**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. Course Syllabus (5 pages)
2. Case Chart (10 pages)

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

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

**FALL EXAMINATION- DECEMBER 2019**

**LAW 211.04**
**Contract Law**

**Professor Ljiljana Biukovic**

**TOTAL MARKS: 100**

**TIME ALLOWED: 1 HOUR & 20 MINUTES (INCLUDING READING TIME)**
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**NOTE:**

1. This is a CLOSED BOOK examination. You may refer ONLY to the clean copy of the case chart and the syllabus as provided to you in the classroom before the exam. NO OTHER BOOKS OR REFERENCE MATERIALS, WHETHER ORIGINALS OR COPIES, MAY BE USED.
2. Deal with the question on the basis of materials and topics we have covered in Contract Law classes during this term. Do not concern yourself with cases that are not on the case chart.
3. You may refer to cases in the short form (for example, *Carlill* when you refer to the case *Carlill v Carbolic Smoke*).
4. If you think that additional facts are necessary to answer a question fully, please state those facts and explain why they are necessary.

**THIS EXAMINATION CONSISTS OF 1 QUESTION.**

**MARKS** **Question 1:**

**100**

Maxwell Shock is a 70-year-old successful business owner, an engineer, and a widower. His home and his business office are in Kelowna, BC. His engineering company "Maxwell Equipment LP" (MELP) is well known for their innovation in gas equipment. His company was trusted and well-known player in gas and oil industry in North America. Maxwell was devastated by his wife's death. He sought refuge in work, family, and old friendships.

Maxwell did not want to return to the empty house after his wife's funeral so he allowed his high school friend Norman and his wife Lana, who were going through some hard times and were living in a motor home, to move into his basement apartment. He made them sign an agreement that "in exchange for 1.00 dollar per month and natural love and affection" they would live in the apartment for as long as Maxwell was alive. They happily lived with Maxwell and he never collected a penny "for rent." There were days when they were loud and they could have kept the place cleaner but Maxwell never complained because of his fear of solitude.

Soon after his wife had died in the fall of 2018, Maxwell's company MELP started negotiating a new and complicated project to design four gas compression units for a BC company "Natural Energy Light" (NEP) working on an expansion project for its Lightening Bay site. NEP's project manager and lead engineer Ms. Goldsteam contacted MELP by email on October 10, 2018, and explained that NEP needed four custom natural gas compression units delivered before the weather would warm up in the spring 2019 making roads too soft to deliver heavy equipment. The project's price was originally set at $6.1 million.

Maxwell emailed back to NEP on October 11, 2018: "To meet proposed schedule MELP would need precise details of the compression units ASAP. We would need to find a manufacturer capable of meeting your timeline. We have some coolers in stock that could be remodeled and we could start working on orders for other process equipment when we see your specifications."

NEP emailed specifications on October 12, 2018. On October 17, 2018, Maxwell emailed back. The message included four quotations for four different types of compressor packages that MELP had proposed to design for NEP, a letter of intent which a one-page summary of each unit's components and price, a list of proposed options for the units to be selected by NEP and confirmed by MELP, and MELP's Terms and Conditions which set out the MELP's warranty. After receiving MELP's documents, Ms. Goldsteam emailed back explaining that the Board of NEP was yet to approve the Expansion Project and to prepare a formal contract between NEP and MELP. She would contact Maxwell immediately when the approval came through.

**MARKS** **Question 1 continues:**

**100** On October 29, 2018, Ms. Goldsteam emailed "no news yet" and asked if MEP could "get something started." Maxwell responded within an hour explaining that he could complete the engineering design and make some orders before the full project was committed but that these actions would require NEP's payment of 10% of each unit value immediately. Ms. Goldsteam emailed back immediately: "This is a real squeeze but do we have any option?" Maxwell responded: "Not with us."

On November 5, 2018, Ms. Goldsteam emailed to Maxwell: "Please find attached our signed Intent to Purchase. As noted, options and terms will be defined on a forthcoming purchase order. Please also note that we will be purchasing only 2 units. Let me know if you need anything else to get things rolling." The signed Intent to Purchase contained MELP's Terms and Conditions, including price modified for a 2 units order.

After seeing the signed Intent to Purchase Maxwell started making orders and paying suppliers for elements needed for the units. He hired two part time engineers in order to meet NEP's timeline. From November 15, 2018, and pursuant to the Terms and Conditions, Maxwell started emailing progress invoices to NEP for every step of the work and every purchase MELP made. NEP did not protest invoices but never paid a dime – not even the 10% advance for each unit requested by MELP.

On January 15, 2019, Ms. Goldsteam emailed to Maxwell NEP's notice of cancellation of its order of two units. Maxwell did not see this email for three days because he was out of the office to celebrate Orthodox New Year in memory of late wife's faith. But since that was not a statutory holiday, his office kept working on the two units. When he returned to the office, he emailed back to request payments of the submitted invoices under a contract that, in his opinion, MELP had concluded with NEP. Ms. Goldsteam emailed back that NEP would not pay invoices as there was no contract concluded between NEP and MELP.

Maxwell was overwhelmed and felt disappointed in people. He came to your office today. Maxwell first explained that he offered Norman and Lana a friendly help when he let them use the basement flat but he now wanted them to leave. They refused and said that they did nothing wrong – they still loved him dearly and that it was true that they had never paid but he had never asked them for money. Then, Maxwell said that he has been calling and emailing Ms. Goldsteam every week since January 17, 2019, but she has never picked up the phone or answered his emails. Maxwell also said that MELP could not survive loss suffered due to NEP's breach of the contract. Assume that no statute applies to Maxwell's relations with his tenants and NEP and explain how would court see his rights and liabilities on the basis of principles of Contract Law.

**THE END OF EXAMINATION**

**LAW 211.004: Contract Law**
**Syllabus and Outline 2019/2020**
**Professor: Ljiljana Biukovic/GEE Small Group**

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## COURSE SYLLABUS

### Term 1

## INTRODUCTION TO THE STUDY OF THE LAW OF CONTRACT

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| Ben-Ishai & Percy, *Contracts: Cases and Commentaries* | 1-15 |

## FORMATION OF THE AGREEMENT: OFFER AND ACCEPTANCE

### 1. Introduction

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| Ben-Ishai & Percy, *Contracts: Cases and Commentaries* | 17-20 |

### 2. Offer and invitation to treat *(MacDougall, ch.1)*

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| *Canadian Dyers Assn. Ltd. v Burton* | 20 |
| *Pharmaceutical Society v Boots* | 23 |
| *Carlill v Carbolic Smoke Ball Co.* | 28 |
| *Goldthorpe v Logan* | 33 |
| *R. v Ron Engineering & Const. (Eastern) Ltd.* | 36 |
| *M.J.B. Enterprises Ltd. v Defence Const. (1951) Ltd.* | 39 |
| *Mega Reporting Inc. v Yukon* (2018 YKCA 10) | supp. |

### 3. Communication of offer

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| *Williams v Carwardine* | 48 |
| *R. v Clarke* | 50 |

### 4. Acceptance

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| *Livingstone v Evans* | 53 |
| *Butler Machine Tool Co. v Ex-Cell-O Corp.* | 56 |
| *Dawson v Helicopter Exploration Co.* | 67 |
| *Felthouse v Bindley* | 73 |
| *Saint John Tug Boat Co. v Irving Refinery Ltd.* | 76 |
| *Eliason v Henshaw* | 81 |
| *Business Practices & Consumer Protection Act (B.C.)*, ss. 12-14 (unsolicited goods) | supp. |

### 5. Communication of acceptance

(a) Mailed acceptance



**NOTE: THIS DOCUMENT IS A PLAN, NOT A CONTRACT. CASES AND READINGS ARE SUBJECT TO ADDITIONS, DELETIONS AND REORDERING WHICH WILL BE ANNOUNCED BY YOUR INSTRUCTOR IN CLASS IN ADVANCE.**

*Household Fire & Carriage Accident Ins. Co. v Grant* 83
*Holwell Securities v Hughes* 86

(b) Instantaneous methods of communication

*Brinkibon Ltd. v Stahag Stahl* 89
*Electronic Transactions Act* (B.C.), ss. 15-18 supp.
*Century 21 v Rogers Communications Inc.* (2011 BCSC 1196) supp.
*Business Practices & Consumer Protection Act* (B.C.) supp.
s. 17 “distance sales contract”, s. 46 (disclosure of information), s. 47 (distance sales contract in electronic form), s. 48 (copy of distance sales contract), s. 49 (cancellation of distance sales contract);

**6. Termination of offer**

(a) Revocation

*Dickinson v Dodd*s 99
*Byrne v Van Tienhoven* 103
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(b) Lapse

*Barrick v Clark* 106

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**1. Introduction**

Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 113-15

**2. Vagueness**

*R. v CAE Industries Ltd.* 116

**3. Incomplete terms**

*May & Butcher Ltd. v R.* 122
*Hillas & Co. Ltd. v Arcos Ltd.* 124
*Foley v Classique Coaches Ltd.* 129

**4. Agreements to negotiate**



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| | |
|---|---|
| *Sale of Goods Act* (B.C.), ss. 12-13 | supp. |
| Ben-Ishai & Percy, *Contracts: Cases and Commentaries* | 134-35 |
| *Empress Towers Ltd. v Bank of Nova Scotia* | 136 |
| *Mannpar Enterprises Ltd. v Canada* | 138 |
| Ben-Ishai & Percy, *Contracts: Cases and Commentaries* | 143-49 |

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**THE ENFORCEMENT OF PROMISES** *(MacDougall, chs.7-9)*

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| Ben-Ishai & Percy, *Contracts: Cases and Commentaries* | 157-59 |

**2. Exchange and bargains**

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| *Dalhousie College (Governors of) v Boutilier Estate* | 159 |
| *Wood v Duff-Gordon* | 169 |
| *Business Practices and Consumer Protection Act* (B.C.) | supp. |

NOTE: s. 17 "continuing services contract" and "future performance contract", s. 19 (required contents), s. 23 (future performance contracts), s. 24 (continuing service contract—terms), s. 25 (continuing service contract—cancellation); Regulation 272/2004

**3. Past consideration**

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| *Eastwood v Kenyon* | 170 |
| *Lampleigh v Brathwait* | 172 |

**4. Consideration must be of value in the eyes of the law**

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| *Thomas v Thomas* | 173 |

**5. Bona fide compromises of disputed claims**

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| *B. (D.C.) v Arkin* | 175 |

6. **Pre-existing legal duty**

(a) Introduction



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Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 179

(b) Public duty

Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 180

(c) Duty owed to a third party
*Pao On v Lau Yiu Long* 180

(d) Duty owed to the promisor – the traditional position
*Gilbert Steel Ltd. v University Const. Ltd.* 185
*Foakes v Beer* 190
*Law and Equity Act* (B.C.), s. 43 supp
NOTE: Abrogates (within limits) the rule in *Cumber v. Wane*, which was applied in *Foakes v Beer*.

(e) Duty owed to the promisor – judicial reform

*Williams v Roffey* 192
*Nav Canada v Greater Fredericton Airport Authority* 198
*Rosas v Toca* 203

**7. Promissory estoppel** *(MacDougall, ch.9)*

*Central London Property Trust Ltd. v High Trees House Ltd.* 215
*Dunn v Vicars* (2009 BCCA 477) supp.
*M. (N.) v A. (A.T.)* 238

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Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 244

(b) Family arrangements
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(c) Commercial arrangements
*Rose & Frank Co. v J.R. Crompton & Bros. Ltd.* 248
*Toronto-Dominion Bank v Leigh Instruments Ltd. (Trustee of)* 250

**9. Formality: promises under seal** *(MacDougall, ch.8)*

Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 254

**10. Formality: the requirement of writing**

*Law and Equity Act* (B.C.), s. 59 supp.
*Electronic Transactions Act* (B.C.), supp.

s. 5 (requirement for a record to be in writing), s. 11 (signatures)
*Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.*
(2018 UKSC 24) supp.

**PRIVITY OF CONTRACT** *(MacDougall, ch.7)*

1. Introduction

Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 285-86

2. History of the doctrine of privity and third party beneficiaries

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*Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd.* 287

3. Ways in which a third party may acquire the benefit

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Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 291-93

(b) Specific performance
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(c) Employment
*London Drugs Ltd. v Kuehne & Nagel Int'l Ltd.* 309

(d) The Principled Exception
*Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.* 319

4. Privity and contract theory

Ben-Ishai & Percy*, Contracts: Cases and Commentaries* 324-25

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| *Law 211.04 Biukovic* | **Case** | **Rule** | **Topic** |
| --- | --- | --- | --- |
| [1] | *Canadian Dyers Ass. Ltd. v Burton* (1920) 47 O.L.R. 259 (HL) | • There can be no contract of sale unless there can be found an offer to sell and an acceptance of the offer.<br>• A mere quotation of price does not constitute an offer to sell; it is no more than an invitation to treat.<br>• The court looked at the *language* used in the light of the *circumstances* in which it was used and into the *subsequent actions* of both parties to determine whether what was said by the seller during one on one negotiations was a mere quotation of price or an offer. | Formation: **Offer & Invitation to Treat** |
| [2] | *Pharmaceutical Society v Boots* [1953] 1 QB 401, [1953] All E.R. 482 (CA) | • Formation of a contract by conducts of the parties.<br>• The general assumption in the case of retail self-service sales is that placing goods on shelves is an invitation to treat.<br>• Court held that an offer and acceptance took place at the cashier when a customer offered to buy and a cashier accepted the offer (and took money). | Formation: **Offer & Invitation to Treat** (retail sale) |
| [3] | *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 (CA) | • An ad was held to be an offer for a unilateral contract, an offer to the public at large—to everyone who does something (a guarantee in an ad was held to be an indication of the intention to create legal obligations).<br>• An ordinary rule of law is that acceptance of an offer requires the offeror to be notified in order that the two minds may come together.<br>• However, in the case of a *unilateral contract*, an offer is made to the public but the contract is not concluded with everybody (all the world). It is only formed with that limited portion of the public *who come forward and perform the condition on the faith of the advertisement* (following the indicated method of acceptance). | Formation: **Communication of Offer – public offer to anyone who does something**; **Unilateral Contracts to treat** |
| [4] | *Goldthorpe v Logan* [1943] O.W.N 215, [1943] 2 D.L.R. | • The general assumption is that advertisements published in newspapers are invitations to treat, not offers.<br>• However, the court looked at the *surrounding circumstances*, the *actions of both parties* (direct contact, consultation, examination, etc.) and the *language* used in the ad and held that Logan's electrolysis ad was an offer to the public at large. | Formation: **Public offer or invitation** |
| [5] | *R. v Ron Engineering & Construction (Eastern) Ltd.* [1981] 1 SCR 111, 13 B.L.R. 72 | • Analyses the tender process a 2-phase process which includes formation of two contracts (A and B).<br>• The tender call is the offer and the bid submission is the acceptance of that offer which leads to formation of contract A; the consideration is the preparation of the bid; consequence of formation of contract A is the imposition of contractual liability on the tenderer (not to withdraw from the bid) and the owner (to treat tenderers fairly and in good faith). Contract B is the construction contract to be formed between the owner and the successful tenderer. | Formation: **Offer & Invitation to Treat - tenders** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
|---|---|---|---|
| [6] | *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd* [1999] 1 SCR 619 | • The submission of a tender in response to an invitation to tender *may give rise to contractual obligations* (contract A), quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender (contract B). *The privilege clause* is only one term of contract A and must be read in harmony with the rest of the tender documents—it *does not override the implied obligation to only accept compliant bids.* | Formation: **Offer & Invitation to Treat - tenders** |
| [7] | *Mega Reporting Inc. v Yukon* (2018 YKCA 10) | • The breach of Contract A did not trigger the right to remedy because of the existence of the enforceable and explicit exclusion of liability clause in Contract A.<br>• Exclusion clauses in public procurement contracts are not automatically unenforceable against public policy.<br>• Clear exclusion clauses agreed upon by sophisticated business parties will be void due to overriding public policy if the harm caused to the public interest is "substantially incontestable."<br>• Statutory rules of transparency and procurement practices were to protect both bidders and the government. | Formation: **Offer & Invitation to Treat - tenders** |
| [8] | *Williams v Carwardine* (1883) 4 B. & Ad. 621, 110 E.R. 590 (KB) | • The court held that in the case of rewards (or an offer to anyone who can give the information requested) the defendant is entitled to the reward *regardless of her motives* (fear of God's punishment) because *she knew of the reward and she performed the act* in question. | Formation: **Communication of Offer – public offer to anyone who does something** |
| [9] | *R. v Clarke* (1927) 40 C.L.R. 227 (Aust. HC) | • The court held that Clarke was *not entitled to the reward because he did not act in reliance on the offer but for other reasons* (to clear himself from a false accusation).<br>• Clarke admitted that he had forgotten about the offer and thus could not had intended to accept it when he had performed the requested act. | Formation: **Communication of Offer – public offer to anyone who does something** |
| [10] | *Livingstone v Evans* [1925] 3 W.W.R. 453, [1925] 4 D.L.R. 769 (Alta SC) | • *A counter-offer is a rejection of the original offer, a mere inquiry is not.*<br>• If an offeror replies to the rejection, the reply ("cannot reduce price") may amount to a renewal of the offer.<br>• The answer is dependent upon considering all surrounding circumstances. | Formation: **Acceptance counter-offer; rejection and counter offer** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
|---|---|---|---|
| [11] | *Dawson v Helicopter Exploration Co.* [1955] SCR 868 | • In order to avoid problems with contract formation (and revocation of offer) courts should treat offers "as calling for bilateral rather than unilateral action when the language can be fairly so construed"; SCC found a bilateral contract was concluded.<br>• Although in theory an offer for a unilateral contract can be revoked any time before the acceptance, such as offer could be interpreted to have an implied term that an offeror who controls conditions of cooperation of an offeree would not be allowed to prevent performance/acceptance of an offeree.<br>• The SCC interpreted various conditions on which performance of the contract depended as conditions precedents meaning that the binding contract existed up until a condition subsequent was not fulfilled. The defendant had broken the contract and the plaintiff's silence was not found by the SCC to be the forfeiture of the plaintiff's right to damages for breach of contract. | Formation: **offer and acceptance; unilateral and bilateral contracts** |
| [12] | *Butler Machine Tool v Ex-cell-o Corp.*<br>[1979] 1 W.L.R. 401, 1 All E.R. 965 (CA) | • Lord Denning restated the traditional last shot formula for a more holistic approach that sometimes the court has to come up with terms implied as necessary make the contract work:<br>• 1. *Last shot:* a contract is concluded upon the terms of the last document sent by one of the parties that was not objected to; 2. *First shot*: a contract is concluded upon the terms of the first document sent ; 3. *All shots count and the court must discover its terms on an objective basis*: A) a contract is concluded upon terms drawn from all the documents that have passed between the parties when the terms can be reconciled as to give a harmonious result, or B) a contract is not concluded since the differences are irreconcilable. | Formation: **Acceptance – counter-offer; battle of forms** |
| [13] | *Felthouse v Bindley*<br>(1962) 11 C.B. (N.S. 869, 142 E.R. 1037 (Ex. Ch.) | • Silence does not amount to acceptance.<br>• Even though the nephew (seller) might have intended to sell, he never communicated this intention to his uncle (buyer).<br>• In general, the offeror is in control of the mode of acceptance but the courts are reluctant to allow silence to be specified as the mode of acceptance. | Formation: **Communication of Acceptance** |
| [14] | *Saint John Tug Boat Co. v Irving Refinery Ltd.* [1964] SCR.614 | • Both offer and acceptance could be communicated by conduct.<br>• The conduct of an offeror (keeping the boat available) and the conduct of an offeree, unaccompanied by any verbal or written undertaking, could under certain circumstances (such as continuing service on terms previously agreed) be reasonably constructed as valid offer and acceptance. | Formation: **Communication of Acceptance** |
| [15] | *Eliason v Henshaw*<br>4 Wheaton 225<br>(USSC 1819) | • A valid acceptance is the one that complies with mode of acceptance stipulated in the offer.<br>• The US court held that the acceptance has to be in the mode as stipulated but not actually literally the same (acceptance "by return wagon" interpreted to mean that acceptance had to be communicated within the time the return trip would require). | Formation: **Communication of Acceptance** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
|---|---|---|---|
| [16] | *Brinkinbon v Stahag Stahl*<br>[1983] 2 A.C. 34 [1982] 1 All E.R. 293 (HL) | • The mailbox rule (the contract is concluded where and when the acceptance is mailed) applies only if acceptance by mail is required or if that has been a regular business practice of the parties or if the offer is made by mail and no acceptance requirements are specified.<br>• The receipt rule (the contract is made when and where the acceptance is received) applies to instantaneous communications such as phone or telex or facsimile. | Formation: **Communication of Acceptance– Instantaneous communication** |
| [17] | *Household Fire v Grant*<br>(1879) 4 Ex. D, 216 (CA) | • *The court upheld the general mailbox rule in situations where the acceptance is lost in the post* and as a consequence the offeror was bound by the offer even though acceptance was not received. The majority held the post office to be the agent of both parties. The dissent rejected this and applied the recipient rule. | Formation: **Communication of Acceptance – mailed acceptance** |
| [18] | *Holwell Securities v Hughes*<br>[1974] 1 W.L.R. 155, 1 All E.R. 161 (CA) | • The postal rule should only apply if it does not lead to "manifest inconvenience and absurdity".<br>• The postal rule does not apply if the express terms of the offer specify that the acceptance must reach the offeror. The requirement for "notice" was held to invoke the recipient rule. | Formation: **Communication of Acceptance – mailed acceptance** |
| [19] | *Century 21 Canada v Rogers Communications Inc.*<br>2011 BCSC 1196 | • The act of visiting the web site could constitute the acceptance of terms (of use) of the web agreement and the formation of contract as long as a user of the web site continues to browse after reading the terms posted.<br>• The court found that there was an enforceable browse wrap agreement on the Century 21 web site and that terms of use were properly incorporated because the terms of use were clear and a person who browsed the web site had enough time to read them prior to accepting them. | Formation: **Acceptance by Browsing;** web posted contracts (browse wrap agreements) |
| [20] | *Byrne v Van Tienhoven*<br>(1880) C.P.D. 344 | • The mailbox rule does not apply to revocation—*revocation must be received by the offeree to be effective.* | Formation: **Termination of Offer - Revocation** |
| [21] | *Dickinson v Dodds*<br>(1876) 2 Ch. D. 463 (CA) | • The court held that *an offer could be revoked by indirect communication* applying the same general rule logic—that is, once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for them to accept the offer and the contract is impossible to make.<br>• A promise to hold an offer open is not binding unless have consideration or a deed. Equity cannot be applied when a third party has acquired rights. | Formation: **Termination of Offer - Revocation** |
| [22] | *Errington v Errington and Woods*<br>[1952] 1 KB 290, [1952] 1 All E.R. 149 (CA) | • Unilateral contracts are formed when all conditions of the offer are met.<br>• In general, offers for unilateral contracts can be revoked any time prior to complete fulfillment by the offeree, but the court held that in this case an offer for a unilateral contract could not be revoked by the promisor as it contained an implied promise not to revoke once the promesee had entered on performance of the act (but it would cease to bind the offeror if performance was left incomplete and unperformed). | Formation: **Termination of Offer – Unilateral contracts** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
|---|---|---|---|
| [23] | *Barrick v Clark*<br>[1951] SCR 177, [1950] 4 D.L.R. 529 | • An offer will lapse if it is not accepted within a time limit determined by the offeror, or if a time limit is not specified, then it will lapse within a reasonable time.<br>• The court will determine *what is a reasonable time* using the rule of construction (*objective test*)—it will depend upon the nature and character of the item being sold, on the normal or usual course of business in negotiations as well as the circumstances of the offer, including the conduct of the parties in the course of negotiation. | Formation: **Termination of Offer – Lapse of Time** |
| [24] | *R. v CAE Industries Ltd.*<br>[1986] 1 F.C. 129 (FCA) | • The court dealt with vagueness of a "best efforts" term by constructing its reasonable meaning in the context of the language used by the parties and the overall purpose of the contract which has also been partly performed.<br>• Preliminary issue was if the contract was intended and the court held that it could be answered by analyzing the surrounding circumstances as well as the letter itself. | Formation: **Vagueness of Terms** |
| [25] | *May & Butcher v R.*<br>[1934] 2 KB 17 (HL) | • To be a good contract there must be a concluded bargain which settles everything that is necessary to be settled and leaves nothing to be settled by later agreement between the parties.<br>• It has long been a well-recognized principle of contract law that an agreement in which some critical part of the contract matter is left undetermined is no contract at all.<br>• It is perfectly possible to contract to sign a document which will contain all the relevant terms, but it is not acceptable to agree that the parties will in the future agree upon a matter which is vital to the contract. | Formation: **Certainty of Terms** |
| [26] | *Hillas v Arcos*<br>(1932) 147 L.T. 503 (HL) | • House of Lords took a more modern approach: Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business that are far from complete or precise.<br>• It is the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects. | Formation: **Certainty of Terms** |
| [27] | *Foley v Classique Coaches Ltd.*<br>[1934] 2 KB 1 (CA) | • Interpreted the general principles of H.L.'s decision in *Hillas* to mean that each case should be decided on the construction of the particular document.<br>• Held that an agreement to agree on price from time to time was certain enough since the parties believed they had a contract and had acted for 3 years as if they did i.e. there was already partial performance: The land had been transferred and a portion of the sale of gas agreement had been performed. | Formation: **Certainty of Terms** |
| [28] | *Empress v Bank of Nova Scotia*<br>[1991] 1 W.W.R. 537 (BCCA) | • The court will try, wherever possible, to give the proper legal effect to any clause that the parties understood and intended to have legal effect.<br>When the parties stated a formula (e.g. market rental) to ascertain a clause, but did not supply machinery (e.g. arbitration) for applying the formula, the courts will supply (be) the machinery and apply the formulae so long as the formulae is not defective.<br>• Where the formula is set out but is defective, and machinery is provided for applying the formula, the machinery may be used to cure the defect in the formula.<br>• Although the traditional common law rule is that agreements to agree cannot be enforced the court in this case held that there was an implied term requiring good faith negotiations towards a market rental price for the renewal of the rental agreement and therefore it was enforceable. | Formation: **Certainty of Terms** |

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| [29] | *Mannpar Enterprises Ltd. v Canada* [1999] 173 D.L.R. (4th) 243 (BCCA) | • The court held that the renewal clause in the rental contract was a mere agreement to agree—the contract did not provide a formula or objective measure to determine rent (such as fair market value) or a mechanism to apply the formula.<br>• Also, the Crown was acting on behalf of the Skyway Band and was not free to negotiate but had to renegotiate the renewal in accordance with the Band's wishes. | Formation: **Certainty of Terms** |
| [30] | *Bawitko Investment Ltd. v Kernels Popocorn Ltd.* (1991) 79 D.L.R. (4th) 97(Ont. CA) | • The court held that an oral agreement in contemplation of a formal written agreement was not enforceable due to the lack of certainty; it was a contract to make a contract.<br>• The court constructed the parties' intention to be bound by analyzing how many aspects of the relationship had remained to be settled by the parties. | Formation: **Certainty of Terms; Anticipation of formal contract** |
| [31] | *Balfour v Balfour* [1919] 2 KB 571 | • Atkin L.J.: the common law does not regulate agreements between spouses…The consideration that really obtains from them is that natural love and affection.<br>• There is a strong presumption that family agreements are not intended to produce legal consequences. | Intention to Create Legal Obligation; **Social Setiing** |
| [32] | *Rose and Frank v J.R. Crompton Bros.*, [1923] 2 KB 261 (CA) | • There is a strong presumption that business agreements are intended to produce legal consequences.<br>• However, if there is a clear and definite expression of the business parties that they do not intend to be subject to legal jurisdiction, there is no reason in public policy why effect should not be given to their intention. | Intention to Create Legal Obligation: **Business Setting** |
| [33] | *Toronto Dominion Bank v Leigh Instruments* (1999) 178 DLR (4th) 634 | A letter of comfort held not to be intended to be binding as a guarantee but only as a broadly worded statement provided to a bank by a parent company about its policy towards a subsidiary company (which was not to manage Leigh's affairs). | Intention to Create Legal Obligation: **Business Setting** |
| [34] | *The Governors of Dalhousie College at Halifax v The Estate of Arthur Boutilier, Deceased* [1934] SCR 642 | • For a promise to be binding as a contract it has to be supported by a good and sufficient consideration which moves from the promisee at the time of and in exchange for the promise which is sought to be enforced.<br>• The promise of the deceased was not given in exchange for a promise by the university nor could the university's actions in reliance on a representation or a promise could not be used to create a legal obligation (promissory estoppel could not be used as a "sward" – see cases on promissory estoppel below). | Enforcement of Promises: **Consideration** |
| [34] | *Wood v Lucy, Lady Duff-Gordon* (1917) 118 NE 2014 (NY 1917) | • The court implied a good consideration into an agreement between the parties the same way courts imply terms into contract in order to give "business efficiency" to the agreement.<br>• The implied promise of Wood to promote Lucy's design was necessary to make the agreement work because without it Lucy's promise to give Wood exclusive rights would be unenforceable. | Enforcement of Promises: **Implied Consideration** |
| [35] | *Eastwood v Kenyon* (1840) 11 Ad. & E. 438, 113 E.R. 482 (QB) | • Moral obligation is *nudum pactum*, a voluntary promise without any consideration.<br>• Past consideration is not a good consideration for a new promise made after a benefit was conferred and when the benefit was not conferred at the request of the promisor. | Enforcement of Promises: **Past Consideration** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
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| [36] | *Lampleigh v Brathwait*, (1615) Hobart 105, 80 E.R. 255 (KB) | • Past consideration may be a good consideration for a subsequent promise if the benefit was conferred at the request of the promisor. | Enforcement: **Past Consideration** |
| [37] | *Thomas v Thomas* (1842) 2 QB 851, 114 E.R. 330 | • Consideration is something which is of some value in the eyes of the law.<br>• Consideration must move from the promise.<br>• Consideration must be sufficient but need not be adequate. | Enforcement of Promises: **Nature of Consideration** |
| [38] | *B. (D.C.) v Arkin* [1996] M.J. No. 362 (QB) [1996] M.J. No. 499 (Man. CA) | • Promise to forbear from lawsuit may constitute a valid consideration when given in return for a promise to pay a sum of money.<br>• However, the promise to forbear a claim would not be constitute good consideration when a claim lacks merit and the person making a threat to sue knows that the claim was not valid, and the money paid in exchange for such a promise is recoverable (note: the lawyer for Zellers knew that there was no valid claim against a parent). | Enforcement of Promises: **Forbearance – Bona Fide Compromises** |
| [39] | *Pao On v Lau Yiu Long* [1980] A.C. 614 (PC) | • Past consideration can be good consideration if: 1. The act was done at the promisor's request; 2. The parties understood that the act was to be remunerated; and 3.Payment would have been legally enforceable had it been promised in advance.<br>• A promise to perform, or the performance of a pre-existing contractual obligation to a third party can be valid consideration.<br>• Economic duress is a coercion of the will so as to vitiate consent and may render a contract voidable, but this must be claimed promptly (note: not found on the facts of the case) The commercial pressure alleged to constitute economic duress must be such that the victim entered the contract against their will, they had no alternative course open to them, and they were confronted with coercive acts by the party exerting the pressure. | Enforcement of Promises: **Pre-existing Legal Duty—Duty Owed to a Third Party; Economic Duress; Past Consideration** |
| [40] | *Gilbert Steel v University Construction Ltd.* (1976) 12 O.R. (2nd.) 19, 67 D.L.R. (3d) 606 (CA) | • A unilateral promise to increase price (and modify the existing contract) is unenforceable because there is no clear agreement to rescind the existing contract – the new provisions were unilaterally imported into the document and accordingly, consideration of the oral agreement was not found in a mutual agreement to abandon the earlier written contract and assume the obligations under the new oral one. | Enforcement of Promises: **Pre-existing Duty to the Promisor - Traditional Position** |
| [41] | *Williams v Roffey Bros.* [1990] 1 All E.R. 512 (CA) | • Pre-existing legal duty owed to the promisor may be a valid consideration for a subsequent promise if the promisor derives 'practical benefit' from the agreement and if the subsequent promise is not given under economic duress. | Enforcement of Promises: **Pre-existing Duty to the Promisor – Practical Benefit and Consideration** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
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| [42] | *Foakes v Beer* (1884) 9 App.Cas. 605 (H.L.) | • The HL held that promise of one party to accept a smaller sum from the other party in satisfaction of a debt of a larger sum is not a good consideration. HL held that no fresh consideration was given in exchange for the modification of the original contract.<br>• This case has been overruled in B.C. by s.43 of the *Law and Equity Act* which says the creditor has to accept the part performance if it's "rendered pursuant to" the agreement. | Enforcement of Promises: **Part payment of debt and Consideration** |
| [43] | *Greater Fredericton Airport Authority Inc. v NAV Canada* [2008] N.B.J. No. 108 (NBCA) | • NBCA held that it is time to build upon the UK decision in *Williams v. Roffey* and accepted that post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation of contracts was not procured under economic duress.<br>• Commercial reality needs to be recognized and considered—that is, that the parties frequently vary and modify their contractual obligations and that the law has to protect their legitimate expectations that the modifications or variations will be regarded as enforceable. | Enforcement of Promises: **Pre-Existing Duty to the Promisor – Judicial Reform in Canada** |
| [44] | *Rosas v Toca* 2018 BCCA 191 | • In a case of an unpaid debt between non-commercial parties the court held that "a modification to a going transaction" was binding without need for a fresh consideration as long as that modification was not obtained by duress and unconscionability or absent other public policy concerns.<br>• BCCA followed the *NAV Canada* case and did not expressly apply the "practical benefit" concept devised in the UK in *Williams v Roffey.* | Enforcement of Promises: **Pre-Existing Duty to the Promisor – Judicial Reform in Canada** |
| [45] | *Central London Property v High Trees House* [1947] 1 KB 130, [1956] 1 All E.R. 256 | • A promise intended to be binding, intended to be acted on and in fact acted on, is binding even if there is no consideration (Lord Denning relied on the doctrine of promissory estoppel).<br>• Estoppel was used as a shield by tenants against the landlord who wanted to enforce a higher rent. | Enforcement of Promises: **Promissory Estoppel** |
| [46] | *Dunn v Vicars* 2009 BCCA 477 | • Waiver (in the context of rights of the respondents) and promissory estoppel (in the context of rights of the appellants) examined as two separate concepts: although "the policy roots of waiver and estoppel are very closely allied…it does not mean that the elements of estoppel and waiver are the same." [para. 43]<br>• A broad concept of promissory estoppel adopted to include elements of proprietary estoppel and estoppel by representation and to establish that the respondents were estopped from denying that the appellants had the right to exercise the option.<br>• The appellants altered their position in reliance of the conduct of the respondents (not objecting their move into the property to avoid further mortgage payments) and the appellant moved in.<br>• "It would be unconscionable to allow the respondents to resile from the implication of their conduct." [para. 71] | Enforcement of Promises: **Waiver and Promissory Estoppel** |

| *Law 211.04 Biukovic* | Case | Rule | Topic |
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| [47] | *N.M. v A.T.A.* (2003), 13 B.C.L.R. (4th) 73 (BCCA) | • BCCA found little evidence in Canadian authorities to indicate a move toward a more generous approach to promissory estoppel and distinguished the case from *Walton*, in which there was a reasonable expectation of a legal obligation.<br>• BCCA held that because the defendant did not make a promise intended to create a legal relationship and that did not give rise to promissory estoppel which could only be applicable to modify an existing legal relation rather than to create a new one. | Enforcement of Promises: **Promissory Estoppel & Contract Formation** |
| [48] | *Tweddle v Atkinson* (1861) 1 B & S. 393 | • A person who is not engaged in a contract (a third party) can generally neither sue nor be sued on that contract.<br>• Love and affection are not sufficient consideration. | Privity of Contract: **Third Party Beneficiaries** |
| [49] | *Dunlop Pneumatic Tyre Co. v Selfridge & Co. Ltd.* [1915] AC 847 (HL) | • Only a person who is a party to a contract can sue on it.<br>• Even if a contract provides a third party with an enforceable right, there still must be consideration.<br>• A principal not named in the contract, however, may sue upon it if the promisee really contracted as his agent. | Privity of Contract: **Third Party Beneficiaries** |
| [50] | *Besweck v Beswick* [1966] 1 Ch. 538; [1966] 3 All E.R. 1 (CA) [1968] A.C. 58; [1967] 2 All E.R. 119 (HL) | • C.A: Lord Denning MR finds an equitable exception to general rule of privity where the third party is in a trustee relationship - in this case the widow sued in her capacity as executrix of the estate, and also in her personal capacity (that is, she could make a joint claim but note HL disagreed with him on the point of a personal claim– see below).<br>• H.L.: Lord Reid found that although the widow in her personal capacity had no right to sue, she had a right as administratrix of her husband's estate to sue and seek for specific performance of a contract (rather than damages); the widow is in that way enforcing the | Privity of Contract: **Ways for Third Parties to Acquire Benefits (choice of remedy)** |
| [51] | *London Drugs Ltd. v Kuehne & Nagel International Ltd.* [1992] 3 SCR 299 | • Iacobucci J held employees were protected from clause limiting their liability even though they were not parties to the contract.<br>• The employee could rely on the limitation of liability clause if such clause expressly or implicitly extends its benefits to the employees and if the employees have been acting in the course of their employment and performing the very services provided for in the contract between their employer and the customer when the loss occurred.<br>• Limited exception to privity, available as a 'shield' not as a new cause of action. | Privity of Contract: **Judicial Reform and Exceptions for Employees** |
| [52] | *Fraser River Pile & Dredge Lt. v Can-Dive Services.* [1997] 39 B.C.L.R. (3d) 187 (BCCA) | • Followed *London Drugs* analysis re: application of limitation of liability clause on employees in order to enforce the insurer's waiver of its rights of subrogation against the charterer.<br>• Does not modify the test of London Drugs but extends its application on contracts other than employment contracts as long as the contract explicitly or implicitly extends its benefits to the third party and if the third party has been performing the activities contemplated in the contract. | Privity of Contract: **Judicial Reform and Exceptions for other than Employees** |

| *Law 2 11.04 Biukovic* | **Case** | **Rule** | **Topic** |
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| [53] | *Rock Advertising Ltd. v MWB* [2018] UKSC 24 | • UK Supreme Court held that a clause that the modification of the contract had to be in writing and sign by the parties was enforceable and invalidated an oral agreement to vary the contract.<br>• UK Supreme Court held that when the parties agreed on the ‘no oral modification’ clause they had effectively agreed to bind their future conduct in a way that limited their party autonomy and precluded them from oral modification of the contract. | Formality: **Requirement of Writing for Contract Variation** |
| [54] | *Wiebe v Bobsien* (1985) 59 BCLR 183 (BCSC), (1985) 64 BCLR 295 (BCCA) | • At trial, the court distinguished two categories of condition precedent--one ‘has the nature that creates no binding agreement’ and the other that “just act[s] as an ingredient which suspends performance of an otherwise complete agreements”—and held that it would depend on the intention of the parties expressed in the contract and in the context of surrounding circumstances which one would apply.<br>• BCSC held that the purchaser had an implied duty to take reasonable steps to sell his house; by doing so the purchaser fulfilled condition precedent and made the vendor contractually bound to sell the property to him.<br>• BCCA upheld the trial decision; Lambert J., held, in dissent, that the meaning of the condition precedent was too uncertain to had a contract concluded. | Contingent Agreements |
| [55] | *Dynamic Transportation Ltd. v O.K. Detailing Ltd.* [1978] 2 SCR 1072 | • Obtaining subdivision approval was a stipulated condition precedent of the contract for sale of land.<br>• SCC held that since the planning legislation stipulated that a party proposing the subdivision has a duty to apply for subdivision, the vendor had an implied duty to take reasonable steps to make such application. | Contingent Agreements |