LAW 5115 002 CONTRACT LAW SUMMARY FALL 2018

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PROFESSOR G. DEMEYERE

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# Contracts Generally

To determine if there is a contract you must consider:

1. What is intent? (To create legal relations)
2. Was there an offer?
3. Was there acceptance?
4. Was there consideration?

Also consider if promise was under seal (if so then it is binding)

## Bilateral Contracts

Bilateral = Promise exchanged for promise.

* *B’s Offer*: “I promise to sell you my Phone tomorrow for $250”
* *A’s Acceptance:* “I agree to paying $250 for your phone tomorrow”
* Acceptance communicated to offeree – no act has been initiated

## Unilateral Contract

Unilateral = Promise exchanged for completion of an act.

* *B’s Offer*: “I promise to pay you $100 if you mow my lawn by Friday”
* *A’s Acceptance:* Mowing the lawn (must be completed for it to be acceptance, otherwise its not)
* Unilateral contract offer can be withdrawn before performance, which is considered acceptance
* Offer can be revoked at any time before completion but NOT DURING performance – must look at language of offer – was it complete performance or starting performance

# Intention to Create Legal Relations

* liability in contract is thought to be voluntarily created by the parties themselves
* parties to a contract must intend to create legal relations
* closely associated parties (such as social or domestic arrangements) will be presumed NOT to intend legal relations, in the absence of evidence to the contrary
* law employs an objective test of intention, so the criterion of *animus contrahendi* does nor ensure the subjective voluntariness of contractual obligations

## Personal Relationships: Social

### *Balfour v Balfour (1919)* (pg 244): Social arrangement presumed not binding unless this presumption rebutted

* **Ratio: Social arrangements are usually not legal contracts as parties did not intend to be legally bound. “Intention” is measured objectively and for social arrangement to be binding there needs to be objective intention it was meant to be binding aka rebuttal of this presumption. In domestic sphere, there is a presumption that promises made in amity, where the parties are getting along, do not give risk to legal obligation. However, this presumption is rebuttable.**
* Facts: Husband promised to pay 301 a month to wife until she returned home. The couple later separated. Wife sued for restitution of conjugal rights. Trial judge held that the husband was obligated to support his wife. Husband appeals.
* Issue: Is the promise one in which there was an intention to create legal relations?
* **Held: Husband owes wife noting as there is no contract. Wife failed to rebut the presumption that the intention of husband was to be legally bound by a contract.**
* **Reasons: There are agreements between parties which do not result in contracts in the eyes of the law, even if there is what what would between other parties be consideration for the agreement. Although there are mutual promises, they are not contracts because the parties did not intent that they should have legal consequences. If there were a contract, the wife could due if the husband fails to supply it, and he could sue her for non performance of the express/implied obligation she undertook. Courts have no business interfering in the way in the domestic sphere.**

### M(N) v A(AT) (pg 238): Social arrangement presumed not binding unless this presumption rebutted

* **Ratio: Social arrangements are not binding unless parties intended there to be a legal relationship. Estoppel is not a cause of action but a defence (shield not a sword).**
* Facts: Man tells woman to come live with him in Canada and hell pay for her house. She quits job and moves. He only gives her 100k loan and eventually kicks her out. She is suing for something, as she feels she quit the job due to his promise
* **Held: She gets nothing. There were no intention for this to be a legal relationship so there was never a binding agreement. Estoppel is also not a cause of action, but rather only a defense in Canada. Therefore it cannot be used here to get money.**

## Business Relationships: Commercial

### *Rose and Frank Co v JR Crompton and Bros Ltd* (pg. 248): Commercial presumed binding unless rebutted

* **Ratio: it is assumed that parties in business relationships intend to be bound. If something expressly states in agreement they do not wish to be bound, courts must respect their intentions (this rebuts the initial presumption). In the commercial sphere, there is a presumption in favour of the intention to create legal relations. However, this is rebuttable (e.g. where parties explicitly state that a written agreement is not a contract, then the agreement is not a contract).**
* Facts: Plaintiff was the sole agent selling the defendants paper products in the US. The companies signed a written agreement that looked like a contract but contained a clause stating that it was not binding.
* Issue: Was the agreement a contract?
* **Held: Parties clearly rebutted the presumption of legal intention with clause stating that it was not. No legal remedy for non delivery**
* **Reasons: The clause in question shows an intention by the parties that their agreement shall not be legally enforceable**

### *Toronto-Dominion Bank v Leigh Instruments Ltd* (Trustee of) (pg 250): Comfort letters not legally binding

* **Ratio: Comfort letters not legally binding. When sophisticated parties reach an agreement and the language of that agreement does not give rise to legal obligations, a contract is not created**
* Facts: TD loaned Leigh a significant sum of money. Leigh was controlled by the Plessey Company. When securing the loans, Plessey provided letters of comfort to TD.
* Issue: Was there a legally binding contract between Plessey and TD by which Plessey agreed to guarantee the loans made to Leigh?
* **Held: There was a rebuttal in one of the comfort letters so not legally binding. No contractual obligation enforceable in law. Appeal dismissed. Affirmed the lower court’s order dismissing the Bank’s action.**
* **Reasons: Eli Lily and Co v Novopharm (1998)- contracts are to be interpreted as follows: bearing in mind the relevant background, the purpose of the document, and considering the entirety of the document, what would the parties to the document reasonably have understood the contested words to mean? TD knew the letter of comfort was not security and that its commercial value depended on the relationship that existed between the lender and the provider of the letter. Plessey would not provide guarantee on loans made to Leigh by the bank, and TD knew this. Therefore, neither party intended for legal relations to be created.**

# Offer

Defined: “Expression of a willingness to be bound to contract on certain terms.” Needs a willingness to be bound, which can be shown through conduct.

To constitute an offer it must be interpreted as such by a reasonable person. Offeror must communicate their offer directly to that who the offer Is direct for it to be an offer. Meeting of the minds: two people have come together and on the same terms.

### *Williams v Carwardine (pg 48):* Motive is irrelevant in accepting an offer | & | Knowledge of an offer is needed for it to count as an offer

* Ratio: You must have knowledge of an offer to accept it and the motive of completing performance does not impact a person’s right to a reward. Provided that the offeree fulfills the contract, motive/intention for accepting a contract does not impact the person’s right to collect under that contract. It is sufficient for the offeree to have knowledge of the offer. Note: mote is irrelevant whether dealing with a unilateral offer communicated by performance, or a bilateral offer communicated by acceptance (knowledge and intent to create legal relations still matter)
* Facts: Plaintiff was examined in connection with a murder, but did not provide any information leading to the apprehension of the offender. Defendant later published an ad stating that a 20l reward would be given to anyone who provided information that could lead to the discovery of the murderer. The offender beat the plaintiff because he was aware that the plaintiff witness the murder. The plaintiff, thinking she was lose to death, gave information that led to the conviction of the murderer. She gave information to clear her conscience.
* Issue: Is tent relevant when determining whether there was acceptance of an offer?
* **Held: valid contract formed. Yes she is entitle to reward. All that matters is that 1. She knew about the offer (yes) and 2. That she met the conditions of the unilateral offer (yes again). Motive in acceptance is irrelevant. Therefore she is entitled to reward.**
* **Reasons: Performance is acceptance of a unilateral contract. The offer was made with the intention of create legal relations.**

### *R v Clarke* (pg 50): Knowledge of an offer is needed for it to count as an offer

* **Ratio: You need to know about an offer to accept it. If you have no knowledge of an offer you cannot accept it and therefore there can be no binding contract without knowledge of the offer. Intention/motive is irrelevant for the acceptance of an offer. Knowledge is sufficient.**
* **Obiter: Forgetting something is the same as not knowing it existed**
* Facts: Crown proclaimed a reward to anyone who gave evidence leading to the arrest and conviction of the person or persons who committed the murders. Large gave evidence that was of value to the Crown. Clarke had seen the proclamation, but had offered up the information in order to protect himself against the false charge of murder. After the failure of the appeal, Clarke, on the suggest of an Inspector, for the first time thought of the reward and decided to claim it. Crown refused to pay.
* Issue: Was there a contract between Clarke and the Crown?
* **Held: Judgement for the Crown. No, he is not entitled to the money. How can you accept an offer that you didn’t know existed?**
* **Reasons: Plaintiffs info did not satisfy the requirement of the offer; the info he provided only led to the conviction of 3/4. Distinguished from Williams, because the offer in this case said “info as shall lead to arrest/conviction of murderers” not “info as may lead”**

### *Christie v York Corporation 1940 SCC:* Quebec Freedom of Commerce: any merchant is free to deal as he chooses with any individual member of the public

* **Facts: Christie was a black man who entered a tavern in Montreal and asked to be served a glass of beer. The waiters refused for the sole reason that they have been instructed not to serve coloured people. Christie persisted in demanding a beer and went to the length of calling the police. He claimed the sum of $200 for the humiliation he suffered. York alleged that in giving such instructions to its employees and by refusing to serve Christie, it was well within its rights; that its business is a price enterprise for gain and that the business was simply protecting its own business interests. TJ found in favour of Christie in the amount of $25 and Christie appealed.**
* **Issue: Has the tavern owner the right to refuse to sell beer to any one of the public?**
* **Held: Appeal dismissed, finding for respondent. Respondent was within his rights as there was no legislation governing this case**
* **Ratio: Freedom of contract allows discrimination based on race so long as the vendor is not engaged in a monopoly or in contravention of public order. Any merchant is free to deal as he chooses with any individual member of the public.**
* **Reasons: Falls under the principle of commerce under Quebec Licensing Act.**

## Unilateral Contracts

Unilateral contract is essentially where: completed performance = acceptance

### *Carlill v Carbolic Smoke Ball Co 1893* (pg 28): if offer is unilateral, acceptance will occur with performance

* **Ratio: Fulfilling the conditions of a unilateral offer constitutes acceptance. An offer of a unilateral contract gives risk to a unilateral contract upon acceptance or performance. An an can constitute an offer of a unilateral contract if it expresses a willingness to be bound, and if performance of the conditions is sufficient acceptance.**
* Facts: Carbolic places an ad in the paper which states that a 100l reward would be paid to anyone who caught cold after having used the ball 3x a day for 2 weeks. Plaintiff saw the ad and bought the defendants ball. she used it as directed for 2 months. While using the ball, she caught influenza. TJ decided in favour of plaintiff. Defendants appeal.
* Issue: (1) Did the ad constitute an offer? (2) If the ad was an offer, could it give risk to a unilateral contract? (3) Does notice of acceptance have to be communicated?
* **Held: Yes. It was a unilateral contract, person performed and therefore did not need to ‘accept’ as performance is acceptance. The ad was worded in a way that made it seem they were intending to be bound to the offer. They get the money. Judgement for plaintiff**
* **Reasons: Ad was intended as an offer and suggests a reward would be paid per the terms (reserving the money at the bank shows intention). This is not an offer to the whole world. It is only an offer to anyone who, before it is retracted, performs this condition. It is a contract the moment the person fulfils the condition. The person who makes the offence may dispense with notice to himself.**
* **Consideration: Any act of the plaintiff from which the defendant derives benefit or advantage or any labour, detriment or inconvenience sustained by the plaintiff, provided that such act is perforce, with constant of the defendant. It is consideration enough that the plaintiff took the trouble of using the ball. But the defendant also benefitted from this because it would promote their sale**

### *Goldthorpe v Logan* (pg 33): \*Bad law avoid for exam!

* **Facts: Female appellant had hair on face and wanted them removed. She saw ads in the paper by Anne Graham Logan. Plaintiff went to the place, spoke to an employee of Logan who said that the hair could be removed and the result was guaranteed. Plaintiff was told that there would be no pain, marks or scars. The hairs were not removed and plaintiff’s husband also said he suffered damages. Plaintiffs claim they eat into a contract expecting safe service with guaranteed results.**
* **Held: There was an a agreement made and it is enforceable by the law**
* **Ratio: An advertisement constitutes an offer than can be accepted on the terms if it outlines/shows and the offeror beats the risk if the promises are extravagant or unlimited in nature.**
* **This is an example of a bilateral contract rather than a unilateral contract such as in Carbolic Smoke Ball. This case was rightly decided but for wrong reasons (do not cite for the exam)**
* **Damages: she was provided damages for where she was prior to the contract but this reasoning is wrong. She should have been provided damages for where she would be IF the contract was performed.**

### *Leonard v Pepsico Inc*: Example of an advertisement that is NOT a unilateral contract

* **Ratio: Advertisements are usually not unilateral offers. Standard used to determine if an ad constitutes an offer: would a reasonable person understand this to constitute an offer?**
* Facts: Defendant advertised their pepsi point rewards. Ad stated that 7, 000, 000 points could get you a harrier jet. The harrier jet was not listed in pepsi’s reward catalogue. The plaintiff tried to obtain the harrier jet by sending in his points and a cheque for the outstanding money needed to obtain it. Defendant reused to deliver the jet. Plaintiff is suing for the jet
* Issue: Does the TV ad constitute an offer?
* **Held: Not an offer, judgement for the defendant. Not a unilateral contract. Reasonable person would not think it was one or that military jet was being give. The ad is invitation to treat the actual offer, which would be the Pepsi catalogue with the prizes.**
* **Reasons: Court does not find that this ad constitutes an offer. A reasonable person would not have taken the ad seriously, as an expression of an offer. No intention to create legally binding contract.**
* **Distinguished *Carlil*, where there was a unilateral offer, and the ad actually showed that the company was serious (they had put money aside)**

## Bidding/Tendering Process

### *R. v Ron Engineering & Construction* (pg. 36): Basic Foundation of Tendering: Contract A/Contract B

* **Ratio: Bids (per conditions set out in tender process) are binding if they comply with the tender process The initial call for tenders was an offer to engage in a unilateral contract**
* Facts: Contractor submitted a tender along with a certified cheque (tender deposit). After tenders closed, the contractor submitted a telex request to withdraw its tender, explaining that it had left out a significant figure for own forces work in its tender. The Contractor is requesting return of the tender deposit.
* Issue: Was the initial call for tenders an offer to engage in a legally binding agreement?
* **Held: There were conditions that would allow them to get deposit back, but they were not met and therefore they don’t deposit back. Tender process creates two contracts. Also established Contract A and Contract B rules:**
  + **Contract A: Call for tenders is the (unilateral) offer - Performance here is submission of a bid, which equals acceptance (The acceptance is understanding that if their bid is chosen, contract B forms). Created and executed upon the bidder’s tender submission, becomes a unilateral contract upon the tender submissions. Performance is acceptance.**
  + **Contract B: The call for tenders is invitation to treat. Any submitted bid is an offer. The company who called for tenders now accepts one of these bids to complete contract B. Contract B is the contract being B on and is executed upon acceptance of tender submission.**
  + **Contract A was an offer, an innovation to treat for Contract B. Contract B binds both parties**

### *M.J.B. Enterprises Ltd v Defence Construction* (1951) Ltd (pg 39): Non-compliant bids cannot be selected

* **Ratio: Non-compliant bids cannot be selected, even in the presence of a privilege clause. There is implied term in contract A that only compliant bids will be selected for contract B. A privilege clause does not override the implied obligation to a accept only compliant bid. However, it does allow the owner discretion in choosing a compliant bid that is not the lowest tender.**
* Facts: Respondent invited tenders for construction. Tender instructions had a privilege clause stating “the lowest or any tender shall not necessarily be accepted”. The contractor with the lowest bid submitted a written note (a qualification that invalidated its tender), but the respondent accepted its tender. Appellant provided the second lowest bid. Appellant sues for breach of contract
* Issue: Does the inclusion of a privilege clause allow the respondent to disregard the lowest bit in favour of any other tenders, including a non compliant one?
* **Held: DC can not accept the bid they did as it was not valid. Privilege clause is only compatible with compliant bids and only valid bids can be accepted, regardless of what the privilege clause says. Risk and effort to complete compliant tender is large, so allowing invalid bids would go against the fairness of the entire process.**
* **Reasons: By accepting a non compliant bid, the defendant breached the contract. Note: expectation damages will put the complainant in the position they would have been if there was not a breach. Note: other contractors could sue for breach of contract, they would only get nominal damages (meant to compensate for a legal wrong, but not anything else)**

## Invitation to Treat

A response to an invitation to treat cannot be legally binding. It would only lead to an offer, at which point (with acceptance) it could become legally binding.

### *Pharmaceutical Society of GB v Boots Cash Chemists (Southern)*(pg 23) At self serve stores contract completion occurs at cash register.

* **Ratio: Goods on shelves of self-serve store are an invitation to treat. Contract completion occurs at cash register. The display of goods is presumed to be a mere invitation to treat. Bringing an item to the cash desk constitutes an offer to purchase the item, which the shop keeper (or other authorized person) can accept.**
* Facts: Defendants (Boots) operate a self serve pharmacy. Pharmacist supervised only the part of the sale that tok place at the cash desk, at which point he was authorized to prevent any customer from removing any drug from the premises (as he saw fit). Two customers bought substances that were included on the “Poisons List.”
* Issue: Is a contract completed when an article is put into the cart, or is it only complete when the shopkeeper accepts the offer?
* **Held: Drugs on shelves are invitation to treat not an offer. Offer is when customer places goods by cash register. Acceptance is when pharmacist agrees to sell for price. Therefore contract was completed when it was bought at the cash register, which was under the supervision of a pharmacist. There is no issue.**

# Acceptance

## Counter-Offer

### *Livingstone v Evans (pg 53):* A counter offer kills an offer |&| A dead offer can be renewed

* **Ratio: Counter-offer kills an offer, but a dead offer can still be revived. To kill an offer, the counter-offer must meet requirements of an offer though. Counter offer constitutes a rejection of the initial offer, unless the wording of the counter offer specifically allows for acceptance of the initial offer.**
* Facts: Defendant wrote to plaintiff offering to sell him land for $1800. Plaintiff wrote back offering $1600 cash and requesting the lowest cash price. Defendant replied that price could not be lowered. Plaintiff wrote back accepting the offer. Defendant no longer wants to sell the land to the plaintiff.
* Issue: Does the plaintiff’s response to defendants offer constitute a counter offer? Is a counter offer a rejection of the initial offer?
* **Held: Yes it is a contract. $1600 from L was a counter offer, which killed initial offer of $1800. E saying cannot reduce rejects $1600 counter-offer (killing it) and re-offers the initial $1800. This means L could accept $1800 and he did. Therefore binding contract. Binding contract for the sale of land to the plaintiff for which he is entitled to specific performance**
* **Reasons: Counter offer constitutes a rejection of the defendants initial offer. But, the defendants reply indicated that he was willing to stand by his initial offer. If the defendant did not wish to renew his initial offer, he should have explicitly stated that, instead of using ambiguous language. There was “consensus ad idem” a meeting of the minds.**

## Battle of the Form

### *Butler Machine Tool Co v Ex-Cell-O Corp. (pg 56):* When final form is sent and received with no objection contract is formed

* **Ratio: Once the last form is sent and received with not objection, a contract is formed. In a “battle of forms”, must look at all forms and circumstances in order to determine whose terms prevail.**
* Facts: Seller offered to sell a machine. Their T&C stipulated that the sellers T&C would prevail over any T&C in the buyer’s order. Buyer submitted an order form with a tear off slip which the sellers were invited to use to a accept the order (but on buyers T&C). Sellers used the slip to a accept the order. Upon delivery, sellers requested an additional sum.
* Issue: Which parties T&C clause prevails?
* **Held: Appeal allowed, Judgement for the buyers. You must look at all the documents as a whole, and not just say “the first or last company that says my terms overrule yours” prevails. Here, the first offer (with the terms from the first company) was rejected as a result of a counter-offer with the terms of the other company. As it was this counter-offer that was ultimately agreed to, that is who wins the battle of forms. This last sheet was torn off and submitted, which also tipped the scale in favour of the one side. They didn’t just submit it, but there was an action involved.**
* **Reasons: Buyer’s document was concise and agreeable. Sellers act of using the buyer’s slip and returning it to the buyer constitutes acceptance; suggests the buyer’s terms prevail.**
* **takeaway: courts will try to reconcile all of the terms. It is not first shot or last shot, instead it is something that stands out or communicates that the term was important to one party or another and that was given to the other party**

### T*ywood Industries v St. Anne-Nackawic Pulp & Paper* (pg 58): Terms cannot be snuck into contracts without notification | & | Conduct of parties can be used to determine essence of the contract

* **Ratio: If changes in terms are being made, the other party must be notified. Must look at the parties understanding of what the contract was; cannot “sneak” terms into a contract without obtaining acknowledgement of the terms.**
* Facts: Defendant submitted a purchase order to the plaintiff with T&C containing a new arbitration clause. The defendant requested that the order be signed and mailed back by the plaintiff. Plaintiff did not sign the order form, but delivered goods to the defendant. Plaintiff brings this action for the price of the goods sold.
* Issue: Whose T&C apply?
* **Held: Defendants application for stay dismissed. The 12 terms and conditions prevail, not the modified one by St.Anne that said arbitration. Tywood never returned a copy of acceptance and St. Anne never complained. This means the first agreement is binding and not the second as Tywood never agreed to the new terms. Even though it was commercial transaction, the conduct of the parties made it seem like all that mattered was specifications and price.**
* **Reasons: Plaintiff never signed the purchase order, and the defendant never said anything about it. Therefore, the arbitration clauses can be viewed as unimportant.**

### *Pro CD v Matthew Zeidenberg and Silken Mountain Web Services* (page 61): Shrink-wrap licenses constitute a reasonable offer and confirming such a license constitutes acceptance

* **Facts: The plaintiff, has compiled a database of telephone directories that can be searched based on criteria that the user enters. The main commercial use of the software is to compile lists of potential customers, but it is also used as an electronic phone book by consumers. Pro CD engaged in price discrimination, selling its database to consumers for a much lower price than to commercial users. For consumers to use the software, they had to agree to a licenses which is encoded on the CD and printed in the manual. The license appears on the computer screen every time the software runs and informs users of the limited use of the problem to non-commercial purposes. Defendant purchased the software as a consumer, ignored the software license, and created a database online where people can purchase the same information for a price lower than that of ProCD. District court held that shrink-wrap licenses are not contract because the licenses are inside the box and said that the purchaser does not agree and cannot be bound by terms that were secret at the time of purchase. Pro CD appeals.**
* **Ratio: Shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general.**
* **Held: Appeal allowed.**
* **Reasons: UCC permits contracts to be formed in different ways and ProCD proposed a different way and Zeidenberg agreed by using the software. A buy accepts good when, after an opportunity to inspect, fails to make an effective rejection. ProCD extended an opportunity to reject if a buyer finds the license terms unsatisfactory and Zeidenberg, tried the software, saw the licence and did not reject the product.**

## Termination or Withdrawal of Offer

### *Livingstone v Evans (pg 53):* A counter offer kills an offer |&| A dead offer can be renewed

* **Ratio: Counter-offer kills an offer, but a dead offer can still be revived. To kill an offer, the counter-offer must meet requirements of an offer though. Counter offer constitutes a rejection of the initial offer, unless the wording o the counter offer specifically allows for acceptance of the initial offer.**
* Facts: E wrote to L offering to sell land for $1800. L says will give $1600, send lowest cash offer. E says “cannot reduce.” L then accepts initial $1800. E does not want to sell to L though. Is this a contract?
* **Held: Yes it is a contract. $1600 from L was a counter offer, which killed initial offer of $1800. E saying cannot reduce rejects $1600 counter-offer (killing it) and re-offers the initial $1800. This means L could accept $1800 and he did. Therefore binding contract.**

### *Dickinson v Dodds (pg 99*): Offeror can withdraw offer at any point until offeree has accepted

* **Ratio: Offeror free to withdraw offer at any time until it has been accepted. A nudum pactum (naked promise) is a promise without consideration, and it not legally binding.**
* Facts: Defendant offered to sell his property to the plaintiff, and told him the offer would stand until Friday On Thursday, the plaintiff was informed that the defendant sold the property to someone else.The plaintiff then tried to give the defendant formal acceptance, but the defendant declined. Plaintiff bought an action seeking specific performance
* Issue: If an offer has been made for the sale of property, and before that offer is accepted, the perform who made the offer enters a binding agreement to sell to someone else, afterwards, can the initial person to whom the offer was made making a binding contract by acceptance?
* Held: No binding contract for sale of property to plaintiff. Judgement in favour of defendant. An offer cannot constitute an agreement on its own. Dickinson never agreed to anything so Dodds was not bound to wait. No meeting of the minds obviously as Dodds sold it to someone else.
* Reasons: Although the defendant said he would leave the offer open until Friday, he was not bound to do so. It was a naked promise. Analogy of accepting an offer after someone dies (impossible)

### *Byrne v Van Tienhoven (pg 103):* Withdrawal of an offer must be communicated & received by offeree so that they have knowledge of it

* Ratio: The withdrawal of an offer does not follow postal rule, and just posting it is not sufficient communication. Offeree must have knowledge of it to count. To be effective, a withdrawal (revocation) of offer must be communicated to the offeree (postal rule is not applicable to the withdrawal of an offer)
* Facts: Oct 1 🡪 Defendants mailed an offer to sell merch to plaintiffs. Oct 8 🡪 Defendant mailed revocation of offer. Oct 11 🡪 Plaintiffs received offer and immediately accepted by telegram. Oct 15🡪 Plaintiff confirmed acceptance by letter. Oct 20 🡪 Plaintiff received revocation; but Plaintiff had already sold merch to third party. Plaintiff brought action against defendant for breach of contract for failure to deliver
* Issues: Was posting a letter of withdrawal enough or did the plaintiff need to receive it?
* Held: Contract was complete and binding on both parties when entered on October 11. Judgment for the plaintiff. Although withdrawal was technically sent before acceptance, for it to have killed the offer it would have had to reach offeree prior to acceptance. Acceptance here was made as soon as it was posted (postal rule) and prior to receiving the withdrawal, therefore the contract is binding.
* Reasons: An uncommunicated revocation is no revocation at all. Legal principles and practical convenience require that a person who has accepted an offer not known to have been revoked shall be in a position to act upon the basis that the offer and acceptance constitute a binding contract.

### *Errington v Errington & Woods (pg 104*): A unilateral contract can only be revoked if the party does not live up to their side of the contract

* **Ratio: Unilateral contract cannot be revoked if party is performing. Once performance has begun, a unilateral contract can only be revoked by the offeror if an offeree does not live up to the terms of the contract**
* Facts: Father bought house for son and daughter-in-law. Gifted them the down payment, and promised that the house would be their once they paid off the mortgage. Most of the mortgage was repaid. Upon his death, the father’s widow is suing in order to obtain property
* Issue: Can a unilateral contract be revoked after the death of the offeror?
* Held: Appeal dismissed. Son cannot be ejected. No order of possession made. House is hers. As she is continuing to pay mortgage payments, she is living up to the unilateral contract and it cannot be revoked. An offeror can only revoke a unilateral contract if the offeree did not fulfil terms of contract.
* Reasons: Fathers promise was a unilateral contract- a promise of the house in return for their act of paying the instalments. It could not be revoked once the couple began performance. Implied promise that as long as the son paid the instalments they should be allowed to remain in possession

## Expiry of an Offer

### B*arrick v Clark (pg 106):* Reasonable time to accept an offer can be determined from many factors including: the conduct and language of parties, nature of the goods and other reasonable indications

* **Ratio: Statements made outside of a contract have no bearing in deciding whether there was an agreement. Also, in determining the reasonable amount of time to accept an offer is determined through nature and character and normal or usual course of business and circumstance of offer and conduct of parties. Reasonable time depends on (a) the nature, character and normal/usual course of business in negotiations leading to a sale; and (b) the circumstances of the offer, including the conduct of the parties during the negotiations**
* Facts: October 30 🡪 Clark offered to purchase land. November 15 🡪 Barrick counter-offered and asked to hear back ASAP. November 20🡪 Mrs. Clark replied that her husband would be back in 10 days. December 3 🡪 3rd party accepted Barrick’s offer to purchase the land. December 10 🡪 Clark sent Barrick the deposit and agreed to the counter-offer. Clark brought action seeking specific performance for ‘contract’ with Barrick.
* Issue: Was Clark’s acceptance (Dec 10) made within a reasonable period of time?
* Held: Appeal allowed in favour of Barrick. Acceptance not made within a reasonable time. In the facts, there was no agreement to wait 10 days from B. He was not bound to that timeframe. Further, it was open for 13 days which is reasonable amount of time given the circumstances.
* Reasons: Barrick’s language showed immediacy: asked to hear back ASAP by wire.

# Acceptance

### *Dawson v Helicopter Exploration Co* (pg 67): Acceptance does not need to be explicit but can be inferred from actions of party or parties

* **Ratio: Failure to perform does not remove the obligation of that contract. Courts tend tot read offers as calling for bilateral, rather than unilateral action when the language can be fairly construed. Acceptance of an offer need not be in express terms, but may be found in the language and conduct of the parties (implied).**
* Facts: Dawson staked land and filed claims, which lapsed. He communicated with the respondent, who agreed with that the appellant should take him to the land. Respondent offered an interest in the land, should they stake it. Plaintiff agreed that once the respondent obtained a pilot, they would do. Respondent told the plaintiff they would not go to the land. Respondent later found pilot, went to the land without the appellant, and contracted with another part to develop the land. Appellant sues for breach of contract.
* Issue: was there a valid offer and acceptance constituting a contract? If there was a contract, was it unilateral or bilateral?
* **Held: Appeal allowed. Respondent, having found a pilot, breached its contract with the appellant. H was under contract to take D to the property, and by exploring the area on its own they breached the contract. Court will try to interpret or opt for a contract to be bilateral and not unilateral.**
* **Reasons: This was a bilateral contract. In promising that the company would cooperate, the respondent impliedly agreed that the company would not, by its own act, prevent performance by the appellant. By breaching the contract, the company dispensed any further duty of readiness on the part of the appellant… for Dawson to perform, he needed the respondents to first find a pilot.**
* **takeaway: the actions of the parties made it seem as though they are contractually bound**

### *Felthouse v Bindley* (pg 73): Silence on its own cannot constitute acceptance | & | Acceptance cannot be forced onto somebody

* **Ratio: Silence on its own cannot constitute acceptance as it does not show an intention ro willingness to be bound. While there may have been intention to sell the horse, it is irrelevant if there is no objective evidence to back it up.**
* Facts: Plaintiff agreed to purchase a horse from his nephew. Nephew’s stock was being auctioned off. Auctioneer (defendant) was told to reserve the hose, but forgot to do so. After the horse was auctioned, the nephew wrote his uncle “that horse( meaning the one I sold to you) is sold”. Plaintiff bought action for the conversion of the horse
* Issue: Did the nephew’s silence constitute acceptance of the plaintiff’s odder to purchase the horse? If no, did his letter after the auction establish that the offer was accepted?
* **Held: Plaintiff cannot recover. There was never a contract, N never accepted P’s offer as silence cannot constitute acceptance.**
* **Reasons: Nephew did not respond to his uncle expressing a willingness to be bound. Therefore, there was no acceptance of the plaintiff’s offer. Nephew’s letter after the auction is not evidence that there was acceptance prior to the auction of the horse.**

### *Consumer Protection Act,* SO 2002, c 30, s 13: Consumers have no obligation to do anything for unsolicited goods

* Unsolicited goods or services: relief from legal obligations
* No payment for unsolicited goods or services

### *Saint John Tug Boat Co v Irving Refinery Ltd* (pg 76): Acceptance can be inferred from conduct | & | Silence can constitute acceptance if there is conduct that can be inferred to mean acceptance

* **Ratio: If you are getting something from someone, where it can be reasonably assumed that they would not be doing it without compensation, then liability exists to compensate them for it. Silence combined with reasonable construed conduct can constitute acceptance.**
* Facts: SJ had deal with IR to supply them with tugboats. They said they only had 2 and if they wanted more they would have to pay extra. Once contract expired, appellant offered “on call” tugboats for use. Respondent was silent regarding the offer, but continued to employ the appellant’s boats. IR used the boats for the time frame of the contract, then IR continued using them with no new contract. SJ billed IR for this period but IR does not want to pay. Appellant sent invoices each month. Respondent refused to pay.
* Issue: Did the respondents conduct constitute acceptance of the appellant’s offer, giving rise to binding contract to pay the invoices?
* **Held: Appellant is entitled to recover the sum of the invoices. Even though there was no contract for the new period, the fact SJ allowed the boats to be used in the same would is interpreted as a continuation of their initial offer. Further, as IR continued using the tugboats, that can be implied to mean they accepted the initial offer/price point, even though acceptance was never explicitly stated. Ruling that IR has to pay SJ for the period they used the boats even though there was no contract.**
* **Reasons: Respondent was rendered services for its benefit and did not attempt to either dispense with the service or complain about the charge. Respondent must be taken to have known that the tug was on standby for its use and to have known that the appellant expected payment at the per diem rate specified in the invoices.**

## Master of the Offer

Offeror can specify the form of acceptance, how it is communicated, deadlines, etc. and can specify that acceptance is through performance or act.

### *Eliason v Henshaw* (pg 81): Offeror can choose stipulations of how the offer is responded to (location + mode of communication)

* **Ratio: Offeror can stipulate how an offer is responded to, and if these conditions are not met, there does not always have to be a binding contract even with acceptance. Court will sometimes look at the context of these stipulations however to determine if a reasonable alternative was used. Location can be a consideration of proper acceptance. Offeror is the master of the offer and can dictate how communication of acceptance must be made (time, place, manner) for it to be binding.**
* Facts: E wrote to defendant proposing to buy his flour. Plaintiff dictated that a letter statin acceptance was to be sent back via wagon to Harper’s Ferry. Defendant replied by standard mail to Georgetown. Defendant sent flour way water. Plaintiff refused to purchase the flour.
* Issue: Was there a valid contract?
* **Held: This is not a contract. E specified the mode of communication and location, and it was sent to the wrong location. As E wanted it sent to the location for a specific reason, court found it was not binding, as all conditions of the offer were not met.**
* **Reasons: Although there was uncertainty as to the time when the answer to the offer would be received, there was none as to the place to which the answer was to be sent. The place constituted an essential part of the plaintiff’s offer. The plaintiff had a right to dictate the terms upon which he would purchase the flour. Their arrangements may have been made with a view tot he circumstance of place, and they were the only judges of its importance.**

## Postal Rule

### *Household Fire & Carriage Accident Insurance v Grant* (pg 83): When the same mode of communication as the offer is used for acceptance, it is binding as soon as that acceptance is posted (Postal Rule)

* **Ratio: Acceptance does not need to be received by the offeror if it is posted using the same mode of communication as was used for the offer. Essentially a contract is binding as soon as a letter that confirms acceptance in response to an offer sent by mail is put in the mail box. If post an option method of communication as soon as the letter of acceptance is delivered to the post office, the contract is made complete binding.**
* Facts: Defendant applied to purchase shares in the plaintiff company. Plaintiff accepted application and posted the allotment to the defendant. Defendant never received the latter. Defendant declined to pay the liquidator on the grounds that he was not a shareholder.
* Issue: Was there an acceptance of the defendants offer to purchase shares?If so, when did the acceptance become binding?
* **Held: As the letter informing him had been put in the mail, and just failed to reach him, that was good enough to constitute a valid and binding contract. Defendant was bound by the terms of the contract He has to pay.**
* **Reasons: Under the circumstances, the court must imply that the defendant authorize the company to send the notice of allotment by post. If an offeror uses the post and does not receive reply, he can make inquiries of the person to whom his offer was addressed. The post office is an agent of both parties the consequence of a mistake on the part of the mutual agent fall equally upon the shoulders of both.**
* *Note:* An offeror may always make the formation of the contract he proposes dependent upon the actual communication to himself of the acceptance.

### *Holwell Securities v Hughes (pg 86*): Acceptance can only be binding on posting if a method is not specified | & | Offeror can choose mode of acceptance and if not meet does not have to bind

* Ratio: If offeror desires acceptance to be in a specific way, any other method of acceptance does not bind the contract unless it satisfies offeror. By specifying the type of acceptance, the offeror shifts risk to offeree in making sure acceptance meets required conditions for it to bind. Postal rule only applies if the use of the post was within the reasonable contemplation of the partied to begin with.
* Facts: Option conditions specified: ‘the said option shall be exercisable by notice in writing to the Intending Vendor at any time within six months from the date hereof.’Plaintiff mailed the defendant a letter stating intention to exercise option. After mailing it, the letter went astray. Defendant sold the property to another buyer.
* **Issues:** Did the plaintiffs exercise an option to purchase the premises by posting a letter to the defendant, which he never received? Does the postal rule apply?
* **Held: Appeal dismissed. Postal rule application is that H needed to receive the acceptance for it to be binding. Acceptance on posting only occurs where there is use within the reasonable contemplation of the parties as a method of communication to begin with. H specified he wanted “notice in writing”, so HS was on the hook if acceptance never made it to him.**
* **Reasons: Postal rule does not apply where an offer specific that the offeror must receive the acceptance. Defendant explicitly used the term “notice”, meaning that the plaintiffs intention to exercise the option needed to be made known to him. Postal Rule does not apply when (1) the express terms of the offer specify that the acceptance must read the offeror and (2) its application would produce manifest inconvenience and absurdity**

## Jurisdiction of a Contract

### *Brinkibon v Stahag Stahl UND Stahlwarenhandelsgesellschaft mbH* (pg 89): Location of acceptance is where contract is formed

* **Ratio: Place where acceptance of an offer is received is where the contract was formed for instantaneous communication. General rule applies to telex: contract is formed when and where the acceptance f offer is communicated by offeree to offeror.**
* Facts: Telex dated May 3 was sent from sellers in Vienna to buyers in London (counter offer); Telex dated May 4 from buyers in London to sellers in Vienna was acceptance. Buyers then opened a letter of credit (acceptance by conduct)
* Issue: Does an acceptance by telex sent from London, received in Vienna cause a contract to be made in Lindon or Vienna? Does the postal rule or general rule apply to telex?
* **Held: Appeal dismissed. Appellant (buyer) fails. Acceptance was in Vienna, so not under English jurisdiction. General principle is that contract is formed when acceptance of offer is communicated by offeree to offeror. Therefore, the place where acceptance is communicated to the offeror (wherever that acceptance of an offer is sent and then received is the location and place where contract was forced).**
* **Reasons: Acceptance was made in Vienna**

## Terms of Service

### *Rudder v Microsoft Corp* (pg 94): Online terms and conditions are as valid as agreements in writing

* **Ratio: An electronic contract that is not materially different from a written contract, must be afforded the same sanctity.**
* Facts: Rudder brought a class action suit against MSN took payment from their credit cards in breach of contract, and that Microsoft fails to prove reasonable or accurate info concerning accounts. On sign up potential members must acknowledge their acceptance the terms of the Member Agreement. They are presented wit the terms, as well as a button to select in agreement. Defendant wants a permanent stay on the grounds that the action was brought in the wrong jurisdiction
* Issue: Did the plaintiffs agree to forum selection clause which states the jurisdiction that applied?
* **Held: Online terms and conditions upheld . Relief granted to defendant. Action was temporarily stayed in Ontario**
* **Reasons: Potential members are advised via clear notice that they will be bound by the terms should they be accepted. Although only a small portion of the agreement was initially visible, potential members could scroll to see the rest (not materially different from a multi page written contract). All terms were written in the same font, and in plain language. Court is not bound to give effect to an exclusive jurisdiction clause, but the choice of the parties should be respected unless their is a strong reason to override.**

### *Douez v Facebook*, 2017 (online quiz story): Went against Rudder v Microsoft finding, term of online Term and Condition not upheld

* **Ratio: Terms and conditions of websites may not always be totally binding. Forum selection clauses can be overridden where there is a compelling reason to do so (i.e. public policy concerns)**
  + This is unique case though since it is Facebook, unlikely to be the case with other sites. But interesting since it distinguishes from *Rudder*
* Facts: Applicant brought action against Facebook for using her name and portrait in an advertisement product without her consent
* Issue: Was express or implied consent of users obtain through T&C/disclosure?
* Held: One of terms and conditions of Facebook is you have to go to California to challenge them, which was NOT upheld by the SCC. Said they would hear a case about Facebook here in Canada Forum selection clause deemed unenforceable.
* Reasons: Gross inequality of bargaining power. Quasi constitutional privacy rights are engaged by appellants claim

### Electronic Commerce Act, SO 2000: general contract rules for electronics

* S.4: a contract is not unenforceable just because it is in electronic form.
* S.5: a legal requirement that info may be in writing is satisfied by info in electronic form if it is accessible for subsequent reference
* S.6: a legal requirement that a person provide info in writing to another is satisfied by info in electronic form if (a) accessible for subsequent reference (b) capable of being retained
* S.7: a legal requirement that a person provide info in a specified non-electronic form to another is satisfied by info in electronic form that is (a) organized in substantially the same way (b) accessible for subsequent reference (c) capable of being retained
* S.8: a legal requirement that an original document be provided, retained, or examined, is satisfied by the provision, retention, or examination of an electronic document if (a) it retains the integrity of the information from creation to final form (b) it is accessible for subsequent reference and can be retained
* S.11: a legal requirement that a document be signed is satisfied by an e-signature
* S.19: an offer, acceptance, or other matter that pertains to the formation/operation of a contract may be expressed (a) by means of electronic info (b) by an act intended to result in electronic communication eg. clicking an icon or speaking
* S.22: (1) electronic info is sent when it enters an info system outside the sender’s control or, if the sender and addressee use the same system, when it is capable of being retrieved and processed by the addressee
* S.22: (3) electronic info is presumed received (a) if the addressee uses an info system for the purpose of receiving info of the type sent, when it enters that system an becomes capable of being retrieved and processed ( if you have specific email address, etc and it is in inbox, then it counts as received) (b) if addressee has not designated or doesn’t use an info system to receive info of the type sent, when the addressee becomes aware of the info in their info system and it is capable of being retrieved and processed (if you have no specified email address etc, it is when you are aware of it

# Consideration

An offer unsupported by consideration is a gratuitous promise. Parties create, courts enforce. Courts enforce contracts don’t look at if the consideration is fair/balanced/etc. Consideration must be sufficient (aka must exist in some form) but it need not be adequate.

* Must be: Mutuality of exchange
  + Both parties of the contract both provide consideration
  + Promises must be made for one another; that is the mutuality of exchange
  + There must be consideration from both parties, but the consideration does not necessarily have to flow through a party involved. Can go to a third party
* Past consideration is not valid consideration
* If an obligation is publicly offered then it cant serve as consideration
  + (eg. firefighter offering their service as consideration)

## Certainty of Terms and Bargaining in Good Faith

### *R v CAE Industries* (pg 116): Courts will make every effort to apply definite meaning to vague terms in a contract so not to render it unenforceable.

* **Facts: CAE Industries wished to take over and run an aircraft maintenance base no longer required by Air Canada and the Government. An agreement was made, which contained many vague statements, but essentially stated that although the based usually generated 700, 000 man hours per annum, the Government could not commit to guaranteeing more than 40-50 thousand although they would use their “best efforts” to increase this number. The contract was formed, however the hours fell below 40,000 and CAE sued for breach. They were successful at trial, which the Crown appealed.**
* **Held: appeal dismissed.**
* **Ratio: In business relationships, the courts will make every effort to apply definite meaning to vague terms in a contract so as not to render it enforceable; this is especially true if it is obvious that the parties intended to enter into a binding relationship, or if there was part performance.**
* **Reasons: Parties definitely intended to enter into a contract because they acted as if they did until the respondent brought this action (part performance as per *Foley*). Onus was on the Crown to prove they did not enter into a contract and they did not do this. None of the “uncertain” clauses are so vague as to render no meaning to the contract. Crown guaranteed a certain amount of work, and this was not provided and therefore the Crown did breach the contract.**

### *May & Butcher Ltd v R* (pg 122): A terms yet to be determined means that there is no contract if it is an essential term; it is simple an agreement to agree and is not enforceable.

* **Facts: Plaintiff wanted to buy surplus teenage fro the Disposals Board. In June 1921, the Board defined the terms of the agreement and stated that terms such as the price and dates of payment and the delivery would be decided between the parties at a later date. All disputes were to be settle by arbitration. Plaintiff made a deposit of 1000 euros as a security. In January 1922, referred to verbal negotiations for an extension of the agreement and confirmed sale of the teenage which would be available up to March 31 1923. Control of the Disposals Board changed at this time and the Board refused to deliver specifications to the plaintiff or allow them to inspect the goods. The Board no longer considered itself bound by the contract and the plaintiff sued for breach. Plaintiffs were unsuccessful in lower courts.**
* **Held: Appeal dismissed**
* **Ratio: where an essential term has yet to be determined, that means there is no contract. The court cannot read terms into an incomplete contract.**
* **Reasons: No contract existed since part of contract was undetermined, specifically the price. An agreement to enter into an agreement is not a contract. S. 8 of the Sale of Goods Act provides for a price to be fixed in the future, but s. 9 holds that if the price cannot be fixed by a third party, no agreement is formed. Being unable to fix between the parties and having a third party being unable to fix the price are the same. Since there was no agreement, there is nothing binding the parties to go to arbitration. Rejects plaintiffs argument that the deposit was to secure them delivery of future parcels as they became available because no agreement was formed.**

### *Hillas & Co v Acros Ltd* (pg 124): A contract to negotiate is enforceable.

* **Facts: Plaintiffs were merchants purchasing timber from defendant. Agreement was reached to purchase 22, 000 standards of timber, under the specific condition that they should also have the option of entering into a contract with Arcos to purchase 100, 000 standards the following year with a 5% price reduction. Across refused to sell them the 100, 000 standards the following year. Hillas was successful at trial, Arcos appealed successful to CA and Hillas appealed to HoL.**
* **Held: Appeal allowed, binding contract existed to sell the 100, 000 standards.**
* **Ratio: A contract to negotiate is enforceable. The courts should intervene to determine the terms of an agreement through context and intentionality of the parties.**
* **Reasons: Found that the terms for the subsequent sale of 100, 000 standard was more than an agreement to make an agreement, and was an offer that merely had to be accepted by Hillas. Only thing to be negotiated was the price, but this was because prices change yearly. Judge said: “woprds are to be interpreted so that subject matter is preserved not destroyer”, a legal realist position focusing on intention of the parties.**

### *Foley v Classique Coaches Ltd* (pg 129): Agreement to amen an agreement is not a contract. Past performance will indicate that a contract is binding.

* **Facts: Foley owned a gas station and sold a piece of land attached to the filling station to Classique Coaches to use for their business on the condition that they purchase all of their as from Foley for as long as he can supply it. There was no indication of price in the contract, but there was a clause stating that their arguments should be settled in arbitration. After 3 years, a lawyer for Classique claimed that because there was no stated price, the contract was not valid and Classique began purchasing gas from other suppliers. Foley sued for breach of contract and was successful at trial and Classique appealed.**
* **Held: Appeal dismissed**
* **Ratio: Agreement to make an agreement is not a contract. Wrongful repudiation of a contract by one party relieves the other party from the performance of any conditions of the contract. Pat performance will indicate that contract is binding.**
* **Reasons: There was a contract and held that the parties acted for 3 years as if there was a contract so Classique cannot simply decided not to adhere to it all of a sudden. If there was an issue with price it should have been settled in arbitration as was laid out in the contract and so Classique breached the contract by going to other vendors.**

### *Empress Towers Ltd v Bank of Nova Scotia* (pg 136): Agreements to agree cannot be enforced but courts will, when possible give the proper legal effect to any clause that the parties understood to have legal effect.

* **Facts: In 1972, Scotiabank first entered into leas with Empress Towers to leaser property and this lease expired in 1982. In 1984, the partied entered into a new lead which contained a clause that Scotiabank could renew for 2 successive periods of 5 years provided that it gave 3 months written notice, and the “rental for any renewal period, which shall be the market retail prevailing at the commencement of the renewal terms as mutually agreement between the Landlord and Tenant”. On may 25 1989, Scotiabank exercised its option to renew for a further 5 years from September 1 1989. On June 23 1989- Scotiabank proposed a rate of $5400 a month, up from roughly $3000 under the existing lease but they received no written reply from Empress Tower. On August 3, Empress Towers responded stating that Scotiabank would be allowed to stay if they made a payment of $15,000 before September 15 and rent of $5,4000 per month thereafter, and that tenancy would be terminable on 90 days notice going forward. Express sought a writ of possession. Scotiabank was successful at trial and Empress appealed.**
* **Decision: Appeal dismissed**
* **Reasons: held that he could either follow *May* (if things were left to be agreed upon then there is no contract) or *Hillas* (the courts should strive to find meaning if there is an agreement between parties) Judge interprets the section of the clause requiring the parties to agree on the rent to mean: a) empress could not be compelled to enter into a market rental value, b) there was an implied term that the landlord will negotiate in good faith; and c) an agreement on market rate would not be unreasonably withheld. Empress did not negotiate in good faith by adding the $15,000 penalty**
* **Ratio: Agreements to agree cannot be enforced but courts will, wherever possible, give the proper legal effect to any cause that the parties understood and intended to have legal effect.**

### *Mannpar Enterprises Ltd v Canada* (pg 138): There is no common law obligation to negotiate in good faith, it must be in the contract, with explicitly or impliedly

* **Facts: Parties entered into a contract for the extraction of sand and gravel from an Indian Reserve, permit was originally effective for 5 years. Under the permit, Mannpar was obliged to pay a modest yearly rental on the working area plots on the reserve, as well as a royalty on the materials removed. The permit provided for a right to renew for a further five years, subject to satisfactory performance and renegotiation of the royalty rate and annual surface rental. Band Council substantially agreed to the terms and conditions of the agreement between Mannpar and the Crown. Mannpar gave written notice of its intention to renew the permit for an additional five years. Band became less satisfied with the permit arrangement. Neither the Crown nor the Band were prepared to renegotiate the royalty rate for the purpose of renewal. Crown failed to renew the permit. Mannpar took the position that the Crown had repudiated its obligation to renew, and elected to accept the repudiation and commence an action for damages. TJ held that the renewal clause was void for uncertainty, which Mannpar appealed.**
* **Held: Appealed dismissed**
* **Reasons: Language in renewal clause afford the Crown a lot of latitude in deciding whether to agree to any extension of the permit and in deciding what terms might be acceptable. No enforceable agreement arose out of the language of the renewal clause. Distinguished from Empress on the facts: there was no general market rate in this case, no element of objectivity and no was to calibrate the value at hand.**

### *Bhasin v Hrynew* (pg 143): SCC leading case which stablished tat the law of contracts is infused with a general “organizing principle” of good faith

* **addresses good faith in the performance of a contract rather than good faith in contract negotiation**
* **court pointed out that the organizing principle of good faith is manifested in a number of more specific contract law rules and doctrine that are recognized by the courts**
* **organizing principle as manifests in good faith doctrines encompasses two obligations**
  + **parties must act honestly and reasonably, not capriciously or arbitrarily an**
  + **parties may put their own self interest before the interests of the opposite party but must have a degree of regard for the interests of the other that is appropriate in the circumstances.**
* **the decision in this case also undermined the argument based on the allegedly self interested stance of contracting parties**
* **according to the SCC, the articulation of an organizing principle of good faith the the recognition of specific good faith doctrines “will bring the law closer to what reasonable commercial parties would expect it to be”**
* **suggests that a process agreement to negotiate in good faith tor each a substantive contract, or substantive terms thing a broader contract, is itself contractually enforceable: a party who failed to act in good faith in negotiating terms is in breach of contract.**

### *Bawiptko Investments v Kernels Popcorn* (pg 150): An oral agreement in contemplation of a formal written agreement, when lacking essential terms, is not enforceable due to a lack of certainty. It is simply a contract to form a contract.

* **Facts: the parties agreed orally to amend Kernels' standard 50-page franchise agreement to change several provisions along specific lines to Bawitko's advantage. They also agreed that time would be of the essence. Bawitko began making payments according to Kernels' schedule and invested $10,000 in a similar franchise in another city. Two months later, Kernels wrote Bawitko advising they wanted to execute his franchise agreement as soon as possible, as the store opening was about a month away. Bawitko did not reply. Two weeks later, Kernels informed Bawitko that as the store was to open in eight days, he had four days to sign. One day before the deadline, Bawitko sought relevant documents from Kernels' solicitor, who forwarded the franchise agreement, application for trademark use, sublease, shareholders' covenants, etc. The agreement was in the form offered to the second franchise, but not in the form the parties had agreed upon at the April meeting. On the deadline day, Bawitko asked for an extension of time, remarking he was willing to execute whatever agreement the second franchise executed. Kernels refused and returned his deposit, and Bawitko sought damages for breach. He was successful at trial, which Kernels appealed.**
* **Held: Appeal allowed.**
* **Reasons: there was no real contract, but even if there was, Bawtiko had not been ready and willing to sign the documents contemplated by the contract. It could not be said that the parties had agreed in April as to the final form of the franchise agreement; terms other than those specifically agreed to had yet to be settled and thus there was no meeting of the minds. The unsettled details were not mere formalities. Even if the oral contract was binding, Bawtiko had been willing to complete the transaction only pursuant to an agreement that formed no part of the alleged agreement**

## Orthodox View Cases: Consideration IS required

### *Governors of Dalhousie College v The Estate of Arthur Boutilier (*pg 159): Gratuitous promise not enforceable | & | A valid contract needs consideration

* **Ratio: A gratuitous promise is not sufficient consideration for a binding contract unless given for a specific purpose which can be seen as of some benefit to the promisor. A gratuitous promise (without consideration) does not give rise to a binding contract**
* Facts: Appellant claims the Estate owes $5000 in payment of a subscription obtained from the deceased. The terms of the subscription stated a letter from he deceased would specify ter,s of payment. No letter specifying the terms was sent. Boutillier died without payment
* Issue: Was there consideration for the subscription?
* Held: Not a contract so not binding. The man offered to donate money, it was a gratuitous promise not consideration. There needs to be consideration from both parties for there to be a contract.
* Reasons: It is not sufficient consideration that the deceased signed up for a subscription. There was no privity of contract (no mutual interest/right). The doctrine of mutual promises does not apply. There is no proof of an agreement by the College to do certain act in return. There must be something more than the mere incurring of liability by the College on the fair of the promise (no evidence that the liability would not have occurred if not for the promise)

### *Brantford General Hospital Foundation v Marquis (pg 165*): Consideration can’t be forced by one party

* **Ratio: Consideration must be something expressly wanted/accepted by the other party for it to constitute consideration. A gratuitous promise is not enforceable; consideration cannot be forced on a party. There must be a mutuality of exchange.**
* Facts: Mrs Marquis pledged $1 million over 5 years to BGH. She made on instalment prior to her death. In her will, it stated BGH was to receive 1/5th equal share of the residue in her estate. Estate refused to pay the balance of the pledge. BGH intended to name the critical care unit after the Marquis. It was irrelevant to Mrs. MArquis that the unit was to be named after her. There was no mention of the name in the pledge document itself.
* Issue: Does the signed pledge form constitute a legal and binding contract?
* Held: Action dismissed, there was no quid pro co. Plaintiff’s case fails. M’s estate not bound given there was no consideration. Although H claims they were going to name a wing after her, that was not something she had shown interest in so cannot count. H can’t force consideration. Therefore, there was no consideration, it was just a gratuitous promise and not binding.
* Reasoning: The naming of the unity cannot constitute consideration when it is still subject to board approval. If the contract was completed when he pledge was signed, there should be no uncertainty on this key aspect, Moreover, the naming was not a condition of the pledge. No consideration fund in either the pledge itself, or the circumstaces. Court cannot enforce intentions in the absence of an enforceable binding contract

## What Constitutes Consideration

### *Wood v Lucy, Lady Duff-Gordon (pg 169*): Consideration may be implied

* Ratio: For a term to be implied in a contract it has be obvious. A promise may be lacking, and yet the whole writing may be “instinct with an obligation” imperfectly expressed, constitution a contract
* Facts: Plaintiff was hired by the defendant and given exclusive right to place the defendants endorsement on the designs of others. In return, the defendant would get 50% profits and revenues. Contract was for 1 year. Plaintiff sues for damages, alleging the defendant broke her promise by secretly putting her endorsement on things and withholding the profits.
* Issue: Can consideration be implied?
* Held: For W. Appeal allowed. Consideration was implied, therefore there was a contract. It was implied that if W was going to give DG 50% of profits he would expect reasonable effort to implement the agreement on DG’s end (meaning he had exclusive ability to DG’s name).
* Reasons: Defendant gave exclusive privilege: she had no right to place her own endorsements except through the plaintiff. Without an implied promise, the transaction cannot have such business efficacy as both parties intended. Implies that but for the plaintiff’s efforts, the defendant would not get anything. Plaintiff’s promise to pay 50% of profits and revenues was a promise to use reasonable efforts to bring profits and revenues into existence. Plaintiff promised to account for all moneys and take out any patents necessary to protect rights affected by the agreement.

## Past Consideration

### *Eastwood v Kenyon (pg 170):* Fulfillment of moral obligation is not consideration | & | Past consideration cannot be valid consideration

* **Ratio: Moral obligations have 0 value in eye’s of court and cannot be consideration. Payment for her education was past consideration for her, cant be used again. Past consideration is no consideration.**
* Facts: S was left alone and E took her in as guardian. He borrowed money to pay for education, and S said she would pay him back. Paid one year’s interest. S married K. K then promised to pay E back the rest. E looking for money now.
* Issue: Was there consideration for the defendants promise to pay?
* Held: Decided in favour of the defendant. Promises are not a contract. Keep in mind E is going after K, not S, who set up arrangement initially. Even though K may be morally obligated to pay E back he is not bound to it. Plus E and K made the agreement after performance, there was no mutual exchange.
* Reasons: The defendant was in no way connected to the money expended. The defendant’s obligation was a moral obligation, not a contractual obligation. No consideration. Only a past benefit not conferred at the request of tend defendant. Defendant would have had to provide fresh consideration for him to be bound.

### *Lampleigh v Brathwait (pg 172*): Past consideration is not valid consideration | & | Past consideration can be valid if there was implied understanding of a fee, or performance was spurred by actionable request

* Ratio: Past consideration is not valid unless: there was an implied understanding of a fee prior to performance or if performance was spurred by an actionable request. An express promise (made after a request for which there was consideration) will be binding if there is already an implied promise to the same effect
* Facts: After committed a felony, the defendant asked the plaintiff to obtain a pardon from the King. Plaintiff attempts to get the pardon. Defendant latter promise the plaintiff to give him 100 pounds. The plaintiff obtained the pardon, but the defendant did not pay him.
* Issue: Can a promise be binding if it was made after the initial promise? Can a promise in respect to a request be binding when it is made after the performance of the request.
* Held: Decided in favour of the plaintiff. Money is owed. An express promise made after performance can be enforced, if that performance was spurred by an actionable request. If there already was an implied understanding of a fee, a later promise for a specific amount will be binding.
* Reasons: The promise was not naked because it was coupled with the earlier request for which there was performance. The initial request had an implied obligation of reward. It was just missing the amount (which came later in the express promise). Past consideration is not valid. But, a court will look at the total circumstances to see if they can find an implicit request that precedes the performance for which there was consideration.

### B*. (D.C.) v Arkin* (pg 175): Consideration must be something that can be done or achieved | & | Promise to NOT do something can be consideration

* **Ratio: Consideration must be something that can actually be done or achieved. Further, the promise to not do something can be consideration, provided the thing NOT done was something that could have been done. Generally: Forbearance to sue is good consideration, money in exchange not to sue is a valid and enforceable legal contract. Exception: If the claim is invalid, is not intended to be pursued, and is not reasonable. If claim is not intended to be pursued but is reasonably, forbearance is good consideration. If the validity of the claim is doubtful, forbearance to enforce it can be good consideration**
* Facts: Son shoplifted at Zellers. Zellers told mom pay $225 and we wont take it to court. She pays, but later finds out Zellers would not have been able to go to court even if they wanted. She sues for money as it was not a contract since she got no consideration. Was there a contract?
* Issue: Can the plaintiff recover on the grounds that there was no consideration?
* Held: Appeal allowed, plaintiffs claim is allowed with interests and costs. No contract, money is hers. Zellers had no possible legal claim against her, so they could not say the consideration they offered her was not going to court, as it was not possible. As no consideration, no contract and not binding.
* Reasons: Defendants claim was invalid. Defendants claim was BS. They gave up nothing of value. Counsel for the store knew or ought to have known that the claim would not succeed if pursued.

## Pre-existing Duty

* Public duty does not count as consideration unless the party is doing some special, beyond what their public duty was
* Pre existing duty to a third party count as valid consideration

### *Pao On v Lau Giu Long* (pg 180): Prior obligation can technically be consideration as long as that obligation has not yet been completed

* **Facts: Fu Chip Investment Co Ltd, a public company majority owned by Lau You Long, wished to buy a building owned by Tsuen Wan Shing on Estate Co Ltd (Shing On, who's majority shareholder was Pao On. Instead of simply selling the building for cash. Law and PAo did a swap deal for the share in their companies. The Main agreement was that Shing On would get 4.2 million $1 shares in Fu Chip and Fu Chip bought all the shares on Shing On. The Subsidiary Agreement: to ensure the share price of Fu Chip suffered no shock, Pao agreed to not sell 60% of the Fu Chip shares for at least one year. Also, in case the share price dropped in that year, Lau agreed to buy 60% of the Fu Chip shares back from Pao at $2.50. Pay realized, if the Fu Chip share price rose over $2.50 int he year, the price would stay fixed and he would not get the gains on buying back, so he instead demanded that Lau would merely imdenfiy Pao if the share price fell below $2.50. Pay made it clear that unless he got his “guarantee agreement”, he would not complete the main contract.**
* **Held: Finding for plaintiff (Pao On); guarantee agreement upheld**
* **Ratio: Prior obligation can technically be consideration as long as that obligation has not yet been completed. Pre-existing contractual obligation to a third party can be valid consideration.**
* **Reasons: Disposed of question about past consideration because a promise to perform a pre existing contractual obligation to a third part can be good consideration (Lampleigh b Braithwaite). Consideration for the guarantee was the promise to preform according to the other contractual agreement signed by the parties. Price Council held that this was not duress bur rather commercial pressure as a result of the nature of the market. For economic duress, it must be shown that the victims consent to the contract was not voluntary on his part**

### *Stilk v Myrick* (pg 184): Pre-existing legal obligation owed to the same party is not consideration

* **Ratio: A new contract cannot be formed out a new one unless there is fresh consideration, or the conditions of the previous contract have been fully satisfied. Sailors already obligated to do what they were saying was new consideration. A pre-existing legal obligation owed tot he same party is not consideration. Where there is pre existing legal obligation, and a party wants to vary its terms, the term wont be enforceable unless there is a mutuality of exchange.**
* Facts: Sailors on a boat where a few sailors have left. Captain says he will divide shares of sailors of left among sailors who remain if he can’t get help. He doesn’t get help. Are the sailors entitled to that money?
* Issue: Was there a contract entitling the plaintiff to a higher rate of wages?
* Held: Not entitled to money. The sailors were already on contract to oversee the boat. If they were negotiating for more money, they would have had to offered fresh consideration to the captain. Losses at sea are expected in their work, so just working more is not enough.
* Reasons: There was no fresh consideration for the promise of higher rate of wages. The seamen had undertaken to do all they could under all emergencies of the voyage. The desperation of two segment is considered an emergency (as though they had died). If the seamen had the liberty to quit after voyaging one way, their agreeing to return may have been sufficient consideration for the promise of an advance of wages, but that was not the case.

## Pre-existing Legal Duty- Variation of Terms

### *Gilbert Steel Ltd v University Const Ltd* (pg 185): Pre-existing legal obligation to the same party is not consideration | & | Variation of contracts need consideration

* **Ratio: Consideration is needed for variation of contract to be binding. Can’t use the same thing already legally obligated to provide on new terms without offering fresh consideration. Varying the terms of a contract does not amount to the recession of a contract. Variation must be supported by fresh consideration. A contract is rescinded if the mutual abandonment of a right under the prior contract (requires evidence of an intention to rescind)**
* Facts: Plaintiff entered a written contract to supply the defendant with building materials. Plaintiff’s supplier announced increased prices. Plaintiff discussed the increased prices with the defendant. Plaintiff alleges that the discussion resulted in a binding oral agreement in which the defendant agreed to pay increased prices and abide by two new clauses. Defendant did not pay the increased price. Trial judge dismissed plaintiff’s action.
* Issue: Was there consideration for the oral agreement?
* Held: Appeal dismissed, plaintiff fails because contract lacked consideration. New price not binding. GS was not offering fresh consideration for increase in price. Was UC getting more steel? Better steel? No, so therefore there was no consideration and an oral agreement does not bind anything.
* Reasoning: Parties did not intend to rescind their original contract and replace it with a new one. Consideration for the oral agreement is not to be found in a mutual agreement to abandon the earlier written contract and assume the obligations under the new oral one. It is clear that the oral agreement was the agreement to pay the increased price for the steel, not one that would replace the initial contract in toto (completely)

## Promises to Accept Lesser Payments

### *Foakes v Beer* (pg 190) (Pinnel’s Case): payment of a lessor amount cannot act as consideration

* **Ratio: A lesser payment than is owed cannot be considered consideration. Part payment of a debt cannot be consideration for a new agreement to prohibit the creditor from collecting on the remainder of the debt. Partial payment of a debt cannot serve as consideration for an agreement to accept less.**
* Facts: F owed B money, and the two agreed F could pay partially upfront and then in instalments. After instalments were done, B asks for interest. Did F owe B interest even if there was no consideration?
* Issue: Was there consideration for payment of the interest?
* Held: Yes, interest is owed. The agreement between them was not binding as there was no consideration so doesn’t matter if it said interest or not. As a lesser payment than is due cannot be considered consideration, him paying installments cannot be seen as consideration. Thus interest is owed.
* Reasons: Interest was part of the original debt

### *Foot v Rawlings (pg 194):* the type of payment or form can constitute consideration

* **Ratio: Accepting terms that benefit creditor for connivence can amount to consideration when a lessor amount is given. A negotiable instrument (or an object of less value than the debt) can be consideration depending on the circumstances. Promise to accept less will be supported where payment takes a different form**
* Facts: Appellant owed the respondent a large sum of money. The parties came to an agreement in writing regarding the repayment of the debt, which both signed. The appellant substantially complied with the terms. The respondent later sued for the balance
* Issue: was there consideration for the debt repayment agreement ?
* Held: Appeal allowed, judgment for the appellant. Delivering post dated cheques can be consideration. In this specific arrangement R lost his right to sue when he agreed to this substitute agreement. He was getting money in advance for his benefit so the only way he could sue if F fails to keep up with payments
* Reasons: Promise to forbear is implied in this agreement, unless the appellant did not comply with the terms. Delivery post dated cheques counts as good consideration. Promise to a accept partial payment is not consideration.

### *Mercantile Law Amendment Act*, RSO 1990, c M10, s 16: Partial payments of debt can get rid of the debt if it was expressly accepted as satisfaction of the debt, even if there is no consideration

* **partial payment of a debt can extinguish the debt if it was expressly accepted in satisfaction of the even, even if there is no consideration.**
* **Exception: partial payments can only count if part performance has already occurred**
  + **This means some debt must have already been paid (doesn’t say how much though)**

### *Judicature Act (2000)* (pg 196):

* (1) part performance of an obligation either before or after a breach thereof shall be held to extinguish obligation
  + (a) when expressly stated by a creditor in satisfaction. or
  + (b) when rendered pursuant to an agreement for that purpose though without any new consideration
* 6(2) Not withstanding subsection (1), an obligation is not extinguished by part performance where a court of competent jurisdiction finds that it is unconscionable to so allow.
* 6(4) a creditor may revoke an agreement under clause 6(1)(b) where:
  + (a) the debtor has not commenced performance of the agreement; or
  + (b) the debtor has commenced performance of the agreement, but fails to continue performance on a date or within a time provided for in the agreement, and it would be unreasonable in the circumstances for the creditor to give the debtor more time to remedy the default

## Modern View Cases: More Flexible Understanding of Consideration

### *Williams v Roffey Bros & Nicholls (Contrctors) Ltd* (pg 185): Benefit is consideration, court behind to expand the traditional rule of consideration

* Facts: Defendant (contractor) subcontracted the plaintiff to assist with renovations. Plaintiff encountered financial difficulties partly because it agreed to too low a price. The defendant, fearing that the plaintiffs would not complete the subcontract on time, agreed to pay the plaintiff an additional 10,000 pounds above the contract price. The defendants made one payment of 1500 pounds. When the defendant failed to make further payments, the plaintiff stopped work and claimed damages.
* Issue: Was there consideration for the alteration to the contract?
* Ratio: A variation of terms is supported by consideration where there is a benefit accrued to the promisor (mutual benefit to the parties), and the promise is not given as a result of duress or fraud.
* Held: Appeal dismissed in favour of the plaintiff. Defendants’ promise to pay was supported by consideration and constituted an enforceable agreement.
* Reasons: Benefit to defendant of having the plaintiffs complete the subcontract on time is consideration for the promise to pay more. Consideration is the practical benefit.

### *Greater Fredericton Airport Authority Inc v Nav Canada* (pg 198): Changes can be binding without consideration provides certain factors are met

* **Ratio: Gratuitous promise can be consideration as long as there is no undue duress. Applies to variation on existing terms. Post Contractual modification, unsupported by consideration, may be enforceable as long as the modification was not procured under economic duress.**
* Facts: Airport Authority (AA) entered into an agreement (ASF) with Nav Canada (NC) under which NC assumed responsibility for air navigation services across Canada. As part of a project, AA requested that NC relocate a system to a new runway. NC suggested replacing part of the system. AA & NC disputed who would pay replacement costs. AA surrendered, but maintained that it was not responsible to pay. It promised to pay the replacement costs. NC replaced a portion of the system. AA refused to pay.
* Issue: Was AA’s promise to pay legally binding?
* Held: Not binding as it occurred under duress. Post-contractual modification without consideration can sometimes be enforceable as long as variation was not procured by economic duress.
  + Economic Duress TEST:
    - 1.) The promise but be made under pressure (demand/threat);
    - 2.) The pressured party must have no option but agreeing.
  + If these conditions are met, three factors must be analyzed:
    - Was the promise supported by consideration?
    - Was the promise made "under protest"?
    - Were reasonable steps taken to disaffirm the promise?
* Reasons: Under *Stilk v Myrick*, performance of a pre existing obligation is not fresh consideration. NC breached its pre existing obligation to pay the replacement costs. Additionally, there was no consideration for AA’s promise to pay (got nothing in return). Onus is on NC (the part seeking to enforce the modification) to establish that the post contractual modification was not procured under economic duress. It is no longer necessary to look for exhscnage of promises or detriment on part of promisee to enforce variation as long as promisor obtains benefit/advantage.
* Court altered *Stilk v Myrick* rule because existing contract are frequently modified to respond to contingencies not anticipate or identifies during initial contract negotiation.

### *Rosas v Toca* (pg 203): potentially moving away from needing fresh consideration. Not binding but might be the future.

* Facts: Rosas loans $600,000 of her lottery winnings to her friend Toca to allow her and her husband to buy a home. It was to be repaid without interest in on years time. Toca and her husband often drove around Rosas and her husband and when Rosas purchase a convenience store, Toca’s husband often did work for them without being paid. Toca kept asking for more time and kept saying “I will pay you next year”. Rosas accede to the requests year after year. When Rosas finally came to the court for relief, Toca resisted judgement on the debt in the trial court on the basis of a limitations defence- Rosas had waited too long, 7 years had gone by so too bad. Toca gave no consideration for Rosas resisting suing. TJ stated that Rosas patience was just voluntary abstention from exercising her right to enforce repayment of the loan which did not affect the running of the applicable limitation period
* judge here wants to change the law: when parties to a contract are to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability or other public policy concerns which would render and otherwise valid term unenforceable.
* judges view: a variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative
* Limitation clause for an action in debt is usually 6 years, which would have already passed
  + Rosas argued that the parties entered into multiple forbearance agreements to extend the timeline to repay the debt as each year until 2013, Toca came to her and said that she would pay her back next year and Rosas always agreed to extend the term
  + Toca did not provide anything to Rosas in exchange for extending the time for repayment
  + TJ concluded that without any additional consideration, these forbearance agreements were invalid and they were simply a voluntary abstention on the part of Rosas to exercise her rights
  + because these were not valid, TJ concluded that the claim was filed outside the limitation period and was therefore statute barred
* Toca requested a variation in the existing contract and Rosas grants that request by forbearing to claim against Toca in respect of what would otherwise be a breach of the existing contract. There is a lack of consideration flowing from Toca in exchange for the forbearance from Rosas
* pre existing duty rule: “where one party promises something in exchange that they already owe to the other party, they have, in effect, given nothing in exchange, and courts have held that this does not amount to consideration. (*Stilk v Myrick*)
* Canada has generally adopted the rule from *Stilk v Myrick* that there must be additional consideration where the promise from one party is simply to do something they are already obligated to do under contract
* part payment of a debt if not valid consideration for a promise from a creditor (*Foakes v Beer*)
* In *Nav v Canada*, the court appears to have expanded the doctrine of consideration by holding that any “post contractual modification” may be enforceable though unsupported by consideration as long as economic duress was not made out.
* judge’s view: when parties to a contract agree to vary its 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
* judge would enforce the modifications as to the payment date made by the parties to this loan transaction as found by the trial judge. The parties agreed to vary the terms of their original loan each time Toca told Rosas she would pay her next year. They were not procured under duress, are unconscionable or otherwise invalid base don public policy
* the annual modifications extended the date on which repayment was due and delayed the running f the limitation period
* Held: allowed the appeal and granted judgment for Rosas in the amount of $600,000 plus prejudgment interest against Toca

# Promissory Estoppel

Promissory estoppel is the legal principle that a promise is enforceable by law, even if made without formal consideration, when a promisor has made a promise to a promisee who their lies on that promise to his subsequent detriment.

All about what is fair and equitable: the conduct of the parties can determine what is fair an equitable

* The inequitable conduct can make promissory estoppel impossible as a defence

“Estop” that. You are estopped from going back on your promise.

Equitable doctrine based on the notion of fairness. must Show that…..

1. Existing contractual relationship at the time of the promise
2. A promise or representation clearly made
3. Promise/representation as relied upon by the other party
4. The person to whom the promise was made has acted equitably

*Note:* Reliance is sufficient. Detrimental reliance isn’t necessary (strengthens argument).

*Note:* The promise must be clear.

Indefinite term promise: can bring estoppel to an end by providing reasonable notice (e.g. If I made a representation that I wasn’t going to rely on my strict contractual rights but then I give notice that I am taking that back and will be relying on those rights.)

*Note:* reasonable notice is decided by the court; typically the length of time that would help undo the detriment

## Element of Primary Estoppel From High Trees

1. a clear and unequivocal promise or representation as to future conduct which indicates that the promisor will not enforce all his rights under the existing contract with the promisee
2. which the promisee relies on
3. and which it would be inequitable for the promisor to revert and insist upon his full contractual rights

## Element of Primary Estoppel From High Trees

1. There must have been an existing legal relationship between the parties at the time the statement on which the estoppel is found was made
2. There must be a clear promise or representation made by the party against whom the estoppel is raised (promisor), establishing her or his intent to be bound by what she or he has said
3. There must have been reliance by the party raising the estoppel (promisee) upon the statement or conduct of the party against whom the estoppel is raised (promisor)
4. An action of the party to whom the representation was made (promise) to her or his detriment
5. The party to whom the representation was made (promisee) must have acted equitably

## The Nature of the Representation

* the representation must be clear and unequivocal but need not be express (ie. can be implied based on words or conduct)
* in *John Burrows Ltd v Subsurface Surveys Ltd.,* friendly indulgences are not enough to show that “promisor” intended to suspect its strict rights

## The Equities

* the promisee must have acted equitably
* in *D & C Builders v Rees*, promissory estoppel did not operate because the representee/promisee acted inequitably (D exploited P’s financial vulnerability)
* note that in Canada, partial performance legislation such as the *Mercantile Amendment Act* could eliminate the need to plead promissory estoppel in such a case

## Termination of the Estoppel (Reassertion of Legal Rights)

* promissory estoppel generally may be terminated upon notice of reassertion of strict contractual rights
* notice intended to protect representee’s reliance
* notice effective only after lapse of reasonable time
* notice ineffective if representee’s reliance is irreversible

## Simple Reliance v Detrimental Reliance

* it is unsettled whether the promisee's reliance must have been to her detriment in order to give rise to an estoppel
* simple reliance = promisee acted on basis of promise, but no prejudice suffered (in *WJ Alan* Lord Denning stated that detrimental reliance was not required)
* detrimental reliance = worse position (upon revocation of the promise) than if promise had not been made (English and Canadian courts have sometimes held that the promisee must have altered her position to her detriment before promissory estoppel an apply (*eg*., SCC in *Canadian Superior Oil* in 1970 - not in your materials)
* arguably, a better approach is that taken in *Post Chaser*: Would it be inequitable to allow the assertion of legal rights? According to Lord Goff in that case, “[t]he fundamental principle is that …that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealing which have thus taken place between the parties. To establish such an inequity, it is not necessary to show detriment; indeed the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights....But it does not follow that every case in which the representee had acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights for the nature of the action or inaction [of the representee] may be insufficient to give rise to inequity.”
* in the *Post Chaser*, since only 2 days had passed since the representation had been made, it was not inequitable to allow the reassertion of strict legal rights

## Sword or Shield?

* shield: a defence to an action arising out of existing contract
* blunt sword: basis of action within existing contract
* sharp sword: basis of action outside existing contract
* example of orthodox view: *Combe v Combe* (Eng CA, 1951) - promissory estoppel cannot be used as a sword to create a new cause of action where none existed before; it can only be used as a shield to prevent a party from insisting on strict legal rights when it would be unjust to enforce them
* example judicial endorsement of use as a blunt sword: *Robichaud v Caisse Populaire* (NBCA, 1990)
* example of successful use as sharp sword (not in Canada): *Waltons Stores v Maher* (HCA, 1988)
* example of unsuccessful attempt to use as sharp sword (in Canada): *M(N) v A (AT)* (BCCA, 2003)

## As a Shield

### *Hughes v Metropolitan Railway Company* (pg 214): If a promise is implied in negotiations and one part reliefs on that promise, then it is inequitable to allow the other party to act as though the promise does not exist.

* **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 exit.**
* Facts: H leased property to Railway company and gave them 6 months to complete repairs on the building. During this period, the Railway approached H and asked if they could buy the building and negotiations began but nothing was settled. Once th original 6 months elaspsed, H sued the Raiwlway for breach of contract and tried to evict the company. Tenant completed the repairs in June. H was successful at trial but was overturned on appeal
* Held: HL confirmed CA and found in favour of railway. It would be unfair for the plaintiff to take advantage of the defendants by negotiating with them and stalling, allowing the 6 months to expire and then suing them. Throughout their dealings, both parties made in inequitable to count the time of the negotiations as part of the 6 months. Defendants relied on this promise and there it would not be fair to hold them liable. Implied promise is enough to allow estoppel to apply.

### *Central London Property Trust v High Trees House* (pg 215): A promise intended to be binding, intended to be acted on and that is acted on, is binding so far as its terms properly apply

* **Ratio: A promise intended to be binding, intended to be acted on and in fact is acted on, is binding so far as its terms properly apply. You have to give reasonable notice that you are reverting back to strict contractual rights if you are going to do so. Estoppel works when there is a variation of terms within an existing relationship and a reliance on the promise.**
* Facts: PT granted HT ability to rent houses. It was during war though and hard to get renters. PT allowed rent to be lower. Neither party stipulated the period for which this reduced rental was to apply. After war had passed, PT asked for payment of the full rental costs from June 1945 onward.
* Issue: Did the written agreement bind the parties?
* Held: Judgment for the plaintiff in the amount requested. Plaintiff entitled to recover full rent once conditions ceased. A party who waives a part of the performance of a contract may later reinstate that portion if it would not be unjust or violate the reliance of the other party. Court held that the rent waiver was only meant to cover the wartime period and so it was not unjust to raise the rent back to the original amount after the war when the defendant would bea able to pay it again. They only get money from when the war had ended. In cases where there was no specific period discussed for when rental is less, the estoppel lasts until reasonable notice is provided that they are reverting to strict contractual rights.
* Reasons: Rent was reduced temporarily while the flats weren’t fully/substantially let due to the war. While the defendant continued to pay less, the conditions had changed. The promise was understood by all parties only to apply under the initial conditions (flats partially let). Rent is payable at the full rate after the conditions ceased.(1) Existing relationship (2) Promise – ‘estopped’ from claiming the full amount until wartime conditions ceased (3) Relied upon (4) Equitable

### *Combe v Combe* (pg 233): promissory estoppel can be a shield and not a sword. Estoppel is only a denfence, not a cause of action were one did not exist before.

* **Ratio: Friendly gesture does not constitute binding agreement. The fact the friend let the clause slide cannot be used to form an estoppel defence. For estoppel, the conduct must have been done with an intent to alter legal relationship, which it did not. Promissory estoppel is a shield (defence), not a sword) cause of action)**
* Facts: Mr Combe made an agreement to pay his estranged wife 100 pounds per year. Wife brough an action to enforce the promise invoking promissory estoppel. TJ held that estoppel can be a cause of action. Mr. Combe appealed.
* Held: appeal allowed. Denning (having ruled in *Central London Property*) clarifies that promissory estoppel is a “shield and not a sword”. It cannot be used as a cause of action but only as a defence when someone is trying to claim that a promise they made did not have consideration and is therefore bot binding. Only issue in this case is whether or not the wife gave consideration for the yearly payments. DEng decides that she did not as there is no evidence the husband ever requested the wife not to go to court. Her claim fails.

### *John Burrows Ltd v Subsurface Surveys Ltd* (pg 218): Friendly gesture does not constitute binding agreement | & | Estoppel defence cannot form from friendly gesture

* **Ratio: Friendly gesture does not constitute binding agreement. The fact the friend let the clause slide cannot be used to form an estoppel defence. For estoppel, the conduct must have been done with an intent to alter legal relationship, which it did not. Estoppel cannot be invoked unless there is evidence that one of the parties entered into negotiations which led the other to suppose that the strict rights under the contract would not be enforced (i.e. there must be evidence that the first party intended that the legal relations created by the contract would be altered as a result.**
* Facts: Defendant purchased the plaintiff’s business, and agreed to make monthly payments. The agreement contained a clause permitting the creditor to claim the entire amount if the defendant was more than 10 days late on any monthly payment. The defendant consistently paid more than 10 days late. Following a disagreement, the plaintiff sued for the whole amount. Defendant tendered the instalment, but the plaintiff rejected it.
* Issue: Does estoppel apply?
* Held: Appeal allowed. Judgement for plaintiff. Estoppel does not apply in this case. For estoppel to apply, the conduct of Burrows must amount to a promise or assurance intended to alter the legal relationship between the two, and that it is impossible to infer this from he facts of the case. He was simply acting as a friend, and not entering into any negotiations with Whitcomb over new terms of payment. Guy owes the entire thing, clause upheld. Just since the one friend let the late payments go, does not mean he intended to alter legal relationship. He was just being nice, and it was within his right to later use the clause if he wanted.
* Reasons: Plaintiff granted friendly indulgence to an old associated while retaining his right to insist on the letter of the obligation. A friendly gesture is not a binding agreement and does not entitle a party to claim estoppel.

### *D & C Builders Ltd v Rees* (pg 221): No settlement can be binding stemming from intimidation | & | Promisee must act equitably

* **Ratio: Substitute agreements require consideration to be binding at common law. Substitute agreements may be acceptable in equity even if they do not have consideration, if it would be inequitable to force the debtor to pay any more, there was an agreement between the two parties that the new sum would settle the debt and that this agreement was relied upon by the debtor. Accepting payment or don’t get paid cannot be consideration. Promisee must act equitably. Undue pressure bars a party from relying on an alleged estoppel.**
* Facts: Plaintiffs were employed to do work for the defendant. Plaintiffs gave the defendant invoices. Defendant paid a portion of the invoice. The plaintiffs followed up to get the rest of the payment to no avail. The defendant’s wife contacted the plaintiffs to complain about the work and offer partial payment in settlement of the account. She told the plaintiffs they would get nothing otherwise. When the plaintiffs went to collect the payment the defendant’s wife insisted the receipt read “in completion of the account.” Defendant’s wife knew that the plaintiffs were in need of money to meet their own commitments. Plaintiffs brought action for the balance.
* Issue: Is the settlement binding, or are the plaintiffs entitled to the original amount?
* Held: Appeal dismissed. TJ’s judgement in favour of the plaintiffs upheld. They are owed total amount. Substitute contracts are not allowed unless there is consideration provided. Intimidation cannot be used to procure a lesser settlement. There is also no consideration here for D&C to take less. So not a binding agreement.
* Reasons: Not bound unless there was a true accord between the parties.Debtor’s wife held the creditors to ransom; she put undue pressure on the plaintiffs, threatening to break the contract to compel them to do what they were unwilling to do (settle the account).

### *WJ Alan & Co v El Nasr Export & Import Co* (pg 224): Detrimental reliance is not required for promissory estoppel to apply. Promissory estoppel requires that the claimant party reg on the actions of the other party and alter their position as a result.

* Ratio: Detrimental reliance is not required for promissory estoppel to apply. Promissory estoppel requires that the claimant party reg on the actions of the other party and alter their position as a result.
* Facts: WJ agreed to sell 250 tons of coffee beans to El Nasr payable on credit. At the time, the value of Kenyan shillings and pound sterling were of equal value and the contract stipulated the price payable in Kenyan shillings, however the credit account referred payment in pound sterling. There were a number of other discrepancies between the credit agreement and the contract but they we rectified in a revised agreement but this revised agreement still referred to payment in pound sterling. Value of the pound dropped dramtically. WJ then sought to revert to Kenyan shillings and demanded further payment. El Nasr claimed that in accepting the instalment in pound sterling and redrafting the credit agreement without changing the currency there was an implied promise that they would not revert to Kenyan Shillings. WJ argued that El Nasr had not acted to their detriment in reliance of this promise as they gained a benefit.
* Held: Appeal allowed. There was a variation in the form of payment in the revised agreement to pound sterling and that WJ waived their right to be paid in shillings. Once an alternative method of payment is accepted (the pounds sterling) it is deemed to have been accepted as a term of the contract and the sellers had waived their right to be paid in shillings. WJ could not then withdraw this waiver if it was either too late, or if it would be unconscionable in the circumstances.

### The Post Chaser (pg 228):

* case that dealt with the question of reliance and whether detrimental reliance is required
* courts have now accepted that mere reliance is sufficient

## Sharp Sword

### *M(N) v A(AT)* (pg 238): Estoppel cannot be used as ‘sword’ outside a pre-existing contract

* **Ratio: Social arrangements are not binding unless parties intended there to be a legal relationship. Estoppel is not a cause (sharp sword) of action but a defence or blunt sword. This is one of the few Canadian cases dealing with this in Canada. Traditional view of estoppel in Canada: estoppel can only be relied upon defensively as a shield and not as a swore (i.e it is not a cause of action)**
* Facts: M promised to pay off A’s mortgage if she would live with him in Canada with a view to marriage. A moved to Canada. M didn’t pay off her mortgage, but loaned her $100,000 on a promissory note. M evicted A from his home. A sued, claiming estoppel.
* Issue: Should the promise on which A relied be enforce?
* **Held: She gets nothing. There were no intention for this to be a legal relationship so there was never a binding agreement. Estoppel is also not a cause of action, but rather only a defense in Canada. Therefore it cannot be used here to get money. Even with Waltons Stores (Australia), Canadian court here**
* **Reasons: A necessary element of promissory estoppel is the promisee’s assumption or expectation of a legal realtisonhip. No evident supporting a finding that M intended his voluntary promise to pay off A’s mortgage to have binding effect. No evidence that A viewed the promise as binding. She took on the risk. Lack of mutuality- A could be under no enforceable obligation to stay with M if he fulfilled the promise.**
* **Unsuccessful attempt to use promissory estoppel as a sharp sword**