

## Summary - Chapter 1

### Summary

#### Becoming a sophisticated client

- Knowledgeable, up to date, and confident
- Understands the role of lawyer and of client

#### The role of the lawyer

- Client is decision maker
- Lawyer can help client make better business decisions
- Client makes many business decisions without consulting a lawyer (time, cost)
- Sophisticated client can find relevant legal information
- Sophisticated client knows when to retain a lawyer (e.g., criminal law)

#### How to find an appropriate lawyer

- Many sources of lawyers' names
- Initial consultation
- Importance of mutual trust

#### How lawyers bill their clients

- Fixed fee
- Time spent and hourly rate
- Contingency fee
- Disbursements must be reimbursed by client
- Retainer is a deposit

#### Legal aid

- Available for certain types of legal problems
- Client eligible if meets financial requirements

- Lawyer is an expert who provides legal advice
- Information provided to lawyer must be kept confidential

#### Should I hire a lawyer?

- Small businesses face many issues on which a lawyer can advise
- Even if client qualifies for legal aid, may have to pay some or all of legal costs
- Usually not available to owners of small businesses

#### How to complain about your lawyer

- Mediation may be available to resolve fee disputes
- Lawyer's bill can be reviewed by a court official
- Other complaints made to law society
- Investigation may be followed by a hearing
- Penalties range from reprimand to disbarment
- Process does not provide compensation to the client

#### Ethics

- Rules of professional conduct contain professional and ethical obligations of lawyers
- If rules broken, lawyer may be penalized
- There are many recent cases involving legal/ethical situations
- Sophisticated client will make a commitment to ethical behaviour
- May prepare a code of conduct for business
- Should be based on ethical values and principles
- May also adopt a best practice approach to social responsibility

## Summary - Chapter 2

### Summary

A workable definition of “law”

- Law is the body of rules made by government that can be enforced by courts or government agencies

#### Categories of law

- Substantive law governs behaviour
- Procedural law regulates enforcement processes
- Common law jurisdictions rely on principles established by judge-made laws (precedents)
- Rigidity of the common law triggered development of equity
- Statutes prevail over inconsistent case law—legislation of federal and provincial governments

#### Constitution of Canada

- Constitution is composed of statutes, conventions, and case law on constitutional issues
- Various statutes have constitutional status
  - *Constitution Act, 1867 (BNA Act)*
  - *Constitution Act, 1982* including the *Charter of Rights and Freedoms*
  - Statutes listed in the Schedule to the *Constitution Act, 1982*

#### *Constitution Act, 1867*

- Created the Dominion of Canada and established its structures
- Divides power between legislative, executive and judicial branches of government
- Legislative powers are set out largely in sections 91 and 92

- Public law comprises constitutional, criminal, and administrative law
- Private law involves one person suing another

#### Canada’s legal systems

- Civil law jurisdictions rely on principles found within a civil code
- First Nations claim inherent rights and treaty rights, and all Indigenous peoples claim rights to self-determination and self-government.
- Courts interpret and rule on constitutional issues

#### *Charter of Rights and Freedoms*

- Entrenches rights protecting individuals and others from government interference
- The Constitution is supreme, so all legislation must also be compliant with the *Charter*
- Applies to relationships with government
- Limited by sections 1, 32, and 33
- Guarantees rights and freedoms subject to justifiable, reasonable limits

#### Human rights legislation

- Federal—provides protection against discrimination by individuals and businesses that fall under federal jurisdiction and by *Indian bands*
- Provincial—addresses discriminatory practices by parties under provincial regulation
- Prohibits discrimination in specific areas upon prohibited grounds

## Summary - Chapter 3

### Summary

#### Alternative dispute resolution (ADR)

- Alternative dispute resolution is a recent trend to avoid costs and delays associated with litigation
- Advantages:
  - Control, timeliness, productivity, cost, privacy, good will, flexibility
- Disadvantages:
  - Unpredictable, no precedents set, cannot deal with complex legal problems
- To be successful, must be voluntary and must be a balance of power between the parties

- Courts are open to the public and the press, unless there is a matter of national security or a case involving children or sexual assault
- The burden of proof in a criminal prosecution is beyond a reasonable doubt; in civil litigation, it is on a balance of probabilities
- Provincial courts have jurisdiction over less serious criminal offences, small claims disputes, family issues (except divorce), and youth justice offences
- Superior courts have jurisdiction over serious criminal offences, civil disputes involving any amount of money, divorces, probate matters, and bankruptcy cases
- Trial judges make findings of fact and law, unless there is a jury, which would make findings of fact
- New specialized courts have been created to deal with societal change
- Provincial courts of appeal hear appeals from lower courts and make final decision on most matters
- An appeal is not a new trial; appeal court will consider questions of law, not questions of fact
- All but lower-level provincial court judges are appointed by the federal government
- Federal Court holds trials on matters within federal jurisdiction and hears appeals from some administrative tribunals
- Federal Court of Appeal hears appeals from the Federal Court, Tax Court, and some administrative tribunals
- Tax Court is a superior court that deals with cases involving federal tax matters
- Supreme Court of Canada is an appeal court that is the highest court in Canada
- Most cases do not have an automatic right of appeal to the SCC; it deals primarily with constitutional and *Charter* matters, as well as cases of national importance

#### Process of civil litigation

- Litigation must be commenced within the relevant limitation period
- Court will have jurisdiction if
  - There is a real and substantial connection
  - It is the most appropriate court
- Commercial forum selection clauses usually enforced
- Pre-trial procedures:
  - Plaintiff files statement of claim
  - Defendant responds with statement of defence and maybe a counterclaim

- Parties must cooperate to ensure agreement and resolution
- ADR mechanisms:
  - Negotiation—direct discussion between parties
  - Mediation—neutral third party facilitates discussion
  - Arbitration—neutral expert makes a binding decision
- ODR is being used in resolving online disputes and some litigation matters

#### The courts

- Procedural rules vary with jurisdiction and ensure that the process is fair
- Discovery of documents, examination for discovery, and pre-trial conference provide evidence to narrow the issues and facilitate settlement
- Formal offer to settle may be made by either party
- Many recent initiatives to increase accessibility of courts and to reduce costs and delays of litigation process
- At the trial, witnesses are examined and evidence is presented
- Jury decides questions of fact while judge decides questions of law
- Losing party usually pays costs, but this does not normally cover the winning party's legal fees
- Damages are monetary payments to compensate the victim and include general, special, and punitive
- Other remedies include an accounting, injunction, specific performance, or declaration
- A judgment creditor can conduct an examination in aid of execution to determine which assets owned by the judgment creditor are available to seize and which funds owed to him are available to be garnished
- Judicial remedies may be available before judgment

#### Dealing with regulatory bodies

- Decisions of government bureaucrats are reviewable by the courts
- Administrative tribunals enforce government policies and resolve disputes
  1. Must act within the jurisdiction granted by the enabling statute
  2. Must maintain a minimum standard of procedural fairness
  3. Must comply with the *Charter of Rights and Freedoms*
- Rules of natural justice require:
  - Fair hearing with adequate notice
  - Decision made by the person who heard the evidence
  - Absence of bias in process
- Methods of judicial review:
  - Courts can review administrative decisions when the administrative tribunal did not have jurisdiction or did not follow the rules of natural justice
  - Can issue prerogative writs, including *certiorari*, *mandamus*, and prohibition
  - Can make a declaration or order an injunction
  - Privative clauses are statutory provisions that attempt to prevent judicial review, which sometimes are resisted by the courts

## Summary - Chapter 4

### Summary

#### Intentional torts

- Assault and battery involve deliberate interference with one's person; defences are consent or self-defence (reasonable force)
- Trespass is the temporary or permanent intrusion on someone else's property without lawful right or consent
- Trespass to chattels, conversion, and detinue involve deliberate interference with another's goods
- False imprisonment is the restraint of a person by someone without authority
- Malicious prosecution is pursuing criminal charges in the absence of evidence
- Private nuisance is the unusual use of property causing foreseeable disturbance to a neighbour
- Unlawful interference with economic relations is causing damage by the use of unlawful means to disrupt the business of another
- Intimidation is using threats to cause another person or business to act against their interests
- Deceit is deliberately misleading another with false statements
- Conspiracy is acting in concert with others to damage a third party
- Passing-off is misleading the public to think one's goods or services are those of another

- Defamation is a false, published statement that discredits a person
  - Libel is written defamation; slander is spoken
  - Defences include truth, absolute privilege, qualified privilege, fair comment, and public interest responsible journalism
- Injurious falsehood (product defamation or trade slander) is false, published statements that damage the goodwill associated with a product or business

#### Other business torts

- Inducing breach of contract, which is knowingly causing the breach of a contract that exists between two other parties
- Misuse of confidential information is the wrongful use or disclosure of trade secrets and other confidential information
- Intrusion upon seclusion is the violation of a person's reasonable expectation of privacy
- Spoliation is the destruction of evidence to hide proof of wrongdoing

#### Online torts

- Present problems with jurisdiction and with enforcement

## Summary - Chapter 5

### Summary

#### Negligence

- Inadvertent conduct falling below an acceptable standard of behaviour
- Plaintiff must establish:
  - A duty of care was owed using the reasonable foreseeability test; in new situations, the court may also refer to policy considerations
- Defences to negligence:
  - If there is contributory negligence, courts may apportion the losses
  - If the plaintiff voluntarily assumed the legal risk, the defendant has a complete defence
  - If the plaintiff was hurt while engaged in illegal activity, he may be denied a remedy
- Special situations:
  - Statutes may impose a duty of care where none exists at common law, or may create liability in the absence of fault
  - Strict liability means that liability is imposed even where there is no fault on the part of the defendant
  - Vicarious liability means that liability is imposed on one party for the wrong committed by another; employers are held vicariously liable for torts committed by their employees
  - Occupiers' liability refers to legislation that imposes a duty on occupiers to people who are injured on their property
- Product liability:
  - Unlike in the United States, strict liability is not imposed on manufacturers in Canada
  - Manufacturers owe a duty of care to consumers of their products, but the plaintiff consumer must establish breach of that duty, causation, and damage

- Breach of duty by conduct falling below the level expected from a reasonable person
- Causation using the "but for" test, which establishes a physical link; remoteness test used to determine if the injury or damage was unforeseeable
- Damage must have resulted from the conduct

#### Professional liability

- Usually based on negligence
- Professionals may be liable for:
  - False or inaccurate information that causes economic loss
  - Breach of fiduciary duty or of contractual obligations

#### Insurance

- Designed to spread the risk of loss
- Liability, property, business interruption, life, and health are the primary forms of insurance available
- Insured must have an insurable interest in the subject matter; recovery is limited to the extent of that insurable interest
- *Contra proferentum* rule: the policy's ambiguities are interpreted in the insured's favour
- Insurance is a contract of utmost good faith
- Insured has a duty to act fairly, fully disclose material facts, and be honest
- Misrepresentation of material facts enables the insurer to have the insurance contract rescinded
- When a claim is paid, the insurance company has salvage rights and is subrogated to the rights of the insured

## Summary - Chapter 6

### Summary

#### The contractual relationship

- A contract is an exchange of promises enforceable in court
- There are five elements of a valid contract: consensus, consideration, capacity, legality, and intention
- There are many important terms and definitions relevant to the contractual relationship

#### Consensus

- A contract requires “a meeting of the minds”
- An offer is a tentative promise by the offeror contingent upon an acceptance by the offeree
- All the essential terms of the contract must be contained in the offer; non-essential terms will be implied by the courts
- An invitation to treat, or an invitation to negotiate, is not an offer
- An offer must be communicated to the offeree before it can be accepted
- The postbox rule says that an acceptance by mail (when reasonable) is effective when and where it is dropped in the mailbox
- The postbox rule has been extended to telegrams, but not to instantaneous forms of communication
- The law of contracts has evolved with respect to electronic transactions and will no doubt continue to do so as e-commerce continues to grow in importance

#### Consideration

- Consideration is the price paid for another party's promise and can be anything of value
- Both parties must have experienced some benefit; a gratuitous promise is not enforceable
- A gratuitous promise to vary an existing contract may be enforceable if it was not procured under economic distress
- Consideration must be specific, but it need not be fair; courts will not review its adequacy

- An offer will end at a specified time, but it may be revoked earlier by notice to the offeree, unless an option agreement has been entered into
- If there is not a specified time limit, an offer will lapse after a reasonable time
- A counteroffer, a rejection of the offer, or the death or insanity of the offeror will also cause an offer to lapse
- A standard form contract is interpreted strictly against the party who drafted it
- There is now a need for good faith contractual performance and a duty to act honestly in the performance of contractual obligations
- An acceptance is an indication of a willingness to be bound; a contract is formed when an offer is accepted
- An acceptance must be complete and unconditional
- An acceptance must be communicated in the manner required by the offer; it is effective when and where it is received
- Silence may be acceptance if there is an existing business relationship
- A promise to do what you are already legally obligated to do is unenforceable
- Past consideration is no consideration
- An agreement to accept less in full satisfaction of a debt is unenforceable in common law, but may now be binding under legislation
- Illegal consideration and impossible consideration are not valid consideration
- An out-of-court settlement is enforceable, as there is valid consideration
- *Quantum meruit* is used when there is a request for services with no agreement as to the amount; a reasonable price must be paid
- Promissory estoppel enables a gratuitous promise to be used as a defence
- When a contract is sealed, consideration is not necessary

## Summary - Chapter 7

### Summary

#### Capacity

- For a contract to be binding, each of the parties must have legal capacity
  - In most provinces, contracts with minors are not binding on them, except for contracts for necessities and beneficial contracts of employment or for service
  - In British Columbia, all contracts with minors are unenforceable except those that are specifically made enforceable by legislation, such as government student loans
  - Corporations, enemy aliens in times of war, trade unions, Crown corporations and government bodies, bankrupts, and Indigenous persons defined as "Indians" have their capacity to enter into contracts limited to some extent
- The test for the capacity of minors is objective
  - Parents are not liable for the torts or contractual obligations of their children unless there is legislation making them liable
  - A contract with someone who is insane or drunk will be rendered invalid only when the person was so incapacitated as to not know what he was doing, and the other contracting party knew or ought to have known of that incapacity

#### Legality

- To be binding, a contract must be legal and be performed legally
- If a lawful contract is performed illegally, the courts may rule that the contract is illegal and void, or just void, or they may enforce some or all of the contract
- An illegal contract is illegal at the time it is formed. Illegal contracts include contracts that violate legislation and contracts that are against public policy
- The courts may rule that an illegal contract is illegal and void, or just void, or they may enforce some or all of the contract
- There are many types of contracts that are illegal because they violate legislation or are against public policy
- One example is contracts that unduly restrain trade, which are usually illegal, but contracts in which one party agrees not to carry on business in competition with another are legal if they can be shown to be reasonable in terms of the interests of the parties and the public

#### Intention

- For a contract to be binding, each of the parties must intend to be bound by it
- The courts will enforce the stated intention of the parties
- In family and other social relationships, there is a presumption of no intention. This presumption can be challenged by evidence that shows an intent to be bound
- In commercial relationships, intention is presumed; this can also be rebutted
- In other situations, the courts use the reasonable person test to determine intention

#### Form of the contract

- Most verbal contracts are valid if they contain the essential elements of a contract
- Under the *Statute of Frauds*, certain contracts must be evidenced in writing to be enforceable
- The *Statute of Frauds* has been repealed or modified in many jurisdictions
- Most jurisdictions now have legislation requiring certain types of contracts to be in writing
- Legislation now gives electronic documents and electronic signatures the same legal status as paper documents and manual signatures, with some exceptions
- When part performance is established, verbal agreements dealing with interests in land are also enforceable

## Summary - Chapter 8

### Summary

#### Misrepresentation

- A false statement that induces a person to enter a contract

| Types                          | Remedies                                                                           |
|--------------------------------|------------------------------------------------------------------------------------|
| • Innocent misrepresentation   | • Rescission is the only remedy                                                    |
| • Negligent misrepresentation  | • Damages and/or rescission                                                        |
| • Fraudulent misrepresentation | • Damages (and possibly punitive damages) for the tort of deceit and/or rescission |
| • As a term of the contract    | • Rescission OR damages for breach of contract                                     |

#### Duress, undue influence, or unconscionability

| Types                                 | Remedies                                                        |
|---------------------------------------|-----------------------------------------------------------------|
| • Duress; contract made involuntarily | • Contract is voidable—rescission                               |
| • Undue influence                     | • Contract is voidable—rescission                               |
| • Unconscionable Transactions         | • Contract is voidable—Court may rescind or modify the contract |

#### Mistake

- Must go to the nature of the agreement or the existence of the subject matter, not just to the effect of the agreement when performed

| Types                                    | Remedies                                                                                                      |
|------------------------------------------|---------------------------------------------------------------------------------------------------------------|
| • Both parties making a common error     | • If serious, there is no contract                                                                            |
| • An error in recording the terms        | • Can be corrected by rectification                                                                           |
| • A misunderstanding between the parties | • Most reasonable interpretation of the contract is enforced                                                  |
| • A one-sided mistake                    | • <i>Caveat emptor</i> applies unless the mistake is so fundamental as to destroy consensus or there is fraud |

#### Privity of contract

- Only the original parties to the contract are bound. Any benefit going to a third party must be enforced by the original party to the agreement
- A trust is a true exception to the privity rule because the beneficiary can enforce it even though he is not a party to the original agreement
- Other exceptions include real estate transactions, contracts of insurance, and various principled exceptions as defined by the courts

#### Negotiable instruments

- Negotiable instruments may be enforced by third parties without notification to the original drawer (the party who wrote and signed the cheque) of the instrument  
Negotiable instruments sometimes convey better rights than existed between the original parties

#### Assignment

- Only the benefits, not the obligations, in a contract can be sold (assigned) to a third party, and those benefits are to be enforced through the original contracting party, the assignor
- But when an assignment qualifies as a statutory assignment, the assignee can enforce the assigned rights directly, in its own name

## Summary - Chapter 9

### Summary

#### Discharge of contracts

- Can come to an end through performance, breach, agreement, or frustration

#### Discharge by performance

- Substantial performance may discharge a contract unless exact performance is required
- When performance is properly tendered but refused, contract may be discharged
- When payment is tendered but refused, the creditor must bear the cost of its collection

#### Discharge by breach

- Breached condition—the victim may treat the contract as discharged and sue

#### Discharge by frustration

- Frustration occurs when performance is impossible or fundamentally changed
- Monies advanced may be apportioned to compensate for expenses or losses incurred
- Self-induced frustration is a breach of contract

#### Remedies

- Damages paid to compensate the victim
- Damages limited to what was reasonably foreseeable
- Damages must be reduced or mitigated by the victim
- Deposits or liquidated damages set out in contract must be reasonable or they will be treated as a penalty

- Breached warranty—contract is still binding but the victim can sue for damages
- Anticipatory breach—victim can treat the contract as discharged immediately or wait for performance (and later sue) but is bound by her choice

#### Discharge by agreement

- Contract may provide for its own end; the agreed-upon method for termination is effective in ending the contract
- Condition precedent—obligations to perform arise if the condition is fulfilled
- Condition subsequent—obligations exist and continue until the condition is fulfilled
- Liquidated damages—parties may agree in advance as to sum payable in event of breach
- Deposit, if forfeitable, is regarded as liquidated damages

provision—courts do not enforce penalty clauses

- Rescission—restores the parties to their original position
- Rectification—allows the court to correct a written contract to correspond with what the parties had agreed to
- Specific performance—requires the breaching party to fulfill the agreement
- Injunction—a court order to stop conduct that breaches the contract
- Accounting—requires disclosure of information so the other party can assess the extent of damages
- *Quantum meruit*—an equitable remedy requiring payment of a fair sum equal to what the goods or services are reasonably worth