BACKGROUND TO THE LAW OF CONTRACT

Areas within the Law of Obligations

* Torts
	+ Generalized obligations that automatically exist; your rights and duties are the same with respect to everyone
	+ Deals with a **misfeasance** (to do something wrongly or inappropriately)
	+ Tort looks to the past; goal is to put you in the position you ought to have been in had the tort not occurred
* Contracts (K)
	+ Obligations you voluntarily entered into; your rights and duties to the other party are specific to the contract and do not apply to others
	+ The performance of a contract conveys the transfer of real rights (i.e. transfer of property or transfer of goods)
	+ Deals with **nonfeasance** (to not do something)
	+ Contract looks to the future; seeks to put parties in the position that they agreed to be in
* Restitution (quasi-K) – unjust enrichment
* However, these distinctions are not always so clear; categories are not mutually exclusive and often overlap.
	+ Consider why you might to address your case through contract or tort? How would this differ?

Hohfeld’s – Jural Relationships

* Describes the law as being about sets of relationships – everything has a correlative
* **Right – Duty/obligation**
	+ A has a right to receive a product; B has the corresponding duty/obligation to provide the product
* **Liberty/freedom/privilege – “No right”**
	+ If A is allowed to do something, B is not allowed to make a claim against that person
	+ This relationship is about the absence of rights
	+ Associated with ‘Freedom of Contract’ – the freedom to voluntarily enter or not enter into contracts
* Power – Liability
	+ A situation where one person can act, and one person is a necessary passive recipient of that act
	+ A can take action, B cannot do anything about it
* Immunity – Disability
	+ The immunity of one person creates a disability on another (i.e. liability waiver)
* Through the course, think about how one action affects someone else. Consider the correlatives to the rights, power or duties that are presented.

**History of Common Law & Equity**

* \*Common Law (Kings Bench & Common Pleas)
	+ Court with strict black & white rules; would only settle disputes to determine the ‘correct’ party; the court did not grant rights; only the contract itself creates rights and duties/obligations
* \*Equity (Court of Chancery)
	+ Important to contract law – common law could not conceive of intangible property
	+ Equitable rules/doctrines/remedies based in fairness and equity; discretionary application
* \*Statutory Law – Parliament (House of Lords) was the court of final resource; not bound by precedent; this has since changed
* Mercantile Law – system developed by merchants; rules and principles adopted by common law in 1875

Application

* May need to invoke different traditions for different circumstances
* Understand that different rules developed in different legal systems – where the doctrine was created will affects how it works and when it can be used
	+ i.e. common law rules the creation of a contract (offer/acceptance) while only equity possesses doctrines to void/make a contract voidable
* Equity Maxims
	+ *“Follows the law”;* must see what the common law says first
	+ Equitable remedies are discretionary; parties must demonstrate to the court why the common law resolution (damages) is not sufficient
* Law & Equity Act
	+ November 19, 1858 is the ‘day of reception’; the day English law was adopted in the colony of BC
	+ Includes the provision that *“equity prevails”*

FORMATION OF THE CONTRACT

**Forming a Contract** – Ingredients for a contract typically include:

* Offer and acceptance
* Certainty of terms
* Intention to create legal obligations
* Written record of a contract (not required, but common)

Offer

* An offer sets the terms of the contract; the acceptance is simply an unqualified ‘yes’ to the offer
	+ Because a contract does not exist until an acceptance is made to an offer, it is imperative to understand who made the offer (Pharmaceutical Society v. Boots)
	+ This may also involve differentiating between an offer and an invitation to treat (Canadian Dyers Assoc. Ltd. v. Burton)
* Contents of an Offer:
	+ Recitals (Inoperative terms)
		- Items that are included that are not “terms” of the contract; do not make up the offer/promise
		- This includes intentions, representations and “mere” puffs (see below)
	+ Terms (Operative terms)
		- Make up the offer/promise
		- Statutes may create additional terms not explicitly included in the offer – i.e. all sales of goods are subject to the implied terms created by the *Sale of Goods Act*
* Why is this relevant?
	+ A breach of contract is a breach of promise only; misrepresentation of facts does not constitute a breach of contract (see below)
* **Remedy for Breach of Contract**
	1. Specific Performance
	2. Substitute Performance (damages)
	3. Termination (end the contract)
		+ Does not allow for rescission (making the contract no longer exist)

Invitation to Treat/Tender/Deal

* Statement of readiness to negotiate; precedes the offer and is not binding
* May be:
	+ Source of terms that constitute an offer
	+ Source of representations or assumptions about the contract
	+ ****Source of information for the basis of claim for certain types of damages (i.e. intentions which would establish potential damages)

Offer vs. Invitation to Treat

* What’s the difference?
	+ The acceptance of an offer creates a binding contract
	+ The acceptance of an invitation to treat does not create a binding contract. It is a “statement of readiness to negotiate”.
* Categorization of communications requires an objective assessment of the **intention**, as determined by:
	1. **Language used**

NOTE: There is theoretically no hierarchy regarding language vs. conduct. However it is true that an expressed communication does have practical priority over an implicit statement or conduct.

* 1. **Conduct**
	2. **Timeline** – see below
		+ Concerned with ACC: What was the intention at the point of offer/acceptance?
		+ If evidence was admitted after this point, it may allow parties to construe evidence in their favour (Canadian Dyers Assoc. Ltd. v. Burton)
* However, the concept of ‘intention’ is subjective intent based on the offeree (subject to change)
* Text describes two fact that can help identify an offer:
	1. Are the terms certain or readily implied from communications?
	2. Would treating the communication as an offer lead to an absurdity?
* See p. 295, Chart G7
* Illustrates that termination means the primary obligation ceases to exist; termination typically triggers the secondary obligation (becomes enforceable)

**1. Offer**

Established Principles

* Characterization as an offer or invitation to treat requires an objective assessment of the intent of the parties ACC – including the language used, their conduct, and the timeline (Canadian Dyers Assoc v Burton). However, post-ACC evidence or characterization is cautioned against.
* Goods on display are an invitation to treat, not an offer (Pharmaceutical Society v Boots). However, the offer an acceptance of sales vary on a case and fact specific basis.
	+ Overturned in R. v. Milne (1992). The display of goods was characterized as an offer.
	+ Keep in mind that different types of transactions can be characterized in different ways.
* Generally an advertisement or a proclamation is characterized as an invitation to treat. However, if supported by the intent (based on language used, conduct and timeline) it can be characterized as an offer (Carlill v Carboc Smoke Ball). Acceptance of this offer, in whatever method specified, will become a contract.
	+ The maker of a general offer has some duty to limit the offer expressly if the offeror does not want to find himself or herself in contractual relations with unexpected person.

Liability in Contract

* *Contract, generally speaking, is strict liability*
	+ Meaning, contract is not subject to the proof of fault (intent or negligence)
	+ Very few defences in contract for not fulfilling duties or obligations
	+ Gives you the right to explicitly take action against the other party of the contract, unlike tort where you have to take action against the party at fault
* However, a contrary argument exists that offeror’s obligations are fulfilled once the contract terms are fulfilled
	+ i.e. once the offeree receives the jar of pickles; the offeror is not responsible for it’s explosion

Contract A/Contract B Situations

* Suppose a “statement” or “event” requires a label – a or b?
* Leads to three possibilities:
1. Receive a choice (election – one or the other)
2. Receive a choice (either or both)
3. Merger (law itself decides and that one characterization takes over)
* In some situations, an **offer could also be characterized as an acceptance or an invitation to treat**
* Common Example: Construction Contracts
	+ - A – call for tender (“invitation to treat”)
		- B, C, D, E, F – submit bids (“offers”)
		- A accepts D’s bid – acceptance, contract exists
	+ What if A had included a term in the call for tender indicating they would accept the lowest bid, and B had the lowest bid? Does B have any recourse?
		- B does not have a contract with A, the contract is with D
		- The offer& acceptance between A & D form the main contract (KB)
		- The preliminary contract (KA) is a procedural contract between A & others
		- This gives B a remedy; A did not follow the preliminary contract

Operations of Offer

1. Relevance of communication
	* An offer has to be communicated in order for it to have any legal relevance
2. Relevance of knowledge of the offer by the “offeree”
	* Despite the ambiguity in Williams v Cawardine, an offeree must be aware of/have knowledge of the offer in order to complete the required actions for acceptance.
	* R v Clarke (Aus HC) establishes that knowledge of an offer is necessary for acceptance. Adding intention to accept creates consent.
3. Relevance of motive of the offeree
	* If you carry out an action that could be characterized as acceptance, does your motive have to be the offer or can it be some other external reasoning? Per Williams v Cawardine and R v Clarke, motive is irrelevant.

Motive vs. Intention

* If there is a distinction, what is the relevance? When does motive become important as opposed to intention?
* Motive – why do you choose to enter a contract? What gains would you get? Why would you want to?
	+ The court has said this isn’t relevant
	+ Common law unconcerned with conscience; only equity is concerned with motive
* Intention – the intent to enter into a contract or legal relationship
	+ Relevant for consideration (what you give to get into a contract)
	+ Essentially, it is narrowly construed motive

**2. Termination of Offer**

1. What brings the offer to an end?

1. Revocation: an action by the offeror
	* The offeror is simply able to end the offer; need only communicate this desire to the offeree in some way
	* Offer itself does not create on obligation; requires acceptance for an obligation to exist
		+ Right to revoke the offer exists even if the offeror has indicated a timeline
	* Dickinson v Dodds: An offeree is free to revoke an offer before the end of an established timeline. The requirements for communication of revocation are vague – fact & case specific.
		+ Suggests that a reliable indirect communication may suffice. If the revocation is communicated, then it is effective – receipt of the revocation by the offeree is not required; the communication must just be made.
	* Byrne v. Van Tienhoven: An offer may be revoked **if** the communication reaches the offeree before or at the same time as the acceptance would have become effective.
		+ PAR does not extend to entities other than the public mail service (i.e. Canada Post)
2. Rejection: an action of the offeree
	* Words – rejection
	* Actions – rejection (including counter-offers)
3. By a lapse of time: inaction by the offeree
	* Explicit wording of offer can self-expire (i.e. within 2 days)
	* Inaction – elect (confirms) the status quo (no contract); passage of a period of time
		+ This period of time is determined **(1) implicitly from the language of the offer, or (2) by default as a ‘reasonable’ period of time**
		+ But from whose perspective?
			- If from the perspective of the offeror, look at events up to the time of the offer
			- If from the perspective of the offeree, look at events up to the time of acceptance (or inaction)

Preventing Early Revocation of an Offer – Option Contracts

* What if the offeree wants to protect the offer they’ve received? May be of concern when the offer terms require laborious or expensive acceptance actions on the part of the offeree.
* Can turn the subject of the offer into a contract.
	+ The offeror promises not to revoke that offer – the offer is turned into a preliminary option contract
	+ Consideration is required to bind an option contract
* What if the option contract is terminated by the offeror?
	+ Available remedies will be dependent upon the current circumstances – for example, if the property in the option contract has been sold, likely to receive only damages (not specific performance)

2. Unilateral Contract

* Arises when only one party has obligations
* Only enforceable if the offeree has already completed their obligation through actions of acceptance.
	+ These pre-K actions act as acceptance and as consideration (often costly and time-consuming)
* However, termination may occur any time prior to acceptance; no obligations until this point
* **Question arises, are unilateral contracts special cases? Can you prevent early revocation without an option contract?**
	+ Some cases have held that in such a situation, where the offeror knows that the offeree has started to do what is necessary to accept, the offeror cannot revoke the offer.
* Carlill v. Carbolic Smoke Ball
	+ Could have been characterized as a unilateral contract
		- Where acceptance requires that she buy it, use it, get ill and make a claim
		- However the CSB could revoke the offer before she makes the claim
	+ However, this allowed CSB to revoke the offer prior to Carlill completing the above actions; no obligations until acceptance occurred
		- If it is a bilateral contract (meaning acceptance occurred at the time of purchase), then customers could still make a claim.
			* Sale contract
			* Warranty/guarantee contract
* Errington v. Errington and Woods: In a unilateral contract, the offeror cannot revoke the offer once they are aware that the offeree has begun performing the actions required for acceptance.

3. Rejection and Counter Offer

* Livingstone v. Evans: A counter-offer is a rejection of the original offer. The original offer cannot be accepted without the consent of the offeror.
	+ May need to characterize communication(s) as a request for clarification; not a counter-offer

4. Lapse of Time

* Barrick v. Clark: Offers will lapse due to inaction at some point in time. But determining when or why it lapses can be difficult to determine.
	+ To further the confusion, if the offeror makes the offer to different people and a question arises of whether the offeree has implicitly rejected it, it may depend on the characteristics of the offeree.

**3. Acceptance**

* **Acceptance plays a pivotal role, it brings the contract into existence** – must determine if, when, where and who
* **Where:** Determines whose law applies
	+ Affects enforceability and viability of the contract
		- This ambiguity may (not always) be resolved by creating a term of the contract that specifies its jurisdiction
		- Relates to conflicts of law – what court can hear the case? In the event a different court hears a case, it is assumed that the courts jurisdictional laws apply. Often use lawyers from the appropriate jurisdiction as expert witnesses.
	+ As a lawyer, you need to know if you are able to give advice to a client
* **When:** The moment of acceptance is significant because some items:
	+ Only occur pre-contract (pre-K)
		- Misrepresentation
		- Mistake
		- Duress/undue influence
		- Unconscionability
	+ Only occur once the contract exists (K)
		- Frustration
	+ Only relevant at the point of acceptance (ACC)
		- Intention to create legal relations (ICLR)
		- Consideration
		- Quantum of damages
		- Knowledge
		- Certainty of terms
* **Who:** accepts the contract?
	+ Traditional Approach: Offeror makes the offer and the offeree accepts; any changes are construed as a counter-offer
	+ Denning Approach: Contracts are “brought into existence” as in Butler Machine Tool
		- Start with the contracts existence and work backwards; this method has since been overruled
		- Makes a compelling argument; more realistic approach in relation to how contracts are truly developed
			* Not likely that only one party creates all of the terms and the other has no input
		- In addition, its possible that the parties themselves may have wanted to include a term in the contract that the court deems invalid

(a) Acceptance

* Butler Machine Tool Co. v. Ex-cell-o Corp: The terms of the contract are specified in the offer – the offeror’s terms prevail. Involves the characterization of communications as offers and counter-offers.
* Livingstone v. Evans: Reinforces the traditional method of acceptance – requires that one party makes the offer and sets all the terms while the other party simply accepts. Negotiation in-between should be characterized as counter-offers with implicit terms.

 (b) Communication of Acceptance

* In order for the acceptance to be effective, it must be communicated
	+ Begs the question, how can communication be achieved?
	+ This can cause additional problems in unilateral contracts
* Must be some form of saying an unqualified “yes”
* However, certain examples exist whereby acceptance by conduct may be recognized by the courts
	+ Where the offeror and offeree are acting as if a contract exists
* Inaction: Felthouse v. Bindley: Inaction cannot serve as acceptance; communication of acceptance is required.
	+ Any other standard would impose an unfair obligation/contract on an offeree.
* Notification: Carlill v. Carbolic Smoke Ball Co.
	+ Court was not concerned with the fact that the offeror didn’t know that the offeree had accepted
	+ In unilateral contracts, the communication of acceptance may be waived. The offeree is required only to complete certain actions to constitute acceptance.
* Postal Acceptance Rule: Household Fire v. Grant
	+ Establishes the postal acceptance rule (PAR)
	+ The postal acceptance rule establishes the government/public post office as the agent for the purposes of acceptance (not for revocation). Therefore, acceptance occurs at the point the post office receives the acceptance (when deposited in a mailbox) whether or not the offeror receives it. All other forms of acceptance require receipt by the offeror (or their agent).
* Jurisdiction: Brinkibon v. Stahag Stahl
	+ With the exception of the postal acceptance rule, the contract is made within the jurisdiction where the offeror receives acceptance.
* Override of the PAR: Holwell Securities v. Hughes
	+ PAR cannot apply (1) when there are express terms in the offer specifying that acceptance must reach the offeror or (2) where its application would produce manifest inconvenience and absurdity.
		- “Notice in writing” indicates that the offeror must receive the acceptance
		- Land is generally considered a case where manifest inconvenience and absurdity is assumed

Notes on PAR & Jurisdiction

* The PAR has not changed – recall the post office serves as the agent of the offeror. Therefore, the point of acceptance is always when the contract exists and the jurisdiction that applies. If the agent received the acceptance in the UK, then the UK is the jurisdiction.
* Has become a much more complicated issue in contemporary settings – if we’re both on vacation in different places in South America, does Canadian law still apply?
* May specify in the contract:
	+ Whose law applies? Known as the “law of the contract”
	+ Which courts hear the jurisdiction? Known as the “law of jurisdiction”.
* However, whether the jurisdiction will hear the case may be another story.
* The Vienna Convention on Sales Contracts deals with this; as long as you are within signatory states, the rules of the convention apply. Unless the parties contract themselves out of the convention.

B. CERTAINTY OF TERMS

* Ingredients required to complete contract: **certainty of terms** and **intention to create legal relations (ICLR)**
* Consideration is not necessary for existence; it affects only the enforceability of the contract

Certainty of Terms

* Meaning that the important terms of the contract must be explicit; ambiguity may cause a contract to fail
* Two problems with certainty:
	+ Too Little: How can it be a contract when you don’t know if the parties have agreed on this aspect?
	+ Too Much: What was said, has more than one meaning. Parties’ intentions are not clear. Or irrelevant terms make the agreement ambiguous.
* **General approach is to try to “save” contracts when ICLR exists**
	+ When it says too little, the court can impose terms based on statute or “reasonableness”
	+ When it says too much, you take things out or engage in “construction” – to interpret the contract to see what it means; utilize “cannons of construction”
* Save contracts through an analysis of express and implied terms
	+ Interpret the expressed terms within the verbal or written contract
	+ Imply terms using:
		- (1) the law
			* Common law
			* **Statute** (*Sale of Goods Act* and others); almost always legislation which governs the terms of the contract
		- (2) the parties
			* Based on the customs/usage of the parties or industry
			* Necessity of terms (not reasonableness)
* Cases illustrate that it is possible to save contracts; but it is also possible that courts may not save a contract in the event that a term is incomplete/missing

(a) Incomplete Terms: Too Little

* Agreement to Agree: May & Butcher v. R
	+ An agreement to agree is not a contract.
	+ Terms “vital to the arrangement” cannot be decided at a later time (i.e. price)
* Construction of Contracts: Hillas v. Arcos
	+ Courts should construe contracts fairly and broadly; attempt to imply terms into seemingly incomplete or uncertain contracts where ICLR exists
* Prevailing Method: Foley v. Classique Coaches Ltd
	+ Reject May & Butcher; affirm Hillas v. Arcos by imposing “a reasonable price” from the provisions of the contract – available when language provides some certainty (see Empress)

(b) Incomplete Terms: Too much

1. What they have said has no meaning (increasingly common in the advent of the internet)
	* Remedy: Discard/sever the irrelevant provision(s)
2. Not clear what the term means; open to interpretation
	* Remedy: construction (interpret) the contract
	* i.e. are we talking about CAD, HKD or USD?
3. Or terms that conflict with each other
	* Remedy: construction (interpret) the contract
	* Utilizing “cannons of construction” (p.123); principles, not rules

Example of Ambiguity: Agreements to Negotiate

* Distinction can be drawn from:
	+ Agreement to agree – whereby you perform a transaction on uncertain terms or terms to be agreed
		- Agreement to agree imposes undue levels of risk (often based on market fluctuations)
	+ Agreement to negotiate – an attempt to settle terms under which a transaction will be performed
		- Can be of real practical value; parties must make a serious effort to reach agreement
* **Generally considered too uncertain to have any binding force**
* Promise to Negotiate: Empress Towers Bank of Nova Scotia
	+ A promise to negotiate (in good faith as an implied term) has a limited & narrow meaning. Can be used as the basis for defense (shield), but not as a cause of action (sword)
	+ Where the meaning of good faith is often ambiguous. No objective standard. Often contrasted with “bad faith” whereby negotiations are denied or done with no intention to reach a positive outcome.
* Limits to Empress: Mannpar Enterprises Ltd. v. Canada
	+ A duty to negotiate cannot be used as a cause of action (sword); it can also not be used in the absence of an objective benchmark or standard against which to measure the duty.
	+ Language must provide some certainty to negotiation (i.e. market rate). Fiduciary obligations may ‘override’ contractual obligations

C. INTENTION TO CREATE LEGAL RELATIONS

* An intention to enter legal relations must have existed at the time of ACC; often affects family and social arrangements/agreements where the courts will refuse to adjudicate
* Commercial Arrangements: Rose and Frank Co. v. JR Crompton and Bros. Ltd.
	+ Courts will impute intent to create legal relations on commercial agreements. The courts will adjudicate on these agreements despite attempts to exclude the jurisdiction of the courts.
* Family Arrangements: Balfour v. Balfour
	+ The common law will not recognize ICLR in family agreements. They are not likely to be adjudicated on by the courts.

ENFORCEABILITY ISSUES

A. MAKING PROMISES BIND

* Enforceability determines whether or not you can enforce an obligation within a valid contract – that is, an existing contract may have been properly conceived, but obligations within it may not be enforceable in court
	+ Issue arises when an obligation is not fulfilled; a post-ACC issue
* What promise is at issue? Who made it (the promisor) and who wishes to enforce it (the promisee)

**1. History of Enforceability**

* “Real Contract”
	+ A has to actually deliver something to B; the *res* (thing) is required to make the contract binding
	+ Contract only enforceable after delivery; breach occurred only if the person did not pay (non-feasance)
	+ Stemmed from the idea that a contract for a thing required compensation for it; one person must have promised to pay the other person
		- Abstract ideas of things in the future were unrecognized by the common law
* See below for seals and consideration

**2. Nature of Seals**

* Pre-dates consideration; promises made under seal create a “formal contract” or deed
	+ Contract where someone promised something, but *res* was not immediate
	+ An obligation exists pre-transfer (in contrast to a real contract)
	+ No requirement for consideration
* The maker of the promise (promisor or covenant) must affix the seal to the written contract containing the promise and they must be aware of the seals significance
* Limited action available; can only sue against the promisor (parties to the contract)
* Seals: Royal Bank v Kiska
	+ A promise is enforceable in the absence of consideration when it is "under seal". Since documents under seal are an exemption to the doctrine of consideration, there should be strict compliance with the formalities.
	+ A pre-printed circle or seal by the promisee can be acceptable, as long as the promisor does something to “make it their own”; remembering that the promisor must be the one to affix and must have knowledge of the significance of the seal

**3. Nature of Consideration**

* *In consideratione* made it possible to make contracts without seals – known as an “informal contract”
	+ Makes it possible to enforce obligations that have not yet been performed
	+ Includes both unilateral and bilateral contracts
* **Most common legally acceptable way to make a contract binding**
	+ It is the promisee’s “payment” for the promise; consideration is seen as the “price of the promise”
	+ It is what is given by the promisee in exchange for the promise from the promisor
* “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other.”
* Rules of Consideration:
	+ Must move from the promisee and not from another party; does not matter to whom the benefit moves
		- The promise must move from the promisee (where promises are considered a legal benefit), the practical benefit may move elsewhere
	+ Must be given at the time the contract came into existence (ACC) and in exchange for the promise
		- N.B. Consideration for one promise may or may not be applicable to multiple promises from the promisor; based on construction of the contract
	+ Must have legal value – a benefit to someone or a detriment to the promisee or a combination thereof
* Commonly a promise to do something in return for the promise granted; a promise not to do something is included (forbearance)
	+ An action may be consideration (typical in unilateral contracts)
	+ Preferably expressed, but may potentially be implied
		- i.e. *Sales of Goods Act* will often imply consideration
* How do we utilize the above rules? Must ask two questions:
	1. Will the contract ever be enforceable? Determined at ACC; cannot be rectified over time
		+ Determined by reviewing the perspective of the promisor at the time the contract came into existence
	2. Can it actually be enforced now? Determined based on the promise(s) made at the time the contract, but determined based on the language or terms of the promise.
* Example:
	+ A makes promise x (to deliver gravel on November 7) to B
	+ B makes promise y (to pay 2 days after delivery) to A
	+ Notionally, they are enforceable as consideration (the promises) exists at the time of the contract
	+ But A’s promise is not enforceable until November 7, and B’s promise is not enforceable until A performs their promise

**4. What is consideration not?**

1. Adequacy

* The value assigned to consideration – where the law is concerned only that consideration exists, not the value
* HOWEVER, adequacy may be an issue in other areas of contract law (conscionability, duress or undue influence)
* AND, certain things/promises are of no legal value
	+ For example, a promise to stop legal action against someone that was groundless in the first place, will not be accepted by the courts.

2. “Failure of Consideration” refers to a breach of contract; different from the enforceability of the contract

* i.e. the promisee does not own the property they offered as consideration

3. Condition – “if x, then y”

* Often consideration and conditions overlap or are found in the same place. However, the presence of a condition in the contract, does not guarantee the existence of consideration.
* Confusion results from the various definitions of condition:
	+ - Quality – what condition is it in?
		- Synonym for term (obligations in the contract)
		- A type of term\*\*
		- The timing of obligations – specify the order of performance of the contractual obligations; where the performance of one obligation is conditional on something else occurring
			* Independent – where obligations are not preconditioned on another
			* Precondition – where a condition precedent exists; something else has to occur before something else has to be done; my obligation is a precondition to the enforceability of yours
			* Concurrent – obligations must be performed at the same time; i.e. must pay upon delivery
			* [condition subsequent] – something ends an obligation
* i.e. no longer have to pay child support when a child turns 18
* Consideration
	+ - “if x performed, then y enforced” – where the performance of x is a precondition to y, and x is the promise in consideration for y
			* Here the condition precedent is the same as consideration; however this is not always the case
		- “if it rains and if the municipal government gives license, then x and y”
			* Here the preconditions (rain and license) are not a form of consideration
		- Generally speaking, preconditions are beyond the scope of the parties to the contract (i.e. factual statement)

4. Motive

* + Consideration is often connected with motive – why am I making this promise?
	+ However the existence of motive does not mean that the party was given consideration for the promise. Motive does not presuppose the existence of consideration.
	+ Motive is of some relevance to equity – an illegitimate motive may legitimize the voidance of a contract
	+ Motive may also be relevant in determining damages – your expectations

Principles:

* Motive & Adequacy: Thomas v Thomas
	+ Motive is not equivalent to consideration in determining enforceability of contract.
	+ The court is generally unwilling to assess the value of consideration; must only be of some legal value.
* Forbearance: Callisher v Bischoffsheim
	+ Forbearance can be good consideration; results in a detriment to the promisee and/or a benefit to the promisor
	+ However, if the promise is to forebear from something that could not be legally done anyways (i.e. a trivial lawsuit) then the consideration is valueless.
		- Subjective test of knowledge of the P; Callisher believed his claim was valid
	+ Accepted by the SCC in Francis v Allan (SCC)
* If it can be shown that your promise could not legally be done, it is not acceptable consideration (i.e. a trivial claim). You are essentially offering nothing.
	+ This is further assessed with the subjective test of knowledge of the P – if they reasonably thought there was merit to their claim, then their unlikely claim may be saved as consideration.
	+ Objective test may be applied – if they were a lawyer or a big corporation, they should have known.
* Competing interest however, is to encourage people to settle civil suits outside of court.

Past Consideration

* + - * Consideration must be fresh; consideration in the past (benefit or detriment) cannot be good consideration
			* **Exceptions:** Court accepts that incapacity at the time of the promise would allow consideration to be provided later; may potentially excuse the difference in time
1. Capacity: If there was no capacity at time of promise, that promise is not enforceable (i.e. X does favour, Y promises Z in return without capacity). If promise made afresh when capacity is gained, consideration from before converges with the promise that was given later (i.e. Y later reiterates promise when capacity gained, X’s favour is good consideration).
2. Emergency: Past-consideration for a promise given later can be good if there was a reason that the promise wasn’t given at the same time; some rationalization (often an emergency situation).
* Rule for Past Consideration: Eastwood v Kenyon
	+ Past consideration cannot be “good” consideration unless subject to the two exceptions outlined above.
	+ These exceptions do not change that consideration must move from the promisee.
* Making Past Consideration Good: Lampleigh v Brathwait
	+ Past-consideration may “become good” when:
		- The act was done at the promisor’s request
		- The parties understood that the act was to be remunerated either by payment or the conferment of some other benefit
		- Payment must have been legally enforceable had it been promised in advance (ACC)

**5. Pre-Existing Legal Duties**

* When A makes a promise to perform X in exchange for B’s promise.
* However, A is already legally bound to perform X. X an existing duty owed to the public, a 3rd party (C) or the promisor (B) by A.
* Since A would have completed this task anyways, A has not ‘given anything up’.
* Denning LJ disagreed on the premise that “a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given.”

(a) Public duty

* A public duty, often a duty specified by statute, cannot be good consideration. Examples:
	+ A police office performing the duties of his employment contract. Cannot have a binding contract with a civilian to investigate a case they were contractually bound to investigate anyway.
	+ Tort or criminal law – cannot use a promise not to kill someone as good consideration.
* However, specifics regarding a pre-existing legal duty may be different.
	+ For example, requesting that the police provide additional services to a mine – though they are required to protect the public, this is in a specific location, in a specific way at a specific time.



(b) Duty Owed to a Third Party

* Duty owed to a 3rd party has traditionally been accepted as good consideration; particularly in the family context
* Re: The duty to the 3rd party has to have existed prior to the contract (pre-existing legal duty). Duties to 3rd party made to a third party at the same time as the formation of the contract is good consideration (as long as it moves from the promisee).
* Pre-Existing Legal Duty: Pau On v Lau Yiu Long
	+ A pre-existing legal duty to a third party can be good consideration. The promisor gains the right to enforce that contractual obligation.

(c) Duty Owed to the Promisor

* When A promises X and B promises Y. Later A still promises X, but B promises Y + Z
	+ Is a promise to give more (+Z) enforceable?
* Or, when B is promising Y - Z
	+ Is a promise to accept less (-Z) enforceable?
* That is, are compromised/varied obligations enforceable without fresh consideration?
	+ Within the consideration doctrine – no. The context of the cases may make the obligations enforceable in other area of law.
* How can a compromised obligation be made ‘good’? Five ways:
	1. Eliminate the original contract and create a new one; this “refreshes” consideration on both sides
	2. Make the change under seal
	3. Create (consciously) or find (often by the court) fresh consideration
	4. Find a sincere promise; whereby consideration is not needed (Greater Fredericton)
	5. Argue promissory estoppel (despite the fact that Gilbert Steel and Greater Fredericton says you can’t do this; other cases say you can)

Eliminate the Original Contract (1)

* Original: **A promises X + Y, B promises W + Z** Later: **A promises X + Y, B promise W + Z + Ω**
	+ Without fresh consideration, promise Ω is not enforceable
* Common Law: does not view the original contract as rescinded
	+ Will preserve promises X and W
	+ Allows A’s promise of Y and B’s promise of W + Ω to stand alone
* Equity would rescind the original contract, making X and W unenforceable. Would and allows A’s promise of Y and B’s promise of Z + Ω to exist

Principles of Duty Owed to Promisor

* Agreement to Pay More: Gilbert Steel v University Const
	+ Variations of existing contracts require fresh consideration to be valid. Otherwise the original terms remain in place.
* Agreement to Pay More: Greater Fredericton Airport v NAV Canada
	+ A post-contractual modification (variation) made sincerely and unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.
	+ Affirms that promissory estoppel can only be used as a defence, not the sole basis for a cause of action.
* Instalments: Foakes v Beer
	+ Payment of a lesser sum or a greater sum of an amount already owing cannot be good consideration for another contractual obligation.
	+ “…by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum”
* Refreshing Monetary Consideration: Foot v Rawlings
	+ A negotiable instrument such as a cheque, or an object of a value less than the debt, can be consideration if the amount is less than the cash debt.
	+ Example of construction of the contract – implied forbearance from legal action by the P
* Negotiable Instruments
	+ Promissory Note
	+ Bill of Exchange (bills/notes)
	+ Cheque
* Often reasons to use one form or another
* Re: Thomas v Thomas – rent paid to the trustees, not the landlord; the differing form of payment has impacts

B. MAKING PROMISES BIND – ESTOPPEL

Law and Equity Act

* Wide-ranging statute applicable to many areas of law
* Includes and codifies parts of the English common law and equity
	+ For example, s. 44 when a conflict exists “equity prevails”
* **Section 43 – Rule in *Cumber v. Wane* abrogated**
	+ “Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor (promisor) in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.”
		- For example, if A offers to pay B $80 for the $100 A owed B, if B expressly accepts it, this extinguishes the original $100 obligation.
	+ *Cumber v Wane* is a series of cases which follow the rule established in Foakes v Beer – you need consideration to hold somebody to accord in satisfaction; that is, a promise to accept less is not binding without consideration
* Limitations
	1. Needs to be expressly accepted – requires voluntary acceptance and intent to accept in satisfaction of the full obligation (not often the case)
		+ Can only be used in this context – does not solve Greater Fredericton or Gilbert Steel situations
	2. Has to be part performance – its not a promise to accept part performance, it is about actions
		+ i.e. B’s promise to accept the $80 can be revoked up until he receives the $80
* Consider written property contracts (s. 59)
	+ Whereby part performance (equity) can save a property contract prior to registration at the LTO

What is Estoppel?

* A statement made by one person to another; where the equitable doctrine seeks to “hold you to your word”
	+ You are “estopped” or stopped from stating the contrary; the law will not accept anything other than what you originally stated
	+ Holding someone to a statement, even if it was false
* As with many other evidentiary doctrines; it has been strictly controlled and can only be used in specific contexts
* Prior to promissory estoppel (High Trees), no promises in the future could be binding without other doctrines of enforcement (particularly consideration).
* Application:
	+ Some forms of estoppel will “estop” both parties; others will only “estop” one party
	+ Uni-directional estoppels require one party to have relied on the other parties statement to their own detriment (reliance element)

Limiting Promissory Estoppel: Canadian Context

* Estoppel applies to a statement made that is a promise or assurance. If the statement is made as though it is intended to be binding and if the promisee has relied on this promise to their own detriment, equity may make the promise binding. This power is highly discretionary.
* Canadian courts have thus far limited the doctrine in the following ways:
	+ Can only be used where legal relations are pre-existing
	+ The promisee must have relied on the promise to their own detriment
		- Where the detriment will be sustained if the promisor is not held to it
	+ The promisor must have made an express promise with the intent for it to be binding; ICLR
	+ Cannot be used as the sole basis for a cause of action; must be combined with another cause of action or used as a “shield”
		- Gilbert Steel – “a plaintiff cannot found his claim in estoppel”
	+ It is a discretionary equitable doctrine used only to “to satisfy the equity”
		- Should be applied only if inequitable results would arise; to avoid unconscionaility
		- More limited remedies available
* Keep in mind that other jurisdictions – Australia and the US – have allowed this doctrine to expand much further (see Walton Stores)

Promissory Estoppel: Waivers & Elections

* Waiver is not a separate doctrine; you cannot create a waiver; rather it is the result of a contract
	+ May occur as a result of promissory estoppel – i.e. agree to waive your right to collect the full amount owing in lieu of a lesser amount (re: s. 43)
* Elections occur when you reach a legal “fork in the road”
	+ Promissory estoppel may impact the election provided to a party – i.e. you had promised that you would choose one option over the other and the other party has relied on this promise
* That is when an election is made, the party has waived their other option; the promisee relies on this waiver and may utilize promissory estoppel
* Concepts vary in their time aspect – promissory estoppel impacts the future, elections are immediate
* You can analyze High Trees as a waiver – the landlord waived his right to collect rent during the war; promissory estoppel estopped CLPT from collecting rent during that time period only

Proprietary Estoppel v Promissory Estoppel

* Proprietary Estoppel (OMIT) – usually arises in land/property contracts; can be used as a sword
* Sole Difference: Remedies
	+ Promissory estoppel may provide only a temporary remedy (i.e. High Trees)
	+ Proprietary estoppel often grants a permanent remedy (i.e. granting of an easement)
* Remember: estoppel will be applied only as necessary “to satisfy the equity”

Promissory Estoppel Cases:

* Creation of Promissory Estoppel: Central London Property Trust v High Trees House
	+ Established promissory estoppel. A promise to accept a smaller sum in discharge of a larger sum, if it was intended to be binding and relied upon (ICLR), is binding notwithstanding the absence of consideration.
	+ Consistent with s. 43 of the L&E Act
* Express Promise: John Burrows v Subsurface Surveys
	+ The statement must have been an express promise or assurance intended to alter the legal relations between the two parties.
* In Satisfaction: D&C Builders v Rees
	+ Affirms Foakes v Beer – payment of a lesser sum is not good consideration.
	+ Affirms High Trees – it would be inequitable to force the debtor to pay more when they had relied upon the promise to accept less
	+ However, economic duress will void this promise.
* Shield Only: Combe v Combe
	+ Cannot use promissory estoppel as the sole basis for a cause of action.
* Other Jurisdictions: Walton Stores v Maher (Aus HC)
	+ Other courts, including Australia, UK and the US, have allowed the doctrine of promissory estoppel to expand much further than in Canada. It can be used as a stand-alone basis for your claim (Walton) and does not require pre-existing legal relations.
* ICLR: M(N) v A(AT)
	+ The use of promissory estoppel requires that the promise was made with the intention to create legal relations.
	+ This case also represents the court considering the use of the doctrine as a “sword”.



C. ENFORCEMENT BY AND AGAINST WHOM – PRIVITY

* Who can enforce a promise and against whom?
* **Doctrine of Privity:** In order for an obligation in a contract to concern you (that is, you can enforce it or have it enforced against you), you have to be privy to the contract. With respect to that promise you have to have been the offeror or the offeree.
	+ Can be difficult in the cases where multiple people are parties to a contract
* Two Types:
	+ Horizontal – Where A and B have a contract to the benefit of C
	+ Vertical – A chain of contracts where someone wants to “jump the chain” and sue someone else
		- Most often occurs in consumer situations
* Relationship to the Doctrine of Consideration
	+ A third party outside the contract has typically not given any consideration; remember that consideration must move from the promisee
	+ Nonetheless, privity operates independently of consideration – that is the existence of consideration does not make a third-party privy to the contract

**1. Third-Party Beneficiaries**

* Horizontal: Tweddle v Atkinson
	+ Third parties cannot enforce contractual obligations – must have been the offeror or offeree to be privy to the contract – even if they have received a benefit.
* Vertical: Dunlop Pneumatic Tyre v Selfridge’s
	+ Affirms Tweddle v Atkinson
	+ Privity is related to consideration – in order to enforce an obligation under the contract, consideration must have moved from the promisee. A third party generally has not provided consideration.

**2. Circumventing Privity**

a. Specific Performance:

* Re: common law remedy is damages – based on injury/loss
* However, a request for specific performance – to have the obligation performed as promised – is available to parties privy to the contract who have not suffered any damages
* This allows B to take action against A for the benefit of C
* Remedy of Specific Performance: Beswick v Beswick (Eng Ca & HL)
	+ Affirms doctrine of privity – only individuals privy to the contract can enforce it (including administrators of estates).
	+ However, the common law will only provide damages to B based on the injury or losses suffered.
	+ Contracting parties can sue for specific performance – performance of the contractual obligation – where the losses were suffered by C.
		- This may circumvent the issue of damages and privity.

b. Trust

* Similar to the way it operates in property: B purchases property from A to hold for the benefit of C
* Allows C to take action against B for breach of trust; rather than taking action against A for breach of contract
* However, courts are reluctant to find a trust where one has not been explicitly established

c. Agency

* When B enters into a contract with A, for the benefit of C
* Works in both horizontal and vertical contracts, to reconstruct the contract so that C obtains benefits as a trustee
* However, requires that:
	+ C provided consideration for the contract with A
	+ C receives the direct benefits of the contract
	+ C and B cannot have conflicting interests

**3. Exceptions to Privity**

* Employers: London Drugs v Kuehne & Nagel International
	+ Employees (C) may utilize contractual benefits obtained on their employer (B) if:
		- The limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees seeking to rely on it;
		- The employees seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff when the loss occurred
* Subrogation: Fraser River Pile & Dredge v Can-Dive Services
	+ Third-parties may rely on benefit conferred to them by the contract in order to defend against an action initiated by one of the parties; and only in circumstances where the right has been granted.

D. FORMAL PRE-REQUISITES FOR ENFORCEMENT

* Written evidence of the K is not required in informal K to be enforceable
	+ Significant only as evidence; makes it easier to prove the existence and terms of the k
	+ Can affect how the K is interpreted (re: construction or rectification)
	+ Will engage the PER – rule specifies that the express operative terms in the written evidence are the only terms which will be accepted by the court; does not apply to implied terms or misrepresentations
	+ However, the PER is a presumption only; evidence can be adduced to rebut the presumption (Gallen v Allstate Grain Co)
		- To overcome, can argue for additional terms, implied terms or a separate collateral agreement
		- Presumption is less strong in the case of standard form K (Gallen v Allstate Grain Co)
* Only required for
	+ Formal K (under seal)
	+ By statute (L&E Act, s. 59) – such as K’s related to the disposition of land, financings K or sales K

THE CONTENT OF THE CONTRACT

A. REPRESENTATIONS AND TERMS (Chart pp. 293-296)

* **Representations**: A statement made of some significance to the K made by the offeree, offeror or a other 3rd party that is not a term of the contract; simply a statement about how the world currently exists
	+ **Misrepresentation** (untrue statements) offers the following remedies:
		- Rescind the K – this annuls the K; eliminates its existence ACC (difficult remedy to obtain in practice)
		- Tort Damages (unrelated to K)
* **Terms:** Promises found within the offer & acceptance; commonly related to the future
	+ **Breach of Terms** (K) offers the following remedies:
		- Terminate the K – eliminates the primary obligations only; shifts to secondary obligations
		- Damages
			* Where breach of K grants a right to a remedy; the right to damages
* Statements/phrases should be characterized based on the intent of the parties and the “totality of the evidence” – such as necessity, implied terms, or the circumstances of the agreement (i.e. commercial) (Hielbut, Symons & Co v Buckleton)
	+ Where the challenges in obtaining misrepresentation remedies may make it preferable to characterize a statement as a term (within the offer/invitation to treat)
	+ Statute may be used to resolve the issue of determining if something is a term, a promise or a statement of fact (representation) (i.e. *Sale of Goods Act* in Leaf v International Galleries)
* Once characterized as a term or representation, the statement cannot be re-characterized as the other; once characterized that must carry through to the remedies (Leaf v International Galleries)

Doctrine of Merger

* When the possibility of two characterizations or claims exist, the lesser nature is merged into the more significant one
	+ One characterization is absorbed into the other; the P must proceed on one basis or another
* Prior to recent case law, tort claims were “merged” into K claims; meaning parties in a K had access only to K remedies
	+ K “occupies the field”
	+ Due to the deliberate and voluntary nature of the arrangement of obligations in K as opposed to the generally imposed obligations of tort
* In Leaf v International Galleries, the P could not use misrepresentation remedies because it is merged into remedies for termination

B. CLASSIFICATION OF TERMS

* Rarely need to classify terms; see **Chart D, Categorizing Terms** (p. 147) to determine when it might be necessary
* Only those representations made prior to acceptance (pre-K) are relevant

1. Primary and Secondary Obligations

* **Primary obligations** are the main promises/obligations which the parties intend to perform
	+ They are the benefits intended to be conferred by the K; however in some cases individuals enter into the K intending to gain benefits from the secondary obligations
* **Secondary obligations** become enforceable when primary obligations are not performed
	+ The substitute obligations to be performed upon breach of the primary obligations; often serve as remedies for the breach of the primary obligations
* **Relevance of Distinction:** Freedom of K applies to primary obligations only; however, limits can and are often applied to secondary obligations
	+ Re: Damages aim to put the P in the position they would have been in if the obligations had been performed. Courts will interfere with agreed upon secondary obligations (liquidated damages) if they do not conform with this principle.

2. Conditions, Warranties and Intermediate Terms

* This categorization applies only to primary obligations
* The power to terminate the K will only occur upon breach of important terms (**conditions**) (Hong Kong v Kawasaki)
* Courts will characterize terms of the K in light of the evidence (including written evidence) as a whole and the relationship between the parties (Wickman v Schuler)
* Upon breach, the party not at fault has an election to **affirm** or **terminate** the K

\*Where the election must be communicated by words, action, or inaction (elect the status quo)

* Therefore the categorization of terms dictates the remedies available:
	1. **Conditions** are the vital terms or material obligations in the K; their breach is likely to be more serious
	2. **Warranties** are the less vital terms of the K; their breach is likely to be less serious
		+ Categorization occurs ACC; in theory the categorization of the term should be known at ACC
		+ NOT based on the seriousness of the consequences at the time of the breach
	3. **Intermediate Term** – where the breach of the term may or not may not go to the root of the K
		+ Categorization occurs at the time of the breach; based on the seriousness of the consequences
		+ **I**f the breach is serious it is treated as a condition. If the breach is less serious then it is treated as a warranty, for the purposes of the determining the available remedy or relief (Hong Kong v Kawasaki).
			- This characterization can change over time; from one breach to another
* Parties may attempt to define the terms of the K as conditions and warranties in the written K. Unfortunately the words “condition” and “warranty” have several legal meanings (Wickman v Schuler).
	+ Instead need to specify in the K, “in the event of the breach of clause 10, party B may terminate the K”.

3. Contingent Conditions (Timing)

* Conditions in the sense that they are conditional; affect the structure of the K with respect to what events (sometimes obligation) occur and in what order
* **Concurrent** – presume the obligations are intended to occur at the same time; this is reinforced by statute
	+ i.e. that payment and delivery of *x* will occur at the same time
* **Conditions Precedent** – an event which is required to occur in order to trigger an obligation (or the K)
	1. As an obligation
		+ Where obligations exist ACC; but A cannot call upon B to perform their obligation until the condition precedent is fulfilled
		+ i.e. when you finish shovelling my driveway, then I will pay you
	2. As an event(s) external to the contract
		+ Where an event must occur before an obligation(s) is required
		+ i.e. I will shovel your driveway if it snows more than 4 inches
	3. As a trigger to the K (common in unilateral K)
		+ Meaning either party could revoke the K until the completion of the condition precedent; the K does not yet exist until the condition precedent occurs
		+ i.e. if you choose to shovel my driveway, then I will be required to pay you
	+ **How are these implemented**?
		- Agreed upon by the parties; can be done by “tying obligations together” or using specific dates
		- Should ensure clear language to avoid judicial discretion
			* Unclear wording may result in CoT; K may not exist
			* i.e. if you shovel my driveway could be construed as a unilateral K
		- However, courts often choose to construct a K as existing where the ICLR is clear
	+ Per Turney v Zhilka (1959) SCC, a party can only unilaterally abandon a condition precedent for their own benefit if it was a promise made by the other party
* **Conditions Subsequent** – required to occur to end the obligation (or the K)
	+ Usually less problematic; may be an obligation in a K or they may be some other event

**Example:** Conditions, Warranty & Intermediate Terms and Contingent Conditions

* A owes obligation *a*; B owes obligation *b*
* *a* is a condition precedent to *b*
	+ Both obligations exist and are enforceable ACC; however A cannot enforce *b* until she completes *a*
* Where A does not perform *a*, issue may arise whether *a* is a condition, intermediate term, or warranty
	+ Will affect what remedy/relief is available to B
	+ If a condition, then B gains the power to terminate the K and is not required to perform *b*
	+ If a warranty, then B is entitled to damages only and his obligation to perform *b* continues; if *a* is performed later on, then B is required to perform *b*
* What about concurrent conditions?
	+ In order to claim breach of K for concurrent conditions, A is required to show that she was prepared to perform *a* and that B was not available to perform *b*
	+ However an implicit delay (per implicit terms) may occur where it would be necessary or by statute

4. Entire and Severable Obligations

* Generally at issue where there is a condition precedent and quantum performance
	+ Condition Precedent: How much of *a* does A have to perform in order for B to be required to perform *b*?
	+ Quantum Performance: Where a measurement of obligation is required
* **Entire** – an obligation that must be performed entirely (completed in full)
* Where entire requires only “substantial performance” as determined on a case and fact basis (Fairbanks Soap v Sheppard)
* If an entire obligation is not completed, then the K is considered abandoned (Sumpter v Hedges); parties may agree to a new K to address the abandoned obligations
* **Several/Severable** – an obligation that only partly performed triggers performance of an obligation by the other party
	+ Commonly impacted by statute; such as labour laws, consumer protections laws, etc.
	+ Where the several parts of an obligation may be entire obligations unto themselves; meaning A may perform parts 1, 2 and 3 of *a* but not part 4. Employee who goes home early example.
* Where a condition precedent obligation is entire, substantial completion of the obligation may be enough to make the conditioned obligation enforceable (Fairbanks Soap v Sheppard)

**Aside:** Remedies, Relief and Jural Relationships

* **Repudiation**
	+ Where one party rejects their contractual obligations (i.e. through breach of K)
	+ Not a synonym for rescission and termination
* **Damages (Remedy)**
	+ Any breach of a 1° obligation in a K grants the right to damages and an obligation on the party at fault to pay those damages
	+ Also applies to the right to remedies due to misrepresentation
* **Rescission (Relief)**
	+ If a misrepresentation is made pre-K, the party not at fault has the power to rescind the K
		- B is liable to accept; but this does not create an obligation on B
		- Must be done within a reasonable amount of time (Leaf v International Galleries)
	+ Effect: Eliminates the primary and secondary obligations from the ACC (annuls the K)
* **Termination (Relief)**
	+ If 1° obligations are not fulfilled and the obligation is a condition, then A the power to terminate the K
		- B is liable to accept; but this does not create an obligation on B
		- In theory, the party at fault repudiates the K and the party not at fault receives an election to accept the repudiation (and terminate the K) or to affirm the K
	+ Effect: Eliminates the primary obligations from the point of termination
	+ **Relief** is not a right in the sense that you have the election to affirm or terminate the K and that this power creates no additional obligations on the part of the party at fault.
* **Abandonment**
	+ Situation where both parties mutually agree to end their K; not likely to be done unilaterally (Sumpter v Hedges)
		- Court may find abandonment based on inaction (typically inaction affirms the *status quo*)
		- May not find the K affirmed since their primary obligations were not performed
		- May not find termination since there was no attempt to recover damages or enforce secondary obligations
	+ Effect: Eliminates both primary and secondary obligations from the point of abandonment
	+ If abandoned, the court may create a new K to address the partially completed obligations under the original K
		- Known as *quantum meruit* K (“work that’s been done”) – a type of K that is concocted by the law when the first K with entire obligations is abandoned; court creates a new K so that the party who has partially performed their obligation will be paid for what they’ve done
* **Difference: Response by the not at fault party to the repudiation**
	+ Affirm the K – primary and secondary obligations continue; right to damages for breach of K
	+ Terminate the K – ends primary obligations; right to damages for breach of K
	+ Rescission – ends both primary and obligations from the point of ACC; no right to damages for breach of K
	+ Abandon the K – end both primary and secondary obligations from the point of abandonment; no right to damages for breach of K

5. Express and Implied Terms

* Express
	+ Commonly used for primary obligations; not commonly used for secondary obligations
* Implied (see p. 464)
	+ Many terms are implied; particularly secondary obligations
	+ Not subject to the PER; strong litigation tool used to add implied terms to the K
	1. **Custom or Usage** – must be evidence to support an inference that the contractual parties would have understood such a custom or usage to be applicable; implied on the basis of presumed intention of the parties ACC
		1. From previous K’s between the individuals
		2. From the industry – i.e. fisherman always do it this way
	2. **By Operation of Law (Law)** – “as legal incidents of a particular class or kind of K, the nature and content of which have to be largely determined by implication”; most common method
1. Statute – i.e. *Sale of Goods Act*; typically cannot “contract out”
	* 1. Common Law/Equity – often codified in statutes; nothing barring parties from “contracting out”
	1. **Implication Because of Necessity (Fact)** – must be able to show that the term is “necessary for business efficacy” (Machtinger v Hoj); implied on the basis of presumed intention of the parties ACC
		* Not reasonableness; commonly litigated

C. EXCLUDING AND LIMITING LIABILITY

Standard Form or Adhesion Contracts

* “Standard” in that they are not re-negotiated each time; exist as a standard form used multiple times
* Common where one party substantially sets/dictates the terms of the K and the other is forced to accept; usually based on a power imbalance (i.e. consumer contracts)
	+ Common law doctrines available to disregard some part of the K or make obligations unenforceable
	+ Statutes can prevent this; evident in consumer protection legislation
* Most common among terms that:
	+ Exclude or limit the liability of the stronger party in the event of a breach of K
	+ Inflate the liability of the weaker party in the event of a breach of K

**Exclusion and Limitation Clauses**

* Clauses used to eliminate or limit the liability of a party for breach of K; where limitation can be:
	+ Substantive – i.e. maximum limit of $40 per London Drugs v KNI
	+ Procedural – such as onerous procedural requirements or limitation periods
* Presumption that they benefit the stronger party and that the weaker party did not really assent to them
	+ Where Justice Wilson held in Hunter that both exclusion and limitation clauses should be construed the same way; limitation clauses can be just as onerous
* Often run afoul of common law rule that secondary obligations should put you in the “same” position you would have been if the primary obligations had been completed
* In order for an exclusion and limitation clauses to “survive” litigation, it has to undergo several tests to be used successfully by one of the parties (see Chart p. 164)
	1. **Notice** – in order for a term to be a part of the K, both parties must be aware of it
		+ Onus on the offeror to draw attention to onerous clauses
	2. **Construction** – construe the K in light of any statutory controls; was this clause meant to apply?
		+ Related to CoT; courts will rely on cannons of construction to determine if the term was meant to apply
		+ *Contra proferentum* – a particularly onus provision (benefits one party more strongly that the other) will be construed very narrowly against the person who wants to use it
	3. ~~Fundamental Breach~~ – clauses could not apply in the event of a fundamental breach (do not apply)
	4. Unconscionability –
	5. ~~Unfairness/Unjustness~~ – developed by Wilson in Hunter; does not seem to be good law
	6. Public Policy – another way of discussing illegality
* Part of a bigger issue as to how the law protects certain types of people, contracts or clauses within Ks

**1. Notice**

* An exclusion/limitation clause cannot be part of the K if one of the parties was unaware of the term (question of fact)
* *Hard Authorities*: Irrelevant whether or not the individual read the terms or even could read, as long as they knew a term existed, they are bound by virtue of the notice
	+ Lead to the development of the fine print – on the back of ticket stubs, in sales contacts, etc.
	+ The onus is on the party seeking to eliminate the exclusion/liability clause to prove that the signature was not theirs (*non est factum*), fraud or misrepresentation occurred, or that the other party had reasons to know that they were mistaken about the terms of the written document (Karroll v Silver Star)\*\*
* *Soft Authorities*: Individuals must have some understanding of what the terms mean; without understanding, they cannot be said to have objectively agreed to the term
	+ Parties must be aware of all terms of the K, including exclusion and limitation clauses, prior to acceptance. They must have the opportunity to reject the offer upon becoming aware of the terms included in the offer (Thornton v Shoe Lane Parking)
	+ The argument of custom/usage to imply a term into a K or to satisfy the notice requirement can only be used if the previous dealings demonstrate subjective knowledge of the term at issue (McCutcheon v David MacBrayne)
		- Much ambiguity in this area – how often does the standard form have to be signed for it ti be implied?
* Is this resolve through the use of a signature?
	+ Presumptively, a signature indicates that an individual has received notice (Tilden)
	+ However, this is a presumption only. Courts have:
		- Put the burden on the party requiring the signature to support the legal significance of the signature
		- Put the burden on the party who signed to support their position that notice was not given
	+ A clear signature may not be enough to overcome the notice requirement; the burden is shifted to the party seeking to use an onerous exclusion or limitation clause to prove that reasonable measures were taken to draw attention to the clause in the form (Tilden)
	+ Party denying knowledge of the clause does not need to prove fraud, misrepresentation or *non est factum* (Tilden)

**Aside:** What is the consideration for the exclusion/limitation clause?(Karroll)

* You pay for a day on the slopes. In exchange for use of their facilities, you pay them money.
* But before going up the ski lift, you are forced to sign an additional form excluding or limiting liability which changes the nature of the original K. On what basis is this binding? Is this not a pre-existing legal duty?
* **Attempts to Remedy:**
	+ Implied Term: Could argue it’s an implied term based on custom/usage and that the form is simply written evidence. However, would have to demonstrate that their waiver is the standard in the industry.
		- Further, may come back to the issue that an implied term does not have adequate notice.
	+ Not Required: Use Greater Fredericton as authority that new consideration is not require for an alteration to an existing contract.
		- However this is authority for a promise to do more, not to do less.
	+ Promissory Estoppel: Party promised not to hold them to their tortious obligation; relied on this promise to their detriment.

**2. Fundamental Breach and Its Aftermath**

* Parties cannot rely on an exclusion clause in the case of a fundamental breach of K (a serious breach going to the root of the K); irrespective of the intent of the parties and no matter how widely expressed (Karsales v Wallis)
	+ May undermine the efficacy of business transactions
	+ Doctrine taken over by statute in UK (Photo Production v Securicor); still referenced, though not used in Canada
* Eliminated by dissent in Tercon v BC; area of the law is still very unclear

**3. Other Options for Addressing Exclusion Clauses**

* Construction of the K & *Contra Preferentum* (Photo Production v Securicor; Tercon v BC)
	+ Exclusion clauses should be addressed as a matter of construction to avoid interfering with freedom of K – did the parties intend for the clause to apply?
	+ Must analyze terms of the K, including exclusion & limitation clauses, in light of the purpose of the K, the context of the K and the overall terms (Tercon)
	+ *Contra proferentum* should be applied to particularly onus terms
		- *Contra proferentum* – where you have a particularly onus provision (benefits one party more strongly that the other), the provision will be construed very narrowly against the person who wants to use it
* Unconscionability
	+ Only other control against exclusion clauses; relates to the inequality of bargaining power pre-K and ACC
* Unfairness/Unjustness
	+ Developed in Hunter v Syncrude by Wilson to control exclusion and limitation clauses post-K; seemingly eliminated in Tercon
* Public Policy
	+ Must be able to demonstrate a statutory legal obstacle or a principled legal argument against the freedom of K of the parties
	+ Did not specify whether this had to occur ACC, or if it could occur post-K
	+ Does not specify how these issues might relate to exclusion/limitation clauses

EXCUSES FOR NON-PERFORMANCE OF THE CONTRACT

A. EFFECT OF EXCUSES FOR NON-PERFORMANCE

* Excuses used to avoid performing contractual obligation(s); do not depend on breach of K (

Eliminating the K (Chart, p. 291)

* **Void** – at Common Law
	+ Effect: No K is said to have existed. If property was transferred under the K, parties may be required to return it as there is no contractual basis for keeping it.
	+ Who: Both parties can use by operation of law
	+ Reasons: Flaw in some of the formative stages – offer & acceptance, ICLR, CoT, capacity, etc.
		- Can also arise from illegality, common mistake, *non est factum*, and duress
* **Voidable** – Setting Aside/Rescinding/Avoiding the K
	+ Effect: The K is “undone” such that neither party is any longer responsible for or liable to do anything under the K
		- Parties returned to pre-K state; no contractual remedies available under secondary obligations
	+ Who: The protected party – the party treated in a les than honest way
		- Party receives an election to avoid the K or affirm the K
	+ Reason: Occurs when the K is flawed due to surrounding circumstances pre-K or ACC
		- Such as misrepresentation, duress, undue influence, unconscionability, etc.
	+ All terms mean the same thing, however:
		- Misrepresentation = rescission
		- Undue influence, duress & mistake = avoided
		- Unconscionability = set aside
* **Frustration** – ends all primary and secondary obligations from the point of frustration; K formed validly

Altering the K (Chart, p. 292)

* **Severance**
	+ Removing Part of K – remove terms b/c they offend a legal principle (i.e. unnecessary, uncertain or illegal terms)
		- these “hived off” terms are treated as void or more commonly unenforceable
		- Can only be done with peripheral terms; terms not “at the heart of the K”
		- Blue Pencil Test: Remove words or terms and see whether the remaining K make sense
		- Notional Severance: Adds or rewords terms; rarely available (KRG Insurance v Shafron)
	+ Divide the K – into two or more parts; the main written K and a collateral oral K
		- To resolve issues of privity, to treat one K as terminated or frustrated, to meet form requirements
* **Judicial Adjustment of Terms**
	+ Ad-hoc remedy which requires positive action by the courts to:
		- Assist in creating terms – where it was difficult to tell what was in the offer
		- Set the K aside “on terms” – due to mistake or unconscionability
		- Severance – to reconstitute an agreement after removing part(s)
	+ Not the same as resolving uncertainty, rectification or the implication of terms; where the courts are only resolving “what the parties themselves meant to put in the contract”
* **Unenforceability**
	+ Occurs when a valid K is formed, but the terms are unenforceable by the courts; anything transferred under the K is legally transferred
	+ Consideration – if consideration for a promise cannot be found, it is unenforceable
	+ Exclusion/Limitation Clauses – if found to be unfair or unconscionable
	+ Illegality – though commonly void, the illegal part of the K may be severed and become unenforceable
	+ Capacity – where performance of an obligation by a person with no capacity is full effective, but unenforceable
	+ Limitation Periods – where the time limit has passed

B. MISREPRESENTATION AND RESCISSION (VOIDABLE)

Introduction

* Are significant statement(s) of fact made in the context leading up to the K
* Some statement which may induce contractual relations and that a reasonable person might rely upon
* Can be made by the contractual parties or a closely related 3rd party
* An operative misrepresentation is one which “operated to lead you into the K”
* When untrue or false, may allow the party whom the representation is made to, to rescind the K
* May also provides tort liability for negligence and deceit

Operative Misrepresentations – must contain four elements:

1. A Statement of Fact
* Must be based on the present or the past, not the future
* May include statements of intent or silence (where the silence is misleading)
* **Cannot be a statement of opinion, prediction, belief, promise or law**
* Presumption is held, although unreasonably, that citizens “know the law”
* However the statement need not be entirely factual; may include elements of opinion or belief
* Especially where one party is basing their opinion on facts not known to the other party (Smith v Land)
* Or if “enough fact” can be found in the statement
* **Contentious issue**; not always easy to characterize and this area of the law is often ambiguous
* Disclosure:
* *Caveat emptor* – there is no duty for the parties to disclose all facts
* However, contracts of “good faith” or where one party owes a fiduciary obligation create a duty on the party(ies) to disclose relevant information
* Generally the statement must be made by the contracting party; however some examples exist where the person who made the misrepresentation was closely related to the contractual party
* Actions in tort for deceit or negligent misrepresentation may be available
* Where misapprehension cannot be attributed to another part, may use the doctrine of mistake
1. Untrue
* Statement maker need not know the statement is false; innocent representations still create a right to rescission
* If made knowingly (fraudulently), then a tort action in deceit is available
* Where the statement is ambiguous, the benefit of the doubt will be given to the maker
* A duty owed by the statement maker to communicate a change from true to false post-K
1. Material
* Statement must be material to the K; substantial or “going to the root of the K”
* Case and fact specific; closely related to reliance
1. Reliance (Redgrave v Hurd)
* Statement must be relied upon in for entering the K; does not have to be the sole or most important reason
* There is no duty on the person relying on the statement to verify its accuracy (Redgrave v Hurd)
* Requires an objective/subjective test
	+ Would a reasonable person have relied on the statement?
	+ Did the contracting party rely on this statement for the purpose of entering the K?

Types of Misrepresentation

* Fraudulent
	+ Occurs when the statement maker knows the statement is untrue (Redgrave v Hurd)
	+ Tort of deceit may allow for additional damages/recovery
* Negligent (Redgrave v Hurd)
	+ Occurs when the statement maker ought to have known the statement was untrue
	+ Equity does not require knowledge of the untruth of the statement in order for it to have some impact
	+ Tort of negligent misrepresentation may allow for additional damages/recovery
* Innocent
	+ Occurs when the statement maker does not know the statement is untrue
	+ Again, equity not concerned with knowledge of the statement maker
* N.B. Rescission is available as a discretionary form of relief in all cases.

Rescission for Misrepresentation

* An equitable doctrine – it is a discretionary form of relief; it is not automatic (Kupchak v Dayson Holdings)
* One party has the power to rescind the K, but the effect resonates on both parties
* Makes the K voidable; upon discovery, the party to whom the representation was made receives an election to:
	1. Hold the other person to the lie as the truth – estop them from denying it; **estoppel by representation**
		+ Commonly used as a defence; making part of the doctrine unenforceable
	2. Hold the other person to the actual truth –K would not have been made if the truth had been known (**rescind**)
		+ Other likely to contest the rescission
* **Form of “undoing the K”** – parties are returned to their pre-K position
* Parties may be forced to return property; or compensate under the law of restitution
* However, there may be **bars to rescission** which are strongly interrelated:
1. Impossibility of Restitution *in integrum*
	* + Where the property exchanged under the K cannot be returned in similar condition
			- Meaning rescission is most commonly available “early in the K” or soon after ACC
		+ Money may be used as compensation (substitute) for use and deterioration of property and/or where the property is no longer available (Kupchak v Dayson Holdings)
			- More likely in the case of fraudulent misrepresentation or where the person who relied upon he statement is able to return their property (Kupchak v Dayson Holdings)
			- Less likely if the person who relied upon the statements cannot return the property
		+ N.B. Where this money is a form of restitution; not a form of damages
2. Execution of the K
	* + Where the K has been discharged; fully executed or performed
3. Affirmation
	* + Where the party who relied upon the statement does not repudiate the K; proceeds with the K
		+ Could include continuing to use the subject matter of the K or making other arrangements under the K
4. Delay (“Laches”)
	* + Affirmation of the K by the passage of time – may cause undue hardship to the statement making party
			- Reasonable time period dependent on surrounding circumstances and subject matter of the K
		+ Differs slightly from a common law election
5. “Clean Hands” Doctrine (uncommon)
	* + Affects judicial discretion; where the P must be able to demonstrate that they were prepared to perform the K and had not breached the K themselves

**Q:** What if the misrepresentee told the other party not to “worry about the lie”?

* That is, you continued to act on the other party’s promise that the misrepresentation would be fixed
* Could argue that though this looks like affirmation or that laches should apply, that the other party promised that you would not have been perceived as having made an election. A form of promissory estoppel in conjunction with request for rescission on the basis of misrepresentation.

C. MISTAKE

**1. Introduction**

* Occurs when a misunderstanding under the K that occurs pre-K or ACC that is not attributable to the other party
* Doctrine is rarely invoked – used secondary to misrepresentation
	+ Courts are not apt to excuse parties from their obligations because of their own carelessness
	+ Extremely difficult to prove; even if proven the law/courts may not do anything to rectify it because it commonly results in an innocent party suffering the loss
		- K law expects parties to protect their own interest; allocation of risk is a primary purpose of K
	+ Mistakes attributable to 3rd parties should be addressed through negligent misrepresentation (tort) or courts may imply a term to avoid the use of the mistake doctrine

Characterizing Mistakes

* **What is the mistake about?** Difficult to apply:
	+ Terms or Obligations
		- Often addressed through rectification
	+ Mistaken Assumptions (facts)
		- Per Bell v Lever Bros, mistaken assumptions may apply in the context of identity, subject matter and quality where these assumptions are not dealt with through express terms of the K.
		- Per McCrae, parties have are assumed to have allocated responsibility for this issue. Where allocation of risk is a purpose of K.
* **Who was mistaken?**
	+ Unilateral: occurs when only one party is mistaken about the terms of the K or an assumption related to the K
		- Uncommon; law is extremely reluctant to provide a remedy
	+ Mutual: occurs when both parties give different and reasonable interpretations in the context of the offer and acceptance
		- Can often be characterized as an issue of CoT or consensus *ad idem*
		- Or courts may choose one parties interpreation, making it an issue of unilateral mistake
	+ II Types:
		- Same Mistake – Common
			* Infrequently litigated and difficult to establish
			* Party arguing common mistake will often suffer counter argument of unilateral mistake
		- Different Mistake – Mutual
			* Usually dressed up as issues offer & acceptance
			* K often rendered void; no meeting of the minds (Blackburn in Smith v Hughes; Bell v Lever Bros)

**Approaches to Mistake: Common Law vs. Equity**

* Common Law – Void
	+ K will be set aside as void and goods transferred under the K must be returned
	+ Existence of the Subject Matter
		- Generally dealt with by *Sale of Goods Acts*; making K’s for non-existent subject matter void
		- However, if the existence of something is a term of the K, may not be void
	+ Substance vs. Quality
		- Different substance always makes the K void (i.e. pregnant vs barren cow)
		- Quality of the subject matter will only render the K void if the mistake regarding quality makes the thing without the quality essentially different from the thing as it was believed to be (Bell v Lever Bros)
* Equity – Voidable (or at the courts discretion)
	+ Grants the courts broad discretion – to render void or avoid and to sever or imply terms
	+ Per Solle v Butcher (Denning) equity can set aside a K when it would be unconscientious for the other party to avail himself of the legal advantage which he had obtained
		- “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 conclude a K on the mistaken terms instead of pointing out the mistake”
	+ Lower threshold than common law – appears to allow mistake for anything to do with “facts” or “rights” provided it is “fundamental” and “unconscientious”
		- “ At some point a mistake can be so fundamental that the compromise agreement cannot stand”

**Considerations in the Law of Mistake:**

1. What does the mistake have to be about?
	* Law suggests only assumptions; not terms or obligations
2. Does the mistake of one party allow a result to follow?
	* Generally the courts have only been interested in mutual mistake
	* Some authority exist to make unilateral mistake relevant
3. Does the other party have to know that the party was mistaken?
	* Hannen (Smith v Hughes) suggest that they must know – fraud or tantamount to fraud (unfair)
	* Blackburn (Smith v Hughes) does not make this a requirement

**2. Mistaken Assumption**

Types of Mistake

* **Common Law Mistake** (Bell v Lever Bros)
	+ Renders the K void
	+ Must be mutual or common mistake; cannot be addressed by an express term of the K for mistake to apply
		- If a mistake “fits into” the Lever format, mistake is available
	+ The mistake must be held reasonably (McRae v CDC)
	+ **Identity:** Subject to a discrete body of law (Shogun)
		- Nearly always a unilateral mistake
	+ **Subject Matter**: A common mistake related to the existence of the subject matter (McRae v CDC)
	+ **Quality**: Mistake must make the subject matter essentially different from the thing it was believed to be
* **Equitable Mistake** (Solle v Butcher)
	+ Similar to unconscionability, remedies may be variable.
	+ Case seems to allow for common and unilateral mistake where it would be unconscientious for the other party to avail himself of the legal advantage which he had obtained
	+ Includes mistake as to the law (not just assumptions and/or terms)
	+ Equitable mistake no longer exists in the UK (Great Peace v Tsavliris)
* **Written Record:** A K exists but the written record does not reflect the K you agreed to. Two options:
	+ Rectification – modify or correct the written record
	+ *Non Est Factum* – not what I meant to entered into
* **Everything Else:**
	+ Terms (Smith v Hughes)
		- A narrow area of law; more commonly addresses through offer & acceptance or CoT
		- “Snapping Up” – occurs where the offeree is aware of a mistake in the written offer & chooses to “snap up” the offer; K may be void if the “snapping up” is fraud or tantamount to fraud
		- Tendering Context
	+ Assumptions
		- Only if the other party can be said to have committed fraud/deceit

**3. Mistake & 3rd Party Interests**

* Both *non est factum* and rectification can be used in conjunction with other areas of mistake
	+ These are almost always unilateral mistakes; rare example of the potential impact of unilateral mistake
	+ If they are common, they are likely to be resolved by the parties

***Non Est Factum***

* “That’s not my signature, deed or seal”
	+ Common law doctrine which sets aside the K (void)
	+ Applies only where a written record exists; often appears in conjunction with the PER
* Two contemporary areas of application:
	+ Where parties did not realize what they were signing
		- Such as where the offeree was illiterate, blind, couldn’t understand, or was distracted by the offeror; something less than misrepresentations in tort
	+ Where someone commits identity theft or forges the document
		- Requires blameworthiness on the part of the other party
* Doctrine applies a reasonable person or objective standard
* Where the P cannot rely on the doctrine if his signature was due to his own negligence, carelessness or wrongdoing (Saunders v Anglia Bldg Society)
	+ The mistake must be as to the nature (not the contents) of the document; must be fundamentally or radically difference (Marvco Color v Harris)
	+ The party claiming *non est factum* has the burden of proving that the document was not signed by his own negligence (Saunders v Anglia Bldg Society)

**Rectification**

* Occurs when one or both of the parties believe there is a mistake in the written record of the K
	+ Mistake in the process of reducing their agreements to writing; a typo or otherwise
	+ Peculiarly Canadian set of rules exist; equitable doctrine and its use is therefore discretionary
* Requires parties to overcome the PER – court amends the written document to accurately reflect the parties agreement
	+ Courts task is corrective; to return the parties to the original agreement
* Mutual Mistake – court is likely to act; rare courts will hold parties to a written agreement they both disagree with via PER
	+ Court can:
		- Hold that there is no agreement at all – no offer & acceptance or CoT
		- Rectify the written record; becomes a question of whose interpretation is accepted
* Unilateral Mistake – potentially actionable where the other party was aware of the mistake in the written record and chose not to bring it to the attention of the other party; fraud or tantamount to fraud (Sylvan Lake)
	+ A mutual mistake – both parties argue the written record wasn’t correct
		- Document says C; I’m arguing it should be A, you argue it should be B
		- Court is likely to step in; rare that the court will hold the parties to a written agreement that they both disagree with via the PER
* To use rectification, P must demonstrate: (Sylvan Lake Golf v Performance Industries)
	+ (1) P show the existence + content of the inconsistent prior oral agreement
		- Where documentary evidence could be adduced
		- A legal agreement existed which was incorrectly translated into written form
	+ (2) P shows ‘precise form’ in which the written instrument can be made to express prior intention;
		- Changes must be minimal; cannot add “full sentences” or “provisions”
		- Where mutual mistake will require the court to either declare the K void or choose one of the rectifications proposed
	+ (3) P shows that D knew or ought to have known of mistake in reducing the oral terms to writing – fraud or tantamount to fraud; [unilateral mistake only]
	+ (4) P must demonstrate “convincing proof” of the above – higher standard that BoP but below BRD
* Parties cannot rely on rectification where they have failed to exercise due diligence or were negligent – i.e. sign the document without reading it
* Evidence as to the terms agreed to by the parties includes the actions and intentions of the parties pre-K, ACC and post-K (Bercovici v Palmer)
* Options for changing the K:
	+ Construction – the written record should be interpreted in this way
	+ Implication – the written record contains additional implied terms
	+ Rectification – the written record is inaccurate (option of last resort; most difficult to prove)

C. PROTECTION OF WEAKER PARTIES

* Set of doctrines designed to protect individuals at a legally significant disadvantage vis-a-vis the other contracting party
* All are equitable nature and problematic; subject to many criticisms
	+ Most commonly the K is rendered void; but in other cases it is voidable or unenforceable
* In Lloyd’s Bank v Bundy, Denning attempted to consolidate the doctrines in “inequality of bargaining power”
	+ Re-characterization was rejected, but the case has encouraged courts to expand the doctrines

Overview of Overlap Among Doctrines

* All three are interrelated; can be argued together
* All three are unique in Canadian law; take a different approach than UK jurisprudence
* Politically charged doctrines – requires one party to admit it was “weak”
* Duress
* Undue Influence
	+ Based on the relationship between the parties; whereby one party is “under the control” of the other
		- General context only; unclear to what extent the content of the K is relevant
		- No threat is required
	+ Equitable; relief provided on a discretionary basis
* Unconscionability
	+ Based on the contents of the K and the process by which it was created
	+ Remedy/relief provided seems to be an open question
* Where the “inequality of bargaining power” must be between individuals closely related to the K; not necessarily parties to
	+ Common in the family context; more commonly between spouses
* Area of law is complicated because:
	+ Remedies are unclear – cases do not speak uniformly to what happens if you establish the doctrines
	+ Case law is confusing

**1. Duress**

* Occurs when the “stronger” contractual party (or someone closely related) applies pressure to the “weaker” party to accept an offer; where duress vitiates consent
	+ Duress need be only one of, not the sole or even the main reason, why the threatened person entered into the K
	+ Operates with respect to the circumstances that surround the making of the K (ACC)
* Remedy: Varies
	+ Void
		- May unjustly allow the person who created the duress to get out of the
	+ Voidable
		- Grants the “weaker” party the opportunity to affirm the K should they choose
		- Barriers exist – restitution may be impossible or a 3rd party may be adversely affected

Established Categories of Duress

1. *Duress to the Person* – Occurs when the physical integrity or life of the “weaker” party is threatened. Where physical violence will follow unless someone agrees to a K.
	* Includes the threat of physical violence against a 3rd party (typically family relationship)
2. *Duress to Goods* – Where the physical integrity of property is threatened. Such as threatening arson or theft.
	* Not commonly applied; has been accepted in recent jurisprudence
	* No applicable to intangible property; no application to pure economic loss or mental health
3. ***Economic Duress*** (established in Pau On)
	* Challenging area – the business world requires that individuals use their advantages or market position to negotiate. Most commercial K’s involve a “stronger” and ‘weaker” party.
	* Previously argued as consideration issue; establish the doctrine to appropriately deal with the threat involved

Test for Economic Duress & Legitimacy (Pau On)

1. Was there a threat?
* May also consider if an objection to the threat was made; although this is not required
1. Was the threat a reason for the K being entered into?
* Does not have to be the sole or primary reason
1. Did the threatened party get independent advice with respect to the threat and the K?
* Often irrelevant under the circumstances; no opportunity to gain advice
* May help or hurt – Relief may be unlike where independent legal advice advised you to take alternative action or where independent legal advice was not sought and the P had ample time exist to do
1. Did the threatened party take action in time?
* Cannot wait to see if the K materializes as a good or bad deal
1. Was the threat or duress legitimate?
* Nature of the pressure applied – where the threat of unlawful actions are illegitimate
* Nature of the demand which the pressure is applied to support – demand may be unlawful, supported by a threat to do something lawful (i.e. call the police)
* Based on the subjective interpretation of the person who made the threat
	+ - i.e. thought you had a legitimate reason to pressure the other party
* May apply Greater Fredericton v NAV Canada to challenges against the variation of a K:
	+ Dependent on two conditions precedent:
		- Must be pressure
		- No practical alternative; K or change result
	+ Once met, focus shifts to whether the party consented to the K variation. Not a determinative list.
		- Was the promise supported by consideration? Where an evaluation of the quality or value of consideration is material
		- Was there a protest?
		- Did you take steps in time? (timeliness of the complaint)

**2. Undue Influence**

* Occurs where one party effectively controls the other; including entering into the K
	+ “…defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter a K”
* Remedy: Voidable (Rescission)
	+ K can be set aside by equity; requires the P to establish reason for rescission
	+ Some courts have entertained arguments for selective enforcement; rendering some parts unenforceable
* Roles of the P and D:
	1. P must established the relationship of undue influence; a presumption of undue influence then exists (Geffen v Goodman Estate)
		1. Established Categories of Relationships – irrebuttable presumption
			+ i.e. parent-child, guardian-ward, trustee-beneficiary, solicitor-client & medical advisor-patient
			+ No automatic presumption occurs between spouses
		2. Other Types of Relationships – rebuttable presumption
			+ Require evidence of undue influence – proof that one person placed his or her trust or confidence in the other and proof of the questionable nature of the transaction
			+ Commercial Context – P must show a “manifest disadvantage” to them within the K (Geffen)
				- Conflicting; La Forest held that undue influence deals with the formation, not the content, of the K
			+ Non-Commercial Context – do not need to show manifest disadvantage
	2. D must establish that the K was not affected by undue influence
		+ Must show that the P entered into the K by his own “full, free an informed thought’
		+ May include showing no actual influence was deployed, that the P had independent legal advice (see duress) and that the K is “perfectly fair” or a realistic allocation of risks and benefits
* Undue Influence by a 3rd Party
	+ Common in situations of husband & wife; whereby one guarantees the other financial
	+ Some courts have held that a creditor must take reasonable steps to satisfy himself of the legitimacy of the agreement because:
		- The transaction on its face is not to the financial advantage of the wife
		- There is substantial risk in transactions of that kind and that the husband had committed a legal or equitable wrong that entitles the wife to set aside the transaction

What is manifest disadvantage?

* “…that the K worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the D was unduly benefitted by it”
* Relates to the content of the K; however it can be difficult to determine
	+ i.e. peppercorn for a car vs. less than market value for a car
* May create an exception to the rules of consideration – whereby the court will assess the value of consideration provided

**3. Unconscionability**

* Occurs when no relationship of undue influence exists, but one party takes undue advantage of the other through their ignorance, need or distress
	+ Focuses on context of the K; often involves only short relationships
* Doctrine allows for “creative remedies” (Morrison v Coast Finance)
	+ May avoid issues whereby doctrines “give too much or too little”
* Problems:
	+ “Weaker” party must admit to ignorance, need or distress
	+ Does not address post-K unfairness
* Courts unfavourable to the application of the doctrine in commercial contexts
* To establish unconscionability:
	1. Proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and;
	2. Proof of **substantial unfairness** of the bargain obtained by the stronger.
	+ Upon proof of these circumstances, a presumption of fraud is created – an unconscientious use of power. The “stronger” party must rebut this presumption by proving that the bargain was fair, just and reasonablev
* A simplified version of Morrison developed in Harry v Kreutiziger
	+ “The single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.”
	+ Version lends itself to public policy and illegality arguments
		- May be combined with the question of an illegal K

**Aside:** Inequality of Bargaining Power

* Attempt by Denning to collapse all of the “protecting weaker party” doctrines (Lloyds Bank v Bundy)
	+ “…law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”
* Rejected in subsequent cases (Tercon); however it has been influential in other areas of law
	+ Referenced by Wilson in Hunter v Syncrude
* Concept is useful on final exams – should this doctrine exist?

D. ILLEGALITY/PUBLIC POLICY

* Encompasses policy concerns about a particular type of K – including its formation, its purpose or its performance. Labels the K or the clause “illegal”.
* Remedy or effect should be whatever advances the interests of public policy
* How do you approach this?
	+ Is it illegal? And if so why?
		- Best if you can fit it into one of the existing “categories”; more difficult to create new categories
		- The type of or reason for the illegality is relevant in determining what the consequence will be
	+ If you’ve labelled it illegal, what happens next?
		- Which part is illegal?
		- What is the nature of the effect?

**1. Contracts Contrary to Public Policy (Illegality)**

1. Statutory Illegality – Does the statute specify that the K must be formed or perform in a particular way? Does it apply a fine or render the K void?
2. Whether the making/formation of the K is illegal
* May give rise to problems where one party knew of the illegality of the K and the other did not; able to use the illegality to their advantage
1. Whether the purpose or performance of a K is made illegal – the statute does not render the formation of the K illegal, but the K is carried out in an illegal fashion
2. What the intentions or the knowledge of the parties are
3. Objective of the statute and whether making particular Ks illegal might further the object of the statute
	* “There is a distinction…between a K which has as its object the doing of the very act forbidden by the statute, and K whose performance involves an illegality only incidentally”
	* Must consider the consequence of invalidating the K, the social utility of those consequences and a determination of the class of persons for whom the prohibition was enacted (Still v MNR)
4. Common Law
* Categories of public policy have developed where the courts have previously held a K or clause to be illegal
	+ Relevant where the statute has set out guidelines for legal versions of a K (i.e. contingency fees) whereby the formation of the K must conform with these guidelines; otherwise the K is rendered illegal at common law
1. **Restraint of Trade\*\***
* Occur where society’s interests outweigh the parties desire to enter into a K; common where restrictive covenant prevents one party from using his/her talents, skills or knowledge in an area for a period of time
	+ Requires a balancing b/w freedom of K and societal interests
* “presumption that restrictive covenants are *prima facie* unenforceable” (KRG Insurance v Shafron)
	+ A **restrictive covenant** is simply a promise not to do something; not all will offend societies interests in avoiding monopolies (restraint of trade)
* Onus is on the party seeking to enforce the restrictive covenant to show that is reasonable
	+ Must be reasonable in the interest of the contracting parties and the public
		- Requires a reason for the restriction – such as being ancillary to the main K or reasonably necessary to render the K effective
		- Courts consider the breadth of the restriction
	+ An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity (Shafron)
* May be a different attitude taken with respect to K’s related to the sale of a business and those related to employment (Shafron)
	+ Businesses might be an unsaleable commodity if cannot grant assurance
	+ Whereas the imbalance of bargaining power in an employment K frequently leads to oppression; therefore restrictive covenants in employment K’s will be the subject of “more rigorous scrutiny” (Shafron)
1. Commit a Crime or Do a Legal Wrong
	* + Does not have to be criminal; can be a tortious or public wrong (such as agreeing to misstate revenue with the intention of deceiving the tax authorities) or a K to break some other K
			- Where a K to break some other K will likely be dealt with through breach; will be difficult to receive a ‘special remedy’ through illegality
		+ “No court will lend its aid to the enforcement of illegal, immoral or fraudulent contracts”
2. Contracts Prejudicial to Good Public Administration
	* + Such as a K to use personal influence against a government official – i.e. bribing government officials
3. Contracts Prejudicial to the Administration of Justice
	* + Connected to the previous; including influencing or bribing officials within the justice system (such as bailiffs, judges, prosecutors, etc.)
		+ Such as an agreement to pay to stifle a prosecution, to represent a client in conflict with one of your other clients, or an illegal “champerty K” (common law version of contingency fee K)
4. Contracts Prejudicial to Good Foreign Relations
	* + Illegal to have a K to raise money to support hostilities against a friendly government
		+ Illegal to have a K that will assist a hostile government, bribe a foreign official, undermine a foreign political system, etc.
5. Morals
	* + Not contemporarily used; moral and immoral distinctions change too much over time

**2. Effects of Illegality**

* Historically illegality rendered the K void; potentially causing as many problems for the P as it does the D
	+ Now applied only for serious or significant forms of illegality – such as duress
* Contemporarily the K is unenforceable
	+ Broad discretion granted to judges to dispense consequences; whereby different forms of illegality will often lead to different results
* Consequence should be dictated by what public policy requires; to advance the purposes & aims of public policy or statute
	+ Meaning public policy may support no consequence at all (Still v MNR)
		- Where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so (Still v MNR)
	+ However the purpose and aims of common law rules may be more difficult to interpret
* If you’ve labelled it illegal, what happens next?
	+ Which part is illegal?
		- Historically was an “all or nothing” proposition – either void or voidable for the entire K
		- Can sever the K into multiple Ks or parts – should only be used where the clause is clearly severable, trivial to and not the main purpose of the restrictive covenant (KRG Insurance v Shafron)
			1. Multiple K: Sever the K into multiple K’s and argue the illegality of only one
			2. Part of the K: Sever and declare illegal only one part/clause of the K – the impact or remedy applies only to that part
				* Apply blue pencil test – does the transaction still make sense if the provision is severed?
				* Notional severance should not be used to resolve ambiguities (KRG Insurance v Shafron)
				* Common in the case of restrictive covenants
			* Related to the idea of certainty of terms; takes what it is uncertain and attempts to make it certain
	+ What is the nature of the effect?

**Aside:** Transfer of Goods Under an Illegal K (Still v MNR)

* The transfer of property or goods under an illegal and unenforceable K will have been validly transferred
	+ Why? There is no restitutionary remedy when the illegal K must be relied upon to return the goods
* Courts may still allow a party to recover what was transferred under the K when:
	1. Parties not equally blameworthy (particularly where the illegality is meant to protect an innocent party to the K)
	2. P “repented” before the K was fully executed – i.e. the party reputed the K after becoming aware of the illegality
	3. Claim to the property does not depend on relying on the illegal K such as through another area of law (such as tort)
		+ i.e. where the ownership interest of the lessor is not affected by an illegal lease

REMEDIES

INTRODUCTION

* Need to determine what the obligations are; must be able to monetize consequences
	+ Secondary obligations are a substitute set of obligations that make the primary obligations enforceable; without this set of obligations, the K is futile
* **Basic Compensatory Principle**:
	+ Damages should only compensate for what was actually lost – the P and D should be put in a better position as a result of the breach of K
	+ Only nominal damages may be available if the breach of K resulted in a gain relative to the obligations
* Common Law
	+ Tends to respect the express terms of the K; may allow for several forms of remedies with one breach of K
* Equitable Remedies
	+ An order to do or not do something; where the equitable devices don’t always sit well together; meaning commonly only one remedy is allowable for each breach
* Statute
	+ Most common source of secondary obligations/remedies
	+ Often a restatement of the CL and equitable remedies; makes pre and non-statute based case law relevant

A. DAMAGES – RATIONALE

* Damages only arise out of breach of obligation (terms) of the K; grants an enforceable right to claim damages [unless the K contains an exclusion or limitation clause]
	+ Does not include problems or concerns about the K that are not breaches of terms
* Two issues: right to damages and quantification of damages

**The Interest Protected** (Fuller and Purdue)

* Compensation is for the failure to perform the 1° obligation; where 1° obligations are “strict” because they are voluntarily assumed
	+ Would be unjust to make a profit by the breach or to be compensated for a loss never suffered
* **Expectation Interest** [main reason]
	+ Based on the idea that parties enter a K expecting that the other party will fulfill their obligations; it is the compensation necessary to put the P into the position he/she would have been in had the K been performed (forward looking)
	+ Compensation is given for either lost profit or for the cost of substitute performance;
		- a.k.a. “loss of profit”
	+ Should be for net, rather than gross profits
* **Reliance Interest** [secondary reason]
	+ Compensation is given for expenditures made towards performance of the K; compensation necessary to put the plaintiff into the position she/he was in before the K was made (backward looking)
		- a.k.a. “costs”
	+ Uses money to compensate for the costs and expenditures that the P would have avoided if he or she had not entered the K in the first place
		- Must be able to prove that the costs or expenditures were **“wasted”** (McCrae v CDC)
		- Court must establish if the costs/goods incurred could be used in some other capacity and to what extent their value has changed
	+ Useful when it is difficult to quantify the expectation interest; often impossible to evaluate what financial position of the claimant would have been but for the breach of K
	+ May not be available if the D can show that the performance of the K, would have resulted in the P’s loss anyways
		- Ds breach “saved” the P from a potentially greater loss than would have occurred if the K had been carried out
* **Restitution Interest**
	+ Restoration to the P of a benefit conferred on the D to which the latter is not entitled; purpose is not to compensate the P for a loss but to deprive the D of an unjust benefit (examines the position of the D; rather than the position of the P)
		- Separate from law of restitution or a fiduciary obligation (leading to disgorgement)
	+ Unlike expectation and reliance, based on what the D has gained or kept as a result of the breach
	+ Only available in exceptional circumstances (Attorney-General v Blake)
		- Some courts have held that it is inappropriate the that D should be able to keep the gain that they made from breaking the K with the P; even though the P may not have lost out, there are cases where the D should be forced to give damages based on what the D gained
		- Perhaps where the P had a legitimate interest in the breach of K and/or criminal sanctions were relevant
	+ Should be dealt with through restitution; as a separate area of the Law of Obligations

**Aside:** Can you claim reliance and expectation?

* If both loss of profits and costs has occurred, the P must prove it is not double compensation (Sunnyside Greenhouse)
	+ Court wants to avoid over compensating
* In same coses, may be forced to go for costs rather than profits (McRae v CDC & Sunshine Vacation Villas)
	+ Where it is impossible to determine what your profits were going to be
* If the court holds that the P can claim only one or the other, the P can choose whichever is greater

B. DAMAGES – QUANTIFICATION PROBLEMS

* P must establish a figure on a BoP; may be difficult to quantify – i.e. loss of profit arising from a salvaged ship? (McRae)
* The D is not relieved of the burden of damages due to difficulties in calculation damages; no matter how numerous and difficult the contingencies (Chaplin v Hicks)
* **Mental Stress for Breach of K**
	+ A P is entitled to damages for mental stress in addition to breach of K when you rely on an expectation – when the K itself was for enjoyment and pleasure (affirmed by the SCC) (Jarvis v Swans Tours)
	+ If the emotion is different from the one agreed to under K, mental stress is available within the calculation of damages (Jarvis v Swans Tours)

**Cost of Completion vs. Difference in Value**

* Arises commonly in the case of K’s for work done; where the work is done improperly or not at all
	+ Depends how the obligation is framed and the context of the K (re: pool for developer vs. professional swimmer)
	+ Groves v John Wunder suggests that the bad faith or deliberate breach of K may be relevant
* Cost of Completion: the cost of buying substitute performance from another including undoing any defective performance (often higher)
* Difference in Value: the market value of the performance the K breaker agreed to minus that actually given (often lower)
	+ For example, the value of the property had the work been completed vs. the value of the property after the partial work done (Groves v John Wunder)

C. LIMITING DAMAGES – REMOTENESS

* Limits the damages available to the P when the loss becomes too remote to be the responsibility of the D; despite passing a “but for” test of causation (similar to the concepts in tort)
* Rules Governing Remoteness (Hadley v Baxendale)
	+ (1) An injured party may recover those damages reasonably considered to arise naturally from a breach of K and;
		- General Damages – The damages applicable to any breach of a similar K; they can be identified within the terms of the K itself and would be foreseeable by any party in a similar contractual scenario
		- Such as all sales contracts
	+ (2) Those damages within the reasonable contemplation of the parties at the time of contracting.
		- Special Damages – Losses arising from the breach of K that are specific to this contractual scenario; based on the special circumstances that vary from party to party
		- The D is responsible for these losses only if the D was aware of these special circumstances at the time of acceptance (ACC) and took on the risk that such a loss would occur
			* Where the nature of the losses (not the quantum) have to be known at ACC
			* Two interpretations available:
				+ Actual/subjective knowledge and knowledge via a reasonable or ordinary person standard is sufficient (Victoria Laundry v Newman)
				+ Actual or subjective knowledge of the special circumstances ACC is required; objective knowledge is too similar to tort (The Heron II)
			* Objective knowledge would be too low a threshold; too similar to tort damages
	+ Can claim both general and special damages for breach of K; as long as they meet the remoteness test
* Remoteness may be of limited application due to exclusion/limitation and liquidated damages clauses (Shatilla v Feinsten)

D. LIMITING DAMAGES – MITIGATION

* Where ongoing losses ensue, the P should take reasonable steps to stem the losses/injury within a reasonable period of time (i.e. purchase replacement goods) (Asamera Oil v Sea Oil)
* This **duty to mitigate** may force the P to make an election which would lead to lesser damages – i.e. elect for damages where specific performance is unlikely
	+ At some point, a P will be required to seek damages where specific performance or an injunction are unlikely to be granted by a court or impossibly completed by the D (Asamera Oil v Sea Oil)

E. TIME OF MEASUREMENT OF DAMAGES

* The timing of the assessment of damages is often crucial to assessing the value of the loss; particularly relevant in the case of fluctuating share values (Asamera v Sea Oil)
* General Rule: Loss is assessed at the earliest date the P can be expected to mitigate (knowledge of the breach)
* Exception: Unlike compensatory damages, damages in lieu of specific performance should be measured at the time of trial. This is because specific performance would occur at the time of trial (Semelhago v Paramadevan).
	+ Don’t have a right to specific performance until the time of the judgement; the money is in lieu of the order by the court, this would occur at the time of judgement
	+ Whereas the right to damages arises as soon as the breach occurs
* What about in the case of an anticipatory breach?
	+ Occurs where one party advises the other party that they will not be performing the obligation. No breach occurs until the time at which performance would be required.
	+ P receives an election:
		- To accept the anticipatory breach and proceed immediately to remedies. Damages will be calculated based on the day you accept the notice of breach.
		- To affirm the K and seek remedies at the time performance is owed.
	+ Case law is ambiguous as to whether you must elect one option or the other knowing the impact the timing will have on the quantum of damages.

F. LIQUIDATED DAMAGES, DEPOSITS AND FORFEITURES

**a. Liquidated Damages**

* Not a claim for damages; claim for debt (to collect liquidated damages)
	+ Additional losses can be claimed as damages
* Liquidated damages must be a reasonable pre-estimate of what the loss is going to be, based on the position of the parties at the time of acceptance (ACC) (Shatilla v Feinsten)
	+ Must attempt to establish what consequences might be and quantify
	+ Absolute prevision is not necessary; can develop a “formula” to address this issue (HF Clarke Ltd v Thermidaire)
* Cases show that liquidated damages clauses may be unlikely to survive; where the quantum is not reflective of the loss actually incurred (Shatilla v Feinsten)
* “The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach” (HF Clarke Ltd v Thermidaire)
* Will be characterized as a penalty clause and deemed unenforceable (Shatilla v Feinsten); regular damages rules apply
	+ Equitable nature means the court will intervene at their discretion; are unlikely to intervene on behalf of the part imposing the liquidated damages clause (JG Collins Insurance v Elsley)
* How might the courts interference be avoided?
	+ Could attempt to construe as a limitation clause rather than liquidated damages
	+ Argue it’s a primary obligation, rather than secondary. Since freedom of K applies only to primary obligations
	+ Creates an incentive for performance of an obligation

**b. Deposits/Forfeiture Clauses**

* A preliminary payment – as acceptance, to confirm acceptance or to trigger the other party’s obligations
* Has characteristics of the primary and secondary obligations
	+ Primary: Part payment of the total purchase price
	+ Secondary: Deposit is forfeited by way of remedy. Additional damages may be available fore breach but the deposit must be credited towards the damages awarded.
* Similar to LD as a pre-determined sum; however deposits are generally paid prior to the breach
	+ “Not a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid”
* Open to the courts to characterize a payment as a deposit or forfeiture (Stockloser v Johnson)
	+ Meaning that the payment can be characterized in some other way and returned to the purchaser
		- The seller can keep the money as long as the K remains open and available for performance. If the K is rescinded or ended, the purchaser is entitled to recover his money subject to a cross-claim by the seller for damages.
	+ However, if characterized as a deposit or forfeiture clause, the payment is not recoverable unless the purchaser can appeal to equity. Must demonstrate:
		1. The clause is of a penal nature – where the sum forfeited is out of proportion to the damages
		2. Would be unconscionable for the seller to retain the money
	+ N.B. May be characterized as an issue of total failure of consideration
* Why might a party seek to challenge the forfeiture of the deposit on breach?
	+ I broke the K – unlikely to get deposit/payment back
	+ You broke the K – courts are inclined to give me the money back; why should the party who breached their obligations be able to keep a deposit?

Law and Equity, s. 24

* “The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.”
* Allows BC courts to intervene with respect to deposits and forfeitures
* Can apply this provision in addition to Stockloser; case law outlines how and when courts should exercise this discretion

G. EQUITABLE REMEDIES

* Function as an alternative to common law remedies at the discretion of the court
	+ Whereby the court is not likely to grant equitable remedies if it would be overly complicated to do so
* Limiting Concerns:
	+ Adequacy of Damages – must be able to demonstrates that the common law remedies are not adequate (damages)
		- Such as where the goods are unique, of sentimental value or cannot be replaced
		- Or where damages are too slow or far away (injunction)
	+ Clean Hands Doctrine
		- Must show that you haven’t done anything that “puts equity off” in the context of that transaction; such as performing your own obligations under the K
	+ Timeliness
		- Must seek specific performance and/or mitigate your losses within a reasonable amount of time
	+ Hardship to 3rd Parties
		- Such as where the vendor has sold the property to a 3rd party
		- However, this will not always prevent the use of the equitable remedies

**a. Specific Performance**

* Specific performance only available in situations where substitutional relief (damages in lieu) does not sufficiently protect a P’s interests in the K or does not adequately compensate (John Dodge v 805062 Ontario)
	+ When the P is seeking to have the D perform their obligation under the K; an order to perform
* Commonly an interest in land always offered specific performance; historical assumption that land is unique
	+ Since Semelhago, now requires that P’s prove that the land is “unique” in order to qualify; however it is rare that courts will turn down a request for specific performance in these circumstances
	+ The evaluation of “uniqueness” should be made at the time of breach (John Dodge v 805062 Ontario)
* Where it is clear that specific performance may not be available, there may be an onus on the P to mitigate and seek damages (Semelhago)

**b. Injunctions**

* An order of the court forbidding the D from doing something (prohibitory) or requiring the defendant to do a particular act (mandatory)
	+ Mandatory injunctions are similar to specific performance in that they create a positive obligation the D; however mandatory injunctions are broader in that they are not confined to an order for performance of the K
* Available in only very limited circumstances; however they have been heavily influenced by the legislature
* Interim: Last for a short specified period of time
* Interlocutory: Obtained after the notice of claim is filed until the end of litigation; to avoid uncompensable damages
* Perpetual: Granted from judgement and finalizes the adjudication; not usually “perpetual” in the common sense
* Find ratio for Warner Bros v Nelson

**Aside:** Frustration

* Is a reason why someone might not perform their contractual obligations
* Parties have distinctly assumed that the world is going to unfold in a particular way; where some catastrophic event occurs that disrupts the bargain they have entered into
	+ Plagues, fires, earthquakes, wars, etc.
	+ Law specifies that the contract is frustrated – terminates both primary and secondary obligations from that point on. No obligations & no remedies.
	+ The K was perfectly valid before the frustration. Goods transferred under the K were validly transferred.
* May not apply in an area that is prone to earthquakes, floods, etc.