

JURI 1107 Introduction to Legal Studies



Cancel culture



- Cancel culture came into the collective consciousness around 2017, after the idea of "canceling" celebrities for problematic actions or statements became popular.
- Cancellation is a "cultural boycott" of a certain individual, whether celebrity or not, brand, company, or concept.
- It is connected with the #MeToo movement.

Criminal Law: Theory of offence

- It is the lens through which we can analyze whether a particular conduct is a crime or not.
- **Observation and analysis of facts (conduct).**
 - Isolate the relevant conduct, i.e., the conduct that may potentially be criminal, from other conduct.
 - Analyze the conduct (break it down in relevant parts)
- **Definitional terms**
 - Find the definition of the offence most likely to coincide with the conduct.
 - Break down the elements of the offence.
- **Concurrence between conduct and definitional terms**
 - Determination if there is a match between facts (conduct) and legal requirements of the crime in question.
 - Theory of offence permits to do the analysis of whether there is a match or not.

Criminal Law

- A crime is an actus reus performed with the required mens rea, provided that there are no defenses.



Actus reus

- It is the physical act specified in the crime.
- The actus reus consists of a voluntary act that causes social harm.
- **Voluntary act:**
- **Voluntary:** The threshold is very low. It simply requires a willed contraction of a muscle or a movement of the body which follows our volition. So, for example, epileptic seizures are not voluntary.
- **Act:** it is simply a bodily movement, a muscular contraction. Examples would be to pull the trigger of a gun, to blink an eye or simply put one leg in front of the other to walk.
- **Causation:** but-for test.
- **Social harm**

Mens rea

- **Intention:** “I want to”. (subjective test)
 - Purpose.
 - Transfer intent (bad aim cases): the law transfers the perpetrator’s state of mind regarding the intended victim to the unintended one.
- **Knowledge:** “OK, I know but I don’t mind. So be it”. “I don’t want to know.” [Also: “I don’t want to know.”] (subjective test)
 - Willful blindness
- **Recklessness:** “No, it won’t happen”. (subjective test)
 - The perpetrator disregarded a substantial and unjustifiable risk of which he was aware (subjective test).
- **Negligence:** “I didn’t even think of it”. (objective test)
 - A person’s conduct is negligent if it constitutes a deviation from the standard of care that a reasonable person would have observed in the perpetrator’s situation.

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Defences

- Mental disorder.
- Intoxication.
- Duress.
- Necessity.
- Entrapment.
- Self defense.

Torts

- Tort constitutes a breach a legal duty, other than under contract, with liability for damages.
 - Observation and analysis of facts (conduct).
 - Legal definition of torts.
 - Determination if there is a match between facts (conduct) and legal requirements of the tort in question.
 - If so, determination of compensation.
- The elements of Canadian Tort: (i) conduct: intentional, negligent, strict liability; and (ii) damage.

Torts. Elements

- Defendant's conduct.
- The nature of the defendant's conduct
 - Intention
 - Narrow in scope.
 - Negligence.
 - Broad in scope.
 - Accident (strict liability)
- Causation.
- Damage.
 - The nature of the plaintiff's loss: not all losses may be compensated.
- The lack of full defence or the existence of a partial defence.

The negligent tort

- Conduct.
- Negligence.
- Causation.
- Damage.
- Lack of a full defence.

Negligence

The negligent act is determined by identifying the appropriate **standard of care** and applying it to the facts of the case. The standard of care is that of a reasonable –careful- person. It is an objective standard focused on the defendant's conduct with reference to that of a reasonable person.

The central element in applying the standard of reasonable care is the concept of a reasonably foreseeable risk.

Two questions:

- **Duty of care:** Does the defendant owe the plaintiff a duty to take reasonable care to avoid causing an unreasonable risk of harm?
- **Breached standard of care:** Did the defendant breach their standard of care? The plaintiff must prove that the defendant did not live up to the standard of care of a reasonable person in preventing the harm the plaintiff suffered.

Breached standard of care

- Once a duty of care has been found, it is necessary to ask whether the defendant has acted in such a way as to have breached that duty of care.
- Standard of care speaks to what is *reasonable* in the circumstances, i.e., what the reasonable prudent person does.
- Level: The **general rule** is that defendants are expected to act with a reasonable level of skill in the activity they are undertaking. **The applicable standard of care is that of a reasonably competent person undertaking the activity in question.**
- The so-called *reasonable person* in the law of negligence is a creation of legal fiction. Such a "person" is really an ideal, focusing on how a typical person, with ordinary prudence, would act in certain circumstances. The test as to whether a person has acted as a reasonable person is an objective one, and so it doesn't take into account the specific abilities of a defendant.
- Proof: The standard of care will always be based on reasonable foreseeability. This means that the courts will not ask the defendant whether they foresaw a certain outcome or not, but rather they will seek to work out what the defendant ought to have foreseen.

Damage

- No liability can arise in negligence unless the plaintiff suffers damages as a result of defendant's wrongful act, but not all losses may be compensated.
- Remote damages are NOT compensated.
- Defendant is liable only for the REASONABLY FORESEEABLE CONSEQUENCES OF ITS NEGLIGENCE.
- Special remoteness issues: The Thin-Skull rule: as long as some physical injury to the plaintiff was foreseeable, the defendant is liable for all the consequences of the injury arising from the plaintiff's unique physical or psychological make-up whether or not those consequences were foreseeable.

The intentional tort

- Each intentional tort has its own elements. In general, each tort will have the following elements.
- Act
- Intention
 - The defendant desires the consequences of her actions.
 - If the consequences, while not desired, are substantially certain to result from the defendant's conduct, e.g., bomb in an airplane.
 - Transferred intent
- Causation
 - Factual
 - Proximate
- Damages: no limitation to reasonably foreseeable damages.
- Lack of defences

Intentional interference with the person

- **Battery (bodily security)**
 - A direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person.
- **Assault (threats of violence)**
 - The threat of an immediate battery
- **False imprisonment (liberty)**
 - There must be a complete restriction of plaintiff's freedom (eg. blockage of bridge is not false imprisonment).
 - Imprisonment can also be psychological (e.g., a person may be intimidated or threatened to go somewhere).

Intentional interference with chattel

- Trespass to chattels:
 - The intentional damage to a chattel in the physical control of the plaintiff.
- Detinue
 - Defendant refuses to return the plaintiff's chattel
- Conversion
 - Defendant has taken plaintiff's chattel, eg. theft, shoplifting, etc.

Intentional interference with land

Trespass to land

- It provides a remedy for the direct, intentional (or negligent), and physical interference with land in the possession of the plaintiff. It is actionable without proof of damage.

Three ways to commit it:

- To enter personally onto land without permission
- To place objects on the plaintiff's property (effective possession doctrine for aircrafts)
- When the possessor revokes a visitor's permission or licence to be on the property.

Strict liability

No need to prove that defendant was guilty of any wrongful (intentional or negligent) conduct. In the absence of defences, proof that the defendant caused the plaintiff's loss is sufficient to impose liability. Strict liability does not play a significant formal role in modern Canadian tort law. But this has been matched by a rise in a de facto strict liability under the guise of strict standards of care within the tort negligence

Contracts

A contract is a legally enforceable agreement between two or more parties that creates an obligation to do or not do particular things.

- An agreement
- That is legally enforceable

Laws that Govern Contracts

- Provincial.

Types of Contracts

- Bilateral contract: a mutual exchange of promises among the parties.
- Unilateral contract: the offer requests performance rather than a promise from the person accepting the offer. A unilateral contract is **formed when the requested act is complete.**

Elements of a contract

- An offer:
- An acceptance: must be unqualified (must match the offer, in all of its terms). Otherwise: counteroffer.
- Consideration: mutual benefit and detriment.

Contracts

- Means and moment of acceptance: The general rule is that an acceptance must be communicated to the offeror according to the terms of the offer or other reasonable terms.
- The offeror cannot impose a contract on the offeree against his/her wishes by deeming that his/her silence should amount to an acceptance.
- Moment: Where an instantaneous method of communication is used, e.g. email, it will take effect when and where it is received.

Exceptions to moment of acceptance rule

- In unilateral contracts, the normal rule for communication of acceptance to the offeror does not apply. Carrying out the stipulated task is enough to constitute acceptance of the offer.
- The Mailbox Rule - Where acceptance by mail has been requested, or where it is an appropriate and reasonable means of communication between the parties, then acceptance is complete as soon as the letter of acceptance is mailed out, even if the letter is delayed, destroyed, or lost in the post so that it never reaches the offeror.

End of offer

- It ends by passage of time:
 - The term of the offer.
 - Reasonable time has passed.
- By Failing to Comply with a Condition Precedent.
- Because of the Death of Either Party.
- By revocation

Revocation of offer

- A revocation is valid at any time until the offeree has made an effective acceptance.
- Unilateral offers may not be revoked if the offeree began performing.
- Mailbox rule: The revocation of the offer may not be done once the offeree has mailed out his/her acceptance.

Defences to contract formation

- **Duress:** when consent is induced by physical force or threats of force.
- **Unconscionability:**
 - Procedural Unconscionability: fault or unfairness in the bargaining process.
 - Substantive Unconscionability: fault or unfairness in the bargaining outcome.
- **Misrepresentation of fact:** fraudulent (knowingly or recklessly made with the intent to deceive) or material (likely to induce reliance). In some cases, silence may be equivalent to misrepresentation, such as in case of fiduciary relationships.
- **Illegality:**
- **Incapacity:**
 - Voidable at the minor's option but are enforced against adults.
Affirmation occurs upon majority by express or implied terms.
- **Statute of Frauds/Statute of limitations:** marriage, one-year, land, estates, goods over \$ 5000, surety (guarantor).

Interpretation of contracts

- **Plain and ordinary meaning.**
- A “**practical, common-sense approach** not dominated by technical rules of construction”. The ultimate goal is to determine the intent of the parties. A contract must be read as a whole, in light of the surrounding circumstances known to the parties at the time the contract was formed (SCC, *Creston Moly Corp. v. Sattva Capital Corp.*).
- **Intent of the parties** (against the contract’s objective contextual scheme; the analysis should not be framed in terms of the parties’ subjective intention at the time they entered into the contract. In interpreting a contract, the court should consider the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity, among other factors (*RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA).

Breach

- A party's failure to fulfill any term of the contract.
- Only material breaches give rise to contractual remedies.
- **Remedies for a Breach of Contract**
- **Damages**

Remedies for breach of contract: Damages

- Compensatory damage: aim to put the non-breaching party in the position that they had been if the breach had not occurred.
- Punitive damages: meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the Canadian business contracts setting.
- Nominal damages: when a breach occurred, but no actual money loss to the non-breaching party was proven.
- Liquidated damages: damages identified by the parties in the contract itself. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach.

Remedies for breach of contract

- **Specific Performance.** If damages are inadequate as a legal remedy, the non-breaching party may seek an alternative remedy called *specific performance*. Specific performance is best described as the breaching party's court-ordered performance of duty under the contract.
- **Cancellation and Restitution.** A non-breaching party may *cancel* the contract and sue for *restitution* if the non-breaching party has given a benefit to the breaching party.

Expectation

A court, enforcing a contract, attempts to put the non-breaching party where he or she would have been had the contract been performed (benefit of the bargain).

- Expectation: Lost benefits to plaintiff.
- Reliance: Cost to plaintiff.
- Restitution: Benefit to defendant.

Expectation

- The court calculates damages by taking the value of the contract (actual damages) and subtracting costs avoided, but adding the consequential damages and incidental damages.
- Actual damages: Profits lost, or the additional cost to replace the subject of the contract.
- Costs avoided: Any cost the breach allowed the non-breaching party to avoid.
- Consequential damages: Damages that are not part of the contract, but occur because of the breach.
- Incidental damages: Costs that the non-breaching party incurs while trying to mitigate damages or secure the value of the contract. Often this includes transaction costs (costs of completing the transaction).

Example

Elizabeth agrees to rent a car from Carlye for two days at \$30/day plus \$10 insurance so that Elizabeth can visit clients at \$100/hour. But Carlye cannot deliver a car, so Carlye has breached the contract. After an hour, making one phone call from a pay phone to other rental agencies, Elizabeth rents a car from Emily for \$45/day, but Emily does not require Elizabeth to buy insurance.

- Actual damages = The additional cost to rent the car (\$30 for two days)
- Costs avoided = The insurance premium that Emily did not charge (\$10)
- Consequential damages = The fees Elizabeth could not collect while waiting an hour for another car (\$100)
- Incidental damages = The cost of the phone call (\$0.50)
- $\$30 - \$10 + \$100 + \$0.50 = \$120.50$.

Intellectual property

- Patents.
 - Inventions
 - Strongest protection: 20 years of exclusive rights.
 - In exchange of protection, the patent is published so that the ideas in the invention go into the public domain and can be used to create other innovations.
- Trademarks.
 - Protection of the goodwill that merchants invest in their products.
 - Exclusive rights in the markings that identify goods.
 - No two trademarks can be so similar that members of the public can be confused.
 - Standard to determine infringement is consumer confusion.
- Copyright.

Copyright

- Original
 - Some spark of creativity or individuality.
- Literary, dramatic, musical and artistic works or compilations.
 - Literary: anything that is written, such speeches, essays and books and may be in any form.
 - Dramatic: the characters, scenes, choreography, cinematography, relationship between characters, dialogue and dramatic expression.
 - Artistic: sculptures, paintings, photographs, charts, and engravings.
 - Musical: any musical compositions with or without words.

Copyright: No protection

- No protection for an idea or for some fact.
 - Stock literary figures (butler, dumb cheerleader)
 - Standard plotlines (boy loves girl, butler kills homeowner).
 - Stock literary devices (using a calendar to mean passage of time).
 - Ideas, principles, concepts, procedures, and processes not copyrightable.
- Only the expression of an idea is protected.

Copyright

Criteria for Copyright Protection

- **Originality**
- **Fixation:** The original work must be expressed in some material form, capable of identification, and having a more or less permanent endurance.
- **Nationality.**

Beginning of protection

- Automatic: copyright is granted when the work is created.
 - Voluntary registration of copyrights. Helpful for lawsuits.

Duration of a Copyright

- 50 years following the end of the calendar year in which the creator dies. Then public domain.
 - US: Life + 70 years.

Copyright

Rights Conferred

- Copyright
 - Publish, reproduce, perform, transmit and show in public.
 - Subsidiary rights: abridgment and translation.
- Moral Rights:
 - The author retains their moral rights: to determine how the work is being used and what the work is being associated to.
- Neighbouring Rights
 - The performance, transmission and reproduction.
 - They were created for three categories of people who are not technically authors: performing artists, producers of phonogrammes, and those involved in radio and television broadcasting.

Copyright: Fair dealing

- Private use
 - A back-up is permitted, provided you keep both copies and there is no circumvention of digital lock.
- Research
- Study
- Review or criticism
- News gathering

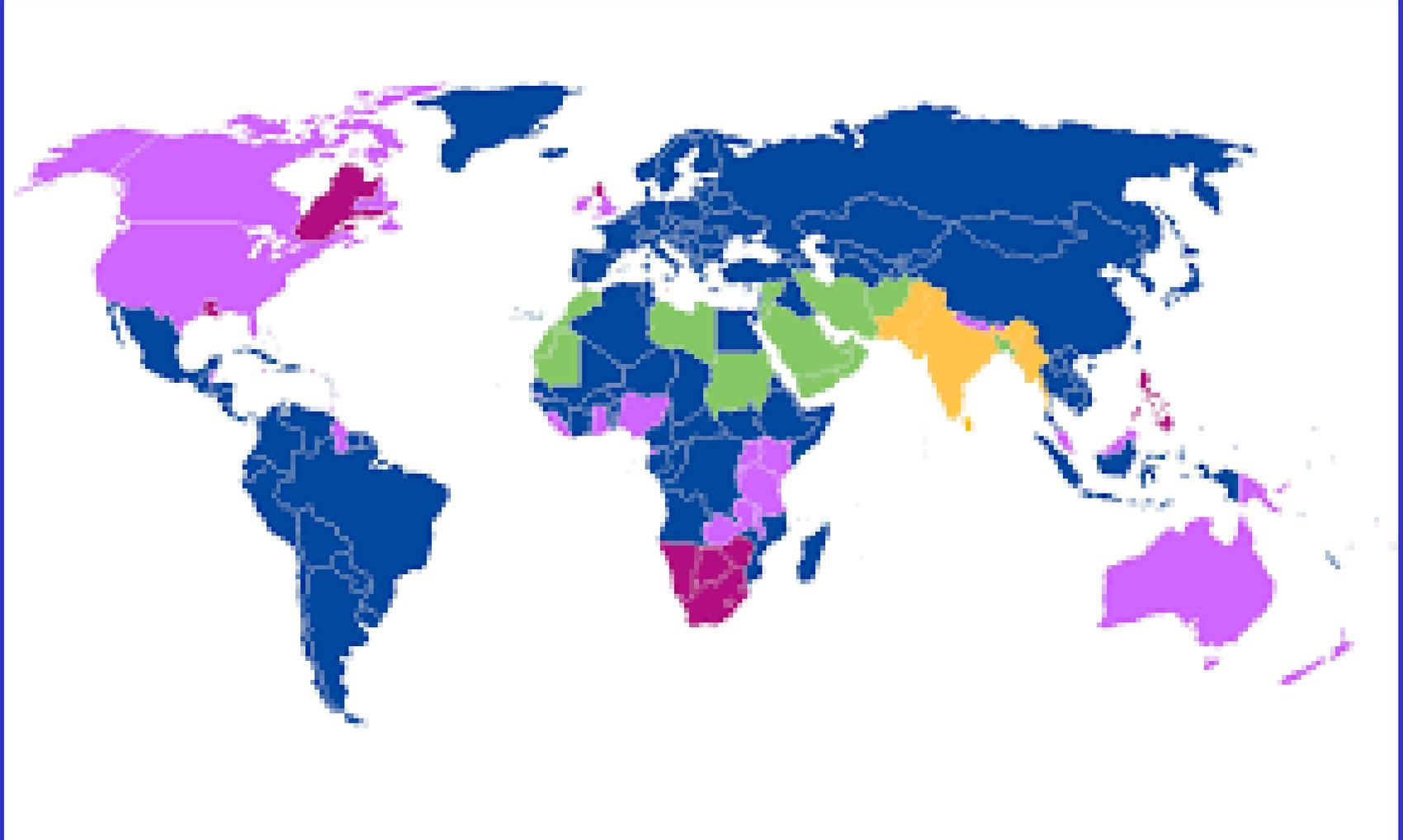
Copyright: Infringement

- **Substantial Similarity**
- Plaintiff owns valid copyright in a work; and
- The defendant copied original elements of that work.
- The defendant had access.
 - “Reasonable opportunity to view” the work in question.
- The defendant produced something “substantially similar,” to the copyrighted work.
 - Substantial similarity “exists where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”
 - It does not mean identical, somewhere between no similarity and identicalness.

Right of privacy

- It gives an individual the exclusive right to profit commercially from the use of their name, image, photograph, likeness, or persona.
- A common law cause of action for appropriation of name or likeness may be pleaded by alleging:
 - the defendant's use of plaintiff's identity;
 - the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise;
 - lack of consent; and
 - resulting injury.
- It also protects an individual from the emotional anguish resulting from the publication or dissemination of private facts that are of no concern to the public at large, facts that are embarrassing, intimate, or those facts that portray them in a false light that is highly offensive.

Common Law vs. Civil Law



Common law

- Common law as we know it today has evolved since 1066.

Influence:

- Islamic law as in the teaching of law in the Inns.
- Common law received a lot of:
- Islamic Law: court of Inns
- Roman Law (primitive): contracts. Oxford and Cambridge taught Roman Law.
- Talmudic Law: commercial law.
- Aboriginal law: land property system

Common law

- Law was administered by local people, who served in juries and applied their local laws. They were monitored and supervised by professional judges who had the confidence of the King, the French King. So, they traveled around the British Isles in circuits.
- Then it was no longer possible to apply local law, so they decided to apply a general more common law to all towns, i.e., the same everywhere, in every county.
- **But, since there was not much in common the only way was to create new law; and soon these judges started to make law, which was commonly applied.** This is the origin of common law and one of its main characteristics.

Common law

- So common law is born –and exists today- as a law created by judges and closely connected to trials, i.e., **procedure**.
Adversarial process of adjudication: the judge is simply an arbiter. The parties through their lawyers move forward the case. Jury decides the facts and the judge the law.
- Case and controversy: standing, ripe (not moot) and jurisdiction no political questions.
- Right to appeal: 1700's?
- Publication of appellate decisions.
- **Stare decisis**: precedent: of a higher court must be followed, unless considered no longer good law.
- Importance of the writs.

Common law: sources

- Constitution
- Precedents
- Statutes/Codes
- Regulations
- Contracts
- Publications

Civil law

Roman Empire

- Advice given by juriconsults with respect to particular cases or disputes.
- Ownership of things: patrimonial things vs. extrapatrimonial, common things vs. sacred things, principal vs. accessory things. Ownership was essentially private.
- Contracts: no general consensual concept.
- Classification
- Real: verbal (solemn words), literal contracts, consensual contracts.
- Liability was only objective.
- Commentators: list of authorities.
- Justinian's Digest.

Civil law

Modern continental law

- Roman law rediscovered in the 11th century in Europe.
- Glosses on Roman Law texts.
- 1804 Napoleonic Civil Code.
- **Resident judges.**
- **Investigative procedure.**
- **No judge-law making.**
- **Historical prestige of law professors.**
- Decline in other forms of social cohesion or glue: aboriginal traditions, religion, and religious morality.
- Other codes.
- Law relational and obligational.
- **Rights: unilateral entitlement.**

Civil law

Modern continental law

- Law becomes subjective. And, it generates rights.
- Contract: meeting of autonomous wills. Consensual.
- Delictual obligation becomes subjective, i.e., fault based.
- Law has a human goal.
- Greek tradition of rational enquiry.
- Human construction is possible, from no thing can be developed something.
- The means of creation is through logical thought –Aristotle’s law of non contradiction or the law of the excluded middle. Deductive thought follows from this form of logic.
- Construction of modern state.
- **Interpretation of laws –rather than creation- is at the heart of the civil law tradition. Legal nature and positivism.**

Civil law

Sources

- Constitution
- Codes
- Statutes
- Precedents or court decisions
- Regulations
- Contracts

Scholarly publications (books and articles by legal scholars)

Law careers: The path to legal practice

- **Education**
- 4-year University degree (with a very high GPA)
- LSAT
- Letters of recommendation and admissions essay.
- Law School: 3 years
 - 1st year required courses + mostly electives in the upper years.
 - Socratic method.
 - Objective: to think like a lawyer.
 - Undergraduate nature. No research.
- Article (1 year).
- Bar exam (commercial preparation): Member of the bar (Law Society). Admission by province (US bar exam).

Types of legal practice

- **Private Practice:**
 - Solo practitioner
 - Law firm: junior associate 6 years to become partner.
- **Public Interest Law:** serves low-income individuals, marginalized groups and social causes; practitioners may work for advocacy groups, legal aid clinics and other organizations with the goal of advancing an interest of the public.
- **Government Counsel:** governments hire lawyers for legal advice and representation; lawyers directly employed by the government may work for ministries, government agencies and crown corporations.
- **Corporate Counsel:** corporations can employ lawyers as in-house counsel; an in-house counsel works for a single company to advise on legal matters related to its business activities.
- **Court practice:** judge, prosecutor, etc.

Areas of legal practice

- Torts
- Real Estate
- Labour
- Environmental
- Intellectual Property
- Family Law
- **Other legal professions**
- Paralegals: regulated:
- Police officers
- Criminal Justice officers (parole, probation, corrections)
- Justice of the Peace
- Human Rights officers
- Immigration and Refugee officers
- ADRs.

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- Contract managers
- Insurance and real estate assistants
- Loss prevention and investigations
- Social policy researchers, consultant, and program officers.
- Border services officer (student program).
- Court interpreters
- Court clerks and other personnel.
- By-law officers and inspectors
- Intelligence officers
- Military police.