Write Your Exam Code Here: _____
Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

Attachments:

1. Annotated Syllabus (26 pages)

THIS EXAMINATION CONSISTS OF 3 PAGES (INCLUDING COVER PAGE)
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FIRST TERM EXAMINATION - DECEMBER 2018

LAW 211.004
Contracts

Professor Blom

MARKS: 100

TIME ALLOWED: ONE HOUR 15 MINUTES
(TOTAL INCLUDING READING TIME)

****

NOTES:

1. This is a CLOSED BOOK examination. You make take no materials into the examination room, but you should be provided with a clean copy of the annotated syllabus (the final version of the one that I posted on the Canvas website during the term).

2. If you think you would need more facts in order to answer any question completely, please state what those facts are.

3. Please answer both questions.

THIS EXAMINATION CONSISTS OF 2 QUESTIONS

MARKS

60 1. Gina Gentileschi, a moderately successful painter, works not just in conventional media such as oil or acrylic paints, but also makes large, vivid mixed-media pictures that combine pieces of glass, fragments of hand-woven cloth, and coloured stones with the paint. Her works, which she has been producing for about ten years, have all been sold through the Dawnlight Gallery, which at all material times has been operated on South Granville, in Vancouver, by Edward Easel, a good friend of Gina's. There is no written agreement between Gina and Dawnlight. There is only an understanding between them, which has developed over the years, that she will sell exclusively through Dawnlight. This works well for Gina because Edward is a very good marketer of artists' work, with excellent connections not only in Canada but also the United States. A sizable proportion of Gina's work is in fact sold to buyers in the United States who either are visiting Vancouver or buy the pictures through Dawnlight's online store.

Any would-be buyer of a painting who approaches Gina directly is told that the picture can only be purchased through Dawnlight. Gina's business cards the last few years have included a notation, "Exclusive Agent: Dawnlight Gallery", with Dawnlight's contact information.

For ten years Gina has brought Dawnlight between ten and twenty pictures each year, with the prices stipulated. The price is the one the customer pays; Dawnlight's commission on each sale is 40%. Sometimes Edward thinks the picture is over- or underpriced and discusses that with Gina, and they have always been able to agree on a price. It is understood that if a picture has not sold after six months, Edward can ask Gina to take it back to make room in the gallery, but Edward often lets Gina's pictures hang longer because Edward likes Gina and believes in the long-term potential of her work. On average only one picture in every twenty is eventually taken back. It's also understood that any picture Gina takes back in this way can be sold by her in whatever way she chooses, and she has sold most of them directly to individuals and a few through other Vancouver galleries.

Gina's big break comes when a glowing review of her work appears in the *New York Times*, written by a *Times* reporter who encountered Gina's pictures in the Dawnlight Gallery and interviewed Gina. The piece referred to Dawnlight as the "exclusive agent" for Gina's pictures.

Not long after the *Times* article appeared, Gina is approached by Splendid Gallery, whose headquarters are on Park Avenue in New York City. Splendid offers to become Gina's exclusive agent in the United States. Their marketing clout is far larger than Dawnlight's and Gina decides that, for the sake of her career, she will accept Splendid's offer. Over the next few months she proceeds to sell a large number of her most spectacular new works through Splendid. She does not tell Edward that she has done this but Edward notices fairly quickly that Gina is bringing far fewer pictures to Dawnlight. Since demand and prices for Gina's work have soared, Edward keeps asking Gina why she is not bringing in more pictures. After a

MARKS

while Edward sees Splendid's ad in a trade magazine, referring to Splendid's "exclusively representing" Gina and realizes, as he says, that he was "betrayed".

Edward consults you about whether Dawnlight has any legal claim against Gina. Advise Dawnlight.

40 2. Highroad Projects Ltd., a developer, announced that it was going to construct a new hotel in downtown Vancouver. Each hotel room would be separately strata titled. The developer sold units, each comprising one hotel room, to investors. The investors bought a unit, not to occupy the room, but to derive revenue from it. The information given to prospective investors included projected rates of occupancy for the rooms, based on expected market conditions two years down the line, when the building was expected to be completed and investors would receive title to their units.

Richard Riskaverse, an investor, purchased one of the units in the hotel by entering into a contract that provided for closing when the hotel was completed. Richard paid a deposit of $100,000 on a total price of $750,000, the balance to be paid on closing. The contract contained a clause that said, "No information provided orally or in writing to the buyer forms part of this contract unless it is expressly included in this document." The occupancy projections were not included in the document.

Not long after he enters into the contract to purchase, Highroad reads about growing occupancy problems in the hotel industry in Vancouver. He speaks to a senior representative of Highroad, who tells Richard, "Don't worry. Those projections that were in our sales package were conservative and solid. They're still good."

Two years later the hotel is completed. Richard pays the balance of the purchase price and Highroad conveys title to his unit. Within a year it is obvious that the revenue from the room is much lower than was projected because the occupancy rate is much lower than projected. It turned out that the occupancy rate projections that investors had been given two years before, had been much more optimistic than expert professional opinion, based on the then-current and expected market conditions, could have supported. However, Highroad and its team honestly believed, then and at the time of closing, that the projections were realistic.

Discuss whether Richard has any remedy in contract for the disappointingly low revenue from his investment. (Please ignore possible tort claims.)

END OF EXAMINATION

211.004 ANNOTATED SYLLABUS TO ACCOMPANY DECEMBER 2018 EXAMINATION

1 INTRODUCTION TO THE STUDY OF THE LAW OF CONTRACT

Materials 1-15
McCamus 1-28

Tues., 4 Sept. We dealt with administrative details about the materials and the syllabus.

We then spent some time on some general questions about Contracts. I suggested that you have to look at the law from three points of view: that of the citizen who has to know what the law is and how she or he can use it, or respond to claims; that of the legal profession (lawyers and judges) who have to deal with negotiations and disputes about contracts; and that of the scholar who is examining the law from a variety of points of view having to do with the justice and social merits of the system. Certainty and predictability loom large for the citizen. The legal profession also attaches weight to clarity and certainty, though more in terms of working through legal disagreements than knowing for sure how obligations stand. The scholar is interested in certainty and predictability and clarity, too, but as part of a broader examination of how well the law serves the needs of society, which goes beyond how well it serves the needs of the citizen or the legal profession.

We also talked about the interrelationship of contract with tort (and restitution) and property. Contract, tort and restitution are all forms of civil obligation but contracts, alone, requires that the parties rights stem from an agreement that they have made with somebody else. Torts (or some torts) also deals with obligations that stem from some kind of voluntary undertaking, but that undertaking need not be contractual. (It can be; there is some overlap between tort and contract, like when your surgeon messes up your operation — there can be liability both in contract and in tort for medical negligence.)

2 FORMATION OF THE AGREEMENT: OFFER AND ACCEPTANCE

2.1 Introduction

Materials 17-20
McCamus 31-38

2.2 Offer and invitation to treat

Canadian Dyers Assn. Ltd. v. *Burton* (Ont HC 1920) 20

Thurs., 6 Sept. We spent the first hour or so on the two remaining broad questions left over from Tuesday. How can you tell if you're dealing with a K? The basic elements of a K are conventionally taken to be offer + acceptance, consideration, and intention (objectively determined) to create legal relations. Consideration is a very fundamental concept but an odd one because it is pretty well a threshold requirement. There has to be some consideration as the exchange for the promise that you want to enforce, but what form it takes hardly matters,

and what it's objectively worth doesn't matter at all. We will look at the limits of consideration in more detail when we get to the *Smoke Ball* case.

The other broad question we spent a bit of time on is what makes a "good" law of K, or, more usefull, what we mean when we say the law is "good". We can describe things the law should obviously be — treat people equally, recognize when they're being oppressed, and so on — but can such value judgments be related to some overall framework of what makes a good system of law? My own view is that the answer is basically no. You can look at the law from the point of view of utilitarian considerations (does it work well in providing what it should), which is how we usually approach it. Or you can look at the law through the perspective of a theory like law and economics, feminist theory, philosophy, morality, and so on. Each of these focuses on some broad ideas of how law works or should work, but none is definitive and none can be proved to be right or wrong. No single frame of reference for defining a just system of law is possible, I think. A good legal theory is one that gives you worthwhile insights. and different theories give you different insights, which may all be worthwhile to think about.

We started in on offer and acceptance with *Burton*. The issue to be resolved was whether Δ (the defendant) had made an offer in his letter repeating his lowest price, or whether he had just invited Π (the plaintiff) to make an offer. The court's conclusion was that Δ had made an offer, because that's how his letter should be interpreted in the light of the earlier exchanges and the language used in the decisive letter. The court added another reason, which was that Δ, through his lawyer, had clearly assumed for a while that there was a K, only to try to back out later. I suggested that that raises a logical difficulty, which is that if there was no contract just because Π accepted Δ's letter (assuming the letter was not an offer), how does a non-contract turn into a contract during the following weeks when Δ carries on as if there is a K? When does the agreement actually materialize? It's much cleaner if you can identify the moment at which one party accepted the other's offer.

(Π could have argued that, if Δ's letter wasn't an offer, Π had clearly offered to buy by sending Δ the commitment to buy and the cheque, and Δ had implicitly indicated acceptance by cashing the cheque and having his lawyer send a draft of the documentation. However, that wasn't argued, and I speculate that it wasn't because there would have been a problem holding Δ to a K of purchase and sale when there was no memorandum in writing, signed by Δ, setting out the terms of the agreement, which was the requirement of the then *Statute of Frauds* in Ontario.)

McCamus 38-41
Pharmaceutical Society of G.B. v. *Boots Cash Chemists (Southern) Ltd.* (CA 1953) 23
McCamus 41-43
Carlill v. *Carbolic Smoke Ball Co*. (CA 1893) 28

Tues., 11 Sept. We're working our way through offer and acceptance — in particular, the way in which those concepts are adapted to different types of situation. *Burton* was a case of one-on-one negotiation, and so the offer was identified mainly by construing what each party said to the other. *Boots* was a contract made entirely by conduct, so what had to be "construed" was the conduct of seller and customer in a self-service retail store. The offer was found to be made, not by the store's display, but by the customer's taking goods to the checkout, so the acceptance

was the store's agreeing to sell the goods for payment. That interpretation of the parties' conduct was adopted mainly for pragmatic reasons; in general, it is the legal view of the situation that is most convenient for everybody concerned. There may be circumstances that take things out of the usual rule, e.g. if the store explicitly says a display is an offer to sell, but there's usually no business reason why a self-service store should do that.

The Smoke Ball case shows that there can be a business reason why a company advertising its wares to the public would actually make an offer to the public — in that case, not an offer to sell the product but an offer to pay £100 to any user of the product that met the conditions (use for 2 weeks as directed, catching the flu). (The purpose, of course, was to sell the product but the actual offer was not one for the sale of smoke balls, it was for the reward.)

We saw that once this "living up to your advertisement" issue was slotted into the category "contract", the usual contract requirements had to be found — the offer (the advertisement, construed as the average member of the public would read it), the acceptance (fulfilling the conditions, possibly letting Δ know they'd been fulfilled), and consideration (we'll pick that topic up on Thursday). The court never settles on an exact definition of when the acceptance is complete, because it doesn't have to. It would have had to, if Δ had revoked its offer between the time that Π fulfilled the conditions (the earliest logical date when acceptance could be said to be complete) and the time when she let Δ know that she'd fulfilled them (the latest logical date).

Goldthorpe v Logan (Ont CA 1943) 33
McCamus 43-48
R. v. *Ron Engineering & Const. (Eastern) Ltd.* (SCC 1981) 36

Thurs., 13 Sept. We started by looking at two more aspects of the Smoke Ball case. One was the argument that the contract was too uncertain to be a contract, because it left key things unspecified, notably about when the entitlement to the reward kicked in (did it include people who were already using the smoke ball when the ad first appeared, did it extend to people who had used the smoke ball but stopped, or people who got the flu after the current epidemic). All those issues were briskly dealt with by putting a reasonable construction on the ad, reading it as ordinary people would read it.

The other aspect was consideration. The Δ's promise to pay £100 was supported by consideration "moving from" Π, namely, her incurring detriment by using the smoke ball when she didn't have to, and the benefit that Δ derived (indirectly) from that use. The formulation is important — either detriment or benefit will do, although in most cases you'll have both. If it's a detriment, note that it has to be incurred at the promisor's request to qualify as consideration — the promisor has to have "bargained for" that detriment as the quid pro quo of the promise.

Goldthorpe applied the Smoke Ball analysis to another advertisement, but the "performance" that was the acceptance was Π's purchasing and going through the electrolysis treatment. It was treated as a unilateral K (if you buy the treatment, we guarantee results), rather than part of the bilateral K (we'll perform the treatment, and guarantee results, if you buy). In practical terms it makes no difference which analysis you use; Δ is bound to the guarantee in either case. But courts sometimes use this "two contract" technique to add obligations to what otherwise looks like a self-contained agreement.

In a way, *Ron Engineering* illustrates that technique, too. The SCC decided that the K governing the tendering process (contract A) was a separate K from the actual construction K (contract B). That allowed the court to explain why each bidder was bound by the terms of the competition (not to withdraw the tender, etc.) and to explain why the bidder's making a mistake as the amount of the tender had no effect on the validity of contract A (the mistake was not known, and not apparent, when contract A was formed). Contract A, like the contract in *Goldthorpe*, was seen as a separate K from the main K for the building of the project, but its function was different — it governed the process by which the main K was to be arrived it.

M.J.B. Enterprises Ltd. v. *Defence Const. (1951) Ltd.* (SCC 1999) 39

Tues., 18 Sept. We carried on with *Ron Engineering*. I noted that an analysis similar to the contract A/contract B technique used in *Ron* was used in *Warlow v Harrison* (1859), 1 El. & El. 295, 120 E.R. 925 (Exchequer Chamber). An auctioneer who'd advertised a horse auction as "without reserve" (i.e. without any minimum bid requirement) was held to have made an offer that was accepted by whoever became the highest bona fide bidder on the horse, which turned out to be Π. The Δ auctioneer was held to have broken the contract to have an action without reserve, by permitting the horse's owner to bid, and thus withdraw the horse from the sale, because the owner thought that Π's bid was too low. The Π was entitled to damages from the audtioneer for the breach. The court explicitly compared the "without reserve" advertisement to the advertisement of a reward, that becomes a contract if accepted by someone's finding the dog, or whatever the condition of the reward may be. (Similar logic, too, to *Goldthorpe*, where the beautician was held to have made an offer, in her advertisement, that guaranteed results of the electrolysis treatment. The offer was accepted by Π's undergoing the treatment. A contract was thus found to have been made, which added a promise to the main contract.)

The policy underlying the contract A innovation in *Ron* was to give legal force to the tenderer's obligation not to withdraw. That was seen as a way to preserve the integrity of the process by preventing a tenderer from claiming his or her bid was made under a mistake, after the other bids are disclosed.

The *MJB* case shows the contract A/contract B analysis used for the benefit of a bidder, by holding that the owner was in breach of an implied obligation under contract A not to accept non-compliant bids. The implication was based on the presumed intention of the parties (what was necessary to give business efficacy to the K, or something that the parties would tell an officious bystander they "of course" agreed to include as part of the K). That implied obligation could sit alongside the privilege clause that formed part of this contract A. There was an issue, too, as to whether Δ's breach caused Π any loss; the answer was yes, because Π could show (on a balance of probabilities) that it would have been chosen as the successful tenderer, had Sorochan's tender been rejected, as it should have been, as non-compliant.

Mega Reporting Inc. v Yukon (Government of) (YKCA 2018) supp

2.3 Communication of offer

McCamus 49-53

Williams v. *Carwardine* (KB 1833) 48

R. v. *Clarke* (Aust HC 1927) 50

Thurs., 20 Sept. I started with *Hub Excavating Ltd. v Orca Estates*, 2009 BCCA 167, where a disappointed bidder sued, not because another bidder had been wrongly preferred to them, but because the owner hadn't accepted any bid at all because it decided not to proceed with the development. Π had expected (and had some reason to expect) to be selected and passed up bidding on a different project because it counted on getting this one. The CA held there was no breach. There was no "free-standing duty of fairness" by which an owner owed it to the bidders to proceed, so such a duty did not form part of contract A.

In *Mega Reporting*, there was arguably a breach of contract A because the Yukon government promised that the successful bidder would be selected in a particular way but (it was alleged) had departed from its own principles of transparency, etc., when dealing with Π's bid. There was no remedy for Π, however, because the terms of the competition included a very explicit clause by which each bidder agreed it would have no claim for damages if the government broke any of the rules of the competition.The Π argued, based on the *Tercon* case, that this exclusion of liability was contrary to public policy, and cited cases in which lower courts had said that it was against public policy to exclude liability if the effect of that would be to strip citizens of rights they were supposed to have according to statute (human rights, access to compulsory insurance coverage if injured in a motor vehicle accident). The BCCA distinguished those cases by saying they were cases in which the statute was specifically aimed at protecting people who suffered the type of wrong the Π suffered. Here, the rules about procurement practices, transparency, etc., were to protect the government as much as bidders, and so there was no "substantially incontestable" injury to the public interest from excluding liability for the risk that the government might get things wrong. (There was no suggestion, as the court noted, that the government had acted in any way improperly, like the decision-maker being in a conflict of interest or acting dishonestly.)

Moving on to unilateral offers, both *Williams* and *Clarke* raised the issue how far a person who responds to such an offer must "intend" to accept the offer. So far as we can decipher it, *Williams* stands for the proposition that if the "accepting" party knows of the offer, that's all the mental element you need. *Clarke* seemed to apply a more demanding standard, which is whether the accepting party had actually formed the intention to accept when they performed the requested act (as the logic of offer and acceptance would suggest). That case turned on an admission that the plaintiff had completely forgotten about the offer of a reward when he gave the information; he just wanted to avoid being prosecuted as an accessory to the murders.

2.4 Acceptance

McCamus 53-60	
Livingstone v. *Evans* (Alta SC 1925)	53
McCamus 60-68	
Butler Machine Tool Co. v. *Ex-Cell-O Corp.* (CA 1979)	56

Tues., 25 Sept. We started with a discussion of *ratio decidendi*. I suggested there is the "hard" version, which comes into play when the issue whether a court is bound by an earlier decision of a higher court (or, in the UK, whether the Court of Appeal is bound by a previous decision of its own). The *ratio* for this purpose is the minimum that the case must be taken to decide – that is, the minimum scope of the factual range of cases that *must* be decided the same way because they can't be distinguished from the "binding" case.

(This hard version of *ratio* also copes with questions like, what if there's no majority reasons, only a majority result? Books have been written on this kind of question.)

The use of *ratio* that is more relevant for your purposes is a more general "what does the case stand for" question – how can the case be used in terms of influencing later cases? It looks forward from the case to potential future cases, rather than back from the present case to a past "binding" case. This soft ratio is basically a matter of educated guesswork as to how subsequent judges are going to respond to a particular decision. There is no scientific method for determining a ratio in this sense, just a lot of room for creative use of analogy, policy arguments, etc.

Resuming offer and acceptance, we saw that *Livingstone* was about the normal rule that a counter-offer puts an end to the offer because it implicitly rejects it. The offeror is entitled at that point (if she or he doesn't accept the counter-offer) to walk away with no risk that the other party will suddenly accept the original offer. In *Livingstone,*, though, the offeror hadn't just rejected the counter-offer but (as the court found) renewed the original offer, which did enable the other party to accept as they did.

The *Butler* case addresses the question how you analyze offer and acceptance if the contract is formed by exchanges of mutually inconsistent sets of terms. If one party discontinues the exchange of forms, of course, the question is simply whether the parties ever got to an agreement. In *Butler* the problem was that the paper deal was never clearly concluded but the parties clearly had made a contract and gone on to perform it. The issue of what the price terms were was resolved, by Lord Denning, in the buyer's favour either on the traditional "offer -- counter-offer – acceptance of counter-offer" analysis, or on a more holistic view that asks, issue by issue, whether the parties agreed on the term(s) relevant to that issue. The latter approach opens up the possibility (though not in the actual case) that the contract might be composed of some terms from one party's form and some from another party's – and maybe some from neither party's form because relevant terms on the two forms were too irreconcilable and you couldn't say which version reflected the parties' consensus, so you have to imply a reasonable term ("necessary to give business efficacy") to fill the gap.

In *RTS Flexible Systems Ltd. V Molkerei Alois Muller GmbH & Co. KG (UK Production)*, [2010] UKSC 14, the parties had gone ahead with a £1.6 m. contract to build and install two production lines in Δ's dairy processing plant, despite never having signed the written terms, which specified that they would not be binding until both parties signed. The issue was whether the draft terms that the Δ buyer had sent the Π seller, which were a set of industry association standard terms, were part of the deal – one of those terms limited the damages that the buyer could claim from the seller if the production lines didn't work as promised. The UK Supreme Court decided that the proper interpretation of the parties' conduct was that they had proceeded on the basis of the draft terms, and so both of them were bound by those terms. This was a case in which there was only one set of terms that had been proposed, not two, and that made it easier to conclude that that one set was in fact impliedly accepted by both parties when they proceeded with the construction of the production lines.

Eliason v. Henshaw (USSC 1819) 81
McCamus 68-74
Business Practices and Consumer Protection Act (B.C.), ss. 12-14
(unsolicited goods) supp

2.5 Communication of acceptance

2.5.1 MAILED ACCEPTANCE

McCamus 74-77
Household Fire & Carriage Accident Ins. Co. v. *Grant* (CA 1879) 83

Thurs., 27 Sept. We started with a reminder that the issues whether there was an offer, and whether it was accepted, are part of a web of issues – did the parties reach an agreement at all? (if one or other breaks off negotiations, the argument may be that no agreement was ever reached); if they did, were the terms sufficiently spelled out? (with gaps filled by implying terms where that is possible); if the terms were sufficiently spelled out, how should they be interpreted? Which takes us back to the interpretation of the offer and the acceptance.

All the cases we did in this class involve interpreting the offer or the acceptance. In *Dawson*, the SCC interpreted the correspondence as involving an offer (we'll take you up if we get a helicopter, we'll stake the claims if we think it's worthwhile, if we do we'll give you a 10% interest). That offer invited acceptance, not by simply doing an act, but by making a reciporocal promise (yes, I'll take you up if I can get leave). Thus a bilateral K was concluded. The various conditions on which performance depended were described as conditions subsequent – there was a binding K unless and until one or other of the conditions subsequent was not fulfilled. The Δ had broken the K by not taking Π up (they did have a helicopter) and not giving him a 10% interest in the claims (which they staked for themselves). Π had not lost his right to claim breach of K just because he had not responded to their letter of 7 June, which basically seemed to negate the deal. His not doing anything in response to the anticipatory breach did not forfeit any right he had to claim for the actual breach, which came later. Doing nothing did not show an abandonment of the K, either.

Felthouse dealt with the question whether the offer can not just stipulate the mode of acceptance, but also do away with the need to accept altogether. The answer was no. The fact that the nephew intended to accept was not itself an acceptance; the intention had to be manifested in a way that the offer contemplated as an acceptance.

(Hence the rule, confirmed by the provisions in the *Business Practices and Consumer Protection Act* referred to on the syllabus under section 2.4, that you can't impose an obligation on somebody by sending them unsolicited goods. The act makes it clear that this applies even if you use the goods. You're not bound to anything unless you expressly accept the goods.)

In *Saint John Tug Boat* the offer and the acceptance were both communicated by conduct, the offer being the tug company's keeping the tug available and the acceptance by Irving's continuing to call for the services of the tug, just as they had before. The offer was basically, "If you want us to keep the tug available you have to keep paying the $450 a day charge", and the acceptance was continuing to order up the tug knowing that this continuation of the $450 charge was what the tug company expected.

In *Eliason* the issue was whether the seller of the flour could accept the buyer's offer in way that didn't comply with the stipulated mode of acceptance. The USSC said no, the acceptance had to be as stipulated, though it did not have to be literally the same – just the same in terms of place (Harper's Ferry) and time (when a return wagon would usually get there).

Holwell Securities v. *Hughes* (CA 1974) 86

2.5.2 *INSTANTANEOUS METHODS OF COMMUNICATION*

McCamus 77-83
Brinkibon Ltd. v. *Stahag Stahl- und Stahlwarenhandelsgesellschaft mbH* (HL 1982) 89
Electronic Transactions Act (B.C.), ss. 15-18 supp
Century 21 Canada LP v Rogers Communications Inc. (BCSC 2011) supp

Tues., 2 Oct. We continued with the rules as to when an acceptance takes effect, and where. Even if the offer otherwise did make it reasonable to respond by post, the postal acceptance rule doesn't apply if the wording of the offer excludes it ("notice in writing", etc.) or if the nature of the transaction is of a kind where the postal acceptance rule would lead to absurd results. The court in *Holwell* thought that both reasons for excluding the rule existed in the case. The court did not need to decide what would happen if the written acceptance did arrive before the deadline but the offeror wasn't home to receive it. I suggested that, because this was an option K, the offeror binds him or herself to make acceptance possible up to the deadline and so can't defeat acceptance by leaving town.

The postal acceptance rule did apply to telegrams (they were another situation in which a public or quasi-public utility did the transmission), but *Brinkibon* shows that instantaneous communications, with the two parties in direct contact with each other (no human intermediary), are generally subject to a rule that acceptance only takes effect if and when it is received by the offeror. The risk of non-communication is on the accepting party, whereas under the postal acceptance rule it is on the offeror (who can exclude it if he or she wants, as in *Holwell*).

The *Electronic Transactions Act* contains rules making electronic information or records equivalent to writing for the purposes of a legal requirement that something has to be in writing (s 5). An electronic signature, as defined in s 1, satisfies a legal requirement that a document must be signed (s 11), subject to some exceptions, where a more secure form of electronic signature is required.

Sections 15 to 18 set up rules for the formation of contracts by electronic means, allowing offer and acceptance to be communicated electronically, including, in the case of acceptance, by clicking on a button on a screen, etc. (s 15). It also sets up rules to determine when electronic information or records are sent (s 18(1)) and when they are received (s 18(2)). The time of sending and receipt is defined by reference to leaving or entering the relevant party's information system. The place is, however, defined in terms of the sender or receiver's place of business (s 18(3)-(4)) or, if they have no place of business, their habitual resicence (s 18(5)).

The *Century 21* case shows how the common law handles formation of a contract online. The *ETA* didn't have to be used because none of the issues covered by the statute arose. There

was no dispute, for instance, as to when agreement took place. The only question was whether it took place, which turned on whether the Terms of Use were an offer that any visitor to Π's website accepted.simply by using the website. The court held that they were, and a contract was therefore formed and Δ was bound by the terms of use.

Business Practices and Consumer Protection Act (B.C.), s. 17 "distance sales contract", 46 (disclosure of information), 47 (distance sales contract in electronic form), 48 (copy of distance sales contract), 49 (cancellation of distance sales contract) supp

Don't sweat the details. The point is to see, generally, how and why a statutory mechanism is provided for the protection of consumer interests where the common law would not adequately do so.

2.6 Termination of offer

2.6.1 REVOCATION

McCamus 53-60, 83-86

Dickinson v. *Dodds* (CA 1876) 99

Byrne v. *Van Tienhoven* (CPD 1880) 103

McCamus 86-90

Errington v. *Errington* (CA 1952) 104

2.6.2 LAPSE

Barrick v. *Clark* (SCC 1950) 106

Thurs., 4 Oct. I briefly noted the "distance sales contract" provisions of the *BPCPA*. They illustrate very common techniques of statutory regulation on consumer contracts, namely, disclosure provisions (s 46-48) and the right of the consumer to cancel in particular circumstances (including inadequate disclosure) even if the common law would not permit them to do so (s 49). I also mentioned insurance legislation, which typically requires that insurance policies of particular types include a set of mandatory terms as to coverage.

All the cases we did today had to do with how and when an offer comes to an end in the sense that it can no longer be accepted. One way, of course, is if the offeror revokes, but that revocation must become known to the offeree or else it will be just a change of heart on the offeror's part of which the offeree is unaware. It makes no difference if the offeree learns of the offeror's changed intention indirectly through a third party rather than directly from the offeror (*Dickinson*). The postal acceptance rule does not apply to revocations of offers (*Byrne v Van Tienhoven*) or, for that matter revocations of acceptances – but it is possible for a postal acceptance to be revoked (i.e. withdrawn) while it is still in the post, provided the revocation reaches the offeror before the letter of acceptance does. The logic is that at no time does the offeror have reason to think that the offer has been accepted.

Unilateral offers pose a particular problem with revocation because acceptance is an act of performance, and that act may be spread over a period of time – in *Errington*, making mortgage payments over a period of 30 years or so. *Errington* decided on the facts of that case that the father had impliedly promised not to revoke his offer as long as the son and daughter-in-law kept making the payments, which they had for 20 years and were still doing (though by now the

daughter-in-law was doing it for the two of them). This is analytically another instance of a contract A/contract B situation – contract A is the promise not to revoke once performance has begun (the consideration being starting the performance) and contract B is the promise to convey the house once performance is complete (the consideration being the full paying off of the mortgage).

Offers also lapse simply because the deadline for acceptance has passed. An express deadline of course is decisive, but even if an offer has no express deadline there is an implied deadline, namely, once a reasonable time has expired. *Barrick v Clark* is the leading Canadian case on how the courts approach that question. What is a reasonable time depends, as that case shows, both on the nature of what is being offered (sale of land vs sale of perishable commodity) and the other circumstances of the transaction (what the market is doing, etc.). If the offeror indicates that he or she expects a speedy response, which is how Kellock J read the Barricks' offer letter, that will shorten the reasonable time accordingtly. It's unreasonable to take longer than the offeror indicates would be reasonable – the offeror's always in charge of the conditions for acceptance.

3. FORMATION OF THE AGREEMENT: CERTAINTY OF TERMS

3.1 Introduction

Materials	113-15

3.2 Vagueness

McCamus 105-11	
R. v. CAE Industries Ltd. (FCA 1986)	116

3.3 Incomplete terms

McCamus 94-102	
May & Butcher Ltd. v. *R.* (HL 1929)	122
Hillas & Co. Ltd. v. *Arcos Ltd.* (HL 1932)	124
Foley v Classique Coaches Ltd. (CA 1934)	129

3.4 Agreements to negotiate

McCamus 102-05	
Sale of Goods Act (BC), s 12, 13	supp
McCamus 139-61	
Materials	134-35
Empress Towers Ltd. v Bank of Nova Scotia (BCCA 1991)	136
Mannpar Enterprises Ltd. v. *Canada* (BCCA 1999)	138
Materials	143-49

3.5 Anticipation of formalization

Bawitko Investments Ltd. v Kernels Popcorn Ltd. (Ont CA 1991)	150

Tues., 9 Oct (double class). The book has organized the materials separately under "vagueness" and "incomplete terms", but the two are overlapping issues. If the parties have left

a key point too vague, the contract is incomplete. In *CAE*, the first issue was whether the ministerial letter was meant to be a contract at all (held, based on objective indications, the answer was yes). The second issue was, even if it was meant to be a binding agreement, were the terms so open-ended as to amount to no agreement at all. On that the court held no, the terms could be given an interpretation that would prevent the contract from failing. The key issue is whether the court can arrive at an interpretation that enables you to say when a party is or is not in breach of his or her obligations. The main problem was what to do with the government's promise to use its best efforts to steer maintenance work CAE's way to work towards that "reasonable target" of 700,000 a year. The court said that "best efforts" was an obligation that had determinable content, and in fact went on to find that the government was in breach of it, and that CAE had lost $1.8 m in profits from work the government should have given to the maintenance facility, were it using its best efforts, but didn't.

The trio of English cases show how differently the same problem can be handled, depending on the nature of the contract. In *May & Butcher* the HL read price "to be agreed" as meaning there was no K at all unless and until a price (for a particular lot) was agreed. The umbrella K by which Π got the right to buy all the tentage in effect was not legally enforceable because the government was free to stop selling it the tentage (and May & Butcher was, by the same token, free to stop taking the tentage). The arbitration clause was interpreted as not intended to cover a failure to agree on price.

Hillas went the other way in interpreting the option clause entitling Π to purchase a very large quantity of Russian lumber in the 1931 season. The fact that prices were left to be determined based on an official price list, and that specifications, shipping dates, etc., were all to be worked out between the parties, did not make the K incomplete; if the parties couldn't reach an agreement a court could decide what a reasonable apportionment of quantities, shipping dates, etc., would be under the circumstances.

Foley was the easiest of the three cases, because the agreement to buy all their petrol needs from Π could be read as binding Δ to pay a reasonable price for the product, and there was an arbitration clause that (as the CA read it) did cover a dispute about price. The subject matter of the K was a market commodity (unlike tentage) in a normally functioning market (unlike the British lumber importers piling back into the market in 1931), which made it easier to interpret the agreement as a legally complete one. (The underlying issue is whether, by enforcing the obligation, the court is forcing obligations on the unwilling party that are too upredictable to be fair. *Foley* was a case in which Δ could demonstrably live with the obligation because they already had, for 3 years.)

Where the parties' agreement contemplates further negotiation, the traditional common law stance is that an agreement to negotiate (in good faith or not) has no legal content because there is no objective standard by which to decide if a party is living up to the obligation. Both parties are entitled to pursue their self-interest as seems best to them. *Empress Towers* and *Mannpar* were both concerned with options to renew for another term, in which the rental payments or royalty payments were to be renegotiated. In *Empress Towers* the court held the renewal clause was enforceable against the landlord, because the "market rental to be agreed" contained an implied obligation to negotiate in good faith towards a market rental and not withhold agreement unreasonably. In *Mannpar* the renewal clause was not enforceable because, under the circumstances, it should be read as leaving the federal Crown free not to

negotiate at all if saw fit. The fact that it was acting on behalf of the Skyway Band, and had to respect its wishes, was a key part of the factual context for so interpreting the renewal clause.

The materials at pp. 143-49 examine the question whether the SCC's recognition of a "general organizing principle" of good faith in the law of K has altered the traditional refusal to enforce promises to negotiate in good faith. The argument advanced is that *Bhasin v Hrynew* shows that the Canadian law of K is now readier than before to give content to obligations of good faith, and this might extend to an obligation to negotiate in good faith. I suggested that the argument has most appeal where the negotiations are between parties who already are in some kind of relationship with each other (as with the renewal clause cases). I also suggested that the ultimate impact of *Bhasin* is hard to predict. Perhaps it will make it easier to imply specific obligations, devolving from the "general organizing principle" – imply them not because they're necessary to give business efficacy (the traditional test), but because they represent essential fairness. Whether that shift is enough to make a promise to negotiate in good faith an enforceable promise is still an open question, though.

We finished with *Bawitko*, which deals with the problem of parties negotiating terms up to what may seem like a finishing point, but still contemplating execution of a formal contract. Are they already bound? It's a matter of construing their intentions. Either they intend to be bound now, with all the key terms agreed and the formal K only being literally a formality, or they intend not to be bound unless and until the formal K is concluded (*Bawitko* itself falling into that category). "Subject to contract" makes it pretty well certain that the latter is meant.

4. THE ENFORCEMENT OF PROMISES

4.1 Introduction

McCamus 215-36

4.2 Exchange and bargains

Materials 157-59
McCamus 218-23, 233-36
Dalhousie College(Governors of) v. Boutilier Estate (SCC 1934) 159
Wood v. Duff-Gordon (NY 1917) 169
Business Practices and Consumer Protection Act (B.C.), ss. 17 "continuing services contract" and "future performance contract", 19 (required contents), 23 (future performance contracts) 24 (continuing service contract—terms), 25 (continuing service contract—cancellation) sup*p*

Don't worry about the details; this is just to give you an example of how the legislature can intervene to regulate contracting practices. The regulations made under the Act to (among other things) designate pursuant to s. 17 what continuing services contracts are covered, are also on the website (Reg. 272/2004).

4.3 Past consideration

McCamus 237-43
Eastwood v Kenyon (QB 1840) 170

Tues., 16 Oct. Turning from the question whether offer and acceptance have resulted in a viable set of terms (including issues of uncertainty, agreements to negotiate, etc.) we turned to the consideration requirement. All the cases we did today hinge on the idea that a promise is only enforceable if it was part of an agreement under which the promisee would confer a benefit, or incur a detriment, in return. A stand-alone promise (*nudum pactum* in the nice Latin phrase) may be binding as a matter of morality but is not binding in law.

In the *Dalhousie v Boutilier* case Mr. B had promised the money but there was no reciprocal promise by the university to do anything it wouldn't have done anyway. Nor could the university's reliance on B's promise, by spending money on faculty or buildings, amount to consideration because merely choosing to act in reliance on a promise can't convert a non-binding gratuituous promise into a binding contract. Acting in reliance on a representation or a promise can, as we'll see later on, give rise to an estoppel that prevents the representor/promisor from going back on what he or she led the other party to believe. But the doctrine is that estoppel is a shield, not a sword, which means that it can't create a binding obligation where there was none before. If it could, it would eliminate the need for consideration because detrimental reliance alone would be enough to make the promise binding.

Wood v Duff-Gordon is an example of consideration being implied rather than expressed. It was necessarily implied that Wood would do his best to market Duff-Gordon's designs and endorsements, because otherwise the agreement to give him exclusive rights would have no point as far as Duff-Gordon was concerned. That implied promise was the consideration for her promises to give him exclusive rights, etc.

The sections of the *BPCPA* on the syllabus show how statutory regulation intervenes to correct market unfairness that a "free" market can lead to – in the case of the relevant contracts, people signing up for multi-year dancing lessons or fitness studio access with no way to get out of it if their needs change. The regulation takes the form partly of a consumer awareness goal (supplier has to disclose certain key aspects of the agreement) and partly of a limit of 2 years on how long these agreements can run. There are also defined cancellation rights.

Where, a the time of promising, the promisor has already received the benefit from the promisee, there is no consideration; there conferral of the benefit was gratuitous, and then the later promise to pay for the benefit is just a gratuitous promise in return. *Lampleigh* illustrates this with the disconnect between the benefit conferred by Π (spending money for Sarah's benefit when she was a minor) and the promise by Sarah's husband. It would have been different if the benefit had been conferred at the husband's request, because then the law does recognize that the later promise is *de facto* an exchange for the requested benefit.

Lampleigh v Brathwait (KB 1615) 172

4.4 Consideration must be of value in the eyes of the law

Thomas v. *Thomas* (QB 1842) 173

4.5 Bona fide compromises of disputed claims

Omit this heading in the materials.

4.6 Pre-existing legal duty

Materials	179-80
McCamus 237-57	
Pao On v. *Lau Yiu Long* (PC 1979)	180

Thurs., 18 Oct. We continued our exploration of the consideration doctrine. *Lampleigh* illustrates the situation that was held not to exist in *Eastwood*, in which a past service (getting a pardon for Δ from James I) was held consideration for Δ's subsequent promise to pay Π for what he'd done. The key was that his service was at Δ's request and was never treated by either as a simple favour to a friend – it was a service that was to be compensated if possible.

As an aside, I highlighed the fact that some cases of benefits conferred by A on B give rise to a claim in restitution rather than K. Because B would be unjustly enriched if A took the benefit for free, A can claim the value of the benefit from B. Services performed for B by mistake, for example, which are accepted by B knowing that A didn't have to provide them, give rise to such a claim. If B actually requested that A provide the services, the transaction is more naturally viewed as an implied K – A does something B wants done, and B impliedly promises to compensate A for it. So the past consideration cases, like *Lampleigh*, can be seen as a service giving rise to an implied promise to compensate, with the express promise later on putting an exact price on the implied obligation.

Thomas v Thomas is not about past consideration but about what constitutes consideration. The consideration recited in the K between the executors and Π was the wishes of Π's late husband; that could not be consideration in law because it didn't "move from" Π. But other features of the K did amount to consideration, that is, Π's promises to pay the executors £1 a year and to keep the premises in good repair. She didn't just take the gift of a house that came with some costs; she made separate undertakings vis-à-vis the executors that supplied sufficient consideration. The fact that the executors' main motive for making the K was their respect for the late husband's wishes, was irrelevant as long as Π did, in law, promise to provide consideration.

Pau On combines the past consideration and present (promised) consideration, because the consideration recited in the K (Πs having entered into the K to sell their shares to Fu Chip and hang onto part of the Fu Chip shares received in return, for a year) was a past benefit rendered to Δ (the owner of Fu Chip) that was meant to be compensated and the compensation was fixed when Δ promised his guarantee in the new subsidiary K. The "extrinsic evidence" showed that, in return for the guarantee, Πs promised to perform their K with Fu Chip. That, too, was consideration because promising to perform your K with a third party (Fu Chip being a legal person distinct from Δ, its shareholder and controlling mind) is a detriment to you, since it adds a new promisee (Δ, in this case) to the one you already had (Fu Chip) and so you're now bound to two people instead of just one.

Pao On also introduced the idea that a K can be voidable on the ground of economic duress, but found that such duress was not present on the facts.

Stilk v Myrick (KB 1809)	184
Gilbert Steel Ltd. v. *University Const. Ltd.* (Ont CA 1976)	185
McCamus 257-63	

Foakes v. *Beer* (HL 1884) 190

Law and Equity Act (B.C.), s. 43 supp

Abrogates (within limits) the rule in *Cumber* v. *Wane*, which was applied in *Foakes* v. *Beer*. On the common law side, see also *Re Selectmove Ltd.* (materials at 201) refusing to extend *Williams v. Roffey*'s looser view of the consideration requirement.to agreements to accept part payment. To do so, the English CA thought, would be tantamount to reversing *Foakes v. Beer*, which the CA had no power to do.

Tues., 23 Oct. All the material we're going through involves people making changes to an agreement they've already made. The past consideration cases (including *Pau On*, so far as it deals with the expressed consideration of "having entered into" the main K) deal with Π doing something for Δ at Δ's request and then later promising to compensate Π for what Π's done. The willingness to treat the past conferral of a benefit as consideration for the later promise is based on a theory that the two are essentially part of one exchange, even if the time period over which the events occurred was quite spread out.

Stilk and *Gilbert Steel* both deal with Δ promising to pay more for Π's doing what they were already contractually bound to do. (This means bound vis-à-vis Π; *Pau On* (the second ground) said that a promise made to a third party to perform what you're already bound to do for the other contracting party is good consideration for the third party's promise to compensate you for doing it.) Both decided that the promise to pay more is unsupported by consideration. *Gilbert* illustrates various ways around this rule, all of which failed. The main ones were the novation argument (first K entirely replaced by the second), which failed on the facts, and the "added credit" argument, which basically failed because being given the same time to pay a larger debt is not a benefit to the debtor. Estoppel also failed because that doctrine can't be used to set up a new obligation, only to modify an obligation you already owe – can't used as a sword, only as a shield. The reason is that otherwise it would make too big an inroad into the doctrine of consideration.

Foakes v Beer and s. 43 of the *Law and Equity Act* deal with promises to accept less than is actually owing. Again, no consideration if all that the debtor does is promise to discharge part of the obligation – which they already owed in the first place. The act reverses *Foakes* on its facts, but leaves unclear whether a creditor's agreement to accept part performance in the future in full satisfaction, can be revoked. The act says the creditor has to accept the part performance when it's "rendered pursuant to" the agreement but doesn't cover the situation where the creditor repudiates the agreement before the debtor "renders" the part performance.

Rosas v Toca (BCCA 2018) 203

4.7 Promissory estoppel

McCamus 283-96

Central London Property Trust Ltd. v. *High Trees House Ltd.* (KBD 1946) 215

Thurs., 25 Oct. We spent most of the class on *Rosas v Toca*, in which the BCCA (following the NBCA's example in the *NAV Canada* case) broke with tradition and held that a "modification to a going transaction" should be binding without consideration, subject to not having been obtained by duress and not being unenforceable on some other ground like unconscionability or public policy. The court preferred not to apply the "practical benefit" expansion of consideration

the English CA had used in *Williams & Roffey* (but held, in *Selectmove*, could not be used in a case like *Foakes v Beer*, where one party agreed to forego part of a debt, because that would be to overrule *Foakes*). (The BCCA held there was, in fact, practical benefit to Rosas from her promise to Toca to extend the date for payment, but expressly didn't make that the basis of the decision.) The annual extensions granted by Rosas were therefore binding without consideration, which meant that each annual deadline was binding and there was no breach until Toca failed to pay on the last of the deadlines, which was well within the limitation period. Duress by Toca to extort the promise of the extensions was not a factor.

The big question with *Rosas v Toca* is how far it goes to change existing precedent. That depends in the first instance on what counts as a "modification to a going transaction". Pretty clearly the court meant any modification, whether to increase one party's obligation or decrease it, so it would seem to cover both the *Gilbert Steel* and *Foakes v Beer* facts, which would make both those cases obsolete in BC. (*Foakes* was reversed by s 43 of the *Law and Equity Act* anyway.) It might or might not cover the scenario in *Pao On*, because that was expressly structured by the parties as the replacement of one agreement by another, rather than a modification. It's always open to later courts (other than the lower courts in BC) to disagree with all or part of *Rosas*, so its impact remains to be worked out in the case law.

Rosas also may change a case like the *High Trees* situation, in which one party agrees to except less, by way of performance of an ongoing contract, than the contract originally provided. In *High Trees* it was assumed the variation could not be binding as a contract (also because it was a variation not under seal of a sealed document). It could, however, be binding by way of estoppel – the landlord's promise to accept less was intended to be acted upon by the tenant and was acted upon (though the court doesn't say how, exactly – presumably by arranging its resources according to the new, lower payout requirement). That made it unjust for the landlord to go back to the original contract terms. Those terms, however, had revived when the wartime conditions came to an end and the promise to accept a reduced rent – as Denning J interpreted it – had come to an end.

Dunn v Vicars (BCCA 2009)	supp
McCamus 298-301	
M.(N.) v. A.(A.T.) (BCCA 2003)	238

Tues., 30 Oct. *Dunn v Vicars* decided that the parties' rights to the real property had shifted from joint ownership to sole ownership by Dunn, because she was entitled to say that she had exercised the option to take over the property under Plan B. The objection that she had not exercised the option according to the written K, because she hadn't given notice in writing and she hadn't paid Vicars the correct amount owing, was rejected. The evidence did not show that Vicars had waived strict compliance with the option because he had not expressed an unequivocal intent to forego his legal rights under the written agreement. But Vicars was estopped from denying that Dunn had exercised the option, because he had basically invited her to take the course of action she took, she had changed her position in reliance on his being OK with doing it this way, and it would be inequitable for him now to insist on strict compliance with the written K. The BCCA cited a number of precedents supporting a broad view of estoppel under which promissory estoppel had shared characteristics with estoppel by representation

(also referred to as estoppel *in pais*) and proprietary estoppel (which estops somebody from denying that the relying party has acquired an interest in the estopped party's property).

M v A was concerned with the shield/sword distinction – Π argued that Δ was estopped from deying he was bound to pay off her debt, because he'd promised to do so and she'd altered her position in reliance on that. *Waltons Stores* in Australia had said that you could be estopped from going back on an expectation of a future legal relationship that you had created or allowed to be created. That does allow estoppel give rise to a new legal obligation rather than just modify an existing one. The BCCA decided that even if *Waltons* was good law in BC, the facts of the case didn't trigger the *Waltons* principle because Δ's promise was not a promise to create a new legal relationship. It was just a promise made in the context of making a number of arrangements for a future life together, a promise that was not intended (objectively) to amount to a legal commitment.

4.8 Intention to create legal relations

4.8.1 INTRODUCTION

Materials 244
McCamus 112-14

4.8.2 FAMILY ARRANGEMENTS

McCamus 130-37
Balfour v. *Balfour* (CA 1919) 244

4.8.3 COMMERCIAL ARRANGEMENTS

McCamus 114-30
Rose & Frank Co. v. *J.R. Crompton & Bros. Ltd.* (CA 1923) 248
Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (Ont CA 1999) 250

4.9 Formality: promises under seal

Omit this section in the materials.

4.10 Formality: the requirement of writing

Omit this section in the materials. The Statute of Frauds, discussed in the materials and by McCamus at 164-97, has been retained in Ontario and other provinces, but radically reformed in BC by s. 59 of the *Law and Equity Act*..

Law and Equity Act (B.C.), s. 59 supp
Electronic Transactions Act (B.C.), ss. 5 (requirement for a record to be in writing), 11 (signatures) supp

Thurs., 1 Nov. We wrapped up promissory estoppel with a review of its fuzzy edges. An old fuzzy edge is what kind of reliance makes it "inequitable" for the promisor to resile from the promise, and whether the inequity is temporary or permanent (i.e. the estoppel can't be got rid of by giving advance notice that you're going back on the promise). The basic answer is that inequity is a flexible concept, but (according to the consensus of judicial and academic opinion) can operate either to suspend the right to exercise a legal right (or rely on a defence), or to bar the exercise of the right permanently.

A second fuzzy edge (which got fuzzy when some cases, notably *Waltons Stores*, came along) is whether the sword/shield distinction is a hard one (as it used to be assumed to be) or soft-ish, in that in a strong enough case, the combination of promise and reliance makes it inequitable to refuse to proceed into a legal relationship. This isn't going to happen often because usually, if what the parties have done does not amount to a valid contract, the parties ought to be aware of that (they're deemed to know the law) and it's not inequitable for either party to take the position that, accordingly, there will be no contract. *Waltons* was exceptional because one party's reliance on the prospect that there would be a contract was so clear (starting construction on the property to be sold) and was acquiesced in, even invited, by the other party.

A third fuzzy edge is new, which has to do with *Rosas v Toca*. It means that facts falling within that case – going-transaction modifications – are binding as contracts so estoppel is no longer required (*High Trees* itself having facts that probably qualify under this description). *Rosas* is about agreed modifications, though, which probably does not extend to modifications produced in a case like *Dunn v Vicars* by one party's making an implied promise not to stick to the letter of the contract and the other party relying on that promise in such a way that it becomes inequitable for the first party to go back on the assurance. That's not an agreed modification in an ordinary sense, I would think.

Intention to create legal relations comes up, as the cases we did show, in a variety of contexts. There's the informal social or family arrangement (*Balfour*) (which also has fuzzy edges, as when parents make deals with adult children, which sometimes will be contractual and other times won't). There's the commercial arrangement that explicitly says it's not binding (*Rose and Frank*). And there's the letter of comfort type of document (*Leigh Instruments*) which is drafted so as not to be a legal promise such as a guarantee, but does give a broadly worded assurance of some kind of benign attitude towards the debtor's repaying the creditor. As the court construed the letters in *Leigh*, they had some legal content – they made a statement about what the parent company's policy was, which would have given rise to a tort claim in negligent misstatement if it had been both untrue and negligently made (in fact it was true). But the letters did not give the bank any more than that. The argument that this made nonsense of the letters was rejected. The letters were sought by the bank and accepted by them because they thought it was useful to have those assurances from Plessey, the parent. The usefulness was not that they could be sued on as if they were a promise, just that they committed Plessey in a non-contractual way, and the bank was content with that level of commitment. It could hope to exploit the letters, if necessary, as a matter of business relationships.

We looked at the requirement of writing for certain types of contract. Under the *Law and Equity Act*, s. 59, contracts respecting land or a disposition of land require writing (or the equivalent of "part performance" along the lines of the *Statute of Frauds* case law), and so do contracts of guarantee or indemnity.

Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.
(UKSC 2018) supp

5. PRIVITY OF CONTRACT

5.1 Introduction

Materials 285-86
McCamus 303-05

5.2 History of the doctrine of privity and third party beneficiaries

McCamus 305-10
Tweddle v Atkinson (QB 1861) 286
Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd. (HL 1915) 28**7**

Tues., 6 Nov. The *Rock Advertising* case concerned the extent to which parties can restrict their own ability to make modifications to their agreement. The particular restriction was that any modification had to be in writing. Contrary to what had been assumed (in the US and in the Commonwealth generally) to be the position, the UKSC held that parties could preclude themselves from making oral modifications to their agreement. Except for Lord Briggs, who differed on this one point, they thought that no matter how clear the intention to modify was, it would not be effective if it was oral. They saw commercial benefits from enforcing such NOM (no oral modification) clauses, and no objection to them other than the conceptual one that an oral agreement to modify must logically supersede an earlier written agreement not to modify in that way.

Lord Briggs thought that parties could agree orally to abandon the "only in writing" provision either expressly or by implication, but the intention would have to be clear.

The *Colautti* case, cited at para. 8, is a Canadian decision about a "no oral order for extra work" provision in a municipal construction contract. The court held that an oral order for extra work was binding, partly because the parties had made earlier change orders in that way, and partly because a "written changes only" clause was so constricting that, given the nature of a construction project, the parties were going to depart from it anyway. The UKSC would, I think, have enforced the clause. They recognized in *Rock* that estoppel is available if the contractor relies on the promise (implied) by the owner to treat the oral change order as valid, but they said at para 16 that the promising party has to indicate unequivocally that the variation is valid although not in writing, and they said that the unequival indication has to involve something more than the informal (i.e. oral) promise itself. That would seem not to be satisfied in a case like *Colautti*, where the facts show no unequivocal representation that the change order was valid without writing – it was just implicit in the municipality's behaviour.

Had the UKSC gone the other way on the NOM clause issue, and held that the oral rescheduling agreement was OK, it would have had to decide (as the CA had done) whether there was consideration for the variation. The CA had said yes, based on the *Williams and Roffey* "practical benefit" test – MWB got the practical benefit of keeping a licensee in the premises and getting some of the arrears immediately (by Rock's payment of £3,500). So the agreement was valid from that point of view. The CA had also held that estoppel would not work, because Rock had not acted in reliance of MWB's promise in a way that made it inequitable for MWB to resile from its promise. In BC, *Rosas v Toca* would probably apply (this

was as much a going-transaction modification as the rescheduling of the repayment in that case) and take care of the consideration issue that way.

We then started on privity of K. Both *Tweddle* and *Dunlop* illustrate the concept. In *Tweddle* the Π son-in-law could not force his father-in-law's estate to pay up because Π was not a party to the K between the two fathers, and the consideration for the father-in-law's promise to pay moved from Π's own father (his promise to pay his share), not from Π himself. In *Dunlop* the manufacturer could not sue the retailer for breaching terms on which the retailer had bought tires from Dew, the wholesaler, terms that Dew had insisted on because Dew had promised Dunlop to include them in any sales of Dunlop tires to retailers. There was no contract between Dunlop and the retailer, Selfridge's, and no consideration had moved from Dunlop to Selfridge's.

In both cases agency was put forward, but the facts didn't support it. In *Tweddle* the Π's father had not acted as Π's agent in making the K with the wife's father; if he had, Π would be personally liable on his own father's promise to pay. In *Dunlop*, Dew hadn't acted as Dunlop's agent in getting the price maintenance commitment from Selfridge. Dew had acted for itself. The consideration for Selfridge's commitment came entirely from Dew, namely, sellng Selfridge the tires that Dew had bought from Dunlop.

5.3 Ways in which a third party may acquire the benefit

McCamus 317-30	
Beswick v Beswick (CA 1966)	293
Beswick v Beswick (HL 1967)	295
London Drugs Ltd. v Kuehne & Nagel Int'l Ltd. (SCC 1992)	309
Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd. (SCC 1999)	319

5.4 Privity and contract theory

Materials	324-25

Tues., 13 Nov. There are ways around, and qualifications of, privity that have been devised to avoid the serious injustices that privity can create. *Beswick* enforced the widow's entitlement to receive her annuity by having the estate (of which she was admnistrator) sue the nephew for specific performance. It happened to be a case in which the estate was willing to sue and one in which specific performance, according to the usual rules, was available, so it worked. But it would not be available in cases where the performance to be enforced involved supervision, or involved services to be rendered to the third party rather than just a simple payment. Obligations like that usually can't be the subject of specific performance orders. So it's a solution, but only in some cases.

The NB and UK legislation, which actually give the third party a right of action against the original party that made the promise, would of course cure the problem, too, in all cases. The third party's right to enforce might conflict with the original parties' right to modify their K, but both statutes, in different ways, restrict that right if (in the UK act) the third party has communicated his or her assent to the the term giving the benefit (see s 2(1), at 292 of the book) or (in the case of both acts) the third party has changed his or her position in reliance on the term. In the NB act, the original parties can change the term but have to compensate the

third party for loss caused by the change on account of that reliance (see s 2(3)), in the UK act the original parties lose the right to modify the term if it's been relied upon (see s 2(1)(b)-(c)).

The *London Drugs* and *Fraser River v Can-Dive* cases modify the Canadian common law so as to vest a right in the third party to invoke a promise by one of the parties to the contract not to sue the third party. In *London Drugs* the promise was the customer's promise not to sue the warehousing company for more than $40 if the goods were lost or damaged. That promise, the SCC held, impliedly extended to the employees (who could be sued in tort) as well as the employer (who could be sued in contract or in tort). In *Fraser River* it was the insurer's promise not to sue (make a subrogated claim against) a number of third parties, including any charterer that hired the barge from Fraser River, the original contracting party. That promise extended expressly to the charterer and the charterer, accordingly, could invoke it against the insurer and, ipso facto, against Fraser River, whose right to sue the charterer for damaging the barge was the foundation of the subrogated claim by the insurer.

The *Fraser River* case also involved the original parties (insurer and insurer) getting together and agreeing to amend the insurance contract so as to remove the waiver of subrogation rights against the charterer. The SCC held that once the right of action arose that was covered by the waiver of subrogation, the charterer's right to the protection of the clause was "crystallized" and could not thereafter be retroactively stripped away by agreement of the parties to the insurance contract.

(I meant to spend a couple of minutes on the "agency exception" that was discussed in these two cases, which I'll pick up at the start of Thursday's class.)

6. CONTINGENT AGREEMENTS

McCamus 710-20	
Materials	327-32
Wiebe v. *Bobsien* (B.C.S.C. 1985)	332
Wiebe v. *Bobsien* (B.C.C.A. 1986)	338
Dynamic Transport Ltd. v. *O.K. Detailing Ltd.* (S.C.C. 1978)	343
Law and Equity Act (B.C.), s. 54	supp

In *Turney v. Zhilka* (materials at 350) and *Barnett* (in the notes after *Turney*) the SCC developed a theory, unique to Canada, that a party cannot waive the non-fulfilment of a condition precedent that depends upon a third party or upon external events. The theory is that even if the condition was included for the sole benefit of the would-be waiving party, it nevertheless represents a bargain that if the condition fails the contract will be void. To allow that party to enforce the contract in spite of the failure of the condition, the theory goes, would be to let him or her do an end-run around this bargain. (See McCamus at 720-26.) The *Law and Equity Act* provision (which implemented a Law Reform Commission of BC report) reverses this rule for contracts governed by BC law. Note the conditions for exercise of the power of waiver.

Thurs., 15 Nov. I spent the first while on the agency device that courts used to deal with some privity issues. Most of them are now taken care of by the *London Drugs* exception, but not all are covered by that principle.

The agency approach has been used to allow parties A and B to agree that B is going to do something for C, or not sue C, and turn this into a binding unilateral K by finding that A was acting as C's agent in making this unilateral offer from B to C, and C was accepting B's offer by an act of performance (unloading a ship, etc.). The *New Zealand Shipping* case in the JCPC, in the casebook at 304, used this approach to explain why the cargo owner was bound vis-à-vis the stevedoring company not to sue them, even though the promise not to sue was contained in a K between the cargo owner and the carrier. The carrier had stipulated that the promise not to sue extended to any stevedore, and so the owner was said to have promised the carrier, as the stevedore's agent, not to sue the stevedore if the stevedore provided consideration to the owner by unloading he cargo. (An agent can act on behalf of an undisclosed principal or a future principal, so it doesn't matter if the carrier selected the stevedore only after the K of carriage was made.)

The agency rationale is still needed if the aim is to allow one of the original contracting parties to *enforce an obligation against* the third party rather than bar an original party from suing the third party, which is now mostly covered by *London Drugs*. I suggested as an example where the retailer, in the K of sale to a purchaser, also agrees on behalf of the manufacturer that there will be a manufacturer's warranty in favour of the purchaser. The retailer can act as the manufacturer's agent in communicating the manufacturer's offer of a warranty to the consumer, who in turn accepts the offer by buying the product. The consumer thereby gets a right of action against the manufacturer.

Turning to conditions precedent (a topic also touched on in the *Dawson v Helicopter Exploration* case), the *Wiebe* case shows the two main ways one can construe conditions precedent – as conditions precedent to the *existence* of a K ("I'll buy this if I decide that I want to") or as to the *performance* of (the main obligations of) the K ("subject to selling my current house", "subject to financing", etc.). The typical conditions precedent in real estate sale Ks ("interim agreements" in the BC practice) are of the latter type, and this has the benefit of protecting the purchaser – who is assured of a certain time to try to get the condition satisfied – and also means that the vendor has a right to sue the purchaser if the latter (a) has an obligation, express or implied, to try to get the condition satisfied, and (b) does not use best efforts to do that. As a practical matter it may be difficult for the vendor to prove that kind of a breach by the purchaser, but if the vendor doesn't want to be stuck waiting for the purchaser to do his or her thing, the vendor can always negotiate a different term, such as the 72-hour notice provision that was used in the K in the *Wiebe* case. The *Dynamic Transport* case is an example where the issue was whether the obligation to get subdivision approval, which was a stipulated condition precedent, lay on the purchaser or the vendor. The court held the latter, based on the legislative setup relating to subdivision. In cases where the condition is getting approval to change the property's zoning, the obligation would typically be on the purchaser (assuming the municipality's rules permit the purchaser to apply before they own the property), since that is the person who has a plan for the property that requires a change in zoning.

Can either party waive an unfulfilled condition precedent? Not a condition precedent to the existence of a contract – you can't waive a condition that says there is no K yet – but s 54 of the *Law and Equity Act* says you can waive a condition precedent to performance if it is solely for the benefit of the waiving party (that's a question of construction of the agreement, in light of the circumstances surrounding the making of the K), the K can be performed without the fulfilment of he condition, and the party gives notice of waiver before the deadline by which the condition must be fulfilled. In most other provinces the SCC's decision in *Turney v Zhilka* (in the book at 350) prevails, which says that you cannot waive a condition, the fulfilment of which depends on the will of a third party (such as a zoning authority). That means that if you want the power to waive, you have to write it into the K.

7. REPRESENTATIONS AND TERMS: CLASSIFICATION AND CONSEQUENCES (PART)

7.1 Introduction

Materials 357-58

7.2 Misrepresentation and rescission

McCamus 335-58

Redgrave v. Hurd (C.A. 1881) 359

Smith v. Land & House Property Corp. (C.A. 1884) 363

Kupchak v. Dayson HoldiDicngs Ltd. (B.C.C.A. 1965) 368

Tues., 20 Nov. After reviewing conditions precedent and subsequent (the latter hardly ever occurring in the cases, except *Dawson*, which I suggested really involved conditions precedent), we moved on to misrepresentation.

The facts that one party misrepresented a fact (only facts can be false or true) to the other party, before the contract was made, and that the representee relied on it, gives the representee the right to seek rescission of the contract. If the misrepresentation was fraudulent (known by the representor to be false, or stated recklessly as to whether it was true or false), and is acted upon, the representor is liable for the tort of deceit. Non-fraudulent (= "innocent") misrepresentation does not amount to a tort unless it falls within the tort of negligent misstatement, which we'll discuss a bit on Thursday.

Rescission is the judicial order that requires each party to restore what has been received under the contract so that each party is put back into the position he or she was in before the contract was made. The party getting rescission is not made whole in respect of losses caused by the making, and then rescission, of the contract – that can be done only with damages. Only the acts done in performance of the contract as such (transferring property, paying money as required by the K) are reversed as part of rescission. If nothing was done by either party yet, rescission is just a matter of telling the other party that you're rescinding – you don't need the court's assistance.

Reliance on the misrepresentation is proved, as *Redgrave* held, by showing that the representation was material to the reprsentee's subsequent decision to commit to the K. The

representee does not have to show that he or she would not have entered into the K, but for the representation. If it was one of the reasons for entering into the K, that is enough.

Rescission is an equitable remedy that can be granted only if it is possible to restore the parties to the contract to their pre-K position. I mentioned the former rule that a fully executed (i.e. performed) K can't be rescinded. That applied to innocent but not to fraudulent misrepresentation. It is no longer an absolute bar to rescission even for innocent misrepresenation; it's a factor in deciding whether to order rescission. The K in *Redgrave*, which was innocent misrepresentation, could still be rescinded – the property hadn't yet been conveyed to Δ. In *Kupchak* the K for the sale of the motel had been performed but it was a case of fraud.

The two other main bars to rescission appear in *Kupchak* – delay or laches (inequitable to rescind given the representee's slowness in asserting his or her rights, and the representor's reliance on the K during that period), and the intervention of third party rights (a bona fide third party for value without notice has by now got an interest in the subject matter of the K). All the bars to rescission are tied to the idea that it must be possible fully to undo the K and restore both parties to their previous position – *restitutio in integrum*, as it's called in the old cases.

A fourth bar to rescission is that the representee has affirmed the K, meaning that he or she knew of the misrepresentation but communicated to the representor that he or she nevertheless would stick with the contract. This is basically waiver of your right to rescission. Once made it can't be withdrawn.

In *Kupchak* the representor was unable to restore the property it had received in trade for the motel it had sold to the representee. That, however, did not prevent rescission because the court thought justice was done by making the representor pay the representee the value of the property as it was at the time of the trade.

Redgrave also shows one thing that is not a defence to rescission – that the representee was careless in failing to check on the truth of the representation.

Smith v Land & House illustrates that a misrepresentation can be an implied, rather than express, assertion of fact. Giving an opinion can imply knowledge of a state of facts that support the opinion, and describing the tenant as "desirable" was held to be an implicit statement of fact that was false.

The remedy of rescission is to be kept distinct from termination, which is a permitted response to breach of contract if the breach is sufficiently serious – a repudiation of the K (a refusal to go on performing at all) or performance so deficient that the innocent party shouldn't have to go on (how this test works will be part of next term's material). Termination (if it is justified) puts an end to both parties' obligation to perform the remainder of the K, but the K is not retroactively cancelled, as with rescission. Another distinction from rescission is that damages can be claimed for the breach (whether or not the injured party terminates the K as well), whereas damages cannot be claimed for misrepresentation (except in tort, for fraud or negligence).

Neither rescission nor termination is something the representee or injured party must do; they have an option to carry on with the K, if that is possible in the post-breach situation.

7.3 Representations and terms

McCamus 729-35
Heilbut, Symons & Co. v. Buckleton (H.L. 1913) 376
Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd. (C.A. 1965) 381

7.4 Statutory reform

Omit this section in the materials, but do have a look at:
Business Practices and Consumer Protection Act (B.C.), ss. 4-5 (deceptive acts or practices), 171 (action for damages) Supp.

Note how the definition of "representation" is broader than the common law one, the supplier has the onus of showing the representation was not made, and the consumer can claim damages if the representation caused her or him loss.

7.5 Concurrent liability in contract and tort

McCamus 358-64
BG Checo International Ltd. v. British Columbia Hydro and Power Authority (S.C.C. 1993) 403

Thurs., 22 Nov. I spent some time on the bars to rescission, which are included in my notes of the previous class.

Returning to misrepresentation, both *Heilbut Symons* and *Dick Bentley* involved representees trying to get damages by arguing that what the representor said was a warranty. (They could not have got rescission of the K in either case because it was not possible to restore the other party (or third parties) to the pre-contract position. In *Heilbut* the warranty argument failed, because the evidence did not support a finding of intent to be bound; the conversation with Johnston was just too casual to amount to a guarantee that the company was a rubber company. *Dick Bentley* went the other way because (despite Denning's use of fault as a criterion) the evidence did support a finding of intention to give a warranty. The car dealer made a specific statement about an important matter that he knew about and the purchaser did not.

The *BPCPA* provisions create a statutory right to damages for harm caused by any deceptive act or practice, the definition of which includes representations of various kinds. It removes the question of contractual intent and just focuses on whether the act was deceptive, and whether in fact it caused harm (a kind of tort liability rather than contract, because the ac or practice is not a promise but just a misleading statement).

The *BG Checo* case shows that the basic attitude to the overlap between the tort of negligent misstatement on the one hand, and breach of contract on the other, is that the plaintiff is basically entitled to choose to claim in either, subject to the "primacy of private ordering", which gives the contract priority if it cuts back or eliminates liability in tort. In *Checo* itself the contract did not cut back on liability for the negligent misstatement, so Π could claim both in tort or in breach of contract. There was a difference in the damages. Contract damages are to put the Π in the position he or she would have been in if Δ had performed the K, so you compare Π's actual position with what the position would have been in if Δ had performed the obligation in question (having the right-of-way cleared by others). That meant Π should recover the amount Π

had had to spend extra because of the need to clear. In tort the Π is to be put in the position as if the tort had not been committed, which means you ask in this case what Checo would have done if Hydro had not negligently misrepresented that the right-of-way would be cleared by others. The finding was that Checo would have built the extra cost of clearing into its bid, which meant that Π could claim for loss of profits on the clearing work as well as the cost of clearing as such. In K they could claim only the latter, because the clearing work was not part of their obligations under the K.

END OF ANNOTATED SYLLABUS FOR EXAM