

### Communication of Offer

Facts: secretary - towards the end of her employment was taking Board minutes mentions her retirement would come with 2 years' pay as bonus - when she retires did not get communicated to her

- ⑧ Blair v. Western Mutual Benefit Assn. 1972 BCCA offer must be deliberately communicated - it is not an offer if not communicated to the party to whom it is directed in order to prove that the offeror intended to be legally bound.
- A party must intend to make an offer for it to be an offer capable of acceptance, and it must be communicated to the party to whom it is directed in order to prove that the offeror intended to be legally bound.
- It makes no difference if the offeree knows about the offer by another means - it must be deliberately communicated to them by the offeror.

- ⑨ Williams v. Carwardine 1833 KB Pl gave info about Df's brother's murder which led to conviction of her husband - Ratio Knowledge of an offer is sufficient to accept on a unilateral offer even if performance as such is not motivated by the offer. Held Df's offer by Pl's action formed a contract even though she was motivated by her husband beating her.

- ⑩ R. v. Clarke 1927 Knowledge of offer required
- Cannot perform under a unilateral contract without knowledge of the offer.
  - K REQUIRES consensus ad idem In this case Clarke has forgotten about the reward / offer but had given statement to reduce his own sentencing.

## Termination of Offer

1. **Introduction: The Duration of an Offer** → as long as an offer remains in effect, it can be accepted 3 ways an offer can be terminated:

1. Revocation – offeror cancelling offer
2. Rejection – offeree rejects offer (can do with a counter-offer)
3. Lapse of Time

### 2. **Termination by Rejection or Counter-offer**

- Acceptance mailed Oct 1
- Rejection faxed Oct 3
- Acceptance received Oct 8
- According to the postal rule, k is formed when letter is posted. BUT postal rule is an exception, so should revert to the regular rule. SO, fax indicates that there was no meeting of the minds at time of acceptance.

Receipt rule - *Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH*

Postal acceptance rule - *Household Fire & Carriage Accident Insurance Co. v. Grant*

### 3. **Termination by Death**

#### (a) **Death of the Offeror**

- If the offeree knows of the death, then the offer terminates
- If there was an option to leave the k open, the contractual rights are left to the assignee, however it depends on the offer itself, eg personal services k, and depends on the intention of the offeror. The death ends the k if its something only the deceased can do, if the estate can fulfil the k, then k is still valid

#### (b) **Death of the Offeree**

- If the estate of the offeree can accept, then K is still valid. The offeror may not intend to make the offer to a deceased or his estate. Look to the intent of the offeror: was the k intended to be made to the offeree only, or to the offeree and his living representatives.

#### (c) **Revocation -offeror communicates that the offer is not longer open.**

- Offers open to the world should be revoked by the same means that the offers were made.
- Revocation is not effective unless it is communicated (does not have to be direct) (ex: *Dickinson v. Dodds*)

# DEFINITIONS

## Offer and Invitation to Treat

**Invitation to Treat** – A solicitation for one or more offers usually as a preliminary step to forming a contract.

**Offer** – A promise to do or refrain from doing some specified thing in the future; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

**Offer to all the World** – An offer, by way of advertisement, of a reward for the rendering of specified services, addressed to the public at large.

The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other. Further requirements are that the agreement must be certain and final; and special problems arise from conditional agreements. An **offer** is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. Under the **objective test** of agreement, an apparent intention to be bound may suffice. An offer may be addressed to either an individual, a group of persons, or to the world at large. When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply respond to a request for information, or he may make a similar request. That party is then said to make an "**invitation to treat**": he does not make an offer but invites the other party to do so. The distinction between an offer and an invitation to treat is often hard to draw as it depends on the elusive criterion of intention.

**Auction Sale** – the general rule is that the offer is made by the bidder and accepted by the auctioneer when he signifies his acceptance in the customary manner.

**Display of Goods for Sale** – the general rule is that a display of price-marked goods in a shop window is not an offer to sell goods, but is an invitation to a customer to make an offer to buy.

**Advertisement and Other Display** – advertisements of rewards for the return of lost or stolen property, or for information leading to the arrest or conviction of the perpetrator of a crime, are invariably treated as offers: the intention to be bound is inferred from the fact that no further bargaining is expected to result from them.

**Tenders** – a statement that goods are to be sold by tender is not normally an offer, so that the person making the statement is not bound to sell to the person making the highest tender. Similarly, a statement inviting tenders for the supply of goods or for the execution of works is not normally an offer. The offer comes from the person who accepts one of them.

# Invitation To Treat cases

## ① Canadian Dyers Association v. Burton (1920) ~~ONSC~~

*A Mere Quotation Does Not Constitute An Offer, But Rather is only an Invitation to Treat*

A contract requires an offer and an acceptance. Are price quotations offers? Each case should be decided on the facts. The question is one of intention. "We quote you" has been held not to be an offer but "shall be happy to have an order from you to which we will give prompt attention" was held to be an offer. "In each case of this type, it is a question to be determined upon the language used, and in light of the circumstances in which it is used, whether what is said by the vendor is a mere quotation of price or in truth an offer to sell."

## ② Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953) ~~ECA~~

*Articles on Shelves are an Invitation to Treat*

"In the case of an ordinary shop, although goods are displayed and it is intended that customers should go ahead and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed." Goods displayed in a shop are merely an invitation to treat.

## ③ R. v. Dawood (1976) ~~EWCA~~

*An Offer is Made Once the Item is Brought to the Counter – It is Accepted behind the Counter*

A woman falsified a price tag on an article and then paid for it. "When the appellant took the jumper and blouse to the checkout counter ... she was representing to the cashier that both articles had been displayed for sale at this price, although she knew such was false. The cashier had authority to accept such offer, which she did by accepting the cash proffered. At that point a contract of sale had been made; true, it was a voidable contract as having been induced by fraud. The cashier had a general authority to accept such offer and to sell the goods on behalf of her employer."

## ④ Carlill v. Carbolic Smoke Ball Co. (1893) ~~1892 ECA~~

*An Offer is limited only to those who accept or perform the duties outlined in the offer*

The company put a sum of money on deposit with a bank and said they would pay this money to anybody who got influenza while using their product. Well, a consumer caught influenza. The courts held that a special "unilateral contract" could be created in these circumstances and the Smoke Ball Co. had to pay up. A unilateral offer can be made to all the world and is accepted by anyone who performs the condition of the offer.

## ⑤ Goldthorpe v. Logan (1943) ~~ONCA~~

*A specific advertisement guaranteeing results is an offer and not an invitation to treat*

A woman answers an ad guaranteeing removal of facial hair. Treatment fails. Was there a contract? The judge thought so. The ad was the offer. Relying on the Carbolic Smoke Ball case the judge added: "if the vendor's self-confidence persuaded her into an ... extravagant promise, she cannot now escape a complaint from a credulous and distressed person to whom she gave assurance of future excellence and relief from her burden. The weak unfortunate person, however gullible, can be sure that the courts ... will not permit anyone to escape the responsibility arising from an enforceable contract."

⑥ Harvey v. Ferry (1953) ~~SCC~~

Facts: parties exchanging letters negotiating terms - at one point seller's lawyer wrote "we have no objection to the agreement of sale"

Held: despite what seller's lawyer wrote, there was no agreement, no meeting of minds, as the buyer was still negotiating for better terms

SCC: allowed appeal and set aside order for SP

# Contract A, Contract B

## **TENDERING CONTRACT- CONTRACT A and CONTRACT B**

- There is an obligation on both the owner and bidder to comply with the terms and conditions of the tender document.
- Owners must act equally and in **good faith** towards all the bidders, especially during the tender evaluation process as established in *Martel*.
- The decision to accept or reject the tender should be based on criteria stated in the terms and conditions of the tender, expressly or impliedly.
- *M.J.B. Enterprises*, the Court held that there was an implied duty on the owner to accept only compliant bids.
- \**Double N Earthmovers* ruled that the bids must be **substantially** compliant with all **material conditions of a tender**.
- If a bid does not substantially comply with the terms, then the owner cannot amend or waive the errors and accept the amended bid, as this would result in a breach of the duty of fairness towards the other bidders.
- The decision in \**Maystar* reiterates all these basic principles and warns that not adhering to them can lead to a damages claim by the other bidders. The decision emphasized the importance of preserving the integrity of the fair bidding process. The court reasoned that it would not be advantageous for a contractor to submit bids for an expensive and time-consuming tendering process if the owner could simply circumvent the process and accept a non-compliant bid.

## **Tendering in the Construction Industry**

- A tenderer who has already submitted a tender may submit a further tender at any time up to the official closing time. The last tender received shall supersede and invalidate all tenders previously submitted by that tenderer.
- A tenderer may withdraw or qualify his tender at any time up to the official closing time by submitting a letter bearing his signature and seal. No telegrams or telephone calls will be considered.
- With a tender, essentially two contracts are formed: The first contract has as its principal term, the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a second contract upon the acceptance of the tender.
  - 1) In cases of a sale of goods by auction, a sale is complete when the auctioneer announces its completion by the fall of a hammer or in any other customary manner; any bidder may retract his bid until this announcement is made (*Ontario Sale of Goods Act*)
    - a) Auctioneer's call for bids is an invitation to treat, bid is offer, saying "sold" at the end is acceptance
  - 2) Owner, by issuing tender documents created a unilateral K (Contract A: offer that owner will award the contract to the lowest bidder in exchange for an irrevocable bid - bilateral). The general contractor's submission of a tender is the act of acceptance for contract A. The successful bidder and the owner will then enter into contract B. (*Ron Engineering*).
    - a) Tender is an acceptance of a unilateral contract A by each bidder, and offer for terms of contract B
    - b) Once the tender is submitted a binding contract A has formed and tender is irrevocable even if it is in error
    - c) You can only escape contract A if the error is obvious and substantial on the face of the tender
  - 3) Some tender offers have privilege clauses that mean don't have to accept lowest bid.
    - a) Doesn't allow you to pick non-compliant offers (*M.J.B. Enterprises*). There is no freedom to accept or reject tenders without having regard to the spirit and intent of the tender documentation. Contractors must take care to ensure that all tenders abide by the rules of the tender call to ensure compliance.
    - b) Still have to treat bidders fairly and not give any of them unfair advantage (*Chinook Aggregates*) – if it is not stipulated it cannot be exercised (like a preference for local bidders)
    - c) A duty to treat all bidders fairly means treating all bids consistently, applying assumptions evenly
      - a. (*Martel Building*)
    - d) With careful drafting and use of a "request for proposals" the owner or buyer may have significant freedom to select the party that it wants to negotiate with, however there still needs to be a "fair process" (*Buttcon*)
  - 4) Courts will apply or twist common law rules of formation so as to protect reliance and uphold the integrity of the bidding process

### **R. v. Ron Engineering & Construction (Eastern) Ltd.** 1981 SCC Contract A (uni) and Contract B (bil)

Contact A is irrevocable C

Current rules around tender process provide for two contracts – one unilateral

*The invitor of a tender has certain obligations to the tenderors*

In this case, a tender required a deposit of \$100,000 which, the tender document stipulated, would be forfeited if the tender was withdrawn. The contractor, after submitting both tender and deposit, then tried to change his tender but was denied. The contract went to another company and the deposit was not returned. The Supreme Court said that there was a preliminary, initial and "unilateral contract" which the court called "contract A" (which creates no obligation on any party until a bid is made); and the main contract, which the court called "contract B." Contracts A provide that the person issuing the tender can select one of the tenderers and enter into contract B with the tenderer so selected. Upon the person doing

so, the tenderers, other than the one so selected, would be discharged from any obligation under contract A. The tenderer selected, however, would then be required to enter into contract B with the person issuing the tender (the process has been compared to a leaseholder exercising an option to purchase). Contract B, however, does not come into force until executed by both parties. In this case, under the terms of contract A, the deposit was not refundable. The court said that the person that issues a call for tender creates an "offer to contract" which, once a bid is submitted both in conformity with, and in response to, the invitation to tender, is binding and is irrevocable if the tender conditions says that the bids are irrevocable. This case has had a profound effect on the tendering process in Canada.

The issue is not mistake but on the forfeiture clause. Deposit was recoverable by the Contractor under certain conditions, which was not met. Deposit subject to forfeiture, conditions met by the Owner.

### **\*Double N Earthmovers Ltd. v. Edmonton (City)**, [2007]SCC - Compliance w terms of a call for tenders

- The owner does not have a duty to investigate as to whether a submitted bid is compliant or to look beyond the face of the bid to ensure compliance;
- It only has the duty to treat all bids fairly and equally
- When an owner accepts a compliant bids and enters into contract B on the terms set out in the tender document, Contract A is fully discharged and an owner has no any further obligations to unsuccessful bidders  
(Dissent): breached obligation to treat all bidders fairly.

Facts: bid based on equipment being 1980 or newer – the winning bidder stated so but in the end supplied and finished work with some equipment older than 1980

### **\*Design Services Ltd. v. Canada**, [2008] 1 S.C.R. 737; 2008 SCC 22. – no duty of care to subcontractors

Reasons: test for duty of care:

1. reasonably foreseeable? Yes, subcontractors would suffer harm
2. sufficient proximity? No. Maintained distance and were not proponents of bid.

Generally, new duty between owner and subcontractor was not justifiable

P had opportunity to become party to contract A and did not take it

Application: subcontractors should secure adequate protection themselves (in the bid)

### **M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.** 1999 SCC privilege clause

- The privilege clause is only one term of contract A and must be read in harmony with the rest of the tender documents – it does not override the obligation to only accept compliant bids – **must still only accept COMPLIANT BIDS**

Notes: whether there were any implied terms and whether there were any breaches seems specific to the facts

Some courts have described the owner's obligations as a duty of good faith (particularly government contracts). However rejected in

*Martel Building Lrd v R* (2000) SCC → no tort/negligence in the conduct of commercial nego's

↳ no special requirement to any bidder due to past r'ship

↳ no duty of care when preparing tender scope but duty to treat all bidders fairly & equally

Facts: MJB invited tender w/ a privilege clause "lowest bid may not necessarily be accepted". Winning tender had a note attached for alternative pricing in case of different material. DC sued for breach of contract A for accepting non-compliant bid

④

\*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] 1 S.C.R. 69; 2010 sec 4.

Held

- {majority}: exclusion clause did not apply because it did not cover breach in question, Tercon could recover
- {dissent}: clause did cover the province's breach and there were no public policy concerns which would allow the court to refuse to enforce the provision

Reasons:

- both majority and dissent said time has come to rest the doctrine of fundamental breaches as to applies to exclusion clauses generally; only can be used in extreme circumstances
- The approach that should instead be followed in interpreting these clauses involves three stages of analysis:
  1. The court must determine, as a matter of interpretation, whether the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed any further.
  2. If the exclusion clause does apply, the court must then consider whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" This second issue is said to deal with contract formation and not breach.
  3. If the exclusion clause is held to be valid and applicable, the court must then determine whether it should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of the contracts

} for facts see #8  
under Standard forms

⑤

\*Maystar General Contractors Inc. v. Newmarket (Town), ONCA – damages claim from other bidders allowed

- Owner should not be able to circumvent the process and accept non-compliant bids.
- "the integrity of the tender process is essential in order to foster a fair and orderly bidding process where contractors will expend the time, effort and expense to bid, knowing they will be treated fair and equally"

⑥

Naylor Group Inc v Ellis-Don Construction Ltd (2001) SCC

Facts: Prime Contractor awarded a large construction contract incorporating sub-con's bid – subcon workers are not members of IBEW so PC refused to enter into sub-contract and hired other subcons who had IBEW workers - PC was obligated under a recent Labour Board ruling that

PC was under a collective bargaining commitment to only use IBEW affiliated companies

TJ: no contractual claim but assessed damages for 730k

CA: BOC but damages 182k

SCC: appeal on liability dismissed cross appeal on quantum increased to 365k

SCC: no "frustrating event" as the labour board decision only affirmed existing IBEW obligation, PC was the one who approached Naylor to do do the work w/ non-IBEW worker companies

See also → ⑦

On optics for  
Duty of Good faith

Is there an obligation to  
NEGOTIATE in good faith  
between contracting parties?

**(1) Empress Tower Ltd v Bank of Nova Scotia (1990) BCCA**

Facts: D is tenant of P, agreed to renew lease but failed to reach an agreement. Lease expired and P offered a non market value price

Held: an agreement to renew had 2 obligations

① to negotiate in good faith

② to not withhold agreement unreasonably

Decision: writ of possession denied. P landlord obliged to offer rent at fair market price.

not distinguished,  
conflicting authority

**(2) Maxpar Enterprises v Canada (1999) BCCA**

Facts: negotiation of renewal of a quarry lease

Held: no market price to benchmark if negotiations was done in Good Faith or not. No obligation to negotiate when the clause provide for a 5 year extension based on "market price"

**(3) Martel Building Ltd v Canada (2000) SCC**

Facts: Canada a lease w/ Martel, with an option to renew. Martel thought they were negotiating a renewal but Canada called for tender. Martel's attempt to negotiate renewal was frustrated by some of Canada's employees not being earnest negotiating. Martel joined and bid but lost, even though theirs were lowest after certain costs were added to it. Canada had a privilege clause in its call for tender.

Held: -no duty of care in pre-contractual negotiations, including preparing specifications and requirements

A DUTY TO  
BARGAIN IN  
GOOD FAITH  
HAS NOT BEEN  
RECOGNIZED  
IN CANADIAN  
LAW.

④ Honda Canada Ltd v Keays (2008) SCC

Held: good faith conduct is implied in the contract of employment

Facts: See Damages. ⑨

⑤ Bhasin v Hyknow (2014) SCC

Breach of duty to act in good faith in exercising renewal clause.

Facts: See Consideration. ⑯

⑥ Churchill Falls (Labrador) Corp v Hydro Quebec (2018) SCC

TDR: court can't force parties to renegotiate existing contracts

→ See printout

⑦

\*Oz Optics Ltd. v. Timbercon, Inc. (2011), 107 O.R. (3d) 509; 2011 ONCA 714. Duty of good faith

Held: no actual contract, court bound by prior authority that there is no freestanding duty of good faith in tort; but negligent misrepresentation available (In this case no Contract A, Contract B has been found)

Rules: Justice Armstrong discusses the duty of good faith and current law

- Ontario Court of Appeal stated that it is difficult to ascertain in what circumstances an obligation to act in good faith will be applied, but that "the common law has not recognized a free-standing duty of good faith based in tort" and that, to date, the Supreme Court of Canada has not extended the doctrine of good faith beyond the context of an existing contractual relationship.  
In essence, the state of the law was described as follows:
  1. There is currently no recognized "free standing duty of good faith based in tort." The duty of good faith arises only through contract.
  2. The law has not recognized "a general duty to bargain in good faith," although the Court of Appeal has previously left open the possibility that such a duty exists in "special circumstances."<sup>2</sup> Those "special circumstances" which could give rise to pre-contractual bargaining obligations, however, require that the parties ultimately enter into a contract.
  3. In certain circumstances, a "duty to enforce or perform a contract in good faith has been recognized" (although it has also been criticized by some courts).
  4. A specific duty of good faith has been recognized in the termination of employment contracts, as between a franchisor and franchisee, and between a condominium developer and a condominium corporation.
  5. A duty of good faith has been recognized in the commercial tendering context, under the Contract A/Contract B framework originally recognized by the Supreme Court of Canada in *Ontario v Ron Engineering*.<sup>3</sup>
- "However, in light of the reluctance of the courts, in particular the Supreme Court of Canada, to extend the doctrine of good faith beyond the context of a contractual relationship (whether formal or implied) I would be hesitant to invoke the doctrine here given that recovery can be grounded in negligent misrepresentation. This approach is suggested by the Supreme Court in *Martel*. Therefore, I do not find it necessary to consider this issue further."

TDR: where is duty to act in good faith present?

	YES	NO	Path
1) in tort		✓	Oz
2) in termination of employment	✓		Bhasin
3) commercial tendering	✓		Ron Eng
4) in bargaining contracts	✓		Martel

Decision: Negligent misrep

no free standing duty to act in good faith pre-contractually (bargaining/nego)  
in the absence of Contract A, Contract B situation

Facts: see printout



# SUPREME COURT OF CANADA

[disponible en français](#)

## Case in Brief: *Churchill Falls (Labrador) Corp v. Hydro-Québec*

Judgment of November 2, 2018 | On appeal from the Court of Appeal of Quebec  
Neutral citation: 2018 SCC 46

**Courts can't force parties to renegotiate contracts, the Supreme Court has confirmed. Unexpected changes in electricity prices didn't mean that Hydro-Québec had to share its profits from the Churchill Falls power station.**

In 1969, after many years of negotiations, Hydro-Québec and the Churchill Falls (Labrador) Corporation (part of Newfoundland and Labrador Hydro) agreed to build a power station on the Churchill River. It was a huge and expensive project. Hydro-Québec took on most of the financial risk in the contract. It agreed to buy most of the electricity at fixed prices price for 65 years, whether it needed it or not, and to cover any construction cost overruns. But it got a long-term supply of cheap energy in return for taking this risk on. The Corporation got a long-term, stable source of income. That meant it was able to borrow money to build the station, which in 2018 was worth over \$20 billion.

By 2009, the price of electricity was much higher than it had been forty years before. Hydro-Québec was taking advantage of the low rates and selling electricity to customers outside Quebec at higher prices. The Corporation didn't think this was fair. It said it should be able to share in the profits. In 2010, when Hydro-Québec refused to renegotiate the contract, the Corporation asked the courts to force it to.

In Quebec law, people who sign a contract together have certain duties toward each other. The province's Civil Code says that all sides have to treat each other with "good faith." That means they have to be honest and not do anything to hurt each other. As part of this duty, they are sometimes expected to cooperate. How far the duty goes depends on the kind of contract it is. It is stronger for a "relational" contract than for a "transactional" one. A relational contract is based on a long-term, cooperative relationship where risks and benefits are expected to be shared (like a partnership). A transactional contract specifically sets out risks and benefits agreed to by all sides. The Corporation said the contract was relational, so Hydro-Québec had to share its benefits. Hydro-Québec said it wasn't a relational contract, so it didn't have to share anything.

Both the trial court and the Court of Appeal ruled for Hydro-Québec.

The majority at the Supreme Court also ruled for Hydro-Québec. It said the trial judge was not wrong to decide that the contract wasn't relational, and that Hydro-Québec didn't have to renegotiate. The contract set out many things very precisely, which showed both sides meant to follow the specific wording of the agreement, not to rely on any ongoing relationship. Good faith didn't mean Hydro-Québec had to give up the benefits it had negotiated. Good faith also didn't mean Hydro-Québec had to renegotiate just because there was an unexpected change in electricity prices. While Quebec courts sometimes make a party compromise a bit to find a solution, no court ever forced parties to renegotiate the key parts of a contract. Also, no court ever found that a duty to cooperate meant a party had to give up some of its profits just because the other party wasn't profiting as much. Finally, the majority agreed with the trial judge that the Corporation's claim was too late anyway.

This case dealt with a long-term contract and civil law concepts of good faith, equity, and unforeseeability. The majority confirmed that courts should not change contracts or force parties to renegotiate them if this would upset the balance the parties originally agreed to.

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**Breakdown of the Decision:** **Majority:** Justice Clément \_\_\_\_\_ dismissed the appeal (Justices \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ agreed) | **Dissenting:** Justice Malcolm \_\_\_\_\_ said the contract was relational and both parties had a duty to cooperate, so would have allowed the appeal | **Note:** former Chief Justice \_\_\_\_\_ sat on the bench and heard this case, but didn't take part in the judgment

**More information (case # 37238):** | |

**Lower court rulings:** |

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## The Background

Timbercom issued a purchase order to Oz for the purchase on consignment of manual optical products. Those products were part of the equipment to be supplied by Timbercom to Lockheed Martin for installation into fighter aircraft. Because Oz did not sign the purchase order the Court held that there was not a contract between the parties and dismissed Oz's claim for payment for manual optical products not used by Timbercom.

Timbercom and Oz also had discussions about the supply by Oz of automated optical products to be similarly supplied by Timbercom to Lockheed Martin. Timbercom repeatedly told Oz that Oz was the sole supplier and there was no competitive supplier.

Unknown to Oz, Timbercom obtained a competitive bid from another supplier. Timbercom advised the competitor that its price was higher than another competitor's price (being Oz), so the competitor reduced its price. Timbercom gave no such competitive "heads-up" to Oz. Then, when Timbercom submitted the two bids to Lockheed Martin, it marked up Oz's bid by 72% but only marked up the competitor's bid by 42%. Lockheed Martin accepted the competitor's bid, but its employee testified at trial that, had Oz's bid been the only one, Oz's bid would have been successful.

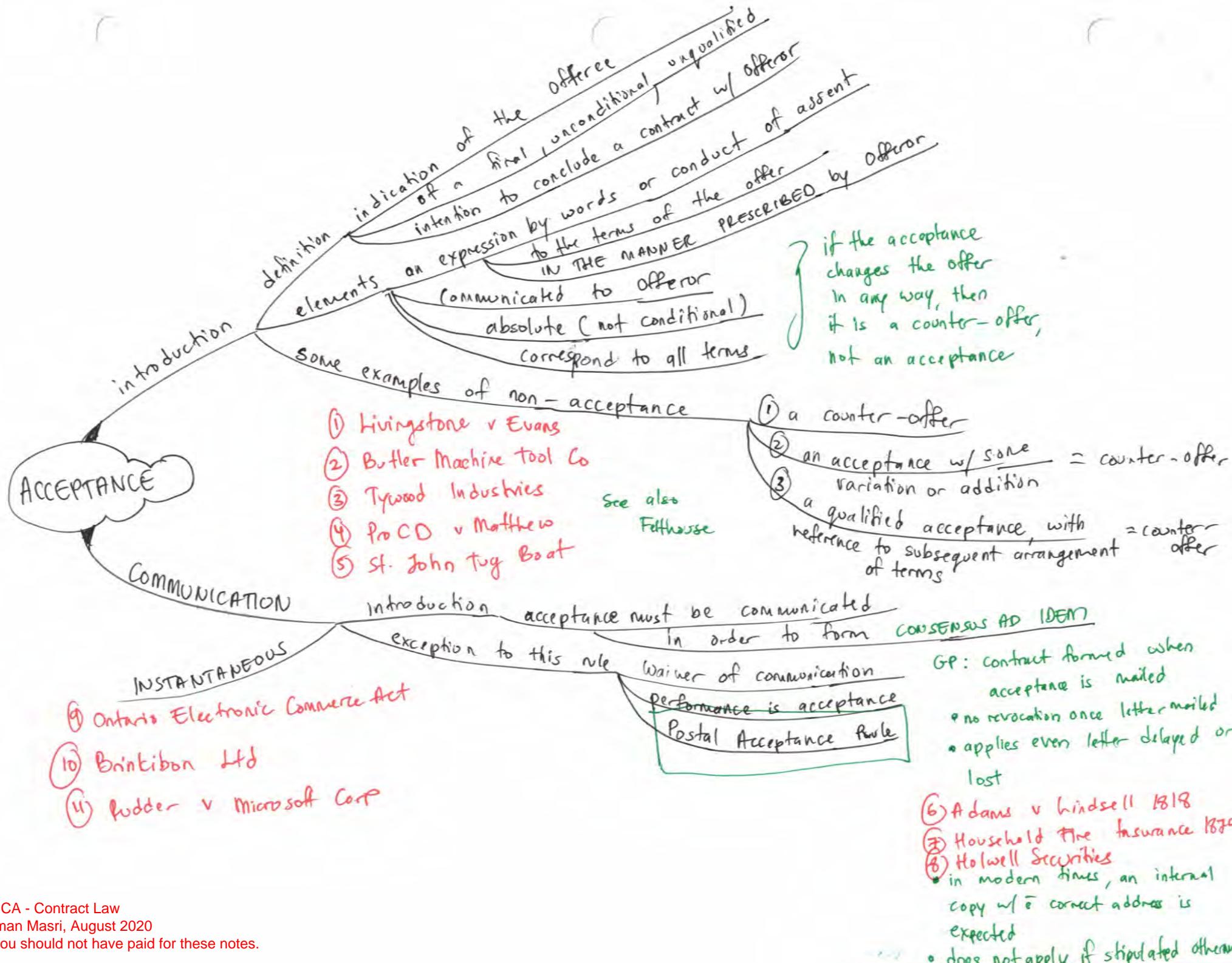
The Court of Appeal for Ontario held that Timbercom was liable to Oz for negligent misrepresentation. The Court agreed with the trial judge that there was a special relationship between the parties concerning the statements made by Timbercom to Oz. Timbercom's statement that Oz was the sole supplier was a negligent misrepresentation, if not nearly fraudulent, the Court held. The evidence established that Oz had relied upon that statement to its detriment, and that if Oz had been aware of a competitive bid, it would have acted differently by changing its delivery schedule which was the only element in its bid that was less advantageous than the competitor's.

In view of its finding of liability for negligent misrepresentation, the Court of Appeal declined to decide whether Timbercom could be liable under a self-standing duty of good faith. Such liability could arguably result from an inferred contract based on the whole process. The Court noted that the process was not a bid depository system and therefore did not necessarily result in the Contract A – Contract B regime recognized by the Supreme Court of Canada in *Ontario v. Ron Engineering*, [1981] 1 SCR 111 and *M.J.B. Enterprises Ltd v. Defense Construction 1951*, [1999] 1 SCR 619. Accordingly, a duty of good faith arising from a Contract A relating to the bidding process itself did not necessarily arise.

The Court of Appeal also noted that, in view of *Martel Building Ltd v. Canada*, [2000] 2 SCR 860 and similar cases, the pre-contractual negotiations leading to a tender does not create a general duty of care. However, the Court said that, if a subcontractor is told that it is the sole supplier, then there is arguably a stronger basis to infer a duty of good faith when "the bidder is unknowingly considered a bidder among many."

Having explored the legal and policy grounds for and against the existence of a duty of good faith in these circumstances, the Court of Appeal declined to decide the issue. The finding of negligent misrepresentation was, in its view, a sufficient basis to dispose of the appeal.

Moreover, the Court was of the view that the torts of negligent misrepresentation and fraud are available to address misconduct during an informal bidding process. Only if and when those torts were not sufficient to deal with liability should a court embark upon the difficult task of deciding if a self-standing duty of good faith arises in the circumstances of the particular tender.



Offeree must communicate acceptance to Offeror AND (ordinarily) the Offeror must receive acceptance.

#### Time for Valid Acceptance

- if offeror specifies time (offeror is the master of acceptance) → acceptance must be made within that time frame
- if no time is specified → "reasonable time" governs – depends on circumstances, usually 1 – 2 business days

#### Acceptance of Firm / "Irrevocable Offers"

- if no consideration, nonetheless revocable at common law
- Dickson v Dodds (1976) UKCA Ch D:** D makes irrevocable offer to sell P house; offer open for 48 hours; P accepts within time frame, but D has already sold house
- Rule:** In the absence of consideration, the promise to keep the offer open is not enforceable but courts may protect reasonable reliance

#### How to Accept

- offeror = master of acceptance and can set out all terms of acceptance: how and when it must be done
- offeree has no obligation to reply

#### Acceptance and the Effect of Silence

- Felthouse v Bindley (1862) Exch:** an offeror specifying that silence is acceptance is invalid

#### Counteroffers

- The mirror image rule – **Livingston v Evans** – counteroffer is rejection of original offer

Exception: the battle of forms: for large commercial transactions only **Butler** criteria used

①

#### **Livingstone v. Evans (1925)** Alta SC the mirror image rule - Counteroffer is rejection of original offer

Rule: If acceptance doesn't mirror the offer, then this ought to be construed as a counter offer.

- If in rejecting a counter offer you imply original offer is still valid, you may be obliged to form k w/ those terms if accepted.

Reasoning: "cannot" reduce price indicates the offer is still on the table (has been renewed).

- There was a binding k.
- Original offer was still open b/c of the language used in rejecting k.

#### 3. Acceptance Must be Unconditional

- "I accept your offer if..." Is NOT an acceptance, but a counter offer
- This is different from "I accept. Can you start Friday?"
  - The question is w/in the bounds of a k
- Need a manifest intention to be bound unconditionally, immediately

#### 4. Acceptance by Silence

- Needs to be a manifestation of an intention to be bound
- There needs to be a change in actions
- Silence is only acceptance when its intended to mean acceptance

*Seller replied "cannot reduce price" to buyer's counter offer : Held: this implied the original offer still stands, so when buyer replied to accept original offer, a binding contract is in place. Note: if seller did not reply, there would be no "renewal" of offer and the buyer's counter offer would have been rejection.*

#### Acceptance by conduct:

- Acceptance doesn't have to be in words, can be by action
- Eg: if send a cheque for goods and seller cashes the cheque, that's acceptance.

#### The Battle of the Forms

Traditional Analysis: (mirror image rule: person who sent the form last or "fired the last shot" terms prevail)

CA Engw

Standard terms

**Butler Machine Tool Co. v. E -Cell-O Corp.** 1979 – our terms prevail clause  $\Rightarrow$  solution

Battle of the Forms – terms should be taken as a whole and reconciled when possible If they cannot be reconciled Seller had price variation, buyer did not off slip stating "accept order on terms therein" but afterwards sent letter regarding price

then the k is concluded

Ratio: "last blow" rule:

- usually in battle of forms, terms on the last form win.
- However, this is an exception @ the terms of the k consist of the terms in the offer subject to modifications contained in the acceptance.

**Tywood Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co. Ltd.** 1979 – Adopts Butler

ONSC

Issue: Who wins battle of the forms? – where is the case heard?

Under Traditional Analysis: D would have won  $\rightarrow$  fired last shot

But in this case court approached from a "reasonable agreement b/w the parties" f.o.v. abs reasonable contracting

Held: last blow was on buyer's terms  
Seller's subsequent letter was only a reiteration of price

RATIO: essence of the contract = parties more interested in price & specs

- cannot sneak in new terms without proper notice

- look at conduct of business, what is reasonable

\* more aware from the specific contract model

## *end user license agreement (US, CA)*

### ProCD v. Matthew Zeidenberg and Silken Mountain Web Services, Inc. shrink wrap licenses valid

- The court held that Zeidenberg did accept the offer by clicking through.
- The court noted, "He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance." The court stated that Zeidenberg could have rejected the terms of the contract and returned the software. The court, in addition, noted the ability and "the opportunity to return goods can be important" under the UCC.

### Dawson v Helicopter Exploration Co Ltd (1955) SCC ~Protecting Reliance: Imposing Bilateral Analysis

#### \* Reasons for decision:

- not clear that obligation was unilateral b/c D and P will go TOGETHER (not P performing alone = bilateral undertaking)
- P's reliance: could go look for another mining exploration company, but didn't b/c P believed he had an agreement w/ D (awarded expectation damages – not reliance-based damages)
- unjust enrichment: likely that P divulged confidential information about location (though not focused on)

### Felthouse v. Bindley 1862 – acceptance must be positive, no negative optioning

Horseplay between Nephew and Uncle nothing done to bind trying to sue Actioneer – THINK negative optioning

Silence does not constitute acceptance (even if it ok in the offer)

Uncle offered a pony, nephew did not accept but asked  
Actioneer to exclude horse from the rest of farm stock but it  
was sold together anyway

Ratio Without acceptance, no claims can be brought under a contract. Acceptance must be positive action.

Notes to the case – legislation has mandated that unsolicited goods are not required to be paid for (THINK: cable companies negative optioning in the 1990's see Consumer Protection Act s.13)

### St. John Tug Boat v Irving Refining (1964) SCC

#### *Responsibility to Disown: Acceptance by Conduct*

- Rule: If offeree begins performance, this indicates acceptance. Once conduct equals acceptance, both parties are bound by all terms of K. can't just pay quantum meruit, responsible for full loss of profits

Silence can constitute acceptance if combined by conduct. If a party allows work to be done, then they

Eliason v. Henshaw 1819 US Offeree must follow terms of offeror for acceptance to be valid

Ratio: Offeree must follow the terms of the offeror (time/place/manner of acceptance) for an acceptance to be valid and binding.

## **Communication of Acceptance**

### Exceptions:

- waiver of communication,
- the performance is the acceptance, postal acceptance rule

#### (a) Mailed Acceptances

(6)

**POSTAL RULE:** A binding K is formed when acceptance is mailed (*Adams v Lindsell, 1818, KB*)

- no revocation by Offeror once letter is in the mailbox
- applies even if acceptance is delayed or lost in mail (*Household Fire Insurance v. Grant, 1879, UKCA Exch*), provided proof of mailing. Offeree can establish mailed with correct address
- TODAY: expect COPY with CORRECT internal address + some proof of mailing (balance of probabilities - if important → registered mail)

(7)

### default rule:

- ONLY applies if Offeror sends by mail & does not specify alternate mode of acceptance
- offeror can stipulate no binding K unless:
  - i) telephone call / courier to confirm or
  - ii) acceptance ACTUALLY received

### Household Fire & Carriage Accident Insurance Co. v. Grant – postal acceptance rule

(1878) Eng

#### Postal acceptance rule

Facts: D. offered to buy shares. Company's acceptance by post. Notice never reached D. Company bankrupt, liquidator (P) sues f/cost of shares not paid for.

Ratio: postal acceptance rule: K is made as soon as acceptance posted. (post-office as common agent)

#### Held

- {majority}: there was a valid contract, because the rule for the post is that acceptance is effective even if the letter never arrives.
  - He noted that anyone can opt out of the rule, and that even if it sometimes causes hardship, it would cause even more hardship to not have the rule.
  - Once someone posts acceptance, he argued, there is a meeting of minds, and by doing that decisive act a contract should come into effect.
- {dissent, Bramwell L} gave a spirited dissent, concluding that acceptance should only be effective once it arrives

## (8) Holwell Securities v. Hughes postal rule doesn't apply when stipulated otherwise (1974) Eng

Rule: Postal rule doesn't apply when stipulated otherwise.

- Also doesn't apply when the parties cannot have intended that there should be a binding agreement until the party accepting the offer had in fact communicated acceptance or exercise to the other.

Reasoning:

- The postal rule is displaced in this case b/c the express terms dictate notice, which implies receipt, not just posting. Although the offeree gave notice w/ a phone call, it doesn't count b/c it wasn't received in writing.

## (b) Instantaneous Methods of Communication

### 10 Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH 1983 H.L. Eng

The Mailbox rule

The receipt rule (the contract is made by mail and no acceptance requirements are specified to instantaneous communications such as phone or telex or fax) - acceptance where contract formed - Postal company agent exception to rules - Can make case by case - USA more set on stone

Instantaneous - acceptance & contract formation is where it is received

WHERE AND WHEN CASE (10-1) Brinkibon - in Canada, contracts are under the jurisdiction where acceptance is received.

- American restatement - Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.
- Use 'forum selection' clause to determine jurisdiction of contract.
- Post office acts as an agent for both parties, acceptance received when Postal receives it. (exception to the rule)

Uniform Electronic Commerce Act and Electronic Commerce Act 2000

- deemed receipt occurs when the electronic document both enters the information system designated by the addressee and is capable of being retrieved and processed by the addressee.
- if no information system designated, receipt deemed when addressee becomes aware and is able to retrieve electronic document

### 11 Rudder v. Microsoft Corp. 1989 ONSL

- Terms of contract entered into on the internet can be displayed on multiple pages. Users are expected to follow the links and become familiar with all terms before accepting the terms of the contract
- Clicking the "I agree" button results in formation of a valid contract

class action stayed on grounds of forum non conveniens - contract clause: exclusive JD to WA state

**Time of sending of electronic information or document**

22. (1) Electronic information or an electronic document is sent when it enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee.

**Contracting out**

(2) Subsection (1) applies unless the parties agree otherwise.

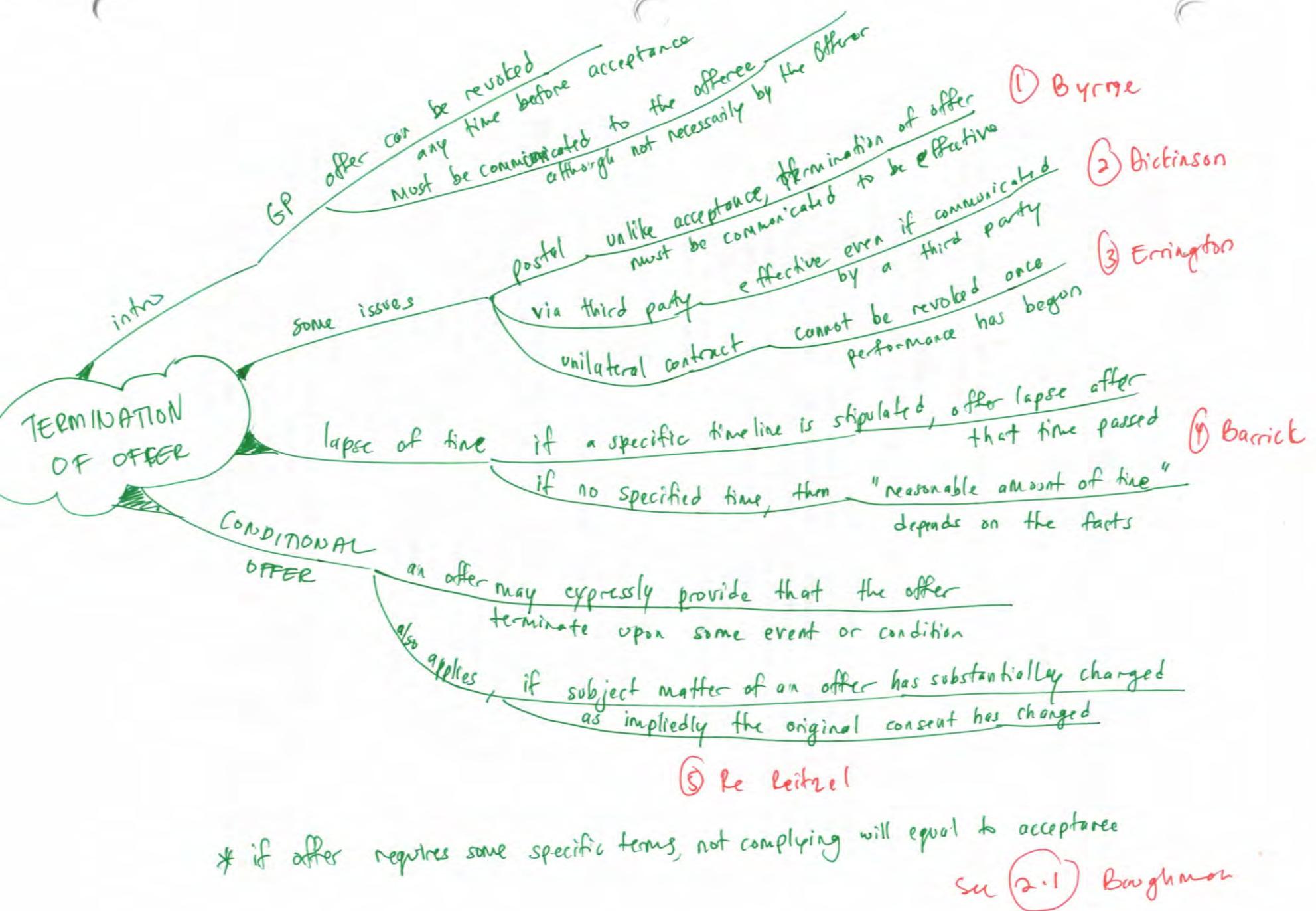
**Presumption, time of receipt**

(3) Electronic information or an electronic document is presumed to be received by the addressee,

- (a) if the addressee has designated or uses an information system for the purpose of receiving information or documents of the type sent, when it enters that information system and becomes capable of being retrieved and processed by the addressee; or
- (b) if the addressee has not designated or does not use an information system for the purpose of receiving information or documents of the type sent, when the addressee becomes aware of the information or document in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.

**Places of sending and receipt**

(4) Electronic information or an electronic document is deemed to be sent from the sender's place of business and received at the addressee's place of business.



## Termination of Offer

### Revocation

As a general rule, an offer can be withdrawn at any time before it is accepted. It is not withdrawn merely by acting inconsistently with it – notice of the withdrawal must be given and must actually reach the offeree. Although withdrawal must be communicated to the offeree, it need not be communicated by the offeree. It is sufficient if the offeree knows from any reliable source that the offeror no longer intends to contract with him.

**Revocation** – An annulment, cancellation, or reversal usually of an act or power. In Contracts, it signifies the withdrawal of an offer by the offeror.

①

#### Byrne v. Van Tienhoven (1880)

*The Revocation of an offer only takes effect when it is communicated and cannot be communicated through post*

On October 1, an offer to sell was mailed. It was received on October 11 and was accepted by telegram sent on October 11, confirmed by letter mailed October 15. But on October 8, a letter was sent by the offeror revoking the offer (the offeror received the letter of acceptance on October 20). The court decided that the revocation was inoperative; that the postal rule was "inapplicable to the case of the withdrawal of an offer. The court said that "an offer can be withdrawn before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not." But a withdrawal has no effect until it is communicated to the person to whom the offer has been sent. "A state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all."

*Buyer Seller Buyer thought he had until Friday but seller already sold to someone else on Thursday*

② **Dickinson v. Dodds (1876)**

*Revocation can take place through a third party – all that is important is that it is communicated*

Once a person is informed that the thing that was offered to him was sold to another person, there is an implied communication of the revocation of the offer and it is too late for acceptance.

②.1

#### Baughman v. Rampart Resources Ltd (1995)

*Performance must accord strictly with the offer*

The court says that there was a valid employment contract at the time that she had exercised the option. The issue now, then, is whether or not she exercised the option in accordance with the terms stipulated by the company. Baughman admits that she had not exercised the option strictly to its terms – does she have to conform exactly as stipulated? She argues that she does not have to do that because they wrongfully repudiated the contract to start with. What are the obligations and rights on the other side? In a unilateral contract you must perform according to the terms of the offer. In defending your own deficiencies you cannot point to the deficiencies on the other side.

*BCCA*

*terms: require payment as part of acceptance, without paying, there was no acceptance and no contract*

③

#### Errington v. Errington (1952)

*The revocation of a unilateral contract cannot occur once the performance has begun*

The father paid the down payment of a house and then told his son and daughter-in-law that they could live in it, to pay the monthly mortgage and that it would be transferred to them upon the father's retirement. When the father died, before the mortgage was paid, the court decided that the occupants did not have a contractual obligation to pay the mortgage but that as long as they did so regularly (based on the deceased's promise to them) and once the mortgage was paid, they would own the house.

## Lapse

**Lapse** – Of an estate or right; to pass away or revert to someone else because conditions have not been fulfilled or because a person entitled to possession has failed in some duty over a specified period of time.

An offer that is expressly stated to last for a fixed time cannot be accepted after that time; and an offer which stipulates for acceptance 'by return' must normally be accepted either by a return postal communication or by some other no less expeditious method. An offer that contains no express provision limiting its duration terminates after laps of a reasonable time. The period that would normally constitute a reasonable time for acceptance may be extended if the conduct of the offeree within that period indicates an intention to accept and this is known to the offeror.

### ④ Barrick v. Clark (1951)

*An offer will expire in a reasonable amount of time depending on the nature and character of the offer and the normal course of business*

A potential purchaser took 25 days to respond to an offer of farm land. By that time, the land had been sold to someone else. An offer, unless revoked or containing a deadline, is only valid for a reasonable time, each case to be decided on its merits. For stocks the time frame would be far shorter than for farmland. In the context of this case, 25 days was judges to be too long, or unreasonable.

### Manchester Diocesan Council of Education v. Commercial and General Investments Ltd. (1970)

*Acceptance of an offer communicated by any mode that is no less advantageous to the offeror will conclude the contract*

An equivocal "the sale has now been approved" letter was endorsed as a valid acceptance even though the letter went on to say that the approval of a government agency was also necessary.

## Conditional Offer

An agreement is conditional if its operation depends on an event which is not certain to occur. The word 'condition' may refer either to an event, or to a term of a contract. Where condition refers to an event, that event may be either an occurrence which neither party undertakes to bring about, or the performance by one party of his undertaking. Furthermore, an offer that expressly provides that it is to terminate on the occurrence of some condition cannot be accepted after that condition has occurred, and such a provision may also be implied.

### ⑤ Re Reitzel and Rej-Cap Manufacturing Ltd. (1985)

*If the subject matter of an offer is substantially changed, the offer fails because the implied consent has changed*

An offer was given for a house which included an obligation for the vendor to insure it. When the house burnt to the ground, the offer was immediately accepted, ostensibly so the purchaser could benefit from the new construction at the price given to him based on the pre-fire building. The court held that the destruction of the building substantially altered the state of the goods, thereby voiding the offer and no longer open to acceptance.

## Certainty of Terms

### Introduction

An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete. A contract made 'subject to...' may be construed as two things: First, the parties do not intend to enter into a binding agreement until a formal drafting; Or, secondly, the parties have entered into a binding contract and only have to formalize it through writing.

#### 1 Vagueness

An agreement may be so vague that no definite meaning can be given to it without adding new terms. There are four basic considerations dealing with vagueness that ought to be reviewed:

1. Custom and Trade Usage – apparent vagueness can be resolved by custom. That is the parties in a contract can expect to receive the 'regular' service.
2. Reasonableness – a contract can be upheld where the standard of reasonableness can be applied to make an otherwise vague phrase certain.
3. Duty to Resolve Uncertainty – an agreement may be binding because one party is under a duty to resolve the uncertainty.
4. Meaningless Phrases – a phrase that can be omitted without any effect to a contract can be excluded without vitiating the contract.

#### R. Cae Industries Ltd. (1986)

*Where contracts are vague the court will try to determine whether the intention exists and if the contract is clear enough so duties may be performed*

A memorandum signed by three federal ministers was held to be a contract even though it was somewhat vague. For example, the contract provided that the government would make "best efforts". The court repeated the principle that the onus of proof is on the person who asserts that no legal effect is intended, and the onus is a heavy one and that the courts "should make every effort to find a meaning in the words actually used by the parties in deciding whether an enforceable contract exists."

#### Nicolene Ltd. v. Simmonds (1953)

*If a meaningless clause exists, the court will strike it out and enforce the contract*

A clause to the effect that "the usual conditions of acceptance apply" was held to be so vague and uncertain as to be incapable of any precise meaning. The court then severed the clause "but the contract, nevertheless, remains good." This is an example of *meaningless phrases*.

#### 2 Missing Terms

Parties may reach agreement on essential matters of principle, but leave important points unsettled, so that their agreement is incomplete. There is, for example, no contract if an agreement for a lease fails to specify the date on which the term is to commence. Similarly, an agreement for the sale of land by instalments is not a binding contract if it provides for conveyance of a proportionate part as each instalment of the price is paid but fails to specify which part was to be conveyed on each payment.

#### Hillas and Co. Ltd. v. Arcos Ltd. (1932)

*If uncertain parts of a contract can be construed from an agreement it will be binding*

If there are essential terms of a contract of sale undetermined and therefore to be determined by a subsequent contract, there is no enforceable contract. An agreement to make an agreement is not

enforceable. But if the uncertain parts can be construed from the context of the agreement, the contract will be binding. The court used the context of the 1930 contract and its option clause to create a binding contract because the terms are sufficiently clear given the nature of the business.

(3)

### Agreements to Agree

*GP : not a contract*

An agreement may be incomplete because it expressly requires further agreement to be reached on points as yet left open. A possibility is to provide that certain matters (such as prices, quantities, or delivery dates) are to be agreed later, or from time to time. The question whether the resulting agreement is a binding contract then depends primarily on the intention of the parties; and inferences as to this intention may be drawn both from the importance of the matter left over for further agreement, and from the extent to which the parties have acted on the agreement. There will be no contract if it appears from the words used or other circumstances that the parties did not intend to be bound until agreement on such points have been reached. However, where it can be inferred that they intended to be bound immediately, in spite of the provision requiring further agreement, a binding contract can be created at once.

#### **May and Butcher v. R. (1929, reported in 1934)**

*There can be no agreement if there is no agreement on a term essential to the contract*

"An agreement between two parties to enter into an agreement in which some critical part of the contract matter (eg. price) is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in future agree upon a matter which is vital to the arrangement between them and has not yet been determined."

#### **Foley v. Classique Coaches Ltd. (1934)**

*If terms are unsettled, there must be a mechanism provided to do so – In the absence of such a mechanism, there is only an agreement to agree and no contract*

The issue of price was omitted from a contract that nevertheless ran for three years without a hitch. When the defendants tried to buy petrol elsewhere, basing their argument that the exclusivity contract was void for lack of agreement on price, the court disagreed. Each case is decided on its own merits and for three years, both parties believed they had a contract. The court implied into the contract a clause to the effect that the petrol was to be of reasonable price and quality.

#### **Courtney and Fairbairn Ltd. v. Tolaini Brothers (1975)**

*When an essential element of a contract is left undecided and is to be the subject of further negotiation, then there is no contract*

For a building contract, the absence of agreement on price or a method by which the price is to be calculated (not dependent on the negotiations of the two parties themselves) means the absence of an essential term and there is no contract. A contract to negotiate, like a contract to enter into a contract, is not a contract known to law.

#### **Sudbrook Trading Estate v. Eggleton (1983)**

*Where the intent of the parties is clear, the courts are willing to find certainty*

An agreement to purchase property set up a system for determining the price "not being less than £12,000" involving consultation with assessors appointed by each party. The court decided that this was a valid contract. "The parties intended that the lessee should pay a fair and reasonable price to be determined as at the date when he exercised the option."

**DeLaval Co. v. Bloomfield (1938)**

*A standard of reasonableness shall be used where there is intent on behalf of the parties to be bound*

The contract provided for a total payment of \$400, "\$200 on November 1, 1937 balance to be arranged." The court rejected the defence that the contract was void for lack of certainty. "In the present case, it is not the price but the mode of payment only that is held over."

**Good Faith Negotiations**

*See full chapter →*

**Empress Towers Ltd. v. Bank of Nova Scotia (1991)**

*The Court will read in an implied term to a contract so that the parties will negotiate in good faith*

A tenant and landlord had a renewal contract that provided for a rent of "market rental prevailing ... as mutually agreed. If the Landlord and the Tenant do not agree upon the renewal rental within 2 months ... then this agreement may be terminated." The landlord submitted an outrageous increase including a sum payable of \$15,000. The court was asked if the renewal clause was void for uncertainty and decided that it was not. The court decided that the contract used the words "mutually agreed (which) carries with it an implied term that the landlord will negotiate in good faith .... and ... that agreement on a market rental will not be unreasonably withheld."

**Mannpar Enterprises Ltd. v. Canada (1997)**

*Unless there is a benchmark or a standard by which to reassure such a duty, the negotiation concept is unworkable*

The renewal clause was merely an agreement to agree and ought to be void for uncertainty, creating no obligation to bargain in good faith.

(4)

**Anticipation of Formalization****Meyer v. Davies (1989)**

*The words 'don't worry about it' constitute a general waiver*

In this British Columbia case, two lawyers had exchanged correspondence related to the sale of a law practice. One of the letters had concluded: "please call me ... so that we can arrange to draw up a formal agreement." During a subsequent phone call, the lawyers reviewed and agreed on outstanding issues. Offering to complete and courier the documents for immediate signature before the vendor left for vacations, the vendor said "Don't worry about it ... deal with it when I get back." The court decided that at this moment "a bargain was struck." Quoting precedents, the case states: "if the documents ... relied on as constituting a contract contemplate ... a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

**Knowlton Realty Ltd. v. Wyder (1972)**

*When something is subject to an agreement to agree there can be no contract*

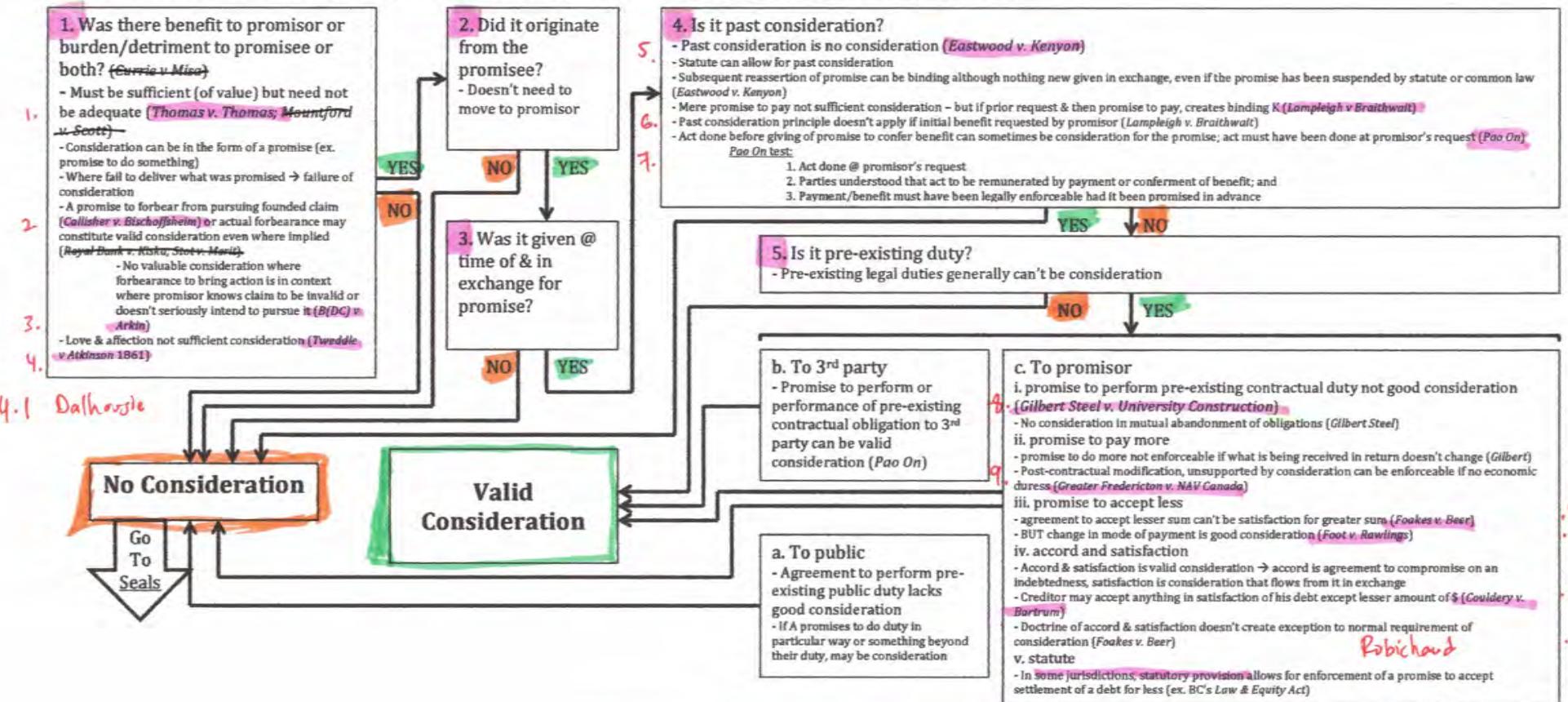
"If we are successful in negotiating a lease on your behalf on terms acceptable to you, we will be entitled to a commission." But the lease was never fully executed, just an interim agreement "subject to execution of the lease documents." Where the words similar to "subject to contract" appear, they indicate a

conditional offer or acceptance only. The court decided that "the event on which commission became payable never occurred."

## MAKING PROMISES BIND: CONSIDERATION

### B. WAS THERE CONSIDERATION FOR THE PROMISE?

- To be enforceable, a promise must be given in return for something of value provided by the promisee, or for "good consideration"
- Motive is different from consideration (*Thomas v. Thomas*)
- Consideration assessed on promise-by-promise basis, not on whole-contract basis, except in unilateral K where only 1 promise (*Pao On*)



Historical exceptions to past consideration

- ① Promise lengthening limitation period
- ② Post-majority ratification of debt of a minor
- ③ Post-bankruptcy promise
- ④ Promise to pay for medical services after provided (implied request)

(13) Bhushan & Rayamajhi

1/3

## ① Thomas v Thomas (1840) QB

F: after death of husband, brothers told widow she can rent the house for 1 l (pond)

H: court not consider the value of the consideration, but that it must have moved from the promisee

1 pound is sufficient consideration  
Does not need to detriment/benefit

## ② Callisher v Bischoffsheim (1870) QB

Facts: P threatens to sue the govt. of Honduras — D promise to provide 600 pound in bonds if he does not sue

Held: forbearance from suing is good consideration. But critical that the promisee believes he have a claim

## ③ B.I.(D.C.) v Arkin (1996)

forbearance to sue is a good consideration but QUALIFIED to valid claim — person intending to sue must believe he has

## ④

## Tweddle v Attinson (1861)

Facts: F.I.L contract w/ father to pay 100 pound after marriage to the son — F.I.L. died and estate refused to honour the agreement

Held: ① son could not enforce agreement as he is a third party  
② Natural love & affection is not sufficient consideration in the eye of the law

## ⑤

## Hambleigh v Braithwaith (1615)

Facts: • D killed a man  
• P got pardon from the king at a cost to P  
• After pardon was achieved, D promised to pay P 100 pounds

Held: since the labor was at the D's request, even though the consideration promise come after the labor, it is enforceable

## ⑥

## Eastwood v Kenyon (1840) UKCA

F: P (guardian) repaired Sarah's property, and borrowed 140 pounds from Blackburn. When Sarah came of age she promised to pay BB and paid interest for 1 year. She married then the husband Defendant orally promised the same but did not. P sues D for promise to pay BB

Held: promise to pay for work already done in the past without request is Past Consideration, no right to enforce payment

## ⑦

## Pao On v Lau Ying Lu (1980) AC

Facts: Shing On and Fu Chip enter into a share swap agmt — SO unable to sell shares 60% for 1 year — SO unable to benefit when share prices rose

— SO enters a second agreement w/ FC's shareholders, promising the same (not sell) in exchange for the shareholder to indemnify them of any loss

Held: the "past consideration" (of promising not to sell) fulfill all conditions to be enforceable under Hambleigh (1) done at promisor's request (2) understood to be renumerated and (3) enforceable had it been made at the time of the original promise

third party  
good consideration subject of economic stress.  
existing duty  
be good & fit  
be fair & reasonable  
be reasonable & fair  
\*

## Enforcement of Promises

### The Enforcement of Promises

1. *Formality* – the general reason for formality is to ensure that the parties are clearly entering a contract situation. By following some prescribed steps, the parties acknowledge that they know what they are getting into and are prepared. There are more general reasons:
  - a. Evidentiary Function – provides an objective and permanent record
  - b. Cautionary Function – introduces a note of deliberation and a period of reflection
  - c. Channelling Function – serves to signalize the enforceable promise
2. *Seriously Intended Promise* – promises should create legal obligations if they are seriously intended and made for a good reason. If the contract has ‘cause’ (there must be a valid purpose, a reason for, an end to be pursued in the contract) it is mostly likely binding
3. *Reliance* – A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
4. *Exchange and Bargains* – in insisting upon existence of consideration, the common law emphasizes that contracts are primarily about exchanges or bargains, in which an act or promise was given by the promisee in consideration of the original promise.

#### 4.1 The Governors of Dalhousie College v. the Estate of Arthur Boutilier (1934)

Dispute regarding whether the college gets a sum of money or whether the beneficiaries get the money. The college raises three arguments based on the enforcement of the contract:

1. The university had made expenditures based on the expectation of that income
2. In return for the promise of \$5000, the college had made promises regarding how they would use that money
3. In return for the deceased giving the money, others have equally promised to give money to the college

**Others Equally Promised** – the courts decide that this is not a valid consideration because there is a lack of a privity of contract between the school and the subscribers. The college does not have privity of the contract. Dalhousie itself has provided no consideration.

**Promises Regarding Use** – there is no request as to how the money is going to be spent. There were no restrictions at all with regard to how they would use that money. They made no promise on the facts regarding how they were going to use the money. When we look for consideration, we are looking for consideration for each of the parties. In a bilateral exchange agreement, a house sale example, the promise to exchange the money is the consideration for the house where the promise to hand over the property is the consideration for the money. The promises must have consideration on the other side. This translates into the notion that each contract has two promisors and promisees. It is wrong to say that in a purchase of a house the consideration is \$300,000. It is the promise to pay \$300,000 that is the consideration.

This is the key difference between a promise and a gift. ‘I promise to give you all my money’ is not valid until there is an act of delivery. However, ‘I promise to give you \$50 for that piece of equipment’ is binding.

**University Made Expenditures** – the courts state that these are things that the College would have done anyway without a real promise. There is no direct link between the promise and the activities.

8

### Gilbert Steel Ltd. V. University Const. Ltd.

- GS provides UC with steel for project based on written contract. Later agree verbally price of steel will increase, UC refuses to pay higher price
- GS says they will provide "good price," Court says too vague, thus, no fresh consideration
  - Court says there was oral agreement, but not binding b/c no consideration
  - Pre-existing legal duty? need fresh consideration for amendments to existing contract
  - Prior duty owed not legally sufficient consideration

(9) contrast with

*Greater Fredericton Airport Authority Inc. v. Nav Canada* - see DURESS for facts

- post contractual modification w/out consideration is enforceable

LESSER PAYMENT IS NOT GOOD CONSIDERATION FOR DEBT

First stated in Pinnel's Case (1602)

10

### Foakes v. Beer (1884),

Facts: B lends F money, original promise incl. interest. B promises F: you don't have to pay interest if you pay part of the debt. F pays part of the debt. B sues for interest.

- Payment of a lesser amount cannot serve as satisfaction of a larger amount
- An agreement to do less in exchange for the same promise lacks consideration -> not binding
- Part payment cannot be consideration for a new promise

### PRINCIPLE OF ACCORD AND SATISFACTION

11

### Couldery v Bartrum (1880)

"According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law he could not take 19 shillings and sixpence in the pound; that was nudum pactum." (bare promise)

TLDR: lesser amount + something else eg a robe can be good consideration

### Foot v. Rawlings

- Agreed that P would charge less interest on debt if regular payments made on post-dated cheques. Agreement kept for 2 years. P sues for balance
- Different than Foakes - Add consideration for new promise. modification so that not only is one party paying less but something else is different (ex: different time/place/payment method etc.) – **then new arrangement is binding**
- Modification of payment (form, place or time) exempts k from the rule that a smaller sum can't satisfy a larger debt.

The Canadian position:

### Robichaud v. Caisse Populaire de Pokemouche Ltee, 1990 (NB CA),

The majority of Canadian provinces have passed legislation on this point so as to permit a solution in accordance with reason and business practice.

ANGERS J.A. However, it cannot be denied that a financial institution, of its own accord and knowing all the consequences of its action, entered into an agreement by which it agreed to waive the priority of a judgment in its favour in return for part payment of the debt due to it. This agreement constituted full satisfaction. The consideration for the Caisse Populaire was **the immediate receipt of payment and the saving of time, effort and expense**. In my opinion, it is not up to the court to judge the reasons for entering into such an agreement but rather to determine that the agreement was reached with full knowledge and consent. The court must therefore recognize the validity of the agreement. It would be foolish to suppose that financial institutions disdain the old adage, "A bird in the hand is worth two in the bush." Finally, I would go so far as to find that implicit in the agreement to settle for \$1,000 is the proviso that if the lesser amount is not paid, the original debt again comes into force. In conclusion, I would allow the appeal and order the Caisse Populaire to remove its judgment after receiving payment of the amount of \$1,000. I would allow the appellant costs at trial and on appeal.

ITLR lesser minor + something else is it like can be legal  
consideration

From a **Ramsey's**  
Agreed that P would choose less interest on debt if lower  
but unusual trade on post-debt charges. Assessment held for S  
less. P has got price  
**Different from Lister** - Add consideration to new lower  
monition to the one only is one best by law less put  
amount less is different (ex: different principles)  
difference in price - this new arrangement is principle  
Monition of balance (low, price or time) example of how  
the law may a smaller sum can satisfy a larger debt.

higher position

any a **Ciese Bobigny de Performance Ltd**, 1996 (V/C)

only Ciese Bobigny based on this point  
being a solution in accordance with reason and process practice

S.A. However, it cannot be denied that a financial institution of  
second and third world all the consequences of the case, suited to  
want of applying a theory of make the theory of a judgment in its  
a reason for the best solution of the debt due to it. This decision  
is only a suggestion. The conclusion for the Ciese Bobigny  
is only a suggestion. The suggestion and the value of time, effort  
immediate receipt of payment and the value of time  
seen, in my opinion, it is not up to the court of justice the reason  
for sending into step the moment for justice to determine that the  
conclusion was reached with full knowledge and counsel. The court must  
reject the suggestion the validity of this statement. It would be better to  
make two in the first. Finally, I would go to the board that it is reasonable  
imposition in the occurrence of settle for £1,000 in the case of a reduction  
amount is not fair, the original debt goes into force. In consequence,  
I would write the debt and order the Ciese Bobigny to remove its  
debt after receiving payment of the amount of £1,000. I would also  
the appellate costs in the first and no other.

### 13 Bhasin v Hyndman (2014) SCC

**Facts:** C did not renew B's contract  
when B refused to be reviewed by  
H who was his competitor (B  
previously refused H's proposal to  
merge)

**Held:** C breached duty to act in  
good faith in exercising the non-  
renewal clause, no liability  
on H - no contract b/w B & H

Contract law II (Part 2) Summary Case Law

CC provides EC with rules for project based on written contract  
Pursue strict liability rule of strict liability, EC requires of each  
partner liable  
CC says will provide "good faith", Court says too vague, this  
on top consideration

Court says we only succeeded but not binding pre no  
consideration  
pre-existing legal duty, need less consideration for  
businesses of existing contracts

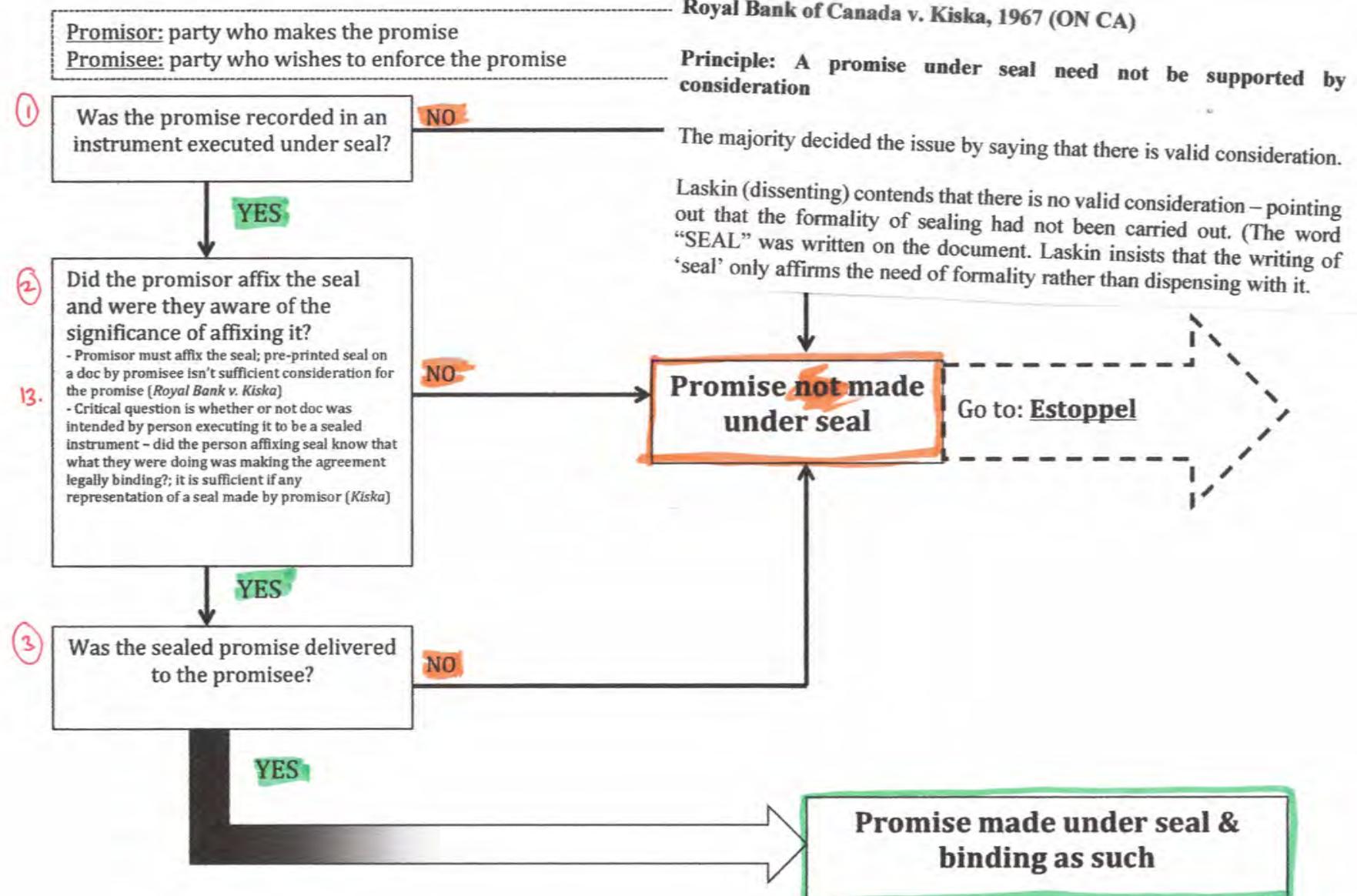
Contract law II (Part 2) Summary Case Law

Final stage in Pungs' Case (1993)  
Hedge v. Pecc (1884)

PRINCIPLE OF ACCORD AND Satisfaction  
Contract v. Balfour (1880)

According to English common law a creditor might sue him in  
specification of his debt except a less amount of money. He might take a  
power of a claim, or mount it to choose and trial was second and  
settlement per p's a most extraordinary basis of the principle  
business law if calling for type 10 shillings and sixpence in the business  
and ought because (and because)

## A. WAS THE PROMISE MADE UNDER SEAL?



## Definition: PROMISSORY ESTOPPEL -

a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and the promisee actually did rely on that promise to his detriment

### Central London Property Trust Ltd v High Trees House (1970)

F: landlord reduced rent due to low occupancy during wartime. When war ended and vacancy lessened, landlord sought full rental. Tenant claimed P.E.

Held: no PE as rent reduction was meant to cover wartime period - waiver can be retracted subject to reasonable notice

### John Burrows Ltd v Subsurface Surveys Ltd (1968)

Facts: debtor was consistently late in his payments - creditor did not sue for payments until the relationship soured - debtor argued foreseeable estoppel

Held: indulgence is not enough to constitute a P.E. - evidence must show some sort of promise e.g. if parties entered negotiations promised

### Ryan v Moore (2005) SCC

Facts: R sold M for personal injury, not knowing M had passed away and that he is outside of limitation under Survival of Actions statute

SCC: overturned NLCA decision that M's estate/insurer was estopped from applying SOA - letters exchanged never mentioned if M was alive or not (rogue)

- even if there is a mutual assumption R did not rely on assumption, R's

conduct did not show that any changes were effected to the P's legal relationship - plus, reduced limitation period is not a DETERIMENT

- as for E by representation, cannot arise from silence unless P had a duty to speak

### DYC Builders v Rees (1966)

- Equity has intervened w/ & CT rule on a creditor who accepts partial payment as settlement of debt
- however - qualified - must be inequitable to allow (see Central London where it was held equitable)

- (5) Equity - promisee must have acted equitably

• in this case it is inequitable as there was undue pressure and intimidation = no true accord

PLUS: PE can only be a shield, cannot be used as a sword

### 5 elements required to have PE:

- ① existing legal relationship b/w parties when the promise is made
- ② clear promise or representation, establishing an intention to be bound
- ③ reliance by the party raising estoppel
- ④ acted upon - promisee must have relied on it to his detriment

## PRIVITY

- Multilateral Ks: several parties; each has agreement with each of others, on same terms
- Joint/several liability: >1 person on one side of contract; question is how obligations/benefits sorted out
  - Several: 2 (or more) parties each to pay/receive specified amount
  - Joint: single amount which 2 parties jointly responsible to pay/entitled to receive

### I. Doctrine of Privity

- Only parties who have created K (offeror & offeree) are parties to the contract & only they can enforce the obligations in it or have obligations imposed on them by it (*Tweddle v Atkinson; Dunlop Pneumatic Tyre v Selfridge*)
- 3<sup>rd</sup> party can be recipient of benefits under the K, but can't enforce the obligation that benefits him/her (*Beswick v Beswick 1968 HL*)
- Privity operates independently of consideration
- Test for employees party to K (*London Drugs v Kuehne & Nagel 1992*):
  - a. Clause must expressly or impliedly extend benefit to employees; &
  - b. Employees must have been acting in course of employment; &
  - c. Performing services provided for in K when loss occurred

2  
Types

#### Horizontal

- A enters K with B for something that benefits C → if B doesn't perform obligation, C can't bring contractual action for remedy & A can't sue for damages suffered by C (*Lyons v Consumers Glass Co 1981 BCSC*)

#### Vertical

- Each person in chain has K with person above and below but not others, so can't bring contractual claim against the other parties (*Dunlop Pneumatic Tyre v Selfridge*)

### III. Exceptions

#### Abolition

- Many jurisdictions have abolished horizontal and/or vertical privity by statute

#### Limited Exception

- Modification to horizontal privity: ability of person not party to K to use a defence against tort claim where that defence exists in K of 2 other parties
  - 1<sup>st</sup> developed in employment context (*London Drugs v Kuehne & Nagel*)
  - Then extended to 3<sup>rd</sup> parties in Ks generally → "principled exception" (*Fraser River Pile v Can-Dive Services*)
  - In order for exception to apply, must show:
    - a. Parties to K intended to confer the benefit of the contractual defence on 3<sup>rd</sup> party; and
    - b. 3<sup>rd</sup> party was performing services contemplated in the K
  - If 3<sup>rd</sup> party not intended to benefit, then not available (*Edgeworth Construction v ND Lea 1993 SCC*)

⑦ *Brown v Belleville (cite)*

### II. Circumventing Privity

#### a. Suit by party to K

- Have someone who is party to K to take action to obtain satisfaction for person who's not party (*Beswick v Beswick*)
- When P makes contract for group, only P can bring an action, but can claim for all losses in group (*Jackson v Horizon Holidays 1975 CA*)
- Contracting party can only recover damages suffered by 3<sup>rd</sup> party when @ time of contracting, parties contemplated that that breach would cause identifiable loss to 3<sup>rd</sup> party and 3<sup>rd</sup> party would have no other means of recourse (*Alfred McAlpine v Panatown 2000 HL [UK]*)

#### b. Reconstruct as agency situation

- Say when A enters K with B that benefits C that A is acting as C's agent and so K is actually between B & C
- Where party named in K was acting as agent of 3<sup>rd</sup> party, the 3<sup>rd</sup> party can be sued (*Dunlop v Selfridge 1915*)
- Can be agency situation even though parties didn't acknowledge in agreement (*McCannell v Maher 1926 BCAC*)
- Court reluctant to find agency where A & C have potentially conflicting interests from the K (*Dunlop Tyre v Selfridge*)

#### c. Collateral K

- When A & B entered K that affected C, came into being a collateral K between A & C, not necessarily through B as agent for C (*Shaklin Pier v Detel Products 1951 KB*)

#### d. Assignment & Subrogation

- Legal device for effecting transfer of entitlement to intangible - K right is intangible
- C buys/is assigned A's position between A and B → C takes over A's contractual position
- Problematic: C can't get any more from B than A could have
- Some Ks (personal services) can't be assigned (*Griffith v Tower Publishing 1897*)

#### e. Transfer of obligation

- Civil Law: Object & claims against manufacturer keep being passed along by K, with each new sale
- Common Law: Doesn't give original contractor any positive rights against owner, only claim for injunction for interference with contractual rights
- Operates only in context of existing burden that a new owner has express knowledge of (*Lord Strathcona Steamship v Dominion Coal 1926*)

#### f. Trust

- A settles property on B, trustee, to hold for benefit of C, beneficiary; arrangement between A & B created through K - if B uses property in way not in conformity with trust terms, trust law allows C to bring claim against B for breach of trust (*Vandepitte v Preferred Accident 1932*)
- Not legitimate to import into K the idea of a trust when parties have given no indication that such was their intention (*Re Schebsman 1944 CA*)

## ① Tweddle v Atkinson (1861)

F: Agreement between father and father-in-law to pay son (3rd party) after marriage

Held: third party can be beneficiaries but cannot sue to enforce contract, unless consideration moved

## ② Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd (1915)

F: Dunlop made tires and wanted to maintain a standard resale price. Sold to wholesaler on condition that tires were sold to retailers who agree to not sell below specified price. Selfridge was a retailer who sold at prices below specified

Held: no privity between Dunlop & Selfridge, no consideration, no enforcement

& no agency either as potentially conflicting interest

① The limitation clause must either expressly or impliedly, extend its benefit to the employees; and

② Employees must be acting in the course of their employment and performing the very services provided in the contract when the loss occurred.

## ③ Beswick v Beswick (1966)

F: agreement btw uncle & nephew that nephew would pay support to uncle's wife upon uncle's death. Nephew reneged after death. Widow sued

H: widow able to sue, not personally but as executor of uncle's estate and on his behalf

## ④

## London Drugs Ltd v Kuehne & Nagel International Ltd (1992) SCC

F: London Drugs stored a transformer at the respondent's storage. There was a clause in the contract limiting liability to \$40. Two employees of the respondents negligently mishandled the transformer causing damage of \$33,000.00. London Drugs sued employees personally as well.

Trial J found employees liable for negligence.

CA allowed appeal.

SCC: Two-step test to determine if employees can benefit from the limitation clause:

In this case yes to both

## ⑤

## McCannell v Mabee McLaren Motors Ltd (1926) BCCA

test for agency:

- ① agent brings parties together
- ② parties recognize agency is created, though formal designation not necessary

Held: principal can sue in a contract where agent is the party

## ⑥

## Shanklin Pier Ltd v Detel Products (1951) KB

F: contract for renovation of pier with a contractor - DF demanded Pl that their paint was good (7 years) when it wasn't (3 months)

Held: although no direct contract btw Pl & DF but warranty given by DF caused Pl to instruct contractor to use - warranty extended to Pl and entitled to damages

## COLLATERAL AGREEMENT

(5)

## Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd. (1999) SCC

Fraser River owned a ship that sank while it was under charter by Can-Dive. Can-Dive was negligent in the sinking of the ship. Fraser River recovered from their insurance company, who in turn sued Can-Dive.

However, there was a clause in the contract between Fraser River and their insurance company stating that the insurance company could not bring actions against any charterers of Fraser River, however Fraser River made an additional agreement to waive the right to the waiver of subrogation. Can-Dive was found liable at trial but that was overturned by the Court of Appeal and Fraser River sought leave to appeal to the Supreme Court.

### Issue

Can Can-Dive benefit from and/or bring action to enforce the limitation of liability clause in the contract between Fraser River and their insurance company?

### Reasons

Iacobucci, writing for a unanimous court, clarifies that the test in London Drugs does not only apply to employees, but to any third party who meets the requirements. He goes on to say that the evidence in favor of relaxing the doctrine of privity is even more convincing in this case than in London Drugs as it explicitly states that charterers will be exempted in the contract. As Can-Dive was expressly mentioned in the contract, and they were doing the activity anticipated in the contract (chartering), they are covered by the limitation clause and therefore the insurance company cannot sue them. Further, the plain reading of the contract shows that this should be the case. Fraser River was acting as the agent of Can-Dive when they excluded them from liability.

### Ratio

The test in London Drugs applies to all third parties and not only employees of one of the parties.

(6)

## Edgeworth Construction Ltd. v N.D. Lea & Associates Ltd. (1993) SCC

### Facts

Edgeworth Construction Ltd. was engaged in the business of building roads in British Columbia. In 1977, it bid on a contract to build a section of highway in the Revelstoke area. Its bid was successful, and Edgeworth entered into a contract with the province for the work. Edgeworth alleges that it lost money on the project due to errors in the specifications and construction drawings. It commenced proceedings for negligent misrepresentation against the engineering firm which prepared those drawings, N.D. Lea & Associates Ltd. as well as the individual engineers who affixed their seals to the drawings.

### Issue

Is the defendant exempt from liability due to the intervention of the Ministry and their liability clause?

Decision: Appeal allowed.

### Reasons

McLachlin, writing for the majority, holds that liability for negligent misrepresentation occurs when a defendant:

- makes a representation,
- knows it will be relied upon, and
- it is relied upon.

When Edgeworth performed the construction it was relying on N.D. Lea, not the provincial government. Following the provisions in London Drugs the court finds there was no express or implied protection of the respondent in the contract, **exception clause was only meant to protect the ministry**. Further, unlike in London Drugs the respondent could have protected themselves through disclaimer, insurance etc. i.e they are not "powerless" like in London Drugs.

## Brown v. Belleville (City), 2013 ONCA

Facts: In 1953, the municipality built a storm sewer drainage system along the frontage to private land. To service the system, the municipality required access to the land. Municipality then entered an agreement with the landowner whereby the municipality received access to the land for an indefinite period in exchange for promises to service the system, including a typical enurement clause that the promise shall "inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns." The promise was personal and did not run with the land as a covenant. The agreement was never registered on title.

The municipality maintained the system for six years. The original owner died in 1966, and land was transferred to subsequent buyers once 1973 and again in 2003. There was no express assignment of the agreement each time the land transferred. The municipality was requested to maintain the system once in 1980, but municipality responded that it was "no longer bound" by the agreement. They had the same response again in 2004 by the current owners Brown.

Further discussions followed without fruit and, in 2011, the Browns sued the city for specific performance or damages in lieu.

Trial Judge:

- the Browns' action was not statute barred in relation to time;
- the Browns were successors in title and entitled to enforce the agreement without an assignment;
- the agreement was not void on public policy grounds as fettering the city's discretion in relation to future uses of public roads and allowances.

On appeal, ONCA held that the Browns were effectively a party to the original agreement, if not to the consideration, and able to enforce it like a party.

Nevertheless, the Court considered the privity issue as if the Browns were third party beneficiaries, and, as previously observed, did so in two ways.

First, by simply discussing the **clear intention of the original parties to ensure that successors in title would enjoy the benefit** of the enurement clause as a matter of construction, and

secondly, by **finding the situation to fit into the principled exception rule**. Since intention is the key to both approaches, there was considerable overlap in both discussions of the Court.



Facts:

- agreement to buy a residential prop -
- deposit 150k paid, price 1.5 million -
- contract subject to "inspection of the Property by a property inspector of the Purchaser's choice and receipt of a report satisfactory to him in his sole

- report identified various defects relating to construction design
  - most could be remedied at minor cost
  - one washroom leak-in determinable
  - P's plans for rooftop garden & patio doors would be costly

Held:

- Sole discretion clause must be exercised honestly and in good faith.
- Report identified legitimate uncertainties and inconveniences they were entitled to take into account. Evidence supported T's finding that purchasers' decision was made in honest and good faith & reasonable.

### ① Wiebe v Bobsien (1986) BCCA

F: P offered to buy D's house subject to P selling his old house. \$1k deposit was paid. P sold his house w/in deadline but D refused to sell the house.

Held: D is bound to sell, the agreement is binding. Court looks at surrounding events and finds parties intended to reach consensus when they formed the contract.

i.e. The condition precedent did not prevent the formation of the contract but only suspended the covenant of the parties.

Dissent: the CP is too uncertain, no contract until CP is met.

### ② Dynamic Transport v OK Detailing (1978) SCC

F: agreement for sale of land, CP approval for sub-division obtained, silent on who is the responsible P to get approval

H: implied promise on each party to do all that is necessary, 'in good faith'; in this case the Vendor is obligated to apply for approval as P would have to do it in V's name - failure is breach & contract

③

### Metro Trst Co v Pressure Concrete Services (1973)

F: action for specific performance on an agreement to buy real property from pressure. Agreement was subject to vendor obtaining consent from mortgagee. Vendor failed to use best efforts to obtain approval.

Held: an award for S.P. should not be allowed where third party interests are at stake. Plaintiff entitled to damages only for breach.

④

### East Walsh Homes Ltd v Anatol Developments Ltd (1990) ONSC

F: D agrees to sell lots to P and use "best efforts" to have a plan of subdivision registered before closing.

H: D was found to have breached the "best efforts" clause, but only nominal damages to be awarded.

Ratio: onus on the PI to show that the breached caused his loss, in

this case, court found even w/out D's breach, it is unlikely that the approval will be granted  
\* "best effort" = no reasonable stone unturned

⑤

### Turney v Zhilka (1959) SCC

F: contract to purchase land subject to town's approval to sub-division. Purchaser tried to waive condition by sued for SP.

Held: ① cannot unilaterally waive a CP that benefits both P's  
② as the CP depends on the will of an independent third party (town) it is a TRUE C.P.

TlDR: no contract until CP met, thus no breach as well as CP never met

⑥

### Beauchamp v Beauchamp (1972) ONCA

F: Sale of land conditional upon acquisition of mortgage, first for 10K & second \$2.5F. Appellant got a mortgage for \$12K and gave notice that condition have been complied with. Respondent refused to complete sale.

Held: condition was solely for the protection of the appellants and accordingly may be waived by the appellants. Respondents' interest is only to get the money regardless the method of financing.

Facts:

- Developer sought to acquire land for the purposes of building an apartment complex.
- contract specifically provided for the agreement to come to an end if planning division was not granted, and contained a specific clause granting a waiver power to the purchaser if water and sewage conditions were not met.
- Developer diligently tried to obtain planning permission but was unable to obtain it within the given period.
- On the date of expiry of the agreement, the developer as purchaser sought to waive the condition and close the deal, but the vendor refused on the grounds that the conditions were not satisfied.

The Court offered several reasons for why the rule in Turney should be maintained as originally formulated. The Court held that it was capable of distinguishing between a situation in which one party waives performance under the contract owed to themselves by the other party, and an attempt of a contract party to waive their own non-performance owed to someone else or the independent action of a third-party.

The Court also focused upon the explicit wording of a clause concerning water and sewage access, which specifically granted the purchaser a power of waiver not present in other parts of the contract.

Dissent (Laskin CJ & Spence J.):

1. Conduct of third party in the performance of a CP is not *ipso facto* make the condition a "true CP";
2. A CP in which both parties have an interest may be subject to a unilateral waiver by one party because their interest in the CP may not be the same (of same value or weight);
3. Allowing waiver does not equal to "rewriting the agreement" as it is hardly the case where waiver can only be effected lawfully where there is an express provision for waiver.

- sale of condominium units before their construction by a developer.
- Plaintiffs sought specific performance of the agreement on the grounds that the units they contracted to purchase were commercially unique and valuable property.
- developer defendant claimed that failure to register the project under the Condominium Act was a "true condition precedent" under the terms of the agreement that had rendered the contract unenforceable.

Commenting on the original Turney rule, Chief Justice Michael MacDonald concluded that one should

"note then the ingredients and consequences of a true condition precedent: the condition represents a future uncertain event, the occurrence of which is beyond the parties' control; neither party reserves the right to waive the condition; and there can be no breach of contract should that event not occur."

**HELD:** The requirement of registration of the project under the Condominium Act was a true conditional precedent. As the date for registration passed without registration, the agreement was at an end. On this basis, the Court overturned the trial level decision as no breach of contract had thus occurred.

①

statement made at time of  
contract formation related to subject  
matter of contract that may INDUCE  
entry into contract BUT no contractual  
promise that it's true

## REPRESENTATIONS & TERMS

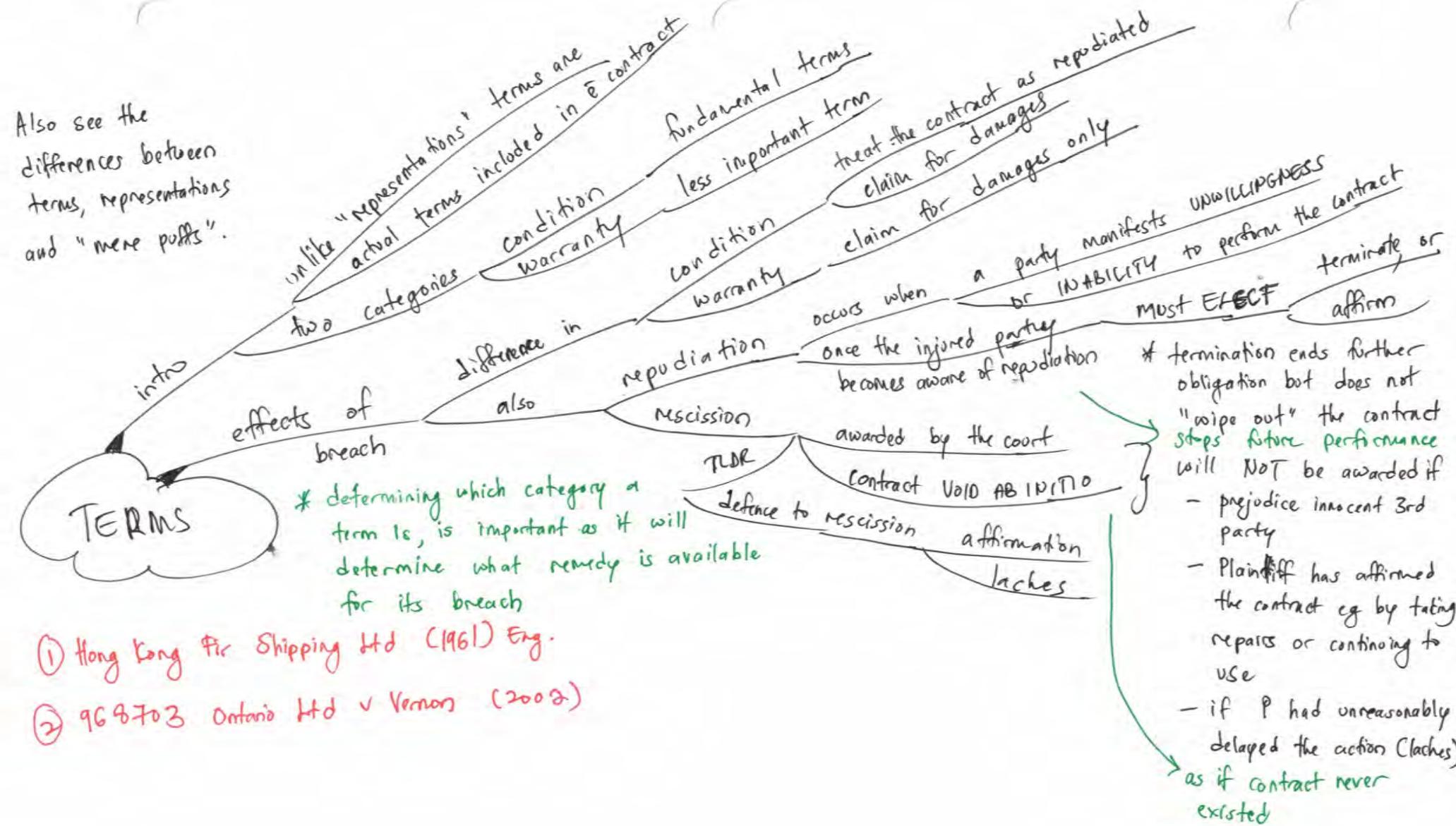
Type	Definition	GP	Authorities	Legal Effect
FRAUDULENT MISREPRESENT.	- statement made KNOWING it was false, or acting in a RECKLESS or CARELESS manner as to whether the statement was true or false	<ul style="list-style-type: none"> <li>• rescission available even if contract has been performed</li> <li>• can also get reliance damages</li> </ul>	① Kupchak v Daysan Holdings	① Rescission; ② Damages in tort
INNOCENT MISREPRESENTING	<ul style="list-style-type: none"> <li>- a misstatement of fact w/ the intention to INDUCE but not to actively deceive</li> <li>- statement is false but the person making it didn't know</li> </ul>	<ul style="list-style-type: none"> <li>• rescission ONLY IF contract has not been fully performed</li> <li>• rescission must be sought promptly</li> <li>• no reliance or expectation damages but may be awarded what needs to reinstate innocent party</li> </ul>	② Redicor v Neibert ③ Seddon v North Eastern Salt Co. ④ Ennis v Klassen ⑤ S-244 Holdings Ltd v Seymour Building ⑥ Redgrave v Hurd ⑦ Smith v Land & House Property ⑧ Bank of BC v Wren Developments ⑨ Heilbut, Symons & Co v Buckleton ⑩ ONTARIO LEGISLATION	① Rescission; ② Restitution in Integrans
NEGIGENT MISREPRESENTATION	<ul style="list-style-type: none"> <li>- limits to claim of innocent misrep and difficulty proving fraudulent misrep, may still pursue remedy under negligent misrep</li> </ul>	<ul style="list-style-type: none"> <li>- needs the element of "reasonable reliance", replacing the reasonable foreseeability component of the Anns test</li> <li>- ie parties must be in a type of relationship that gives rise to a duty of care</li> <li>- foreseeable that innocent party will rely on statement</li> </ul>	⑪ Hercules Management ⑫ P v Imperial Tobacco Canada ⑬ No. 2002 Taurus Ventures Ltd v Intrawest Corp ⑭ Hedley Byrne v Heller ⑮ B&C Choco v BC Power & Hydro	① Damages (reliance damage)

RESCSSION: contract is void ab initio, because of defect at formation  
money damages for the restoration to pre-contractual positions

DAMAGES: action to enforce agreement, object of substitution of money damages for the performance

\* See Defences  
to Rescission!

Also see the differences between terms, representations and "mere puffs".



① Kupchak v Dayson Holdings (1965)  
BCCA

F: K purchased hotel from D in exchange for 2 properties. Found D made false representation on past earning of the hotel. K commenced action for rescission while continuing to live in and operate the hotel.

Held: where Ps could not be restored to pre-contractual conditions — in this case D tore down structure and sold half of the property — as an equitable remedy such as compensation

\* K argued defence of election: D continued to live in hotel

— defence of laches:  
unjust to give remedy because party has by its conduct done that might be regarded as waiver

Held: Election does not work as K had no other choice but to continue using the hotel.

No laches either — repudiated by K even when he continues to operate hotel.

Compensation ordered to make up for the deficiency in consideration

② Redican v Nesbitt (1924) SCE

F: innocent misrep that house had electricity

H: no remedy as contract was performed (transaction closed)

③ Seddon v North Eastern Salt Co Ltd (1905)

F: innocent misrep of the extent of previous trade losses

- Contract completed for sale of controlling shares in a limited co

H: rescission cannot be awarded as contract HAS BEEN COMPLETED (even for non real estate)

④ Ennis v Klassen (1990)

- can rescind if chattel and if absence of equitable remedy produces unfair result

RATIO: distinct from sale of land, rescission is available for innocent misrep in a contract for chattel subject to REASONABLE PROMPTITUDE  
• what is reasonable time = q. of facts

⑤ S-244 Holdings Ltd v Seymour Building Systems Ltd (1994)

- prime contractor unintentionally induced mistake on part of sub-contractor who only bid for phase 1 (22 units) and not the whole project (52 units)

Held: appropriate remedy is rescission — subcon not bound to perform whole contract and entitled to be paid for Phase 1 work done

OBITER: execution of contract is only a relevant factor but not a DECIDING factor in deciding to award rescission in an innocent misrep case

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### ***Redgrave v. Hurd* Rescission for unreasonable innocent misrepresentation**

One is NOT entitled to gain a benefit from a statement that he knows or should know to be false. If one is induced to enter a contract by false representation, due diligence cannot be claimed against him. No damages for deceit as it was innocent misrepresentation. RATIO: TEST An innocent misrepresentation requires the plaintiff to show:

(1) Misrepresentation was material; (2) Statement made to induce; (3) Statement did induce to enter into contract.

FACTS, D enters into agreement to purchase P's home and share in PRACTICE. P claims practice brings \$300/400K/year, shows receipts that show \$200K/year and provides papers that claimed to relate to additional businesses that D did not read. D moves to Birmingham, learns practice is worthless and refuses to complete the transaction. P brings suit for SPECIFIC PERFORMANCE; D claims misrepresentation and counter-sues for RESCISSION, return of deposit, and damages in DECEIT for a loss and trouble of move. HELD, the contract should be rescinded and the deposit returned. He does not get damages because it is an innocent misrepresentation and not fraudulent. In order to make out fraudulent misrepresentation, you have to show that it was made KNOWING it was false. There were no books which showed the business done, and P did not keep any books and so it is a mistake to suppose that there were any books before D which he could look into to ascertain the correctness of the statements made by P. D was NOT guilty of negligence in not doing that which it was impossible to do.

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### ***Smith v. Land & House Property Co.***

If both parties are NOT equally aware of certain facts, then a statement of opinion CAN be equated with a statement of fact

HELD, WAS misrepresentation. If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts BEST involves very often a statement of material fact. Here seller knew everything and buyer knew nothing.

FACTS, seller sold building with the added bonus of a "most desirable tenant". Tenant was a deadbeat – defendant argued it was merely his OPINION that tenant was desirable. HELD, the statement was a MISREPRESENTATION, but since it was held in belief the extent of it is as an "innocent misrepresentation". RATIO, when knowledge of parties is equal as to the facts, then a statement of opinion may be implied as a statement of fact.

### **FAILURE TO INFORM**

#### ***Bank of BC v. Wren Developments* Conduct, actions (silence) can be misrepresentation**

The failure to inform (silence) may result in a finding of misrepresentation – courts look at words, conduct, and actions.

A failure to disclose material facts=misrepresentation. Silence can be misrepresentation if it distorts the general inference of other facts or if there was a positive duty to disclose relevant facts. Court found bank had a positive duty to say something to D in the change of security arrangements before D signed the new guarantee.

Held D is NOT liable to P and guarantee should be RESCINDED

FACTS, Banker failed to inform defendant that necessary collateral had already been used – defendant entered into another loan making a guarantee based on the fact that the collateral was still there (it wasn't). HELD, court looked at words, actions, conduct – bank's action implied no change in status of the security – based on his misrepresentation the guaranty was signed. RATIO, the courts do NOT require an express statement of misrepresentation, it can be derived from conduct, such as SILENCE (a type of conduct).

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**Heilbut, Symons & Co v. Buckleton** – Innocent Misrepresentation – statement was representation, not warranty – no fraud

In order to find a “collateral” warranty, the parties must have intended to include it – promissory intent (in this case they DID NOT). The reply was FALSE, but not fraudulent, so there are no money damages.

An innocent misrepresentation gives no right to damages no matter in what way or under what form the attack is made

FACTS, H purchases shares after being assured (not fraudulently) that F is a rubber company. Shares fall in value because F is not actually a rubber company. Court held the statement was not a warranty. In this case, there is NOTHING which can be taken as evidence of an INTENTION on the party or either parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation and nothing more. The reply was FALSE, but not fraudulent, so there are no money damages.

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**LEGISLATIVE PROVISIONS** to fill the gap in common law of absence of remedy sounding in damages for an innocent misrepresentation.

Ontario legislation – **CONSUMER PROTECTION ACT S.O. 2002**.

(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice **may be rescinded by the consumer** and the consumer is entitled to **any remedy that is available in law, including damages**. 2002, c. 30, Sched. A, s. 18 (1).

Remedy if rescission not possible

(2) A consumer is entitled to recover the **amount by which the consumer's payment under the agreement exceeds the value** that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,  
(a) because the return or restitution of the goods or services is no longer possible; or  
(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value. 2002, c. 30, Sched. A, s. 18 (2); 2004, c. 19, s. 7 (6).

(3) A consumer must give **notice** within one year after entering into the agreement if,  
(a) the consumer seeks to rescind an agreement under subsection (1); or  
(b) the consumer seeks recovery under subsection (2), if rescission is not possible. 2002, c. 30, Sched. A, s. 18 (3).

By and large the statutory provisions apply to **consumer transactions**.

“**consumer**” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; (“consommateur”)

“**consumer agreement**” means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment; (“convention de consommation”)

Need to check if facts fall under this type

## Hercules Management Ltd v Ernst & Young (1997) SCC

Facts: E&Y accounting firm prepared audited statements for 2 companies in which appellants were shareholders - claim that E&Y was negligent causing economic loss to appellant

Held: E&Y had duty of care - Anns test modified to "reasonable reliance"

but duty of care NEGATED due to policy consideration (per Cardozo in Ultramores Corp)

Analysis: ① Anns test

Five indicators of reasonable reliance:

- direct or indirect financial interest in transaction in which representation was made
- Df was a professional or someone with special skill/judgment or knowledge
- Advice was given in the course of Df's business
- Information given deliberately and not on a social occasion
- Information given in response to a specific inquiry or request

TDR: Df can reasonably foresee that Pl will rely on his representation

However part 2 of Ann's test:

= Reliance by P, be REASONABLE

analysis in Ultramarine Corp by Cardozo:

Df may be exposed to

- liability in an indeterminate amount
- for an indeterminate amount of time
- to an indeterminate class

TDR: No duty of care as policy considerations negate it

**DISSENT:** freedom of contract is a better form of regulation for audit mistakes?

## R v Imperial Tobacco Canada Ltd

TDR: government cannot be liable for negligent misrep. see case in tort #8 "public auth".

## No. 2002 Taunus Ventures Ltd v Intrawest Corp (2007) BCAC

Facts: purchase contract for building in Whistler Mountain. Contract did not contain provisions to build ski runs and ski trails. Pl. claimed Df represented that they would.

TJ: Df liable for negligent misrep, but that there was no collateral agreement

BCCA: No negligent misrep as this claim is barred by the "entire agreement" clause contained in the contract. Also that there was a collateral contract. Remit back to Supreme Ct on question if collateral contract breached.

## Hedley Byrne v Heller

See tort on P.E.L case # ①

TDR: Yes duty of care - damages

## B G Checo v BC Power & Hydro

See torts PEL case # ④

TDR: Duty of care not excluded by contract

Plaintiff: P.I awarded expenses to compensate

# ① Hong Kong Fir Shipping Co. Ltd

## v Kawasaki Kisen Kaisha Ltd (1961)

### Facts

Hong Kong Fir agreed to rent their ship to Kawasaki for 24 months and stated on the date of delivery that the ship was fitted or use in ordinary cargo service. However, due to the fact that the engine room staff was inefficient and the engines were very old, the ship was held up for 5 weeks, and then needed 15 more weeks worth of repairs after the deal had been made. Kawasaki repudiated the contract, and Hong Kong Fir sued for wrongful repudiation. Hong Kong Fir was successful at trial and Kawasaki appealed.

### Issue

What is the test for determining if a breach of a contract leads to a right of repudiation?

### Ratio

The correct test to determine if a breach should lead to repudiation is to look at the events which have occurred as a result of the breach and to decide if these events deprived the party attempting to repudiate of the benefits that it expected to receive from the contract (the breach must lead to the party not being able to obtain all or a substantial proportion of the benefits that they intended to receive by entering into the contract) - if they do, then repudiation is in order, else only damages can be awarded.

On the facts, the Court held that the seaworthiness and maintenance clause was not viewed as so fundamental so as to amount to a condition of the contract, but rather constitutes a term allowing damages. Secondly, the Court held that an innocent party cannot treat the contract as repudiated due to delays, however significant, if the breach falls short of a frustration of the contract rendering performance impossible. On the facts, the delays, albeit serious and repeated, did not amount to a frustration of contract that entitled repudiation of the contract, but merely a breach allowing for damages.

**Significance:** It introduced the concept of innominate terms, a category between "warranties" and "conditions". In this case, Diplock LJ proposed that some terms could lead either of the two terms. What mattered was not whether a particular contract term was called a "warranty" or a "condition", but how serious was the breach of the term. In short, the test for whether or not one may repudiate has now become, "does the breach deny the claimant the main benefit of the contract?"

# ②

## 968703 Ontario Ltd. v. Vernon, 2002 CanLII 35158 (ONCA)

### Eg.

Factors to consider in determining whether breach substantial or minor:

- 1) how much of obligation remains unperformed (ratio),
- 2) seriousness of breach to innocent party,
- 3) likelihood of repetition of breach,
- 4) seriousness of consequences of breach for the K, and
- 5) relationship of part obligation performed to whole obligation

### Facts:

Vernon agreed to have the assets of his business sold at auction with the proceeds to be deposited in a bank account. Vernon was to get the first \$450 000, the auctioneer was to get the next \$150 000, and anything else was to be split 70/30. But after two days the auctioneer made no bank deposit, keeping the entire \$100 000 proceeds for himself. Vernon refused to let him back on his property to complete the auction. The auctioneer sued and Vernon countersued.

## Parol Evidence Rule

### In General

The parol evidence rule aims to restrict what evidence is admissible before the triers of fact. Three are two traditional rationales to the rule:

1. Historically, the courts used to control unpredictable and unreliable juries from being influenced by the prejudicial effect of oral evidence where written evidence existed; and,
2. Straying from the admission of oral evidence gives finality to the written bargain.

In modern times, the courts have found that it is easiest to avoid the controversy of uncorroborated oral evidence by sticking to the parole evidence rule, which provides for only limited exceptions. The parole evidence rule, then, is an evidentiary rule to which there are many exceptions. It can be enunciated as follows: No extrinsic evidence is admissible for the purpose of altering, varying, or interpreting the written terms of the agreement.

### Goss v. Lord Nugent (1833) Eng CA

"If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, even before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."

### Exceptions

There are a number of exceptions that have developed in order to temper the burdens imposed by a strict adherence to the parole evidence rule.

### Zell v. American Heating Co. (1943) US 2<sup>nd</sup> Circ

Facts	Holding
<ul style="list-style-type: none"> <li>○ Plaintiff was employed and to be paid by the defendant \$1,000 per month plus a % commission</li> <li>○ The contract did not include provision for the commission</li> <li>○ Defendant refused to pay the commission and seeks to rely on the parole evidence rule</li> </ul>	<ul style="list-style-type: none"> <li>○ There are four exceptions where we may admit oral evidence:           <ol style="list-style-type: none"> <li>1. To interpret the contract;</li> <li>2. To remove ambiguities;</li> <li>3. To imply terms for the sake of business efficacy; and,</li> <li>4. Where rectification is needed</li> </ol> </li> <li>○ The key for exceptions is to help gather the parties' intentions</li> <li>○ The parole evidence rule will apply where the following three conditions are met:           <ul style="list-style-type: none"> <li>○ A written contract exists that contains the terms of the agreement between the parties;</li> <li>○ The parties have actually concluded a valid and binding contract; and,</li> <li>○ Parole evidence would have the effect of varying, adding to, or contradicting express terms of the written agreement</li> </ul> </li> </ul>

It is necessary to ensure that the parties have, in fact, created a written contract that contains all the relevant terms. Where it does not parole evidence may be necessary to find the complete contract. Parole evidence may also be admitted in order to determine the intention of the parties entering into the contract.

**Hawrish v. Bank of Montreal (1969)**

Facts	Holding	Ratio
<ul style="list-style-type: none"> <li>○ Hawrish had taken a loan from the Bank on the oral assurance that he would be released of his obligations as a guarantor once the Bank gained a joint guarantee from Crescent</li> <li>○ The Bank did gain this joint guarantee, but Crescent later went bankrupt</li> <li>○ Defendant claims that a collateral oral contract exists</li> </ul>	<ul style="list-style-type: none"> <li>○ If you have an oral agreement that contradicts the written contract, then it will not be admissible</li> </ul>	<ul style="list-style-type: none"> <li>○ You cannot have an inconsistent collateral contract contradicting the express written terms of the agreement</li> </ul>

**Bauer v. Bank of Montreal (1980)**

Facts	Holding	Ratio
<ul style="list-style-type: none"> <li>○ The bank had improperly registered the security to a loan</li> <li>○ Plaintiff argues that the bank orally promised to secure his debt and that he would not have entered into the agreement unless the bank would do so</li> </ul>	<ul style="list-style-type: none"> <li>○ A collateral contract that is inconsistent with the written contract will be inadmissible</li> <li>○ The burden to prove the existence of the collateral contract rests with the party seeking to free him or herself of the obligations of the contract – the burden is quite high</li> </ul>	<ul style="list-style-type: none"> <li>○ There is no room for a collateral agreement that contradicts terms under a written agreement</li> <li>○ Note: Where there is a misrepresentation, the parole evidence rule does not apply</li> </ul>

**J. Evans & Sons v. Merzario (1976)**

Facts	Holding	Ratio
<ul style="list-style-type: none"> <li>○ The plaintiff had contracted with the defendant shipping company to have a number of containers shipped</li> <li>○ The defendant promised orally that the containers would be shipped below deck – the containers were shipped above deck and lost at voyage</li> <li>○ Defendant pled exclusion clause as the written agreement specified that any special clauses must be in writing</li> </ul>	<ul style="list-style-type: none"> <li>○ The promise was given by the defendant to the plaintiff in order to induce him into entering the contract</li> <li>○ A collateral contract may be admissible where the oral evidence provided adds to the contract by way of inducing the party to enter into the agreement</li> </ul>	<ul style="list-style-type: none"> <li>○ A collateral contract may be admissible in so far as it adds to the contract, but does not contradict the express written terms of the agreement</li> </ul>

**Gallen v. Butterley (1984)**

Facts	Holding
<ul style="list-style-type: none"> <li>○ A farmer purchased a set of seeds on the oral assurance that it would kill crop-killing weeds</li> <li>○ The written contract had an exemption clause limiting liability</li> <li>○ The new crop did not kill the weeds, the weeds smothered the crop instead</li> </ul>	<ul style="list-style-type: none"> <li>○ The judge considers eight points regarding parole evidence:           <ol style="list-style-type: none"> <li>1. If a written contract exists, then it will be assumed that inconsistent oral agreements not only have no effect, but they do not exist;</li> <li>2. This is not an absolute rule, though, as it is subject to a number of exceptions;</li> <li>3. Canadian cases, such as Bauer and Hawrish allow for the evidence to be heard;</li> <li>4. Parole evidence rule does not apply where there has been a misrepresentation</li> <li>5. Parole evidence might be admitted where it adds or subtracts to the contract;</li> <li>6. The rule will be strongly supported where oral evidence contradicts;</li> <li>7. The rule will be strongly supported in cases of a negotiated contract;</li> <li>8. The presumption is not very strong applied against a general exclusion term</li> </ol> </li> <li>○ The vendor's statement here was a warranty – point 8 also applies</li> </ul>

## STANDARD FORM

### (1) Adhesion eg tickets

- if not signed, imposing party have to take reasonable steps to give the other party notice of the condition

⑤ Parker v South Eastern RY Co (1877) Eg

⑥ Thornton v Shoe Lane Parking (1971) Eg

• Infotext, again here

⑦ McCutcheon v Macbrayne (1964) Eg

- if signed approach to exclusion clauses / standard forms

⑧ Terra Contractors Ltd v BC Transportation & Highways (2010) SCC

GP: clauses in signed contracts are presumptively valid. In determining the effect of an exclusion clause, consider: Three Step Evaluation

⑨ Laychuk v Cougar Mountain Adventures Ltd (2012) BCCA

3 step:

① clarity of language, nature of notice interpretation, contra preferentum

② hurried v studied; relative knowledge of p's;

insurance? reasonable to expect 1 party to insure? standard form v individually signed

③ rare - criminal act, dishonesty, endangers health & safety See (10)-(13)

## STANDARD FORM ↴ EXCLUSION CLAUSES

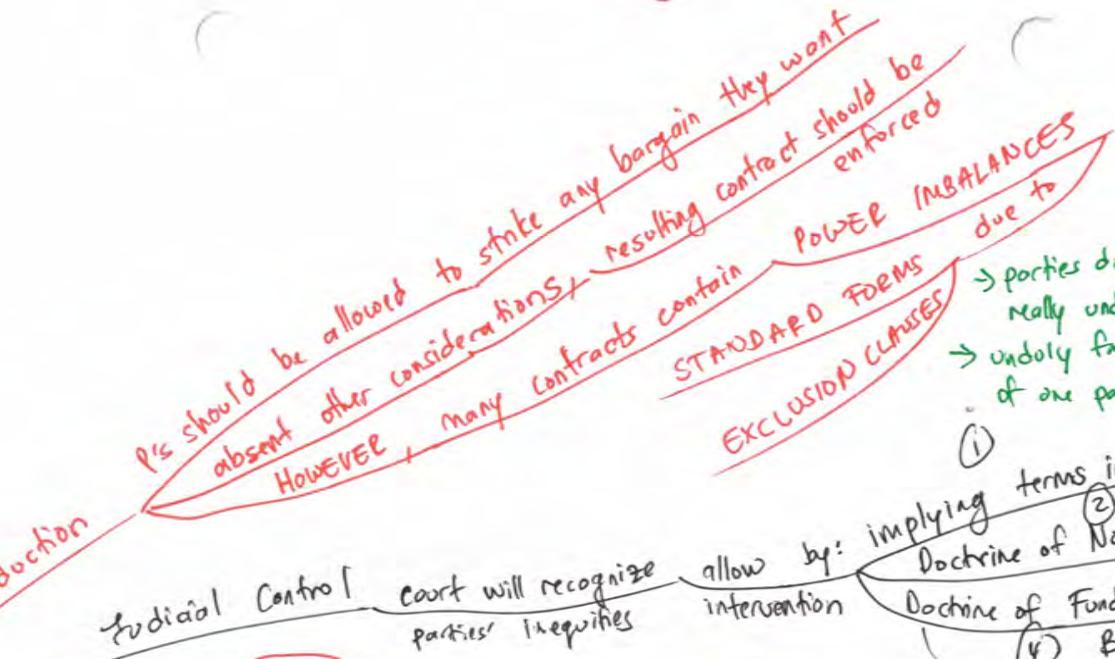
### CONTRACTUAL INTERPRETATION

- using the words used by the parties, court attempt to give impression to parties' intention
- GPS:
  - extrinsic evidence can show that words have taken on a specific meaning
  - contra preferentum - ambiguous term will be construed against the party who imposed it

⑩ Scott v Wanounesa Mutual Insurance Co. (1989) SCC

(contra preferentum case)

- only applicable when there is ambiguous terms



### IMPLIED TERMS

- Some terms are implied by statutes:  
eg Sale of Goods Act  
consumer protection legislation

- In the absence of stat. directive, court still have power to imply terms into contract

⑪ Wallace v United Grain Growers Ltd 1997 SCC

- implied a term of an employment contract that employer act in good faith when dismissing employee

⑫ Infotext Picture Library Ltd v Shlett (1987) FCR

- implied parties should act in good faith

⑬ Machtinger v Høj Industries Ltd (1992) SC

- Terms can be implied by court based on
  - 1. custom or usage
  - 2. if necessary for business efficacy
  - 3. legal incidents of a particular class of contract

## (2) Infefoto

F: holding fee £5 a day on 47 unit of products - bill of £3,783.50

H: holding fee exorbitant given the industry standard - this onerous condition had to be brought to P's attention

Decision: reduce award to reflect industry standard of £3.50 a week

## (3)

**Facts** Both appellants began working for HOJ Industries, a car dealer, in 1978, and were discharged in 1985 without cause. At the time they were dismissed Machtlinger was credit manager and rust-proofing sales manager and Lefebvre was sales manager. Each had entered into a contract for employment for an indefinite period which contained a clause allowing the respondent to terminate his employment without cause, in Machtlinger's case without notice and in Lefebvre's case on two weeks' notice.

Under the provincial **Employment Standards Act** the appellants were entitled to a **minimum notice period of four weeks**. After they were dismissed, the respondent paid each of them the equivalent of four weeks' salary. The appellants brought action for

wrongful dismissal and the trial judge found that they were entitled to reasonable notice of termination, and that the period of reasonable notice for Machtlinger was 7 months and for Lefebvre, 7½ months, however this was overturned by the CofA

**Issue** What should the notice period be in order to terminate employment if none is specified?

**Decision: Appeal allowed, lower court judgment restored.**

**Reasons:** McLachlin, writing a concurring judgment, examined the legal principles governing the implication of terms. She

identifies three types of implied terms:

1. terms implied by fact (intention required);
2. terms implied by law (no intention required); and
3. terms implied by custom and usage,

and **identifies #2 as the type the courts will read into a contract**. Implication of law can be from custom, for business efficiency (what is necessary in a contract), or what is reasonable (from Denning's dissent in *Liverpool City Council v Iain*). She finds that the Court of Appeal erred in characterizing a term implied in law as a term implied in fact, which brought in the intentionality of the parties. Holding that the employer had a legal obligation to provide reasonable notice and that this can only be displaced by an express contrary agreement, the court imposed a reasonable term of notification on HOJ.

**Ratio: Terms can be implied by the court based on:**

1. custom or usage;
2. if necessary for business efficacy;
3. legal incidents of a particular class of contract.

**Ratio** A reasonable notice period is an implied term of an employment K and the intention of the contracting parties is not relevant to terms implied as a matter of law (but only to terms implied as a matter of fact)

**Ratio:** The test for implication of a term as a matter of law is necessity or whether the term sought to be implied is a "necessary incident" of the K

## (4)

**Ratio:** where terms are clear and unambiguous, court should not interfere w/ meaning - contract preference can't apply

**Dissent:** courts should be guided by reasonable expectation and purpose of ordinary person entering the contract - terms ambiguous as to [joint responsibility of parent and minor child]

## FACTS :

**Facts:** The Scott's home was damaged by a fire deliberately set by their 15-year-old son without their knowledge or complicity. At the time, they had a **homeowner's Insurance policy** with Wawanesa. Wawanesa denied their insurance claim on the ground that the loss occurred through the "wilful act...of the Insured" within the meaning of an exclusion clause in the insurance policy. The word "insured" in the policy included "the Named Insured" and "if residents of his household, his spouse, the relative of either, and any person under the age of 21 in the care of an Insured".

The trial judge held that the definition of "insured" did not include the Scott's son. He found that the son's interest was separate from that of his parents and, accordingly, the exclusion clause was inapplicable to their claim. The Court of Appeal reversed the judgment.

**Issue:** Does the exclusion clause apply only to the parents or to the son as well?

**Decision:** appeal dismissed with costs

**Reason:** **{Majority L'Heureux-Dubé, (4/3 decision)}** writing for the majority, held that when the **wording of a contract is unambiguous, the courts should not give it a meaning different from that expressed by its clear terms, unless the contract was unreasonable or had an effect contrary to the intention of the parties**. In this case, the terms of the insurance policy were perfectly clear - the policy excluded liability of the insurer for damage caused by the criminal or **wilful acts of the insured, or of his minor children living in the home**. Accordingly, the damages suffered by the Scott's were clearly excluded from coverage. Moreover, the insurable interests of the parents and of the child were inseparably connected and the misconduct of one was sufficient to contaminate the whole insurance policy. The son's interest was not limited to his personal possessions; he had a direct relationship to the family home and its contents, since they were the source of accommodation and support. **{Dissent La Forest}** in construing an insurance policy, the courts must be guided by the reasonable expectation and purpose of an ordinary person in entering such contract, and the language employed in the policy is to be given its **ordinary meaning, such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it**. In this case, the Scott's did not take out fire insurance to insure their son's possessions: they insured to protect their house. Where the term "Insured" is defined so as to extend to others than the named insured, that definition should not be construed so as to restrict or limit the coverage enjoyed by the named insured but rather, it is intended to extend coverage, in the absence of clear and precise language in the policy to the contrary, the obligation of the insurer of a fire insurance policy which covers the interests of more than one person, should be considered several as to each of them. Here, there was no clear language in the policy to the effect that the insurer considered its obligations joint. **Where the language of the policy is ambiguous, the contract preferentem doctrine should be applied to construe the language in a manner favourable to the insured.**

## ⑤ PARKER 1877

F: P deposited bag at railway station.  
Bag was lost. P given ticket w/  
clauses limiting liability

Held: P not bound by the exclusion  
clause as it was not signed.  
It was company's obligation  
to make P aware of  
the condition.

## ⑥ Thornton v Shoe Lane 1971

F: automatic car park - P injured  
due to malfunctioning elevator -  
machine dispensed ticket with exclusion  
clause

H: exclusion clause not binding

Ratio: ① contract formed when press  
button so condition is after formation,  
not binding AND ② even if part of  
contract, CLAUSE SO WIDE AND  
DESTRUCTIVE OF RIGHTS - it then

REQUIRES SPECIAL NOTICE

## ⑦ McCutcheon 1964

F: Ferry sank and car lost, carrier  
had liability exclusion clause but  
car owner did not sign. Carrier  
tried to rely on previous dealings  
to have exclusion clause implied

H: Carrier failed to prove owner  
acquainted with conditions in previous  
dealings. Previous dealings only  
relevant where knowledge of terms  
is proven/actual and not constructive.

## ⑧ Laychuck 2012 BCCA

F: ziplining, employee negligent operation  
injured P. P signed waivers releasing  
them from liability

H: applying the three step evaluation  
① clause applies to the circumstances  
② not unconscionable, ziplining an  
optional activity  
③ no PP as the participants to the  
activity put themselves in the  
situation known to be risky

## ⑨ TERCON

### Facts:

-BC govt wants to build hwy  
- Puts out RFP documents (transparent govt  
process: sets out qualifications / terms of  
assessment)  
→ had exclusion clause that no Proponent has  
a claim for compensation as a result of  
participating in RFP, and submitted a proposal  
= acceptance that it has no claim  
-parties put forward "proposals" (like an  
Invitation to treat) instead of "bids" (which are  
binding b/c they embody acceptance of offer)  
-Govt selects 2 best proposals, Tercon and  
another company (Brentwood)  
-Govt accepts Brentwood, despite legal  
advice that Brentwood was an unqualified  
bidder  
-Tercon later learns that Brentwood put  
forward an unqualified proposal (i.e.  
Brentwood's proposal was actually a joint-  
venture)  
-Tercon sues for breach of K (expected profits  
3.5mil)

Analysis: to avoid the application of an exclusion  
clause or other terms of the contract, the  
court should consider:

- ① Determine whether the clause applies to the circumstance  
by interpreting the intentions of the parties
- ② If the clause applies, then consider if clause is  
**UNCONSCIONABLE**. If yes, invalid (at formation).
- ③ IF VALID at formation, then consider if  
enforcement can be refused on public policy  
grounds - then will be unenforceable due to  
violation of PP.

Applying ① clause doesn't apply as it refers to submission  
and not accepted proposals

- ② not unconscionable as both parties SOPHISTICATED
- ③ no PP breached Unlike Thornton it affected  
public safety

Three Step Evaluation to replace  
Doctrine of Fundamental Breach

Plaintiff & Defendant: PP affected because public interest in a fairly transparent bidding

10

## Tilden Rent-A-Car v Clendenning (1973) ONCA

- D rent a car from P. Added "additional coverage" for extra charges - D signs standard form. D observed to NOT READ
- small print - customer can't drive if consume alcohol "whatever quantity"
- D drove into pole. On advice by criminal counsel D plead guilty to impaired driving although Judge found on fact he DID NOT

- P brought action to recover damages
- D argues he should be covered by the extra insurance coverage

TJ: P's action dismissed - ct found P's employee's oral terms had misrepresented terms of the contract to D

AC: Dismissed ① P took no step to alert D of the onerous terms ② fine print = unreasonable to expect customers to read

\* Now car rental companies will exclude coverage if impaired, higher cost for insurance.

Analysis: onerous term (drink but not NCA - Contract Law  
Imran Masri, August 2020  
You should not have paid for these terms of transaction

11

## Photo Production v Securicor Transport 1980 HC

Held: For D. Exclusion clause binding in P

Facts:

- P owns greeting cards factory; D provides security services
- P hired D for night patrol of factory (note: fee only about 50 cents per visit; 4 visits a night)
- K has exclusion clause: **"D not responsible for any injurious act or default by an employee UNLESS such act could have been foreseen and avoided by exercise of due diligence"** (only liable in exercise of supervision or hiring)
- D's employee deliberately started fire (tho maybe didn't have intent to burn factory down) by throwing a match into some cartons → Much of factory burned down
- P brings action against D
- D argues on basis of exclusion clause

TRIAL: exclusion clause defeats P's claim

APPEAL: reversed decision: since there was a fundamental breach of K by D, by a rule of law the exclusion clause was nullified

**HOL: exclusion clause effective!**

Analysis:

- it is a question of "construction" or "interpretation" whether breach by one partner is so significant that reliance cannot be placed on exclusion clause
- exclusion clauses to be interpreted *contra proferentem* → but no ambiguities here
- What effect will the exclusion clause have?
  - 1) Commercial situation (both sophisticated / knowledgeable)
  - 2) Likely to insure on basis of allocation of risk
    - first party insurance = cheaper
    - 3rd party insurance = double insurance
  - 3) D received small amt, so should be liable for only what is outside exclusion clause (Remuneration / Liability Ratio)
  - 4) Circumstances of K formation → not hurried, P had opportunity to carefully study
  - 5) Clarity of language

12

## Hunter Engineering v Syncrude Canada (1989) SCC

F: Hunter provided gearboxes to Syncrude which failed - had exclusion clause excluding statutory warranties and waiver only for 24 months

H: Dickson: doctrine of fundamental breach not part of Canadian law, parties should be bound to contract terms save for UNCONSCIONABILITY

[In this case] no unconscionability, P had freedom to agree to terms

Also, clear language to oust legislation, so no issue on interpretation

Doctrine is V was found to be a better way to protect weaker P.

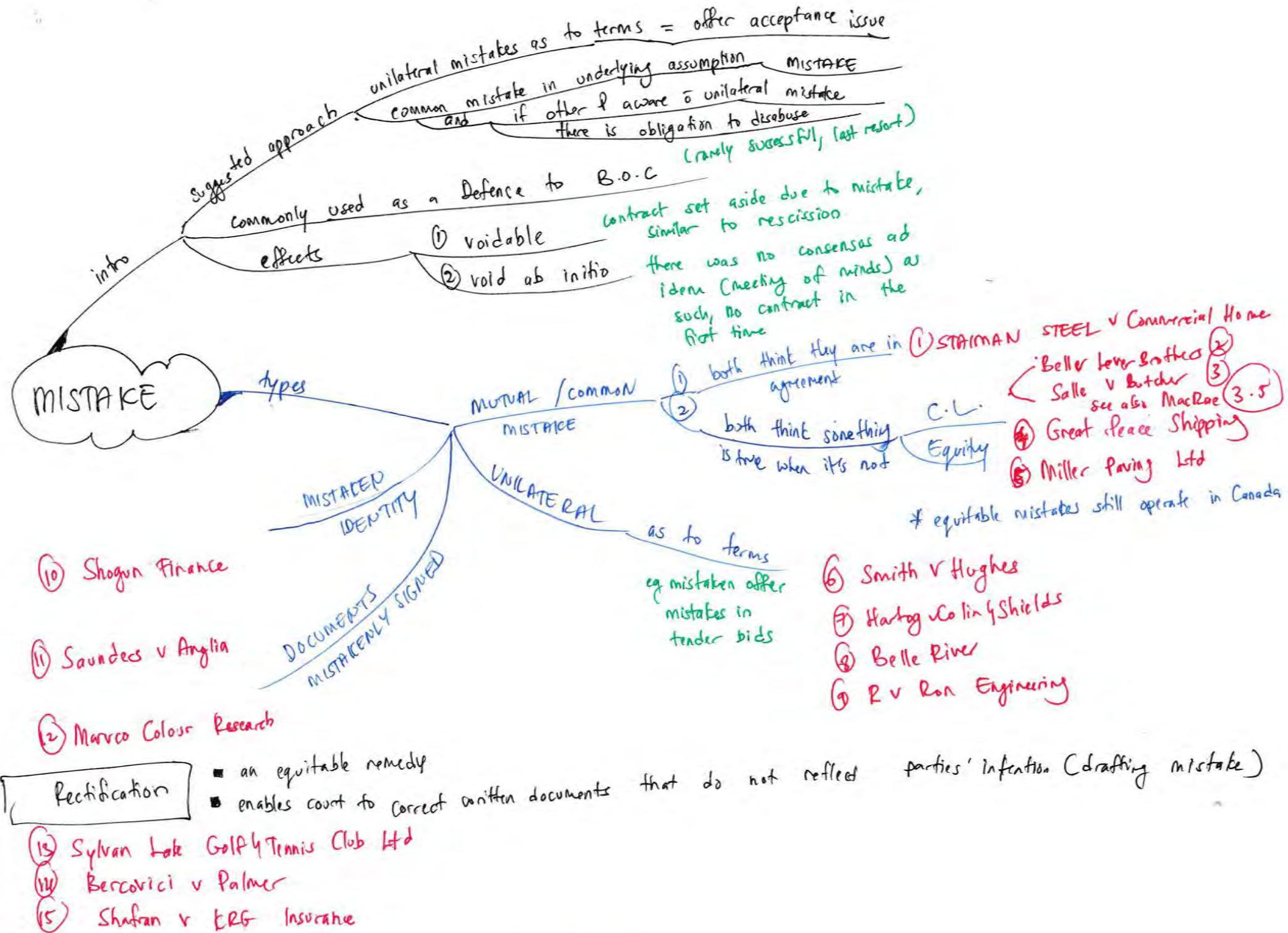
13

## Plastex Canada Ltd v Dow Chemical of Canada Ltd (ABCAT) 2004

F: supply of resin to manufacture pipe contain a limiting liability clause, but Dow knew resin was defective

D: D deliberately withheld information inserted limitation clause to protect itself, knowing P's about to get the pipes buried all over AB

H: Undoubtedly unconscionable, D liable for costs of repairs and loss of profits



### ① STAMAN STEEL V COMMERCIAL 1976 HC HOME BUILDERS (aNSC)

544

A purchaser bid for steel at an auction thinking it was a mix of new and used steel, when it was really only used steel - A reasonable person would have realized that the offer excluded the building steel - The plaintiff was mistaken in the belief that the building steel was being offered - A mutual mistake will not negate a contract where the reasonable person would see no mistake

**RATIO Test:** what would the reasonable person infer that the contract is from the words & conduct of the parties

TJ: a RM would infer the existence of a Contract to buy and sell the bulk lot  
Circumstances are so ambiguous that a reasonable bystander could not infer common intention, then courts will hold no contract created; mere speculation = rescission without any building steel - thus binding on both  
P's notwithstanding the mutual mistake - Seller bound to sell lot and bidder to buy w/out the disputed item

### ② Bell v. Lever Brothers - when a contract will be invalid due to MISTAKE OF ASSUMPTION

Motives or reasons to contract (mistaken assumption) does not invalidate the contract unless: (1) the subject matter of the contract does NOT exist; (2) There is a mistaken identity as to one of the parties; (3) Quality is fundamental to the subject matter of the contract. Shared mistake, HELD contract NOT void. Shared mistake of ASSUMPTION must go to the root of the contract to render it void.

**Test of essential/fundamental difference:** Is the thing fundamentally different from what the parties assumed it to be OR does the state of new facts destroy the identity of the subject matter as it was in the original state of facts (i.e. parties contracted on shared assumption that something existed when in fact it did not exist)? FACTS, D agreed to pay two directors of subsidiary company (P) sums of money in compensation for termination, while unaware of the fact that they had engaged in irregular conduct which would have allowed them to be dismissed without pay (so misapprehension). Did not need to pay them. P was also unaware that they could be DISMISSED (therefore a SHARED MISTAKE that they both assumed the employees were entitled to some compensation for their loss of office, and they did NOT engage in any conduct that would allow them to be terminated). Contract is NOT void - agreement can still be upheld. It fulfilled this requirement, therefore contract is void.

### ③ Solle v. Butcher - Equitable Mistake [regarding RENTAL AGREEMENT]-voidable

A contract may be set aside in EQUITY where (1) mistake is fundamental and goes to root of the contract or (2) party seeking to set contract aside was NOT at fault. **Equitable mistakes result in a voidable opportunity.**

FACTS parties made a RENTAL AGREEMENT under the common mistake that the flat was not subject to rent control legislation. It was. Lease found out and SUED for the difference between controlled rent and agreed rent. HELD, agreement was voidable. Equitable mistake results in voidable opportunity. If it is RESCINDED, it wipes out the retroactive aspect. But until this happens, there's a valid existing contract. A contract can be set aside in equity if the parties were under a common misapprehension as to facts or as to their relative and respective rights, provided the misapprehension was fundamental and the party seeking to set it aside was

not himself at fault

NOTE: P seeking to use a common mistake in equity to have contract set aside and rendered VOID AS LE must not himself be at fault.

3.5

### *Mcrae v Commonwealth Disposals Commission*

1951 Aus. silence on allocation of risk 565

- relying on rumors sold remains of tanker - none there and never had been - Disposals Commission claimed a common mistake
- Held - CDC had promised the existence of the ship - Any mistake was solely attributable to their own culpable conduct
- A common mistake can be relied upon to void a contract where:

1. A party deliberately makes the mistake to induce another to enter;
  2. Where the contract is silent on the **allocation of the risk of the mistaken to one of the parties**
- (contractual construction and the allocation of risk)
  - Relying on rumours, the commission sold to mcrae the right to salvage an oil tanker thought to be marooned at a specified location. Unfortunately the **tanker didn't exist, D claimed common mistake**
  - **Issue:** was there an implied condition precedent that the goods were in existence?
  - It was held that the commission "took no steps to verify what they were asserting and any mistake that existed was introduced by their own culpable conduct"
  - CDC was found to breach the term, and **mcrae was entitled to damages**, in this case being the reasonable cost of the failed salvage mission plus the price he paid for the tanker, the promisor knew or should have known that the tanker wasn't there
  - **Ratio:** breach of k if a non-existent thing was being sold, as well wrt res extincta (the thing that ceased to exist prior to the making of the k), then there will be no k/k will be void according to the sale of goods act, BUT if the thing was in existence when the k was made, there is no mistake
  - **Rule: whether the K Is void for common mistake is primarily a matter of construction**
  - Where A has all the means of knowledge and B has none, and A asserts something (such as its existence) knowing that B will rely on this to enter into a k - no voidness for mistake; it is at most a term, at least an innocent misrepresentation; at the v least, there will be damages, the k will not be void
  - **Reasoning:** the ct found that the seller warrants the ships existence
    - o Whether the ct will imply a warranty in respect of the matter concerning which both parties were mistaken, will dep on whether the warrantor had expertise and special information available
    - o **Both parties made mistakes, but mcrae's mistake was induced by the CDC**
    - o In sitns where both parties were equally able to check the sitn out, then the cts will be less reluctant to find that matter warranted
    - o If the thing ceases to exist after the k has been made, may have a case of frustration but not mistake b/c at the time of k formation, there was no mistake
    - o What is it that leads to the concl that the cdc has promised to sell the tanker, that they must have borne this risk? -

#### 4 Great Peace Shipping

2002 Eng. No more equity - *Salle* overruled v *Tsavliris Salvage* 574

- Facts: The D's needed help w/ a ship, they were lead to believe that the "Great Peace" was closest to their ship, it turned out to be 410 miles rather than 35 miles away. The D shipping company argued that their contract was void (or voidable) for mistake
- Issue whether that mistake rendered the k: 1) void in law for fundamental mistake, or 2) voidable in equity for mistake, entitling Tsavliris to rescind the k
- The CA applied the rule in *Bell v Lever* and held that no relief could be given to the D's b/c the k wasn't fundamentally different from that which the parties had intended
  - Telling pt is the reaction of the D's in learning the true positions of the vessels, they didn't want to cancel the agreement until they knew if they could find a nearer vessel to assist. This rxn was a telling indication that the fact that the vessels were considerably further apart than the appellants had believed didn't mean that the services that the "Great Peace" was in a posn to provide were essentially different from those which the parties had envisaged when the k was concluded
  - The fact that the vessels were further apart than both parties had appreciated didn't mean that it was impossible to perform the contractual adventure
- Rule: there is no basis on which to rescind a k on the grounds of a mutual mistake where the k is valid and enforceable at CL (Equitable mistake no longer exists)
- Overruled *Salle*, CL rule should not be trumped by equity that aims to rescue ppl from their bad bargains
- The fact that the vessels were further away than believed didn't mean that those services were essentially different
- \*\*test from Great Peace, pg 581, casebook

#### 5

#### *Miller Paving Ltd v B. Gottlards Cos. Hd*

2007 Ont CA equitable mistake still good in Canada (*Salle* valid) 579

Plaintiff signed agreement had been paid in full turned out he hadn't - Agreement provided plaintiff bore risk of mistake - the agreement hadn't become something different due to this Mistake plaintiff's fault so common law doctrine not available - Defendant altered its position as result of mistake i.e. bought more stuff and therefore equity doesn't apply as there has been no enrichment

- Facts: The appellant (Miller) sold some materials to the respondent. In 2001 the parties signed an agreement that stated that the respondent had paid the appellant in full for all materials, it was later discovered that there was an outstanding payment
- Issue: can miller recover?
- Holding: miller can't recover
- Rule: the common law and the equitable doctrines of mistake are recognized in Canada; first the parties should look to the k to see if the parties have provided for who bears the risk of the relevant mistake
- Here, the parties themselves set out in the k of 2001, that Miller would bear the risk of any loss (the Dec 20 "Memorandum of Release" provides that it is the supplier that "Acknowledges and agrees that payment in full has been received for the materials supplied"; moreover the billing practice here, as w/ most supply contracts, made it the responsibility of the supplier to determine what was owing for the material supplied and to then invoice for that amt)
- Furthermore, even if this were not the case, setting aside the agreement would not succeed b/c nothing abt the mistaken assumption changes the subject matter of the k and miller would have to show that the mistake wasn't his fault - but it was
- Summary: CL mistake didn't apply (The release form wasn't different in kind from what they thought the agreement was), and equitable mistake didn't apply (oversight in payments was miller's fault)
- Equitable mistake still operates in Canada - the ct notes that great peace shouldn't be adopted in Canada, b/c of the valuable flexibility that equitable mistake brings to these cases,

6

**Smith v Hughes** 1871

546

A buyer was shown a sample of old oats at the time of purchase and assumed that he would be delivered old oats - The Vendor sent the purchaser new oats - A distinction must be made between mistake as to quality (assumption) and mistake as to terms - Unless the seller is responsible for inducing a mistaken belief in the buyer, which induces him to enter into the contract, he is not responsible - However, a reasonable third party would have seen a contract for oats

**Caveat Emptor** (no rescission)

- no rescission unless there is a warranty/condition in the contract as to the quality being disputed

Rationale: there is consensus on the sale and purchase but no consensus as to the quality

Exception: fraud/deceit; mere reluctance to inform buyer of his mistake is not

- ex. purchaser thought he was getting old oats, but the vendor sold him new oats, the sale contract was for oats but the quality of old/new wasn't specified
- held in favor of selling just oats

**(b) "Snapping Up" a Mistaken Offer**

This is a situation where B accepts an offer on terms expressed by A knowing or suspecting that A has made a mistake as to the terms and really intended to make a different offer

**Snapping up Offer** (rescission available)

- if offeree knows that there is a clear fundamental mistake/error in the offer, the claim for breach of contract will not be enforced (objective test)

Rationale: rule of objectivity, offeree knows that this is not the true intention of the offeror; also based on fairness

7

**Hartog v Colin & Shields** (p551c) mistake in price (large) held must have known this was a mistake therefore not allowed to claim for a breach of contract when they refused to perform

8

**Belle River** (p551) cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract

9

**P v Ron Engineering & Construction (Eastern) Ltd** 1981 SCC -

554

Realized made mistake in tender - didn't withdraw as would have lost deposit - instead argued other party knew of mistake - Here they are 2 contracts the first is unilateral where the bidder agrees to lodge a tender on the terms advertised - This is irrevocable if a security deposit is paid - Tenderer takes the risk

Tender contract binding as unilateral mistake was not induced by the other party

10

### Shogun Finance Ltd v Hudson 2003 UKHL

583

person bought car on hire purchase claiming to be someone else (had driving licence in their name) - Then sold the car on - if this was a valid Hire purchase then buyer in good faith gets the car - **Held by majority no contract of Hire purchase** - This followed the principle established in *Cundy v Lindsay*, that written agreements do not infer a presumption to sell to the immediate purchaser, where identity is of key importance to contracting

**Facts:** A rogue went to buy a Mitsubishi Shogun on hire purchase. The rogue told Shogun Finance Ltd that his name was Mr Patel and produced Mr Patel's driving licence. The finance company did a credit check on Mr Patel, finding no problems, and the rogue drove away. Then, the rogue sold the car to Mr Norman Hudson. Under s.27 Hire Purchase Act 1964 a non-trade buyer of a car who buys in good faith from a hirer under a hire purchase agreement becomes the owner, so Mr Hudson would have been the owner if the hire purchase agreement were valid. **Shogun Finance argued that it was not on the basis that there was a mistake as to identity.** They therefore claimed against Mr Hudson for conversion.

**Judgment:** The majority of the House of Lords (Lord Hobhouse, Lord Phillips and Lord Walker) held there was no contract (rescission) of hire purchase between Shogun Finance and the rogue, so that the car was not Mr Hudson's. This followed the principle established in *Cundy v Lindsay*, that written agreements do not infer a presumption to sell to the immediate purchaser, where identity is of key importance to contracting. Lord Nicholls and Lord Millett dissented.

{Dissent Lord Nicholls and of Lord Millett} are of interest, in their arguments to overrule *Cundy v Lindsay*, in effect protecting the third party purchaser:

Accordingly, if the law of contract is to be coherent and rescued from its present unsatisfactory and unprincipled state, the House has to make a choice: either to uphold the approach adopted in *Cundy v Lindsay* and overrule the decisions in *Phillips v Brooks Ltd* and *Lewis v Avery*, or to prefer these later decisions to *Cundy v Lindsay*.

I consider the latter course is the right one, for a combination of reasons. It is in line with the direction in which, under the more recent decisions, the law has now been moving for some time. It accords better with basic principle regarding the effect of fraud on the formation of a contract. It seems preferable as a matter of legal policy. As between two innocent persons the loss is more appropriately borne by the person who takes the risks inherent in parting with his goods without receiving payment. This approach fits comfortably with the intention of Parliament in enacting the limited statutory exceptions to the proprietary principle of *nemo dat non quod habet*.

**Reception:** The result of *Shogun Finance Ltd v Hudson* is that the area of mistake to identity retains the face to face distinction. This is that contracts of immediate vicinity differ from contracts made over distance. Such a distinction has been labelled "artificial and unfair to third parties, who bear the entire loss, where - at least in the instant case - it is argued that Shogun Finance Ltd had far better means to uncover the rogue's fraud, than the independent purchaser; in any case, the original seller is usually in the better position to protect and insure against such risks.

11

**Non Est Factum** A claim of *non est factum* ("it is not my deed") means that the signature on the contract was signed by mistake, without knowledge of its meaning, but was not done so negligently. A successful plea would make the contract void *ab initio*.

### Saunders v Anglia Building Society 1971 HL

591

The plaintiff mortgaged a house for his nephew who was a rogue. The party pleading non est factum cannot escape the consequences of their own negligence. **Test for Non Est Factum:**

1. Carelessness - not reading the documents; or,
2. Documents are fundamentally different from one another

*In order to claim 'non est factum', the document signed must be fundamentally, radically, or totally different from the document that it was believed to be as between the contracting parties.*

## Marvco Colour Research Ltd v Harris (1982) SCC

## ~Fraud Inducing Mistake: Careless Party Liable

**Held:** For P. As btwn 2 innocent parties, the one who should suffer loss is the one who was CARELESS (or negligent) AND COULD HAVE MOST EASILY PREVENTED THE LOSS.

**Facts:**

- J&S purchase business from P (Marvco Colour) for \$85,000
  - paid \$30,000 cash; agreed to joint obligation to pay \$55,000 remaining
- Later, S agrees to sell interest in business to J if:
  - i) J pays S \$15,000 cash
  - ii) S is discharged from \$55,000 joint obligation to P
    - P will only discharge S if another credit worthy guarantor
- J asks his parents-in-common-law (D) to mortgage their home for \$15,000
- out of love for their daughter, D *knowingly signs \$15,000 + also sign unknowingly due to fraud / deception didn't read documents properly, relying* mortgage guarantee to P for *on J* \$55,000
- J bankrupt and in jail
- P suing on mortgage guarantee; D argues they are victims of fraud and didn't intend to sign document → signed by "mistake"

**Analysis:**

- the mortgage is a NON NEGOTIABLE instrument
- distinction btwn negotiable and non-negotiable instruments
- Negotiable: easily transferrable by delivery or endorsement (cheque payable to cash; bearer bond)
  - if careless w/ creating negotiable instrument, liable to 3<sup>rd</sup> party, even if you're the victim of fraud (*Foster v McKinnon 1869 ENG*)
- Non-Negotiable: not readily transferrable, greater limitations (ex. mortgage, guarantee)
- if MISCONCEPTION as to LEGAL CHARACTER of the document → no liability (*Carlisle v Bragg 1911*, affirmed in *Prudential v Covenant, 1956 SCC*)
  - but if mistaken as to "contents:" akin to mistake of law
- BUT SCC asserts it's not "bound" to its previous decision in 1956, wants to follow *Saunders v Anglin Building Society*, which imposes liability to innocent third parties for carelessness, regardless of whether document is negotiable or non-negotiable
- Rule:** If fraud/dishonesty by one party as to nature/contents of document → that party cannot enforce against the signer [i.e. Rogue cannot enforce] BUT, 3rd party, NOT involved in dishonesty, no reason to be aware of "MISTAKE", can rely on the document. 3rd party can rely on the K, despite the error/mistake → the person whose CARELESSNESS allowed the mistake to occur bears the loss.
- Justification: places loss on party who could have most easily avoided it; promotes certainty & security in commerce

• Approach by Lord Denning in *Lewis v Avery (1972) Eng CA* → place loss on innocent party who could have most easily avoided loss → affirmed in *Houseman v Bagley (2008) ABCA*; leave to appeal refused SCC (2009)

→ Eng cts rejected Denning's approach in *Shogun Finance Ltd v Hudson (2004)*; leaving the fraudulent induced transaction unenforceable (following *Bell v Lever Bros approach*)

→ Cda and Eng follow different laws re: innocent parties

→ HOWEVER, if situation of theft: original owner has title, not innocent party (*nemo dat quod non habt* – one cannot give (legal title) what one does not have)

- Rectification - equitable remedy - enables the courts to correct written documents that do not reflect the agreement of the parties where there has been a mistake in the reduction of the terms to writing
- Courts must admit extrinsic evidence of matters preceding the written contract

<b>13</b>	<b>Rectification (Sylvan Lake)</b>	<b>Mistake (onus on P, evidentiary burden = higher than BOP)</b>
Transcription Errors in Written Contracts	1) existence and content of an oral agreement that is inconsistent with the written document	
Equitable Remedy	2) D knew or ought to have known about the mistake - D trying to rely on mistake amounts to fraud or <u>equivalent of fraud</u> "bad faith" Rationale: Closes the floodgates to unilateral mistakes committed by one party	
Exception to Parol Evidence Rule	3) P to show the <u>precise form</u> of the written contract <u>so it conforms with the original</u> intention Rationale: Closes floodgates to speculative contracts, focus on what the parties originally agreed to	
Use this to keep Contract (varies the terms rather than void it)	4) P must establish 1-3 on a standard of "convincing proof", higher the regular civil standard - can use subsequent conduct of the parties as evidence ( <u>Bercovici v Palmer</u> )	
	Failed Argument - if no Due Diligence conducted, then can't rectify - courts ought to hold commercial entities to reasonable level of due diligence in documenting their transactions vs. unilateral mistake involves a degree of carelessness on part of the P (but fraud was involved!)	

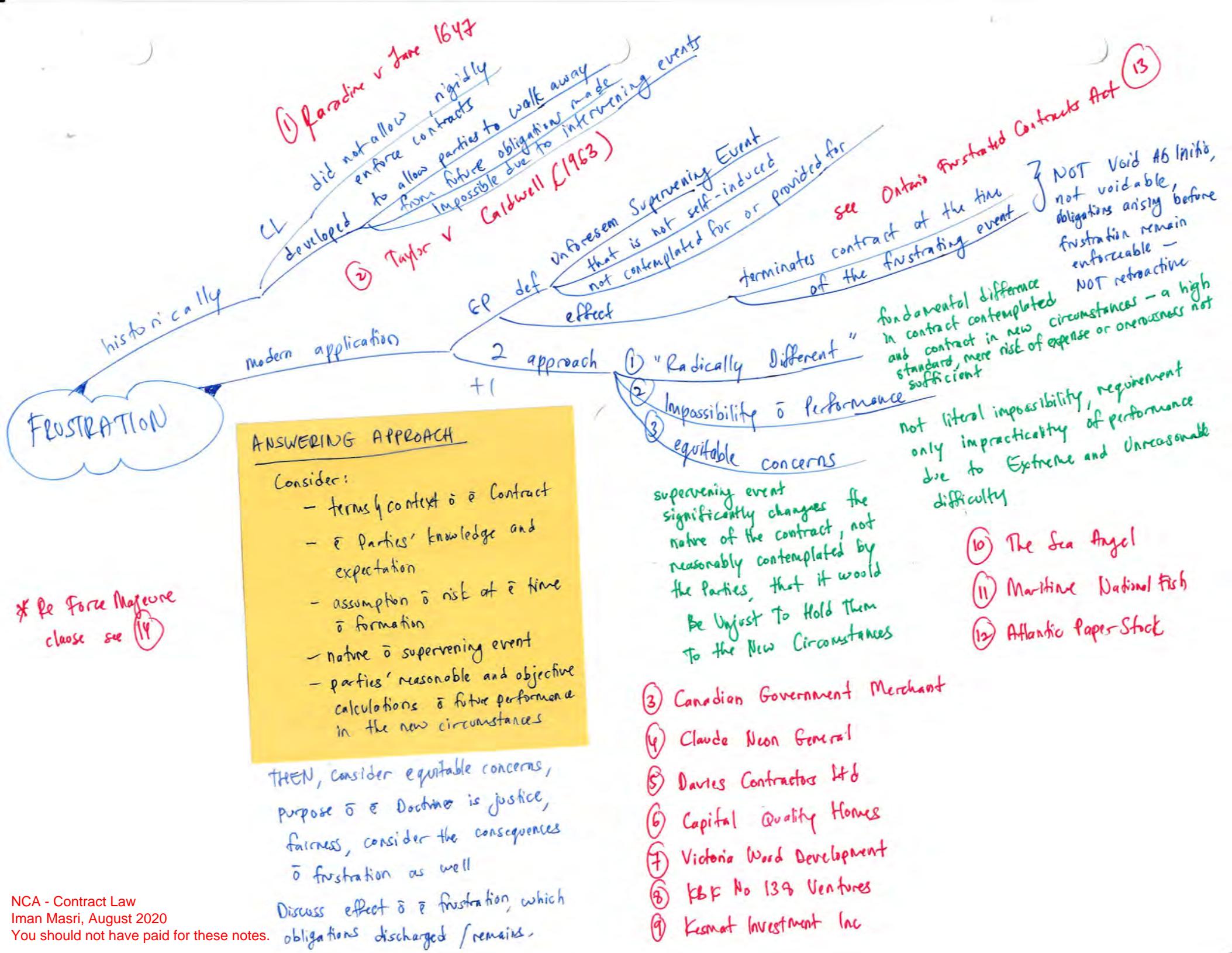
**14** Bercovici v Palmer 1966 Sask QB and Sask CA 601 and 603  
(p601c) - lawyer inexplicably include a cottage in a conveyance- held court was satisfied beyond any fair and reasonable doubt that the (cottage) was not intended by either party to be included in their transaction." - On appeal, the court added that in cases where rectification is an issue, it is within the purview of the court to consider conduct subsequent to the contract.

### Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd

*the four prerequisites required by Sylvan in a case of unilateral mistake are:*

- a previous oral agreement inconsistent with the written document;
- the other party knew or ought to have known of the mistake and permitting that party to take advantage of the mistake would amount to unfair dealing;
- the document can be precisely rewritten to express the parties' intention; and
- each of the first three prerequisites must be demonstrated by convincing proof.

**15** Shafrazi v KRG Insurance Brokers [2009] 1 S.C.R. 157; 2009 SCC 6 (at paras. 51-57 particularly).  
Rectification cannot be invoked to resolve the ambiguity in this case. **Rectification is used to restore what the parties' agreement actually was, were it not for the error in the written agreement.** Here, there is no indication that the parties agreed on something and then mistakenly included something else in the written contract. Rather, they used an ambiguous term in the contract. KRG Western can point to no prior agreement, written or oral, that explains the term "Metropolitan City of Vancouver". [para. 3] [para. 57]



## ① Paradise v Zone 1647

Facts: D leased land from P but was forced off the land during war. P sued for unpaid rent.

Held: rent due to P even during time when it is not available to D due to invasion

TLDL: rigid approach, criticized

## ② Taylor v Caldwell (1963) Eng

F: contract to supply concert hall for performances - hall burnt down

H: when item perishes, performance becomes impossible, at no fault of the parties, then parties are excused from the **performance**

\* frustration based on an implied term - as if parties considered the event and reasonably agree to terminate

In this no money paid, and P sued for loss of profits for being unable to perform, effect: no recovery to P.

## ③

### Canadian Government Merchant Marine v Canadian Trading Co (1922)

F: labour unrest caused unjust delay in building ships - goods unable to be transported

H: labour dispute is not outside what could be foreseen - not an extraordinary occurrence - No Frustration

- \* foresight negates frustration
- \* reasonable person would agree the contract should end due to circumstances (implied)
- \* can't imply if reasonably could be

Contemplated the risk & circumstances being what they in fact proved to be when the time of performance arrives

## ④

### Claude Neon General Advertising v Sing (1942)

F: ordered a neon sign - a ban during war meant it couldn't be used at night

H: no frustration, sign can still be used during the day, no frustration due to the reduction / restriction on use

## ⑤

### Davies Contractors Ltd v Fareham (1956)

F: contract to build houses - labour shortage due to post-war market causing long delay

H: no frustration, labour shortage is foreseeable - had adjusted tender to reflect profit margin of finishing in that period

#### DOCTRINE OF FRUSTRATION:

→ when law recognizes that without default of either party, a contractual obligation become incapable of being performed because the circumstances in which the performance is called for would render it a thing RADICALLY DIFFERENT from that which is undertaken by a contract

Frustration CAN NOT occur:

- ① the thing that purported prevents performance could reasonably be foreseen
- ② reason for seeking frustration of a contract is of equal significance to both parties (parties would have thought to include it) - not on implied term as then it would have been foreseen

Modern application

TLDL: IS NOT BASED ON IMPLIED TERM !!

⑥

Capital Quality Homes v Colwyn Construction Ltd (1975) ON CA

P: agreement to buy 26 building lots with the intention to convey them. New legislation passed restrict the ability to convey. D asked for his deposit back.

H: legislation was not foreseen, the intervening new law "destroyed the very foundation of the agreement."

creating a new situation not within the contemplation of the parties when agreement was entered

- Both parties discharged from performance

\* This decision set aside a ruling in England that state doctrine of frustration to not apply to land lease contracts.

\* In this case, the land purchase contract included a condition that the lot would be subdivided - now made impossible to do by closing date due to the new legislation.

⑦

Victoria Wood Development Corp v Audrey (1977) Ont HC

- P agreed to buy land from D to subdivide, before completion, new leg. introduced that precluded subdivision

H: rejected P's reliance on "Capital" case, J found agreement made no condition upon the purchaser's ability to carry out intention - Developer in purchasing land, is always conscious

of risk in zoning changes etc which may delay his intended outcome or make it impossible

⑧

KBK No 138 Ventures v Canada Safeway Ltd (2000) BCCA ~Structuring K around Purpose

**Held:** Rezoning is a frustrating event b/c K was structured around P's intended use. P gets deposit back (as per s. 3(1) of *Frustrated Contracts Act*)

**Facts:**

- P Ked to purchase property from D: advertised as being zoned in "C-2" (i.e. commercial or residential) w/ maximum floor space ratio (F.S.R.) of between 2.5 and 3.22 (relates to the size/height of what can be built)
- P planned to develop property and expected to obtain F.S.R. approval of 2.3 to 2.5.
- After K was signed, city re-zoned the property, which decreased F.S.R. To 0.3. (reduced the value per sq/ft of the commercial property)
- P argued K was frustrated and requested return of its deposit of \$150k; D refused to do this and resells for \$3 mil less

**Analysis:**

- moved away from talking about what the parties implicitly intended to a discussion of what the court should impose as just and reasonable:
- Re-zoning is not a frustrating event UNLESS it is stipulated in the K
  - but here, use of property specified in K, rezoning very unusual, & price tied to the F.S.R. → K structured in contemplation of that specific development.

**Rule:** the terms of contract (as well as the nature of the event) will help determine whether the event is a frustrating event, or merely "inherent risk of the contract." Though rezoning usually not a frustrating event, it may be if contract premised on certain zoning.

9

For sales of land, although it is NOT sufficient that the vendor merely had knowledge that the buyer intended to develop the land, IF the K was structured in contemplation of that development, THEN it is sufficient for frustration.

#### Kesmat Investment Inc., v. Industrial Machinery Co. (1986) (p640) – rezoning – no frustration

- Mere hardship or inconvenience or material loss or the fact that the work becomes more onerous than originally anticipated does not amount to sufficient grounds for frustration
- A rezoning undertaking by Industrial, of Kesmat's land, was unexpectedly subjected to a mandatory, and expensive, environmental assessment. The court concluded that this additional requirement did not operate to frustrate the contract.
- "Hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration. Courts have, however, interpreted impossibility of performance to encompass .. impossibility in the sense of impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss." But in this case "the requirement of an environmental impact report was not an unknown requirement" and it could not be said "that no man of common sense would incur the outlay."

10

#### 3. A Restatement

##### Edwinton Commercial Corporation and Another v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd. The Sea Angel

###### Facts

- oil tanker crash; D chartered Sea Angel tanker from P to undertake salvage; port claimed compensation from d for damage, d refused;
- 108 days later Karahi court ordered port to release Sea Angel.
- P claims hire for entire period, D claims frustration, owes no hire for the days held at port.

Issue: Was the delay a cause of frustration?

###### Held

- appeal dismissed, no frustration.
- Application of the doctrine requires consideration of a range of factors including the terms of the contract, its context, the parties' knowledge and assumptions as to risk at the time of the contract, the nature of the supervening event and the parties' reasonable calculations as to the possibilities of future performance in the new circumstances.
- There was also the requirement to do justice.
- D as the chartering party had assumed the general risk of delay in the specific context of the salvage industry where the risk of unreasonable detention was foreseeable and was provided for by the SCOPIC clause incorporated into the charter.
- Although the solution was not in D's control, it was achievable with negotiation and legal pressure.
- The purpose of the charter had been achieved and the consequences of delay in this case were purely financial.
- Therefore the contract had not been frustrated.

#### EQUITY CONCERNs (Sea Angel)

- supervening event significantly changes nature of contract, not reasonably contemplated by parties, would be unjust to hold them to new circumstances, so discharge them

11

#### Maritime National Fish Ltd. v. Ocean Trawlers (1935) – self induced frustration = inapplicable

###### Self-Induced Frustration does not lead to a frustrated k.

Facts: The P chartered a trawler from the D knowing that there was legislation that limited the number of licenses granted for the trawler type. The P had five trawlers but was granted only three licenses. They allowed the licenses to apply to the trawlers that the P did not charter from the D.

Ratio: If the contract cannot be performed due to an act or election of one party, then the k cannot be frustrated and the party is responsible for the k.

Dec: Find for the D

- The appellant had chartered a trawler at \$590 per month from the respondent Appellant owned 4 other trawlers
- Only got 3 licences
- Tried to end the charter and claim frustration
- Held when charter entered both aware licensing requirement applied and it was within his hand to choose which of the trawlers he used the licence for
- *Self-induced frustration makes the doctrine inapplicable*

12

#### Atlantic Paper Stock v. St. Anne Nackawick Pulp and Paper (1976)(p656c)

- St. Anne promised to buy waste paper from Atlantic for ten years "unless, as a result of an act of God ... or the non-availability of markets for pulp or corrugating medium." Fourteen months into the contract, St-Anne tried to invoke the "non-availability of markets" clause to end the contract

- Held this was a typical act of god clause and as such required the unexpected, something beyond reasonable human foresight and skill....
- an event over which the respondent exercises no control
- Here there was just St. Anne's difficulty in finding a market so couldn't rely on it
- Canada's Supreme Court thought that the clause was a typical "act of God" clause and, as such, required "the unexpected, something beyond reasonable human foresight and skill.... an event over which the respondent exercises no control." But the evidence showed strong and competitive international demand for the product and that the difficulty of St-Anne in finding markets were the result of its poor marketing. "I do not think St. Anne can rely on a condition which it brought upon itself."

## 7. Effect of Frustration

The effect of frustration is to terminate the contract at the point of frustration: Obligations that have arisen before frustration remain enforceable – obligations after frustration are automatically discharged.

- Frustration is not retroactive – contracts are not void ab initio, parties are just released from future obligations
- Frustration does not allow the innocent party to choose, contract is just terminated

There are two major problems:

1. The party who has prepaid the purchase price could not recover; and,
2. The party who has started to perform the contract, but has conferred no benefit on the other will not be able to recover any sum to compensate for the wasted expenditure

### Ontario Law Reform Commission, Report on Amendment of the Law of Contract

- terminate contract as of the moment of frustration, regardless of the wishes of the parties
- not retrospective, does not render past dealings void, rather parties are released from further obligations
- rights and obligations accrued prior to frustration remain enforceable

<b>Foreign Jurisdictions</b>	<p>U.S. "impractical" - lower bar, emphasis on efficiency</p> <p>Scandavia "Social" - when party experiences adverse life events</p>
<b>*Ontario Frustrated Contracts Act</b>	<p>Inapplicable to: - insurance, sea carriage, perishable goods</p> <p>Payments made before discharge due to frustration - paid back to payer - if payable, discharged</p> <p>Exceptions: Expenses: if receiving party expended money in performing the contract, discretionary Benefits: if party gave benefit to other party, may get reasonable money for it, discretionary</p>

## Should the Doctrine of Frustration be Expanded: Commercial Impracticality and Social Force Majeure?

- Long term supply contracts are more common now (water, fuel electricity)
- US doctrine of "commercial impracticality" – obligation to perform excused if "performance as agreed as been made impractical by the occurrence of a contingency the non-occurrence of which was the basic assumption the contract was made"
- Is *Capital Quality Homes* really impossible or impractical?

### Anticipating the Unforeseeable: Force Majeure Clauses

- A common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties,
- There are three basic types of force majeure clauses: 1. Suspends performance for a period of time; 2. Vary the contract for a period of time; and, 3. Lead to termination without payment of damages

## Introduction

## Protection Of Weaker Parties

SEE ALSO INCAPACITY

3 categories

① Contract of necessity

② Voidable contracts

③ Void Contracts

④ Hart v O'Connor  
Privy Council (1985)

F: 83 yo o unsound mind sold his farm to Hart, H did not know and was fair in his negotiation w/ O's lawyers - H occupied land & made improvements, O's brother tried to set aside sale

H: no equitable fraud - not voidable for Unc.



## DURESS

Historically: threats to economic position was not claimable

Modern: D is defined as OVERBEARING of a person's will - compulsion vitiates consent and contract can be set aside NO CONSENSUS AD IDEM (VOIDABLE)

GP: prove a COERCION OF WILL court will analyze 4 + 1 criteria:  
① Did a P protest at the time?  
② The viability of alternatives?  
③ Presence o independent advice?  
④ Any steps taken to avoid the contract after entering?

+  
⑤ Principle approach to see if duress was justified under the circumstances?

- ① Greater Fredericton Airport Authority Inc v NAV Canada
- ② Pao On v Lau Yin Long
- ③ Williams v Roffey Bros

## UNDUE INFLUENCE

Comparison to Duress:

D: compulsion under which a person acts due to fear of suffering at e time o making e contract

- threat may be to someone close or stronger
- makes contract voidable ≠ void

U.I.: unconscious use by one person of power to induce other to contract \* Duress failing short of CL requirements may constitute U.I. in equity

GP: 2 ways to establish:

- ① Prove actual U.I.
- ② Prove special rship btw P's

④ Geffen v Goodman Estate

⑤ Royal Bank o Scotland v Etridge

⑥ CIBC Mortgage Corp v Rowatt

⑦ Gold v Rosenberg

## UNCONSCIONABILITY

Definition: unconscious use of power by a stronger party over a weaker party.

Traditional Doctrine: test to determine U.I.

① Proof o inequality arising out of the weaker party's need, disfay or ignorance

② Proof o substantial unfairness

③ Morrison v Coast Finance Ltd

④ Braut v Stee

"A Wider View" - not law

⑤ Lloyd's Bank v Bundy

Current Canadian position:

⑥ Harry v Kreuziger

⑦ Do v Nichols (BCCA)



\* UBER Technologies Inc v Heller (2020) SCC

6

Greater Fredericton Airport Authority  
Inc. v NAV Canada (2008) NBCA

F: AF needs to build new runway. NAV had equipment which needed to be moved but NAV figured it would make more economic sense to purchase new equipment. NAV told AF they won't move the equipment unless AF agree to pay for the new acquisition. AF wrote saying they agree but "UNDER PROTEST". NAV completed the work and incurred \$288K expense. AF refuse to pay.

Arbitration: no obligation on AP to pay under original contract but the subsequent correspondence give rise to separate and binding contract supported by consideration - the word "under protest" does not negate contractual liability

QB: Overturned arbitrator's ruling.

CA: Dismissed Appeal

**RATIO:** Post - contractual modification, unsupported by consideration may be enforceable so long variation was not procured under economic duress.

Test TWO conditions + THREE factors

- ① Promise (variation) extracted due to demand / threat / pressure
  - ② Coerced party had no practical alternative but to agree

6

Pao On v Lau  
Yiu Long [1980]  
AC 614 (PC)

Privy Council

- P agrees to sell shares to Fu Chip in exchange for 4M shares in Fu Chip (as part of this deal, P agrees to hang onto 60% of stock in order to prevent its depression); P wants protection in case the stock price goes down, so gets indemnity agreement with D; when P realizes they won't receive benefits if the price goes up, they re-negotiate a new indemnity deal; D will buyback the shares at a min of \$2.50 each if stock goes lower by xx date.
  - Stock crashes to \$0.36, D won't buyback
  - 2 separate contracts: (1) P + Fu Chip, (2) P and D (indemnity deal)

- Past consideration can sometimes be good consideration if: (1) the act was done at the promisor's request, (2) the parties understood that the act was to be remunerated (compensated for trouble), and (3) payment would have been legally enforceable had it been promised in advance.

- A promise to perform, or the performance of a pre-existing contractual obligation to a third party can be valid consideration.

- Duress is a coercion of the will so as to vitiate consent; duress may render a contract voidable, but this must be claimed promptly.

- The commercial pressure alleged to constitute duress must be such that the victim entered the contract against their will, they had no alternative course open to them, and they were confronted with coercive acts by party exerting the pressure.

**Economic duress is a valid cause of action in equity** First test to succeed at **economic duress**

**Facts:** Main K = F.C. & P @ F.C. buying majority of Shingon (owned by P) shares w/F.C. shares. Subsid. K = P & D @ P not to sell shares f/1 yr. after which D would buy back at \$2.50 regardless of market value. Ps wanted benefit if value rose @ New subsid. K = Ds to indemnify Ps if shares lost value and P affirms main K. Shares drop, P brings action to enforce new subsid. K.

To succeed on the ground of economic duress, the P must prove that his will was coerced and that the pressure exerted to do that was legitimate. There are 4 factors to consider in determining if a party has been coerced:

1. Did he protest?
  2. Was there an alternative course open to him?
  3. Was he independently advised?
  4. After entering the k did he take steps to cure it?

**Dec:** There was no economic duress in this case. Find for the P

7

Williams v Loftus Bros & Nicholls Contracting Ltd (1989)

F : Roffey Bros subcontracted carpentry jobs to refurbish 27 flats at 20k pounds. Some work was done and 16.2k paid. W ran into financial difficulty as the price was too low and Roffey was at risk of late completion penalty. Both agreed to an extra \$75 per flat for on time completion. W did 8 flats and stopped after Raffey only paid \$1500. New carpenters brought in.

Held: We entitled to full \$75 x 8 plus whatever owing from original sum.

Ratio: both sides agreed original price too low - raising it to reasonable level was in both sides' interest

#### ④ Geffin v Goodman Estate (1991) SCC

F: A trust was set up by a woman w/ manic depressive disorder - trust set up by lawyer recommended by her brothers - trust left the house w/ her brother as trustee. Her son tried to set trust aside as it cut him from the estate - claiming U.I.

H: to find for U.I.:  
① Nature of r'ship - there must be dominance, manipulation, coercion, abuse  
② Nature of transaction:

- in commercial, must be undue disadvantage or benefit
- in gift (such as trust) only evidence of dominant r'ship

Decision: Woman had INDEPENDENT LEGAL ADVICE - NO U.I.

#### ⑤ Royal Bank v Scotland & Ethridge

- home put on surety for H's business, W signed surety agreement

H: Bank must ensure spouse had independent legal advice - bank is faced w/ constructive knowledge that there is risk of U.I. if they transact for security over a domestic home, but loan only benefit one spouse and not the other

#### ⑥

#### CIBC Mortgage Corp v Rawatt (2002)

U.I. is only a presumption, J must look at individual cases and evidence.

In this case, evidence shows the spouse knew about the mortgage and freely consented to it.

Held: No. U.I.

\* "presumption is only an evidentiary concept"

#### ⑦

#### Gold v Rosenberg (1997) SCC

→ Customer gave back collateral mortgage on trust property -

H: Whether or not someone requires legal advice will depend on ②

- ① Whether they understand what is proposed to them, and
- ② Whether they are free to decide on their own will

Held: Bank not required to advise guarantor to obtain independent legal advice

#### ⑧

#### Morrison v Coast Finance Ltd (1965) BCCA

F: 79 yo woman persuaded by 2 men to mortgage her home and give them the proceeds

H: Test of U.I.:

- ① Inequality of bargaining power
- ② A substantially unfair bargain.

When ① + ② present - presumption of fraud is raised and it is on the "stranger" to show it is fairly reasonable.

#### Braut v Stee (2005) BCCA

- follows Marshall v Canada Permanent Trust Co (1968)

Rule: where a claim is made that a bargain is unc. it must be shown

- ① inequality of P's due to ignorance, need or distress
- ② substantial unfairness in the bargain

Facts: B & S signed an "equity"

agreement where obligation to work on their resort is on S but B gets all the benefits - evidence is S not understanding formal language and was under duress to agree

(10)

### Lloyd's Bank v Bundy (1975)

Judgment of Denning added consideration - a wider view on improvident bargain that is based on exploitation

(NOT FOLLOWED IN CANADA)

See H v K

(11)

### Do v Nichols (2016) BCCA

BCCA case applying the test for UNCONSCIONABILITY:

Party claiming U must prove:

- ① Inequality in the position of the parties arising from ignorance, need, or distress of the weaker, which left him at the power of the stronger; and
- ② Substantial unfairness in the bargain

The onus lies on the party seeking to establish bargain was unconscionable.

Fact: D purchased from N property for 1.7 million, with a provision that N will pay D \$50k if they fail to subdivide the property

TJ: the penalty is unconscionably -

CA: N bore the onus of proving unc.  
- 1.2 mil is not a fair price for pre-subdivision value of property is not proven - thus agreement is not unfair, let alone substantially

grossly unfair

(11)

### Harry v Kreutziger (1978)

BCCA

F: sale of fish boat worth 16k but sold for only 4.5 by buyer who got pressured into selling it and did not know how easy seller can get a license

H: followed 2 step test in Morrison

- ① Inequality of bargaining power
- ② Substantial unfairness giving rise to presumption of fraud rebuttable by proof

Held: SCCA rejects Uber's argument that a stringent test to determine unc and held the test applicable is the two part - higher threshold requires transaction to be "grossly unfair" and the bargaining power overwhelming, with INTENTION to take advantage.

\*

### UBER

Uber Technologies Inc v Heller (2020) SCC

Facts: H provide food delivery services using U's software applications. To become an Uber driver, H had to accept U's standard agreement.

In 2017 H started a class action against U in Ontario for various employment standards legislation. U brought a motion to stay the action in favour of an arbitration in Netherlands (as per the standard agreement). The arbitration process required up front costs that is most of H's annual income.

Motion J: stayed the proceedings - principle that parties can determine their own jurisdiction to arbitrate

CA: Arbitration clause unconscionable, based on the inequality of bargaining power and improvident cost of arbitration

J Ratio: Stringent approach narrows the doctrine making it more formalistic and less-equity focused. Unc has "always targeted unfair bargains resulting from unfair bargaining".

## Some cases on contravention of statute

### A. Illegal in formation

(9) St John Shipping Corp

(10) Yango Pastoral Co

### B. Illegal in performance

(11) Ashmore, Beeson, Leatt & Co

## Illegality & Public Policy

intro

def.  
types

statutory  
common law

objective / P's acts under the  
contact is illegal

acts prohibited by statute  
contractual results prohibited

generally contrary to public  
policy

e.g.  
contract to commit a legal wrong  
contract injurious to public life  
purporting to oust jurisdiction of court  
contract prejudicial to administration or  
restraint of trade (justice)

ct to give effect to P INTENTION  
to parties and alter the terms & C

as P's should be free to contract  
and choose P words that  
represent the contract terms  
in some restricted cases

reading down provisions  
so as to make it legal

remaining parts of  
contract, cross out illegal parts,  
leaving the parts

out illegal parts, leaving the parts

remaining without affecting meaning

(the remaining legal terms still

retain a core of the contract)

application  
types

def. SEVERANCE

Traditional approach:

Illegal contracts void ab initio

Modern approach: see 344

contract may be declared illegal

but reliefs may be granted

(1) Shafron v KRB Insurance Brokers  
(Western) Inc

(2) Mason v Chem-Trend Limited  
Partnership

(3) Still v Minister of National Rev.

(4) Transport EA Express

(5) Oldfield v Transamerica Life

(6) Alexander v Rayson

(7) Parkinson v College of Ambulance

(8) Enderby Town FC Ltd v The FA Ltd

\* Notional cannot be applied  
to restrictive covenants

→ invites unreasonable  
restrictive covenants if the  
only sanction is for the  
court to enforce it to a

"reasonable extent"

→ no objective rule to make it reasonable, see Shafron & Mason

①

① Shafran v KRG Insurance Brokers (Western) Inc (2009) SCC

F: S signed employment contract w/ KRG that had a non-compete clause to not work at an insurance broker firm within "the Metropolitan City of Vancouver" for 3 years. S later went to work for another firm in Richmond, BC. KRG sued for enforcement of NC clause.

H: restrictive covenant is the geographical location is "Metropolitan City of Vancouver" to be ambiguous - no legal definition of this term; ambiguous = unreasonable, thus the NC clause is VOID

WPT severance!

② Notional severance cannot be used in restrictive covenants as it would invite unreasonable restrictive covenants w/o assurance that sanction would be courts to enforce what is reasonable  
③ no bright-line test for court to make it R

②

**Mason v. Chem-Trend Limited Partnership** (2011), 106 O.R. (3d) 72; 2011 ONCA 344. Broad restrictive covenant a restrictive covenant that prohibited a former employee from competing with his previous employer by providing services to or soliciting business from all current and former customers of that company anywhere in the world for a period of one year was much too broad to be enforceable.

The Facts

- In 1992, Tom Mason was hired as a salesperson by Chem-Trend Limited Partnership, a chemical developer and manufacturer. At that time, he signed a standard Chem-Trend Confidential Information Guide and Agreement, which contained the following clause restricting his future activities after his employment with Chem-Trend ended:
  - ...I will not, for a period of one year following the termination, directly or indirectly, for my own account or as an employee or agent of any business entity, engage in any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which I was an employee of the Company, or take any action that will cause the termination of the business relationship between the Company and any customer, or solicit for employment any person employed by the Company. (Emphasis added)
- When his employment was terminated 17 years later, Mr. Mason's sales territory spanned all of Canada and certain mid-Atlantic U.S. states.
- As a result, he was familiar with a number of Chem-Trend's customers, some of which operated worldwide.
- Moreover, as a technical sales representative, he had acquired significant knowledge about Chem-Trend's business, including about its products and pricing.

The Reasons

The Court of Appeal gave four reasons for finding that the restrictions on Mr. Mason's post-employment activities imposed by the clause quoted above were not reasonable:

- As is the case with many such agreements, in the Chem-Trend agreement there was a separate confidentiality clause prohibiting Mr. Mason from using or disclosing any trade secrets or confidential information after the termination of his employment, so the additional restrictions on competition and solicitation were not necessary to protect Chem-Trend's confidential information or trade secrets.
- The prohibition against dealing with former customers was not justifiable because, among other things, any information Mr. Mason may have had about former Chem-Trend customers going back over a period of 17 years was stale and likely of little competitive value.
- Mr. Mason was not the president or CEO of the company, but simply one of a number of salespeople who dealt with Chem-Trend's customers in a limited territory, i.e., he did not have a relationship with or special knowledge about all of them.
- The scope of the prohibited activity was practically unworkable. It was not possible for Mr. Mason to be sure whether he was prohibited from dealing with a prospective customer since he neither knew all of Chem-Trend's customers nor had access to its full current and archival customer lists.
  - In balancing Chem-Trend's rights to protect its trade secrets and customer information with the public interest in free and open competition in the context of this case, the Court of Appeal concluded that "the complete prohibition on competition for one year is overly broad as well as unworkable in practice and makes the restrictive covenant unreasonable and unenforceable."

Conclusion

- In summary, the Court of Appeal affirmed that any restriction on an employee's post-employment activities must, above all else, provide clear guidance to the employee and be reasonable.
- The prohibited activity, the geographic scope and the time-frame must be expressly tailored to the specific employee's role within and actual knowledge of the company's business and customers; the restrictions must be workable on a practical level (i.e., the employee must be able to determine what clients he/she is prohibited from soliciting); and the restrictions must be required to protect a legitimate business interest beyond the protection of trade secrets and confidential information that are already protected by other express provisions.

### (3) Still v Minister of National Rev. (TCA)

- Pl denied employment insurance as the period & time she worked while on "visitor" status was illegal
- HELD: Pl had mistakenly believed she had entitlement to work due to what is written on her document. As such, she should not be disentitled to benefits on grounds of st. illegality

#### Applications:

- ① person should not benefit from own wrongdoing
  - ② relief, if given, should not undermine purpose and object of legislation
- \* in this case, Pl's intention & mistaken knowledge is crucial, otherwise ① would apply

### (4) Transport North American Express Inc. v New Solutions Financial Corp (2004) SCC

F: s. 347 of CC prohibits effective annual interest rates in excess of 60%. Contract found to contravene prohibition.

Held (majority): national severance appropriate to be applied

RATIO: traditional rule = contravene

statute = void ab initio — court to employ judicial discretion — careful consideration of contractual context and the illegality in question.

- Blue line — not applicable, as it would turn into an interest free loan
- Notional applicable, considering

- ① whether S.347 purpose is subverted by severance (No)
- ② whether parties entered into contract w/ evil intentions
- ③ relative bargaining positions & ps in reaching agreement (balanced w/ respective legal advise)
- ④ potential of unjustified windfall (No)

Order: invalid only parts that purports to above 60%, overturned CA's decision to (effective) 30.3% as this rewrites the contract, restored TJs 60%

### (5) Oldfield v Transamerica Life Insurance Co of Canada (2009) SCC

F: widow denied life insurance benefit as husband died during a commission of a crime (trafficking drugs)

HELD: no public policy or rule of contractual interpretation bars an innocent beneficiary from claiming life insurance despite illegal act by the deceased husband

### (6)

#### Alexander v Rayson (1936) English

F: Pl & DF entered into 2 separate lease agent for the same flat to facilitate Pl getting lower taxes by the municipality. When Pl sued for rent DF claimed illegality

Held: Contract was intended for an unlawful purpose. The court will not enforce it.

⑦

Partinson v College & Ambulance Ltd  
(1925) English

F: Pl sued saying Df misrep to him that by giving donations, Df will procure knighthood for pl

H: not an enforceable contract - to purchase an honorary title is improper and illegal - donation irrecoverable as a gift

⑧

Wilkinson v Osbourne (1915)  
English

F: W bribed 2 politicians to lobby for completion of a govt. transaction in return for 250 pounds. Transaction completed but no payment made.

HED: not recoverable as contract promoted corruption - illegal as the 2 mps abused their position

⑨

Enderby Town FC v The FA Ltd  
(1977) English

F: Pl was fined so they appealed to the FA. Pl wanted to be represented by a counsel but FA rejected under their association rule.

HED: this rule 38(b) was not invalid but rule 40(b) prevent legal proceedings w/out court's consent was contrary to PP as it ousted jurisdiction of the court

(a)

## St John Shipping Corporation v Joseph Rank [1957] 1 QB 267

### Facts:

The plaintiff, St John Shipping Corporation, owned a ship that was to sail from a port in the United States to the United Kingdom. The defendants held a bill of lading in respect of some of the ship's cargo. Whilst the ship was in the United States the charterers took on additional cargo which overloaded the ship. On arrival in the United Kingdom the master was prosecuted under s.44 and 57 **Merchant Shipping (Safety and Load Line Conventions) Act 1932** and fined. The defendants paid some of the amount owing on the contract of carriage but withheld some of the balance equal to the amount of cargo that had overloaded the ship. The plaintiffs sued for the remaining amount.

### Issues:

The defendant argued that, as it was illegally performed, the plaintiffs could not enforce rights that resulted from their own crime and the contract could not be sued upon.

### Held:

Performing a contract illegally did not render the contract illegal unless the statute meant to prohibit that contract. Parliament had not intended the 1932 Act to prohibit all contracts for the carriage of goods which involved overloading a ship. He said (at 288) that many statutory regulations in commercial life could be broken in very trivial ways and without "wicked intent" and, therefore:

"a court should be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract."

Otherwise if a breach of a statute was very trivial the seller could lose a much larger sum than any penalty Parliament had intended to impose.

(b)

## Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 15 CLR 410

### FACTS

- The P lent the D a sum of money, secured by a mortgage and several guarantors. When the D defaulted on the loan, the P sued the mortgagees and guarantors. The D said they could not do that based on provisions of the *Banking Act 1953* which fined anybody who carried out banking without a proper license. The P did not have a proper licence.

### HELD

- The statute did not expressly render it unlawful to give or lend money without a licence, it just imposed a fine on those who did (similarly to building licenses here)
- This was supported because the fine was not *per contract*, it was per day.
- The HCA refused to believe that parliament would have intended to render the contract illegal where the result would be grave injury to innocent members of the public.

(c)

## Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd [1973] 1 WLR 828

### Facts:

In 1967 the plaintiffs, manufactured tube tanks. The defendants, AV Dawson, a haulage company, agreed to carry the plaintiff's equipment by lorry. With the knowledge of the plaintiff's transport manager, the defendants loaded their vehicle in excess of the weight permitted by the **Road Traffic Act 1960**, s.64(2). The vehicle toppled over during the journey, and the plaintiff sued in negligence for £2,225 in damage caused to the equipment by the defendant's driving. At first instance the trial judge found in favour of the plaintiffs and awarded damages. The defendants appealed.

### Held:

The Court of Appeal reversed the trial judge's decision. It held that the contract was void for illegality. Although the contract itself was not illegal, had been performed in a manner that was illegal with the knowledge and agreement of the plaintiff. If a party enters into a lawful contract and it agreed that contract is to be carried out unlawfully, that party cannot recover damages for its breach.

- innocent party wants a remedy, the other party wants to prove a defence
- Consideration will be given to contract value, efficiency & morality.

### ■ Some key concepts:

- no compulsion to perform
- compensation in the form of money
- sometimes, equitable remedies may apply if money isn't "enough"
- key goal is compensation and NOT punishment

If not responsible for losses that could have been avoided by pl acting reasonably

- 
- REMEDIES
- Common Law Damages
    - type forward/backward
    - quantum limit to recovery
  - causation, remoteness & certainty
  - liquidated damages, deposits & forfeitures
  - mitigation
- 11) Hodgkinson v Simms
  - 12) Hadley v Baxendale
  - 13) Victoria Laundry v Newman Industry
  - 14) Koufos v Czarnikow (1969)
  - 15) RBC Dominion Securities v Merrill Lynch 2008
  - 16) Asamer Oil v Sea Oil & General
  - 17) Evans v Teamsters Local Union (2008)
  - 18) Bowes v Gross Power Products Ltd (2012)
  - 19) Supercar Disposal Ltd v Blazin Auto Hd (2011)

see  
next page  
for G.P.

expectation interest = as if contract fulfilled  
restitution = prevent unfair gain  
reliance interest = restore to position before contract

- ① Bowley Logging v Donkor Ltd 1982
- ② Sunshine Vacation Villas v HBC 1984
- ③ AG v Blake 2001 \* rarely followed

④ loss of a chance Chaplin v Hicks (1911)

- ⑤ Groves v John Winder (1939)
- ⑥ Jarvis v Swan's Tours (1973)
- ⑦ Fidler v Sun Hfc Assu. 2005
- ⑧ Wallace v United Grain Growers (1997)

- ⑨ Keays v Honda (2008)
- ⑩ Whiten v Pilot Insurance Co (2002)

\* aggravated = distress caused to pl. damages to compensate for intangible  
punitive = "punishment" onto Df due to Df's action in bad faith

TDR: aggravated looks at pl (compensatory)  
punitive looks at Df (punishing)

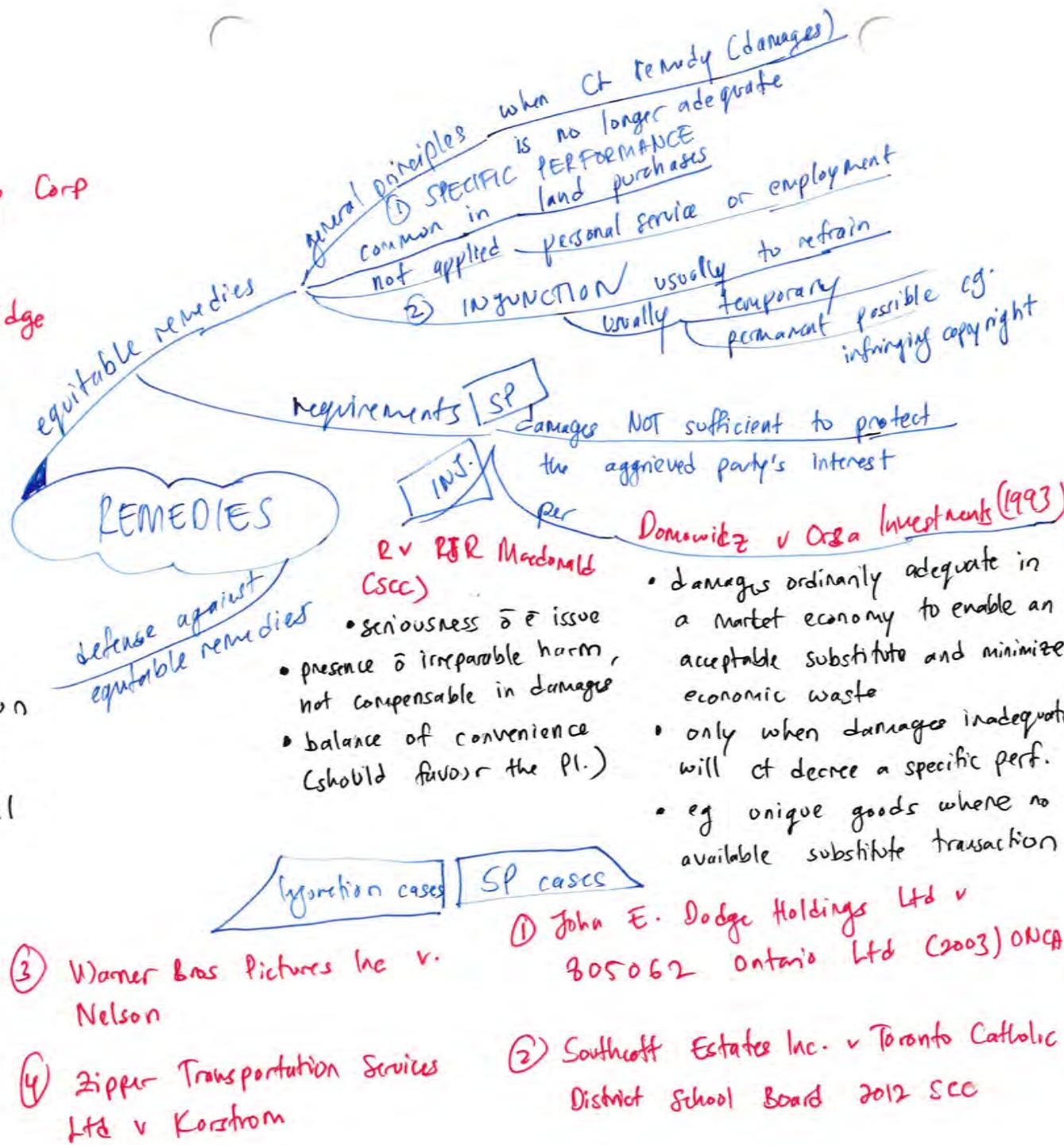
Note: true aggravated damages rest on independent actionable wrong

## APPELLATE REVIEW

⑤ Sattva Capital Corp v Creston Moly Corp  
 (2014) SCR

⑥ Hedcor Construction Ltd v Northbridge  
 Indemnity Insurance Co (2016) SCR

- Standard of review is usually to show deference (reasonableness) as contract interpretation involved mixed issues of fact and law
- Standard of review of correctness may apply in cases where interpretation more likely to create a precedent and less dependent on the factual matrix of the contract



③ Warner Bros Pictures Inc v Nelson

④ Zipper Transportation Services Ltd v Korstrom

① John E. Dodge Holdings Ltd v 805062 Ontario Ltd (2003) ONCA

② Southcott Estates Inc. v Toronto Catholic District School Board 2012 SCC

1

### ***John E Dodge Holdings Ltd v. 805062 Ontario Ltd - Specific performance needs unique land***

Court held property is UNIQUE, the person seeking SPECIFIC PERFORMANCE must show the property has a quality that cannot be readily duplicated elsewhere. The time to determine whether a property is unique is the DATE when the breach takes place (not before the breach). In this case the piece of land offered SUPERIOR ACCESS and LOCATION to sites that they were targeting with the hotel construction. It also had a zoning designation favourable for banquet halls and eating establishments, and P did not want a full restaurant facility in the hotel. No other site had a combination of attractive features at a comparable price FACTS, P wants to buy land for a HOTEL business and has a contract for purchase with D. D breaches, but claims other comparable lands were

available, and his land was NOT unique enough to require specific performance. Court held property is UNIQUE, the person seeking SPECIFIC PERFORMANCE must show the property has a quality that cannot be readily duplicated elsewhere. It should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose it was intended.

2

### ***Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC***

While *Southcott* appears to have significantly restricted the opportunity to pursue specific performance in relation to commercial transactions, it did not conclusively restrict specific performance to residential transactions

The SCC has decisively curtailed the availability of specific performance in the context of commercial land transactions. In *Southcott*, the Court reinforced the principle enunciated by Sopinka J in *Semelhago v Paramadevan*, [1996], at para 22, that specific performance should, "...not be granted as a matter of course absent evidence that the property is unique."

Unlike somebody who has his heart set on a particular house to live in, a developer is only interested in the land for the profit that it will yield. From this point of view, one piece of land is pretty much like another  
**Southcott's Duty to Mitigate**

a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible.

FACTS *Southcott* brought an action for specific performance for the school board's failure to consummate an agreement for the purchase of land. The school board claimed that *Southcott Estates* failed to mitigate its loss by trying to find substitute property. The Supreme Court, although acknowledging that there may be circumstances where specific performance is justifiable and no duty to mitigate arises, that circumstance was not present in this fact situation. *Southcott* could not demonstrate that the land had a special and peculiar value such that damages would not be an appropriate remedy. Failure by *Southcott Estates* to make a diligent effort to find substitute land resulted in a nominal sum damages award.

3

***Warner Bros Pictures Inc v. Nelson* – Injunction for employment**

HELD, an injunction CAN be ordered to enforce a negative covenant (doing something they promised not to do) in a personal service contract. P must SHOW an interest in enforcing this contract that is SEPARATE from enforcing the positive covenant (interest in enforcing that goes beyond the actress from simply wanting her to make movies for them)

FACTS, D had a long term contract to act exclusively for P. She breached when she took on work with a third party, and P sought an injunction to stop her. Court granted injunction even though this was a personal service. HELD, an injunction CAN be ordered to enforce a negative covenant (doing something they promised not to do) in a personal service contract. P must SHOW an interest in enforcing this contract that is SEPARATE from enforcing the positive covenant (interest in enforcing that goes beyond the actress from simply wanting her to make movies for them). There is great difficulty in estimating damages (correct) – D's services were special, unique, and extraordinary and her breach may cause great and irreparable injury and damage. They only award 3 years because to completely restrict her to only Warner Bros would be unjust.

4

***Zipper Transportation Services Ltd v. Korstrom* – Interim and interlocutory injunctions**

Interim injunctions are those granted before the trial and are only for a set period of time. An interlocutory injunction is to be in place until the trial

**3 stage test in determining granting an injunction:**

- (1) Must ensure there is a serious question to be tried
- (2) Determine whether the applicant would suffer IRREPARABLE HARM if the application was refused;
- (3) Irreparable refers to the nature of the harm rather than magnitude; harm which either cannot be QUANTIFIED in monetary terms or cannot be cured because one party cannot collect form the other. E.g. one party is put out of business by the court's decision, or where a party suffers permanent market loss. Assessment is made as to which party would suffer GREATER HARM from the granting of the remedy. The court could determine with SOME PRECISION the damages caused to P – P even said if D paid the \$30,000 P would not have commenced the action. Thus there is no irreparable harm CAUSED to P if the injunctive relief is denied. By contrast if the injunction is upheld, D is prohibited from making a living in the courier or trucking businesses in Winnipeg and will Suffer markedly greater harm. The court balances the RISK of harm against the risk that P's rights will be significantly impaired if the injunction is NOT granted and too much harm for D here. FACTS, D contracted to provide courier services to P's customers. D breaches the non-competition clause and provided services DIRECTLY to one of P's customers. P sought INJUNCTION to stop him. HELD, would NOT grant an injunction (**imbalance of harm test**).

5

## SATTVA CAPITAL

This case regards a dispute over the date to evaluate a share price in determining a finder's fee. The parties agreed on the value of the finder's fee but could not agree on the evaluation date and so disagreed on the number of shares to be distributed in payment.

An arbitrator agreed with the claimant's interpretation of the contract. The Court of Appeal overturned that decision, saying the issue was legal and not correctly decided.

The Supreme Court determined otherwise – stating that contractual interpretation is not simply a matter of law, but one of mixed fact and law. In so doing, the Supreme Court has largely settled the question, as there were two lines of judicial authority on the point.

Historically, the question of contract interpretation was considered a legal one, as members of a jury were considered incapable of understanding a contract. More recently, some courts abandoned that approach and treated contractual interpretation as an exercise in determining a question of mixed fact and law.

In *Sattva*, the Supreme Court recognized contractual interpretation is inherently fact specific, and also is often limited to the obligations between the parties. Interpretation was recognized as requiring consideration of each term in the contract, surrounding circumstances, the purpose of the agreement, the nature of the relationship, and the ordinary meaning of each word.

*Held:* The appeal should be allowed and the arbitrator's award reinstated. The Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract. In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at \$0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

During construction, a building's windows were scratched by the cleaners hired to clean them. The cleaners used improper tools and methods in carrying out their work, and as a result, the windows had to be replaced. The building's owner and the general contractor claimed the cost of replacing the windows against a builders' risk insurance policy. The insurers denied coverage on the basis of an exclusion contained in the policy for the "cost of making good faulty workmanship".

The trial judge held the insurers liable, finding that the exclusion clause was ambiguous and that the rule of *contra proferentem* applied against the insurers. The Court of Appeal reversed that decision. Applying the correctness standard of review to the interpretation of the policy, the court held that the trial judge had improperly applied the rule of *contra proferentem* because the exclusion clause was not ambiguous. The court devised a new test of physical or systemic connectedness to determine whether physical damage was excluded as the "cost of making good faulty workmanship" or covered as "resulting damage". Based on this test, the court concluded that the damage to the windows was physical loss excluded from coverage, because it was not accidental or fortuitous, but was directly caused by the intentional scraping and wiping motions involved in the cleaners' work.

*Held:* The appeals should be allowed. *Per SCC:* The appropriate standard of review in this case is correctness. The interpretation of a standard form contract should be recognized as an exception to the Court's holding in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal.

The first reason given in *Sattva* for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts. Indeed, while a proper understanding of the factual matrix of a case is crucial to the interpretation of many contracts, it is less relevant for standard form contracts because the parties do not negotiate the terms. The contract is put to the receiving party as a take-it-or-leave-it proposition. Factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract, but they are generally not inherently fact specific and will usually be the same for everyone who may be a party to a standard form contract.