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Chapter 3: Certainty of Terms

GOOD FAITH

What is unclear is whether an agreement to negotiate in good faith is sufficiently certain to be recognized as a contract itself or as a part of a broad contract

- The Canadian cases, including ***Empress Towers***, suggest that an agreement to negotiate in good faith is contractually enforceable if it refers to an objective standard guiding the conduct of negotiations.
- For example, in *Empress* the agreement to negotiate was over the market rental rate. This allowed the Court to determine whether the landlord negotiated in good faith by comparing the rent demanded with the prevailing rate for comparable properties.
- So, an agreement to negotiate in good faith is not a contract for two reasons:
  (1) It is impossible to define the meaning of the obligation in a way that allows us to know what sort of behavior does or does not amount to good faith in a negotiation.
  (2) Negotiating parties are and should be unfettered in taking the position that suits their subjective interest, however unfair and unreasonable that position may be to the counterpart.

But then there is ***Bhasin v Hrynew:***

- The conclusion that can be drawn from the Court's decision is that while the precise actions and constraints required by good faith may vary according to the context of the obligation, the meaning of the standard in any given context is ascertainable
- Accordingly, if it is not inherently uncertain, an agreement to negotiate in good faith meets the certainty requirement for contract formation and is a contract
- *Bhasin* bolster's *Mannpar's* analysis of *Empress* in part because it concludes that the good faith standard is capable of definition (good faith includes the idea of "best efforts", per *Empress*)

Good Faith as Reasonableness

- Largely concerns good faith as an implied term
- Some contracts contain a good faith term by operation of law (e.g. insurance contracts)
- Some contracts contain a good faith term implied in fact. The term is implied based on the presumed intention of the parties and must be "in some sense, obvious from the circumstances" (McCamus) – *MJB* shows how terms are implied in fact based on business efficacy
- The cause of action is breach of contract

Good Faith as Honesty

- SCC recognizes a new duty of honesty which informs all contracts
- This duty is a "simple requirement not to lie or mislead the other party about one's contractual performance"
- Breach of this duty is independently actionable (unlike the principle of good faith)
- Entire agreement clauses cannot totally exclude the duty, though parties may be entitled to relax the duty
  - Entire agreement clause: The contract as written. Nothing else in negotiations is included. If not in contract, doesn't exist

Bhasin v Hrynew (2014)

Facts: Defendant (Can-Am) was a supplier of educational savings plans that it marketed through enrolment directors. The plaintiff (Bhasin) was an enrolment director. The defendant Hrynew attempted to merge/take over Bhasin's business. Can-Am appointed Hrynew to a position where he audited Bhasin's business records, did not tell Bhasin that he would become an employee of Hrynew, did not confirm the merger when asked. Can-Am then exercised its right to not renew Bhasin's enrolment director agreement
Issues: Are parties to a contract subject to a duty of good faith? Was there an implied duty of good faith in the manner in which the contract was performed?
Holding: Held for Bhasin. SCC held that you can't imply a good faith term because of the clause, but the defendant had breached a new duty called the **duty of honesty**
Reasons:

- Contracts generally do not include a term implied in the law requiring the parties to act in good faith in the manner of performance
- Two principles were advanced, described as "incremental steps" in the further development of the common law

(1) Good faith contractual performance is an **"organizing principle"** of the common law of contracts which underpins and informs the various rules in which the common law, and various situations and types of relationships recognize obligations of good faith contractual performance
(2) As a manifestation of this organizing principle of good faith, there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations

- The articulation of an organizing principle of good faith and the recognition of specific good faith doctrines will "bring the law closer to what reasonable commercial parties would expect it to be" which is "a basic level of honesty and good faith in contractual dealings"
- This means **there is no general duty of good faith in contractual performance,** but there is an **organizing principle of good faith** that underlies specific contract rules and doctrines – this is a new common law duty of acting honestly

Ratio:

- The organization principle states that parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily
- In carrying out their own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the partner
- The good faith principle is a standard which underpins, organizes and unites those aspects of contract law that require honest, candid, forthright or reasonable contract performance – it is NOT A CAUSE OF ACTION
- Parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract

Styles v Alberta

- The principles in *Bhasin* do not enable either party to insist on covenants and provisos that are not set out in writing in the agreement, not do they allow parties to ignore the plain wording of the agreement or insert provisions inconsistent with the actual terms of the contract
- The good faith principle cannot directly insert content in a contract because it is **not a free standing rule** – it is rather a source of rules, doctrines and other aspects of contract law
- This case shows that a conservative approach should be taken, contract law didn't drastically change in *Bhasin*

085664 BC Ltd v TimberWest Forest Corp

A recent example of the principles from *Bhasin*

Facts: The parties had an agreement for the plaintiff to log on TimberWest's properties. It was a five-year contract with only the first-year rate set. The subsequent years were to be "negotiated in good faith." TimberWest ended the agreement and the plaintiff sued

Holding: Held for the plaintiff

Reasons:

- The substantive contract had an express good faith term even though there was no definition or standard to measure it against
- Invoked the *Bhasin* principles of a duty of honest performance, which requires honesty in the performance of contractual obligations
- TimberWest was therefore required to act honestly in negotiations of rates since that was part of the substantive contract
- They did not because they didn't disclose a strategy to terminate the contract to reduce costs, which eliminated the very purpose of the agreement

Ratio: Difficult to predict what will happen in the future with the good faith principle – pending decisions at the SCC

ANTICIPATION OF FORMALIZATION

Bawitko Investments Ltd v Kernels Popcorn Ltd (1991)

Facts: The parties agreed orally to amend Kernels' standard franchise agreement to change provisions to Bawitko's advantage. One day before the deadline, Bawitko sought relevant documents from Kernel's solicitor in the form offered to the second franchise, but not in the form the parties had agreed upon at the previous meeting. Bawitko sought damages for breach

Issue: Is an oral contract in contemplation of a formal contract enforceable?

Holding: Appeal allowed

Reasons:

- The court held there was no oral contract. On the evidence, it could not be said the parties had agreed in April as to the final form of the franchise agreement; terms other than those specifically agreed to had yet to be settled and thus there was no meeting of the minds. The unsettled details of the complex agreement were not mere formalities

Ratio: An oral agreement in contemplation of a formal written agreement, when lacking essential terms, is not enforceable due to lack of certainty; it is a contract to form a contract

Note: The phrase "subject to contract" or wording to similar effect is often viewed as an indication that the parties did not intend to be bound until a formal document is executed

Chapter 4: The Enforcement of Promises

Promises can be enforced: (a) as a contract (b) as a seal (c) by way of estoppel

Promises enforced as contracts

- Need offer, acceptance, principles of certainty and completeness BUT an agreement is not sufficient to make it binding as a contract
- Need **(1) the promise must be supported by consideration (2) the promisor must intend to create legal relations (3) certain classes of agreements must be evidenced in writing**
- **Consideration:** may consist either of some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other
    - Contracts are *bargains where an act or reciprocal promise is given by the promisee in return for ("in consideration of") the promise*
    - For consideration, an act or undertaking must have been given *in exchange for* the promise
    - Mainly about reciprocity: “something of value in the eye of the law” must be given for a promise in order to make it enforceable as a contract
    - **Doctrine of consideration:** an agreement is not enforceable absent consideration. If the promise isn’t ‘purchased’, it is gratuitous and not legally enforceable
    - **Nominal consideration is good consideration:** court doesn’t want to judge the adequacy, common law says it is still binding

Promises enforced as seals

- A promise that is "signed, sealed and delivered" is binding as a deed, a legal instrument distinct from a contract but with virtually the same legal effect
- Enforceable even if no consideration from the other side – goal of having a gratuitous promise be enforceable

Promises enforced by way of estoppel

- The law can prevent a party from breaching his or her promise, at least to the extent required to avoid injurious reliance, even where the promise is neither supported by consideration nor given under seal
- Promissory estoppel

EXCHANGE AND BARGAINS

Governors of Dalhousie College v the Estate of Arthur Boutilier (1934)

Facts: Boutilier promised to pay Dalhousie $5000 in a campaign run by the university to raise funds to "improve the efficiency of the teaching, to construct new buildings and to otherwise keep pace with the growing need of its constituency" with terms of payment "as per letter from Mr. Boutilier". No letter ever followed and Boutilier fell on hard economic times and could not pay. He acknowledged that he still intended to pay, and would do so when he could afford to. He died, and Dalhousie claimed against his estate for the money. Dalhousie was successful at trial that was overturned on appeal

Issue: Is a gratuitous subscription promise sufficient to find a binding contract? What did Dalhousie give back in exchange for Boutilier’s pledge?

Analysis:

- Court held that this gratuitous promise did not receive any consideration and is thus not a binding agreement. Boutilier didn't promise to pay the money for any specific reason and was not getting a specific benefit out of it. Unless the promisor gets some specific benefit from a gratuitous promise, then there is no consideration
- Crocket J. also finds that estoppel does not apply here because it can only apply when a representation has been made in fact (when the promisor has partially performed his promise)

Holding: Appeal dismissed. Estate not required to pay

Ratio:

- For estoppel to apply, the promisee must rely on actual actions of the promisor, not merely a statement that they will do something
- Third party consideration is no consideration because:
    - Consideration must flow from the promisee
    - Subscription of others is not consideration in law
- Courts will never find consideration in the promise of the donor to do the things recited, even when they are specific
- In common law, reliance can't transform a gratuitous promise into something that is contractual

Brantford General Hospital Foundation v Marquis Estate (2003)

Facts: Helmi Marquis signed a pledge in 1998 to donate one million dollars to a hospital. She passed away before completing all the instalments and her estate refused to pay the balance owing to the pledge. The hospital argued that having the hospital wing named after her and her late husband was consideration for the bargain
Issue: Was there good consideration for the promise to pay? (Here the payments had already begun)
Analysis:

- The court held that Marquis never sought the naming of the unit a condition for making the pledge, and that the hospital suggested this mechanism, so it is not found to be consideration. Under Canadian law (as opposed to American), a promise to subscribe to a charity is not enforceable in the absence of a bargain.

Holding: Appeal dismissed
Ratio: A promise to donate to a charity is unenforceable without consideration, even if payments have already taken place

Wood v Lucy, Lady Duff-Gordon (1917)

Facts: The plaintiff was supposed to have the exclusive right to place the defendant's endorsements on the designs of others to market them, and in return she would have half of all the profits and revenues derived from any contract he might make. This was supposed to last for at least one year. The plaintiff says that the defendant breached the contract by placing her endorsement on items without his knowledge, and withholding the profits. The defendant says the agreement of employment lack the essential elements of a contract
Issue: Was there consideration, even though in the contract the plaintiff didn't explicitly state that he would use reasonable efforts to get endorsements?
Analysis:

- Uses a more modern interpretation of contract law where precise wording isn't always necessary. A promise may be lacking, but in its entirety be sufficient
- The court found consideration in the plaintiff's efforts, because without his efforts she wouldn't get anything (without an implied promise, the transaction cannot have business efficacy)

Holding: Held for the plaintiff. The promise has value in its intent, because the plaintiff has some duties
Ratio: Imperfect contracts may be enforced if consideration is present and has been performed, even though consideration may not be explicitly stated within the terms of the contract

PAST CONSIDERATION

Lampleigh v Brathwait (1615)

Facts: Brathwait killed a man and then requested Lampleigh seek a pardon for this crime from the King. Lampleigh rode around the country to obtain this pardon, after which Brathwait promised to pay Lampleigh £100
Issue: Can a promise to pay after a request has been fulfilled be binding?
Reasons: The court held that while a mere voluntary promise is not sufficient consideration, there was a prior request and then the promise to pay. This is then not *a nudum pactum,* but rather coupled with the prior request and therefore a binding contract
Holding: Held for the plaintiff. Binding contract found
Ratio: A promise made after performance can be enforced, only if it was understood by the parties that they have some kind of reward after the performance

- Past consideration is no consideration
- The act must have been done at the request of the promisor
- Contractual ***quantum meruit:*** "as much as deserved" – founded on the implied promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labour

BONA FIDE COMPROMISES OF DISPUTE CLAIMS

Valid claims: Promise to release a valid claim is good consideration

Claims known to be invalid: There is no consideration if the sole consideration provided by A is his forbearance to enforce a claim which is clearly invalid and which he either knows to be invalid, or does not believe to be valid

Doubtful claims: Where a claim is doubtful in law, a promise to abandon it involves the possibility of detriment to the potential claimant and of benefit to the other party. Such a promise is *good consideration for a counter promise* given by the latter party promising to abandon the claim

Claims wrongly believed to be valid: A promise to A to abandon a claim is *good consideration for a counter promise* even though A's claim is clearly bad in law. If this were not the rule, in no cases of a doubtful claim could a compromise be enforced. A also suffers detriment because he gives up what he believes to be a right of action (although in general consideration must be something of value, not something believed to be of value)

Forbearance to sue ingredients (Treitel)
A's promise to abandon a claim which is clearly bad is good consideration of all of the following conditions are in place:

1) Must be a reasonable claim
2) A must honestly believe that the claim had a fair chance of success
3) Must not conceal from B any facts known, which would enable him to resist the claim
4) Must show that he seriously intended to enforce the claim

B(DC) v Zellers Inc (1996)

Facts: Plaintiff suing defendants for money she paid to them as compensation for damages the defendant (Zellers) sustained resulting from thefts committed by her son
Issue: Even though she handed over the money, can she recover it on the ground that Zeller never had a valid claim against her personally?
Reasons:

- There is no general rule that parents are liable for the torts of their children by virtue of their status as parents - only would be liable if they themselves were in some way negligent
- Although forbearance to sue is good consideration and money paid for exchange of a promise not to sue is a valid and enforceable legal contract, the court held that this was a claim that was known to be invalid - Zeller's could not have honestly thought that this was a valid claim

Holding: Appeal allowed
Ratio: A promise is not binding if the sole consideration for it is a forbearance to enforce a claim which is invalid and which is either known by the party forbearing to be invalid. For claims that are doubtful or not known to be invalid, forbearance to enforce it can be good consideration

PRE EXISTING LEGAL DUTIES

General: a promise to do what one is already bound to do is indistinguishable from a promise to do what has already been done – A gives up nothing for B's promise

1) **Pre existing public duty: (*Ward v Byham*)**
    a. E.g. nephew is promised by his uncle to give him money if he stops selling illegal drugs. He does so but the uncle refuses to pay. Is this promise enforceable?
        i. Nephew was already under a public duty to not sell drugs - a promise not to do something that you already had a duty not to do is *not* consideration
        ii. No detriment to the promisee - they don't experience detriment by obeying the criminal code, no benefit to the promisor than what they already have - need to give something extra
    b. E.g. *Ward v Byham,* case where mother has a pre existing legal duty to support the child, no obligations on the father, but he promised to pay money to her accompanied by some requests. He doesn't pay - is there consideration?
        i. Father is promising money, but the mother is promising to look after the child in exchange, but she already has this obligation pursuant to legislation

ii. Court found that the mother had to do more than the statute required her to do, which would constitute consideration for the father's promise
iii. Court finds consideration here because the mother was required to prove that the child was looked after, happy, and given the choice of whether or not to live with her mother

2) Pre existing duty owed to a third party: (*Shadwell*)

a. Promisee has to purchase the promisor's promise - consideration has to flow from the promisee
   i. But consideration *doesn't* have to flow to the promisor (*Shadwell*)
   ii. E.g. paying money to a third party at the request of the promisor is good consideration
b. Example 2: pre-existing legal relationship
   i. Nephew is engaged to his fiancé (pre-existing obligation to marry), his uncle promises to pay $150/year upon the nephew's marriage - uncle didn't pay, is there consideration?
   ii. What did the nephew do to purchase his uncle's promise? He only fulfilled a pre-existing contractual obligation to marry
   iii. Court said that the uncle's promise is legally enforceable even though the nephew was under an obligation to marry
   iv. Controversial but still good law - no detriment
   v. Ratio: Fulfilment of a duty owed to a third party at the request of the promisor is good consideration for the promise

3) Duty owed to the promisor:

a. Where the promise sought to be enforced is made in return for or in anticipation of some performance by the promisee that the latter is already contractually bound to provide to the promisor. Two categories:
   i. (1) Cases involving a promise to vary an existing contract by adding to the duties owed by the promisor to the promisee
   ii. (2) Cases involving a promise to vary an existing contract by subtracting from the duties owed by the promisee to the promisor
b. Traditional view that promises in both categories are unenforceable for lack of consideration, but some legislatures have modified this for the second category

Promises to Pay or Provide More

Stilk v Myrick (1809)

Facts: Action for a sailor's wages - the captain promised the crew extra wages after the journey had began
Issue: Is there consideration supporting the captain's promise to pay more?
Holding: No, there was no consideration for the extra pay promised to the sailor, they had sold their services already until the journey was completed. Plaintiff cannot recover
Ratio: There must be additional consideration where the promise from one party is to do what they are already obligated to do under contract

- Doing something extra is key in the context of fulfilling a pre-existing legal duty to the promisor, otherwise not enforceable
- Contractual variations require fresh consideration (according to traditional law)

Gilbert Steel Ltd v University Const. Ltd. (1976)

Facts: The plaintiff entered into a written contract with the defendant for the supply of steel at a fixed price for 3 building projects. Prior to the commencement of construction of the 1st of the two building for the University Project, the plaintiff announced a price increase. Later, the parties entered into a new contract for the supply of steel for the 1st building at the increased price. While the 1st building was still under construction, the plaintiff announced a 2nd price increase. On March 1, 1970, the parties entered into an oral agreement for the supply of steel for the 1st building reflecting the 2nd price increase. Further to their oral agreement on March 1, a written contract was sent to the defendant, but was never executed. The defendant continued to accept deliveries of the steel, but failed to make full payments against invoices reflecting the 2nd price increase.
The plaintiff sued for breach of contract for the balance owing
Issue: Is there consideration supporting the defendant's promise to pay more?
Reasons:

- No consideration on the part of the plaintiff for the defendant to pay the increased price since the plaintiff was already bound

- No consideration in the argument that it was a new contract since it was only the price that was changed, or in the promise of a "good price" since the plaintiff never made any commitment in this regard. No consideration in the increased credit afforded by the plaintiff to the defendant
- Plaintiff cannot found a claim in estoppel (shield, not a sword). The fact that the defendant didn't reject the invoices reflecting the higher price didn't mean he agreed to them

Holding: Appeal dismissed, held for defendant

Ratio:

- In order to argue that there was an implied rescission you must prove that both parties agreed to rescind the contract in total rather than merely changing one aspect of it
- Estoppel cannot be used as a sword

Note: What could they have done?

1) Negotiated a clause according to a formula – e.g. saying that the price of steel is going to be measured according to a formula designed to reflect the market price
2) Make the initial contract a "cost plus" contract – not risking the increase in price, instead is negotiated to market (still leaves some uncertainty to the market)

Promises to Accept Less

ACCORD AND SATISFACTION

- In cases involving promises to accept less the courts generally adhere to the traditional position that no consideration is provided, than they have in cases involving promises to pay more
- Sometimes a promise to extinguish an obligation in exchange for partial performance of the same will be enforced on the theory that the parties intended to rescind the original contract and create a new one
    - Traditionally the rescission argument is only available where the obligations of both parties are at least partially unperformed (executory, as the consideration is the mutual release of the old obligations
    - If one party has fully performed (executed) the agreement, an "accord and satisfaction" is normally required at common law to release the other party wholly or partially from obligations
- **Accord and satisfaction**: the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself
        - The accord is the agreement by which the obligation is discharged
        - The satisfaction is the consideration which makes the agreement operative

Overview

1) At common law, a "less for more" agreement is not binding unless":
    a. The agreement is under seal
    b. There is accord and satisfaction
2) Cases where no consideration is found:
    a. *Foakes* (applying the rule in *Pinnel's* case)
3) Cases where consideration is found:
    a. Debtor agrees to do something extra (such as paying early)
    b. *Foote* (cheques are consideration)
    c. *Robichaud* (practical benefits are good consideration in the form of saving "time, effort and expense" in not having to pursue the debtor)
4) Does the reasoning of *NAV/Tocas* possibly apply such that consideration is not needed?
    a. If the *Judicature Act* applies, a "less for more" agreement is enforceable
        i. Only point of contention is if s. 13 applies to the executory agreement
    b. If promissory estoppel applies, the "less for more" agreement is enforceable

Foakes v Beer (1884)

Facts: Foakes owed money to Beer. They entered into an agreement not under seal that Foakes would pay £500 immediately and £150 every 6 months until he had paid off the debt and in return Beer wouldn't take any action. Foakes paid off the entire principal. Beer sought leave to proceed on the judgment, claiming she was entitled to interest because the debt was not paid off immediately. Foakes claimed there was a contract with no mention of interest that Beer claimed was invalid because she did not receive any consideration

Issue: Is partial payment of a debt sufficient consideration for the original contract between Foakes and Beer?

Reasons:

- Because the contract was not under seal the defendant was not bound unless there was consideration. The judge acknowledges the doctrine has been criticized so adopts it hesitantly

Holding: Appeal dismissed. Interest must be paid
Ratio: The payment of a smaller sum of money for a larger sum is not consideration because in paying less is not whole satisfaction (Court applies the rule in Pinnel's case)

Robichaud v Caisse Populaire

Facts: Caisse obtained a judgment against the plaintiff, as did the Royal Bank. As part of debt consolidation both agreed to remove from the registry their judgments against the plaintiff in exchange for the payment of $1000 to each creditor. Subsequently the board of directors of Caisse refused to ratify the agreement. The plaintiff sued the Caisse to accept the payment as agreed and to remove the judgment - consideration was the immediate receipt of payment and the saving of time, effort and expense
Issue: Is Caisse bound by its agreement with Robichaud?
Ratio:

- Estoppel can be used as a cause of action
- If the court can find legally sufficient consideration, even one of time/effort/expense, it can enforce a promise to pay less
- Practical benefits are accepted as good consideration

Foot v Rawlings (1963)

Facts: Foot owed Rawlings money for several debts. Rawlings offered a new agreement whereby the appellant would pay less money monthly as long as he gave post-dated cheques every six months for the following six months. If he performed this, then the respondent would not sue. Both parties signed this agreement. Foot followed this agreement, however after cashing the November 1960 cheque an action was brought for the balance
Issue: Is there consideration for the creditor's agreement to accept less in full satisfaction?
Reasons:

- The respondent relinquished his right to sue when he entered into the substitute agreement. The consideration in the agreement was the appellant's agreement to provide the post dated cheques in advance purely for the benefit of the respondent so that he could enjoy the money before his death

Holding: Appeal is allowed; the new agreement may continue and the respondent cannot sue unless the appellant fails to keep up the payments
Ratio:

- Accepting terms that benefit the creditor for convenience can amount to consideration
- A negotiable instrument such as a cheque, or an object or a value less than the debt, can be consideration even if the amount is less than the cash debt
- Not a very compelling argument overall – court bending over backwards to achieve the desired result

Legal Response to Foakes v Beer

Judicature Act

Part Performance
13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) When expressly accepted by a creditor in satisfaction, or
(b) When rendered pursuant to an agreement for that purpose though without any new consideration

An agreement to accept a lesser sum in satisfaction of the whole is enforceable under the *Judicature Act*

- Don't need consideration if it falls under s. 13
- This provision appears to overrule the rule in *Foakes v Beer*
- Only point of contention is if s. 13 applies to the executory agreement – unclear about this

DUTY OWED TO THE PROMISOR – JUDICIAL REFORM

NAV Canada v Greater Fredericton Airport Authority Inc (2008)

Facts: Airport is the assignee of the fed gov't. NAV Canada responsible for air navigation services. Airport requested that NAV relocate a landing system, NAV suggested an alternative that would include purchasing new equipment. NAV was responsible for the cost but insisted that the airport pay. Airport agreed to pay, now airport refuses to pay
Issue: Was the airport's promise to pay for the DME legally binding?
Reasons:

- The Court of Appeal characterized GFAA's "under protest" letter promising to pay for the DME as a variation to the existing contract, however found that the arbitrator had erred in finding that the variation was supported by fresh consideration (and constituted therefore a binding agreement)
- The Court accepted that a post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress

Holding: Appeal dismissed. The promise made by the airport was made under duress, and therefore unenforceable
Ratio: A contractual variation is enforceable unsupported by consideration and absent duress

- Gives rise to two lines of authority in Canada:
    - One that follows the *Gilbert Steel* analysis
    - One that follows the *NAV Canada* analysis

Rosas v Toca (2016)

Facts: Ms. Rosas lent $600,000 to her friend Ms. Toca. Ms. Toca used the loan to purchase a house. The friends agreed that the loan would be repaid without interest in one year. In the ensuing years, Ms. Toca repeatedly requested permission to delay the loan repayment, saying she would repay the loan "next year", "in a year", or "after a year." Ms. Rosas accommodated Ms. Toca's requests. In July 2014, Ms. Rosas commenced an action against Ms. Toca seeking repayment of the loan. The action was commenced more than seven years after Ms. Rosas originally advanced the loan to Ms. Toca.
Issue: Has the contract between the parties been varied in a binding way or does the limitation defence provide a full answer to the plaintiff's claim?
Reasons:

- Justice Bauman was persuaded that contracting parties' legitimate expectations and intentions to modify an ongoing contract ought to be protected. Justice Bauman proposed to modify *the Stilk* rule such that where parties agree to vary the terms of an agreement, the variation is enforceable without consideration, absent duress, unconscionability or other public policy concerns, which would render an otherwise valid term unenforceable. A lack of fresh consideration would no longer be determinative, although it may be a "valuable signal that the parties intend to be bound".

Holding: Appeal allowed
Ratio: When parties to a contract agree to vary its terms, the variation is enforceable without consideration, absent duress, unconscionability or other public policy concerns

- An agreement to move the due date of a loan is enforceable and moves the period of limitation (still need to show there isn't duress)

CONTRACTUAL VARIATION REVIEW

- A contractual variation must be supported by fresh consideration (*Stilk, Gilbert Steel, Foakes, Foot*)
- This can be seen to work an injustice where the doctrine of consideration is arguably applied in an unduly technical way
- Response:
    - Avoid an unpalatable outcome by controversially finding consideration (*Foot*)
    - Accept practical benefits (saving time, effort and money) as consideration for the defendant's promise to accept a lesser amount (*Robichaud*)
    - Legislative response in the context of setting a debt for a lesser amount in certain jurisdictions such that the creditor is bound by an agreement to accept a lesser amount even absent consideration (*Judicature Act*)
    - Contractual variations do not require fresh consideration provided the variation is not secured by duress (*NAV*) or more expansively, absent duress, unconscionability or other public policy concerns (*Rosas*)

LAW OF DURESS

Notes on Duress:

1) The law will not enforce contracts made as a result of one party being threatened with physical harm or actual harm (coercion, not voluntary)
    a. Duress includes economic duress
2) Economic duress often takes the form of one party placing financial or commercial pressure on the other
    a. E.g. a company might threaten to break a contract that it knows is important to the other side unless the other side gives certain financial concessions in return
    b. These concessions will be unenforceable if it is shown that the coercion went beyond ordinary commercial pressure to a force or a coercion of will so as to vitiate consent (*Pao On*)
    c. Ordinary commercial pressure is acceptable, but going beyond this is not
3) The *Pao On* test was revamped in *Universe Tankships* - duress now requires showing:
    a. Pressure amounting to compulsion of will of the victim (no practical alternative) and
    b. The illegitimacy of the pressure exerted
4) In determining the legitimacy of the pressure, need to consider the nature of the pressure and the nature of the demand the pressure is applied to support
    a. If there is a 'flavour of blackmail', then likely to be illegitimate
    b. If the party making the threat is seeking to enforce a right to which it believes that it is entitled to in good faith, then the threat is legitimate
5) Principles from *Kolmar Group:*
    a. Threatening a breach of contract to obtain further concessions, without any justification, is illegitimate
    b. It is relevant to consider whether the claimant had a "real choice" or "realistic alternative", and could have resisted the pressure by pursuing practical and effective legal redress. If no reasonable alternative, this supports the conclusion that the victim of duress was influenced by the threat
    c. The presence of absence of protest may be relevant when considering whether the threat had some coercive effect. But even the total absence of protest does not mean voluntariness was present
6) Indicia of duress (*Ellis v Friedland*):
    a. Whether the party protested at the time the agreement was entered into
    b. Whether the party had a realistic alternative to entering into the agreement
    c. Whether the party had the opportunity to speak with independent legal counsel
    d. Whether, after entering the agreement, the party took steps to avoid it within a reasonable period of time
    e. If a party can show that a-d was met, whether the pressure exerted was legitimate
7) Pressure that is illegitimate for the purposes of the law of duress might take many forms:
    a. Pressure arising from normal economic factors (e.g. supply and demand) is not sufficient
    b. Bargaining hard to advance own interests is not illegitimate
    c. Determining illegitimacy must be assessed on the facts

UNDUE INFLUENCE

Can be established two ways: (*BMO v Duguid*)

1) **Prove actual undue influence** – show that this has occurred on the facts
    a. Claimant must prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular impugned transaction
2) **Presumed undue influence** – complainant only has to show that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. One a confidential relationship has been proved, the burden shifts to the wrongdoer to prove that the complainant entered into the transaction freely, for e.g. by showing that the complainant had independent advice. Such a confidential relationship can be established two ways:
    a. Class 2A: Certain relationships bring a presumption of undue influence (e.g. solicitor-client) as a matter of law
    b. Class 2B: If the complainant proves the de facto existence of the relationship under which the complainant generally reposed trust and confidence, there may be a presumption of undue influence. The complainant will succeed in setting aside the transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer
        i. The specific relationship of husband and wife, without more, does not give rise to this presumption of undue influence

Bank of Montreal v Duguid (2000)

Facts: Bank required Ms. Duguid to co-sign for her husband. Loan went into default; Mr. Duguid declared bankruptcy, now the bank is suing Mr. Duguid. She refuses to pay because of Mr. Duguid's undue influence
Issue: In what circumstances can a party set aside a transaction on the ground of undue influence as against a third party to the alleged wrongdoing?
Reasons: Where a claimant relies on a presumption of undue influence, the court must look to the nature of the relationship and determine whether the potential for domination exists as a matter of fact, or whether it may be presumed

- Sets out the categories for actual and presumed undue influence
- The presumption can be rebutted:
    - By evidence that the surety obtained, or was advised to obtain, independent legal advice
    - By evidence that shows the contract was the act of a free and independent mind even though no external advice was given
- Husband/wife relationship may give rise to a presumption of undue influence if the claimant can prove the relationship of trust and confidence existed

Holding: No undue influence found
Ratio: Husband/wife relationship does not automatically indicate a relationship of trust and confidence. Sets out the categories for actual and presumed undue influence

UNCONSCIONABILITY

Unconscionability test from *Titus,* applied in *Heller* requires:

1) A grossly unfair and improvident transaction
2) A victim's lack of independent legal advice or other suitable advice
3) An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability, and
4) The other party's knowingly taking advantage of this vulnerability

Contrasting approach used by the BC Court of Appeal from *Morrison v Coast Finance Ltd*, applied in *Douez* by the dissenting judges:

1) Inequality of bargaining power
2) Unfairness

Note: Under *Rosas,* contractual variations are enforceable even without consideration as long as no duress, etc. – these defences are rarely made out, generally meant for an extreme situation

Heller v Uber

Facts: Appellant is a licensed driver, bringing a proposed class action, wants a declaration that uber drivers are employees and that the employment standard legislation has been violated by Uber. Also wants provisions in the service agreement to be unenforceable (disputes must be arbitrated in the Netherlands)
Issue: Is unconscionability present?
Analysis: In *Heller* the test from *Titus* is applied:

- Is the clause improvident or unfair? Uber says if the drivers they win they'll get the money back – very unrealistic
- Clear lack of independent legal advice
- Imbalance in bargaining power - not a lot of analysis in this case on this point, seems that Uber has fundamentally acknowledged this point
- Taking advantage of the vulnerability - court says that Uber chose the clause to favour itself and take advantage of drivers vulnerable to the market strength

Holding: Held for the respondent
Ratio: Four-step test used. Criticisms of the four-step test - are these adjectives really helping us? (Newfoundland Court of Appeal). Adjectives meant to signal extreme scenarios, but maybe they're too extreme

PROMISSORY ESTOPPEL

- Overall idea: consideration can be quite harsh, whenever we have some sort of change in a contractual relationship and insisting on consideration it can lead to an injustice so we need to have the equitable response of promissory estoppel (*Central London v High Trees*)
    - Idea that promissory estoppel is generally regarded as suspending rights
- Sometimes PE is permanent: two categories
    - If the parties are in a relationship with ongoing obligations – giving reasonable notice to terminate is acceptable
    - If parties are in a 'once and for all obligation' – law is uncertain but some indicia – it may be too late to withdraw, perhaps can't withdraw without injustice to the other party. In this case the estoppel is permanent
- The law respecting promissory estoppel has undergone a significant development since the *High Trees* principle was enunciated by Lord Denning in 1946 – still some uncertainties
- No SCC decision contains a sustained, comprehensive examination of promissory estoppel (MacDougall)

OVERVIEW

- Need to have consideration supporting the variation; otherwise the variation isn't enforceable (*Foakes, etc.*)
- Can be inequitable - in response some courts make up consideration (*Foot v Rawlings* - courts found cheques to be consideration, of uncertain value)
    - Courts like *Robichaud* accept practical benefits
- Legislative response - *Judicature Act* - promise to accept a lesser amount is enforceable, even without consideration
- Don't even need consideration necessarily as long as there is no duress, unconscionability, etc. - *Rosas v Toca*

INGREDIENTS (MacDougall, Fridman, McCamus, Treital)

1) **There is a legal relationship between the parties**
    a. Parties must be contractually bound to one another
2) **There is a clear promise, assurance, or representation of intention by the representor**
    a. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on
3) **The representee acts on/relies on the promise, assurance or representation of intention by the representor**
    a. Point of controversy whether the reliance must be detrimental – MacDougall says the bulk of authority states that detrimental reliance is required (*Ryan v Moore*)
    b. Examples of cases that do not require detriment include *WJ Allan,* and *Maracle*
    c. Detriment: goes to the idea that the promisee will suffer or be worse off somehow if the promisor is allowed to resile from the promise or assurance – could be because they have already incurred costs of some time
4) **Promissory estoppel is an equitable doctrine such that: a) the representee must have acted equitably in order to raise the defence of PE and b) it must be inequitable to allow the representor to resile**
    a. For a: *D & C Builders*
    b. For b: MacDougall – the circumstances may make it unfair to find PE
5) **Promissory estoppel cannot be used to found a cause of action**
    a. A minority of cases go the other way

Note for exam: when asked to advise under…

- Common law: determine consideration
- Equity: assess promissory estoppel
- Statute: *Judicature Act*

Hughes v Metropolitan Railway Company (1877)

Facts: The landlord gave his tenant 6 months to repair the property else risk forfeiture. Within the 6 months, negotiation for the sale of the lease was opened between landlord and tenant. The negotiation failed after 6 months and the tenant failed to repair. The landlord sought to enforce forfeiture.
Issue: When does time run against the tenant?
Reasons:

- With a view to equity, the court held that all the time that had elapsed between the giving of the notice and the letter given later was waived as part of the six months during which the repairs were to be executed. This means that the clock began to run when the negotiation was concluded
- If parties who have entered into definite and distinct terms involving certain legal results afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that strict rights arising under the contract will not be enforced, or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties

Holding: Appeal dismissed
Ratio: First case of promissory estoppel - an example of promissory estoppel is where A promises B that he would not enforce his legal rights and B acted and relied on it without giving any consideration, equity would not allow A to renege on his promise to B

- Time does not always run strictly – equity involved, prevails over a strict interpretation

Central London Property Trust Ltd v High Trees House (1947)

Facts: Central Trust (landlord) has a 99 year lease with High Trees House (tenant). L offers to reduce the rent. One of L's creditors put L into receivership (job is to look at the assets and liabilities of the company). T paid a reduced rent for years, which the receiver discovered, and demanded full rent from T going forward plus arrears of 8000 pounds
Issue: The defendants argued that the agreement to pay the rent at a reduced rate applied to the whole term of the lease. They argued that the plaintiffs were estopped from claiming that the rent should be higher
Reasons:

- The court reviewed the past case law, especially ***Hughes,*** where the House of Lords had held that parties should be prevented from going back on a promise to waive certain rights
- Denning J stated that the cases showed that a promise which the promisor knew was going to be acted on by the person to whom it was made was enforceable despite a lack of consideration. The time had come for this to be recognized as giving rise to an estoppel
- Here, the plaintiffs had made a binding promise. However, the evidence showed this only applied during the war. Therefore, after the war the defendants were liable for the full rent

Ratio: Lack of consideration can still amount to estoppel

Note: **Estoppel by representation –** if one party makes a representation as to a present or past fact which the other party relies on to his detriment, the representor cannot afterwards repudiate the representation

THE NATURE OF THE REPRESENTATION

John Burrows Ltd v Subsurface Surveys Ltd (1968)

Facts: Subsurface buys part of a business from the plaintiff. Included in the purchase price was a promissory note where the defendant paid 42, 000 upfront then agreed to make monthly installments. The installments were late, the plaintiff could accelerate the payments and claim the entire amount due, but the P does nothing. After a disagreement between the P and the D, the P sues for the entire amount
Issue: Does the defence of promissory estoppel apply? By accepting late payments month after month, is the plaintiff saying that the acceleration clause will not be invoked and therefore promissory estoppel applies?
Reasons:

- Court cites *Hughes* - this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract wouldn't be enforced. This implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations
- It is not enough to show that one party has taken advantage of indulgences granted to him by the other - if this was the case it would mean the holders of promissory notes would be required to insist on every letter being followed in case this ended up affecting the enforcement of the contract
- Estoppel does not apply in this case. For estoppel to apply the conduct of Burrows must amount to a promise or assurance intended to alter the legal relations between the two, and that it is impossible to infer this from the facts of the case. He was simply acting as a friend, and not entering into any negotiations with Whitcomb over new terms of payment.

Ratio:

- In order for a promise to be capable of being relied upon and have estoppel available as a defence, it must be a promise or assurance *intended* to alter the legal relations between the two parties
- A friendly gesture is not a binding agreement, and if it is relied upon estoppel will not be available as a defence

THE EQUITIES

D&C Builders Ltd v Rees (1966)

Facts: The plaintiffs were a small company who did work for the defendants. The defendant made a payment on the account after the work was completed, but after this failed to pay the remainder of the balance. The defendants finally offered some payment, but refused to pay the full balance, citing poor work. They stated they would never have enough to pay the balance. The plaintiffs finally accepted the money to prevent them from falling into bankruptcy

Issue: Can a party accept a lesser amount for satisfaction of a debt and then demand payment in full?

Reasons:

- At common law, substitute contracts are not enforceable unless there is consideration provided. But substitute agreements that satisfy the necessary accord can be valid in equity, even if they don't have consideration, if it would be inequitable to allow the creditor to sue for the money from the original contract. To satisfy this requirement an agreement must have been made, the debtor must have relied on it, and it must be unfair to allow the creditor to claim more money
- In this case there is no consideration - Denning states that the pressure placed on D & C forced them to accept an agreement that was unsatisfactory. Therefore there is no reason why the creditor should not enforce the full amount of the debt
- The creditor is barred from his legal rights only when it would be inequitable for him to insist on them - when there has been a true accord, it is inequitable
- No person can insist on settlement procured by intimidation

Holding: Judgment for D&C, no reason in law or equity why the creditor should not enforce the full amount

Ratio:

- Substitute agreements require consideration to be binding at common law
- Substitute agreements may be acceptable in equity even if they don't have consideration, if it would be inequitable to force the debtor to pay anymore, there was an agreement between the two parties that the new sum would settle the debt and this agreement was relied upon by the debtor
- A person is not held to a representation if it was made under compulsion – 'clean hands' can affect the availability of promissory estoppel

THE RELIANCE

WJ Alan & Co v Nasar Export and Import Co (1972)

Facts: This case concerns the sale of coffee beans between a Kenyan coffee business and a Tanzanian based buyer (El Nasr). The contracts were made payable on credit, the agreement of which was set up using amounts in sterling. This is the key discrepancy between the contract for sale and the credit agreement. The first shipment was accepted by El Nasr, who paid for this installment in pounds sterling. When payment became due on the second installment, the value of sterling had decreased. To avoid a loss WJ Alan demanded payment in Kenyan Shillings, meaning that the sterling balance needed increasing/the balance owed

Issue: Could the buyers rely on promissory estoppel, based on the original acceptance of the first payment in sterling and the lack of redress about the inclusion of sterling during the addressing of other issues?

Reasons:

- There had been a variation in the form of payment in the revised agreement - WJ Alan had waived their right to be paid in shillings. This was held not to be a sale of goods deliverable in installments where the terms could vary, so the sellers couldn't unilaterally change their currency of exchange
- Could be consideration because the parties agreed to vary their contract in a way that could benefit either party (usually generates its own consideration)
- Denning held that once an alternative method of payment is accepted, it is deemed to have been accepted as a term of the contract. No support in the case law for the requirement of detriment, simply that the other party had relied on the decision and altered their position

Holding: Appeal allowed

Ratio:

- A requirement of promissory estoppel is that the promisee's conduct has been influenced by the promise or representation
- To rely on promissory estoppel, detrimental reliance is not a key requirement. You must only establish that the promisor has changed their position

Note: waiver vs. promissory estoppel

- Waiver is the voluntary relinquishment of some known right
- Estoppel is the inhibition to asserting it
- There is functionally no difference between the two - the difference is virtually nonexistent

SWORD OR SHIELD

Combe v Combe (1951)

Facts: During the divorce process, a husband promised to pay his wife a tax-free sum of £100 each year to represent a permanent maintenance payment. The wife was aware that the husband was not in a good financial state and made no claim to this payment. Several years later, she brought an action to claim the arrears that were owed under their agreement.
Issue: This case was brought only four years after the landmark decision given in Central London Property Trust LD v High Trees House LD, which held that a party could not revert on an earlier promise made. The court in this instance was required to consider whether the husband could withdraw from his earlier promise to pay the wife the sum of money
Reasons:

- The court held that the wife could only enforce her agreement for the payment that was promised by the husband if she had given consideration. The court found that the wife gave no consideration as she had not agreed to apply for the maintenance that was promised by the husband. The husband did not request the wife to refrain from taking the maintenance payment and therefore the wife could not claim for the money

Ratio: Promissory estoppel is a shield and not a sword – cannot be used to found a cause of action, only as a defence

Note: Canadian authority is of the view that estoppel is incapable of creating new rights, as opposed to limiting the enforcement of existing rights

Robichaud v Caisse Populaire (1990)

Facts: Caisse obtained a judgment against the plaintiff, as did the Royal Bank. As part of debt consolidation both agreed to remove from the registry their judgments against the plaintiff in exchange for the payment of $1000 to each creditor. Subsequently the board of directors of Caisse refused to ratify the agreement. The plaintiff sued Caisse to accept the payment as agreed and to remove the judgment
Issue: Can Robichaud rely on promissory estoppel to enforce Caisse's promise?
Reasons:

- Ingredients of promissory estoppel fulfilled
- Problem is that Robichaud is suing Caisse as a plaintiff, on the bank's promise to accept a lesser amount – not using promissory estoppel defensively

Ratio:

- Court relaxes the rule in *Combe* (didn't want the bank to get away with their conduct based on the sword/shield distinction)
- A plaintiff can rely on promissory estoppel if it is a defence to a defence (e.g. you are estopped from raising the defence)

INTENTION TO CREATE LEGAL RELATIONS

Balfour v Balfour (1919)

Facts: Husband agrees to pay his wife 30 pounds a month while she is away. She does not want to come back, and sued him to enforce payments
Issue: Can Mrs. B enforce Mr. B's promise?
Reasons:

- There can be mutual agreements that are not contracts, e.g. arrangements between husband and wife. These are not contracts because the parties didn't extend that they should be attended by legal consequences
- The consideration that obtains these agreements is love and affection, which the courts don't care about
- The common law does not regulate the form of agreement between spouses, and the evidence does not prove a contract

Holding: Held for Mr. B
Ratio:

- In a commercial setting: intention to create legal relations is presumed. The person disputing the intention must rebut this presumption
- Family arrangements: no intention to create legal relations is presumed. The person disputing the intention must show that there was intention to create relations
- This was the first time the court said that the plaintiff may have to show an intention to create legal relations
- The intention to create legal relations rule here is an artificial barrier erected by the court to stop the claim that it was discriminatory – probably shouldn't be followed

Note: Can argue that *Balfour* shouldn't be followed in Alberta, as this case could present a precedent that hurts your client

Equality theory: Includes the idea that the law should strive for fairness in relation to common law rules

- Flows from the *Charter* – judge made law should reflect *Charter* values
- Look for patterns of inclusion, exclusion, and vulnerability

Feminist critique: *Bliss* held that inequality between the sexes in this are is not created by legislation, but by nature (in response to the law treating the unemployed women differently from other unemployed persons) – this was reversed in *Brooks*

- E.g. Tender Years Doctrine: as a default, young children would be placed in the custody of their mother
- *Balfour*: the rule in this case typically leaves women in a disadvantaged position because they have to show intention to create legal relations. Essentially means women are left without legal recourse

Liberal theory:

- Public sphere:
  - Governmental
  - Law is legitimate in this sphere
- Private/Public:
  - Marketplace
  - We want law in the marketplace to maintain market choice, protect property and enforce contracts
- Private/Private:
  - Law has virtually no legitimate scope
  - Hearth/home
  - Values of altruism, love, affection – law has no business being here (alluded to in *Balfour*)
  - When the law says it doesn't want to go into the private sphere, this isn't remaining neutral, but rather preserving the status quo

PROMISES UNDER SEAL

- The seal is no longer a necessary condition of enforceability for a promise; however, it is a sufficient condition
- The seal provides clear evidence that the promisor intended to create a legal obligation. The act of sealing it served to encourage the promisor to carefully contemplate the legal consequences of their actions

Royal Bank v Kiska (1967)

Facts: Kiska's brother took out a loan. Kiska signed as the guarantee. The plaintiff brought an action on the guarantee. There was no wafer seal attached but the word seal was printed on the document next to where the signature was.
Issue: Is the guarantee under seal such that it is enforceable even absent consideration?
Reasons:

- A wax impression is no longer required, a gummed wafer will suffice
- The words "seal here" are not enough to make a formal seal – there should be some semblance of formality because common law requires an operative act such as affixing of wax or adoption of a seal
- The word 'seal' after the signature is merely an invitation to place a seal there
- The consideration for Kiska's guarantee was that the Bank gave his brother extra time to pay the debt

Dissent: Laskin says there is no consideration supporting the guarantee because there was no promise (express or implied) to forbear or do anything

THE REQUIREMENT OF WRITING

- The Statute of Frauds applies to certain kinds of contracts and legislation, deriving its force from most Canadian provinces
- Its purpose was to prevent litigants from trying to enforce promises that were never made
- Sec. 4 includes the kinds of contracts that must be in writing to be enforceable
- Sec. 17 states that contracts for goods of sale greater than $10 must be in writing
  - An equivalent provision is found in the Sale of Goods Act 2000 (>$50)
  - In Alberta, s. 4 has been replaced by the Guarantees Acknowledgement Act

Why certain kinds of contracts have to be reduced or evidence in writing:

- *Statute of Frauds, Sales of Goods Act, Guarantee Acknowledgement Act*

Rationales for the writing requirement:

- Shuts the door on confusion, memory loss, strategic memory loss
- Statute of Frauds: to prevent fraud in litigation
    - Defendants would be the victims of sham litigation through perjured evidence by asserting a contract against the defendant

What kinds of contracts must be reduced to writing or evidenced in writing:

1) **Contracts for the sale of land or any interest concerning them (*Deglman, Thompson)***
2) **Contracts not to be performed within a year (*Adams, Hanau*)**
    a. Idea that people's memories fade, but this rationale doesn't really hold up
3) **A contract for the sale of goods of the value of $50 or upwards (*Sale of Goods Act*)**
    a. Not enforceable unless the buyer accepts part of the goods sold and actually receives that part, or gives something in earnest to bind the contract or in part payment (over and above consideration of the contract)
    b. Need some note or memo in writing and signed by the party
    c. There is acceptance of goods in the meaning of this section where the buyer does any act in relation to the goods that recognizes a pre-existing contract
4) **Contracts of guarantee (*Guarantees Acknowledgement Act*)**
    a. Guarantee doesn't have any effect unless the person entering into the obligation appears before a lawyer, acknowledges to the lawyer that the person executed the guarantee, and in the presence of the lawyer signs the certificate
    b. This means it is not enough in Alberta that a guarantee is evidenced in writing – need to have the certificate, appear before a lawyer, and sign the certificate

Rules:

- Statute of Frauds is technical - courts try to avoid application of it. These two rules are to help avoid application of the Statute
- Rule in *Adams*: contract only has to be in writing if its performance of necessity must last longer than one year
- Rule in *Hanau:* if there is no mention of time and time is uncertain or indefinite, the agreement is not within the statute

Memorandum or Note Requirement

- There is liberal interpretation of this requirement
- Must adduce the existence of the contract and not fail for uncertainty (*McKenzie*)
    - Party, property and price are usually vital, but other essential terms might exist (*Tweddell*)
- Document doesn't have to be intended as a memo of the contract
- It is sufficient if the memo comes into existence anytime before the action is commenced - doesn't have to be contemporaneous with the deal
- It can be constituted by several pieces of paper
- It must be signed by the party against whom the contract is being alleged: (but inclusion must be intended as part of the signature, pg. 269 note 2)
- Mere initialling is insufficient
- Hand-printed name is sufficient
- Printed name of the contracting party on top of a standard form is sufficient
- E-contracts: (*Electronic Transactions Act*)
    - Contracts can be concluded online, but some restrictions exist
        - Exchange of emails usually leads to the formation of a formal contract
        - Signed in writing requirement can be demonstrated electronically
        - Always up to the discretion of the judge

Non-Compliance

- **At common law:**
  - Failure doesn't make the contract void, only unenforceable
  - Statute of Frauds doesn't deal with the validity of the transaction, only the evidence to prove an agreement
    - Not saying there is no contract, but that there is a procedural problem with enforcement (contract still may exist)
    - The contract can be used by way of defence (*Wauchope*) and also be used as consideration for a new contract
    - Goes again to the court's desire to use the Statute as little as possible
- **Equity**
  - Defendants would not be allowed to plead and rely on the Statute if to permit them to do so would be to allow the Statute to be used as an engine of fraud
  - Equitable principles which hold that the Statute of Frauds does not apply where there has been performance or part performance of the oral contract by, or where otherwise the result would be fraud against or injustice to the other party

PART PERFORMANCE

- Has been used by the courts to circumvent the strict application of the Statute of Frauds
- Courts of equity would enforce some contracts for sale in the interest of land, absent a sufficient note or memorandum, as long as certain circumstances could be proved
- **Equity's ability to dispense with the writing requirement became known as the doctrine of part performance**
  - Plaintiff trying to enforce a contract not reduced to writing
  - Sufficient acts of part performance in relation to the land will essentially replace the requirement to be evidence in writing

OVERVIEW

Maddison v Alderson - seems to include two views

1) One view: the acts relied on must be referred to the actual contract (narrow view) (*Deglman*)
   a. Part performance must be referable to the oral agreement that is relied on
   b. E.g. acts could also be referable to a long term lease, so can't pass this articulation of the test
2) Second view: the acts relied on must be unequivocally, and in their own nature, referable to some such agreement as that alleged (broad view)
   a. *Toombs*
   b. Broader is better for enforcement - if you want the contract enforced need to push for this
   c. 'Some' such contract - doesn't matter if fee simple, or a 99 year lease

SCC FOLLOWS THE BROADER VIEW

Note:

- Payment of money is equivocal and does not count as a sufficient act of part performance
- If you allege that contract is caught by the Statute of Frauds but can't show sufficient acts of part performance, still may receive a quantum meruit (*Deglman*)

Deglman v Guaranty Trust Co (1954)

Facts: Aunt promised nephew she would leave him her house if he would run errands, etc., from time to time. Agreement was never recorded in writing. Acts of alleged part performance included driving aunt around, odd jobs around the house. The nephew only lived at one of her properties for about 6 months

Issue: Are these sufficient acts of part performance?

Reasons:

- Majority follows the broader test from *Madison* – acts of part performance must be referable to some such agreement as that alleged
- After this has been proved, then evidence of the oral agreement becomes admissible for the purpose of explaining those acts – this is why a payment of money alone can never be a sufficient act of part performance
- There is nothing here in the nature of the acts proved that bears any necessary relation to the interest in land

- The quantum meruit is a response to the fact that there is an unenforceable contract. The nephew understood that he was not rendering services gratuitously – could give him a quantum meruit
- Cartwright said we can't imply a contractual promise to pay a reasonable fee because we have already said the contract is unenforceable. We CAN imply a restitutionary quantum meruit
- **Restitutionary quantum meruit:** idea that one person has been unjustly enriched at the expense of another. Requires:
    - An enrichment
    - Corresponding deprivation
    - Absence of a juridical reason justifying the enrichment

Ratio: Broad view from *Madison* is accepted as correct

Thompson v Guaranty Trust Co (1974)

Facts: G began working as a hired hand on D's farm, continued this for 48 years. G alleges that this word was done in consideration for D's promise to devise and bequeath his land and personalty to G. D would often be injured or ill and G would nurse him back to health. G took a somewhat marginal farming operation and made it successful. On D's death, no will was found. G sued for specific performance

Issue: Was G's work over this time sufficient to count as part performance so that his agreement with D can be enforced?

Reasons:

- Used the broad test from *Madison*
- Practically every part of part performance as to which evidence was given were acts which were unequivocally referable to a contract in reference to the very lands in question

Holding: Held for G

Ratio:

- Example of a case that shows an extreme case of acts of part performance, versus *Deglman* where the evidence is equivocal

Chapter 5: Privity of Contract

Definition: a contract cannot, as a general rule, confer rights or impose obligations arising under it on any persons except the parties to it. This means that someone who stands to benefit from a contract between two parties cannot sue on the contract

Two examples:

1. You are both in a contract to buy A's house. A breaches.
    a. If the person who breach isn't involved, they are an officious intermeddler
2. A and B are in a contract where A promises to convey a house to C and B pays for that promise.
    a. Contract contemplates a third party (C) - C has no obligations of the contract, but they are the intended beneficiary of the contract
    b. Historically C could sue (*Provender*) but this was reversed in *Tweedle*

Overview:

- Historically third parties could sue on a contract, it was the CL that led to the current issue
- Now only a party can sue or be sued, so as default rule third parties cannot sue or be sued
- Main case is ***Dunlop*** – firm line against allowing a third party to sue/be sued, insisted on agency and consideration
- ***NZ Shipping:*** test for agency
- ***London Drugs*** – changed the CL, the LD test punts the consideration requirement
    - Have to show the clause expressly or impliedly extended benefit to employees and the employees were working on the relevant activity
- ***CanDive*** – applied in context of a subro claim. Need to ask:
    - Did they intend to extend the benefit?
    - Is the third party beneficiary performing the acts contemplated?
    - Outcome consistent with sound policy considerations?
- ***Beswick*** – sometimes seeking an answer of specific performance can be an answer to the privity problem, can get specific performance when the CL remedy would somehow be deficient

Provender v Wood (1630)

Facts: Bride's father and groom's father contracted that they would each give the groom an annual stipend upon the marriage. Groom sues his father in law, court allowed him to do this.
Ratio: The person who accrues the benefit of a promise may bring an action (third parties can bring actions)

Tweedle v Atkinson (1861)

Facts: John Tweddle, father of William Tweddle, agreed with William Guy to pay William Tweddle £100 after marrying his daughter. The written agreement contained a clause which specifically granted William Tweddle the power to sue for enforcement of the agreement. William Guy died, and the estate would not pay and William Tweddle sued
Ratio:

- Third party beneficiaries cannot sue or be sued on contracts
- Natural love and affection is not sufficient consideration in the eyes of the law

Dunlop Pneumatic Tyre Co v Selfridge Co (1915)

Facts: Dunlop, a tire manufacturing company, made a contract with Dew, a trade purchaser, for tires at a discounted price on condition that they would not resell the tires at less than the listed price and that any reseller who wanted to buy them from Dew had to agree not to sell at the lower price either. Dew sold the tires to Selfridge at the listed price and made Selfridge agree not to sell at a lower price either and that they would pay £5 in damages if they violated this agreement. Selfridge proceeded to sell the tires below the price he promised to sell them for. Dunlop brought action and was successful at trial but this was overturned by the Court of Appeal
Issue: Is it lawful for Dunlop to sue Selfridge even though no contractual relationship exists between them?
Reasons:

- There was no contract between Dunlop and Selfridge and therefore Dunlop cannot sue
- There are a few fundamental principles of law underpinning this decision:
    - a) the doctrine of privity, which states that only a party to a contract can sue in breach of the contract;
    - b) the doctrine of consideration would require the promisee (Dunlop) to give consideration to Selfridge for the contract to be completed, and this did not occur as Dunlop did not give anything to Selfridge here (Selfridge made a promise to Dunlop to only sell at a certain price but it was gratuitous because Dunlop gave no consideration in return);
    - c) the only way that a principal not named in a contract can be sued is if he acted as an agent on behalf of one of the parties privy to the contract. Dew was not acting as an agent for Dunlop, therefore this does not apply in this case
- If Dew were Dunlop's agent, then the effect of the two deals would really be one deal. In an agency agreement, the Agent disappears and the contract is between the principal (Dunlop) and the third party (Selfridges) The principal gives tires and the third party gives money. This did not happen here. The court held that the tires belonged to Dew, not Dunlop. They had already sold them

Holding: Appeal dismissed
Ratio:

- Only parties to a contract can sue for a breach of the contract
- The only exception to this rule is if a party named in the contract was acting as an agent of an unnamed party; in this case, the unnamed party can be sued

Ways in which a third party may acquire a benefit

Privity is obviated when:

1) **The plaintiff can proceed with an action in tort**
    a. Don't always need a contract to sue someone successfully
2) **The plaintiff can establish a collateral contract**
    a. Collateral contract: the consideration is the making of another contract – collateral to the contract, but has its own independent existence
    b. E.g. the plaintiff sues hairdryer manufacturer pursuant to a collateral contract containing the warranty (the consideration for the collateral contract is in the plaintiff entering the main contract to purchase the hairdryer from the retailer)
3) **Statute law creates an exception to the operation of privity**

a. E.g. *Insurance Act* – if the insurer doesn't pay out, the beneficiary might not have a cause of action at common law so the Act gives one

4) **The plaintiff brings an action for specific performance**
   a. *Beswick*
5) **Trust law applies**
   a. Once a trust is established, the beneficiary is entitled to enforce the trust obligation directly
6) **There is an agency relationship**
   a. E.g. principal authorizes an agent to enter into contracts on the principal's behalf with third parties – suggests the agent is no longer a third party, but party to the contract
   b. *Dunlop* and *New Zealand Shipping*
7) **A common law exception applies**
   a. The limitation of liability clause falls within *London Drugs* (as opposed to *Edgeworth*)
   b. The waiver of rights clause falls within *Fraser River*

Beswick v Beswick (1968)

Facts: Peter Beswick was a coal merchant. He agreed to sell his business to his nephew, the respondent, if he paid him a certain sum of money for as long as he lived, and then to pay his wife (the appellant) £5 per week for the rest of her life after he died. He died, and the nephew only paid his aunt once before stating that no contract existed between them. She was also the administratrix of her husband's will

Issue: Is Mrs. B able to sue her nephew in her own personal capacity, as an executrix of the estate, or both?

Reasons:

- The House of Lords decided that the aunt had no right to sue her nephew in her own capacity, as she was not a party to the contract. This overturns Denning's findings in the lower court allowing third parties to sue for benefits that were guaranteed to them under a contract. However, in her capacity as the administratrix she is able to sue him for the specific performance of his promise that was made in the contract.

Holding: Appeal dismissed. Held for Mrs. B

Ratio:

- Third parties cannot sue for breach of contract when they were not a party to the contract, even if they were named as a beneficiary of the contract
- This case **exemplifies the courts using equitable principles to remedy a technical situation - using specific performance as a remedy**, even though Mrs. B was a third party beneficiary

New Zealand Shipping v Satterthwaite & Co (1975)

Facts: Ajax Machine Co manufactured and consigned a drill to Satterthwaite. A bill of lading was issued by agents for the Federal Steam Navigation Co, which contained a clause stating: (1) no liability for the carrier or servants/agents to the consignee; (2) all claims must be within one year; (3) not accountable for damages in excess of $100. The stevedores were New Zealand Shipping (of which the Federal Steam Navigation Co was a subsidiary of) and they damaged a drill due to negligence. Satterthwaite brought an action 3 years after the damage, NZ claimed they were not liable as they were covered by the clause in the bill of lading

Issue: Does the limited liability clause in the bill of lading apply to the stevedores?

Reasons:

- Wilberforce, for the majority, lays out a **test for agency:**
  - If the party is meant to be covered by provisions;
  - If the promissor is clearly acting as agent for the party; and
  - If the promissor has the authority to do this;
  - Then consideration moves from party through agent to promisee. Applying to this case it is clear that the subsidiary relationship between the parties fulfills each requirement
- Satterthwaite agreed to exempt carrier and agents from liability in the bill of lading, and commercial realities must mean that this covers the whole carriage. This is essentially a "unilateral" contract which becomes bilateral with the specific performance of loading the goods
- These acts constituted consideration for an agreement between Satterthwaite and NZ, and therefore NZ would be subject to the exemption conditions of the bill of lading
- This decision is in the interest of ensuring an efficient global market

Holding: Appeal allowed, liability clause applies

Ratio:

- Test for agency. Shows how a court can use alternative routes to ensure smooth functioning - e.g. here a **unilateral contract** was shown to exist
- **Fulfilment of a pre-existing legal duty to the promisor is not good consideration for a fresh promise (*Gilbert Steel*), but fulfilling a pre-existing legal duty to a third party IS good consideration because its coming at the request of the promisor, Ajax**

London Drugs v Kuehne & Nagel International ( )

Facts: LD is the appellant, had a contract with K&N to store a transformer. Included in this contract is a limitation of liability clause, which limited the warehouse employee's liability to $40 dollars. LD at the time of the contract was assumed to have known that K&N's employees would be responsible for the moving of the transformer. The respondents attempted to move the transformer negligently, which resulted in damage to it.
Issue: Can the employees shelter under the limitation of liability clause as a defence to LD's action?
Reasons:

- Even though the employees are not parties to the contract between K&N and LD, the SCC contends that it is time for a judicial reconsideration of the rule regarding privity as applied to employer's contractual limitation liability clauses
- The court recognizes that a right for third party beneficiary to rely on a limitation of liability clause should have little impact on the rights of contracting parties to vary their contracts, in comparison with the recognition of a third party right to sue on contract
- **When a person contracts with an employee for certain services, there can be little doubt generally that employees will have the prime responsibilities related to the performance of the obligations which arise under contract**
- **The Court is not suggesting that employees are a party to their employer's contracts in the traditional sense so that they can bring an action on the contract or be sued for breach of contract**
    - There is simply no valid reason for denying the benefit of the clause to employees who perform the contractual obligations (policy reason for extending the procedure here – privity shouldn't stand in the way of commercial reality and justice)

Holding: The LLC applies to the two individuals on an implied basis
Ratio:
The employees can obtain the benefit if they can show:

1) The limitation of liability clause must either expressly or impliedly extend its benefits to the employees seeking to rely on it
2) The employees seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and then plaintiff when the loss occurred

PRIVITY AND SUBROGATION

Right of subrogation: insurance companies generally have the right to step into the shoes of the party whom they compensate (the insured) and sue any party whom the compensated party could have sued (for causing the loss)

Fraser River v Can-Dive Ltd (1999)

Facts: FR and CD had a charter contract for a boat. FR is the plaintiff and owns the barge, CD is the defendant who was allegedly negligent and sunk the barge. FR has an insurance contract for the barge. Under this contract the insurance company would ordinarily have the subro right to sue as the insurance company, but in this insurance contract the subro right was waived. CD is now subject to a subrogated action despite the waiver of subro in the contract. CD is a third party beneficiary, not party to the insurance contract
Issue: Can the third party beneficiary (CD) rely on the waiver of subro clause as a defence to the action against it in negligence?
Reasons:

- Determination made based on two factors: **(1)** did the parties to the contract **intend** to extend the benefit in question to the third party seeking to rely on the contractual provision? **(2)** Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general?
- Once the rights are developed into an actual right, they cannot be revoked unilaterally. **Once the third party's acts crystallize under the contract, the contract in relation to this right cannot be buried**
- Court finds policy reasons for relaxing the doctrine of privity in these circumstances

- **When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of the waiver of subro clause to an ascertainable class of third party beneficiary, any conditions purporting to limit the extent of the benefit to be available must be clearly expressed**

Ratio: Courts indirectly say there is a third outcome to tack onto *London Drugs* – has to be a policy foundation when you apply the test – what are the main policy reasons in favour of permitting the waiver to be relied upon as a defence?

Chapter 6: Contingent Agreements

- The need to create a presently binding contract on established terms subject to a proviso that will release one or both of the parties from the obligation to actually perform under those terms if the contingency does not materialize may be met by making the contract conditional
    - Typically referred to as a condition precedent
- Recall the case of *Dawson v Springer*. The contract was subject to Springer getting a helicopter and taking Dawson in it. The implied subsidiary obligation is to make good faith efforts. If this condition is fulfilled, then the principle obligation of giving 10% of the stake is fulfilled. But if the condition is not fulfilled, there may still be a breach of contract as was the case in this case.

A contingent condition describes an event or state of affairs that neither party to a contract has promised will come about, but the occurrence of which is a prerequisite of their obligation to perform their contractual obligations - a condition precedent is contingent (if its operation depends on an event which is not certain to occur)

- **Condition subsequent –** the parties introduce a provision that the fulfillment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract

CONTINGENT AND PROMISSORY CONDITIONS

1) Condition as an event (**contingent condition**) versus condition as a term (**promissory condition**)
    a. **Event:** condition as an event that neither party undertakes to bring about. The obligations of both parties are contingent on the happening of the specified event which may therefore be described as a *contingent condition*
    b. **Term:** where one party's duty to perform is contingent on the other party performing their undertaking. The contract is immediately binding on both parties

2) **Conditions precedent and conditions subsequent**
    a. **Precedent:** a condition precedent provides that the contract is not to be binding until after the specified event occurs. It can relate to a situation where there is no contract at all until the condition is fulfilled or a situation where there is a contract
    b. **Subsequent:** a condition is subsequent if it provides that a previously binding contract is to determine the occurrence of the event

Note: DON'T ASSUME that the presence of an unfulfilled condition precedent means the absence of a binding agreement

DEGREES OF OBLIGATION

An agreement that is subject to a contingent condition precedent is not fully binding until the specified event occurs; nor does either party undertake that it will occur. An agreement subject to such a condition may impose some degree of obligation on the parties or on one of them

Four Possibilities:

1) **Before the event occurs, each party is free to withdraw**
    a. We have a condition precedent going to the creation of the obligation as opposed to one the fulfillment of which triggers the duty to perform
    b. Either party could walk away before this point and it wouldn't be a breach
    c. No contract unless and until the condition is fulfilled

d. *Murray:* agreement for sale of a patent is executed, but the parties agree that it should "not be in the agreement" unless a third party approved of the invention. No agreement UNTIL approval

2) **Before the event occurs, the main agreement is not binding but, so long as the event can still occur, one or both of the parties CANNOT withdraw**
   a. There is a contract – waiting for the event to occur – can't withdraw
   b. Need to have a contract in place to prevent withdrawal
   c. Primary obligation to buy and sell is suspended, subject to an event occurring – implied subsidiary obligations on the vendor to wait and see, and on the purchaser to make good faith efforts
   d. *Smith v Butler:* A sells land to B subject to financing. A cannot withdraw before the time fixed for completion; he was bound to wait to see whether B could arrange the loan

3) **Before the event, the main agreement is not binding but in the meantime, the parties must not prevent occurrence of the event**
   a. In a contract – part of your compensation is going to be tied to performance
   b. Need to avoid breaching the implied subsidiary obligation of giving the individual the time to achieve the performance
   c. *Bournemouth:* Football player is transferred. He is to be paid part of his fee immediately and the balance upon scoring 20 goals. He is cut before he has the chance to score the goals. Held that the team was in breach because it didn't give him reasonable opportunity to so do

4) **Before the event occurs, the main agreement is not binding but one of the parties undertakes to use reasonable efforts to being about the event without undertaking that those efforts will succeed**
   a. The principal obligation to buy and sell will not take effect if planning permission is not obtained
   b. But there is an implied subsidiary *promissory* obligation to make reasonable efforts
   c. *Hargreaves Transport Ltd v Lynch:* land is sold subject to the condition that the purchaser should obtain planning permission – he is bound to make reasonable efforts to get the permission, but isn't liable for failing

Conditions precedent to obligation vs. conditions precedent to performance

- A condition precedent may relate to the binding effect of an agreement or to the duty to perform an existing contract
- The existence of such a condition depends upon the intent of the parties as gathered from the words they have employed, and it will be interpreted according to the general rules of construction (*Wiebe*)

DOOR #1: CONDITION PRECEDENT TO CREATION OF THE CONTRACT
- No binding agreement results because the condition precedent is illusory
- It is based on 'whim, fancy, or dislike'. It has no objective content and therefore cannot be enforced
- E.g. I'll buy your house if I like it

DOOR #2: CONDITION PRECEDENT TO THE DUTY TO PERFORM THE PRIMARY CONTRACTUAL OBLIGATIONS
- A binding agreement results, but whether the primary contractual obligations depends on whether the condition precedent is fulfilled
- Such agreements can have subsidiary obligations (express or implied), breach of which is actionable

True Condition Precedent

- An external condition upon which the existence of the obligation depends. Until the event occurs, there is no right to performance on either side (*Turney*)

Wiebe v Bobsien

Facts: Weibe paid a deposit of $1000 to Bobsien, the vendor. The house sale is subject to the plaintiff selling his own residence on or before 18 August 1984. Before that date, the defendant purports to cancel the interim agreement. Plaintiff didn't accept this cancellation and fulfilled the condition by selling his own home. On that day, the plaintiff notified the defendant that the "subject clause" was removed. The defendant refused to complete
Issue: Is the interim agreement a binding contract or a failed option to purchase that the defendant was entitled to cancel?

Reasons:

- A condition precedent has the effect of (1) preventing the creation of a contract or (2) merely suspending performance of some or all of the obligations set out in the contract until the condition is met
    - This depends on the **intention** of the parties
- In this case it is a door #2 condition precedent, the time set aside for performing the condition precedent is such that one or both sides have to wait – most of the time we have a door #2 precedent – here the vendor has an obligation to wait and see if the purchaser can fulfill the condition (can't withdraw during this time)
- Conditions relating to the approval of the premises and of chattels imply a condition of whim, fancy or dislike (if the purchaser likes them then they complete the purchase) – this constitutes an illusory contract that was no agreement at all (*Murray*)
    - While a purchaser must use his best efforts in doing things such as obtaining financing, etc. there is no way the law can test whether he used his best efforts in deciding if he likes a particular property or not, so there is no contract in these instances
- The law seems to lean in favour of the concept **that there is a condition precedent such as a subject to clause, a contract is formed on signing of the parties. It is merely in suspense pending the completion of the condition**

Ratio:

- The general rule is laid down that in a real estate transaction a condition precedent which must be performed by the purchaser will not usually prevent the formation of a contract, but will simply suspend the covenant of the vendor to complete until the condition precedent is met by the purchaser
- In come instances a condition may prevent the formation of a contract if the agreement itself and surrounding events indicate it was never the intention of the parties to bind themselves to a contract
- **If your condition precedent is uncertain such that it can't be applied, then though you didn't intend to be in a door #1 scenario, this is the result**

Note: The *Murray* decision is cited in this decision. This was an example of a decision where there was a door #1 condition precedent, meaning there was no contract at all. This is the best example of this type of a condition precedent

RECIPROCAL SUBSIDIARY OBLIGATIONS

- Contractual obligations that fall to be performed only upon satisfaction of a condition precedent may be described as the parties' primary obligations. They relate to the ultimate objective of the contract
- However, the conclusion that a contract exists before the primary obligations become operative suggests that are subject to other obligations in the meantime
    - There are *subsidiary obligations*
    - They are defined as **the simple obligation to refrain from withdrawing from the contract**. A refusal to proceed manifested before the time stipulated for satisfaction of the condition precedent has arrived will accordingly constitute a breach of contract
- In *Wiebe,* the purchaser had an implied subsidiary obligation to make reasonable efforts to bring about the sale of the house by a specified date
- In some cases the courts will imply a term that requires one of the parties to refrain from conduct that will make fulfillment of the condition less likely

Dynamic Transport v OK Detailing (1978)

Facts: Dynamic Transport has a contract with OK Detailing, subject to the condition that the land can be subdivided (means the purchaser is interested in buying the land, but only if it can be broken down into larger pieces). The vendor is trying to get out of the deal, says there is only an attempt to contract. Purchaser brought an action for specific performance

Reasons:

- The SCC held that the parties have a binding agreement subject to the division - there was an implied promise by the vendor to get approval for the subdivision – vendor is in breach of the implied subsidiary obligation
- **This case is a specific instance of the general principle that the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract**
- This case is an application, idea that **there is an implied subsidiary obligation on the vendor – if they don't do this they are in breach**

- Remedy/damages: court requires the vendor to make a bona fide application – incentivizes them by holding that if they don't make the application, the appellant is entitled to damages for the loss of the bargain (full expectation damages would be granted even though this isn't what would necessarily happen)

Ratio:

- The existence of a condition precedent does not preclude the possibility of some provisions of a contract being operative before the condition is fulfilled
- The remedy is that the vendor will make bona fide efforts, and if they don't then the purchaser is entitled to damages
- Courts are often inclined to the view that one of the parties has an implied subsidiary obligation to take steps to bring about the state of affairs constituting the fulfillment of the condition

REMEDIES FOR BREACH OF SUBSIDIARY OBLIGATIONS

- Courts that award damages for breach of a subsidiary obligation of the kind addressed in *Dynamic Transport Ltd*. generally recognize that there is no guarantee that the requisite approval or state of affairs would have been achieved if proper efforts were made; what the victim of breach has lost is the chance to realize the benefit that would have followed from the fulfillment of the condition
- Note that a plaintiff who requests specific performance may end up with neither performance nor damages if approval is not granted
- Even if the court has to make something up, they will generally try to assess damages. It is no argument that it is too hard to assess monetary value. We do not know what the basement of chance is, but there is an Ontario Court of Appeal decision that gave an award based on an assessed 20% chance of success (see below)

Eastwalsh Homes v Anatal Developments

Facts: Contract between the parties is subject to subdivision. Contractual term required the vendor to use its "best efforts" to have the plan of subdivision registered prior to closing date. The vendor breached this term

Issue: How should the plaintiff's loss be measured?

Reasons:

- Plaintiff has to prove that the D's breach cause the loss on a B of P, in this case a loss of chance. Also has to prove that the loss of chance constitutes some reasonable probability of realizing an advantage of some real, substantial monetary value
- TJ's award is reversed on this basis - Eastwalsh didn't lose a 50% chance of closing the sale
- Anatal could not have succeeded in registering a plan of subdivision within the time frame of the contract. Nothing more than nominal damages is warranted - loss is too unsubstantial

Ratio:

- General rule that the burden is on the plaintiff to establish on a balance of probabilities that, as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed
    - If the plaintiff is not able to establish a loss, the plaintiff may only recover nominal damages
- Second principle: where it is clear that the breach of contract caused loss to the plaintiff but it is very difficult to quantify the loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour
- SCC has said that proof of the loss of a mere chance is not enough; the plaintiff must prove that the chance constitutes some reasonable probability of realizing an advantage of some real substantial monetary value
    - In Ontario, 20% has shown to be substantial in *Multi-Malls* – it is unclear whether anything less than that would be considered 'substantial'

UNILATERAL WAIVER

- Parties to a contract that includes a condition precedent as one of its terms can agree to vary or waive satisfaction of the condition
- In many case one of the parties wishes to waive the condition so the contract can be given effect while the other party does not
- Parties should include in the contract explicit provisions that either allowed or prohibit the waiver of conditions precedent, however, often contracts are silent on the matter
- For example, the homebuyer may wish to proceed with purchase of the house, even though he or she is not able to obtain financing by the date specified in the condition precedent. If he or she purports to waive fulfilment of the condition, is the seller obliged to complete the transaction?

- Common sense would suggest that, since the condition was included to ensure that the purchaser would have funds available to make the purchase and was thus intended for the purchaser's benefit, he or she should be permitted to waive it
- Waiver would, of course, put the purchaser in the position of being subject to an unconditional contractual obligation to pay the purchase price on the agreed date, regardless of whether he or she has succeeded in arranging the necessary funds from an external source

Turney v Zhilka

Facts: Parties entered into a contingent agreement for the purchase and sale of land. Conditions are as stated (annexation condition). Purchaser made some efforts to secure fulfillment of the condition, but then purported to simply waive the fulfillment of the condition (saying this condition has to be fulfilled or the purchaser waives it, saying that they don't care anymore just want the land). Vendors claim that they are not bound by the agreement because the condition was not fulfilled
Issue: Did the purchaser have the right to unilaterally waive the condition precedent?
Reasons:

- SCC doubts that the benefit was solely for the benefit of the purchaser (SOB disagrees with this)
- Purchaser has no right to waive the annexation condition, which was a true condition precedent (this term is newly introduced here)
- The obligations, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party – the Village Council. This is a true condition precedent -- an external condition upon which the existence of the obligation depends. Until the event occurs, there was no right to performance on either side. The parties did not promise that it would occur
- The purchaser now seeks to make the vendor liable on his promise to convey in spite of non-performance of the condition and this to suit his own convenience only
- Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

Ratio: This decision is wrong, but the ratio is right. A condition can be waived if a term is for the sole benefit of one party, the condition is not a true condition precedent and the condition is severable

Note: How to get around *Turney*

- Courts apply *Dynamic* in that a true condition precedent can have implied subsidiary obligations. *Turney* has been otherwise distinguished, or just outright ignored
- You can get away from *Turney* by drafting your contract around it **by inserting a waiver clause**. Have a clause saying that the condition precedent can be waived, therefore it is not a true condition precedent
- Another possibility is to **frame the condition so that the appropriate party can declare the contract null and void**. The purchaser may at any time, up to and including the __day of __, 199__ , waive the protection of the above clause in whole or in part by giving notice to that effect to the vendor in writing at __ (address)
- This agreement may be declared null and void at the option of the purchaser (vendor) if the purchaser (vendor) is unable to obtain by the __ of __ , 19 __ , financing upon the following terms and the deposit shall be returned to the purchaser without deduction

Chapter 7: Representations and Terms

A misrepresentation is a misstatement of some fact, which is material to the making, or inducement of a contract (Fridman)

Misrepresentation versus a term: stating something as a fact versus promising something

General rule: no relief for a misrepresentation unless it is a statement of *existing* fact

- **Mere puffs do not count as misrepresentations**
- **Statements of opinion or belief do not count as misrepresentations (but see *Smith v Land; House Property Corp)***
  - Provided the person making the statement has no knowledge of the matter
  - If they lie about their own opinion/know the truth and misrepresent this then it would count as misrepresentation of fact. If negligently done then actionable
- **Representations as to the future do not count as misrepresentations (*Edington v Fitzmaurice*)**

- Misrepresentation going to the future is not actionable, only would be if recited as a term in the contract
- Different than if you lie about your future intent, which is a misrepresentation of fact

Ingredients of an actionable misrepresentation – the misrepresentation of an *existing* fact must be:

1) **Unambiguous**
2) **Material**
    a. **Test:**
        i. It must be one which would affect the judgment of a reasonable person in deciding whether or on what terms to enter into the contract without making such inquiries as he would otherwise make (Treitel)
        ii. The materiality requirement means that the misrepresentation must relate to the matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question (McCamus)
        iii. Means that the misrepresentation must relate to the matter that would be considered by a reasonable person to be relevant in the decision to enter the agreement in question (*Redgrave v Hurd*)
    b. Materiality goes to the reasonable person – would it affect them? Specifics of the representee
3) **Relied on by the representee**
    a. How is reliance different from the materiality criterion? (see *Redgrave v Hurd*)

Meanings of rescission – the remedy for misrepresentation

- An action to set the contract aside due to some defect affecting the formation of the contract (this is the focus in this chapter)
- Voluntary setting aside of the contract by both parties
- Incorrectly, refers to a situation where one party is discharged from having to carry out his or her obligation under the contract because the other party has committed a serious breach

Difference between a claim for damages and an action to rescind a contract

- *Damages*: plaintiff seeks money damages for the performance which should have been rendered under the contract
- *Rescission*: plaintiff seeks non-enforcement of the contract (parties restored to their pre-contractual position)

LIABILITY IN TORT

Fraudulent misrepresentation: A representation is fraudulent if either the misrepresentor knew that the statement was false, or made the statement "recklessly and without care, whether it was true or false"

- Use *Redgrave*

Negligent misstatement (i.e.: negligence): a prima facie duty of care exists when there is proximity and reasonable foreseeability (*Deloitte & Touche v Livent*)

1) Proximity is established if there is a close and direct relationship between the parties
2) Reasonable foreseeability is established if (a) the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation and; (b) such reliance would, in the particular circumstances of the case, be reasonable

Redgrave v Hurd (1881)

Facts: Redgrave advertised to sell his business premises and a share in his business, representing that it brought in between £300 and £400 a year when it truly grossed less than £200 a year. The defendant purchased the property and a partnership in the law practice on the premises on the basis of this representation. However, when he discovered that the law practice was "utterly worthless" he refused to complete his payments

Issue: Can a defendant rescind a contract because of a misrepresentation?

Reasons:

- The plaintiff argues that the defendant cannot rescind the contract because he simply should have used due diligence and sought more information before purchasing the premises. The judge rejects this and says that the only limitation on suing for a misrepresentation is the limitation period, which starts when the fraud reasonably should have been discovered
- If it is shown that a representation was made in an attempt to induce a party to enter into a contract, and the contract was in fact formed, then there is a presumption that the representation was relied upon. This can only be refuted by proving that the party hearing the representation had definite knowledge to the contrary, or by explicit evidence that they did not rely on the representation

- Where you have neither evidence that he knew the facts showing that the statement was untrue, or that he did anything to show that he did not rely upon the statement, the inference remains that he relied upon the statement as being a material statement (condition) in the contract. Therefore, its being untrue is sufficient ground for the rescission of the contract. This comes from the courts of equity; common law takes a different approach
- Court makes a mistake here - says that if you show representation is material, it will be an inference of law that there was reliance - NOT accurate. Actually need to show on the facts that there was reliance

Ratio:

- A representation is fraudulent if either the misrepresentor knew that the statement was false or made the statement recklessly and without care, whether it was true or false. You can show tort in this case so you may be able to get damages as well as recession
- Reasonable opportunity to discover the truth is not a bar to innocent misrepresentation or fraudulent misrepresentation
- Misrepresentation = damages
- Tortious misrepresentation = damages and rescission

REASONABLE OPPORTUNITY TO DISCOVER THE TRUTH & DUTY TO DISCLOSE

- Representee does not have any obligation of due diligence as per *Redgrave* – it is not a response to the plaintiff that saying if you had used due diligence, you could determine that the misrepresentation was false
- If the plaintiff is duped by a liar, the fraudster cannot use as a defence that if you had not been so stupid you could find out they were lying
- **The reasonableness of your reliance is irrelevant for rescission, but is relevant for recovery of damages in tort**

Smith v Land and House Property Corp (1884)

Facts: Land and House contracted with Smith to buy the title of the Marine Hotel at Walton-on-the-Naze. Smith had advertised that it was let to Fleck, "a most desirable tenant". Land and House agreed to buy the hotel however Fleck, who had been overdue with rent, went bankrupt just before transfer of title. Land and House refused to complete the transaction, defending Smith's specific performance on the basis that the description of Fleck's virtues was grounds for misrepresentation.

Issue: Was the statement a mere opinion or a representation of fact?

Reasons:

- Bowen held that when facts are equally known to both sides, then statements are generally opinions, however when facts are not equally known, then a statement of opinion by one who knows the facts best is often a statement of material fact as they are implying that his opinion has justification
- In this case, with Fleck being behind in his rent, the statement of him being a "desirable tenant" was not a true statement and thus Land and House were entitled to not complete the transaction due to misrepresentation

Ratio:

- A statement of opinion, from a knowledgeable party to one who is not, is a representation. If false, it is actionable
- Innocent misrepresentation allows rescission

Bank of BC v Wren Developments (1973)

Facts: Smith and Allan were directors of Wren. They wanted a loan, so they put up shares in another company that Wren owned as collateral with the Bank. Smith had the bank cash in shares without Allan knowing, who thought that the shares were still in place. Allan went to the bank to ask about them and they said they would "get back to you later on the details". The bank claimed the balance owing in place of the collateral from Allan

Issue: Was there a misrepresentation of fact?

Reasons:

- Munroe held that Allan had laboured under the mistaken belief that collateral security pledged by the company was still at the bank. He had not been informed of any sale or exchange, his signature was required for banking transactions, and neither he nor the company had ever authorized Smith to act as agent
- He had been materially misled by the words, acts and conduct of the Bank. Satisfied that Allan would not have signed the second loan guarantee if he had known all the facts, Munroe found he was induced by misrepresentation (failure to disclose facts) to sign the second agreement. In the circumstances, he is not liable for repayment of the second agreement

Ratio:

- Failures or omissions can qualify as a misrepresentation especially if there is an active concealment of the truth

- Negligent misrepresentation permits rescission
- Silence *can* be a misrepresentation

DEFAULT RULE: silence is NOT a misrepresentation, generally no duty to disclose BUT there are many exceptions to this statement, so hard to rely on it broadly

- **Exceptions**:
    - Representor offers a half truth - partial disclosure, misrepresentation because you think you're getting a full answer, representing that your disclosure is complete
    - Representor conceals the truth – actionable
    - Circumstances affect the truth of a misrepresentation - not correcting the first statement is a misrepresentation because circumstances have changed
    - Contractual relationship requires disclosure - E.g. *Wren,* relationships like insurance contracts where there is a positive obligation to make disclosure of material facts

Universal Concerts Canada v Ryckman Amateur Sports Society (1997)

Facts: Universal is the plaintiff in an action for breach of a lease contract. They are a concert promoter, in this case for shock rocker Marilyn Manson. The defendant is the lessor of a Calgary area. There was argument that the Marilyn Manson act was controversial, so that there was a misrepresentation by omission, and defendant's sought a rescission of contract
Issue: Was there a duty to disclose the controversy surrounding the act?
Reasons:

- The response is that that the defendant previously allowed hard rock acts to be booked into the Max Bell without comment. Further, there was a brief oral description of the act, and there was no criteria put in place as to the types of Rock acts that could play in the Max Bell
- Secondly, the Plaintiff gave the Defendant a warning and offered to provide the Defendant with further information about Marilyn Manson by the Defendant declined the Plaintiff's invitation

Ratio: There is a requirement to disclose if only a half-truth has been provided, there is an active concealment of the truth, or there are changing circumstances

INDEMNIFICATION

- Essentially reimbursement; can be raised in rescission. You must be required to do something (e.g. rent money or a duty to repair) as stated in the contract to be able to seek indemnification
- In tort, the question is had the plaintiff known the truth, would they have entered into the contract? If no, but for the tort, could have been engaged in profitable endeavors at another location (opportunity cost issue)

Kupchak v Dayson Holdings (1965)

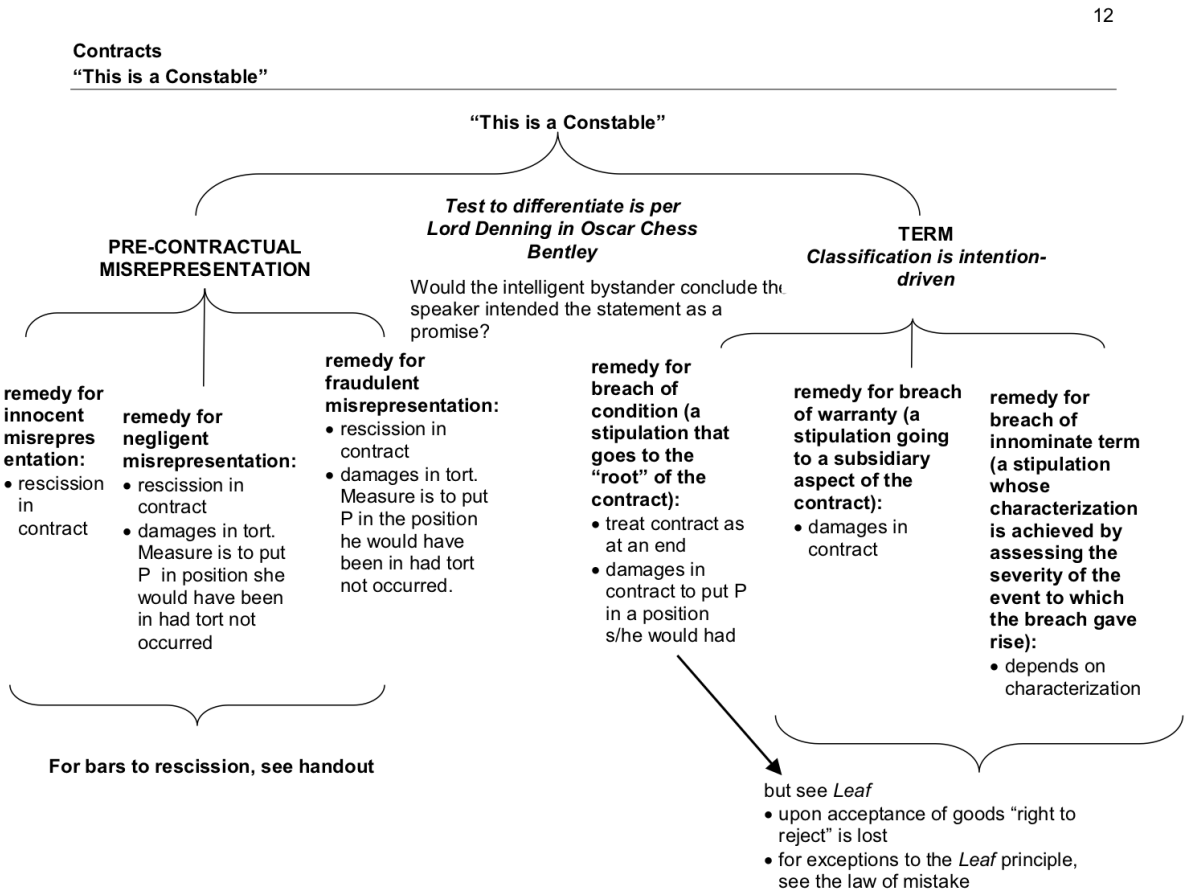
Facts: The Kupchaks bought the shares of a motel company from Dayson Holdings giving in exchange two properties on Haro Street and North Vancouver and a mortgage for $64,500 for the motel. In July 1960, the lawyer for the Kupchaks stopped making payments on the mortgage as they had discovered that past earnings of the hotel were false. On September 16 their solicitor wrote to Dayson. Dayson subsequently sold half of their interest in the Haro Street Property to Marks Estates Ltd. and the existing building was torn down and an apartment complex erected. On November 21, 1961 the Kupchaks commenced their action against Dayson for rescission; in the meantime they had continued to live in and operate the motel
Issue: Can the plaintiffs claim rescission? Is rescission barred by laches? (lapse of time)
Reasons:

- **Dealings in property obtained by fraud cannot be used to bar restitution** - there must be flexible remedies to attempt to restore parties to their original positions. Davey holds that a remedy of rescission (accompanied by restitution) is equitable and its application is discretionary while noting that when applied it must be moulded to the exigencies of the case
- In cases of innocent misrepresentation courts will not be as interventionist as the parties are not at fault, however in fraudulent misrepresentation the courts will exercise their jurisdiction to order rescission to the fullest unless that order would be impractical or unjust. In the case at bar, to return the property at Haro Street would be unjust due to the fundamentally altered nature
- Even though equity is not supposed to give damages, it can order compensation to make good some deficiency in perfect restitution
- On laches, the facts show that the defendant was aware of an action as early as September of 1960 and there was no prejudice against them as a result of the action not being commenced until November 1961

Ratio:

- **Situations where the misrepresentee is not entitled to claim rescission:**
  - (**1**) When third party rights intervene
  - (**2**) When there is election or affirmation
  - (**3**) When there is laches or delay
  - (**4**) When rescission would cause radical injustice to misrepresentor
  - (**5**) When there is innocent misrepresentation and the contract has been executed
- Monetary compensation may be granted under recession where it is impossible or inequitable to restore the original property
- Note that allegations of fraud are serious and potentially very damaging to those accused of deception. Where a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent, costs on a solicitor-and-client scale are appropriate
- The court has the jurisdiction to be **practically just** although it cannot award damages in contract

REPRESENTATION AND TERMS



Helibut, Symons & Co v Buckleton (1913)

Facts: An agent of Buckleton purchased shares from an agent of Heilbut, Symons & Co. on two occasions based on what the respondent's claim was a representation that the company was a "rubber company". The company turned out to be sour and Buckleton lost money on the transaction and brought an action for breach of warranty.

Issue: Did the actions of the appellant constitute a representation?

Reasons:

- Moulton, writing for the majority, says that strictly speaking the contracts in this case were not contracts of sale, as the defendant was only an agent of the rubber company and he was to undertake the necessary action to procure the shares for the plaintiff

- The court holds that **in order to establish a cause of action in damages for misrepresentation the statement must have been fraudulent, or it must have been made recklessly**. He clearly states that it is a principle of law that a person is not liable for damages resulting from an innocent misrepresentation
- This case was an innocent misrepresentation; therefore the appeal must be allowed as no damages can stem from an innocent misrepresentation. As per Denning, there must be intention for it to be a term of the contract

Ratio:

- Damages are only awarded for fraudulent or reckless misrepresentations, or misrepresentations that refer to a material issue that fundamentally change the contract
- Innocent representations are only referred to as warranties if they have clearly been **intended** to be warranties by the parties (test is *intention*)

Dick Bentley Productions Ltd v Harold Smith (1965)

Facts: Bentley purchased a car from Smith, relying on the representation that it had only traveled 20,000 miles after it had been repaired. Subsequent to the purchase it became clear that the engine had been driven much further and repairs were required. Bentley brought an action for breach of warranty

Issue: Was the statement about the car's mileage an innocent representation or a warranty?

Reasons:

- **There is a prima facie assumption that a representation made in the course of dealings for a contract for the very purpose of inducing a party into the contract is a warranty. It was intended to be acted upon, and it was in fact acted upon**
- The appellant was a car salesman and therefore that he should have taken the diligence to discover how far it had traveled or at least he should not have made a false representation if he did not know the exact distance
- Denning agrees with the trial judge that the representation was not fraudulent; however, it was stated as a fact and was a warranty in the contract for the sale of the car. Therefore, breaching it gives rise to a cause of action for damages

Ratio:

- A representation made in the course of dealings for a contract for the very purpose of inducing another party to enter into the contract is presumed prima facie to be a warranty of that contract and therefore, a breach of it will lead to a cause of action for damages – can rebut if representation was made innocently
    - But note that in this case, the seller should have known about the mileage and thus innocent representation was not an applicable defence
- **It is an objective test that is used to determine if a representation was a warranty – if an intelligent bystander would reasonably infer a warranty was intended, then it is a warranty**

CONCURRENT LIABILITY

- **General principle favours the possibility of concurrent liability in tort and contract in contractual contexts**
    - **But cannot recover damages twice**
- **The plaintiff has the right to assert the cause of action that appears to be most advantageous to them in respect of any particular legal consequence**
- This liability can arise where a relationship of sufficient proximity to create a duty of care in tort is established by the contract and where the resulting tort duty is co-extensive with an obligation also imposed by the contract itself
- A concurrent liability in tort will not be admitted if its effect would be to permit the plaintiff to escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort
    - Subject to this qualification, where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence
- Important tort in this context is **negligent misstatement**
    - To establish, the plaintiff needs to show that there was a duty of care between her and the defendant
    - Duty of care is sometimes called a 'special relationship' – *prima facie* duty of care which exists with proximity and reasonable foreseeability
        - Proximity is established when there is a close and direct relationship between the parties
        - Reasonable foreseeability is established if the defendant should have reasonably foreseen the plaintiff would rely on the representation, and the representation was reasonable

BG Checo v BC Hydro (1993)

Facts: BG Checo successfully bid to erect transmission towers on BC Hydro's property. The contract said that BC Hydro would clear their land before the towers were erected, but they did not. As a result, BG Checo's work was more difficult and expensive. They sued in breach of contract and negligent misrepresentation. The lower courts allowed BG Checo to claim in both contract and tort, which BC Hydro appealed.

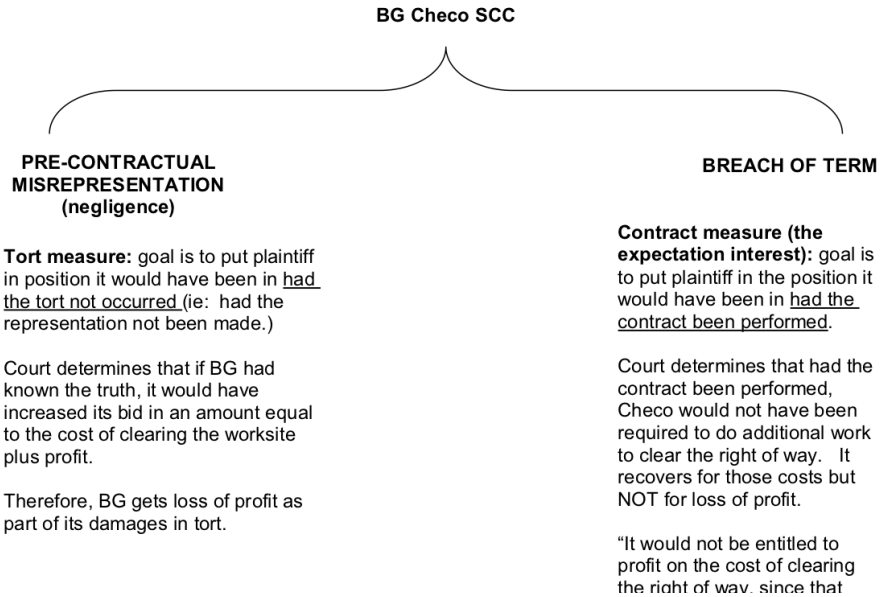
Issue: Can BG sue in both contract and tort?

Reasons:

- La Forest and McLachlin, writing for the majority, decide that they can sue in both causes of action, and that there are different remedies for both actions because the law should allow wronged plaintiffs to recover in any way possible
    - In the contract action, the goal is to put the plaintiff in the position that they would have been in if the contract was performed
    - In the negligence action the damages could amount to any loss that reasonably stemmed from the negligence, as the goal is to put the plaintiff in the place they would have been in if the representation never happened
    - A tort action is only disallowed if it is explicitly set out that this is the case in the contract. In this case, the contract did not limit the BC Hydro's duty. Therefore, they have the ability to sue in both, but this case needs to be sent back to trial to determine the damages in tort
    - The damages for breach of contract are to put the party in the position it would have been in had the contract been completed
- Claim in tort: general rule is that where a given wrong prima facie supports a wrong in contract and in tort, the party may sue in either or both, *except* where the contract indicates that the parties intended to limit or prohibit the right to sue in tort
    - **Idea that if the tort duty is negated by the contract, you've given up tort action**
    - **If the contract doesn't impact on the tort duty you can sue on both**
- **3 kinds of contract:**
    - **(1)** Stipulates a more stringent obligation than the general law of contract would impose
        - E.g. contract requires more than reasonable care, where you have to deliver by a certain date
        - Prudent here to sue in contract and tort - good to have a backup action in case the contract action fails
    - **(2)** Contract stipulates a lower duty than would be presumed in contract due to an exemption or liability clause
        - Limits the liability of the defendant in some way
        - E.g. a moving company where the customer bears all risk of loss or damage to the goods, including by negligence
        - Should probably sue in both contract and tort to be safe here as well
    - **(3)** Duty in contract and tort is coextensive
        - Includes 'common calling cases' - a service generally available to the public where skill is necessary, e.g. a lawyer
        - There is a contract, but the obligation is defined by implied terms (by the court)
        - E.g. a lawyer is obligated by contract to give his client competent legal advice. Breaching this would bring an action in tort and contract

Ratio:

- A plaintiff is always allowed to sue in both tort and contract, if they both apply, so long as the relevant duty necessary for the tort action is not explicitly negated in the contract
- The goal of damages for breach of contract is to put the party in the position it would have been in had the contract been completed



PAROL EVIDENCE RULE

- *Sattva:* the parol evidence rule precludes evidence outside the words of the written contract that would add to, subtract from, or contradict a contract that has been wholly reduced to writing
- Purpose of the rule is to achieve finality and certainty in contractual obligations, and to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract
- **Exceptions:**
    - **(1)** Does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract
        - Evidence of surrounding circumstances is not used for adding/subtracting, but rather as an *objective* interpretive aid to determine the meaning of the words parties used
        - While the factual matrix can't be used to craft a new agreement, a TJ must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context
        - Goal is to deepen the TJ's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract
    - **(2)** Does not apply when the contract is intended to be partly oral and partly written

CLASSIFICATION OF TERMS

- Warranty and condition - whether a term is classified is a condition or a warranty has an impact on whether the party has an opportunity to fulfill its contractual obligations in light of the breach of the other party
    - **Breach of condition - gives the right to reject and treat the contract as ended (*Leaf*)**
        - If there are ongoing obligations under breach of condition, the party can elect to treat the contract as ended a sue for damages, so the obligations are set aside
        - Innocent party can also insist on performance by the other side, notwithstanding the severity of the breach and sue for damages
    - **Breach of warranty - only gives the remedy of damages**

Hong Kong Fir v Kawasaki

Facts: Contract between Hong Kong and Kawasaki. Defendants provided for a charter, that the owners would maintain the ship in a good state. In Feb the ship is delivered at Liverpool with an undermanned and incompetent staff. During the voyage the ship was off hire for 5 weeks due to the need for repair to engines due to staff incompetence. June 6 the charterers purport to repudiate for breach of condition.

Issue: is there a breach of terms such that the charterers can treat the contract as repudiated, or are the charterers themselves

Reasons:

- **What kind of breach amounts to repudiation: 5 relevant factors as to whether there has been a fundamental breach (a breach going to the root of the contract)**
    - (1) The ratio of the party's obligations not performed to the obligation as a whole
    - (2) The seriousness of the breach to the innocent party
    - (3) The likelihood of repetition of such breach
    - (4) The seriousness of the consequences of the breach
    - (5) The relationship of the part of the obligation performed to the whole obligation
- Before *Hong Kong,* the test for distinguishing a warranty from a condition was whether the term and its non-performance went to the whole root and consideration of the contract
    - Breach of condition would allow the innocent party to repudiate and/or seek damages. Breach of warranty would allow the innocent party only to seek damages
    - Under this scheme, breach of term defined to be a condition triggers the right to repudiate, even if the event caused by the breach is minor
- **Changed here:** seeks to mitigate potential harshness and formulaic quality of the old scheme by introducing a third possibility – the innominate term (an intermediate term that can't be defined as either a condition or a warranty
    - Assuming the term involved is an innominate term, the innocent party will be discharged from further performance under the contract if the answer to the following test is positive:

        - **Test: Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties expressed in the contract that he should obtain, as consideration for performing those undertakings?**
        - It is the happening of the event, and not the fact that the event was the result of breach by one party of his contractual obligations that relieved the other party from further performance of his obligations
    - If the 'depriving' event occurs due to breach by one party, that party is in breach of contract
    - If the event occurs due to no one's fault, the contract may be *frustrated:*
        - Contract is simply set aside
- **How to approach the issue of classification in Alberta:**
    - **(1)** Apply the traditional condition/warranty test from *Bentsen:*
        - Look at the contract in light of the surrounding circumstances
        - Decide whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition
    - **(2)** Include consideration of the commercial setting when assessing surrounding circumstances
        - Genesis of the transaction, the background, the context, the markets in which the parties are operating
    - **(3)** If the intent is still not determined, then the basis for seeking out that intent should be an assessment of the gravity of the event to which the breach gave rise
- **Court MUST interpret words in their factual matrix or surrounding circumstances**
    - Surrounding circumstances: consists of objective evidence of the background facts at the time of the execution of the contract, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting
    - Examples: the genesis, aim or purpose of the contract, the nature of the relationship created by the contract, and the nature or custom of the market or industry in which the contract was created
    - Can include absolutely anything which would have effected the way in which the language of the document would have been understood by a reasonable man
- **Keep in mind when implying the intent tests that:**
    - Even where a breach of a term has produced a minor event, it can be treated as a breach of a condition
        - Parties may think some matter, seemingly of very little importance, to be essential. If they sufficiently express an intention to make the literal fulfillment of such a thing a condition, it is one
    - Common sense has a role to play
        - Using the word condition in the contract may be enough to establish this intention, but not conclusively
        - The fact that a particular construction leads to a very unreasonable result must be a relevant consideration
        - The more unreasonable the result, the more unlikely it is that the parties intended it, ad if they don't intend it the more necessary that they shall make that intention abundantly clear

PRINCIPLE OF GOOD FAITH IN CONTRACTUAL PERFORMANCE

Machtinger v Hoj Industries Ltd (1992)

Facts:

Issue: What should the notice period be in order to terminate employment if notice required in employment contract violates legislated standards?

Reasons:

- Intention is relevant to terms implied as a matter of *fact,* where the question is what the parties would have stipulated had their attention been drawn at the time of the contracting to the matter at issue
- Intention is NOT relevant to terms implied as a matter of *law*
- 3 types:
    - **Terms implied in fact**
    - **Terms implied in law**
        - The test is necessity - should be read into the contract as the nature of the contract implicitly requires, no more, no less
        - Not whether the term is "necessary" for the existence of the contract, but rather necessary in a **practical** sense to the fair functioning of the agreement, given the relationship between the parties
    - **Terms implied as a matter of custom or usage**

- Requirements for reasonable notice in employment contracts fall into the category or terms implied by law - don't depend on custom or usage, although this can be an element in determining the nature and scope of the legal duty imposed
    - Also don't fall into a category of terms implied as a matter of fact, where the law supplies a term which the parties overlooked but obviously assumed
- Bases upon which a term may be implied into a contract:
    - **Terms implied as a matter of custom or usage**
        - There must be evidence to support an inference that the parties to the contract would have understood such a custom or usage to be applicable
        - Terms are implied in this manner on the basis of a *presumed intention*
    - **Terms implied as necessary to give business efficacy to a contract**
        - These are terms which the parties to a given contract would obviously have presumed
        - Also implied on the basis of *presumed intention*
        - Correspond to Treitel's category of terms implied in fact
    - **Terms implied as legal incidents of a particular class or kind of contract, the nature and contents of which have to be largely determined by application**
        - Correspond to Treitel's category of terms implied in law

Bhasin v Hrynew (2014)

Facts: Plaintiff B was party to an enrollment director's agreement, Can-Am was also a party. The EDA contained a non-renewable clause exercisable on 6 months notice by either side and an entire agreement clause (no representations, warranties, terms, conditions or collateral agreements..).

- TJ held that Can-Am misled and was dishonest with Bhasin on a number of fronts. Said the contract between the parties contained an implied term of good faith, and that the entire agreement clause was not a barrier to implying a term of good faith because it would be unjust and inequitable to allow Can-Am to rely on it
- Based on the good faith term, Can-Am's non-renewal would have to be exercised fairly
- Entire agreement clause seeks to define the scope of the parties' contract in order to preclude allegations of terms

AB Court of Appeal

- Reversed the TJ's decision entirely
- There was no duty or term of good faith performance engaged by the contract because:
    - A court cannot imply a term that conflicts with an express term; and
    - The contract contained an entire agreement clause

SCC on good faith principle:

- The principle is that **parties must generally perform their contracts "honestly and reasonably, not capriciously and arbitrarily"**
- Means that parties have an **appropriate regard to the legitimate contractual interests of their contracting partner**
- The good faith principle does NOT found a cause of action. It is a STANDARD that organizes, unites, and underpins contract law
- **The good faith principle has two functions:**
    - **(1)** It is the source of and justification for certain aspects of contract law already in place
    - **(2)** It is the foundation for the courts to devise new contract rules or elements, though this must be a restrained, incremental and precedent-respecting manner
- The application of the organizing principle of good faith to particular situations should be developed *where existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the CL of contract and gives due weight to the importance of private ordering and certainty in commercial affairs*

The good faith principle as reasonableness and honesty

- **Reasonableness:**
    - The higher standard
    - Largely concerns good faith as a contractual term implied in law and implied in fact
        - *Implied in law:* in certain types of contracts good faith is implied as a legal incident (employment, landlord/tenant, franchise)
        - *Implied in fact:* good faith is implied as a term based on the officious bystander and business efficacy tests
            - SCC gives the example of the tendering contract, where good faith is "generally" implied
            - This is a limited avenue. Courts can only imply a given term based on the parties contractual interpretation and only if it is necessary or is in some sense, obvious from the circumstances of the particular transaction (McCamus)

    - Three other types of situations where the good faith term exists: (list is not closed and is always context specific. The cause of action is a breach of contract)
        - *(1) Where the parties must cooperate in order to achieve the objects of the contract*
        - *(2) Where one party exercises a discretionary power under the contract*
        - *(2) where one party seeks to evade contractual duties*
- Example of a contract with a discretion clause from *Bhasin*
    - *Mitsui & Co v Royal Bank:* The lease of a helicopter included an option to buy at the "reasonable fair market value of helicopters as established by the lessor"
        - Here the reasonableness requirement arose as an implied term that was necessary to give business efficacy to the agreement

- **Honesty**
    - This is the foundation for the SCC's new duty of honesty in contractual performance
    - This duty, which applies to all contracts, is a simple requirement not to lie or mislead the other party about one's contractual performance
    - This duty is **independently actionable** but is not a term or a tort
    - Operates irrespective of the parties' intentions
    - This duty cannot be broadly disclaimed and would not be captured by the standard entire agreement clause

Summary

- The good faith principle foes NOT change contract law fundamentals – rather is explains those fundamentals and moors them
- The good faith principle is not a free-standing rule or otherwise independently actionable
- Manifestations of it are limited
- In relation to its **reasonableness** arm, the principle underpins common law rules which, in types of relationship and types of situations, recognize obligations of good faith contractual performance
    - E.g. certain kinds of contracts: employment, insurance, landlord/lessee, franchise and generally in the tendering context
    - Where parties must cooperate, where one party has a discretionary power, and where one party seeks to evade contractual duties
- In relation to its **honesty** arm, the principle is responsible for generating the duty of honesty in contractual performance

Application of the law to the facts of *Bhasin*

- SCC rejects analysis by TJ where she implied a term of good faith, because it falls outside the existing relationships (e.g. insurance and franchise) and types of situations
- Also rejects implying a term of good faith due to the operation of the entire agreement clause

Chapter 8: Standard Form Contracts and Exclusion Clauses

Standard Form Contracts

- Reduce transaction costs
- They are not objectionable per se
- E.g. car rental companies - idea that they can charge a smaller amount of money per person because the contracts are not individualized

Exempting Clauses

- Often found in standard form contracts
- Purpose to limit the service providers liability for the contract going awry
    - E.g. *London Drugs* - warehouseman limiting liability for damage to property to $40 - can signal who is liable
- These clauses can be a reasonable device for defining the bargain reached by freely consenting parties in a case where there is reasonable bargaining power
- **Problem:** when an exemption is inserted in a standard form contract by a dominant party, or when an exclusion clause appears to relieve a contracting party of the responsibility that the contract seemed to intend to impose
- Need to determine if the exempting clause is part of the contract
    - Can have an exempting clause if it forms part of the contract - may provide a defence
    - If some malfunction where the clause isn't part of the contract, then the defence would prevail

- Two main ways of incorporating an exemption clause:
  - **(1) By notice**
    - *Thornton*
  - **(2) By signature**
- Three questions:
  - **Incorporation:** did the purported exclusion clause enter the agreement?
  - **Interpretation:** does the content of an agreed-upon exclusion clause apply to, or cover, the complained-of loss?
  - **Justification:** can an otherwise valid limiting clause nevertheless be rendered unenforceable because its application would be too unfair or contrary to public policy?

INCORPORATION: UNSIGNED DOCUMENTS

Thornton v Shoe Lane Parking (1970)

Facts: T parked his car in the parking lot, was seriously injured when placing goods in his trunk
Issue: Is the exempting condition, posted in the garage and on the ticket, part of the contract? Does the fact that the ticket was dispensed automatically matter?
Reasons:

- Lord Denning states that this case differs from the preceding cases because the ticket is issued automatically and not from a clerk. Therefore, there is no chance to look at the conditions, reject them, and get your money back. Effectively the offer is made by Shoe Lane in having the machine posted with the prices, and this offer is accepted when the driver places money in the machine
- This contract cannot be subject to conditions that are presented after this time. The writing on the ticket stating that it was subject to the conditions was not visible until after the contract had been formed, therefore the contract is not truly subject to the conditions. The ticket is simply a receipt showing that the contract had been formed
  - Shoe Lane did not do what was reasonably sufficient to give notice of the conditions to Thornton – a driver would have to walk around the parking lot to discover them, which is more than can be asked of a sensible patron
- Megaw J agrees, but focuses exclusively on the fact that the defendant did not give reasonable notice rather than the formation of the contract prior to the conditions being delivered
- Willmer J states that in cases involving an automatic ticket machine there is something distinctly irrevocable about the offer made by the company owning the parking lot

Ratio:

- In cases with automatic ticket dispensers, the contract is formed when the plaintiff inserts money into the machine and receives the ticket; conditions that are not seen until after this time are not binding as the contract has already been agreed upon without the conditions
- This case shows the importance of whether the exempting clause was part of the contract or not

INCORPORATION BY SIGNATURE

Karroll v Silver Start Mountain Resorts (1998)

Facts: K signed up for a ski race, signed a liability insurance waiver where she agreed to assume all personal liability risks. She was hurt and contended she was not bound because she wasn't given adequate notice of its contents
Issue: Is the indemnity agreement binding?
Reasons:

- McLachlin held that it was not a general principle of contract law that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. The burden was on Karroll to show fraud or misrepresentation, or that Silver Star knew or had reason to know she was mistaken as to terms of the document
- Essentially have two lines of authority here - need to reconcile
  - **Court holds that *Tildon* can't be taken as a general rule, but only a rule that applies in special circumstances.**
    - We do this by limiting the rule that the party offering the exclusion clause must take reasonable steps to bring to the other party's attention
  - **Pg. 515 - where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot be taken as having reasonably consented to that term, with the result that the signature is not a consensual act**
    - To allow someone to sign a document where they know the contents are not understood is not far from misrepresentation

    - Usually in a commercial situation it is safe to assume that the party signing intends to be bound
    - **If the circumstances are ones where the plaintiff is being rushed, or the clause excluding liability is inconsistent with the overall purpose of the contract then we have different circumstances**
        - **In these special circumstances there is a duty on the parties to take reasonable measures to bring the exclusion clause to the attention of the other side**
- Court discusses exceptions to rule that once you have signed you are bound:
    - Fraud
    - Misrepresentation
    - Non es factum
    - **When the other party knew or had reason to know of the other party's mistake as to terms, very close to an act of misrepresentation (*Karroll*)**
- Factors of if the duty to advise of the exclusion clause arises:
    - Does the clause run contrary to the party's normal expectation?
    - What is the length of the contract?
    - What is the format of the contract?
    - What is the time available for reading or understanding it?
    - Any other relevant considerations (case by case basis)
- Karroll signed the release knowing it was a legal document affecting her rights. The release was short, easy to read and headed in capital letters. In the circumstances, a reasonable person in would not conclude that Karroll was not agreeing to terms of the release. In any event, Silver Star took reasonable steps to discharge any obligation to bring the contents of the release to Karroll's attention

Ratio:

- It is not a general principle of contract law that a party must draw attention to an exclusion of liability clause
- To find it if there is a duty to draw attention, must look at:
    - The effect of the clause in relation to the nature of the contract
    - The length and format of the contract
    - The time available for reading and understanding the contract
- Absent extreme circumstances, people should take care of themselves

CONTRACTUAL INTERPRETATION

- The goal of contractual interpretation is to understand the mutual and objective intentions of the parties expressed in the words of the contract (*Sattva*)
- This involves the **plain meaning rule** and the contract's **factual matrix**
- When parties fail to address an important aspect of their contractual relationship, the court may be able to fill in the blanks through implied terms - but can't count on this since the test in *Matchtinger* can't be relied on with certainty

Plain Meaning

- Need to read the contract as a whole, giving words their ordinary and practical meaning with the surrounding circumstances known to the parties at the time of formation of the contract
- Consideration of surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning

Factual Matrix

- Considering the surrounding circumstances does not offend the parol evidence rule
- The factual matrix *must be considered even absent ambiguity*
- Surrounding circumstances includes objective evidence of the background facts at the time of the execution of the contract
    - Knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting *(Sattva*)
- Examples of relevant background facts include:
    - The genesis, aim or purpose of the contract
    - The nature of the relationship created by the contract
    - The nature or custom of the market or industry in which the contract was executed
    - Surrounding circumstances can include absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable person