WINTER 2022 | CONTRACTS | LAW 410A

ENFORCEMENT OF PROMISES

Deals with which promises are legally enforceable and thus which contracts are enforceable through the apparatus of the state. The simple question has various subfactors.

1. Bargains – something needs to be paid for or given in exchange for promise to be enforceable, this forms a contract
    - Bargain theory is the theory of contract
2. Promises at seal – legally enforcing promise not made as part of bargain but meets certain formal requirements
    - Formal requirement = requirement of the seal
    - Will be enforced even if not bargain
3. Promises enforceable by way of promissory estoppel – equitable doctrine
    - Promise made, not a contract because there is no bargain or seal
    - Promisee relied on promise in some way and changed behaviours
    - These are situations where promises may be enforced

Criteria for legally enforceable promise:

1. Offer and acceptance
2. Intention to create legal relations
3. Consideration
4. Some contracts have to be reduced to writing

CONSIDERATION

A legal concept that identifies a price or value theorem: a promise will only be enforced if it forms part of a bargain.

- This doctrine holds that to be enforceable, a promise must be purchased in the sense of being in return for something of value provided by the promisee. Hereof give
- When this occurs, it is said to be a good consideration
- A promise is made, and then a price is paid for that promise (consideration)

Definition: Consideration given in exchange for a promise is the act or forbearance of promise thereof given in return for the promise that one wishes to enforce

- Promises with no consideration given in return may be said to be gratuitous, being called ‘bare’ or ‘nudum pactum’ and are not enforceable at law

Valid consideration can be a right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility gave, suffered, or undertaken by the other

- Consideration reflects reciprocity, something must be given in order to bind agreement in eyes of law
- Consideration, being price promisee pays, must flow from promisee
    - It is interpreted broadly to include an act or forbearance or promise to do so
- Consideration is a necessary part of contract – with limited exceptions
    - Each promise is looked to separately courts do not weigh in to ensure there is a good bargain, but look for consideration for each promise

Consideration Overview

- Promises are enforceable if made as part of a bargain/exchange (reciprocal promise)
- Consideration is price paid by promisee
- Consideration must flow from promisee to promisor
- Consideration interpreted broadly (act or forbearance or a promise to do either)

Governors of Dalhousie College at Halifax v Estate of Arthur Boutilier, Deceased / consideration

Ratio	**Consideration must flow from promisee and third party consideration does not count.** - **Reliance by promisee cannot turn gratuitous promise into a binding one.**

Facts	June 1920, defendant (Arthur Boutilier) signed a subscription card promising money to plaintiff (Dalhousie college) as part of a fundraising effort with terms of payment to be determined later - In the gift, it said to maintain teaching, construct new buildings, keep pace with growth - April 1926, responds to letter from president saying he no longer has funds to donate and is unable to pay - October 1928, defendant passes away without making payment, Dalhousie brings action against his estate for the $5,000
Procedural History	Trial court found good consideration - Provincial court affirmed this finding - Supreme Court of Nova Scotia reversed and found a nudum pactum
Issues	Is Boutilier's promise a legally binding contract or not? - Was there 'good and sufficient' consideration for Boutiliers promise either in the subscription paper itself or in the circumstances as disclosed by the evidence?
Rule	A contract without consideration is unenforceable
Analysis	Argument 1: Dalhouse argued the subscription paper itself state it was given in good consideration of subscription of others - The court says that others had signed separate subscriptions for same object or were expected to, this does not constitute a legal consideration - Consideration must flow between the parties, cannot come from a third party - The privity of contract here is between Boutilier and Dalhousie, consideration has to flow between the two Argument 2: Dalhousie argued there were mutual promises, the subscription said money to be used for certain purposes and interpreted as an implied 'request' by Boutilier to Dalhousie so they would use the money that way - Court says there is no mutual promise, either express or implied - Subscription cannot be construed this way, no express request simply states promise is made for purpose of.. - No reciprocal obligation on part of college, haven't promised anything specified - Would be implausible to argue Boutilier could have sued Dalhousie on their vague and uncertain terms regarding the purpose, suggesting no contract Argument 3: Dalhousie argued it made increased expenditures on the strength of the subscriptions and such increased spending in reliance on promise was consideration - SCC says subsequent reliance on promise made cannot imply necessary consideration for legally enforceable contract - Cannot be implied promise simply because they have undertaken to incur certain expenses, if this was the case could say naked promise is converted into binding legal contract when promisee takes subsequent action alone without consent of promisor Contracts cannot confer rights/legal obligations on third parties to the contract - Privity of contract = contracts only legally enforceable relationships between the parties
Holding	SCC finds no consideration given, promise unenforceable as contract - No consideration from implied promise here - Appeal dismissed

Brantford General Hospital Foundation v Marquis Estate / charity and consideration

Ratio	**A promise to subscribe to a charity is not enforceable in the absence of a bargain.**

Facts	- Helmi Marquis and her late husband were philanthropists with a passion for Brantford General Hospital - Due to previous donations, hospital named Cardia unit after Jack Marquis - Nov 20, 1998 Helmi signed a pledge for $1,000,000 to be paid in instalments - Pledge made as a result of a number of conversations between her and CEO of hospital in which they discussed retaining her late husband's name on the wing and adding hers - Mrs. Marquis made first of 5 instalments but passed before fulfilling pledge, left 1/5th of the residue of her estate to the hospital
Issues	- Is the pledgee document a legal and binding contract? - Was there consideration for her promise to give one million dollars to hospital, or was it a naked promise? - What did the foundation promise to give in consideration of her promise to pledge the million dollars?
Rule	A contract without consideration is unenforceable. Promise to subscribe to a charity is not enforceable in the absence of a bargain.
Analysis	For a pledge to be a contract, there must be consideration shown - Plaintiff argued that consideration was commitment to name the new wing after Mr and Mrs Marquis - Court rejects this argument, there would be no complete contract at this stage, to rename unit required board approval and there was no authority to commit naming wing in the pledge agreement Court says Mrs Marquis did not appear to seek out naming of hospital wing after her and it was irrelevant to her decision - No mention of naming in pledge document itself - This wasn't her reason for the pledge or a condition of it Cannot find consideration in pledge or circumstances as disclosed by evidence - Even if it was her intention to donate, cannot treat as binding in absence of consideration
Holding	Action dismissed

Dalhousie and Brantford distinguish a promise and gift. In the cases it was undisputed that intention was to give money to institution in question, but courts will not give legal effect with lack of consideration.

For a gift to be legally recognized you require:

1. Donative intent
2. Accepted by recipient of gift
3. Some sufficient act of delivery of gift to recipient

One-way gifts are not contractually enforceable, obligation requiring an exchange is tantamount to intention to gift or donate

- There is a difference between someone intending to donate as a gift versus making promise as part of bargain or exchange
    - The latter is contract, former is gift
    - Gift without sufficient delivery would not be enforceable and contractual obligation requires reciprocity or exchange

PAST CONSIDERATION

If a promise is made after an act has already been performed, then it follows the act could not be part of the bargain for the promise

- A promise made subsequent to the act is a bare gratuitous promise, made for something already done

General Principle

Past consideration is no consideration at all

- Leading authority is *Eastwood v Kenyon* which is often cited for this principle

Eastwood v Kenyon / past consideration general principle

Ratio	**Promises are not sufficient to found a contract** - **Consideration made in past is no consideration at all** - **Moral obligation does not constitute consideration**
Facts	On death of John Sutcliffe, his daughter Sarah was sole heiress - P acting as Sarah's guardian spent money on her education and for benefit of estate and borrowed money from Blackburn to whom in return he gave a promissory note - When Sarah came of age, she promised P she would pay amount on the note and did pay one year's interest on the note - Subsequently, Sarah married the defendant who also promised to pay P the amount on note - Defendant failed to make any payments and plaintiff sued on the promise
Rule	An express promise can only revive a precedent good consideration which may have been enforced at law through medium of an implied promise had it not been suspended by some positive rule of law - Can give no original cause of action if obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statute
Analysis	The promise was express, good consideration for it was given in the past and executed long before - It is not laid to have been at request of the defendant, however, or even of his wife - Declaration really discloses nothing but a benefit voluntarily conferred by P and received by the defendant with an express promise by D to pay the money
Holding	No consideration – a past benefit not conferred at request of D

Lampleigh v Brathwait / past consideration exception

Ratio	**Exception to general rule of past consideration; bare promise not enforceable but if action is accompanied by request of party, then it will bind.** **A promise made after performance can be enforced, if it was understood by parties that there would be some kind of reward prior the performance.**
Facts	Brathwait found guilty of killing someone and was seeking pardon from the king - Brathwait asks Lampleigh to ride across country and obtain pardon for him - Lampleigh expends time and energy riding across country to try and secure pardon, when he returns Brathwait says he will pay him 100 pounds - Makes promise and then simply refuses to pay it, Lampleigh says there is an enforceable promise not under seal, Brathwait says there was no promise
Issues	Whether Lampleigh provided good consideration in support of Brathwait's promise to pay?
Rule	Past consideration is not consideration at all. Contracts with no consideration are unenforceable.
Analysis	This case presents exception to general rule, bare promise not enforceable but if the action is accompanied by a request of the party then it will bind. - A voluntary courtesy will not have enforceable promise - If the courtesy was made by a request from promisor, it will bind the promise

	- The promise may come later but it is not bare because it attaches to the earlier act at the promisor's request
Holding	Sided with plaintiff, promise legally enforceable and there is good consideration
Takeaways	**The Lampleigh exception has two interpretations:** 1. Past consideration principle does not apply if initial benefit has been requested by promisor • Even though promise comes later, it is not bare and attaches to earlier request • No argument here for why it attaches 2. Modern interpretation - where we have services provided and reasonable expectation of compensation, this gives rise to a claim for restitution (unjust enrichment) • At the point where reasonable expectation of compensation, gives rise to legal obligation to provide compensation for a claim in restitution/unjust enrichment • The quantum of damages is a reasonable amount for efforts • Once that claim arises, subsequent promise made simply makes precise or crystallizes that existing obligation • The obligation arises in restitution and unjust enrichment → potential claim for measure of damages that is reasonable → subsequent promise crystallizes the amount owed for provision of services

Quantum Meruit
The quantum of damages in restitution in this scenario is quantum meruit (as much as deserved)
- Founded on implied assumpsit or promise to pay plaintiff as much as he reasonable deserved for his labour
- When a claim for compensation in restitution arises such that a service has been provided and there is a reasonable expectation of compensation, measure of damages will be quantum meruit (obligation to pay reasonable amount for services provided)

McCamus Interpretation of Lampleigh
Where a service is provided and a reasonable expectation of compensation for that service, what arises at that point is a binding obligation
- An obligation to provide compensation for restitution
- Restitution is a different grounds of liability (in unjust enrichment, different than contractual liability)

If a subsequent promise is made, effect is to give expression or precision to the already existing obligation to provide restitution
- Consider what was intended by parties
- Was the intention reasonable expectation of compensation and at that point a binding obligation to compensate creates an enforceable claim in restitution?
- Most people prefer interpretation that promise simply gives expression to reasonable amount in question

Pao On v Lau Yiu Long / affirming general past consideration rule

Ratio	**Affirms that 'mere existence or recital of a prior request is not sufficient in itself to convert what is a prima facie past consideration into sufficient consideration in law to support a promise' and sets forth a 3 part test.**
Notes	Decision from JCPC after the *Lampleigh* decision - Affirms that 'mere existence or recital of a prior request is not sufficient in itself to convert what is a prima facie past consideration into sufficient consideration in law to support a promise' A prior request on its own not enough to convert past consideration into sufficient consideration. **Court articulated test with three parts:** 1. Act has been done at promisor's request

	2. Parties have understanding that payment and some other benefit was expected or reasonable expected 3. Payment must have been legally enforceable if it had been promised in advance McCamus does not like the requirement of request, uses no language of request - This approach in *Pao On* does not account for situations where there is no request but still claim in restitution - Important to keep in mind benefit of parties when circumstances originally occurred

VALUABLE CONSIDERATION

General principle: consideration must be of value in the eyes of the law

- Courts generally do not inquire into adequacy of consideration, does not require consideration to be of certain or adequate value
- Simply has to be a bargain, law not looking for good or fair bargain
    - Some consideration of value provided, not consideration of a certain or adequate value
    - Consideration is a sufficiency requirement, must be sufficient

This is upheld in *Styles v Alberta Investment Management Corp.* – courts do not inquire as to adequacy of consideration provided

- Often referred to as 'peppercorn principle'

Peppercorn Principle

A peppercorn in exchange for a promise can count as sufficient consideration in the eyes of the law

- Has been articulated by courts and is still articulated today
- Bargain can be exchanged for something of trivial value and the exchange will be enforceable

<u>Justification for Consideration & Peppercorn Principle</u>

- Party autonomy
    - Protects autonomy, peppercorn may have little objective value but may mean a great deal to one person
    - Law should not be evaluating subjective value individuals place on items
    - Is able to respect autonomy and uphold parties intentions
- Facilitates use of legal instrument of contract
    - Consideration is strictly a formal requirement
    - All it does is provide formal mechanism for parties to communicate that they are legally bound

<u>Exceptions for Consideration & Peppercorn Principle</u>

Serious discrepancy may alert courts to other issues law may want to address

- Severe inadequacy of consideration provided may be relevant for determining whether fraud was at play or whether doctrines of unconscionability or undue influence are applicable
- May inquire as to whether it indicates fraud, not saying it was not enough consideration

Courts can exercise equitable jurisdiction to refuse to enforce a specific contract for an additional reason

- When there is extreme disparity, there may be something else at play and equitable doctrine steps in to protect weaker parties

<u>Bona Fide Compromises of Disputed Claims</u>

Whether giving up a claim counts as good consideration?

- Generally it is an accepted principle that forbearance to sue does count as consideration because the right to sue has value: relinquishing this is paying a price

B (DC) v Arkin (Zellers Decision) / is forbearance to sue valid consideration?

Ratio	**Forbearance to sue is valid consideration for a contract**
Facts	Plaintiff was mother of minor caught shoplifting from Zellers, items amount to roughly $60 - Items recovered and returned to Zellers, minor was caught and no issue regarding non-recovery - Subsequently, lawyer from Zellers sends letter to mother threatening to sue, says they will settle out if she pays $225 for restitution in damages and costs Zellers had a loss recovery program which was a corporate program to recover loss from shoplifting, Zellers trying to build in costs of their ongoing loss recovery program which is the $225 from the mother - P responds to letter by paying the money but obtains legal advice, learning she was not obligated to pay - P seeks to recover the payment back and Zellers argues there is an enforceable promise: it provided consideration in support of P's payment in the form of forbearance to sue
Issues	Did P have obligation to pay Zellers the $225? - Was Zeller's forbearance of legal action good consideration for P's promise to pay?
Rule	Contracts cannot hold if there is no consideration flowing from promisee - Typically, forbearance to sue counts as good consideration in the general principle
Analysis	There are exceptions to general rule that forbearance to sue counts as good consideration turning on the viability of underlying cause of action - Can only count as good consideration as part of enforceable contract if forbearance to sue is in connection with respect to the underlying claim <u>Exceptions to the general rule as follows:</u> 1. Claims known to be invalid • A promise is not binding if sole consideration for it is forbearance to enforce a claim which is invalid and which is either known by the party forbearing to be invalid or not believed by him to be valid • A promise to not sue for a claim that is totally invalid has no value at all 2. Claims which are doubtful or not known to be valid • If validity is doubtful, forbearance can be good consideration 3. There can be good consideration even if claim is clearly invalid in law so long as it was a reasonable claim which was in good faith believed by party to have good chance of success <u>Condition for forbearance to count as good consideration:</u> 1. Reasonable claim 2. Brought in good faith that it has reasonable chance of success 3. Cannot deliberately hid facts that would allow other party to defeat claim 4. Must show serious intentions to pursue claim In this case, the claim by Zellers was invalid - Cannot be that they seriously thought it would succeed or intended to pursue it if not paid, a competent lawyer would know or ought to know it had no prospect of succeeding in court
Holding	Court finds in favour of plaintiff, plaintiff entitled to recover the $225 - P was misled by tone and content of letter, claim invalid and their lawyer knew or should have known it had no prospect of success

PRE-EXISITNG LEGAL DUTY

Can a pre-existing legal duty count as good consideration?

- General issue is the enforceability of promises when the promisee promises to do what they are already legally obligated to do, does this count as good consideration?
- Promise is made from promisor to promisee, trying to determine whether good consideration is given to promisee in exchange for promise

There are three variations on general issue:

1. Promises to do what one already has public duty to do (generally not good consideration)
2. Promises owed to third parties (generally good consideration)
3. Promises owed to one's contracting party (post-contractual variation)
   - Traditional approach is that such variations are not enforceable but there has been a shift in law in jurisdictions other than Alberta which are persuasive

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Public Duty

A promise to fulfill a pre-existing public duty to promisee at request of promisor, generally not good consideration for promisor's promise

- Promisee only doing what legally required to do at law

What counts as a public duty?

- Anything you have obligation to do by force of law (statutory obligation for example)
  - Does not include legal obligation voluntarily undertaken by contract
- Where promisee obligates to do more than already legally required there can be good consideration
  - If you promise to do more than legally required by force of law

Ward v Byham / public duty and consideration

Ratio	**Going beyond statutory obligations can be good consideration for pre-existing legal duties**
Facts	- Father promises to Mother he will pay her 1 pound/week if she can prove child will be well looked after and happy and is allowed to decide for herself if she wishes to live with mother - Mother was already under statutory obligation to care/maintain child - There was a statutory scheme requiring mothers to have sole obligation to care for child when child born out of wedlock - Mother gets married, father refuses to pay
Issues	Whether Mother provided consideration for Father's promise to pay given she was statutorily obligated to care for the child?
Rule	Promises that are also pre-existing public duties usually contain no consideration and make contract unenforceable unless they promise to do something more than already legally required
Analysis	Morris LJ: There is consideration because mother had additional obligations beyond statutory ones to prove child was well looked after and happy and to give choice of where to live Denning LJ: Motivated to find consideration, argues that even if there was no obligation above and beyond legal duty, there could be consideration - Promise is benefit to person to whom it is given, analyzing separate legal relationships - Always be cautious with Denning's view, line of law has been interpreted as following Morris' reasoning generally There were two routes to achieve fair/just outcome in this case: - Morris more consistent with the way law was developing and has developed - Judges can take different routes to fair and just outcome

Holding	Consideration present, valid contract as mother had additional obligations other than statutory ones and this constituted consideration.

Duty Owed to Third Party

In general, fulfilment by promisee of a pre-existing legal duty owed to a third party at request of promisor is good consideration for promisor's promise

Shadwell v Shadwell / duty owed to third party and consideration

Ratio	**Legal pre-existing duties to third parties are typically considered to have valid consideration**
Facts	- Nephew became engaged and at the time, had a legal obligation to marry fiancé - Uncle promises $150 per year upon the marriage - Seems like a unilateral contract, act of getting married constituted acceptance and is consideration for promise - However, nephew already had a legal obligation to marry at law
Issues	Did the nephew give good consideration for the uncle's promise?
Rule	Promises that are also pre-existing duties to third parties usually contain valid consideration and make contract enforceable
Analysis	Suggestion that uncle acquired benefit; he now has acquired direct obligation from nephew - Before the promise, nephew owed obligation to fiancée, he now also owed to uncle - There is a different legal obligation to uncle than the one owed to his fiancée Even if there is obligation between two parties, there may be desire by promisor to receive further assurance that obligation was discharged, this constitutes consideration
Holding	Consideration present, valid contract, side with nephew.
Notes	It is unclear why we cannot say the same in context of public duty? - In principle this reasoning seems inconsistent with common law and how they address pre-existing duty related to public duty Why is it the case for third parties? - May be because a third party is afraid another will shirk their responsibility, provides more certainty because you can gain a direct assurance - More direct promise being made between the two parties, gives additional obligation for assurances and certainty - There is something qualitatively different between something for force of law and a voluntary undertaking General rule: promise to do something for pre-existing public duty is not good consideration, in case of duty to third party there can be good consideration

Duties Owed to Promisor

Where promise ought to be enforced is made for something that they are already contractually bound to provide the promisor

- There is already a contract; dealing with some kind of variation of pre-existing obligations
- The most important category for the purposes of our class

DUTIES OWED TO PROMISOR

Two broad categories:

1. Promises to pay or provide more
    - Generally not enforceable

- Stilk v Myrik and Gilbert Steel

2. Promises to accept less
    - Promisor basically says they will accept less than promisee already obligated to do under contract
    - Generally not enforceable
    - Foakes and Beer, Foot and Rawlings
    - Judicature Act modified common law for promises to accept less

Both categories generally not enforceable at common law
- Nothing supplied by counter-party to render promise enforceable
- Both unenforceable for want of consideration, except promises to accept less when judicature act applies
    - There have also been recent common law developments on these issues (Rosas and Nav)

Promises to Pay More

Stilk v Myrick / promises to pay more

Ratio	**All agreements involving one sides variations of existing contracts fail on basis of pre-existing duty rule** - **Consideration arguments will be engaged more than public policy analysis**
Facts	- Plaintiff was a sailor, defendant was captain - P to be paid rate of 5 pounds/month - When two seamen deserted the ship defendant promised the wages for these men to the remaining crew members if replacements could not be found - It was impossible to find replacement crew and ship was sailed back to London by remaining original crew - Sailors trying to enforce promise captain made to pay remaining crew wages of deserters
Issues	Did Stilk provide good consideration for Captain's promise to pay the extra wages?
Rule	Contracts without consideration are unenforceable, promises to pay more generally unenforceable
Analysis	A policy based argument and formalistic argument, formalistic argument ultimately won <u>Public Policy Argument</u> - Basic idea is that if we enforce these kinds of promises, sailors would be able to say they will not do anything unless captain pays them more - Sailors would 'suffer a ship to sink' unless captain would 'accede any extravagant demand they might think to make' - Lord Ellenborough rejects this public policy argument, agreement was struck on shore and there was no immediate danger on shore - Cannot say captain was under constraint or apprehension, not coerced - Ultimately decision not made on basis of public policy but consideration principle (formalistic argument) <u>Formalistic Argument</u> Sailors had already committed to do all they could under the emergencies voyage - Already promise to do what they had done - If they had right to step away under original contract, they would be giving something in exchange for promise to pay more, but they were not giving anything more - Desertion of ship by some crew was an emergency, remaining sailors were bound to original contract to bring ship in safely to destined port, he would have had to do this either way, no consideration flowing from Stilk

Holding	Agreement void for want of consideration, no consideration for ulterior pay promise to mariners who remained with the ship
Takeaways	The absence of consideration argument rather than policy argument has taken hold in subsequent cases - It is interpreted as all agreements involving one-sided variations fail on basis of pre-existing duty rule (party already obligated under existing contract) - Some argue this is over-inclusive when dealing with parties of equal bargaining power; an overreach where there is no worry of exploitation of vulnerability

Gilbert Steel Ltd. v University Construction Ltd. / prior duty and promise to pay more

Ratio	**A prior duty owed to promisor is not legally sufficient consideration**
Facts	Sept 4, 1968: Parties enter contract where P was to supply fabricated steel bars for 3 projects - P supplied the steel bars at agreed price, two of the projects completed and two buildings remained for 3rd project Oct 22, 1969: due to announced increase in price of steel, P approaches D to discuss a new agreement, a written contract was entered at increased price Mar 1, 1970: another increase announced, P approached D for further discussion, an oral agreement to alter price resulted - P argues oral discussion resulted in binding oral agreement to alter price - P produced a new contract but it was never signed, P billed defendant according to price agreed but D continued to accept deliveries and did not pay higher price P brings action for breach of oral agreement
Issues	Whether oral agreement is legally binding or fails for absence of consideration? - Did P supply good consideration in support of D's promise to pay a higher price?
Rule	A contract without consideration is not enforceable. Promises to pay more for an existing agreement do not provide adequate consideration with few exceptions.
Analysis	Plaintiff made 3 arguments: 1. P's promise to give D good price on steel for construction of second building counts as good consideration for higher price used to construct first building • Court responds that no consideration in vague reference in evidence to possibility that P would give good price, P never made true commitment and language too vague 2. Not variation of existing contract, mutual abandonment of existing contract replaced by new agreement • Court responds that parties did not intend to rescind original contract and replace with new one, sole reason of discussion was price and no other changes made, looks to intention of parties and did not find intention to replace entire contract 3. Increased price results in an increased access to credit for D, this increase amounts to good consideration • They borrow these bars, if price goes up they've given D increase amount of credit and amount owing goes up for P's • Court responds that increased credit is not a real, substantial benefit and the only reason credit increases is because of increased price and that is what is being disputed One-sided contractual relations have to be supported by fresh consideration, mutual rescission can be supported by facts but the facts did not support this

	Courts respond to cases like this with doctrine of promissory estoppel
Holding	P's appeal dismissed, oral agreement was a variation of existing contract and no fresh consideration given for variation

This was a reinforcement of the *Stilk* analysis: promises to pay more are not enforceable unless good consideration goes both ways

- Gilbert Steel did nothing more than they were already obliged to do, under no right to force higher pay

Promises to Accept Less

Often when there is an obligation to pay, creditor will agree to accept less to satisfy the debt

When both parties have outstanding debt obligation under original contract, there may be an argument that original contract was rescinded and substituted for a new one – mutual release from obligations constitutes consideration

- Traditionally only available if both parties have not completely performed their end of the deal
- When one party has fully performed their obligations in order to have a legally binding agreement to accept less, the traditional position is the law required 'accord and satisfaction'

Accord and Satisfaction
Purchase of release from obligation, by means of any valuable consideration, not being performance of the actual obligation itself

- The accord = agreement by which obligation is discharged
- The satisfaction = consideration which makes the agreement operative

Only works if given something different than actual obligation

- Paying less money in satisfaction for more is not enforceable
- Must be a different type of satisfaction
- In most cases, there is accord but no satisfaction

Foakes v Beer / accord and satisfaction

Ratio	**Less for more agreements are not enforceable; satisfaction may come in a different form because less money cannot be exchanged for more money**
Facts	Beer (respondent/creditor) secured judgment against Foakes (appellant, debtor) in amount of $2,090 pounds plus interest and is now judgment creditor - Foakes asks for time to pay and they enter written agreement where Beer agreed to take a lesser sum in full satisfaction of the whole (forgave the interest) - Beer agreed not to take any further proceedings to collect on judgment if Foakes made down payment plus series of installments until total amount was paid - Foakes paid down payment and all instalments - Beer brought action for payment of the interest she claims she is entitled to because Foakes paid in instalments, she argues the agreement is unenforceable for want of consideration
Issues	Whether Beer has legal claim for interest against Foakes? - Is the agreement the parties entered into such that Beer has an obligation not to seek enforcement for interest or is it unenforceable for want of consideration?
Rule	Satisfaction must take a different form than actual obligation
Analysis	He was under antecedent obligation and payment could not be consideration for relinquishment of interest and discharge of the judgment - Less for more agreements are not enforceable (cannot be accord and satisfaction) - Payment of lesser sum on day in satisfaction of greater cannot be satisfaction for the whole, no lesser sum can be satisfaction to P for a greater sum

	Court acknowledge that this produces results we might say do not make sense - Court wrestles with application of the doctrine of consideration - Says the law is the law and will enforce promise under seal but not a written agreement entered unless good consideration applied Foakes tried to argue agreement was accord, payments were satisfaction - General rule that a lesser sum of money cannot be satisfaction of a greater sum, must take a different form
Holding	Agreement unenforceable, appeal dismissed. Foakes loses and Beer succeeds.
Notes	This case crystallized the Accord and Satisfaction principle

Robichaud c Caisse Populaire de Pokemouche Ltee / practical benefit as consideration

Ratio	**Less for more agreements are not enforceable but immediate payment saying time, effort and expense can be good consideration (practical benefit**
Facts	- Robichaud owed money to Caisse and RBC - Caisse secures judgment against Robichaud and RBC obtained judgment - Robichaud represented by a company negotiating with creditors, Caisse agrees to remove judgment in return for a $1,000 payment in full satisfaction of outstanding obligation and to remove judgment from registry - Caisse receives cheque but board of directors refuse to compromise agreement - Cheque not cashed, Robichaud brings action to enforce agreement
Issues	- Whether Caisse was bound by agreement with Robichaud? - Whether Caisse's promise to accept less was enforceable?
Rule	Satisfaction in a subsequent agreement must be of a different form
Analysis	A financial institution of its own accord entered an agreement in which it accepted to forego the ranking of its judgment for part payment owing to it - This resulted in saving time, effort, expense - It should not be up to court to judge reasons for entering but determine whether agreement was entered with full knowledge and consent - They can sometimes find consideration to achieve just result If sophisticated parties enter agreement with full knowledge/consent it is presumably of value to them - There is a practical benefit gained here and there is a reason why they agreed to accept less for greater efficiency or some other purpose
Holding	Agreement enforceable. Caisse not entitled to claim judgment.
Notes	Trial judge applied Foakes v Beer, held that agreement was unenforceable - Courts are loathe to apply doctrine from Foakes and Beer - Case demonstrated skepticism of traditional view, but promissory estoppel was basis of judgment - Dicta in this case is not decisive but persuasive and shows the courts shift to approach of these issues, judge hints at overruling Foakes

Foot v Rawlings / cheque as satisfaction for cash

Ratio	**Less for more agreements are not enforceable but a different form of payment (cheque instead of cash) can add value to the lesser sum to give it valid consideration**
Facts	By letter in July 1958, Rawlings suggested he would accept an interest rate lower than the one negotiated for the existing loan and lower monthly instalments if Foot supplied a regular series of post-dated cheques and fulfilling the agreement faithfully - In agreement, Rawlings expressed he was in advanced years and would like money earlier

	- Agreement signed by both parties, Foot complied with the new terms, Rawlings changed his mind and sued for what was owed in original agreement - Foot argues Rawlings is bound by an agreement to accept a smaller sum, Rawlings argues that the agreement is unenforceable for want of consideration
Issues	- Whether Rawlings can bring the action or whether it is premature? - Whether the revised agreement is enforceable or is there a lack of consideration for Rawlings promise to accept less in full satisfaction of the outstanding debt?
Rule	Satisfaction in a subsequent agreement must be of a different form
Analysis	Several series of post-dated cheques was good consideration for agreement by respondent - Supplying post-dated cheques counts as good consideration in exchange for promise to accept less and forbearance to sue - Judge argues acceptance of negotiable instrument may be in law a satisfaction of a debt of greater amount - If you give negotiable security paid in a different way the security may be worth more or less and it is of uncertain value - Paying with post-dated cheques akin to discharging debt by giving someone horse rather than cash So long as appellant was upholding the agreement, the agreement is enforceable at law - Rule in Foakes still stands, but consideration here was different form and is sufficient satisfaction
Holding	Cheques count as good consideration, agreement enforceable, appeal dismissed. - Rawlings not entitled to original payments.

Reconciling Foakes and Foot

Judges try to give consideration where possible to avoid unjust result

- Court in Foot distinguished Foakes without overruling, reasoned that cheques are different than money as they can be exchange for a lesser sum even if cash cannot

Denning prefers to deal with this in different way: doctrine of promissory estoppel

- When a cheque is given this is a conditional payment, when it is cash you get cash and a cheque is the same as receiving cash

Bigger picture questions: which promises should be enforced through the state?

- Traditional common law view is only those with exchange of promise or bargain
- In the common law, promises to pay more are not enforceable, promises to pay less require accord and satisfaction (variation in type of payment)
- People have expressed discomfort with these traditions and legislature has responded to this

Judicature Act

Legislative response to perceive injustices from application of rule in Foakes v Beer; applies only to promises to pay less

- This trumps common law
- Overrules *Foakes*

Judicature Act, RSA 2000, C. J-2
Section 13 (1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation (a) When expressly accepted by a creditor in satisfaction OR (b) When rendered pursuant to an agreement for that purpose though without any new consideration

Part performance of obligation nullifies agreement if accepted by creditor but not when it has not been received

- You cannot enter agreement, do partial performance of obligation, and then have creditor attempt to revive original agreement

Interpretive Issues

What about agreement where creditor forgives debt entirely, no partial performance?

- What if part performance was itself partially performed?
- Is creditor's undertaking irrevocable as soon as part performance has commenced (ie. Do all instalments need to be made)?
- Could creditor in the alternative revive the original debt by arguing it has not been accepted or has not been fully rendered according to terms of the agreement?

The statute would be applicable in situations like Foakes and Beer

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Judicial Reform

The following cases re not Alberta cases, not binding in Alberta, but are persuasive and picking up steam in Canadian common law

- Demonstrates how common law changes incrementally

Nav Canada v Greater Fredericton Airport Authority Inc. / judicial reform post-contractual variation

Ratio	**A post contractual variation, unsupported by consideration, may be enforceable so long as variation was not procured under economic duress**
Facts	Federal gov entered aviation and services facilities agreement with Nav, assigned its rights and duties to Greater Fredericton Airport Authority - Under ASF, Nav was responsible for air navigation services and equipment, on a monopoly basis at Canadian airports - Issue arose and Airport Authority request Nav relocate an instrument landing system equipment because one runway was being extended - Nav suggested an alternative which required purchasing new equipment for $223,000 - Under ASF, Nav was responsible for costs of new equipment when making a suggestion or alternative, Nav refused to relocate unless Airport Authority agreed to pay - Airport Authority signed letter under protest agreeing to pay but now refuses to pay
Issues	- Was Airport Authority's promise to pay for DME legally binding? - Whether party seeking to enforce post-contractual variation agreed to do more than originally promised in return for agreement to modify contract?
Rule	Under traditional rule, we need some kind of consideration to make the promise to do more enforceable.
Analysis	<u>Doctrine of Duress</u> Law will not enforce contracts made as result of one party being threatened with physical harm or actually harmed - Duress is now broader, includes economic duress - Ordinary commercial pressure acceptable, going beyond is not Performance of pre-existing obligation under Stilk does not qualify as fresh or valid consideration and such an agreement to vary an existing contract remains unenforceable - Under ASF, Nav had pre-existing contractual obligation to pay for DME, Nav promise nothing in return for promise to pay for navigational aid

	- Forbearance from breaching existing contract does not qualify fresh consideration, detrimental reliance not a valid basis for enforcing otherwise gratuitous promise (shield not sword) Under classical approach, Nav gave no consideration so promise was not enforceable, but law is in need for modification <u>New view for post-contractual modifications</u>: law will recognize that a variation to an existing contract unsupported by consideration is enforceable if not procured under economic duress
Holding/Conclusion	Post-contractual modification unsupported by consideration, may be enforceable as long as variation not procured under economic duress - Promise by Airport Authority procured under economic duress - Appeal dismissed
Takeaways	Three reasons for the shift from Stilk and Myrik: 1. Traditional position unsatisfactory (both over and under inclusive) 2. Doctrines of consideration and promissory estoppel work in tandem to impose injustice on those promisees who have acted in good faith and to their detriment relying on enforceability of contractual modification (shield not sword) 3. Doctrine of consideration developed centuries before recognition of modern and evolving doctrine of economic duress Not overruling SCC in Stilk and Myrik but stating it should not be determinative as to whether gratuitous promise is enforceable, doctrine of consideration still relevant

Williams v Roffey Bros & Nichols / consideration modification for practical benefit

Ratio	**English COA modified the consideration doctrine by asking whether promisor obtained a benefit or advantage from the agreement to vary, regardless of whether promisee agreed to do more** - **A pre-existing duty to promissor can be legally sufficient consideration if there is a practical benefit to the promissor**
Facts	- Construction project, general contractor hired a carpenter who was moving too slowly because they felt price they had agreed to was too low - Contractor starts to worry because they were subject to their own penalty with owner of project if project was late - Contractor decides to make extra payment to the carpenter as they faced their own penalties, carpenter Williams continued the work but money still missing - Roffey contracted new carpenters
Issues	Can there be sufficient consideration for a pre-existing duty?
Analysis	Court reasoned that doctrine of economic duress lessened need for rigid adherence to doctrine of consideration - Practical benefits had accrued to D as a result of modification As long as promise not made under duress, and if contractor obtained practical benefits, it can be enforceable - Practical benefit contractor receives is to not have penalty from third-party, not flowing from carpenter - Fact that P did not suffer a detriment did not matter as D clearly gained a commercial advantage from agreement (does not matter that practical benefit didn't flow directly from carpenter to contractor) Contractor benefits > speedier build and won't be subject to penalty - Carpenter has to do no more or less

Holding	The practical benefit of a timely completion constitutes good consideration even though a pre-existing duty is performed

Rosas v Toca / judicial reform post-contractual variation

Ratio	**When parties agree to vary terms, the variation should be enforceable without fresh consideration absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable**
Facts	- Rosas wins lottery, lends money to Toca ($600,000) to buy a new home - The loan was interest free, was to be repaid in one year, but each year Toca would approach saying 'I will pay you back next year' - Rosas granted extensions numerous times but eventually sued on debt
Procedural History	Rosas lost at trial due to Toca's successful limitations period defense - Under BC law, action had to be commenced within 6 years of debt being due - If limitation period measured when debt originally due, Rosa's action commenced 6 months too late but if promises to extend the date the debt is due are enforceable the action falls within the limitation period - Rosa's extensions did not move due date, they were gratuitous and of no contractual effect - Toca gave nothing in exchange for Rosa's contractual variation regarding loan's due date and her forbearance to sue
Rule	A forbearance to sue can count as good consideration (*Zellers*)
Issues	Are purported variances to original loan agreement binding or does the limitation defence provide a full answer to the claim? - Is it law that Ms. Rosas cannot rely on various promises to pay 'until next year' because no consideration was given?
Analysis	Deals with enforceability in post-contractual variation – still need good consideration for original agreement to be enforceable - Court notes *Roffey Bros, Robichaud, Foakes and Beer* and legislative response, and *Nav Canada* - Highlights commentary criticizing the pre-existing duty rule - Application of rule has resulted in courts producing ways to try to avoid its application Reforms run on two factors: 1. Seriousness of parties intentions 2. Legitimate expectations of business parties In final analysis, legitimate expectations should be protected - Go straight to issue of legitimate expectations instead of trying to look for consideration as indication of legitimate expectations - Practically, parties may want to change their contractual obligations
Holding/Conclusion	Variances enforceable, limitations period runs from the end of last extension - Claim within limitations period and Rosas can collect on her loan - Appeal allowed

Current State of Law

Foakes and Beer state traditional position that promises to accept less are not binding without consideration – require accord and satisfaction

- This was overturned by statute for cases that fit the AB statutory provision for debt reduction (*Judicature Act)*

- *Rawlings* suggests that consideration can be supplied if different from original obligation (provision of a cheque)
- Appears courts try to seek for consideration where they can

For promises to pay more, *Stilk and Myrik* still applies and has not been formally overturned (promises to pay more are not binding)

- Judicial reform and willingness to see post-contractual variations unsupported by consideration as binding in absence of duress or unconscionability
  - *Nav Can* (can be made enforceable without consideration absent economic duress)
  - *Rosas and Toca* (look to intentions; courts find consideration when they can in absence of duress or unconscionability)
  - Consider obiter in *Robichaud*
  - *Roffey Bros* (practical benefits)
- All of the erosion in Nav and Rosas is only for post-contractual variations, still need consideration for formation of the original contract

PROTECTION OF WEAKER PARTIES

There are three doctrines that will protect weaker parties in contract law:

1. Duress (common law)
2. Undue Influence (equitable)
3. Unconscionability (equitable)

Before we consider the doctrines, we already have an enforceable contract

- Law will step in to say agreement is rendered unenforceable at request of one of the parties based on the doctrines
- If we have offer, acceptance, certainty, consideration we may have one of the doctrines stepping in and giving a reason not to enforce an agreement

Duress is a common law doctrine while the other two are equitable, duress has particular relevant in context of post-contractual variation

- Particularly important for new developments and judicial reform in the area

Duress

Law will not enforce contracts made as a result of one party being threatened with physical harm or actually harmed

- Innocent party has been coerced and agreement not made voluntarily
- Duress is a broader concept now including economic duress
- Duress undermines/vitiates voluntariness of one party entering a contract

Economic Duress

Financial or commercial pressure, the nature of which goes beyond the normal course (illegitimate commercial pressure)

- Line is traditionally drawn when coercion went beyond ordinary commercial pressure (*Pao On*)
  - 'Overborn will test' asks whether will of party was overwhelmed such that we can say it vitiates consent?

This has now been softened as the test from ***Pao On*** was quite strict; the test was revamped in ***Universe Tankships*** as a two-step analysis:

1. Pressure amounting to compulsion of will of victim, not overwhelming but pressure amounting to compulsion (giving victim/complainant **no practical alternative**); and
2. **Illegitimacy** of the pressure exerted

The ABCA has cited *Pao On* but interpreted in a way consistent with *Universe Tankships*

1. No practical alternative – straightforward to determine

2. Illegitimacy
    - Amounting to crime or treat, clearly illegitimate
    - Threatened breaches of contract, normally lawful but can cross line into illegitimate
    - Becomes clearer when threats have flavour of blackmail

Attila Dogan Construction and Installation v Amec Americas Ltd. / economic duress

Ratio	**ABCA lists four applicable principles cited from *Kolmar Group*:** **1. Economic pressure can amount to duress if characterized as illegitimate and constitutes a but for cause inducing claimant to enter into relevant contract to make a payment** **2. Threat to break contract generally illegitimate, particularly where D must know that it would be in breach if threat were implemented** **3. Consider whether claimant had a 'real choice' or realistic alternative, could have resisted pressure and pursued practical and effective legal redress** **4. Presence or absence of protest may be of some relevance, just evidential, total absence of protest does not automatically make it voluntary** **ABCA identifies 5 indicia/badges of duress:** **1. Whether party protested at time agreement was entered** **2. Whether party had a realistic alternative to entering agreement** **3. Whether party had opportunity to speak with independent legal counsel** **4. Whether after entering agreement, they took steps to avoid it in a reasonable period AND** **5. If party can show 1-4 are met, whether pressure was illegitimate**
Facts	Attila and Amec were equal participants in joint venture to build a plant in Jordan, under the Joint Venture Agreement Amec had certain responsibilities - Attila responsible for fabrication of items/construction - Project starts developing difficulties with delays and issues, unexpected shortfall in cash - Amec writes Attila saying they need to make a cash contribution or they will obtain external financing, if they do that, Attila has to waive all rights against Amec in the project After the demand, Amec unilaterally withholds certain progress payments as a means to try to get Attila to waive rights under proposal - In short, Attila retains counsel and enters negotiation for amended agreement - Attila felt no alternative to renegotiate but conceded that renegotiated terms made agreement fair
Analysis	**ABCA cites test from *Pao On*** - Illegitimate form of pressure, sufficient to overcome will of protesting party that vitiated consent or agreement and caused entering into of unchallenged transaction (but for the pressure, would parties have entered agreement?) Courts sets out the applicable principles in 4 points and states four relevant badges/indicia of duress to determine whether pressure was illegitimate - Think of the 4 principles but be alert to the badges/indicia of duress - The badges/indicia are indicators rather than legal principles

<u>Attila Test Applied to Nav Can</u>

The New Brunswick court in Nav formulated a test for duress but for our purposes, we must be aware of the ABCA approach from *Attila:*

1. Can economic pressure be characterized as illegitimate?
    - Nav Can had obligation to pay
    - They did not necessarily explicitly threaten but Court held that by implication they did (withholding performance – not holding up their end of bargain)
2. Threats to break a contract generally regarded as illegitimate
3. Was there a real choice or realistic alternative?
    - It was monopoly over providing services to all airports in Canada
    - No indication there was another service they could have gone to, practically or legally
    - Airport Authority faced with choice to agree to pay and no practical alternative (could have brought legal action but this takes time)
    - No effective legal redress
4. Was there protest?
    - Yes – clearly under protest, signed variation agreement under protest
    - They paid under protest, while protest not necessary it is good indication of illegitimate form of pressure
    - Protest important indicia, does not on its own have significant legal implications

Duress on an Exam

- Cite Attila as authority in AB
- Attila cites Pao On (cite Pao On)
- Attila goes through 4 principles above, set out the 4 principles they cited from *Kolmar*
    - Can economic pressure be characterized as illegitimate?
    - Threats to break contract regarded as illegitimate
    - Real choice or realistic alternative?
    - Was there protest?
- Go through indicia from *Attila*

Undue Influence

When there is an ability to exercise exceptional power in relation to another person's choices, it is a power of persuasion that is objectionable because it arises out of a confidential or other special relationship between parties

- When common law doctrine of duress did not apply, this equitable doctrine arose
- Idea of relationship of confidence and trust between parties

For undue influence to be available, the person making claim has to show terms of agreement are disadvantageous?

- Most say this is not relevant
- Not about whether bad bargain, about relationship between parties
- Better view is that outcome is not really important to the analysis

Claim of undue influence established in two ways (*Barclays Bank v O'Brien)*:

1. Actual undue influence – P must demonstrate actual use of power to influence choice made in situation
2. Presumptive undue influence – P must prove that parties have relationship of such a nature that court presumes that power was exercised in this case (once relationship established, undue influence presumed), there are two routes to establish:
    a. Relationship recognized as matter of law (doctor/patient, parent/child)
    b. Relationships not falling within the categories, but nature of particular relationship on facts gives rise to presumption of power

Once presumptive influence is established, onus shifts to wrongdoer to rebut the presumption

- A key piece of evidence to rebut: showing complainant obtained independent legal advice

Bank of Montreal v Duguid / presumptive undue influence

Ratio	**No presumptive undue influence, husband/wife relationship here did not give rise to presumption of power**
Facts	Mr. Duguid and business partner apply for loan from BMO (promissory note to finance investment in condo project) - Bank will not give without Mrs. Duguid, who was a real estate agent, co-signing on loan as guarantor - Mr. Duguid approaches wife and she ultimately signs loan BMO had internal policy requiring co-signors of loans to obtain independent legal advice but this did not happen, the representative failed to advise her to obtain independent legal advice - Loan goes into default and Mr. Duguid declared bankruptcy - BMO looking to collect from Mrs. Duguid was guarantor of loan
Issues	Did Mrs. Duguid co-sign note as result of her husband's undue influence?
Rule	Parties may set aside transactions if they were induced by another's undue influence under one of the categories in *Barclays Bank v O'Brien* - If bank had notice of undue influence between parties it is straightforward, contract can be voided - If bank is unaware of undue influence, they must protect themselves through internal policies requiring individuals to obtain legal advice, bank must take steps to ensure consent of guarantor is freely given
Analysis (Majority)	Under the categories of undue influence: 1. Actual undue influence – claimant must prove affirmatively wrongdoer exerted undue influence (burden is much higher) 2. Presumptive undue influence – arises in relationship of trust and confidence between complainant and wrongdoer a. Certain relationship as a matter of law (burden shifts to wrongdoer to rebut presumption that undue influence has been exercised) b. Complainant must show de facto existence of relationship under which complainant generally reposed trust and confidence in wrongdoer (onus then shifts to bank, in this case) Court holds that relationship is not of that sort, ample evidence to the contrary - Court says she could not have been surprised when bank asked her to co-sign, she knew her husband and business associate were embarking on this enterprise and had insufficient funds - She had background related to transaction, he had made similar investments in past - She was real estate agent and knew risks of investment and does not just rely on confidence of her husband Mere fact of close relationship not enough to establish presumption, look to particulars of situation
Analysis (Dissent)	Her background as real estate agent is irrelevant - Given she agreed to loan during low ebb in her marriage and signed guarantee to maintain tranquility in household, a presumption of undue influence is established - Not rebutted by bank, didn't advise her to obtain legal advice and they should have known husband would pressure her due to their close relationship
Holding/Conclusion	No undue influence: husband/wife not a category of undue influence like a doctor/patient relationship - Nature of relationship in this case did not give rise to presumption of power - Appeal allowed

Unconscionability

Is an equitable doctrine, courts step in to permit a party to avoid contractual obligations when bargain is interpreted as an unfair one

- Challenge is to say when it is an unfair bargain
- Allows courts to set aside agreement even when parties are stranger to one another
- Do not need pre-existing relationship

Uber Technologies v Heller / unconscionability

Ratio	**Unconscionability has two elements: inequality of bargaining power and improvident bargain** - **Inequality = one party cannot adequately protect their interests in the contract process** - **Improvident bargain = if it unduly advantages the stronger party or unduly disadvantages the more vulnerable one, must be assessed contextually**
Facts	Heller is licensed Uber driver and representative plaintiff in a class action against Uber - Heller argues Uber drivers should be legally classified as employees, not independent contractors - To become a driver, Heller had to accept without negotiation the terms of standard form agreement, stated that the law of Netherlands would govern any disputes and such disputes must be resolved through mediation and arbitration in Netherlands - The minimum to pursue arbitration is $14,500, typical Uber driver only earns $20,800-$31,200 per year - Cost of arbitration would eat up significant amount of Uber driver salary
Issues	Is the service agreement enforceable or can Heller successfully argue unconscionability in order to avoid application of the arbitration clause?
Rule	Unconscionability requires proof of inequality of bargaining power and improvident bargain
Analysis (Majority)	Unconscionability used to set aside unfair agreements resulting from inequality of bargaining power, used to protect vulnerable persons in transactions with others - Meant to protect vulnerable people in contracting from loss or improvidence to the party that bargain was made - Unconscionability is a widely accepted doctrine, but questions remain about content and it has been applied inconsistently - This court takes opportunity to clarify the doctrine, requires proof of two elements: a. Inequality of bargaining power b. Resulting in improvident bargain <u>Inequality of Bargaining Power</u> Inequality between two parties such that we can say process of entering into or negotiating reflects problematic inequalities - Inequality can be attributed to: personal characteristics of the party and circumstances the parties are in when contract is negotiated - Clearly inequality between Uber and Heller • Boilerplate contracts are pervasive (worries about enforcing them due to no input from the party agreeing and potential for inequality is heightened due to nature of the contract) • Heller was powerless to negotiate any terms • Significant gulf in sophistication between the two parties <u>Improvident Bargain</u> Improvident if unduly advantages stronger party or unduly disadvantages the more vulnerable

	- Measures at time of contract formation, always assessed contextually looking at terms in light of circumstances like market price, commercial settings, parties positions - There was improvidence in the arbitration clause, mediation and arbitration costs a lot for potentially very little reward (fee comes close to drivers annual income) • Clause modifies substantive rights making subject to precondition of travelling to Netherlands and incapable of enforcing rights unless paying significant fees to travel there • No reasonable person who had understood and appreciated implications of the clause would have agreed to it
Holding/Conclusion	Appeal dismissed; arbitration clause held to be unconscionable and unenforceable
Takeaways	Court adopts highly contextual analysis that focuses on the protection of weaker party - SCC has been criticized for this approach and not considering the state of mind of the stronger party in the analysis They explain common traps in unconscionability: 1. Inequality a. Common example is that of necessity: where weaker party so dependent on stronger that serious consequences would flow from not agreeing to contract b. Test to address how weaker party cannot protect their interests during contract formation 2. Improvident Bargain a. Unduly advantages stronger or unduly disadvantages weaker b. Measures at time of contract formation, cannot assist parties trying to escape contract when circumstances are such that agreement now works a hardship on them c. Assessed contextually: read terms of bargain in light of circumstances

In *Nav and Rosas* courts proposed a test that says contractual variations will be enforceable absent duress, unconscionability, or public policy concerns

- Don't just apply in contractual variations but post-contractual variations is one important context for their application

PROMISSORY ESTOPPEL AND WAIVER

Estoppel: an equitable doctrine

- Basic idea is that a party is 'estopped' or prevented from doing or claiming a certain thing because of their own prior actions
- Where court exercises discretion under equitable jurisdiction to stop a party from doing or claiming something because of something they have done or said in the past
- Applied in a discretionary manner to produce a just result when common law would otherwise produce a harsh result

Two things to keep in mind as it is an equitable doctrine:

1. Clean hands in equity
    - Person making claim must also have conducted themselves equitable
2. Idea that promissory estoppel can be used as a shield and not a sword

Promissory Estoppel: a doctrine that operates to enforce a promise when there is no consideration

- When one party (promisor) says they will not enforce their legal rights under a contract and the other relies on that, promisee can use promissory estoppel to that promise if it would be equitable to do so

Waiver: promissory estoppel thought to have evolved from doctrine of waiver

Hughes v Metropolitan Railway Company / doctrine of waiver

Ratio	**If a promise is implied in negotiations and one party relies on that promise, then it is inequitable to allow the other party to act as though the promise does not exist** - **This waiver/promise can be inferred from conduct**
Facts	Under lease, tenant had obligation to repair the property in 6 months of landlord's written notice - Oct 22, landlord serves notice to repair - Nov 28, tenant offers to sell leasehold back to landlord and proposes deferring commencing the repairs until landlord makers a decision about this offer - Parties engage in negotiations but they break down in December - Landlord never responded to proposal to defer repairs - Apr 19, three days before deadline to finish repairs, says that because negotiations have broken down it would not undertake repairs - Apr 28, landlord serves Tenant with writ of ejectment, evicting tenant because repairs not done within 6 month period from notice of repairs that expired on Apr 22
Issues	When does six-month time period for completing repairs expire against the tenant?
Analysis	If parties who have entered into definite and distinct terms involving legal results afterwards enter into a course of negotiations which has effect of leading one party to suppose the strict rights from the contract will not be enforced, then the person who otherwise might have enforced those rights will not be allowed to enforce them where it is inequitable to do so - Tenant believed landlord waived rights to enforce agreement - Relied on landlord's actions entering course of negotiations on basis they would not enforce original agreement - It would now be inequitable for landlord to do so Landlord waived rights for notice of repair under lease, can no longer insist on repair being done in 6 months of October notice - Time period runs from break down of negotiations - This kind of waiver is found through actions rather than express statements, by entering a course of negotiations they effectively waived their rights to insist and enforce the legal rights under original agreement - There must be pre-existing legal relationship - This kind of waiver can be inferred from conduct, does not need to be express, landlord implicitly promised that notice to repair would be suspended while negotiating
Holding	Appeal dismissed, time for completing repairs runs from the Dec 31st date when negotiations broke down - Tenant completed repairs within 6 months of end of December and landlord has not right under lease to eject tenant

This case is cornerstone of 'doctrine of waiver'

- **Doctrine of Waiver:** a party can waive right to insist on strict performance of the agreement by conduct, and cannot insist on strict performance later where inequitable to do so
    - A party that relies on promise during negotiation can use this doctrine to prevent the other from acting as if promise did not exist
    - Waiver need not be explicit, inferred from conduct
    - Usually party relies on waiver to defend allegations it has breached original contract

Central London Property Trust Ltd. v High Trees / promissory estoppel

Ratio	**A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply**
Facts	Sept 24, 1937: landlord and tenant enter 99 year lease at 2,500 pounds per year - Due to war conditions in London, the flats were not fully occupied, landlord and tenant engage in discussions about lowering rent - Jan 3, 1940: landlord writes 'we confirm the arrangement made between us by which the ground rent should be reduced as from commencement of lease of 1,250 pounds per year' - Mar 20, 1941: landlord's creditor puts landlord into receivership - Jan 1945: flats fully let, tenant paid reduced rent from 1941 to beginning of 1945 when all flats were fully let and continued to pay lower rent even after - Sept 1945: receiver discovered the arrangement of reduced rent and demanded full rent going forward plus arrears
Issues	Can the receiver/landlord revert to original rent amount and collect arrears?
Rule	If a promise is implied in negotiations and one party relies on the promise, then it is inequitable to allow the other party to act as though the promise does not exist
Arguments	<u>Defendant's Arguments:</u> - Letter of Jan 3, 1940 constituted an agreement that rent should be 1250 and related to whole term of lease - Alternatively, landlord estopped from alleging rent is more than 1250 - Alternatively, by failing to demand more landlord waived right to any rent in excess of the amount accrued up to Sept 24, 1945
Analysis (Denning)	Traditional position in law entitles P to recover full amount of rent for full term as it was post-contractual variation and there was no fresh consideration - Doctrine of estoppel and doctrine of representation would not have applied to this case at the time Denning says law has not stood still; there have been cases in which promise made intended to create legal relations and knowledge of person making promise was going to be acted on by person to whom it was made - When it was acted on, courts have said the promise must be honoured (*Hughes*) - Party can be estopped from going back on promise, promise relied on by other party gives rise to estoppel Question remains is one of scope of the promise: - The promise was intended to apply to the trouble associated with letting the flats in wartime conditions - On the evidence, rent should be reduced as a temporary expedience while block of flats was not fully let due to wartime conditions - On these conditions, we revert to full rent chargeable under conditional lease agreement
Holding	Decides in favour of P for final two quarters, during which time flats were fully rented but not back payment for prior period, landlord estopped from amounts above 1250 per year for that period - Here it was binding as covering period down to early part of 1945 and after that time rent is fully payable - Promise intended to be binding, acted on, and was acted on and these types of promises are usually enforceable

<u>Elements Required for Claim in Promissory Estoppel</u>

1. Legal Relationship
    - Must be pre-existing legal relationship between parties
    - Often looking at situations where there is attempt to vary existing contract
    - Cannot be used to create new binding contract from promise with no consideration
    - Parties must be in legal relationship at time of promise or assurance (*Trial Lawyers Assoc. of BC)*
2. Representation
    - Is there a clear promise, assurance or representation of intention by promisor?
    - Be clear which party is making representation and which party to whom representation is made
    - Requires words or conduct by promisor clearly constructing a promise or assurance that use of promisor's rights or some other legal stipulation will be altered in some w ay
        - Clear and unequivocal
        - Need not come in form of promise
        - Just a statement or representation about future conduct and obligations
    - Need to establish promise intended to affect legal relationship of parties by representor in such a way as intended to be acted on by representee

Used as shield when other party trying to assert legal rights under original agreement

John Burrows v Subsurface Surveys Ltd. / representation and mere indulgence

Ratio	**Must be some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rules of the contract would not be enforced** - **It is not enough to show that one has taken advantage of indulgences granted to him by the other (lack of protest is mere indulgence, not a course of negotiation)**
Facts	D purchased business belonging to P - Part of purchase price was secured by a promissory note that D gave to P - Included an acceleration clause which permitted creditor (P) to claim the entire amount due in case of a default of more than 10 days on any monthly payment - Over 18 months, D was repeatedly late in monthly payments but P never took issue and never invoked the clause - Parties had faling out when D was late, P sued for whole amount - D tendered instalment but P rejected it
Issues	Can D rely on defence of promissory estoppel? - Has P made a representation on which D relied? - D argues that there was a representation to accept late payments through the conduct of the plaintiff
Rule	If a promise is implied in negotiations and one party relies on this promise, it is inequitable to allow the other party to act as though promise does not exist
Analysis	Promissory estoppel defence cannot be invoked unless evidence that one party entered a course of negotiation which led the other to suppose strict rights of contract would not be enforced - Entering negotiations is the interpretation of the representation - It is not enough to show that one has taken advantage of indulgences granted to him by the other (lack of protest was a mere indulgence, not a course of negotiation) Policy based reasoning offered - If we were to enforce promissory estoppel in situations like this, where people are simply granting forgiveness of mere indulgence, this would require parties to a commercial transaction to vigilantly insist their rights under agreements

	Evidence does not warrant inference that P entered negotiations, granted friendly indulgences while retaining right to insist on letter of obligation
Holding	Decides for plaintiff; plaintiff not estopped from asserting rights under acceleration clause - Plaintiff can enforce obligations under original agreement
Takeaways	Look for representation made by promise that indicates intention to change rights going forward - Does not need to be explicit, can make reasonable inference from conduct but must be more than a friendly indulgence - Would a reasonable person in the position of the plaintiff has known or should have known that his/her inaction would be acted on by the other thereby changing their position?

The Equities

Promissory estoppel is an equitable doctrine: the main question is whether promissory estoppel would be equitable or inequitable.

- We are concerned with conduct of both of the parties
- Examine two aspects:
    a. Representee – must have acted equitably themselves to establish a claim, the clean hands doctrine (person making claim in equity must come to court with clean hands themselves)
    b. Representor – there are situations where representor can terminate effective estoppel where we would say it is actually fair for them to go back on promise when they have given some reasonable notice to the promisee

The Representee

Asking whether representee themselves acted equitable

- Clean hands doctrine: person making claim in equity must come to court with clean hands themselves
- This is the one to whom the promise is made
- Always consider conduct of both parties

D&C Builders v Rees / conduct of representee

Ratio	**No person can insist on settlement through intimidation; there is no equity by the intimidator that would estop innocent party from claiming original right** - **Case provides example of court saying representee did not come to court with clean hands**
Facts	P's were little company engaged in small construction jobs, D employed Ps to do work on his house - Ps completed work and rendered accounts, part of amount was paid, no dispute made about quality of work but $482 still outstanding - Ps started to press for payment and only when pressed did D complain about quality of work - Mrs. Rees phoned Ps and offered 300, in her view 300 is better than nothing - Ps faced bankruptcy and in immediate financial need, considered the offer and decided to accept 300 and see what they can get later - Mrs Rees gave P cheque and insisted on receipt saying it was tendered in completion of account, Ps felt they had no choice as they faced bankruptcy, she knew position they were in - P consulted solicitors, wrote debtor saying whole amount is owed and Ds respond alleging bad work plus binding settlement - Ps bring action to collect on the balance and try to assert rights under original agreement

	P is representor, they are making promise to accept 300 instead of full payment - D is representee, make request for paying lesser amount
Issues	- Is there consideration supporting Ps promise to accept lesser sum in full satisfaction of whole? - Is the P estopped from seeking the balance?
Rule	A promise to accept less is void for lack of consideration - Promise may be rendered valid without duress/unconscionability/undue influence and if it is not estopped
Analysis (Denning)	<u>Accord and Satisfaction?</u> Was there an enforceable agreement with accord and satisfaction? - Denning does not buy argument that cheque for lesser amount counts as satisfaction for agreement to accept less - Court rejects Canadian reasoning in Foot, seeing it is not enforceable and no satisfaction in form of cheque instead of cash <u>Can Plaintiff be Estopped?</u> Traditional position is that creditor not bound by the settlement - Equity has stretched a hand to help the debtor, courts have invoked broad principles from Hughes - Cites HighTrees for promissory estoppel; an equitable remedy, ultimate determination: would it be equitable to do so? Denning finds it not equitable for plaintiff/representor to go back on promise to accept less - The conduct of the representee was inequitable, there has to be true understanding between parties - Here there was no accord, Mrs. Rees held creditor to ransom, Ps were in need of money and she knew it - No equity in D to warrant departure from due course of law - Promissory estoppel will not apply, it is not inequitable for P to go back on promise to accept less as it was procured through intimidation/undue pressure
Holding	- Appeal dismissed, no reason in law or equity why creditor should not enforce full amount of debt owed to him
Takeaways	Case had common law and equity argument - At common law, court concludes no accord and satisfaction - In equity, Ds argue promissory estoppel but court concludes no equity in D to warrant departure from true course of law, cannot insist settlement by intimidation - Representee did not come to court with clean hands

When it comes to promissory estoppel, it is not examining promise of original bargain; it is examining parties who want to change terms after original contract in effect

- Rees pushed for variation but did not make the representation
- The representation is the on with the thing to waive, so that would be D&C (D&C wants to waive obligation; accept new amount)

<u>The Representor</u>

It must be inequitable to let the representor resile

- In most cases, promisor can terminate the effect of the estoppel on giving reasonable notice to the promisee
- If promisor gives reasonable notice they are withdrawing promise, court may conclude not inequitable to resile (this is effectively what is done in *High Trees*)
- Depends on circumstances and facts
- If there is ongoing obligation the estoppel or effects of estoppel can be terminated by reasonable notice

Inquiring whether it is fair to hold promisor to their promise

- There may be situations where equitable or not inequitable for them to back out and they can withdraw their promise
- Always think of equities as two separate questions:
  - Did representee act equitably? Clean hands doctrine – *D&C Builders*
  - Would it be inequitable to allow representor to resile? It might not be if reasonable notice given, presumably does not make sense in all or nothing promise more in ongoing obligations like *High Trees*

Broad principle: promissory estoppel only applies if inequitable for representor to go back on promise

Promissory Estoppel So Far

Has required so far:

1. Pre-existing legal relationship: between representee and representor
2. Representation: a clear promise, made with intention it be relied on by other party
   - Might infer from conduct, more than a mere indulgence (*Burrows*)
   - Equities: Did representee seek equity with clean hands? Did representor give reasonable notice such that it would be equitable to allow them to resile?

We are concerned with subsequent promise made, not promises pursuant to original agreement

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The Reliance

Another element of promissory estoppel is reliance

- Whether or not the representee relied on or acted on the promise/assurance/representation
- Change in position or conduct because of promise or assurance by representor
- Reliance must be detrimental to invoke promissory estoppel
  - In *BC Trial Lawyers Association* the SCC confirmed that there MUST be detrimental reliance for promissory estoppel
  - Represented must have acted on/changed position in reliance on promise to their detriment
  - Justification is that promissory estoppel is equitable, must be an inequity suffered by one party
- Detriment is tested at the time when the promisor purports to resile from the promise
  - What detriment would be suffered at time at which promisor purports to withdraw promise?

Trial Lawyers Association of BC v Royal & Sun Alliance Insurance Company of Canada /detrimental reliance

Ratio	**Detrimental reliance must be shown by promisee to assert promissory estoppel** - **What makes the conduct unfair/unjust is that the promisor has induced the promisee to changes its position in reliance thereon, to its detriment** - **Asserting promissory estoppel requires evidence of prejudice, inequity, unfairness or injustice before courts will give hold a promisor to its promise or assurance**
Analysis	Promissory estoppel is an equitable defence whose elements are well settled The defense requires: 1. Parties be in legal relationship at time of promise or assurance 2. The promise or assurance be intended to affect relationship and be acted on 3. The other party in fact relied on the promise or assurance (it is implicit here that such reliance be to their detriment) Promissory estoppel requires detrimental reliance - Has always been a requirement - Its goal is to address unjust/unfair/unconscionable conduct

	- What makes it unfair/unjust is that they relied on promise to its detriment

Sword vs Shield

The fifth and final element of promissory estoppel is the sword and shield concept

- The general premise is that promissory estoppel, as an equitable doctrine, can only be used as a defence of the innocent not for the offence of the wrongdoer

Combe v Combe / sword vs. shield

Ratio	**Estoppel is not a cause of action in itself and cannot do away with the necessity of consideration** - **It cannot be used to commence a new cause of action; it can only be used by a party as a defence against the other party making a separate claim**
Facts	Mr and Mrs Combe going through divorce proceedings - Agreement negotiated with assistance of lawyers pursuant to which Mr. Combe agreed to pay her 100 pounds per year as spousal maintenance post-divorce - After divorce finalized, her solicitor wrote for instalment and he never paid any amount - She pressed for payment privately and did not take legal action - After several years bring action for amount of 675 pounds
Issues	- Is there consideration supporting Mr. Combe's promise to pay 100 a year as permanent maintenance? (always think first about issues surrounding consideration, then equity) - Is Mr. Combe bound by his representation that he would pay 100 a year permanent maintenance via promissory estoppel?
Procedural History	Mrs. Combe successfully relied on promissory estoppel at trial, even though no consideration promise was enforceable based on High Trees - Was unequivocal acceptance of liability intended to be binding, acted on, and in fact acted on (High Trees) - She received amount of 600 pounds due to partially successful limitation period defence
Rule	If one party, by his conduct, leads other to believe the strict rights arising under contract will not be insisted on, then the party thereafter will not be allowed to insist on the original terms
Analysis	Promissory estoppel does not create a cause of action where none existed before - Simply prevents parties from relying on strict legal rights where to do so would be unjust in light of parties previous interactions - One asserts legal rights, other raises defence of promissory estoppel - Cannot eviscerate principle of consideration by saying a primary cause of action could be grounded in promissory estoppel Mrs. Combe trying to use as new cause of action - Trying to use as sword not shield
Holding	- Inclined to favour High Trees, however, here it is stretched too far - Concern about stretching bounds of promissory estoppel too far, Husband not bound by promissory estoppel, appeal allowed - Cannot use as sword rather than shield
Takeaways	Sometimes it will be P who cannot insist on application of strict legal rights, sometimes it will be D who cannot insist on strict legal rights - Ie. Purchaser of goods cannot waive right to timely delivery then refuse to accept on late delivery - Purchaser is D, prevented from resiling promise, this is not promissory estoppel being used as a sword even though it is sometimes D who is not allowed to insist on strict legal rights

	- Promissory estoppel is not a question of defendant/plaintiff but one of defence

Robichaud c. Caisse Populaire de Pokemouche Ltee / sword vs shield exception

Ratio	**Promissory estoppel can be used as cause of action**
Facts	Robichaud owed money to Caisse and RBC - Caisse secures judgment against Robichaud and RBC obtained judgment - Robichaud represented by a company negotiating with creditors, Caisse agrees to remove judgment in return for a $1,000 payment in full satisfaction of outstanding obligation and to remove judgment from registry - Caisse receives cheque but board of directors refuse to compromise agreement - Cheque not cashed, Robichaud brings action to enforce agreement
Issues	Can Robichaud rely on promissory estoppel to enforce Caisse's promise?
Rule	Promissory estoppel can be used as a shield, not a sword
Analysis	Conclusion arrived at through two routes: 1. Sophisticated commercial actors, an agreement entered of some benefit to the parties or they would not have entered 2. Concurring judgment (Rice J) agreed on outcome from perspective of promissory estoppel • There was representation in course of negotiations • Appellant relied on promise made and changed his position, suffered a detriment PE can be a shield, not sword - Court acknowledges it is shield not sword but Robichaud is bringing action to have agreement enforced and their judgment against him removed from register - Is it a sword here? • Seems irrational to make enforceability depend on chance of whether promisee is plaintiff or defendant • Decide in favour of Robichaud, even though it seems he is using as sword, court says cannot refuse to apply doctrine of PE just because it is not raised as a defence here It could have been used as a defence in this case, he would have had to wait until bank seized his goods and then objected to it and use promissory estoppel as shield - If defense is available, allow him to assert it now and not wait for events to play out making him raise as a shield
Holding	Appeal allowed, Caisse Populaire must cancel judgment against Robichaud
Notes	Distinction does not map on to P and D - Look at who is trying to assert rights under original agreement and who relies on promise as defence - Promissory estoppel as shield, not sword, is still the general principle even after this case - This is an exception of same general principle in roundabout way

Elements Requires for a Claim in Promissory Estoppel (Recap)

General principle from *High Trees*

We can determine 5 elements that need to be present for claim in promissory estoppel:

1. Legal Relationship

- Legal relationship between parties
- Not stated in *High Trees,* but it is implicit

2. Representation
    - Clear promise, assurance, or representation of intention by representor
    - Words or conduct by promisor clearly constituting a promise or assurance to the promisee that the promisor's rights will be altered in some way (*High Trees*)
        - Must be more than a friendly indulgence (*John Burrows)*
    - We need to establish promise was made, which was intended to affect legal relationship between the parties, and intended to be acted on
    - May be inferred as a result of conduct, take reasonable objective perspective
3. Detrimental Reliance
    - Representee acts on and relies on promise/assurance of intention
    - Representee must actually rely on promise and must be detrimental (*BC Trial Lawyers Association*)
    - Reliance is tested at point of change of position by promisee: detriment tested at time when promisor purport to resile from the promise
4. The Equities
    - Representee must have acted equitably to raise the defence, clean hands doctrine (*D&C Builders*)
    - Must be inequitable to allow the representor to resile as long as they give reasonable notice
5. Sword/Shield
    - Cannot be a cause of action (*Combe*)
    - Some jurisprudence to establish potential as a sword (*Robichaud*)

Post-Contractual Variation Exam Problem (Putting It All Together)

1. Common law position
    - Promises to do more common law (Stilk, Gilbert Steel)
    - Promises to accept less (Foakes, Foot) and statute (Judicature Act)
2. Judicial reform
    - Rosas and Nav Can (asbent duress, unconscionability, or other public policy concerns)
    - Consider reform from Rothey Bros (practical benefits argument)
3. Promissory estoppel, equitable argument
    - Finally, consider promissory estoppel and the five elements discussed

INTENTION TO CREATE LEGAL RELATIONS

The 4th requirement at law: offer, acceptance, consideration and intention to create legal relations

Commercial Contexts

- Where the 3 other elements are present, parties are presumed to have requisite intention to create legal relations
- Onus on party claiming there was no intention to enter legally binding relationship to rebut that presumption

Domestic Contexts

- Even where offer, acceptance, and consideration the parties are NOT presumed to have intended legal relations
- Onus on party alleging existence of contract to prove intention exists
- Distinction between everyday moral practice of promising (like promising friend to drive to airport) vs legal practice of enforceable contractual obligations – do parties intend to be legally bound?
- *Balfour v Balfour*

Balfour v Balfour / intention in spousal relationship

Ratio	**Agreements between spouses not contracts and not given force of law**

Facts	Married couple lived together in Sri Lanka until 1915 - Mr Balfour went on leave from work, they returned to England - When D's leave was up, the plaintiff on doctor's advice remained in England as she had medical condition - Mr Balfour orally agreed to give her 30/month when their relationship was amicable, ws not a separation agreement - Subsequently Mr Balfour suggests they remain apart and they divorced, she was without financial support for a period of time - Mrs Balfour brings action to make D promise to pay 30/month allowance
Issues	Is D's promise legally enforceable? - Did the parties intend legal relations?
Procedural History	P won at trial, found legally binding agreement between the parties - Her consent was sufficient consideration - Not just consent to receive amount but implicit promise not to pledge her husband's credit for necessaries - She effectively gave up legal right counting as good consideration - Nature of relationship suggested legal territory, an exchange of legal rights between parties
Rule	In domestic contexts, parties are not presumed to have intended legal relations and onus is on party alleging existence of contract to prove intention exists
Analysis (Atkin LJ)	There are some agreements that law does not treat as enforceable - Most commonly between husband and wife - There is consideration in these situations (mutual promise) but they do not result in contracts even with consideration Parties do not intend this to have legal consequences - Lack of requisite intention makes otherwise enforceable promise unenforceable Public policy argument: if we recognize these rights, courts would be overwhelmed - Seems absurd to think wife can sue husband and husband can sue wife for these kinds of arrangements - Private domain of husband/wife distinct from purview of the courts
Holding	Appeal allowed, no contract between them due to lack of legal intention.
Notes	Interpreted as creating new rule at common law - First time courts refused to enforce agreement because parties could not prove legal sanctions were intended - Previously presumption was enforceable unless parties expressly say it is not

Critical Analysis of COA's Judgment In *Balfour*

1. Be wary of arguments by analogy – they say agreement in this case is like agreement to take a walk
    - This may be unfair analogy
    - The circumstances/stakes are quite different
2. Negative consequences argument
    - Decontextualized analysis of relationships between parties
    - There was a power relationship and court is taking a stand/entrenching the status quo saying wife cannot have enforceable agreement here
3. Floodgate argument
    - Public policy argument, holding them enforceable would overwhelm the courts
    - Shouldn't a person have remedy they are entitled to as matter of fairness/justice
    - Fact floodgates open should suggest existing allocation of entitlements is problematic
    - Can't just ignore, indicative of something problematic

4. Parties intentions
    - There was real intention to be bound here
    - Did not look at particular intention of parties per se
5. Domestic sphere and public/private divide
    - His premise is that type of relationship is based on mutual love and respect
    - There's no reason to believe that other types of relationships to contracts do not have mutual trust or understanding

Current State of the Law

Balfour is the current position of law

- Presumption that in domestic sphere, legal relations not intended
- This presumption has disproportionate affect on women in relations
- This kind of presumption can also apply in other contexts such as family members
- Important principle is what parties intentions are, given nature of relationship between them

How to rebut the presumption?

1. Detrimental reliance – implicitly agreed not to pledge her husbands credit, and in exchange got nothing
2. Formality of nature of communication between parties – if you had lawyers advise you that is a strong indication

FORMALITY: PROMISES UNDER SEAL

Prior to development of doctrine of consideration, a seal was necessary to render agreement enforceable

- Seal no longer necessary but still a sufficient condition for enforceability even with no consideration
- Today law does not require wax, so it is common that a sticker is affixed to symbolize seal
- Seal plays evidentiary and cautionary role
    - Intention to bind
    - Requirement to perform act forces promisor to contemplate consequences
- What constitutes a valid seal is a question of law, a question of fact is whether document is effectively sealed

Royal Bank v Kiska / promises under seal

Facts	**Kiska's brother borrows money from Royal Bank** - **Kiska guarantees brother's debt obligation** - **Bank tries to enforce guarantee on basis of promise made under seal** - **At time of signing guarantee, no wafer attached but word 'seal' was written on document next to signature**
Issues	Is the guarantee under seal such that it is enforceable even absent consideration?
Analysis (Majority)	Found guarantee to be binding because it was supported by good consideration - The dissent reasoning in this case was taken up by subsequent courts
Holding	Appeal allowed and contract upheld, guarantee was binding and supported by good consideration
Analysis (Dissent)	Wax seal no longer obligatory, as long as seal affixed by or acknowledged by party executing the document on which it was placed - Any representation of a seal made by signatory will do - As long as affixed by person making the promise Rejects idea that signing under seal and stating it is under seal should be bound accordingly even with no seal - Saying 'given under seal' or 'signed, sealed, delivered' is just anticipating a future formality - The word 'seal' is not enough, anticipating use of seal and cannot amount to use of seal - Some semblance of formality should be preserved

	- The present document had 'seal' written which will not suffice and not executed under seal - If there is no consideration, defendant has no obligations under guarantee Critical and crucial point is whether or not seal adopted by promisor with intention of executing under seal - Intention of promisor is what really matters

FORMALITY: REQUIREMENT OF WRITING

Writing requirement is a necessary condition
- For certain categories of contracts to be enforceable, they must be in writing
- Not the default position, only for certain categories of agreements

Statute of Frauds

Passed in 1677 In England, the statute goes over restrictions of certain contract, aimed at preventing people from perpetrating frauds by alleging promises that were not made
- Provides evidentiary basis for promises undertaken, especially during historical period where rules of evidence were under developed
- Was seen as necessary due to state of evidence law at the time

Statute of Frauds
- **Section 4 and 17:** Provide that certain kinds of contracts must be in writing to be enforceable - **Section 4:** Sets out 5 categories of contracts that must be in writing • Contracts to charge an executor or administrator on a special promise to answer damages out of their own estate • Contract upon sideration of marriage • Contracts to answer for the debt, default or miscarriage of another person • Contracts not to be performed within a year • Contracts for sale or an interest in land - **Section 17:** imposes writing requirement on contracts for purchase and sale of goods for a price of 10 euros or more

Justification Today

Many argue we should do away with this requirement, now that we have developed and advanced rules of evidence
- Argue that it is an outdated legal requirement
- There are some reasons we may think to still have the requirement enforced
  - Might indicate to parties gravity of obligation they are undertaking
  - Written contracts for land may facilitate land settlement

Alberta

Statute of frauds inherited in Alberta and there are two important refinements
1. Present day equivalent of s 17 now in *Provincial Sale of Goods Act*
2. Further supplemental requirements involving guarantees (*Kiska)*

Sale of Goods Act, RSA 2000, c S-2
Section 6 – Enforcement of Contract Over $50 (1) A contract for sale of any goods of value of $50 or more is not enforceable by action

(a) Unless the buyer accepts part of the goods so sold and actually receives the part or gives something in earnest to bind the contract or in part payment, OR
(b) Unless some note or memorandum in writing of the contract is made and signed by the party to be charged or the party's agent in that behalf

Categories from s 4 in Statute of Frauds

1. Contracts to charge executor or administrator on special promise to answer damages from estate
    - Historically the case that administrators took residual property in estate as part of administration
    - People would put pressure on administrator to compensate debtors out of residual estate that administrator in charge of
    - Still required in AB to be in writing
2. Contracts upon consideration of marriage
    - Still required in AB
    - Contract where there has been transfer of property in exchange for promise to marry
3. Contracts to answer for debt, default or miscarriage of another person
    - Promises that are guarantees, promise to answer for debt of another person (guarantee there debt, ie. Kiska)
    - Has been interpreted as applying to guarantees, not indemnities
        - Indemnities are primary obligation under debt
        - Guarantee is a secondary obligation conditional on primary oblige failing to make good on obligation
    - Guarantees Acknowledgment Act in AB
        - Requires further formalities for guarantees to be enforceable at law
4. Contracts not to be performed within a year
5. Contracts for sale or an interest in land

All categories still in play in Alberta, big legal issue is doctrine of part performance in oral promises for conveyance of land and how the equitable doctrine applies

Contracts Not Performed Within a Year

Adams v Union Cinema

Rule that contract must be in writing only if its performance of necessity must last longer than 1 year

- If it is of indefinite duration but could possibly be performed within a year, it does not fall under the statute even if it is likely to last longer than a year
- Statute of Frauds only applicable to those that MUST last longer than 1 year

Hanau v Ehrlich

If there is no mention of time and time is uncertain or indefinite the agreement is not within the statute

- An agreement that stipulates a specified period of performance of more than one year is caught by the provision even though the contract also stipulates it may be terminated within that period
- Does not fall within statute for uncertain or indefinite time period

Contracts not to be performed within a year still have a written requirement in AB

Contracts for Sale or Interest in Land

Most important category → most likely to arise in modern times

- Interpretive issues arise as to how land is defined in the statute
- Equitable doctrine of part performance in contracts for sale or interest in land is primary focus

Some Memorandum or Note Thereof

The contract or agreement has to be in writing, or if agreement is not in writing, it is sufficient if there is some memorandum or note thereof memorializing the agreement in writing which is signed by party against whom action is being brought

- Either agreement itself in writing or some memo or note as evidence of the agreement
- Memo/note does not need to take certain form and does not need to be contemporaneously created with formation of agreement

Memo/Note Requirements

- Does not need to be intended as a memo of contract
- Courts try to interpret in liberal/forgiving way
- It is sufficient if memo comes into existence anytime before action commenced
- Can be constituted by several pieces of paper (joinder)
    - Even where one document is signed and the other is not, but there is some connection between the documents and the connection has to be obvious in some sense
    - Ie. Master document refers to the other and is signed
    - Ie. One document implicitly refers to another, obvious in some way
- Must adduce existence of contract and not fail for uncertainty
- A not or memo sufficient if all material/essential elements or terms are recorded
    - For purchase and sale of land: parties, property, price
    - Three essential P's
    - Per *Tweddell* there may be other essential/material terms
- It must be SIGNED by party against whom contract being alleged
    - Has also been interpreted liberally/broadly
    - May include initials, hand printing, need not be at end of doc, can be electronic, etc.
    - Needs to demonstrate intent of party against whom claim is being made and that the party is authenticating the document

Electronic Memoranda

At common law, memoranda can be in electronic form, can satisfy writing requirement

- This is interpreted broadly
- There is now legislation addressing contracts signed electronically
- Most legislation for electronic signatures excludes contracts for transfer/interest in land
- Requirement under electronic transactions: need during and accessible record of communication so we can refer to it later on
    - Will satisfy if it meets broad principle

Valid But Unenforceable Contract

Can have several consequences:

1. Plaintiff only has procedural problem re enforcement but contract itself does exist
2. Valid but unenforceable contract means evidence may arise to permit enforcement subsequent to formation, enables equitable doctrine of part performance to apply
3. Valid but unenforceable contract can be used by way of a defence and can be used as consideration for new contract

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Part Performance

Equitable doctrine to achieve just or fair result on basis of detrimental reliance on oral promise

- Issues arise when parties promise land will be transferred and work is done in reliance on that promise

Doctrine of Part Performance: where one party partially performs their undertaking, oral agreement may be enforced to avoid injustice to party conferring value

- Application rests on determination of actions being pointed to as part performance and relationships actions have with alleged unenforceable oral agreement

Specific performance often sought and awarded in context of land

Deglman v Guaranty Trust Co / part performance test

Ratio	**Broader view: Acts must be unequivocally referable to specific house OR to any dealing with land**
Facts	Deceased promised P she would leave him her house if he would run errands and do various tasks she might request from time to time - Agreement never recorded in writing - Acts of alleged part performance: driving around, doing odd jobs around two houses, and various errands and minor services for her personal needs - He never actually lived at the house that is the subject of the alleged contract and never lived at her other house except for a 6 month period when he attended school
Issues	- Whether agreement between P and deceased was enforceable? - Whether P's acts are sufficient for part performance?
Rule	*Madison v Alderson:* there is a strict test for part performance according to which the acts undertaken must be unequivocally referable to the agreement in question - Acts cannot be viewed in any other way to perform the agreement, they were only done because of the agreement in question
Analysis	Begins with discussion of *Maddison v Alderson* as leading authority - Acts relied on must be unequivocally and in their own nature referable to the agreement alleged and could be done with no other view or design than to perform that agreement - Majority and minority reach same conclusion, articulate slightly different tests <u>Per Rand J (Minority):</u> This case should be decided same way as *Maddison v Alderson* - Acts are neutral and have no relation to the premises and no more than mere expectation his aunt would give in will - Not connected to the certain property at all, does not meet strict test - Must be demonstrated connection between acts of performance and a dealing with the land before evidence of terms of any agreement is admissible - P can recover for services on basis of *quantum meruit* - 'Reasonable value' for services provided and he did not intend to do them for free but on footing of contractual variation (he should be given $3,000 for services) **Rand J: We must draw line where those acts are referable and referable only to contract alleged** <u>Per Cartwright J (Majority):</u> Uses language that none of acts were unequivocally referable to the specific house OR to any dealing with that land - Rand is saying it must be unequivocally referable to specific contract alleged - Cartwright says it has to be unequivocally referable to any dealing with the land - Dealings in land can look differently, just have to have be referable to SOME dealing with the land, not as stringent a test as that of Rand J **Cartwright J: Acts must be unequivocally referable to specific house OR to any dealing with the land (less strict)**

	Under both tests it fails, acts have no necessary connection to some deal with land or specific contract
Holding	Agreement not enforceable, acts of part performance do not demonstrate a sufficient connection to the contract being alleged
Notes	Less strict test of majority adopted by ONCA in *Erie Sand and Gravel* - Adopted Cartwrights approach The best answer on exam would say "The rule as *Maddison* states is … but, this has rationale has been debated by the SCC. As per *Deglman* acts could be referable to the specific contract alleged (Rand) but they could also be referable to any dealing with the land (Cartwright)

Thompson v Guaranty Trust Co / part performance test

Ratio	**Followed broader view: acts must be unequivocally referable to specific house OR to any dealing with the land**
Facts	Gus began working as hand on Dick's farm and continue for 48 years - Gus alleges his work done in consideration for Dick's promise to devise and bequeath his land to Gus - Gus nursed him back to health when sick and ill - TJ found that Gus took a marginal farming operation and made it successful: built granaries, made decisions on crops, equipment purchases, etc. - No will found but it seems clear his intention was to bequeath to Gus
Issues	- Given existence of oral contract 'whether or not lacking such a memo in writing there have been sufficient acts of part performance on part of appellant to take case out of s. 4 of Statute of Frauds'
Rule	*Madison v Alderson:* there is a strict test for part performance according to which the acts undertaken must be unequivocally referable to the agreement in question - Acts cannot be viewed in any other way to perform the agreement, they were only done because of the agreement in question
Analysis	<u>Per Spence J:</u> - Considers *Maddison* and *Deglman* - Distinguishes from Deglman on the facts, little resemblance to services in Deglman - Gus not a hired hand, was operator and manager of a whole farm industry owned by D, not good enough to award *quantum meruit* here <u>Per Fridman, Lord Selbourne, and Maddison:</u> Posits two views: 1. Narrower view: acts relied on must be referable to actual contract • Part performance must be referable to oral agreement relied on • Narrow view was followed in Deglman by Rand 2. Broader view: acts relied on must be unequivocally and in their own nature referable to some such agreement as that alleged • Prove existence of some contract and consistent with that contract • Followed in Thompson (plainly referable to AN agreement as to very land)
Holding	Appeal allowed, order for specific performance - P has proved part performance and application of statute of frauds negated

<u>Part Performance Summary</u>

There is the narrower and broader view

- Best to acknowledge how strict the narrow view is, it is so strict it would be hard to ever meet
- P argues there is a very specific agreement with the land and court says unless there is a specific agreement there could have been a contract with many unknown terms

Broader view was followed in *Thompson* and also by Cartwright in *Deglman*

- Narrow view followed by Rand in *Deglman*

INDIGENOUS AND ABORIGINAL LAWS IN CONTRACTS

Trans-systemic law = more than one legal order

- First challenge: determinate how the legal orders relate to one another
- Second challenge: how do we engage in comparative analysis between two different legal orders?

Two legal orders can be equally binding in generating law

- We don't just talk about state law, but other legal practices communities accept as binding and normatively significant
- Exercise caution in mapping one context and reasoning in one legal order onto another
  - Not a straightforward implementation

Indigenous Law

Internalized knowledge embedded in fabric of a person's being which is informed by their worldview

- Practices, governance, and legal orders internal to particular communities
- Rich history of practices that preceded implementation of Canadian state law
  - Have developed practices for managing agreement/disagreement and these governance practices had same normative force as law has for us in Canadian state law context

Aboriginal Law

Laws that are imposed from the outside, such as Canadian state laws imposed on Indigenous peoples

- Legal practices external to and imposed on communities
- Can be seen as coercive governance structures imposed on communities with their own legal practices

How do Aboriginal and Indigenous laws relate?

- Colonial view would be to say that 'state law trumps'
- Indigenous peoples contract with people outside community according to common law
  - Might undertake obligations according to Canadian legal order
- Indigenous governance structures/practices can include practices governing same issues in common law but addressed differently reflecting different values/understandings
- Each party bring self-understanding of governance systems and legal practices

Worldview

A worldview is how people understand themselves in relation to the broader world in which they live

- The only way to understand a particular governance structure, and related legal order is through some understanding of worldview which underlies it

What is the 'worldview' underlying each?

1. Common law perspective
   - Need some kind of way of providing resolution to disputes
   - Liberal ideology of independent autonomous individual freedom to bind themselves in contract
     - Entering binding obligation simply reflects/respects that autonomy
     - Obligations respect pre-existing autonomy of individual
   - Allows us to continue in face of disagreement revolving around issues surrounding undertakings for future commitments
2. Indigenous perspective
   - Ability of individual, always interconnected to larger community to accept obligations to others as part of a relationship

- Generally a relational understanding of individual in Indigenous legal orders (obligations constitutive of an individual's autonomy)

Relational Autonomy – Indigenous Perspectives
Understands individual autonomy as being irreducibly relational
- Only way to understand choice/governance of your own life is in relation to others, no way to understand in fully individual way
- Law is constitutive of the autonomy, what is possible for autonomy is constituted by relationships possible to enter into
- View laws as being one practice constitutive of individual's autonomy

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Contracts in Aboriginal Law

Contracts/voluntary undertakings under Canadian state system
- Idea of individuals free and equal, bargaining on equal footing (implicit assumption)
  - Each can bargain in own self-interests
  - Law ought to respect obligations individuals enter into
- Indigenous scholars document how this ideal is often not lived up to (often not fully free and equal and bargaining on equal footing)
  - Demonstrated in treaties, etc.
- Scholars have undertaken a critical evaluation questioning whether ideal of underlying worldview is actually born out

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Contracts in Indigenous Law

Challenges with mapping across legal orders:
- Legal decisions vs. oral traditions, songs, art, and ceremonies
- Voluntary obligations with non-humans
- Worry about conflating concepts: Story of porcupine
  - Suggests that binding force of obligations comes from offer, significance of offer in creating bindingness of obligation
  - Another way of understanding undertaking ultimately provided is as a commitment not just to counter-party but to collective community as a whole (Consideration does not play same role)
  - Different approach to remedies highlights different way of understanding things (remedial possibilities less obvious – don't see specific performance, damages, etc.)

PRIVITY OF CONTRACT

Doctrine of Privity
A contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it
- There may be attempt to benefit third party who has benefits under contract, but question is whether third party has legally enforceable rights and obligations under contract
- Generally, third party does not have enforceable rights or obligations

Justifications
- Bargain theory: considerations must flow between parties to have enforceable rights
- Promissory theory: obligation is relational between promisor and promisee (idea of promissory morality)
- Efficiency theory: enforcement of third-party rights would significantly increase price of contracting

Provender and Tweddle / early privity cases

Facts	In these early cases, parents of bride and groom make promise that if they get married, father of bride will pay some sum to the groom (parties are two respective in-law, third party beneficiary is the groom)
Issues	If one or both of the fathers fail to pay, can groom successfully sue?
Analysis	***Provender****:* court said yes 'the party to whom the benefit of promise accretes may bring his action' - Thought was that if you benefit under contract, you can bring an action under that contract ***Tweddle:*** no, this line of authority is reversed (genesis of the doctrine of privity) - Consideration must move from party entitled to sue upon contract, it would be monstrous to allow those who are party to contract for purpose of suing for his own advantage and not a party to it for purpose of being sued - Groom is stranger to agreement and supplied no consideration, cannot sue on the contract
Notes	*Tweddle* changed the law, introduced modern idea of privity of contract

Dunlop Pneumatic Tyre v Selfridge & Co / foundational case showing doctrine of privity

Ratio	**Only exception to privity of contract is if a party named in the contract was acting as an agent of an unnamed party and consideration flowed through the agent between third party and promissor**
Facts	Dunlop (plaintiff/appellant) was a tyre manufacturer, dew & company were a wholesaler, and Selfridge & co (defendant/respondent) was a retail department store. There are 3 contracts: 1. <u>Between Dunlop & Dew and Company</u> • Contains a resale price maintenance clause: under clause wholesaler can only sell below list price to retailers like Selfridge who are legitimately engaged in motor trade and agree not to sell below list price to customers • Trying to control price at which their product is sold to retail customers on market (want to ensure tyres not sold below list price and undercutting their price) • Dew can sell at 10% below list price to the retailers if they obtain their promise to observe life price 2. <u>Between Dew and Selfridge</u> • Selfridge promises Dew that it would not sell below the manufacturer's list price or offer to do so and agreed to pay Dunlop 5 pounds by way of liquidated damages in case of breach 3. <u>Between Selfridge and final consumer</u> • In breach of contract 2, Selfridge sold tyres below list price to consumer under contract 3
Issues	Can Dunlop sue Selfridge for breach of contract 2, even though contract 2 is between Selfridge and Dew & Company?
Rule	*Tweddle:* only a person who is party to a contract can sue on it, third party has no right to sue
Analysis	<u>Viscount Haldane:</u> - Only person who is party to contract can sue on it, English law knows nothing of 3rd party right to recover arising by way of contract - A second principle is that if a person with whom a contract not under seal has been made is able to enforce it, consideration must have been given by him to promisor to some other person at promisor's request (consideration must be from Dunlop to Selfridge to enforce)

	- Dunlop is not a party and consideration flows from Dew to Selfridge, neither directly or indirectly from Dunlop (Dunlop did nothing in consideration) - Dunlop argued that Dew entered contract as their agent and Dunlop was principle, court rejects this argument as principal named may sue if really contracted as agent but must have still given consideration either personally or through promisee acting as his agent in giving it - If consideration was permission to Selfridge to buy tyres, the structure of contract is not consistent with this (is a naked/bare promise) <u>Lord Dunedin (Agency Exception):</u> - Addresses possibility of the agency argument (undisclosed principal) and potential for Dew acting as agent on behalf of Dunlop - However, still lacking any consideration from Dunlop to Selfridge, even if an undisclosed principal they need to show consideration from Dunlop > Selfridge
Holding	Courts find against Dunlop, appeal dismissed (Dunlop cannot sue Selfridge)
Notes	Case is foundational for doctrine of privity - Lays foundation for agency exception (undisclosed principal) - Basic principal: third party must be both party and consideration must flow from them for promise to be enforceable

AVOIDING DOCTRINE OF PRIVITY

1. Statute
2. Specific performance
3. Trust
4. Agency
5. Employment
6. Principled exception

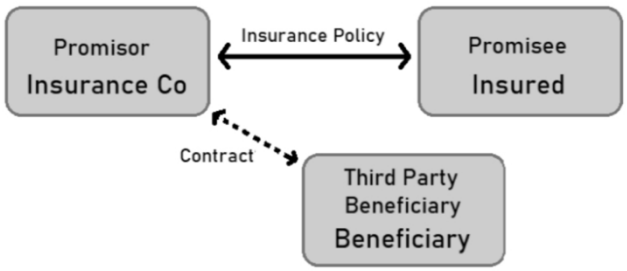
Statute

General Exception

- In Australia, NZ, and England, legislatures have passed Acts that address doctrine of privity in general way
- In Canada, province of NB has also enacted legislation granting 3rd party beneficiary's right to enforce the contract
- Modifies such that 3rd party beneficiary can sue if contract specifically provides for it or they receive some benefit and meet some criteria

Specific Exception

- Legislatures have intervened to provide specific exceptions to the common law doctrine of privity of contract
  - Consumer protection legislation (Ie. *Consumer Protection and Business Practices Act of Saskatchewan)*
  - Insurance contracts (Ie. *Insurance Act, Ontario)*
    - Most common in insurance cases



Specific Performance

The effect of doctrine of privity may also be avoided if promisee is able and willing to bring an action for specific performance

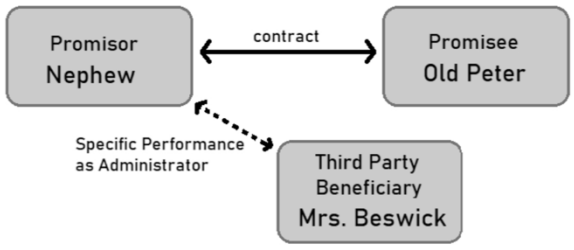
- Requires promisor to perform obligation, is necessary because the damages suffered by promisee are nominal
- Requires promisee willing to bring action of specific performance

Beswick v Beswick / specific performance & privity

Ratio	**Using specific performance as a remedy is a way to confer benefit to a third party with no right to sue in personal capacity**
Facts	Old Peter Beswick sells business to nephew John Beswick on these terms: - Old Peter Beswick to stay on as consultant - On Peter's death, Nephew to pay his widow 5 pounds/week until her death, which was to come from the business Old Peter Beswick dies, Nephew makes first payment but refuses to pay anything farther - Mrs. Beswick sues in capacity as administrator of estate of Old Peter Beswick for specific performance of agreement and in her personal capacity claimed arrears in the sum of 175 pounds - Agreement was between nephew and old Peter Beswick, Mrs. Beswick was a 3rd party beneficiary
Issues	Does doctrine of privity prevent Mrs. Beswick from successfully bringing this action?
Rule	*Tweddle:* Only a person who is party to a contract can sue on it, third party has no right to sue
Analysis	<u>Denning:</u> General rule is that no 3rd party can sue or be sued on contract to which they are not a party - Denning characterized privity as just procedural, not affecting underlying right - Third person has right arising by way of contract, it can be enforced by 3rd party in America by adding him as a defendant <u>House of Lords (Lord Reid):</u> Reaches same result as Denning but on narrower grounds - Concludes that doctrine of privity applies, she has no right to sue in personal capacity - In capacity as administrator of estate, however, she has a right to sue - Damages would be nominal in her capacity as administrator of estate as did not suffer any loss as a result of nephew's failure to perform - However, as administrator she was entitled to remedy of specific performance which enables court to require the nephew to continue paying the widow on ongoing basis - Narrows Denning's reasoning but achieves same result
Holding	Mrs. Beswick in her capacity as administrator of estate may bring action for specific performance to compel nephew to make payment to Mrs. Beswick

Specific performance is an equitable remedy, considerations of equity brought into play when applying this remedy

- Some flexibility when it is available on equitable grounds
- A unique case, if 3rd party beneficiary not administrator of estate they would need the administrator to sue on their behalf to obtain specific performance



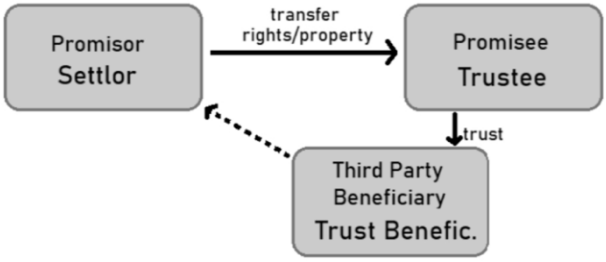
Trusts

Underlying doctrine of privity, is the idea that 3rd party beneficiary has no legal relationship with the promisor they are trying to sue

- One way to avoid application of the doctrine is to prove existence of such a relationship – one kind of legal relationship is that of a trust

In a trust relationship, we have trustee with legal rights to property held in trust

- We have trust beneficiary, who has beneficial interest in the trust but no legal rights in property
- Settlor transfers the rights/property to trustee who holds in trust for beneficiary
- Once trust is created, beneficiary is entitled to enforce the trust obligation directly



Agency

A third-party beneficiary can overcome privity rule through agency law

- Proving agency relationship establishes a legal relationship between 3rd party beneficiary and promisor
- Under law of agency, where principal authorizes agent to enter contracts on principals behalf with 3rd parties, result of doing so is that principal has direct contractual relationship with 3rd party

Have to establish relationship of agency between 3rd party beneficiary and promisee

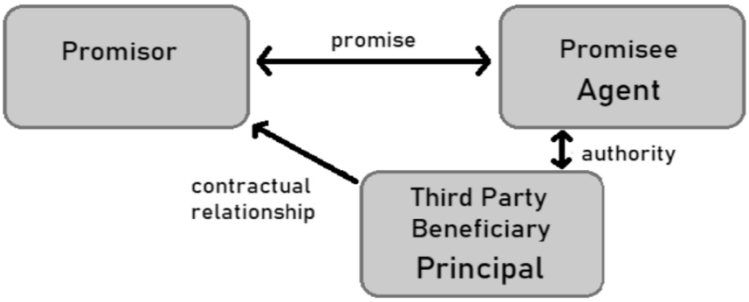
- If there is this relationship, where promisee obligated to act on behalf of third party beneficiary as agent, then 3rd party beneficiary has direct contractual relationship with promise through agency law

Have to establish:

1. Actual authority
    - Agent actually has authority granted from principal
    - Can be broken down into:
        - Implied actual authority – authority to act on behalf of principal on particular matter is not express, but implied on facts or actual express authority that has been granted to agent
        - Express actual authority – express agreement, such as agency agreement which grants agent authority to set parameters surrounding kinds of matters agent can act on behalf of principal on
2. Apparent authority
    - Shifts focus to relationship between promisor and principal
    - Looking to see whether principal has made some kind of representation that cloaks agent with authority as far as promisor is concerned

There must be some kind of agency relationship between principal and agent, requiring analysis of authority (can be actual or apparent)

- Promisee is authorized to act as an agent on behalf of 3rd party beneficiary
- Promisor promises agent to confer a benefit on the 3rd party beneficiary
- 3rd party beneficiary has a direct contractual relationship with promisor



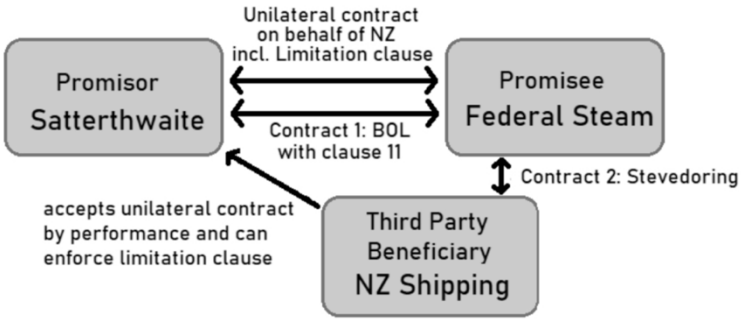
New Zealand Shipping Co Ltd. v A.M. Satterthwaite & Co. Ltd. / agency

Ratio	**Test for agency:** - **Party is intended to be protected by the provisions** - **Clear that in addition to contract on its own behalf, is also contracting as agent on behalf of some third party and same provisions apply** - **Actual principal agency relationship between the parties; AND** - **Any difficulties relating to consideration are overcome (need 3 elements of agency along with some kind of consideration flowing for them to benefit)**
Facts	Parties: 1. Ajax machine tool co. (consignor) 2. AM Satterthwaite (consignee, defendant) 3. Federal steam navigation (carrier), subsidiary of NZ Shipping Co. 4. New Zealand Shipping Co. (stevedores, plaintiff) Ajax manufactures drilling machine and wants to ship to Satterthwaite (consignor to consignee) <u>Contract 1: Bill of Lading – Ajax and Satterthwaite Contract Federal Steam</u> - Ajax and Satterthwaite contract with Federal Steam to be a carrier to transport drilling machine - Contract includes exclusion of liability clause limiting liability of carrier (liability limited to 100 euros by operation of clause 11 of the BOL and Carrier discharged liability in respect of damage to drill unless suit commenced within 1 year after delivery) <u>Contract 2: Stevedoring Contract – Federal Steam and NZ Shipping</u> - Stevedores hired to unload equipment from boat > dock In course of unloading the equipment, stevedores negligently drop and damage it - Satterthwaite holds BOL and legal owner of drill at time dropped, brings action - Commences action against Stevedore because it is past 1-year limitation period and they cannot directly sue Federal Steam
Issues	1. When Consignee sues NZ shipping for negligence, can NZ shipping 'take benefit of time limitation provision' in the BOL? 2. Whether NZ shipping is a 3rd party beneficiary under the BOL and therefore has no legal rights due to privity of contract?
Rule	*Tweddle:* only a person who is party to a contract can sue on it; third party has no right to sue Obiter from *Scruttons v Midland Silicones,* where Lord Reid sets 4 criteria for parties to arrange affairs so 3rd party can have legal right to enforce limitation clause under agency law: 1. BOL makes it clear stevedore is intended to be protected from provisions 2. BOL makes it clear the carrier, in addition to contracting on own behalf, is also contracting as agent on behalf of stevedore and the same provisions apply 3. Actual principle agency relationship between carrier and stevedore; and 4. Any difficulties relating to consideration from Stevedore to Satterthwaite are overcome (need the 3 elements of agency and some kind of consideration for them to benefit)
Analysis	Court relies on the obiter from *Scruttons v Midland Silicones* and concludes that the criteria are met: - BOL clearly intends for exemption to apply to carrier and carrier as agent for independent contractors stipulates for same exemptions - Agency relationship need authority granted to act as agent; New Zealand was parent company of Federal Steam so authority here

	- Carrier was indisputably authorized by appellant to contract as agent for purpose of the clause Was there consideration flowing? - The whole contract is of a commercial character, does not make sense to think of these undertakings/promises as friendly or gratuitous - The carrier assumes obligation to transport goods and discharge at port of arrival, clause 1 of BOL agrees shipper exempt from liability, carrier has servants and independent contractors - This is a typical commercial agreement, tries to give effect because not to gift effect would upset commercial practices Transaction analyzed as a unilateral contract: - Carrier acted as agent for NZ shipping for purposes of communicating offer of a unilateral contract to NZ shipping by Satterthwaite - Conclude that it becomes full contract when NZ shipping performs the services that form part of the offer (discharging the goods) - By 'unloading' the goods, NZ shipping supplies good consideration
Holding	NZ as principal of Federal Steam, not third party and entitled to protection
Notes	Court trying to give legal effect to clear intentions of commercial parties - NZ successfully argued agency relationship provides exception, for this to succeed parties must prove genuine intention to create agency relationship and there must be consideration flowing - The dissenting judge does not like the consideration argument here but agency alone is only part of the picture, agency relationship in addition to collateral contract which is unilateral - One way to interpret is needing to establish agency, way relationship operates is that they communicate collateral contract offer (unilateral contract) and that it is accepted by stevedore when actually unloaded

Authority was granted by NZ shipping to Federal steam to act as agent to contract with Satterthwaite; without this granting the whole argument falls apart

- Other contract (unilateral) that Federal Steam as agent enters on behalf of NZ shipping with Satterthwaite, without this NZ would be responsible for shipping as well as unloading



Employment

A true exception to doctrine of privity in the employer-employee relationship

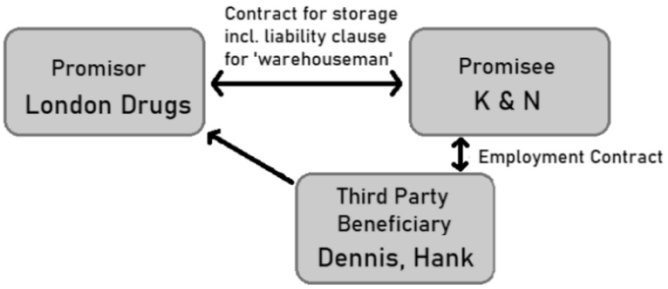
- Articulated by the SCC in *London Drugs*
- Distinctly Canadian doctrine, a common law exception

London Drugs v Kuehne & Nagel International Ltd. / employment exception

Ratio	**Test for employee benefitting for employer benefits:** **1. Limitation of liability clause must, express or implied, extend benefit to the employees seeking to rely on it AND**

	2. Employees must have been acting in the course of their employment and must have been performing the services provided for in their employer's contract with the plaintiff customer (must be relating to service contracted for)
Facts	London Drugs wanted to store a transformer at K&N's warehouse - Contract included limitation of liability clause of the 'warehouseman' to $40 per package unless special valuation declared and extra fees paid - London Drugs did not opt for extra coverage though the transformer was worth a lot of money - Employees negligently attempted to move the transformer with forklift even though it should have been lifted from above - Transformer toppled over, leading to damages of $33,000 - London Drugs sued K&N and the employees
Issues	Can the employees benefit from limitation of liability clause as a defence to London Drugs' action? - In what circumstances can employees be entitled to benefit from limitation of liability clause found in a contract between their employer and customer?
Procedural History	At trial, London Drugs won - On appeal, BCCA reduced individual liability to $40 on basis of the limitation of liability clause - London Drugs appeals to SCC
Rule	*Tweddle:* Only a person who is party to a contract can sue on it; third party has no right to sue
Analysis	<u>Iacobucci J:</u> Employees were 3rd party beneficiaries to the limitation of liability clause and may directly benefit, notwithstanding they were not signing parties - Commercial reality and common sense require reconsideration When employee and customer enter contract for service, they know employer will be carrying out service through employees - This is particularly true in corporations, if corporation is counter-party to agreement as an artificial entity it cannot carry out the service itself - Customers know that the service paid for is carried out by employees - No valid reason to deny the benefit for employees who perform contractual obligations for their employers - For privity to block this, it would frustrate sound commercial practice and justice, and inconsistent with party expectations - This is a specific, limited exception to privity: permitting employees who qualify as 3rd party beneficiaries to use their employees clause as shields Here, the parties did not use express language to refer to employees, but can also understand employees being referred to by implication - Having regard to the nature of relationship, identity of interest, the fact that appellant knew employees would be involved, and absence of clear indication to the contrary the term 'warehouseman' makes them 3rd party beneficiaries with respect to the clause - Further, employees clearly acted in course of employment and performed services contracted for by appellant when damages occurred
Holding	Appeal dismissed, employees can benefit from the limitation clause, even though they are not parties to the contract

The new test is very similar to *NZ Shipping,* however, consideration is absent in this test
This test also depends on intentions, express or implied



The Principled Exception

Other exclusions were more niche exceptions to doctrine of privity, but this one is more general application to basic situations that require an exception.

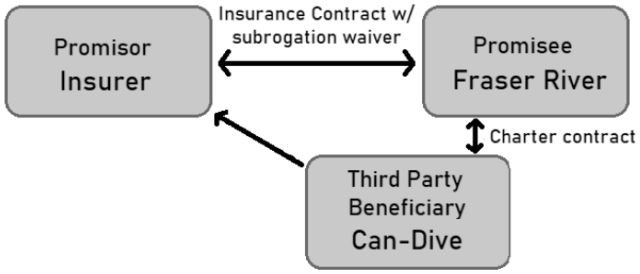
Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd. / principled exception

Ratio	**Test for benefiting third parties from *London Drugs* (not just employer-employee):** **1. The benefit provision must, expressly or impliedly, extend benefit to the parties seeking to rely on it; and** **2. The third party must have been acting in the course of performing the very services provided in their employer's contract with plaintiff customer**
Facts	Fraser River owned a barge, called the Sceptre Squamish. They insure the SS with an insurer. Under the terms of the insurance contract, the insurer waived right of subrogation against 'any character' - Subrogation is a process that allows insurer to step in the shoes of the party who they compensate and sue any party who the compensated party could have sued - In general, insurers have this right but waived the right here Can-Dive had the SS under charter and due to their negligence sank the SS - The insurer paid Fraser River for the loss and insurer and Fraser River enter into a further agreement pursuant to which Fraser River waives the insurer's right of subrogation, freeing the insurer to sue Can-Dive by way of subrogation - Insurer brings claim against Can-Dive against which Can-Drive purport to rely on the waive
Issues	Can Can-Dive, as 3rd party beneficiary, rely on the waiver of subrogation clause as a defence to the action against it in negligence?
Procedural History	At trial, Can-Dive as a third party could not enforce the waiver of subrogation
Rule	*Tweddle:* Only a person who is party to a contract can sue on it, third party has no right to sue
Analysis	None of the current exceptions to privity apply here, a new exception must be dependent upon the intention of contracting parties. There are 2 critical and cumulative factors: 1. Did the parties to contract intend to extent benefit in question to the 3rd party seeking to rely on the provision? AND 2. Are the activities performed by the 3rd party seeking to rely the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, against as determined by intentions of the parties? <u>Intention of Parties</u> There is a strong case here to as parties intended the benefit to apply to the third party - Reference to 'characters', clear that Can-Dive was considered a third-party rather than a mere stranger - Freedom of contract cannot be exercised after the rights have crystallized by Can-Dive, they cannot have a contract that removes benefit of the first

	- Fraser River and insurer cannot unilaterally revoke the right once it has crystallized, so Can-Dive became 'for all intents and purposes a party to the initial contract for the limited purpose of relying on the waiver of subrogation clause' - Freedom of contract always applies, other than limited situations: • Not to undo contractual shield when it crystallizes • Fraser River could have amended the agreement before Can-Dive wanted to use it, not after • Freedom of contract has to balance 3rd party rights to rely on protections subject to the timing <u>3rd Party Performing Activities Contemplated</u> Beneficiary is involved in the very activity contemplated - The relevant activity was the context of Can-Dive to Fraser River as a charterer - This activity anticipated in the policy pursuant to the waiver clause There are policy reasons in favour of exception here: 1. Privity as it applies in insurance contexts was inconsistent with commercial reality 2. Fraser River unable to provide a commercial reason for failing to enforce a bargain entered into by sophisticated commercial actors 3. Large-scale change should be left to legislatures, this is incremental 4. All this does it allow 3rd party to use clause to defend themselves, not to found a separate clause so floodgate has no traction
Holding	Language extends to 3rd party beneficiaries. Can-Dive can benefit from the clause. - Appeal allowed

Fraser River takes the broadest approach, look like it could be expanded to apply in range of other contexts

- Not limited to certain class or category of contracts
- If there is an agency arrangement, argue *NZ shipping* first
- If there is an employment relationship, go with *London Drugs* first
- If those do not work, potentially argue *Fraser River*



Opinions are divided to whether privity is a necessary element of contract law.

- On the bargain theory of contract, a contractual obligation is enforceable only if the party is pç≈art of the bargain (given consideration)
- On the promissory morality theory of contract, a contractual obligation is relational – between the two parties who actually make the promises
- On economic theories, to grant an enforceable right to third party beneficiaries would increase the cost of contracting resulting in inefficiencies
    - Costs of litigation would go up such that parties may be hesitant to contract.

CONTINGENT AGREEMENTS

Sometimes referred to as 'conditional'

- If operation depends on event that is not certain to occur
- Ex. Agreements for purchase and sale of home subject to home inspections, financing, etc.

A contract will prescribe something other than simple performance of promises in agreement that must be realized in order for one or more of the promises in the agreement to be enforceable

There are two primary ways in which 'condition' is used. Under this topic, 'condition' is used in a very specific way. Classification of terms (next unit) uses condition in a different way, so contingent agreements are an area of law muddled from inconsistent use of precise terms.

1. **Promissory Condition** – classification of a contractual term of importance, breach of which results in termination of contract
    - Used to classify a particular kind of term as a condition, classification as a condition has important legal consequences
        - One party's obligation to perform is contingent on the other party performing their undertaking
        - Ie. A promises to work for B at a weekly rate, payable at the end of each week
        - A breach of term that is not a condition but a warranty does not allow for termination of contract but for damages
2. **Contingent Condition** – an event or state of affairs which is a prerequisite of parties' obligations to perform contractual obligation
    - Goes to heart of primary obligations of promises made by both parties to each other
    - An event or state of affairs that neither party to the contract has undertaken to bring about
        - Ie. A agrees to work for B and B is to pay A the sum of 50 pounds 'if it rains tomorrow'
        - Something has to occur for promise to be enforceable
    - Here, we are dealing with contingent conditions (performance being conditional on some event)
    - Contingent conditions may be either conditions precedent or conditions subsequent:
        - **Condition Precedent**: state of affairs must exist before one or more of the promises in the agreement becomes enforceable (no obligation until condition satisfied)
        - **Condition Subsequent:** a state of affairs that will bring an already enforceable and binding obligation to an end (no longer have obligations when condition subsequent occurs)

CONDITIONS PRECEDENT

The core disagreement: when and whether parties have agreement which is actually subject to a condition precedent or whether there is no agreement at all

- Main disagreement is whether or not parties have legal obligations

There are two possible interpretations:

1. Condition for contract formation?
    - The condition that must be satisfied before the contract arises (no enforceable contract at all until condition satisfied)
    - There is no binding agreement prior to the condition being satisfied, either party can walk away from the agreement because no contract has been formed
    - Ie. Offer to buy home only open for acceptance if financing has been secured
1. Condition for performance of obligation under a contract?
    - The contract has arisen but the condition must be satisfied before parties have obligation to perform under the contract
    - There is a binding agreement but obligations to perform are suspended until condition is satisfied
    - Ie. 'I am willing to buy house, only if I secure financing first' is interpreted meaning seller cannot revoke the offer or sell to anyone else, because they are in contract with potential buyer

Much more common for condition precedent as condition of enforceability of one or more of the undertakings in an agreement but not of the existence of agreement itself

- In second interpretation, cannot just withdraw offer because there is already formation
- Under first interpretation, there is not yet formed contract and offer can simply be withdrawn

Intention, Certainty & Consideration

There are multiple issues within this topic:

1. If condition is too uncertain, counter-party might refuse to complete agreement on grounds of certainty

2. If satisfaction of condition depends on actions of one or the other party, we have a problem where one party might simply not make effort to ensure the condition is satisfied if not to their benefit
3. Issue of waiver
    - When can parties waive a condition and say it no longer needs to be satisfied?
4. Consideration
    - Language of contingency may be such that promisor did not actually promise to do anything in return for promisee's promise

Wiebe v Bobsien / conditions precedent in real estate transaction

Ratio	**<u>Category 1:</u> Where condition precedent is based on whim, fancy, like or dislike and has no objective content/we cannot tell when it is to be satisfied** **<u>Category 2:</u> General rule for real estate transactions, a condition precedent which must be performed by the purchaser will not prevent the formation of a contract but will simply suspend the covenant of the vendor to complete until the condition precedent is met by the purchaser, unless there was no real intention from parties to bind themselves to the sale**
Facts	Bobsien was selling property in Surrey (defendant) - Wiebe wanted to buy property but wanted to first sell his current house (plaintiff) - On June 22, 1984: The parties entered an interim agreement making the sale subject to him selling his home on or before August 18, 1984 - By July 22, 1984: D purported to cancel the interim agreement but plaintiff did not accept the cancellation - On August 18, 1984: P sold his Port Moody home, fulfilling the condition and then notified D that the 'subject clause' was removed but defendant refused to close
Issues	Whether interim agreement was a binding contract? - Whether D was entitled to withdraw before the condition was fulfilled? (If a condition for formation of contract, he can withdraw whenever he wants before the condition was satisfied)
Arguments	P argues the interim agreement was a binding contract of purchase and sale, the sale of his house was a condition precedent to the completion of the agreement (the contract was merely in suspense pending sale of P's home) D argues that there was no binding contract, at most it could be construed as option contract but even on this interpretation it would fail for want of consideration (D was entitled to withdraw from terms and did so by his telegram before the 18th of August)
Analysis (Trial)	Reviews the case law as conditions precedent that have been judicially analyzed in 2 ways: 1. Circumstances where condition precedent prevents formation of contract 2. Circumstances where a condition precedent suspends performance of a contract <u>Category 1</u> - Tends to be cases where the condition precedent is illusory (based on whim, fancy like or dislike and has no objective content/we cannot tell when it is to be satisfied) - Relies on an uncertainty type analysis, so vague no standard as to render the agreement enforceable - No binding agreement results from this kind of condition (turns on idea of being illusory, not objective, representing like or dislike) <u>Category 2</u> - A binding agreement arises but whether the primary contractual obligations must be performed depends on whether the condition precedent is fulfilled

	- Must be interpreted according to own terms and surrounding circumstances, but law leans in favour of concept that where there is condition precedent such as 'subject to' clause, a contract is formed on signing by the parties but is merely in suspense pending the completion of the condition - General rule in real estate transaction: condition precedent which must be performed by purchaser will not usually prevent the formation of a contract but simply suspend the covenant of the vendor to complete until the condition precedent is met by the purchaser - Such a condition, however, may prevent formation of a contract if agreement itself and surrounding events indicate that it was never the intention of the parties to bind themselves to a contract and of sale and purchase - There may be cases where we look to intention of parties and conclude that even in real estate transaction that they never intended to bind themselves Agreements can have subsidiary obligations, breach of which is actionable (to give effect to intentions there may be implied subsidiary obligations) - P must take reasonable steps to sell house, D must wait to see if P fulfills condition precedent Here, the parties intended to reach consensus when they signed the interim agreement, there was a binding contract whose performance was suspended subject to a condition - Once port moody house was sold, the suspension was lifted and there was an obligation to purchase and sell the house
Holding	At trial, judge found for plaintiff where the interim agreement was binding, found 2 categories of condition precedent - D not within rights to cancel the contract
Analysis (Court of Appeal)	<u>Dissent (Lambert:</u> Adds a third category to conditions precedent: 1. Some conditions precedent are so imprecise or depend so entirely on subjective state of mind of purchaser that contract process must still be regarded as at the offer stage 2. Where condition is clear, precise, and objective there will be contract, but performance held in suspense until parties know whether objective condition is fulfilled 3. Third class/condition = types of conditions that are partly subjective and partly objective (can deal with by implying term that the purchaser will take all reasonable steps to fulfill the condition, there are also cases here that will fail for uncertainty) The present case is one of the third category, suffers from incurable uncertainty - What does it really mean to imply term that P has to make 'reasonable efforts to sell his house'? - The agreement can be rendered certain by removing the condition OR the sale of the Port Moody house; until then it was just a standing offer that could be revoked - Offer was withdrawn before house sold, never any contract Read this dissent for classification of the conditions, not the result

Reciprocal Subsidiary Obligations

Where a contract has arisen and the condition precedent suspends the performance of the contract; the parties may have subsidiary obligations that exist prior to their primary obligations under the contract

- Ex. P agrees to purchase Ds property for $360,000 subject to P selling current house by a certain date
    - Primary obligations: P obligated to pay purchase price of $360,000
        - D obligated to transfer title and possession to P
    - Subsidiary obligations: P to take reasonable steps to sell current house

- D to refrain from withdrawing contract prior to certain date
- Subsidiary obligations exist prior to primary obligations
- Most common condition precedent in case law and in Dynamic Transport is the kind relating to a condition requiring procuring some kind of approval or licence from a 3rd party (Ie. Procuring some kind of zoning or subdividing approval depending on actions of some 3rd party – still requires one counter-party to take steps to apply for zoning approval)

Dynamic Transport Ltd. v OK Detailing Ltd. / reciprocal subsidiary obligations

Ratio	**Conditions precedent don't preclude provisions of a contract being operative before the condition is fulfilled.** **When there is a contingent agreement with condition precedent and this requires seeking some kind of approval of a third party, courts might imply subsidiary obligations prior to the primary obligations of the parties to give effect to intentions under business efficacy test.** - **Can determine obligations by interpretation of relevant statutes or reasonable inference based on who has legal rights to the property**
Facts	Dynamic Transport prospective purchase of property, OK detailing is the vendor - Dynamic wanted to buy land from OK detailing - Enter a contract for purchase/sale price of $53,000 - Contract was subject to condition that land can be subdivided, contract did not specify which party was responsible for seeking subdivision approval Present market value of the land is now $200,000 - OK detailing trying to resist sale on basis that it is unenforceable for failure to specify which party would obtain approval under *Planning Act* - Dynamic Transport seeks order for specific performance to force sale of the land
Issues	Whether there is a binding contract? - Whether the condition precedent prevents the formation of a contract, or merely suspends the obligations of parties under the contract?
Rule	Section 19 of the *Planning Act:* - Person who proposes to carry out a division of land shall apply for approval of the proposed subdivision in the manner prescribed y the Subdivision and Transfer Regulations Section 2 of the *Planning Act:* - Subdivision means a division of a parcel by means of a plan of subdivision, plan of survey, agreement or any instrument including a caveat, transferring or creating an estate or interest in the part of the parcel
Analysis	Court will find implied promise by one party to take steps to bring about event for condition precedent in appropriate circumstances - Looking to the *Planning Act* it is the person who proposes to carry out the subdivision of land that is the vendor (must divide his parcel for purpose of sale and he can only do so in vendor's name and as his agent) - Vendor under duty to act in good faith and take all reasonable steps to complete sale (cannot accept proposition that failure to fix responsibility renders the contract unenforceable) - Must be taken to include agreement that vendor will make proper application for subdivision plan or use best efforts Part of the reasoning is statutory guidance - Also implied obligation on grounds of business efficacy

	- Even without statutory guidance, this reasoning may still go through as vendor has legal title to land (until contract is concluded, purchaser has no rights to land – how can someone without rights to piece of property seek subdivision of that property?
Holding	Finds in favour of Dynamic Transport, concludes there was a contract formed and binding with an implied term that respondent would seek subdivision approval - Obtaining subdivision approval was condition precedent and parties had primary obligations to sell and purchase land at a price, however, fact that they did not specify whose obligation it was does not render it uncertain and parties had binding obligations

Remedies for Breach of Subsidiary Obligation

Principal remedy for breach of contract is expectation damages: monetary damages in amount that would place innocent party in position they would have been in had contract been performed and breach not occurred (forward looking)

- Specific performance is an equitable remedy at court's discretion
- Generally not awarded where damages would adequately compensate for loss and will rarely be a practical option for breach of subsidiary obligations

In *Dynamic Transport* the appellant was awarded specific performance

- The court ordered OK detailing to make and pursue a bona fide application as necessary to obtain registration of approved plan
- Further, also provided for award of damages in event they failed to pursue the plan as directed

What amount of damages is appropriate?

- General approach by courts is *loss of chance* to realize the benefit that would have followed from fulfillment of that condition
- In *Dynamic* the damages were calculated as 'loss of bargain'
    - Looked to difference between market price of land at time of breach vs agreed upon price in contract
    - Proceeded on assumption that approval would be granted and then awarded the amount in expectation damages quantum

Eastwalsh Homes v Anatal Developments Ltd. / calculation of damages for breach

Ratio	**Plaintiff must establish that as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed (if not, only nominal damages)** **In assessing damages, court must discount the value of the chance by the improbability of its occurrent.**
Facts	Eastwalsh (plaintiff/purchaser) was builder of homes and Anatal Developments (defendant/vendor) was a land developer - Anatal agreed to sell 147 building lots in proposed subdivision plan, an express term of the contract required Anatal to use its best efforts to have the plan registered prior to the fixed closing date - The agreement provided that failing registration, agreement would be terminated - Plan was not registered in time and sale fell through, Eastwalsh sued for specific performance or damages - Finding of fact at trial: Anatal failed to use best efforts to register the plan
Issues	What remedy is Eastwalsh entitled to? How should the loss be measured?
Rule	Plaintiff must establish on balance of probabilities that, as a reasonable and probable consequence of the breach, the plaintiff suffered damages claimed (if not, only nominal damages)

	- If causation has been proven, but the loss is hard to quantify, this is no reason for denying plaintiff the award
Procedural History	Trial declined order of specific performance, only entitled to damages - If Anatal used best efforts: 50% chance of registering plan in time period - Awards damages at 50% of increase market value of lots over sale price: $2,000,000 - Difference in price between market and purchase price (roughly 4 million dollars but discounted 50% because probability of registering plan was 50%
Analysis (Court of Appeal)	Proceeds with two-step analysis here: 1. Causation: plaintiff must prove the breach caused the loss suffered (causation) as a 'reasonable and probable consequence' of the breach (on balance of probabilities) and if not P can only get nominal damages • Causal connection between breach of subsidiary obligation + loss of chance • At least show there was reasonable probability that benefit would have been realized if contract was performed 2. Quantifying loss: if causation has been proven, but loss is difficult to quantify, there is not reason to deny the award • Courts will attempt to evaluate lost chance and award damages on proportionate basis If no recoverable loss, take best efforts to estimate what the loss would amount to - Discount value for improbability of occurrence - Proof of loss of mere chance is not enough, must prove the chances constituted some reasonable probability of realizing an advantage of some real, substantial monetary value (here, reasonable probability of registration of plan within time frame) Court says the trial judge was correct for causation but disagreed with second step - On the facts, not enough time for approval within the period of the contract - Eastwalsh failed to discharge burden, notwithstanding the breach, the transaction would not have been completed in the time contemplated by the parties - Court awards nominal damages here
Holding	Eastwalsh can only receive nominal damages.
Notes	First, analyze the causal connection then quantify damages for breach - Courts approach by value of loss of chance (expectation damages reduced by probability of not occurring) - Some courts conclude that even a 20% chance is enough for reasonable probability - Keep in mind that this is only for breach of subsidiary obligation but not primary obligation

Unilateral Waiver

What if one or both parties waived on of the conditions?

- If both want to waive and agree, there is no issue
- If only one wants to waive that is a 'unilateral waiver'
  - Issues arise in case where one party wants to waive a condition
  - You may think that if condition is just for that parties benefit there would be no problem, however, the issue is that if you waive the conditions the primary obligation is now triggered and seller has obligation
- In *Turney v Zhilka* the SCC decision places a limitation on unilateral waivers of 'true conditions precedent'
  - The distinction between conditions precedent and *true* conditions precedent is only important if one is trying to waive a condition (if no one is waiving, do not consider it)

Turney v Zhilka / unilateral waivers of 'true conditions precedent'

Ratio	**If condition is 'true condition precedent', unilateral waiver of the idea is not available.**
Facts	P and D entered a contingent agreement for purchase and sale of land - Condition stated that providing property can be annexed to village and a plan is approved by village council for subdivision - Completion date for sale was fixed by reference to condition '60 days after plan approved' - Neither party was tasked with seeking approval and neither reserves a power of waiver - Purchaser made some efforts to secure fulfillment of the condition but the prospects seemed remote - Purchaser said this was purely for their benefit so they were going to waive it (no longer caring about approval and just wants land) bringing an action for specific performance - Defendant vendor claimed they have no obligations under agreement as condition was not fulfilled
Issues	Whether parties have contractual obligations given non-fulfillment of the annexation condition? - Whether P purchaser can waive condition?
Rule	For a waiver, one party may forgo a promise advantage or dispense with party of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the circumstances - SCC creates new rule that if condition is 'true condition precedent' unilateral waiver is not available
Procedural History	Trial judge held that condition was for sole benefit of purchaser and they could simply waive the condition - COA affirmed trial, appealed to the SCC
Analysis	<u>Judson J</u> - Obligations depend on future uncertain event, the happening of which depends entirely on a third party - This is a true condition precedent: external condition upon which existence of the obligation depends (until the event occurs, no right to performance on either side) The purchaser now seeks to hold the vendor liable on his promise to convey, in spite of the non-performance of the condition and to suit his convenience only, this is nothing short of him trying to write a new contract for himself
Holding	Doubts whether evidence shows it was for sole benefit of purchase, but in any event, falls to be decided on broader grounds - Plaintiff purchaser had no right to waive the condition which was a 'true condition precedent'
Notes	What is a true condition precedent? - Condition depending on 'future uncertain event'? (too broad) - Is it the idea that fulfillment 'depends entirely on will of a third party'? (also seems to broad, as in Dynamic it is normal for condition depending on fulfillment entirely on will of third party) - Is it that obligations on both sides are subject to the condition? It is not immediately obvious which factor grounds the majority decision here In *Barnett v Harrison* the SCC revisited the rule and concluded it should stay in place for certainty and avoids having to settle two difficult questions:

	1. Is the condition for benefit of just one party or both? 2. Is it severable from the rest of the agreement? Court has said parties can avoid application of the rule by expressly permitting one or both to waive the condition

Is a true condition precedent category 1 or category 2 condition?

- Did they mean purported binding agreement was of no binding effect until condition fulfilled? (Category 1)
- OR did they mean neither party could call on other to perform until the condition was fulfilled? (Category 2)

It sounds more like a category 1, cannot waive right because there are no rights to waive

- No obligation created, nothing to waive
- However, why would an annexation clause fall into category 1?
    - Does not seem illusory or subjective like in *Wiebe*
    - These clauses are quite common and treated by parties as being category 2 conditions

Courts have since limited the reach of *Turney v Zhilka*

- Courts either say it is category 2, distinguish on facts saying it does not apply, or ignore decision altogether
- When there is true condition precedent according ot this reasoning, suggests that there are no obligations including no subsidiary obligations (ambiguity in the decision)
- To avoid *Turney v Zhilka,* expressly provide in terms of the agreement

Summary – Exam Answer

1. Identify as condition precedent and classify into category (*Wiebe v Bobsein*)
    - Category 1: condition precedent prevents formation, is 'illusory' based on whim, fancy, like or dislike having no objective component
    - Category 2: condition precedent suspends performance of contract (clear, precise and objective)
        - If unclear, go to *Dynamic* where they add business efficacy to make it a condition 2
    - Category 3: it looks like category 1, but made determinate by implied subsidiary obligations?
2. Use *Dynamic Transport* for when subsidiary obligations will be implied
3. Use *Eastwalsh* for determining damages for breach of subsidiary obligations

*NOTE: *Turney v Zhilka* only relevant when one party is trying to waive a condition and once we have a scenario where one party is trying to waive condition precedent

- Do not use this case until then, then determine whether true condition precedent or not
- If 'true condition precedent' it cannot be waived (parties may argue that condition is not true condition precedent)
- If ordinary condition precedent, can be waived if for the sole benefit of party waiving or parties agree

REPRESENTATIONS & TERMS

Parties make statements in course of contract formation

- Question: what is the legal classification and consequence of various statements?
- Three categories of statements:
    1. Mere puff or sales talk (no contractual intent)
        - Not necessarily a representation
        - Not induced into buying due to 'truth' of statement
        - Ie. 'Best donair in town'
    2. Mere representations (not terms, but have legal consequences)
        - There can be consequences attached to misrepresentations of material facts
    3. Contractual terms (serious legal liabilities if broken)
        - A statement that comprises part of the obligations of the contract
        - Legal effect of breach depends on how the contractual term itself is classified

        - Can be either: conditions, warranties, innominate or intermediate terms
- Main consequence is the possibility of the remedy of rescission (distinguishing between the 3 is vital as they come with different remedies)

MISREPRESENTATION & RESCISSION

Misrepresentation: a misstatement of some fact which is material to the making or inducement of a contract

- General rule: No relief for misrepresentation unless it is a statement of **EXISTING** fact
    - A false statement is only a misrepresentation if in relation to existing or past fact
- The following DO NOT count as misrepresentations:
    - Mere puff/sales talk
    - Statements of opinion or belief
    - Representations as to the future (more likely a promise)
- A misrepresentation may be made:
    - Innocently
    - Negligently, or
    - Fraudulently (*Kupchak*)

Remedy: standard remedy for misrepresentation is rescission

- **Rescission:** the agreement is cancelled/undone; parties put in position they were in prior to the contract
    - Standard remedy for contract is forward looking (puts parties in position they would have been in had the contract been performed) but rescission is trying to restore the parties PRIOR positions before the contract
    - Understood as a restitutionary remedy
- **Fraudulent misrepresentation**: false statement of existing fact that is unambiguous, material, and relied on, but must also be made with knowledge that it is false or reckless disregard for the truth or falsity (remedy is rescission but courts will do best to unravel all fraud which could include damages)
    - May also have damages for tort of deceit
- **Negligent misrepresentation:** possible remedy of rescission and damages for tort of negligent misstatement
- **Innocent misrepresentation** = false statement of existing fact that is unambiguous, material, and relied on (remedy is rescission but subject to bars)

Redgrave v Hurd / distinguishing fraudulent misrep from innocent misrep at common law

Ratio	**Using statements to induce someone into signing a contract, there is an inference that the other party relied on them. If the statements were untrue, it is grounds for rescission.**
Facts	Regrave was an elderly solicitor practicing in Birmingham, Hurd was defendant, solicitor practicing in Stroud. - Regrave wanted to sell a share in his legal practice and home - Hurd entered negotiations for the transaction and asked the practice's annual income - Redgrave told him it was around 300-400 pounds per year, produced papers indicating 200 per year - Hurd inquired further and Redgrave produced papers related to additional business making up the difference in income - Hurd did not examine the papers in detail and went ahead and agreed to purchase for 1600 pounds and deposit of 100 pounds Hurd moves to Birmingham, discovering the practice is worthless and refused to close deal - Redgrave brings claim for specific performance - Hurd counterclaims for. Rescission, return of deposit and damages for deceit
Issues	Is there an enforceable contract or is it impeachable via pre-contractual misrepresentation?
Rule	In equity, it is not necessary to prove the information was a misrepresentation when it was obtained in order to rescind the contract.

Procedural History	At trial, Hurd loses because papers were made available to him and he failed to examine them and not taken to have relied on the representations regarding the value of the practice. - Hurd appeals
Analysis	<u>Common Law & Fraudulent Misrepresentation</u> - A contract could be rescinded if the misrepresentor either (i) knew the statement was false or (ii) made the statement 'recklessly and without care, whether it was true or false and not with the belief that it was true' - Further, relief also available in damages for tort of deceit, along with rescission <u>Equity & Innocent Misrepresentations</u> - Remedies available at equity for innocent misrepresentation - Courts may set aside a contract where obtained by material false representations, even if the representee did not know it to be false when representation was made - A man cannot benefit from statement that he now admits to be false or insist on keeping the contract, no man ought to seek to take advantage of his own statement The effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence - It is not enough to say if you took due diligence you would have discovered it was not true - If it is a material representation calculated to induce to enter the contract it is an inference of law that he was induced by the representation to enter it (to rebut, must be shown that either he had knowledge of facts contrary to representation or he stated in terms or shewed clearly by his conduct that he did not rely on the representation) - *According to Akbari, this is more of an inference of facts that can be rebutted on the facts (look to facts to determine whether or not the misrepresentee actually relied on the statements entering the contract, not simply an inference of law) This court agreed with TJ on all points but 1: TJ held that Hurd was induced by material representations made by Redgrave but he did not rely on them or if he did he made an inquiry for more information and this bound him in courts of equity - Court rejects the reasoning, Hurd not guilty of negligence in not doing that which was impossible to do (no books in existence that showed the state of the business) - There was no way for Hurd to figure this out on his own, no documentary evidence made clear the true earnings of the practice
Holding	Appeal allowed, Hurd can rescind and have the contract and deposit returned.
Notes	Trying to classify statement as possibly being misrep, doing so would have legal consequences - Test as set out by the court: a false statement about material fact that induced the party to enter the contract - Better way to think about it is trying to establish whether or not misrepresentee relied on statement in entering the contract

Elements of Actionable Misrepresentation

The court sets out necessary elements for misrepresentation:

1. About past/present (not future) fact (not opinion)
2. False
3. Unambiguous
4. Material
5. Relied upon by representee (or 'induced' the representee)

Materiality Criterion:

Misrepresentation must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question

- Consider whether this relates to a matter considered, from a reasonable perspective, to be relevant to choice of misrepresentee to enter agreement at issue

Inducement Criterion:
Misrepresentation must actually induce the representee to enter the agreement

- If representee undertakes their own investigation regarding the fact, may be found not to have relied on the statements
- Representee has no duty to engage in such investigations (*Redgrave v Hurd*)
    - No obligation or. Duty to undertake investigation to verify every statement the representor has made
- Think about misrepresentation as an inference of fact, inquire as to actual facts established through evidence about whether or not representee had facts to contrary or undertook to inquire about the truth or falsity of the fact on their own, in which case we say they did not rely
- Is like a rebuttable presumption that can be rebutted on the facts

When determining criteria of inducement, consider all relevant facts to see whether statement relied on

- If unclear that nothing else but representation relied on in entering contract, pretty clear there is inducement
- Ultimate determination on basis of facts to see what other factors were at play

Smith v Land and House Property Corp. / misrepresentation is about fact, not opinion

Ratio	**A statement about an opinion or belief cannot count as a misrepresentation (has to be about past or existing fact), however, when there is asymmetry of information between parties and party with more knowledge expresses opinion implicitly relying on a material fact there may be a misrepresentation** - **Is an objective perspective: what would the counter-party understand as being implicit in the expression?**
Facts	Plaintiffs offering to sell a hotel stating it was leased to Frederick Fleck 'a most desirable tenant' - Ds agreed to buy hotel, but shortly after Fleck went into bankruptcy - Ds refused to complete sale, Ps bring action for specific performance - Ds argue that Ps statement was a representation about facts of Fleck as a tenant and were false facts relied upon in entering the agreement (misrepresentation) - Ps arguing that it was not a statement of fact but an opinion about Fleck
Issues	Is the description of Fleck as a 'desirable tenant' a misrepresentation? - Is this expression implicitly including facts or is it simply an opinion? - What must be true to express an opinion like someone is a 'desirable tenant'?
Rule	If facts are not equally known between the parties, a statement of opinion by the party who knows more is often a statement of material fact as he states he knows the facts that justify his opinion
Analysis	<u>Bowen LJ:</u> Draws important distinction between 2 categories: 1. Both parties equally informed about relevant facts and one simply gives opinion (nothing but an expression of opinion, cannot be misrepresentation) 2. Where facts are not equally well known, then a statement of opinion by one party who knows facts best involves very often a statement of material fact, for he impliedly states he knows facts that justify his opinion (asymmetry of information between parties) True that expressions of opinion are not the same as expressions of facts, but this depends on how much the parties know - Expression of opinion can implicitly include statement of fact This is an objective perspective, what would the counter-party understand as being implicit in the expression 'most desirable tenant'?

	- A landlord knows the relationship with tenant, other person do not know them equally well, when a landlord opines about tenant he really avers that the facts peculiarly in his knowledge are such as to render his opinion reasonable - This is based on an asymmetry of information Here, Fleck paid his rent late often and that was enough to make him 'undesirable' - An opinion about desirability of a tenant expressed by landlord rests on implicitly certain facts about that tenant - It is reasonable to assume the tenant meeting their obligations in past is fact that is presumed in saying they are a good tenant - He had already made late payments in the past
Holding	This counts as a misrepresentation, D can rescind the contract.

Opinion or Fact
According to McCamus, where an opinion is offered by someone who has no particular expertise on the matter, the statement would be one of opinion instead of fact

- Reasonable person would not rely

When one possesses superior knowledge or expertise, the opinion may be held to have made an implicit statement concerning the nature of information upon which the opinion is based

- Think of the comparative knowledge/facts available
- When one expresses an opinion, does it rest on certain facts implicitly and are these material facts?
- Are they implicitly making statement about past or existing fact?

Bank of British Columbia v Wren Developments / can silence constitute a misrepresentation?

Ratio	**Failures/omissions can qualify as misrepresentation. Negligent misrepresentation permits rescission.**
Facts	Allan was director, secretary of Wren Developments (defendant) and Smith was president and managing director. Wren took a loan from Bank of BC (plaintiff) and as security for the loan, deposited with the bank shares in several companies. - This was done through a hypothecation agreement, Allan has signed a personal guarantee for Wren's loan with the bank. The bank released some of the shares to Smith without Allan or Wren's knowledge, negatively affected Allan's financial exposure. - Allan was told that the loan was in arrears and he needed to sign a new guarantee - Allan inquired with bank about the position of the shares held as collateral, bank's credit supervisors said he would look into it and report back. Allan did not wait for answer and signed on assumption that there was no change. - Allan was certain the shares were still held since Smith was not entitled to release them alone.
Issues	Does Allan have an obligation to pay under the loan guarantee?
Rule	A misrepresentation of fact invalidates a contract.
Analysis	Defendant Allan was misled by words, acts, and conduct of P into believing there was no change in the collateral of the securities (otherwise would not have signed) - Unilateral mistake on party of D, Allan, that was induced no part of P in failing to disclose material facts to him Court concludes Allan is not liable under personal guarantee, the first guarantee was discharged and second guarantee operating

	- Bank negligently released the securities because they released on basis of purported authorization by agent who did not have authority to do it - P is not in position to return the collateral security pledged, bank cannot return the collateral because they let it go - If creditor holding securities sues for his debt, he is under obligation on payment of debt to return security, if unable to return the security they cannot have judgment for the debt (claim of plaintiffs fails)
Holding	Action against Allan dismissed, Allan does not have to pay on guarantee - He signed the second guarantee on a misrepresentation made by the plaintiff (Bank of BC)

General position at law: silence cannot constitute a misrepresentation

- However, in the case book there are recognized exceptions:
    1. Half-truths (ex. 'Not aware of any restrictive covenants' but haven't checked)
    2. Conduct amounting to deliberate concealment of the truth (ex. covering up a crack in the wall with bricks)
    3. If a true representation is followed by a chance of circumstances prior to the agreement which renders the statement false, the representor has a duty to draw the change to the representee's attention
- There are also categories of relationships that require additional good faith

Kupchak v Dayson Holdings Ltd. / remedies for misrepresentation & bars to rescission

Ratio	**Monetary compensation may be granted under rescission where it is impossible or inequitable to restore the original property.** **In cases of fraud, courts willing to exercise discretion to grant damages more liberally.**
Facts	Kupchak's purchased shares in motel company from the respondent - Appellant's transferred properties owned to respondent and gave mortgages over land and chattels of the palms motel (mortgage partly debt financed) - Appellant's discovered statements made about property were false and stopped making payments on mortgage, consult a lawyer and respondents bring an action (obtained warrant to seize property under mortgage) In the interim period, respondent sold undivided half interest in one of the properties (tore down existing building and built a new apartment building) - Appellant's continued to live in and operate the hotel - A year later, respondent brings unsuccessful foreclosure action and appellants commence action for rescission of the contract
Issues	At trial, finding that they were not induced by fraudulent misrepresentation to enter contract and this was confirmed on appeal - Remaining issue: what should remedy be for fraudulent misrepresentation in this case?
Procedural History	At trial, judge denied rescission but awarded damages for $28,000
Rule	Standard remedy is rescission to put the parties in a position they would have been in prior to the contract
Analysis	Here, the respondent could not restore the two properties to the appellant (impossible because they did not own entire interest anymore and character greatly changed – would be unjust to deprive respondents of improved land) The COA says party guilty of fraud is not entitled to raise in response to claim of restitution, his own dealing with property acquired by fraud

	- Court says this should not be an insurmountable barrier to the remedy of rescission (ought not to bar rescission unless impractical or so unjust that it ought not be imposed on guilty party) Technically, court cannot award damages under equity unless account or indemnity may be ordered - Equity here may order part payment of compensation to adjust rights of the parties consequence upon rescission just as it may order payment of money upon account or by way of indemnity In a case of fraud, court will do its best to unravel all fraud - May involve adjustments on both sides, exercise jurisdiction to prevent respondent from enjoying benefits of fraudulent activity - Under equity, court can require rescission but give effect to rescission through award of monetary damages - The claim that Kupchak's could have discovered the fraud on their own is not persuasive <u>Bars to Rescission</u> Even at equity, there are certain bars to rescission and the guilty party would have to plead and prove this defence to remedy of rescission - Respondent did not plead these defences here but they were argued and appellant did not object, court did not reject these potential bars - These bars depend on establishing facts through evidence but this evidence was not adduced as it wasn't plead in the first instance **Affirmation** – party barred from seeking rescission if they affirmed the agreement (can be through conduct, words, silence, etc.) • Test is on a reasonable view of words and conduct of parties, can we say the party seeking rescission actually affirmed the agreement? • If after learning material fact was false and they continued to act by affirming, barred from rescission **Laches** – due to delay after becoming aware of material fact as in this period, representor invested in the property in question (time, money, industry, etc.) • Would it be unjust in this situation to award rescission? • Not just delay: consider length of delay in responding upon discovery of material evidence AND the nature of acts done during the interval <u>Application to the Present Case</u> Affirmation: Court says Kupchak's made monthly payments on the mortgage but then started to refuse payments (can assume they learned of misrepresentation close to when they refused payment) - Court says evidence is obscure, even though they maintained share in the hotel, did not abandon, stayed in hotel, they basically could not abandon (it is not practically reasonable that they abandon the hotel) Laches: Evidence is against the respondent, lawyers contacted the respondents and told them they were not happy about the representation that was false before they sold half-interest in the property - The sale of half-interest an demolishing of apartment block all occurred after respondents on notice that appellants wanted to repudiate
Holding	Rescission and damages, appeal allowed.

Rescission

The point of the remedy of rescission is to undue the agreement, put parties in position they were in before the agreement

- Agreements are voidable but not void immediately (contract remains enforceable until rescission is actually concluded)

Bars to Recessionary Relief:

1. Relief not available if it is not possible to effect a mutual restoration of the benefits conferred by the parties (when it is not possible)
    - For example, If goods perished
    - In cases of fraud, courts willing to exercise discretion to award damages more liberally (*Kupchak*)
2. Affirmation
    - If after becoming aware of misrepresentation and right to rescind, a party has 'affirmed' a transaction, they can no longer rescind it
    - If you discover fraudulent misrepresentation and continue acting on it, that is a bar to rescission
    - Examples where party was not aware of right to rescind, clock starts running after the party becomes aware of their right to rescind (starts running here for either laches or affirmation)
3. Rights of third parties
    - If a bona fide purchaser has acquired a right for value, original misrepresentee may not be able to get property back
4. Execution of the agreement
    - In certain contexts, once a transaction has closed it cannot be rescinded for innocent misrepresentation, but it can for fraudulent misrepresentation
5. Laches
    - Unreasonable delay in claim
    - Merely delay alone not enough, award of rescission unfair or practically unjust to misrepresentor
    - Two factors are important: the length of delay in responding upon discovery of the material fact, and the nature of the acts done during the interval

In essence, remedy of rescission involves an unwinding or setting aside of contractual relationship between the parties

- Agreements subject to rescission are voidable
- They remain enforceable until rescission is actually concluded (not the same as cancelling contract, voiding just ends it from the moment on while ending acts as if it never existed)

REPRESENTATIONS & TERMS

Representation: induces contract formation

- Can be innocent, negligent or fraudulent

Terms: statements that form part of the contract

- Has significant legal consequences
- Does not induce formation but simply is forming part of the contract itself (a term of the contract)
- If a representation is stated in a contract (written or not) it is a term
- Terms can be classified as:
    - Conditions
    - Warranty
    - Innominate terms

When does a statement induce formation or form part of contract?

- Legal classification/categorization of various statements
- When is statement actual term?
    - **Representations:** When party makes a statement, it may be classified as a misrepresentation which induced formations and equity may award rescission

        - If fraudulent/negligent there may be other remedies
    - **Warranty (Generic Sense):** Implicit statement undertaking or a guarantee that the fact is true and undertaking forms part of a collateral enforceable contract entered by representor and representee
        - Can have damages
        - 'Warranties' also have a more technical use where they are differentiated from conditions but in *Heilbut* the word warranty is used in the generic sense as in equivalent to contractually binding undertaking
    - **Terms:** If representation explicitly stated (promised) in the contract, it will be a term of the contract
        - These are terms
        - Breach of term results in damages for breach of contract
        - If representation was explicitly stated, it will be a term and damages available
- Statement may implicitly or explicitly form part of contract, remedy of damages may be available in either case

Heilbut, Symons & Co v Buckleton / representation or warranty?

Ratio	**An affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended.** - **A mere statement of the company does not indicate sufficient evidence of a collateral contract/warranty.** - **Innocent representations are only referred to as warranties if clearly intended to be warranties by the parties.** - **We look to totality of the evidence to determine whether there is intention that affirmation forms part of the contract.**
Facts	Appellants were rubber merchants who underwrote large number of shares in a company - Individual, Mr. Johnston was acting as agent on behalf of the appellants for purposes of selling shares - In the course of discussions, Mr. Johnstons mentioned company to a broker for the plaintiffs and they had further communication over phone - Prospective purchasers phones agent of underwriter from own agents office and have conversation where representation made that it is a rubber company - Buckleton purchased shares after this exchange but subsequently a deficiency discovered on the estate and shares declined Buckleton brings action for fraudulent misrepresentation or for damages from breach of warranty
Issues	What is the legal statute or representation of the statement: 'this is a rubber company'? - Was it a misrepresentation or a collateral warranty creating a binding contractual obligation?
Rule	Warranty is an undertaking or guarantee that a particular statement of fact is true or will continue to be true or will become true on a particular future occasion (used here in the generic sense, not in the technical sense as in differentiating a condition)
Analysis	This might be warranty (ie. Contract collateral to the main contract to take shares) where defendants in consideration of P taking shares promised that the company itself was a rubber company - An offer for unilateral contract where taking up offer means entering into a main contract (the main and collateral contract would have independent existence) - Ie. 'If you enter contract for shares of rubbery company, I promise that it is a rubber company' In the case of collateral contract, representation made before formation becomes term of collateral unilateral contract

	- Such contracts can exist, but must be rare (natural way to frame is to lump in all consideration to main contract) Whether statement is representation or term, look to intention of the parties and whether it was actually intended as a warranty - Look for contractual intention 'animus contrahendi' At common law, attempts to make person liable for innocent misrepresentation have usually taken form of attempts to extent doctrine of warranty beyond its limits to find that a warranty existed in cases where there is nothing more than innocent misrepresentation - This is the present case, here there was no animus contrahendi to show existence of an intention other than as regards to the main contracts An affirmation at time of sale is a warranty, provided it appear on evidence to be so intended (look for intention as to whether undertaking or simple representation) - We ask whether totality of evidence indicates intention that the affirmation forms part of the contract Here, the requisite intent is missing, the statement was a mere statement of fact - No evidence of intention, a mere statement about nature of company does not indicate evidence of a collateral contract/warranty - The statement here was an answer to an inquiry for information
Holding	Representation, not warranty. Appeal allowed, no damages.
Notes	The court is referring to warranty here in the generic sense, an undertaking or promise (not the technical sense we are concerned with) - They are not differentiating from condition with their use

Collateral Contract Analysis

Saying: if you enter in Contract X, I will give you $100

- The representation made before formation is the promise to pay, it becomes a term of a collateral and unilateral contract
    - Promise to pay is collateral (secondary) to the main one of the contract, the main and collateral contract have independent existence and both have status as a contract (finding breach of collateral will lead to damages due to breach of contract)
- Collateral analysis is not natural (forced analysis by courts) and this argument is looked at suspiciously with strict application
    - Sometimes courts try to make parties liable for collateral beyond its limits and avoid the problem of damages where they cannot give it so try to characterize as warranty
    - If we took this as valid, it would make all law around innocent misrepresentation as meaningless

Dick Bentley Productions Ltd. v Harold Smith (Motors) Ltd. / objective test for warranty

Ratio	**The representation/warranty determination depends on conduct, words and behaviour of parties, rather than their thoughts.** - **Would an intelligent bystander reasonable infer through words and conduct of parties that they intended to provide undertaking or a promise? (Akbari says to use 'reasonable bystander' instead of 'intelligent')** - **Objective test** **When the representor has expertise or privilege of access to information, the information that is communicated should be things they ought to know and the buyer acts on that**

	information, the statement will be a warranty. This can be rebutted as innocent misrepresentation.
Facts	Bentley wanted to purchase a Bentley car - Harold Smith Motors was a seller of luxury cars - Smith told Bentley a number of things during negotiation, told him that the car only had 20,000 miles since fitted with replacement engine and gearbox - Bentley bought it for 1,850 euros and ended up having to take it back for work numerous times - Eventually, Bentley brings action for breach of warranty
Issues	Is the statement that the car only had 20,000 miles a term of the contract or a misrepresentation? - Is there a breach or warranty? - Was this an innocent misrepresentation or warranty?
Rule	Warranty is an undertaking or guarantee that a particular statement of fact is true or will continue to be true or will become true on a particular future occasion - *Heilbut:* an affirmation at time of sale is a warranty, provided it appear on evidence to be so intended
Analysis	<u>Denning:</u> Starts by citing *Heilbut* regarding intentions of the parties - Denning says 'intended' has given rise to difficult - Whether there is warranty depends on conduct of parties, on words and behaviour, rather than thoughts - Whether a reasonable bystander would reasonable infer that a warranty was intended If representation is made for purpose of inducing another to act and it actually induces them, that is *prima facie* ground for determining that representation was intended as a warranty - Denning's version of the test appears close to the test for operating misrepresentation - The maker of the representation can rebut inference if they show innocent misrepresentation and that it would not be reasonable to be bound by it
Holding	This was a warranty. Appeal dismissed, damages appropriate.
Notes	Test: would intelligent bystander reasonably infer that a warranty was intended? (Akbari says to use 'reasonable bystander' instead of 'intelligent bystander') - Focus on test: would reasonable bystander infer that a warranty was intended? - Shy away from framing in terms that looks like test for misrepresentation (focus on intention here) Ultimately comes down to parsing the fact - Use reasonable bystander test - Look at analogous cases with similar facts, draw distinctions and analogies If not intended to be a promise, or is just a statement of fact, then it more likely falls in category of a pre-contractual misrepresentation - For there to be contract or collateral agreement, there needs to be promissory intention

Denning distinguishes *Oscar Chess* from this case with various factors to find if there is representation:

Oscar Chess	*Dick Bentley*
Non-professional vendor	Professional vendor
Relied on a logbook stated something wrong	Stated a fact that he was in a position to know (within his knowledge)
No warranty based on reasonable bystander test	Warranty based on reasonable bystander
Innocent representation	Not innocent misrepresentation

In *Oscar Chess* Denning concluded there was a representation, not a term
- Was not intended to provide undertaking that car had relevant miles (not intending warranty)
- Based on facts in *Oscar Chess,* reasonable bystander would not infer that seller was making a warranty
- In this case, warranty based on reasonable bystander test

Denning emphasized whether representor has expertise or privileged access to information about the thing being sold and it should be 'within his knowledge' (also focuses on fact that it was a professional vendor)
- These factors used by Denning to differentiate are important and can be used in the analysis
- The important takeaway, however, is intention

Conditions vs Warranties

Were the parties intending to deliver something or just stating a fact about the thing?
- When it comes to parsing the facts, all we have to go on are precedents
- Look to previous decisions where courts have said certain statements are or are not warranty
- Conditions and warranties are both contractual terms, but different classifications of sub-contractual terms

Condition
- Goes to root of contract
- Breach of condition entitles innocent party to terminate contract
- Whether innocent party affirms/terminates they are also entitled to damages

Warranty
- Concerns some less important or subsidiary element of the contract
- Breach of warranty entitles innocent party to damages only
- The distinction drawn is based on intentions

One test: how central is the term to the contract?
- *Hong Kong Fir* is about classifying terms as conditions or warranties
- *Heilbut and Dick Bentley* were about classifying as representations or terms

Leaf v International Galleries / rescission as remedy depending on classification as rep or term

Ratio	**If a warranty is breached then there is action in damages. If a condition is breached then there is action in repudiation and in damages.** - **Rescission will be barred if sufficient time has elapsed such that purchase is accepted.**
Facts	Leaf is a plaintiff/buyer and International Galleries are defendant/sellers - P purchased painting which D represented as being by a certain artist - Receipt stated 'original oil painting by J. Constable' - Five years later, P wants to sell painting and has it appraised to learn it was not a Constable painting - P argues that the statement about the painting being a Constable was an innocent misrepresentation and that he is entitled to claim rescission under equity (Leaf wants to unwind the transaction)
Issues	Is P entitled to rescind the contract?
Rule	Innocent misrepresentation of a contract will allow a remedy of rescission.
Analysis (Denning)	This was a contract for purchase and sale of goods, we apply principles applicable to sale of goods - There was a mistake here but it was to the quality of the subject matter of the contract (not the subject matter itself)

	Doctrine of mistake: if there is a mistake as to subject matter itself, doctrine of mistake would apply - Denning says doctrine does not apply here, it was to the quality of subject matter and not the subject matter itself - Here, there was mistake about quality of subject matter and this mistake was in one sense essential and fundamental but does not void the contract - No mistake about subject matter of the sale A term can be condition or warranty - If warranty, purchaser can only claim damages - If condition, purchaser can reject the contract unless goods have been accepted in which case they are relegated to claim of damages When it comes to breach of condition, right to reject or terminate is barred if buyer purports to reject the goods after a lapse of reasonable time – then there is deemed acceptance - Here, it is too late, the plaintiff took 5 years and that is more than reasonable time (P has accepted the goods) - Only remedy available is damages but P did not bring a claim for damages here Innocent misrepresentation is less potent than breach of condition - A condition is a term of contract most material to character and if a claim to reject for breach of condition is barred, it seems a claim to rescission on grounds of innocent misrepresentation is also barred - Innocent misrepresentation would not be more powerful than remedy for breach of condition
Analysis (Evershed)	Argues that P received thing that they contracted for but it is 'difference in quality' rather than substance of thing itself - Evershed also considers other policy arguments raised in context of statutory reform - Opening the floodgates, costly, and difficult litigation (once article is accepted, this is the end of transaction otherwise market would be 'unworkable') - If representation is a warranty, perfectly adequate compensation for damages at common law, no justification for bringing in equity here
Holding	No, P is not entitled to rescind. The statement was not an innocent misrepresentation, it was a term of the contract.

Doctrine of Mistake

Common mistake: parties have reached agreement but agreement is based on a common fundamental mistaken assumption

- Generally, a finding of common mistake will render contract void
- Mistake must be fundamental such that performance is impossible
- When it comes to sale of goods, mistakes about quality do not count (*Scott v Littledale*)
- Mistake to quality may count if it renders subject matter essentially different or goes to identity of the thing

There are 4 elements of common mistake:

1. Parties share mistake
2. Neither expressly or implicitly agreed to take on risk of mistake
3. Neither party at fault
4. Mistake to fundamental that performance is impossible

Bars to Rescission

Execution of contracts for land

- When it comes to purchase and sale for contract of land, purchaser can inspect and discover issues before contract so once contract has been executed there is a bar to rescission
- Another bar is whether a reasonable period of time has passed for execution of a contract for sale of goods (Denning's analysis)
    - Execution may not necessarily be bar to rescission, turns on whether reasonable time has passed (*Leaf*)

Statutory Reform

How should law be reformed surrounding representation and remedy of rescission?

- Should representation always form part of agreement so remedies for breach available?
- Should scope be broadened?
- Should we allow misrepresentee to choose between the 2?
- Should choice be left to courts?

The motivation for these questions: increasing consumers being misled and call for reform in the area (*Ontario Law Reform Commission*)

- The remedy for rescission may be both too narrow and too broad
    - Too narrow = bars to rescission, not a lot of relief to consumers
    - Too broad = restrictions to rescission because of things like *Kupchak* (difficult to unwind the arrangement or there are 3rd party rights involved)
- In general, courts do not have power to make award of monetary damages in substitution or addition to rescission
    - They recommend removing execution as bar to rescission (even in land cases)
    - Where there is prima facie right to rescission, court should still be able to deny and award damages in lieu of
    - Courts still be able to apply just damages for restitution in favour of losses

Consumer Protection Act, RSA 2000 c C-26.3
(1) A consumer may cancel at no cost or penalty to the consumer a consumer transaction, whether written or oral, that was entered into by the consumer and a supplier who engaged in an unfair practice regarding the consumer transaction, whether the unfair practice occurred before, during or after the time when the consumer transaction was entered into, and in addition the consumer is entitled to any remedy that is available at law, including damages

Increasing introduction of consumer protection legislation

- This will not be on the exam but know that it provides a number of protections against specific wrongs done by sellers
- Section 7 specifies cancellation of transaction as additional remedy to consumers in addition to common law remedy such as damages
    - Provides more protections and rights to consumers

CONCURRENT LIABILITY IN TORT AND CONTRACT

Can misrepresentation give rise to liability under both tort and contract?

- Usually arise when there are contracts for services that require service provider to make statements of some sort
- Landmark decision is *Hedley v Byrne:* interpreted to stand for proposition that tort of negligence could cover economic loss for negligent mistake
    - In reliance on statements about credit worthiness of a customer of bank, P entered business relationship with the customer and subsequently suffered economic loss (due to disclaimer given, P lost the case, but the court held that with no disclaimer there could have been claim for negligent misrepresentation)
    - Have to determine whether there is a 'special relationship' grounding liability

- In *J. Nunes Diamonds v Dominion Electric* the SCC rejected the possibility of concurrent liability
    - SCC reluctant to go down the path of *Hedley Byrne*
    - Basis of tort liability in *Hedley* inapplicable to any case where relationship governed by contract unless independent tort unconnected to the contract
    - Once parties enter the contract, they have specified between themselves their rights and obligations which supplants their rights and obligations in tort law
- In subsequent cases (*Central & Eastern Trust Co v Rafuse*) the SCC adopted general principle favouring possibility of concurrent liability in tort and contract in contractual context
    - Where concurrent liability exists, there is right to assert cause of action most advantageous to them in respect of any particular consequence

In general, there can be a misrepresentation giving rise to liability under both tort and contract
- If fraudulent, may have claim tort of deceit
- If negligent or careless, plaintiff can have claim in negligence
- The plaintiff cannot recover in both even when there is liability in tort and contract, the plaintiff merely able to bring action in either domain

Sodd Corporation Inc. v Tessis / concurrent liability

Ratio	**Professional responsibility may create a DOC** - **There is concurrent liability in contract and tort for pre-contractual misrepresentation**
Facts	Defendant was selling assets of bankrupt furniture business, put tender to liquidate the bankrupt's goods - D was a chartered accountant and licensed trustee in bankruptcy - D represented to P that method of calculating retail value was by doubling the wholesale cost - In reliance on statement, P submitted a tender containing an exemption clause - It was a misrepresentation, goods were overvalued by approximately 100%
Issues	Did D have a duty of care to the plaintiff which was breached? - Is there breach of collateral warranty?
Rule	Tort of negligence could cover economic loss for negligent mistakes - Have to determine whether there is a 'special relationship' grounding liability (*Hedley Byrne*) - Where concurrent liability exists, there is right to assert cause of action most advantageous to them in respect of any particular consequence (*Central Eastern Trust Co.*)
Procedural History	TJ held that D was negligent in misrepresenting the quantity and value of the goods and was not entitled to rely on the exemption clause, D appealed
Analysis (Lacourciere JA)	<u>Did D owe P a duty of care?</u> - This was a 'special relationship' creating a duty of care and P was negligent in representation concerning the value - He should have known he would and did induce P to prepare his tender (profession of representor is relevant but not decisive) - Really must ask: "Should D have known his statements would be relied upon and induce the P to enter into making bid for tender"? - P was not negligent in relying on licensed trustee who had caused an inventory of the stock to be taken *Deloitte v Livent* is leading case for determining whether there is prima facie DOC here: - Two staged anns-cooper analysis from torts

	- Whether prima facie DOC exists (proximity and reasonable foreseeability) and whether there are residual policy considerations outside the relationship that may negate imposition of DOC? Court rejects argument that *Hedley Byrne* does not apply - Present case involves a pre-contractual negligent misrepresentation which induced P to submits its tender - The negligent misstatement can be characterized as either: • Pre-contractual negligent misrepresentation with liability under tort OR • Collateral warranty inducing P to submit its tender (main contract for purchase of goods through tender, collateral was promise that retail value of goods calculated in certain way if tender submitted) - Either outcome will be the same here, an amendment would not be unfair and it is unnecessary to characterize as one way or the other to come to a just result <u>What would measure of damages in tort be?</u> - Compensate, place in position prior to wrong suffered - If part of contract, measure of damages would be difference between market value of consideration supplied and price paid <u>Exemption Clause</u> The negligent misstatement falls outside of the exemption clause because either: 1. Claim grounded in tort and not on basis of contract OR 2. Claim grounded in contract and related to breach of warranty of the collateral contract not the main contract (does not exclude liability under collateral contract analysis)
Holding	Appeal dismissed, D liable for negligence in tort
Notes	Under *Deloitte & Touche v Livent* proximity is established if there is a close and direct relationship between the parties Under *Deloitte & Touche v Livent* reasonable foreseeability is established if: 1. The defendant has reasonably foreseen that P would rely on his or her representation and 2. Such reliance would, in the circumstances of the case, be reasonable

BG Checo International Ltd. v BC Hydro & Power Authority / concurrent liability

Ratio	**Plaintiff may sue in either contract or tort, subject to any limits the parties themselves have placed on that right by their contract.** **There are excluded cases where contractual limitation is invalid as by fraud, mistake or unconscionability.** **A contractual limitation may not apply where tort is independent of the contract in the sense of falling outside the scope of the contract.**
Facts	Checo is a large corporation engaged in construction of electrical transmission lines - In Nov. 1982, Hydro called for tenders for transmission lines - In Dec. 1982, BG Checo inspected by helicopter and observed right of way partially cleared, assumed clearing process had begun would be completed by Hydro - In Feb. 1983, Checo's tender was accepted; Hydro contract to construct 138 towers and install insulators, hardware, conducts, over 42 KM of right of way No further clearing took place by Hydro, Checo had to clear themselves at own expense

	- The condition caused difficulties and resulted in loss to Checo - Checo sued for negligent misrepresentation or breach of contract - Evidence during discovery indicated Hydro knew of the problems and how it would negatively impact, Checo made statement of claim to include fraud
Issues	Whether claims lie in contract and tort and if so, what is the measure of damages? - Can there be concurrent liability in tort and contract and what is the benefit of pursuing one course of action over the other?
Rule	*Rafuse:* concurrent liability possible where contract created a sufficiently proximate relationship to generate a duty of care in tort
Procedural History	Trial judge awarded Checo $2.6 million for total loss from fraud (tort of deceit) - BCCA rejected finding of fraud but found negligent misrepresentation, awarding $1.1 million
Analysis	Rather than attempting to establish new barriers, law should move to eliminate unjustified difference between remedial rules to the two actions <u>Claim in Contract</u> What do parties intend? - Objective test - Look first to text of the contract in determining rights and obligations of the parties (primary issue is construction/interpretation of the contract and how to reconcile inconsistent provisions, MUST interpret contract as a whole) - Court should attempt to find interpretation that reasonable gives meaning to all terms in question in the contract as a whole (if this cannot be found > court may rule one clause or the other ineffective) - Terms often reconciled by construing one term as qualifying another, where general terms are qualified by specific ones Here, the general term was qualified by specific obligation: obligation for clearing - Given specific nature of Hydro obligation, the obligation of Checo to satisfy itself to contingencies could reasonably be interpreted to refer to matters OTHER than clearing the site - Hydro specific obligation to clear was not negated by the general clause which Checo was subject to, Hydro breached this specific clause Measure of damages to put Checo in position it would have been had contract been performed (forward looking) - Contract provided 15% for overhead and profit on extra work (Checo would have avoided some overhead and can recover some, but no profit entitled for clearing right of way) <u>Claim in Tort</u> Court follows general principles of *Rafuse*, where there is an action supported in tort and contract, the party may sue for either or both except where contract indicates that the parties intended to limit or negative right to sue in tort - Misrepresentation must be statement of fact, however, in tort opinions can be subject matter for negligent misrepresentation Three situations where contract and tort are applied to the same wrong: 1. Where contract stipulated more stringent obligation than general law of tort (ie. Misrepresentation must be statement of fact no opinion but in tort opinions can be subject matter of negligent misrepresentation)

	2. Where contract stipulates lower duty than that presumed by law of tort in similar circumstances (exemption/exclusion of liability clause) 3. Where duty in contract and common law duty in tort are co-extensive whether through an express or implied contractual duty (we are filling this one here, contract did not negate common law duty not to negligently misrepresent that it would have right of way cleared) Checo may also sue in tort, as the duty was co-extensive whether through an express or implied contractual duty
Holding	Appeal dismissed, defendant liable for tort of negligent misrepresentation
Notes	This judgment confirms that concurrent liability in tort and contract is the law It all depends on how exclusion of liability clause is construed as to whether or not there can be concurrent liability in tort and contract - Exclusion of liability clauses are construed quite narrowly by courts (not expressly mentioning negligence may be interpreted not to include negligence)

If prompt says 'advise for breach of contract' do not discuss tort law or concurrent liability

- If it is asking whether representation or term, we know representations do not constitute a breach of contract (would have to be a term for claim at common law for breach of contract)
- Be mindful as to how the question is framed, if framed in general terms interpret as both representation and term
- If question is asking about advice for breach, do not discuss rescission (proceed as if statement is term rather than representation that might be false)

PAROL EVIDENCE RULE

In certain circumstances, party that wants to rely on oral evidence or undertakings will be prevented from introducing evidence of oral undertakings if inconsistent with terms reduced to writing

- A contract wholly reduced to writing cannot be modified in sense of having terms added, subtracted, contradicted by oral evidence
- As a general principle, applies to any prior communication purporting to modify terms of contract that has been reduced to writing
- Purpose is to have certainty and finality in contractual matters

Exceptions to Parol Evidence Rule

1. Contracts that are partly written and partly oral – rule does not operate to preclude adducing of oral evidence
2. Interpretation of written contract – prior oral communications can be used as aid in interpreting a written contract
    - Can be introduced as surrounding circumstances at time contract was entered
    - Used as objective aid to determine meaning of words parties used

Exemption and Entire Agreement Clauses

Parties will often include 'entire agreement clause'

- This signals intention by including clause that reliance on any materials beyond written agreement is prevented
- However, courts construe these clauses narrowly
    - Look to see if they are a genuine representation of the parties intentions
    - If entire agreement clause in standard form contract and one party is not aware of the effect, courts more often willing to allow oral undertaking to have some force

Classification of Terms

Recall that we saw distinction between conditions (root of contract, right to terminate and damages) and warranties (concerns less important or subsidiary, right to damages)

- The term condition is confusing due to various uses, can be used to refer to:
    - A promise which reflects a party's contractual obligation (type of term)
    - A state of affairs that will make the contract enforceable (condition in a contingent agreement, ie. Condition precedent)
    - We are now turning to condition as promise which represents a party's contractual obligation (in contract to a warranty)

Rescission & Repudiation

Rescission is sometimes used to refer to:

- Equitable rescission for misrepresentation (correct use)
- Termination of agreement for breach (incorrect use)

Repudiation is sometimes used to refer to:

- Severe breach of contract by one party (repudiatory breach)
- Choice by innocent party to treat the contract as terminated as a result of severe breach (repudiation/termination)

Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. / innominate terms

Ratio	**For an innominate term, repudiation may be available when occurrence of the event deprives the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings** - **If they do deprive of whole benefit, repudiation is in order** - **If they do not deprive whole benefit, damages only possible avenue**
Facts	Hong Kong Fir owns a ship, Kawasaki Kisen Kaisha wants to charter the vessel for 2 years - Entered an agreement to which P would lease the vessel to D including certain provisions going to the 'seaworthiness' of the vessel (clause 1: vessel 'in every way fitted for ordinary cargo service' and clause 3 'owners would maintain ship in thoroughly efficient state in hull and machinery during service) On February 13: vessel delivered with undermanned and incompetent engine room staff, P knew the ship's machinery was old and needed better crew - During the voyage, vessel was not working for 5 weeks due to engine repairs On May 25: vessel arrives in bad shape, requires 15 more weeks to make repairs and make vessel seaworthy - On June 6: defendants purport to repudiate the contract, saying they severely breached contract and treating contract as terminated because of severe breach of seaworthiness of the vessel - On September 11: defendants against purported to repudiate - On September 15: vessel is seaworthy and has efficient and adequate staff, still available for 17 months of the contract
Issues	- Whether Ps breached a term such that defendants had right to repudiate? - Are the defendants themselves liable for wrongful repudiation? (If Ds had no right to repudiate, the non-compliance now amounts to breach)

Rule	Parties may specify events that relieve/discharge one of the parties of their duty to perform but when they have not it is for the courts to determine whether a particular event has this effect or not. - General principle: does occurrence of the event deprive party who has further undertakings to still perform of substantially the whole benefit which was the intention of parties expressed in contract they should obtain as consideration for performing the undertaking?
Procedural History	Trial judge found breach of seaworthiness term of plaintiffs - As of June, there was no reason to determine it would not be seaworthy by September, no breach requiring D to repudiate the contract
Analysis	When parties do not specify events that relieve/discharge the duties, it is up to court to determine whether particular event discharged obligations under the contract: - **Frustration:** event which occurs and deprives innocent party of substantially whole benefit is result of default by neither party, each is relieved of further performance of undertakings (a radical change arising from unforeseen circumstances in respect of which no prior agreement has been reached coming about without default by either party) - **Breach of condition:** where event occurs as result of default of a party, the defaulting party remains under obligation to perform undertakings and innocent party may treat the event as relieving him of his undertakings We can distinguish between: 1. Conditions – promises where every breach deprives party of whole benefit of contract 2. Warranties – promises where breach never deprives party of whole benfit of contract 3. Innominate terms – promises of the kind where some breaches will and others will not give rise to event which deprives party not in default of substantially the whole benefit intended that he should obtain from the contract Here, the undertaking is an innominate term, some breaches will lead to event that deprives other party of whole benefit and others will not - The breach here did not deprive defendant of substantially the whole benefit of the contract, there was no right to repudiate - There was no indication that the vessel would not be ready by September, it was ready for use for 17 months and extended benefits are possible still
Holding	Both parties still obligated to discharge their obligations under the contract, no right for innocent party to repudiate the contract - Side with plaintiff, no right to repudiate

The Pre-*Hong Kong Fir* Approach

Under the old approach, the only conceptual tools were conditions/warranties

- The analysis was boxed in, if you conclude seaworthiness was a condition then even minor breach allowed for termination
- The court attempts to resolve this problem here
- The new approach avoids problematic outcomes of the rigid approach
    - Allows us to consider whether occurrence of event deprives party of substantially whole benefit which was contracted for (this is what the analysis turns on, which will sometimes allow right to terminate and sometimes allow right of damages)
    - Severity of breach depends on event depriving party as result of breach

***Spirent* Factors**

There are 5 factors to consider in determining whether breach deprived of 'substantially whole benefit' (*Spirent Communications of Ottawa v Quake Technologies* – subsequently adopted by the ABCA*):*

1. Ratio of parties obligations not performed to obligation as a whole
    - What the defaulting party failed to do
    - How large a part of the obligation did they fail to discharge?
2. The seriousness of the breach to the innocent party
    - How much emphasis did they place on the term?
    - How important was it to the innocent party?
3. Likelihood of repetition of such breach
    - What would otherwise be minor breach that keeps happening, there may be no confidence that there will not be a future breach of the term
    - Repetitive breach may amount to depriving party of substantial benefit
4. Seriousness of the consequences of the breach AND
    - What were the consequences? Was Hong Kong Fir no longer able to carry out their own business and they lost a tremendous amount of profit?
5. Relationship of part of obligation performed to the whole obligation
    - Looking to how much of the obligation is still left to perform (ie. How much of contract is left)

First City Trust v Triple Five Corporation / ABCA application of Hong Kong fir

Ratio	**First → Look to intention of parties (did parties from reasonable perspective intend term to be warranty or condition?)** **If unclear → turn to the innominate terms analysis and apply the *Spirent* factors**
Analysis	Hong Kong Fir accepted and incorporated into the analysis by ABCA - Takes position that decision and analysis does not replace the warranty/condition distinction but is additional to it 1. Ask whether there is clear evidence on parties' intentions that they intended the term to be a condition or warranty, look at surrounding circumstances and commercial settings (*Bentsen v Taylor)* 2. Second, if intent does not settle the matter, move to an innominate terms analysis and ask whether non-breaching party has been deprived of substantially the whole benefit of the contract (look to gravity of event to which breach gave rise and assess using the *Spirent* factors)

Wickman Machine Tool Sales Ltd. v L. Schuler A.G / use of 'condition'

Ratio	**Use the word 'condition' as indication, even a strong indication of such intention, but it is by no means conclusive.** - **Courts will search for other plausible meanings of the phrase in circumstances where consequences of so interpreting the phrase are unreasonable.** **To rebut the presumption or conclude condition was not used in the technical sense:** - **The fact that particular construction leads to unreasonable result must be relevant** - **The more unreasonable the result, the more unlikely it is that parties intended it**
Facts	Parties entered agreement where Schuler gave exclusive right to Wickman to sell products in the UK and other areas. - Agreement included several clauses going to obligations of the parties under terms of the agreement. - Clause 7: 'It shall be condition of this agreement that Wickman has duty to undertake aggressive sales tactics' and Clause 11 stated how the agreement could come to an end. - Wickman failed to comply strictly with this clause, they sent representatives regularly but failed on a few occasions.

	- Shuler is repudiating the agreement, arguing that Wickman breached a condition of the contract and therefore had right to terminate.
Issues	- Whether Schuler had right to repudiate contract as result of Wickman's non-compliance with Clause 7?
Rule	Breach of condition: where the event occurs as a result of default of a party; the defaulting party remains under obligation to perform undertakings and the innocent party may, but need not, treat the event as relieving him of his undertakings
Procedural History	<u>Trial:</u> - Accepted Schuler's argument, held that agreement was lawfully terminated as clause 7 was breached <u>Appeal:</u> Denning distinguished 3 kinds of ways to understand condition: - Proper meaning (sense in which we use condition in contingent agreement) - Common meaning (often just a term of contract – labelled a condition but really meant to communicate idea that it is a term) - Term of art (how lawyers understand the term – breach of condition gives rise to right to repudiate however slight the breach) - Here, it was used in common usage as ordinary term of contract, its breach would not be a repudiatory breach
Analysis (Lord Reid)	Contract must be read as a whole, when analyzing and trying to determine intention from reasonable perspective, read all terms of agreement together Clause 11 states that the contract will persist unless terminated in accordance with terms of the clause - This implied that it cannot be terminated before the date in any way other than as provided (provides that agreement can be terminated if there is a material breach not remedied) - This is critical, parties have turned their mind to consequences of a material breach of agreement - The question is whether a breach of the obligation is capable of being remedied within the meaning of this agreement (if it is capable of being remedied, there must be opportunity to remedy the breach) It was the intention of the parties, Wickman's failure to make some required visits could be remedied by making arrangements to prevent recurrence of future breach - A breach of clause 7 could not give immediate right to terminate but entitles Schuler to require the breach to be remedied If parties use the term 'condition' we may say there is a presumption that they mean to use the term in the sense of a contractual term, breach of which gives right to terminate - Not always used this way, however, and even if condition is used we still have to inquire the intentions of the parties - Here, Schuler's interpretation is so unreasonable – missing a single visit entitled Schuler to terminate (the more unreasonable the result the more unlikely the party intended the interpretation) - Parties would not have used the term to lead to such an unreasonable result, look for other possible interpretation of the contract
Dissent	Adopts a more plain meaning, strictly textualist reading - Parties use term condition, court should not impose their own interpretation of the word on the parties
Holding	Side with plaintiff, no right to repudiate

Commentary on *Wickman* (McCamus)
Although the phrase 'it is a condition of this agreement' will normally have effect of true condition, courts will search for another plausible meaning in circumstances where consequences of interpreting the phrase are absurd or unreasonable

Intention of Parties
Keep in mind when applying the intention test:
- Even where breach of term produced a minor event, it can be treated as breach of condition
- In *Wickman,* parties may think some matter apparently or little importance to be essential (if they sufficiently express intention to make literal fulfillment of such a thing a condition, it will be one)
- We are searching for intention as disclosed by contract as a whole
    - As per *Wickman,* using word condition may be enough to establish intention but not conclusively, especially when leading to unreasonable result

PERFORMANCE OBLIGATIONS

Principle of Good Faith & Duty of Honest Performance
There are often disputes over which obligations are actually demanded
- Even if parties address performance requirements, courts might imply additional duties
- *Machtinger* sets a classification of different categories of implied terms and differences between them

Machtinger v Hoj Industries Ltd. / classification of implied terms

Facts	Employment law case, dealing with issue of whether there is an implied requirement of reasonable notice of termination of employment in employment agreement
Issues	In absence in contract of employment of legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period and to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?
Analysis	3 types of implied terms: 1. **Terms implied as matter of fact**: necessary to give business efficacy, based on parties' intention • Officious bystander • Business efficacy • Like *MJB* where implied term on parties intentions necessary to give business efficacy to contract or if it otherwise would meet officious bystander test • Not based on reasonable parties in general, but presumed intentions of these 2 parties 2. **Terms implied as a matter of law**: legal incidents of particular class or kind of contract, the nature and content of which has been largely determined by implication • Not based on parties intentions but necessity for fair functioning of agreement 3. **Terms implied as matter of custom or usage**: requires evidence that parties would have understood such custom or usage to be applicable, based on parties' intentions • Must be evidence that parties would have understood custom or usage as having meaning it does Requirement for reasonable notice in employment and these fall into second category, an implication as a matter of law - The test is necessity: such obligation should be read into contract as nature of contract implicitly requires - It is whether necessary in practical sense for fair functioning of the agreement, look to nature of contract and relationship in question

	This implied term is a default but if parties make express contrary agreement then implied term can be displaced - No contrary agreement, so employee entitled to reasonable notice of termination and implied term governs

Terms Implied by Law

Operate like default rules that can be displaced by contrary stipulation of parties

- In terms implied in law, courts may place greater emphasis on a requirement that the contrary stipulation be clear and explicit

There is a 4th category of terms implied by law and there are also certain terms implied by law by operation of statute

- For statute, look to particular of statute to determine how it operates
- Some terms implied by law due to statute operate as default rules and can be expressly contracted around but some are mandatory and cannot be expressly contracted around

Bhasin v Hrynew / duty of honest performance in contractual obligations

Ratio	**The organizing principle is simply that parties generally must perform contractual duties honestly and reasonably and not capriciously or arbitrarily** - **Parties must have 'appropriate regard to the legitimate contractual interests of the contract partner'** **There is also a duty of honest performance which informs all contracts and grounded in underlying principle of good faith (a breach of duty of honest performance can give rise to independent ground of action)**
Facts	Bhasin (Plaintiff), Hrynew (Defendant), Canadian American Finanacial Corp (Corporate Defendant) - Can-Am was company sold educational savings plans, Bhasin and Hrynew were enrolment directors who earned compensation and bonuses selling investment products - Hrynew had been successful and merged with others and wanted to merge with or take over Bhasin - Bhasin was not interested in merger, Hrynew asked Can-Am to make it happen As a result of an Alberta Securities Commission investigation, Can-Am had to appoint someone to audit all of its EDs for compliance, appointed Hrynew - Due to appointment, he was in position to look at Bhasin's confidential business records, Bhasin objected to this but Can-Am falsely represented to Bhasin that Hrynew work would be subject to duty of confidentiality and ASC prohibited appointment of an outsider - Can-Am disclosed to ASC that it planned to restructure and Bhasin would become employee of Hrynew, Bhasin inquired whether restructuring was a done deal and Can-Am equivocated and did not give straightforward answer despite knowing restructuring would go ahead When Bhasin continued to object to Hrynew auditing him, Can-Am exercise right not to renew his ED agreement - The ED agreement contained: non-renewable clause exercisable on 6 month's notice by either side, entire agreement clause seeking to define scope of contract to preclude allegations of terms beyond written in contract
Issues	Whether there is an implied duty of good faith that governs how Can-Am can exercise its contractual right of non-renewal under the ED agreement?

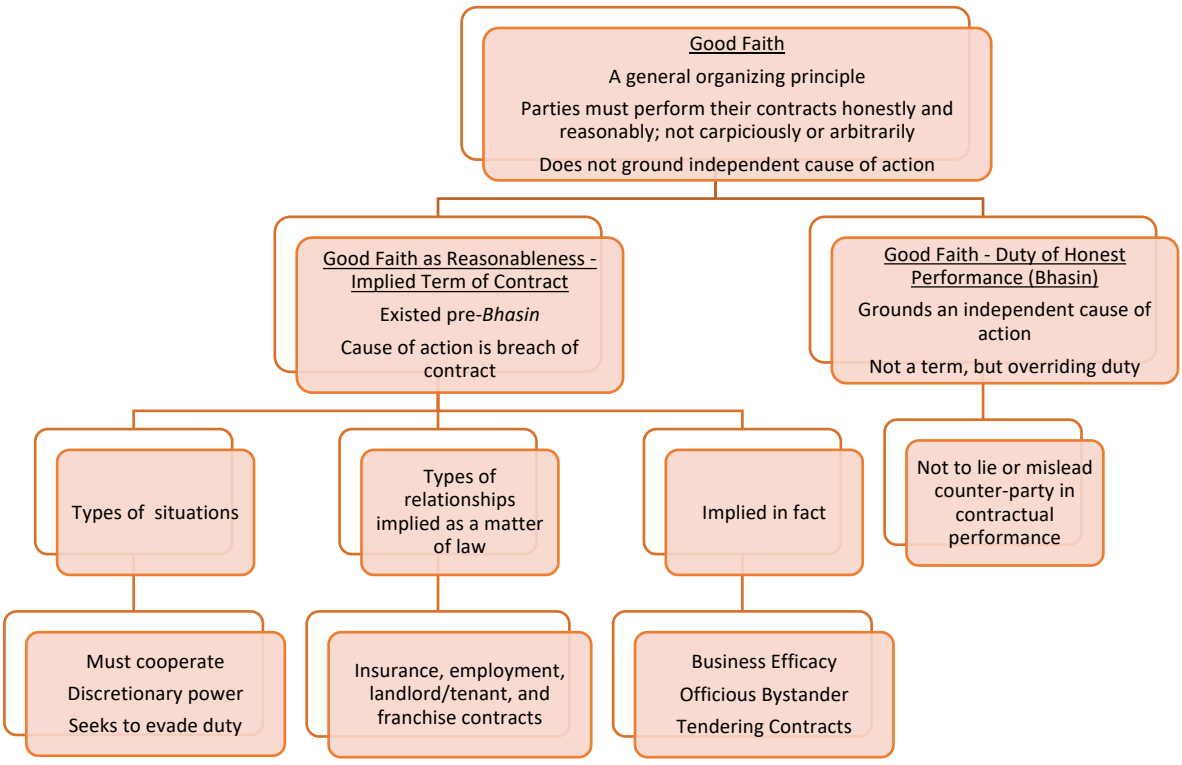
	- More broadly, what is the role of principle of good faith in Canadian contract law?
Rule	In carrying out performance of contract, parties must have appropriate regard to the legitimate contractual interests of the contracting partner.
Procedural History	<u>Trial</u> TJ held that there was implied term that contract could only be terminated for good faith reasons - Entire agreement clause not a barrier to implying good faith term, unjust and inequitable to allow Can-Am to rely on it - Can-Am's non-renewal would have to be exercised fairly - Held that Can-Am misled and was dishonest with Bhasin - Awarded damages of amount of $380K for loss of income/business <u>ABCA</u> Reversed the TJ decision, concluded that requiring good faith could not be implied, there was no duty or term of good faith performance required because: - Court cannot imply term that conflict with express term AND - Contract contained entire agreement clause
Analysis	<u>Organizing Principle of Good Faith</u> The first step is to recognize that there is organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance - Principle of good faith is background operating principle used to derive more specific doctrine - The organizing principle is simply that parties generally must perform contractual duties honestly and reasonably and not capriciously or arbitrarily (appropriate regard to legitimate contractual interests of the contracting partner) - Appropriate regard does not rise to same duty as that of a fiduciary, appropriate regard depends on the context - Does not mean putting counter party interests ahead of your own This principle does not ground an independent cause of action, just states in general terms requirement of justice from which more specific legal doctrines can be derived. To say it is an organizing principle means: 1. Source of and justification for certain existing elements of contract law; and 2. The principled foundation on which courts can develop new contract doctrine, though this must be in a restrained, incremental and precedent-respecting manner <u>Categories of Implied Terms:</u> 1. Doctrine where principle of good faith implies term as **matter of law** (ie. Insurance, employment, landlord/tenant, franchise, and implied term of reasonableness in certain contexts such as termination in employment) 2. Some contracts contain a good faith term implied as **matter of fact** (exercise in contractual interpretation, must fit with terms of contract and intention of parties such as in *MJB*) 3. **Types of situations where courts had held that duty of good faith exists** such as: where parties must cooperate to achieve objects of contract (Dynamic Transport), where on party exercises a discretionary power (Empress) and where one party seeks to evade contractual duty <u>New Duty of Honest Performance</u> The SCC articulates a new 'duty of honest performance' which informs all contracts and grounded in the underlying principle of good faith - A simple requirement, not to lie or mislead about contractual performance

	- Breach gives rise to independent cause of action - Parties can relax but not totally exclude the duty - A general doctrine that imposes a duty and operates independent of intentions <u>Application to Present Case</u> No implied term of good faith, it falls outside both: - Types of existing relationships and - The types of situation/context where courts imply a term by fact Agreed with ABCA that implying a term requiring good faith is prevented by operation of the entire agreement clause, BUT reverses the ABCA decision on basis that all contracts are subject to a duty of honest performance (not a term, but overriding duty)
Holding	Can-Am breached duty of honest performance when triggered its contractual right of non-renewal - Had Can-Am been honest, Bhasin would have sought to sell or otherwise monetize his agency before they triggered decision not to renew - SCC awarded Bhasin value of his agency at time of non-renewal
Notes	Bhasin does not deal with negotiating in good faith, but in good faith performance of existing contract

Summary of the *Bhasin* Principles

1. There is general organizing principle of good faith that underlies many facets of contract law
2. In general, the implications of the broad principle for particular cases are determined by resorting to body of doctrine that has developed which gives affect to aspects of that principle in certain situations and relationships
    - Implied in law for certain relationships
    - Implied in fact
    - Implied in situations
3. It is appropriate to recognize new common law duty that applies to all contracts as a manifestation of the general organizing principle: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations

SUMMARY



<table>
<tr><th colspan="6">Statement</th></tr>
<tr><th colspan="3">Misrepresentation</th><th colspan="3">Term</th></tr>
<tr><th><u>Innocent</u></th><th><u>Negligent</u></th><th><u>Fraudulent</u></th><th><u>Condition</u></th><th><u>Warranty</u></th><th><u>Innominate Term</u></th></tr>
<tr><td>Rescission</td><td>Rescission</td><td>Rescission</td><td>Root of contract</td><td>Less important subsidiary part of contract</td><td>Could be breached in multiple ways</td></tr>
<tr><td></td><td></td><td>Damages to unravel fraud</td><td>Repudiation</td><td>Contract damages</td><td>If condition - repudiation</td></tr>
<tr><td colspan="3">Consider potential bars to rescission</td><td>Contract damages</td><td></td><td>If warranty - damages</td></tr>
<tr><td>Redgrave</td><td>Checo/Livent</td><td>Kupchak</td><td>Wickman</td><td>Wickman</td><td>Hong Kong Fir</td></tr>
<tr><td></td><td colspan="5">Concurrent liability in tort (Checo)
For misrepresentation: tort of deceit, negligent misstatement
For term of contract: concurrent liability for breach and potentially negligent misstatement</td></tr>
</table>

Determine whether there was promissory intent (*Dick Bentley)*

- If not, misrepresentation
  - Misrepresentation can be innocent, negligent, or fraudulent
  - Consider all bars to rescission
- If yes, there was a term (apply *Wickman* to determine intention – condition or warranty)
  - Warranty and conditions have different remedial consequences
    - Think about whether it deprives innocent party of substantially whole benefit of the contract
  - If intention is unclear, might treat as innominate terms pursuant to *Hong Kong Fir*
    - Analyze gravity of breach (*Spirant Factors*)

In the background, consider concurrent liability in tort (*Checo*)

- Contract might limit tort liability, depending on particular arrangement
- Can have concurrent liability: damages for tort of deceit, damages for negligent misstatement, etc.
- Alternatively, might be term of contract with concurrent liability for breach of contract and potentially negligent misstatement

CONTRACTUAL INTERPRETATION

The goal of contractual interpretation is to ascertain the reasonable/objective intentions of the parties (*Sattva*)

- Not interested in subjective state of mind
- Ascertaining intentions at time entered into contract
- Question of mixed fact and law
  - What were parties intentions from reasonable perspective?

Overarching Principles

1. **Contract must be read as a whole**
   - Cannot simply interpret clause in isolation
   - In complex commercial transactions, might be several documents as part of single transaction and interpret in light of all documents comprising the transaction
   - Basic goal is to provide reasonable interpretation that avoids rendering one or more provisions ineffective
   - *Wickman:* interpreting term requiring weekly sales visits to 6 car manufacturers

        - Court reads provision in context of whole contract and particular provision that governed how it could be terminated
        - Read in way to render consistent with rest of agreement
    - *MJB:* court implied term on basis of business efficacy that only compliant bids would be selected
        - Implied term then used to interpret privilege clause interpreted in light of entire agreement
2. **Interpretation based on words used in the contract**
    - Plain meaning rule: give words ordinary and grammatical meaning
    - Must be informed by context of the document and surrounding circumstances
3. **Surrounding circumstance/factual matrix**
    - Traditional view: evidence of prior negotiations not admissible, final document records the consensus and is authoritative as to intentions
    - Modern view: modern approach is more flexible, such evidence is admissible as aid to uncover the objective intentions of parties; evidence of subjective intentions is still not admissible

Sattva Capital Corp. v Creston Corp. / contractual interpretation question of mixed fact and law

Ratio	**Shift to less technical, more flexible and practical approach to admitting evidence of prior facts but only to do so to provide context within which to interpret words used by parties to ascertain objective intentions** **Questions of contractual interpretation are questions of mixed fact/law but there may be cases with extricable questions of law**
Facts	There was agreement pursuant to which Creston would pay Sattva finder's fee in relation to acquiring mineral property - Sattva to be paid finders fee equal to maximum under TSXV policy ($1.5 million USD) - Pursuant to agreement, Sattva could be paid in shares, cash or combo of cash and shares and if no affirmative election was made the default was payment in shares - As Creston was exploring acquisition, the trading of shares on TSXV was halted - The market price of shares is defined in agreement as price calculated on close of business day before the issuance of the press release announcing the acquisition - Issue is that number of shares depends on date (Sattva says Jan 31 which would give 11.5 million shares, and Creston argues it was payable no later than 5 days after closing and May 17 was closing which would give 2.5 million shares) - Parties enter arbitration under the arbitration act, Creston appeals and it goes all the way to the SCC
Issues	Under arbitration act, issue must be question of law - When should contractual interpretation be treated as question of law and when should it be question of mixed law/fact?
Analysis	Cannot point to many cases for precedential value because it is so highly fact-specific - Contractual interpretation is a question of mixed fact/law because aim is to determine objective intention of THESE parties but we do so by applying legal principles so it is mixed fact/law This is the case for 2 reasons: **1. Contractual interpretation has evolved to a practical, common sense approach not dominated by restrictive and technical rules** • Aim is determining objective intentions • Read contract as whole, give ordinary and grammatical meaning, consideration of surrounding circumstances • Contextual factors may include: purpose of agreement, nature of relationship, and potentially custom of market or certain industry in later ABCA case

	• This signals shift in Canada to more modern approach to contractual interpretation 2. **Questions of law are questions about the correct legal test, in contractual interpretation the goal of exercise is to ascertain objective intent which is a fact-specific goal, through application of legal principles of interpretation** • It may be possible to identify extricable questions of law from initial question of mixed fact and law (ie. Application of wrong legal principles) • Due to close relationship, however, this will be rare as it is very difficult to extract pure questions of law <u>The role of surrounding circumstances:</u> - Deepen understanding of parties intentions as expressed in contract - Cannot be used to deviate from text such that court creates new agreement - Vary from case to case - Knowledge that was or reasonable ought to have been in mind of both parties at or before date of contracting consists of objective evidence of background facts - Parol evidence rule precludes admission of evidence outside words of written contract that adds to, subtracts, varies, or contradicts contract wholly reduced to writing but can still be used for surrounding circumstances to interpret words <u>Application</u> Here, the BCCA erred in finding that construction of agreement was question of law - Interpretation requires relying on the relevant circumstances including the sophistication of the parties, fluctuation of share price, and nature of risk party assumes when accepting shares instead of cash - Here, no extricable question of law and arbitrator applied the correct principles
Holding	No extricable question of law, arbitrator applied correct principles so finding for P - BCCA erred in finding construction of agreement was question of law

Ledcor Construction v Northbridge Indemnity Insurance Co. / law or mixed fact & law in standard form contract?

Ratio	**Depending on precedential value, may be of interest to interpret standard form contract as a matter of law**
Issues	Whether interpretation of clause in standard form contract is question of law or mixed fact and law?
Analysis	Justice Wagner takes different approach than in *Sattva:* What is really depends on is what the precedential value of decision on the matter would serve - Would it be useful to opine on certain contractual interpretation because subsequent parties could rely on interpretation? - Interpretation of standard form can be of interest in the future, has precedential value - Understanding of factual matrix is crucial, but fact-specific nature of inquiry might be less relevant for standard form because: (1) non-negotiated and (2) precedential value in the future, setting terms on which parties will be subject to going forward
Holding	There is some value to treat as matter of law - This decision provides finality on how to interpret standard form, not just important to these parties but also for subsequent judges and lawyers

Ambiguity & *Contra Proferentem* Rule

Contra Proferentem Principle: ambiguity in written contract interpreted against party who drafted it and in favour of the other party

- **Ambiguity:** multiple reasonable interpretations, not resolved by general principles of interpretation
- Order of analysis:
    - Apply the general principles, determine from reasonable or objective perspective intention of parties
    - If cannot be resolved because of multiple interpretations, apply the *contra preferetem principle*
- Tendency to apply depends on multiple variables:
    - More likely to apply when drafting party in stronger bargaining position
    - Standard form agreement
    - Exclusion/limitation of liability clauses drafted by parties intended to limit their own liability for breach of contract (if exclusion is ambiguous, interpret in way that favours other party)

In ***DirectCash****:* principle should be employed as last resort measures when all other rules of contractual interpretation have failed

- A term in agreement between 2 parties separate from you should be used to interpret agreement between you and someone else
- Trial court failed to apply general principles of contractual interpretation and jumped too quickly to *contra preferentem rule*
- Main takeaway: idea of *contra proferentem* should be applied as last resort measures
    - First, apply the general principles of contractual interpretation to ascertain intentions and only if this fails, then apply the principle

Rationale for *Contra Proferentem:*

- Drafting party had opportunity to protect their interests through clear language
- Disincentivizes opportunistic use of ambiguous language

Strict Construction

Related to *contra preferentem principle* often applied in interpreting exclusion or limitation of liability clauses

- **Strict Construction:** unless exclusion says liability for negligence is included, courts will interpret this clause narrowly and view it as not including negligence
    - When it comes to exclusion clauses, very clear words must be used to protect one party from liability
    - *Canada Steampship Lines:* if you want to exclude liability from negligence, must say negligence (not enough to use general language)
        - Should be specific about kinds of liability you are trying to carve out and careful in saying what kinds of events would give rise to liability that you intend the clause to apply to
    - *Miida Electornics v Mitsui:* SCC took less restrictive approach
        - Given commercial context, applied the principle of interpreting the exclusion clause in light of the contract as a whole

Implied Terms

- **Implied by Statute:** default or mandatory
    - Can be default or mandatory terms unlike common law
- **Implied by Fact:** business efficacy/officious bystander
- **Implied by Law:** necessary for fair functioning of agreement given nature of relationship between the parties
- **Implied from Custom/Usage:** established cutoms or usages relating to terms on which parties deal in particular trades or commercial contexts

STANDARD FORM CONTRACTS & EXCLUSION CLAUSES

Freedom of contract allows parties to limit liability to each other

- Parties can effectively allocate legal risks as between themselves as part of a bargain
- The aim exclusion clauses = limit liability under specific circumstances
    - Can limit liability in tort or contractual liability

Standard form & exclusion clauses are useful tools to promote efficiency by reducing transaction costs entering into a number of contract

- The idea of standard form contract evolved over time, used to be the case that older standard form contracts incorporated standard clauses for typical industry practice/commercial practice
    - This was a move from 'standard clause in industry X' to 'If you want to use Gmail, you MUST accept standard form contract'
    - Problems arise when exemption asserted in standard form contracts with dominant bargaining position
    - Another issue is that exclusion clause purports to relieve contracting party of the very obligation that contract seemed designed to impose (undermines whole purpose of contract)

<u>Exclusion Clause Issues</u>

1. Incorporation: has exclusion clause been effectively included as term of contract?
    - When can they be included in unsigned and signed contract?
2. Interpretation: what does the exclusion clause mean?
3. Justification: Can an otherwise valid clause be rendered unenforceable because application is too unfair or contrary to public policy?

INCORPORATION: UNSIGNED DOCUMENTS

Main question: Did parties actually agree to the particular clause?

Thornton v Shoe Lane Parking Ltd. / exclusion of liability & reasonable notice

Ratio	**Exclusion of liability can be incorporated by reasonable notice to counter-party** - **Can be incorporated through signature**
Facts	Thornton was a freelance trumpeter of the highest quality, Shoe Land Parking owned a multi-story car park which uses automatic machine to issue tickets - Entrance had sign stating 'all cars parked at owners risk' - Thornton parked car in parkade but suffered bodily injury when he came back to collect his vehicle - Trial court held fault on part of both parties (D was negligence and does not contest this) - The ticket in small print on back excluded liability for this kind of action, saying 'conditions of issue as displayed on the premises' - The exempting condition was on a pillar opposite the machine and in paying office when about to leave but not visible when ticket was issued - Excluded liability for damage to vehicle and also injury to the customer, there was finding of fact that he did not read the terms on back of ticket
Issues	Are exempting condition part of the contract? - Incorporated into contract between Thornton and Shoe Lane?
Analysis (Denning)	Takes two approaches to the issue: 1. Ticket delivered by automatic machine • Offer: made by proprietor who holds out the machine as ready to receive money • Acceptance: when customer puts his or her money in the slot • Terms of offer contained in notice near machine stating what is offered, customer bound as long as they are sufficiently brought to this notice beforehand but not otherwise (not bound to terms on ticket if they differ as the ticket comes too late)

	• Any notice after acquiring the ticket is too late, no possibility for person to later object with automatic machine • Offer was contained in notice at entrance of the garage but interpreted as 'risk of owner for damage of car' • Just said 'AT OWNERS OWN RISK' and Denning interpreted this would just mean damage to the vehicle • Once offer accepted by P driving to entrance and taking ticket, contract is concluded and cannot be altered by words on printed ticket exempting from liability in negligence 2. The ticket cases of former times: ticket delivered by attendant • Offer: Issue of ticket by attendant was offer by company • Acceptance: customer taking/retaining ticket without objection • Customer bound by exempting condition if they know ticket is issued subject to it or if company did what was reasonably sufficient to give him notice of it • Under this approach, D admitted they did not do what was reasonably sufficient to give notice (nature of exemption clause here is so wide and destructive of rights, should not be bound unless drawn attention to it in the most explicit of ways) • A lot turns on 'reasonably sufficient notice' The whole question is whether exempting condition formed part of the contract - Denning says it did not, P did not know of condition and D did not do what was reasonably sufficient to give him notice of it
Holding	D cannot rely on the exempting condition to escape liability

Reasonable Notice

What amounts to reasonable notice is fact-specific

- Where person receiving document might reasonably assume that it has some other purpose than communicating contractual terms, more inclined to view reasonable notice not given
- Signage can be helpful but must be visible when signing
- Tickets designed to hide limitation with very small print may not fulfill the requirement
- Requirements of reasonable notice will escalate in proportion to the severity of the terms in question (more wide-ranging excluded liability, the more we expect in terms of reasonable notice)

INCORPORATION: SIGNED DOCUMENTS

Traditional Rule (*L'Estrange v Graucob*): when document with contractual terms is signed, then in absence of fraud or misrepresentation, the party signing it is bound and it is wholly immaterial whether he read the document or not

- There are situations, however, where insufficient notice of serious or unfair terms might case even a signed document into suspicion (*Tilden*)
- *Karroll* is the way to approach these issues now

Tilden Rent-A-Car v Clendenning / if onerous provision, obligation for reasonable notice

Ratio	**If there are onerous provisions, there is obligation to take reasonable steps to bring to attention of the other party (subsequently modified in *Karroll*)**
Facts	Mr. Clendenning signed car rental agreement and accepted additional insurance coverage - D signed agreement in presence of clerk, he did not read the terms before signing which was apparent to the clerk - He damages car in a collision, Tilden tries to rely on exclusion clause to argue he is liable for collision damages

	- On the front of agreement: 'Collision damage waiver by customers initials JC' and in consideration of payment, customers liability for all damages NIL' - On the back in small type: customer agrees not to use vehicle in violation of law, ordinance, rule of regulation of public authority and agrees vehicle not be operated by drunk or consuming liquor or under influence of any drugs - At trial, it was accepted he plead guilty to a charge of impaired driving but was not impaired and had control of the vehicle - He inquired about coverage before and they described as full non-deductible coverage - Practice for the company was that unless inquiries made, nothing said about exclusionary clauses and if inquiries made they were to advise there was complete coverage unless intoxicated
Issues	Whether D is liable for damage to car by reason of exclusionary provisions of the contract? - Did he actually assent to the terms in such a way that we can say it was incorporated into the terms of the agreement between the parties?
Analysis	Court looks to provisions of agreement, observes that they purported to limit liability and were inconsistent with the express terms purporting to provide coverage - The first term: if you pay $2 per day, your liability is NIL - However, then goes on to say there will be liability in a number of otherwise ordinary situations A number of normal situations were even included such as driven off roads not services by federal, provincial, municipal governments (if private road, no coverage) - Was so stringent that even if he had one drink he would have liability - Would have liability if he broke the law (even if he drove over speed limit by 1KM) A number of onerous provisions that were completely inconsistent with broad understanding of aim and purpose of the coverage - If D knew full terms, he would not have entered agreement and did not acquiesce to the terms A signature is only one way of manifesting assent, a formal indicator that someone has assented - Even if they signed agreement, but unaware of the stringency of the provisions, cannot say he was intending to be bound by the agreement - The courts view is that the company ought to have known he did not read it - That, along with the stringency of the provisions, means there was an obligation on part of the rental company to bring the provisions to his attention - No efforts were made by the company to draw attention to the onerous provisions, Tilden cannot rely on provisions they had no reason to believe Clendenning was agreeing to
Holding	In these situations, if party attempting to rely on exclusion of liability is seeking to rely on it and knew or ought to have known other party was not assenting to terms, then they have to take reasonable measures to draw terms to attention of other party - Rental company cannot rely on the clause - Clendenning not liable for damage to the vehicle

Karoll v Silver Star Mountain Resorts Ltd. / limits Tilden, creates test

Ratio	**There is no general requirement to take reasonable steps to bring onerous terms to attention or ensure they read and understand them** - **Only where circumstances are that reasonable person should have known party signing was not consenting to the terms in question that obligation arises**

	Test: **1. Apply the general rule from *L'Estrange*** **2. Ask if any exceptions apply** • ***Non est factum*** • **Where agreement was induced by fraud or misrepresentation** • **Where party seeking to enforce the document knew or had reason to know of the other's mistakes as to its terms, those terms should not be enforced**
Facts	Silver Star hosts ski race in their resort, Karroll wants to participate in the race and given a release to sign - Karroll signed document releasing the resort from liability, had previously competed in the race several times (5th time competing in the race) and signed same liability form - P broke leg during race in collision with another skier and alleged negligence on part of the defendant (D did not ensure course clear before sending her down) - D relying on the terms of release she signed, Karroll argues that she was not given adequate notice of content of release of liability nor sufficient opportunity to read and understand it Relevant part of the statement: - Release and indemnity PLEASE READ CAREFULLY: explicitly points to acts including negligence (in line with principle of strict construction) - Court describes form as clearly and emphatically labelled, only took a couple minutes to read
Issues	Whether P is bound by terms of release? - Karroll points to line of authority from Tilden, not bound because no reasonable notice and did not assent to the terms
Analysis	This decision acknowledges 2 lines of authority in tension: 1. First, build on rule from *L'estrange:* where party signs knowing it affects their legal rights the party is bound in absence of fraud or misrepresentation even if they have not read it 2. Second, including *Tilden:* the paryt seeking to rely on exclusion of liability which signing party has not read, must show he made reasonable attempt to bring the signing party's attention to the terms contained on the form if he wishes to rely on the release Court attempts to limit the scope of *Tilden* - Does not apply as a general principle any time there are onerous terms but have to see it as a limit proposition that applies in an order of analysis beginning with the traditional rule from *L'estrange* <u>Test:</u> 1. Apply general rule from *L'estrange* 2. Ask if any exceptions apply • *Non est factum:* signature not representative of the signer's genuine act ▪ Very particular kind of fraudulent inducement going to nature of document being signed (Ie. Led to believe contract to sell land is actually selling shares) ▪ Contract is void • Where agreement has been induced by fraud or misrepresentation • Where party seeking to enforce the document knew or had reason to know of the other's mistakes as to its terms, those term should not be enforced (*Tilden,* more of an exception to the general rule, have to inquire as to whether person seeking to enforce the clause knew or had reason to know of the other mistakes)

	Various factors for determining whether reasonable steps needed: - Effect of clause in relation to nature of contract (whether effect runs contrary to parties normal expectations for a contract of this sort) - Length and format of contract - Time available for reading and understanding the contract Asking when, from reasonable perspective, the party seeking to rely on provision must take reasonable steps to advise signing party of the relevant terms/clauses <u>Application</u> The plaintiff signed release knowing it would after her legal rights - She is bound under *L'Estrange* unless an exception applies - Does it fit under the 'refined third category' under *Tilden?* • The question is (1) would a reasonable person have known she did not intend to agree to the terms and (2) the D failed to take reasonable steps to bring to her attention? • Court says these facts do not fall within the scope of the exception: release consistent with scope and purpose, enabled P to engage in hazardous activity and limitation for D needed to make this possible, release was short and clear, release was easy to read and no fine print, these releases are necessary for these activities to be practicable, signing these releases is common and she signed them at least 4 times before • From the ski resorts perspective, she knew what she was doing when signing the release, did not need to take reasonable steps to bring contents to her attention to ensure she read it fully Even if wrong, they took reasonable steps and did discharge the obligation - Not even triggered obligation because of nature of contract, relation to the purpose, other surrounding circumstances, and fact she participated in similar kind of events before - They did take reasonable steps to bring to her attention (clearly written, quick, easy to read, short, etc.)
Holding	Bound by terms of release, can rely on the exclusion from liability clause

Fundamental Breach

Doctrine of Fundamental Breach

Party could not rely on exclusion clause, however widely expressed, whether it had committed fundamental breach of contract

- This was the old/confusing articulation of the rule – what was fundamental?
- Changed to → ask whether breach falls within scope of clause drafted, turning on contractual interpretation
    - Lord Denning later resurrected the doctrine as the idea is that party should not have benefit of contractual protection when failing on core/fundamental commitment that the contract is about
- In many Canadian jurisdictions, legislation deems exclusion clauses void in consumer contracts
- In *Tercon,* SCC attempted to 'shut the coffin on the jargon associated with fundamental breach'
    - Categorizing contract breach as fundamental or immense or colossal is not helpful
    - Court has no discretion to refuse to enforce unless P can point to paramount public policy consideration overriding the public interest in freedom of contract and defeats otherwise what would be contractual rights of the parties

Tercon Contractors v BC / fundamental breach

Ratio	**3 Step Framework:**

	1. First, ask whether as matter of contractual interpretation the exclusion clause applies to the circumstances established in the evidence **2. Second, ask whether the exclusion clause was unconscionable at time the contract was made 'as might arise from situations of unequal bargaining power between the parties'? (Cite *Uber v Heller*)** **3. Third, where exclusion clause is valid and applicable, should it nevertheless not be enforced because of overriding public policy (proof lies on party seeking to avoid application) that outweighs the strong public interest in enforcement of contracts**
Facts	Province of BC engaging tender process - Tercon submitted bid in response to Ds requests for proposals - Province of BC accepted bid from bidder not eligible to participate in the tender and took steps to conceal the fact - Court found that D had breached tender contract by considering bid from ineligible bidder (accepted bid from those submitting as joint venture which was not in accordance with the requirements) - However, the RFP including an exclusion clause that read as follows: no proponent shall have any claim for compensation for any kind whatsoever result of participating in the RFP - D argues that exclusion clause shields from liability for breach of contract
Issues	Whether exclusion clause operates to successfully prevent D from liability?
Procedural	Trial: - Exclusion clause does not bar recovery, clause was ambiguous and applying contra proferentem resolved ambiguity in P's favour - Further, Ds breach was fundamental and therefore not fair or reasonable to enforce the exclusion clause
Analysis (Majority)	Adopts framework from the dissent but disagree on first step of framework - Proper interpretation of exclusion was not intended to capture conduct of D giving rise to liability here - Exclusion protects D from claims from participating in RFP but could not have intended participation to include selection of non-conforming bidder (once accepted, they can no longer say you are participating the RFP – undermined very premise of their own RFP process) - Further, words of the clause not effective to limit liability for breach of implied duty of fairness to bidders Have to interpret provision in light of words used, in harmony with rest of. Contract and in light of its purpose in commercial context - Whole point of tender process is to set grounds for eligibility to engage in bidding for contract, now trying to exclude liability for not following process - Process which would include other non-eligible bidders would not be a process called for by the RFP - Fact that minister had approved closed list of participants strengthens the usual inference the use of different words was deliberate so as not to exclude compensation for a departure from the basic eligibility requirement - If it was broad enough to exclude compensation for allow ineligible bidders to participate, there is little purpose for clause reserving D's unilateral ability to cancel the RFP and issue a new one to wider circle of bidders (this goes against a different clause in the agreement)

	Contra preferentem: even if this isn't the right interpretation, then language of the clause is ambiguous and participating in this RFP should be interpreted in Ps favour and exclude compensation for liability resulting from the D's selection of ineligible bidder - The clause has multiple reasonable meanings so is ambiguous - In this case, apply contra preferentem and find in favour of P
Analysis (Dissent - Binnie)	Lays out the analytic framework to approach these issues: 1. First, ask whether as matter of contractual interpretation the exclusion clause applies to the circumstances established in the evidence 2. Second, ask whether the exclusion clause was unconscionable at time the contract was made 'as might arise from situations of unequal bargaining power between the parties'? (Cite *Uber v Heller*) 3. Third, where exclusion clause is valid and applicable, should it nevertheless not be enforced because of overriding public policy (proof lies on party seeking to avoid application) that outweighs the strong public interest in enforcement of contracts <u>Application</u> 1. As matter of interpretation the exclusion clause even applies to the circumstances: participating in the RFP began with submitting a proposal not just selecting a winning big • P did participate in RFP and their bid was considered • The assertion that RFP process ceased to be RFP when accepted invalid bid is a strained and artificial interpretation • Participation begins with submitting proposal not just selecting winning bid and there is clearly participation in RFP on part of Tercon so the clause applies 2. Whether exclusion clause was unconscionable at time the contract was made • There was no inequality of bargaining power here, while Tercon did not have same power they are a big player with experience in the place and have been through the process before • Discuss test articulated from *Uber v Heller* for inequality of bargaining power • Dissent views this as not unconscionable 3. Should the exclusion clause nevertheless not be enforced because of public policy? • No, there is public interest in fair and transparent tendering, it cannot defeat the enforcement of contract A, there was an RFP process and P participated in it • D's conduct, while breach, was not conduct so extreme as to engage in some overriding and paramount public interest in curbing contractual abuse • Based on jurisprudence, the D's misconduct did not rise to level where public policy would justify court depriving D of protection of the exclusion clause freely agreed to by P in the contract Dissent finds in favour of D based on the 3-step framework
Holding	If they held that selection of ineligible bidder was part of the RFP process, this would be contrary to express terms of contract read together with aim and purpose of contract and given the commercial context in which contract designed to operate - Clause properly interpreted did not apply to facts and ended at the first stage

Public Policy – what kinds could outweigh the public interest in enforcing freely-entered contract? (Addressed by Binnie in dissent)

- Public policy should only be invoked in clear cases where harm to public is substantially uncontestable and does not depend on idiosyncratic inferences of a few judicial minds
    - Conduct approaching serious criminality or egregious fraud are examples of substantially incontestable considerations that override freedom of contract

        - Contract breaker's conduct need not rise to criminality or fraud to justify finding
        - Egregious public harm such as: toxins in cooking material sold to consumers, toxins in baby formula
    - Cites ABCA *Plas-Tex Canada* where D was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit assistance of the court
        - D provided plastic resin here and pipeline degraded causing significant damage and risk
    - Potentially could argue *Bhasin* where court held there is a duty of honest performance that applies to all contracts
        - Not an implied term such that it can be contracted around by law or fact
        - Is there an argument to be made that if fraud amounts to dishonest performance and this is a recognized duty not simply an implied term, would exclusion of liability clause operate to limit liability for dishonest performance?
        - Could argue that you could not allow the exclusion of liability clause to operate

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Exclusion Clause Analysis – Summary

1. Is exclusion clause incorporated into the contract?
    - Look to *Thornton, Tilden, Karroll:* was clause incorporated by signature or notice?
    - If no, then not part of contract but still argue in the alternative in an exam
2. If yes, did parties intend that exclusion clause apply to the circumstances/conduct at issue?
    - Turns on interpretation of exclusion clause
    - See Binnie and Cromwell's interpretation in *Tercon*
    - Consider principles of interpretation and *contra proferentem*
3. If yes, was exclusion clause unconscionable at time contract was made?
    - See *Uber v Heller* (inequality of bargaining power and improvident bargain)
4. If no, assuming clause is valid, is there overriding public policy reason that would justify refusal to enforce?
    - See SCC discussion in *Tercon* (was party relying on clause contemptuous of its contractual obligation and reckless as to consequences of the breach as to forfeit assistance of the court and the other considerations in the decision)