

BUSINESS

LAW IN

CANADA

ELEVENTH EDITION

RICHARD A. YATES • TERESA BEREZNICKI-KOROL • TREVOR CLARKE



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This book offers a general discussion of legal principles relevant to business students. It is not intended to provide legal advice nor address specific situations. The law discussed in this book was compiled between June 2014 and April 2015. Subsequent changes in the law will not be reflected in the text.

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10 9 8 7 6 5 4 3 2 1 V058

Library and Archives Canada Cataloguing in Publication

Yates, Richard, author

Business law in Canada / Richard A. Yates (Simon Fraser University), Teresa Bereznicki-Korol (The Northern Alberta Institute of Technology), Trevor Clarke (Aurora College).— Eleventh edition.

Includes bibliographical references and index.
ISBN 978-0-13-384713-0 (paperback)

I. Commercial law—Canada. I. Bereznicki-Korol, Teresa, 1957–, author II. Clarke, Trevor, 1952–, author III. Title.

KE919.Y376 2015 346.7107 C2015-906144-X
KF889.Y383 2015

PEARSON

978-0-13-384713-0

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Preface

In order to ensure that *Business Law in Canada* continues to be a valuable resource to post-secondary instructors and students, the 11th edition has undergone a thoughtful revision, incorporating changes based on the increased importance of the Internet, information technology, and intellectual property. It also incorporates the large amount of feedback and many thoughtful suggestions provided by users of the 10th edition.

CHANGES TO THE 11TH EDITION

The following pedagogical changes have been made to the 11th edition:

- Content from the previous edition's Chapter 14, "Information Technology and the Internet," has been updated and integrated into relevant chapters to better address the pervasive presence of the digital world when making everyday business decisions.
- An increased number of CanLII citations have been incorporated into the text to provide readers with quick access to online materials.
- An increase in the number of visuals, such as tables and checklists, to make content more visually appealing and more accessible to visual learners.

The key changes for each chapter are listed below:

Chapter 1: Managing Your Legal Affairs: Revisions include a Case Summary on the Supreme Court of Canada decision in *Cojocar v. British Columbia Women's Hospital and Health Centre*, in which the Court discussed the presumption of judicial integrity and impartiality, as well as an expanded discussion in the Ethics section regarding corporate social responsibility.

Chapter 2: Introduction to the Legal System: The Case Summaries in this chapter have been updated significantly, including one that discusses *R. v. Caron*. Case Summary 2.2 now focuses on *Craig v. Canada*. A summary of the Supreme Court's decision on physician-assisted suicide (in *Carter v. Attorney General of Canada*) has been added. A summary of *Simpson v. Oil City Hospitality Inc.* is introduced, and the *Campbell River* case has been replaced with *Canada (Attorney General) v. Johnstone*. New Case Summaries examine *Vaughan (City) v. Tsui*, *R. v. Keshane*, and *Smith v. St. Albert (City)*. Table 2.1 has been updated, and material concerning the Mounted Police Association case has been removed.

Chapter 3: The Resolution of Disputes: The Courts and Alternatives to Litigation: The section on Alternatives to Court Action has been moved to the beginning of the chapter. Information relating to jurisdiction from the previous edition's "Information Technology and the Internet" chapter has also been incorporated into this chapter.

Chapter 4: Intentional Torts and Torts Impacting Business: Revisions to this chapter include the refinement of the "unlawful means" tort, as clarified lately by the Supreme Court of Canada, and the effect of the Internet on tort law and privacy from the previous edition's chapter "Information Technology and the Internet."

Chapter 5: Negligence, Professional Liability, and Insurance: The chapter is introduced with a new Case Summary dealing with negligence. The *Crocker v. Sundance* case has been retained, but is located in the section dealing with defences to negligence. In direct response to reviewers' comments, the *Design Services v. Canada* Case Summary has been replaced by a recent product liability case, *More v. Bauer*. A chart detailing what needs to be established to prove negligence has been added. Analysis of strict liability and occupiers' liability has been rearranged, while analysis of the *Hercules* case has been expanded.

Chapter 6: The Elements of a Contract: Consensus and Consideration: A discussion on the Supreme Court of Canada decision in *Bhasin v. Hrynew* has been added to the chapter. The case creates a new “general organizing principle of good faith contractual performance,” and also a common law duty of parties to a contract “to act honestly in the performance of contractual obligations.” Material from the previous edition’s “Information Technology and the Internet” chapter relating to Internet transactions, consensus, and ecommerce legislation has been incorporated into this chapter.

Chapter 7: The Elements of a Contract: Capacity, Legality, and Intention: Material from the previous edition’s “Information Technology and the Internet” chapter relating to Internet transactions, capacity, writing, and ecommerce legislation has been incorporated into this chapter.

Chapter 8: Factors Affecting the Contractual Relationship: Case Summaries have been updated and, in response to reviewer input, the *Ron Engineering* case is addressed. Other additions include two tables on rescission of contract and exceptions to operation of the privity rule.

Chapter 9: The End of the Contractual Relationship: A Case Summary describing the *Tercon* decision has been added together with further marginal notes as needed. Reviewers asked for a detailed review of the status of fundamental breach in contract law, so the approach taken by the courts “before and after” the *Tercon* case has been detailed. Table 9.2, on the effect of the *Frustrated Contracts Act*, has been clarified. The analysis of exclusionary clauses and their enforceability has also been updated.

Chapter 10: Agency and Partnership: The discussion of agency has been carefully delineated from partnership, with the importance of choosing an agent emphasized and fiduciary duty clarified. The discussion of sole proprietors and partnership has been expanded and a summary of items that could be included in a partnership agreement added. The status of a partner being an employee was clarified with a discussion of the Supreme Court of Canada case *McCormick v. Fasken Martineau DuMoulin LLP*. The discussion of limited liability partnerships has been clarified and a section on joint ventures added. Content pertaining to undisclosed principals has been reduced.

Chapter 11: Corporations: Case Summaries have been refreshed with new content and a short section entitled “Shareholder Agreements” has been added to the chapter.

Chapter 12: Employment: Relevant material from the previous edition’s “Information Technology and the Internet” chapter has been incorporated into this chapter. In response to reviewers’ requests, the *Tree Savers* case has returned as Case Summary 12.6. The *R. v. Cole* Case Summary has been updated to include the new ruling from the Supreme Court of Canada. The recent Supreme Court decision in *Potter v. New Brunswick Legal Aid Services Commission* dealing with constructive dismissal has been summarized. Employment law is an area undergoing constant change, so further new cases summarized or discussed include

- *Crisall v. Western Pontiac Buick GMC (1999) Ltd.*,
- *Jardine Lloyd Thompson Canada Inc v Harke-Hunt*,
- *Payette v. Guay Inc.*,
- *Pate Estate v. Galway-Cavendish and Harvey (Township)*
- *Hicks v. HRSDC*
- *Canada (Attorney General) v. Johnstone*
- *Ontario (Attorney General) v. Fraser*

This case is addressed under the Cases and Discussion Questions section:

- *Goudie v. Ottawa (City)*

Chapter 13: Intellectual Property: This new chapter covers relevant material taken from the previous edition's chapter "Real, Personal, and Intellectual Property" and "Information Technology and the Internet," including a discussion on copyright, patents, trademarks, and other forms of intellectual property. The chapter also looks at the protection of private and confidential information and how these subjects intersect with changing technology and the expansion of the Internet.

Chapter 14: Real and Personal Property and Protection of the Environment: In general the chapter content has been condensed and clarified where possible and a major section on the protection of the environment added. Intellectual property has been moved to Chapter 13, as indicated above. The discussion on joint tenancy and tenancy in common has been expanded, as has the discussion of mortgages. In the area of residential tenancies, a list of areas often changed by provincial legislation has been included.

Chapter 15: Priority of Creditors: The section entitled "Alternatives to Bankruptcy" has been moved to the end of the chapter so that the material on bankruptcy would flow more smoothly.

Chapter 16: Sales and Consumer Protection: Discussion of the *Sale of Goods Act* has been simplified. Thus the requirement of writing discussion has been removed and the discussion of FOB, CIF, COD, and bill of lading contracts has been condensed. However, discussion of sales made online and the *International Sale of Goods Act* has been expanded with material from the previous edition's chapter "Information Technology and the Internet." Discussion of the *Federal Competition Act* and the subject of mergers have been reduced. A discussion of identity theft has been added, as well as an examination of the 2001 *Internet Sales Contract Harmonization Template* and an extended discussion of electronic money based on material from the previous edition's chapter "Information Technology and the Internet."

FEATURES

You will find the following text features in the 11th edition:

Learning Objectives provide an overview of the chapter content.

Learning Objective icons appear where the discussion of each learning objective begins.

Case Summaries appear throughout each chapter. They are used to introduce topics and to provide concrete examples that help students understand key legal issues. Many of the Case Summaries also include Discussion Questions, which help promote a more thorough understanding of the relevant issues, or Small Business Perspectives, which identify the relevant legal issues facing small business owners.

Marginal notes summarize adjacent paragraphs and highlight key points.

Reducing Risk boxes are featured throughout the text. Each Reducing Risk box describes what the sophisticated client would do in the business situation the box presents.

Provincial content is available on MyBusLawLab.

Diagrams illustrate cases with complex fact patterns.

Key legal terms appear in bold and full definitions appear in the Glossary.

Summaries in point form promote quick review and reference.

Finally, we remind all who use this text that it is designed as a tool for learning business law and not as an authoritative source of legal advice. When faced with a specific legal problem, the reader is advised to seek the assistance of a lawyer.

Student Supplements

MyBusLawLab (www.pearsonmylabandmastering.com). MyBusLawLab is an online study tool for students and an online homework and assessment tool for faculty. MyBusLawLab provides students with an assortment of tools to help enrich the learning experience, including

- pre- and post-tests with study plan,
- mini-cases with assessment questions,
- simulations (new),
- provincial material,
- CBC videos with assessment questions, and
- a Pearson eText electronic version of the textbook.

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An access code for MyBusLawLab is included with every new printed textbook or can be purchased separately at www.pearsonmylabandmastering.com.

Instructor Supplements

Business Law in Canada, 11th Edition, is accompanied by a complete package of instructor supplements. Some of the following items are available for download from a password-protected section of Pearson Canada's online catalogue at <http://catalogue.pearsoned.ca>; see your Pearson Canada sales representative for details and access.

Instructor's Resource Manual. This supplement contains summaries of each chapter, answers to the questions found at the end of each chapter in the text, and solutions to the cases, plus their full citations.

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Acknowledgments and Dedications

As has been the case in every new edition of *Business Law in Canada*, reviewers have played an important role in correcting, reshaping, and updating the book, and we would like to acknowledge their invaluable contributions. In addition to providing encouragement and insight into what instructors want and need, they provide an important connection to the people this book is designed to serve.

We thank all those who have patiently gone over the text and made suggestions for revision, including Lorrie Adams, MacEwan University; Michael Bozzo, Mohawk College; Douglas Kennedy, NAIT; Daniel Le Dressay, Langara College; Douglas Peterson, University of Alberta; Joseph Radocchia, University of Waterloo; Mark Schwartz, York University; Don Valeri, Douglas College.

I am grateful for the opportunity to continue contributing to *Business Law in Canada* and wish to express my gratitude to my co-writers, Trevor and Teresa, for their leadership and dedication to the text. The writing and publishing of a textbook requires a coordinated effort by many people. Pearson Canada provided us with a team of enthusiastic and knowledgeable people, all of whom willingly helped us in many ways. I appreciate and acknowledge the assistance and support received from Carolin Sweig, Karen Townsend, Jessica McInnis, Leona Burlew, Kimberley Blakey, and Alex Li at Pearson Canada.

Finally, I would like to thank my wife, Ruth, who continues to lend her support to this effort. I would like to dedicate this edition of the text to her, our children, their partners, and our grandchildren.

—Richard A. Yates, LLB, MBA

Allow me to acknowledge my colleagues and the students at NAIT. Working within such a supportive environment has been a real pleasure. I value the positive energy of Anna Beukes, chair of the School of Finance, and Tad Drinkwater, Peter Nissen, and Perri Sinal, dean and associate deans, respectively, for the JR Shaw School of Business. My colleagues who teach business law, Douglas Kennedy, Kim Watamaniuk, Anne Henderson, Craig Grubisich, Angus Ng, Chelsea-Evans Rymes, Justin Matthews, and Robin Kaulback, have all contributed to the success our course has had in creating sophisticated clients. Thank you for all your efforts.

I would like to dedicate the 11th edition to my husband, Rick, and my supportive family, whose plans were frequently adjusted to accommodate my work. Have I told you lately that I love you?

—Teresa Bereznicki-Korol, BA, JD

I would like to dedicate the 11th edition to all of the students I have taught using *Business Law in Canada*. My interactions with my students have always been inspiring, and watching them develop into sophisticated clients continues to be incredibly satisfying and motivating. Given that, it only seems right to dedicate this edition of the textbook to all of them, wherever they are and whatever they are doing.

I would like to thank one of those former students in particular, Sherry Baxter. Now a practising lawyer, Sherry did the research required to update the legislation and case law relevant to the chapters in the 11th edition for which I was responsible. This task is time consuming and demanding. Sherry did an excellent job and provided comments, insights, and suggestions that were extremely helpful. Thank you once again, Sherry.

I would also like to acknowledge the unwavering support of my wife, Peggy. The saying “Behind every successful man is a great woman” is definitely true. Preparing a business law textbook is an onerous project. I could not have completed the work required to prepare the 11th edition without Peg’s continued patience, tolerance, understanding, and encouragement. Thank you very much, Peg!

—Trevor Clarke, BSc, MBA, LLB

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1

Chapter

Managing Your Legal Affairs

LEARNING OBJECTIVES

- 1 Explain the meaning of “sophisticated client”
- 2 Examine the role of the lawyer
- 3 Identify when to hire a lawyer and when to represent yourself
- 4 Explain how to find an appropriate lawyer
- 5 Review how lawyers bill their clients
- 6 Describe legal aid
- 7 Outline the procedure to follow to complain about your lawyer
- 8 Discuss the ethics of lawyers and of clients

Defendant: Before I plead guilty or not guilty, I would like to ask if a lawyer could be appointed to defend me.

Judge: You were caught robbing a convenience store, holding the stolen goods with a gun in your hand, standing over the store clerk who was lying on the floor. What could a lawyer possibly say in your defence?

Defendant: That’s just it—I’m really curious as to what he could possibly say.

Lawyers constantly hear lawyer jokes at parties and receive them via email. Some business law students tell lawyer jokes in class. This is often a humorous attempt to embarrass the lawyer who is teaching the class.

Students tell lawyer jokes . . .

“I THINK I NEED LEGAL ADVICE . . .”

Sometimes a student who has told a lawyer joke in class (or a friend or relative of the student) becomes involved in a “legal situation” during the semester. She may have been charged with a criminal offence. She may have become eligible to apply for a pardon for a crime for which she was previously convicted. She may have received a traffic ticket, or been charged with a drinking-and-driving offence. She may have been involved in a car accident and be facing charges, or be having difficulty dealing with her insurance company in obtaining benefits. She may not have received her damage deposit from her former landlord or be in some sort of dispute with her landlord. She may be unable to collect from someone to whom she lent money. She may have been involved in a house deal that has collapsed. She may be involved in divorce proceedings or a custody dispute. She may have been served with a restraining order. She may have a business idea involving a

. . . but when involved in a “legal situation” . . .

... they seek advice from a lawyer

product she has invented. She may have written a song or a software program for a computer game. She may be thinking of setting up a business with one of her friends or relatives.

All of the above situations (and many more) have been experienced by students of the authors of this textbook during recent semesters. (Some of these situations have in fact been going on for extended periods of time.) In every case, the involved student approached her business law instructor to ask for advice. That is, while the typical student may publicly participate in the criticism of lawyers, when faced with a personal problem involving legal aspects she will unashamedly seek advice from a lawyer.

The student often approaches the instructor because she has suddenly realized that the situation in which the student (or her friend or relative) is involved relates to legal issues or requires decisions that require legal input if they are to be dealt with appropriately. The student often says, “My parents don’t know that I am speaking to you about this issue.” Alternatively, she may say, “My friend heard me talking about the business law course I’m taking and asked me to ask you about this issue.”

This usually indicates that the student has been listening during her business law classes and has been reading the relevant course materials. She has begun to realize that many decisions in today’s world involve legal issues, and that good decisions can be made only if appropriate attention is paid to the relevant legal advice. She therefore puts aside the bias against lawyers she started the course with and approaches a lawyer (her business law instructor) to obtain the relevant legal advice.

The objective is to help students become sophisticated clients

This textbook attempts to help the student develop the attitude that it is often best to obtain legal advice before making business decisions. Obtaining relevant legal advice on a timely basis requires putting aside the usual derision and public mistrust of lawyers and instead building a good long-term relationship with a lawyer. We will refer to someone who understands the importance of the solicitor–client relationship and who knows how to form and use such a relationship to make good business decisions as a “sophisticated client.” This textbook chapter will try to help business law students become sophisticated clients so that they can manage their legal affairs more efficiently and effectively.

LO 1 BECOMING A SOPHISTICATED CLIENT

Meaning of “sophisticated client”

The first step in becoming what is known as a “sophisticated client” is to understand what is meant by the phrase. The dictionary meaning of “sophisticated”¹ would suggest that a sophisticated client is confident, knowledgeable, and up to date on legal trends. A **sophisticated client** understands the role of the lawyer and of the client. She knows when to represent herself, when to hire a lawyer, and how to hire a lawyer. She understands the costs associated with hiring a lawyer. A sophisticated client also knows what can be done if she is dissatisfied with the conduct of her lawyer. All of these topics will be discussed in this chapter.

Taking a business law course often helps students understand the significance of becoming a sophisticated client. It also marks the beginning of their development into sophisticated clients. One of the authors of this textbook has asked the question “Explain the meaning of ‘sophisticated client’ and discuss whether the objective of helping you develop into a sophisticated client has been achieved during the course” on the final exam for a business law course. Many students answer the question by describing a situation that they (or their friends or relatives) faced while they were taking the course. They explain that they dealt with the situation in a quite different manner from what they had done in similar

¹ See, for example, *Canadaspace.com English Online Dictionary*: <http://dictionary.canadaspace.com>.

situations in the past. They attribute this difference to what they had learned in the business law course.

A business law course, with its practical emphasis on general legal principles as they apply to many different areas of business, often serves as a catalyst in the development of students. It provides a spark that results in a sense of empowerment. Students come to realize that business decisions are made all the time and usually have serious consequences. Therefore, they begin to understand that it is critical that good decisions be made.

The business law course also makes it obvious that good business decisions cannot be made without consideration of the appropriate laws. The students start to appreciate that sometimes, through their own research, they can find the legal information required to enable them to make sound business decisions, but that other times the necessary information must be obtained from a lawyer. This understanding of the importance of having a good lawyer on your team is a critical component of being a sophisticated client.

A useful example illustrating how students come to understand the advantages of considering the relevant laws when making business decisions involves the importance of evidence. Students learn that the burden of proof borne by the plaintiff in a civil lawsuit is that he must prove his case on a balance of probabilities. The students see that evidence is introduced during the trial through the testimony of witnesses on direct examination, cross-examination, and re-examination. They learn that the evidence can be a tangible object (“the bloody knife”), a piece of documentation (“the contract”), or simply an eyewitness account. They learn that hearsay (second-hand) evidence is not admissible. Once the students learn about the importance of evidence in satisfying the relevant burden of proof and the different types of admissible evidence, their behaviour changes. They will take pictures after a car accident, for example, and get the names and telephone numbers of any witnesses. They will also understand the significance of having a written contract for a business transaction. They know that they may not win a case based on a verbal contract, when the evidence will consist of their word against the word of the other party. They then realize that the lawyer is not advising her clients to “Get it in writing!” simply to generate legal work for which the lawyer will be paid. They will instead understand that the lawyer has provided legal advice to help them make good business decisions. They are now approaching the situations that they encounter as sophisticated clients.

The author mentioned above frequently encounters former students several years after they took the business law course. They usually indicate that they have constantly used what they learned in the course in making their personal and business decisions. They specifically mention contract, employment, consumer, and intellectual property law, and the research they have done (usually online) about relevant legal topics. It is clear that many business law students do indeed become sophisticated clients!

Business law course a catalyst

Need a lawyer on the team

Evidence shows that business law students become sophisticated clients

THE ROLE OF THE LAWYER

One of the reasons for the general lack of respect for lawyers is that many people do not understand the role of the lawyer in the solicitor–client relationship. This misunderstanding is shown by the student who, after consulting with a lawyer, claims, “My lawyer told me to do this.” This statement implies that the decision maker in the relationship is the lawyer, not the client.

The better approach is to see the client as the decision maker. She has encountered a problem and must make a decision. She needs to collect certain information before she can make an informed decision. In this regard, she consults her “experts”—namely, her accountant, marketing manager, human resources officer . . . anyone who can provide relevant information. She gathers all of the useful information, which she then takes into consideration when she makes her decision.

LO 2

Client is decision maker

Lawyer is an expert providing advice

The lawyer is simply one of the experts the businessperson consults. The lawyer provides legal advice relevant to the client's situation. The client is, of course, free to ignore the legal advice she receives, just as she is free to ignore any other advice she receives. Sometimes it would be unwise to ignore the lawyer's advice. ("If you do this, you will be committing a crime for which you will go to jail if you are convicted.") But the businessperson makes her decisions in light of all the relevant factors. She may therefore choose to accept some legal risk because she deems some other business factors to be of greater importance.

A clear understanding of the nature of the solicitor–client relationship will demystify the role of lawyers. While they typically are experts in their area of practice and can provide invaluable assistance to their clients, lawyers are simply providers of advice. They are hired by the client, who provides them with instructions. The lawyer is bound to follow these instructions, provided that they are lawful.

A client's information must be kept confidential

There is one aspect of this relationship that must be emphasized. A lawyer's advice to his client will not be of any value unless the client has provided all relevant information to the lawyer. If the client does not have confidence that her information will be kept confidential, she may not divulge all the relevant information to the lawyer. **Solicitor–client privilege** refers to the duty of the lawyer to keep the information provided by the client confidential. Solicitor–client privilege is therefore fundamental to our legal system, since without it access to justice would be significantly reduced. Most lawyers will advise their clients about solicitor–client privilege and encourage their clients to disclose all relevant information. A sophisticated client will understand that the value of the legal advice will vary in direct proportion to the completeness of the information provided to the lawyer.

CASE SUMMARY 1.1**Can Solicitor–Client Privilege Be Ignored? *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*²**

The Privacy Commissioner requested records from an employer with respect to an employee requesting access to her personal employment information. The employee, who had been dismissed, suspected that the employer had improperly collected inaccurate information and used it to discredit her before its board of directors. At the time of dismissal, the employer had sought legal advice from its lawyers. The employer claimed solicitor–client privilege for certain records and refused to provide them. The Federal Court ordered that these records be provided to the Privacy Commissioner so that she could fulfill her statutory investigative role. The Federal Court of Appeal reversed this decision and ordered that the records did not have to be provided. The Supreme Court of Canada upheld this decision on the basis that the relevant legislation did not expressly allow the Privacy Commissioner to "pierce" the solicitor–client privilege. Given the fundamental importance of the privilege, clear and explicit language is required to allow it to be breached.

SMALL BUSINESS PERSPECTIVE

A businessperson seeking legal advice must be completely honest with his lawyer or the legal advice provided by the lawyer will not be appropriate for the situation. The client need not worry that the information provided will be made public because the lawyer is obligated to maintain confidentiality by the solicitor–client privilege. Are there any exceptions to the general rule that solicitor–client privilege attaches to all communications between a client and a lawyer?

² [2008] 2 SCR 574, 2008 SCC 44 (CanLII).

SHOULD I HIRE A LAWYER?

LO 3

When to Hire a Lawyer

It is useful to examine the solicitor–client relationship in the context of a small business. From start-up to the selling of the business, the owner has many decisions to make. As a sophisticated client, when should the small business owner consult his lawyer for advice?³

The first thing the owner should do is consider how he will organize his business. Will he operate as a sole proprietor? Will he have a partner? Should he incorporate? Will the business be operated as a franchise? The decision as to the form of business organization is significant and has many implications (including liability, income taxes, and estate planning). The lawyer can provide information and advice that will help the owner make decisions appropriate for achieving his objectives.

If the owner is buying an existing business, the lawyer can provide advice and information that will enable the owner to minimize his potential risk and liability. What if the current owner has unsatisfied judgments against her? What if the assets of the current business have mortgages registered against them? Can the owner make good business decisions in these situations without receiving appropriate legal advice?

Anyone starting a business should ensure that all relevant laws will be complied with. How will the owner of the business determine which laws are relevant to his business? Can he understand the laws and whether his business plan will result in compliance with these laws? The lawyer can, of course, determine which municipal, provincial, and federal laws are relevant to the business and provide advice as to what is required to ensure compliance with them. This could cover everything from obtaining a business licence to complying with municipal noise bylaws to satisfying provincial and federal environmental standards.

Most businesses require a physical location, which usually means that there will be a lease to be negotiated. As is the case with all contracts, the owner should read the form of lease provided by the landlord. What if the owner doesn't understand various clauses of the document? Should he just sign the lease anyway, or should he consult his lawyer as to the meaning of the clauses before he signs?

The same questions apply to the documents provided by the bank or other lending institution. The owner of a small business usually must finance the start-up of the business or the purchase of an existing business. In particular, the extent of the personal liability of the owner for losses incurred by the business should always be carefully analyzed and understood by the owner before he signs the relevant documentation. This may require the provision of legal advice by the owner's lawyer.

There are other contracts that may need to be prepared in connection with the business. Examples include contracts with employees, suppliers, and customers. Can the owner of the business draft these documents himself? Would he be wise to do so without obtaining legal advice from his lawyer?

Most businesses today have intellectual property issues. These vary from the naming of the business to the protection of the business's intellectual property, such as patents, trademarks, and copyrights, to ensuring that the business is not infringing on someone else's property rights. This is a very complicated area that is changing rapidly. Is it prudent for the business owner to make decisions involving intellectual property without obtaining relevant legal advice?

Even when selling his business the owner may need to seek legal advice from his lawyer. Should the sale involve the assets of the business or the shares of the corporation that owns the assets? What are the income tax implications? Is there any potential future liability for the seller to consider? How does the seller ensure that he will get paid? It is clear that there are many issues for which a business owner should consult his lawyer to ensure that he makes good business decisions, even when he is selling his business.

Business owners make many different decisions

Examples of business decisions and how a lawyer can help

Legal advice will enable better decisions

³ This approach was used in Glenna Erikson, "Pay Me Now or Pay More Later," *LawNow* (March 1993): 19.

When to Represent Yourself

The above section suggests that a good approach to understanding the solicitor–client relationship is to view the client as the decision maker. The lawyer is one of the “experts” that the client approaches in his efforts to collect the information necessary for him to make good business decisions. This approach assumes that good business decisions will be based, at least in part, on relevant legal information and advice.

Not always necessary to retain a lawyer

It is not, of course, necessary (or desirable) for the client to seek legal advice for every decision he must make. To do so would not only be prohibitively expensive, but it would also result in delays in the client’s decision making. The crucial question, then, is “When should you hire a lawyer?”

Best to research relevant law

If you need to make a business decision and you do not retain a lawyer, then you will either not be considering relevant legal information when you are making your decision or you will be obtaining the legal information yourself. For small, insignificant decisions it may be appropriate to proceed without taking the time to find the relevant legal information. But in most cases it would be prudent to proceed only after completing some research of the relevant law.

Sophisticated clients may be able to find legal information

A sophisticated client will understand this and will know how to find the relevant information. This is helped along, of course, by the availability of legal information online. In the past, lawyers were “the keepers” of legal information. It was necessary to consult a lawyer to access legal information. This added to the “mystique” of (and the resentment against!) lawyers. This has recently changed: Now anyone with a computer and access to the Internet can find legal information online. A sophisticated client will capitalize on this; he will do his own legal research whenever he requires legal information to make a business decision and it is not appropriate to hire a lawyer to find the necessary information.

Legal information is now readily available . . .

This textbook will help students realize that legal information is readily accessible and will assist them in overcoming their fear of the law. It will also serve as a valuable resource with many references to online legal information and specific legal websites. The MyBusLawLab that accompanies this textbook also emphasizes the availability of online legal information by providing relevant provincial law and legal information as well as direct links to significant legal websites.

. . . but may be incorrect or incomplete

For perceptive clients, the availability of an abundance of easily accessible legal information is a positive development. Not only do they understand the need for legal input when business decisions are being made, but they know how to access relevant legal information. This is an important aspect of the empowerment that business law students experience as they start to develop into sophisticated clients. It is important, however, that they develop an understanding and appreciation that not all online information is correct or complete, and that their research may be incomplete if, for example, they do not consider a relevant issue.

Sophisticated clients need to know when to seek legal advice

The question asked earlier in this chapter, “When should you hire a lawyer?” is therefore more difficult to answer than it was in the past. As always, the businessperson must consider the time and the cost that will be incurred if a lawyer is consulted for assistance in making a particular business decision. But there is now another alternative—namely, the businessperson doing his own research and finding the relevant legal information himself.⁴ If this approach is used, the time it takes to find the information must be considered. Furthermore, if the businessperson is unable to find the relevant information, or if he is unable to understand

⁴ There now appears to be a third alternative, at least in some jurisdictions. Ontario, for example, allows the licensing of paralegals. Like lawyers, they are regulated by the Law Society of Upper Canada. Licensed paralegals are authorized to represent clients in small claims court, the provincial offences court, the summary conviction court, and before various administrative tribunals. In 2012, the Law Society of British Columbia approved rule changes that allowed designated paralegals to perform certain duties under a lawyer’s supervision. A two-year pilot project allowing designated paralegals to appear in specified family law proceedings was undertaken. See www.lawsociety.bc.ca/page.cfm?cid=2582&t=Paralegals.

the information he does find, then he should call his lawyer for advice. This is an important attribute of a prudent client—knowing when it is necessary to consult a lawyer.

One example that illustrates the above discussion involves small claims court litigation. Each of the provinces has set a monetary jurisdiction for small claims court. (The limit in Alberta, for example, is \$50 000.⁵) A sophisticated client will understand that any litigation involving an amount greater than the small claims court maximum limit will take place in a superior court and that a lawyer should therefore be retained.⁶ A careful client, however, will also appreciate that while a case may involve an amount of money less than the monetary jurisdiction of small claims court, a lawyer may still need to be retained because of the complexity of the case.

Another example showing how a sophisticated client will manage his legal affairs in an appropriate manner involves the collection of accounts receivable. Assume that all of the accounts involve amounts less than the monetary jurisdiction of small claims court. One form of contract is used for all credit sales. A perceptive client would realize that it is not necessary to retain a lawyer to secure judgment against customers who don't pay their accounts. The client, or one of his employees, can go to small claims court on behalf of the business. The client could hire a lawyer to train him or his employee with respect to how to conduct a trial in small claims court. The lawyer can be consulted if there are any complications on any particular collection file.

There is one issue that always needs to be considered when someone is deciding whether to represent herself. If you break the law and harm someone else, there will likely be two different legal proceedings. First, there will be a criminal prosecution in which you will be charged by the government with committing a crime. If you are convicted, you will be punished and you will have a criminal record. Given this, it is wise to always retain legal counsel when you are facing criminal charges.

If the person you harmed sues you, you may be liable for damages whether you were convicted of a crime or not. The civil litigation may take place in small claims court; in most of these cases you could represent yourself. If the litigation involves an amount of money greater than the monetary jurisdiction of small claims court, then you should hire a lawyer to represent you because the trial will take place in a superior court. Given the growing complexity of the law and the resulting specialization of lawyers, you may even have two lawyers: one to represent you in your criminal trial and the other to represent you in your civil trial.

Small claims court litigation

Collection of accounts receivable

Best to retain counsel for criminal charges

May be liable even if not convicted of a crime



REDUCING RISK 1.1

This textbook will help students become sophisticated clients so that they can better manage their legal affairs. Such management involves managing legal risk, which is therefore a primary focus of this textbook. This emphasis will be highlighted by the inclusion of “Reducing Risk” boxes throughout the textbook. These boxes will contain suggestions as to how sophisticated clients can manage legal risk.

Sophisticated clients understand that success ultimately depends on making good business decisions, and that good business decisions can be made only if they are based on

appropriate information. One type of information required for good decision making is legal information. Sophisticated clients have the skills and the confidence to find basic legal information. Sophisticated clients will, however, understand that there will be situations in which it is necessary to retain a lawyer to obtain the required legal information. Sophisticated clients will not be afraid to request legal advice from a lawyer in such situations. They will then incorporate the legal advice received into their decision-making process, thereby reducing their legal risk.

⁵ *Provincial Court Civil Division Regulation*, Alta. Reg. 329/89.

⁶ This is subject to the abandonment of small amounts over the limit.

LO 4 HOW TO FIND AN APPROPRIATE LAWYER

Assume that you are going to start a small business. You have decided that you need to retain a lawyer to help you. How do you find a good lawyer?

This question deals with an important issue, but it is not worded correctly. It would be better to ask, “How do you find an *appropriate* lawyer?” This emphasizes that a lawyer may be very knowledgeable and successful, but may not be appropriate for you. What, then, makes a lawyer “appropriate” for a particular client?

Make a list of possible lawyers . . .

. . . from telephone listings

The first step in finding an appropriate lawyer is to make a list of lawyers. There are many possible sources of lawyers’ names. The first source most students think of is the telephone book, specifically the *Yellow Pages* and its online companion. This source can be overwhelming. For example, on August 1, 2014, there were 965 lawyers and 953 corporate lawyers listed on YellowPages.ca for Edmonton! It is possible to tell where a lawyer’s office is located, and perhaps what type of law the lawyer practises, but there is definitely not sufficient information in the *Yellow Pages* advertisements to help you decide whether a particular lawyer is appropriate for you. The same limitation applies to any advertisement, regardless of the medium used.

. . . or from friends or relatives

Another important source of lawyers’ names involves getting referrals from friends or relatives. It is important that the referral be given by someone whose judgment you trust. Also, it is important that the referral be provided by someone who had the same type of legal problem that you are now facing. Being referred to a highly recommended real estate lawyer is not much help if you have just been charged for committing a serious crime. If you are considering setting up a small business, you want a referral from someone who operates a small business and is willing to recommend the lawyer who has provided legal advice to him in this context.

. . . or from a provincial law society

Another possible source of lawyers’ names is the provincial **law society**. These organizations are self-governing bodies for lawyers. Their mandate usually involves regulating the legal profession in the public interest.⁷

. . . or from a lawyer referral service

Some of the provincial law societies (such as the Law Society of Alberta and the Law Society of Upper Canada) offer a lawyer referral service. These services provide the names and phone numbers of lawyers who practise in the relevant area of law. This service is offered by the law societies free of charge. The lawyers who are referred will provide up to 30 minutes of free consultation.

Call for an initial consultation

In British Columbia, the Lawyer Referral Service is operated by the BC Branch of the Canadian Bar Association (CBA).⁸ The CBA is a professional organization that represents judges and lawyers. One of its purposes is to enhance the profession and the commercial interests of its members. The Lawyer Referral Service is offered by the BC Branch free of charge. The lawyer to whom you are referred will charge you \$25 (plus tax) for up to 30 minutes of consultation.

Mutual trust is key

Once you have the name of a lawyer near you who practises the type of law relevant to your situation, you should set up a meeting for an initial consultation. It is best to confirm the cost (if any) of this meeting when you are setting it up. You do not want any unpleasant surprises, such as receiving an unexpected bill from the lawyer after the meeting.

The primary purpose of the initial consultation is for you to decide whether to retain the lawyer. At the same time, the lawyer will decide whether to agree to represent you. Both of these decisions should be made on the basis of trust, as the solicitor–client relationship will not function as it should unless there is mutual trust between the lawyer and the client. Unfortunately, there are no objective

⁷ This discussion will refer to three of the provincial law societies: the Law Society of Alberta (www.lawsociety.ab.ca), the Law Society of British Columbia (www.lawsociety.bc.ca), and the Law Society of Upper Canada (www.lsuc.on.ca). All of the information in the chapter referring to these law societies may be accessed through these websites.

⁸ Canadian Bar Association, “Lawyer Referral Service,” <http://cbabc.org/For-the-Public/Lawyer-Referral-Service>.

criteria to measure “trust.” Both you and the lawyer must use your instincts in deciding whether to form a solicitor–client relationship. Relevant factors may include whether you believe you can work with the lawyer; whether you feel comfortable discussing all relevant information, no matter how personal or sensitive, with her; and whether you want that particular lawyer to negotiate on your behalf or represent you in court. The lawyer will be concerned about whether the client will be honest and disclose all relevant information.

With respect to someone who is setting up a small business, the best approach to follow is to assume that the lawyer you choose to assist you in the start-up of the business will continue to represent you even after the business has been set up and commences operating. There are several advantages to maintaining an ongoing relationship with your lawyer. She will know and understand you and your business, which will enable her to provide you with legal advice more efficiently, reducing your legal costs. It will also enable her to customize the legal advice so that it will be even more useful to you when you are making your decisions. And because you are her client, she will give you and your requests for legal advice priority. This can be very important when you are facing matters that must be dealt with urgently. Finally, the more you deal with your lawyer, the more comfortable you will become with her, which means that you will be more likely to call her when you require legal advice.

Advantages of an ongoing relationship

HOW LAWYERS BILL THEIR CLIENTS

One of the reasons people don’t retain lawyers even when they clearly require legal advice is that they are afraid of the cost. While the provision of legal services is not cheap, an understanding of how lawyers bill their clients will help someone determine whether to retain a lawyer. In this regard, the issue of fees should be discussed during the initial consultation with the lawyer.

Every legal problem is unique. Also, there are many factors a lawyer will consider when calculating the fee to charge a client. It is therefore important that the client understand from the beginning exactly how the lawyer will bill him for providing assistance with his particular problem. It is prudent to confirm this understanding in a fee agreement with the lawyer.

Each of the provincial law societies provides online information on lawyers’ fees.⁹ It appears that there are three main ways that lawyers calculate their fees. First, the lawyer may charge a **fixed fee** for the work required, regardless of the time involved. This method of billing is often used for specific tasks, such as preparing a will, purchasing a house, or incorporating a business.

Second, the lawyer may bill the client for all of the time she spends working on his file using her hourly rate. Hourly rates vary with the number of years that the lawyer has been practising law. A senior lawyer may have a higher hourly rate than a junior lawyer, but the experience of the senior lawyer may enable her to complete the required legal work more efficiently, perhaps resulting in a fee lower than that charged by the relatively inefficient junior lawyer, who will be learning as she does the work.

Third, the lawyer may receive a percentage of the amount the client collects, either through a settlement or a court judgment. If the client does not collect anything, then the lawyer does not receive anything. This is a **contingency fee** agreement, which is often appropriate in personal injury claims or product liability cases when the client does not have any funds to pay the lawyer at the beginning of the case. The provincial law societies may restrict the use of contingency fee agreements or set a maximum contingency fee for certain types of cases. The Law Society of

LO 5

Discuss fees with the lawyer

Have a fee agreement with the lawyer

Lawyer may bill on basis of a fixed fee . . .

. . . or on basis of time spent and hourly rate

. . . or as a contingency fee

⁹ See the Law Society of Alberta, *supra* note 7 at www.lawsociety.ab.ca/public/public_fees.aspx; the Law Society of British Columbia, *supra* note 7 at www.lawsociety.bc.ca/page.cfm?cid=141&t=Common-billing-practices; and the Law Society of Upper Canada, *supra* note 7 at www.lsuc.on.ca/with.aspx?id=2147490124.