



## Road Map

### Contract formation

- is there a contract?
  - bilateral/unilateral/non-bargain?
  - offer & acceptance (correspondence?)
  - formalization & certainty
  - intention
  - consideration
- existing contract modification
  - consideration? promissory estoppel?
- privity of K
  - ~~3<sup>rd</sup> party seeking to enforce K~~
  - 3<sup>rd</sup> party relying on limitation clause
- does the written K constitute the whole agreement (parol evidence)?

### Non-bargain promises (i.e. no consideration)

- contracts under seal
- past consideration
- promissory estoppel?

### Contract interpretation

- representations
  - innocent misrepresentation
  - ~~fraudulent misrepresentation (tort)~~
  - ~~negligent misrepresentation (tort)~~
- written contract
  - forms: tickets, standard form
  - interpretation of terms (*contra proferendum*)
  - exclusion or limitation clause(s)
  - commercial context / factual matrix
- collateral warranty
  - inconsistent w/ written contract
  - varies/adds/modifies written contract

### Parol evidence rule

- admissibility → pleading
- substantive → written K = total agreement OR written K + parol evidence = total agreement

### Contract Issues

- contract formation
  - rectification
  - non est factum*
  - mistaken identification
- unfairness
  - undue influence
  - duress
  - unconscionable
- penalties/forfeitures
- illegality
  - common law
  - statutory
- public policy
  - restraint of trade
  - ambiguity
- mistake
  - mistake in contractual terms
  - mistake in assumption
  - equitable mistake
  - rectification
  - frustration

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## Guiding Principles

contract	A promise that the law will enforce.
<i>nemo dat quod habet</i>	"you can't give what you don't have"

## Supplementary Definitions and Policy Arguments

### Vocabulary

<i>Term</i>	<i>Definition</i>
Agency	Mechanism by which a person contracts on behalf of a 3 <sup>rd</sup> party. Principal (3 <sup>rd</sup> party) confers authority to agent to make Ks or dispose of property on behalf of principal. As agent authorized to act 3 <sup>rd</sup> party, principal (not agent) bound directly to other party, and liable for contractual obligations / receives contractual benefits. Agency agreements specify the scope within which the agent can act (i.e. the types of Ks entered into).
Assignment	Legal transference of right or property that transfers all associated rights and obligations. Historical limitations on assignment rights mostly eliminated by statute or equity. Ex: B owes A \$500. A sells B's debt to C for \$400. C takes the K subject to the equities and state of accounts in the K → subject to the equities in the K: C's rights are no greater and no less than A's rights → subject to the state of accounts: if B paid \$100 to A, B will only have to pay \$400 to C → no requirement for permission of B unless K has a prohibitions on assignment (or falls within exceptions for personal service Ks)
<i>Caveat emptor</i>	"let the buyer beware" → no recovery from seller for defects in property unless concealed/misrepresented
Charterparties	Part of a special body of law around mercantile shipping Key contractual term: any deviation from the route specified in the K is considered a serious breach of K (can only accept significant risks of shipping on an agreed-upon route)
Condition	Damages and right to repudiate contract.
<i>Contra proferentem</i>	K interpretation principle: ambiguous term will be construed against the interests of the party that wrote it
K without term	Implied provision that the K can be ended by either party with reasonable notice, or with cause. Common law provision for notice can be specified in the K. If not, case law determines what constitutes reasonable notice.
Fixed term K	Termination at end of K term, or with cause.
Innominate term	Depending on type of breach: repudiation and damages (condition-like) OR damages (warranty-like)
Integration clause	Clause stating that the written document contains all terms of agreement (excludes other representations)
Liquidated damages	Genuine forecast of the damages that a party might suffer if K is broken
Nonfeasance	Failure to perform an act required by law
Partially executed K	Exchange of intangible promise and tangible consideration.
<i>Statute of frauds</i>	Requirement that certain kinds of contracts (incl. those for the disposition of land) are only enforceable in writing. In BC, minimal writing requirements still in place although may be overcome by some evidence.
Subrogation	Legal mechanism under common law by which an insurer of one party steps into that party's shoes so to have the benefit of that party's rights and remedies against a third party. Typically a non-subrogation clause to prevent recovery against policy holder and policy holder's family.
Void	Having no legal force and therefore not binding at law.
Voidable	Capable of being void.
Warranty	A promise that has contractual force. Expectation damages.
Wholly executory K	Exchange for a promise for a promise.
"Who's in breach?" ("game")	After entering a K, one of the parties is dissatisfied w/K. Instead of breaching, looks for the other party to breach in order to declare the K breached (and therefore repudiated). However, the other party will claim that the breach was not sufficient to repudiate K and argue that the first party "jumped the gun" and therefore was the party to breach.

Remedies in Contracts	
Remedies	Details
Estoppel	Method of stopping the other party of raising an argument or doing something that the other party would otherwise do. <b>Shield, not a sword.</b> <u>Fact estoppel</u> : A asserts a fact. B relies on fact. A will be estopped from rescinding original fact. <u>Promissory estoppel</u> : A promises to do something, or not do something. B relies on promise. A will be estopped from rescinding promise ( <i>Hughes, Central London Property Trust</i> )
Expectation damages	→ in tender K, balance of probabilities whether plaintiff would have received K if non-compliant bid rejected. Expectation damages = full profit of the job ( <i>MJB Enterprises</i> )
Repudiation	Due to a breach of K, both parties are relieved of future obligations (no longer bound by K).
Rescission	Unravel the entire K to return the parties to their original position ( <i>status quo ante</i> ). To use, must be possible to restore parties to original position. n.b.: not typically a remedy for a breach of K when straight forward non-performance  Equitable remedy requirements: clean hands, come to court of equity promptly, must not be guilty of sharp practise, no interference w/ 3 <sup>rd</sup> party rights

Policy Considerations in Contracts	
Policy Consideration	Details
Certainty	Pre-requisite for enforceability is a certain agreement.
Freedom to contract	Courts are hesitant to interfere with parties' decisions to contract as they choose.
Predictability	Courts should enforce the sanctity of the contract to ensure predictable commercial functioning.
Unjust enrichment	Courts should not permit a defendant to breach a contract in such a fashion that the defendant benefits at the plaintiff's expense.
"Happy breach"	Courts should not permit a plaintiff to oblige a defendant to remain in a contract that is financially disadvantageous. Typically, the defendant should be able to breach the contract and pay the damages to put the plaintiff in the position as if the contract was completed (in a happy breach situation, this cost is less than the continuation of the contract.)
Risk allocation	Contracts permit parties to allocate risk based on determining which party will be liable for which risks. To facilitate risk allocation, courts enforce intention of bargains.

Contract Enforceability Policy Factors	
Enforceability typically matches the degree to which an agreement matches the traditional commercial bargain. Higher degree of correspondence = higher degree of enforceability. Lower correspondence = lower change of enforcement.	
Promoting enforceability	Advocating caution
Enforce voluntary obligations assumed in bargain	Avoid imposing (new) contractual obligations
Protect reasonable expectations of the parties	Avoid imposing unfair surprise on parties
Promote commercial efficiency	Less resemblance to standard commercial bargain
Avoid finding uncertainty	Family arrangement
Harmonious interpretation	Contradiction between written and collateral Ks

Spectrum of Contract Enforceability	
← Probably enforceable	Likely not enforceable →
allocation of risk	illegality
reasonable expectation	no reliance
commercial good	impossibility
reliance	ambiguity
business predictability	non-commercial agreements
mutuality of obligation	coercive
clear wording	no capacity / mental state

Bargains: Offers and Acceptances			
Term	Details	Key Concepts	
Bargain	Intention and mutual assent to sufficiently certain terms	<ul style="list-style-type: none"> <li>• Mutual assent</li> </ul>	
Qualities of a commercial bargain	(1) offer (2) acceptance (3) consideration (typical in commercial bargains)	<ul style="list-style-type: none"> <li>• Offer</li> <li>• Acceptance</li> <li>• Consideration</li> </ul>	
Offer	→ A binding offer requires intent to be bound: would a reasonable party believe the other party intended to be bound by the proposed terms? ( <i>Denton</i> ) → PPP (price, property, parties): an offer must contain all the terms necessary to form a K such that an acceptance is all that is required to complete the K ( <i>Johnston Bros.</i> ) → advertisements not generally offers (unilateral K / offer to world) but may be considered if sufficiently certain ( <i>Lefkowitz</i> ) → self-serve items as "invitation to treat" therefore offer = presenting to cashier for purchase and acceptance = cashier accepting payment ( <i>Pharmaceutical Society</i> ) → offer may be changed or withdrawn prior to acceptance ( <i>Lefkowitz, Manchester Diocesan</i> )	<ul style="list-style-type: none"> <li>• Intention</li> <li>• All necessary terms</li> <li>• Advertisements</li> <li>• Invitation to treat</li> <li>• Change / withdrawal prior to acceptance</li> </ul>	
Acceptance	→ may be stipulated by offer ( <i>Eliason</i> ) → must be communicated to person who made offer ( <i>Larkin</i> ) → must be made in a reasonable time frame ( <i>Manchester Diocesan</i> )	<ul style="list-style-type: none"> <li>• Match offer</li> <li>• Must be communicated</li> <li>• Within reasonable time frame</li> </ul>	
Battle of the forms	Classical model: when contradictory term, new terms are a rejection of the 1 <sup>st</sup> offer therefore 2 <sup>nd</sup> form is a counter-offer and the conclusion of the K is acceptance ( <i>Butler Machine</i> ) → typically the last "offer" prior to acceptance governs, but degree of arbitrariness in what is acceptance (i.e. in a product order, is acceptance shipping the goods after receiving a purchase order or is acceptance opening the box with an invoice on top?) → business efficiency: more cost-effective to use own forms and run risk of battle of the forms than to secure an individualized offer/acceptance each time as most battle of the forms cases will not go to court (options: absorb/internalize loss; run risk that other party will be prepared to internalize loss over court fees; negotiate a solution)	<ul style="list-style-type: none"> <li>• Business efficiency</li> </ul>	
Tendering	Canadian context: all public/quasi-public organizations must tender contracts → primarily construction contracts but may include service contracts for legal services, hospitality services, etc. → applicable to government (local/provincial/federal), Crown corporations, school boards, hospital boards  Canadian model of tender process ( <i>Ron Engineering</i> )	<ul style="list-style-type: none"> <li>• Public/quasi-public organizations</li> <li>• Contract A and Contract B</li> <li>• Implicit term of fair dealing = consideration</li> </ul>	
	Contract A: tender contract Offer = request for proposals/tenders Acceptance = submitting tender/bid Tender/bid cannot be withdrawn changed after submission (per term in Contract A)		Contract B: construction contract Offer = submitted tender/bid (per terms of Contract A) Acceptance = selecting K (per terms of Contract A)
	Implicit term of fair dealing in Contract A that fulfills requirement for consideration (both parties secure terms in K) ( <i>Ron Engineering, MJB Enterprises</i> )		

Bargains: Formalization and Certainty		
Term	Details	Key Concepts
Principle	An agreement must contain <b>all essential components of contract</b> . As a general rule, courts will not enforce agreements that are missing essential terms.	<ul style="list-style-type: none"> <li>• All essential terms</li> </ul>
Spectrum of Certainty and Enforceability	<i>no agreement on any terms</i> ← <i>all terms agreed upon in excruciating detail</i> → Tension: a document that courts will find <b>too vague and uncertain</b> will be <b>efficient</b> in the <b>commercial context</b> while a document that is <b>clear and formal</b> will be <b>inefficient</b>	<ul style="list-style-type: none"> <li>• Preference for enforceability</li> <li>• Commercial</li> </ul>

	<p>Balance: sufficiently specific for courts to enforce but general enough to be practical                  → in Canada, courts are inclined to find the contract enforceable especially in situations where parties intended the agreement to be legally enforceable                  → indicator: pre-existing legal relationship where past practise was for legal enforcement (<i>Hillas, Foley, Empress Towers</i>)</p>	<p>efficiency</p> <ul style="list-style-type: none"> <li>• Certainty</li> <li>• Balance commercial flexibility w/ certainty</li> </ul>
<p>Agreement on Price / Enforceability of Unfixed Prices</p>	<p>If the agreement <b>does not specify price or a mechanism to set price</b>, the agreement is simply a set of terms that the parties intended to include in a K when it is formed.                  → Agreement to enter an agreement (with critical component undetermined) is not a K</p> <p>If the agreement <b>specifies a mechanism to determine price but the formula is faulty</b>, the court may find the mechanism sufficiently precise and use the mechanism to resolve the defect, provided that the rest of the agreement constitutes a binding agreement (<i>Empress Towers</i>)                  → Arbitration clause not applied if nothing agreed upon as no K (<i>May &amp; Butcher</i>)                  → Arbitration clause applied</p> <p>If the agreement <b>specifies a formula but no mechanism</b>, the courts will supply the machinery to provide the formula.</p> <p>If the agreement is <b>silent on price</b>, the court can apply a term for a reasonable price                  → reasonable price = market price (the court = mechanism for disagreement)</p> <p>If the agreement follows <b>an existing contractual relationship</b>, the court may find the past practise sufficient to resolve a gap in certainty (<i>Hillas</i>)</p>	<p>Three solutions for unfixed prices:</p> <ul style="list-style-type: none"> <li>• (1) silence = implied term for reasonable price (<i>May &amp; Butcher</i>)</li> <li>• (2) 3<sup>rd</sup> party mechanism to determine price (<i>May &amp; Butcher</i>)</li> <li>• (3) past practise (<i>Hillas</i>)</li> </ul>
<p>Interpretation Approach</p>	<p>The courts determine what the parties <b>intended</b> and <b>give effect to that intent</b>.                  → do not interpret words to destroy content but do not create a K where none should be created                  → construe documents fairly and broadly to give effect to intention (<i>Hillas</i>)</p> <p><b>Commercial context:</b>                  There may be a contract that appears incomplete or uncertain but is sufficiently certain in light of context (and past experience determining price and type, etc.)                  → existing contractual relationship (<i>Hillas</i>)  <u>Policy Consideration:</u> finding a new K unenforceable would create uncertainty about past actions (<i>Hillas</i>)</p> <p><b>Implied terms:</b>                  Courts may imply terms to meet industry standards or based on an “officious bystander” test to include what a reasonable person would expect (<i>Foley</i>)</p>	<ul style="list-style-type: none"> <li>• Give effect to intent</li> <li>• Broader in commercial context</li> <li>• Existing contractual relationship</li> <li>• Implied terms</li> </ul>

**Bargains: Correspondence**

<i>Term</i>	<i>Details</i>	<i>Key Concepts</i>
General Rule	Acceptance is valid (and the K is formed) when communicated and received by offeror.	• Acceptance = receipt
Post box Acceptance Rule	<p>In commercial context, it is common for agreements between parties in different locations to be facilitated by the postal service.</p> <p><b>If there is an implied or express term that acceptance may be made by mail, the acceptance is complete when it is mailed (<i>Household Insurance</i>)</b>                      * does not apply to revocation, which must be communicated (<i>Byrne</i>)                      * does not apply when overridden by express terms of K (<i>Holwell Securities</i>)                      * does not apply to faxes (<i>Eastern Power</i>)</p>	<ul style="list-style-type: none"> <li>• Post to facilitate agreements</li> <li>• Acceptance = mailing</li> <li>• Exception: express or implied terms of K</li> </ul>

	<p><u>Policy Consideration:</u> While rule is outdated in light of instantaneous communication, it is a well-known rule which allows both parties to know the legal principle and limit/mitigate associated risk.</p>	
Risk Allocation	<p>Key feature of bargains is <b>certainty</b>: when can the acceptor reliability count on the binding K being formed so that the acceptor can start conducting affairs with the understanding that the K is formed?</p> <p>(1) risk for acceptor if acceptance at receipt = uncertainty as to when the K is formed (2) risk for offeror if acceptance at mailing = wait to receive acceptance</p> <p><u>Policy Consideration:</u> Offer terms are set by the offeror therefor in a position to <b>minimize or limit risk</b> → i.e. can specify time or location of acceptance (<i>Eliason</i>)</p>	<ul style="list-style-type: none"> <li>• Certainty</li> <li>• Risk allocation</li> <li>• Offeror holds position to minimize or limit risk</li> </ul>
Instantaneous Correspondence	<p>If the <b>phone line goes dead</b> prior to acceptance being communicated, <b>no K</b> formed. → Likely the party giving the acceptance is aware either that the acceptance was not heard or at least doubt whether it was heard.</p> <p><b>Instantaneous (electronic) forms of communication</b> are governed by provincial legislation. Typically, <b>follow general rule (valid when delivered)</b> (<i>Eastern Power</i>). → presumption that receipt = moment the communication was available to be received → if there is an error, no electronic means to rectify the error and the individual notifies the other party of the error, the K is not formed (and any consideration must be returned) (<i>Electronic Commerce Act, ON</i>) → acceptance can be formed by clicking an icon on a website</p>	<ul style="list-style-type: none"> <li>• No K if phone line dead</li> <li>• Instantaneous communication = general rule (typically)</li> </ul>
Jurisdiction	<p>Generally, <b>legal jurisdiction is the one in which the K is formed</b>. A K is formed when the acceptance is complete (<i>Eastern Power</i>) → With post box, acceptance is complete at the moment of mailing therefore <b>K formed where acceptance is mailed</b>. → With instantaneous forms of communication, acceptance is complete at delivery therefore <b>K formed where acceptance delivered</b>.</p>	<ul style="list-style-type: none"> <li>• Jurisdiction = where K formed</li> <li>• Postal acceptance exception</li> </ul>

### Bargains: Consideration

Term	Details	Key Concepts
General rule	<p>For a K to be enforceable, something must be given between the promisor and the promisee. This exchange is the consideration. → Law privileges standard commercial bargains or those that closely resemble a commercial bargain as enforceable. Consideration is a standard component of the commercial bargain.</p> <p><u>Policy Consideration:</u> Ks should be enforced to facilitate smooth commercial operations by fulfilling the expectation that Ks will be upheld.</p>	<ul style="list-style-type: none"> <li>• Consideration = exchanged</li> <li>• Standard commercial bargain</li> </ul>
What constitutes consideration?	<p>Consideration = some element of exchange to make a contract enforceable such as a <b>benefit</b> to promisor or a <b>detriment</b> to promisee and which includes <b>exchange of promises</b> (wholly executory contract) → "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" (<i>Hamer</i> CB 257) → courts <b>do not assess the value of consideration</b> but rather determine whether something was promised/done/forborne/suffered → consideration must be "of <b>some value</b> in the eye of the law, <b>moving from the plaintiff</b>" (<i>Thomas</i> CB 259)</p> <p><b>Nominal consideration</b> = something that has value but value is not commensurate with the value of the exchanged promise.</p>	<ul style="list-style-type: none"> <li>• Types of consideration</li> <li>• Benefit or detriment or exchange of promises</li> <li>• Nominal consideration</li> </ul>

	<p><u>Policy Considerations:</u> (1) evidence that parties made the agreement; (2) evidence that parties intended the agreement to be legally binding (as opposed to unenforceable offer or a gift)</p> <p><u>Consideration:</u></p> <ul style="list-style-type: none"> <li>→ abstaining from drinking, smoking, gambling &amp; swearing (i.e. something that one was <b>legally entitled to do</b>): <i>Hamer</i></li> <li>→ £1 ground rent paid to executor (i.e. <b>nominal consideration</b>): <i>Thomas</i></li> <li>→ undertaking additional danger in an existing K: <i>Hartley</i></li> <li>→ incurring liability to a 3<sup>rd</sup> party: <i>The Eurymedon</i></li> <li>→ discharging a (honestly believed) legal obligation: <i>Fairgrief</i></li> </ul> <p><u>No consideration:</u></p> <ul style="list-style-type: none"> <li>→ complaining about distribution of father's estate (i.e. something that one <b>did not have a legal entitlement to do</b>): <i>White</i></li> <li>→ keeping property in good repair (i.e. something <b>incident to one's benefit</b> received under the K): <i>Thomas</i></li> <li>→ respect for testator's wishes (i.e. something from <b>someone not party to K</b>): <i>Thomas</i></li> <li>→ promise to do something already obliged to do (i.e. <b>pre-existing duty</b> in maritime context): <i>Harris, Stilk</i></li> <li>→ increased credit (i.e. something <b>not bargained for</b>): <i>Gilbert Steel</i></li> <li>→ possibility of "good price" on a future K (i.e. <b>no express commitment</b>): <i>Gilbert Steel</i></li> <li>→ paying a lesser sum in satisfaction of a greater amount: <i>Pinnel's Case, Foakes</i> Exception: <i>Law and Equity Act</i> (BC) will permit part performance to constitute satisfaction of the obligation with express acceptance of creditor</li> <li>→ "in consideration of the subscription of others" (not an exchange of promises) : <i>Dalhousie College</i></li> <li>→ undertaken building projects: <i>Dalhousie College</i></li> </ul>	
Gift vs. Contract	<p>To be enforceable, the gift must be complete (i.e. it must be delivered).</p> <p><u>Policy Consideration:</u> Delivery required as a gratuitous gift does not involve consideration and delivery ensures that legitimate creditors are not deprived without certainty of intention to make a gift. (Likely <i>White</i> and <i>Hamer</i> would be decided as gifts in modern jurisprudence.)</p>	<ul style="list-style-type: none"> <li>• Gift = complete</li> </ul>
Contract Interpretation	<p>"The law has <b>outgrown its primitive stage of formalism</b> when the precise word was the sovereign talisman and every slip was fatal. It takes a broader view to day. A promise may be lacking and yet the whole writing may be "instinct with an obligation," imperfectly expressed" (<i>Tobias</i> CB 265)</p> <ul style="list-style-type: none"> <li>→ courts can <b>imply terms</b> when (1) "<b>official bystander</b>" would expect term; and (2) to <b>meet industry standards/necessary for business efficacy</b></li> </ul>	<ul style="list-style-type: none"> <li>• Formalism</li> <li>• Implied terms</li> </ul>
<b><i>Pre-existing Duties, Existing Contract Modification &amp; Consideration</i></b>		
General Rule: Pre-Existing Duties	<p>Generally, promising to what one is <b>already required (obliged) to do is not sufficient consideration</b> (<i>Stilk</i>).</p> <ul style="list-style-type: none"> <li>→ exception: undertaking <b>additional danger</b> in an existing K (<i>Hartley</i>)</li> <li>→ exception: incurring <b>liability to a third party</b> (<i>The Eurymedon</i>) "An agreement to do an act which the promisor is under an existing obligation to a third party to do may quite well amount to valid consideration" (<i>The Eurymedon</i> CB 267)</li> </ul>	<ul style="list-style-type: none"> <li>• Classic rule (<i>Stilk</i>)</li> </ul>
General Rule: Existing Contract Modification	<p>Generally, the rule from <i>Stilk</i> applies: <b>consideration ≠ promising to do something already obliged to do.</b></p> <p><u>Policy Consideration:</u> Strict interpretation can make business operation more difficult especially with business arrangements concluded without legal advice.</p>	<ul style="list-style-type: none"> <li>• Existing K modification: standard approach</li> </ul>

	<p>To make an existing contract modification binding, must provide consideration (<i>Gilbert Steel</i>):</p> <p><u>Option A</u>: <b>effective rescission</b> to replace existing K          → (1) original K; (2) K to break original K; (3) new K</p> <p><u>Option B</u>: provide <b>nominal consideration</b></p> <p><u>Option C</u>: sign the <b>agreement under seal</b> (therefore no consideration required to be enforceable)</p>	
Relaxation of General Rule	<p>Narrow modification of doctrine of consideration in narrow situations related to existing K modification (<i>Williams</i>):</p> <ol style="list-style-type: none"> <li>(1) A enters into a K w/B to do work/supply goods in exchange for payment</li> <li>(2) At some stage prior to completion of K, B has reason to doubt that A will be able to complete K</li> <li>(3) B promises add'l payment to A in exchange for promise to perform K on time</li> <li>(4) As a result of B's promise, B obtains in practise (i.e. from the surrounding circumstances) a benefit or obviates a disbenefit (i.e. avoids a loss) but not necessarily obtained directly from A</li> <li>(5) B's promise is not a result of economic duress or fraud on the part of A</li> <li>(6) Doctrine of practical benefit: B's benefit is capable of being consideration for B's promise so that the promise is legally binding and enforceable</li> </ol> <p><u>Canadian relaxation</u>:</p> <p>→ <i>Greater Fredericton</i>: post-contractual modification unsupported by consideration is <b>enforceable unless there is economic duress</b></p> <p>→ <i>River Wind Ventures</i>: post-contractual variation can be enforced "in the absence of consideration if the evidence establishes <b>either detrimental reliance by the Π or the gaining of a benefit or advantage by the Δ</b>"</p>	<ul style="list-style-type: none"> <li>• Relaxation of general rule w/ existing K modification</li> </ul>
Compromise	<p><u>Debt Satisfaction</u></p> <p>Classic rule: paying a lesser sum in satisfaction of a greater amount is not adequate consideration (<i>Pinnel's Case, Foakes</i>)</p> <p>→ Exception: <i>Law and Equity Act</i> (BC) will permit part performance to constitute satisfaction of the obligation with express acceptance of creditor</p> <p><u>Legal Action Compromise</u></p> <p>Classic situation: A drops a book and breaks B's foot. B sues A for \$20,000. Prior to trial, A and B meet to compromise. B agrees to pay \$10,000 if A agrees to give up legal action.</p> <p>→ While it appears to be a promise for a promise, what happens if A's claim was wholly spurious and B is not liable? If there is no real legal claim, has A given up something of value?</p> <p>→ Avoiding the costs of litigation regardless of outcome therefore generally found to be enforceable (despite the illusory nature of the consideration)</p> <p><u>General rule</u>: if the parties have a <b>genuine belief in the claim</b>, a compromise is supported by adequate consideration (<i>Fairgrief</i>)</p>	<ul style="list-style-type: none"> <li>• Debt settlement</li> <li>• Compromise of legal rights</li> </ul>
Charitable Donations	<p>Generally, a promise to make a charitable donation is not enforceable unless there is consideration (and an enforceable K). If it is not a K, it is a failed gift (unless delivered and the gift is complete).</p> <p>→ potential exception if subscription for specific building project and reliance</p>	<ul style="list-style-type: none"> <li>• Generally unenforceable unless K w/ consideration</li> </ul>

**Intention**

<i>Term</i>	<i>Details</i>	<i>Key Concepts</i>
Principle	Factors in the parties' relationship that would lead a <b>reasonable person to believe that the parties did not intend the promises to have legal effect.</b>	<ul style="list-style-type: none"> <li>• Some situations in which reasonable</li> </ul>

	<p><u>Family arrangements:</u> Generally presumed that families do not want their arrangements to be legally enforceable (<i>Rose</i>)</p> <p><u>Express statements that the agreement is not legally enforceable:</u> If expressly provided as such, agreements will not be found enforceable (<i>Rose and Frank</i>) → occasionally the courts find contradictory provisions/terms in Ks (esp. w/ documents under seal) and therefore the courts find the agreement enforceable (in spite of the express clause)</p> <p><u>Other situations:</u> → election promises (<i>Canadian Taxpayers Federation</i>)</p>	<p>person would not believe intention to make promises</p> <ul style="list-style-type: none"> <li>• Family arrangements</li> <li>• Express statements that the agreement is not legally enforceable</li> <li>• Election promises</li> </ul>
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**Non-bargain promises**

**Agreements under seal**

<i>Term</i>	<i>Details</i>	<i>Key Concepts</i>
Principle	<p>Agreements made under seal are enforceable irrespective of consideration.</p> <p>The seal does not replace consideration, but rather finds its historical origin in covenant. → Covenant recognized that a promise made in a deed (i.e. a promise under seal) would be legally enforceable.</p> <p><u>Policy consideration:</u> Placing an agreement under seal is clear evidence of the intention to be legally bound. Generally, Canadian legislatures have not hastened to abolish the seal although some American jurisdictions have not permitted the enforcement of gratuitous promises under seal.</p>	<ul style="list-style-type: none"> <li>• Enforcement w/o consideration</li> <li>• Historical origin in covenant</li> <li>• Clear indicator of intention to be legally bound</li> </ul>

**Past consideration**

Principle	<p>Typically, a mere voluntary courtesy will not normally give rise to an action. → However, there may be an action if the courtesy is extended because of a request (<i>Lampleigh</i>) → A later promise cannot be associated back with the original promise if gratuitous (no consideration) (<i>Roscorla</i>)</p> <p><u>Modern doctrine:</u> "An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise" (<i>Pao On</i>) Three requirements: (1) "The act must have been <b>done at the promisor's request</b>" (2) "the parties must have understood that <b>the act was to be remunerated</b> either by a payment or the conferment of some other benefit" (3) "payment, or the conferment of a benefit, must have been <b>legally enforceable had it been promised in advance</b>"</p>	<ul style="list-style-type: none"> <li>• Past consideration may be sufficient if requested</li> <li>• Modern doctrine</li> </ul>
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**Reliance and estoppel**

Principle	<p><u>Classic statement:</u> "It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results— certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has <b>the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced</b>, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights <b>will not be allowed to enforce</b>"</p>	<ul style="list-style-type: none"> <li>• Estoppel</li> </ul>
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	<p><b>them where it would be inequitable</b> having regard to the dealing which have then taken place between the parties" (<i>Hughes</i> CB 321)</p>	
Fact Estoppel	<p>When one party makes a representation of fact to another in words or by acts/conduct, the party will be estopped from asserting a different fact.                  → applicable to representations made at time of K formation  <i>Maddison v. Alderson</i> (UKHL 1883):                  "the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises <i>de future</i>, which, if binding at all, must be binding as contracts" (CB 320)</p>	<ul style="list-style-type: none"> <li>• Fact estoppel</li> <li>• Representations at K formation</li> </ul>
Waiver	<p>A tool developed by equitable courts as a kind of estoppel.</p> <p><b>Waiver = the assertion by words or conduct that party A will not rely on its strict legal rights under a K w/ party B</b>                  → an action arises when party A acts based on this reliance and party B asserts its strict legal rights</p> <p><u>Example:</u> with respect to real estate time clauses, equitable courts presumed that the time period was "a reasonable time thereafter." The presumption could be displaced by express terms ("Time is of the essence"). However, if the seller granted the buyer several extensions (i.e. to secure mortgage), the equitable courts would find that the seller waived the right to immediate action unless reasonable notice to rescind waiver.</p> <p>→ somewhat <b>arbitrary distinction from promissory estoppel</b>: traditional waiver is like an "on/off switch" (a representation that strict legal rights will or will not be enforced) while promissory estoppel is like a "halfway house" (a promise that strict legal rights will or will not be enforced)</p>	<ul style="list-style-type: none"> <li>• Waiver</li> <li>• Equitable form of estoppel</li> <li>• Distinction from promissory estoppel (arbitrary)</li> </ul>
Promissory Estoppel	<p>While contracts will not enforce a promise, they do refuse to let parties act inconsistently with the promise and enter an estoppel.                  → not traditional estoppel but "<b>promises</b> – promises intended to be binding, intended to be acted on, and in fact acted in" (<i>Central Property Trust</i> CB 322)                  → used as a <b>defence by either Δ or Π</b> (if Π's action founded on an independently existing right, Ktual or otherwise)                  → <b>equitable remedy</b> (<i>D&amp;C Builders</i>)</p> <p><u>Requirements:</u></p> <ol style="list-style-type: none"> <li>(1) <b>Existing legal framework</b> between the two parties</li> <li>(2) One party makes a <b>promise to the other party</b> in the existing legal relationship</li> <li>(3) This party is <b>prevented from going back</b> on the promise                  → promise include express promises (<i>High Trees</i>) and implicit promises by conduct (such as examples of fact estoppel and waiver)                  → promise can be <b>withdrawn with reasonable notice</b> (<i>Central Property Trust</i>)</li> </ol> <p><u>Classic Statement:</u>                  "The principle, as I understand it, is that where one party <b>intended to affect the legal relations</b> between them and to be acted on accordingly, then, once the other party has <b>taken him at this word and acted on it</b>, the one who gave the promise or assurance <b>cannot afterwards be allowed to revert to the previous legal relationship</b> as if no such promise or assurance had been made by him, but he must accept their legal relationships subject to the qualification which he himself has so introduced, <b>even though it is not supported in point of law by any consideration</b>, but only be his word" (<i>Combe</i> CB 324)</p>	<ul style="list-style-type: none"> <li>• Promissory estoppel</li> <li>• Shield not sword</li> <li>• Reasonable notice to withdraw</li> </ul>

	<p><u>Canadian application:</u></p> <ul style="list-style-type: none"> <li>→ only applies if used as a defence (<b>shield</b>) – cannot use to ground an action (<b>sword</b>) (<i>Gilbert Steel</i>)</li> <li>→ both parties <b>must intend to enter a legal relationship</b> or be in existing legal relationship (<i>N.M.</i>), which includes consideration of context in which promise is made (personal/romantic/family vs. commercial) + sufficient articulation of legal arrangement (<i>N.M.</i>)</li> <li>→ both parties <b>must intend change to legal relationship</b> (<i>John Burrows</i>) + consideration of context in which promise is made (commercial/legal vs. personal/friendly) (<i>John Burrows</i>)</li> <li>→ <u>test</u>: the course of conduct in the existing legal relationship has to be such that the one party could <b>reasonably infer that it was a representation that affected their legal rights</b> (not express words) (<i>Owen Sound Public Library</i>)</li> </ul>	
"Pointy Shield"	<p>Promissory estoppel cannot ground an action / create new legal relationships.</p> <ul style="list-style-type: none"> <li>→ However, it can prevent one party from enforcing a K right if a representation was made otherwise, which may make this party in breach of K (and therefore susceptible for a claim for damages) (<i>Owen Sound Public Library</i>)</li> </ul>	<ul style="list-style-type: none"> <li>• Promissory estoppel preventing exercise of a K right in such a fashion that it is in breach of K</li> </ul>

Unilateral Contracts		
Term	Details	Key Concepts
Principle	<p>One party makes an offer specifying a benefit if a particular act is performed (offer to the world). <b>Acceptance + consideration = performance of K.</b></p> <p>Classic case: "Lost dog. Reward \$50 if found."</p> <p><u>Policy considerations:</u> Useful in commercial contexts, efficient mode of business practise when attempting to reach broad audience</p>	<ul style="list-style-type: none"> <li>• Offer to the world</li> <li>• Acceptance + consideration = performance of K</li> </ul>
Spectrum of Specificity	<p style="text-align: center;">express term <span style="float: right;">extravagant marketing comment</span></p> <p style="text-align: center;">←—————→</p> <p style="text-align: center;">offer to the world (unilateral K) <span style="float: right;">puffery</span></p>	<ul style="list-style-type: none"> <li>• Puffery → offer to the world</li> </ul>
Requirements	<ol style="list-style-type: none"> <li>(1) Offer                         <ul style="list-style-type: none"> <li>→ can be revoked* (<i>Carbolic Smoke, Dale</i>)</li> <li>→ must include sufficient information for performance (<i>Grant</i>)</li> </ul> </li> <li>(2) Performance of K                         <ul style="list-style-type: none"> <li>→ performance functions as acceptance and consideration</li> <li>→ <b>no notice required</b> for performance unless specified in offer as acceptance is contemporaneous w/ performance (<i>Carbolic Smoke</i>)</li> <li>→ offers that <b>are continuing in nature do not require notice prior to performance</b> (provided offer is unrevoked*) (<i>Dale</i>)</li> <li>→ performance <b>cannot require both offeror and acceptor</b> (<i>Dawson Helicopter</i>)</li> </ul> </li> <li>(3) No requirement for motivation but likely requirement for awareness of offer (<i>Williams</i>)</li> </ol> <p>* Courts resolve problems w/ revocation in order to find no problem: (1) interpret performance req'd for acceptance broadly (<i>Carbolic Smoke, Grant</i>) OR (2) imply a term that offer not revocable (<i>Errington</i>) OR (3) find no revocation (<i>Dale</i>) OR (4) determine to be bilateral K / mutual exchange of promises (<i>Dawson Helicopter</i>) OR (5) imply relationship of trust and confidence (<i>Lac Minerals</i>)</p> <ul style="list-style-type: none"> <li>→ <b>implied term of no revocation more likely in a specific offer</b> (albeit unilateral K) than offer to the world (<i>Errington</i>)</li> <li>→ <b>preference for bilateral Ks</b> as easier to assess reliance and promises (<i>Dawson Helicopter</i>)</li> </ul>	<ul style="list-style-type: none"> <li>• No notice req'd</li> <li>• Performance = acceptance &amp; consideration</li> <li>• Revocation problems</li> </ul>

Government Agents	Three types of authority ( <i>Dale</i> ): (1) ostensible or apparent (appear to a reasonable person that the agent has authority) (2) implied (necessary authority to fulfill role) (3) actual or real (direct grant from authorizing party)	• Types of authority
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**Third-party Beneficiaries**

Term	Details	Key Concepts
Issue	Third party = non-participant in the contracting process Two issues: (1) can 3 <sup>rd</sup> party benefit from the K? (2) can 3 <sup>rd</sup> party be liable in the K?	• 3 <sup>rd</sup> party difficulties
Third Party Benefits: Privity of Contract	<b>Privity of contract:</b> only a party to the K who provided consideration can sue on the K ( <i>Tweddle, Beswick, Dunlop Tyre</i> ) → substantive issue (not procedural one): 3 <sup>rd</sup> party cannot sue unless (1) party to K and (2) provided consideration to other party ( <i>Beswick</i> ) → <u>exceptions</u> : (1) K formed by agent acting on behalf of 3 <sup>rd</sup> party (2) trustee relationship (3) assignment of rights	• Privity of K • Classic exceptions
Third Party Reliance on Himalaya Clause ( <i>The Eurymedon</i> approach)	<b>A 3<sup>rd</sup> party may rely on an exemption clause expressed for its benefit.</b> → <i>Himalaya</i> clause: a K provision for the benefit of a 3 <sup>rd</sup> party who is not a party to the K (from <i>Adler v. Dickson ("The Himalaya")</i> (UKCA 1954))  Mechanism by which this benefit is associated w/ the 3 <sup>rd</sup> party ( <i>The Eurymedon</i> ): <b>(1) agency relationship between party to K and 3<sup>rd</sup> party</b> a) bill of lading makes stevedore protected by liability limitation b) carrier, in addition to securing limitation of its own behalf, secures it for stevedore c) carrier has authority from stevedore d) any difficulties w/ consideration are resolved <b>(2) consideration = performance of unilateral K (per <i>Carbolic Smoke</i>)</b> a) consignor requires stevedore to unload cargo b) consignor issues unilateral K: if stevedore unloads cargo, consignor will grant stevedore benefit of liability limitation c) <b>promise to a 3<sup>rd</sup> party to perform an existing obligation can be good consideration</b> as it creates a direct obligation to enforce  * SCC adopts this approach in <i>ITO v. Miida Electronics</i> (SCC 1986)	• 3 <sup>rd</sup> party reliance on exclusion clause expressed for benefit • <i>The Eurymedon</i> approach
Extension of Liability Clauses to Third Parties (the Canadian approach)	Incremental change: <b>privity of K may be relaxed to include 3<sup>rd</sup> party beneficiaries who are covered by a limitation clause in a K</b>  <u>Policy Considerations:</u> difference between extension of liability clause (shield) and right to sue on K (sword); give weight to allocation of risk in K (not providing backdoor to recovery to a party that assumed liability for risk); serious injustice if employees deprived benefit of these clauses as not in position to K w/ other party directly; commercial context favours capacity of employer to negotiate benefit for employee (independent of agency arrangement)  <u>Requirements for Employee 3<sup>rd</sup> Party (<i>London Drugs</i>):</u> (1) limitation of liability clause includes <b>express or implied terms purporting to cover employees (<i>London Drugs</i>)*</b> * matter of interpretation that includes consideration of commercial context and policy considerations supporting relaxation (see above) ( <i>London Drugs</i> ) * plain reading of clause: no qualifying/limiting language (req. clear terms to counter clear terms) ( <i>Fraser River Pile</i> )	• Canadian extension of liability clauses to 3 <sup>rd</sup> parties • K interpretation • Within scope of K

	<p>(2) employees <b>acted in course of employment</b> and <b>performed services specified in the K</b> between the employer and the other contracting party (<i>London Drugs</i>)</p> <p><i>London Drugs</i> extends to non-employee/employer situations b/c focus on intention (express or implied inclusion of a 3<sup>rd</sup> party beneficiary) (<i>Fraser River Pile</i>)</p> <p><u>Requirements for Non-Employee 3<sup>rd</sup> Party (<i>Fraser River Pile</i>):</u></p> <p>(1) did parties intend to extend benefit to 3<sup>rd</sup> party seeking to rely on K provision?                  (2) are the activities performed by the 3<sup>rd</sup> party contemplated as within the scope of the K or K provision w/ reference to the intention of the parties?</p> <p>→ freedom of K should prevail unless it amends a crystalized benefit to a 3<sup>rd</sup> party                  → no unilateral withdrawal of benefit once it is crystalized (i.e. an actual benefit develops) (<i>Fraser River Pile</i>)</p>	
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**Mistaken Identity (of void and voidable contracts)**

Term	Details	Key Concepts	
Third-Parties Relying on Previous Ks	When B purchases a car from A and then sells it to C, C only acquires rights through B's acquisition of rights from A. C therefore relies on K btwn A and B. If there is a problem w/ the K btwn A and B, <b>3<sup>rd</sup> party rights depend on whether the K is void or voidable.</b>	<ul style="list-style-type: none"> <li>• 3<sup>rd</sup> party reliance on previous Ks</li> </ul>	
Void and Voidable Ks	<p><u>Void</u> = no K was formed given the significant defect</p> <p>Limited categories in which a K will be void:</p> <p>(1) forgery                      (2) <i>non est factum</i>                      (3) some kind of mistakes (typically fundamental) incl. a fundamental mistake in identity (i.e. Queen of England)</p>	<p><u>Voidable</u> = there is an error in the K but the K exists until one party takes action to set aside the K. A voidable K retains the features of a K (incl. the right to transfer Ktual rights to a 3<sup>rd</sup> party) therefore cannot be set aside after transferred to 3<sup>rd</sup> party.</p> <p>Example of categories in which a K will be voidable:</p> <p>(1) misrepresentation                      (2) mistaken belief that someone is credit worthy</p>	<ul style="list-style-type: none"> <li>• Void (limited)</li> <li>• Voidable (no longer voidable after transfer to 3<sup>rd</sup> party)</li> </ul>
Mistaken Identity vs. Mistaken Belief in Credit Worthiness	<p><u>Test: did the party intend to K w/ the person present</u> (believing that person to be credit worthy) (<i>Phillips</i>) or <u>w/ a specific person</u> (<i>Ingram</i>)?</p> <p>→ <u>criticism</u>: test is a matter of wordplay                      → <u>factors to consider</u>: <b>timing</b> (was the K concluded or all but concluded when misrepresentation occurred? or was the misrepresentation made at the outset of negotiations?) and <b>individuality</b> (was the K w/ a credit worthy person or w/ a specific person?) (<i>Phillips</i>)                      → <u>presumption</u>: K between the parties present (<i>Ingram, Lewis</i>)</p> <p><u>Phillips rule</u>: when 2 parties come to a K, the fact that 1 party is mistaken as to the identity of the other does not void the K. K is voidable prior to 3<sup>rd</sup> party acquisition of rights under K (<i>Lewis</i>)</p> <p><u>Policy consideration</u>: person forming the K is in the best position to prevent the risk therefore fairness dictates that person absorb the risk (as opposed to an innocent 3<sup>rd</sup> party who must rely on the first K)</p>	<ul style="list-style-type: none"> <li>• Mistaken identity = void</li> <li>• Mistaken belief in creditworthiness = voidable</li> </ul>	

***Non est factum* ("it is not my deed")**

Term	Details	Key Concepts
Principle	Written K was signed by mistake (without knowledge of true content of K and without negligence) therefore K void	<ul style="list-style-type: none"> <li>• Void K</li> </ul>

	<p>→ "Halfway house" between forgery (void K) and misrepresentation (voidable K).                  → Limited plea in instances when actual signature is on the document</p> <p><u>Presumption:</u>                  When a person of full age and understanding signs a legal document without reading it (and relying on another person's characterization of it), the document is signed (<i>Saunders</i> CB 451)</p> <p><u>Requirements:</u></p> <p>(1) signed <b>without negligence</b> (<i>Saunders</i>)                  → negligence (≠ tort negligence) = ordinary meaning of "carelessness"                  → <b>good reason why document was not read</b> (occasionally, good reason to rely on the option of another person such as a spouse)                  → "no man can take advantage of his own wrong" (<i>Saunders</i>)</p> <p>(2) document <b>materially different</b> from what person thought was being signed (<i>Saunders</i>)                  → generally: "fundamentally different"                  → difference in the <b>effect of the document</b> (not just form/content) (<i>Saunders</i>)                  → distinction between <b>character</b> (legal document vs. birthday card) = sufficient and <b>content</b> (mortgage for \$500,000 instead of \$5,000) = generally insufficient can be helpful but <b>not exhaustive standard</b> (<i>Saunders</i>)</p> <p><u>Policy Consideration:</u>                  Generally, signature on a document means that the signatory intended to sign the document (therefore high reliance for 3<sup>rd</sup> parties). The 3<sup>rd</sup> party relies on the signed document therefore the party who carelessly signs must bear the risk (<i>Marvco Color</i>).                  → need to certainty / security in business transactions</p>	<ul style="list-style-type: none"> <li>• Rare application</li> <li>• Presumption = signed</li> <li>• Two requirements</li> </ul>
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### Parol Evidence Rule

Parol Evidence Rule		
Procedural Element		
Term	Details	Key Concepts
Principle	<p>If K is in writing, <b>no evidence of pre-contractual negotiations or previous drafts (parol evidence) will be admissible</b> (<i>Prenn</i>)                  → parol evidence = what is said or written prior to distilling K into final written form</p> <p>When <b>oral promises contradict written K</b>, the parol evidence will be <b>excluded</b> (evidence rule) (<i>Hawrish</i>)                  → in Canada, this hardline approach followed in trio of decisions: <i>Hawrish</i> (SCC 1969), <i>Bauer</i> (SCC 1980) &amp; <i>Carman Construction</i> (SCC 1982)</p> <p>Admissible evidence = <b>factual matrix</b>                  → <u>Factual matrix</u>: factual background known to the parties at the time of or before K formation (incl. K genesis and objective purpose); commercial context</p>	<ul style="list-style-type: none"> <li>• Presumption: no admissibility if written K</li> <li>• Factual matrix</li> </ul>
Pleas	<p>The correct plea will permit the admission of parol evidence.</p> <p>Ex: <b>rectification</b> (massive quantities of evidence will be introduced to demonstrate the the K provision was incorrectly expressed in the written K)</p> <p>Ex: <b>collateral K or warranty</b> (a 2<sup>nd</sup> K made to induce signing of main K, which constitutes the 2<sup>nd</sup> K's consideration)</p> <p><u>Categories of pleas that will permit admissibility</u> (<i>Gallen</i> CB 513):</p> <p>(1) to show K invalid due to fraud, misrepresentation, mistake, incapacity, lack of consideration or lack of intention</p>	<ul style="list-style-type: none"> <li>• Pleas that permit admissibility of parol evidence</li> </ul>



	<p><u>Test (Yorke v. Duval qtd. in Gallen):</u></p> <ul style="list-style-type: none"> <li>(1) looking at the K in light of factual matrix, what would the impact of the statement be on the substance and foundation of the K's intended purpose?</li> <li>(2) whether it becomes plain by the words and actions of the parties that the responsibility of the warranty's representation rests with the vendor</li> </ul> <p>→ question of fact whether warranty exists but bound up w/ questions of K interpretation therefore decided together (<i>Gallen</i>)</p> <p>→ if warranty found, parol evidence is admissible and the oral warranty and written K are interpreted together (if possible): <b>harmonious interpretation = no application of <i>Hawrish</i> rule</b></p>	
<p>Printed Forms / Tickets</p>	<p><u>Rule:</u> "In cases in which the K is contained in a railway ticket or other unsigned document, it is necessary to prove than an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. <i>When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not</i>" (Scrutton in <i>L'Estrange v. F. Graucob</i> qtd. in <i>Tilden Rent-a-Car</i>)</p> <p>→ limited by circumstances surrounding the signing: rule strongest when parties are in formal circumstances that permit review and consideration of all terms and <b>less strong when the transaction "is invariably carried out in a hurried, informal manner"</b> (<i>Tilden Rent-a-Car</i> CB 507)</p> <p><u>Policy Consideration:</u> "we do not allow printed forms to be made a trap for the unwary" (Denning in <i>Neuchatel Asphalte</i> qtd. in <i>Tilden Rent-a-Car</i>)</p>	<ul style="list-style-type: none"> <li>• Unsigned documents = notice req'd</li> <li>• Signed document = presumed read</li> <li>• Formal/informal divide</li> </ul>

**Clauses Excluding Liability**

<b>Term</b>	<b>Details</b>	<b>Key Concepts</b>
<p>Principle</p>	<p>Generally, a <b>clause that limits the remedies of the other contractual party</b></p> <ul style="list-style-type: none"> <li>→ "no remedies" = exclusion clause</li> <li>→ "can't sue" = waiver</li> <li>→ "damages limited to \$50" = limitation clause</li> </ul> <p><u>Policy Considerations:</u>  <b>practical commercial purpose</b> (permits parties to negotiate risk allocation, to determine who needs to take add'l measures like insurance, and to price services accurately in light of assumed risk); difficult area of the law as <b>balances complex interests</b> (consumer protection and commercial certainty)</p>	<ul style="list-style-type: none"> <li>• Exclusion clause</li> <li>• Practical commercial purpose</li> <li>• Balance complex interests</li> <li>• Risk allocation</li> </ul>
<p>History of UK Jurisprudence on Clauses Excluding Liability (a.k.a. Lord Denning v. UKHL)</p>	<p><u>Round 1: <i>Karsales v. Wallis</i> (UKCA 1956)</u></p> <ul style="list-style-type: none"> <li>→ exclusion clauses are only applied if the party claiming the clause fulfilled fundamental obligations under the contract</li> <li>→ doctrine of fundamental breach: breaking fundamental obligations = no reliance on exclusion clause</li> <li>→ lower courts adopt this position w/ glee as clear way to navigate complex policy considerations in balancing contractual interests</li> </ul> <p style="text-align: right;">Denning: 1 UKHL: 0</p> <p><u>Round 2: <i>Suisse Atlantique</i> (UKHL 1967)</u></p> <ul style="list-style-type: none"> <li>→ doctrine of fundamental breach does not account for the circumstances between two sophisticated commercial parties</li> <li>→ fundamental breach of K relieves party of future performance; applicability of exclusion clause is matter of construction</li> <li>→ however, long and volute judgement &amp; difficult to determine what was endorsed</li> </ul> <p style="text-align: right;">Denning: ? UKHL: 1?</p>	<ul style="list-style-type: none"> <li>• Historical evolution: fundamental breach</li> <li>→ K interpretation</li> </ul>

	<p><u>Round 3: Harbutt's Plasticine v. Wayne Tank</u> (UKCA 1970)</p> <ul style="list-style-type: none"> <li>→ applies, again, doctrine of fundamental breach</li> <li>→ Π's deprived of fundamental element of K therefore K void (and no exclusion clause)</li> </ul> <p style="text-align: right;">Denning: 2 UKHL: ?</p> <p><u>Round 4: Photo Production v. Securicor</u> (UKHL 1980)</p> <ul style="list-style-type: none"> <li>→ overrules <i>Harbutt's Plasticine</i></li> <li>→ application of exclusion clause is a matter of K construction</li> </ul> <p style="text-align: right;">Denning: 2 UKHL: KO</p>	
<p>Clauses Excluding Liability (the UK Approach)</p>	<p><u>Rule:</u> it is a <b>matter of construction</b> whether the exclusion clause applies to a given situation (<i>Photo Production</i> adopting the rule in <i>Suisse Atlantique</i>)</p> <ul style="list-style-type: none"> <li>→ exclusion clauses and other K terms are often intended to apply to breach of K and therefore termination should not invalidate these terms</li> <li>ex: terms of liquidated damages, limitation clauses (damages or time period)</li> </ul> <p><u>Factors considered:</u> modest price, reasonable allocation of responsibility for insurance, commercial sense (<i>Photo Production</i>)</p> <p><u>Contract interpretation principles:</u> <b>contra proferentem</b> (resolve ambiguity against the interests of the party who wrote the term); exclusion of negligence must be <b>clearly stated</b> (<i>Photo Production</i>)</p> <ul style="list-style-type: none"> <li>→ requisite clarity required in order to find an exclusion clause applies</li> </ul>	<ul style="list-style-type: none"> <li>• Matter of construction</li> <li>• K interpretation principles</li> </ul>
<p>Clauses Excluding Liability (the Canadian Approach)</p>	<p><u>Rule:</u> it is a <b>matter of construction</b> whether the exclusion clause applies (<i>Hunter Engineering</i> adopting the rule in <i>Photo Production</i>) + <b>residual power</b> to withhold K enforcement if <b>unconscionable</b> or <b>contrary to public policy</b> (<i>Tercon Contractors</i>)</p> <p><u>3-step analysis of exclusion clauses</u> (<i>Tercon Contractors</i>):</p> <ol style="list-style-type: none"> <li>(1) was it the <b>intention of the parties that the exclusion clause apply</b> to given circumstances (<b>matter of construction</b>)?</li> <li>(2) using the court's residual power to withhold enforcement, are there reasons of <b>unconscionability</b> not to enforce the exclusion clause?</li> <li>(3) using the residual power, are there reasons of <b>public policy</b> not to enforce the exclusion clause?             <ul style="list-style-type: none"> <li>→ (i) parties' freedom to bargain as they choose</li> <li>→ (ii) balancing societal interests: importance of stability/certainty in commercial bargains, and public interest in preventing harm to the legal system or Canadian society in general</li> <li>ex: cynical manipulation of freedom to K to shield egregious fraud (<i>Plas-Tex Canada v. Dow Chemical</i>), criminality (poison baby formula)</li> </ul> </li> </ol>	<ul style="list-style-type: none"> <li>• <i>Tercon Contractors</i> 3-step analysis</li> <li>• Exceptions: unconscionability, public policy</li> </ul>

### Misrepresentations

<i>Term</i>	<i>Details</i>	<i>Key Concepts</i>
<p>Definition</p>	<p>Law in contracts that is designed to give relief when parties have used words in an enforceable agreement that (for one reason or another) turn out to be untrue, and financial losses occur.</p>	<ul style="list-style-type: none"> <li>• Misrepresentation definition</li> </ul>
<p>Historical Context</p>	<p>19<sup>th</sup> century: limited remedies if K entered on the basis of misrepresentation on the part of one party</p> <ul style="list-style-type: none"> <li>→ innocent misrepresentation: K would be set aside in limited circumstances</li> <li><u>rule:</u> <b>innocent misrepresentations do not give rise to damages</b></li> <li>→ fraudulent misrepresentation: tort action (even when related to K law)</li> </ul> <p>Attempts to broaden scope of fraud (to permit claims for damages):</p> <ol style="list-style-type: none"> <li>(1) "sharp practise": innocent misrepresentation became fraudulent when the party who made the statement and learned that it was false attempted to enforce the K</li> </ol>	<ul style="list-style-type: none"> <li>• Historical: limited remedies for misrepresentation</li> <li>• Narrow scope of fraud (<i>Derry</i>)</li> </ul>

	<p>(2) restricted by <i>Derry v. Peek</i> (UKHL 1899): fraud = a statement made by a person who a) knew that it was false or b) made the statement recklessly (w/o caring whether statement was true or false)</p> <p>(3) new strategy: claims of collateral warranties that contain the representation (and thus are breached when the misrepresentation turns out to be false)</p>	
When a representation is a collateral K	<p><b>A statement is only a warranty if it is intended by both parties.</b>  <u>Requirement:</u> both parties had the <b>intention to K</b> (<i>Heilbut</i>)                  → "An affirmation at the time of sale is a warranty, provide it appears on evidence to be so intended" (<i>Heilbut</i>)</p> <p><u>Determining intention:</u>                  → intention = analysis of the words and behaviours of the parties (<i>Bentley Productions</i>)</p> <p>(1) <b>reasonable person test</b>                  → "an intelligent bystander would reasonably infer that a warranty was intended" (<i>Bentley Productions</i> CB 742)</p> <p>(2) <b>crucial/deciding factor in entering main K</b> (<i>Bentley Production</i>)                  → whether the words and behaviour permit the inference that the statement induced the other party to enter the K                  → "if a representation is made in the course of dealings for a K for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the K, that is prima facie ground for inferring that the represented was intended as a warranty" (<i>Bentley Productions</i> CB 742)</p>	<ul style="list-style-type: none"> <li>• Representation = collateral K if intended by both parties</li> </ul>
Remedies for misrepresentation	<p>(1) <b>rescission</b> (innocent misrepresentation)                  → must meet requirements for equitable remedy                  → K must not be executed if land K (<i>Redgrave</i>)                  → if K not for land, may be rescindable post-execution (<i>Leaf</i>)</p> <p>(2) <b>damages</b> (negligent and fraudulent misrepresentation, collateral K)</p>	<ul style="list-style-type: none"> <li>• Rescission (innocent)</li> <li>• Damages (limited, negligent/fraud misrepresentation)</li> </ul>
Negligent Misrepresentation	<p>If there is a <b>special relationship between the parties</b> (created by one party <b>relying on the special skill and knowledge of the other</b> and the other is <b>aware of this reliance</b>) there is sufficient proximity to give rise to a duty of care. <b>If the standard of care is not met, negligent misrepresentation may be found</b> (<i>Hedley Byrne</i>)                  → negligent misrepresentation = tort = reliance damages</p> <p><u>Test (<i>Esso Petroleum</i>):</u>                  → "if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a K with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable" (<i>Esso Petroleum</i> CB 769)</p>	<ul style="list-style-type: none"> <li>• Special relationship</li> <li>• Reliance (awareness)</li> <li>• Standard of care</li> </ul>
Relationship between Tort and Contract Law	<p><del>→ tort action inapplicable in a case where the relationship is governed by a K unless it is an independent tort unconnected w/ performance of K (<i>Nunes Diamond</i>)</del></p> <p>→ "a concurrent or alternative liability in tort <b>will not be admitted</b> if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the <b>plaintiff has the right to assert the cause of action that appears to be most advantageous to him</b> in respect of any particular legal consequence" (<i>Central Trust</i> CB 770)</p>	<ul style="list-style-type: none"> <li>• P's election unless K limits liability</li> </ul>

**Unfairness: Unconscionability, Undue Influence & Duress**

Term	Details	Key Concepts
Principle	Generally, Canadian common law favours the certainty and predictability of enforcing	• "bridge too far"

	<p>parties' bargains (freedom of K). However, there has always been an limit to freedom of K – " a bridge too far."</p> <p>→ Canadian courts retain residual power to intervene in some kinds of unfair transactions:</p> <ol style="list-style-type: none"> <li>(1) unconscionability</li> <li>(2) undue influence</li> <li>(3) duress</li> </ol>	
<p>General Application (<i>Pridmore</i>)</p>	<p>Courts often do not distinguish between the three recognized categories of unfairness.</p> <p>In <i>Pridmore</i>, the BCSC applies a general test of how to resolve the question of whether it would be inequitable to hold the Π to his/her bargain:</p> <ol style="list-style-type: none"> <li>(1) there is a K or bargain of an <b>improvident character</b> (substantive unfairness)</li> <li>(2) there is a person who is <b>ignorant or unaware of position</b> (procedural unfairness)</li> <li>(3) there is <b>no independent legal advice</b></li> </ol> <p>In such a situation, it is the dominant party's burden of proof <b>to establish that the transaction was fair and reasonable in the circumstances</b> (i.e. would a practising lawyer approve the settlement?) (<i>Pridmore</i>)</p>	<ul style="list-style-type: none"> <li>• Lack of distinction between three categories in practical application</li> <li>• <i>Pridmore</i> approach</li> </ul>
<p><b>Unconscionability</b></p>		
<p>Requirements</p>	<p>Two elements (Leff, "Unconscionability and the Code – The Emperor's New Clause"):</p> <ol style="list-style-type: none"> <li>(1) <b>procedural unfairness</b> (<u>issue of K formation</u>)                     <ul style="list-style-type: none"> <li>→ ex: physical duress (obliging an agreement at gunpoint)</li> <li>→ indicators: inability to consent, gross inequality of bargaining power (<i>Marshall</i>)</li> <li>→ factors indicating procedural unfairness: age of party, infirmity, dependence on other party, position of influence of other party, significant change in party's position (<i>Vanzant</i> in <i>Mundlinger</i>)</li> </ul> </li> <li>(2) <b>substantive unfairness</b> (<u>issue of K operation/substance</u>)                     <ul style="list-style-type: none"> <li>→ ex: 55" flatscreen TV for \$2</li> <li>→ indicator: significantly undervalued price (<i>Marshall</i>)</li> </ul> </li> </ol> <p><u>Test (<i>Mundlinger</i>):</u></p> <ul style="list-style-type: none"> <li>→ "if the bargain is fair the fact that the parties were not equally vigilant in their interests is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a K freely entered into. It is the <b>combination of inequality and improvidence</b> which alone may invoke the jurisdiction. Then the <b>onus is placed upon the party seeking to uphold the K to show that his conduct through was scrupulously consideration of the other's interests</b>" (<i>Mundlinger</i> CB 601)</li> </ul>	<ul style="list-style-type: none"> <li>• Procedural unfairness</li> <li>• Substantive unfairness</li> <li>• Burden shift</li> </ul>
<p><b>Undue Influence</b></p>		
<p>Requirements</p>	<p>Undue influence <b>vitiates consent</b> by making it such that one party did not genuinely consent to the transaction agreed upon based on undue pressure or influence by the other party (or a 3<sup>rd</sup> party).</p> <p><u>Two categories:</u></p> <ol style="list-style-type: none"> <li>(1) prove <b>actual undue influence</b> <ul style="list-style-type: none"> <li>→ the person who had a relationship w/ the dominant party was pressured to accept the bargain (such that the person's will was overborne)</li> <li>→ overlap w/ economic duress</li> </ul> </li> <li>(2) <b>relationship of trust and confidence</b> between the parties + <b>transaction that requires explanation</b> <ul style="list-style-type: none"> <li>→ burden of proof shift: party in the stronger position must prove that the bargain was fair and reasonable under the circumstances</li> <li>→ relationship component sub-divided into two categories (<i>Allcard v. Skinner</i>):                             <ol style="list-style-type: none"> <li>(i) categories where the relationship is presumed</li> </ol> </li> </ul> </li> </ol>	<ul style="list-style-type: none"> <li>• Two categories: actual undue influence or relationship of trust and confidence</li> <li>• Relationship = presumed or proven</li> </ul>

	<ul style="list-style-type: none"> <li>→ parent/child, solicitor/client, doctor/patient, religious leader/disciple</li> <li>(ii) categories where the relationship of confidence is proven</li> <li>→ burden of proof on claimant to prove this component</li> </ul>	
<p>Spousal Guarantors</p>	<p>When a spouse who owns a business needs to borrow money, the lender will typically ask for security. As business assets are generally insufficient given a corporation's limited liability for debts, the lender will request a personal guarantee, which requires an asset (typically the matrimonial home.) The lender will require the other spouse's signature (as joint tenants) to secure this asset.</p> <p>In such situations, there are potentially difficulties w/ the quality of consent of the non-commercial spouse to the guarantee (potentially undue influence or misrepresentation). This situation raises <u>two competing issues</u>:</p> <ol style="list-style-type: none"> <li>(1) fairness to spouse who may not have understood the nature of the transaction</li> <li>(2) concern about commercial impact if lender absorbs burden of spousal relationship (unlikely to loan if only personal asset is matrimonial home)</li> </ol> <p><u>Principles (Etridge):</u></p> <ol style="list-style-type: none"> <li>(1) the lender placed <b>on notice of the possibility of undue influence whenever the lender is dealing with non-commercial guarantors</b></li> <li>(2) if the lender is <b>aware of undue influence</b>, the lender <b>cannot benefit from the guarantee</b> unless reasonable grounds to rely on the guarantor's consent as genuine             <ul style="list-style-type: none"> <li>→ if the lender is <b>unaware and has reasonable grounds to rely on the guarantor's consent as genuine</b>, the transaction <u>cannot be set aside</u> (despite undue influence of third party)</li> <li>→ if the lender is <b>aware</b>, the transaction <u>can be set aside</u></li> </ul> </li> </ol> <p><u>Application (Etridge):</u></p> <ul style="list-style-type: none"> <li>→ anytime someone guarantees a loan for non-commercial reasons (i.e. not a partner in the business but family or marital relationship or other reasons of personal affection), the lender must take steps to ensure that they have reasonable grounds to rely on the guarantor's consent as genuine</li> <li>→ <b>reasonable grounds = a reasonable belief that the guarantor is working with a solicitor and receiving independent advice</b></li> <li>→ solicitor provides certificate indicating that such independent legal advice was provided. Requirements for certificate to be issued:             <ol style="list-style-type: none"> <li>(1) solicitor that the <b>wife has chosen herself</b></li> <li>(2) solicitor explained <b>the risk of the transaction</b> (i.e. potential loss of the house)</li> <li>(3) solicitor must have <b>information from the bank about the situation of the borrower</b> (i.e. credit position; previous borrowing history; company's situation)                 <ul style="list-style-type: none"> <li>→ sufficient information for the lawyer to suggest <b>whether the transaction makes financial sense</b></li> </ul> </li> </ol> </li> <li>→ <b>senior bank official may be relied upon to provide the advice unless there are facts known to the bank that increase the risk of undue influence</b> (i.e. wife does not have a commercial background; wife does speak primary language of business well)</li> </ul> <p><u>Non-commercial guarantors in Canada:</u></p> <ul style="list-style-type: none"> <li>→ a creditor's duty to spouses in spousal guarantee may extend to other non-commercial guarantors w/ a relationship of trust and confidence (<i>Gold v. Primary Developments</i>)</li> </ul>	<ul style="list-style-type: none"> <li>• Spousal guarantors</li> <li>• Notice of possible undue influence = req'ment to have reasonable grounds to believe consent genuine</li> </ul>
<b>Duress</b>		
<p>Principle</p>	<p>Duress <b>vitiates consent</b> by eliminating all alternatives to agreement (i.e. w/ a gun to your head, you cannot give free consent as all other answers but "yes" are eliminated.)</p>	<ul style="list-style-type: none"> <li>• Physical duress</li> <li>• Duress of goods</li> </ul>

	Three types of duress: (1) physical, (2) of goods, and (3) economic	• Economic duress
Economic Duress	<p><u>Two requirements for economic duress:</u></p> <p>(1) pressure so great that one party had <b>no realistic alternative</b> → difficult to measure</p> <p>(2) <b>illegitimate pressure</b> → not simply criminal or tortious acts but judicial uncertainty as to what constitutes the line between legitimate and illegitimate pressure (as legitimate pressure will always be a component of the commercial bargaining process) → threat to breach K does not constitute illegitimate pressure (<i>Greater Frederickton</i>) → illegitimate pressure not applied in existing K modification (<i>Greater Frederickton</i>)</p> <p><u>Policy considerations:</u> → w/ any negotiated deal, parties will likely have unequal bargaining power (esp. w/ respect to financial positions) → not a question of unconscionability but rather differing financial and commercial contexts/positions → court balances competing interests: (1) commercial dependence on economic pressure to reach agreements (as it obligates parties to settle); and (2) not permitting extreme economic pressure that truly vitiates consent</p>	<ul style="list-style-type: none"> <li>• No realistic alternative</li> <li>• Illegitimate pressure</li> <li>• Illegitimate pressure in existing K modification</li> </ul>

Penalties & Forfeitures		
Term	Details	Key Concepts
Principle	<p>While common for Ks to provide for what happens if K broken (liquidated damages), the equitable court will <b>not enforce a penal provision</b> (<i>Dunlop Tyre</i>)</p> <p><u>Definition of penal:</u> → "the essence of a penalty is a payment of money stipulated as in terrorem of the offending party"</p> <p><u>Definition of liquidated damages:</u> → "the essence of liquidated damages is a genuine covenanted pre-estimate of damage" (<i>Dunlop Tyre</i>)</p> <p><u>Policy Consideration:</u> → "the fact that the appellant subscribed to it, and may have been foolish to do so, does not mean that it should be left to rue its unwisdom" (<i>H.F. Clarke</i>)</p>	<ul style="list-style-type: none"> <li>• No enforcement of penal provision</li> <li>• Liquidated damages enforceable if genuine pre-estimate</li> </ul>
Penalty	<p>Matter of construction (terms and inherent circumstances of each particular K provision, judged as at the time of K formation not at the time of breach):</p> <p><u>Some considered factors:</u> → sum is extravagant and unconscionable compared to the greatest loss that could be conceivably foreseen as arising from the breach → breach consists only in paying a sum of money, and the liquidated damages are greater than the sum that was owed under the K → single lump sum made payable on the occurrence of one or more of several different events, where the several events are not all severe (no specificity = too general to be a genuine pre-estimate = penalty)</p> <p>n.b. if the circumstances are such that a precise pre-estimate is almost impossible and a sum is set for certainty purposes, it is not a penal clause</p>	<ul style="list-style-type: none"> <li>• Penalty = matter of construction</li> </ul>
Forfeiture	<p>Courts will generally enforce forfeiture clauses (<i>Stockloser</i>) → however, equity will intervene when two requirements are met: (1) deposit or forfeiture must be <b>grossly disproportionate</b> ("penal in nature") (2) <b>unconscionable</b> for receiver to retain (i.e. sharp practise, unjust enrichment)</p>	<ul style="list-style-type: none"> <li>• Forfeiture = enforced unless equitable remedy</li> </ul>

Contract Illegality		
Term	Details	Key Concepts
Principle	<u>Classic rule</u> : "No court will lend its aid to a man who founds his cause upon an immoral or illegal act" ( <i>Holmon</i> CB 656)	• No K enforcement if illegal act
<b>Common Law Illegality</b>		
Types of Ks	<u>Ks illegal due to public policy (common law illegality)</u> : → cannot receive benefit conferred through crime ( <i>Brisette Estate</i> ) → cannot K to commit crimes or torts → cannot K contrary to the administration of justice and/or oust the jurisdiction of courts (less vigorously enforced) → cannot K to gamble (unless within provincial regulatory system) → cannot K in restraint of trade ( <i>Shafroon</i> )	• Types of common law illegality
Approach	<u>Factors considered</u> : → is the K complete independent of the illegal act? ( <i>Holmon</i> ) → is the K sufficiently clean and precise to avoid illegality? ( <i>Shafroon</i> ) → does the K benefit the illegal actor ( <i>Brisette Estate</i> ) or an innocent third-party beneficiary ( <i>Oldfield</i> )?	• Approach
Insurance Policies and the Benefits of Crime	Typically, courts will not enforce insurance Ks when the beneficiary committed a crime to acquire the benefit of the insurance K ( <i>Brisette Estate</i> ).  However, the court has found a limited exception when the beneficiary is an innocent 3 <sup>rd</sup> party ( <i>Oldfield</i> ) → "an innocent beneficiary named in an insurance policy should not be disentitled to insurance proceeds where the insured dies while committing a criminal act and does not intend the loss" ( <i>Oldfield</i> CB 673)	• Insurance policies & benefits of crime
<b>Statutory Illegality</b>		
Types of Ks	<u>Ks illegal due to policy expressed in statute (statutory illegality)</u> : → not simply Ks contrary to a statutory provision → cannot K to do something a statute prohibits → cannot K contrary to policy expressed in statute	• Types of statutory illegality
Approach	(1) Classic approach: violation of statute/regulation = no enforcement ( <i>Kingshot</i> )  (2) <u>Modern approach (Doherty)</u> : → is <b>there a public policy harmed if the K is enforced?</b> (i) do the terms of the statute specify that Ks in contravention of the statute are unenforceable? (ii) would compliance with the statute result in a different outcome? (iii) would not enforcing this K be fair/just? → would enforcing being enabling a "disingenuous attempt to take advantage of [Δ's] own failure"? ( <i>Doherty</i> )	• Classic approach • Modern approach ( <i>Doherty</i> )
<b>Mitigating the Consequences of Illegality</b>		
Exceptions to Non-Enforcement	Following the rule in <i>Holmon</i> , courts will not enforce Ks that are illegal therefore no return of transferred benefits.  <u>Two classic exceptions</u> : (1) parties are not <i>in pari delicto</i> ("in equal fault") → if one party is more blameworthy than the other, the court will allow the least blameworthy party to recover any transferred benefit → however, ignorance of the law does not reduce fault ( <i>Outson</i> ) (2) one party repents → if one party repents (and is really, really sorry) prior to completion of K, the court will enable this party to recover a transferred benefit ( <i>Outson</i> )	• Classic rule: no enforcement of illegal Ks • Exceptions to non-enforcement
Modern	In modern context, <b>no longer automatic declaration that K is enforceable</b> . Instead,	• Modern approach =

<p>Approach</p>	<p>contract illegality is a principle (not a rule) that determines whether <b>it is contrary to public policy to permit the plaintiff an action</b> (<i>Still</i>).</p> <p>→ “where a K is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all 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” (<i>Still</i>)</p> <p><u>Approach:</u>                  → <b>identify what public policy reasons in statute bar action</b>                  → <b>weigh reasons against Π’s prima facie right to recovery</b></p>	<p>not automatically unenforced</p>
<p>Other Remedies</p>	<p><u>Notional severance</u>                  → strike out provisions in such a fashion <b>to leave what would be legal / acceptable</b> (i.e. strike interest rate to 60%) (<i>New Solutions</i>)                  → “judicial discretion should be employed in cases in which s. 347 has been violated in order to provide remedies that are tailored to the contractual context involved” (<i>New Solutions</i>); “<b>remedial flexibility</b>” (<i>New Solutions</i>)                  → not applicable if provision is unconscionable (<i>New Solutions</i>)                  → <b>only applicable when there is a bright line test</b> such as s. 347 as must be clear what would be legal (<i>Shafron</i>)                  → wholly inappropriate in employee/employer Ks (<i>Shafron</i>)</p> <p><u>Severance (“blue pencil test”):</u>                  → method of severing a clause from a K where a <b>blue pencil can strike through the offending words and leave an intelligible K</b> (<i>Shafron</i>)                  → <b>cannot make a new bargain for the parties</b> (<i>Shafron</i>)</p>	<ul style="list-style-type: none"> <li>• Notional severance</li> <li>• Blue pencil test</li> <li>• No new bargain for parties</li> </ul>
<p><i>Criminal Code</i> s. 347 (<i>New Solutions</i>)</p>	<p>Offence to K for or receive interest at rate &gt; 60% per annum                  → designed to provide a bright-line test for loan sharking (simpler to enforce than finding witnesses to testify)                  → however, captures a broad range of charges that the provision deems to be interest and uses rigid methods to compute interest                  → as a consequence, sophisticated commercial parties with legal advice create complex commercial arrangements that <i>prima facie</i> violate the provision                  → not typically prosecuted criminally, but often raised as a defence in civil actions</p>	<ul style="list-style-type: none"> <li>• Loan sharking</li> </ul>

### Mistake

#### Doctrine of Mistake

Term	Details	Key Concepts
<p>General Application and Categorization</p>	<p>Almost every time there is something wrong w/ a K, there is a “mistake.” However, doctrine of mistake does not treat all these cases. Rather, it typically applies when <b>none of the other doctrines apply</b> (i.e. no fraud, no misrepresentation, no unconscionability.)</p> <p><u>Two broad categorization strategies:</u></p> <p>(1) <b>type of mistake:</b> common mistake (i.e. both parties were mistaken about the same thing in the same way); unilateral mistake (i.e. only one party was mistaken); and mutual mistake (i.e. both parties were mistaken but in different ways)                  → outcome determine by how the mistake was categorized: common mistake = void; unilateral mistake = no remedy; mutual mistake = either remedy                  → historical but occasionally still referenced</p> <p>(2) <b>mistake in contractual terms or mistake in assumption</b>                  → easier to classify but classification does not determine outcome/remedy</p>	<ul style="list-style-type: none"> <li>• Doctrine of mistake applies when no other doctrines apply</li> <li>• Old categorization: by type of mistake</li> <li>• Modern categorization: mistake about K terms or mistake in assumption</li> </ul>

#### Mistake about Contractual Terms

Term	Details	Key Concepts
<p>Principle</p>	<p>Mistakes about the particular terms of an agreement.</p>	<ul style="list-style-type: none"> <li>• Mistake in terms</li> </ul>

	<p><u>General Approach:</u></p> <ol style="list-style-type: none"> <li>(1) <b>what would a reasonable person reading the K think the term meant?</b> (<i>Hobbs</i>)             <ul style="list-style-type: none"> <li>→ determines what the term was intended to be</li> <li>→ esoteric meanings must be communicated to other party (<i>Hobbs</i>)</li> <li>→ consider factors such as a <b>commercial context</b> and <b>factual matrix</b> to determine what a reasonable inference would be (<i>Staiman Steel</i>)</li> <li>→ <b>parol evidence always admissible</b> to solve ambiguity in K (<i>Staiman Steel</i>)</li> </ul> </li> <li>(2) <b>if there is no way to distinguish between two positions, the reasonable person test does not apply and the K is void as no consensus between parties</b> (<i>Raffles</i>)             <ul style="list-style-type: none"> <li>→ ex: two ships w/ same proper name (<i>Raffles</i>)</li> <li>→ limited to circumstances in which it is <b>impossible to determine a meaning</b> to the K term (<i>Staiman Steel</i>)</li> </ul> </li> <li>(3) if one party has made a mistake in K terms and the other party is aware that the parties are contracting on different terms, the K is unenforceable (<i>Smith</i>)</li> </ol>	<ul style="list-style-type: none"> <li>• Reasonable person test</li> <li>• No distinguishing = no consensus = no K</li> <li>• Knowledge of other party's mistake in K terms = unenforceable K</li> </ul>
<p><i>Caveat emptor</i></p>	<p><u>Sale by sample / caveat emptor</u> (<i>Smith</i>):</p> <ul style="list-style-type: none"> <li>→ if party <b>relies on his own knowledge and assessment of the sample, an error does not generate relief</b></li> <li>→ if party wanted assurance, he was req'd to ask</li> </ul> <p><u>Policy Consideration:</u></p> <p>If one party unreasonably relies on their own knowledge, the court will still enforce the K as their responsibility to seek assurance. Not the same situation as believing a different term from the other party.</p>	<ul style="list-style-type: none"> <li>• Sale by sample</li> <li>• Assurance = ask</li> <li>• Rely on self = no remedy</li> </ul>
<p><b>Mistake in Assumptions</b></p>		
<p>Principle</p>	<p>No mistake in the terms of the K but rather a mistake in an assumption that underlies the K.</p> <p><u>Classic approach (common law mistake):</u></p> <ol style="list-style-type: none"> <li>(1) <b>recognized categories</b> (<i>Bell</i>)             <ol style="list-style-type: none"> <li>i) mistaken identity (<i>Ingram</i>)</li> <li>ii) both parties assume that some object exists at time of K formation when in fact it does not (i.e. horse dropped dead immediately prior to sale)</li> <li>iii) one party sells something that he believes belongs to him but in fact already belongs to purchaser (fishing rights in <i>Cooper v. Phibbs</i>)</li> </ol> </li> <li>(2) quality of mistake: <b>completely and fundamentally different thing</b> (<i>Bell</i>)             <ul style="list-style-type: none"> <li>→ difference in kind (<i>Bell</i>)</li> <li>→ similar to recognized categories to constitute sufficiently fundamental mistake (<i>Bell</i>)</li> </ul> </li> </ol> <p><u>Modern (UK) approach (<i>Great Peace</i> ¶176):</u></p> <ul style="list-style-type: none"> <li>→ does the mistake "render the contractual adventure impossible of performance?" (<i>Great Peace</i> ¶162)</li> <li>(1) common assumption as to the <b>existence of a state of affairs</b></li> <li>(2) <b>no warranty by either party</b> that the state of affairs exists             <ul style="list-style-type: none"> <li>→ if the K allocates the risk, no room for doctrine of mistake</li> </ul> </li> <li>(3) mistake <b>not attributable to the fault of either party</b></li> <li>(4) mistake renders <b>performance impossible</b> <ul style="list-style-type: none"> <li>→ impossibility = assumption so serious that K cannot be performed without it being true</li> </ul> </li> <li>(5) mistake can cover a range of things (consideration to be provided, circumstances that must exist to make performance possible)</li> </ul>	<ul style="list-style-type: none"> <li>• Classic approach (common law mistake) = <i>Bell</i></li> <li>• Modern approach (UK) = <i>Great Peace</i> (generally not followed in Canada)</li> </ul>

<p>Equitable Mistake</p>	<p><u>Principle</u>: a K will be voidable if <b>mistake is fundamental</b> and the party seeking to set aside the K is <b>not at fault</b> (<i>Solle</i>)                  → "A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault" (<i>Solle</i> CB 800)                  → rejected in <i>Great Peace</i></p> <p>n.b. <b><i>Solle</i> approach adopted in Canadian courts despite <i>Great Peace</i></b>:                  → <i>Great Peace</i> eliminates <b>flexibility in <i>Solle</i> "to correct unjust results in widely diverse circumstances"</b> (<i>Miller Paving</i>)                  → however, virtue of <i>Great Peace</i> approach is recognition that <b>if the K allocates risk, there is no room for mistake to set the K aside</b> (same decision as in <i>Miller Paving</i>)                  → Canadian courts hesitate to limit the cases in which interference is possible (however, would increase commercial certainty and eliminate bizarre interpretation of <i>Bell in Solle</i>)</p>	<ul style="list-style-type: none"> <li>• Equitable mistake = fundamental + claimant not at fault</li> <li>• Approach adopted in Canadian courts (incl. post-<i>Great Peace</i>)</li> </ul>
<p>Unilateral Mistake / Other Party Unaware of Mistake</p>	<p>Generally, there K is enforceable if one party made a mistake in underlying assumptions but the other party was completely unaware that the mistake was made (<i>Ron Engineering</i>).                  → mistake in assumptions by only one party = historical category of unilateral mistake</p>	<ul style="list-style-type: none"> <li>• Unilateral mistake</li> <li>• K enforceable</li> </ul>
<p><b>Rectification of documents</b></p>		
<p>Principle</p>	<p>Equitable for mistake in terms (i.e. when a K written incorrectly) that is rarely applied.</p> <p><u>Two requirements</u>:</p> <p>(1) pre-existing oral agreement that is sufficiently certain                  → parol evidence will be admissible (<i>Bercovici</i>)                  → question of credibility: which party has the most reliable account of the pre-error agreement?                  → court considers evidence w/ respect to negotiation + conduct after K formation (<i>Bercovici</i>)                  → court considers surrounding circumstances (<i>Sylvan Lake</i>)</p> <p>(2) specific error in transcription that the court can correct                  → rectify document to reflect true intentions of parties</p>	<ul style="list-style-type: none"> <li>• Remedy for mistake in K terms</li> <li>• Requirements: sufficiently certain pre-existing oral agreement + specific error in transcription</li> </ul>
<p>Canadian approach</p>	<p>Rectification, an equitable remedy, is available when the party claiming it can show that the written K wrongly reflects the oral agreement.</p> <p>Four elements (<i>Sylvan Lake</i>):</p> <p>(1) <b>existence and content of the inconsistent oral agreement</b>                  → parol evidence</p> <p>(2) other party <b>knew or ought to have known</b> that a mistake had been made                  → not necessarily fraud or deceit but dishonest action</p> <p>(3) <b>exact change</b> that, if made, makes the written document accurately reflect the pre-existing oral agreement</p> <p>(4) evidentiary burden: <b>clear and convincing evidence</b>                  → <b>balance of probabilities</b> only standard of proof in civil cases: <i>F.H. v. McDougall</i> (SCC 2008)</p>	<ul style="list-style-type: none"> <li>• Four elements (<i>Sylvan Lake</i>)</li> </ul>
<p><b>Frustration (Mistake about Future Events)</b></p>		
<p>Principle</p>	<p>Not an error at the time of K formation, but a mistake as to a future event that alters or renders impossible K performance.</p> <p><u>Historical development</u>:</p> <p>→ Classic rule: absolute promises (<i>Paradine</i>)                  → <i>Taylor</i> rule: imply a term that the fundamental assumption would exist at the time of K performance</p>	<ul style="list-style-type: none"> <li>• Classic rule = absolute promises</li> <li>• <i>Taylor</i> rule = implied term</li> <li>• Modern rule = doctrine (not implied term), flexibly</li> </ul>

	<p><u>Modern rule (<i>Capital Quality Homes</i>):</u>                  Doctrine of frustration (not implied term) will be found and the parties will be relieved of future performance when three requirements met:                  (1) the event occurs <b>after the K has been formed</b> beyond the control of the parties                  (2) the event makes <b>the performance of the K something totally different than the parties contemplated</b> (i.e. defeats a crucial assumption)                  (3) the event occurs <b>without fault</b> of either party and <b>without provision in K</b></p> <p>→ flexible approach, not restricted by arbitrary formula (<i>Capital Quality Homes</i>)</p> <p><u>Policy considerations:</u>                  Ks are about risk allocation, which can include express or implied terms as well as “the contemplation of the parties” (<i>The Sea Angel I</i> CB 875)</p>	<p>approached</p>
<p>Remedy</p>	<p>At common law, parties were only relieved of performance. If benefits were transferred or expenses incurred, there was nothing that a court could do.</p> <p><i>Frustrated Contracts Act</i> expands the remedial power of the courts to adjust the benefits and allocate costs between the parties.                  → not perfect but performs as designed</p>	<ul style="list-style-type: none"> <li>• Common law: only relieved of future performance</li> <li>• Statute: increase remedial power</li> </ul>
<p>Modern Statement of the Rule (<i>The Sea Angel</i> approach)</p>	<p>Interpretation of K and factual matrix to determine whether frustration occurred</p> <p><u>Four requirements (<i>The Sea Angel</i> ¶ 873):</u>                  (1) <b>supervening event without fault</b> of either party                  (2) <b>no sufficient provision</b> for the event made in K                  (3) event <b>changed the nature of the promise</b>                  → “radically different” test                  (4) <b>unjust</b> to hold parties to strict bargain                  → underlying concern (not to be overstated): consequence/outcome always “measured against the demands of justice” (<i>The Sea Angel</i> CB 875-76) → “a reality check” (<i>The Sea Angel</i> CB 878): whether it would be just or unjust to maintain the bargain?</p> <p><u>Foreseeability:</u> tool not a test (i.e. “most events are to a greater or lesser degree foreseeable”) (<i>The Sea Angel</i> CB 877)                  → foreseeability always measured in light of the risk allocation (i.e. a foreseeable event may be accounted for to a point, but after that point it is no longer part of the risk allocated in the K)</p> <p><u>Considered factors in “multifactorial approach” (<i>The Sea Angel</i> CB 875):</u>                  → terms of K                  → factual matrix and commercial context                  → nature of the supervening event                  → “the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively”                  → “the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances”</p>	<ul style="list-style-type: none"> <li>• Four requirements (<i>The Sea Angel</i>)</li> <li>• Multifactorial approach</li> </ul>

<b>Cases (Bargains, Offers and Acceptances)</b>	
<i>Denton v. Great Northern Railway</i> (UK QB 1856)	<i>Denton</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π planned travelled based on Δ's printed timetable. Train was cancelled. Two options: (1) false misrepresentation and (2) breach of K (but where was offer and acceptance?)</p> <p><u>Decision:</u> both options available to Π</p> <p><u>Reasons:</u> (1) K = offer (timetable) and acceptance (presentation at station), (2) to make functional, imply terms in contract (i.e. can only offer at capacity, on payment for ticket, etc.)</p> <p><u>Policy Considerations:</u> (1) ticket purchase as offer/acceptance?; (2) unilateral offer (offer to the world)</p>	<ul style="list-style-type: none"> <li>• Location of offer</li> <li>• Unilateral contract (offer to the world)</li> </ul>
<i>Johnston Bros. v. Rogers Bros.</i> (Ont. County. Ct. 1899)	<i>Johnston Bros.</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δ sends flour prices by "We quote you" to Π and requests reply by telegram given fluctuating market; Π sends telegram to purchase at quoted price; Δ replies with higher price</p> <p><u>Decision:</u> No K</p> <p><u>Reasons:</u> (1) likely offer was Π's reply as it included the necessary information; (2) price quotation is not an offer ("offer to treat"); (3) Δ's price quotation did not specify quantity (i.e. no PPP)</p> <p><u>Policy Considerations:</u> (1) suppliers cannot be expected to accommodate everyone who received a price quote; (2) no guarantee of stock at the time of Π's reply</p>	<ul style="list-style-type: none"> <li>• PPP</li> <li>• Location of offer</li> <li>• Price quotations</li> </ul>
<i>Leftkowitz v. Great Minneapolis Surplus Store</i> (Minn. SC 1957)	<i>Leftkowitz</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Advertisements in the newspaper for items for sale.</p> <p><u>Decision:</u> K = offer (ad) + acceptance (arrival for "First Come, First Served")</p> <p><u>Reasons:</u> (1) no contract is 1<sup>st</sup> ad as terms of offer not sufficiently precise; (2) contract in 2<sup>nd</sup> ad as terms of offer were sufficiently certain (mode of acceptance specified "First Come, First Served"); (3) House Rule could not be applied after acceptance (i.e. completion of K)</p> <p><u>Policy Considerations:</u> (1) unilateral contract (offer to the world) → invitation to treat; (2) newspaper advertisements are typically just statements of price (implied term that only available to 1 person even though distributed to a large number of people)</p>	<ul style="list-style-type: none"> <li>• Advertisements</li> <li>• Unilateral contract (offer to the world)</li> </ul>
<i>Pharmaceutical Society of Great Britain v. Boots Cash Chemists</i> (UK CA 1953)	<i>Pharmaceutical Society</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Statute required certain products to be sold under supervision of registered pharmacist. With switch to self-serve model, question of whether sale completed under sale of pharmacist</p> <p><u>Decision:</u> K = offer (placing item at till) + acceptance (taking money from customer)</p> <p><u>Reasons:</u> (1) not other option (K = placing on shelves and placing item on basket) as would imply unacceptable consequences (could not change mind and return item to shelf, forgotten wallet)</p> <p><u>Policy Considerations:</u> (1) offer/acceptance at till to permit pharmacist to supervise purchase</p>	<ul style="list-style-type: none"> <li>• Location of offer and acceptance</li> </ul>
<i>Manchester Diocesan Council v. Commercial &amp; General Instruments</i> (1970)	<i>Manchester Diocesan</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Decision:</u> implied term of acceptance in a reasonable time frame; when offer is open (prior to acceptance), the person offering can change the terms (i.e. impose a time frame for acceptance, withdraw the offer, etc.)</p> <p><u>Reasons:</u> (1) consider surrounding circumstances to determine what constitutes "reasonable"; (2) two theories: (a) implicit withdrawal of original offer (i.e. self-expiry) or (b) lack of response in a reasonable time frame constitutes refusal</p>	<ul style="list-style-type: none"> <li>• Reasonable time of acceptance</li> <li>• Changing offer prior to acceptance</li> </ul>
<i>Larkin v. Gardiner</i> (Ont. Div. Ct. 1895)	<i>Larkin</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> @ T<sub>1</sub> Δ made offer to purchase from Π; @ T<sub>2</sub> Π accepts offer but does not communicate to @ T<sub>3</sub> Δ withdraws offer; @ T<sub>4</sub> Π communicated acceptance from T<sub>2</sub></p> <p><u>Decision:</u> no K because the acceptance must be communicated</p> <p><u>Reasons:</u> (1) K can be withdrawn by the person offering when no acceptance has been communicated</p>	<ul style="list-style-type: none"> <li>• Communication of acceptance</li> <li>• Withdrawal of offer prior to acceptance</li> </ul>

<i>Dickinson v. Dodds</i> (1876)	<i>Dickinson</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> @ T<sub>1</sub> Δ made offer left open with an expiry date for acceptance (firm offer); @ T<sub>2</sub> Δ accepts a different offer; @ T<sub>3</sub> Π learns of offer at T<sub>2</sub> but accepts offer from T<sub>1</sub>; @ T<sub>4</sub> the offer from T<sub>1</sub> would expire</p> <p><u>Decision:</u> the firm offer was a promise to leave the offer open for a fixed period of time, but not a K (∴ not enforceable)</p> <p><u>Reasons:</u> (1) contract = agreement (offer + acceptance) + each side must give something (consideration)</p> <p><u>Policy Considerations:</u> (1) in other jurisdictions, firm offers are enforced; (2) in Canada and the UK, something must be given in return for the promise to be enforceable (i.e. a deposit) or the offer must be put under seal</p>	<ul style="list-style-type: none"> <li>• Consideration</li> <li>• Withdrawal of offer prior to acceptance</li> </ul>
<i>Eliason v. Henshaw</i> (US SC 1819)	<i>Eliason</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π makes offer to Δ to purchase flour (included quantity, price and delivery location) and specified acceptance to be sent "by return of the wagon" (to Harper's ferry.) Δ sends acceptance to Georgetown.</p> <p><u>Decision:</u> No K existed.</p> <p><u>Reasons:</u> (1) generally silence cannot be imposed as the mode of acceptance; (2) must sufficiently correspond to the offer (otherwise viewed as counter-offer)</p> <p><u>Policy Considerations:</u> (1) acceptance of unsolicited mailer of books on door step?</p>	<ul style="list-style-type: none"> <li>• Acceptance</li> </ul>
<i>Butler Machine Tool Co. v. Ex-Cell-O Corp.</i> (UKCA 1979)	<i>Butler Machine</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π offers to sell machine to Δ with terms and conditions (incl. price variation clause) that "shall prevail" over Δ's order terms and conditions. Δ places order with terms and conditions (no price variation clause) with acknowledgement signed by Π. Π claims cost increase of £2,892 but Δ refuses to pay.</p> <p><u>Decision:</u> @ trial, Π awarded judgement. @ appeal, Δ awarded judgement</p> <p><u>Reasons (Lawton and Bridge):</u> (1) classical model (offer/acceptance) governs; (2) use the classical doctrine to construe counter-offer as a rejection of the first offer (and ∴ the last shot prevails)</p> <p><u>Reasons (Denning):</u> (1) traditionally, Δ's order = counter-offer as contained sufficient changes to original offer → Π's acknowledgement was acceptance; (2) this model is outdated ∴ assessment should look at "all the documents passing between the parties" to determine "whether they have reached agreement on all material points, even if there may be differences between the form and conditions printed on the back of them"; (3a) typically in "battle of forms", "last shot" = accepted form; (3b) sometimes the first form is accepted if the second form's terms are so materially different that it would take advantage of the first form's party (unless new terms made express to first form's party); (3c) sometimes both forms are required: "[t]he terms and conditions of both parties are to be construed together"; (4) in this case, Δ's terms were both the last shot and the exception in 3b (express terms) ∴ the K was formed on Δ's terms, not the Π's terms</p> <p><u>Policy Considerations:</u> (1) how to reconcile the "battle of the forms" (esp. with small print)</p>	<ul style="list-style-type: none"> <li>• Battle of the forms</li> <li>• Counter-offer = rejection of offer</li> </ul>
<i>MJB Enterprises v. Defence Construction</i> (SCC 1999)	<i>MJB Enterprises</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δ issued tender for a lump-sum contract for construction that would involve a post-K choice of backfill by the site engineer (∴ cost absorbed by tender company). Π tendered project and then sued for breach of K when Δ accepted another tender that included a handwritten note allowing for an additional fee per meter if a more expensive type of backfill was required. Δ invoked privilege clause to select this tender ("the lowest or any tender shall not necessarily be accepted.")</p> <p><u>Decision:</u></p> <p><u>Reasons:</u> (1) in <i>Ron Engineering</i> (SCC 1981), SCC recognized that the tender process creates two Ks: A between contractor and owner in regard to the tender process and imposing obligations on the contractor, and B in regard to the construction K; (2) in this case, question whether type A formed and imposed obligations on owner</p> <p><u>Policy Considerations:</u> (1) harmonious construction (privilege clause compatible with implied term to accept compatible bid but incompatible with requirement to accept lowest bid); (2) good faith not a defence for breach of K</p>	<ul style="list-style-type: none"> <li>• Tender process</li> <li>• Privilege clause</li> </ul>

<b>Cases (Bargains: Formalization and Certainty)</b>	
<i>May and Butcher v. The King</i> (UKKB 1929)	<i>May and Butcher</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> agreement to purchase tentage as it becomes available w/ price to be determined at availability. Tantage becomes available in 199 and Π provides price. Disposals Board does not agree w/price and refused to sell. Clause for arbitration but no specific of price or mechanism to determine price.</p> <p><u>Decision:</u> no K</p> <p><u>Reasons:</u> (1) simply a set of terms to be put into a K if parties decide to form K; (2) K requires all critical parts of K to be determined; (3) arbitration clause irrelevant as no K; (4) Sale of Good Act permits silence on price but no silence here as term that parties must agree on price; if silent, court could have implied a term for a reasonable price</p>	<ul style="list-style-type: none"> <li>• Unspecified price or mechanism</li> <li>• Agreement to agree on price ≠ K</li> </ul>
<i>Hillas v. Arcos</i> (UKHL 1932)	<i>Hillas</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> contract to sell 22,000 standards of Russian timber with option to renew but no specification on price or type of timber in renewal clause.</p> <p><u>Decision:</u> sufficient certainty to form K</p> <p><u>Reasons:</u> (1) interpretation balance: do not interest to destroy content but do not create K where one should not be created; (2) in commercial context, there may be a K for future performance that is incomplete or uncertain formally but not in context; (2) distinguish from <i>May &amp; Butcher</i> as existing commercial context (previous K indicates intention for binding legal relationship)</p> <p><u>Policy Considerations:</u> (1) commercial efficiency; (2) prevent uncertainty as a finding of unenforceability would create uncertainty about past actions</p>	<ul style="list-style-type: none"> <li>• Commercial context</li> <li>• Existing contractual relationship</li> <li>• K interpretation</li> <li>• Policy: balancing certainty w/ commercial efficiency</li> </ul>
<i>Foley v. Classique Coaches</i> (UKCA 1934)	<i>Foley</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Agreement for Π (petrol) to sell Δ (motor coach) land if Δ purchased his future petrol from Π (supplemental agreement). Agreement incl. "price to be agreed by the parties in writing and from time to time." After three years, Δ disputes price and quantity. Π sues for injunction and damages.</p> <p><u>Decision:</u> certainty through implied term that price and quality reasonable</p> <p><u>Reasons:</u> (1) <i>May &amp; Butcher</i>: agreement to make agreement ≠ K and <i>Hillas</i>: detail to be agreed upon management; (2) imply term that sale was to be reasonable in quality and in price (indication that this was how the parties were conducting themselves); (3) imply terms to meet industry standards and where reasonable person ("officious bystander test") would expect a term; (4) not in category of Ks against public policy (i.e. K in restraint of trade)</p> <p><u>Policy Considerations:</u> (1) commercial efficiency; (2) past practise/preference for certainty</p>	<ul style="list-style-type: none"> <li>• Imply term to meet industry standards and "officious bystander" test</li> </ul>
<i>Empress Towers v. Bank of Nova Scotia</i> (BCCA 1990)	<i>Empress Towers</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> ET (landlord) and BNS (tenant) had lease between 1972 and 1984. New clause included clause for successive renewals (1984-1989). In 1989, BNS exercised renewal for Sept 1 and incl. increase in rent based on market rental rate. On Aug 31, ET replied w/ agreement on rental rate but add'l \$15,000 (likely the remainder of \$ after insurance that had been stolen in a robbery of an ET employee in BNS) and 90 day termination clause.</p> <p><u>Decision:</u> ET did not negotiate in good faith ∴ writ of possession dismissed</p> <p><u>Reasons:</u> (1) three types of rent clauses that may be void for uncertainty: to be agreed (unenforceable); formula but no machinery (courts provide machinery); defective formula plus machinery (courts apply machinery to resolved defect); (2) courts "give proper legal effect to any clause that the parties understood and intended was to have legal effect"; (2) clause was for agreed market rental rate ∴ landlord cannot be compelled to enter lease; (3) however, implied term that a) landlord will negotiate in good faith w/ objective of reaching agreement and b) agreement on market rental will not be unreasonably be withheld</p> <p><u>Policy Considerations:</u> (1) willingness of courts to find enforceability when the parties have intended to making a binding K w/ legal effect</p>	<ul style="list-style-type: none"> <li>• Implied terms</li> <li>• Give legal effect to clauses where intention to have legal effect</li> <li>• Enforceability</li> </ul>

Cases (Bargains: Correspondence)	
<i>Henthorn v. Fraser</i> (UKCA 1892)	<i>Henthorn</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><b>Facts:</b> T<sub>1</sub> - Δ orally offered Π sale of property w/ note on price and duration of offer. T<sub>2</sub> - Δ offered sale to another person subject cancellation of Π's offer. T<sub>3</sub> - Δ mails letter to cancel offer. T<sub>4</sub> - Π's attorney mails acceptance to Δ. T<sub>5</sub> - Δ's letter delivered. T<sub>6</sub> - Π reads Δ's letter. T<sub>7</sub> - Π's letter delivered. T<sub>8</sub> - Δ reads Π's letter.</p> <p><b>Decision:</b> specific performance awarded to Π</p> <p><b>Reasons:</b> (1) offer continuous until Π aware that it was withdrawn ∴ valid (unlike <i>Dickinson</i>, where the Π was aware that the offer was withdrawn); (2) post box acceptance rule: acceptance made at the time of posting (<i>Dunlop v. Higgins</i> (UKHL 1848)) provided implicit authorization of nature of transaction or parties (<i>Household Insurance v. Grant</i> (UKCA 1879)); (3) when it is in the contemplation of the parties that post would be used, acceptance = time of posting</p>	<ul style="list-style-type: none"> <li>• Post box acceptance rule</li> </ul>
<i>Byrne v. Leon Van Tienhoven</i> (UK 1880)	<i>Byrne</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><b>Facts:</b> Δ = Cardiff and Π = New York (approx. 10 days to mail letter). T<sub>1</sub> - Δ offered Π 1000 boxes of tin plates by mail. T<sub>2</sub> - Δ withdraws offer by mail. T<sub>3</sub> - Π accepts offer by cable. T<sub>4</sub> - Π confirms acceptance by mail. T<sub>5</sub> - Δ's revocation received.</p> <p><b>Decision:</b> revocation inoperative ∴ K formed</p> <p><b>Reasons:</b> (1) no UK authority for posting the withdrawal to constitute communication; (2) post box acceptance rule in <i>Dunlop</i> applies to acceptance; (3) US case law and Pothier (UK legal theorist) state that non-communicated revocation ≠ revocation</p> <p><b>Policy Considerations:</b> (1) practical convenience supports this outcome</p>	<ul style="list-style-type: none"> <li>• Revocation must be received in order to be effective</li> </ul>
<i>Howell Securities v. Hughes</i> (UKCA 1974)	<i>Howell Securities</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><b>Facts:</b> Π had an option to purchase a property from Δ. Π mailed acceptance but never received by Δ. Option expires w/o communication from Π.</p> <p><b>Decision:</b> no K as postbox rule overridden by express terms of agreement</p> <p><b>Reasons:</b> (1) agreement specified "by notice in writing" to Δ (court interpreted as notice must reach Δ); (2) <i>prima facie</i> presumption that acceptance must be communicated to offeror; (3) post box acceptance may be sufficient but does not displace specific terms of offer</p> <p><b>Policy Considerations:</b> (1) strict compliance w/ terms of agreement to distinguish from other cases</p>	<ul style="list-style-type: none"> <li>• Exception to post box acceptance rule = express terms of K</li> </ul>
<i>Eastern Power v. Azienda Comunale Energia &amp; Ambiente</i> (ONCA 1999)	<i>Eastern Power</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><b>Facts:</b> Π and Δ negotiate to form a joint venture agreement to construct power plant in Italy. Δ signed and faxed letter of intention to Π. Π signed and faxed back. No conclusion. Π sued for breach of K. Δ motioned <i>forum non conveniens</i> grounds to stay (conflict of laws)</p> <p><b>Decision:</b> K formed in Italy</p> <p><b>Reasons:</b> (1) general rule = acceptance formed where the offeror receives the acceptance; (2) post box exception = acceptance formed where the acceptance mailed; (3) no jurisprudence to support extension of post box exception to faxes; (4) jurisprudence supports notion that instantaneous communication follows general rule; (4) not an absolute rule or exception as circumstances may assess variants in form of communication and whether sent/received by principals</p>	<ul style="list-style-type: none"> <li>• Instantaneous communication (fax) = general rule</li> <li>• K formed where acceptance received (= legal jurisdiction)</li> </ul>

### Cases (Bargains: Consideration)

<i>White v. Bluett</i> (UK Ex. Ct. 1853)	<i>White</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><b>Facts:</b> Δ (son) owed father \$. Son had father cancel promissory note as son argued he had not received the same benefits as his siblings. In exchange, son promised to cease his (frequent) complaining. After father's death, Π (executor) claims payment of promissory note, which was not torn up.</p> <p><b>Decision:</b> debt payable to estate</p> <p><b>Reasons:</b> (1) the promise to cease whining was not consideration as Δ had no right to claim; (2) to constitute consideration, must abstain from something that he had a right to do</p>	<ul style="list-style-type: none"> <li>• Consideration ≠ not whining</li> <li>• Consideration = abstinence from something entitled to do</li> </ul>

<u>Policy Consideration</u> : family arrangement; did not closely resemble commercial bargain; uncertainty whether K formed as promissory note not torn up; executor's responsibility to fulfill wishes of testator	
<i>Hamer v. Sidway</i> (NYCA 1891)	<i>Hamer</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts</u> : Uncle promised nephew \$5,000 if he refrained from drinking, smoking, swearing and gambling until 21. Conditions fulfilled. Uncle wrote and agreed that conditions were met but would hold \$ until nephew was "ready" for it. Nephew sold claim to 3 <sup>rd</sup> party. Uncle died. 3 <sup>rd</sup> party claims from uncle's estate. <u>Decision</u> : K binding <u>Reasons</u> : (1) court rejects argument that nephew benefited from abstinence (thus invalidating the consideration); (2) consideration can be a benefit accrued to one party or a detriment attaching to the other; (3) courts do not assess the value of consideration but rather whether something was promised/done/forborne/suffered; (4) legal right to smoke/drink ∴ the consideration was binding as it "restricted lawful action" <u>Policy Consideration</u> : better evidence (witnesses to original agreement, letter from uncle)	<ul style="list-style-type: none"> <li>• Consideration = not drinking, gambling, smoking or swearing</li> <li>• Consideration valid if restriction on legal action</li> </ul>
<i>Thomas v. Thomas</i> (UKQB 1842)	<i>Thomas</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts</u> : Δ = executors of Π's husband's will. On deathbed, husband decides that will did not adequately provide for Π (wife). Husband asked Δ to provide his house and its contents (or £100) to Π. Written agreement signed by Δ and husband to convey house to Π for life (or until she remarries) provided that she pays the Δ £1 toward the ground rent/annum and keep the house in good repair. <u>Decision</u> : enforceable K <u>Reasons</u> : (1) £1 toward ground rent is sufficient consideration as not incident to assignment of house (i.e. keep in good repair) and payable to executors (not superior landlord); (2) consideration should not be too broad; it must be "of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant"; (3) consideration is not respect for testator's wishes (not from Π) or (likely not) the repairs to the house (as attached to the "gift" of house) <u>Policy Considerations</u> : (1) enforceable as written K, evidence of intention of testator, Π was permitted to remain in house until 1 <sup>st</sup> executor's death, consideration; (2) while executors may be resolving claims against estate, widow still requires financial support	<ul style="list-style-type: none"> <li>• Consideration = £1</li> <li>• Nominal consideration</li> </ul>
<i>Tobias v. Dick</i> (MBKB 1937)	<i>Tobias</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts</u> : Π (selling agency) arranges "exclusive selling agency" w/Δ to buy (in order to sell) Δ's machines at specific price and terms within a specific geographic zone. Δ enters agreement with Eaton to sell machines. Π sues for breach of K and interfering with rights in K. <u>Decision</u> : no enforceable K <u>Reasons</u> : (1) no mutuality (one-sided agreement); (2) Π acquires right but no obligation to sell while Δ can be forced to not sell or not have someone else sell machines; (3) no consideration from Π to Δ ∴ more closely resembles an offer; (4) Π purchased 2 machines to sell, which he did not, and did not try to return as would likely occur in agency K <u>Policy Considerations</u> : (1) unlikely to be able to imply a sufficiently precise term that wouldn't be detrimental to Δ	<ul style="list-style-type: none"> <li>• No consideration</li> <li>• One-sided agreement</li> </ul>
<i>Wood v. Lucy, Lady Duff-Gordon</i> (NYCA 1917)	<i>Wood</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts</u> : Agreement = exclusive right for Π to place Δ's endorsements/designs on market in exchange for 50% profits. Δ issues endorsements and does not share profits w/Π. <u>Decision</u> : enforceable K <u>Reasons</u> : (1) law beyond formalism ∴ will imply term that Δ will use reasonable efforts to market Δ's endorsements (as otherwise will not receive benefit of shared profits) ∴ promise in exchange for a promise; (2) business efficacy; (3) detailed terms of K (including requirement to render accounts monthly) supports finding the implied term <u>Policy Considerations</u> : (1) promote business efficiency/certainty by finding K enforceable	<ul style="list-style-type: none"> <li>• Implied term</li> <li>• Business efficacy</li> </ul>
<i>Harris v. Watson</i> (UKKB 1791)	<i>Harris</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts</u> : Π is seaman on <i>Alexander</i> w/ Δ as master/commander. Δ promised Π an additional 5 guineas on	<ul style="list-style-type: none"> <li>• Pre-existing duty</li> </ul>

<p>top of wages to perform additional tasks while ship was in danger.  <u>Decision:</u> no enforceable K  <u>Reasons:</u> (1) common merchant code that all hands must work to prevent harm to ship/cargo in emergencies, and the <i>Alexander</i> was in danger; (2) general notion that if freight is lost, wages are lost  <u>Policy Considerations:</u> (1) seamen should not be permitted to hold ship/cargo hostage while extorting extravagant wages to save it during emergency situations</p>	<ul style="list-style-type: none"> <li>• Contrary to public policy to permit blackmail for + wages</li> </ul>
<i>Stilk v. Myrick</i> (UK 1809)	<i>Stilk</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π has K to be paid £5/month by Δ (captain). 2 crew deserted and Δ promised to split their wages among remaining crew if not replaced. No replacement. No additional £.  <u>Decision:</u> no agreement as no consideration  <u>Reasons:</u> (1) crew had already undertaken to do all they could in all emergencies ∴ all services sold until voyage complete; (2) desertion of part of the crew = emergency (different situation if crew were free to leave at Coronstadt and ∴ K renewal to continue); (3) promise to do what you are already required (obliged) to do is not sufficient consideration</p>	<ul style="list-style-type: none"> <li>• Pre-existing duty</li> <li>• No consideration if all possible service already promised</li> </ul>
<i>Gilbert Steel v. University Construction</i>	<i>Gilbert Steel</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π = steel bar manufacturer; Δ = construction company. Oral agreement for Π to supply bars to Δ for three bldgs. (1) oral agreement w/price and delivery terms. (2) prior to quantity fixing under K (1), price increased and new agreement written for bldg. 1. (3) alleged binding oral agreement for 2<sup>nd</sup> price increase but written version not executed (not signed.) Π invoices Δ at (3) price but Δ underpays at price in (2).  <u>Decision:</u> no consideration = no K  <u>Reasons:</u> (1) no consideration (consideration ≠ increased credit or “good price” on next K); (2) no rescission as req K breaking 1<sup>st</sup> K and new 2<sup>nd</sup> K; (3) no estoppel as shield not sword  <u>Policy Considerations:</u> (1) evidentiary challenge as Δ did not pay oral “agreement” price, did not sign K (3)</p>	<ul style="list-style-type: none"> <li>• Increased credit or “good price”</li> <li>• Existing K modification</li> <li>• Estoppel = shield (not sword)</li> </ul>
<i>Williams v. Roffey</i> (UKCA 1991)	<i>Williams</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π (carpenter) K'd by Δ (general contractor) to refurbish flats for £20,000. Δ paid installments up to £16,200. Π experienced financial difficulties as bid too low and poor supervision of workers. Π told Δ that he would require add'l \$. Δ agreed to pay add'l £10,300 in order to ensure work complete as main K included penalty clause. However, only £1,500 paid.  <u>Decision:</u> K enforceable  <u>Reasons:</u> (1) key factual findings at trial: a) original K for work too low for Π to operate satisfactorily; b) Δ's surveyor advised to pay bonus of £10,300 to Π; c) main contractor who accepts too low a bid is acting contrary to his own interests as job will not finish w/o add'l \$; (2) Δ achieved some benefit (no breach of K, no penalty for delay in main K &amp; no add'l costs for new carpenter); (3) court rejects Δ's argument that no benefit at law (consideration) = no K as only work previously agreed upon (<i>Stilk</i>)  <u>Policy Considerations:</u> (1) recognize changing commercial circumstances (not the high seas such as a <i>Harris and Stilk</i>); (2) commercially efficient to enforce modifications in such circumstances</p>	<ul style="list-style-type: none"> <li>• Existing K modification</li> <li>• No consideration req'd if Δ derived additional benefit by the promise</li> </ul>
<i>Greater Fredericton Airport Authority v. NAV</i> (NBCA 2008)	<i>Greater Fredericton</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Variation of existing K (“post contractual modification of an executory K”) in which NAV (Δ) has statutorily created exclusive authority to provide aviation services to GFAA (Π). NAV must provide surface and GVAA must use service. GFAA is extending runway, which requires NAV to move tower/equipment. NAV decides to upgrade system at cost of \$233,000. NAV responsible for cost of moving or upgrading under existing K but asked airport to pay otherwise it won't happen. GFAA agrees “under protest” in order to get runway operational and avoid economic loss.  <u>Decision:</u> could be enforceable K (without consideration) but economic duress  <u>Reasons:</u> (1) hallmark of bilateral K = consensual bargain; (2) under general rule of consideration, NAV must have detriment for K to be binding; (3) <i>Gilbert Steel</i>: forbearance from breach of K ≠ consideration; (4) <i>Combe</i>: detrimental reliance ≠ enforcement of gratuitous promise (essential estoppel as sword); (5) legal fictions used to avoid <i>Stilk</i> (i.e. finding more promised than obliged in original K, change in circumstances makes original act sufficient consideration, claim of detrimental reliance, mutual rescission); (6) “incremental” change in the post: post-contractual modification unsupported by consideration should be</p>	<ul style="list-style-type: none"> <li>• Existing K modification</li> <li>• No consideration req'd in existing K modification unless economic duress</li> </ul>

accepted unless its created under economic duress <u>Policy Considerations:</u> (1) <i>Stilk</i> out of step w/ current commercial context/reality; (2) <i>Stilk</i> developed prior to doctrine of economic duress (thus consideration was used as proxy to achieve fair outcome)	
<i>River Wind Ventures v. BC</i> (BCSC 2009)	<i>River Wind Ventures</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Decision:</u> post-contractual variation can be enforced "in the absence of consideration if the evidence established either detrimental reliance by the Π or the gaining of a benefit or advantage by the Δ" <u>Reasons:</u> (1) <i>GFAA</i> doesn't adequately capture the modern conception of the doctrine of consideration as articulated in <i>Williams v. Roffey Bros.</i>	<ul style="list-style-type: none"> <li>• Existing K modification</li> <li>• No consideration req'd if detrimental reliance or benefit accrued to Δ</li> </ul>
<i>Foakes v. Beer</i> (UKHL 1884)	<i>Foakes</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Beer received a judgement from Foakes. In an agreement, Foakes agreed to pay £500 down and the balance in fixed payments over 5 years. Beer agrees to take no proceedings on judgement. Agreement did not for interest. Beer initiates proceedings for interest. <u>Decision:</u> Foakes req'd to pay interest + costs <u>Reasons:</u> (1) classic rule: paying a lesser sum in satisfaction of a greater amount is not consideration in itself ( <i>Pinnel's Case</i> ); (2) court rejects Foakes' arguments: a) old rule does not make commercial sense as it prevents creditors from making beneficial arrangements/compromises, and b) the court does not inquire into the relative value of consideration but here the court considers relative value <u>Policy Considerations:</u> (1) c.f. <i>Mercantile Law Amendment Act</i> (ON) or <i>Law and Equity Act</i> (BC)	<ul style="list-style-type: none"> <li>• Debt settlement</li> <li>• Consideration ≠ less sum paid in consideration of greater amount</li> <li>• c.f. <i>Law and Equity Act</i> (BC)</li> </ul>
<i>Fairgrief v. Ellis</i> (BCSC 1935)	<i>Fairgrief</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Δ is retired and owns/lives on Lulu Island worth \$2,500. Marriage is strained (wife lives in California). Δ asks Πs to keep house for him and promises to leave house to them when he dies. Wife demands that he get rid of Πs and cancel promise. Δ promise \$1000 to Πs in exchange for leaving and not suing. As original agreement was oral, Π's claim was unenforceable as <i>Statute of Frauds</i> does not permit claims based on oral Ks (in order to prevent fraudulent claims). <u>Decision:</u> enforceable K <u>Reasons:</u> (1) despite invalidity of 1 <sup>st</sup> agreement, the 2 <sup>nd</sup> agreement is valid as Δ believed he was obliged to the Πs and ∴ made the 2 <sup>nd</sup> agreement to discharge this obligation. <u>Policy Considerations:</u> (1)	<ul style="list-style-type: none"> <li>• Compromise on legal action</li> <li>• Consideration = discharging (honestly believed) legal obligation</li> </ul>
<i>Dalhousie College v. Boutilier Estate</i> (SCC 1934)	<i>Dalhousie College</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Donor made promise to Dalhousie Campaign Fund of 1920 to donate \$5,000 in installments and signed memorandum to this affect that specified the purpose was to maintain the efficiency of the college's teaching, constructing new buildings, etc. Donor met with severe financial reversals in the 19s0 and wrote to indicate that he could not pay at present but hoped in the future. Donor died in 1928 with no testamentary provision in his will for college. <u>Decision:</u> no consideration ∴ no enforceable K ∴ failed gift <u>Reasons:</u> (1) consideration ≠ "in consideration of the subscription of others" (no exchange of promises) nor undertaken bldg. projects (no specific project requested and cost exceeded value of donation)	<ul style="list-style-type: none"> <li>• Charitable donation</li> <li>• Generally enforceable (failed gift) unless enforceable K w/ consideration</li> </ul>

**Cases (Intention)**

<i>Jones v. Padavatton</i> (UKCA 1969)	<i>Jones</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Daughter working and living in Washington w/grandson. Mother keen that she go to England and train to be an English barrister (w/ eventual hope of relocating to Jamaica, where mother lived, to practise law.) Mother promised daughter an allowance of \$200/month provided daughter moved to England and studied law. Daughter moved to England but rental accommodation difficult to find. Instead of allowance, mother purchased a house in England and allowed daughter to live in it. Daughter was taking an unreasonably long time to read for the bar so mother demanded that she move out.	<ul style="list-style-type: none"> <li>• Intention</li> <li>• Family arrangement</li> </ul>

<p><u>Decision</u>: no legally binding K</p> <p><u>Reasons (Danckwerts)</u>: (1) family arrangement that was intended to be adaptable in the circumstances (and was adapted); (2) no hallmarks of commercial arrangement; (3) minimal difference in the two positions should have been resolved amicably within the family</p> <p><u>Reasons (Salmon)</u>: (1) intention to create legally binding K (daughter gave up lucrative position, mother wanted daughter to study law for personal reasons, mother's promise was persuasive in inducing daughter to enter agreement); (2) however, K unenforceable as vague (but implied terms incl. a term that the arrangement would only extend for a reasonable time, which had expired)</p> <p><u>Policy Considerations</u>: (1) courts should not be involved in adjudicating family (emotional) disputes; (2) family arrangements should be permitted to be flexible/adaptable (therefore uncertain)</p>	
<i>Rose and Frank Company v. J.R. Crompton</i> (UKCA 1923)	<i>Rose and Frank</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts</u>: Rose and Frank Company = American merchants. J.R. Crompton = UK manufacturers. Parties enter a business arrangement to specify future arrangements but specify expressly that not legally enforceable.</p> <p><u>Decision</u>: not legally enforceable</p> <p><u>Reasons</u>: (1) parties can choose to enter legally binding Ks and parties can also choose to enter non-legally binding Ks</p> <p><u>Policy Considerations</u>: (1) companies may want an arrangement to govern their relationship but don't want to be in a position to sue/be sued in the event that the arrangement is not met</p>	<ul style="list-style-type: none"> <li>• Intention</li> <li>• Expressly provided that not legally enforceable</li> <li>• Commercial arrangement</li> </ul>

**Cases (Non-bargain Promises: Past Consideration)**

<i>Lampleigh v. Braithwait</i> (UK 1615)	<i>Lampleigh</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts</u>: Braithwait slays a man and asks Lampleigh to secure a pardon for him. Lampleigh secures a pardon and then brings a case to claim payment.</p> <p><u>Decision</u>: enforceable arrangement</p> <p><u>Reasons</u>: (1) a mere voluntary action will not normally give rise to an action; (2) however, if the courtesy is extended because of a request, there may be an action if it was expected that \$ would be paid for request</p>	<ul style="list-style-type: none"> <li>• Requested voluntary courtesy may provide an action</li> </ul>
<i>Roscorla v. Thomas</i> (UK 1842)	<i>Roscorla</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts</u>: Π purchased horse from Δ. No promise of horse's warranty and commonly understand that guarantee of horse's quality must be in the K otherwise <i>caveat emptor</i>. After purchase, Δ promised that the horse was sound and free of vice. The horse, however, was not a nice horse.</p> <p><u>Decision</u>: no warranty</p> <p><u>Reasons</u>: (1) cannot imply a promise that the horse was free of vice into purchase K; (2) the later promise was gratuitous (no consideration) and cannot be associated back w/ original K</p>	<ul style="list-style-type: none"> <li>• No consideration in original K w/ new gratuitous promise</li> </ul>

**Cases (Non-bargain promises: Reliance and Estoppel)**

<i>Hughes v. Metropolitan Railway</i> (UK 1877)	<i>Hughes</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts</u>: in lease, landlord has right to demand repairs of property w/6 month notice. Landlord and tenant enter negotiations to buy out the tenant's interest. Tenant under the belief that he does not need to effect the repairs if he will be selling his interest. Negotiations break off. After the 6 month period, the landlord demands that the tenant forfeit the lease as the repairs were not made.</p> <p><u>Decision</u>: estopped from demanding forfeit</p> <p><u>Reasons</u>: (1) "the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties"</p>	<ul style="list-style-type: none"> <li>• Strict enforcement of legal rights</li> </ul>
<i>Central London Property Trust v. High Trees</i> (UKKB 1947)	<i>High Trees</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts</u>: Πs leased a block of flats to Δs for 99 years starting September 1937 for a rent of £2500 annually. Due to outbreak of war, Πs agreed to accept reduced rent of £1250 in 1940. In 1941, Πs were handed</p>	<ul style="list-style-type: none"> <li>• Promissory estoppel</li> <li>• Reasonable notice</li> </ul>

<p>over to receivership due to creditors. In early 1945, the flats were fully let. Π's receiver claims full rent for quarter ending in September 1945 and onward. "Friendly" proceedings (submit agreed upon facts for judgement.)</p> <p><u>Decision:</u> full rent payable for quarter ending in September 1945 and onward</p> <p><u>Reasons:</u> (1) promise was intended to be binding, intended to be acted upon and were acted upon; (2) characterization of promise: full rent would not be charged when the flats were not full let; (3) when the flats were full let (quarter ended in September 1945), the rent is full payable; (4) same outcome as would be found in estoppel (i.e. the strict right under the K can be reinstated w/ reasonable notice where possible)</p>	for ending promise
<p><i>Combe v. Combe</i> (UKCA 1951)</p>	<i>Combe</i>
<p><b>Case Details</b></p>	<b>Key Concepts</b>
<p><u>Facts:</u> wife divorced husband and claimed maintenance (although unlikely that maintenance would have been granted from divorce court as she had more income than her husband). Agreement between wife and husband's solicitors agree for husband to pay the wife £100/annum. After a number of years of non-payment, wife applies for repayment of unpaid 6 years (limited to 6 years by statute of limitations).</p> <p><u>Issue:</u> suing on the basis of a promise that does not appear to have any consideration</p> <p><u>Decision:</u> no cause of action</p> <p><u>Reasons:</u> (1) principle in <i>High Trees</i> should not be stretched too far; (2) promissory estoppel does not create a new cause of action; (3) promissory estoppel = one party makes promise intended to affect legal relationship + other party acts on this effect = promisor cannot revert to previous legal relationship (w/o notice) even if unsupported by consideration; (4) wife's forbearance from applying for maintenance was not sought by husband therefore not consideration (likely her forbearance was more motivated by a recognition support would not be granted)</p> <p><u>Policy Considerations:</u> (1) enforceability either requires an existing legal framework (promissory estoppel) or consideration (enforceable K)</p>	<ul style="list-style-type: none"> <li>● Promissory estoppel</li> <li>● Shield not sword</li> <li>● Consideration</li> </ul>
<p><i>John Burrows v. Subsurface Surveys</i> (SCC 1968)</p>	<i>John Burrows</i>
<p><b>Case Details</b></p>	<b>Key Concepts</b>
<p><u>Facts:</u> Π sold majority of assets to Δ, a friend. Promissory note for payment exchanged (security = Δ deposited some shares w/ Π; interest accrued at 6%/annum compounded monthly) + acceleration clause (any default by Δ would make the entire outstanding amount payable immediately). Payments often received late and Π accepted w/o comment. Disagreement between Π and Δ. At the next late payment, Π called the loan.</p> <p><u>Decision:</u> @ trial found that promissory estoppel would only apply if Π knew (or should have known) Δ changed legal position based on Π's conduct. @ appeal estoppel found. @ SCC parties promissory estoppel does not apply (Π awarded outstanding debt).</p> <p><u>Reasons:</u> (1) parties must intent a promise within the context of the legal relationship; (2) in this context (friendly relations), Π's conduct was likely due to friendship as opposed to making a promise intended to change legal relationship; (3) deference to trial judge's judgement (appellate courts generally avoid disturbing a trial judge's finding of fact)</p>	<ul style="list-style-type: none"> <li>● Promissory estoppel</li> <li>● Both parties intend to make promise within context of legal (not personal) relationship</li> </ul>
<p><i>Owen Sound Public Library v. Mial Developments</i> (ONCA 1979)</p>	<i>Owen Sound Library</i>
<p><b>Case Details</b></p>	<b>Key Concepts</b>
<p><u>Facts:</u> K for renovation of public library. In such a K, common for payments to made as progress is made on renovations (so main contractor can pay sub-contractors who expect to be paid when they complete their Ks.) Progress payments operated on certificate system (assurance that sub-K complete and sub-contractor paid). Once a certificate is submitted, the payment is due (and if unpaid, K cancelled). Certificate issued Nov 2 and due Nov 12. Library asks for corporate seal from sub-contractor on certificate. Contractor agrees but did not send corporate seal prior to due date. Library does not pay. Contractor claims that library breached K. Library argues promissory estoppel: K made a representation that the payment was not req'd until corporate seal received. "Who's in breach": contractor breached K b/c library did not.</p> <p><u>Decision:</u> representation was made therefore promissory estoppel applies</p> <p><u>Reasons:</u> (1) test: the course of conduct has to be such that one party could reasonably infer that the other party made a representation that affected their legal rights (not express words); (2) accepted trial judge finding that library's agent could reasonably infer that there was such a representation; (3) "pointed</p>	<ul style="list-style-type: none"> <li>● Promissory estoppel</li> <li>● Test for reasonable inference of representation</li> </ul>

shield": broader consequence that the use of estoppel creates a new legal right for library to sue for breach of K <u>Policy Considerations:</u> (1) commercially prudent for client to "pay as you go" to ensure money paid to sub-contractors (to avoid builders' liens if main contractor does not pay sub-contractors)	
<i>D&amp;C Builders v. Rees</i> (UKCA 1965)	<i>D&amp;C Builders</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Π (small building company) complete work for Δ (total bill £746). Δ pays £450 and Π credits £14. Outstanding balance £482. Πs send several reminder letters. Unpaid for 3+ months. Δ's wife offers £300 to settle account. Πs counter: accept £300 + 1 year to pay balance. Δ's wife refuses and offers £300 period otherwise will breach K (not pay at all). Πs accept due to financial difficulties. Δ's wife insists receipt "in completion of account" (Πs hesitate but accede due to financial difficulties). Action for rest of £. <u>Decision:</u> no accord to modify K therefore acceptance of £300 modification unenforceable <u>Reasons:</u> (1) a lesser sum is not consideration in favour of the greater sum ( <i>Foakes</i> ); (2) promissory estoppel suggests that a lesser sum may apply if equitable; (3) promissory estoppel requires that the non-enforcement of the promise would be inequitable; (4) as equitable remedy, person must come w/ clean hands (and Δs held Πs hostage w/ threat to break K) <u>Policy Considerations:</u> (1) equitable remedy	<ul style="list-style-type: none"> <li>• Promissory estoppel</li> <li>• Equitable remedy = clean hands</li> <li>• Creditor accepting lesser sum for debt</li> </ul>
<i>N.M. v. A.T.A.</i> (BCCA 2003)	<i>N.M.</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Π lives and works in UK. In relationship, Δ convinces Π to leave UK and move to BC w/ promise to pay off Π's mortgage in UK. Π moves but Δ refuses to pay off mortgage. Instead, Δ loans her \$100,000 on promissory note. Relationship ends. Π claims enforcement of promise to pay off mortgage. <u>Decision:</u> no enforceable promise = no enforceable K <u>Reasons:</u> (1) no extension of promissory estoppel to Π's reliance on Δ's promise in the context of a romantic relationship; (2) romantic relationship (like family relationships) does not generally result in promises intended to be legally enforceable (inherent risk in entering romantic relationship w/ respect to promises); (3) no case law to show that promissory estoppel is moving to a broader/more flexible doctrine in Canada to preclude unconscionable conduct or to create justice; (4) absence of evidence that Δ acquired interest in house / future income (therefore lack of mutuality to suggest legal/Ktual relationship) → insufficiently articulated legal relationship <u>Policy Considerations:</u> (1) American position suggests that reliance on a promise should create an enforceable promise (in this case, Π relied on promise to give up job and move to Canada)	<ul style="list-style-type: none"> <li>• Promissory estoppel</li> <li>• No intention of parties to enter legal relations (romantic relationship)</li> </ul>

### Cases (Unilateral Contracts)

<i>Williams v. Carwardine</i> (UK 1833)	<i>Williams</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Δ's brother murdered. Π witnessed murder but refused to testify. Δ offers reward for info leading to conviction. Π badly beaten and in danger of dying. To save her soul, Π made statement implicating murderer (who was convicted). Π claims reward. <u>Decision:</u> Π entitled to reward <u>Reasons:</u> (1) motivation (£20 or conscience) irrelevant to fulfilling conditions of reward; (2) recovery = meeting conditions of offer; (3) Π aware of reward; (4) "There was a K w/ any person who performed the condition mentioned in the advertisement" (CB 354)	<ul style="list-style-type: none"> <li>• Unilateral K</li> <li>• Motivation irrelevant</li> <li>• Π was aware of reward</li> </ul>
<i>Carlill v. Carbolic Smoke Ball Co.</i> (UKCA 1893)	<i>Carlill</i>
<b>Case Details</b>	<b>Key Concepts</b>
<u>Facts:</u> Δ published ad offering £100 to anyone who contracts the flu after using their smoke ball. Ad stated that £1000 was in bank for claims. Π buys ball, uses it, contracts the flu and claims the £100. Δ refuses to pay claiming it was an insurance policy, bet or extravagant marketing claim (puffery). <u>Decision:</u> enforceable unilateral K <u>Reasons:</u> (1) "express promise to pay £100 in certain events" (CB 357); (2) intended as a promise (not puffery) as £1000 deposited w/bank; (3) binding in light of precedent advertisements offering rewards as specifies "to anybody who performs the conditions named in the advertisement" (CB 357); (4) exception to the rule that acceptance must be communicated as it was a continuing offer (never revoked); (5) in such a case, acceptance is contemporaneous w/ performance	<ul style="list-style-type: none"> <li>• Unilateral K (puffery)</li> <li>• Performance = acceptance &amp; consideration</li> </ul>

<i>Dale v. Manitoba</i> (MBCA 1997)	<i>Dale</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δ created ACCESS program to increase access to university. University staff administer the program. Students (incl. Π) applied and were advised funding would be continued throughout their university career. Δ cancelled program.</p> <p><u>Decision:</u> binding offer made</p> <p><u>Reasons:</u> (1) "a binding offer was made to the student applications, open for acceptance without specific and direct communication to government" (CB 361); (2) Πs believed that they had "a contractual arrangement with the government not to alter the terms of the funding arrangements" (CB 360); (3) program administrators communicated continuation of funding to Πs; (4) offers that are continuing in nature do not require notice prior to performance (provided offer unrevoked); (5) program administrators had the apparent or ostensible authority to speak on behalf of Δ as only point of contact for students</p>	<ul style="list-style-type: none"> <li>• Unilateral K</li> <li>• Acceptance w/ performance</li> <li>• Continuing nature = no notice req'd for performance</li> </ul>
<i>Grant v. New Brunswick</i> (NBCA 1973)	<i>Grant</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π claims \$4800 (value of 4,000 barrels of potatoes) allegedly sold to province under potato price stabilization program. Π met qualifications specified in application. However, Δ rejected application as they did not believe he was the owner of the potatoes. However, potatoes belonged to Π. Δ argues that there was no legally binding req'ment to pay (subsidies not enforceable.)</p> <p><u>Decision:</u> enforceable K therefore Π entitled to \$</p> <p><u>Reasons:</u> (1) general information was sufficient to constitute an offer as no limitation on quantity of value and no assertion of req'ment for committee to approve application (i.e. no term that payment conditional); (2) test: reasonable person in the position of the parties (CB 364); (3) interpretation of what constituted the K: rejected Δ's version (Π makes offer to sell potatoes and Δ chooses whether to accept) and accepted Π's version (Δ made offer to purchase and Π accepted by performing / filling out the form and meeting the conditions)</p>	<ul style="list-style-type: none"> <li>• Unilateral K</li> <li>• General information can constitute an offer to the world</li> <li>• Test: reasonable person in position of the parties</li> </ul>
<i>Errington v. Errington</i> (UKCA 1952)	<i>Errington</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Father purchases home for son and DIL (Π) with £250 cash and mortgage of £500. Told Π that house would belong to them provided they paid the mortgage off. Father dies. Widow (Δ) refuses to transfer house to Π.</p> <p><u>Decision:</u> K therefore house transferable on completion of mortgage payments</p> <p><u>Reasons:</u> (1) unilateral K from father to son/DIL ("promise of the house in return for their act of paying the [mortgage] instalments"; (2) implied term that K could not be revoked once son/DIL started performance (payment on mortgage); (3) in an offer to a specific person (such as this one), it is more likely that offeror will be aware performance started and more likely aware of Π's reliance/investment based on started performance (4) house only transferred if mortgage paid</p> <p><u>Policy Consideration:</u> (1) although family arrangement, likely worked against estate that Δ's position appeared contrary to father's position</p>	<ul style="list-style-type: none"> <li>• Unilateral K</li> <li>• Specific offer</li> <li>• Implied term of no revocation</li> </ul>
<i>Dawson v. Helicopter Exploration</i> (SCC 1955)	<i>Dawson Helicopter</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π negotiated by mail w/ Δ to assist him in staking mineral claims (financing + transportation to sites). Π and Δ make agreement. Π called to US Navy active duty. Correspond w/ Δ while abroad to schedule visit. Δ cancelled agreement and then staked/sold claims. Π brought action.</p> <p><u>Decision:</u> not unilateral K</p> <p><u>Reasons:</u> (1) Δ alleged that agreement was an offer for a unilateral K that req'd Π's performance to accept (classic model: if he participated in staking the claim, he would receive % of profits); (2) court rejects unilateral K as performance req'd action of both parties (as agreement for Δ to provide transportation); (3) court finds bilateral K of mutually exchanged promises; (4) silence on part of Π was not abandonment of K as Π took reasonable actions in circumstances (active duty abroad) to communicate position to Δ (+ wrote to Mining Report + located claims)</p> <p><u>Policy Considerations:</u> (1) preference for bilateral Ks as easier to assess reliance on promises (as immediately binding)</p>	<ul style="list-style-type: none"> <li>• Unilateral K</li> <li>• Preference for bilateral Ks</li> <li>• No unilateral K if both parties req'd for performance</li> </ul>

<b>Cases (Third-party Beneficiaries)</b>	
<i>Tweddle v. Atkinson</i> (UK 1861)	<i>Tweddle</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π (son of deceased Tweddle) married daughter of deceased Guy. Prior to marriage of son and daughter, Tweddle and Guy agree to contribute £100 and £200 respectively. Both die prior to sum paid. Π claims £200 from Guy's estate (Δ).</p> <p><u>Decision:</u> enforceable K btwn Tweddle and Guy but no benefit to Π (3<sup>rd</sup> party)</p> <p><u>Reasons:</u> (1) privity of K: to found an action, Π must be a) be a party to a K or b) consideration must flow from Π to party in K; (2) rejects exceptional arguments: Π could not claim natural love and affection as consideration and father not agent on behalf of son (in which case Π could sue as would be party to K); (3) Π not liable to Δ therefore Δ not liable to Π</p> <p><u>Policy Considerations:</u> (1) mutual exchange of obligations (and responsibilities) in K</p>	<ul style="list-style-type: none"> <li>• Privity of K</li> <li>• No agency relationship</li> <li>• Consideration ≠ natural love and affection</li> </ul>
<i>Beswick v. Beswick</i> (UKHL 1966)	<i>Beswick</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> "Old Peter Beswick" sells coal merchant business to Δ (nephew) in exchange for employment as consultant for life at £6 10s./week and £5 payment/week to widow (Π) after his death. Beswick dies and Δ ceases to pay £5 to Π. Π sues to enforce K.</p> <p><u>Decision:</u> Π not a party to K and did not provide consideration for K (but could sue as executor of estate)</p> <p><u>Reasons:</u> (1) rejects argument from UKCA (Lord Denning) that privity of K is a procedural issue (i.e. can be resolved by 3<sup>rd</sup> party joining w/ a party to the K: A↔B C → A↔B↔C); (2) privity of K is a substantive issue: 3<sup>rd</sup> party must be a part of the K and provide consideration in order to sue; (3) find that Π can sue as executor of estate by ordering specific performance instead of damages (argument that no loss to estate if widow does not receive £5)</p> <p><u>Policy Considerations:</u> (1) decision to produce just result (today likely would be unjust enrichment)</p>	<ul style="list-style-type: none"> <li>• Privity of K</li> <li>• Work around: sue as executor for specific performance</li> </ul>
<i>Dunlop Pneumatic Tyre v. Selfridge</i> (UKHL 1915)	<i>Dunlop Tyre</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Manufacturer enters K w/ wholesaler. Manufacturer sets list prices for tires and agrees to sell specified quantity to wholesaler at discount from list price. K incl. term that wholesaler must incl. a price maintenance clause w/ retailer Ks (i.e. agreement not to sell below list price). Wholesaler sold tires to retailer w/o price maintenance clause (likely breach of K w/ manufacturer). Wholesaler creates new K w/ retailer that provides discount off list price in exchange for agreement to not sell below manufacturer's list price. Friendly action to determine whether manufacturer can enforce price maintenance clause between wholesaler and retailer.</p> <p><u>Decision:</u> privity of K = no action</p> <p><u>Reasons:</u> (1) manufacturer is not a party (unless wholesaler is agent for manufacturer, which the facts do not support in this case); (2) no consideration from manufacturer (discount off list price not sufficient)</p>	<ul style="list-style-type: none"> <li>• Privity of K</li> <li>• No agency relationship and no consideration</li> </ul>
<i>New Zealand Shipping v. A.M. Satterthwaite</i> ("The <i>Eurymedon</i> ") (JCPC 1975)	<i>The Eurymedon</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> <i>Eurymedon</i> to transport expensive drilling machine from consignor, Ajax Machine, in Liverpool to consignee (Π), A.M. Satterthwaite, in Wellington. Carrier, Federal Steam Navigation, is a subsidiary of the stevedore (Δ), New Zealand Shipping (stevedore = party that unloads cargo from a ship). Carrier's bill of lading w/consignor (consignee party to this K through statute) specified limited liability of carrier extended to agents/independent contractors. Δ damages drill through negligence in unloading. Through subrogation, Π sues Δ for damage.</p> <p><u>Decision:</u> 3<sup>rd</sup> party (Δ) party to K through agency K</p> <p><u>Reasons:</u> (1) <i>Midland Silicones</i> (UKHL 1962): a K btwn 2 parties cannot be sued on by a 3<sup>rd</sup> party even if K expressed for his benefit but exception to this rule if 1 party was agent for 3<sup>rd</sup> party; (2) to find agency relationship, four factors: a) bill of lading makes stevedore protected by liability limitation, b) carrier, in addition to securing limitation on his own behalf, secures it for stevedore, c) carrier has authority from stevedore, and d) any difficulties about consideration moving from stevedore to other party are overcome; (3) in commercial context, preference to find promise for consideration as opposed to gratuitous promise (avoid insurmountable difficulty in finding consideration); (4) in this case, all four elements found as court finds unilateral K: consignor/consignee aware that stevedore req'd to unload cargo; unloading the ship is a benefit to consignor/consignee; consignor makes offer to stevedore to extend benefit of limited liability</p>	<ul style="list-style-type: none"> <li>• Relaxation of strict privity of K</li> <li>• Agency relationship</li> <li>• <i>Himalaya</i> clause</li> <li>• Consideration through unilateral K</li> </ul>

<p>clause to stevedore in exchange for unloading the ship; benefit extended when K performed; (5) promising to a 3<sup>rd</sup> party to perform an existing obligation to perform can be good consideration as it creates a direct obligation to enforce (CP 397)</p> <p><u>Policy Considerations:</u> (1) English law takes practical approach to technical/schematic doctrine of K formation; (2) give effect to clear intention in document to extend liability coverage to stevedore; (3) avoid floodgates issue by providing a work around for exemption clauses</p>	
<p><i>Greenwood Shopping Plaza v. Beattie</i> (SCC 1980)</p>	<p><i>Greenwood Shopping</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Π covenanted w/ tenant (Δ's employer) to insure against fire. If Π did not procure the insurance, Π req'd to provide tenant w/ notice. Insurance not acquired nor notice provided to tenant. Δs (employees) started a fire and caused great damage to shopping centre. Π tried to sue tenant but tenant protected by lease clause.</p> <p><u>Decision:</u> Δs liable as not able to rely on tenant's (employer's) protection</p> <p><u>Reasons:</u> (1) employees were not entitled to rely on the lease protections: a) employer did not have subrogation waived as insurance never acquired, and b) Δs total strangers to K; (2) lease clause did not protect anyone in lease (only a promise to secure insurance, which was broken and therefore discharged the tenant's liability but this shield could not extend to others)</p> <p><u>Policy Considerations:</u> (1) not overruled in <i>London Drugs</i> but not considered an expansive decision</p>	<ul style="list-style-type: none"> <li>• Failure of owner to acquire insurance discharged tenant's liability but not the tenant's employees</li> </ul>
<p><i>London Drugs v. Kuehne &amp; Nagel</i> (SCC 1992)</p>	<p><i>London Drugs</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Π entered K w/ Δ to store transformer. K limited warehouseman's liability to \$40 unless Π declared excess value (Δ would acquire add'l insurance and bill Π for cost; in alternative, Π could acquire own insurance, which it did). Π asked for transformer and Δ's employees loaded up the transformer using forklifts (instead of lifting from above as per the instruction on the box.) Transformer damaged. Π claims from insurance and insurance sues Δ and Δ employees through subrogation.</p> <p><u>Decision:</u></p> <p><u>Reasons:</u> (1) privity of K is well established but incremental change appropriate in commercial context; (2) 3<sup>rd</sup> party beneficiary should be able to enforce K provisions made for 3<sup>rd</sup> party's benefit (exception typically made for agency Ks); (3) special considerations of employee/employer relationship: a) clear that employee will perform K work and b) "identity of interest" (interests overlap) → no reason not to extend liability coverage; (4) requirements for relaxation: a) employer's limitation of liability includes express or implied extension to employees and b) employees acted in course of employment, and performed service/work in K; (5) requirements consistent with <i>The Eurymedon</i> and attune to the intention of the K; (6) in this case, no specific wording but circumstances shows implicit inclusion as 3<sup>rd</sup> party beneficiaries given policy considerations and factors in (3) above</p> <p><u>Policy Considerations:</u> (1) given how well established privity of K is, any change must be at legislative level; (2) why relax in this case? a) used as a shield, not a sword, and b) no concern re: floodgates/double recovery/reciprocity; (3) difference between shield (limitation of liability) and sword (right to sue under K); (4) unfair for insurance company to get backdoor when it was aware that it was bearing the risk (allocation of risk clear in this type of commercial context); (5) corporation lacks arms/legs therefore must act through employees (i.e. risk in K is that employees will be careless, not corporation); (6) serious injustice if employees were deprived benefit of employer's limited liability as no opportunity to K w/ other party</p>	<ul style="list-style-type: none"> <li>• Relaxation of strict privity of K</li> <li>• Two requirements: express or implied inclusion in K and 3<sup>rd</sup> party beneficiary acting in course of employment + performing service/work in K</li> </ul>
<p><i>Fraser River Pile v. Can-Dive</i> (SCC 1999)</p>	<p><i>Fraser River Pile</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Π had insurance on ships. Insurance incl. waiver of subrogation rights against "any charterer." Δ chartered ship from Π and sunk by Δ's negligence. Insurance co. advises Π that Π's premiums will increase unless subrogation clause waiving liability for any charterers was dropped. Π drops clause. Through subrogation, insurance sues Δ.</p> <p><u>Decision:</u> benefit extended; no unilateral withdrawal of benefit once it had crystalized</p> <p><u>Reasons:</u> (1) <i>London Drugs</i> applies outside employees; (2) in this case, express provision that the charterer would have been covered by the unamended waiver; (3) Π could not unilaterally withdraw this benefit to Δ once it had crystalized (i.e. been used)</p> <p><u>Policy Considerations:</u> (1) <i>London Drugs</i> rule (and its extension in this case) preserve freedom of K as coverage does not extend unless express or implied in K</p>	<ul style="list-style-type: none"> <li>• Extension of <i>London Drugs</i> to non-employer/employee situations</li> </ul>

Cases (Mistaken Identity of void and voidable contracts)	
<i>Phillips v. Brooks</i> (UKHC 1910)	<i>Phillips</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Rogue enters P's shop and purchased pearls and ring for £3000 (cheque). Normally would wait until cheque cleared but P permitted rogue to take ring as believed to be Sir George. Cheque bounced. Rogue pawned ring w/ Δ. P claims return of ring.</p> <p><u>Decision:</u> Δ retains ring</p> <p><u>Reasons:</u> (1) P intended to K w/ the person present, although the ring would not have been released w/o fraudulent misrepresentation; (2) test: did you intend to K w/ the person present or did you intend to K w/ a particular person?; (3) timing matters: misrepresentation as Sir George occurred after P decided to sell jewellery (but before decision to release ring); (4) individuality matters: decision to sell occurred prior to shift from "credit worthy person" to Sir George (individual)</p> <p><u>Policy Considerations:</u> (1) P in best position to absorb risk as P could have held jewellery until the cheque cleared (while the Δ cannot verify the original K)</p>	<ul style="list-style-type: none"> <li>• Mistaken identity</li> <li>• Voidable K</li> <li>• 3<sup>rd</sup> party retains stolen item</li> </ul>
<i>Ingram v. Little</i> (UKCA 1961)	<i>Ingram</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> P's advertised car for sale (£725). A man purporting to be Hutchinson (in phone book) offered £717 by cheque. P's accepted. Cheque bounded. "Hutchinson" sold to Δ. P claim return of car from Δ.</p> <p><u>Decision:</u> trial decision = Δ acted in good faith but rogue had not K given mistaken identity (therefore no rights to transfer to Δ); CA = fundamental mistaken in identity therefore K void</p> <p><u>Reasons (Sellers):</u> (1) Presumption: 2 parties negotiating = contracting parties unless 1 is an agent. Contrary finding requires clear evidence; (2) disguise (physical) equivalent to deceiving words (but still must assess whether deceit significant); (3) distinguished from <i>Phillips</i>: in a shop rogue could only be "customer" (not "[individual]"); (4) question of fact in each case whether offer directed to person (present) or person (allegedly) → interpretation of promise</p> <p><u>Reasons (Devlin in dissent):</u> (1) question of mistaken identity = assessment of the intention of the parties (to K w/ person present or person purported); (2) presumption = person present (unless authorized agent); (3) Q = is there a mistake that vitiates the K (mistake = one that frustrates the object of K); (4) policy: who absorbs the loss btwn 2 innocent parties? (loss should only be imposed on 3<sup>rd</sup> party w/ good reasons)</p>	<ul style="list-style-type: none"> <li>• Mistaken identity</li> <li>• Void K</li> <li>• P's retain stolen car</li> <li>• Dissent: presumption that K w/ person present</li> <li>• Dissent: loss should only be imposed on 3<sup>rd</sup> party w/ good reason</li> </ul>
<i>Lewis v. Averay</i> (UKCA 1972)	<i>Lewis</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> P offers car for sale (£450). Rogue called to book appt. to see the car. Rogue led P to believe that he was the actor Richard Greene (of Robin Hood fame) and wrote cheque for £450. P did not want to let car go until cheque cleared. Rogue produced ID (wrong spelling) for studio. P released car. Cheque bounced. Rogue sold car to Δ for £200 presenting himself as P to conclude transaction.</p> <p><u>Decision:</u></p> <p><u>Reasons (Denning):</u> (1) fundamental mistaken of identity = no exchange of goods; (2) uphold <i>Phillips</i>: when 2 parties come to a K, the fact that 1 party is mistaken as to the identity of the other does not the K. K voidable prior to 3<sup>rd</sup> party acquisition of rights under K; (3) adopt Devlin's presumption in <i>Ingram</i>: K between parties present</p> <p><u>Policy Considerations:</u> (1) P enabled rogue to acquire car not the Δ (who did not w/ respect to the fraud)</p>	<ul style="list-style-type: none"> <li>• Mistaken identity</li> <li>• Voidable K</li> <li>• Presumption K w/ person present</li> <li>• Risk allocation: P enabled rogue to acquire car (not Δ)</li> </ul>

### Cases (*Non est factum*)

<i>Saunders v. Anglia Building Society / Gallie v. Lee</i> (UKHL 1971)	<i>Saunders</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Gallie (72) had long lease on house. Parkin (nephew, 40) was told house would be left to him. Gallie gave him the deed. Parkin spoke to Lee as he was behind on maintenance payments to 1<sup>st</sup> wife. Parkin and Lee agree that Gallie should give deed to Lee, who would take out a mortgage and make payments to "Mrs. Parkin" (mistress) or Parkin's business. Gallie was not wearing glasses and signed the deed transfer w/o reading it or having it read to her. Building Society gave Lee £2000 mortgage. No sum made available to Parkin by Lee. Gallie claims assignment of deed void (and damages for fraudulent misrepresentation) from Lee. Against Building Society, Gallie claims assignment of deed void and re-</p>	<ul style="list-style-type: none"> <li>• <i>Non est factum</i></li> <li>• Requirements: (1) signed w/o negligence, and (2) document materially different</li> </ul>

<p>delivery of deed to her.  <u>Decision:</u> trial = transfer voidable; CA = transfer was enforceable K; HL = uphold CA decision  <u>Reasons (Sellers):</u> (1) presumption that person signed document; (2) plea not available in some circumstances (but not too constraining); (3) <i>non est factum</i> test: a) subjective assessment of intention, b) question of fact of negligence/carelessness on part of signer, and c) degree of difference between intended and actual document  <u>Reasons (Reid):</u> (1) application limited in circumstances (likely not a man of full capacity unless misled that document did not affect legal rights); (2) only applicable if difference between expected and realized document (not if never read in first place); (3) "radical difference" in consideration of all the circumstances  <u>Policy Considerations:</u> (1) signatory retains risk for not reading (esp. once 3<sup>rd</sup> party is involved)</p>	
<p><i>Marvco Color Research v. Harris</i> (SCC 1982)</p>	<p><i>Marvco Color</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Husband and wife (Δ) sign mortgage collateral as a guarantee for daughter's live in partner, Johnston, who is buying out his partner to purchase their business. Δs sign mortgage documents separately based on Johnston's representations that amendment to existing mortgage (but in fact it was a new mortgage to Πs for \$55,650). Document not read.  <u>Decision:</u> Δs not negligent but were careless therefore <i>non est factum</i> does not apply  <u>Reasons:</u> (1) follows <i>Saunders</i>: correct statement of law = carelessness prevents a claim of <i>non est factum</i>; (2) consideration of case specific circumstances in order to balance difficult interests (lack of consent of signer and protection of 3<sup>rd</sup> party interests)  <u>Policy Considerations:</u> (1) protect innocent party who relied on careless party's signed document (careless party who is in position to avoid loss bears the risk)</p>	<ul style="list-style-type: none"> <li>• <i>Non est factum</i></li> <li>• Carelessness precludes a claim of <i>non est factum</i></li> <li>• Significant policy considerations</li> </ul>

<p style="text-align: center;"><b>Cases (Parol Evidence Rule)</b></p>	
<p><i>Prenn v. Simmonds</i> (UKHL 1971)</p>	<p><i>Prenn</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Prenn purchases company where Prenn works in order to benefit from his scientific expertise. Simmonds' employer becomes subsidiary to Prenn's parent company. To entice Simmonds to remain w/ subsidiary, Prenn offers him 4% interest in company if £300,000 profit made in exchange for a £6,000 investment. Dispute whether profit for parent company alone or for parent company w/ subsidiaries (incl. Simmonds' employer, which had been quite profitable.) Simmonds argues for incl. of evidence of oral negotiations to construct meaning of K provision.  <u>Decision:</u> no negotiation evidence admissible but found K interpretation in favour of Simmonds  <u>Reasons:</u> (1) no "island of literal interpretation" but rather consideration of commercial context / factual matrix; (2) with difficult/complex negotiations, there is consensus only in the final (written, signed) agreement; (3) previous drafts may suggest commercial object however frustration of objective may street court away from 1 interpretation; (4) admissible evidence: factual background known to the parties at or before K date (incl. K genesis and objective purpose); (5) commercial context would consider parent company's profits as incl. subsidiaries, which is consistent w/ business practise and document as a whole</p>	<ul style="list-style-type: none"> <li>• <b>Parol evidence</b></li> <li>• Pre-K negotiations presumptively inadmissible</li> <li>• Consider factual matrix in K interpretation</li> </ul>
<p><i>Hawrish v. Bank of Montreal</i> (SCC 1969)</p>	<p><i>Hawrish</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Hawrish (solicitor) signed \$6000 guarantee to BMO for indebtedness of Crescent Dairies, which bought assets of Waldheim Dairies (Hawrish held interest). Oral assurance from bank manager that guarantee only for existing debt and would be released when new guarantee signed by directors of Crescent Dairies, which was completed. However, written guarantee was continuing (covering existing and future indebtedness up to \$6000) and incl. termination provision (through notice to bank but termination only effective against future liabilities). Document excluded other representation through an integration clause. Crescent Dairies insolvent and BMO claims \$6000.  <u>Decision:</u> oral representation of bank mänge was not a collateral K; no parol evidence admissible  <u>Reasons:</u> (1) distinguish from <i>Standard Bank</i> (SCC 1920), which found that an oral agreement supported by parol evidence suspended/delayed the written agreement, as that case the condition in question was manifestly different; (2) follow CA: a) oral agreement was not an independent agreement as it was not consistent w/ written agreement (contradicted it), b) oral evidence was not admissible given this contradiction; (3) oral evidence cannot support a collateral agreement that contradicts the terms of the</p>	<ul style="list-style-type: none"> <li>• <b>Parol evidence</b></li> <li>• Substantive component: oral agreements (collateral Ks) will not be found where inconsistent w/ main K</li> </ul>

<p>agreement (collateral K only valid if consistent w/ main agreement); (4) collateral K = clearly intended to be binding agreement + consistent w/ written K; (5) in this case, intention not supported by evidence and alleged collateral K was inconsistent w/ continuing guarantee provision of written document</p>	
<p><i>Tilden Rent-a-Car v. Clendenning</i> (ONCA 1978)</p>	<p><i>Tilden Rent-a-Car</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Δ rented a car from Π and purchased add'l insurance as was his habit. Written K indicates that add'l coverage reduces liability to nil. Δ (businessman who frequently rented cars) did not and had not in past read K. Back in small and illegible type were onerous exclusion clauses incl. not being intoxicated while operating rental car, violation of road laws and only applicable on publically maintained highways. Δ crashed car into pole after consuming alcohol. Δ does not contest claim of impaired driving as living in Ontario (cheaper to pay fine then contest claim). Δ asserts that he was in control of the car and this assertion is not contested by Π. Π claims cost of repairs not covered by add'l insurance. Δ claim admissibility of parol evidence: oral explanation of clerk did not specify exclusions.  <u>Decision:</u> action fails as exclusionary provisions do not apply (not represented as part of K)  <u>Reasons:</u> (1) presumption (<i>L'Estrange</i>): signed document = party bound unless fraud or misrepresentation; (2) <i>consensus ad idem</i> essential to K formation; not found if a) other party knew no intention to consent or b) facts show not reasonable to assume consent (+ consent not given); (3) modern commercial context requires that parties be aware of true intention to depend on signatory  <u>Policy Considerations:</u> (1) <i>Neuchatel Asphalte</i>: "we do not allow printed forms to be made a trap for the unwary" (CB 510)</p>	<ul style="list-style-type: none"> <li>• Parol evidence</li> <li>• Reliance on onerous exclusion provisions obligates party relying to inform other party</li> <li>• Context of hurried, informal signing of provisions</li> <li>• Exceptional circumstances</li> </ul>
<p><i>Gallen v. Allstate Grain</i> (BCCA 1984)</p>	<p><i>Gallen</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> President of Δ company made oral representations to Π that experimental crop of buckwheat in Fraser Valley would choke out weeds given the buckwheat's canopy effect. Δ desired crops in Fraser Valley given longer growing season and desire to capitalize on Japanese market for early buckwheat (first crop as opposed to second crop available in shorter Saskatchewan growing season). Standard written agreement signed incl. exclusion of liability for crop yield. Weeds grew faster than buckwheat. Crop lost.  <u>Decision:</u> warranty had contractual effect therefor Δs liable  <u>Reasons:</u> (1) parol evidence = evidentiary and substantive rule; (2) right pleading satisfies evidentiary component of parol evidence (i.e. claim for warranty / collateral K); (3) oral representation that contains a warranty may be admissible to support claim for damages (either as 1 K, where the final agreement incl. oral + written components, or as 2 K, where the oral agreement is a collateral K); (4) distinction between collateral K and innocent misrepresentation whether intended to be a part of contractual relationship (determined from objective evidence incl. whether parties acted on it); (5) warranty = a) consideration of K in light of surrounding circumstances and determination of how the representation would affect the substance of K intended actions, and b) words and actions of parties that make plain where responsibility lies (vendor); (6) <i>Hawrish</i> principle does not necessarily apply to situations where the oral agreement modifies/varies/adds to written K; (7) preference for harmonious interpretation as presumption that parties do not intent inconsistent obligations</p>	<ul style="list-style-type: none"> <li>• Parol evidence</li> </ul>

<p style="text-align: center;"><b>Cases (Clauses excluding liability)</b></p>	
<p><i>Photo Production v. Securicor</i> (UKHL 1980)</p>	<p><i>Photo Production</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Δ provided night patrol service to Π's factory for nominal fee. Limitation clause in K eliminates Δ's liability for employees unless Δ could foresee the problem and do something to prevent it. Employee sets fit to factory. Δ raises limitation clause as the problem was unforeseen/not preventable.  <u>Decision:</u> exclusion clause applies  <u>Reasons:</u> (1) adopts <i>Suisse Atlantique</i>: the question of whether an exclusion clause applies to a breach (incl. fundamental) is a matter of construction; (2) <i>Unfair K Terms Act</i> (UK 1977) proscribes just and reasonable standards to consumer Ks w/ exception clauses; (3) termination (releasing party or parties from performance of K and then permitting a claim for damages) ≠ invalidation of K terms (in fact, this situation is exactly when K terms are intended to apply); (4) factors considered: modest price (would charge more to assume greater risk), reasonable allocation of responsibility of insurance (party w/ knowledge of bldg. and capacity to enact preventative measures to reduce insurance rate), commercial context (less cost for</p>	<ul style="list-style-type: none"> <li>• Limitation clause</li> <li>• Matter of construction</li> <li>• K interpretation principle: <i>contra proferntem</i></li> </ul>

<p>service = savings allocated to insurance); (5) K interpretation: <i>contra proferentem</i>, exemption from negligence must be clearly drafted → requisite clarity present in this K  <u>Policy Considerations</u>: (1) parties negotiating Ks should be able to estimate risk (claims) according to Ktual provisions, not a post-breach analysis of whether it was fundamental</p>	
<p><i>Hunter Engineering v. Syncrude</i> (SCC 1989)</p>	<p><i>Hunter Engineering</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts</u>: commercial K between two sophisticated commercial bodies for gearboxes. Gearboxes poorly designed for intended purpose and developed cracks. Π sues claiming inherently defective (unfit for intended purpose/not merchantable quality) and therefore fundamental breach of K. Δ raise limited warranty clause (claim fell outside window).  <u>Decision</u>: no reason not to enforce limited warranty clause  <u>Reasons (majority)</u>: (1) adopt <i>Photo Production</i>: application of exclusion clause is a matter of K construction; (2) Canadian statement of rule: hold parties to K unless agreement is unconscionable  <u>Reasons (dissent)</u>: (1) distinguish question from whether clause was reasonable at time of negotiation from question of whether clause should be enforced; (2) <i>Beaufort Realities</i>: context of particular breach even if clause clear and unambiguous; (3) no similar legislation to UK therefore need for common law to balance K reliability w/ disinterest in facilitating parties totally repudiating Ks; (4) after determining intent, courts still must decide whether to give effect (either due to fairness or balancing conflicting interest)  <u>Policy Considerations</u>: (1) avoid disturbing the bargain struck by two sophisticated parties; (2) (dissent) court should retain residual power to withhold assistance on public policy grounds</p>	<ul style="list-style-type: none"> <li>• Limited warranty clause</li> <li>• Adopt <i>Photo Production</i></li> <li>• Add'l factor: no enforcement if unconscionable</li> </ul>
<p><i>Tercon Contractors v. British Columbia (Minister of Transportation and Highways)</i> (SCC 2010)</p>	<p><i>Tercon Contractors</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts</u>: Δ accepted bid from contractor not eligible to bid (did not pre-qualify per tender process), and took steps to hide this decision. Clause excluded all claims resulting from bid process. Π sues for damages.  <u>Decision</u>: trial = as bid was non-compliant, exclusion clause did not apply; BCCA = exclusion clause applies per <i>Hunter Engineering</i>; SCC = exclusion clause not excluded on policy reasons but ambiguous (5:4 split on ambiguity but unanimous on application/treatment of exclusion clauses in Canadian law)  <u>Reasons (Majority)</u>: (1) as a matter of interpretation, exclusion clause does not apply to breach in this case as outside scope of tendering process; (2) rule of construction: read harmoniously w/ rest of K and purpose of K; (3) in alternative, clause was ambiguous (did it apply to pre-qualifying K and Contract A?) and application of <i>contra proferentem</i> results in interpretation that favour Π's position  <u>Reasons (Minority on Interpretation; Majority on Applicability)</u>: (1) exclusion clause clear and unambiguous; (2) 3-step analysis of exclusion clauses: i) was it the intention of the parties that the exclusion clause apply to given circumstances (matter of construction), ii) using the court's residual power to withhold enforcement, are there reasons of unconscionability not to enforce exclusion clause, ii) using the residual power, are there reasons of public policy not to enforce  <u>Policy Considerations (Minority/Majority)</u>: (1) approach to exclusion clauses is not a rule to override freedom of parties to K w/ respect to that term; (2) Π experienced tender bidders therefore familiar w/ risk of exclusion clause</p>	<ul style="list-style-type: none"> <li>• Exclusion clause</li> <li>• Three step analysis: intention of K provision to apply (matter of construction) + residual power to not enforce if unconscionable or against public policy</li> </ul>

**Cases (Misrepresentation)**

<p><i>Heilbut, Symons &amp; Co. v. Buckleton</i> (UKHL 1913)</p>	<p><i>Heilbut</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts</u>: Π bought shares in rubber co. from Δ's agent on basis of Δ underwriting the shares. Π's broker spoke w/ Δ's broker who advised Π that he did not have the prospectus. Π asked "if it was alright" and Δ replied "we are bringing it out." Rubber trees deficient. Shares drop. Π sues for misrepresentation or (in alternative) collateral warranty.  <u>Decision</u>: no misrepresentation or collateral K (trial &amp; CA found no representation but did find collateral K)  <u>Reasons</u>: (1) restrict attempts to create liability by extending the scope of deceit, legal fraud or collateral K; (2) only collateral K if intended to be collateral K; (3) collateral K's consideration may be the signing of main K; (4) no evidence of warranty in this case (statement of fact that was innocently misrepresented)  <u>Policy Considerations</u>: (1) suspicion of collateral K: why wouldn't a warranty be written into main K?; (2) restrict broad use of collateral K to increase the scope of Ktual liability, which erodes the rule that innocent misrepresentations do not give rise to damages; (3) no imposition of liability for forgetfulness/mistake/lack</p>	<ul style="list-style-type: none"> <li>• Innocent misrepresentation</li> <li>• Collateral K</li> <li>• Req. intention for representation = collateral K</li> </ul>

of knowledge; honest misrepresentation	
<i>Bentley Productions v. Smith Ltd.</i> (UKCA 1965)	<i>Bentley Productions</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π purchases used car from Δ (car dealer). Δ advises Π that car had been fitted w/ a replacement engine and gearbox 20,000 miles ago. This fact turns out to be false.</p> <p><u>Decision:</u> collateral K</p> <p><u>Reasons:</u> (1) collateral K must be intended by both parties; (2) intention = analysis of words and behaviours of parties (not guessing their thoughts, which is impossible); (3) intelligent bystander test: would a reasonable person believe warranty was intended?; (4) if the statement induced other party to enter K, prima facie presumption that representation was intended as a warranty (rebutted by truly innocent misrepresentation) (not picked up by other courts)</p>	<ul style="list-style-type: none"> <li>• Collateral K</li> <li>• Intelligent bystander</li> <li>• Induce K formation</li> </ul>
<i>Redgrave v. Hurd</i> (UKCA 1881)	<i>Redgrave</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π sought lawyer to purchase house and take over legal practise (selling practise ancillary to selling house). Δ interested in purchasing practise therefore Ks to purchase both. Δ learns that practise was worthless so gives up possession and refuses to complete sale. Π claims specific performance and Δ claims rescission given false statement regarding profitability of legal practise.</p> <p><u>Decision:</u> misrepresentation sufficient ground to rescind K</p> <p><u>Reasons:</u> (1) misrepresentation of profitability of legal practise induced entry into K and not rebutted by Π; (2) rescission available if req'ments of equitable remedy met</p>	<ul style="list-style-type: none"> <li>• Collateral K</li> <li>• Rescission</li> </ul>
<i>Leaf v. International Galleries</i> (UKCA 1950)	<i>Leaf</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π purchases painting from Δ (gallery) that they both believe to be a Constable, which is why he acquired it. Five years later, Π attempts to sell but Christie's cannot confirm that it is a Constable (i.e. it isn't.) Π claims rescission (later claims damages, but not accepted given timing.)</p> <p><u>Decision:</u> sale was for a particular painting but action barred by timing (<i>Sale of Goods Act</i>, equity's promptness)</p> <p><u>Reasons:</u> (1) term of K said painting was a Constable therefore the sale was for a particular painting by a particular artist; (2) rescission may be possible after a K is executed however too late to rescind as 5 years have passed</p> <p><u>Policy Considerations:</u> (1) unfair for commercial liability to carry forward forever &amp; forever (time frame was unreasonable period to expect Δ to pay out claim); (2) given time frame, Π derived some benefit from painting (only significant when time to sell)</p>	<ul style="list-style-type: none"> <li>• Rescission post-execution if non-land good + equitable requirements met</li> </ul>
<i>Murray v. Sperry Rand Corp.</i> (ONHC 1979)	<i>Murray</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π interested in purchasing a self-propelled forage harvester to prepare forage for feed. Viewed product at fair. At Δ's display, Π read brochure with specific assertions of performance (size of forage, yield, test condition results, degree of customization). Π invites dealer to farm, who sells Π forager for \$12,000+. Forage harvester does not perform as advertised. Π sues dealer (out of business) and manufacturer.</p> <p><u>Decision:</u> dealer liable for breach of K (collateral K) and manufacturer liable for breach of K (unilateral K)</p> <p><u>Reasons:</u> (1) collateral K as representation of performance induced Π to sign K; (2) unilateral K imposes liability on manufacturer (addressing issue of remoteness): offer = brochure alleging performance, acceptance/consideration = purchase of machine</p> <p><u>Policy Considerations:</u> (1) unusual for manufacturer's advertising to be accurate/specific/serious enough to constitute representations that induce the purchase</p>	<ul style="list-style-type: none"> <li>• Collateral K + unilateral K</li> <li>• Brochure</li> </ul>
<i>Hedley Byrne v. Heller</i> (UKHL 1964)	<i>Hedley Byrne</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π = advertising agents. A client submits a large order. Π contacts Δ to check creditworthiness. Δ provided statement that client was good for ordinary business engagements "without responsibility on the part of this bank." Client insolvent. Π lost £17,000 on credit extended to client.</p> <p><u>Decision:</u> negligent misrepresentation found but disclaimer discharged duty</p> <p><u>Statement of Law:</u> if there is a special relationship between the parties (created by one party relying on the special skill and knowledge of the other and the other is aware of this reliance) there is sufficient proximity</p>	<ul style="list-style-type: none"> <li>• Negligent misrepresentation (tort)</li> </ul>

to give rise to a duty of care. If the standard of care is not met, negligent misrepresentation may be found.	
<i>Esso Petroleum v. Mardon</i> (UKCA 1976)	<i>Esso Petroleum</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> franchise/lease of service station. Mardon enters K to lease petroleum station and purchase petroleum to sell from Esso. Rental rate determined on estimate annual consumption. However, e.a.c. not revised after city planning codes req'd change to entrance location, which affected visibility (and therefore sales) of the station. Old e.a.c. was out of touch w/ real consumption. Esso reduced rent when clear e.a.c. was unrealistic and "tried" to find 2<sup>nd</sup> site to offset losses but eventually Mardon completely out of business (and all personal capital.)</p> <p><u>Decision:</u></p> <p><u>Reasons:</u> (1) no collateral K for e.a.c. as though Mardon relied on e.a.c. to enter K, the forecast of future performance (opinion of future events) is not a promise for future events to occur. However, warranty that e.a.c would be a sound forecast (made w/ reasonable care and skill; (2) test for negligent misrepresentation specified; (3) forecast (in collateral K) made negligently therefore reliance damages (tort): compensation for entering a disastrous K</p> <p><u>Policy Considerations:</u> (1)</p>	<ul style="list-style-type: none"> <li>• Collateral K</li> <li>• Negligent misrepresentation</li> </ul>
<i>Central Trust v. Rafuse</i> (SCC 1986)	<i>Central Trust</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Mortgage invalidated in foreclosure claim. Lawyers, when drafting document, forgot legal rule that limited corporations from using own shares as collateral. Π sues lawyers (Δs) who prepared mortgage documents for negligence and breach of K.</p> <p><u>Decision:</u> negligent action permissible</p> <p><u>Reasons:</u> (1) relationship between lawyer and client is a contractual one; (2) while limitation period barred recovery under K, action was available in tort provided that it did not circumvent contractual exclusion or limitation clause (in this case, limitation period was statutory)</p>	<ul style="list-style-type: none"> <li>• Relationship between K and tort</li> </ul>

**Cases (Unconscionability, Undue Influence and Duress)**

<i>Marshall v. Canada Permanent Trust</i> (ABSC 1968)	<i>Marshall</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π (business man, alert, intelligent, 52) offered to purchase land from Walsh (resided in a rest home, frail, 68) for \$7,000. Deposit \$100 sent to Walsh's lawyers. Walsh's lawyers refuse to cash cheque and arrange for committee. Π sends remainder of \$7,000. Walsh's lawyers refuse to send title. Π claims specific performance of land transfer. Δ claims rescission of K on behalf of Walsh, who can no longer make Ks after appointment of committee.</p> <p><u>Decision:</u></p> <p><u>Reasons:</u> (1) test: i) was the individual capable of protecting his interest? and ii) was the transaction improvident?; (2) in this case, court found that at time of K formation, Walsh's state of mind was impacted by a minor stroke that left him incapable of transacting business (could not relate to past or future) although he appeared quite rational and understanding (i.e. could read a K); (3) court found purchase K significantly undervalued the land; (4) procedural unfairness found (Walsh unable to consent + gross inequality in bargaining power, which affects the parties' abilities to protect their interests) and substantive unfairness found (undervalued price)</p>	<ul style="list-style-type: none"> <li>• Unconscionability</li> <li>• Procedural unfairness (lack of consent + gross inequality in bargaining power)</li> <li>• Substantive unfairness (undervalued land)</li> </ul>
<i>Mundlinger v. Mundlinger</i> (ONCA 1968)	<i>Mundlinger</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π (wife) applies to have a separation agreement and land conveyances rendered void. At time of signing, Π was suffering from a serious nervous breakdown and was hospitalized. Δ (husband) and Π raised three grown children and were married 25+ years. Δ had affair. Π overdosed and hospitalized for 3 years. Agreement and conveyances were signed in first 6 months of hospitalization: 1<sup>st</sup> agreement Π contacted solicitor, who advised her to reject; 2<sup>nd</sup> agreement Δ obliged her to sign (told her not to seek legal advice.) 2<sup>nd</sup> agreement (like 1<sup>st</sup>) significantly undervalued Π's interest in alimony and land.</p> <p><u>Decision:</u> agreements void; alimony and damages to be set by trial court</p> <p><u>Reasons:</u> (1) <i>Vanzant v. Coates</i> (ONCA 1917): equity will protect a donor if not equal to protecting him or herself; (2) factors considered in determining unequal to protecting self: age of donor, infirmity, dependence on donee, position of influence of donee, significant change in donor's intention (<i>Vanzant</i>);</p>	<ul style="list-style-type: none"> <li>• Unconscionability</li> <li>• Procedural + substance unfairness = onus on party claiming enforcement to show result not a consequence of undue influence /</li> </ul>

(3) when procedural and substantive unfairness found, onus on Δ to show result not a consequence of undue influence/unconscionability; (4) burden not discharged	unconscionability
<i>Lloyd's Bank v. Bundy</i> (UKCA 1975)	<i>Lloyd's Bank</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δ owned family farm valued at £10,000. Son's business failing so Δ provides series of guarantees: i) mortgage for £7,500 (although solicitor advised no more than £5,000) and ii) (after bank manager advises son that bank considering withdrawing credit) additional security of £3,500 (total £11,000, which exceeds value of house). In ii), Δ did not keep forms overnight nor did he seek independent legal advice. Son's company defaults and Π (bank) claims default of house.</p> <p><u>Decision:</u> no K due to undue influence</p> <p><u>Reasons:</u> (1) consideration moving from the bank was inadequate in ii) as no benefit to father or company (no promise to continue overdraft or increase; the overdraft was in fact reduced); (2) relationship w/ bank was one of trust and confidence (despite the fact that the bank manager was new, Δ had a long-standing relationship w/ bank and believed he was being advised in his best interests); (3) natural relationship of trust and confidence w/ son; (4) conflict of interest between Π and Δ (bank did not realize conflict and recommend independent legal advice, which would have advised against the bargain)</p> <p><u>Policy Considerations:</u> (1) Lord Denning attempts to draw a common thread of inequality in bargaining power through all unfairness issues: i) duress of goods, ii) unconscionable transaction, iii) undue influence, iv) undue pressure, and v) salvage arrangements</p>	<ul style="list-style-type: none"> <li>• Undue influence</li> </ul>
<i>Royal Bank of Scotland v. Etridge</i> (UKHL 2001)	<i>Royal Bank of Scotland</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> series of cases in front of UKHL w/ similar factual matrices: husband operates business independently of wife (wife typically unaware of business dealings); wife and husband (or wife alone) own matrimonial home; business needs a loan and lender asks for personal guarantee on loan; husband offers matrimonial home and lender requires wife's signature; husband takes documents to wife; lender has no knowledge of the conversation between spouses (possible that husband misrepresents issue or pressures wife to sign); business fails and lender moves to foreclose the house. Wife claims undue influence or another form of unfairness.</p> <p><u>Reasons:</u> (1) when dealing w/non-commercial guarantor (i.e. spouse), lender on notice of possibility of undue influence; (2) to rely on the genuine consent of a non-commercial guarantor, the lender must have reasonable grounds to believe that the consent is genuine; (3) reasonable grounds = reasonable belief in independent legal counsel; (4) independent legal counsel = chosen by wife, explains risk of transaction and has sufficient information to determine whether transaction is financially prudent; (5) senior bank official may be relied on to provide independent advice unless there are facts known that increase the risk of undue influence</p> <p><u>Policy Considerations:</u> (1) two innocent parties (as 3<sup>rd</sup> party, husband/spouse, exerts undue influence); (2) two competing issues requiring balance: fairness to spouse (who may lose home) and concern about commercial impact if lenders are imposed the risk (and therefore decide not to provide loans to small businesses where only personal asset is the matrimonial home)</p>	<ul style="list-style-type: none"> <li>• Undue influence</li> <li>• Spousal guarantee</li> <li>• Requirement for good reason for lender to rely on genuine consent of spouse</li> </ul>
<i>Pridmore v. Calvert</i> (BCSC 1975)	<i>Pridmore</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π injured in car crash due to Δ's negligence. Within 48 hours of crash, Π attended by insurance adjuster and signed release in favour of Δ's insurance and Δ. Δ claims release as complete defence.</p> <p><u>Decision:</u> inequitable to hold Π to bargain</p> <p><u>Reasons:</u> (1) <i>Towers v. Affleck</i> (BCSC 1974): whether the parties were on such unequal footing that it would be inequitable to hold the Π to bargain → i) was Δ/insurance adjuster in dominant position? and ii) if yes, was the settlement fair and reasonable (would a practising lawyer approve the settlement); (2) trigger = improvident bargain + ignorant Π – independent legal advice = dominant party's burden of proof to establish transaction fair and reasonable; (3) factors considered in case: Π had limited intelligence (no formal education after nurse's training at 15), no husband or close friends to request advice, no legal or lay advice sought at signing, no evidence of business acumen, timing and location (in this case, at Π's home w/ 48 hours of injury), adjuster saw Π consume pain medication and complain of pain, adjuster had done no investigation prior to settlement meeting, adjuster recommended/suggested amount of claim, and adjuster balanced multiple interests (insurance company, Π, Δ)</p>	<ul style="list-style-type: none"> <li>• Unconscionability / undue influence</li> <li>• Factors to indicate unfairness</li> <li>• General application of unfairness matrix to a situation</li> </ul>

<i>Greater Fredericton Airport Authority v. NAV Canada</i> (NBCA 2008)	<i>Greater Fredericton</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> similar facts in earlier excerpt</p> <p><u>Decision:</u></p> <p><u>Reasons:</u> (1) classic economic duress: i) pressure so great that one party had no realistic alternative, and ii) illegitimate pressure; (2) first element met at GFAA did not have an alternate service provider; (3) court does not apply legitimate/illegitimate distinction in an existing contractual modification context (however, likely statutory monopoly carried a req'ment for fair treatment, which was not met in this case); (4) threat to breach K is not illegitimate as w/in freedom to K/right to refuse to perform; (5) considered factors: economic pressure + indication of payment under protect + action commenced as soon as practical (i.e. strong indicators of lack of consent); (6) does not consider independent legal advice</p>	<ul style="list-style-type: none"> <li>• Economic duress</li> <li>• Varied test in existing K modification context (illegitimate pressure)</li> </ul>

### Cases (Penalties and Forfeitures)

<i>H.F. Clarke v. Thermidaire Corp.</i> (SCC 1974)	<i>H.F. Clarke</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δ signed agreement to distribute Π's product and not sell competing products. K incl. liquidated damages equal to gross trading profit of sold competing goods. Δ breached K ("unscrupulous, brazen and flagrant") and sold competing products.</p> <p><u>Decision:</u> trial &amp; CA = liquidated damages enforceable; SCC = not enforceable</p> <p><u>Reasons:</u> (1) "grossly excessive and punitive response" (actual damages were \$92,000 but liquidated damages were \$240,000); (2) "the fact that the appellant subscribed to it, and may have been foolish to do so, does not mean that it should be left to rue its unwisdom" (CB 545)</p>	<ul style="list-style-type: none"> <li>• Penalty clause</li> <li>• No enforced when punitive (despite agreement to it in written K)</li> </ul>
<i>Stockloser v. Johnson</i> (UKCA 1954)	<i>Stockloser</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π K'd to buy plant and machinery from Δ. Purchase price payable in installments. K incl. term that Π's default = Δ's retake possession of machinery and retain payments made. Π defaulted and claimed return of installments.</p> <p><u>Decision:</u> forfeiture clause valid</p> <p><u>Reasons:</u> (1) distinguish forfeiture from penalty clause: forfeiture = entitled to \$, penalty = act of oppression; (2) if no forfeiture clause, if seller keeps the K open the seller can retain \$; once rescinded, buyer can claim return of payments (subject to cross-claim for damages); (3) if there is a forfeiture clause or \$ paid as a deposit, there is no recovery at law (possible equitable remedy if a) penal in nature and b) unconscionable to retain)</p>	<ul style="list-style-type: none"> <li>• Forfeiture clause</li> <li>• Forfeiture clause or deposit = no return at law</li> <li>• Return at equity if a) penal nature, and b) unconscionable to retain</li> </ul>

### Cases (Contract Illegality)

<i>Holman v. Johnson</i> (UKKB 1775)	<i>Holman</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K made in Dunkirk for sale and delivery of tea from Π to Δ. After receiving tea, Δ would have to smuggle into England. Smuggling was contrary to the law of England. Π delivered tea but Δ refused to pay. Π sued for cost of tea. Δ raised defence that the K was illegal (i.e. both Π and Δ knew that Δ would smuggle the tea once it was purchased sold.)</p> <p><u>Decision:</u> K enforceable</p> <p><u>Reasons:</u> (1) basic rule: "no court will lend its aid to a man who founds his cause upon an immoral or illegal act"; (2) K was complete independent of the smuggling; (3) no condition that tea had to be smuggled successfully in order for payment to be made; (4) no illegality as part of K therefore the rule doesn't apply</p>	<ul style="list-style-type: none"> <li>• Basic rule: K not enforceable if illegal</li> </ul>
<i>Shafron v. KRG Insurance Brokers</i> (SCC 2009)	<i>Shafron</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Shafron (insurance broker) sold business in 1988. Purchaser continued to employ Sharfon. Employment K incl. non-competition clause. Business sold and K continued w/ non-competition clause. In 2000, Shafron leaves business and began working for another company.</p> <p><u>Decision:</u> sever non-competition clause from K</p> <p><u>Reasons:</u> (1) court decided that Shafron was in employee/employer relationship given time since his sale and the subsequent ownership change; (2) reasonable non-competition clause = clear and certain clause;</p>	<ul style="list-style-type: none"> <li>• K in restraint of trade</li> <li>• No enforceable K</li> </ul>

<p>(3) no legal/geographic definition of "Metropolitan City of Vancouver" therefore ambiguous/undefined;  (4) as clause is not certain, sever clause from K using blue pencil test; (5) notional severance does not apply as severance cannot make a new bargain for the parties  <u>Policy Considerations:</u> (1) power differential between buyer/seller and employee/employer (greater freedom to K between a buyer/seller than employer/employee; (2) given power differential between employee/employer, court will take a hard look at the reasonableness of a non-competition clause; (3) non-competition clause will be found reasonable if limited geographic scope and limited time period</p>	
<p><i>Brissette Estate v. Westbury</i> (SCC 1992)</p>	<p><i>Brissette Estate</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> married couple purchased insurance policy where both were the insured. In such a policy, the insurance proceeds would be paid to the survivor. Husband murders wife. Estate of deceased wife attempts to claim insurance proceeds though transference to husband and court imposing constructive trust to benefit their children.  <u>Decision:</u> no constructive trust as cannot transfer proceeds to husband  <u>Reasons:</u> (1) while dissent identifies that estate anticipate money would be available to heirs, the majority found that the constructive trust would be insuring against the husband's illegal conduct; (2) the insurance company cannot pay the proceeds to husband as it is against public policy (even if constructive trust was imposed immediately, the transfer itself is the problem)  <u>Policy Considerations:</u> (1) significant criticism as an insurance policy payable to the estate (as opposed to the surviving spouse) would not encounter this problem</p>	<ul style="list-style-type: none"> <li>• Insurance policy</li> <li>• K conferring a benefit due to crime</li> <li>• No enforceable K</li> </ul>
<p><i>Oldfield v. Transamerica Life Insurance</i> (SCC 2002)</p>	<p><i>Oldfield</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> husband had insurance policy on life benefiting ex-wife as part of separation agreement. Husband transported cocaine to South America in condoms in his stomach. Condom burst and the cocaine caused a heart attack. Husband died.  <u>Decision:</u> K enforceable  <u>Reasons:</u> (1) distinguish from <i>Brissette Estate</i> as insurance proceeds go directly to innocent 3<sup>rd</sup> party; (2) innocent 3<sup>rd</sup> parties should not be disentitled from insured proceeds when "insured accidentally dies will committing a criminal act"; (3) limited application: innocent beneficiary +insured dies while committing criminal act + insured does not intend the loss  <u>Policy Considerations:</u> (1) do not penalize innocent 3<sup>rd</sup> party for insured's "anti-social behaviour"; (2) role of legislature to take up</p>	<ul style="list-style-type: none"> <li>• Insurance policy</li> <li>• K conferring a benefit due to crime</li> <li>• Enforceable K when innocent beneficiary + and loss not intended by insured</li> </ul>
<p><i>Kingshot v. Brunskill</i> (UKCA 1953)</p>	<p><i>Kingshot</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Π has small apple orchard and offered to sell apples to Δ, who own larger business packaging and selling apples to wholesalers. K to purchase apples at set price. Δ takes away ungraded apples, grades them and sells them. Disagreement on total amount owed due to quality dispute. Δ claims K unenforceable as Π violated statute (did not grade apples per <i>Farm Products Grades and Sales Act</i>).  <u>Decision:</u> no enforceable K  <u>Reasons:</u> (1) action contrary to regulation that establishes rating processes for farm products; (3) purpose of the regulation: consumer protection (slightly different than this case where the Π sold to Δ who graded apples); (4) sale in violation of the regulations = no action (despite unjust enrichment of Δ)</p>	<ul style="list-style-type: none"> <li>• Statutory illegality</li> <li>• No enforceable K</li> </ul>
<p><i>Doherty v. Southgate (Township)</i> (ONCA 2006)</p>	<p><i>Doherty</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Δ (town) entered K to sell land to Π after a year on the market. Condition that Δ would re-zone the land. Δ did not rezone therefore Π sues for breach of K. Δ claims K invalid as did not provide notice pursuant to <i>Municipal Act of Ontario</i>.  <u>Decision:</u> K enforceable  <u>Reasons:</u> (1) broad approach: is there a public policy harmed if K enforced? Consider three factors: i) terms of statute; ii) whether compliance would produce different result; and iii) would not enforcing the K be fair/just?; (2) in this case, the court found that enforcing the K would not be contrary to public policy expressed in the statute: i) no express terms, ii) no indication that public notice would have changed outcome given the year on the market and the sale had been before council on two prior occasions, and iii) Δ attempting to skirt liability for breach through technical provision of statute (disingenuous)</p>	<ul style="list-style-type: none"> <li>• Statutory illegality</li> <li>• Broad approach to determining statutory illegality</li> <li>• Enforceable K</li> </ul>

<i>Outson v. Zurowski</i> (BCCA 1985)	<i>Outson</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Δs induced Πs to enter pyramid scheme. Δs promised to indemnify Πs if the board stopped (original investment = \$2000). Prior to Πs recruiting participants, Δs cancelled the scheme. Πs not aware that scheme was illegal and claim \$2000 from Δs.</p> <p><u>Decision:</u> Πs entitled to recover (more restitution than K enforcement)</p> <p><u>Reasons:</u> (1) parties were <i>in pari delicto</i> (ignorance of the law does not reduce the fault); (2) Πs repented as they had barely begun participation in the scheme (no serious efforts to recruit further investors)</p>	<ul style="list-style-type: none"> <li>• Contract illegality</li> <li>• Classic exceptions: parties not in equal fault and one party repenting</li> </ul>
<i>New Solutions Financial v. Transport NA Express</i> (SCC 2004)	<i>New Solutions</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Loan of \$500,000 at 4% daily interest = 60.1% per annum plus 30.8% in other fees (monitoring fee, royalty payments and other fees captured in provision), which violates <i>Criminal Code</i> s. 347.</p> <p><u>Decision:</u> trial = notional severance; CA = blue pencil test; SCC = notional severance (strike interest to 60%)</p> <p><u>Reasons:</u> (1) notional severance is available "in order to provide remedies that are tailored to the contractual context involved"; (2) spectrum of violation: criminal loan sharking to Ks that contravene s. 347 in technicality alone</p> <p><u>Policy Considerations:</u> (1) under blue pencil test, Π would receive a great deal less than what they intended, or what the law would permit (60%) as would strike out 60.1% and leave 30.8%; (2) intention of the parties as sophisticated commercial actors was to have high interest rate given volatility of loan</p>	<ul style="list-style-type: none"> <li>• Notional severance</li> </ul>
<i>Still v. MNR</i> (FCA 1998)	<i>Still</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π married Canadian and received notice of pending approval of Permanent Residency status w/ wording she interpreted as permission to work. Π employed as housekeeper and paid EI premiums. Received permanent residency status. Laid off. Deemed ineligible for EI as not legal to work for time pre-permanent residency. No penalty for violation but argued that Π had no action as she was not eligible to work.</p> <p><u>Decision:</u> not disentitled from EI benefits on the grounds of statutory illegality</p> <p><u>Reasons:</u> (1) classical model honoured more in the breach (w/ exception, it has lost persuasive force); (2) restatement rule as a principle in modern context: question of whether contrary to public policy to permit Π an action; (3) considered factors: not in country illegally; worked in good faith believing that she was entitled to work; not a flagrant abuse of system; no express penalty for her breach of the work requirement + requirement that the breach be knowingly committed; contributed to the benefits (unjust enrichment for government to retain payments for benefits when she is not eligible to claim; (4) in light of considered factors, no public policy that bars recovery</p> <p><u>Policy Consideration:</u> (1) while no SCC decision, <i>Still</i> has been referred to in SCC (neither affirmed nor rejected); (2) approach preferred by courts to contextually determine whether violation of public policy</p>	<ul style="list-style-type: none"> <li>• Principle, not a rule</li> <li>• No enforcement if contrary to public policy to permit an action</li> </ul>

### Cases (Mistake)

<i>Hobbs v. E&amp;N Railway</i> (SCC 1899)	<i>Hobbs</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Hobbs purchased land from E&amp;N agent. No reference to land only incl. surface rights. Hobbs believed that it incl. mineral rights. E&amp;N said that it did not incl. mineral rights and E&amp;N agent had no right to sell mineral rights.</p> <p><u>Decision:</u> K incl. mineral rights</p> <p><u>Reasons:</u> (1) mistake = whether or not K incl. mineral rights; (2) terms of the agreement stated "for land" (E&amp;N: surface rights only / Hobbs: normal and natural meaning of land incl. surface and mineral rights); (3) analysis: what would a reasonable person reading the K think?; (4) decision: reasonable person would believe land incl. mineral rights and surface rights; (5) if E&amp;N did not intent to incl. mineral rights, they used an esoteric meaning that was not communicated to Hobbs – and Hobbs' version of the K prevails</p>	<ul style="list-style-type: none"> <li>• Mistake in K terms</li> <li>• Test: what would a reasonable person reading the K think?</li> </ul>
<i>Raffles v. Wichelhaus</i> (UK 1864)	<i>Raffles</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> two ships w/ same name (<i>Peerless</i>) but different departure days. Cotton market price fluctuates.</p>	<ul style="list-style-type: none"> <li>• Mistake in K terms</li> </ul>

<p>Dispute over which ship indicated in K (likely to the advantage of one party to have it be one ship, and the other ship for the other party).</p> <p><u>Decision:</u> no K</p> <p><u>Reasons:</u> (1) reasonable person test does not apply as no way to distinguish between two ships w/ same proper name; (2) in such a situation, the reasonable person test does not apply to determine what the term means; (3) no consensus = no K</p>	<ul style="list-style-type: none"> <li>• Reasonable person test does not apply if not way to distinguish</li> <li>• No consensus = no K</li> </ul>
<p><i>Staiman Steel v. Commercial</i> (ON 1976)</p>	<p><i>Staiman Steel</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Δ (auctioneer) offers up “all the steel in the room” after suggested to combined a number of lots of steel incl. in the auction catalogue into a sale in bulk. Π picks a piece of steel off ground and asks if incl. in auction. Δ agrees. Some pre-fabricated steel structures in room but not in auction catalogue. After successfully winning auction bid, Π claims pre-fabricated steel structures. Δ insists that the structures were not incl. (in fact, had already been sold) and demands that Π sign a waiver incl. Π not entitled to the structure prior to releasing other steel. Π refuses and sues for breach of K as Δ would not deliver any of the steel.</p> <p><u>Decision:</u> Δs liable for damages for breach of K on bulk steel but excludes prefabricated structures</p> <p><u>Reasons:</u> (1) reasonable person would infer that the bulk steel was included but not the prefabricated structures (more reasonable to exclude than include despite Π’s question); (2) K binding on parties notwithstanding the mistake as a meaning was determinable; (3) influenced by commercial context (unusual to sell items not listed in auction catalogue) and price (price likely reasonable excluding the prefabricated structures); (4) distinguish <i>Raffles</i> as in this case it was possible to determine a meaning (no ships w/ same name here)</p> <p><u>Policy Considerations:</u> (1) likely perceived Π’s question as sharp practise or theatrical</p>	<ul style="list-style-type: none"> <li>• Mistake in K terms</li> <li>• Reasonable person test</li> <li>• K enforceable if reasonable person test infers meaning</li> </ul>
<p><i>Smith v. Hughes</i> (UKCA 1871)</p>	<p><i>Smith</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Π took sample of oats to Δ and asked for K to sell oats. Δ considered oats for a couple of days and then agreed to purchase the oats. Oats delivered but are “new” oats. Δ believed he was purchasing “old” oats (which were more valuable.)</p> <p><u>Decision:</u> new trial</p> <p><u>Reasons (Cockburn):</u> (1) sale by sample = <i>caveat emptor</i>; (2) if Δ relies on his own knowledge and assessment of the sample, an error does not generate relief; (2) if Δ wanted assurance, he was req’d to ask</p> <p><u>Reasons (Blackburn):</u> (1) questions to jury problematic as included both mistake in K term (“did the Δ believe the Π meant old oats”) and mistake in assumption (“did the Δ believe he was contracting for old oats”) therefore new trial</p> <p><u>Policy Considerations:</u> (1) concern about providing relief for mistake in assumption (hence preference for <i>caveat emptor</i>)</p>	<ul style="list-style-type: none"> <li>• Sale by sample / <i>caveat emptor</i></li> <li>• Mistake in K term would give relief but not mistake in assumption</li> </ul>
<p><i>Bell v. Lever Bros.</i> (UKHL 1932)</p>	<p><i>Bell</i></p>
<p><b>Case Details</b></p>	<p><b>Key Concepts</b></p>
<p><u>Facts:</u> Bell hired for 5 year term by Lever Bros. for £8,000 per annum. Lever Bros. terminates K early and pays substantial severance (£30,000). Lever Bros. later learns that Bell breached K by trading on his own account to make profit (significant breach of fiduciary duty), which would have permitted termination for cause (no severance). Lever Bros. claims return of severance.</p> <p><u>Decision:</u> no mistake in assumption</p> <p><u>Reasons:</u> (1) alleged mistake in assumption: both parties believed at the time of K formation that \$ needed to be paid to validly terminate K (in fact, no severance req’d as terminable for cause); (2) three categories of cases in which mistake in underlying assumption has been recognized: i) mistaken identity, ii) object believed to exist at K formation but did not, and iii) K for something that already belongs to purchaser; (3) new category (quality of the item contracted for that both parties made a mistake in assumption about) = must be completely and fundamentally different thing (i.e. difference in kind); (4) claim must be similar to recognized categories to constitute a sufficiently fundamental mistake; (5) in this case, not completely different as same K was being terminated, same outcome was reached and no fundamental difference in whether severance was req’d or not</p> <p><u>Policy Considerations:</u> (1) narrow scope of recovery given allocation of risk</p>	<ul style="list-style-type: none"> <li>• Mistake in assumption</li> <li>• Mistake must be completely and fundamentally different</li> </ul>

<i>Solle v. Butcher</i> (UKCA 1950)	<i>Solle</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Π (tenant) employed as surveyor by Δ (landlord) and acted as Δ's letting agent. Π believed that bldg. was not rent controlled and advised Δ of such. Δ relied on Π's assessment and charged rent accordingly. Π entered 7 year K w/ Δ. Π learned that rent control does apply although bldg. could have been exempted if Δ submitted proper paperwork. Π claims controlled rent in existing 7 year K. Δ claims fundamental mistake in assumption as both parties believed non-controlled rent was legal.</p> <p><u>Decision:</u> not null from beginning but misapprehension was fundamental therefore K voidable</p> <p><u>Reasons:</u> (1) comply w/ <i>Bell</i> as parallel situation (only difference between two Ks is the rent, which parallels severance in <i>Bell</i>); (2) equity gives court power to set aside K when i) mistake is fundamental, and ii) the party seeking to set K aside is not at fault</p> <p><u>Policy Consideration:</u> (1) arbitrary (fictitious) split between common law mistake (<i>Bell</i>) and equitable mistake (<i>Solle</i>)</p>	<ul style="list-style-type: none"> <li>• Mistake in assumption</li> <li>• No remedy at common law (<i>Bell</i>)</li> <li>• Equitable mistake: K voidable if mistake is fundamental and party seeking to set aside K not at fault</li> </ul>
<i>Great Peace Shipping v. Tsavlis Salvage ("The Great Peace")</i> (UKCA 2002)	<i>Great Peace</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Ship was in distress and urgently seeking a salvage ship close enough to render assistance. Ship contracted w/ salvage tug believing vessels were 35 miles apart. In fact, vessels were 410 miles apart. Ship attempted to find closer salvage tug. On finding closer tub, cancelled K. Salvage tug requests cancellation fee under K. Ship refuses based on mistake in assumption (both parties thought the vessels were closer than they actually were).</p> <p><u>Decision:</u> K not void</p> <p><u>Reasons:</u> (1) impossible to reconcile <i>Bell</i> (common law mistake) and <i>Solle</i> (equitable mistake); (2) test = impossibility of performance (<i>Bell</i>); (3) five elements (¶176); (4) failed element 4: K not void as the distance between the two vessels did not render performance impossible (services were not essentially different, ship did not cancel until alternate tug found); (5) failed element 2: by providing a cancellation clause in K, parties had allocated the risk if the agreement was cancelled</p>	<ul style="list-style-type: none"> <li>• Mistake in assumption</li> <li>• Principled approach to common law mistake (<i>Bell</i>)</li> <li>• Rejection of <i>Solle</i></li> </ul>
<i>R. v. Ron Engineering; Ron Engineering v. Ontario</i> (SCC 1981)	<i>Ron Engineering</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Contractor submitted bid w/ certified cheque for deposit in compliance w/ tender call. Tender call specified that bids could be changed or withdrawn up until opened. Deposit not returned if withdrawn after bids opened or if contractor refused to enter Contract B. Contractor discovers mistake (missing \$750,000 for labour) and immediately notifies the government that there was an error in the bid. No withdrawal but clear that contractor will not enter Contract B. However, bids were opened prior to notification. Government retained deposit per agreement. Contractor argues that fundamental mistake meant that government could not accept bid (and retain deposit).</p> <p><u>Decision:</u> mistake did not affect Contract A therefore K enforceable</p> <p><u>Reasons:</u> (1) one party made mistake in underlying terms (left out labour costs) but other party unaware that mistake was made; (2) contract A formed prior to the discovery of the mistake therefore government was unaware of the mistake</p>	<ul style="list-style-type: none"> <li>• Mistake in assumption / mistake in K terms (old unilateral mistake)</li> <li>• Other party unaware = no remedy</li> </ul>

### Cases (Rectification of documents)

<i>Bercovici v. Palmer</i> (SKCA 1966)	<i>Bercovici</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K for purchase of parcel of land described two lots: business (Δ's) and cottage (not Δ's but similar lot number). Π claims error in describing cottage and K should be amended to incl. right lot. Δ claims only intended to sell business lot (solicitor's error to include add'l lot.)</p> <p><u>Decision:</u> on the evidence, cottage property not intended by either party</p> <p><u>Reasons:</u> (1) both parties agree that there was a mistake therefore just question as to which account of the pre-written agreement is most credible; (2) consider evidence w/ respect to negotiation (parol evidence) and conduct after K formation; (3) in this case, Π did not request keys or acquire insurance for cottage lot</p>	<ul style="list-style-type: none"> <li>• Rectification</li> <li>• Equitable remedy</li> <li>• True intention of parties</li> </ul>
<i>Sylvan Lake Golf &amp; Tennis Club v. Performance Industries</i> (SCC 2002)	<i>Sylvan Lake</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K to sell a length of land along fairway. K describes the length at 110 feet. Buyer argues that</p>	<ul style="list-style-type: none"> <li>• Rectification</li> </ul>

<p>correct length was 110 yards. Vendor knew that the K said 110 feet (therefore mistake only on part of buyer.) Buyer did not read written document prior to signing but rather relied on oral agreement.</p> <p><u>Decision:</u>  <u>Reasons:</u> (1) rectification available when party shows that written K wrongly reflected oral agreement: consideration of content of negotiations and the surrounding circumstances; (2) argument that 110 yards too vague for rectification as it did not describe the boundary but two plans available (court simply had to select one)</p>	<ul style="list-style-type: none"> <li>• Four requirements to show that written K did not reflect oral agreement and can be corrected</li> </ul>
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<b>Cases (Frustration)</b>	
<i>Paradine v. Jane</i> (UK 1647)	<i>Paradine</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> Lease of land. Tenant assumed that some profit from the land would be generated to pay the rent. Foreign enemy invades, occupies the land and evicts tenant. Landlord sues tenant for rent.</p> <p><u>Decision:</u> no frustration</p> <p><u>Reasons:</u> (1) no excuse for non-performance can arise from future events; (2) promises are absolute</p>	<ul style="list-style-type: none"> <li>• Frustration</li> <li>• Promises absolute</li> </ul>
<i>Taylor v. Caldwell</i> (UK 1863)	<i>Taylor</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K for hall rental for gala performance. Hall burned down prior to performance.</p> <p><u>Decision:</u> frustration</p> <p><u>Reasons:</u> (1) music hall ceased to exist w/o fault of either party therefore both parties are excused from K (neither party can sue each other); (2) fundamental assumption that the hall would be there = implied term that the hall would exist at the time of performance; (3) four requirements: fundamental assumption underlying K, future event makes assumption impossible, neither party responsible, K silent to risk</p>	<ul style="list-style-type: none"> <li>• Frustration</li> <li>• Impossibility of performance</li> </ul>
<i>Krell v. Henry</i> (UKCA 1903)	<i>Krell</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K for room rental on particular street to watch King's coronation procession. King became ill and coronation date was postponed.</p> <p><u>Decision:</u> frustration</p> <p><u>Reasons:</u> (1) if just room rental, performance was not impossible (as rooms were still available and nobody was dead); (2) semantic shift: K to rent rooms to view coronation procession = frustrated K</p>	<ul style="list-style-type: none"> <li>• Frustration</li> <li>• Interpretation of impossibility of performance</li> </ul>
<i>Capital Quality Homes v. Colwyn</i> (ONCA 1975)	<i>Capital Quality Homes</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> K for purchase of land, which was to be separated into 26 lots w/ 26 separate deeds that would be transferred to purchaser on the date of closing. Prior to closing, Ontario passed <i>Planning Act</i> w/ amendment to control the process of subdivision in certain areas incl. the area in which this parcel was. As req'd planning approval before valid subdivision, vendor was not able to subdivide prior to closing.</p> <p><u>Decision:</u> frustration</p> <p><u>Reasons:</u> (1) no longer reliance on implied term theory (<i>Taylor</i>) but doctrine of frustration: event occurs after K formation that is beyond control of parties + event makes performance totally different than what the parties contemplated + no fault / no provision in K; (2) in this case, entire deal was predicated on separate lots, which was impossible to provide at the time of performance; (3) in this case, purchaser received deposit back although historically parties were only relieved of performance (<i>Frustrated Ks Act</i> adjust benefits and costs between parties)</p>	<ul style="list-style-type: none"> <li>• Frustration</li> <li>• "incapable of fulfillment as contemplated by the parties"</li> </ul>
<i>Edwinton Commercial v. Tsavlis Russ ("The Sea Angel")</i> (UKCA 2007)	<i>The Sea Angel</i>
<b>Case Details</b>	<b>Key Concepts</b>
<p><u>Facts:</u> ship chartered by Δ from Π retained at port by authorities w/ 3 days remaining in 20 day charter. As a consequence, charter period was exceeded by 108 days. Π claims late penalties in charter K.</p> <p><u>Decision:</u> no frustration</p> <p><u>Reasons:</u> (1) delay often isn't a frustrating event but an extreme limit may make it frustrating (context-specific); (2) emphasis on K interpretation as Ks often provide for risks; (3) foreseeability = not determinative but makes it more or less likely that K was frustrated</p>	<ul style="list-style-type: none"> <li>• Frustration</li> <li>• Statement of modern rule</li> <li>• Emphasis on K interpretation</li> </ul>

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