COMMERCIAL TRANSACTIONS CAN

Key Components of Commercial Law

Commercial Law is the body of law that governs the sale and payment of goods and services between business entities.

→ Transactional law between business entities, typically the sale and payment of goods

- Domestic sales only
- Payment usually **not with cash**
  - Checks, bills of exchange, and promissory note
- Guarantees
- Bankruptcy and insolvency
- Commercial litigation

Sources of Commercial Law

- **The Law Merchant** → an aspect of common law and equity
  - it was administered by specialized common law courts
  - Emerged from the customs of merchants and has become part of common law
- **The Common Law** → took over law merchant
  - at one point sales law came solely from the common law
  - Contract, property, unjust enrichment, agency
- **The Victorian Commercial Law Codifications**
  - Sale of Goods Act
  - Bills of Exchange Act
  - Codifying the common law
- **Modern commercial law codifications**
  - Statutes that regulate the area on a comprehensive level
  - Two recent significant codifications
    - PPSA → Outside the scope of this course
    - Securities Transfer Act

The primary source of commercial law is the <u>statute</u>!!

Interests Protected by Commercial Law

- Facilitation of commercial transactions
  - Structures permit parties to transact how they wish
- Recognition of commercial expectations
  - Standards expected in transactions
  - Codifying wished and expectations of consumers
- Promotes certainty, predictability and timeliness

CHAPTER 1: SALE OF GOODS ACT

A. Introduction

Two fundamental aspects of sales law:

1. **The terms of the contract:** time, place of delivery, quality of goods, fitness of goods, remedies available for the breach
2. **Property concerns:** When does the title pass? What are the consequences of the title passing? What happens when a seller does not own the goods?

S.58(1) of the Sale of Goods Act provides that the common law and equity continues to apply UNLESS it is inconsistent with the express provision

58(1) The rules of the common law including the law merchant except insofar as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of the goods.

**** SO... sales law provides the core substantive rules but DOES NOT oust the common law****

How the Common Law is applied (*Bank of England v Vagliano Brothers*):

- **Starting point is the statute**... emphasis on the wording of it
- If there is ambiguity in the statute then you can go back to the common law to help to interpret the statute

The Scope of the Sales of Goods Act

- Takes the principles of common law and puts them into a statute
- If something is not in the provisions, then it does not apply under the act
- **S.1 Definitions** help to determine what is governed within the act
- **S.3** defines a contract of sale and explains what it consists of

B. The Nature and Function of a Contract of Sale

Transfer of property (s. 3(1))

Section 3(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.

What is a Contract of Sale?

- **S.3** of the Sale of Goods Act
- Seller transfers or agrees to transfer the property to a buyer for money consideration
- Both an actual transfer and an agreement to transfer are covered → **Not restricted to a passing of title**
    - Includes and agreement to sell as well as a sale
    - What's the difference between a sale and an agreement to sell?
    - Sale = actual transfer of property between seller and buyer
    - Agreement to sell: The sale has not occurred yet

Transfer of property (s. 3(1))

Section 3(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.

****** Elements of whether a transaction is governed by the SGA ******

1. Transfer of property from seller to buyer
2. Property must be goods
3. Consideration must be money

Goods:

1. Chattels personal OTHER THAN things in action or money;
   - Not real property and not intangibles

2. Emblements, industrial growing crops, and things attached to or forming part of the land that are **agreed to be severed from the land before sale** or under contract of sale - **Not considered a good prior to severance.**
   - Oil and gas, etc. continue to be part of the land unless they are extracted

Property = ***general property*** which does not have a limited right and not merely a minimal right → **must be transferring ownership of property**

General property = the idea of the absolute transfer

- Need to transfer the entire interest in the goods
- As opposed to the transfer of a more limited interest or right
- A lease does not count
  - You have possession, but I am still the owner
- Question: What about 50% interest in a boat
  - That's okay, partial interests are okay
- But not bailments, secured transactions

Sale = bargain of sale as well as sale and delivery, so you do not need to have possession of the goods in order to sell them.

**** Transfer of possession and transfer of title (ownership) are two different things!!****

Identify which of the following transactions are within the scope of the *Sale of Goods Act*? If it is within the scope of the Act, indicate if it is a sale or an agreement to sell.

Problem	Does the SGA apply?
Antonio gives a gold ring to his daughter as a birthday present.	**No – needs to be monetary consideration**
Becca agrees to give Casey the right to extract gravel from her land, and Casey agrees to pay $10,000 for this right.	NO – the gravel is not considered a good. It is part of the real property. This is a *profit a prendre*, or a real property right • It could be a sale of goods if it was structured different • Ex. The seller extracts the goods and then sells you the extracted goods • Question – who is severing the goods from the land?
Deepak borrows $10,000 from Emily and transfers title to his Rolex watch to her on the understanding that Emily will retransfer title back to him once he repays the loan.	NO – this is not a sale. It is a secured loan/transaction. • Not all of the rights have been transferred. Deepak still has a limited interest
Felicity agrees to transfer her computer to Gaston in exchange for a transfer of his phone to her.	NO – needs to be for money, not an exchange of goods. But this would be covered by contract law
Hasna agrees to sell a rug to Ian for $500. Hasna has not yet made the rug nor bought any of the materials that she intends to use to produce it.	YES – this is an agreement to sell • This cannot be a sale, because the goods do not yet exist. But it can be an agreement to sell
Jack agrees to give up possession of his vehicle to Kerry in return for $500 each month for so long as Kerry wishes to use it.	NO – this is rent, not the entire interest. Jack still has ownership rights
Laura agrees to sell all the apples in her orchard to Manny for $1500. The apples have not been picked and are still on the trees.	YES – Agreement for sale. Also this is a growing crop, so it is included as a good
Nora purports to transfer title to a bicycle to Oscar for $200. She does not own it – Petra is the owner of the bicycle.	YES – the contract contemplated a transfer of property. The intention of the K is to transfer the interest. The fact that the seller doesn't have the interest is a breach of K, but has nothing to do with the K itself.

STEP ONE: DOES THE SGA EVEN APPLY? → If the SGA does not apply, remember that you still probably have rights arising elsewhere (Contract, bailment etc.)

When does it matter if the SGA applies?

- Many times the result is the same, because the SGA is just a codification of contract law
- The SGA has a number of formal requirements that other K law isn't required to have
  - ex. The writing requirement in the SGA

Writing Requirement

s.6(1) K for goods over $50, you cannot enforce K unless:

- If the K is wholly executory and the goods have yet to be delivered and the seller has not obtained part payment, there is a requirement of writing
- **So either (1) you delivered part or paid part OR (2) it is in writing**

** But this only applies when the SGA applies

Sale of Goods or the Provision of Labour/Services

- This distinction goes back quite a ways
- If it is labour/services, there is no writing requirement (Statute of Frauds requirement)
- In a SGA contract, implied condition of fitness for purpose
  - In a K for labour and services, the obligation of the supplier is different. There is no promise of fitness for purpose. All they do is promise to use reasonable skill and care in the provision
    - Important difference: In the case of sale of goods, I promise that the goods will be reasonably fit – a promise of strict liability. I may have exercised all skill and care in production, but if it is not fit for purpose, I am liable
    - But in the services case, I just need to use reasonable skill and care

Two IRRECONCILABLE CASES:

***Canada Bank Note Engraving and Printing Co v Toronto Railway Co* (1895)**

Ratio: If the chattel is transferred at the end of the transaction it is a K for the sale of goods

- P were engravers and were suing D for the price of bonds and coupons printed by them for D
- D refused to accept the bonds because they were not in proper form
- **Issue: is this a contract for the sale of goods within the Statute of Frauds or a contract for work, labour and materials not covered by this Act?**
    - There was a contract for the manufacture and delivery of a chattel that was supposed to serve a certain purpose
    - Does not matter that the chattel may have no value to anyone except the person ordering it
- **Lee v Giffin = governing law**
    - "If the contract is intended to result in transferring for a price from B to A, a chattel in which A. had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale.
    - Even if labour goes into it, **if the end result is the transfer of a chattel, it is a K for the sale of goods**
        - Painting, sculpture, etc. = final transfer
        - Therefore the sale falls under the Act
        - However, the court found that there was not sufficient note or memorandum in writing (s.6)

Borek v Hooper

Ratio: If the materials are proportionately less valuable than the labour put in, it's a K for service

- Plaintiff sued a painter who created a large painting for her for $4000 but began to yellow after 3 years and then chip in the corner
- The trial judge awarded 50% of the price based on the fact that it should have had a 10 year life
    - Robinson v Graves:
        - Oral K to paint a portrait was a K for labour, not goods
        - **The skill and labour involved are what you are paying for → The material itself is worth nothing to you, the substance of the contract is the skill of the artist**
        - It's incidental that materials pass between you
        - As such, this was not a K for goods but for service (work, and labour, and materials)
    - However in this case, it may not matter because "a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."
        - So for these reasons, and not the SGA, there is a breach
- **What is the value of the labour as compared to the materials?**
- The court found that, in this case, it was a contract for the exercise of skill and therefore was a contract for work and labour and materials
- Therefore the SGA would not apply
- If the SGA had been applied then there was evidence to show a breach of the implied condition of merchantability and that same evidence can be used to show a breach of warranty of good quality materials used by the artist
- So the artist is liable to the plaintiff but for different reasons than given by the trial judge

Courts in Canada will go with either one or the other

- Very opposed

Lee v Giffin is more commercially certain – you know if a chattel is transferred or not. So is it a better test?

**** WOOD LOVES COMMERCIAL CERTAINTY**

Why not adopt the first test?

- Maybe you don't want the writing requirement

But is the better solution just to get rid of the writing requirement?

Hearns v Rizzolo, 2012 NSSC 256

Contract of Sale – 3(1)

Ratio: If you have a swap of items, think – is the consideration 2 goods or is it 2 off-setting sales for money?

1. Goods 2. Money consideration 3. Entire interest

- Cannot be a pure bargain – goods for goods
- **But if you value each jeep at $10,000 and trade them, it becomes 2 simultaneous sales for money consideration of $10,000 but the money never passes because there is an offset**
- But if you never moniterize the value and you simply trade, there is no offset
- In SGA, there is an implied condition that you have title to sell
    - The Court says that in a K for barter, there is no implied term
    - Wood thinks this is wrong – parties must have intended that the trade was not subject to encumbrances

C. Delivery

The issue of delivery has to do with the transfer of **possession** and not the transfer of **title**

Section 1 Definition – voluntary **transfer of possession** from 1 person to another

- **This is not the same as passage of property, which is predicated on the transfer of title**
- Transfer of title may occur upon transfer of possession but this is not always the case
    - Title may pass but delivery may not have occurred or delivery may have occurred but title has not passed

Whats the difference between payment and delivery?

- **Section 28** of the SGA – delivery of goods and payment are concurrent conditions unless otherwise agreed
    - Seller must be ready and willing to give possession in exchange for price and buyer must be ready and willing to pay in exchange for possession
    - **General rule (unless otherwise agreed): delivery is against payment**

s.28 – Delivery and payment are concurrent conditions but this can be varied by K

- But what if one party is in breach?
    - If the seller tenders delivery but buyer doesn't pay, the seller doesn't have to turn over the goods → and vice versa
- What are the remedies available to the innocent party?

Delivery: Time is NOT of the essence, depends on K terms

12(2) – If time is of the essence for delivery, it depends on the terms of the K

- In **commodities K**, time is of the essence in terms of delivery, so if you don't deliver on the delivery date, the buyer can terminate
    - Otherwise, it depends on the K → See ***Hartley v Hymans***
    - **Buyer can make time of the essence** by specifying a reasonable date after the breach by which the goods must be delivered
    - Buyer transforms the delivery date into an essential term
    - But you can also recover damages for loss – ex. Damages for money paid to rent equipment for a week

Payment: Time of payment is typically not of the essence

12(1) – Unless a different intention is in the contract, time of payment is not deemed to be the essence of the K

- So what if the buyer won't pay?
    - Seller doesn't have to deliver the goods and has an unpaid seller's lien on the goods
    - If the buyer doesn't pay, the seller can sell the goods

Ex. Brandon agreed to sell his violin to Anita for $3,000. Brandon indicated that, as he needed it for a performance, it would not be available until September 30. Anita gave Brandon a down-payment of $500.

(a) When September 30 arrives, is Brandon required to deliver the goods to Anita at her residence, or is Anita required to go to Brandon's residence to pick up the violin?

- Location – where does delivery occur?
  - **S. 29(1) – The location of delivery is based on the contractual intention of the parties**. Is it expressly stated who is to delivered? Is it implied?
  - If is a delivery company, its probably implied that they will deliver to you
- 29(2) – If the Court cannot determine location expressly or impliedly, the place of delivery is the seller's place of business or the sellers residence (THIS IS THE DEFAULT RULE, BUT CAN BE CONTRACTED OUT OF)
  - → Anita must go to Brandon's residence to take delivery
- (3) Unless there is an indication to delivery and both parties know where the goods are, then that is the place of delivery

(b) If on September 30 Brandon fails to tender delivery, can Anita immediately terminate the contract for breach?
It is not an automatic rule that failure to deliver gives you the right to terminate

- "Time is of the essence" → "Of the essence" = to the root of the K
- 12(1) – Unless a different intention is in the contract, time of payment is not deemed to be the essence of the K – it's not an automatic right to terminate future performance – BUT THAT'S TIME OF PAYMENT
- 12(2) – If time is of the essence for delivery, it depends on the terms of the K → *Look at the case law here*
- 12(3) – Month means calendar month
  - This means that this is the same day of the next month
  - 1 month after Jan. 31 is Feb 28/29

(c) If on September 30 Anita fails to pay for the violin, is Brandon required to deliver it to her?
The relationship between delivery and payment is that they are concurrent conditions – the seller doesn't have to deliver until buyer tenders payment (s.28)

- This doesn't mean he can terminate the K and sell to someone else
- **There has to be a reasonable period of time for payment to be made before he can terminate**
- Time of payment is not of the essence
  - Again, party may be in breach and there may be consequences for it, but you cannot immediately terminate
- But if Brandon extends a credit period, he cannot demand payment against delivery

(d) What would be the result if the parties did not establish a delivery date?
Section 29(4) → When there is not time fixed, seller is bound to send goods within a reasonable time

Section 29

29(5) and (6) – Methods of Delivery

- (5) When the goods at the time of the sale are in the possession of a third person, there is no delivery by the seller to the buyer until the third person acknowledges to the buyer that the third person holds the goods on the **BUYER**'s behalf.
    - This occurs often in the warehouse context
- (6) Notwithstanding subsection (5), nothing in this section affects the operation of the issue or transfer of any document of title to goods.
- Negotiable document of title – idea here is that certain kinds of documents → Transfers goods through symbolic delivery
    - Instead of giving you the car, I give you my car keys
- **In a warehouse, the warehouse may say they no longer hold for seller, but for buyer**
    - But there may be a bill of lading or warehouse receipt which are symbolic of change of control
    - Goods will not be delivered until someone produces the negotiable document of title (the bill of lading or warehouse receipt)
    - Only person with possession of the paper can demand delivery from the warehouse

ss.27 – 29 SGA

Where should delivery occur?

- The parties may expressly agree upon this, or it might be implication (**s.29**)
- In absence of an express or implied term in a contract, the place of delivery is the seller's place of business or residence (**s.29(2)**)
- If the contract is for the sale of specific goods which the parties know upon making the contract are in a certain place, then that place is the place of delivery (**s.29(3)**)

When should goods be delivered?

- When there is not fixed time, the seller is bound to send them within a reasonable time frame (**29(4)**)

What are the consequences of late delivery?

- The seller may be liable for damages for loss caused by late delivery, but the buyer cannot immediately terminate the contract since whether the time is of the essence or not depends on the terms of the contract (**s.12(2)**)

What is the appropriate mode of delivery?

- Delivery of documents of title or a bill of lading counts as delivery
- Providing the means of controlling the asset is regarded as delivery

***Hartley v Hymans* → Interpretation of 12(2)**

- SGA s. 10 → **Time is assumed not to be of the essence**, unless a different intention appears in the K
  - But see also s.61 which states that all of the rules of common law are in force
- Common law states that the time term is not based on the words of the K (unless words are express), but on the ***nature and character of the goods***
- Ordinary Commercial K – **prima facie time is of the essence with respect to delivery**
  - In mercantile K, stipulations as to time (except as regards time of payment) are usually of the essence of the contract
  - If time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot prima facie call upon the buyer to accept delivery after that period has expired.
    - Seller has failed to fulfill the bargain
- In mercantile K, time is generally considered to be of the essence
- If time were not of the essence for these commercial Ks, there would be no commercial certainty – how long do you have to wait?
  - Especially important when the commodity is sold to sub-buyers and more contracts down the line depend on this
  - SO if time is of the essence, you know if you have to go out and buy substitute goods
- **But outside of those contracts, you have to look at the expectations of the parties**
  - For equipment or something, time is probably not of the essence
    - You are in breach and you can get damages
    - But you cannot terminate
  - But the conduct of parties may show contrary intention
    - If you tell the seller you need the goods for X, then time is of the essence (must have been the intention of the parties)
  - But can Anita be left waiting forever?
    - No you need to afford them a reasonable time. If that reasonable time passes, then you can terminate

Notes:

- **Time of delivery in non-commercial contracts are not assumed to be of the essence unless the buyer has communicated the special need for the goods by a particular time**
- Even if time is of the essence, the buyer may waive this by requesting delivery at a later date

Remember: Difference between timing of PAYMENT and timing of DELIVERY

D. Passage of Property

Passage of Property Rules:

1. Risk of loss is borne by the owner – SGA s. 22(1)
    - Owner generally bears loss if goods are destroyed
2. The right to sue for the price – SGA s. 49
    - Seller cannot sue for price unless property has passed to the buyer
3. Risk of insolvency of the seller
    - If the property has passed to you, then the goods are YOURS!
4. Claims against 3rd parties – SGA s 23(1)
    - Nemo dat vs. BFPV
5. Buyer's right to reject specific goods – SGA s 13(4)

SGA draws important distinction between specific goods and unascertained goods

Specific Goods: goods that are identified and agreed upon at the time of the contract of sale

- Here, the transfer of title occurs **as soon as the contract is made** (**20(2)**)
- If the seller is bound to do something to specific goods to put them into a deliverable state, the property does not pass until the thing is done and the buyer has notice of it (**20(3)**)

Unascertained Goods: are not identified at the time of contract formation, but the nature of the thing is specified → sale by description

- Example – "any color will do", this would be **wholly unascertained goods**
- Sales from a bulk are **quasi specific goods** because the items are from a **limited specific source** but you do not know exactly which ones from that source you are getting
    - **They are UNASCERTAINED goods until you pick which from the bulk you are buying**
- Property will NOT pass to the buyer until the goods become ascertained (**s.18**) NO EXCEPTION TO THIS RULE!

But there is a further distinction

- Wholly unascertained vs. sale from a bulk
- Sales from a bulk → Where a ship has a cargo on board that is a grain of which you have agreed to buy 10/100 tonnes. Not a sale of specific goods, because you haven't identified the goods, just agreed to take a portion of a bulk
    - 100 tonnes of grain vs. 100 tons of grain from a certain warehouse

Issues affected by passage of property:

- Goods remain at seller's risk until the property is transferred to the buyer. At that point the risk is on the buyer even if actual delivery has not been made (**s.22(1)**)
- If delivery has been delayed by the fault of buyer or seller, the goods are at the risk of the party in fault if any loss occurs due to that fault (**s.22(2)**)
- **Insolvency of seller**
    - If a seller goes insolvent before goods have been transferred and the **title has passed** then it is the buyers property
    - If the **title has not passed** then the buyer can file proof of claim to try and get the money that they paid back but they would be considered an unsecured creditor so they may not get much

Passage of property rules:

- **Transfer of title cannot occur until the goods are ascertained** (**s.18**)
    - THIS CANNOT BE VARIED BY K
- For SPECIFIC or ASCERTAINED goods → Property is **transferred at the time that the parties intended i**t to be transferred which is determined by the terms of the contract and the conduct of the parties (**s.19(1)**)

- (3) In determining intention, regard may be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
    - In many situations, the parties don't specify intention – that's when you look at the presumptive rules
    - On exam: Don't jump straight into applying the presumptive rules – see if there is a shown intention to show that parties have indicated when property is to pass
- (4) In the absence of any contrary intention, the passage of property is determined by application of the rules set out in SGA s 20.

- **S.20** sets out the rules for ascertaining the intention of the parties unless a different intention appears (so if you can't figure out the intention of the parties, refer to this section)

BEFORE YOU APPLY s.20, APPLY s.19 → IS THERE A SPECIFIC INTENTION SHOWN BY THE K

So is there something in (1) the contract or (2) conduct manifesting as intention that would specify when the property would pass?

S.20 Rules for intention of parties:
Specific Goods:
20(2) – General rule for **SPECIFIC GOODS** with an unconditional contract is that if the goods are in a deliverable state, the property passes immediately upon the **contract being formed**
20(3) – Where the seller has to do something to the specific goods before they can be sold, the property does not pass until the buyer is notified of the **completion of the condition by the seller**
20(4) – Where the seller has to do something to the specific goods to determine the price, but they are otherwise able to be sold, the property does not pass until the thing is done and the buyer is notified
20(5) – when goods are delivered to the buyer on terms of a trial period (so they can try it out for a period of time risk free), there is no contract of sale

- **20(5)(a)** the property passes to the buyer if the buyer signifies his approval in the product or acceptance of the contract of sale
- **20(5)(b)** if the buyer does not signify his acceptance, but does not reject the goods and keeps them until the time period lapses, or if there was no set period, then a reasonable time lapses, then property passes to the buyer

Unascertained Goods:
20(6) – unascertained goods; The property does not pass until there is **unconditional appropriation** (**a selection that is irrevocable**) by either buyer or seller with assent from the other, the assent can be express or implied and can be given before or after appropriation is made
20(7) – if the seller delivers the goods to the buyer or a carrier or other bailee named by the buyer or not, the seller is deemed to have unconditionally appropriated the goods

Reservation of Right of Disposal

- Delivery of the goods to an independent carrier is ordinarily regarded as delivery to the buyer. **SGA s 32(1)**
- If the seller reserves a right of disposal, the property does not pass until the conditions are satisfied (most often the condition concerns payment). **SGA s 21(2)-(3)**
- Often a right of disposal is reserved by the seller having a bill of lading made to the order of the seller. **SGA s 21(3)**

Jerome v Clements Motor Sales (sale of specific goods)
Ratio: Property does not pass on specific goods until they are put into a deliverable state AND buyer is notified

- Buyer purchased vehicle from seller with conditions regarding when the title would pass (repairs needed to be done to the car before it was considered to belong to the buyer)
- Title was to remain with seller until conveyed or until full purchase price is paid
- Seller claims all conditions were met on Thurs, July 11 **but had not yet informed buyer**
- Fire occurred on Friday, July 12 materially damaging the 1955 Nash
- **Issue: Who's liable for the damage??**
    - **S22 SGA** states that goods remain at sellers risk, until the property has been transferred to buyer
    - **S20(3)** states that the **seller has to inform the buyer when the conditions have been met**
        - Whether the change to be made is trivial or not is irrelevant
        - The notification has to be done <u>after</u> the thing is done, not before
- Seller argues that the repairs were done and the buyer knew to pick up the car on the Friday or Saturday
    - But this was not stated in the contract, in fact it said that there was to be no further terms or conditions other than what was in the contract
- **The property had not yet passed to the buyer at the time of the fire because the seller had not informed the buyer that the condition had been met**

Caradoc Nurseries Ltd v Marsh **(**sale of specific goods, but others are unascertained)
Ratio: Unascertained goods do not pass property until the ascertainment is IRREVOCABLE

- Selling shrubs and trees
- Only the large silver maple was ascertained, everything else was sales by description but not specific
- The seller sent the goods to be delivered to the buyer but the buyer refused to accept them because they were supposed to be delivered in the fall but did not come until April
- **Issue: did the property pass to the buyer?**
    - **In order to sue for price, you have to show that property has passed to buyer**
    - **If the property has not passed, the seller can only sue for damages**
    - Must rely on s.19, rule 5(i) of SGA because there was no express intention of the parties regarding the passing of property
    - There was no appropriation by the buyer
    - Buyer's assent is implied by terms of the contract
- There has been **appropriation by the seller with consent of the buyer** – the seller would pick out the shrubs and trees and deliver to the buyer
- **When does unconditional appropriation occur??**
    - When the goods were delivered to the plaintiffs house, they are ascertained and the seller can no longer turn around and substitute any of the goods
    - Prior to the delivery, the seller could have turned around and substituted any of the goods and therefore they are still not ascertained.
- Because unconditional appropriation occurred, the property had passed and the seller can sue for payment of the price
- The appropriation became final upon delivery to the seller but did not require the goods be accepted by the buyer, the simple delivery is enough to require payment to the seller

Goldcorp Exchange Ltd v Liggett (unascertained goods – quasi specific)
Ratio: If it is a sale from a bulk, property does not pass until the goods from the bulk are irrevocably ascertained

- Sales by the bulk
- Instead of delivery of gold coins, the deal was providing a warehousing, or safe keeping service
- Problem is that there was no allocation or earmarking of which goods belong to which owner
- If they went to the sellers premises, it was all sitting in bulk

- **Issue: When did property pass to buyers?**
    - There has not been ascertaining of the goods
    - The buyer had a contract for sale but the property did not pass – they had a claim for damages but this is an unsecured claim → BANK HAS A SECURED CLAIM AND TOOK ALL THE GOLD
    - If you could satisfy the court that the buyer was retaining proportionate interest in the entire bulk of goods, then this is possible and the buyers would become co-owners

Why wouldn't you want property to pass?

If there is a fire, the owner bears the loss → so depending on what side of the transaction you are on, you may or may not want to be the owner

1. Sale of Specific Goods

Amy agrees to sell her copy of *Bankruptcy and Insolvency Law* to Ben. Unfortunately, she spills a cup of coffee on it. She buys a used copy of the book from the U of A bookstore and tenders it for delivery on the delivery date. When, if at all, did property pass to Ben under the contract of sale?

Are the goods ascertained? Yes. This is a sale for specific goods per the definition in the SGA.

- In a K for specific goods, you agree to sell a specific thing – you cannot substitute anything else.
- In terms of the second book, property NEVER passed to Ben – only the original book would qualify

Under 20(2) – The original book passed to Ben when the K was made (property of the book passed immediately), so the seller could not substitute another book

At the time of delivery, the book is no longer in the condition that was expected, so there is a breach of the term as to the quality of the goods, so the buyer has an action for damages – you haven't met the quality stipulation.

2. Sale from a Bulk

Amy has four copies of *Bankruptcy and Insolvency Law.* She agrees to sell one of them to Ben. She takes one of them off her shelf and attaches a note stating: "Ben's copy". Before the delivery date there is a fire that destroys all four copies. Did property in the book pass to Ben? Can she buy a replacement and tender it at the delivery date?

NO – property did not pass to Ben.

This is a sale of unascertained goods from a bulk – Ben doesn't ask for a specific book, just one of the 4. In this case, the buyer has assented to the seller making the selection. And though she put a sticky on Ben's copy, it is not UNCONDITIONALLY ascertained until she can no longer substitute in a different product. That was not the case, so property never passed to Ben. → See *Cardoch Nurseries*

BUT this an example of a sale out of a bulk. So it had to be one of THOSE four. So she cant substitute another book that she goes out and buys.

- **The seller had a range of goods that they could choose from, but the K provided that it would come from the particular bulk – so another book bought separately would not be part of that bulk**
- There is a restriction of what bulk you choose from

3. Appropriation by Exhaustion

Charlize has a crate of 12 bottles of 1986 Chateau Margaux. She agrees to sell ten of these bottles to David and the delivery date is set for September 23. On September 17, she drank one of the bottles. On September 20, one of the bottles fell on the floor a broke. On September 23, she delivers the ten bottles to David. When, if at all, did property in the wine pass to David?

This is a sale of unascertained goods and also a sale from a bulk. She agreed to sell 10/12. So property doesn't pass at time of K. But once the 2nd bottle breaks, there is only 10 bottles left. **SO NOW the bottles are unconditionally ascertained – appropriation by exhaustion.** So at the moment she drops the 2nd bottle, property passes to Davido.

- Time of delivery doesn't matter, since she has no ability to substitute other goods.

4. Pure Unascertained Goods

Charlize agrees to sell ten bottles of 1986 Chateau Margaux to David and the delivery date is set for September 23. Charlize did not have any bottles in stock at the time of the contract. On September 16, she acquired a crate of 12 bottles. On September 17, she drank one of the bottles. On September 20, one of the bottles fell on the floor a broke. On September 23, she delivers the ten bottles to David. When, if at all, did property in the wine pass to David?

THIS IS PURE UNASCERTAINED GOODS – NOT SALE FROM A BULK.

- Whether she has stock on hand or not actually doesn't matter – its if the buyer agreed to buy specific from a bulk or ANY bottle
- It's up to her where to get them
- So there is no passage of property until the goods are unconditionally ascertained

    - She can still select other goods and go get them in the market
- In this case, property passes on Sept. 23

Sale of Good vs. Agreement to Sell

K of Sale includes an agreement of sale as well as a sale

- Sale = property has passed
- Agreement = property has not yet passed

Both can be for specific OR unascertained goods

E. The Terms of the Contract

1. Warranties and Conditions

Section 1 of the SGA:

"Warranty" means "an agreement with reference to goods that are the subject of a contract of sale but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

- There is no definition for condition, but it is clear that a breach of condition gives you the right to reject the goods

Distinction between **Condition** and **Warranty (ss.12 – 16)**

Section 13(2) - Whether it is a condition or warranty will depend on the construction of the K

If found to be a condition: The breach of which gives rise to a right to treat the contract as **repudiated** (**13(2)**)

- The innocent party can terminate the contract and sue for damages, OR they can accept the goods and ask for a lower price and still sue for damages
- HOWEVER, in the case of specific goods, the breach of condition will be treated as a breach of warranty and not as grounds for rejecting the goods, unless there is an express term in the contract stating otherwise (**13(4)**)

Warranty: When there is a breach of warranty, the innocent party does not have the right to terminate the contract, they can only sue for damages

Intermediate term: doesn't always have to be a condition or warranty, the remedy will be based on the seriousness of the breach → Not allowed on a strict reading on 13(2) – emerged later in the case law

- If the breach is such that it goes to the root of the contract then the other party will be entitled to treat himself as discharged, but otherwise not (*Bremer*)

Innominate terms are EXPRESS terms of the K. If there is an implied term by the SGA, the SGA classifies it.

Cehave NV v Bremer Handelsgesellschaft mbH

Ratio: Whether a term is a warranty or condition may depend on the seriousness of the breach → Derived from CL

Facts: Seller agrees to sell OJ pellets to buyers. 2 K for 6000 tons, six installments of 1000 tonnes. Price in K1 is 73.50/tonne and price in K2 is 73.75/tonne. Contained terms: "Shipment to be made in good condition... each shipment shall be considered a separate contract." Upon delivery, buyer refuses shipment saying it is not in good condition. Seller refuses repudiation. An agent for the seller resells it, to the buyer for significantly less $$.

Issue: Was the term "shipped in good condition" a condition or a warranty?

Reasons:

- **Condition** – breach allows for repudiation OR damges
- **Warranty** – breach allows for damages, but still have to perform obligatons
  - **Innominate terms**: terms that cannot be classified as a warranty or condition until the breach has occurred
    - Long line of case law stating that whether something was a condition or a warranty depends on whether the breach goes to the ROOT of the K (Hong Kong Fir)
- **SGA s.61(2)** says "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act... shall continue to apply to contracts for the sale of goods."
  - **1. On true construction, is a condition strictly so called, that is, a stipulation such that, for any breach of it, the other party is entitled to treat himself as discharged.**
  - **2. If it is not such a condition, then look to the extent of the actual breach which has taken place. If it is such as to go to the root of the contract, the other party is entitled to treat himself as discharged: but, otherwise, not.**
  - **3. To this may be added an anticipatory breach. If the one party, before the day on which he is due to perform his part, shows by his words or conduct that he will not perform it in a vital respect when the day comes, the other party is entitled to treat himself as discharged.**
- "Shipped in good condition"
  - Case law for "fair average quality" states that if it is simply a small portion that is not up to par, then the whole lot cannot be rejected and a price allowance must be given – so is the case for "shipped in good condition"
  - "shipped in good condition" was an innominate term that depends on the severity of the breach
  - the buyer should be bound to accept the goods and not reject them unless there is a serious and substantial breach, fairly attributable to the seller.

QUESTION: DID YOU GET SUSBTAINTIALLY WHAT YOU BARGAINED FOR?

Implied Terms: Act SPECIFIES whether these are conditions or warranties

1. Title, Freedom from encumbrances and quiet possession. SGA, s 14
2. Correspondence with description. SGA, s 15
3. Merchantable quality, SGA. s 16(4)
4. Fitness for purpose. SGA s 16(2)
5. Sale by sample. SGA s 17

Can you contract out of the implied terms?

Section 54: Any implied term can be varied by express waiver, usage, express agreement or by the course of dealings between the parties

Section 16: An implied term is not automatically excluded by an express term unless there is a conflict – then the implied term must yield to the express term

Courts have typically held that a provision that says "we waive all implied terms of the SGA" generally doesn't work on the obligation to supply goods by description (Section 15)

- If you don't sell by description, what do you have to do?

Section 14 – Quiet Possession & Title

SGA 14(a): Seller will have title → CONDITION
Unless the K says otherwise, the seller has the right to sell or will have the right to sell at the time property is to pass

- For an agreement to sell, I may need to get the goods. But I don't need to have title to them until the time I need to deliver them

SGA 14(b): Implied **WARRANTY** of quiet possession

- An implied warranty that goods are free from any charge or encumberance

Ex. The seller steals the goods and then sells them – or has stolen goods, even if they didn't steal them

- But under s.14, it doesn't matter if the seller knows they are stolen are not. If there is no title, the seller is liable

14(c) – an implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time that the contract is made.

Rowland v Divali

Ratio: The title to goods is a condition → Even if you are used the car, you purchased title. Not getting title is a total failure of consideration

- P bought a car from D and took possession of it at once, after which he took it to his shop to sell and sold it to a third party. A few months later, it was discovered that the car was stolen

Issue: can the P recover the money he paid to D on the ground of total failure of consideration?

- There is an implied condition that the seller has the right to sell the car
  - **S.52 of the SGA:** "Where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty" the buyer is not entitled to reject the goods, but his remedy is in damages
    - D argues that since P had 4 months of possession, it is a warranty and not a condition
    - In past cases: P got PARTIAL enjoyment, so he did not entirely not get what he bargained for → There was some benefit derived
    - But this is not the case here. He did not get at all what he asked for – a car he could resell.
- D claims that, due to the amount of time that has passed, the P cannot now rescind on the contract
- **The court finds that, in this case, the P did not receive any portion of what he agreed to buy as the seller had no actual right to sell him the car and therefore the P did not ever have title to the car**
- Therefore the court finds that there is a complete lack of consideration in that the P did not get anything for the money he paid
- Although generally a buyer cannot a rescind a contract if he cannot return the subject matter, the court finds that in the case where there has been a breach of the implied right to sell, the buyer should not be deprived of his right to have his money back because he cannot restore the goods
- **There can be no sale at all of goods that the seller has no right to sell**

SGA → Once goods are accepted, all goods become warranties. So once you accept the goods, section 52 is triggered

BUT – there can be no sale of goods where the seller has no right to sell

But has not received any part of what he was promised under the K – property and right to possession

<u>If you reject the goods, you can:</u>
1. Sue for contractual damages
2. Rescind the contract as exchange goods/money
    - In order for there to be a complete failure of consideration, you have to be able to return the goods
    - Ex. Title defect – this constitutes a complete failure of consideration even if they use the goods – see case.

Arby sold his piano to Bianca. Arby did not tell Bianca that he had given a security interest in the piano to Champion City Music Sales Ltd. (Champion) to secure the unpaid purchase price. Champion properly registered its security interest in the Personal Property Registry. Arby did not realize that the security agreement prohibited him from selling the piano, and he honestly intended to continue to make payments to Champion until the full price had been paid. Bianca later sold the piano to Dane. Champion discovered the facts and immediately contacted Dane and demanded possession of the piano. Dane surrendered the piano and informed Bianca that he was rescinding the contract and demanded repayment of the purchase price. Advise Bianca as to her position.

There was an implied condition that there was a right to sell. And even though the goods had been used, there was a total failure of consideration since he didn't get title → Dane can claim full recovery of the purchase price
But Bianca has the same action against Arby, since he didn't have right to sell either
** If you promise not to sell goods, that means you don't have the right to sell
You could analyze this under 14(c) but (a) is the better remedy as it is a condition

Why is it when a sale of goods are subject to a security interest violate the right to sell?
- Might we say there is a right to sell subject to a security interest?
- Instead of the right to sell, think of the obligations of the seller
    - Obligations of the seller is to transfer GOOD TITLE
    - So if a seller has the right to sell goods subject to good title, the buyer cannot obtain good title because it is subject to a security interest
- This makes 14© almost redundant

Important that 14(a) is a condition not a warranty because of what buyer can do
- If you sell a car subject to a lien
    - If it is a violation of a condition, I can reject delivery
- If it was only a warranty and a breach of 14(c), I would only get damages
    - I would have to accept the goods, then the bank would take action, then I would have to go after the seller
    - So its much better to use 14(a) and be able to treat it as a breach of condition

Would it make any difference if Dane had used the piano for 15 months prior to the rescission?
No difference – he gets the whole purchase price back
But what if Dane uses it up a ton and the goods are worth NOTHING
- The view is: When you got the goods, you may have used them, but you were liable to pay the true owner
- SO you can get your whole purchase price back

What would be the result if, instead of contacting Dane, Champion had demanded payment from Arby, and Arby had paid the remainder of the purchase price? Would Dane be entitled to rescind the contract and recover the purchase price?
What if Arby obtains good title before the other party recinds?
- ***Butterworth v Kingsway Motors***
- Once good title is gotten, the other party can't recind. But they can until that point

What would be the result if Champion had failed to register its security interest with the result that Bianca took free of the security interest? Could Bianca rescind the contract and recover the purchase price? Could Dane?
We don't have case law on this, but the commentators have said under the PPSA a person who doesn't register loses against a buyer without knowledge

- B would get good title and could sell to D
- No violation of the implied condition of right to sell

Could Bianca make a claim?

- She has title, but A doesn't have right to sell
- NO. If B gets good title, the fact that A didn't have right to sell is irrelevant

Section 15: Correspondence with Description

S.15 implied condition that **goods will correspond with description of the goods**

- **Unlikely that this condition can be contracted out of** because that would essentially make the seller not under any obligation at all

Christopher Hill Ltd v Ashington Piggeries Ltd
Ratio: The test for correspondence with description is a broad, common sense test of mercantile character – is what the buyer bargained for present?

  - Buyers and sellers in the market could have only said the relevant ingredient was herring meal
  - More nuaced questions are left to other sections of the Act
  - This section is not an invitation to go into the abstract
- This is not an issue of quality or condition

Test: Would persons in commerce view it as the article called for by the contract?

- A common sense test
- If you order apples and get oranges, that's not what the K called for
- But questions as to attributes and quality are dealt with under merchantable quality and fitness for purpose
  - So in this case, it was food, so it complied → Was not completely different from what was ordered
  - But the poison goes to quality or fitness

Beale v Taylor
Ratio: For words to form part of the description, they have to go to IDENTITY, not to quality

- P bought a car from D that ended up being two cars welded together and not able to be driven safely
- P said that he bought the car under the description that it was a 1200 but the vehicle did not correspond with that description
- **Issue: was this a sale by description or a sale of a thing seen by the buyer**
  - Although seller was making no warranties, he was still selling the car by description
  - The car did not match the description and therefore the court found in favour of the buyer

When **words are found to be part of a description**, if there is a breach of this then the buyer has the right to **reject** the goods
If the **words are not part of the description but they form part of the contract**, they may be a condition, warranty, or intermediate term

Section 16(4) – Quality

S16 - In most contracts there will be **implied terms of quality or fitness**

- An express warranty or condition added into the contract does not negate an implied warranty or condition, unless it is inconsistent. In order to contract out of this implied term, you have to include an exclusion clause (**16(7)**)

S.16(4) Can be parsed into 3 elements:

1. Goods are bought by description – now, almost all sales

- If you get oranges from Safeway and put them on the counter, it's a sale by description
- So this is easily satisfied

2**. From seller who deals in goods of that description**

- Seller is in the business of selling those goods
- In Beale v Taylor, 16(4) would not apply because the seller was not in the business of selling 2nd hand cars
- So this significantly limits the application

3. Implied condition of merchantable quality

Caveat: 16(5) → If the buyer has examined the goods there is no implied condition as to defects that the examination OUGHT TO HAVE revealed (but not requirement to have examined the goods)

Breach of this implied condition allows buyer to reject the goods and sue for damages

M/S Aswan Engineering Establishment Co v Lupdine Ltd

Ratio: If there is (1) another use for the goods (2) that would not demand a reduction in price .. then they are MQ

Facts: P purchases pails of material from D. When the pails arrive, they are left in the hot sun and melt, destroying the contents. If the pails would have been stacked differently, they would not have been destroyed.
Issue: Were the pails of merchantable quality?
***Cammell Laird*: "The Use Test"**

- Difference between goods that can be only used for one purpose and goods that can be used for many purposes
- Needs to be no use for any purpose that such goods would normally be used
  - Such goods = goods that comply with the description of the K under which they were sold
  - **"That the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description**."
    - It may be the case that there are several uses for the goods → It is enough that the goods satisfy one of those uses
      - This is an objective test: 'were of no use for any purpose...' must mean 'would not have been used by a reasonable man for any purpose....

Australian Knitting:

- Would a person who receive them see them as lesser quality and refuse to accept them without a reduction in price?
- It's not sufficient to be able to find SOME use for the goods
- So the question is: Would the buyer demand a price reduction?

Now Cammell Laird and Australian Knitting have been synthesized

- Where there are multiple uses, as long as you can sell them to someone who would use them, then it is MQ
- But if it is single use, if the buyer would demand a price reduction, then it is not MQ
- In certain cases, the price can be an indictor of merchantable quality
- Ex. Brown v Craiks - Price agreed = $90, Dress cloth = $100, Industrial cloth = $40
- The price is such that it indicated that the buyer was acquiring dress making cloth and not industrial cloth
- The price signals quality
- But if the marker price for industrial cloth is $80, price doesn't indicate any level of quality, therefore as long as it satisfies one or the other, that is sufficient

The goods did not have to be suitable for every purpose within a range of purposes for which goods were normally bought under that description. It was sufficient that they were suitable for one or more such purposes without abatement of price since, if they were, they were commercially saleable under that description.

How do we handle after-acquired knowledge?

Ex. You get feed and then later realize it kills poultry but is okay for cattle

- No amount of research would reveal the defect because you wouldn't know there is an issue
- ***Hardwick Game Farms:***
  - After-acquired knowledge as to characteristics are to be considered, even though it could not have been ascertained at the time of sale
  - However, you can also introduce other knowledge, such as the fact that the feed is poison to poultry but not to cattle
  - So the goods were of MQ, because they were saleable to cattle producers at the same price
    - The use test and price abatement test in action

Section 16(2) Fitness for Purpose

S16(2): When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether the seller is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose.

Criteria for the Application of 16(2):

1. A communication of a particular purpose

- Particular doesn't mean unusual purpose, it just means specific or stated
- It can be implied or express, but it HAS TO BE COMMUNICATED
    - Ex. If I buy a toaster, it is implied I am using it to make toast
    - **But if I am using it for a weird purpose, I have to communicate it**
    - So for single purpose goods, courts are willing to imply a communication as to the use of the goods

If the goods have a RANGE of purposes, you have to communicate what your specific purpose is if it not within the range of similar purposes

- Ex. Feeding to cows & pigs is similar, but elephants would need to be communicated

The Manufactorer-Chris Hill K:

- (1) If mink were not expected, then it would have been necessary to communicate the purpose
- BUT, if it is a normal use of goods then:
- (2) If mink had a unique reaction, it would have been paramount to communicate the purpose for the feed

The Chris Hill –Ashtington K

- There was a communication of the particular purpose, BUT, was there reliance?
- Partial Reliance: What the court concluded is that it is the seller's responsibly to select goods suitable to animal's generally, whereas it was the buyer's responsibility to ensure it would not be unsuitable for mink feed

2. Where the seller's skill or judgement is relied upon

- A central aspect if **reliance** on the seller's skill (this is easily found for single use items)
- Regarding trade names or patents, the issue is the lack of reliance on the seller where a buyer looks for a particular trade name because they heard that it was good for the purpose (**16(3)**)

3. In the ordinary course of seller's business

Kobelt Manufacturing Co v Pacific Rim Engineered Products Ltd

Ratio: To rely on the fitness for purpose criteria, you need to state your purpose with sufficient precision – seller needs to know the purpose for which you are using the item. You also must show that you RELIED on the seller – you cannot just ask for something

Buyer claims that the brakes supplied by Kobelt were not fit for the purpose

- **Issue: was the brake fit for the purpose?**

Court focuses on 1) communication of the purpose 2) reliance on the seller's skill

Communication of Purpose:

- **The burden is on the buyer to show that it made it's particular purpose known to the seller and that it relied on the seller's skill and judgment**
- The P relied on the seller's skill only partially because they also relied on their engineer's designs
    - The evidence shows that another company was used to suggest the particular brakes used

- Communication of purpose can be express of implied
    - Explain the purpose or impliedly make it known
    - "This is what I want it for and I only want to buy if you can sell me something that will do"
    - Communicated purpose stated with reasonably sufficient precision = particular purpose
    - Entirely context and fact specific – question of fact
- The particularity of the purpose must be such to show the seller the extent and manner upon which his skill and judgement is relied
    - Not sufficient to show the seller knows the purpose
    - The purpose must be known so as to show reliance
- Although Kobelt manufactures brakes, they were not relied upon as designer in any way but solely as the supplier
- The only reliance on Kobelt was that the brakes meet the specifications given to them by the buyer
- The buyer also did not expressly tell the seller what the particular purpose was of these brakes and there was no reason for the seller to imply that the purpose was what it was

Where there is no express communication of the purpose, there must be evidence to show that the purpose would be generally understood by the seller to be what it was

Sale by Sample:

Section 17 of the SGA

A contract of sale is a contract for sale by sample when there is a term in the contract express or implied to that effect.

(a) Implied condition that gives right to the right to reject if the bulk does not correspond in quality to the sample
(b) Reasonable opportunity to inspect
(c) Implied condition that the goods will be free from defect

The Fair Trading Act:

Applies to **CONSUMER TRANSACTIONS**

Section 1 Definitions:

"**Consumer transaction**": The supply of goods or services from a supplier to a consumer

"**Goods"** – any personal property that is used or ordinarily used primarily for personal, family or household purposes

"**services**' - any service offered or provided primarily for personal, family or household purposes, including repair contracts, club memberships, time shares and credit agreements

- So while the SGA only applies to goods, the fair trading act also applies to services

"**Supplier**" - a person who, in the course of the person's business, (i) provides goods or services to consumers, (ii) manufactures, assembles or produces goods, (iii) promotes the use or purchase of goods or services, or (iv) receives or is entitled to receive money or other consideration as a result of the provision of goods or services to consumers.

"**Consumer**" an individual who receives or has the right to receive goods or services from a supplier as a result of a purchase, lease, gift, contest or other arrangement, but does not include an individual who intends to sell the goods after receiving them

Provisions of the FTA:

2(1) – Cannot waive the terms of the fair trading act

- As opposed to s.54 of the SGA

2.1 – We look at substance rather than form → You cant structure a transaction differently to escape the act
3. None of the rights or remedies under the Act or regulations restrict, limit or derogate from any legal, requitable, or statuatory right or remedy
4. Any ambiguity in a consumer transaction agreement interpreted against the supplier.

Section 5: The Act applies to the following unfair practices:
(a) an unfair practice in which the supplier or consumer is a resident of Alberta;
(b) an unfair practice involving a consumer transaction in which the offer or acceptance is made in or is sent from Alberta;

Section 6 sets out a broad range of unfair practices
(a) a supplier's doing or saying anything that might reasonably deceive or mislead a consumer;
(b) a supplier's misleading statement of opinion if the consumer is likely to rely on that opinion to the consumer's disadvantage;
(e) a supplier's representation that goods or services are of a particular standard, quality, grade, style or model if they are not;
(f) a supplier's representation that goods have or have not been used to an extent that is different from the fact;
(g) a supplier's representation that goods are new if they are used, deteriorated, altered or reconditioned;

** These key on a statement made to the consumer → So you have to prove the seller said it
But look at 4(a)

- That is a lot broader → No longer about a statement of opinion or representation

Rushak v Henneken

Facts: With the advice and assistance of a gentleman friend who was knowledgeable about motor cars, the plaintiff in 1982 purchased a much-used but attractive 14-year old Mercedes Benz sports car for $17,300 through the defendants, the agents of the vendor; this car was found by the trial judge to have been "of such peerless beauty that . . . she appears to have cast an hypnotic spell upon all who had dealings with her."

- Deal knows about a potential rust problem and that it may be under the coating of the car
- The buyer sees the rust and is recommended to take it for a rust inspection
- The dealer says the car is a good vehicle, one of the best of its kind in Van, and a really good car
- The car totally rusts out 1 year later after it is purchased

For the purposes of this Act, a deceptive act or practice includes
(b) any conduct having the capability, tendency or effect of deceiving or misleading a person**.**

- In this case, dealer pointed out the rust but also said it was a good car. Dealer has knowledge that the rust could be a problem
- So saying it is was a good car was deceptive → Especially when there was tell-tale signs of a rust problem

What is the dealer knew, not just had suspicions, but said nothing about the car?

- A supplier doing or saying anything
- **Does doing include an omission?**
  - **We don't have an answer to this. You would have to interpret doing as creating an obligation to disclose**

What if the dealer made the statements but had no inclination of the rust?

- **Is this a matter of strict liability – you say something and it turns out to be untrue?**

- **Court declined to comment on that in this case**

F. Rejection of Goods

The key remedy of a buyer is the right to reject goods. In doing so, they are not accepting the goods
Rejection is the anthesis of acceptance

- Once I have accepted the goods, I no longer have the right to reject

When can a buyer reject?

- When there is a **breach of an express or implied term**
- When the goods are **not of merchantable quality** or not fit for the purpose
- When there is a **material breach of an intermediate term** that is sufficiently serious

Rejection is **NOT possible under intermediate terms for minor breaches**

Improper rejection occurs if the buyer tries to reject the goods but does not have the legal grounds to do so

- Ie: if they say that the goods are not of merchantable quality but they actually are
- **In this case, the buyer is actually in breach of the contract and the seller can seek damages**
- **BUT if the property has already passed to the buyer then can only sue for price**

If property has passed to the buyer, then upon rejection of the goods the property **re-vests** to the seller

Right to Cure
Does rejection result in the termination of the contract? Or can the seller cure the defective tender by retendering conforming goods before the delivery date (or after a reasonable time if time is not of the essence)?

- If the seller tenders nonconforming goods and they are rejected then in most cases the contract will be terminated
- HOWEVER, there are some cases where there will be **a right to cure** within a timely delivery
    - For specific goods, or sales from a bulk, this only means that you can **repair the goods**, they cannot be replaced
    - For unascertained goods you can replace the item with another
- The practicality of the right to cure is not very high and in most instances it will not work
- If the contract is repudiated, then there is no longer a right to cure

If the seller can retender performing goods before delivery date has passed or within a reasonable time, then the buyer cannot reject the second tender of goods

1. Rejection and Specific Goods

SGA, s 13(4) - Loss of Right to Reject:
The SGA provides that when a contract of sale is for specific goods and property has passed to the buyer, the breach of any condition to be fulfilled by the seller shall only be treated as a breach of warranty unless there is an **express or implied term giving the buyer the right to reject.**
**** DOESN'T APPLY TO UNASCERTAINED GOODS *****

Section 20 – property passes when K is made for specific goods in a deliverable state

- Combine with 13(4), then if specific goods are in a deliverable state, the buyer never has a right to reject
- What we see practically is that this rule is not particularly convinant
- Where 13(4) is applied, you end up being stuck with lemons

S13(4)

- Where property has passed to the buyer, the breach of a condition will be treated like a breach of warranty and the buyer can **no longer reject the goods** unless there is an express or implied term suggesting otherwise
- So you can only sue for damages
- **The buyer can escape that provision IF:**
    - They can show that there was an express or implied term suggesting otherwise
    - They can show that property did not actually pass to the buyer
        - Passage of property rules 19(1) and 20(1)
        - Specifically, if you can show there was a conditional precendent (wasn't an unconditional sale)

Wojakowski v Pembina Dodge Chrysler

- P bought car from D and then experienced a number of problems with it
- **Issue: was the car reasonably fit for the purpose intended?**
    - There was a breach under **s16**
- Defendant relies on **s13(4)** to say that P cannot reject the automobile
- Although the car was a specific good, the court finds that the property did not pass to the P within the meaning of **13(4)**
- The P did not ever unconditionally accept the car → there was work to be done to it from the time of purchase that was never completed

2. Acceptance

The acceptance of goods results in the loss of the right to reject the goods

S35 – Acceptance of Goods
The buyer accepts the goods when:

1. The buyer indicates to the seller they have accepted them
2. When the buyer acts in a way post delivery that is inconsistent with the seller being the owner of the goods

- Ex. You purport to reject the goods and continue to use the goods
- **Can the buyer reject if during a sub-sale you find out the goods were not good?**
  - Can no longer reject because you cannot revest title, as you have resold
    - When you reject you have to be able to to revest title in the seller. So if you sold some off already, you cant return a part
    - Right now, you cant accept some goods and reject others → Reject or accept the whole
      - You can only pick out when you have a larger quantity (s.30)

3. A reasonable time has passed without the buyer rejecting the goods
   - You can have time to inspect, etc. but you have to make your choice within a reasonable time

S34 – Examination vs. Acceptance

The SGA provides that the buyer shall not be deemed have accepted the goods unless and until the buyer has had a reasonable opportunity of examining them. Unless otherwise agreed, the place for examination is at the place of delivery.

- When goods are delivered to a buyer that have not been examined the buyer is not deemed to have accepted them until the buyer has a reasonable time to inspect them to determine if they conform to the contract
- Sometimes the contract will say that the inspection point is at another location then the buyers place of delivery
- **If you waive the right to inspection then you intimate that you accept the goods**

E Hardy & Co. v Hillerns

Indicated s.35 trumps s.34

Buyer should not have been deemed to accept unless and until they have the opportunity to examine

- But s.35 says you are deemed to have accepted if you do an act inconsistent → This trumps s.34, especially if you have resold a part of the bulk or have done something that stops you from being able to revest title to the seller

Hart Parr Co v Jones

Facts: An old engine was put in a tractor and made to look new. The buyer was unable to test out the tractor upon the purchase / Over the winter, it was discovered that the tractor had an old engine

- **Issue: is there a breach of an express or implied term?**
  - There was a breach of description (s13)
- **Issue: was there acceptance of the goods?**
  - S35
  - The signed note of acceptance was not sufficient intimation
  - Where the property **has not passed**, the receipt of the good, the payment of part of the money, and the attempted use does not necessarily constitute acceptance
- If the P had used the goods after he purported to reject them or after finding the defect, this would have intimated acceptance

But had the farmer lost the right to reject?

- Not a sale of specific goods, so don't worry about 13(4)
- But still worry about s.35 - Incosistencacy with the ownership of the seller normally comes down to whether or not you can revest at the time you purport to reject
- Was there a lapse of reasonable time? → Court says it depends on the circumstances
  - Delivery was made at end of season when ground was frozen → no opportunity to test out the tractor

****As a buyer, DO NOT use a good if you purport to reject it, or after finding a defect as this will intimate acceptance****

3. Delivery of the Wrong Quantity

Only in the case of delivery of wrong quantities can the buyer **partially reject**

S30 – Delivery of Wrong Quantity

a. When the seller **delivers to little**, the buyer may reject but if he chooses to accept he has to pay for the goods at the contract rate
b. When the seller **delivers too much**, the buyer can reject any amount over the amount agreed to, OR they may reject the whole amount, OR they may accept the whole amount and pay for the whole amount
c. When the seller delivers the **right goods mixed with different goods**, the buyer can accept the right goods and reject the different goods OR reject the whole

***** Having some goods of a lesser quality is not enough to reject parts of the whole *****

Section 31 - Installment Contracts

31(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.

(2) When there is a contract for the sale of goods to be delivered by stated instalments that are to be separately paid for and the **seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.**

Three different situations:

1. A buyer and seller enter **different contracts** for the sale of goods → this would not fall under s31 because they are all different contracts, not installments
    a. Rejecting one contract would have nothing to do with the others

2. An agreement exists in a **single contract** that the goods will be delivered in installments and they are to be separately paid for
    a. If the buyer or seller commits a breach on one of the installments, it will depend on each case whether this breach will amount to a repudiation of the contract as a whole or whether it is a severable breach giving rise to compensation just for that one breach (**31(2)**)

3. An agreement exists where only the **delivery comes in installments but not the payments**. If you accept the first installment you cannot reject any further installments

What happens if the seller tries to force installment deliveries on the buyer?

- Gives part now and offers to give the rest in 2 weeks?
- In this case, the seller is in breach of 30(1) and the buyer may reject

Cimmaster v Piccione

Ratio: To reject future installments of delivery, you look at (1) how extensive the breach is (2) probability of repeate breach

- Contract for installments falling under s31
- There was a problem with one of the installments where the castings had been left to cool which created a problem for 1/3 of the shipment
- **Issue: Did the breach amount to repudiation of the whole contract or a severable breach?**

    - Applied a two part test from a leading case:
        - 1) Look at how extensive the breach was in proportion to the whole installment
        - 2) Look at the degree of probability that the defect will be repeated in the future
- Although there was a large part of the shipment that was defective, it was not a huge magnitude as in past cases finding whole repudiation
- The court found that P had delivered satisfactory goods in the past, and because they knew why the goods were defective, the chances of further defect in the future was low
- Deemed to be a severable breach giving rise to a claim for damages for the defective goods, but not able to repudiate the whole contract
- It is also relevant to note that the receiving company did not notify the seller that they wished to repudiate the contract

Rejection Excercises:

Aaron put an ad in the paper offering to sell a "2006 Toyota Sienna van, green, 85,000 kilometers, good condition, $18,500 obo." Aaron was engaged in full time studies as a law student at the University of Alberta. Becca saw the ad and took the vehicle for a test drive. Everything seemed to be in good order and so she bought the vehicle for $18,000. Later when she took it to her garage she discovered that the bottom of the vehicle was badly rusted and that it would cost at least $5000 to put it into good working order. Becca wants to reject the goods and get her money back. Advise Becca on this matter.

"Good condition"

- Is this part of the description?
- Can she still reject once she has accepted?

Court will probably find these statements form contractual terms

- The right of rejection is a remedy for breach of condition

1. Has a condition been breached?

2. IS there a breach of an implied term?

- Per 16(1), there is no implied terms other than those implied by the SGA

3. Did the goods correspond with the description? If they didn't, it's a breach of condition

- Statements were made about the goods – "good condition"
- It turns out it wasn't in good condition – but, does that go to description?
    - At one time sale by description = unascertained goods
    - But now it applies to specific goods too
    - **Would the parties say it is fundamentally different (identity) or does it go to quality?**
        - In this case "good condition" does not go to fundamental identity
- Section 15 is restricted to fairly significant identifiers as to what is being supplied

Merchantable quality, fitness for purpose are obviously no

- **Important restriction here → Need to be in the course of the seller's business to supply**
- THEY DON'T APPLY TO PRIVATE SALES → No 16(2), 16(4)

4. Is there a breach of an express term?

- So these terms aren't implied, but we know the courts would find them to be express terms
- Conditions, warranties, or innominate terms
    - Contractual statement of express term of "good condition", but in this case it would depend on how serious the breach is
    - Is being rusted out with a $5000 price tag so significant that it would lead to the ability to reject?

What if the court concludes it is so serious that the buyer should be given the right to reject? Can they now reject?

13(4) creates an issue. How to get around it?

- #1 – Say property didn't pass
    - If property passed, the breach of condition becomes a breach of warranty
    - In this case its not a breach of condition, it's a breach of an intermediate term → **So you are not within the section**
- #2 Find it is a term of the K implied that the buyer should have the right to reject

35(a) – Once the goods are accepted, you lose the right to reject

- If you lose the right to reject, you can only sue for damages

So look at 35 → Have the goods been accepted?

- **Make sure you don't keep driving the car around. You cant keep using it after you reject**
- **Lapse of reasonable time**

Feedex Corp. was in the business of manufacturing animal feed. It had in the past manufactured feed for cattle and pigs, but it had begun to prepare food for other types of animals. Wild Bill Game Farms Inc. was in the business of producing wild boar for sale to exotic meat distributors in Canada and the United States. Wild Bill contracted with Feedex for the manufacture and sale of vitamin fortified feed in accordance with a formula that Wild Bill had prepared. Feedex did not have any special knowledge

about the nutritional requirements for wild boar. One of the ingredients in the formula was bone meal. Feedex entered into a contract for the purchase of elk bone meal from Calcade Industies Ltd. Calcade was in the business of selling elk bone meal. Some of its buyers were animal feed producers and others acquired it for compounding fertilizer. Feedex used the bone meal to produce the feed according to the formula prepared by Wild Bill. Wild Bill fed it to his wild boars, and this caused them to sicken and die. It was later discovered that the bone meal contained a toxin that was fatal to wild boar. It was also proven that although wild boar were particularly sensitive to this toxin, pigs were also adversely affected though it rarely caused death. It was also shown that commercial buyers who wanted to use the bone meal for producing pig feed no longer regarded the bone meal as usable, while buyers who wished to use it to produce cattle feed or fertilizer would accept it without an abatement in price. Analyze the potential liability of Feedex and Calcade under the *Sale of Goods Act*.

Basic Pattern
A sells to B then B sells to C → So analyze each K separately
This isn't about rejection, its about damages.

- The food was already fed to the boars. But who bears the loss? Can the loss be passed up to the suppliers?

Calcade → Feedex → Wild Bill
Starting point:

- Eliminate the issue of correspondence with description (re: Ashington Piggeries)

K #1: Feedex → Wild Bill Game Farms
Wild Bill supplied the recipe
Breach of K gives you the right to reject and the right to damages
Two arguments here:
1. Merchantable quality

- (1) Bought by description
- (2) From a seller that deals in goods of that description
- (3) Merchantable quality
  - Such that a buyer would not demand an abatement in price
  - If there are 2 diff uses, its enough that they satisfy one of the uses
    - In this case there are not more than 1 description → No one else would want the goods to feed to the animals
    - So no one would accept the goods

Issue here → If a doctor writes a prescription and the pharmacist fills it, can the doctor sue the pharmacist?

- **Merchantable quality has an elastic quality – if the buyer gets exactly what they order, then you cant make the merchantable quality argument**

2. Fitness for purpose

- A. Express/implicit make known the purpose
- B. Show reliance on skill/judgment
- C. Course of sellers business
- D. Goods must be fit for purpose

Was there a communication of purpose?

- Yes – Feedex knew it was being sold

The issue here is the reliance

- This is a case of partial reliance
- Wild Bill formulated the recipe knowing it would fulfill the nutritional requirement for wild boar
  - But it was the seller's responsibility that the bone meal it chose would be suitable to feed to animals

So we have a breach here → Partial reliance is still reliance

K #2: Calcade → Feedex

1. Merchantable quality

- (1) Bought by description
- (2) From a seller that deals in goods of that description
- (3) Merchantable quality
  - Courts have said that if there are 2 diff uses, its enough that they satisfy one use
  - So the goods were suitable for fertilizer, so they were of merchantable quality

2. Fitness for purpose

- So now we look here – was there a communication of fitness for purpose?
- No – we only see the name Feedex, we have no idea what the purpose for the meal is

So in this case, it looks like the liability will fall on Feedex in the claim for damages

How do quantify the claim for damages?
Look at K damages and see how they are integrated into the SGA

G. The Buyer's Remedies

Buyer has **2 different personal rights** against the seller:

1. **Action for damages for non-delivery**
   a. This is when the seller fails to deliver at all or on time when time is of the essence
   b. Or if a reasonable time has passed and there has not been a delivery
2. **Damages for breach of warranty**
   a. Suing for the difference of what you got compared to what you contracted to get

1. Non – Delivery

S50 – Damages for Non-Delivery

1) When the seller refuses or neglects to deliver → **Establishes the right of action**
2) The measure of damages is the loss resulting from the failure to deliver
   - Codifies the first branch of remoteness in ***Hadley v Baxendale***
3) Where there is a market for the goods, the loss will be determined by looking at the market price, so what the buyer will be able to get the goods for now compared to how much they would have paid the seller
   - **$ they will have to pay to get goods now - $ they paid the seller = loss they can claim**
   - **The "market price rule"**
   - **NEED TO MITIGATE DAMAGES**

2 circumstances where you can get damages for non-delivery:

1. The buyer may recover damages for non-delivery where the seller fails to deliver on time and the buyer treats the contract as at an end.
   - You can reject and IN ADDITION SUE FOR DAMAGES
   - Ex. Seller delivers goods & they are not in merchantable quality, so you reject them. In the interim, the price of goods spike, so you have to buy them for a higher price. You don't just want restitutions from rejection, but also damages

2. The buyer may also recover damages for non-delivery where the buyer lawfully rejects non-conforming goods and the seller does not retender conforming goods.

***Hadley v Baxendale* – Rules of Remoteness**

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be
(i) such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or
(ii) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Red – General damages → Codified in SGA s.50
Blue – Special damages

- If some particular susceptibility is communicated, it is recoverable
- If you could never know, you aren't liable
    - Unless it was specficially communicated to you

Williams Brothers v Ed T Agius Limited

- P and D in contract for sale of 6 cargos
- November shipment not delivered and P claimed damages
- P originally paid the$16 but had to buy the goods for $23 upon non-delivery
- They claimed the difference in these two amounts but the D claim that they should only get the difference between what they bought the goods for and what they would have sold the goods for to a third party (ie: only the profits)
- **Issue: can damages be increased or decreased by virtue of a sub sale by the buyer?**
    - Court says you cannot sue for the amount of profit that you would be getting from the resale of the goods, can only sue for the difference of what you have to pay from a different supplier
    - If the contract was to sell those <u>exact goods</u> then only if you specified this information to the seller would you be able to claim the loss of profits on top of the loss in market price

<u>S.53(a) → Basically codifies the 2nd limb of Hadley v Baxendale</u>

53 Nothing in this Act affects the right of the buyer or the seller
(a) to recover interest or special damages in any case where by law interest or special damages may be recoverable,
This sets out the second branch of Hadley v Baxendale.

<u>The Market Price Rule:</u>

- When we apply the market price rule, we typically don't look at sub-sales → That is not relevant
- **What you do it, if there is non-delivery, you compare K price to market price at date of non-delivery**
- The price you are selling to a 3rd party is not relevant

2. Breach of Warranty

<u>Where the term that has been breached is a warranty, rejection of the goods is not an option</u>

52(1) When there is a breach of warranty by the seller or when the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of that breach of warranty entitled to reject the goods, but the buyer may
(a) set up against the seller the breach of warranty in diminution or extinction of the price, or
(b) maintain an action against the seller for damages for the breach of warranty.
This gives the buyer the right to sue the seller for damages for breach of warranty.

- Where there is a breach of warranty, the buyer may not reject the goods but they may use the breach to **request a lesser price**, or they may maintain an action against the seller for **damages**

- The loss will be estimated as that loss occurring from the breach of warranty (**52(2)**)
- If the breach of warranty goes to the quality, the loss will be the difference between the value of the goods at the time of delivery and the value they would have had if there was no breach (**52(3)**)
- If the buyer uses the breach of warranty to lessen the price, they may still use that breach of warranty for further action is further damage is suffered

When can you sue for breach of warranty?

1. Breach of warranty
2. Breach of innominate term that turns out to be a warranty
3. Breach of condition but didn't exercise right to reject

52(2) The measure of damages for breach of warranty shall be the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of warranty.
This codifies the first branch of the remoteness of damages rule in Hadley v Baxendale.

52(3) In the case of breach of warranty of quality, its loss is, in the absence of evidence to the contrary, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
This sets out the usual manner in which the principle contained in the first branch of Hadley v Baxendale is applied.

53 Nothing in this Act affects the right of the buyer or the seller
(a) to recover interest or special damages in any case where by law interest or special damages may be recoverable,
This sets out the second branch of Hadley v Baxendale.

Atlantic Potato Distributors Ltd v Meersseman

The crop is bad because of the defect in the seed potatoes. It's determined the seller is in breach of K. The question is of damages

- The court in the first instance arrived at the correct result, but for the wrong reasons
- They do the right calculation but start adding in offsetting factors like delivery, loss of reputation, etc.

In 52(3)

- You look at the quality of what you bargained for vs. the quality of what you got
- Look at the crop you expected vs. what you got

Yield if seed potatoes were not defective:
(365 hundredweight/acre)(25 acres)($10.94/hundredweight) = $99,827.50
Yield obtained with defective seed potatoes:
(79 hundredweight/acre)(25 acres)($10.94/hundredweight) = $21,606.50
$99,827.50 - $21,606.50 = $78.221.00
Difference in the value of the crop that would have been obtained if the seed potatoes were not defective and the actual value of the crop grown with defective seed potatoes.
$78.221.00 - $11,410.12 = $66,810.88
The above amount reduced by the price of the seed potatoes that had not been paid by the buyer.

This is not saying that you can never get loss of profits. What it typically says is that you look at the market price at the date of non-delivery

Canlin Ltd v Thiokol Fibres Canada Ltd

A case of consequential loss.: A case where swimming pool covers are defective to the point that no one will buy from the store anymore and the seller needs to rent a warehouse to store all of the unsold merch.

Issue: Can P recover damages for estimated loss of future profits due to the D's breach of warranty?

- The court applies the **Hadley Test** and finds that the seller could anticipate that, in supplying defective products, this could affect the business of the buyer
- The court also finds that there is strong and binding authority that damages for loss of future profits may be included in directly and naturally occurring from ordinary course of events of a breach of warranty

- The court here set the test for remoteness of damages on the same reasonable foreseeability level as in tort cases, however the English courts view the test as having a much higher threshold
  - House of Lord: When you contract, you have the ability to communicate to the other party such that issues come within their contemplation

"The test for determining what is a loss that directly and naturally results in the ordinary course of events from the breach of warranty may be phrased in the classical contract question, namely, are the consequences of the breach of contract such that a reasonable man at the time of the making of the contract would contemplate them as being liable to result or to be a serious possibility; or, in the classical tort question, namely, are the consequences of the act such that a reasonable man at the time the tort was committed would foresee that damages are likely to result."

Canadian courts apply this tort test.

H. The Seller's Remedies

1. The Seller's Real Rights

Remedies of the Seller:

What are the primary obligations of the parties?

- Seller: Tender on the day of delivery goods that satisfy the K description
- Buyer: Accept and pay the price for the goods that conform with K description

Sellers real rights: **Don't need to go to court**

Sellers have **proprietary rights** as opposed to personal rights

The seller has the right to be paid by the buyer

- HOWEVER the payment obligation is **not of the essence**, unless otherwise stated, and therefore failure to pay on the date of payment does not allow the seller to treat the contract as repudiated
- HOWEVER if the buyer does not pay on time, the delivery obligations on the seller is suspended until the payment is made

If a buyer fails to pay, the seller has **three real remedies** (**39(1)**):

1. **An unpaid seller's lien SGA 40-42**
   a. In the case of a lien, the **property has already passed** to the buyer
   b. If the **property has not passed** then it is referred to as the **right to withhold delivery**
   c. An unpaid seller who is in possession of goods can retain possession of them until they are paid in the following circumstances (**40**):
      i. When goods have been sold without a stipulation as to credit
      ii. When the goods have been sold on credit but the credit term has expired
      iii. If the buyer becomes insolvent, even if agreed to sell on credit, the seller would not have to respect the credit period and can demand payment on delivery
   d. An unpaid seller who delivers the goods to a carrier or buyer loses the lien

2. **Right of Stoppage in Transit SGA; 43-45 ** NOT OFTEN USED BECAUSE OF SHORT TIME FUSE**

a. **S43 - The seller who has put goods in transit may halt the ultimate delivery to the buyer by repossessing the goods or by notifying the carrier. The right is only available if the buyer is insolvent (mere non-payment is not sufficient).**
b. The issue of non-payment is not enough to give you this right
c. The buyer has to be insolvent but this doesn't mean that they have to have started insolvency proceedings but they must be unable to pay obligations
d. There has to be proof that the buyer cannot pay debts

3. Right of Resale SGA, s 47

Seller has the right to resell goods if:

(1) the goods are perishable and the buyer does not tender payment;
(2) the seller notifies the buyer of its intention to resell the goods and the buyer does not tender payment within a reasonable time

Time is typically not of the essence, but it can be made of the essence if the buyer gives notice
→ So it can give right to termination, but not in every instance

The seller may resell the goods and recover any losses occasioned by the buyers breach of contract

a. **If the right of resale is properly invoked then the contract is repudiated and the goods re-vest in the seller**
b. If the right of resale is not properly invoked, the new buyer will still get title over the old buyer

You can put a lien on AND then resell (Question → Can you do this even though property has passed?)
If property has passed, technically you get an unpaid sellers lien

- Buyer has title, but the seller has possession and a lien over them

If the seller has title, they have the right to without delivery
** The only difference is whether property has passed or not

(4) When the seller expressly reserves a right of resale in case the buyer makes default and, on the buyer making default, resells the goods, the original contract of sale is on that resale rescinded but without prejudice to any claim that the seller may have for damages.

<u>If you wrongfully exercise your lien or wrongfully resell the goods</u>

S.47(2)

- If the goods are resold, you have no recourse against the 3rd party
- "When an unpaid seller who has exercised the seller's right of lien or retention or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer."

2. The Seller's Personal Rights

Two personal remedies are available to a seller if the buyer breaches their obligations:

1. **Action for the Price**
   a. **S48**
      i. The property must have passed to the buyer
      ii. The buyer wrongfully refuses or neglects to pay
      iii. The seller can maintain an action for the price of the goods
2. **Damages for non-acceptance s.49**
   a. Suing for a loss suffered due to a breach
   b. If the property has not passed to the buyer then the seller can only bring an action for damages and not price
   c. If the seller does not want the price, but instead wants the goods back, they can accept the buyer's repudiation of the contract and then the property will re-vest in the seller

What about a situation like Cardoch nurseries?

- It's a sale of unascertained goods
- Remember → passage of property takes a long time (basically when there is tender for delivery)

Important: The seller cant force delivery on the buyer if the buyer communicates they are not prepared to accept delivery

- If you look at the default rule for unascertained goods, there has to be an unconditional appropriation by one party with the assent of the other party
- If the buyer says they are not prepared to accept delivery, there is no longer that assent

Damages for Non-Acceptance:

49(1) When the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance.
This gives the seller the right to sue the seller for damages for non-acceptance of the goods.
** THIS SETS OUT THE CAUSE OF ACTION

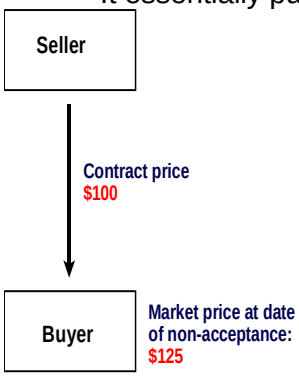
49(2) The measure of damages shall be the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
This codifies the first branch of the remoteness of damages rule in Hadley v Baxendale.

53 Nothing in this Act affects the right of the buyer or the seller
(a) to recover interest or special damages in any case where by law interest or special damages may be recoverable,
This sets out the second branch of Hadley v Baxendale.

The Market Price Rule:

49(3) When there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.
This sets out the market price rule which implements the first branch of Hadley v Baxendale and the mitigation of damages principle
** Like the other market price rule, it only applies where there is an available market

- It essentially puts the 1st branch of Hadley with the mitigation principles of K law



If the market price at date of non-acceptance was $125?

- They get zero. The seller is actually better off, because the goods are worth more
- When we talk about the difference in price, we talk about the situation where the price has dropped

But if there is not an available market, look at the ordinary principles of K law

Victory Motors:
Facts: Sell a mustang and the buyer refuses to take delivery. The argument of the seller is that they have lost the profit on the sale. Although the case may be sold to another person, they would have sold 2 vehciles, instead of 1

The Lost Volume Seller:
Where supply exceeds demand, the seller may argue that the market price rule should not be applied since the seller would have earned a profit on two sales instead of just one. The court in such cases will award the seller the loss of profit in connection with the sale.

I. Nemo Dat and its Exceptions

The Rule of Nemo Dat

<u>The ordinary principle:</u>
Owner → thief → Buyer
Owner has action against thief for conversion
Buyer has action against thief under the SGA
What what if the thief cant satisfy the judgment?

- Normally, the issue then comes down to owner vs. buyer

Rule: We protect the proprietary right of the owner → Buyer loses
What if there is a bailee, leasee and THAT person sells it?

- Giving up possession is not enough to give up title → Owner still wins

- Where stolen property is sold to a third party, nemo dat says that **the true owner of the goods will prevail** regardless of the third parties innocence
- The true owner can sue the buyer for **conversion** or exercise their **right to recapture**
- This will also be the case where the owner gave possession to a bailee and the bailee wrongfully sells the goods
- Position of the buyer
    - As against the true owner, the buyer will not prevail
    - As against the thief, the **buyer has rights based on the implied condition in s14** that the seller has the right to sell
- Where there is an **exception to nemo dat, the, buyer would have better rights than the owner** and therefore the thief gave title even though they did not possess title
    - In this case the owner has an action against the wrongdoer
- Exceptions to nemo dat only apply **where the seller did not have good title**

The Five Exceptions:
(1) Estoppel, SGA s 23, **(2) Sale under voidable title, SGA s 24, (3) Mercantile agent, Factors Act, s 2(1)**
(4) Seller in Possession, SGA s 26(1), (2)
(5) Buyer in Possession, SGA s 26(3)

In some cases, you may have 2 or more applicable to the facts → But you only need to show 1 reason why the buyer has better title

1. Estoppel Exception

S23 23(1) Subject to this Act, if goods are sold by a person who is not the owner of them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had **unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell.**

- The owner in this case would be estopped from enforcing title to the goods due to their conduct
- The buyer will not acquire better title than the seller **unless the owner's conduct suggests that the seller had authority to sell**

McVicar v Herman:
Facts: Herman gives his employee, D the possession and use of his car. There is a purported K to give D the car, but this is never proven. D never gets title and H asks for it back. D goes to M and purports to sell him the car, explaining that it is a gift and he does not have the title documents. M buys the car. H asserts that D never got title and M has no ownership of it
Verdict: Car goes back to H
Reasons:

- Credbilty of witnesses lead the judge not to find a purchase or gift of the car by H to D
- S.32 of the SGA
  - Where goods are sold by a person who is not the owner AND does not have the consent of the owner, the buyer gets no better title to the goods than the seller had UNLESS the owner has by his conduct been precluded from denying the seller the authority to sell
- **Nothing in H's conduct precluded him from denying D's right to sell**
  - **H was careless about his own rights, but D was never lead to believe he had right to sell**
- Rule: You cannot keep goods you acquire in the market from the owner, UNLESS the seller has gained indicitia of title such that he is able to pass as the true owner
- There is no indicia of title → He had possession, but did not have letters of consignment, etc. indicita of title
- **(1) Possession is not enough to prove estoppel**
- **(2) The fact that the company did not vigorously pursue repossession does not give rise to estoppel**
- **Conduct of owner has to be misleading**

pg. 81 – If I lose a valuable dog and someone else has bought it, it is no defense to say I should have chained it up or taken better care of it
But if the owner clothes the person with the indicia of title, then that is different

- You write a letter for them, list them as registered owner, meet the purchaser and acknowledge to them that the person in possession is the owner

A situation where the owner knows of the sale, but does nothing would allow for the estoppel exception

2. Voidable Contracts Exception

S24 When the seller of goods has a voidable title to them but the seller's title has not been avoided at the time of sale, the buyer acquires a good title to the goods if the buyer buys them in good faith and without notice of the seller's defect of title.

Voidable Contracts:

Seller → Rogue → Buyer

Seller and rogue have a voidable sale, rogue and the buyer have a 2nd sale

Seller gets the right to rescind the contract

- There is a sale, its induced by fraud
- So following the sale, the rogue is the owner and has legal title
- BUT, the seller can avoid the K because of the fraud
- When the K is avoided, title revests in the seller

S.24 → Not really an exception to nemo dat

- Because if the K is avoided before the 2nd sale, the owner has title - No long possible for the rogue to pass good title
- But if it is not, then the rogue has good title at the 2nd sale and can transfer it to the buyer

SO this is a timing issue!!!

- If the seller of the goods has voidable title to them, but the title has not been avoided at the time of sale, the buyer will still get good title if they buy in good faith and without notice of the defect in title
- This would be the case where the original seller had an action for fraudulent misrepresentation and therefore has the right to rescind the contract and regain title → But until the contract is voided, the wrongdoer still has title
- Therefore this is not really an exception because **the wrongdoer has good title**

If the seller rescinds the contract **before** the wrongdoer sells to the buyer, then the wrongdoer **did not have the right** to sell and the true owner, or true seller, would prevail

SO... if a wrongdoer fraudulently obtains property (ie through bad check), they can sell the goods up until the point that the contract has been avoided and the title has passed back to the original seller

Car and Universal Finance Co Ltd v Caldwell

Facts: P tries to sell a car to N. N gives him an NSF cheque and a car with no value (fradulant transaction). P goes to police to get the car back, tells bank and registry that the contract is voided. N sells the car to X, who sells it to D. D and X are aware of the title defect.

Note: ** If you can prove the K was voided before the 2nd sale by the rogue, then the 2nd sale was NOT GOOD

Issue: Did C successfully avoid the sale by taking steps to find the thief even though he could not tell him directly about the rescission of the contract?

- C has the right to rescind the contract between himself and the thief buyer but he was unable to communicate this with the thief buyer
- Generally, **you have to communicate intention to rescind a contract with the other party**
- HOWEVER there is an exception when you cannot find the other party as long as you have taken all reasonable steps to regain the goods
- So the contract had already been rescinded by the time that the car was being sold to the third party and the title had revested in D
- Therefore **any sale that occurred after the sale had been avoided was ineffective to pass property**

Real test: Need to assert your decision to avoid in the "plainest and most open manner competent to him"

- Need to unequivocally make it known in the circumstances
- Once you realize the fraud, need to take all possible steps to regain the goods even if you cant find the rogue or communicate with him
- Not sufficient to say in your own mind or on your own books that the K is void

- Even if K had not been voided, s. 23 of the SGA states that if a buyer knows of a title defect, then you are subject to a voidable K even if it has not been voided at the time of sale.
  - Even though G&C finance didn't know of the title defect, Motobella was their agent. And since Motobella knew, it was imputed to the principle

3. The Mercantile Agent Exception

S2 of the Factors Act
When the agent sells to the buyer, there is a K concluded between the principal and the buyer

- There is no sale from principal to agent to buyer, but a sale from principal to buyer facilitated by the agent

But what if you authorize the agent to sell for $500 but they sell for $300

- They are acting in excess of their authority

- S. 2 of FA codifies the idea of **apparent authority**
- The mercantile agent idea applies only to a professional agent, not an ad hoc agent
- If a buyer is buying from a professional agent, they do not have to look further to determine whether that person has authority to sell
- **Requirements** (**all must be proven**)to show apparent authority
    1. Has to be a mercantile agent
    2. Agent has to be in possession of the goods, or documents of title
    3. The possession has to be with consent of the owner
        - Your possession must be gained in your capacity as a mercantile agent → Cant have gained them some other way
    4. The agent has to be acting in the regular course of business of a mercantile agent
        - Transaction has to be of a kind that a merchantile agent would normally enter into
    5. Buyer has to be acting in good faith and without notice
        - The person who buys it cant know the agent is outside their authority
- If all of the requirements are fulfilled, the sale will be treated as though the owner authorized the transaction and the buyer will prevail

Factors Act s.13 → Nothing in the act allows the agent to act outside their authority

1. The principal still has an action against the agent for breach of warranty of authority
2. But the agent may be bankrupt → So whether the Factors Act provision re: Merchantile Agent Exception is established is important

Alberta (Sheriff, Edmonton District) v Kozak
D gave his car to Select Motors to be sold. D told SM to inform him if they found a purchaser and get his approval before any sale was made. SM sold the car without informing D

- **Issue: does the buyer have good title to the car?**
    - Court found that SM was a mercantile agent and that the car was left with them as mercantile agents
    - All requirements under s2 of the Factors Act are met
    - The fact that they sold the car without informing the true owner, as per his request had no bearing on the legitimacy of the sale
    - The consent required by the true owner pertains to the possession of the goods not the consent to sell

What would be the outcome if Select Motors owned a garage, and Kozak gave possession of the vehicle to it for repairs? This changes it, because you need possession as an AGENT, not in some other capacity

4. Seller in Possession Exception

S26(1)
Where a seller has sold goods to a buyer but then **retains possession of the goods or documents of title and then sells them to a third party who buys in good faith and without notice of the first sale, the second sale will be treated as though the seller had the authority of the owner to sell**

Although under common law, the second buyer would lose against the true owner, the SGA says that the second buyer will prevail in some instances

Requirements:
1. There has to be a seller
2. The seller has to be in possession of the goods – **NEED CONTINUITY OF POSSESSION**
3. There has to be a transfer under a sale pledge or other disposition
4. The buyer has to buy in good faith and without notice of the first sale

The idea is that, where a buyer allows the seller to continue to be in possession of the goods, the risk is on the buyer

Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd
- Motordom had an agreement with D where they would buy cars,, sell to D, then maintain possession of the cars as bailee and sell the car on behalf of D
- In the afternoon of Nov 2, the D terminated the deal that they had with M and they said that the authority to sell their cars was terminated
- The evening of Nov 2, the P bought 29 cars from M and on behalf of each car, the manager of M signed a declaration that the car was the seller's property and that they had good title to sell it
- Of those 29 cars, 16 were the D's property
- D demanded the return of their cars from P but P refused saying that they belonged to them
- **Issue: Who has title of the 16 cars, P as a buyer in good faith, or D as the true owner?**
    - Court considers 26(1)
        - Found that cannot be limited to any particular seller, it applies to a purchase from any kind of seller made in good faith
        - The provision is intended as a protection against innocent purchasers in cases where estoppels gave insufficient protection
        - The meaning of "or is in possession of the goods" is that, if the seller remains in possession of the goods, or sells the goods without being in possession but then comes into possession of the goods, they can give good title to a second buyer
        - HOWEVER, if the seller gives possession of the goods to the buyer and then **comes into possession of the goods as a bailee**, he cannot sell the goods a second time and give good title
            - **In that sense, the section is inapplicable ONLY where there has been a break in the continuity of physical possession**
        - **The change in legal title between buyer and seller is irrelevant under this provision**
    - Court finds that, the fact that M was a bailee of D's care is irrelevant and that, even as a bailee, M can give good title to P

Factors Act does NOT work here – since it is a banktruptcy sale, it is not in the ordinary course of the agent's business

Argument made in the case is that the change in capacity altered the situation

- MD was a seller in possession but thereafter acted as an agent
- But the change in possession doesn tchange the situation
- THE SITUATION ONLY CHANGES IF THERE IS A CHANGE IN THE CONTINUTITY OF POSSESSION
    - So if MD sold to MC, MC took possession and then sent them back to MD, the exception would not apply

26(2)

- The first buyer can protect themselves from 26(1)by registering a financing statement which is a means of providing notice of this first sale
- But this only applies where the seller is not a mercantile agent and not someone who typically sells this type of good

5. Buyer in Possession Exception

S26(3)

When a buyer who obtains possession of the goods or documents, but does not yet have actual title to the goods resells them to another party

- **Requirements:**
    1. Buyer who agrees to buy or has bought goods
    2. Who obtains possession or documents of title
    3. With the consent of the owner/seller
    4. And then the buyer, or a mercantile agent acting for him, transfers the title under a sale, pledge or other disposition whereby the possession of the goods is transferred
    5. To another person who receives them in good faith and without knowledge
- Buyer 2 would obtain good title to the goods

Newtons of Wembley Ltd v Williams

- P sells a car to A who sells to B who sells to D
- P transferred title to A but the check bounced and therefore it was a voidable sale
- P rescinded the sale by taking all reasonable steps to rescind the contract
- The sale was rescinded before A sold to B
- S24 does not apply here because the sale was already avoided before the sale between A and B occurred
- According to s26(3), A had possession by consent of P at the time the transfer of possession occurred, so good title would be given to B and to anyone gaining possession after him
- Court finds an **additional requirement for 26(3)**
    - They say that 26(3) has the same effect as if the buyer were a **mercantile agent in possession of the goods with the consent of the owner**
    - **Therefore it has to be proven that the transaction that occurred to transfer the goods to buyer 2 was the type of transaction that a mercantile agent would normally enter into**
- If A had put the car in a car ad to sell it, then 26(3) would not apply because this would not be acting in the manner of a mercantile agent

When would this occur?

- Potentially where there is a financing set up
- Seller keeps title until all installments are paid
- But under 26(4), if there seller has a security interest, then 26(4) doesn't apply
  - There is a different way to provide protection
- If the seller registers, they have a better claim than the buyer 2
- But if the seller doesn't register, buyer 2 wins

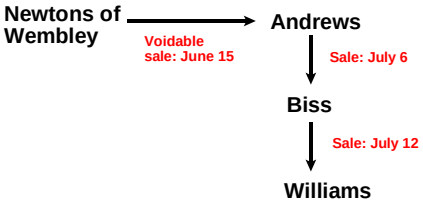
26(4)

- 26(3) does not apply to a conditional sales agreement which would be pursuant to a security agreement under which the seller has a security interest under PPSA ***because you have to register security interests and this would give the buyer 2 ability to recognize it***
- So if you have a conditional sales agreement you are covered by the PPSA

Fraudulent Buyers:

But there is another situation in which 26(3) is relevant even where the PPSA exists:

- Where you have a fradulant buyer
- Seller excercises the power of avoidance and title revests in the seller



Newtons of Wembley

Facts: NoW sells to Andrews, who is a fraudster. Andrews pays for the car with a bounced cheque. A resells to B. But prior to this NoW had taken all reasonable steps to avoid the K and title had revested

- But if it hadn't been avoided in time, B would have won.

Andrews is a buyer in possession?

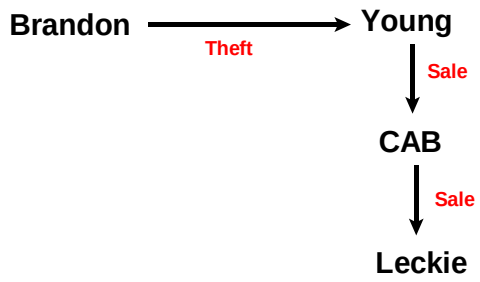
(1) Buyer under sale or agreement to sell
(2) obtains possession of goods or documents of
title with the consent of the seller
(3) transfer under a sale pledge or other disposition
(4) to a person who receives the them in good faith and without notice
All four conditions seem to be met

- But the judge says there is ANOTHER requirement
  - "The same effect as if the person making the delivery or transfer was a merchantile agent in possession of the goods of title with consent of the owner"
  - In the Seller in P, it says "as if it was expressly authorized by the owner"
  - So the language is different
    - We have to treat Andrews as though he is a merchantile agent and he received it with the consent of NoW
    - Then the innocent purchaser wont prevails unless the elements of the Factors Act are established

So this case adds a 5th requirement

- **The sale from Andrews to Biss had to be in the ordinary course of a merchantile agent, had Andrews been a merchantile agent**
- It will unlikely be in the course of a merchantile agent → It is likely to be a private sale
- But in this case, the court found that the street the car was sold on was like a car marketplace
  - From that, the court said it was of a type that a merchantile agent would engage in because there was a market for cars on the street

Brandon v Leckie



- P is the owner, Y steals the goods, sells to CAB who sells to D
- Court finds that 26(3) does not apply because this was a situation where the goods were stolen and therefore **Y did not have possession by consent of the owner**
- If P were taken out of the picture and Y had good title then it would apply
- The law is not meant to deprive a true owner if the goods have been stolen from him
- **The original seller has to have good title for s26 to apply**

Leckie argues that CAB is a buyer in possession

- When we look at the provisions of the act, under 26(1) it says “expressly authorized buy the owner of the goods to make it”
- The argument is that the sections of the sale of goods act deprive the OWNER of title. Does it apply if the intial party acquires it by theft?
- So contrast this case to cases where the property is not acquired by theft

So if the initial party acquires by theft, the true owner (seller) PREVAILS!!!

CHAPTER 2: NEGOTIABLE INSTRUMENTS

PART I: PRINCIPLES GOVERNING NEGOTIABLE INSTRUMENTS

A. Introduction

What is a negotiable instrument?

- **Instrument** = a document that evidences a right to the payment of money and is the kind that in the ordinary course of business is transferred by delivery with any necessary endorsement

→ A piece of paper that entitles whoever is holding it to payment

- **Requirements:**
  - Must be in writing
  - Has to evidence the right to pay money
  - Has to be transferable
- Negotiable instruments are a sort of **exception to Nemo Dat** in the sense that the whoever has the piece of paper regarding the debt has better claim to the debt than the person who gave them the paper
- **Drawor**: Person who CREATES the negotiable instrument (ex. Cheque writer)
- **Drawee**: Person ordered to pay money (ex. Bank)
- **Payee**: The person who gets paid by the negotiable instrument
- Negotiable instruments are governed by the **Bills of Exchange Act**

B. Types of Negotiable Instruments

Three types of negotiable instruments are covered in the BOEA:

1. **Bill of Exchange** (**s.16(1)**)
   - Piece of paper drawn up by the drawer ordering the drawee to pay the payee
   - Was used when there were sales to different countries who wanted to be paid in different currencies
   - The buyer would pay a money changer (drawer) who would then draw up the BOE and send it to the seller (payee) who would then take it to the money changer in their country (drawee) to be paid
   - In some cases the BOE is payable upon presentation, in other cases it may be payable in the future
   - If the BOE is payable in the future, the payee would present to the drawee, the drawee would sign the BOE (**acceptance**) and then would be obligated to pay on it on the date provided
   - If the BOE has been accepted, the payee can then sell the BOE to another party who would be able to collect on the date specified instead of the payee

2. **Cheque** (**s. 165**)
   - Drawee for a cheque is the bank
   - Drawor = holder of the bank account
   - Payee = the person who received the cheque
   - Always payable on demand

3. **Promissory Note** (**176(1)**)
   - Only 2 parties: the maker and the payee
   - The maker creates a promissory note to promise to pay the payee
   - This involves a promise to pay and not an order to pay

- **Requirements**:
    i. Unconditional promise
    ii. In writing
    iii. Of a sum certain
    iv. On demand or on a determinable amount of time
- A mere acknowledgement of indebtedness is not enough

C. Essential Requirements

Negotiable instruments have two important features:

1. **Transferability**: method of transferring debt where you are transferring the right to payment by transferring the paper
2. **Negotiability**: transferee gets better title than transferor

A document that does not qualify as either a BOE or a PN may nonetheless constitute a **contractual obligation** between two parties

In order to be considered a negotiable instrument and be governed under the BOEA, **all three types of instruments must have the requirements** that are derived from the statute to ensure certainty and autonomy

Elements of Negotiable Instruments:

1. Requirement that the instrument involves an unconditional promise (promissory note) or order (BOE or cheque)

- I promise to pay Adam Aske $500 on July 4, 2013 if he delivers the painting that he agreed to sell to me → **This is not unconditional**

2. Needs to be in writing and signed
3. It has to state when it is payable
4. Before the document attains status as a negotiable instrument, there has to be delivery

s.38 Delivery: every contract on a bill is incomplete and revocable until delivery of the instrument
Failure to have all requirements doesn't invalidate it, it just means it's not subject to the Act. Can still be a binding contract

Why do we use negotiable instruments?

If I simply assign a contractual right to pay → Then any contractual defenses that the buyer has against the assignor-seller are transferred to the assignee
Cannot put in a cut-off clause as per LPA 52(2)
But if I use a negotiable instrument:
If the seller sells the good to the buyer and takes a promissory note in respect of the price and negotiates the promissory instrument to the finance company, the finance company doesn't have to be subject to the K defenses

1. Unconditional Order or Promise

- There must **not be conditions** imposed on payment of the instrument
- The note cannot say, "payment of X dollars upon the happening of Y"
- Conditions can still exist outside of the instrument, they just can't be part of the instrument
- The reason for this is that, if the instrument is negotiated to another party, we **do not want that party affected by any conditions** between the two original parties

→ If it is conditional, it may still be a valid contractual obligation

16(3)

- An indication of which account to take money out of, as well as an indication of what the payment is for (ie: a note at the bottom of a check) does not count as a condition
- **HOWEVER, saying "pay out of this account if there is enough money" is a condition**

Bank of Montreal v Abrahams

Ratio: If a PN is detachable, it is more efficient to make it NOT part of the K and not subject to K conditions → better facilitates commerce (Need to do what was commercially reasonable – Did the parties expect that the conditions of the K would apply to the note? Show some evidence, or the PN stands alone)

In 1989, the investors gave a promissory note to the Reemark group

Facts: Reemark group assigned the note to BMO. Investors paid BMO per the promissory notes—until they discovered the Reemark group had failed to transfer title of the property to them.

Stopped paying BMO because the claimed a total failure of consideration, entitling them to repudiate. BMO sued, claiming the notes were unconditional promises to pay

S176(1) BEA

176. (1) A promissory note is an **unconditional promise** in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

Issue here: The PN was attached to the K by a perforated edge. Does this make it part of the K and subject to K conditions?

Notes meet the statutory requirements for 4 reasons:

- 1) Notes themselves contain no conditions and therefore are unconditional
- 2) The clause in the agreement requiring that the purchasers provide the Notes recognizes them as separate instruments from the conditional contract
    - The absence of a cut off clause is irrelevant
- **3) It would frustrate the purpose of the BOEA to interpret an unconditional promissory note in conjunction with a related contract on the sole ground that it was attached by a perforated edge**
- 4) There is no basis to imply a term that payment of the Notes was conditional on Reemark fulfilling its obligation to transfer the title
    - Therefore the investors did have to pay on the notes

Point of the BEA is to facilitate commerce → You should not have to worry about K conditions that MAY be attached to a torn off PN

In the ***Range v Belvedere*** case, the SCC found that because there was no cut off clause, and the contract was together with the PN, the document was not unconditional and so the third party assignee was subject to the defences

- HOWEVER, the court in *Abrahams* departed from this decision and found opposing judgment
- *Belvedere* should be considered because it is an SCC case, but the *Abrahams* case makes more sense for third parties
- *In Belevedere,* the note was APPENDED to the K → Provisions of the K suggested that the note was not meant to stand independently **THUS IT WAS ONLY COMMERCIALLY REASONABLE TO SAY IT WAS CONDITIONAL**

2. In Writing and Signed

Ss 16, 165, and 176 provide that the instrument must be in writing and signed by the maker or drawer.

- The signature does not have to be by the hand of the maker but must be by someone under his authority at least

3. On Demand or at a Future Time

s22 – Bills payable on demand

A bill is payable on demand if it is expressed to be, or if no time at all is expressed

s23 – Payable at Future time

- A bill is payable at a future time if it is expressed to be payable at **sight or at a fixed period** after the occurrence of a specified event that is certain to happen (even if the time of the happening is uncertain)
- If a bill is payable at sight, **three days** are added to the time of payment (**s41**)

4. A Sum Certain in Money

Ss 16(1) and 176(1) → Need to be certain sums

27(1) Sum Certain

27. (1) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid
(*a*) with interest;
(*b*) by stated instalments;
(*c*) by stated instalments, with a provision that on default in payment of any instalment the whole shall become due; or
(*d*) according to an indicated rate of exchange or a rate of exchange to be ascertained as directed by the bill

- It is unusual for a bill to be paid in instilments
- This would likely only be found in a PN taken in respect of a term loan with a repayment schedule that called for equal monthly installments over the course of the loan
- but even if it is payable in installments it is still a sum certain

5. Delivery

S38 - Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable until delivery

- Cannot be determined by looking at the written document
- Until delivery occurs, the instrument is incomplete and revocable
- Once the instrument is delivered, it becomes complete and irrevocable and only then does it gain status as a negotiable instrument

D. Acceptance

<u>Acceptance of Bills of Exchange:</u>
Simplest form: On a specified date, there is an order to pay a certain amount of money
Addressed to (Person who pays it out): Drawee
Signor: Drawor
Recipient = Payee
Drawor directs drawee to pay payee

- The drawee is not liable until the **<u>drawee accepts the instrument</u>**
  - Ex. Stamp

Acceptance needs to be written on the bill and signed by the drawee

- This activates the drawees liability

S34(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

- A drawee must assent to the order of the drawer before he is liable on the bill
- The acceptance of the bill signifies the drawee's assent

Once the drawee accepts, he is referred to as the **acceptor** and then becomes liable to the holder

Do not have to ask for acceptance if the bill is payable on demand!!

E. Negotiation

Transfer of the negotiable instrument to another person is called **negotiation of the instrument**

An instrument is **non-negotiable** when the drawer writes “non-negotiable” or “non-transferrable” or “to B only”

- All provisions regarding negotiability are inapplicable to these instruments

Holder = the person whom the instrument has been negotiated to

- In order to negotiate an instrument the holder **must gain possession of it**

Two types of negotiable instruments:

s.20(2) A negotiable bill may be payable either to order or to bearer.

How an instrument is transferred depends on whether the paper is **payable to bearer or payable to a named person**

- If payable to bearer, only require delivery to negotiate (**59(2)**)
- If payable to a named person, the person wishing to transfer it must **endorse it by signing the back** (**59(3)**)

1. Payable to Bearer

- An instrument that starts out as a bearer instrument retains this status
- **S. 20(3)** An instrument starting out as payable to order can become a bearer instrument by **endorsing it in blank**
- It can then be reconverted to an instrument payable to order **by endorsing it to a named person**

s.59(2) A person who holds a bearer instrument and who wishes to transfer it to someone else DOES NOT have to endorse it, they simply have to give it to the person!!!

2. Payable to Order

S21 – Bills Payable to Order

- An instrument will be considered payable to order if it expresses so, or if it is expressed to be payable to a particular person
- Cannot contain words prohibiting transfer or indicating an intention that it should not be transferable

To transfer, delivery is not enough to transfer the rights

- Need delivery + endorsement **BoEA, s.59(3))**

3. Endorsements

66. (1) An endorsement may be made in blank or special.

An endorsement may be made in blank (**66(2)**)

An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer.

- The payee would sign their name and deliver to the transferee
- It then becomes a **bearer instrument** so that you can transfer possession to another party and **no further endorsement is needed**

(**66(3)**) A special endorsement specifies the person to whom, or to whose order, the bill is to be payable.

S67 (1) An endorsement may contain terms making it restrictive.

- An restrictive endorsement may exist which kills the negotiability of the instrument
- (**67(2)**) Including the word "only" after a special endorsement would be restrictive
    - An endorsement is restrictive that prohibits the further negotiation of the bill, or that expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is endorsed "Pay ... only", or "Pay ... for the account of ...", or "Pay ..., or order, for collection".
- (**67(3)**) An endorsee of a restrictive endorsement has no power to transfer his rights unless expressly authorized to do so
    - A restrictive endorsement gives the endorsee the right to receive payment of the bill and to sue any party thereto that his endorser could have sued, but gives him no power to transfer his rights as endorsee unless it expressly authorizes him to do so.

**** THIS RENDERS THE INSTRUMENT NON-NEGOTIABLE**

F. Liability of Parties

S129 - Liability of the drawer

Drawer engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; and

- **The drawer is liable for the payment of the note upon presentation**
- If the note is not paid, the drawer will compensate the holder or any endorser
- The drawer will be liable if the drawee refuses to accept the bill or if the drawee refuses to pay on the bill

S127 – Liability of acceptor PRIMARY LIABILITY

The acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance.

- The acceptor, upon acceptance is liable for paying on the bill

S185 – Liability of maker of PN

- The maker of the note is liable to pay on the note to the payee or any holder in due course

S132 – Liability of endorser

Endorser engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken

- An endorsee is secondarily liable on an instrument
- If the person who is primarily liable on the instrument does not pay, the holder may bring an action against an endorser
    - For a promissory note, the person who makes it is primarily liable
    - For a BOE, the acceptor is primarily liable
- If the endorser writes the words "without recourse" beside their name, they are no longer liable on the instrument (**33(a)**)

NOTE: If I have a bearer instrument, I need not endorse it in order to negotiate it. SO, I should NOT endorse it, because as soon as my name goes on it, I can be held liable

**** SO THE PAYEE HAS:**
1. A PRIMARY ACTION AGAINST THE ACCEPTOR (BANK) ENDORSER, THE BANK
2. SECONDARY ACTION → DRAWOR, ENDORSER

A person trying to present a note for payment has an action against the person who is primarily liable but they **also have an action against any of the parties** who have previously endorsed the note

If an endorser must pay on the note, they have an action against the drawer and also against **prior endorsers**

A drawee WILL NOT BE LIABLE if they do not accept the BOE or cheque!!! → in the case of the bank, they often will not accept the check and therefore will not be liable on the note

I. Defences

1. Mere Holder

Someone who holds a NI without giving consideration for it
BoEA, s 73(a) - A mere holder has the right to sue in the holder's own name.
BoEA, s 73(d) Payment in due course to a mere holder discharges payor even if the title of the holder is defective
A mere holder will be subject to a defence of want of consideration.

2. Holder for Value

S53 – Holder for Value
A holder is deemed to be a holder for value as regards any persons who were parties to the instrument at the time that value was given.

- Valuable consideration is anything that can support a simple contract or antecedent debt or liability (**52**)
    - ANY consideration, including PAST consideration

Ex:
A draws BOE for C, the payee, B accepts the bill thereby becoming primarily liable
C gave value initially and endorses to D who did not give any consideration (so as a gift)
D is still a holder for value even if he did not provide value
D therefore has an action against A and B but **not against C because of the lack of consideration**
Can only have an action against those who received consideration

S53 makes it so that, IT IS NOT NECESSARY THAT THE HOLDER PERSONALLY GIVE VALUE!! As long as value was given somewhere along the chain

Where consideration has not been given between two people, the holder is not considered a holder for value

- So in the case where the C endorses the bill to D as a gift, D is not a holder in value in relation to C but he would be in relation to any earlier party that DID get consideration for their endorsement

S 57 - Every party who's signature appears on a bill is presumed to have given value, and therefore is presumed to be a holder for value, unless there is evidence to the contrary

3. Holder in Due Course

A holder in due course will acquire better title than that possessed by the transferor of the instrument
Holders in due course don't have to worry about defects in title → They are superior to all

S.55 → Requirements for being a holder in due course

- Took bill in good faith and for value

S.73(b) → Rights of a holder in due course

where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

- Don't have to worry about a defect in title, it doesn't matter if the bill was stolen
- The parties cannot raise a PERSONAL defense against you

Requirements to become a holder in due course:

1. **Holder for value**
   - Per the bills and exchange act
2. **Complete and regular on the face**
   - Nothing can be crossed out or erased
3. **Not overdue**
4. **No notice of previous dishonour**
5. **Good faith**
   - If you deliberately fail to make inquiries where something is fishy "willful blindness" you crossed the line and aren't acting in good faith anymore
6. **No notice of defect in title**

A holder in due course has the ability to bring an action on the instrument even if a defect in title exists which would prevent an action on the instrument between the transferor and immediate transferee

S57(2) Presumed Holder in Due Course

Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

- **There is a presumption that every holder is a holder in due course**
- If it is proven that the acceptance or negotiation of the instrument was affected with fraud, duress, force, or illegality then the presumption no longer stands
- The burden is then on the holder to prove that he is the holder in due course unless or until he proves that value has been given in good faith for the bill by some other holder in due course

Example

- Check is drawn by A payable to C
- D fraudulently induces C to endorse the check over to him (**defect of title!!**)
- D then gives the check to E by way of gift
- E negotiates to F who gives value for it and becomes a holder in due course
- F can then sue on the instrument notwithstanding the defect of title that exists due to the fraud
- BUT E is subject to the defect of title because he is not a holder in due course

Any subsequent holders after a holder in due course are also holders in due course!

Toronto Dominion Bank v Canadian Acceptance Corp



Manager of the D issued cheques beyond his authority as a part of a larger fraud. TD is claiming to be a holder in due course of 9 cheques. D is claiming that the bank did not take the cheques for value and that there was an issue of fraud and the burden was on the bank to establish holder in due course status

Issue: Has the bank fulfilled the holder in due course status?
Reminder: Presumption of HIDC status unless there is fraud, etc.

- Court found that the cheques were affected with fraud and therefore the bank has the burden of proving that they are a HIDC under 57(2)
  - They must prove that they took the cheques in good faith and for value

The jurisprudence suggests that if circumstances invite a person to ask questions but they wilfully close their eyes to doing so then they have not acted in good faith

- Lack of good faith does not equally blundering and careless – need to be willfully blind
  - Court of appeal finds that the bank did act reasonably and in good faith in its actions
  - They also found that the bank was correct in accepting the signature on the cheque because the bank employees cannot be expected to be handwriting analysts
  - The omission of the firm name on one of the cheques was not material because it had the signatures of two known proprietors in the company
  - **Where there is a name discrepancy in the spelling of the names the cheques will not be considered regular on the face and the holder is not a holder in due course**

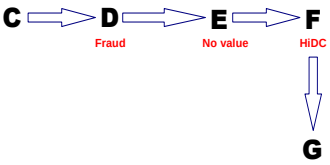
Sheltering – Also applies to NEMO DAT

Sheltering: → Also applied to the exceptions to Nemo DAT

- Once one person has good title, they can keep transferring it and it doesn't matter of the prior events (whether they have knowledge or not)

G get's F's good title

- As long as F wasn't a part of the fraud
- Even if G gets it as a gift from F, they get the good title



3. Real Defences

Personal Defenses:
Defenses that CANNOT be raised against a holder in due course

1. Defences based on total or partial failure of consideration (e.g., non-performance of the contract in respect of which the instrument was given).
   - If you have an issue, raise it with the party that sold you the goods → not with me
   - Back to the autonomy of the instrument – not connected to the original K
2. Fraudulent misrepresentation that renders the transaction avoidable.
   - Cannot be raised against the holder in due course
3. Rights of set-off
4. Theft of the instrument.
   - Where it is a bearer instrument, the fact that it is stolen cannot be raised

These are the title/personal defenses

- Another category of defense CAN be raised → The "real" defenses
- Not a question of who has title, but of saying "that's not an instrument at all"
  - Ex. Forgery

A real defence **speaks to the validity of the instrument**

- The claim is that the instrument is a complete nullity and therefore incapable of imposing liability

A holder in due course IS SUBJECT to any of the real defences raised by a defendant!!!!!!

Real defences are:

1. Forgery of a signature
2. Lack of capacity of signatory
3. Material alteration of the instrument
4. Lack of delivery of an incomplete instrument
5. Non est factum
6. Discharge by payment

So... if any of these defences are found to be valid then the liability is nullified as against ANY holder

National Bank of Canada v Tardivel Association

- D stole a 23,000 check from an acquaintance and went to the bank to cash it
- The P's employee decided to cash the cheque before waiting for it to clear
- A stop payment was issued by the drawer of the stolen cheque the next morning
- The following Monday, the check was sent back to the P bank saying payment stopped and therefore the bank was not going to be paid on it
- The P wants to recover the stolen money from the D
- **Issue: as a holder in due course, can the P bank recover the funds free of any defect of title whether or not the cheque was stolen?**
    - D submits that, because the cheque was stolen it is not properly classified as a BOE
    - Applicable sections are: s39(2), 73(b), 165(3)
    - Does 39(2) protect a holder in due course even when the bill has been stolen
    - Court looks at the decision in *McKenty* and decides that if the instrument is stolen then it never actually becomes an instrument in the first place

HOWEVER, the outcome would be different if delivery to the first payee occurs, then it will be considered an instrument and would be valid to a holder in due course!!

So if the instrument is stolen AFTER delivery to the payee then all the regular rules apply!

Real Defense → Lack of Delivery

S.39 – Deals with delivery

- In a cheque, there is
    - 1. Certain amount of money
    - 2. Promise to pay
    - 3. Initial delivery to party
        - What if there isn't a delivery?

The delivery needs to be voluntary

- Although there is a requirement of delivery, s.39(2) says if the holder in due course is in possession, they are assumed to have taken delivery
    - So even if delivery isn't proper, if the bill ends up in the hands of the holder of due course, valid delivery cannot be raised as against a holder in due course

But there is a line of cases in Canada that states s.39(2) need not be followed

Where the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed.

4. Statutory Estoppels

Statutory estoppels exist that prevent the **real defence of FORGERY** from being raised

S128 – Acceptor precluded from denying to a HiDC the existence of the drawer, the genuineness of the drawer's signature and the drawer's capacity and authority to sign it → Cannot raise defense of forged drawer signature
S129(b) – Drawer is precluded from denying to a HiDC the existence of the payee and the capacity of the payee to endorse → Cannot raise defense of fake payee or fake payee endorsement
S132(b) – Endorser is precluded from denying to a HiDC the genuineness and regularity of the drawer's signature **and all previous endorsements** → Cannot raise defense that previous signatures were forgeries
s 132(c) Endorser is precluded from denying to an immediate or subsequent endorser that the bill was valid and subsisting and that the endorser had good title to it.

Only certain parties can raise estoppels, for example:

- A steals a cheque from B and forges B's signature as an endorsement and then negotiates the check to C as a holder in due course
- C **cannot** sue on the instrument due to the forged endorsement which is a real defence
- C then negotiates the instrument to D
- D can **only** sue C because C is precluded from denying the validity of all previous endorsements

When you endorse a check, you are saying that the instrument is genuine and therefore you are prevented from being able to claim that one of the signatures is a forgery (s132(b))

Personal Defense → Defect in Title Defences

Defect in title = there is a problem with the **transfer of title of the instrument**
This is different than a real defence because the issue if the title of the instrument, not the actual instrument itself

S55(2)

- If a holder obtained a bill or acceptance of a bill by fraud, duress, force, or fear or other unlawful means, or for an illegal consideration or when negotiated in breach of faith
- The title of that person to that bill is defective

This means that the owner still has title to the bill, not the holder

- So if the bill is stolen, this would be a defect in title

Defect in title defence CANNOT be raised against a holder in due course!! Only against a holder for value!!

6. Personal Defences

These are based on **matters external to the instrument** that affects the parties

An example would be **set off claims** where both parties have claim to debts and one claim sets off the other

Iraco Ltd v Staiman Steel Ltd
You cannot exercise the right of set-off, even against the immediate parties

- ** This is one of the issues with using a cheque
- The claim of sub-standard goods cant be claimed on the action on the cheque

This is the same as against a holder in due course
Facts: P sent D welded steel tubes which were found to be rusted and bent upon pick up. There had been a reduction in price for the goods and because the D believed they would be compensated by insurance, they

sent a and delivered a check for the amount owed. D later found out that insurance would not compensate them so they stopped payment on the check. D submits that a counterclaim for damages is a defence to the action on the cheque. So the buyer is trying to raise a **personal defence of a defective product**

Issue: Are claims for damages, breach of warranty, or equitable set off defences to an action brought by a holder not of due course?

- Court looks at s2 of BOEA and finds that the word "counterclaim" is not extended to provide a defence where the counterclaim is for an unliquidated sum
- English court of appeal in *Hanak v Green* determined that there are **three types of set off**:
  - 1) a set off of mutual debts
  - 2) a setting up of matters of complaint which if established reduce or extinguish the claim
  - 3) equitable set off where D is entitled protection from P's claim
- **Equitable set off** = allowing a claim for damages to set off a claim for a debt but it has to arise from the same set of events or contract such that it would be inequitable to not allow it to be raised
- Court found that the **law of equitable set offs** probably does not apply to BOE
  - This is likely because payment by an instrument is **a separate and independent contract** from the sales contract
- Court found that equitable set off did not apply here
- This does not mean that the buyers have no remedy to the damages, they would just have to sue separately for compensation

**** ALLOWS THE CHEQUE TO BE SEPARATE FROM THE K**

PART II: SPECIAL ISSUES RESPECTING CHEQUES

Blank Cheques

s. 30 A presumption about authority

Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates, in the absence of evidence to the contrary, as an authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser, and, in like manner, when a bill is wanting in any material particular, the person in possession of it has, in the absence of evidence to the contrary, the authority to fill up the omission in any way he thinks fit.

- In the absence of evidence to the contrary, the court presumes the person you gave a blank cheque to had the authority to fill it in as they see fit

You can ONLY fill in the sum that you have been given the authority to write in
What happens if the cheque is later negotiated to a holder in due course?
If you fill in the wrong amount (unauthorized) and you are NOT paid, you cannot sue the drawee for the amount

- But that's just between the parties
- If the cheque is negotiated to a holder in due course → s.31
  - Then it doesn't matter what limitation of authority the original holder was given

s.31 – Blank cheuqes to HiCD

Where any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

J. Countermand

S.165(1) – Bills of Exchange Act
165 (1) A cheque is a bill drawn on a bank, payable on demand.
(2) Except as otherwise provided in this Part, the provisions of this Act applicable to a bill payable on demand apply to a cheque.

- All the rules for negotiable instruments apply to cheques – treated like a bill payable on demand where the drawee is a bank

AKA: Stop of payment orders = revoking instruction to pay on a check

If the bank misses the countermand, there will be liability on the bank

167(a) Countermand determines the banks duty to pay on a cheque

Countermand:
The drawor instructs the drawee bank to pay money to the payee

- When you put a stop order on, you put a countermand on that order
- **The bank is obliged to follow the instructions of its customer**

The idea is that if a bank if given the order to countermand, they MUST do so

Without a countermand: LIABLE TO DRAWOR FOR ANY CLAIM PAYEE MAKES AGAINST DRAWOR
If there are sufficient funds and the bank doesn't make it, it is in violation with their K with the drawor – could be liable to pay loss

With countermand: **LIABLE TO DRAWOR FOR ANY $$ PAID TO PAYEE BY BANK**

- Bank has to refund any money that it paid out if the cheuqe has a countermand on it

Countermand does NOT affect the liability on the instrument

- So a holder in due course would still have an action against liable parties, even if the check is countermanded

Effective Countermand:

1. Must be made by the customer
2. Must be made to the drawee bank
3. Must give enough information to identify the check in question
    a. Check number
    b. Date it was issued
    c. Dollar amount
    d. Name of the payee

Giardano v Royal Bank:
Name of payee on countermand instruction:
Evergreen Company
Name of payee on cheque:
Evergreen Wig and Flourish Company
Amount on countermand instruction: $11,007
Amount on cheque: $11,091
**** Countermand not allowed on it**

Westminster
Number on cheque misdescribed.
- This is the ONE unique element, so it is particularly important

Customer did not inform bank that the cheque was post-dated.
- **Unless you tell the bank the cheque is post-dated, the bank is entitled to assume any cheque after the countermand is not subject to the countermand order**

Bank was therefore entitled to assume that countermand related only to cheques that were dated on or before the date of the countermand.

Remfor Industries Ltd v Bank of Montreal
Number on cheque correct
Name correct
Bank informed that cheque had been post-dated.
- If the amount if wrong, it doesn't matter
- **You need not be accurate in all respects so long as you provide enough info to identify the cheque**

Test: Did the bank have sufficient information to identify the cheque?

K. Post-Dated Cheques

Future dated checks which are NOT payable on demand

Prior to the date on the post dated check, the instrument may still be negotiated

Is a post-dated cheque really a cheque?
- Is it still payable on demand?
- The dominant view is that it is still a cheque (Brad Crawford)
  - It means it is not payable until the date arrives

Bank carries a bit more risk, because it is not authorized to pay out before the date and must compensate if they don't
The fact that a cheque is post-dated also doesn't affect the holder in due course status

Wheatland Investments Ltd (cob Money Mart Regina) v SaskTel
Drawer Payee HiDC

SaskTel ⇨ Delorme ⇨ Money Mart

1. **Cheque issued June 15, but post-dated June 17.**
2. **Negotiated to Money Mart on June 15.**
3. **SaskTel places stop order on cheque at the Bank of Montreal (employee had already been paid).**
4. **Money Mart holds cheque until June 17 and then presents it for collection at its own bank.**
5. **The cheque is dishonoured due to the stop order**.

The drawee bank is not liable – they would have to accept the bill
*** Need acceptance to be liable as a drawee

So in the holder in due course only has an action against SaskTel

- MM can still become a HIDC even if the cheque is postdated
- The drawor has the right to countermand the cheque, but this doesn't alter the basic liability

Countermand is really only helpful as between the original parties, subject to Iraco

Issue: is a post dated cheque a BOE?

- Court considers s16(1), s55, and s165(1)
- A post dated cheque does not fall under the 165 definition, but it does fall under s16(1) definition of a BOE and therefore is covered by the Act

Issue: can a post dated cheque be negotiated prior to the date on the cheque and is the person who has negotiated it a holder in due course?

- A post dated cheque is **not irregular or incomplete**
- The court found that money mart had filled all the requirements of s55 and therefore were holders in due course
  - Money mart had no notice that the cheque was overdue or that it had been previously dishonoured
  - The cheque was negotiated prior to the countermand
  - Money mart took the cheque in good faith and for value

Issue: is the stop payment effective against a holder in due course?

- S73 states that a holder in due course is free from any defect in title of prior parties or personal defences between parties and that they may enforce payment against all parties
  - The effect of countermand extends to post dated cheques, subject to the rights of HIDC
- Money mart is a HICD as against SaskTel and therefore **SaskTel's defence that they applied a countermand is not available in the action between a holder in due course and SaskTel**
- **Since the post-dated cheque is a BOE, the countermand is not effective against a HIDC**
- Court found that it is for the drawer of the cheque to pursue the employer rather than the HIDC who negotiated the cheque in good faith

When a holder in due course is holding a post dated check, and they have negotiated for this check in good faith, if a countermand is placed on the check, the holder in due course can commence an action for the amount of the cheque **notwithstanding any defences that may exist between prior parties**

- **So the holder in due course will be able to recover the amount of the check from the drawer and the drawer would then have to sue the payee to recover**

L. Certified Cheques

A holder will have a cheque certified if they are concerned that the drawer will not be able to pay on it

- If this is the case, the drawer is discharged from liability
- The bank has taken liability by certifying the funds

Certification may be requested by the drawer or by the holder (in most cases, the payee).
If it is done at the request of the holder, the drawer is discharged from liability on the instrument. The reason is that the drawer expects that the holder will present the cheque for payment, and should not be liable if the funds are left with the bank.

No statutory authority exists for certifying!!

Process of Certification:

- Bank marks the cheque as certified
- This signifies that there is an account with sufficient funds
- Bank withdraws the funds and puts into a separate account to be used to pay on the cheque

AE LePage Real Estate Services Ltd v Rattray Publications Ltd



1. Cheque issued by Rattray on April 12 drawn on CIBC.

2. Rattray instructs CIBC to stop payment on April 25.

3. London Life presents the cheque to CIBC for certification on April 26.

4. The CIBC misses the stop payment instruction and certifies the cheque.

Issue: can a drawee bank withdraw certification of a cheque which was granted erroneously if the certification was at the request of the payee?

- Where the bank certifies a cheque to either the payee or the drawer, this **is akin** to acceptance by the bank, however **not exactly the same**
    - Therefore **only liability** will be analogous but not all the other rules

The bank will be liable to the holder if it certifies a cheque that has been countermanded

When a bank certifies a cheque, it assumes the same positon as if it had accepted the cheque
So if there is a stop order and the bank certifies the cheque, the bank is going to be liable.

The bank will have to re-credit the customer who placed the countermand but then they may have grounds for an action against the drawer or payee

- If the bank honors a cheque notwithstanding a countermand, and that **debt was to satisfy a just debt**, they may defend an action against the drawer/customer for reimbursement
- Where the cheque was not to satisfy a just debt, they may have an action against the payee in restitution

M. The Clearing System

Clearing: transactions are accounted for as between the member banks of the CPA

Settlement System: moves funds from those who owe money to those who are owed money

The clearing system facilitates the adjustment of financial positions of banks based on who owes what to whom

Re: Collections Inc v Toronto Dominion Bank

- Class action suit claiming that banks benefit from placing holds on cheques because they are able to use the money that belongs to the customers
- There are actually **4 Different types of contract:**
    - Account agreement between drawer and the drawee bank (the bank who has a relationship with the drawer of the cheque)
    - Contract between drawer and payee: bill of exchange involves contract and the engagement to pay and a cheque is a type of bill of exchange

    - Relationship between payee and the collecting bank which is an account agreement
    - Relationship between drawee bank and collecting bank, clearing house rules: rules are a type of contract as between the various participants, in connection with the canadian association clearing rules
- Theory behind class action is mistaken as its wrong to assimilate clearing of cheque with the cheque not being paid
    - It doesn't mean the cheque hasn't been paid ti doesn't happen until the cheque is one way or the other, either brought before the drawee bank and the drawee bank makes its decision as you can see then the court therefore totally undercuts the foundation of the class action
    - Just because it gets the clearing system DOESN'T mean it's paid

S165(3)

- Where a cheque is delivered to a bank and the bank credits him the amount, the bank acquires all the rights and powers of a holder in due course
- Although uncertain, the likelihood is that all the requirements regarding HIDC would still apply, and if the bank knew of any fraud, the court would not find them HIDC

Electronic Bills

A recent addition to negotiable instruments law:

- 163.1 → Concerns official images and electronic presentation
    - Images of bills are allowed to be used just like bills
- Ex. Taking a picture of a cheque
- Added to the Bills of Exchange Act
    - Reminder: When you deposit a cheque, the collecting bank collects on your behalf and the cheque goes through the clearing system
    - If the acceptor bank rejects it, the paper physically moves back to the collecting bank

N. Allocation of Forgery Losses

Forged signature on cheque

- ex. Fake drawor signature or fake endorsement

S.48(1) → The forged or unauthorized signature is wholly inoperative

- 48(1) Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

The person who gets the cheque from the forger has no right to the cheque → Legal title remains with the person who owns the chequebook
One exception:

- If you are estopped from saying it is a forged signature (arguing the geuniness) you can be liable
- When will this occur?
    - Look at s.132(b)
    - When you endorse the back of the cheque, you say the cheque and the signatures are genuine
    - You are estopped from saying the signatures are forgeries
        - You are only precluded from signatures on the cheque at the time of your endorsement → Not for later signatures that may be forgeres

So, suppose the payee's signature is forged:

- Suppose that someone else is a holder in due course
- The forgery is ineffective in transferring the property
- That's why forgery is a real defense!!
    - It has the effect of rendering the whole thing annulled

Statutory Estoppels can be raised in certain cases to preclude people from raising an issue of genuineness of the signature, such as if you endorse the instrument

Basic Principles:

1. **A person who's signature is forged will not be liable on the instrument**
    a. This is the case for a forged drawer signature or a forged endorser's signature

2. **A forged endorsement does not result in the passing of title or a right of possession to the instrument** (**s48**)
    a. The title remains with the true owner

3. **A transferee who obtains possession through a forged endorsement is not a holder in relation to those signatures on the cheque prior to the forgery**
    a. Therefore they cannot bring action against any other person who has signed prior to forgery
    b. They would only have an action against any endorsers who signed the bill after the forgery
    c. NOT the drawor or the payee

4. A transferee who derives title through a forged endorsement may be able to recover against persons who endorse the cheque after the forgery as a result of the statutory estoppel. This is as a result of statutory estoppel

- So the ultimate holder cant sue the parties who signed the instrument prior to the forgery, but they can sue anyone who endorsed after the forgery
- They cannot raise the geuiness of the signature as a defense

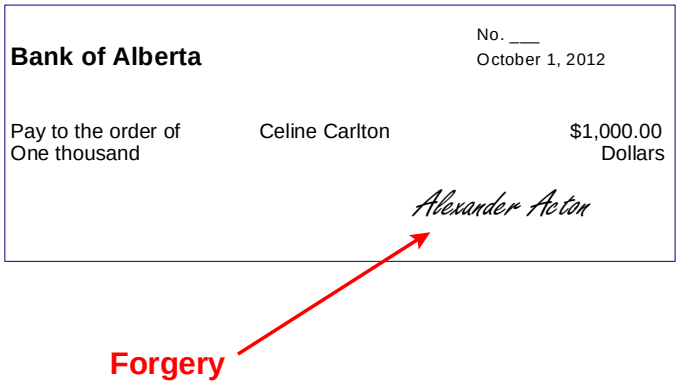
4. **A possessor of the cheque that contains a forgery is not entitled to payment from the drawee bank**
    a. That right only remains with the true owner
    b. If the bank does pay on the forged cheque, they must re-credit the account of the customer which they drew funds from

5. **A true owner has an action in conversion against anyone who has obtained a transfer of the forged cheque**
    a. The cheque is tangible property that represents a debt obligation
    b. If the owner of the cheque brings an action in conversion for the cheque, the innocent holder may bring an action against the person who gave them the cheque for the amount of the cheque

No matter what signature was forged on the cheque

- Generally, customer agrees to check the account and make sure the activity is genuine
- So the customer may be precluded from raising the defense after a certain period of time has passed
- So, this rule can be varied by K

7. A drawee bank that has paid a cheque bearing a forged endorsement in good faith and in the ordinary course of business has the right to recover the amount paid from the person to whom it was paid or from any endorser who has endorsed the bill subsequent to the forged or unauthorized endorsement.



So if I steal Alex's cheque and sign his name

- Celine Carlton is innocent
- Carlton endorses it to HiC
- Carlton is liable to HiC, but Alex is NOT liable to pay to me

*Carlton is precluded from raising the forgery as a defense

s49

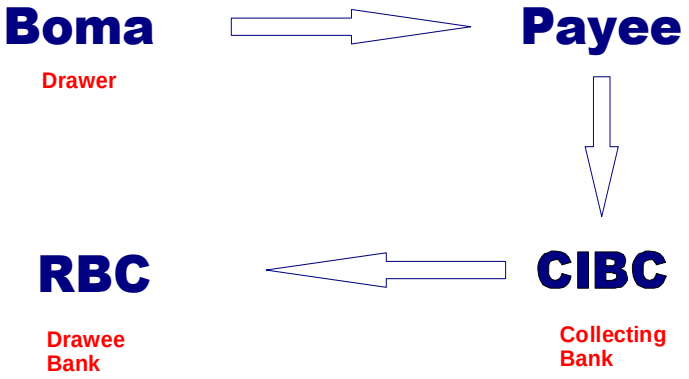
- Where a bill bearing a forged endorsement is paid in good faith, the person by whom it was paid has the right to recover the amount paid from the person it was paid to or from anyone who has endorsed the bill subsequent to the forgery if notice of the forgery is given within a reasonable time after getting notice of the forgery
- Any prior endorser from whom an amount is recovered can bring an action against any prior endorser subsequent to the forgery
- So the drawee bank has a right of action against the collecting bank
    - Suppose there is a forgery of an endorsement and the drawee bank pays on the instrument → The drawee bank passes that loss to the collecting bank and the collecting bank sues the person that gave it the instrument and the people keep passing it off to the person they got it from UNTIL you get to the person who initially got the cheque from the forger → They will bear the loss in Canada

Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce

155 cheques totalling $91,289.54 were issued to various payees. None of these cheques were issued in respect of genuine obligations of the company. The fraud was carried out by Donna Alm, the bookkeeper, who had signing authority but was not a director or officer of Boma.

- 1) 108 cheques to J. Lam or J.R. Lam deposited (most of them unendorsed) into her account signed by Alm.
  - Similar enough name to husband that the bank doesn't act questions
- 2) 6 cheques to J. Alm or J.R. Alm signed by Mange (an officer of Boma).
- 3) 38 cheques payable to existing employees signed by Alm.
- 4) 3 cheques payable to existing employees signed by Mange.

Alm forged the signature on all 41 cheques to existing employees and on 7 of the cheques payable to Lam (five of the cheques she had signed and two signed by Mange)



Drawer = Boma, Payees = Lam and others, Collecting bank = CIBC, Drawee bank = RBC

Issue: Who bears the loss here, Boma or the bank?

Analyses is based on conversion action, then under 20(5) as a defence to conversion, and then 165(3) defence

1) Conversion action →

The true owner of a negotiable instrument may bring an action in conversion against a person who has interfered with the owner's lawful right to possession of it. The tort is one of strict liability and contributory negligence is not relevant.

- The fact that Boma may have been negligent in the way it handled its affairs is irrelevant

Scenario 1



No action for conversion

From the outset, this is just a fake → No value, no action for conversion

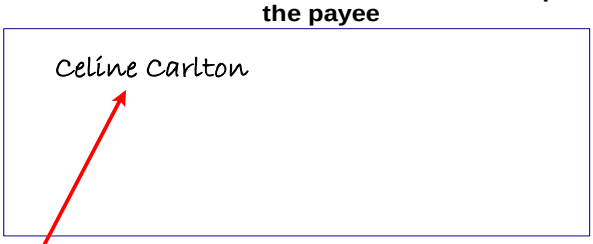
THE CHEQUES ARE CONSIDERED STOLEN FROM OUTSET – THEY HAVE NO VALUE (FAKE CHEQUES)

Scenario 2



Genuine

Drawer issues the cheque to the payee



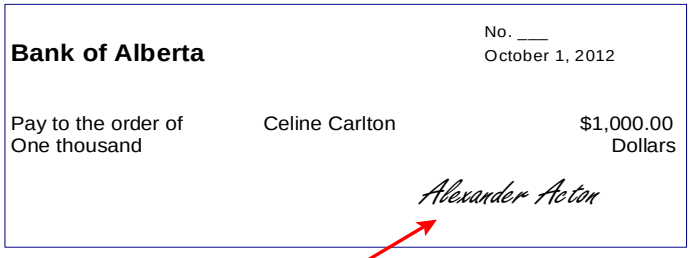
Forgery

Payee is the true owner. Carlton has an action in conversion against parties who have interfered with her right to possession of the cheque.

Acton cannot sue in conversion since it is Carlton who is lawfully in possession of the cheque.

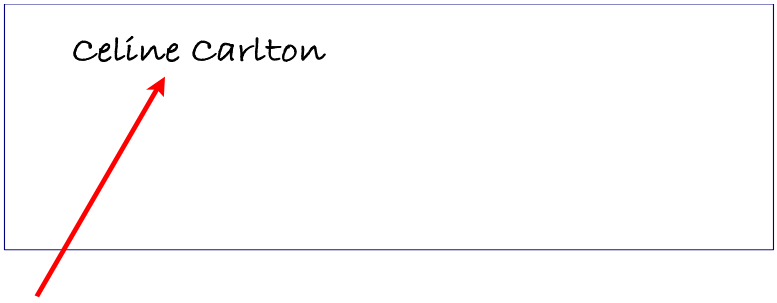
- **The payee as the true owner has the right to sue for conversion**
- **The cheque is property of the payee, not the drawor**

Scenario 3



Genuine

Drawer does not issue the cheque, but it is stolen from the possession of the drawer.



Forgery **The drawer (Acton) is the true owner. The cheque was never issued to Carlton, and therefore Carlton is not the owner of it. Acton has an action in conversion against parties who have interfered with his right to possession of the cheque.**

- **The true owner is still the drawer → THERE WAS NO DELIVERY TO CARLTON**
- **This is controversial, but it IS THE LAW!!!**

Under this, Boma has the right to sue parties that subsequently deal with the cheque

2) Fictious or non-existent payee as a defence to the conversion action

- Did CIBC have a defense to this action in conversion?
- CIBC → If the cheque is payable to bearer, the issue of forgery goes away
  - You just need a transfer of possession
  - So if you can argue that the instrument was payable to bearer, CIBC has a defense and the forgery is irrevelant
    - They are a holder in due course and get good title

S.20(5) – Ficticious or Non_Existent Payee

Where the payee is fictictious or non-existent, it becomes a bearer instrument – the forgery is irrevelant

- Ex. If I make a cheque to Julius Ceaser or Easter Bunny, they are non-existent/fictious so the cheque would be treated as payable to bearer
- In this case, was JR Lam a fictious person? Or what about the employees – the drawor had no intention that they be paid
  - **If you never intend that the payee should get the money, they are a fictious payee**
    - Although Donna Alm did not intend that any of the payees receive the money, it was not her intention that mattered. She had authority to sign, but her intention was not that of the drawer (Boma). **The intention of Boma was that the payees should be paid (although this was a fraudulently induced belief). The cheques to the employees were existing and non-fictious payees.**
  - We look at Boma's intention here, because they are the drawor
  - As a result, the 20(5) defense does not prevail

3) Section 165(3) defence

Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

- Gives the collecting bank holder in due course status – but couldn't be raised. Only applies if the customer of the collecting bank is the payee or a legit endorsee

Fundemental Pricniples

s.48 → Where a signature is forged, its wholly inoperable

- The forgery is simply ineffective
- If an endorsement is necessary to transfer the cheque, and the endorsement is forged, the payee remains the owner
- The payee can sue anyone who wrongfully deals with that cheque
    - Subsequent parties cannot claim holder in due course status
    - So forgery is a real defense

Forgery doesn't effect the ownership of the cheque

- In connection with the drawee bank, the drawee bank is not authorized to pay the cheque if there is a forgery on the cheque
- The customer only authorizes where the signatures are genuine

Basic rule: Bank must recredit customer's account if:

- Drawers sig is forged
- Endorsement is forged
- But there is a one year limitation of the recrediting (need to give notice in writing within one year)

If the drawee bank pays out on an instrument that has been forged, it looks like they take the loss

- S. 49 If there is a forged **endorsement**, the drawee bank can recover from the collecting bank

Forged Drawer's Signature:

What are the rights of the drawee bank if it has paid an instrument bearing a forged drawer's signature?
The drawee bank has no right to pay the money out of its customer's account since the drawer's signature was forged. It therefore had to recredit the account. The issue is whether the drawee bank can recover the money it mistakenly paid on the cheque.

The case of *Price v Neal* was at one time thought authority for the principle that the drawee bank had no right of recovery, although the precise reason for this "finality of payment rule" was subject to debate.

- One theory – drawee bank is expected to recognize the signature of its own customer

SCC:
Drawee bank bears the loss unless they can claim on restiutionary principles

- AKA UNJUST ENRICHMENT

**** SEE PRACTICE QUESTIONS*****

CHAPTER III: Securities

A. Introduction

Securities Transfer Law: Governs the interests in "Securities", designed to reflect market needs and practices
Why do we have securities transfer law?
**** TO FACILITATE LIQUIDITY*****

The Concept of Liquidity:
What do we mean by asset liquidity?

- How fast you can sell the asset and get the same price for it (How easy is it to sell the asset?)
- Money is the most liquid asset
- **Liquidity describes the degree to which an asset can be bought or sold in the market without affecting the asset's price. Liquidity is characterized by a high level of trading activity. Assets that can be easily bought or sold are known as liquid assets.**

Negotiability and Liqudity:
Negotiable Instruments Law aided making bills of exchange liquid

- To the point that bills of exchange almost replaced currency
- Negotiability enhanced the liquidity by allowing the owner more readily to transfer it to another person
  - Because all the info about it was on the paper

Also by allowing for a holder in due course, you don't have to worry about previous holders → Buyers were easy to find because they had little concern about previous defenses

But liquidity is also enhanced by securitization
Securitization does not describe the process of granting a security interest in an asset to a creditor.
Securitization describes the process of taking an illiquid asset and transforming it into more marketable financial assets.

- The creation of shares, bonds, etc. was the earliest process of securitization
- Allows smaller investors to purchase shares in a large asset pool
  - Ex. I probably cant buy an $100,000 asset, but I can afford 1/1000th of it
- Also, allows there to be a READY market with active trading

So securitization creates:
(1) Small share of a large asset pool
(2) Ready market

In summary, liquidity is aided by:
1. Securitization → Portion of a large asset pool in a ready market
2. Negotiability → Can take assets free from defenses

Securities Transfer Act (STA): Governs the transfer of securities in both direct and indirect holding systems
Goal → Create greater liquidity when assets are transferred from one party to another

Definition of Security:

(1) An obligation of an issuer or a share, participation or other interest in an issuer or in property or an enterprise of an issuer.

- Ex. A bond issue

(i) that is represented by a security certificate in bearer form or registered form, or the transfer of which may be registered on books maintained for that purpose by or on behalf of the issuer,

- Here is the idea of the certificated or incertificated security
- Traditionally, the certificated secrutiy → Share, bond, etc.
- Uncertifictaed – Ownership is recorded in the issuer's records

(ii) that is one of a class or series, or by its terms is divisible into a class or series, of shares, participations, interests or obligations, and

- Participation can be divided up

(iii) (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets, or
(B) is a medium for investment and by its terms expressly provides that it is a security for the purposes of this Act;

What is/is not a security?
STA s.10
A share or similar equity interest issued by a corporation, business trust or similar entity is a security.

- This means that a private held corp shares that don't trade on the market is still a security

STA, s 11 A mutual fund security is a security.
See also the definition of open-end mutual fund.

- The mutual fund has records of who the participants are
- This is an example of an certificated security

STA s 12: An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, the terms of the interest provides for the opt-in, or it is a mutual fund security.

- So participation in a partnership is not a security

Bill of exchange within the BoEA is not a security **STA, s 13** → Dealt with under negotiable instruments law
A futures contract is not a security - **STA, s 16**

A security may be: S**hares** (Similar equity interest issued by a corporation, business trust or similar entity (s. 10), **Bonds** (promise to pay money on defined terms issued by a corporation, but not a loan agreement with a single creditor), or A share, unit of interest in an opened mutual fund (s 11)…Or **Money** (in a securities account, turns into a security entitlement)

B. Direct Holding System

Direct Holding System: Shares are not traded on public exchange, meant for private companies issuing shares, direct relationship between issuer and shareholder (holding certificated and un-certificated securities)

Certified Securities

A certificated security is represented by a paper certificate. It may be in bearer form or in registered form (the security certificate specifies a person entitled to the security and a transfer may be registered on the issuer's books).

- Registered form specifies a person entitled to the security

Transferred by delivery
s 17(1) → "purchaser" acquires an interest if security is "delivered" by either:
1. Delivery under s.68
2. Security entitlement under s.95

STA s 68(1)- Delivery of a certificated security occurs when
a) The purchaser acquires possession of the certificate,
b) Another person (not a securities intermediary) acquires possession on behalf of the purchaser, or
c) A person who has possession of the certificate acknowledges that the person holds the security certificate for the purchaser.

Certificated securities in bearer form are transferred by **delivery alone.**

Certificated securities in registered form are transferred by endorsement accompanied by delivery (**s 73**).
STA s 71: Endorsement may be in blank (signature of owner alone or signature with notation "to bearer") or special (signature specifying the person to whom the security is transferred) ().
Endorsement to be effective must be made by an "appropriate person" – i.e. the person entitled to the security, not a forger. The transferee/buyer will present the certificate to the issuer for registration of the transfer.

- **These provisions only apply to the direct securities system, so no security intermediaries exist**

A **forged endorsement** will **NOT be affective** in transferring ownership in a security

Un-Certified Securities:
A security that is not represented by a certificate (s 1(1)(kk). Ownership is registered on the books of the issuer (or transfer agent acting on behalf of issuer – as per definition of "issuer").

s. 68(2) Transfer of an uncertificated security is effected when:
a) The issuer registers the purchaser as the registered owner
b) Another person (not a securities intermediary) becomes a registered owner on behalf of the purchaser (i.e. Trustee relationship)
c) A person who is already registered owner acknowledges that the person holds the security (or security interest) for the purchaser

Delivery of Un-Certificated Securities

- Transfer is still accomplished via delivery, however the delivery process is different (more constructive) that for a certificate security
- **The transfer of an uncertificated security constitutes "delivery", and is effected by an "instruction" to the issuer of an uncertificated security that directs that the transfer of the security be registered or that the security be redeemed.**
  - Normally we consider delivery to be transfer of possession

Protected Purchasers:

Right of Purchaser of a Security
"purchaser" is a person who acquires an interest in the security under a consensual transaction – i.e. **includes buyer, gratuitous transferee, Secured creditor** (STA ss 1(1)(kk) and (mm))

STA s.69 Purchaser acquires all rights in the security that the transferor had or had power to transfer. → Codifies *nemo dat*

A person given/gifted a share only receives ***Nemo Dat*** and is not a protected purchaser, does not receive extra protection → THEY DO NTO GIVE VALUE

Eg. The affect on a fraudulent contract is that it becomes voidable, NOT a protected Purchaser

Ex. Trustee holds shares for beneficiary…Trustee sells shares to X (violation of the beneficiary's rights), trustee assumed to have the power to sell shares, if the trustee does not have a right, then the beneficiary has an adverse claim. If the trustee does have the rights to sell the shares, then there is no adverse claim.

s.70: A **"protected purchaser",** in addition to acquiring the rights of a purchaser, acquires his or her interest free of any adverse claim

An adverse claim is defined as a claim that
(i) the claimant has a property interest in a financial asset, and
(ii) it is a violation of the rights of the claimant for another person to hold, transfer or deal with the financial asset;

s. 1(1)(a) Adverse Claim: Someone makes a competing proprietary claim

- A protected purchaser isn't affected by the adverse claim

STA 1(1)(x) → Protected Purchaser:
A protected purchaser must:
(1) give value;
(2) not have notice of adverse claims; and
(3) obtain control of the security.
All three requirements must co-exist at some point in time**.**

STA s 18 → Notice of adverse claim is

a) Actual knowledge
b) Willful blindness (facts indicate claim probably exists but relevant information is deliberately avoided)
c) Person has a duty imposed by legislation to investigate the existence of a claim

Control of a Security:

STA, s 23
A purchaser acquires control of a **certificated security** by taking delivery of it. If it is in registered form there must also be an **effective endorsement.**

STA, s 24
A purchaser acquires control of an **uncertificated security** by taking delivery of it (i.e., the issuer records the purchaser as the registered owner).
A purchaser can also acquire control of an uncertificated security through a control agreement.

STA s 24
A control agreement is a tripartite agreement in which it is agreed that the issuer will follow the instructions of the purchaser without the further consent of the registered owner. The agreement is effective even if the registered is permitted to make substitutions, originate instructions or otherwise deal with the uncertificated security.

- Purchaser, Issuer, Registered owner
- Agreement is that the issuer follows the instructions of the purchaser and doesn't require the consent of the owner
- Even though the registered owner is the intial party and doesn't cease to be the registered owner, if the 3 parties enter into a control agreement, then that control for the STA

STA s 29
What is the effectiveness of an endorsement or instruction?
An endorsement or instruction is effective if made by an appropriate person or a person who has the power under the law of agency to transfer the security.

- So if the endorsement or instruction is forged/fraudulent, its inoperative/ineffective

The "Shelter Principle"
A purchaser who takes from a protected purchaser takes free of an adverse claim asserted by a prior holder unless the purchaser was previously a holder with notice of the adverse claim (STA s 69(3))

Warranties: what takes place when a party takes possession to a security with an existing adverse claim and they are not a Protected Purchaser…The party will have a right of damages against the person who the received it from, but not entitled to the right of the security. Only a personal right to damages from the exchange. (STA 34)

Example #1
Buyer is a Protected Purchaser (Given Value, had no notice of adverse claim, and contained control of the securities in the form of delivery with an endorsement in blank
- If the security were not endorsed in blank, delivery could only be effected by an effective endorsement to Buyer

* **Note a forged endorsement by the thief would not be an effective endorsement (look back at initial definition of delivery (STA 29)**

Example #2
Where a protected purchase sells to a party who was aware of early fraud but was not a holder, that party under the shelter principle will have the rights of a protected purchaser
- Chris can take free of the owner's claim, because a Protected Purchaser (the "Buyer") can give good title to the purchase of a security (shelter principle applies).
- Chris originally (Aware of fraud/Not Holder), then Chris sold to Mark (who fit all the criteria of a Protected Purchaser), Mark is free of claim from original Owner, however if Mark sold to another party they would be protected, but if Mark sold back to Chris, Chris (This time, as a **previous holder had awareness of an adverse claim** s 69) Chris would not be a protected purchase

Example #3
There was no point in time when all three requirements of (1) value; (2) no notice of an adverse claim; and (3) control of the security had been simultaneously satisfied.
Chris does take subject to the Beneficiary Claim, because he is not a protected purchaser: Chris gave value, and was originally unaware of the adverse claim, however prior to gaining control (**being granted a security interest is not control**) of the security Chris became aware of the adverse interest, so Christ did not become a Protected Purchaser. Look at the order and timeline that the criteria of a protected purchaser take affect.

Obligations of the Issuer:
STA, s64
A purchaser of a certificated security will usually want it to be registered in the purchaser's name since the **issuer is entitled to treat the registered owner as the person entitled to vote and receive dividends.**

STA, s86 The issuer is obligated to transfer a certificate
STA s.87 Issuer is liable for a wrongful transfer if an endorsement on a certificate is not genuine or an instruction in respect of an uncertifcated security is ineffective. The issuer has the right to require signature guarantees or other assurances

The STA doesn't have the liability structure that the bills of exchange act has
- STA leaves it to applicable law
- But it does provide for defenses

To what extent can those types of defense be raised by the issuer?
STA, s 57: The issuer is generally not permitted to raise defences against a purchaser for value without knowledge claiming that the issuance of the securities was invalid.
- However, a totally bogus instrument → Lack of genuineness is a defense

STA, s 58 - Lack of genuineness of a certificated security is a complete defence.
- Acts as a real defense

C. Indirect Holding System

Indirect Holding System:
The indirect holding system involves the direct holding of the securities by a securities depository. The securities depository records the entitlements of the investment banks and brokers. The trading activity amongst these participants is effected by book-entry settlement rather than delivery of certificates.
- So at some level, there is a direct holding
- The customer doesn't have shares in their name and the corp doesn't have you in their records

Examples:
1. Issuer Co. → Deposits Shares with CDS (CDS physically holds the shares for all subsequent transactions of parties acquiring interests in the shares)
*Investors never deal directly with the issuer and have no rights against the issuer. Only the CDS deals directly with the issuer.

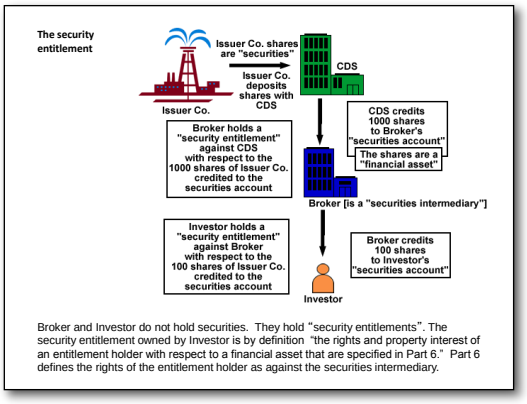
2. Besides the CDS, all subsequent intermediaries and investors never purchase an actual share, **they purchase security entitlements from their intermediary dealer** (Bank, Stock Brock, Investment Firm)
*A security entitlement is a type of sui generis form of property

3. For **un-certified shares**, CDS makes a note in its books, who holds which shares and how many shares (the shares themselves are not physically delivered). **CDS only makes a note in its books for the shares issued to the immediate intermediaries and not subsequent transactions**

4. Process: CDS→ sells to Security Intermediaries; Security intermediaries→ Sell shares to further intermediaries and private investors

* When security intermediaries sell to their investors, <u>that transaction and ownership only exists within the intermediaries books and not on the CDS books</u>

****KEY: NEVER ADJUST SHARES. JUST TRANSFER UP AND DOWN IN BOOKS**



A Security Entitlement:
STA s 95.A person acquires a security entitlement when a **securities intermediary** indicates by book entry that a **financial asset** has been credited to that person's **securities account.**

STA 1(1)(dd) A "securities account" is defined as an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account **is maintained as entitled to exercise the rights that constitute the financial asset.**

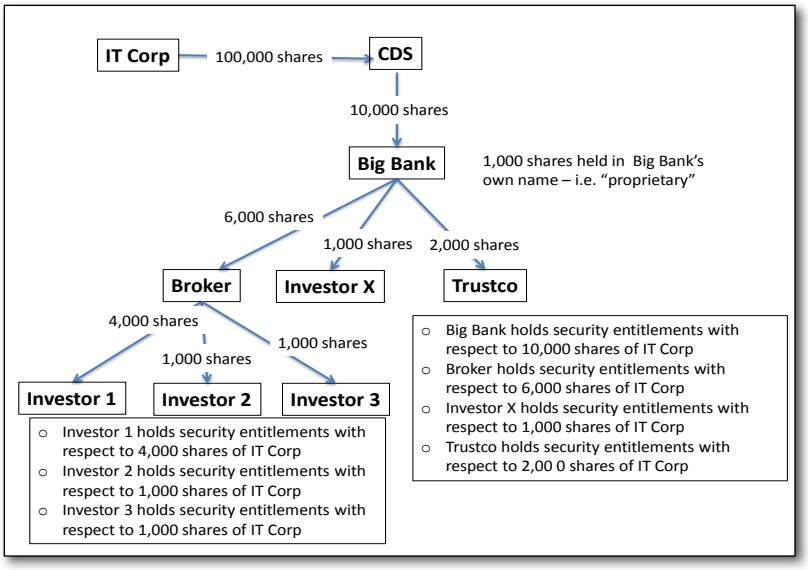
- Your broker opens a securities account
- The securities purchased for you are reflected in that securities account
-

STA 1(1)(o). A "financial asset" is more broadly defined than a security. It covers securities but also covers other types of shares or obligations that are dealt with or traded. It also covers a credit balance (ie. Cash in the account) unless the parties agree that it should not be treated as a financial asset.

Essentially a Security entitlements: is a bundle of rights and property interest with respect to a financial asset

→ In the indirect system an owner will always hold a "security entitlement" and not an actual security

STA 1(1)(ee).-"**Securities intermediary**" is a defined term that means a person, including a broker, bank or trust company, that in the ordinary course of business maintain securities accounts for others, as well as a clearing agency (CDS).



* Even though the final investors don't own the physical shares, with their security entitlements they still receive the voting rights and dividend rights allotted to the shares

- Intermediaries books will say that they credit "shares" however what they are selling and crediting are "security entitlements"
- A securities intermediary can hold both security entitlements indirectly and securities directly for a client
- An intermediary holding a security directly and crediting it to a customers account, makes it a security entitlement
- When an investor sells their shares (security entitlements) for $4000, the broker can directly pay out the $4000 or credit the investors account $4000. If the account gets credited the investor no longer has $4000, but instead a security entitlement with the broker for $4000 (This is a financial asset under the definition of the STA) ..Either way the broker debits the investor the security entitlements they have sold….This is similar to scenario to having a broker hold direct shares, turning them into security entitlements….**The difference b/w payout and creating security entitlements only matters if the broker becomes insolvent**

When depositing direct shares with a broker, property rights are transferred from the investor having rights against the corporation directly to have rights against the broker once the transfer takes place.

- For a party to be registered on the books of a corporation to be a securities holder, that individual or organization must be directly holding the shares
- This whole conversation/scenario are to illustrate who an individual has rights against and who is liable in a case of insolvency

<u>Rights Against the Intermediary</u>

The STA creates a new type of right that is referred to as a security entitlement. This right gives the holder a number of personal rights against the intermediary as well as a real right against some of the assets held by the intermediary.

- You are not the owner of the security → You have a different type of property right

What you get are a number of rights against your own intermediary and nothing else

- You look to your broker to satisfy your obligations
- Point of the system → Limit systemic risk
    - So your rights are only against your intermediary
    - If your broker goes down, you don't want them to take the system with them

Investor C as against Broker C

Broker C as against the Investment Bank

s. 98 STA - The right to require them to promptly maintain financial assets in the quantity equal to all the aggregate of the financial assets

- Ex. Suppose you have a broker with 150 shares in Corp X
  - Customer A has 100 shares in Corp X
  - Customer B has 100 shares in Corp X
- S.98 says both customers have the right to demand that the broker increase its holdings to get the proper amount
  - This is a personal right (Holder as against intermediary)

s. 99 - To obtain any payments that came out from the issuer (dividends)
S.100 - Ex. The right to vote → You can direct the broker to vote your shares a certain way
S.101 - A securities intermediary shall comply with an entitlement order if it is originated by the appropriate person.
S.102 - A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible.

- Brokers don't like doing this → Ex. Getting you a share certificate with your name on it
- It has to be an available form
  - If the corp issues certificated securities, you cant ask for an incertificated securities

S.97(1)(a) - An entitlement holder's property interest is a proportionate property interest in all interests in that financial asset held by the securities intermediary, without regard to the time of acquisition of the security entitlement or the financial asset.

- This is a KIND of property right being given to the entitlement holder
- But its pretty weak
- What you get → a propionate interest in all interest in that particular asset held by the intermediary
- What that means is if your intermediary goes insolvent, you do better than an unsecured creditor who shares with the others
  - You have a proportionate share to the assets held by the securities intermediary
  - So lets say that the securities firm has either the shares or the entitlement of 150
  - But their customers claim 200 shares
  - And they have unsecured creditors
  - What can the entitlement holder do?
    - They have a property interest in the financial assets of the insolvent firm
    - It's propionate
    - If Customer A and B each have entitlements of 100
    - They share pro-rata amoungst the 150 shares held by the intermediary
    - And they claim before the unsecured creditors

STA, s 105
An entitlement holder's property interest is not subject to claims of secured creditors who have been granted in of the financial assets unless the secured creditor has perfected its security interest by control.

- So the entitlement holder also beats out the secured creditors
- If you have a lender who has made a loan and registered it it doesn't matter → You have to perfect by control to beat out the entitlement holder
- Cant be by control agreement → This is only in the direct holding system

Rights Against 3rd Parties:
s.97(4) → Need to satisfy the following four conditions:

- 1. Insolvency proceedings must have started
    - But unless the insolvency proceedings have started, just get your intermediary to buy more
- 2. Must not have enough assets
- 3. Intermediary violated its obligations to maintain sufficient financial assets
- 4. Purchaser falls outside of protection of 97(7)
    - Need to show both knowledge AND collusion with the intermediary

s.96: If you acquire for value and without knowledge, you don't have to worry about an adverse claim

Contrast this position:

- 1. Where you have a corp entering into Ks with buyers/investors
    - Ex. The corp has gold bullion and is issuing certificates saying what each investor has (AKA the facts of Goldcorp)
    - The buyers think they have bought a certain quantity of gold being held by the seller
    - But there is no earmarking & not enough to cover all the claims of all investors
        - Also, the bank has registed a security interest against the corp
- What happens when Goldcorp goes insolvent?
- No passage of property unless the goods have been ascertained
    - Especially in a sale of bulk
- So they become a general creditor
- What about the bank? The bank has a GSA and has a property right
    - The corp granted them a security interest
    - So bank has top priotity
    - Bank takes all the gold, sells it, and then the rest of it is split between the investors as unsecured creditors and all the other unsecured creditors

In England, the buyers would win

- The corp grants a security interest in its own property to the bank, but if property had passed to the buyers, the asset would not be subject to the GSA

What if you put a marking on each bar and indicate to the buyers which asset is being transferred to them?

- And the K says upon signing the property passes
- In that case property passes and they have a better claim then the bank

What if some people had ascertained Q and some didn't?

- Only the investors with ascertained goods would prevail

What if the corp, without authority, sold some of the gold to a buyer

- Could the investors assert a claim as against the buyer?
- First step: Has property passed or not?
    - If no ascertainment, then the corp was still the owner and the purchaser takes free
- What if the buyers did have title?
    - Start with Nemo Dat: The corp had no right to sell without authority of buyer
    - But we know there are exceptions to Nemo Dat
        - No merchantile agent, not an avoidable K, no estoppel
        - Maybe a seller in possession?
            - S.26 of the SGA → Possibility
            - But what else has to happen?
            - Seller in possession with consent of the owner
                - The purchaser must be for value, without knowledge, and in possession, they would take free of the buyer

What if the subject matter is not gold bullion but securities

- And these investors have securities entitlements
- What rights do the investors have against the intermidary?
- Each investor has the right to demand the intermediary to demand more assets to cover all positions (a personal right)

What right against the bank?

- The investors can also beat out the bank's GSA

- But they will lose against a secured creditor to perfected by control
    - So if the bank entered into the control agreement, the bank will beat the investors

What right against the trustee in bankruptcy (on behalf of unsecured)

- The investors definitely have a better right

To what extent can the investors make claims against purchasers who have dealt with the intermediary?

- Unless the purchaser is acting in collusion, no claim against them

CHAPTER IV: GUARANTEES

A. Introduction

Guarantees are used to secure a payment of a debt or to assure performance of a legal obligation

Contract under which the **guarantor** promises to pay the debt owed by the **principal debtor** to a **creditor**

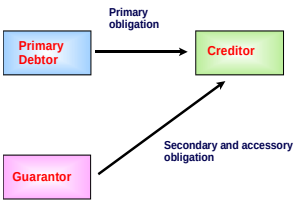
Guarantees involve the following legal relationships:

1. **Principal Debtor and Creditor**
    - Obligation of the debtor to pay a debt owed to creditor
    - If the debt is **secured** by property of the debtor, then the creditor can seize the property if the debtor fails to pay
    - The creditor may also rely on the guarantee to recover any deficiencies in the debt
2. **Guarantor and Creditor**
    - Under the contract of a guarantee, the guarantor is promising the creditor that he will pay the debt owed by the principal debtor in the event that the debtor fails to do so
    - The guarantor's obligations may also be **secured** by property interests in the same way that the principal debtor's obligations are secured
3. **Guarantor and Principal Debtor**
    - The guarantor has right to indemnification from the principal debtor if he is called upon to pay on the debt owed by the debtor
    - The guarantor, in paying under the guarantee is subrogated to the collection rights of the creditor against the principal debtor
4. **Co-sureties**
    - When more than one person gives a guarantee for a debt they are subject to the rights and obligations of contribution

Guarantees Acknowledgment Act

- Includes requirements that cannot be waived by parties
- A guarantee will not have effect unless it meets the requirements found in **s3**
- **DOES NOT APPLY TO:**
    - **Corporations who act as guarantors**
    - **Indemnities, principal obligations, or co-signs**

B. The Nature of a Guarantee



The **primary obligation** is on the primary debtor to pay the creditor

The **secondary and accessory obligation** is the obligation of the guarantor

- This means that the guarantor is only liable if there is a **default in respect to the primary obligation**
- The guarantors obligations are enforceable only to the extent that the primary debtors obligations are enforceable → So if primary debtor is liable due to void, mistake, neither is the G

Guarantee v Indemnity

- In a guarantee, the guarantor promises to pay IF the debtor defaults
- An **indemnity** is a primary obligation to pay regardless if there is a default in payment by another debtor → the person promising to pay has an independent obligation and does not depend on the primary obligation being defaulted on

Primary Obligation:

The indemnitor is liable regardless of whether the debtor has defaulted.

Non-Accesssory Obligation:

The obligation is a distinct autonomous obligation that is independent of the terms or the enforceability of the contract between the creditor and the debtor.

- The indemnifior is not affected by any defenses that the primary debtor may have
- It is not measured on the obligations of the primary debtor

Rules differ depending on whether it is a guarantee or indemnity

1) Writing requirement

- A K of guruantee has to be in writing
- No such formal requirement re: K of indemnity

2) Formal requirement (Alberta)

- But these don't apply to indemnities

3) Right of subrogation

- G's have right to be subrogated, indemnitors do not
  - If you pay you step into the shoes of the lender
  - And can exercise all of the lenders rights (including right to collateral)

4) Special defences (e.g., material variation in the contract between the primary debtor and the creditor)

- If there is a material variation, it relases the G unless the G consented to the change
- Why is that the case?
  - A G is defined by the primary obligation

Discharge by Conduct of Creditor:

1. The guarantor is discharged if the creditor fails to disclose a material fact connected to the dealing between the creditor and the primary debtor that the guarantor would expect not to exist.

- Creditor has to disclose a material fact if the G would not expect it to exist

2. The guarantor is discharged if the creditor and the primary debtor agree to a material alteration in the terms of the contract for the debt without the consent of the guarantor.

- If the agreement is altered with consent of G, G is released

3. The guarantor is discharged by any act or omission by the creditor that has the effect of altering or extinguishing any right that the guarantor has against the debtor.

Legal Nature of Indemnity

- An indemnifier has an independent primary obligation
- So this means that the creditor is owed two primary obligations
  - Therefore the defaulting of the primary obligation has nothing to do with the indemnifier

- The obligation between the indemnifier and the creditor is independent of the terms and enforceability of the obligation between the creditor and the debtor

Credit Foncier Trust Co v Zatala Holdings Inc

- P granted mortgage to D company
- Mr Ready was a shareholder and was included on the mortgage
- When the mortgage was renewed for a higher interest rate, R was not consulted
- R sold his shares in the company after the mortgage renewal which he still did not know about
- D defaulted on mortgage in June and bank sued D and R
- R applied to have the claim against him struck and the trial judge found in his favor because he was a guarantor
- **Issue: was R a guarantor or a principal debtor/indemnifier of the mortgage?**
    - If he is determined to be a guarantor then he will be released from liability because the parties materially varied the contract without his knowledge
        - This would not be the case for a primary debtor
    - The court finds that R is not a guarantor because he may be sued on the mortgage debt at any time and it is not determinative based on the default of any other debtor
    - The obligation of R is such that he has a primary obligation to the bank regardless of the default of the other debtor

**** It is essential to determine whether an agreement is a guarantee in order to determine whether the special defences are available to it****

Royal Bank of Canada v Swartout

- P is providing loans for construction of a condo complex
- The directors and officers of the company gave personal guarantees and limited guarantees
- In addition to these guarantees, they signed an agreement that the project would be completed in accordance with a schedule and within budget
    - If the project went over budget, the agreement said that the guarantors would fund the over costs and if they did not, the loan would be considered in default
- The construction project ends up failing and RBC seeks damages from the guarantors
- **Issue: are the obligations undertaken in the agreement indemnities or guarantees?**
    - The three personal guarantees which the officers had signed are not in issue, it is the agreement regarding the schedule and budget that is in question
    - Appellants submit that they are guarantors for 4 reasons:
        - 1) their obligations are secondary
        - 2) they signed as guarantors
        - 3) they are referred to as guarantors throughout the agreement
        - 4) in the alternative, the agreement is ambiguous and doctrine of contra proferentum applies
    - The fact that the term “guarantors” is used in the agreement does not mean that the parties are actually guarantors
        - Have to look at the actual obligation created
    - The court finds that the arrangement between the directors and RBC are covering two risks: the market risk and the cost overruns
    - In respect to the cost overruns, the directors are assuming a primary obligation
        - This is because the agreement is such that the directors are undertaking to pay and is not conditional upon a failure of the debtor
        - So the imposed obligations of the directors exist regardless of what happens with the borrower of the loan
- **If the language does not make the obligation conditional upon failure of another then the obligation is NOT a guarantee**

C. Formation of the Contract

A guarantee is a contract between the guarantor and the creditor and therefore subject to laws which generally govern contracts

- Such as the requirement of consideration in exchange for the guarantee

A creditor must provide something of legal value to a guarantor by way of consideration for a guarantee

- This would include an agreement to forbear from enforcing existing legal rights
- But the creditor must actually change its position as against the debtor in order for consideration to have been given

Hoon v Bank of Nova Scotia

- Three companies were working together to build an apartment building
- All three banked at the same institution and were substantially indebted to the bank
- Hoon was looking to obtain control of all three companies
- Hoon met with bank and discussed a money advancement to 2 of the 3 companies with Hoon giving personal guarantees for consideration of the bank agreeing to deal with the companies
- Following the guarantees, the bank decided not to advance money and demanded payment on the loans from Hoon based on the guarantees he gave
- There was a stormy discussion between Hoon and the bank and they agreed to postpone the requested payment for one year if Hoon gave further security and guarantees
- The bank then brought action against Hoon for payment

Issue: was there proper consideration given for the guarantee from Hoon?

- The court found that the initial intention of the bank was to terminate the customer relationship with the indebted companies and did so immediately after receiving the first guarantee from Hoon
  - If the litigation were based on this arrangement, the trial judge would have said that there was no proper consideration and would have dismissed the action
- HOWEVER, the question then becomes whether the arrangement in May where Hoon and the bank decided to postpone payment for a year if another guarantee was given altered the position to suggest proper consideration
  - The court found that this agreement did not constitute a fresh transaction between the parties as banker and customer
  - The bank simply demanded additional security as the price for postponing the enforcement of a claim for payment

- **The bank did not actually give up or promise anything as consideration for the guarantee**

D. Discharge of the Guarantor

There are different circumstances under which a guarantor will be discharged from their obligations

- HOWEVER, parties can contract around these situations

Instances where there will be a discharge:

1. Disclosure Obligation

- A guarantor will be discharged if the creditor fails to disclose a material fact that the guarantor would not expect to exist

Bank of Montreal v Collum

- The wife of the director of a company signed a guarantee and gave collateral mortgage of her property to secure a debt of her husband's in 1995 which replaced a guarantee made in 1993
- The bank sued on the 1995 guarantee and won
- D contends that the 1995 guarantee was vitiated due to non-disclosure of financial arrangements

- **Issue: Did the bank fail to disclose a material fact connected with the primary debtor thereby discharging the D of liability as a guarantor?**
    - When D made the 1995 guarantee, she was not informed about additional loan amounts given to the company, or about the security interest that the federal bank had in their foreign accounts
    - The court found that, the language of the 1995 guarantee does not discharge the bank's obligation to disclose facts that occurred prior to the creation of the guarantee
    - They also find that, **if the issue was if consent or disclosure during the term of the guarantee**, the parties had contracted out of the duty to disclose and the requirement of consent
    - HOWEVER, the question is whether the bank had a duty to disclose the change in arrangements **before** D signed the guarantee
        - The duty is to disclose to a guarantor a material fact
    - Two questions to ask:
        - 1) would the information that was not disclosed be likely to affect the mind of the reasonable guarantor
        - 2) is the information connected to the dealings between the debtor and creditor which are subject to the guarantee that the guarantor would expect not to exist
    - The court finds that the information would affect the mind of the guarantor and that it was information which should have been disclosed to D as it significantly reduced the protection that she had as a guarantor

2. Agreement to Material Alteration

A guarantor will be discharged if the creditor and the primary debtor agree to a material alteration in the terms of the contract without the knowledge of the guarantor

- This will not apply if there are terms of the contract that reverse this, OR if the guarantor agrees to the change

Creditors often try to K out of this rule

i. Courts allow you to do this, but they take a microscope to the clause
ii. The best advice –if you intend to vary the basic obligations, get the consent of the G
iii. By the way – the courts have also held – its not just a variation in terms
    If as a debtor you release the co-g from liability, it also releases the G because it changes the risk

The variation doctrine is very strict:

- Any material variation (including the terms of the loan, extending time for payment, etc.) will release a G

Key: Are you changing the risk/promise taken on by the G?

- Things that may seem minor release the G

Manulife Bank of Canada v Conlin

- P made loan to Dina Conlin on which she provided security in the form of a first mortgage
- 2 guarantors: husband and Conlin Engineering, an Ontario Co
    - Promised to pay money as principal debtors in clause 34
- After divorcing, just before the mortgage was to mature, Dina renewed the mortgage without knowledge of her husband
- She later defaulted on the mortgage
- The bank then sued her and the guarantors for the mortgage
- **Issue: should her husband be discharged as a guarantor because of the material variation that occurred when she renewed the loan?**
    - The common law rule is that any underlying variation between debtor and creditor discharges the guarantor

        - This is because it changes the terms upon which the guarantor can become liable and his risk
    - Often, there will be provisions in the guarantee that contract out of this
        - Must this must **clearly** be the intention
        - This is a question of interpretation
            - If there are any **ambiguous terms** used in the guarantee, the words should be construed **against the party who drew it** (contra proferentum rule) or in other words, **in favour of the guarantor**
    - Must look at the obligations of the parties and not just what they are referred to in the document
    - Court concludes that guarantors are not liable without consent to the renewal

3. <u>Protection of Securities</u>

- The guarantor has a right to expect a creditor to protect security interests by registering with the personal property registry or the land titles registry
- If security interests are not protected, the leasor will lose their interest to other competing secured creditors such as the bank
- If the creditor fails to do so, and the guarantor would not have a right to that security interest because of it, the guarantor will be discharged **only from that amount of the loan that the interest is worth**

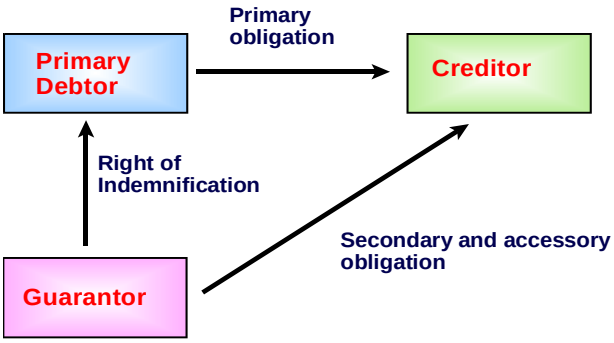
YOUR DEBT DECREASES ONLY BY THE AMOUNT YOU LOST DUE TO LACK OF PROTECTION

- IF the securities had been properly registered, how much additional would the G have recovered?
    - The also can be varied by K
    - Typically, you find a term put in under which the G agrees they will be liable if the creditor fails to protect/register securities
    - Strict interpretation of such terms → Seen in First City Capital

First City Capital Ltd v Hall

- D's company entered into 7 leases of word processing equipment with P and executed a personal guarantee in favour of P
- All 7 leases went into default
- P failed to perfect 5 of the leases and therefore RBC claimed priority over P and seized the equipment
- P then sued D for the amount owing on the leases with interest
- Trial judge found that the P was negligent in failing to secure his interest in the leases, but was relieved from the duty to do so based on the language in the guarantee
- CA found that it is possible to contract out of the requirement to protect security interests, HOWEVER it must be clear that this was the intention of the parties
- Where clear language does not suggest this, it cannot be presumed that the guarantor exonerated the creditor from being required to protect the security interests
- Court found that D was entitled to be discharged due to the negligence of P in failing to protect securities

E. The Guarantor's Rights of Indemnification and Subrogation



Indemnification:

- Right held by the guarantor against the primary debtor
- The guarantor has the implied contractual right to be indemnified against all liabilities that they incur
  - They have a right of action based on this implied right
- Cannot obtain more than 100% of recovery

Subrogation:

- Guarantor who has paid the primary debt is entitled to step into the shows of the creditor and enforce any rights that the creditor had against the primary debtor
-

Therefore a guarantor who has had to pay on the primary debt has the right to sue the primary debtor in his own name for indemnification, as well as the right to recover securities under the creditor's name

These rights are in common law and under the *Mercantile Law Amendment Act* (s.5)

F. Co-Sureties

If more than one guarantor exists, all must share the burden of liability equally

- If one pays more on a debt than the others, he can bring an action against the others to recover the excess contribution

HOWEVER, the creditor can recover the full debt from any one co-guarantor and it would be up to that guarantor to recover the other portion from the other guarantor

Manu v Sasha

- P and D entered into 50/50 partnership in a company
- They guaranteed a loan and were to be equally liable under it
- Disputes arose whereby the P wanted out of the business and it became so hostile that he eventually refused to sign any cheques
- As a result of this refusal the company went out of business and the loan was to be re-paid
- The assets paid back most of the loan but a further 18,000 was taken out of the appellants 25,000 deposit that he left as collateral
- P brought an action against D to recover one half of the money he paid
- **Issue: does the P's conduct in refusing to sign cheques and contributing to the failure of the business disentitle him from the right to contribution?**
  - Court finds that the P's behavior is not enough to deny him the right to contribution
  - HOWEVER, does the P's action provide the D with a cause of action against him?
    - If it does then the claim for contribution would be reduced by the amount that the D had a claim to
  - A co-guarantor will not be required to pay more of the debt unless his conduct gave rise to a cause of action requiring that damages be paid

Argument: Contribution is an equitable docterine → Do you need to ask for contribution with clean hands?

- **Court rejected – because it is discretionary**

Guarantee's Acknowledgment Act

** IF G IS ANYONE BUT A CORP → NEED TO G IN FRONT OF LAWYER + GET CERTIFICATE

"Guarantee" means a deed or written agreement whereby a person, **not being a corporation**, enters into an obligation to answer for an act or default or omission of another, but does not include

(i) a bill of exchange, cheque or promissory note,
(ii) a partnership agreement,
(iii) a bond or recognizance given to the Crown or to a court or pursuant to a statute, or
(iv) a guarantee given on the sale of an interest in land or an interest in goods or chattels

No guarantee has any effect unless the person entering into the obligation

(a) appears before a lawyer,
(b) acknowledges to the lawyer that the person executed the guarantee, and
(c) in the presence of the lawyer signs the certificate referred to in section 4.

Certificate

4(1) The lawyer, after being satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it, must issue a certificate in the prescribed form.

(2) Every certificate issued under this Act shall be attached to or noted on the instrument containing the guarantee to which the certificate relates.

G. Undue Influence by the Principal Debtor

Undue influence is often raised as a defence in respect to guarantees
A guarantee will be unenforceable if the creditor exercises undue influence or duress over a guarantor to get them to sign a guarantee

To prove undue influence, show:
1. Proof of improper pressure; or
2. Proof of a relationship of trust and confidence (which gives rise to a rebuttable evidential presumption of undue influence and places the onus on the dominant party to provide a sufficient explanation)

A relationship of trust and confidence can be established by
(2A) Existence of certain types of relationships (e.g. solicitor-client)
(2B) The *de facto* existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer.
** The mere fact that parties are married does not fall into 2A

- To show 2B, prove that there is trust on confidence
- You don't presume all marriages are like that
    - If spouses keep own bank accounts, etc. may not be able to satify
    - But if the wife relies on the husband to make financial decisions, may be able to prove

*** Not enough to be in a close relationship. Trust and confidence MUST be imposed
But if you can prove actual undue influence (#1) that's all you have to prove
To activate the presumption, show one party placed TRUST AND CONFIDENCE in the other to look after financial affairs

But what about the creditor?
A <u>creditor</u> is affected by undue influence exerted by the debtor upon the guarantor if
1. The creditor was a party to the undue influence or knew about it.
2. The creditor fails to discharge its duty of inquiry when the transaction is clearly detrimental to the person and the relationship between that person and the principal debtor is particularly close.

- There is a duty of inquiry placed on the bank
- If transaction is clearly detrimental, there is a duty to make inquiries
- That's generally how the bank gets ensnared in this

How is this duty discharged?

- Advise the G to get independent legal advice
- Provide the lawyer with sufficient info
- And get confirmation form lawyer that indepdant legal advice will be given

The creditor can discharge its duty of inquiry by

- **Advising the guarantor to take independent advice.**
- **Providing the solicitor with sufficient financial information to be able to advise the guarantor.**
- **Obtaining a confirmation from the solicitor that independent legal advice has been provided.**

Bank of Montreal v Duguid

- D sought loan from bank for investment in condo project
- Bank was not prepared to give loan unless wife was also on the loan
- D claimed that the bank documents were signed in their kitchen and that there was no recommendation by the bank that they obtain legal advice prior to signing document
- Bank had concerns about the investment in the condos but did not disclose the information it had
- D's wife claims that she signed the document by undue influence by her husband and wants to set aside the transaction as against the bank
- **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**
    - Court found that the relationship between husband and wife was not such that would trigger a presumption of undue influence
        - HOWEVER, a wife can raise the issue of undue influence if she can establish that undue influence actually occurred or if she can raise a presumption of undue influence by demonstrating that she left financial decisions to husband
    - Where a bank has constructive notice of a relationship that could produce undue influence, they have a duty to inquire to determine if there was undue influence and to suggest that the party obtain independent legal advice

        - Constructive notice may be established by the existence of a close relationship **coupled** with a manifestly disadvantageous transaction for one of the parties
    - In this case, although the bank did fail to take reasonable steps to ensure that D's wife's consent was voluntary, the transaction will only be vitiated if and set aside if **the transaction was actually procured by undue influence**
    - The court did not find it to be the case here and so D owed to the bank

CIBC Mortgage Corp v Rowatt

- D gave a guaranty and collateral mortgage to secure husband's loan
- She did so after getting legal advice and she supported husband's business
- D's husband told her that the bank wanted to replace the original guaranty and collateral with a new conventional mortgage with regular payments which would support further loans by the bank so she agreed to this and entered into new mortgage
- A few years later D's husband went bankrupt and owed the bank a significant amount
- Bank sued D on the original guaranty which she thought was being replaced by the new mortgage
- **Issue: was there presumed undue influence to which the bank had notice and therefore should have ensured that the D fully understood the new mortgage transaction?**
    - The presumption of undue influence in a spousal relationship has two effects:
        - 1) put the bank on notice to inquire about whether the spouse understands the transaction and is entering into it freely and suggest that the spouse obtain legal advice to be sure they understand
            - This ensures that the spouse cannot later claim undue influence
            - Whenever a wife offers to stand surety for her husband's debts the bank will be presumed to have notice
        - 2) where a bank has not taken the reasonable steps required when they are put on notice, and the guarantor claims undue influence relying on the relationship of the parties and the disadvantageous nature of the transaction, the presumption will be one of the evidentiary matters that the judge considers when determining if undue influence existed
    - A presumption of undue influence may be rebutted after all of the evidence is heard

Continous vs. Discrete

Discrete G:

- A single loan or transction being G'd

More commonly, it's a G not just one obligation, but of a continuing liability

- Ex. A line of credit
    - Or where further refinancing is contemplated
- That's called a continuing G

Can I terminate liability on a continuous G?

- Yes, there is typically a notice period
- There is a 30 day notice
- The G can escape future laibiltiy on the G by givng notice
    - Any new liability incurred is subject to the G durng the 30 days is there
    - Thereafter the 30 days, released from G liability

*****SEE FINAL PROBLEMS*****