**Contract operates by way of agreement by two persons, a meeting of the minds (Consensus ad idem).**

**Efficiency Theory (Posner)**

The law creates incentives for efficient behaviors, and punishments for inefficiency.

1. **Intention**
2. **Offer**
3. **Acceptance**
4. **Consideration**
5. **Capacity**
6. **Legality**

# Intention

**An objective test:** What would a reasonable person believe at the time of the contract?

* Generally presumed no intention of making legal contract between close family members or close **social relationships**. (Balfour)
* It is generally assumed that parties in **business relationships** intend to be bound. (Rose and Frank)
* If parties expressly state in an agreement that they do not wish to be bound, the courts must respect their actual intentions. (Rose and Frank)

# Offer

* **Invitation To Treat**
  + **A mere statement of price does not constitute an offer to sell**; it is no more than an invitation to treat.  (Canadian Dyers)
  + **Goods on a display are invitation not an offer**; the customer makes an offer when they take the goods to the register. (Pharmaceutical Society v Boots Cash)
  + **The cashier is under the shopkeeper's authority to make acceptance**, hence a contract has not been made until the cashier accepts the purchase. (Phamaceutical Society v Boots Cash)

* **Ads and Unilateral Offers**

*A* ***unilateral*** *contract where one party can take action and fulfill the offer*

***Bilateral contract*** *can be accepted by word or by writing*

* + For unilateral contracts the **notification of acceptance need not precede the performance**, and unless the language clearly indicates, it does not require notice of the acceptance apart from the notice of performance. (Carlill v Carbolic Smoke Ball)
  + **An advertisement may constitutes an offer** that can be accepted on the terms it proffered. Courts will look at intention. (Goldthorpe v Logan)
  + **The offeror bears the risk of extravagant promises**. (Goldthorpe v Logan)
  + **No offer is valid without consideration**. (Goldthorpe v Logan)

* **Communication of Offer**
  + **A party must intend to make an offer for it to be an offer capable of acceptance**, **and it must be deliberated communicated to the party to whom it is directed** in order to prove that the offeror intended to be legally bound. (Blair v Western Mutual Benefit)
  + **The motive of an individual in accepting the contract offered has nothing to do with his right to recover under the contract**. Neither mutual consent nor communication of assent is important in case of reward. (Williams v Carwardine)
  + **One cannot accept an offer one doesn't know exists, or that one has forgotten exists**. One needs an expectation or reliance interest in the reward in order for that reward to be recoverable. (R. v. Clarke)
* **Bids and Tenders** 
  + Tender invitation and tender bid are seen as a **unilateral contract**. (Ron Engineering)
  + **Offer is the call for tenders, acceptance is the submission of the acceptable bid**. (Ron Engineering)
  + Significance of the bid is that it becomes i**rrevocable if filed in conformity to the terms** and conditions of the call for tenders (Ron Engineering)
  + A **privilege clause** is only compatible with accepting compliant bids. (M.J.B Enterprises v. Defence Construction)
  + In the **absence of a privilege clause**, you are most likely to be bound to accept the lowest offer. (M.J.B Enterprises v. Defence Construction)

|  |  |  |
| --- | --- | --- |
| Stages of the Tendering Process | Contract A (One or many) | Contract B (Only 1 contract) |
| Call for Tenders | Offer to enter into a fair tendering process in exchange for the submission of irrevocable bids | An invitation to treat |
| Submission of the tender | Acceptance | Offer of contract B |
| Award of project to build |  | Acceptance |

# Acceptance

Acceptance is a **statement or act, given in response to an offer**, and occurs when an offeree agrees to enter in to a contract proposed by the offeror.

**A clear, unequivocal, and unconditional willingness** to enter into a contract.

* **Mirror Image Rule (Counter-Offer):**
  + **You must accept the original offer proposed by the offeror.**
  + The acceptance constitutes the offeree saying "yes" to the offeror. If the offeree says more, it could be a **counter-offer**?
  + **If the counter-offer is proposed, the original offer is rejected** and can no longer be accepted. (Livingstone v Evans)
  + **If there is continued communication by the offeror, his actions may be constituted as a signal of the revival** of the original offer. (Livingstone v Evans)
  + **The quotation of the price was an offer subject to terms and conditions**, in a battle of forms generally the last shot wins. (Butler Machine Tool v Ex-Cell-O Corp)

* **Communication of Acceptance**
  + A contract becomes binding the instant that the acceptance is put in the mail, so long as the parties have contemplated the mail as a viable means of communication in their dealings: the **postal acceptance rule**. (Household Fire & Carriage v Grant)
    - PAR does not apply to revocation, only acceptance.
  + The postal rule does not apply in situations where a **notice of acceptance has been specified**. (Holwell Securities v Hughes)
* **Forum Selection**
  + In cases of instantaneous communication, acceptance is complete when it **is received by the offeror** and the contract is made at the place where the acceptance is received. (Brinkibon Ltd. V Stahag Stalh…)
  + **Click-wrap agreements are as valid as agreements in writing**. (Rudder v. Microsoft)
  + The onus is on the Plaintiff to show strong cause to override a term of exclusive jurisdiction. (Rudder v Microsoft)
  + In absence of a **strong cause**, an exclusive jurisdiction term will be enforced for the benefit of commercial certainty. **STRONG CAUSE TEST** (Rudder v Microsoft/Douez v. Facebook)
  + **Default rule for BC:** 
    - A message is a deemed sent when it leaves the senders' control.
    - A message is deemed received when it reaches an information system in the control of the person to whom it is sent.

# Termination of Offer

* **Revocation**
  + An offeror is **free to withdraw their offer at any point until the offeree has accepted** it, so long as the offeree has not provided any sort of consideration. (Dickinson v Dodds)
  + **An offeree must have knowledge of a revocation**, but explicit communication is not required. (Dickinson v Dodds/Byrne v Van Tienhoven)
  + Mere posting (**postal rule does not apply**) of a revocation is not sufficient communication. (Byrne v Van Tienhoven)
  + The **reasonable time to accept an offer can be determined from the conduct and language** of the two parties, the nature of the goods and other reasonable indications. (Barrick v Clark)
  + **Statements made outside of a contract** have no bearing in deciding whether there was an agreement. (Barrick v Clark)

* Revocation with Part Performance (Unilateral Contracts)
  + An **offeror can only revoke a unilateral contract if the offeree did not live up to their side of the contract**. (Errington v Errington and Woods)
  + Offer **cannot be revoked once offeree doing tasks to accept and offeror knows**. (Errington v Errington and Woods)

**Standard Forms and Exclusion Clauses**

* **Standard forms** and **boiler plates**:
  + Standard form **agreements are mass produced and usually drafted by a party in a**n economic condition on a take-it or leave it basis. Used for transactions over and over again.
  + **Boiler plate term** is a standard provision within a standard form contract. Applies to a situation that occurs over and over again in an unchanged form.
* **Exclusion Clauses**
  + If a term of the contract is particularly onerous, the party looking to enforce that term must **prove the other party was aware of the term** through either their reading of the specific term or through direct notification of the specific term. (Tilden Rent-A-Car v Clendenning)
  + It is **not a general principle of contract law that a party must draw attention to an exclusion of liability clause.**  (Karroll v Silver Star Mountain Resorts)
    - To find if there is a **duty to draw attention**, one must look at:
      * the effect of the clause in relation to the nature of the contract;
      * the length and format of the contract;
      * and the time available for reading the contract.
  + In cases with automatic ticket dispensers, the contract is formed when the plaintiff inserts money into the machine and receives the ticket; conditions that are not seen until after this time are not binding as the contract has already been agreed upon without the conditions. (Thorton v Shoe Lane Parking)

**Consideration**

A promise to sell something needs to be supported by the payment, a promise to pay.

It must move from the promisee to the promisor.

* **Gratuitous Promise**
  + Unless the promisor gets **some specific** benefit from a gratuitous promise, then there is no consideration. (Dalhousie College v Arthur Boutilier)
  + **A promise to subscribe to a charity is not enforceable in the absence of a bargain**.
  + The doctrines of part performance and estoppel will not operate **absent a pre-existing legal relationship between the parties**. (Brantford General Hospital v Marquis Estate)
  + F**or a term to be implied in a contract it has to be very obvious**. A promise may be lacking, and yet there might be "instinct with an obligation" imperfectly expressed. (Wood v Lucy, Lady Duff-Gordon)

* **Past Consideration**
  + **Promises are not sufficient** to found a contract. (Eastwood v Kenyon)
  + **Consideration made in the past is no consideration at all**. (Eastwood v Kenyon)
  + **Moral obligation does not constitute consideration**. (Eastwood v Kenyon)
  + **A promise made after performance** can be enforced, only if it was understood by the parties that there will have some kind of reward **prior the performance**. (Lampleigh v Brathwait)
  + A motive (will) could not be consideration, even 1 pound can be GOOD CONSIDERATION. PEPPERCORN RULE (Thomas v Thomas)
* **Pre-Existing Duty**
  + Performance of a pre-existing duty is not legally sufficient consideration. (Stilk v Myric)
  + **A promise to perform a pre-existing contractual obligation to a third party can be good consideration**, citing Lampleigh v Brathwait. An act done prior to a promise will be good consideration if: (Pao On v Lau Yiu Long)
    1. the act was done at the promisor’s request
    2. the parties understood that that act would be remunerated; and
    3. had the promise occurred in advance of the act it would have been enforceable
  + **A prior duty owed to the promissor is not legally sufficient** consideration. (Gilbert Steel)
  + A pre-existing duty to the promissor can be legally sufficient consideration if there is a **practical benefit** to the promissor. (Williams v. Roffrey Bros) Here it was timely completion.
    1. **Practical Benefit Test (Williams v. Roffrey Bros)**
       1. Obtaining an increased chance of performance already due to them avoiding the need to seek legal redress
          - Demonstrably better chance of completion objectively assessed
       2. Obtaining the chance of acquiring additional benefits beyond those in original contract or of avoiding subsequent dis-benefits
          - EG: avoidance of liability to 3rd parties contractual breaches; maintenance of good &valuable business relationships; prevention of damage to the promisor's reputation or threats to the financial viability of the business.
       3. Practical benefit will be present where actual performance would provide more benefits to the promisor than would non-performance or fewer harms than would breach.
          - The practical benefit subsists in the promisor measuring the value of the promisee's continued performance weighted against the potential disadvantages of accepting this performance
  + A **post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress**. (Greater Fredericton Airport v NAV CANADA)
    1. To establish economic duress, two conditions must be met:
       1. the promise but be made under pressure (demand/threat);
       2. the pressured party must have no option but agreeing.
    2. If these conditions are met, three factors must be analyzed:
       1. was the promise supported by consideration?
       2. was the promise made "under protest"?
       3. were reasonable steps taken to disaffirm the promise?

* **Part Payment**
  + **Payment of a lesser amount cannot serve as satisfaction of a larger amount.** (Foakes v Beer)
  + Distinguished Roffrey and followed Foakes: Even in a case where there may be a practical benefit to accepting a lesser amount in payment of a debt, this is not sufficient consideration to find a binding contract. (RE Selectmove)
  + Accepting terms that **benefit the creditor for convenience can amount to consideration**. A negotiable instrument such as a cheque, or an object of a value less than the debt, can be consideration even if the amount is less then the cash debt. (Foot v Rawlings)

***BC Law and Equity Act S43*** *(Mirrors judicature act in Ontario)*

* Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.
* Cannot be used in a unconscionable way. (Eg. You know the other person is going through financial hardship and you exploit them)

# Promissory Estoppel

The TEST:

1. An existing (or anticipated) legal relationship
2. A promise or representation - intended to be binding and acted upon
3. Reliance by the defendant
4. Detriment to the defendant
5. Equities in the defendant (Unconscionability)

* **Estoppel**
  + **A promise (1) intended to be binding, (2) intended to be acted on and (3) in fact acted on, is binding so far as its terms properly apply** (Central London Property Trust v High Tress House)
  + In order for a promise to qualify for estoppel as defense, **it must be a promise or assurance intended to alter the legal relations** between the two parties. (John Burrows v Subsurface Surveys)
  + **A friendly gesture is not a binding agreement**, and if it is relied upon estoppel will not be available as a defense. (John Burrows v Subsurface Surveys)
  + **Substitute agreements require consideration** to be binding at common law. (D&C Builders v Rees)
  + **Substitute agreements may be acceptable in equity even if they do not have consideration, if it would be inequitable to force the debtor to pay any more**, there was an agreement between the two parties that the new sum would settle the debt, and this agreement was relied upon by the debtor. (D&C Builders v Rees)
  + **Estoppel is only a defence, not a cause of action where one did not exist before**. (Combe v Combe)
    - Detriment accepted as a substitute for consideration in the US as a sword and in AU. Courts not willing to create new rights without fresh consideration.
* **Estoppel with Waiver**
  + To waive rights there must be f**ull knowledge of rights and an unequivocal and conscious intention to waive** them. (Saskatchewan River Bungalows v Maritime Life Assurance)
  + A **waiver can be retracted** (explicitly or impliedly) with sufficient notice in reasonable time. (Saskatchewan River Bungalows v Maritime Life Assurance)
  + Factors considered in estoppel (Waltons Stores v Maher):
    - Need for an immediate response (urgency)
    - Obligation to communicate their intentions

# Privity of Contract

* **If not offeror or offeree, they are a stranger of the contract and not privy.**
* **A contract cannot confer benefits or impose obligations to a person who is not a party to the contract.** Exceptions:
  + Trusts
  + Agency
* **Third Parties (General)**
  + The party to whom the benefit of a promise accrews may bring his action. (REVERSED IN TWEDDLE) (Provendor v Wood)
  + **Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it**. (Tweedle v Atkinson)
  + **Natural love and affection is not sufficient consideration** in the eyes of the law. (Tweedle v Atkinson)
  + **Only a person who is a party to a contract can sue** on it. (Dunlop Pneumatic Tyre v Selfridge)
  + Even if a contract provides a third party with an enforceable right, **there still must be consideration** (Dunlop Pneumatic Tyre v Selfridge).

* **Agency**
  + A principal not named in the contract, however, may sue upon it if the promisee really contracted as his **agent** (Dunlop Pneumatic Tyre v Selfridge).
  + **Each party to an agent by promise to be bound is sufficient consideration** for a contract. (McCannell v Mabee McLaren Motors)
  + **Test for Agency** (New Zealand Shipping v A.M. Satterthwaite):
    1. if the party is meant to be covered by provisions;
    2. if the promissor is clearly acting as agent for the party; and
    3. if the promissor has authority to do this;

* **Trusts**
  + **Third party privity is not enforceable when the legal relationship is created, but when the consideration is actually moved to or from the third party.**
  + **Third Party might acquire a benefit (privity exceptions):**
    - An Assignment (process in which a contractual party transfers their rights to a third party)
      * Assignee is then a stranger to the contract
      * Can provide in a narrow range of cases, a way to avoid the harsh consequences of the privity doctrine
      * Not all agreements are capable of being assigned (personal privilege or obligations)
    - Mortgage
    - Sale of home
    - Debt collection agency
    - Life Insurance
    - Personal Property Security Acts
  + Circumvention Means:
    - Trusts
    - Party brings action for the benefit of a third party
    - Agency relationship
    - Employee claiming benefit of their employer's limitation clauses
  + **Third parties cannot sue for breach of contract** when they were not a party to the contract, even if they were named as a beneficiary of the contract. (Beswick v Beswick)
  + **Executors of wills** can sue for specific performance of promises made in contracts with the deceased. (Beswick v Beswick)
  + **A beneficiary to a trust can sue on a contract made by the trustee for their benefit**. (Vandepitte v. Preferred Accident Insurance)
    - To create a trust there must be clear intention to create a trust by R.E. Berry and no evidence was adduced to establish the creation of such a trust.

* **Third Parties (Employees)**

Privity is used to limit liability to 3rd parties who are not parties to the contract. Where it is the intention of the parties to bestow a benefit upon a 3rd party , the court would uphold that the benefit be upheld.

* + If contracting parties want 3rd parties to benefit from a clause, **they should state that intention as explicitly as possible**. If contracting parties do not want 3rd parties to benefit from a clause, they can exclude those parties using that language. (London Drugs v Kuehne & Nagel International)
    - **He sets out a two-step test that must be satisfied in order for employees to be excluded from liability:**
      1. the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employee(s) seeking to rely on it; and
      2. the employees must have been acting in the course of their employment and must have been performing the very services provided for in the contract when the loss occurred.
  + Test for Negligent Mis-representation (Edgeworth Construction v N.D. Lea):
    - makes a representation,
    - knows it will be relied upon, and
    - it is relied upon.

# Writing Requirement:

***Law & Equity Act*, s.59**

* The common law enforced contracts under writing, oral agreements, as well as partly oral, partly writing agreements.
* Common law do not require contracts to be recorded in writing to be enforceable, but do require some things to be in writing to be enforceable.
* If it is not in writing it is not void but only unenforceable.

**Typically consumer protection:**

* Contracts of sale over $40 (receipts will typically suffice)
* Contract respecting **land** or disposition of land signed by the parties

**Electronic Transaction Act in BC**

* Overrides s.59 of the Law and Equity Act for writing requirement.

May be sent in electronic form.