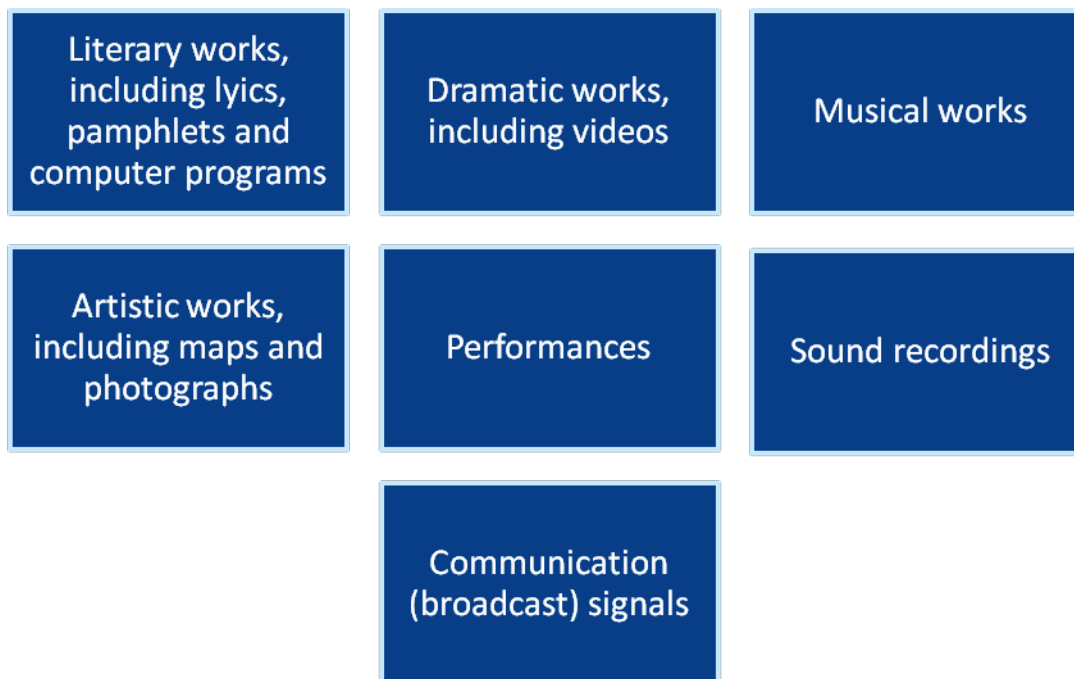
²⁰⁵McInnes et al., p. 425.

Copyrights

A **copyright** protects the manner in which ideas are expressed. Copyright law provides automatic protection as long as the ideas are original to the creator/author, the work is in a fixed medium (something tangible), and the author has some connection to Canada (the idea was created in Canada or created outside of Canada by a citizen or ordinary resident or by a citizen/resident of a jurisdiction with which Canada has a treaty). However, registration under the *Copyright Act*²⁰⁶ creates a presumption that copyright subsists in the work and that the person registered is the owner.

The forms of expression protected by copyright are shown in Figure 6-64. The *Copyright Act* provides the original creator with the sole right to produce or reproduce the work or a substantial part of it, the right to perform or deliver the work in public, and the right to publish an unpublished work. In addition to these and other more specific rights that can be assigned by the author or creator, there are **moral rights** that cannot be assigned (but can be waived), chiefly the right to the integrity of the work and the right to prevent it from distortion and misuse.

Figure 6-64: Forms of Expression Protected by Copyright



The general rule is that a copyright lasts until the end of the calendar year in which the author dies plus 50 years. After that, the work protected becomes part of the public domain.

²⁰⁶ *Copyright Act*, R.S.C. 1985, c. C.42 (Can.).

The *Copyright Act* provides for **fair use** of copyright works for the purpose of private study, research, criticism, review, or newspaper summary. There are other permitted usages such as public readings of reasonable extracts or performance of musical works by churches or schools for charitable purposes.

Work created in the course of employment is owned by the employer unless there is an express agreement to the contrary.

Trademarks

A **trademark** is a word, symbol, or design (or combination of these features) that is used to distinguish the wares or services of one business from those of others in the marketplace. They include ordinary marks (e.g., Nike “swoosh”), certification marks (e.g., CSA [Canadian Standards Association] approval on electrical appliances), and distinguishing guises (Coke bottle).

Trademarks are protected at common law through the **tort of passing off**—misrepresentation of goods, services, or a business so as to deceive the public into believing they are the goods, services, or business of another, thus causing damage to that other person.

Registration of trademarks under the *Trade-Marks Act*²⁰⁷ protects a business for 15 years plus indefinite renewals. Some of the advantages of registering a trademark are:

- Creates the presumption that the trademark is valid and distinctive and indeed owned by the owner.
- Secures an exclusive right to its use throughout Canada (versus the area where the owner does business and has established a reputation).
- Provides the right to register the trademark in other countries.
- Provides protection against other types of infringement besides passing off:
 - knock-offs (exact imitations);
 - marks that will be confusing to consumers because of their similarity to the trademark;
 - trademark depreciation, where someone uses the mark of another to depreciate that trademark’s goodwill; and
 - imports by a distributor who is not an authorized distributor.

²⁰⁷ *Trade-marks Act*, R.S.C. 1985, c. T.13 (Can.).

Patents

A **patent** is the right to stop others from making, using, or selling an invention or an improvement to an invention for a period of up to 20 years from the date of filing a patent application. Unlike a copyright, a patent does not exist automatically but must be granted by the appropriate government body. The proposed invention must be demonstrated to be patentable subject matter (e.g., product, composition of that product, apparatus used to make a product, or manufacturing process), novel, ingenious (or non-obvious), and useful.

Industrial Designs

Industrial designs are “features of shape, configuration, pattern, or ornament applied to a finished article to improve its aesthetic appeal.”²⁰⁸ Protection of industrial designs is dependent upon registration pursuant to the *Industrial Design Act*²⁰⁹ (five years with a renewal), although there may be some protection under common law as a trademark.

Remedies for Infringement of Intellectual Property Rights

In general, there are four remedies available for infringement, as shown in Figure 6-65.

Figure 6-65: Remedies for Infringement of Intellectual Property Rights

Remedy	Description
Damages	Applied in the same manner as under tort law.
Account for Profits	As an alternative to damages, requires a transfer of profits when infringer has been unjustly enriched.
Injunction	Restrains the defendant from further infringement.
Delivering up	Requires infringer to turn over the goods or to dispose of them.

Confidential Information

Confidential information is any information that is of commercial value, such as customer lists, trade secrets, and know-how. Confidential information is not classified as intellectual property because of a Supreme Court of Canada ruling that it is not property that can be the subject of theft under the Criminal Code.²¹⁰

²⁰⁸McInnes et al., p. 445.

²⁰⁹*Industrial Design Act*, R.S.C. 1985, c. I-89 (Can.).

²¹⁰R. v. Stewart, [1988] 1 S.C.R. 963.

However, the law does protect confidential information in four ways:

1. **Laws of licensing**
2. **Enforcement by the courts of protective covenants** that stipulate that a buyer of the information will not divulge it to anyone else.
3. **Enforcement by the courts of restrictive covenants** that restrain an employee from making use of an employer's confidential information.
4. **Imposition of fiduciary duties** upon employees, directors, officers, and partners that prevent them from misusing or divulging confidential information acquired in the course of their relationship to the employers, corporations, or co-partners.

STUDY QUESTIONS FOR PART 6: PROPERTY RIGHTS

1. A fee simple interest in real property gives the title holder the right to:
 - a. Exclusive possession of a property subject to municipal by-laws and specified entries by government officials.
 - b. Exclusive possession of a property for his or her lifetime.
 - c. Exclusive possession of a property for a specified period of time.
 - d. Both a and b.
2. This form of ownership involves two or more people having an equal undivided interest in the property with the right of survivorship:
 - a. Joint tenancy
 - b. Tenancy in common
 - c. Condominium
 - d. Cooperative
3. When it comes to repairs, which of the following is a standard covenant in a commercial lease?
 - a. The tenant is responsible for all repairs except for structural defects.
 - b. The tenant will make minor repairs; the landlord will make major repairs.
 - c. Neither party will make repairs; the tenant must not cause excessive wear or commit waste; and the landlord will maintain hallways and elevators.
 - d. The tenant must not cause excessive wear or commit waste; in return the landlord will make all reasonable repairs required to maintain the property.
4. The promise to refrain from certain conduct on, or use of, land is known as:
 - a. Easement
 - b. Adverse possession
 - c. Restrictive covenant
 - d. Expropriation
5. You find a laptop in the guest parking lot of your employer's property. If you cannot find the rightful owner of the laptop, the laptop will:
 - a. Belong to you as the finder because it was found on public property.
 - b. Belong to the employer because it was found on the public part of your employer's property.
 - c. Belong to you as the finder because it was found on the private part of the employer's property.
 - d. Belong to you no matter what because you found the laptop.
6. Your wallet is stolen from your hotel room while you are using the recreational facilities. The hotel is liable:
 - a. No matter what the situation is because it in effect acts as an insurer against theft of yours goods.
 - b. If the wallet was stolen by an employee.
 - c. If it refused to accept your wallet for safekeeping in the hotel vault.
 - d. Both b and c.

7. Which of these is **not** true about an insurance policy?
 - a. The application is the offer; the issuing of a policy is the acceptance.
 - b. A renewal notice automatically extends the contract.
 - c. Ambiguous clauses will be interpreted strictly against the insurer.
 - d. All of the above are true.

8. The manner in which ideas are expressed may be protected as a:
 - a. Copyright
 - b. Trademark
 - c. Patent
 - d. Industrial design

9. Under registration under the appropriate legislation, the longest-running protection is provided to registered:
 - a. Copyrights
 - b. Trademarks
 - c. Patents
 - d. The protection is the same for all intellectual property.

10. Confidential information is protected by:
 - a. Intellectual property law
 - b. Laws of licensing and imposition of fiduciary duties
 - c. Enforcement by the courts of restrictive covenants
 - d. Both b and c

11. This remedy for infringement of intellectual property rights may include requiring the infringer to dispose of the property:
 - a. Damages
 - b. Account for profits
 - c. Injunction
 - d. Delivering up

ANSWERS FOR PART 6: PROPERTY RIGHTS

1. A. Fee simple grants the most rights, including exclusive possession subject only to municipal by-laws and specified entries by government officials. B is a life tenancy. C is a leasehold estate.
2. A. Joint tenancy involves two or more people having an equal undivided interest in the property with the right of survivorship. This means that the survivor becomes the sole owner upon the death of the remaining joint tenant(s).
3. C. The standard repair covenant is that neither the landlord nor the tenant is liable to make repairs. However, the tenant must not cause excessive wear or commit waste. The landlord will maintain hallways and elevators. As well, the landlord may be liable to repair structural defects if they would interfere with the tenant's quiet enjoyment.
4. C. A restrictive covenant is a promise to refrain from certain conduct on, or use of the land, such as building a highrise. A refers to the right to enter land owned by another for a special purpose. Both B and C are ways to acquire land. B requires staying in exclusive, open, notorious, and continuous possession of another's land. C is used by the government to compel owners to sell their land to the government for some public purpose.
5. B. The applicable finder's rights in this situation are that the laptop will belong to your employer because a guest parking lot is public property, and you are an employee. If a non-employee found the laptop, and the rightful owner could not be found, the laptop would be his or hers to keep.
6. D. Hotelkeepers (who cannot choose their customers) have a duty to take reasonable care and, in some instances, act as insurers against theft or loss of guests' goods. Provincial legislation allows them to limit liability for loss of theft of customers' goods unless the theft or loss occurs through a willful act of an employee (B), or the hotel refused to accept a guest's goods for safekeeping (C).
7. B. An insurance policy ends upon the expiry of its term unless renewed specifically or in accordance with the intentions and past dealings of the parties. A mere renewal notice does not extend insurance contracts.
8. A. Copyrights are given for the manner in which ideas are expressed. Trademarks are words, symbols, or designs that distinguish your wares or services from those of another. Patents stop someone from making, using, or selling an invention or improvement thereto. Industrial designs are features of shape, configuration, pattern, or ornament applied to a finished article to improve aesthetic appeal.
9. B. Trademark registration protects a business for 15 years plus indefinite renewals. Copyrights run for 50 years after the end of the calendar year of the author's death. Patents last for up to 20 years from the date of filing a patent application.
10. D. Confidential information is not considered intellectual property, so A is not applicable. However, it is protected by licensing, imposition of fiduciary duties, and enforcement by courts of both protective covenants and restrictive covenants.

11. D. The remedy of delivering up requires the infringer to turn over the goods to the rightful owner or to dispose of them in accordance with specific instructions.