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NOVA SCOTIA
BARRISTERS' SOCIETY

CONTRACTS

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I. WHAT IS A CONTRACT?

"A contract is a legally recognized agreement made between two or more persons. Such agreement gives rise to obligations that may be enforced in the courts, the failure to observe which creates a liability to pay compensation in the form of damages." (John A. Yogis QC, ***Canadian Law Dictionary***, 2[d]ed., (Hauppauge, NY: Barron's, 1990), p. 52)

II. ESSENTIAL ELEMENTS OF CONTRACTS

There are three essential elements to a simple contract: offer, acceptance and consideration. Additionally, the parties must have the capacity to contract, an intention to create legal relations, and a legal purpose, and the terms of the contact must be sufficiently certain (***Canadian Law Dictionary***, *supra* p. 75). In addition, there are implied principles of good faith and honest performance. These elements will be more fully discussed below.

III. MEETING OF THE MINDS

For a contract to be binding, the law requires that the parties have a "meeting of the minds". In other words, there must be a mutual agreement by the parties on the same subject matter. The outward expression of this "meeting of the minds" is *offer* and *acceptance*. In ***Wambolt v. Armstrong***, 2012 NSSC 363, Justice Moir opined that the person claiming an agreement:

> Bears the onus of establishing, on an objective standard (it would be clear to the "objective reasonable bystander") that the parties manifested "their intention to contract and the terms of such contract***: Cormier v. Universal Property Management Ltd.,*** 2011 NSSC 16 at para. 26.

Except in cases where an agreement in writing is required for it to be enforceable (see discussion of the **Statute of Frauds**, *infra*), the court will give effect to (or effect a remedy for breach of) a verbal agreement provided that all of the requisites for a contract are met. In ***Jeffrie v. Hendriksen***, 2015 NSCA 49, the Court found that a verbal agreement for the purchase and sale of shares, which was contemplated to be reduced to writing but in fact was not, was enforceable (a later subsequent decision ordered specific performance). The Court found that the issue was one of mixed law and fact, and as such was reviewable for palpable and overriding error where the questions of law could not be isolated; or for correctness where the legal issues could be severed from questions of fact (citing ***Sattva Capital Corporation v. Creston Moly Corp***, 2014 SCC 53 – ***Sattva*** and this standard of review are also discussed later in these materials under standard form contracts). In applying this standard to the application judge's finding that there was an agreement and not preliminary negotiations, but overturning the finding that it was unenforceable for want of writing, the Court stated:

> [17] It is well settled that an agreement need not be in writing to be enforceable. For the proper legal test, one need look no further than this Court's decision in *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, at ¶ 75-76:
>
> [75] Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. ***The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented.***
> [Emphasis added]

The Court continued, at para. 23: "With respect, that finding of a commitment was all that was required. If a written agreement were necessary, there could be no commitment. It is inconsistent to find that a commitment had been made and then undo it because it was not in writing."

IV. GOOD FAITH AND HONESTY

The Supreme Court of Canada has established that every contract has an implied element of good faith and honesty, and that this does not arise out of the intention of the parties. This was termed a "new duty of honest performance." In ***Bhasin v. Hrynew***, 2014 SCC 71, Bhasin was under a contract for sale of financial products (RESPs); the term renewed automatically unless notice to the contrary was given six months before the term end. The fund operator gave that notice, which was found to be in bad faith and under pressure from an acrimonious competitor.

The Court found, as a matter of law, that although the fund operator had the contractual right "not to renew," that right had to be exercised in good faith, and in honest performance of the contract. Cromwell, J., for the Court, found that (para. 33):

> *it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.*

He went on to find three examples of bad faith (paras. 49-51): (a) Contracts requiring the cooperation of the parties – for example, a vendor could not refrain from making reasonable efforts to obtain subdivision approval to avoid a contract, when only the vendor could make that application; (b) mis-exercise of contractual discretion – for example, an option to purchase at "reasonable fair market value" did not give a vendor carte blanche to stipulate any price whatsoever; and (c) where a contractual power is used to evade a contractual duty – such as a

vendor conveying to a related party in order to create a title defect. He went on to distinguish commercial honesty from fiduciary duty (para. 60):

> *Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce.*

Cromwell, J. then continued to distinguish the "organizing principle" of good faith from a "free-standing rule, but rather a standard that underpins and is manifested in more specific doctrines and may be given different weight in different situations." He said that the principle is "simply that the parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily," but were entitled to act in their own interests so long as they did not "undermine [opposing] interests in bad faith … good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first." (pars. 63-5), including in situations where the other party suffers a loss or even perhaps an intentional loss (para. 70). Finally, he stated that a breach of good faith claim would generally not succeed if it did not come within the doctrines of "honest, candid, forthright or reasonable contractual performance."

He concluded, at paras 74 and 93:

> *I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.*
>
> *…*
>
> *A summary of the principles is in order:*
> *(1) There is a general organizing principle of good faith that underlies many facets of contract law.*
> *(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed* which gives effect to *aspects of that principle in particular types of situations and relationships.*
> *(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.*

Bhasin, predictably, has begun to receive judicial consideration. For example, in *Community Link Medical Clinic, infra*, Moir J. subsumed the prior doctrine of reasonable notice of termination to the Bhasin terminology of good faith performance. Holding that "[t]he promises

cannot be reconciled with the proposition that one party remains bound after another is dismissed" in the particular close relationship at bar, the mutual obligations were released. In *Industrial Alliance Insurance and Financial Services Inc*. v. *Brine*, 2015 NSCA 104, leave to appeal dismissed 2016 CanLII 26761 (SCC), the Court found that the insurer's lack of good faith (including calculation of overpayments and clawbacks, dealing with payment of benefits, and various other matters) not only spoke to compensatory damages, but to compensatory damages for mental distress and to punitive damages for breach of contract as well. It will be interesting to see how the Supreme Court of Canada addresses such issues, if at all, in *Matthews v. Ocean Nutrition*, leave to appeal granted January 31, 2019. At the Court of Appeal (2018 NSCA 44), the majority found that a wrongfully terminated employee could not avail himself of an incentive plan when its very terms precluded participation in the plan if terminated "with or without cause" and that it would "not be calculated as part of the Employe's compensation for any purposes, including….any severance." In dissent, Scanlan JA cited *Bhasin* at length and would have factored the substantial incentive plan (which was ultimately triggered by the post-dismissal sale of the company) into the calculation of damages.

The duty does not extend to an obligation to revisit an improvident contract. A bad bargain, or one that does not turn out as one (or perhaps even as any) party anticipated at the time is not in itself bad faith or dishonest, when the terms are clear and adhered to: *Churchill Falls (Labrador) Corp. v. Hyndro-Quebec*, 2018 SCC 46.

Although *Bhasin* was not referred to in *Valard Construction Ltd. v. Bird Construction Co.* 2018 SCC 8, the Court found that there was a duty on an insolvent company to inform its creditors of the existence of a labour and material payment bond; the majority so found on the basis that the failure to do so would be a breach of its fiduciary duty.

The *Bhasin* duty applies to contracts formed, not to those in negotiation or in which a consensus ad idem has not been reached: *Burrows v. Starbucks Coffee Canada Inc.*, 2019 NSSM 10.

V. OFFER

An "offer" is the indication by one person (the offeror) to another (the offeree) that she is prepared to enter into a legally binding agreement (contract) with one or more persons upon terms that are certain or capable of being made certain.

1. *Elements of an offer*

An offer must:

- show an intention to be legally bound,
- be certain or definite enough in its terms to be legally enforceable, and
- be communicated to the other party (offeree) or parties (offerees).

2. *Intention to be legally bound*

In interpreting intention, an objective test is frequently applied. What would the reasonable person assume? ***Grant*** v. ***Province of New Brunswick***, [1975] 35 D.L.R. (3d) 141 (N.B.C.A.), followed in ***Puddister Trading Co.* v. *Canada*** (1997), 132 F.T.R. 120 (F.C.) . See also "implied terms" and parol evidence, as well as situations requiring writing, discussed elsewhere in these materials.

Normally, a social engagement such as an offer and acceptance of hospitality would not result in a contract. Similarly, there is a presumption (rebuttable) that arrangements between spouses and close relations, *e.g.*, parent and child or uncle and nephew, are not intended to create legal relationships. ***Balfour*** v. ***Balfour,*** [1919] 2 K.B. 571 (C.A.), ***Jones*** v. ***Padavatton***, [1969] 2 All E.R. 616 (C.A.). Similarly, a "friendship gone wrong" does not give rise to a contract when there were a series of social exchanges or trades over time: *Stein v. Pennie*, 2018 NSSM 95. In practice, one will often encounter a dispute over whether money (or other property) was a gift or a loan. See, eg., *Foster Estate v. Ball*, 2018 NSSM 35.

Where the subject matter of an agreement is of a commercial nature, there is a presumption (rebuttable) that legal effect was intended and there is a heavy onus on the party who makes an assertion to the contrary. ***Edwards*** v. ***Skyways Ltd***., [1964] 1 All E.R. 494 (Q.B.D.) (see also ***Mitsui & Co. (Point Aconi) Ltd.* v. *Jones Power Co.***, 2000 NSCA 95, 189 N.S.R. (2d) 1, leave to appeal dismissed [2000] S.C.C.A. No. 526).

However, even in business relations, an intention to be legally bound may be negatived if the parties expressly or impliedly indicate that their arrangement shall not have legal consequences, and/or is intended to be binding in honour only. ***Rose and Frank Co.*** v. ***J.R. Crompton and Bros. Ltd***., [1923] 2 K.B. 261 (C.A.)

*(**N.B.** While it is a subtle distinction, an agreement that purports to oust the jurisdiction of the courts would probably be declared void as contrary to public policy. This can also be a statutory prohibition, e.g., Small Claims Court Act, R.S.N.S. 1989 c. 430, s. 14).*

3. *Invitations for offers or "Invitations to Treat"*

There are actions that are similar to offers, but which the law distinguishes from offers. Distinctions are often subtle. One party may "invite" an offer from another by words or conduct (*e.g.*, a display of goods). An acceptance of an *invitation* will not result in a contract because the invitation is not an offer.

Some examples follow:

Quotation of lowest price

The statement of the lowest price at which a vendor is willing to sell is generally regarded as an invitation to a prospective purchaser to make an offer. ***Harvey*** v. ***Facey***, [1893] A.C. 552 (P.C.)

Whether a proposal is to be construed as an invitation or an offer, which can be turned into an agreement by acceptance depends upon the language used and the circumstances of the particular case. In ***Canadian Dyers Assoc. Ltd.*** v. ***Burton***, [1920] 47 O.L.R. 259 (H.C.), the defendant

stated a lowest price for a property adding "if it were to any other party I would ask more." The court construed such language as an offer to the plaintiffs.

Display of goods

The display of articles for sale has generally been held to be only an invitation to treat, not an offer from the seller. ***Fisher*** v. ***Bell***, [1961] 1 Q.B. 394 (goods in a shop window), ***Pharmaceutical Society of Great Britain*** v. ***Boots Cash Chemists (Southern) Ltd.,*** [1952] 2 Q.B. 795, aff'd [1953] 1 Q.B. 401 (C.A.) (articles displayed on shelves of a self-service pharmacy.)

*(**N.B.** Policy considerations may require a different result. The issue has arisen in self-service operations where a customer has switched the price displayed on the goods. It is suggested the law of contracts should not be used to determine the outcome of what might otherwise amount to theft. In such a situation, the dishonest customer who takes the goods to a checkout counter is not making a genuine offer, because the goods are not "offered" at the seller's intended price. Thus, no proprietary interest should pass to the customer. **R** v. **Milne**, [1992] 1 S.C.R. 697.)*

Advertisements

Generally advertisements in newspapers, circulars, etc., are not offers but mere invitations. Advertisements may usually be regarded by reasonable persons as mere puffery, or requiring further inquiry into specifics such as quality and description. ***Partridge*** v. ***Crittenden***, [1968] 2 All E.R. 421 (Q.B.D.)

However, advertisements have, on occasion, been held to constitute offers for unilateral contracts (infra) open to anyone who performs conditions outlined in the advertisement. Thus an ad offering a $100 reward to anyone who caught influenza after using a certain medicinal product was held to be a true offer. The Court considered the ad as containing a genuine promise, as the defendant company had demonstrated proof of sincerity by depositing 1,000 pounds with a London bank. The plaintiff acceded to the defendant's request by performing the act of buying the product. ***Carlill*** v. ***Carbolic Smoke Ball Co.*** [1893] 1 Q.B. 256 (C.A.). Similarly, a promise made by advertisement to the general public that hairs could be "removed safely and permanently by Electrolysis" was held to be an offer. The defendants' "guaranteed results" and their promises were "absolute and unqualified." The plaintiff acceded to the "offer" by her act of submitting herself to treatment and paying the fee. ***Goldthorpe*** v. ***Logan***, [1943] 2 D.L.R. 519 (Ont.C.A.).

***(N.B.** Legislation may exist to assist the consumer against certain unfair business practices. The federal **Competition Act**, R.S.C. 1985, c. C-34 creates offences and establishes penalties to prevent a person in promoting any business interest to make a material false or misleading representation concerning products sold or made available to the public. Section 36 provides a civil remedy for loss caused by misleading advertising aimed at the public.)*

Auctions

Generally, the advertisement of a sale at an auction is a mere invitation that does not bind the owner to sell, or to sell to any particular bidder. The bid is the offer. Until the acceptance is signified in some manner, *e.g.*, when the auctioneer's hammer falls, no contract is concluded. ***Anderson*** v. ***Wisconsin Central Ry. Co.*** (1909), 107 Minn. 296 (S.C.). ***The Sale of Goods Act***, R.S.N.S. 1989, c.408, *as am*., specifically addresses the timing of acceptance in a sale by auction. Section 59 (b) provides that "… a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner and, until such announcement is made, any bidder may retract his bid ..."

But, at common law, an advertisement that a sale will be held "without reserve" (*i.e.*, to the highest bidder) has been held to be a genuine offer requiring the auctioneer to accept the highest bid once the sale starts: ***Warlow*** v. ***Harrison***, (1859), 1 E&E 309 , 120 E.R. 925 (En Chamb)

Tenders

The rule has been that a call for tenders is a mere invitation. The offer comes from the party making the tender, which the other party is free to accept or reject: ***Spencer*** v. ***Harding,*** [1870], L.R. 5 C.P. 561. ***R.*** v. ***Ron Engineering & Construction (Eastern) Ltd.***, [1981] 1 S.C.R. 111 modified the traditional rule by suggesting that if the call for tenders is accompanied by terms and conditions (*e.g.*, that the lowest tender will be accepted), then the call may be viewed as an offer, and the submission of the tender is an act constituting acceptance. Specifically, the court developed the Contract A/Contract B framework of analysis: The submission of a tender can create a contract between the bidder and the owner ("Contract A"), which imposes certain obligations on the bidder, and which is separate from the actual contract eventually entered into between the successful bidder and the owner ("Contract B"). Whether or not the process creates a Contract A depends on whether the parties intend to initiate contractual relations by submission of a bid and by the terms and conditions of the tender call (see: ***M.J.B. Enterprises Ltd.*** v. ***Defence Construction (1951) Ltd.,*** [1999] 1 S.C.R. 619, as well as ***Guysborough (Municipality)*** v. ***Resource Recovery Fund Board Inc.***, 2011 NSSC 15. The time for determining "compliance" is at the time the bid is submitted: *C.F. Construction Ltd. v. Town of Westville*, 2018 NSSC 123.

4. *Certainty*

There may be cases where the parties may have thought that they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. An agreement may contain language that is so vague and obscure that the court is unable to attribute to the parties any particular contractual intention. Or, the agreement may be inchoate and never have gone beyond negotiations. In either situation, the courts will generally hold there never was a contract. ***Scammel*** v. ***Ouston***, [1941] A.C. 251 (H.L.). In ***Hillas and Co. Ltd.*** v. ***Arcos Ltd.*** [1932] All E.R. 494 (H.L.) the Court found a contract for the purchase of timber "of fair specifications" could be upheld despite the inartistic language employed. The Court noted the contract was a commercial one and the parties undoubtedly thought they had concluded a contract. However, the key was likely that there had already been ***a course of dealing between***

the parties permitting the Court to draw reasonable implications as to their intent. Thus, the terms employed were reasonably certain. Also on this issue, see ***Fish Reduction Ltd.*** v. ***Malone,*** 1999 CanLII 2314 (N.S.C.A.) where the Nova Scotia Court of Appeal found there was a certainty of terms between a fish processor and a commercial fisherman in respect of a licence to be held in trust.

Community Link Medical Clinic v. Figueroa, 2015 NSSC 278 recently dealt with a situation in which the parties partially or completely executed various different versions of agreements – one party doing so without engaging counsel. While differing on details, the Court had no difficulty in holding there was a valid agreement, and went on to find which terms were in effect. It then went on to hold that two separate agreements between individuals and companies controlled by them were effectively mutual obligations, despite being separate contracts, as performance of one was inextricably linked to performance of the other and either could not be severed, or co-existed in circumstances in which a breach of one was a repudiation that was duly accepted.

In a case where the parties obviously believed they had a contract, had acted upon it for three years, and had a clause agreeing to submit any dispute on difference arising in relation to the subject matter or construction of the agreement to ***arbitration*** the court found an effective and enforceable agreement. ***Foley*** v. ***Classique Coaches Ltd.***, [1934] 2 K.B.1 (C.A.). Similarly, "since an arbitrator can be given such powers as the parties wish, he can be authorized to make a new contract between the parties ...; a provision that ... new or modified terms shall be settled by an arbitrator can without difficulty be made enforceable ..." ***Calvan Consolidated Oil & Gas Ltd.*** v. ***Manning***, [1959] S.C.R. 253, 17 D.L.R. (2d) 1.

Where there is no agreement on a fundamental term (*e.g.*, the price in a building contract) and no machinery or agreed method for ascertaining it, not dependent on the negotiations of the parties themselves, there is no contract. ***Courtney and Fairbairn Ltd.*** v. ***Tolaini Bros (Hotels) et al***., [1975], 1 All E.R. 716 (C.A.)

5. Ambiguity and implied terms

In rare cases, a court may imply terms when there is an ambiguity in a contract. In ***CNR v. Halifax***, 2013 NSSC 307, appeal dismissed 2014 NSCA 104, the Court dealt with sophisticated commercial parties who disagreed over responsibility for certain repair work.

First, Justice LeBlanc differentiated between an ambiguity and a dispute over interpretation. He stated, at paras. 21-2:

> [21] In ***BC Rail Partnership v. Standard Car Truck Co.,*** 2009 NSSC 240, Warner, J. adopted the following useful definition of "ambiguity":
>
> > **24 Canadian Encyclopedic Digest Contracts IX.2(a)** succinctly notes:
> >
> > s. 562 "**Ambiguity**" is a term of art, which refers neither to uncertain breadth of language, nor to an inaccuracy, a novel result, or a difficulty

> in interpretation, nor to clear contractual wording that does not say what one of the parties intended it to say. An ambiguous contractual provision is one that is reasonably capable of more than one meaning .... "**ambiguity**" implies that the parties knew fundamentally what they were contracting for or about, but did not express it clearly ....
>
> s. 563 Correspondingly, a cardinal principle of contractual interpretation is that, if the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the court is required to give effect to that meaning. A court will not resort to subsidiary rules of construction or interpretation unless the words used by the parties are reasonably capable of more than one meaning.

[22] As G.H.L. Fridman notes in *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 442-3:

> …[W]here the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced. [Emphasis added]

He then went on to state, while emphasizing that "the power to imply terms into a contract must not be used by the Court to rewrite a contract for the parties":

> [29] The law has long recognized that parties to a contract will not always succeed in committing every aspect of their agreement to writing. Accordingly, in limited circumstances, the Court may imply a term or terms into a contract in order to give efficacy to the agreement of the parties. In this case, CN asks that I imply a term requiring HRM to assume responsibility for coordinating relocation of the utility lines.
>
> [30] The Supreme Court of Canada outlined the three ways that a term may be implied into a contract in ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] 1 S.C.R. 619:
>
> > **27** The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J.,

> and *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R.986, at p. 1008, *per* McLachlin J. [Emphasis added]

….

> [32] Courts should be slow to exercise the power to imply terms in a contract: *K.W. Robb & Associates Ltd. v. Wilson*, 169 NSR (2d) 201, [1998] NSJ No 249 (NSCA) at para. 73. The court will only imply a term where it is "reasonable, necessary, capable of exact formulation, and clearly justified having regard to the intentions of the parties when they contracted": G.H.L. Fridman, *supra* at 466-7.
>
> [emphasis throughout added by LeBlanc, J]

In GC Lobster Ltd. v. B Atkinson Boat Builders Ltd., 2019 NSSC 342, Justice Muise allowed extrinsic evidence on whether a contract (silent on the point) contained a completion date and, if not, what was a reasonable time for completion implied as a result (paras. 48 and 77 *et seq*.)

See also *quantum meruit* in XV (7) of these materials.

6. *Meaningless terms*

When the parties have agreed on all essential terms, and nothing is left to further negotiation, a clause that is meaningless can often be ignored and rejected without impairing the contract as a whole. ***Nicolene Ltd.*** v. ***Simmonds***, [1953] 1 All E.R. 822 (C.A.).

An agreement that leaves one of the essential terms to be determined by the parties mutually at a future time is unenforceable. ***Friesen et al*** v. ***Braun et al***, [1950] 2 D.L.F. 250 (Man.K.B.) (An option to purchase real estate on terms to be discussed and decided by the parties at the date of acceptance.)

However, *the* ***Sale of Goods Act***, R.S.N.S. 1989. c 408, *as am*, implies a reasonable price where the parties are silent about price. Section 11(2) provides: Where the price ***is not determined*** [in a contract for the sale of goods] the buyer must pay a reasonable price and what is a reasonable price is a question of fact dependent on the circumstances of each particular case.

*(**N.B.** This section would not apply where, e.g., the parties had agreed to fix the price between themselves. In **May and Butcher Ltd.** v. **The King**, [1934] 2 K.B. 17 (H.L.), the principle was stated thus:*

> *To be a good contract, there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties.*

7. *Subject to contract*

Sometimes, particularly in matters relating to interest in land, negotiations are stated to be "subject to contract". It is a matter of construction "whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction, already agreed to, will in fact go through." ***Calvan Consolidated Oil and Gas Co. Ltd.*** v. ***Manning***, *supra*. In ***Knowlton Realty Ltd.*** v. ***Wyder and Western Canadian Properties Ltd***, [1972] 1 W.W.R. 713 (B.C.S.C.) Macdonald, J. in construing the words "subject to the execution of the lease documents" observed:

> It comes ... to this, that where you have a proposal or agreement made in writing expressed to be ***subject to*** a formal agreement being prepared, it means what it says: it is subject to and is dependent upon a formal contract being prepared. (Emphasis added.)

VI. ACCEPTANCE

1. *General*

Acceptance of an offer is an element of a valid contract. Every contract is an agreement between two or more specific identifiable persons, one or more making an offer that the other or others accept. ***Con-Force Products Ltd.*** v. ***Rosen and Boyle*** (1967), 61 W.W.R. 129 (Sask. Q.B.)

An offer must be ***communicated*** to an offeree in such a manner that the offeree would construe it as an offer capable of acceptance and showing an intention to be legally bound. In other words, there must be a promise or representation made to an offeree upon which she would be expected to act. ***Blair*** v. ***Western Mutual Benefit Association***, [1972] 4 W.W.R. 284 (B.C.C.A.)

Yogis QC, ***Canadian Law Dictionary***, *supra* at page 5 defines "acceptance":

> In contracts, acceptance to create a binding contract is the assent to an offer by words or conduct on the part of the person to whom the offer is made…. "Whether or not there has been acceptance depends upon whether the offeree has so conducted himself that a reasonable man would believe that he has accepted…" (*Samek* v. *Black Tusk Energy Inc.*, 2000 ABQB 684, quoting Fridman, *The Law of Contract in Canada (6th ed. 2011) 47.*

The normal test for acceptance is ***objective***. The question is not what the parties had in their minds, but what reasonable third persons would infer from their words and conduct. Acceptance need not be in express terms, and can be found in the language and conduct of the acceptor: ***Dawson Helicopter***, infra.

When a person in an offer made by him to another expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance. ***Carr*** v.

Canadian Northern Ry. Co. (1907), 6 W.L.R. 720 (Man.K.B.) (act of entering upon and taking possession of plaintiff's land). Similarly, where an offer to purchase a property stated that acceptance by an Order in Council would constitute a binding contract, the Privy Council held nothing further by way of notification or communication of acceptance was necessary. ***Dominion Building Corp. Ltd.*** v. ***The King.***, [1933], 3 D.L.R. 577 (P.C.).

Generally, acceptance, in order to be effective, must be communicated to the offeror. Silence will not normally constitute acceptance. ***Felthouse*** v. ***Bindley*** (1862), 142 E.R. 1037. However, "silence may be so deceptive that it may become necessary for one who receives beneficial services to speak in order to escape the inference of a promise to pay for them." ***Saint John Tugboat Co. Ltd*** v. ***Irving Refinery Ltd.***, [1964] S.C.R. 614, 49 M.P.R. 284 (Ritchie, J. quoting from ***Williston on Contracts*** with approval).

2. *Method of acceptance*

a. Unilateral contracts

An acceptance may occur by the offeree ***doing an act***. The performance of the act then constitutes acceptance whether the offeror is aware of it or not. A reward situation constitutes a good example of a unilateral contract. If I offer a $500 reward to the person who finds and returns my lost dog, Sophie, then the person who does in fact find and return Sophie has accepted my offer and performed the act entitling her to the money. See also ***Carlill***, *supra*.

b. Bilateral contracts

An offer that contemplates acceptance by a ***return promise*** (express or implied) is known as a ***bilateral*** contract. In ***Dawson*** v. ***Helicopter Exploration Co.*** [1955] S.C.R. 868, it was contended that an offer to the plaintiff in correspondence to give him an interest in certain mineral deposits in return for his assistance in locating the site, called for an acceptance not by promise, but by the performance of an act. In finding that the offer contemplated a promise by the defendant, Rand, J. quoting from Williston noted:

> in a bilateral contract both parties are protected from a period prior to the beginning of performance on either side – that is from the making of the mutual promises.

There is a tendency of Courts to treat offers as for ***bilateral*** rather than ***unilateral*** action when the language can be fairly so construed in order that the transaction shall have such business efficacy as both parties must have intended, *(Ibid.)*

c. Acceptance may not be conditional

It has repeatedly been held that an acceptance must be ***absolute and unequivocal***. ***Dawson*** v. ***Helicopter Exploration Co.***, *supra*.

3. *Time of acceptance*

- An offer must be accepted within a reasonable time. Regard will be shown for the commodity being bargained for, the time of year of the offer, and the necessity of a prompt decision. ***Shatford*** v. ***B.C. Winegrowers Ltd.***, [1927] 2 D.L.R. 759 (B.C.S.C.) (loganberries). Where the article is of a fluctuating nature, the time for acceptance must be short. ***Manning*** v. ***Carrique*** (1915), 34 O.L.R. 453 (S.C., App.Div) (stock). In ***Barrick*** v. ***Clark***, [1951] S.C.R. 177 it was noted that the offer for farmland (which was the subject of the negotiations) would be open for acceptance longer than would an offer for goods of a perishable character. However, in holding that a reasonable time had lapsed Estey, J. remarked that the offeror had insisted upon a reply by wire.

*(**N.B.** A less traditional test was proposed by Buckley, J. in **Manchester Diocesan Council for Education** v. **Commercial and General Investments, Ltd.,** [1969] 3 All E.R. 1593 (Ch.D). He suggested the "correct view" was not to ascertain what is reasonable **at the time of the offer**, but to consider the **subsequent conduct** of the parties. He thus would ask "whether the offeree should be held to have refused the offer by his conduct.")*

- Death or incompetency of an offeree should put an end to the power of acceptance. "Before there is any contract, there must be an acceptance communicated to the person making the offer." Where a document was signed and given to the offeree's son for the purpose of being mailed, it was held that there was no contract because it was not mailed during the offeree's lifetime, and the authority of the son was terminated by death. ***Re Irvine*** (1927), 62 O.L.R. 319 (S.C. App.Div)

- Postal Acceptance Rule (a.k.a. "Mailbox Rule"):

  Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. ***Henthorn*** v. ***Fraser***, [1892], 1 All E.R. 161 (C.A.)

  The "postal acceptance" or "mailbox" rule is that "an acceptance is effective on mailing a letter or sending a telegram even if the message is destroyed or lost" (see: Waddams, ***The Law of Contracts***, supra, para. 98).

  The postal rule does ***not*** apply:

  - when the express terms of the offer specify that the acceptance must reach the offeror; or
  - if its application would produce manifest inconvenience and absurdity.

  In ***Holwell Securities Ltd.*** v. ***Hughes***, [1974] 1 All E.R. 161 (C.A.) a letter exercising an option was lost in the mail. The Court held the postal rule did not apply. The Court

concluded the requirement of a "request in writing" to the offeror required actual receipt by the offeror.

- Instantaneous communication

  Where a contract is made by instantaneous communication, *e.g.*, by telephone, telex, fax, email or other electronic forms of communication, the contract is complete only when the acceptance is received by the offeror, since the ordinary rule of law is that the acceptance must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of acceptance by the offeree. ***Re Viscount Supply*** (1963), 40 D.L.R. (2d) 501 (Ont.S.C.). This rule was applied to telex in ***Entores Ltd.*** v. ***Miles Far East Corp.***, [1955] 2 All E.R. 493 (C.A.)

In ***Brinkibon Ltd.*** v. ***Stahag Stahl und Stalwarenhandelsgesellschaft mb H***, [1983] 2 A.C. 34 (H.L.) Lord Wilberforce observed the general rule concerning instantaneous communication is a sound rule, but not necessarily a universal rule. He referred to many possible variations: *e.g.*, messages may be sent out of office hours, or at night, on the assumption they will be read at a later time. Such cases must be resolved by reference to the intentions of the parties, by sound business practice and, in some cases, by a judgment where the risks should lie (see also: ***Joan Balcom Sales Inc.*** v. ***Poirier*** (1991), 106 N.S.R. (2d) 377 (Co. Ct.), ***Eastern Power Ltd.*** v. ***Azienda Communale Energia and Ambiente***, (1999) 125 O.A.C. 54, 178 D.L.R. (4th) 409 (C.A.) (contract is made where and when the telex of acceptance is received by the offeror)).

- It has been noted, *supra*, that in the case of unilateral contracts the offer becomes effective as a contract upon the doing of the act contemplated. Ordinarily, there is no need to notify the offeror of the acceptance of the offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give her notice of acceptance within a reasonable time after doing that which constitutes the acceptance. ***Bishop*** v. ***Eaton*** (1894), 161 Mass. 496 (S.C.).

Part II of the *Electronic Commerce Act*, S.N.S. 2000, c. 26 contains statutory rules on what signifies an electronic "acceptance," and where and how it is deemed to be communicated.

See also Greener-MacLean v. Meadow Brook Stables, 2019 NSSM 36: a contract signed by one party only was held valid, when e-communication established the requisite *consensus ad idem*.

4. *Problems concerning acceptance*

- If a person does an act fulfilling the terms of an offer, but in fact does not know of the offer, there should be no contract because there has been no acceptance. Some English cases dealing with rewards seem to hold the contrary. *e.g.*, ***Gibbons*** v. ***Proctor*** (1891), 64 L.T. 594. Other jurisdictions have denied recovery. In ***R.*** v. ***Clarke*** (1927), 40 C.L.R. 227 (Aust. High Crt.) Isaacs, J. held:

> acceptance is essential to contractual obligation, because without it there is no agreement, and in the absence of agreement, actual or imputed, there can be no contract.

- Motive should not be confused with intention, though it might be evidence of one's state of mind. In ***R***. v. ***Clarke***, *supra*, Clarke was denied a reward of $1,000 (of which he had knowledge) because the information which he gave was in circumstances showing that he was not acting on the offer of the reward, but to clear himself of a false charge of murder.

- Acceptance may occur by a course of conduct. The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer is an objective and not a subjective one. ***Saint John Tugboat Co. Ltd.*** v. ***Irving Refinery Ltd.***, *supra*.

- A stranger, by sending goods to another, cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. ***John F. Wheller et al.*** v. ***A.W. Klaholt et al***. (1901), 178 Mass. 141 (S.C.).

- See also the discussion of "Part Performance" under the topic of Statute of Frauds.

*(**N.B. Consumer Protection Act,** R.S.N.S. 1989, c.92, s 23(4) states: " No action shall be brought by which to charge any person for payment in respect of unsolicited goods notwithstanding their use, misuse, loss, damage or theft." However, s. 23(3) provides that with respect to credit cards the "obtaining of credit by the person named in the credit card shall be deemed to constitute written acceptance by him.")*

5. *Termination*

Revocation of an offer by offeror: withdrawal of the power to accept

- The general rule is that an offer can be revoked at any point before it is accepted. However, the notification of retraction of an offer does not have to come from the offeror. The offeree is precluded from accepting an offer where she has learned from a credible source that the offer has been withdrawn. ***Dickinson*** v. ***Dodds*** (1876), 2 Ch. D. 463 (C.A.).

- A promise to hold an offer open for a certain period is not binding upon the offeror ***unless*** made under seal or contained in an option for which consideration has been given. In cases like those, the offer is irrevocable. ***Paterson*** v. ***Houghton*** (1909), 19 Man.R. 168 (C.A.)

- It is sufficient to withdraw an offer if the person to whom the offer was made had knowledge that the person had done some act inconsistent with the continuance of the offer (see ***Paterson*** v. ***Houghton***, *supra*; see also ***Pilgrim*** v. ***Milner*** (1997), 155 Nfld. & P.E.I.R. 221 (Nfld.C.A.).

- Whereas an acceptance, under the postal doctrine, may be effective as soon as the letter is mailed, revocation of an offer must be communicated to be effective. ***Byrne*** v. ***van Tienhoven*** (1880), 49 L.J.Q.B. 316

- In a unilateral contract it may be impossible for the offeror to revoke if there is partial performance. In ***Errington*** v. ***Errington,*** [1952] 1 K.B. 290 (C.A.) a father promised his son and daughter-in-law that a house would be theirs if they paid the mortgage instalments. Denning, L.J. stated:

> The father's promise was a unilateral contract – a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed ...

- Also, a time for acceptance can be specified. If the offeree does not accept the offer before the time expires, the offer lapses. It is possible that the time for acceptance can be extended impliedly by the parties' conduct. If no time is specified, the offer will endure, and be capable of acceptance, for a reasonable time (G.H.L. Fridman, ***The Law of Contract in Canada***, 6th ed. (Toronto: Carswell, 2011) p. 43).

Termination by offeree

- An offeree can reject an offer, thus terminating it.

- It is quite clear that the making of a ***counter-offer*** is a rejection of an original offer (***Hyde v. Wrench*** (1840), 49 ER 132). When an offer has been rejected it cannot be afterwards accepted without the consent of the individual who made it. However, a reply to a counter-offer by the words "cannot reduce price" was interpreted as a renewal of the original offer. ***Livingstone*** v. ***Evans,*** [1925] 4 D.L.R. 769 (Alta.S.C.)

- As noted above, lapse will terminate an offer. An offeree thus can simply leave an offer open until it lapses, which will terminate it. An offer may also lapse on the occurrence of some condition, express or implied, other than the passage of time.

6. Cross offers

Cross offers are not an acceptance of each other. ***Tinn*** v. ***Hoffman*** (1873), 29 L.T. 271 (Ex.Chamb.)

7. The battle of the forms

Lord Denning approved a notion known as "battle of the forms", or the "last-shot" doctrine in ***Butler Machine Tool Co. Ltd.*** v. ***Ex-Cell-o Corp. (England) Ltd.***, [1979] 1 All E.R. 965 (C.A.). He suggested the better way to look at documents passing back and forth between parties is to

glean from them, or the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on them. In most cases, there is a contract as soon as the last form is sent and received without objection. Most often, when there is a "battle of the forms", there is a contract as soon as the last of the forms is sent and received without objection being taken to it (see, for example, ***Cariboo-Chilcotin Helicopters Ltd.*** v. ***Ashlaur Trading Inc.***, 2006 BCCA 50.) See also ***Community Link Medical Clinic v. Figueroa,*** 2015 NSSC 278***,*** *supra,* in which the Court divined the terms of a contract from various partially executed drafts.

VII. CONSIDERATION

1. *General*

A contract is sometimes said to be made "under seal" or "by deed." A contract under seal is usually called a "formal contract", while one not under seal is called a "simple contract." The "sealed" contract provides a method for enforcing promises that otherwise would be invalid for lack of a ***quid pro quo*** (or consideration). The phrase "signed, sealed and delivered" is often used in conjunction with promises under seal. However, these requirements have been greatly relaxed in modern times. The requirement of sealing with wax has disappeared.

Re Bell and Black (1882), 1 O.R. 125 (Ch.D.). A document purporting to be a sealed instrument may be upheld by signature alone. ***Canadian Imperial Bank of Commerce*** v. ***Dene Mat Construction Ltd.***, [1988] 4 W.W.R. 344 (N.W.T.S.C.). However, the document should purport to be a sealed instrument or a formal document. ***Chilliback*** v. ***Pawliuk*** (1956), 1 D.L.R. (2d) 611 (Alta. S.C.) found that a signature to a sealed instrument was not conclusive evidence of an intention to adopt a seal in place of consideration. In this last case, it has been suggested that it might have been unconscionable to enforce a document containing a promise to release a promisee from an action for personal injuries where no value was received by the promisor. Thus, if a bargain is contemplated or thought to be necessary, the seal may be regarded by some courts as presumptive evidence only of an intent to displace consideration (see, however, ***Royal Bank of Canada v. Kiska*** (1967), 63 DLR (2d) 582 (Ont. CA)). In any event, consideration is regarded as an essential requirement to every contract not made under seal.

Consideration is what one party to a contract gives, or promises, in exchange for what is being given or promised from the other side. A more technical definition was provided in ***Currie*** v. ***Misa*** (1875), L.R. 10 Ex.:

> a valuable consideration ... may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment or loss, or responsibility given, suffered or undertaken by the other.

Mutual promises are sufficient to constitute consideration. ***Harrison*** v. ***Cage and His Wife*** (1698), 5 Modern 411 (K.B.)

In *Corbin v. Murchy*, 2019 NSSC 12, Justice Wright found adequate consideration when a landowner wanted to be divested of its property, without cost to itself. The frustrated transferee

so promised, and after finding that the bargain did not fun afoul of the writing requirement in the *Statute of Frauds*, found a binding contract and assessed damages accordingly. Justice Wright's rationale, at para. 46, was that the consideration to the owner was "to be relieved from the burden of future ownership costs and care of the building" and "the fulfillment of the agreement made with Mr. Corbin would have achieved the Assembly's objective in getting rid of an unwanted property on a cost free basis."

Consideration must be of some value (legally sufficient), but it need not be "adequate". The consideration may be small in value, but its adequacy is for the parties to determine at the time of entering into the bargain. ***Dewolfe*** v. ***Richards*** (1908), 43 N.S.R. 34 (S.C., en banc). ***Motive*** is not to be confused with consideration. ***Loranger*** v. ***Haines*** (1921), 50 O.L.R. 268 (S.C., App.D)

Courts, on occasion, construct a ***collateral contract*** where a promise that is not a term of a main contract is enforced because the promise carries with it an implied request that a promisee will enter into the main contract. Thus in ***City and Westminster Properties (1934) Ltd.*** v. ***Mudd***, [1959] Ch. 129 a tenant was given an oral assurance he would be allowed to live on certain premises although the lease contained a covenant that the premises were to be used for business purposes only. The oral promise was upheld. The consideration was the tenant's act of signing the principal contract. Similarly, in ***Shanklin Pier Ltd.*** v. ***Detel Products Ltd.***, [1951] 2 All E.R. 471 an indirect form of inducement and reliance was found. As with all contracts, a collateral contract must have sufficient certainty of terms to constitute an agreement: *Skylink Express Inc. v. Innotech Aviation*, 2018 NSCA 32.

Although the parties may be under an ***erroneous belief*** as to the value or adequacy of the consideration, nevertheless "the law will not enter into an inquiry as to the adequacy of the consideration." ***Scivoletto*** v. ***DeDona*** (1961), 35 W.W.R. 44 (Alta. Dist.Ct.)

A "compromise agreement" effected on the basis that the party making it ***bona fide*** believes he has a serious legal claim and a reasonable ground for suing will be upheld even though it later turns out that the claim was unsubstantial. The ***forbearance to sue*** will constitute a good consideration. ***The Attorney General of B.C.*** v. ***The Deeks Sand & Gravel Co. Ltd.***, [1956] S.C.R. 336.

"Consideration," for purposes of determining compensation, may be interpreted using a "commercially reasonable" objective standard. Thus, when a commercial transaction consisted of a share sale with payment partly in cash and partly by discharge of liabilities, the resulting commission was payable on the total of the two and not just the cash amount of the transaction: ***Millennium Commercial Realty Ltd. v. Scothorn Back Forty Farms Ltd.***, 2017 NSSC 115.

2. *The performance of existing duties*

The performance by the plaintiff of that which he was already bound to do under a contract would not in itself be good consideration unless something extra was provided. ***Dempster*** v. ***Bauld*** (1905), 37 N.S.R. 330 (S.C. en banc).

Continued employment can be good consideration even though the employee continues employment on the same terms as under a prior contract, the rationale being that the new

employer could have terminated the employee's contract if he refused to sign a new employment contract. ***Peerless Laundry & Cleaners Ltd.*** v. ***Neal***, [1953] 2 D.L.R. 494 (Man.C.A.).

Consideration will be good where a party promises another to do something that she is already bound to do under a contract with a ***third party***. ***Shadwell*** v. ***Shadwell*** (1860), 30 L.J.C.P. 145.

Where there is an existing duty imposed by law, the performance of that duty may not constitute good consideration unless something additional (however slight) is provided. ***Williams*** v. ***Williams,*** [1957] 1 All E.R. 305 C.A. (majority)

Lord Denning has, however, expressed the view that a promise to perform an existing duty imposed by law is sufficient consideration to support a promise so long as there is nothing in the transaction which is contrary to the public interest. ***Ward*** v. ***Byham***, [1956] 2 All E.R. 318 (C.A.)

In ***Glasbrook Bros. Ltd.*** v. ***Glamorgan Co. Council***, [1925] A.C. 270 (H.L.) it was held there would be no consideration for a promise by the defendants to pay for normal police protection, such being the ***public duty*** of the county council. However, if the protection provided was an extra (a "superfluity") then it could be regarded a special duty and entitled to payment.

3. *Part performance*

A debt can only be discharged by "accord and satisfaction". "Accord" means an agreement and "satisfaction" means consideration. Payment of a lesser sum in satisfaction of a greater sum cannot be satisfaction of the whole. ***Foakes*** v. ***Beer*** (1884), L.R. 9 App Cas. 605 (H.L.).

Accord and satisfaction may also be the release from an obligation (whether arising under contract or tort) by means of any valuable consideration, not being the actual performance of the obligation itself. Thus an agreement made by a bank to accept from a debtor one-quarter of the amount owing by her on a promissory note signed by her and her husband in settlement of the debt would not be valid unless supported by fresh or additional consideration. ***Bank of Nova Scotia*** v. ***MacLellan*** (1977), 25 N.S.R. (2d) 181, 78 D.L.R. (3d) 1 (S.C.A.D.).

Part payment of a debt made by a third party constitutes good consideration if accepted by a creditor in full settlement. ***Hirachand Punumchand*** v. ***Temple***, [1911] 2 K.B. 330 (C.A.).

A lesser amount of money accompanied by something additional "a horse, hawk, robe, etc." is good consideration. ***Kaulbach*** v. ***Eichel***, [1930] 1 D.L.R. 983 (N.S.S.C. en banc)

An agreement to pay by a negotiable instrument such as a cheque may be good consideration even though it is for a lesser amount than the original debt. ***Foot*** v. ***Rawlings***, [1963] S.C.R. 197, 37 D.L.R. (2d) 695.

The decision in ***Foot v. Rawlings***, *supra*, may be uncertain by reason of ***D.- C. Builders Ltd.*** v. ***Rees***, [1966] 2 Q.B. 617 (C.A.) in which Lord Denning held: "payment of a lesser sum, whether by cash or by cheque, is no discharge of a greater sum."

*(**N.B.** In a number of Canadian jurisdictions (**but not Nova Scotia**) the rule in **Foakes** v. **Beer**, supra, has been changed by legislation. In Ontario, e.g., the **Mercantile Law Amendment Act**, R.S.O. 1990, c.M-10, s.16 states: Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.)*

Part performance can also be sufficient to remove a contract from the operation of the Statute of Frauds, but only if the part performance is unequivocally attributable to *that* contract. See ***Self v. Brignoli Estate***, 2012 NSSC 81 and cases discussed therein, and ***101252 P.E.I. Inc. v. Brekka***, 2013 NSSC 289, affirmed 2015 NSCA 73.

4. *Past consideration and moral obligation*

Consideration that is past is not sufficient consideration. ***Eastwood*** v. ***Kenyon*** (1840), 113 E.R. 482.

Where a service is not purely gratuitous, for example, where the promisee has saved the ***promisor's life or his body*** from grievous harm, a subsequent promise to pay for the service has occasionally been held valid. ***Lampleigh*** v. ***Brathwait*** (1615), 80 E.R. 255. Where services have been rendered at the promisor's request, a later promise to pay may be enforced if the parties had contemplated the services were to be remunerated. ***Pao On*** v. ***Lau Yiu Long,*** [1980] A.C. 614 (P.C.).

A promise to pay a prior debt may sometimes be enforceable, even though the debt itself is for some reason unenforceable. Thus an acknowledgment or promise to pay a statute-barred debt may have the effect of taking the debt outside of the operation of the ***Statute of Limitations*** if contained in some writing signed by the person chargeable thereby, or his duly authorized agent. ***Spencer*** v. ***Hemmerde***, [1922] 2 A.C. 507 (H.L.) See to like effect the *Limitations of Actions Act*, S.N.S. 2014, c. 35, s. 20. An email does not constitute a writing "signed by the person" so as to stop or re-set the limitation period: *Kenzie MacKinnon Law Inc. v. Mont*, 2017 NSSM 71.

A subsequent promise to pay for a debt which would be unenforceable because contracted in infancy may sometimes also be upheld. ***Rex*** v. ***Rash*** (1923), 53 O.L.R. 245 (C.A.).

The ***Statute of Frauds***, R.S.N.S. 1989, c.442, s.9 also addresses this issue. It provides as follows:

> No action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or simple contract made during infancy unless such promise or ratification is made by some writing signed by the party to be charged therewith or by his agent duly authorized to make such promise or ratification.

See also the discussion of Forbearance contained in these materials.

5. *Estoppel: Intention and reliance*

Estoppel can take various forms: equitable estoppel (or estoppel in pais); estoppel by representation; estoppel by convention (agreement), estoppel by acquiescence, and estoppel by deed (instrument).

The notion behind estoppel is that one should not be permitted to go back on a promise or representation upon which another party may have relied or acted. The doctrine of estoppel operated to a limited extent at common law. To establish the doctrine there had to be a representation of some ***past or existing fact***, or state of facts. ***Re Boutlier***, [1933] 1 D.L.R. 697 (N.S.S.C. en banc). (A promise, lacking consideration, to pay $5,000 to Dalhousie was a promise of future action.)

The doctrine does not to apply to a case where the representation is not a representation of fact, but a statement of something which the party intends, or does not intend to do. ***Jordon*** v. ***Money*** (1854), 5 H.L. Cas.185. However, in ***Maracle*** v. ***Travellers Indemnity Co. of Canada***, [1991] 2 S.C.R. 50 , 80 D.L.R. (4th) 652, the Supreme Court of Canada said that the principle of estoppel applied to a promise or assurance, by words or conduct, intended to affect the legal relationship and to be acted upon. Sopinka J. stated:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

In ***Wauchope*** v. ***Maida***, (1971), 22 D.L.R. (3d) 142 (Ont.C.A.), the Ontario Court of Appeal said: "… the common law doctrine that only a statement of existing fact and not a promise *de futuro* can raise estoppel is not to stand in the way of a party who has altered his position in reliance upon a promise *de futuro*." However, it is not necessary for the promissor to have ownership of the disputed asset at the time of the promise for the doctrine to come into operation: ***Cowper-Smith v. Morgan***, 2017 SCC 61. The elements, as noted above, are the representation, the reliance, and the detriment.

Equitable or promissory estoppel emerged in a more fully developed manner in ***Hughes*** v. ***Metropolitan Railway Co.*** (1877), 2 App.Cas. 439 (H.L.). Lord Cairns stated:

> it is the first principle upon which all courts of equity proceed that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense or held in abeyance, the person who

> otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties.

*(**N.B.** the facts in **Hughes** v. **Metropolitan Railway Co.**, supra, are more akin to a "waiver" for a period of one's strict rights under a contract as opposed to a "promise".)*

Lord Denning credits himself with rescuing Lord Cairns' general principle from oblivion and broadening it beyond cases of "waiver" in the case of ***Central London Property Trust Ltd.*** v. ***High Trees House Ltd.***, [1947] K.B. 130. In ***Central*** he held that the natural result of the fusion of law and equity was a doctrine in which a promise made and intended to create legal relations and known by the person making the promise it was going to be acted on by the person to whom it was made, must be honoured by the courts if the promise is in fact acted upon.

Lord Denning restated the doctrine in ***Combe*** v. ***Combe,*** [1951] 1 All E.R. 767 (C.A.) not without causing some confusion. In ***Combe***, he stated the principle of estoppel

> does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties...It may be part of a cause of action but not a cause of action in itself.

This apparent retreat has led some commentators and courts to state the doctrine can only be used as a shield, not a sword.

The sword vs. shield approach has not been universally applied. In ***Robertson*** v. ***Minister of Pensions***, [1949] 1 K.B. 227, the plaintiff was permitted to rely on an assurance contained in a War Office Letter (that he need not seek a medical opinion that his injuries were war related). Later in ***Re Tudale Explorations Ltd. and Bruce*** (1978), 88 D.L.R. (3d) 584 (Ont.Div.Ct.), Grange, J. said:

> The sword/shield maxim has been heavily criticized ... and I must confess to difficulty in seeing the logic of the distinction...

In ***Alan (W.J.) & Co.*** v. ***El Nasr Export & Import Co.*** [1972] 2 Q.B. 189 (C.A.) Lord Denning said that although it was essential to the doctrine of promissory estoppel that the debtor should have acted on the promise, it was not essential that he should have acted on it to his detriment. It was enough if he had relied on the promise in some way. However, see the "detriment" language in the Supreme Court of Canada judgment in ***Cowper-Smith*** v. ***Morgan***, 2017 SCC 61.

Also in ***Alan (W.J.) & Co.*** v. ***El Nasr Export & Import Co.***, *supra*, Lord Denning remarked on the close connection between "waiver" and "promissory estoppel." He said:

> ... one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice

> in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them .... But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party.

It must always be remembered that the doctrine only applies where it would be inequitable for the promisor to go back on his promise. In ***D & C. Builders Ltd.*** v. ***Rees***, *supra*, a firm of builders promised to accept 300 pounds in full settlement of a claim of 482 pounds. Lord Denning held that promise had been extracted by intimidation on the part of the debtor wife. She could not rely on the doctrine.

VIII. THIRD PARTY BENEFICIARIES AND THE DOCTRINE OF PRIVITY

1. *General*

The ***doctrine of privity*** is a fundamental principle of the English common law. Its essential feature is that only a person who is a party to a contract can sue or be sued upon it. ***Dunlop Pneumatic Tyre Co. Ltd.*** v. ***Selfridge & Co. Ltd.***, [1915] A.C. 847 (H.L.).

The doctrine was reaffirmed in ***Scruttons Ltd.*** v. ***Midland Silicones Ltd.***, [1962] A.C. 446 (H.L.). A bill of lading limited the liability of shipowners (as carriers) to $500.00 for loss or damage to goods destined for the respondents, consignees and owners of a drum of chemicals. A contract between the shipowners and stevedores (of which the consignees were unaware) stated the stevedores should be afforded the same protection as contained in the bill of lading. The House of Lords held the stevedores as third parties, who by negligence damaged the drum, were not entitled to rely on the $500 limitation.

In a situation similar to ***Scruttons Midland Silicones,*** *supra*, an exception was found permitting negligent stevedores to claim the benefit of an exemption clause in a bill of lading. Lord Wilberforce in ***New Zealand Shipping Co. Ltd.*** v. ***A.M. Satterthwaite & Co. Ltd.***, [1974] 1 All E.R. 1015 (P.C.) held the stevedores could claim the benefit if 4 conditions are satisfied:

- the contract makes it clear that the stevedore is intended to be protected;
- the contract makes it clear that the carrier is contracting not only on his own behalf but also as ***agent*** for the stevedore;
- the carrier has authority from the stevedore so to contract; and
- there is ***consideration*** moving from the stevedore. The consideration was held to be the act of unloading the vessel.

(It did not matter that the stevedores were already under an obligation to perform this service for the carrier.)

The Supreme Court of Canada adopted Lord Wilberforce's approach in determining a claim for damages for the negligence of a terminal operator. McIntyre, J. referred to the validity “of what

has become known as the Himalaya clause in bills of lading" – in other words, an exoneration clause extending benefits to third parties. ***Ito*** v. ***Miida Electronics Ltd.,*** [1986] 1 S.C.R. 752

Beswick v. ***Beswick*** [1968] A.C. 58 (H.L.) aff'g [1966] Ch. 538 (C.A.), found another avenue to circumvent a privity problem. B assigned the assets of his business to his nephew. The nephew undertook to pay a weekly sum of money to B, and upon B's death a weekly sum to the plaintiff, B's widow. The widow sued for arrears owing and an order for specific performance of the ongoing obligation to pay. In the Court of Appeal Lord Denning would have permitted the widow to sue in her personal capacity. The House of Lords did not go so far. It found that she was entitled to ***specific performance*** because she was in the fortunate position of being B's ***administratrix*** and able to sue on behalf of B's estate. Lord Guest alone noted that

> no question was raised in this House as to the (widow's) right to sue at common law in her personal capacity..

For a time it appeared that the notion of "trust" might provide another way of getting around the privity doctrine. In ***Mulholland*** v. ***Merriam*** (1873), 20 Gr. 152, Mulholland executed an instrument assigning all his property to one Merriam with a direction to pay certain sums of money to his heirs, including the plaintiff. The Court held the relation of trustee and ***cestui que trust*** (beneficiary) was created between the defendant and the plaintiff. While no technical words normally associated with the creation of a trust were employed, the Court determined it was the intention of the parties to create a trust.

However, since the case of ***Vandepitte*** v. ***Preferred Accident Insurance Corp. of New York***, [1933] 1 D.L.R. 289 (P.C.) courts in England and Canada have shown great reluctance to find a trust to circumvent the doctrine of privity without a ***clean intention*** to create a trust. Such intention must be ***affirmatively proved.***

In ***Greenwood Shopping Plaza Ltd.*** v. ***Beattie***, [1980] 2 S.C.R. 228 McIntyre, J. in finding that a company was not contracting as a trustee for its employees stated:

> A common test applied to determine whether a trust has been created has been to pose the question whether the parties to the contract could change the contractual terms without reference to the alleged ***cestui que trust***. The contracting parties could surely have altered the terms [of the relevant paragraphs.] without the [employees'] consent.

In ***Greenwood Shopping Plaza Ltd.*** v. ***Beattie,*** *supra*, there was a lease in which the lessor, the owner of a shopping centre, agreed with a tenant lessee to insure the business premises against fire. A fire occurred due to the negligence of the employees of the tenant. The employee sought to claim protection under the lease arguing that their employer must have intended to cover employees' liability since negligence of a corporation only arises vicariously from its employees' negligent acts or omissions. The Supreme Court rejected the exceptions of agency and trust, and a notion favoured in the Nova Scotia Court of Appeal by Mac Keigan, C.J. that the landlord's covenant in the lease included a promise to cover the employees by finding an ***identification of the employees with the employers***.

However, in ***London Drugs Ltd.*** v. ***Kuehne & Nagel International Ltd.***, [1992] 3 S.C.R. 299 Iacobucci, J. relaxed the doctrine of privity where there was clearly an ***identity of interest*** as far as the performance of the employer's contractual obligations were concerned when parties enter into commercial agreements and decide that one of them ***and*** its employees will benefit from limited liability, or when the parties choose language such as "warehouseman" which implies that employees also will benefit from a protection, the doctrine of privity should not stand in the way of commercial reality and justice.

The employees may obtain such a benefit when:

- the limitation of liability clause either expressly or impliedly intends its benefit to the employees seeking to rely on it; and
- the employees seeking the benefit were acting in the course of their employment and were performing the very services provided for in the contract between the employer and the plaintiff (customer) when the loss occurred.

Arguably, the Nova Scotia Court of Appeal has extended the notion of "identity of interest," although not in express terms, in ***D'eon Fisheries Limited (Re)***, 2016 NSCA 30. That case dealt primarily with the adequacy of the description of a security interest. However, one issue was whether security issued by one company could be called upon to answer a debt in favour of a second, common-control company. Briefly, the Court indicated that a joint loan to the affiliated companies constituted sufficient consideration, and "the evidence of money being advanced jointly to the affiliated companies is sufficient to show there was consideration to both companies." *Quarae* whether the same result would have followed if there were separate loan agreements.

The exception to the doctrine of privity was further refined and extended by the Supreme Court of Canada in ***Fraser River Pile & Dredge Ltd.*** v. ***Can-Dive Services Ltd.***, [1999] 3 S.C.R. 108, 176 D.L.R. (4th) at para. 32:

> In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in London Drugs that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in London Drugs, the determination in general terms is made on the basis of two critical and cumulative factors: (a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and (b) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

See ***Orlandello* v. *Nova Scotia (Attorney General)***, 2005 NSCA 98 for an example of the extended doctrine's use in Nova Scotia.

An unusual way of evading the privity doctrine has occurred by a device called a ***multi-partite contract.*** The owners of two yachts entered into a regatta by sending entry forms to the secretary of a club. All competitors agreed to abide by the rules of the club, one of which provided that if a yacht, in neglect of the rules, fouled another yacht, it would be responsible for all damages. The Satanita ran into and sank the Valkyrie. The owner of the Satanita denied there was any agreement and relied upon a statute which limited damages in such a case. The court found a contract between the owners of the two yachts (and by implication all other competitors). Such reasoning defies any logical analysis. The ***Satanita***, [1895] P. 249 (C.A.). One argument has been that the club was an agent for the purposes of bringing about a contract amongst all competitors.

2. *Agency*

The agency relationship, as has been noted, may be a means of getting around the doctrine of privity (***New Zealand Shipping Co.*** v. ***Satterthwaite,*** *supra*). Agency arises when one person, the agent ("A") acts on behalf of another, the principal ("P") to bring about a contract between P and a third party ("TP"). The A's authority may be actual (express or implied), ostensible (or apparent) or usual (or customary). A party may also be bound through *agency by ratification*, namely when there was no agency relationship at the beginning, but the principal, who would have been competent and able to contract directly (but did not), accepts and adopts the agent's act: ***C&C Technologies International v. McGregor Geoscience Ltd.***, 2016 NSSC 55 at para. 98-100; ***Spidell v. LaHave Equipment Ltd. et al.***, 2014 NSSC 255.

Actual authority may be verbal or in writing. An express authority is established by a consideration of the words used and the surrounding circumstances. An implied authority is actual authority. It means that where there is express authority for a particular purpose, the court will find an implied authority to do everything necessary to achieve that purpose. ***Waugh v. H.B. Clifford & Sons***, [1982] 1 Ch. 374.

Apparent authority involves a representation from P upon which TP relies even though A may be exceeding her actual authority. In ***Hely-Hutchinson*** v. ***Brayhead Ltd.***, [1968] 1 Q.B. 573 (C.A.) Lord Denning said:

> Ostensible or apparent authority is the authority of the agent as it appears to others. It often coincides with actual authority. Thus when the board (of directors) appoints one of their numbers to be managing director, they invest him, not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of the office. Other people who see him acting as managing director are entitled to assume he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoints the managing director, they may expressly limit his authority by saying he is not to order goods worth more than 500 pounds without the sanction of the board. In that case his ***actual*** authority is subject to the 500 pound limitation but his ***ostensible*** authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation."

Usual authority (although sometimes said to be a form of implied or ostensible authority) may exist where TP is not aware A is actually an agent. In ***Watteau*** v. ***Fenwick***, [1893] 1 Q.B. 346 the Court found P "liable for all the acts of the agent which are within the authority usually confided to an agent of that character."

An originally unauthorized act by A generally may be validated by a subsequent ratification by P.

The Nova Scotia Supreme Court recently exemplified both these points (importantly, in the context of the authority of a solicitor) in ***Maritime Travel Inc. v. Boyle***, 2012 NSSC 428. The solicitor acted for a company. A settlement obliged the company's principal, personally, to post security, in two installments. The first instalment was made, but the principal denied that he agreed to post the second personally, or that the company's lawyer had authority to make that commitment on the principal's behalf.

Justice MacAdam found against the principal on both points, finding that (a) the principal had given the company's lawyer authority to enter into the agreement on his personal behalf (b) the lawyer's ostensible authority bound the principal in any event, as although the lawyer was acting for the company, the nature of the transaction and the circumstances of the settlement under discussion gave rise to agency by implication vis-a-vis the principal, personally and (c) the principal ratified the actions by making the first instalment.

A distinction is drawn between a "disclosed" and an "undisclosed" principal. The latter, subject to some limitations, may often step in and take the benefit of the contract made by A with TP. Exceptions include the situation where A acted without authority, or where the identity of P was crucial to TP.

*(**N.B.** A more complete exposition of the agency concept may be found in S.M. Waddams, **The Law of Contracts,** supra,* at ch.7.)

3. *Assignment*

An assignment is a transfer of contractual rights to a third party. A contractual right is a *chose in action* and may be assigned in accordance with the general rules relating to the assignability of choses in action. In particular, see subs. 43 (5) of the *Judicature Act*, R.S.N.S. 1989, c. 240. From a contractual perspective, the act of assignment figures in the analysis over the identity of the party to whom the obligation is owed. It is important to remember that while an assignment may be effective as between the assignor and assignee, it is not effective to release the assignor from its obligations to the other contractual party. This may happen only through novation, or presumably as a result of express contractual language. Novation is a process by which a new contractual party is substituted for one of the existing contractual parties pursuant to an agreement made among that new party and the two parties to the original contract.

It is of critical importance in either drafting contracts or reviewing existing contracts to determine relevant rights of assignment.

IX. MISTAKE

At law, a mistake generally refers to a circumstance where the parties have entered into an agreement in such a way that the completed contract does not actually express their intentions. A mistake may "void" or nullify a contract. Mistakes are generally categorized as "unilateral", "mutual" or "common." Again, this is to be distinguished from a situation in which the outcome of a contract is materially different from what one, or perhaps all, parties envisaged, but is not the subject of a breach: *Churchill Falls*, supra.

1. *Unilateral mistake*

Unilateral mistake occurs where only one party is mistaken. ***Smith*** v. ***Hughes*** (1871), L.R.Q.B. 597 appeared to take a subjective approach in determining whether the defendant could escape from a contract on the grounds of a mistaken belief that he thought he was buying "old" oats. In order to relieve the defendant it was necessary to find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed that the defendant believed that he, the plaintiff, was ***contracting*** to sell old oats. In other words, the plaintiff must have been aware that the defendant was acting on a mistake as to a ***term*** of the contract.

In ***Hartog*** v. ***Colin & Shields***, [1939] 3 All E.R. 566 (K.B.D.) it was held that the plaintiff must be taken to have known, because of preliminary negotiations, that the defendants were operating under a ***material mistake***, and sought to take advantage of it. It is sometimes said that ***Hartog*** v. ***Colin & Shields***, *supra*, shows that the mistake must go beyond the ***quality*** of the subject matter, and relate to a ***material term***.

Imperial Glass Ltd. v. ***Consolidated Supplies Ltd***. (1960), 22 D.L.R. (2d) 759 (B.C.C.A.) involved an error in calculation leading up to the defendant's offer to supply glass at a certain price. The error occurred because the defendant had made a mistake in the square footage of the glass required. The Court held the mistake was not in the offer, but in the motive or reason for making the offer. A bid based on a mistaken calculation was not a mistake as to term. Consequently, there was a valid contract, even though the plaintiff knew of the error at the time of accepting the defendant's offer. The mistake was said to be a result of the defendant's own carelessness.

*(**N.B**. It may have been of some influence on the Court's holding that the plaintiff had relied on the correctness of the defendant's computation in submitting a bid to a subcontractor.)*

In ***McMaster University*** v. ***Wilchar Construction Ltd. et al.*** (1971), 22 D.L.R. (3d) 9 (Ont. H. Ct.) the defendant prepared a tender that mistakenly omitted the first page containing a crucial wage escalator clause. The offeree (plaintiff) knew the defendant had made a mistake in the tender. The Court observed that the plaintiff "snapped at the offer" for its own advantage. It distinguished ***Imperial Glass Ltd***. v. ***Consolidated Supplies Ltd.***, *supra*, by stating that

- the mistake was in the offer itself; and

- the mistake in the offer was known by the offeror before acceptance, and that fact had been communicated to the offeree before acceptance.

2. *Mutual mistake*

Mutual mistake occurs where the parties are at cross purposes: the parties misunderstand each other. The famous case of ***Raffles*** v. ***Wichlehaus*** (1864), 2 H.C. 906 is often cited. Plaintiff promised defendant to deliver 125 bales of cotton "to arrive ex ***Peerless*** from Bombay." There were two ships called ***Peerless***, one sailing from Bombay in October, the other in December. The plaintiff's (vendor's) cotton was on the latter ship; the defendant intended to buy cotton on the former. The Court found there could be no ***consensus ad idem*** and, therefore, no binding contract. While the case seems to have been decided on a subjective approach, the court did not really give reasons and it would appear impossible even on an objective view to resolve the problem.

Industrial Tanning Co. Ltd. v. ***Reliable Leather Sportswear Ltd.***, [1953] 4 D.L.R. 522 (Ont. C.A.) attempts to state the modern approach to mutual mistake. In that case, Hope, J.A. said:

> ... The present case is one of "mutual mistake" as it is commonly referred to in law, *i.e.*, where each party is mistaken as to the other's intention, though neither realizes that his promise has been misunderstood by the other. That, no doubt, is mistake in the popular sense. They have different things or quantities in mind. There is truly a lack of consent. But the Courts have not approached the problem from this viewpoint. They have not tried to find the real intention of each party but have applied the dispassionate and objective test of the reasonable man. They examine all the circumstances and they decide what sense, if any, must be ascribed to the contract. See also: ***Lindsey*** v. ***Heron*** (1921), 50 O.L.R. 1 (S.C., App. Di***v.***).

In ***Brooklin Heights Homes Ltd***. v. ***Major Holdings, Developments Ltd***. (1977), 17 O.R. (2d) 413 (H.C.J.) Grange, J. added the notion of protecting reasonable expectations. He stated:

> it is said – see ***Cheshire*** & ***Fifoot***, Law of Contract, 9th ed., pp. 225-6, that the test of the validity of the contract is an objective one – whether a reasonable man upon all the evidence would infer a contract in a certain sense. It might perhaps better be said that the test is whether the parties had reached a consensus. Still better it seems to me is to start with Waddams' "initial proposition that reasonable expectations are entitled to protection" – and deny relief to the mistaken party when his opposite has such expectations. The intention of the non-mistaken party is of importance and may, indeed, in many circumstances be paramount.

3. *Common mistake*

Common mistake, where both parties share a ***common misunderstanding*** and the true state of affairs comes to light after the parties have apparently reached objective agreement, seems to pose the greatest difficulty.

In ***Bell*** v. ***Lever Bros***., [1932] A.C. 161 (H.L.) Lord Atkin suggested that the common law provided few instances whereby a contract could be set aside. He stated, *e.g.*:

> A buys a picture from B; both A, and B, believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts - *i.e.*, agree in the same terms on the same terms on the same subject matter - they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

Lord Atkin did suggest an instance as to how a contract might be void for common mistake:

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law.

In ***Solle*** v. ***Butcher***, [1959] 1 K.B. 671 (C.A.), Lord Denning echoed the notion that it would be a rare situation in which a contract would be set aside ***ab initio***. He stated:

> The correct interpretation, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearance agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.

However, seeing this as the common law position he sought to widen the scope of the Court's ability by stating that while a contract might not be ***void***, it might be ***voidable***, *i.e.*, liable to be set aside on some equitable ground. The following statements represent his broader view:

> Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had the power to set aside the contract whenever it was of opinion that it was unconscionable for the other party to avail himself of the legal advantage which he had obtained.

> It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

In ***Magee*** v. ***Pennine Ins. Co.***, [1969] 2 Q.B. 507 (C.A.) where both parties entered into a compromise agreement under a common mistake each judge approached the mistake from a different angle. Lord Denning held the common mistake did not make the contract void at law but felt that it was liable to be set aside in equity given that it was a fundamental mistake and the plaintiff's claim lacked validity. Winn, L.J. (dissenting) purported to follow ***Bell*** v. ***Lever Bros., Ltd.***, *supra*, and found no misapprehension as to the subject matter of the contract. The mistake was "as to the nature or at the very least the quality of the subject matter ...." Fenton Atkinson, L.J. found the insurance company was entitled to avoid the agreement "on the ground of mutual (sic) mistake in a fundamental and vital matter."

Some Canadian courts have also held agreements void for common mistake on the basis of a "false and fundamental assumption going to the root of the contract." ***R***. v. ***Ontario Flue-Cured Tobacco Growers' Marketing Board***, ***ex p. Grigg*** (1965), 51 D.L.R. (2d) 7 (Ont. C.A.). The court held that the action in ***Bell*** v. ***Lever Bros. Ltd.***, *supra*, failed "apparently on the ground that there was a ... mistake which related ... to the ***quality*** of the ... contracts being considered."

McRae v. ***Commonwealth Disposals Commission*** (1951), 84 C.L.R. 377 (High Ct. Aust) would not set aside a contract even though there was a fundamental common mistake. Both parties thought there was an oil tanker capable of salvage lying on a reef. There never was such a tanker. However, the defendant Commission was held liable to compensate the plaintiff in damages for their costs in mounting a salvage operation. The Court followed the ***Solle*** v. ***Butcher***, *supra*, approach, but would not set the contract aside because the Commission had ***promised*** there was a tanker in the area specified, and they could not rely on a mistake that "was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground."

(***N.B. Sale of Goods Act***, *R.S.N.S. 1989, c. 408*, *s.9* *states: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."*)

4. *Mistaken identity*

The common law might assist in setting aside a contract on grounds of mistaken identity if the offeror is mistaken as to the identity of the person she is dealing with. It is not sufficient that the offeror is mistaken merely as to some attribute, such as creditworthiness, which she believes the offeree to possess. In ***Phillips*** v. ***Brooks, Ltd***., [1991] 2 K.B. 243 property in jewelry passed to a

rogue so as to entitle him to give good title to any person who gave value and acted ***bona fide*** without notice.

In ***Ingram*** v. ***Little***, [1961] 1 Q.B. 31 (C.A.) it was held the identity of the rogue was critical. Thus, the plaintiffs could recover a car or its value from an innocent party who had purchased the car from the rogue in good faith and without notice. Sellers, L.J. said:

> "Hutchinson," the offeree, knew precisely what was in the minds of the two ladies for he had put it there and he knew that their offer was intended for P.G.M. Hutchinson of Caterham and that they were making no offer to and had no intention to contract with him, as he was. There was no offer which he "Hutchinson" could accept and, therefore, there was no contract.

In ***Lewis*** v. ***Avery***, [1972] 1 Q.B. 198 (C.A.) Lord Denning (returning to a familiar theme) said:

> I think the true principle is that... when two parties have come to a contract... the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.

He found a contract, but one voidable because of the fraud. Property in the plaintiff's car passed to the rogue, and then to an innocent third party before the contract was voided. As between two innocent parties he concluded the plaintiff who had first dealt with the rogue, and let him take the car, should be the one to suffer.

Phillimore, L.J. considered the case to be "on all fours with ***Phillips*** v. ***Brooks***", *supra*, noting a ***prima facie*** presumption that one intends "to deal" with the person actually present, although the person later turns out to be a rogue. Megaw, L.J. found that there was not any evidence that would justify a finding that the plaintiff regarded the identity of the rogue as a matter of vital importance.

5. *Non est factum*

A form of mistake can also occur when a party is mistaken as to the very nature of a written contract. On occasion, a person may be able to escape the effect of her signature to a document by pleading ***non est factum*** ("this is not my deed"). This is a very narrow rule that represents an exception to the general principle that a party is bound by a written agreement bearing his or her signature.

In ***ANSON ON CONTRACTS*** (22nd Ed.) 1964), p. 282, it was said that:

> in order for the defence of ***non est factum*** to succeed, the party executing it must show he was mistaken, not merely as regards the contents, but as to the essential nature of the contract.

And in ***Cheshire, Fifoot & Furmston's Law of Contracts,*** 13th ed. (London: Butterworths, 1996) at p. 267:

> "… the mistaken party will escape liability if he satisfies the court that the signed instrument is radically different from that which he intended to sign and that his mistake was not due to his carelessness."

In the leading English case, ***Saunders*** v. ***Anglia Bldg. Society***, [1971] A.C. 1004 (H.L.) Lord Pearson stated:

> The judgments in the older cases used a variety of expressions to signify the degree or kind of difference that, for the purposes of the plea of ***non est factum***, must be shown to exist between the document as it was and the document as it was believed to be. More recently there has been a tendency to draw a firm distinction between: (a) a difference in character or class, which is sufficient for the purposes of the plea; and (b) a difference only in contents, which is not sufficient. This distinction has been helpful in some cases, but, as the judgments of the Court of Appeal have shown, it would produce wrong results if it were applied as a rigid rule for all cases. In my opinion, one has to use a more general phrase, such as "***fundamentally different***" or "***radically different***" or "***totally different***".

In ***Marvco Color Research Ltd***. v. ***Harrison and Harris***, [1982] 2 S.C.R. 774 the Court touched on the question of whether a signer of a document who is ***negligent*** in not reading it should be precluded from relying on the plea of ***non est factum***. Estey, J., stated:

> I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of ***non est factum*** from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence.

In ***Northside Economic Development Assistance Corp***. v. ***Strickland*** (1990), 96 N.S.R. (2d) 4 (S.C. T.D.), it was held that a woman of "reasonable intelligence" was not negligent in signing certain documents that she did not read. Glube, C.J., found that she completely relied upon the advice of her husband in financial matters. "She was not operating in a frame of mind, which would have dictated that she should take care to read documents and ask that they be explained." The fact that there was inequality of bargaining power between the wife and the person who presented the documents without explanation for her signature was probably a factor the Court took into account.

For a more recent example, see ***Bank of Montreal v. Murchison***, 2013 NSSM 18. A claim against a putative co-borrower was dismissed when the court believed the evidence of a

signatory (who was simply told "sign here") that she was signing only as a witness to her spouse (such testimony being corroborated by the fact that the spouse-borrower was the sole owner of the vehicle being purchased, and the "witnessing" spouse couldn't drive). ***Murchison*** was distinguished in ***Bank of Montreal v. Kincade***, 2014 NSSM 50 (the same counsel acted for the bank in both cases), on the basis that mere neglect or carelessness (not reading a clear document put before her which she had the opportunity to read and instead "going on what she was told" by a co-borrower who had defaulted) was not sufficient.

6. Rectification

A court may rectify a contract where it is convinced that a fully formed agreement is not accurately reflected by the written version. This is distinct from interpretation or implied terms.

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19 involved an agreement pertaining to lands 110 yards deep; the written version said 110 feet. The Court later summarized the ***Performance Industries*** test in ***Sharfron v. KRG Insurance Brokers (Western) Inc.***, 2009 SCC 6, as follows:

> [53] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, Binnie J., at paras. 37-40, set out the necessary requirements for rectification: (1) the existence and content of the inconsistent prior oral agreement; (2) that the party seeking to uphold the terms of the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and (3) "the precise form" in which the written instrument can be made to express the prior intention.

Performance also referred to a "fourth element," namely that

> The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*Ship M. F. Whalen, supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (*Hart, supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray*, 1974 CanLII 172 (SCC), [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.

In ***Performance***, itself, the Court explicitly rejected "due diligence" as a "fifth" element of the test, but indicated that a lack of such diligence could affect the Court's discretion to grant the equitable remedy of rectification.

Again, it is important to keep the concepts of rectification and implied terms (or severability) distinct. In ***Performance***, rectification was ordered when the evidence was clear of the prior agreement and its divergence from the written version. In ***Sharfron***, however, rectification was refused when there was no evidence of such a prior agreement, and severance of the impugned term would effectively rewrite (or "write down") the restrictive covenant in question.

X. CAPACITY

Under the ***Age of Majority Act***, R.S.N.S. 1989, c.4, s.2, a person under the age of 19 is considered to be a minor. The case of ***Rex*** v. ***Rash*** (1923), 53 O.L.R. 245 (Ont. S.C. App. Div.) lays down the general principles concerning infants' contracts. In summary, the common law provided protection for minors by holding that most contracts made during infancy were voidable, at the minor's option, upon attaining majority. Contracts for "necessaries" (*i.e.,* goods and services necessary for the minor's station in life and his actual requirements) are, however, binding. ***Nash*** v. ***Inman***, [1908] 2 K.B. 1 (C.A.). See also *Greener-MacLean v. Meadow Brook Stables, supra* (contract by a minor for the training of her horse held valid).

Rex v. ***Rash***, *supra,* draws a distinction between:

- voidable contracts, *i.e.,* valid unless repudiated by the minor within a reasonable time upon his attaining majority; and
- void contracts, which must be ratified upon attaining majority if they are to be enforceable.

Under the first category, G.H.L. Fridman in ***The Law of Contract in Canada,*** 6th ed. *supra*, at p. 147 states: "Four different types of contract are involved, namely, contracts concerning land, share contracts, partnership agreements, and marriage settlements." All other contracts would appear to fall into the second category.

Contracts of service or employment are usually held enforceable against the minor. Although sometimes treated separately as "beneficial contracts', they are also sometimes regarded merely as another type of contract for "necessaries." ***Miller*** v. ***Smith & Co.*** (1925), 19 Sask.L.R. 464 (C.A.). In any event, whether regarded as "beneficial" or a contract for "necessaries" a contract of employment must not be oppressive or contrary to the minor's interests.

(***N.B. Statute of Frauds***. *R.S.N.S. 1989. c.408, s.9 states: "No action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification is made by some writing signed by the party to be charged therewith or by his agent duly authorized to make such promise or ratification."*)

A "contract" made by a person who is mentally incompetent is unenforceable unless for necessaries. However, it might be preferable not to regard such situations as true contracts, but an obligation imposed by law. See ***Matheson v. Snidley*** (1933), 40 Man. R. 247 (C.A.).

Temporary incompetence, such as drunkenness, may render a contract voidable if the drunkard was in such a state of intoxication that he was unable to understand the nature of the transaction. Such contracts can be ratified when the individual becomes sober. In some circumstances failure to repudiate within a reasonable time has been regarded as a ratification. ***Bawlf Grain Co.*** v. ***Ross***, [1917], 55 S.C.R. 232.

XI. ILLEGALITY

1. General

Generally, contracts considered to be contrary to public policy are illegal. The doctrine of illegality covers a wide range of activities the result of which will render contracts void and unenforceable. It would seem obvious that an agreement to commit a crime, or an intentional tort, is illegal and unenforceable. The following are additional examples of contracts that have been treated as illegal/as contrary to public policy:

- contracts threatening the institution of marriage;
- contracts promoting sexual immorality;
- contracts to oust the jurisdiction of the courts;
- contracts in restraint of trade;
- contracts that are racially discriminatory; and
- contracts that sanction the doing of an act which is forbidden by a statute.

Some of these contracts will be regarded as so totally contrary to public policy as to be absolutely void and unenforceable by either party (*e.g.*, a contract to commit a murder). Other illegal contracts may be only ***prima facie*** void. For example, in ***Esso Petroleum*** v. ***Harper's Garage***, [1976] Q.B. 801, two agreements imposing restrictions against a garage owner were held to be in restraint of trade and ***prima facie*** void. However, in the circumstances one contract was considered to be reasonable (as it was for only four years); the other was for 21 years and considered unreasonable.

Also, where an agreement is not totally objectionable, a court may sever the illegal portion, without revising the remaining legal portion of the agreement. ***Scorer*** v. ***Seymour Jones***, [1966] 1 W.L.R. 1419 (C.A.). S.M.Waddams suggests the test should be "whether the legal parts of the transaction are so closely tied in with the illegal parts that enforcement of the former will tend to subvert the policies underlying the rule of illegality." See S.M. Waddams, ***The Law of Contracts***, 5th ed., *supra*, at para. 578 (see also: ***Garland*** v. ***Consumer Gas Co.***, 2004 SCC 25, [2004] 1 S.C.R. 629 at para 61).

Many contracts, in fact, have express "severability" clauses; however, severability does not mean "rewriting," as discussed next.

2. Restrictive covenants

At common law, restrictive covenants were considered a restraint of trade, and void. Over time, the courts recognized that such restrictions were valuable elements of commerce – whether in the sale of a business or in the employer-employee relationship – and would enforce them if they were reasonable in time, geography and activity. What is reasonable depends on the transaction in question.

In ***Sharfron, supra***, the Supreme Court was faced with an employment contract that prohibited competition in the "Metropolitan City of Vancouver." The Court's headnote summarized the law as follows:

> Restrictive covenants generally are restraints of trade and contrary to public policy. Freedom to contract, however, requires an exception for reasonable restrictive covenants. Normally, the reasonableness of a covenant will be determined by its geographic and temporal scope as well as the extent of the activity sought to be prohibited. Reasonableness cannot be determined if a covenant is ambiguous in the sense that what is prohibited is not clear as to activity, time, or geography. An ambiguous restrictive covenant is by definition, *prima facie* unreasonable and unenforceable. The onus is on the party seeking to enforce the restrictive covenant to show that it is reasonable and a party seeking to enforce an ambiguous covenant will be unable to demonstrate reasonableness. Restrictive covenants in employment contracts are scrutinized more rigorously than restrictive covenants in a sale of a business because there is often an imbalance in power between employees and employers and because a sale of a business often involves a payment for goodwill whereas no similar payment is made to an employee leaving his or her employment. In this case, the restrictive covenant arises in an employment contract and attracts the higher standard of scrutiny.

Note that the Court differentiated between commercial covenants and employment covenants and, as noted above, refused to sever or "read down" a covenant that was overexpansive or ambiguous to "make it reasonable" when to do so would effect a rewriting of the agreement.

The Court expanded on the differentiation of employment and commercial covenants in ***Payette v. Guay***, 2013 SCC 45. In that case, the employee was also the vendor of a large and specialized business. The Court emphasized that the commercial sale and the covenant were linked and an integral part of the goodwill, and thus would attract the "commercial" standard of review rather than the higher "employee" standard. In addition, the Court stated that the presumption on commercial covenants is in favour of enforceability unless the attacking party can demonstrate an unreasonable scope in the particular context – in other words, the presumption and burden of proof is reversed from a "straight employee" situation. Finally, the Court differentiated between non-competition and non-solicitation, stating that the latter generally did not require a territorial restriction.

For a discussion of restrictive covenants in the commercial context, their restricted scope, and their conservative interpretation, see *Jorna & Craig Inc. v. Chaisson*, 2018 NSSC 220.

XII. CONTRACTUAL RIGHTS AND OBLIGATIONS: IS THE CONTRACT ENFORCEABLE? CONDITIONS, WARRANTIES AND MISREPRESENTATION

1. *General*

The terms of a contract are generally described as "conditions" or "warranties". The distinction between the two is directly relevant to the question of remedy if the term can be said to have been breached. The violation of a condition gives rise to the right in the innocent party to repudiate the contract in its entirety, thus freeing the party from performing any further obligations under the contract. A breach of a warranty only gives rise to a claim in damages.

When analyzing contract terms, it is important to remember that terms may be express or implied. ***The Moorcock*** (1889), 14 P. 64 held a term should be implied that a river bed was suitable for the mooring of a vessel. The test is often what the "officious bystander" would have thought. The policy behind implying terms is often to give to a transaction such business efficacy as the parties must have intended. ***Otis F. Wood*** v. ***Lady Lucy Duff-Gordon*** (1917), 222 N.Y. 88, and ***Dawson*** v. ***Helicopter Exploration Co. Ltd***., *supra*, speak of an arrangement being so "instinct with an obligation" that a promise must be implied, though none was expressed.

Conditions and warranties are actual parts of a contract. On the other hand, problematic statements may be made leading up to the formation of a contract which do not become terms of the contract. These statements are called "misrepresentations", and they may be innocent, fraudulent or negligent.

It is important to draw distinctions between conditions, warranties and representations in order to determine the remedies available to the innocent party for breach of a term, or a non-contractual representation that later turns out to be untrue.

Conditions

In ***Wallis*** v. ***Pratt***, [1910] 2 K.B. 1003 Fletcher Moulton, L.J. described a condition as a term of a contract which goes so directly to the root of the contract, or is so essential to its very nature, that if the circumstances are, or become, inconsistent with the condition, all executory obligations under the contract may be treated as discharged by the party who is not in default (*i.e.*, treat the contract as repudiated). The innocent party is not *obligated* to treat the contract as repudiated. She may elect to affirm the contract. But, in either event, damages may be claimed for the breach.

L. Schuler A.G. v. ***Wickman Machine Tool Sales Ltd.***, [1973] 2 All E.R. 39 (H.L.) maintained that the word "condition" does not necessarily have a precise legal meaning. Lord Reid said: "Undoubtedly the word is frequently used in that sense. There may, indeed, be some presumption that in a formal legal document it has that meaning. But, it is frequently used with a less stringent meaning." Lord Reid would seem to require a strong indication, taken from the reading of the contract as a whole that the parties intended the use of the word "condition" to

mean just that. "The more unreasonable the result the more unlikely it is that the parties intended it."

The labelling of a term as a "condition" in a contract is therefore not determinative of whether or not a court will see it as such.

If a term is a "condition," it must also be determined if it can be waived by one party or another, if not within the control of the parties themselves. Often a contract will express whether it is or not. A true condition precedent, however, cannot be waived (absent such language) and exonerates the parties from further obligation. In ***Turney v. Zhilka***, [1959] S.C.R. 578, a condition (annexation of a property to a municipal unit) was not fulfilled; the purchaser sought to waive that condition and proceed; the vendor refused. Judson, J. stated, at pp. 583-84:

> But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party – the Village council. This is a true condition precedent – an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liabile on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

Chief Justice MacDonald reaffirmed this quote in ***Hilchey v. Waterton Condominiums Inc.***, 2012 NSCA 126 (purchase and sale agreements subject to registration of the dwellings as condominium units), stating at para. 31:

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

Notably, the Court also found no bad faith or lack of due diligence by the developer, which is of concern when coupling the doctrines of "true condition precedent" with the "new" duty of honesty and good faith outlined by the Supreme Court of Canada in ***Bhasin.***

Warranties

A warranty is a term that does not entitle the victim to treat the contract as repudiated, but only to claim damages. This is because a warranty is not so vital as to effect a discharge of the contract or, as is sometimes said, to be "collateral" to the main purpose of the contract. In ***Wallis***, the defendant sold a particular kind of seed to the plaintiff. It turned out to be a different and inferior

seed than that contracted for. The Court held there was an implied "***condition***" the seed would be as expressed in the contract.

While in ***Wallis*** v. ***Pratt***, *supra*, the obligation had the status of a condition the purchasers were deprived of rejecting the goods and treating the contract as repudiated because they had accepted and resold the goods. This was because under the ***Sale of Goods Act*** buyers must content themselves with damages where they have accepted the goods, or part thereof, and where the contract is for specific goods, the property in which has passed to the buyer. See the ***Sale of Goods Act***, R.S.N.S. 1989, c. 408, s. 14 (2) and (3).

[N.B. *Specific goods are goods which are specifically identifiable when the sale is made such as "this piano," "this pair of shoes," as opposed to "unascertained goods," such as a pound of sugar which is* ***to be weighed out of greater bulk****, or goods to be manufactured, or timber to be cut, before they are appropriated to the contract. Unless a different intention appears from the contract, the property in* ***specific goods passes to*** *the* ***buyer when*** *the* ***contract is made*** *(e.g., before delivery*)]

Misrepresentations

A misrepresentation is a non-contractual representation which is untrue and which is intended to induce and actually does induce another to enter into a contract.

Before considering the type of misrepresentation at hand, it is important to determine whether, in fact, it induced the contract.

In ***Davies*** v. ***CBC Cape Breton Island Developers Inc.,*** 2013 NSSC 375, the buyers were given various representations as to the amount of financing they could obtain. Those statements turned out not to be true. However, the Court found that the statements did not induce the contract.

Misrepresentation is fraudulent when it is made knowing that it is false, or without belief in its truth, or recklessly, without caring whether it is true or false. ***Derry*** v. ***Peek*** (1889), 14 A.C. 337 (H.L.).

In ***Marsh Canada Ltd***. v. ***Grafton Connor Property Inc***., 2017 NSCA 54, Justice Farrar summarized the principle of reckless misrepresentation as follows:

> [168] This case law provides the principles for determining whether recklessness exists in any given situation. They may be summarized as follows:
>
> - Representation must be made without regard whether it is true or false;
> - An intention to lie or deceive is not required to prove recklessness;
> - Being oblivious to the truth equates to recklessness or fraud;

- Indifference as to whether statements were true or false may amount to recklessness;

- The absence of reasonable grounds for the belief is not determinative of the question but the lack of a reasonable belief can provide some evidence of recklessness.

An innocent misrepresentation is an untrue statement of fact made in the honest belief that it is true.

Fraud renders a contract voidable at the option of the party deceived. The defrauded party has the right either to affirm or repudiate, and a right to damages if damages have been suffered by reason of the deceit.

For innocent misrepresentation, the victim may elect to affirm or repudiate the contract. She may set up the misrepresentation as a defence to an action on the contract (***Redgrave*** v. ***Hurd*** (1881), 20 Ch. D 1); bring an action (or counterclaim) for rescission and restitution, ***but not damages***.

There is a body of law to the effect rescission will not be granted where a contract has been "completely executed" except in cases of fraud. See ***Redican*** v. ***Nesbitt***, [1924] S.C.R. 135. However, in that case Idington, J. appeared willing in some cases to grant rescission even though the contract was executed if the misrepresentation led to an ***"error in substantialibus"*** (a complete failure of consideration). ***Alessio*** v. ***Jovica*** (1973), 42 D.L.R. (3d) 242 (Alta. S.C., App. D) suggested the rule was not "hard and fast."

In ***Heilbut, Symons & Co***. v. ***Buckleton***, [1913] A.C. 30 (H.L.) the plaintiff alleged it had been induced to enter into a contract on the false representation that a company was to be a rubber company. The Court dismissed the notion that the representation gave rise to a collateral contract the effect of which would add to the terms of the main contract (hence not a term). It found such result must be strictly proved. The statement being a mere statement of fact in reply to a question was held to be an innocent misrepresentation giving no right in damages. Lord Moulton said:

> In determining whether [a representation was intended to be warranty] a decisive test is whether the vendor assumed to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may also be expected to have an opinion and to exercise his judgment.

In ***Dick Bentley Productions Ltd***. v. ***Harold Smith (Motors) Ltd***., [1965] 1 W.L.R. 623 (C.A.) Lord Denning stated that whether a representation was "intended" as a warranty

> depends on the conduct of the parties, on their words and behavior, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.

Lord Denning also said that a representation made inducing a party to act on it by entering into a contract will ***prima facie*** be considered a warranty.

The law now draws a distinction between ***negligent*** and ***innocent*** misrepresentation permitting a claim in damages for the former. ***Hedley Byrne Co. Ltd***., v. ***Heller & Partners Ltd***., [1964] A.C. 465 (H.L.) suggested that a person who professes to have special knowledge or skill, and by virtue thereof makes a representation to another with the intention of inducing the other to enter into a contract, has a duty to use reasonable care to see that the representation is correct. If this individual gives erroneous or misleading information she is liable in damages, including to third parties who are reasonably anticipated to rely on this information. See ***also Deloitte & Touche*** v. ***Livent Inc.***, 2017 SCC 63, and the torts materials for this course.

2. *Discharge by breach*

As seen in the previous section, breach of a promissory condition entitles the non-breaching party to treat the contract as repudiated, the effect of which is to discharge any obligations under the contract that have not yet been performed. Breach does not automatically discharge the contract: the non-breaching party may elect whether to proceed with the contract or to treat it as repudiated provided the right to treat the contract as repudiated has not been lost (*e.g.*, ***Wallis*** v. ***Pratt***, *supra*). Remember that where the term is classified as a warranty the non-breaching party is not permitted to treat the contract as repudiated.

In the case of an ***anticipatory breach*** (where a party indicates by words or conduct an intention not to perform, or to perform in a manner inconsistent with the contractual undertaking), the innocent party has certain options. The contract does not come automatically to an end with the "wrongful repudiation." She can choose to sue immediately for compensation in damages, ***or*** wait until the time for performance, holding it as prospectively binding. ***Hochester*** v. ***DeLaTour*** (1853), 2 E. & B. 678 (Q.B.). In ***Shaver*** v. ***Barbosa***, 2007 CanLII 86741 (Ont. S.C.J. (Sm. Cl. Ct.), M. Klien D.J. stated at para. 7:

> … An anticipatory breach is an unequivocal indication that the party will not perform when performance is due, or a situation in which future non-performance is inevitable. An anticipatory breach gives the non-breaching party the option to treat such a breach as immediate and to terminate the contract and sue for damages, without waiting for the breach to actually take place.

G.H.L. Fridman, ***The Law of Contracts***, 5th ed., *supra*, describes the elements of anticipatory breach at p. 606 as follows:

> The authorities reveal that, for this type of breach to occur the following must be established: (1) conduct which amounts to total rejection of the obligations of the contract; (2) lack of justification for such conduct. If, to these, is added the acceptance by the innocent party of the repudiation, then the effect will be to terminate the contract. This does not mean that the repudiating party is free from all liability. It simply means that the innocent party may be freed from his obligations (as in the case of a breach at the due date of performance), and may

> pursue such remedies as would be available to him if the breach had taken place at the time when performance was due.

Canada Egg Products Ltd. v. ***Canadian Doughnut Co. Ltd***., [1955] S.C.R. 398 held the innocent party must accept a wrongful repudiation "with every reasonable dispatch." This does not mean immediately, but what would be reasonably required or dictated by the circumstances. Furthermore, it was held the issuance of the writ by the plaintiff constituted an adoption of the repudiation.

In ***MacNaughton*** v. ***Stone***, [1949] O.R. 853, McRuer, C.J.H.C. said at p. 859:

> the effect of a declaration made by one party to a contract in advance of the date fixed for performance that he will not carry it out is not to rescind it; it take two parties to bring a contract to an end. But when one party assumes to renounce a contract of this sort before the date fixed for its performance, the other party has three courses open to him:
>
> (1) he may elect to treat the contract then and there as at an end and demand the return of his deposit; or (2) he may treat the contract as broken as of the date on which the other party has renounced it and sue for damages sustained by the breach; or (3) he may treat the contract as valid and subsisting and bring an action for specific performance if it is not performed according to the terms thereof.

In the last case the party who renounces the contract may, at any time before the time fixed for completion, elect to carry it out and the other party will then be bound by its terms.

In ***Chapman*** v. ***Ginter***, [1968] S.C.R. 560, 68 D.L.R. (2d) 425, the Court held that even if there has been a wrongful repudiation the innocent party may not be able to claim anything if the ***conduct*** of the parties demonstrates a mutual desire to rescind the contract – *e.g.,* of an abandonment, or a "walking away" from the contract. Abandonment is a high standard, and must be a "giving up, a total desertion, and absolute relinquishment;" to find an inference of intention to abandon, the factors are: "(1) passage of time; (2); nature of the transaction; and (3) the owner's conduct." (***Stewart v. Gustafson***, [1999] 4 W.W.R. 695 (Sask. Q.B.), cited with approval in, e.g., ***Zinck v. Day,*** 2014 NSSM 31 and in ***Chaisson v. Kennedy***, 2014 NSSM 64.

In *GC Lobster*, *supra*, Justice Muise summarized as follows:

> [214] In **White v. E.B.F. Manufacturing Ltd.**, 2005 NSCA 167, at paragraphs 88 to 91, the Court described repudiation as requiring both of the following:
>
> (a) The repudiating party has clearly communicated, explicitly or implicitly, "by words or conduct" that they no longer intend to perform their side of the contract. Factors to consider include "the nature of the contract, the attendant circumstances, and the motives which prompted the breach".

(b) The innocent party has clearly and unequivocally communicated that they accept the repudiation. "Mere inactivity or acquiescence" is generally insufficient. However, depending on the "contractual relationship" and "circumstances of the case", "a continuing failure to perform [may] be sufficiently unequivocal to constitute acceptance of a repudiation".

[215] As stated at paragraphs 15 and 16 of **968703 Ontario Ltd. v. Vernon**, 2002 CarswellOnt 573 (C.A.), with references omitted:

> "15 ... Only a substantial, not a minor, breach of contract will excuse the innocent party from continued performance of a contract ... .
>
> 16 There are several factors that provide guidance in determining whether or not a breach is a substantial breach justifying future non-performance of the innocent party's obligations. They are: (a) the ratio of the party's obligation not performed to the obligation as a whole; (b) the seriousness of the breach to the innocent party; (c) the likelihood of repetition of the breach; (d) the seriousness of the consequences of the breach; and (e) the relationship of the part of the obligation performed to the whole obligation."

[216] "It is clear that as a matter of law a party may be held to have repudiated a contract even when that party professes a continuing desire that the contract be carried out, and even when the party may honestly believe that he wants the contract to be carried out. The test is an objective one." [**Komorowski v. Van Weel**, (1993) 12 OR (3d) 444, 1993 CarswellOnt 856 (C.J., G.D.), at para 35.]

[217] Demanding payment before it is due, accompanied by a refusal to complete the construction phase required to demand such payment, may constitute repudiation, disentitling the builder from recovering payment: **D & M Steel Ltd. v. 51 Construction Ltd.**, 2016 ONSC 1335, paras 58 to 62. However, the builder may still be able to prove a *quantum meruit* claim: **Heyday Homes Ltd. v. Gunraj**, 2004 CanLII 34324 (ON SC), 2004 CarswellOnt 254 (S.C.J.), para 353.

[218] The Court in **Jozsa v. Charlwood-Sebazco**, 2016 BCSC 78, at paragraph 73, stated:

> "73 Even where an owner terminates a contract, the owner can still counterclaim for defective work: *Keating on Construction Contracts*, at p. 293. However, the contractor has the right to remedy any defects in the work himself, and if he is deprived of that right the owner's right of set off may be curtailed: *Wiebe v. Braun*, 2011 MBQB 157 (Man. Q.B.), at para. 32. As stated in *Obad v. Ontario Housing Corp.*, [1981] O.J. No. 282 (Ont. H.C.), at paras. 47-48:
>
> 47 With reference to the counterclaim or claim of set-off for damages arising from non-completion of the work, the effect of the defendant, Ducharme, telling the plaintiff to "get off the job" was to revoke the

> plaintiff's license to continue working there. Furthermore, in a practical way, engaging other persons to do the work of the plaintiff, effectively prevented the plaintiff from completing his contract. The defendant, Ducharme, having thus prevented completion cannot obtain damages for failure of the plaintiff to complete.
>
> 48 With respect to the claim for damages resting on expenditures to correct the plaintiff's work, it would seem that, although the defendant, Ducharme, is entitled to have a set-off for defective work, its obligation to mitigate its damages would require that it allow the plaintiff to continue, having in mind the reasonable probability that the plaintiff would correct its own work in order to obtain payment of the price. On that basis the defendant, Ducharme, is not entitled to have damages based on its own costs of correction. Alternatively, the plaintiff was obliged to correct its defective work and the defendant, Ducharme, having prevented the plaintiff from fulfilling that obligation, cannot have damages in the ordinary way based on its having undertaken itself to carry out such corrections."

3. *Exclusion clauses or exemption*

Contracting parties often seek to insert specific terms exempting or excluding liability for certain acts or liability. Courts have traditionally analyzed these clauses, commonly referred to as "exclusion clauses" or "exemption from liability clauses", with a critical eye. In 2010, however, in a decision that gives prominence to the freedom of contract, the Supreme Court of Canada communicated that such clauses, as long as they are clearly drafted and are not unconscionable, are acceptable and should be given their full force and effect (see ***Tercon Contractors Ltd.*** v. ***British Columbia (Transportation and Highways)***, 2010 SCC 4).

The new approach

As stated above, the Supreme Court of Canada in ***Tercon Contractors***, *supra*, upheld a party's right to include a broad "exclusion of liability" clause in tender documents drafted by a public entity. In doing so, despite its 5-4 split on the factual outcome, the Court set out a new test for determining whether an exclusion clause should be enforced. Conceptualized as three-step analysis, the new test requires the following:

1) a determination as to whether the clause applies to the facts of the case;
2) a determination as to whether the clause itself is unconscionable (and thus invalid from the time the contract is made); and
3) if valid at the time the contract was entered into , whether the court should refrain from enforcing the clause because of some overriding public policy.

Tercon is also important because of its elimination of the doctrine of fundamental breach, which is discussed in the following section.

For a recent example where a "clear" exclusion clause (limiting liability to the amount paid for a building inspection) was upheld despite the inspector missing a substantial and

expensive defect, see ***McCarthy*** v. ***Halifax Home Inspections***, 2014 NSSM 36. See also ***Lafrance v. Federal Express Canada Corporation***, 2019 NSSM 1 in which a carrier's limitation of liability clause was upheld when no valuation was declared and the order lost. Conversely, where the clause was not so clear (and thus the "clause did not apply to the facts"), *contra proferentum* was alive and well and liability continued to accrue to the party in breach: ***3089467 Nova Scotia Limited. v. Town of Bridgewater***, 2016 NSSM 8.

4. *Fundamental breach*

Stated simply, the doctrine of fundamental breach held that a breach that goes to the "root" of the contract absolves the non-breaching party of his or her obligations under the contract, no matter whether there was an applicable exclusion clause. Put another way, even if the contract contained an exclusion clause limiting liability, a "fundamental breach" meant the innocent party could escape its limitations and sue for damages. In ***Tercon***, *supra*, the Supreme Court of Canada has "laid to rest" the doctrine of fundamental breach in Canadian contract law.

In ***Tercon***, the company attempted to claim damages when the Province selected a non-eligible competing bid. An exclusion clause in the Request for Proposals denied liability for all damages "as a result of participating in this RFP."

The Court split 5-4 as to the outcome of the case, but was unanimous in the conclusion that it was time to eliminate the doctrine of fundamental breach. As stated by Cromwell J. at para 62:

> On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426, at p. 462

Binnie J. articulated the three-part test applicable to determining the enforceability of exclusion clauses, but also commented on the demise of the doctrine of fundamental breach. At para 82 the learned Justice wrote:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses.

He then formulated the three-part test noted above.

5. *Unconscionability*

S.M. Waddams has commented that the doctrine of unconscionability in Canada may be a very wide or narrow legal concept. Canadian courts have taken the view that unconscionability involves at least:

- an improvident bargain, and
- inequality in the positions of the parties.

The traditional doctrine of unconscionability is exemplified by the decision of McIntyre, J.A. in ***Harry*** v. ***Kreutziger*** (1978), 95 D.L.R. (3d) 231 (B.C.C.A.):

> From these authorities this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

In the same case, Lambert, J.A. took an approach first embodied in a judgment of Lord Denning in ***Lloyd's Bank Ltd.*** v. ***Bundy***, [1975] Q.B. 326 (C.A.):

> In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the ***Morrison*** and the ***Bundy*** case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.
>
> The single question of whether the transaction, as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher and, in other respects, more

> fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law.

The concept that unconscionability encompasses community standards of conventional morality has found acceptance in a number of subsequent decisions. See, *e.g.*, ***A & K Lick-A-Chick Franchises Ltd.*** v. ***Cordiv Enterprises Ltd.*** (1981), 119 D.L.R. (3d) 440 (N.S.T.D.).

In the debtor-creditor context, see the ***Unconscionable Transactions Relief Act,*** R.S.N.S. 1989, c. 481.

6. *Legislation*

Legislatures have responded to a perceived failure of the common law to adequately regulate the use of exemption clauses in consumer transactions. For example, the ***Consumer Protection Act***, R.S.N.S. 1989, c. 92 specifies a number of conditions or warranties on the part of the seller that are implied in every *consumer* sale and prohibits "contracting out" of them (Section 28(1)). The most notable distinction between the conditions and warranties in the *Sale of Goods Act* (Part XVI of these materials) and the *Consumer Protection Act* is the implied condition of durability for a reasonable period of time (s. 26(3)(j))

XIII. FRUSTRATION OR IMPOSSIBILITY OF PERFORMANCE

The doctrine of frustration excuses the parties from further performance of contractual duties if, without the fault of either party, an event occurs that renders performance illegal, impossible, or radically different from what was contemplated. The following are a few cases that should be considered.

There appears to be a differentiation between frustration in cases involving land (see below) and otherwise.

> ***Matthey*** v. ***Curling***, [1922] 2 A.C. 180 (H.L.)
> This is a 20th century illustration of the rule in ***Paradine*** v. ***Jane*** (1647), Aleyn 26, 82 E.R. 897 (K.B.). Curling let his house to Matthey on a 21-year lease, with Matthey covenanting to repair and to deliver up the house in repair at the end of the lease. During the lease, WWI broke out and the military authorities, acting under statutory powers, seized the house and used it for housing German prisoners of war. Shortly before the termination of the lease, the house burnt down. When the lease expired (the military authorities had since gone), Curling requested Matthey to rebuild the house in accordance with the covenant. Matthey pleaded that the performance of the covenant had become "impossible." The House of Lords unanimously held that Matthey had to perform his covenant.
>
> These two cases – ***Paradine*** v. ***Jane***, *supra*, and ***Matthey*** v. ***Curling***, *supra* – should be read in their particular context; that is, as cases of leases of land. Since a lease conveys an

interest in land, such contracts give rise to unique circumstances and, as echoed in *Cheshire and Fifoot,* 12th edition (pgs 581-3), the law might say that the doctrine of frustration applies to leases "hardly ever". This explains why, on their face, these cases seem to run counter to the general principle of frustration. It is worth noting that in practice, the destruction or loss of use of premises subject to a lease ought to be addressed in the lease itself and through insurance.

Taylor v. ***Caldwell*** (1863), 3 B. & S.826, 122 E.R. 309
Defendants agreed to let the plaintiffs have the use of a music hall for four days for four "grand concerts." Plaintiffs agreed to pay £100 per day. Before the time came for the first concert, the hall was destroyed by fire. It was held that the music hall having ceased to exist without the fault of either party, both parties were excused and therefore defendants were excused from their promise to give the hall and the plaintiffs from their promise to pay the money. The Court held the contract was "… subject to an implied condition that the parties shall be excused in case, before the breach, performance becomes impossible from the perishing of the thing without default of the contractor".

This reasoning differs from ***Paradine*** v. ***Jane***, *supra*, in that impossibility will excuse performance if the contract is not "positive and absolute", but is made ***subject to an express or implied*** condition that performance shall be excused if it becomes impossible. The test in ***Taylor*** v. ***Caldwell*** is whether there can be inferred from the nature of the contract and surrounding circumstances an implied condition that the contract shall cease to be binding if a certain state of things ceases to exist. In other words, if the parties when entering into the contract must have contemplated the continuing existence of a certain state of things as the foundation of what is to be done, there is an implied condition subsequent that the obligations shall be discharged if there is a change in that state of things.

Maritime National Fish Ltd. v. ***Ocean T. Ltd.***, [1935] 3 D.L.R. 12 (P.C.)
In this case, the appellants were trying to get out of an agreement to charter a steam trawler that was owned by the respondents, the "St. Cuthbert." In essence, the appellants could only license three out of five vessels, and selected other ships accordingly. The Privy Council did not allow for this "self-induced" frustration to excuse the appellant from liability.

Krell v. ***Henry***, [1903] 2 K.B. 740 (C.A.)
The defendant entered into a contract for the hire of rooms at a fairly high rate to view the coronation procession of Edward VII. The procession was postponed due to the king's illness. Though nothing was said in the contract about the purpose of the hire, it was understood that the purpose was to enable the procession to be viewed. The defendant had also paid a deposit. The landlord sued to recover the remainder of the rent. Evidence of the purpose of the contract was admitted, and it was held the "tenant" was excused from the obligation to pay the agreed sum because of the cancellation and hence the frustration. (However, defendant could not recover his deposit.) The Court was of the view the coronation was the basis for the contract and the cancellation of it prevented performance of the contract.

> This case is said to have created a new ground for excusing performance because of impossibility or frustration. There is a widely held view that the case is founded upon the idea of "frustration of purpose." The rule in ***Krell*** v. ***Henry***, *supra*, is sometimes expressed in the following terms: "where the 'sole purpose' of a contract has failed or disappeared, through no fault of either party, a contract can be treated as frustrated."

In ***Kesmat Investments Inc.*** v. ***Industrial Machinery Co.***, (1985) 70 N.S.R. (2d) 341 (S.C.A.D.) MacDonald, J.A. stated at paragraphs 18 and 20:

> The law appears clear that before an intervening event or change in circumstances can prematurely determine a contract by operation of the doctrine of frustration, such event or change in circumstances must be of so catastrophic or fundamental a nature as to render performance of the contract impossible.

A contract is discharged by frustration if, during the currency of the contract, further performance becomes illegal. An example of this principle is that a contract is frustrated if legislation is passed after the contract was made, which renders it illegal.

A "personal contract" is ended by the death of either party.

XIV. INTERPRETATION OF THE TERMS OF THE CONTRACT – INTENTION AND THE SO-CALLED PAROL EVIDENCE RULE

1. *Overview*

Cases speak repeatedly of contractual interpretation being an exercise of determining, and giving effect to, the "intention of the parties" (see discussion in the cases cited in ***CIBC*** v. ***Partners Management***, *infra*). This begs the question of how that intention is to be determined, and on what evidence.

The Parol Evidence Rule states that if you have a contract in writing, you cannot introduce oral evidence that is at odds with the written document. The rule is described by Denman C.J. in ***Goss*** v**. *Lord Nugent*** (1833), 5 B & Ad. 58 at pp. 64-65, as follows: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract."

It is important to keep the concepts of parol evidence and hearsay distinct. In ***Soup Pot Ideas Inc. v. Urban Spaces Limited***, 2015 NSSC 317, the Court accepted that a prior landlord had given verbal permission for renovations, while the lease required prior written consent. In the context of the informal day-to-day relationship the parties had, the Court admitted evidence of the consent and held that it was not hearsay (as it was offered for proof the statement was made); the parol evidence rule does not appear to have been argued.

The distinction between ambiguity and disagreement over interpretation is discussed in ***CNR v. Halifax,*** *supra.*

MacDonald, J.A. in ***Shaw (Gordon) Concrete Products*** v. ***Design Collaborative Ltd.*** (1986), 72 N.S.R. (2d) 133 (S.C.A.D.), MacDonald, J.A. states at paragraph 22:

> … When a written contract exists, the terms of the agreement govern the rights and obligations of the parties. The contract is deemed to state finally the intent of the parties and the terms upon which they agreed and prior negotiations are deemed to have been merged into and settled by the contract as finally stated. It is for that reason that courts have uniformly held that evidence of oral agreement is not admissible to add to, vary or contradict the written contract. However oral agreements are admissible in evidence to explain ambiguous parts of the contract or to show the parties' agreement as to a matter upon which the contract is incomplete or totally silent. See: Cheshire and Fifoot, ***The Law of Contract*** (7th Ed.), page 104; Fridman, ***The Law of Contract***, page 245 et seq …

In ***Innotech Aviation*** v. ***Skylink Express Ltd.***, 2017 NSSC 176, Justice Gabriel quoted at length from ***Sattva, infra***, as follows (emphasis that of Gabriel, J.)

> [20] Then, I consider Justice Rothstein's explication of the process in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 S.C.C. 53:
> 56. I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered…
> 57. While the surrounding circumstances will be considered in interpreting the terms of a contract, *they must never be allowed to overwhelm the words of that* (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to *deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract*. The interpretation of a written contractual provision *must always be grounded in the text and read in light of the entire contract* (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, *courts cannot use them to deviate from the text* such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
> 58. The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case. It does, however, have its limits. *It should consist only of objective evidence* of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was *or reasonably ought to have been within the knowledge of both parties* at or before the date on contracting. Subject to these requirements and the parole evidence rule discussed below, this includes, in the words of Lord Hoffman, 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' (*Investors Compensation Scheme*, at p. 114). Whether

something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parole Evidence Rule*

59. It is necessary to say a word about consideration of the surrounding circumstances and the parole evidence rule. The parole evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the *rule precludes, among other things, ecidence of the subjective intentions of the parties (Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parole evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attach a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).

60. The parole evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, *not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting*; therefore, the concern of unreliability does not arise.

61. Some authorities and commentators suggest that the parole evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras 19-20; and *Hall*, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parole evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contact." [underlining added]

2. Standard form and non-standard form contracts

In general, the interpretation of contracts and determining the "intention of the parties" is a question of fact, or a question of mixed fact or law. As such, on appeal, the standard of review is whether the interpretation placed at trial contains a "palpable and overriding error" of fact or, in the case of mixed fact and law, whether the question of law can be severed and reviewed separately for correctness: ***Sattva Capital Corp v. Creston Moly Corp***, 2014 SCC 53. If such are, in fact, "discrete and extricable questions of law," they may be reviewed for correctness on appeal: ***Royal & Sun Alliance Insurance Company of Canada v. Snow***, 2016 NSCA 7, and its companion case, ***Garden View Restaurant Ltd. v. Portage LaPrairie Mutual Insurance Co.***, 2016 NSCA 8. Ibid***, Teal Cedar Products Ltd.*** v. ***British Columbia***, 2017 SCC 32.

A separate analysis, however, applies when the contract is a standard form, or contract of adhesion. In that instance, policy questions of consistency of interpretation and precedential value, as well as the availability of other case guidance, means that the

standard of review is one of *correctness*, as a matter of law: ***Ledcor Construction Ltd.*** v. ***Northbridge Indemnity Insurance Co***, 2016 SCC 37. Accordingly, such "take it or leave it" contracts which have no meaningful element of negotiation as to drafting (and thus are not fact-specific as to their drafting) are subject both to the *contra proferentum* rule, and to interpretation without deference to the trier of fact on such matters of interpretation (see also ***Marsh Canada Ltd.*** v. ***Grafton Connor Property Inc.***, 2017 NSCA 54) Although ***Ledcor*** deals primarily with the standard of review, an underlying premise to the standard-form analysis suggests that parol evidence would rarely if ever be relevant as, by definition, there is no ambiguity that arose in and of itself as a result of the course of negotiation between the parties

With that said, standard form contracts will still be interpreted on an "ordinary meaning" basis. Thus, in ***Sabean*** v. ***Portage La Prairie Mutual***, 2017 SCC 7, the issue was whether Canada Pension Plan disability payments were a "policy of insurance providing disability benefits" for the purposes of a standard-form automobile policy. The Court held that CPP would not be considered to be "insurance" to "[a]n average person applying for this additional insurance coverage" (para. 4).

3. *Exceptions*

- where the written document can be said to be just an incidental act to an oral transaction (bill of lading, *e.g*, where the term that one party seeks to introduce by oral evidence is a true condition precedent – *i.e.*, the condition must occur before either parties have any obligations; where by introducing oral evidence you are ***not*** attempting to prove part of the contract which is in writing, but a ***collateral contract***;
- where oral evidence can be used as an aid in interpreting ***ambiguous*** terms of contract;
- if a mistake has been made in reducing the contract to writing – *e.g.*, a typing error – oral evidence may be used to assist in rectification; and
- where oral evidence can be helpful in establishing what transpired during negotiations.

4. *Additional Cases*

In ***CIBC v. Partners Management Development Inc***, 2016 NSSC 2, Justice Duncan recently summarized the Supreme Court of Canada and others as follows:

> In addition, it is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole (see *B.C. Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12 (S.C.C.) at para. 9). The court's aim is to advance the intention of the parties at the time they entered into the contract. (See *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 (S.C.C.) at page 10). There should not be an *ex post facto* reconstruction of intention.

[27] The issue of intention was considered in the case of *Toronto-Dominion Bank v. Leigh Instruments Limited (Trustee of)*, 1998 CanLII 14806 (ON SC), [1998] O.J. No. 2637 (Ont. Gen. Div.); aff'd 1999 CanLII 3778 (ON CA), (1999), 45 O.R. (3d) 417 (C.A.). Winkler J., as he then was, stated the following at paragraphs 403-405, and 407-410:

> PRINCIPLES OF CONTRACTUAL INTERPRETATION
> 403 The aim of the court, in construing a written agreement, is to determine the intentions of the parties to the agreement, and in this regard, the cardinal presumption is that the parties have intended what they have said. Their words must be construed as they stand. See: *Chitty on Contracts Volume 1, General Principles*, 27th ed. (1994) at 580.
> 404 Where the agreement has been reduced to writing, the parol evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at app. 455-456:
> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing.
> See also: *Hawrish v. Bank of Montreal*, 1969 CanLII 2 (SCC), [1969] S.C.R. 515 per Judson J.
> 405 This is consistent with the principle that where a document purports on its face to be the final and conclusive expression of the parties' agreement, the document will be taken to be a reliable record of the parties' latest agreement, and evidence of the negotiations leading up to it will not be admissible …
> 407 The court need not be confined to a strict, literal interpretation of the language of the document however, and may admit evidence of the "factual matrix" or circumstances surrounding the conclusion of the agreement as an aid in interpretation. …
> 408 The Supreme Court of Canada has adopted the notion that a court may look at evidence of the surrounding circumstances when construing a document. In *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69, the court cited with approval the dicta of LaForest J. (as he then was), in *White, Fluhman and Eddy v. Central Trust co. and Smith Estate* (1984), 54 N.B.R. (2d) 293 at 310-311:
>
> > What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.
>
> 409 From these authorities can be gleaned certain principles which should guide the court in interpreting an agreement. The document should be looked at as a whole, with each contractual term considered in the context of the entire document. See: G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at 469. The court should make every effort to construe the document on its face, without regard to extrinsic evidence.

> 410 Where an agreement is clear and unambiguous on its face, the parol evidence rule operates to prohibit admission of evidence to alter or vary the written terms of the contract. However, the court may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in which the parties were operating. In this regard, evidence to be admitted must be objective in the sense of what reasonable persons in the position of the parties would have had in mind, rather than subjective evidence of the parties' actual intentions.

In Smart Innovations Consultancy Inc. v. Harbour Ridge Golf Club, 2012 NSSC 98, Justice Hood recently considered the cases in the context of whether parol evidence could be admitted to explain a "short but not vague or uncertain" contract. She stated, at paras 20-23:

> [20] In *Hardman v. Alexander,* 2004 NSSC 122, the court said with respect to ambiguity:
>
> > [2] The first question, as I have said, is a determination of whether or not the Agreement is ambiguous. . . . The ***RJB*** decision [*RJB Investments Ltd. v. Ladco Co.* (2000) 154 Man. R. (2d) 183 (Man. Q.B.], goes on to say in para. 11:
> >
> > > Where the language is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. The court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is created by evidence that is sought to be adduced. Parol evidence may not be adduced where the effect of such evidence would be to contradict the written contract. Where the true intentions of the parties are not clear from the documents, then such evidence may be admitted assist in interpreting the true intentions of the parties. The parol evidence rule is intended to avoid injustice.

Hawrish v. ***Bank of Montreal***, [1969] S.C.R. 515

A solicitor attempted to resile from a guarantee (which he said he did not read before signing); he said he had been assured it would cover only existing indebtedness, rather than existing and future obligations.

The main reason Judson, J. said that oral evidence could not be admitted was because the written document said it was to be a continuing guarantee covering all present and future liabilities and therefore clearly ***contradicted*** the oral agreement.

CNR v. Halifax, supra, reiterated the distinction between an ambiguity, which "implies that the parties knew fundamentally what they were contracting for or about, but did not express it clearly" and unambiguous language on which the parties have different interpretations. It is only in the former case that parol evidence will be admitted to "explain" the written contract.

XV. REMEDIES OF THE INNOCENT PARTY

1. *General*

When a breach occurs, the remedies that are open to a person injured by the breach fall under three main heads:

- Every breach of contract entitles the injured party to damages for the loss she has suffered;
- If when the breach occurs the injured party has already done part, though not all, of what he was bound to do under the contract, he may be entitled to claim the value of what he has done, or in other words sue upon a ***quantum meruit***.
- In certain circumstances the injured party may obtain a decree for specific performance of the contract, or an injunction to restrain its breach. These are equitable remedies and are usually granted in the discretion of the court.

Sometimes, the wronged party may have an election as to which remedies it seeks, such as in the case of an anticipatory or an ongoing breach – see discussion infra and also, for example, ***Innotech Aviation*** v. ***Skylink Express Inc.***, 2018 NSSC 93, in which a lease was breached but had not yet expired. Justice Gabriel concluded that the innocent party could (1) do nothing (2) terminate the lease, retaining the right to sue for damages to date (3) re-let on the tenant's account or (4) terminate and sue for the present value of rent to its normal expiry.

2. Damages

As a general rule, the objective of contract damages is to ensure the injured party receives what she or he contracted for in the bargain.

The common law remedy for breach of a contractual promise is that of damages. Unless the parties themselves limit the amount of damages to be awarded it is a matter for the jury or the judge sitting as a jury to assess damages. However, certain losses may be said to be "too remote" and for these the plaintiff may not be entitled to compensation. The question to be asked is – when a contract is broken and action is brought upon it, how do you arrive at the amount which the plaintiff is entitled to recover – or, in other words, what is the measure of damages? The foundation for the modern law in this area is found in the judgment of Baron Alderson in the classic case of ***Hadley*** v. ***Baxendale*** (1854), 9 Ex. 341.

Hadley v. ***Baxendale***

The plaintiffs' mill was stopped as the result of a crankshaft that broke. The crankshaft was

sent to the manufacturers as a pattern for a new one. The defendants who were carriers undertook to deliver the shaft to the manufacturers. The only information given to them was that the "article to be carried was the broken shaft of the mill, and that the plaintiffs were the millers of that mill." By neglect of the carriers, the delivery of the shaft was delayed, and as a result the mill could not be restarted until some time later than it could have been otherwise. The plaintiffs also lost profits thereby. The issue was whether this "loss of profits" ought to be taken into account in estimating the damages. It was held that the information communicated to the defendants did not show that a delay in the delivery of the shaft would entail loss of profits of the mill. The plaintiffs might have had another shaft, or there might have been some other defect in the machinery to cause the stoppage.

The rule as stated in Baron Alderson's judgment is that damages are recoverable in two cases:

- when they arise "naturally, *i.e.*, according to the usual course of things" from the breach; and
- when they are such as can reasonably be supposed to have been in the contemplation of the two parties at the time they made the contract, as the probable result of the breach of it.

For some time the so-called "two branches" of the rule were regarded as two distinct propositions. The first branch was said to cover damage that even if not contemplated by the parties arose "naturally" or "directly" from the breach. The second branch covered damage that from the circumstances must have been known to the party in default at the time of contracting – in other words, what would be deemed as foreseeable as the probable result of the breach. The ***Victoria Laundry*** case casts some doubt on whether you could have such a clear cut dichotomy.

Victoria Laundry Ltd. v. ***Newman Industries Ltd.***, [1949] 2 K.B. 528 (C.A.)
The plaintiffs, a firm of launderers and dyers, wanted to enlarge their operations. For this purpose, they entered into a contract with the defendants to purchase from them a new boiler. It was agreed that the boiler was to be delivered on June 5. When plaintiffs arranged to get the boiler on that day, they were told it had been damaged by a fall and was not ready. In fact, the boiler was not delivered until November. As a result of the delay, plaintiffs lost profits which they would have earned during the period, and in particular, they lost certain highly lucrative dying contracts that they could have obtained with the Ministry of Supply.

It is said to have been established by the general principles in ***Victoria Laundry*** that the test under both branches of the rule in ***Hadley*** v. ***Baxendale*** is the same: recovery depends on "foreseeability." The first branch deals with normal loss, and the test is an objective one. The second deals with abnormal loss and the test is subjective insofar as it requires actual and not merely imputed knowledge. Of course, the preliminary question must still be whether or not the damage was caused by the breach. However, once that has been established the test of remoteness would now seem to favour foreseeability as a result of ***Victoria Laundry.***

> The common law can, of course, be displaced by statute. So, for example, when an employee was terminated and the severance was governed by the regulations under the ***Tourism Nova Scotia Act***, it was the statute that governed and not the (longer) common law notice that would have applied to the party in breach (a private organization governed by the statute) but for the legislation.

3. *Mitigation*

> The common law dictates that a plaintiff must do what is reasonable to mitigate, or lessen, damages. In a leading case, ***Payzu Ltd.*** v. ***Saunders***, [1919] 2 K.B. 581 (C.A.), the parties contracted for the sale and purchase of a quantity of silk by instalments, payment for each instalment being made within one month of delivery. The buyers failed to make punctual payment for the first instalment and the seller wrongfully treated this as a ground upon which the contract could be repudiated. She offered, however, to continue deliveries at the contract price but, on a cash basis. The buyers refused and bought elsewhere at a higher price. They later sued for the difference between the price they actually paid and the price that had been payable under the original arrangement. It was held that they were entitled to damages as their breach had not been such to entitle the seller to repudiate, and thus her termination was itself a breach. However, it was held that they should have mitigated their loss by accepting her offer to sell for cash at the original contract price. Consequently, the damages they recovered were limited to the loss they would have suffered had that offer been accepted.
>
> However, as G.H.L. Fridman points in ***The Law of Contract in Canada***, 5th ed., *supra*, at pp. 776-77, the defendant has the onus of proving failure to mitigate. If such failure is proved, the defendant is relieved from liability for losses that flow from the plaintiff's inactivity or actions that exacerbate the loss.

Historically, impecuniosity has not been an excuse for failure to mitigate: ***The Liesbosch***, [1933] A.C. 449 (H.L.). However, this appears to have been diluted over the years. Recently, in ***Southcott Estates Inc.*** v. ***Toronto Catholic District School Board***, 2012 SCC 51, six of the seven judges considered a case of a "shell" company set up to develop land. The parent company had significant resources. The Court declined an impecuniosity argument on the basis that the parent could have funded the acquisition, so it could not argue that it could not fund mitigation. However, the Court also implied that impecuniosity is available in suitable cases, at para. 29:

> In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

The opportunity to remediate deficiencies can also factor into mitigation, or lack thereof: ***GC Lobster,*** *supra,* at para. 213.

4. *Quantification of damages*

As noted, the purpose of damages is to put the plaintiff in as good a position as he would have been in had the contract been performed. Often we think of a breach causing an aggrieved party monetary, or other, loss; however, not every breach of contract causes actual loss. Despite this, an action is possible, even if no actual loss has occurred, as the defaulting party has not lived up to his or her legal obligations. Generally speaking, however, damages are intended to compensate or restore or to allow the plaintiff to recover what has been paid out in reliance on the defendant's contractual promises, not to punish, so if no actual loss has occurred, the plaintiff may only be awarded nominal damages.

Various types of damages may be awarded (see generally G.H.L. Fridman, ***The Law of Contract in Canada***, 5th ed., supra, pp. 751-756), including:

- Nominal and substantial damages – Losses may be nominal or substantial. Nominal damages will be awarded where a plaintiff did not suffer any losses, or where the losses were trivial, or where a plaintiff is actually better off financially due to the defendant's breach (*e.g.*, because plaintiff was free to pursue other opportunities, a more lucrative opportunity comes along). In fact, if a contract would have caused the plaintiff to lose money, the plaintiff may not be able to recover expenses. Of course, in other cases, a plaintiff's losses can be substantial, and an award of damages will seek to put the plaintiff in the position he or she would have been in had the contract been performed. This can include compensatory damages on a "springboard" basis – that is, when the party in breach has attained a considerable competitive benefit or knowledge out of the contractual relationship (that is, through a breach of confidence): *TDC Broadband Inc. v. NS (Attorney General),* 2018 NSCA 22.

- Exemplary and punitive damages – It used to be that exemplary or punitive damages could not be awarded in actions for breach of contract (***Addis*** v. ***Gramophone Co.***, [1909] A.C. 488 (H.L.)). However, in the Supreme Court of Canada's decision in ***Vorvis*** v. ***Insurance Corporation of British Columbia***, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193, the majority held that while it will be rare to award exemplary or punitive damages in breach of contract cases, they could be awarded in appropriate cases (of which *Vorvis* was not one) if there was the finding of the commission of an actionable wrong that caused the plaintiff's injury. McIntyre, J. went on to state for the majority:

  > … punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. … [I]n any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. (See also: ***Wallace*** v. ***United Grain Growers Ltd.*** (1997), 152 D.L.R. (4th) 1 (S.C.C.).)

More recently, the Supreme Court released companion decisions in ***Performance Industries***, *supra*, and ***Whiten v. Pilot Insurance***, 2002 SCC 18. The Court declined to award punitive damages when the compensation and judicial denunciation of the defendant's business practices meant that punitives did not "serve a rational purpose" to provide for "more punishment….by way of retribution, deterrence or denunciation." The opposite result came out of ***Whiten***, where an insurer denied coverage for a fire loss under criminal aspersions of arson, despite the findings of its own investigator.

- According to Fridman, ***The Law of Contract***, 5th ed., *supra*, at p. 756, the conditions under which exemplary or punitive damages will be awarded, "have been restated by the Ontario Court of Appeal, following *Vorvis*, in two cases. They are: (1) the defendant's behavior must be egregious so as to offend the court's sense of decency; (2) the defendant must have committed an independent actionable wrong against the plaintiff; and (3) such damages must serve a rational purpose because the compensatory damages are insufficient to express the court's repugnance at the actions of the defendant and to punish and deter. (See: ***Marshall*** v. ***Watson Wyatt & Co.*** (2002), 57 O.R. (3d) 813, 209 D.L.R. (4th) 411 (C.A.) and ***968703 Ontario Ltd.*** v. ***Vernon*** (2002), 58 O.R. (3d) 215, 22 B.L.R. (3d) 161 (C.A.).)

- Aggravated damages – May be awarded in appropriate cases. In ***Vorvis***, McIntyre J. quotes with approval from S.M. Waddams' ***The Law of Damages*** (Toronto: Canada Law Book, 1983) at page 562: Waddams recognizes that the term "aggravated damages" has been used interchangeably with punitive or exemplary damages, but notes that there is a difference: "Aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behavior."

  McIntyre, J. goes on to state:

  > Aggravated damages are awarded to compensate for aggravated damage. … [T]hey take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

  As of writing (February, 2019), the Supreme Court of Canada has granted leave to appeal in *Ocean Nutrition Canada Ltd. v. Matthews*. At appeal (2018 NSCA 44), the majority found that a wrongfully dismissed employee who was thereby denied the benefit of a long term incentive plan could have been awarded punitive damages instead, if the facts so warranted (none were so awarded at trial or by the majority on appeal).

- Damages for mental distress – In ***Fidler*** v. ***Sun Life Assurance Co. of Canada***, [2006] 2 S.C.R. 3, the Supreme Court of Canada demonstrates what is required for an award of aggravated damages for mental distress due to a breach of contract. Here, the Court concludes that damages should only be recoverable where such damages can be shown to

have been within the reasonable contemplation of the parties at the time the contract was formed.

As the Court states:

> "It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made."

It is worth noting that the Court of Appeal's decision in ***Industrial Alliance***, *supra*, awarded damages for mental distress for breach of (an insurance) contract "under Hadley v. Baxendale" (para. 169)

- Consequential damages – These compensate for losses that are indirect. John A. Yogis QC states in ***Canadian Law Dictionary***, *supra* at p. 89:

> In contract law, consequential damages are recoverable if it was reasonably foreseeable at the time of contract that the injury or loss was probable if the contract were broken. … They are damages that follow because of knowledge of special conditions imputed to the defaulting party and increase the standard of liability. Thus they are synonymous with special damages [damages as are capable of exact computation].

- Liquidated damages – John A. Yogis QC, ***Canadian Law Dictionary***, *supra*, at p. 90, defines liquidated damages as: "The genuine, reasonable, pre-estimate of the damages, agreed upon in advance by parties to a contract, that will be paid in the event of a breach". The courts allow the parties to contract such amounts in advance, but if the amount is deemed a penalty, it may not be recovered. General rules have been developed for the guidance of the courts, as set down by Lord Dunedin in ***Dunlop Pneumatic Tyre Co.*** v. ***New Garage & Motor Co.*** [1915] A.C. 79 at 86 *et seq*. (H.L.):

  1) The sum in question will be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.
  2) If the obligation of the promisor is to pay a certain sum of money and it is agreed that if he fails to do so he will pay a larger sum, this larger sum is a penalty.
  3) If there is only one event on which the sum agreed is to be paid, the sum is liquidated damages.
  4) If a single lump sum is made payable upon the occurrence of one or more or all of several events, some of which may occasion serious and others only trifling

> damage, there is a presumption, but no more, that the sum is a penalty. But not necessarily if it is difficult to prove actual loss.

(Quoted in G.H.L. Fridman, ***The Law of Contract in Canada***, 5th ed., *supra*, at p. 771)

In ***The Law of Contract in Canada***, 5th ed., *supra*, G.H.L. Fridman states the following concerning penalties at pp. 774-776:

> A penalty is a sum that is fixed in advance as being subject to forfeiture or payment in the event of non-performance of a contract, or some kind of misperformance, for example, a late payment fee for non-payment of rent on time in accordance with the contract. A distinction has been drawn between payment of a sum in the event of non-performance of a contractual obligation (when the sum may amount to a penalty) and payment of a sum of money on the happening of an event. In the latter situation no question of a penalty arises, and the courts will not grant relief. The penalty area has been limited to a "narrow field". The doctrine is not designed to relieve a party from the consequences of what might in the event prove to be an onerous or even commercially imprudent bargain. However, it is clear that the doctrine of penalties applies whether a payment is enforced or a payment is withheld by reason of the other party's non-performance.
> …
> The onus is on the party seeking to invalidate a clause, to show that it inflicts a penalty, rather than determines the damages payable by the guilty party. But even where a clause does inflict a penalty, it will not always be unenforceable, as the Supreme Court of Canada made clear in ***Dimensional Investments Ltd.*** v. ***R.*** [[1968] S.C.R. 93], for example, where it is not unconscionable or where it is protected by statute.
>
> Where a penalty clause is bad, the innocent party is relegated to his right to claim that lesser amount of damages to which he would have been entitled at common law for the breach actually committed if there had been no penalty clause in the contract. But the question remains unanswered whether such clauses are always totally bad, that is, void, in the same way as covenants in unreasonable restraint of trade. The judgment of Diplock L.J. in ***Robophone Facilities Ltd.*** v. ***Blank*** [1966] 1 W.L.R. 1428 (C.A.)] leaves this matter unsolved, and suggests that courts should not be "astute to descry 'a penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former." This should not be done since it might deter parties from the very reasonable activity of determining damages in advance, which is useful because: (1) there are cases when damages are difficult to assess; (2) it saves expensive litigation; and (3) it enables parties to know what their liabilities are going to be in advance. What is more, as the judgment makes clear, a sum which looks extravagant under the first part of the ***Hadley*** v. ***Baxendale*** principle, the objective test, may turn out to be quite acceptable if the case is one to which the second part, the subjective test, properly applies. Such enhanced loss may indicate that the stipulated sum, though seemingly large, is a genuine pre-estimate of the damages. In such circumstances, there should be greater scope for such clauses. As the Supreme Court of Canada made clear in ***Elsley*** v. ***J.G. Collins Insurance Agencies Ltd.*** [(1978), 83 D.L.R. (3d) 1 at 15-

> 16 (S.C.C.)], a penalty clause should only be struck down if it is oppressive, not simply because it might be termed a penalty.

As a result, S.M. Waddams argues in ***Law of Damages*** (Aurora: Canada Law Book) (loose-leaf revision 24 (Nov 2015)), paras. 8.140-8.200, that the real issue in such instances is "unconscionability".

As noted by G.H.L. Fridman, in the ***Law of Contract in Canada***, 5th ed., *supra*, at p. 702, at common law, the remedy for a breach of contract generally is damages, and he states the following concerning defences:

> … Liability is strict, in the sense that the aggrieved party does not have to show that the breach was committed deliberately or negligently. … [T]he only possible defences or excuses are (1) that the breach was caused by supervening impossibility or frustration; or (2) that the other party failed to perform some condition precedent upon the performance of which depended performance by the party alleged to be in breach; or (3) the existence of an exclusion or other clause that exempts the party alleged to be in breach, or otherwise affects that party's liability. In the absence of any such factor, the party who has breached a contract will be liable to pay damages in accordance with principles of remoteness and assessment …"

While generally, the remedy for a breach of contract is damages, there are alternative remedies available, depending on how the breach occurred.

In appropriate circumstances, it may be possible for an aggrieved party to bring an action in tort, rather than an action in contract, if the contract is broken by fraud (tort of deceit) or negligence (often negligent misrepresentation).

In other circumstances, an aggrieved party can request equitable remedies, including specific performance, injunction or rescission.

5. *Specific performance and injunction*

Under certain circumstances a promise to do a thing may be enforced by a decree for specific performance, and an express or implied promise to forbear, by an injunction. These remedies were once exclusively administered by the Chancery. They supplemented the remedy in damages offered by the common law.

The two main characteristics of these remedies are that they are supplementary and that they are discretionary.

Where damages are an adequate remedy, specific performance will not be granted. Damages may be a very insufficient remedy for the breach of a contract to convey a plot of land. However, damages can usually be adjusted so as to compensate for a failure to supply goods. Thus, it is rare, but not impossible for a court to order specific performance of a contract for the sale of goods.

Where the court cannot supervise the execution of the contract, specific performance will not be granted.

Unless the contract is "certain, fair, and just," specific performance will not be granted.

An injunction may be used as a means of enforcing a simple covenant or promise to forbear. It is a general rule that contracts of personal service will not be dealt with by a decree for specific performance. However, an injunction may be granted to restrain the breach of a ***negative*** undertaking in a contract of personal services. A leading case involved the movie actress Bette Davis. Her contract with the plaintiffs obliged her to exclusive services to them. By way of a negative stipulation, she agreed not to render her services to any other business or person without the consent of the defendants. The Court agreed that specific performance of a contract of personal services will never be ordered. Secondly, where a contract contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants, or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants, but this is subject to the consideration that an injunction is a discretionary remedy and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case. See ***Warner Brothers*** v. ***Nelson***, [1937] 1 K.B. 209.

Historically, real property was considered "unique" and specific performance readily available. This has been diluted considerably in recent years. In ***Southcott Estates,*** *supra*, the Supreme Court specifically rejected specific performance as a remedy for a single-purpose corporation (part of a larger group of companies) set up to develop a specific block of land, when the evidence showed there were other lands available in the area for profitable development.

In contrast, in ***Sheetharbour Offshore Development Inc v. Tusket Mining Limited***, 2005 NSSC 307, the Court *did* issue an injunction prohibiting disposition of a specific piece of land pending trial on the merits, when the evidence was that the land was unique and well suited for a specific purpose, and there did not appear to be evidence of other available lands. An appeal from the injunction was refused at 2007 NSCA 59.

6. *Rescission*

Rescission is a powerful equitable remedy, in effect permitting a court to set aside the contract made by the parties and, where appropriate, substitute what is considered to be fair and just in the circumstances. Rescission may be granted for:

- misrepresentation,
- fraud,
- mistake, and
- duress.

The remedy may be lost due to:

- lapse of reasonable time,
- where restitution is impossible,

- where third party rights are affected, or
- where there has been an affirmation of the contract.

(For example, where a party knowing of another's misrepresentation elects to go ahead with the contract).

Rescission and damages appear to be alternative, not cumulative, remedies in the sale of land (***Johnson v. Agnew***, [1980] A.C. 367 (H.L.)), but this restriction does not appear to be the case with other contracts.

7. *Quasi-contract, restitution and unjust enrichment*

In certain situations where there is no actual contract (*e.g.*, medical services rendered to an unconscious person), or where a contract may be rendered unenforceable (*e.g.*, by reason of the ***Statute of Frauds***), a court may believe some remedy is called for.

In ***Imperial Oil Ltd.*** v. ***Atlantic Oil Workers Union, Local 1***, 2004 NSSC 201, Murphy J. provides a succinct comprehensive review of the law of unjust enrichment, starting at para. 96:

> In ***Deglman*** v. ***Guaranty Trust Co. of Canada***, [1954] S.C.R. 725 (S.C.C.), the Supreme Court of Canada considered a situation where the Respondent had an oral agreement with his aunt by which he claimed she had promised to leave him a piece of land in her will in exchange for services to be performed in her lifetime. Although he was unable to establish the writing requirements of the Statute of Frauds, the Court found that he was entitled to recover the value of the services on the basis of quasi-contract or restitution as described in ***Fibrosa Spolka Akcyjna*** v. ***Fairbairn Lawson Combe Barbour Ltd.*** (1942), [1943] A.C. 32 (U.K. H.L.). In that case, when the unjust enrichment doctrine was in its infancy, Lord Wright stated that a man could not retain "the money of or some benefit derived from another which it is against conscience that he should keep". Justice Wilson, for the Supreme Court of Canada, put the principle in these terms in ***Kiss*** v. ***Palachik***, [1983] 1 S.C.R. 623 (S.C.C.): "Equity fastens on the conscience of the appellant and requires him to deliver up that which it is manifestly inequitable that he retain".

The test for unjust enrichment was set out by Justice Dickson (as he then was) in ***Rathwell*** v. ***Rathwell***, [1978] 2 S.C.R. 436 , and again in ***Becker*** v. ***Pettkus***, [1980] 2 S.C.R. 834 . Justice Dickson held in that case, for the majority of the Court:

> [T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach … is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.
>
> The Supreme Court has most recently confirmed the reasoning in ***Becker*** v. ***Pettkus*** as the proper approach to unjust enrichment in ***Garland*** v. ***Consumers' Gas Co.***, [2004] S.C.J. No. 21 (S.C.C.), para. 30, (reported at (2004), 237 D.L.R. (4th) 385 (S.C.C.)). In that case, the Court, per Iacobucci J. held, following the reasoning of Justice MacLachlin (as she then was) in ***Peel (Regional Municipality)*** v. ***Canada***, [1992] 3 S.C.R. 762 (S.C.C.), that establishing enrichment and deprivation requires a "straightforward economic analysis", with other considerations being incorporated into the analysis to determine whether there was a juristic reason for the enrichment (Garland, at para. 31). Justice Iacobucci set out the proper approach to the juristic reason analysis as follows:

> The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason for an established category exists to deny recovery. The established categories that can constitute juristic reasons include a contract, a disposition of law …, a donative intent …, and other valid common law, equitable or statutory obligations. If there is no juristic reason for an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectation of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

In *Maxwell v. Atwood*, 2018 NSSM 13, a co-owner of a property paid out a judgment against the other co-owner in order to allow the sale to proceed. The payor successfully sued for the amount so paid on the basis of unjust enrichment.

As well, it has been long accepted that in contracts for services, where no price is fixed or ascertainable, compensation will be awarded on a *quantum meruit* basis. For a recent example, see ***Pavestone Creations Limited v. Kuentzel***, 2013 NSSC 199.

XVI. LEGISLATION

1. *General*

Sometimes, the wronged party may have an election as to which remedies it seeks, such as in the case of an anticipatory or an ongoing breach – see discussion infra and also, for example, Innotech Aviation v. Skylink Express Inc., 2018 NSSC 93, in which a lease was breached but had not yet expired. Justice Gabriel concluded that the innocent party could (1) do nothing (2) terminate the lease, retaining the right to sue for damages to date (3) re-let on the tenant's account or (4) terminate and sue for the present value of rent to its normal expiry.

Some contracts must be evidenced by ***writing*** in order to comply with legislation. The most significant enactments are the ***Statute of Frauds***, R.S.N.S. 1989, c. 442 and the ***Sale of Goods Act***, R.S.N.S. 1989, c. 408. A useful mnemonic for the statute is "MY LEGS" – marriage, (contracts over) a year, land, (debts of) estates, goods, surety.

The ***Statute of Frauds*** Section 7 states:

> 7 No action shall be brought
> (a) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;
> (b) whereby to charge any person upon any special promise to answer for the debt, default or miscarriage or another person;
> (c) whereby to charge any person upon any agreement made upon consideration of marriage;
> (d) upon any contract or sale of land or any interest therein; or
> (e) upon any agreement that is not to be performed within the space of one year from the making thereof,
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

2. *Memorandum or note*

The memorandum or note must contain all the essential terms of the contract. ***Turney*** v. ***Zhilka***, [1959] S.C.R. 578. In ***Dynamic Transport Ltd.*** v. ***O.K. Detailing Ltd.***, [1978] 2 S.C.R. 1072 a defence under the ***Statute of Frauds*** failed because there was sufficient certainty of description of a property stated in an agreement to be "four acres 'more or less'. The Court could look to surrounding facts such as a map of the land recorded in the Land Titles office, a public document to which the purchaser would be led by the legal description of the land ("language need not be construed ***in vacuo***").

3. *Contracts not to be performed within a year*

C. Boyle and D.R. Percy (ed.), ***Contracts: Cases and Commentaries***, 5th ed., (Toronto: Carswell, 1994) contains the following at p. 301:

Most of the litigation over this provision has arisen on the definitional question of what in law constitutes a contract not to be performed within a year and, as the following extra from the ***O.L.R.C.'s Report on Amendment of the Law of Contract*** (at 82) indicates, the outcome of that litigation depends upon technical considerations which have little or no justifiable policy foundation:

> To illustrate, if a contract is for an indefinite period, but could be performed within a year, it has been held to fall outside the Statute. However, if the contract provides for a specific period for performance of more than a year but also confers a power of determination that may be exercised within the year, it requires a written memorandum. Again, if a contract is to be performed over a period of one year, commencing the day after the formation of the contract, it falls outside the Statute on the principle that the law takes no account of the parts of a day; if, on the other hand, a contract of the same duration commences ***two*** days after the conclusion of the contract, the Statute will be deemed ***to apply even though the day immediately following the conclusion is a Sunday. In addition*** to these constructional vagaries, it has been noted that the statutory provision leads to the curious result that it is in the interest of the defendant to argue that the contract was to run for more than a year, whereas the plaintiff has an incentive to argue equally strenuously that the contract was for less than a year.

4. *Part performance*

In ***International Associated Hairdressers Ltd.*** v. ***Glasgow*** (1957), 65 Man. R. 374, Coyne, J.A. referred to the equitable principles (which gave rise to the doctrine of part performance):

> which hold that the ***Statute of Frauds*** does not apply where there has been performance or part performance of the oral contract by, or where otherwise the result would be fraud against, or injustice to, the other party ...

However, in ***Deglman*** v. ***Guaranty Trust Co. of Canada and Constantineau***, [1954] S.C.R. 725 where an aunt promised her nephew a house if he did certain chores, it was found that as the agreement was oral, the ***Statute of Frauds*** defeated the nephew's claim because the acts performed were not connected to the premises in question. (However, he did recover on ***quantum meruit*** for the services rendered).

Deglman has recently been reaffirmed as the test for part performance (as opposed to a less stringent standard in the U.K.) in ***Self v. Brignoli Estate***, 2012 NSSC 81. Justice Coady concluded, at para. 19:

> I submit that the law in Nova Scotia follows the more traditional test set out in ***Deglman*** and applied by Hallett, J. in ***Carvery***. In order to avoid the ***Statute of Frauds*** a plaintiff must show acts of part performance that are unequivocally referable to the contract for land asserted by the plaintiff.

This has been recently reiterated in ***101252 P.E.I. Inc. v. Brekka***, 2013 NSSC 289, affirmed 2015 NSCA 73.

5. The Sale of Goods Act, R.S.N.S. 1989, c. 408

In Nova Scotia, the following is applicable to the requirement of writing under the *Sale of Goods Act*:

> 7(1) A contract for the sale of any goods of the value of forty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf.

Application of section

> (2) This Section applies to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.

Interpretation

> (3) There is an acceptance of goods, within the meaning of this Section, when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

Property in goods may pass under a contract of sale even if the above provisions have not been met. However, neither party will be able to enforce the contract against the other.

"*Fructus naturales*" or natural products grown on land (crops) are not normally considered "goods" unless they are to be severed from the land by virtue of the contract under which they sold. Contracts for work and labour (services) are ordinarily not sales of goods. A portrait, although consisting of canvas and paint, would not normally be considered goods. The test is whether the "essential character" of the agreement is for goods. ***Preload Co.*** v. ***Regina*** (1958), 24 W.W.R. 433. *In* ***The Law of Contract in Canada***, 5th ed., *supra*, G.H.L. Fridman states at p. 235:

> For a contract to be enforceable under the Sale of Goods Act, one of the three alternatives must be satisfied. The buyer must accept part of the goods sold and actually receive them, or the buyer must give something by way of earnest or in part payment, or there must be some note or memorandum signed by the party to be charged or his agent.

6. Residential Tenancies Act, Insurance Act, etc.

Certain contact forms, such as standard policies for certain types of insurance and residential leases, are governed by statute and certain statutory conditions apply, or are deemed to apply, to each. Residential Tenancies are covered in the Real Estate portion of these materials. Abrogation or modification of common law rules of contract are also contained in several other statutes, *e.g.*, termination pursuant to the ***Tourism Nova Scotia Act***, *supra*.

7. Bankruptcy

In general, on bankruptcy, the rights and obligations of a bankrupt pass to the trustee, and the bankrupt no longer has rights or obligations under pre-bankruptcy contracts. Thus, while a secured creditor may generally realize on its security, the bankrupt no longer has a personal obligation for any shortfall. Similarly, the trustee has the rights of any value under any of the bankrupt's contracts, not the bankrupt him- or herself.

A trustee may redeem security and take the underlying property as an estate asset (***Bankruptcy and Insolvency Act***, RSC 1985, c. B-3, s. 128(3)), may disclaim an interest in property, including rights under real estate (s. 20), or lease (30(1)(k)). Special rules apply to intellectual property rights such as copyrights and patents (ss. 82, 83).

For companies under the ***Companies' Creditors Arrangement Act***, RSC 1985, c. C-36, the Court has extensive powers to permit a company to disclaim, modify, or ratify contracts, and to compel parties to service or continue to service contracts on the same or modified terms, particularly where a supplier of goods or services is considered essential to the continued operation of the debtor.