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# General

* “Officious bystander” test
  + Wording: *Reigate v. Union Manufacturing Co.*, [1918] 1 K.B. 592 at 605 (C.A.).
  + See also:
    - (*Oscar Chess Ltd. v. Williams*, [1957] 1 W.L.R. 370 at 375 (C.A.))
    - (*Storer v. Manchester City Council*, [1974]1 W.L.R. 1403 (C.A.))
    - (*Canadian Dyers Association Ltd. v. Burton*, [1920] O.J. No. 138, 47 O.L.R. 259)

# Is there a Contract?

### Remedy: void ab initio.

## Was there an Offer?

* Was it a MERE PUFF? i.e. so preposterous to be unbelievable (*Bloomenthal v. Ford*, [1897] A.C. 156)
  + YES 🡪 No-K
  + A puff is (not?) a representation
* Was it an INVITATION TO TREAT? i.e. mere statement of readiness to negotiate.
  + YES 🡪 NO-K
  + Retail displays are invitations (*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, [1953] 1 All ER 482 (CA))
  + (Parking) ticket dispensers make offers, not invitations (*Thornton v. Shoe Lane Parking Ltd.*, [1971] 2 Q.B. 163 (C.A.))

## Was the Offer Terminated?

* Was it REVOKED?
  + YES 🡪 No-K
  + The offeror may revoke the offer at any time by unequivocally communicating revocation. (*Byrne. & Co. v. Leon Van Tienhoven & Co.* (1880), 5 C.P.D. 344 (C.P.D.))
  + **But…**
* Was it UNILATERAL and offeree (substantially) begins actions necessary for acceptance?
  + YES 🡪 irrevocable *until offeree abandons*
  + Courts uneasy unilateral revocation when acceptance has begun (*Errington v Errington* (1952), 1 A11 E.R. 149 (C.A.))
* Was it REJECTED?
  + YES 🡪 No-K
  + Counteroffers are rejections (*Hyde v Wrench* (1840), 49 ER 132 (Rolls Court))
  + Inquiries are not rejections (*Stevenson, Jacks, and Company v Mclean* (1880), 5 Q.B.D. 346)
  + Electing to reject is irrevocable (*Hrynenko v. Hrynenko*, [1998] 168 D.L.R. (4th) 437 (BCCA))
* Has there been a sufficient time LAPSE?
  + YES 🡪 No-K
  + Sufficient lapses can amount to implied revocation or implied rejection (*Barrick v Clark*, [1950] SCJ No 39 (SCC))

## Was there Acceptance?

* Was acceptance UNEQUIVOCAL?
  + NO 🡪 No-K
  + Actions can be acceptance (*Saint John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614 (S.C.C.))
  + Anything not “yes” is counteroffer (*Canadian Dyers Association Ltd. v. Burton*, [1920] O.J. No. 138, 47 O.L.R. 259)
  + Clarification is not a “yes” (*Livingstone v Evans*, [1925] A.J. No. 67, [1925] 4 D.L.R. 769 (Alta. S.C.))
  + Silence cannot be “yes” (*Felthouse v. Bindley* (1862), 142 E.R. 1037 (Ex. Ch.))
  + “Subject to the approval of φ” is not counteroffer if implicitly agreed-upon (*Canada Square Corp. v. Versafood Services Ltd.,* [1981] O.J. No. 3125 (Ont. C.A.))
* Did the OFFEREE accept?
  + NO 🡪 No-K
  + No one but the party to whom the offer was made can accept (*Shogun Finance Ltd. v. Hudson*, [2003] UKHL 62 (H.L.))
* Was acceptance IMPOSSIBLE?
  + YES 🡪 No-K
  + The offeror must make it possible for the offeree to accept (*Carmichael v. Bank of Montreal*, [1972] M.J. No. 71, (Man. Q.B.))
* Was acceptance ONLINE?
  + NO NOTICE GIVEN 🡪 No-K
  + Notice must be given, and more effort to find the K-offer, the less likely notice succeeds (shrink-, click-, and browse-wrap agreements) (*Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (B.C.S.C.).)
* Did the offeror RECEIVE acceptance?
  + NO 🡪 No-K
  + The offeror needn’t read the acceptance for it to count (*Renault UK Ltd. v. Fleetpro Technical Services Ltd.*, [2007] EWHC 2541 (Q.B.).)

## Certainty of Terms

* Does the K specify PRICE, PARTIES, and PRODUCT?
  + NO 🡪 No-K
  + The “3 Ps” are necessary for certainty. (*Logikor Inc. v. Bessey Tools Inc*, [2013] O.J. No. 3607 (Ont. S.C.J.), )
* Does the K have MISSING TERMS?
  + YES 🡪 *Probably*-K
  + K words’ meanings are found:
    1. In light of:
       1. The natural the natural and ordinary meaning of those words,
       2. the overall purpose of the document,
       3. any other provisions of the document
       4. the facts known or assumed by the parties at the time that the document was executed, and
       5. common sense, BUT
    2. ignoring subjective evidence of any party’s intentions. (*Marley v. Rawlings*, [2014] UKSC 2)
  + If the parties *act* like there’s a K, the court will try hard to find a K (*Hillas and Co. v. Arcos* (1932), 147 L.T. 503 (H.L.))
* Is it an AGREEMENT TO AGREE?
  + YES 🡪 *maybe* K
  + If the agreement to agree in the future is *sufficiently certain* (i.e. “market-rate” rents) (*Empress Towers Ltd. v. Bank of Nova Scotia*, [1990] B.C.J. No. 2054,(B.C.C.A.))
* Is it an INSURANCE AGREEMENT?
  + YES 🡪 *contra proferentum* rule!
  + Uncertainty in insurance contracts is interpreted against insurers because of the special fiduciary relationship (*Indemnity Insurance Co. v. Excel Cleaning Service*, [1954] S.C.R. 169 at 179 (S.C.C.))
* Is there a FUNDAMENTAL uncertainty?
  + YES 🡪 No-K
  + *Raffles v. Wichelhaus* (1864), 2 H. & C. 906, 159 E.R. 375 (Exch.)

## Intention to Create Legal Relations

### Erstwhile K-breacher bears onus of proof

* If unclear, can intent be CONSTRUCTED?
  + NO 🡪 No-K
  + The courts will attempt to construct intent when possible. (*Canada v. CAE Industries Ltd.*, [1985] F.C.J. No. 171, (F.C.A.))
* Is it a GENTLEMEN’S agreement?
  + YES 🡪 No-K
  + *Rose and Frank Co. v. J.R. Crompton and Bros.*, Ltd., [1923] 2 K.B. 261 (C.A.)
* Is it a LETTER OF COMFORT, or MEMO OF UNDERSTANDING?
  + YES 🡪 No-K
  + These *Bawitko* *Investments Ltd. v. Kernels Popcorn Ltd.,* [1991] O.J. No. 495 (Ont. C.A.)
* Is it PRELIMINARY COMMUNICATION?
  + YES 🡪 No-K
  + Discussion is not intention to create. (*Blair v. Western Mutual Benefit Assn.*, [1972] B.C.J. No. 620 (B.C.C.A.))
* Is K-negotiation by PERSONAL EMAIL?
  + YES 🡪 *Possible* No-K
  + Rapid-fire personal emails are suspect. *Girouard v Druet*, 2012 NBCA 40.
  + Commercial contexts mean emails are a valid negotiation medium. *Vancouver Canucks Limited Partnership v Canon Canada Inc*, 2015 BCCA 144.

Is it a DOMESTIC AGREEMENT?

* + YES 🡪 *Probably* No-K
  + Could be softening, but no authorities.
  + No-K authority (*Jones v. Padavatton*, [1969] 1 W.L.R. 328 (C.A.))

# Who Can Enforce the Contract?

## Privity

* Is a THIRD PARTY trying to enforce?
  + YES 🡪 *likely* unenforceable
  + Only parties to the contract can enforce it (*Beswick v Beswick*, [1966] Ch 538 (CA), rev’d [1968] AC 58 (HL))
* Did a THIRD PARTY suffer QUANTIFIABLE DAMAGES?
  + YES 🡪 enforceable *to the extent of damages*
  + A party to a K can collect damages suffered as a result of breach, but no more.
* Did a COLLATERAL K get created between erstwhile third parties?
  + YES 🡪 enforceable
  + When *A* Ks with *B* such that it affects *C*, a collateral K can formed between *A* & *C*. (*Shanklin Pier Ltd. v. Detel Products Ltd.*, [1951] 2 K.B. 854 (K.B.D.))
  + E.g. *A* Ks that paint is *x* to *B*, and *C* Ks *B* to paint *C*’s dock based on paint being *x*.
* Is the K FOR THE BENEFIT of a third party?
  + YES 🡪 *maybe* enforceable?
  + Mom can’t enforce bottle K on behalf of baby; benefit is for mom’s feeding convenience, not baby’s. (*Lyons (Guardian ad litem of) v. Consumers Glass Co.*, [1981] B.C.J. No. 2180 (BCSC))
  + Mom is agent to baby? Only if baby gives consideration for agency. (*Ibid*.)
* Is there VERTICAL privity?
  + YES 🡪 unenforceable
  + *A* has K with *B*, *B* has related K with *C*. *C* can’t touch *A* & *B*’s K, and *A* can’t touch *B* & *C*’s K. (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.))
* Is an INSURER enforcing a K for its client?
  + YES 🡪 enforceable *via* subrogation
  + Subrogation allows insurers to enforce certain of their client’s contracts to recover.
* Is there a TRUST at play?
  + YES 🡪 *special* enforceability
  + Trustee *A* Ks with *B*, K benefits to benefactor *C*. *A* can enforce *B* to benefits to *C*.
  + *C* can force *A* to enforce *B* to benefit *C*. (*Vandepitte v. Preferred Accident Ins. Co.*, [1932] 3 W.W.R. 573 (P.C.))
* Is someone not named in a SEALED K trying to sue?
  + YES 🡪 unenforceable
  + Only parties named in a sealed K can be privy to it (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 (S.C.C.))

## Exceptions to Privity

* Is privity abolished by STATUTE in this area?
  + YES 🡪 enforceable
* Was there NEGLIGENCE by a third party?
  + YES 🡪 *maybe* unenforceable
  + When
    1. A term protects parties *generically* from their own negligence, *and*
    2. Both K-parties intended extending the term to 3rd parties, *and*
    3. The 3rd party performed acts in K that activate term, *then*

The third party is entitled to the defence’s protection.

* + See *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.)
  + This is a *shield not a sword*; third parties cannot enforce generic terms that are not simply protection (*Holmes v. United Furniture Warehouse Limited Partnership*, 2012 BCCA 227)

## Consideration

### Virtually anything counts (*Currie v. Misa* (1875), L.R. 10 Ex. 153 at 162 (Exch.))

* Does the consideration “flow” from 1promisee to promisor at 2TIME K formed?
  + NO 🡪 *likely* unenforceable
  + If promisee promises a benefit that flows from a third party to the K, it cannot be consideration to promisor. (*Dalhousie College v. Boutilier Estate*, [1934] S.C.J. No. 44)
  + **However,** an act prior to a promise can sometimes be used as consideration, if
* Was purported consideration PRIOR TO THE PROMISE it supports?
  + YES 🡪 *maybe* enforceable
  + Can only support enforceability if:
    1. The act was done at the promisor’s request
    2. It was mutually understood that the act would be remunerated
    3. the conferment of a benefit must have been legally enforceable had it been promised in advance of the act.

*Pao On v. Lau Yiu Long*, [1980] A.C. 614 (P.C.).

* Did a party FORBEAR an act that wasn’t valuable?
  + YES 🡪 unenforceable
  + Forbearing to do something you *cannot* do isn’t consideration. (*B. (D.C.) v. Arkin*, [1996] M.J. No. 362, aff’d [1996] M.J. No. 499 (Man. C.A.))
  + **However**, if both parties thought the forbearance valuable, it can still count (*Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449)
* Did a party agree to PAY MORE than original K, without fresh consideration?
  + YES 🡪 Still-enforceable
  + Unless operating under *duress*, accepted modifications need no fresh consideration. (*Greater Fredericton Airport Authority Inc. v. NAV Canada*, 2008 NBCA 28)
* Did a party agree to PAY LESS without fresh consideration?
  + YES 🡪 *Still*-enforceable
  + The *Law and Equity Act,* s 43 permits *expressly accepted* “part performance” to be enforced as settling a debt even without fresh consideration.
  + A promise to pay a debt already owed is not consideration, and can’t ground an agreement to pay less. (*Re Selectmove Ltd.*, [1995] 2 All E.R. 531 (C.A.))
* Did a party offer to do a PUBLIC DUTY as consideration?
  + YES 🡪 *likely* unenforceable
  + Doing something you’re bound to do anyway isn’t consideration (*Glasbrook Brothers Ltd. v. Glamorgan County Council*, [1925] A.C. 270 (H.L.))
  + **However**, if it’s supererogatory, it might count: *Ward v. Byham*, [1956] 1 W.L.R. 496 at 497 (C.A.).
* Did a party offer to do something it already promised to a third party as consideration?
  + YES 🡪 *maybe* enforceable
  + Existing promises to others might be consideration because they create new value—enforceability—for promisor (*N. Z. Shipping Co. v. A.M. Satterthwaite & Co.*, [1975] (P.C.))
* Was there a SEAL acknowledged by the actual promisor?
  + YES 🡪 *Still*-enforceable
  + A seal can be any mark acknowledged by the promisor themselves—no agents. (*Royal Bank of Canada v. Kiska*, [1967] 63 DLR (2d) 582 (Ont CA))
  + The parties intentions determine what counts as a seal. (*In Re/Max Garden City Realty v. 828294 Ontario Inc.*, [1992] O.J. No. 1080 (Ont. Gen. Div.))
* Is this a TRUST where no consideration passed?
  + YES 🡪 enforceable
  + *Vandepitte v. Preferred Accident Ins. Co.*, [1932] 3 W.W.R. 573 (P.C.).
* Is this a case of PROPRIETARY ESTOPPEL where no consideration passed?
  + YES 🡪 enforceable
  + *Crabb v. Arun District Council*, [1976] Ch. 179 at 187 (C.A.).

## Estoppel

### An *equitable* remedy, not a legal one.

* Was there estoppel by representation?
  + YES 🡪 enforceable *as defence*
  + The following requirements must be met:
    1. *A* has, by word or conduct
    2. justified *B* in believing that certain facts, *x*, are true
    3. *B* has relied on those facts
    4. to *B*’s detriment, *then*

*A* cannot later claim that *x* is not the case.

* + See *A.E. LePage Real Estate Services v. Rattray Publications Ltd.*, [1994] O.J. No. 2950 (Ont. C.A.).
* Was there PROMISSORY estoppel?
  + YES 🡪 enforceable *as defence*
  + The following requirements must be met:
    1. *A* has, by word or conduct
    2. promised *B* that *x*
    3. *B* has relied on this promise
    4. to *B*’s detriment, *then*

*A* cannot go back on *x*.

* + See *Ryan v. Moore*, [2005] S.C.J. No. 38.
* Did PROMISSORY estoppel occur under very SPECIAL circumstances?
  + YES 🡪 *maybe* enforceable as offence
  + When these conditions are met:
    1. P assumed or expected that there was a legal relationship between P and D
    2. D has induced P to adopt that expectation or assumption
    3. P acts/abstains from acting in reliance on the assumption/expectation
    4. D knew and intended P would do so
    5. P’s action/inaction will cause detriment if assumption/expectation is not fulfilled AND
    6. D failed to act to avoid that detriment whether by fulfilling assumption/expectation or otherwise

Estoppel could ground a cause of action (not just defence!)

* + See *Waltons Stores (Interstate) Pty Ltd. v. Maher* (1988), 164 C.L.R. 387 (H.C.); apprv’d *M. (N.) v. A. (A.T.)*, 2003 BCCA 297.
  + **However**, promissory estoppel can be used to *modify* existing obligations
* Was this estoppel by CONVENTION?
  + YES 🡪 enforceable *as defence*
  + The following requirements must be met:
    1. *A* and *B* have, by word or conduct
    2. agreed to K operating in way *x*
    3. *B* has relied on this convention
    4. to *B*’s detriment, *then*

*A* cannot act as if *x* is not the case.

* + See *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303.
* Was this PROPRIETARY estoppel?
  + YES 🡪 enforceable *as cause and defence*
  + The same as any other estoppel, but the representation/promise/convention must relate to land.
  + Can be a sword and a shield: *Crabb v. Arun District Council*, [1976] Ch. 179 at 187 (C.A.)
* Is estoppel being used to enforce a TERMINATED OBLIGATION?
  + YES 🡪 unenforceable (can’t estop)
  + Estoppel cannot operate on obligations that do not exist (*Canadian Oil Ltd. et al. v. Paddon-Hughes Development Co. Ltd, Hambly, et al*, [1970] S.C.R. 932)
* Is a party enforcing a term despite REPEATEDLY ELECTING not to enforce?
  + YES 🡪 *still* enforceable
  + Regularly accepting late payment doesn’t mean you are estopped from enforcing timely payment (*John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607)
* Would estopping be INEQUITABLE?
  + YES 🡪 unenforceable
  + Estoppel is a creature of equity, it will not produce inequitable results (*D. & C. Builders Ltd. v. Rees*, [1965] 3 All E.R. 837 (C.A.))
* Is estoppel EQUITABLE but only FOR A TIME?
  + YES 🡪 enforceable *for a time*
  + Estoppel is a creature of equity, it will not produce inequitable results (*M. (N.) v. A. (A.T.)*, 2003 BCCA 297)

## Voluntary Waiving

### A “waiver” and “abandonment” are often synonymous in the courts’ writing.

* Did a party make an ELECTION between K-stipulated options?
  + YES 🡪 *other options* unenforceable
  + Once a party elects for *x*, the rights to K’s alternatives are waived (*Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corp. of India (The “Kanchenjunga”)*, [1990] 1 Lloyd’s Rep. 391 at 398 (H.L.))
* Did one party ABANDON a right in the K?
  + YES 🡪 unenforceable
  + If these conditions are met:
    1. The abandoning party had full knowledge of its rights, *and*
    2. The abandoning party displayed an unequivocal and conscious intention to abandon the right(s), *then*

The abandoned rights are waived.

* + See *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.
* Did the abandoning party RESCIND its abandonment?
  + YES 🡪 enforceable!
  + An abandoned right may be resurrected by giving sufficient notice, so long as the abandonment has yet to be relied upon.
  + No notice is required if the abandonment has yet to be relied upon (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490)

# How Much of the Contract is Enforceable?

## Classification of Terms

* Is this part of the K a TERM at all?
  + NO 🡪 unenforceable
  + The officious bystander test—i.e. what is outwardly observable. (*Oscar Chess Ltd. v. Williams*, [1957] 1 W.L.R. 370 at 375 (C.A.))
  + If it’s a term, it might be enforceable or not.
* Does the character of the K-parties help to identify terms?
  + YES
  + The skills/knowledge of the parties should be taken into account when evaluating terms (*Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801 (C.A.))
* Does the K CLASSIFY its terms?
  + Courts respect “*primary*” or “*secondary*” classifications in Ks.
  + Courts decide themselves about Ks defining “*conditions*” or “*warranties*”.
    - Courts do respect sophisticated commercial parties (*Heritage Oil and Gas Ltd. v. Tullow Uganda Ltd.*, [2014] EWCA Civ. 1048 (C.A.))

## Conditional Terms

* Has any CONDITION PRECEDENT been satisfied?
  + NO 🡪 unenforceable *subsequent terms*
  + A condition precedent activates enforceability.
  + The test for what is a condition precedent is *objective* (*Wiebe v. Bobsien*, [1984] BCJ No 3209 (BCSC), affd [1985] BCJ No 1742 (BCCA))
  + **Note:** Courts will imply mutual promises to “do what is necessary” to secure performance of K. If the condition hasn’t activated the K, K might still be enforceable for damages/specific performance! (*Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072)
* Has a party UNILATERALLY ABANDONED IT?
  + YES 🡪 *maybe* unenforceable *subsequent terms*
  + This is only possible when the condition being abandoned is *in favour* of the party purporting to abandon (*Turney v. Zhilka*, [1959] S.C.J. No. 37)
  + **Note:** Can so abandon in BC even if it affects a 3rd party (*Law and Equity Act*, RSBC 1996, c. 253)
* Has a CONDITION SUBSEQUENT occurred?
  + YES 🡪 unenforceable
  + A condition subsequent ends the preceding obligations.

## Implied Terms

* Is a term implied by CUSTOM or USAGE?
  + YES 🡪 enforceable
  + A well-established custom between the parties needn’t be revisited every time (*McCutcheon v. David MacBrayne Ltd.*, [1964] 1 W.L.R. 125 at 128 (H.L.))
  + A well-established industry practice needn’t be revisited every time (*McCutcheon v. David MacBrayne Ltd.*, [1964] 1 W.L.R. 125 at 128 (H.L.))
  + Customary terms *can* *be* explicitly excluded.
* Is a term implied by NECESSITY?
  + YES 🡪 enforceable
  + If a non-explicit term is naturally required (officious bystander test), then it is implied (*Reigate v. Union Manufacturing Co.*, [1918] 1 K.B. 592 at 605 (C.A.))
* Does LAW impose a term?
  + YES 🡪 enforceable
  + When statute or the common law imposes a term, it must be followed
    - Duty of honest performance: *Bhasin v Hrynew*, 2014 SCC 71.
    - Duty not to negotiate deceitfully: *Derry v Peek* (1889), 14 App Cas 337 (HL).

## Pre-incorporation

* Was the K entered with a YET-TO-BE INCORPORATED corporation?
  + YES 🡪 unenforceable
  + Until incorporated, a corporation is not a legal entity with whom a K can be made (MacDougall, p 188)

# How can the Contract be Contested and What are the Remedies?

## Capacity

* Is one of the parties mentally incapable?
  + YES 🡪 voidable *usually*
  + **Note:** Physicians’ evidence is no weightier than laypeople’s (*Sawatzky v. Sawatzky*, [1986] S.J. No. 371 (Sask. Q.B.))
  + **Note:** Mental capacity can be fleeting (*MacDonald v Fraser*, [1993] NSJ No 446 (NSSC))
* Did the erstwhile enforcer INNOCENTLY and *BONA FIDE* K with the incapable?
  + YES 🡪 *still* enforceable
  + Only if the enforcer:
    1. Made the K in good faith
    2. Had no knowledge of the mental incapacity
    3. Is not taking an advantage
  + See *Hardman v. Falk*, [1955] B.C.J. No. 119 (B.C.C.A.).
* Was a party INTOXICATED?
  + YES 🡪 voidable
  + There must be evidence that the party was drunk enough to not know what they were doing (*Bawlf Grain Co. v. Ross*, [1917] 55 S.C.R. 232)
  + **Note:** Habitual drunks might be held to a higher standard (*Murray v. Smith Estate*, [1980] 32 Nfld. & P.E.I.R. 191 (PEI SC))
* Was a party an “INFANT”?
  + YES 🡪 unenforceable *usually*
  + Minors’ Ks are unenforceable by the other party, up to one year past majority. Minors can repudiate K up to one year past majority (*Infants Act*, RSBC 1996, c 223, Part 3)
  + **Note:** Minors’ Ks can be enforceable if enforcement is for their benefit (*Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli*, [1977] 18 O.R. (2d) 21 (Ont. H.C.J.), affd [1979] 23 O.R. (2d) 193 (Ont. C.A.))

## Misrepresentation

* Was there an OPERATIVE MISREPRESENTATION?
  + YES 🡪 rescission
  + These conditions must be met by the representor:
    1. The representor (or their agent) communicates by word or act a statement to the representee,
    2. The statement must be made intentionally

(*Ryan v. Moore*, 2005 SCC 38; *Weibelzahl v. Symbaluk* (1963), 42 D.L.R. (2d) 281 (B.C.C.A))

* + 1. That is false in either law or fact, *and*
    2. That is material.

(*CP Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133 (S.C.C.))

* + These conditions must be met by the representee:
    1. The representee must have relied on the statement,

(*Nationwide Building Society v. Lewis*, [1998] Ch. 482 (C.A.))

* + 1. As at least one reason for entering in the K.

(*Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459 (C.A.))

* + **Note:** The representee gets an *election* as soon as rescission becomes available; they must choose, and they must communicate their affirmation/rescission (*Kellog Brown & Root Inc v Aeroteh Herman Nelson Inc*, 2004 MBCA 63; *Hrynenko v Hrynenko*, [1998] BCJ No 2945 (BCCA))
  + **Note:** There is no general contract duty of speech—even to convey vital facts—. Non-negligent nondisclosure is fine unless asked (*Nixon v MacIver*, 2016 BCCA 8)
* Did the misrepresentation BECOME A TERM?
  + YES 🡪 *maybe* rescission *possible?*
  + Generally terms are thought of differently than representations (they’re in-K, not pre-K), **but…**
  + Even when misrepresentation becomes a term in the K, rescission may still be available as an equitable remedy (*Guarantee Co of North America v Gordon Capital Corp*, [1999] SCJ No 60 (SCC))
* Does the K specify the CONSEQUENCES of misrepresentation?
  + YES 🡪 follow the K
  + Parties are able to K the consequences of misrepresentations (*Guarantee Co of North America v Gordon Capital Corp*, [1999] SCJ No 60 (SCC))
* Was the operative misrepresentation INNOCENT?
  + YES 🡪 rescission
* Was the operative misrepresentation NEGLIGENT?
  + YES 🡪 rescission & negligence damages
  + Must meet conditions:

1. Representor must have a *duty of care* to the representee
2. The representation is untrue/inaccurate/misleading
3. The representation was negligently made
4. The representee must have reasonably relied on the representation
5. The reliance must have resulted in a loss to the representee
   * See *Queen v Cognos Inc*, [1993] 1 SCR 87 (SCC).
   * **Note:** Exclusions of negligent misrepresentation liability are plausible (*Carman Construction Ltd v Canadian Pacific Railway Co*, [1982] SCJ No 49 (SCC))

* Was the operative misrepresentation FRAUDULENT?
  + YES 🡪 rescission & deceit damages
  + Must meet conditions:

1. Defendant makes a false representation
2. Some level of knowledge of falsity by the defendant
3. The false representation caused the plaintiff to act
4. (for deceit only) The plaintiff’s actions resulted in provable loss
   * See *Bruno Appliance Furniture Inc v Hyrniak*, 2014 SCC 8.
   * **Note:** liability for fraudulent misrepresentation is not excludable (*Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 (SCC))
   * **Also Note:** Tort damages for fraud are restorative (*BG Checo International ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 (SCC))

* Did EQUITY’S DARLING acquire property after the misrepresented K?
  + YES 🡪 no rescission
  + While rescission usually puts parties back before the K, a BFPfVwoN gets to keep the goods, no damages awarded (*Kingu v. Walmar Ventures Ltd.*, [1986] B.C.J. No. 597 (B.C.C.A.))
* Is RESTITUTION otherwise impossible for the misrepresented K?
  + YES 🡪 no rescission, *maybe* damages
  + Tort damages will still be possible! (*Lumley v Broadway Coffee Co*, [1935] OJ No 224 (Ont CA))
  + Equitable money substitutes sometimes work, if the property still exists (*Kupchak v Dayson Holdings Co*, [1965] BCJ No 153 (BCCA))
* Was the K EXECUTED despite misrepresentation?
  + YES 🡪 no rescission
  + Completed Ks can’t be rescinded (*Shortt v MacLennan*, [1958] SCJ No 61 (SCC))
* Would rescission cause HARDSHIP?
  + YES 🡪 no rescission
  + See *CIBC Mortgages plc v Pitt*, [1994] 1 AC 200 (HL).
* Did the plaintiff DELAY?
  + YES 🡪 no rescission
  + *Laches* precludes restitution (*Kingu v. Walmar Ventures Ltd.*, [1986] B.C.J. No. 597 (B.C.C.A.))

## Mistake

* Was it UNILATERAL mistake as to TERMS, only one party was mistaken about K-term?
  + YES 🡪 *usually* valid
  + When one party makes a mistake, they generally have to own the mistake. (*Asco Construction Ltd v Epoxy Solutions Inc*, 2014 ONCA 535)
  + When one party makes a mistake and induces the mistake in another, they still have to own it. (*Le v 1435375 Ontario Ltd*, 2013 ONCA 516)
* Was it MUTUAL mistake as to TERMS, one party thought some K-term meant *x*, the other thought *y*?
  + YES 🡪 void *ab initio*
  + If both parties’ interpretations are plausible, this is effectively lack of *consensus ad idem*. (*Staiman Steel Ltd v Commercial & Home Builders Ltd*, [1976] OJ No 2205 (Ont HCJ))
  + **Note:** *Very unusual*, because courts will strain to find a contract
* With UNILATERAL mistake as to TERMS, did the unmistaken party KNOW of the mistake?
  + YES 🡪 *possible* void
  + If you know that the other party is mistaken about a term, you cannot have had *consensus* (*Smith v Hughes* (1871), LR 6 QB 597 (QB))
  + **Note:** Even if you *ought to have known* (*Solle v Butcher*, [1949] 2 All ER 1107 (CA))
* Did the TENDERER realize their mistake AFTER ACCEPTING a “CONTRACT A” request for proposals?
  + YES 🡪 valid
  + The *Contract A* acceptance completes that K, cannot rescind tender (i.e. tenderer must forfeit deposit). (*Ontario v Ron Engineering & Construction (Eastern) Ltd*, [1981] SCJ No 13 (SCC))
  + **Note:** Uncertain effect in BC on *Contract B*. Mistaken tenderer might be forced to perform if their *Contract B* offer is accepted. (*Calgary (City) v Northern Construction Co*, [1985] AJ No 741 (Atla CA))
* Was it a COMMON mistaken ASSUMPTION, both parties assumed *x* to be the case, but it was actually *y*?
  + YES 🡪 *maybe* void
  + Must meet these conditions:
    1. Common assumption as to the existence of a state of affairs
    2. No warranty by either party as to the truth of the state of affairs
    3. No fault can be assigned to either party for the mistaken assumption
    4. The mistaken assumption renders performance impossible
    5. State of affairs must be either the existence or vital attribute of the consideration, or circumstances which must exist for the contractual adventure to be possible
  + See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (“The Great Peace”)*, [2002] 4 All ER 689 (CA).
* Was there a mistake as to ESSENTIAL QUALITY?
  + YES 🡪 void
  + *Only* if the actual quality of the thing makes it fundamentally different from what was contemplated in K. (*Bell v Lever Bros Ltd*, [1932] AC 161 (HL))
  + **Note:** If there is a term that guarantees a quality, or obliges someone to verify quality, or makes someone responsible, etc. the contract is valid.
* What about that crazy bastard, LORD DENNING?
  + YES 🡪 equitable *setting aside* for mistake!
  + A contract of mistake that is good at common law can be set aside nonetheless if:
    1. Setting aside causes no injustice to third parties
    2. It is unconscientious for the other party to avail himself of the legal advantage

To common mistake, it can be set aside in equity if:

1. Mistake goes to fundamental facts or fundamental relative or respective rights, and
2. The common mistake is not the fault of the party seeking the contract be set aside

These situations set the contract aside “as the court sees fit, meaning that mistake in equity could result in partial rescission or adding terms.

* + See *Solle v Butcher*, [1949] 2 All ER 1107 (CA); *Toronto Dominion Bank v Fortin (no 2)*, [1978] BCJ No 1237 (BCSC).
* Was a FORGED or careful but IGNORANT SIGNATURE involved?
  + YES 🡪 *non est factum* void
  + If a signature is not truly the product of a properly informed party, it cannot ground a K. This primarily protects non-commercial parties. (*Marvco Color Research Ltd v Harris*, [1982] SCJ No 98 (SCC))
  + Careless signatures are not protected.
  + Deceitful signers are not protected.
* Did someone sign, WITHOUT NOTICE of an ONEROUS TERM?
  + YES 🡪 term is unenforceable
  + Parties must give notice of onerous and unusual terms that do not achieve the core function of the K. If there is no notice, the term cannot be enforced. (*Tilden Rent-A-Car Co v Clendenning*, [1978] OJ No 3260 (Ont CA))
* Does the written K NOT MATCH the actual K?
  + YES 🡪 rectification
  + I.e. the K is written down incorrectly.
  + The outward acts of the parties inform rectification of the K. (*Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6)
  + **Common:** heavy burden on party claiming rectification of a common mistake (other party is happy!) (*Fraser v Houston*, 2006 BCCA 66)
  + **Mutual:** disagree about what the prior “correct” K is. Each party bears burden. (*Bercovici v Palmer*, [1966] SJ No 230 (Sask CA))
  + **Unilateral:** Requires:
    1. A prior oral contract where the terms are ascertainable (pehaps any previous record)
    2. Terms were agreed to, but not written down properly
    3. At the time of the signing (execution) of the document, the party seeking rectification did not now of the mistake, and the other party either knew or ought to have known
    4. Reliance upon this error would be fraud or equivalent to fraud

(*Performance Industries v Sylvan Lake Gold & Tennis Club*, 2002 SCC 19)

## Protecting Weaker Parties

* The Courts will just DO JUSTICE!
  + Courts will protect the weaker party just because it is just, without reference to doctrine, however they please.
  + E.g. *Gaertner v Fiesta Dance Studios Ltd*, [1972] BCJ No 766 (BCSC).
* Was there DURESS on a person or property?
  + YES 🡪 voidable
  + Duress to person is any threat, physical interference, wrongful prosecution, wrongful imprisonment, etc. to party or family. (*Saxon v Saxon*, [1978] BCJ No 810 (BCCA))
  + Duress to property is any interference with personalty or realty. (
* Was there ECONOMIC DURESS?
  + YES 🡪 *legitimate* valid
  + YES 🡪 *illegitimate* voidable
  + Combines *Pao On* and *Universe Tankships*:
    - Traditional Approach
      * Defined as coercion of the will that vitiates consent
      * Has to be more than commercial pressures
    - Factors to consider:
      * Protesting at the time of making the contract
      * Lack of other alternative (such as a legal remedy)
      * Independent advisement
      * After entering, taking steps to avoid it
    - Legitimacy
      * Two factors determine whether the threat is legitimate:
      * The nature of the pressure (first)
      * Unlawful activity is usually illegitimate
      * However, some lawful activity (Blackmail to the police of a crime the coerced has committed) is illegitimate
    - If this isn’t decisive, look at the nature of the demand
      * Some monetary demands are legitimate. Size unknown.
  + See *Gordon v Roebuck*, [1992] OJ No 1499, 9 OR (3d) 1 (Ont CA).
* Was ECONOMIC DURESS applied to MODIFY a K?
  + YES 🡪 voidable
  + Conditions:
    - the contractual variation must be extracted by pressure in the form of a demand or threat;
    - the exercise of the pressure must be such that the coerced party has no practical alternative but to comply with the demand or threat.
  + If above are met, then did the weaker party consent, consider:
    - whether the promise was supported by consideration;
    - whether the coerced party protested the variation or executed it on a “without prejudice” basis;
    - whether the coerced party took steps to disavow the variation on a timely basis.
* Was there UNDUE INFLUENCE?
  + YES 🡪 voidable
  + The unconscientious use by one person of power possessed by him over another to induce the enter a contract. “Domination of the will” rather than coercion. (*Brooks v Alker*, [1975] OJ No 2416 (Ont HCJ))
  + **Test:**
    - There was a relationship capable of undue influence
      * **Irrebutable**: Prove a relationship where one party acquires influence over a vulnerable/dependant and where substantial gifts are not normally to be expected (parent-child, trustee-beneficiary, doctor-patient, etc.)
      * **Rebuttable**:
        + Prove trust was placed by weaker in stronger
        + Prove the K was questionable. (*Geffen v Goodman Estate*, [1991] SCJ No 53 (SCC))
      * **Pseudo-Duress:** Just prove that there was “actual” undue influence through duress test.
* Was UNDUE INFLUENCE exercised by a THIRD PARTY who had NOTICE?
  + YES 🡪 voidable
  + Usually, 3rd parties must act as agents or have notice for their undue influence to avoid a K.
  + **Note:** If the stronger party has not taken reasonable steps to ensure proper King, *notice is constructed*. (*Gold v Rosenberg*, 3 SCR 767 (SCC))
* Was the K UNCONSCIONABLE?
  + YES 🡪 (partial) rescission/unenforceable
  + Meet four conditions:
    1. a grossly unfair and improvident transaction;
    2. the “victim’s” lack of independent legal advice or other suitable advice;
    3. overwhelming imbalance in bargaining power caused by the “victim’s” ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
    4. the other party’s knowingly taking advantage of this vulnerability.

See *Cain v Clarica Life Insurance Co*, 2005 ABCA 437.

* + Results: Partial rescission to weaker’s advantage: *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] SCJ No 23 (SCC).
  + **Note:** Inequality of bargaining power and unconscionability are the same: *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4.

## Illegality

* Did the K do something CONTRAVENE A STATUTE?
  + YES 🡪 *maybe* unenforceable
  + **Factors**: Consider
    1. Considerations of public policy in the light of the mischief the statute was designed to prevent
    2. Language
    3. Scope & purpose
    4. Consequences for an innocent party
    5. Any other relevant considerations
    6. Who the legislation is supposed to protect

See *Canada Permanent Trust Co v Macleod*, [1980] NSJ No 427 (NSCA).

* + **Note:** Older approach just voided statutorily illegal contracts period. This is basically antiquated: *Still v Canada (Minister of National Review - MNR)*, [1997] FCJ No 1622 (FCA))
* Did the K seek to RESTRAIN TRADE (employment) in IMBALANCED WAYS?
  + YES 🡪 unenforceable
  + **Test:** to balance K-freedom and society’s needs
    1. Restraint offers adequate protection to the party against whom it is imposed
    2. It must in no way be injurious to the public

See *Elsley Estate v JG Collins Insurance Agencies Ltd*, [1978] 2 SCR 916 (SCC).

* + Labour Ks need more than mercantile Ks to justify restraints because of power imbalance: *Payette v Guay Inc*, 2013 SCC 45.
  + Restrictive covenants can be good: *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6.
* Was the K with respect to ILLEGAL activity?
  + YES 🡪 void/unenforceable
  + E.g. K to split proceeds of illegal activity. (*Byron v Tremaine* (1898), 31 NSR 425 (NSCA))
  + E.g. Performing K0 requires breaking previous Kx. (*Wanderers’ Hockey Club v Johnson*, [1913] BCJ No 70 (BCSC))
* Does the K PREJUDICE PUBLIC administration or the administration of JUSTICE?
  + YES 🡪 unenforceable
  + See *The People’s Bank of Halifax v Johnson*, [1892] SCJ No 27 (SCC); *Carr-Harris v Canadian General Electric Co*, [1921] OJ No 145 (Ont CA).
* Does the K SUBVERT FRIENDLY nations or help FOREIGN ENEMIES?
  + YES 🡪 unenforceable
  + See *De Wutz v Hendricks* (1824), 2 Bing 314; *Lampel v Berber*, [1917] OJ No 69 (Ont HC).
* Did a party ACQUIRE PROPERTY in an ILLEGAL K?
  + YES 🡪 *usually* keep property
  + Cannot rely on K for anything but transfer of title, but transfer of title is valid. (*Tinsley v Milligan*, [1994] 1 AC 340 (HL))
  + K is unenforceable, but that doesn’t matter.
  + **Exceptions:**
    1. The party seeking recovery didn’t know K was illegal, and other party knew or should have.
    2. The law the K breaks aimed to protect the interests that wouldn’t be protected if transfer happened.

See *Kiriri Cotton Co. v Dewani*, [1960] AC 192 (PC).

* + **Also:** If you back out of illegal K before performance is complete, you can recover *if*:
    1. You didn’t know of illegality
    2. You were induced to K illegally by defendant who did know
    3. You abandoned before substantial illegal consequences…
    4. You are the repenting party
    5. You are only attempting to recover property

*Ouston v Zurowski*, [1985] 63 BCLR 89 (BCCA); *Zimmerman v Letkeman*, [1977] SCJ No 106 (SCC).

## Frustration

### When successful, it brings all primary and secondary obligations to an immediate halt.

* Was performance made (nearly) IMPOSSIBLE due to UNFORESEEABLE misfortune?
  + YES 🡪 frustration (statutory severance)
  + The event must
    1. Occur after K
    2. Be unforeseen by parties
    3. Evidenced by their (modified subjective) circumstances at time of K’ing

See *Canadian Government Merchant Marine Ltd v Canadian Trading Co,* [1922] SCJ No 30 (SCC).

* + **Note:** Do a “reality check” test to see if frustration should override K’s risk allocation. (*Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd; The “Sea Angel”*, [2007] EWCA Civ 547 (CA))
  + **Political?** War, regime change, legal reform, etc. can frustrate. (*Bayer Co v Farbenfabriken vorm Fried. Bayer and Co*, [1994] OR 488 (Ont CA); *Petrogas Processing Ltd v Westcoast Transmission Co*, [1989] AJ No 254 (Atla CA))
* Was the K’s PURPOSE rendered impossible?
  + YES 🡪 frustration
  + **Destruction:** E.g. of concert venue (*Taylor v Caldwell* (1863), 122 ER 309 (QB))
  + **Illness/Death:** (*Lafreniere v Leduc*, [1990] OJ No 405 (Ont HCJ))
  + **Method:** Method contemplated suddenly impossible/onerous (*Tsakiroglou & Co v Noblee Thorl GmbH*, [1962] AC 93 (HL))
  + **Illegality:** Must
    1. If the law changes and makes the contract illegal, and this change
    2. goes to the root of the agreement
    3. Transforms the contract into something totally different than what the parties intended

See *KBK No 138 Ventures Ltd v Canada Safeway Ltd*, [2000] BCJ No 938 (BCCA).

* WHEN was the K frustrated?
  + AFFECTS 🡪 common law restitution
  + Timing of frustration relative to payment obligations is key at common law.
  + Payment payable *before* frustration, but not yet paid 🡪 pay! (*St Catharines (City) v Ontario Hydro Power Comission*, [1928] OJ No 39 (Ont CA))
  + Paid before frustration, but no performance yet 🡪 recovery (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32 (HL))
  + **Statutory Consideration:** Allows severance of performed/paid obligations, for purposes of restitution & recovery. *Frustrated Contract Act*, RSBC 1996, c 166.

## Limitations on Action

* General LIMITATION period in BC?
  + YES 🡪 2 years from when breach reasonably ascertained
  + See *Limitation Act*, SBC 2012, c 13, s 6(1).
* Is there a RECURRING obligation?
  + Yes 🡪 new limitation period starts each breach
  + See *Pickering Square Inc v Trillium College Inc*, 2016 ONCA 179.

# What Happens With Successful Contestation?

## Void Contracts

* The K never existed, rolled back to pre-K situation as possible.
  + Reasons:
    - Bad formation (no offer, acceptance, certainty of terms, intention to create legal relations
    - Common Mistake
    - *Non est factum*
    - Some Mistaken Identities (See Mistake)
    - Illegality (Often, exceptions including severance of severable contracts, noncompete clauses, see illegality)
    - Incapacity (sometimes)

## Voidable Contracts

* What happens to NON-RETURNABLE property?
  + Compensated with $$
  + Reasons:
    - Misrepresentation
    - Duress
    - Undue Influence
    - Unconscionability (sometimes, see Unconscionability)
    - Mistake (scope uncertain, see Mistake)
    - Incapacity (Sometimes, see incapacity)
* What happens to DAMAGE CLAUSES?
  + Extinguished under K-law, but not tort.
* SEVERABILITY?
  + Generally, no.

## Severance

* Can a portion be HIVED OFF?
  + **Test**: Can the portion be removed without fundamentally altering the K?
  + Done for:
    - Nonsense terms (Nullified)
    - Terms without notice to one party (nullified)

See *Nicolene Ltd v Simmonds*, [1953] 1 QB 543 (CA).

* + - Illegality
    - Unconscionability
  + **Blue Pencil Test**: can it be removed without fundamental alteration?
  + **Notional Severance**: adjust to fit original intentions of the parties (*Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7)
    - **Note:** Not available to rectify restrictive covenants (void instead). *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6.
    - **Note:** Won’t allow abuse of process, e.g. rectifying uncertain terms. (*Canadian American Financial Corp (Canada) Ltd v King*, [1989] BCJ No 701 (BCCA))
* Can the K be DIVIDED into Ks?
  + **Note:** Can skirt *parol evidence rule* by dividing into “oral” and “written” Ks, and applying PER to only written.

## Judicial Adjustment

### Positive interference by courts.

* Set aside terms (disapproved of): *Solle v Butcher*, [1949] 2 All ER 1107 (CA).
* To avoid unconscionability: *Morrison v Coast Finance Ltd*, [1965] 54 WWR 257 (BCCA).
* As suggested by promissory estoppel: *Waltons Stores (Interstate) Pty Ltd. v. Maher* (1988), 164 C.L.R. 387 (H.C.).
* Common in:
  + Where there is no consideration, the contract is unenforceable.
  + Unfair exclusion and limitation clauses…
  + Illegality, where the purpose of the illegality is to protect the party being enforced against, or where the party being enforced against has repented. See illegality
  + Contracts made with an incapable party, between the point of contracting and (capable) ratification. See capacity
  + Limitation periods

# So, You Think a Party Might Have Breached the Contract?

## Classes of Terms

* Is the breached term a CONDITION, WARRANTY, or INTERMEDIATE TERM?
  + CONDITION 🡪 breach & termination
    - Conditions are *fundamental* terms in a K. Without them, it loses its character. Secondary obligations trigger for the whole K.
  + WARRANTY 🡪 breach & damages
    - The K survives a breach of warranty, but damages kick in—i.e. secondary obligations for this term.
  + INTERMEDIATE 🡪 judge’s choice
    - The judge decides on whether termination or damages best fits the breach of this term (*Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.))
    - **Note:** intermediate (innominate) terms remain intermediate—they don’t become conditions or warranties when a judge decides on the best remedy.
    - **Note:** The *Sale of Goods Act*, RSBC 1996, c 410 doesn’t mention intermediate terms, but *Cehave NV v. Bremer Handelsgesellschaft MbH (The “Hansa Nord”)*, [1975] 3 All E.R. 739 (C.A.) indicates they would be covered.

## General Repudiation

* Has a sufficiently important term been BREACHED?
  + YES 🡪 election to terminate
  + The innocent party may elect to repudiate or affirm the K. (*Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10)
  + **Effect:**
    - Reject repudiation and affirm the contract
      * Contract remains in force.
      * Each party has a right to sue for damages for past or future breaches, or;
    - Accept the repudiation
      * Contract terminated.
      * Both parties discharged from future obligations.
      * Right and obligations that have matured are not extinguished.
    - See *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] S.C.J. No. 60 (S.C.C.).
  + **Note:** Repudiation must be celar and unequivocal (*Brown v Belleville (City)*, 2013 ONCA 148)
  + **Note:** “Constructive” repudiation is possible through responsive non-performance, but can’t just be non-performance. (*White v EBF Manufacturing Ltd*, 2005 NSCA 167)
* Has breach NOT YET OCCURRED, but it will?
  + YES 🡪 anticipatory breach 🡪 election
  + A party can anticipate its breach, and communicate this to the innocent party. This triggers election.
* Has a BUYER accepted the goods?
  + YES 🡪 buyer retains
  + **Test:** *Sale of Goods Act*, RSBC 1996, c 410, s 39
    1. the buyer intimates to the seller that the buyer has accepted them,
    2. the goods have been delivered to the buyer, and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, or

**Also:**

* + 1. after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them (*Morrison-Knudsen Co v British Columbia Hydro and Power Authority*, [1978] 4 WWR 193 (BCCA))
* Has the innocent party AFFIRMED a PREVIOUS breach, but now wants to REPUDIATE a REPEAT BREACH?
  + YES 🡪 can repudiate
  + See *Dosanjh v Liang*, 2015 BCCA 18.

## General Damages

### The purpose of damages is to substitute for a *primary* obligation that was not performed.

* Were goods DEFECTIVE but still delivered?
  + YES 🡪 damages = valueK – valuemarket
  + “ExpectationInterest” puts you in the position you would have been if the K had been performed.
  + See *Ford Motor Co of Canada Ltd v Haley*, [1967] SCJ No 29 (SCC).
* Did the innocent party suffer materially by RELYING ON the breaching party?
  + YES 🡪 damages = pre-reliance – post-reliance
  + “RelianceInterest” puts you in the position you would have been in if you hadn’t relied on the other party.
  + **Test:** But-for test (*Water’s Edge Resort Ltd v Canada (Attorney-General)*, 2015 BCCA 319)
  + **Note:** The above test doesn’t operate when there’s misrepresentation! (*Rainbow Industrial Caterers Ltd v Canadian National Railway Co*, [1991] 3 SCR 3 (SCC))
* Is the plaintiff trying for BOTH EXPECTATION and RELIANCE DAMAGES?
  + YES 🡪 *maybe* can’t get both
  + Can choose which one they want: *Sunshine Vacation Villas Ltd v Governor and Company of Adventurers of England Trading into Hudson’s Bay*, [1984] BCJ No 1794 (BCAA).
  + Can *sometimes* get both (e.g. delivery of subpar good increases costs, decreases revenue): *Sunnyside Greenhouses Ltd v Golden West Seeds Ltd*, [1973] SCJ No 21 (SCC).
* Did a breaching party BENEFIT FROM BREACH?
  + YES 🡪 restitution
  + When not prevented by policy considerations (discouraging business), such gains are given to the innocent party.
  + E.g. *Bank of America Canada v Mutual Trust Co.*, 2002 SCC 43.
* Did the LOSS arise from the breach REMOTELY?
  + YES 🡪 no damages
  + The loss must be sufficiently caused by the breach to be compensable.
  + **Two-Branch Test:**
    - Fairly and reasonably be considered either arising as a natural consequence of the breach, OR
      * E.g. the difference in value of a car with higher mileage than the contract promised
    - When K was made, could be reasonably supposed to have been the contemplation of both parties, and damage would be a probable result of the breach
      * Special knowledge such as nonspecific knowledge that based upon the original contract, subcontracts would be entered into.
      * Knowledge of special circumstances can be found implicitly from what the party ought to have known.
    - See *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30.
* Was MENTAL DISTRESS caused by a breach?
  + YES 🡪 *maybe* damages?
  + Only when psychological benefits were Kd for, can mental distress be recovered. (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30)
  + **Also**: when insured against mental distress, but insurance fails and more distress: *P(C) v RBC Life Insurance Co*, 2015 BCCA 30.

## Mitigation of Damages

* Did the innocent party FAIL TO MITIGATE their losses due to breach?
  + YES 🡪 recoverable to mitigated extent, *maybe* no equitable remedies
  + E.g. find employment after dismissal: *Forshaw v Luminex Extrusions Ltd*, [1989] BCJ No 1527 (BCCA).
* Did the innocent party fail to mitigate BECAUSE THEY WERE TOO POOR?
  + YES 🡪 too bad so sad
  + Impecuniosity is not a recognized bar to mitigation: *RG McLean Ltd v Canadian Vickers Ltd*, [1970] OJ No 1639 (Ont CA).
  + **Unless:** the breaching party knowingly exploited this: *Mundell v Wesbild Holdings Ltd*, 2007 BCSC 1326.
* Did the innocent party FAIL TO REPUDIATE when repudiation would have mitigated?
  + YES 🡪 *usually* no difference
  + No duty to mitigate by electing repudiation, unless it is “wholly unreasonable”: *Stocznia Gdanska SA v Latvian Shipping Co*, [1996] 2 Lloyd’s Rep 132 (CA).
* Would mitigating require the innocent party to GIVE UP EQUITABLE REMEDIES?
  + YES 🡪 too bad so sad
  + Unless there is a “fair, real and substantial reason for the choice of specific performance”, mitigation requires giving it up: *Asamera Oil Corp v Sea Oil and General Corp*, [1978] SCJ No 106 (SCC).

## Liquidated Damages/Penalty Clauses

### K specifies monetary damages for particular breach.

* Is the liquidated damages clause CLEARLY EXCESSIVE?
  + YES 🡪 unenforceable, judicial alteration
  + K formula for liquidated damages is acceptable unless whatever figure it generates is excessive to satisfy a legitimate interest: *HF Clarke v Thermidaire Corp*, [1974] SCJ No 151 (SCC).
  + Tendency to interpret such clauses as legitimate, due to respect for freedom to K: *Philips hong Kong v Attorney General of Hong Kong* (1993) 61 BLR 41, (PC).
* Is the liquidated damages clause REALLY A PENALTY CLAUSE?
  + YES 🡪 unenforceable
  + They are illegal. Damages will be actual loss in accordance to the general rules of contract. Operates by way of right. (*Jobson v Johnson*, [1989] 1 WLR 1026 (CA))
  + **Test:** Not a genuine attempt at pre-estimation of damages, and disproportionate detriment imposed. (*Peachtree II Associates –Dallas, LP v 857486 Ontario Ltd*, [2005] OJ No 2749 (Ont CA))
* Is a STRONGER PARTY asking to sever a penalty clause, rather than a WEAKER PARTY?
  + YES 🡪 too bad for stronger
  + Only the weaker party can request severance of a penalty clause: *Elsley Estate v JG Collins Insurance Agencies Ltd*, 1978] 2 SCR 916 (SCC).
* Is this an ACCELERATION, or PRICE ADJUSTMENT clause?
  + YES 🡪 not penal
  + Acceleration clauses increase the amount due as *events* occur (not breaches): *General Motors Acceptance Corp of Canada v Hiebert*, [1955] BCJ No 125 (BCSC).
  + Price adjustment clauses set out two possible prices for different dates of payment: *Doman Forest Produces Ltd v GMAC Commercial Credit Corp – Canada*, 2007 BCCA 88.
* Did someone “DEPART MARKEDLY from ordinary standards of DECENCY?
  + YES 🡪 punitive damages
  + When the conduct is malicious, high-handed, offensive to decency, etc., court can order punitive damages: *Hill v Church of Scientology of Toronto*, [1995] SCJ No 64 (SCC).
  + Truly rare. Serves denunciation, deterrence, and retribution instead of usual compensation: *Whiten v Pilot Insurance Co*, [2002] 1 SCR 595 (SCC).

## Other Money Claims

* Is the plaintiff claiming a PROVABLY UNPAID primary or secondary obligation?
  + YES 🡪 debt
  + See *Standard Radio Inc v Sports Central Enterprises Ltd*, 2002 BCSC 460.
* Was there a TOTAL FAILURE OF CONSIDERATION?
  + YES 🡪 all recoverable
  + **Note:** any partial performance means only damages are recoverable (*Stocznia Gdanska SA v Latvian Shipping Co*, [1996] 2 Lloyd’s Rep 132 (CA))

# What About Equitable Remedies?

### I.e. mandatory or prohibitory injunctions and specific performance

## Nine Factors to Consider

1. Common Law Matrix (MacDougall, p 384)
   * Contract rightfully terminated
   * Contract void
   * Contract has been avoided
   * Obligations are unenforceable (court unlikely to enforce)
2. Adequacy of Damages
   * Damages inadequate where:
     + Contract contains an enforceable exclusion or limitation clause that would preclude a useful damages claim (*AB v. CD*, [2014] All E.R. 667 (C.A.))
     + Subject-matter of the contract is unique, (ex realty): *Lalani v Wenn Estate*, 2011 BCCA 499.
     + Unavailability of a financially acceptable replacement, even where goods are not unique: *Sky Petroleum v VIP Petroleum*, [1974] 1 all ER 954 (Ch).
3. Plaintiff’s Clean Hands
   * Even small misrepresentations preclude equity: *Cadman v. Horner* (1810), 18 Ves. Jr. 10, 34 E.R. 221.
4. Plaintiff’s Own Contractual Conduct
   * No equitable remedy where
     + Breaching own contractual obligations
     + In the case of ongoing or future obligations, proof that he is willing and able to carry out his obligations
   * See *Australian Hardwoods Pty Ltd. v. Commissioner for Railways*, [1961] 1 All E.R. 737.
5. Timeliness of Request
   * Laches bars equity: *Orsi v. Morning*, [1971] O.J. No. 1619 (Ont. C.A.).
6. Hardship to the Defendant
   * Too much hardship to defendant will bar equity
   * Too much hardship caused to a 3rd party contracted to defendant will bar equity if 3rd party is BFwoN (*Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd,* [1974] 2 S.C.R. 715)
7. Temporal Extent of Remedy
   * Obligations requiring continuous court supervision in the future bar equity: *Bickford v. Chatham (Town)*, [1889] S.C.J. No. 7 (S.C.C.).
   * **Note:** If such obligations aren’t complicated, can be ordered: *Beswick v Beswick*, [1968] AC 58 (HL).
8. Personal Services
   * Personal services (e.g. labour) are never enforced. Effective slavery!! (*Warner Bros. Pictures Inc. v. Nelson*, [1937] 1 K.B. 209 (K.B.))
9. Mutuality
   * Mysterious one. If the other side could have obtained the same remedy against you in another scenario, you’re more likely to succeed: *Beswick v Beswick*, [1968] AC 58 (HL).

* What if I want EQUITABLE DAMAGES instead of performance?
  + Courts may order these instead of specific performance: *Semelhago v Paramadevan*, [1996] 2 SCR 415 (SCC).